Chapter 9. Procedures outside the Act

Police have powers other than those contained in the *Crimes (Forensic Procedures)* Act which enable them to conduct various forensic procedures. For example, they may conduct breath analysis on drivers, or take identification photographs of people in custody for an offence. The Act specifically states that it does not limit or exclude the operation of other laws relating to the carrying out of forensic procedures.

Through our monitoring activities, we found that there is some confusion about whether certain types of procedures are 'forensic procedures' for the purposes of the *Crimes (Forensic Procedures) Act*. Further, some officers have conducted certain types of procedures ostensibly under the authority of the Act when in fact there is no law authorising those types of procedures.

This chapter examines the relationship between the *Crimes (Forensic Procedures)* Act and other powers police have to conduct 'forensic procedures'.

9.1. Other procedures – prints, photos, urine samples, medical examinations

9.1.1. Fingerprints

The Act states that a forensic procedure includes "the taking of a hand print, finger print, foot print or toe print." However, it does not include prints taken for the sole purpose of establishing the identity of the person from whom they are taken.⁸³³

Police routinely take fingerprints from suspects at the time of charging, under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly under section 353A(3) of the *Crimes Act*). A police officer may take "all particulars that are necessary to identify a person who is in lawful custody for any offence." This may include the person's photograph, fingerprints and palm prints. Where a child under the age of 14 is in custody for an offence, police may apply to a court for an order authorising police to take the child's fingerprints and palm prints, for the purpose of identifying the child.⁸³⁴

9.1.2. Photographs

Photographs as forensic procedures involve taking a photograph of a part of the body. These photographs can be taken under the Act as either intimate or non-intimate forensic procedures. Photographs taken as an intimate forensic procedure will include a photograph of the genital or anal area or the buttocks of a person, or the breasts of a female or a transgender person who identifies as a female. A non-intimate forensic procedure photograph would be a photo of any other part of the body.⁸³⁵

Police routinely photograph suspects at the time of charging, under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly under section 353A(3) of the *Crimes Act*).⁸³⁶ A photograph may be taken under this provision to show to a witness, if an identification parade cannot be held (for example, because the suspect has declined to participate, or has altered his or her appearance).

We understand that NSW Police initially advised officers that all identification photographs should be taken under the *Crimes (Forensic Procedures) Act:* "A photograph for a photograph identification is a photograph of a part of the body, namely the head and shoulders. Accordingly, it must be treated as a forensic procedure under the Act."⁸³⁷ However, after obtaining legal advice on this issue, the current NSW Police position is that photographs can be taken under the provisions of the *Law Enforcement (Powers and Responsibilities) Act*, provided the suspect is in custody for an offence, and the photograph is deemed necessary for the identification of the person. Officers need only proceed under the *Crimes (Forensic Procedures) Act* if the provisions of the *Law Enforcement (Powers and Responsibilities)* of the suspect is not in custody for an offence.⁸³⁸

However, we found there is still considerable confusion among police officers about when photographs can be taken under the provisions of the *Law Enforcement (Powers and Responsibilities) Act*, and when they must be taken under the *Crimes (Forensic Procedures) Act*. For example, one police officer we interviewed commented:

Sometimes it's not clear whether - or why - a procedure falls within the Act. Why do you have to go through the Act to take a photo?839

In our survey of local area commands, some commands singled out the taking of photographs as one of their main problems in implementing the Act:

A little confusion has arisen over the taking of photographs of suspects. Initially a full forensic procedure needed to take place whereby the information sheet had to be read and consent given. Now it appears to be a complete turnaround, whereby a photo during the charging process is sufficient. Even if the suspect is not charged, it appears just taking a photograph is acceptable... [We would like] confirmation on photographing suspects, confirmation on the difference between photographing for identification purposes as opposed to evidentiary purposes.840

The use of arrest photos is still very ambiguous.⁸⁴¹

Opinions can vary... for example the use of photographs... whether existing photos or new photos need to be obtained.842

Several police officers suggested that the Act should not deal with photographs at all, that they should not be treated as forensic procedures.843

During the review period, we received some complaints about photographs being taken in breach of the Act.

Case Study 59

Police interviewed an 18 year old man in relation to his involvement in an assault. Police asked him to participate in an identification parade, but he declined. Police advised that he would be charged, and would have his fingerprints and photographs taken. The young man's legal representative left the room briefly, leaving the young man alone with police. Police then informed the young man that they were not going to charge him, but they went ahead and took his photograph.

When he returned, the man's legal representative immediately asked why the photograph had been taken. Police obtained legal advice about the matter and subsequently decided to destroy the photograph.

Police applied for a court order authorising a photograph to be taken under the Crimes (Forensic Procedures) Act. The court made the order and police took the young man's photograph again.844

Case Study 60

A police officer arrested a boy at school in relation to an assault which had occurred some time previously. The officer took him to the police station, and took his photograph, to show to people who witnessed the assault. The matter went to court and the magistrate made serious adverse comments about the police officer involved. In particular:

- The police officer arrested the young person at school to prevent him from seeking legal advice, knowing that the young person was represented in the matter and that the photograph would not be taken if the legal representative was present to advise the young person.
- The police officer acted unlawfully by arresting the young person for the purpose of taking a photograph, rather than for the purpose of charging him with an offence.
- The police officer took the photograph on the basis of the young person's consent, despite the fact that the Act states that children cannot consent to forensic procedures. The police officer should not have taken the photograph without obtaining a court order.
- The police officer separated the young person from his support person, his father, while the photograph was being taken.

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The magistrate found the police officer lacked credibility, some of his responses to questioning were implausible and dishonest, and that his behaviour during the investigation was "completely unacceptable." The magistrate commented:

The reason for the failure to comply [with the Act] at best was ignorance, a less charitable view was that the constable's conduct was deliberate and deceitful...

The constable's conduct is clearly illegal and improper in... arresting the child for the purpose of taking a photo and not for the purpose of charging... It is clear that nothing had changed with the young person's attendance at the police station except that the police now had his photo. And I note that he was still summonsed, he was not arrested for the purpose of charging. He was clearly arrested for the purpose of obtaining a photograph for use in this investigation.

The magistrate ruled that the picture identification evidence was inadmissible as it was unlawfully obtained.

NSW Police investigated the matter and disagreed with the magistrate's findings. The police investigator concluded that the young person's photograph had been taken under section 353A of the *Crimes Act*, and that the only issue raised by the officer's conduct was his failure to seek permission from the officer in charge of the police station before taking the photograph, as required by section 353A. The police investigation found that police had contacted the young person's legal representative a number of times previously, including the day the photograph was taken.

The police investigator did not agree that the young person had been arrested for the purpose of taking the photograph. Rather, he was arrested for the purpose of being charged, but police ultimately decided to proceed by way of future court attendance notice rather than formally charging him.

We oversighted the police investigation and agreed it could not be determined that the police officer involved deliberately circumvented the provisions of the *Crimes (Forensic Procedures) Act* in order to obtain evidence against the young person. The evidence suggested the officer believed he was acting within his powers when he asked the young person to consent to the photograph.⁸⁴⁵

We note that police cannot arrest a suspect in order to take the person's photograph, as there is no power to arrest solely for the purpose of investigation. It has long been established that police can only arrest a person in order to take the person before an authorised justice as soon as practicable, to be dealt with according to law.⁸⁴⁶ Further, the *Law Enforcement (Powers and Responsibilities) Act* specifies that police can only arrest a purpose where necessary, to ensure the person appears at court, to prevent another offence, to prevent the loss of evidence or harassment of witnesses, to prevent fabrication of evidence or to preserve the person's safety or welfare.⁸⁴⁷ For this reason, if a suspect is not under arrest, police can proceed under the *Crimes (Forensic Procedures) Act* but not under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*.

In some circumstances, police may arrest a person and after conducting further inquiries, decide to release the person without charge. Police may decide to proceed by court attendance notice at a later date, if further evidence comes to light. Police do not need to charge a suspect to be able to take a photograph under Part 10 of the *Law Enforcement (Powers and Responsibilities)* Act.⁸⁴⁸ However, the original arrest must have been valid – that is, the suspect must have been arrested for the purpose of being brought before an authorised justice, to be dealt with according to law.

In our view, the legal position is clear. It appears, however, that NSW Police clarify when officers can take photographs under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*, and when they can take photographs under the *Crimes (Forensic Procedures) Act*. In particular, NSW Police may consider including advice on this issue in the frequently asked questions section of the FPIT intranet site, where there is already a section on photographs. NSW Police may also update the law notes which are still on the intranet to indicate that they have been superseded. Any advice provided to officers should emphasise that a person cannot be arrested for the sole purpose of taking a photograph.

Recommendation 52

NSW Police provide clear advice to officers about when photographs can be taken under sections 133 and 136 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and when photographs can be taken under the *Crimes (Forensic Procedures) Act 2000*.

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This recommendation is supported by NSW Police.849

9.1.3. Cavity searches

The Act provides for various intimate forensic procedures to be conducted, but specifically excludes body cavity searches: "A forensic procedure... does not include any intrusion into a person's body cavities except the mouth."⁸⁵⁰ We are not aware of any law authorising police officers in New South Wales to carry out, or cause to be carried out, searches of people's body cavities.⁸⁵¹

Despite this prohibition, we found that some police have conducted cavity searches, ostensibly under the authority of the *Crimes (Forensic Procedures) Act.*

Case Study 61

Police executed a search warrant on a house and found some green vegetable matter, small resealable plastic bags and an amount of cash. Police suspected that one of the occupants was hiding a package of prohibited drugs in her vaginal cavity. Police strip searched the woman and asked her to remove the suspected item, but the woman declined. Police arrested the woman and applied to a magistrate for an interim order authorising an "intimate forensic procedure," a search of her vaginal cavity. The magistrate made the order, and police took the woman to a hospital, where a doctor performed the procedure. Nothing was found. Police applied for another interim order, this time authorising a search of the suspect's rectal cavity. Again, the order was granted, the search was conducted, and nothing was found. The suspect was released without charge.⁸⁵²

It is of serious concern that such intrusive searches were carried out, without consent, and without any legal basis. Further, in the absence of legislative protection, a cavity search may constitute an assault.

We obtained copies of the court orders and immediately wrote to the relevant local area commander. He considered that the police officers involved "were not aware of what their actual powers in relation to [the Act] were at the time although it is thought that all were acting in good faith but on a power which they did not have." He advised that command's education and development officer would research and deliver training to officers in the command on the issue.⁸⁵³

We also raised the issue with NSW Police at a corporate level, on the basis that it would be appropriate to provide all police officers with advice about searches permitted, and not permitted, under the Act and other legislation. The Deputy Commissioner of Police subsequently advised that he sent a memo by email to all officers reminding them that they do not have the power to search body cavities and discussing their various related powers. The memo was also scheduled for publication in the *Police Weekly*.⁸⁵⁴

It is also of concern that a magistrate made orders specifically authorising the search of a suspect's vaginal and rectal cavities as "intimate forensic procedures" under the Act. We raised the matter with the Chief Magistrate of the Local Court, who shared our concerns, and advised that he sent an email to all magistrates bringing to their attention that the Act does not make provision for cavity searches.⁸⁵⁵

With the consent of NSW Police, we also raised the matter with NSW Health, on the basis that it would be appropriate to provide advice to medical practitioners and other hospital personnel about the types of searches permitted under the Act. We also suggested it might be appropriate to review processes where medical practitioners are presented by police with court orders for searches, to ensure they have access to appropriate advice if required. NSW Health subsequently advised that it is considering writing a policy on this issue.⁸⁵⁶ We note that NSW Health had previously issued a circular outlining its position on the carrying out of forensic procedures, in 2000. It notes that medical staff are not required to carry out forensic procedures and that "NSW Health does not regard the carrying out of these forensic procedures to be a part of its overall functions and health service staff will not be expected to perform the functions."⁸⁵⁷

NSW Police has previously proposed legislative changes to enable officers to ask medical practitioners to examine a suspect's body cavities, in the context of our review of the *Police Powers (Internally Concealed Drugs) Act 2001*, which has since been incorporated into the *Law Enforcement (Powers and Responsibilities) Act 2002*. However, NSW Police subsequently retracted its proposal, commenting that cavity searches are degrading and may contravene the *International Covenant on Civil and Political Rights 1975*.⁸⁵⁸ Submissions from other stakeholders were overwhelmingly

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opposed to enabling police to order cavity searches. NSW Health described the potentially harmful consequences of cavity searches, and the significant risk of causing physical or psychological harm.⁸⁵⁹ The Australian Law Reform Commission has also described the risks associated with cavity searches:

There are obvious problems associated with these searches. The first is the simple medical danger. Considerable harm, in a medical sense, could come to an individual from a body cavity search that was carried out incorrectly or unhygenically. Secondly, a body cavity search, especially one carried out without consent, is likely to be degrading. It is an intensely personal intrusion that is an unwelcome and demeaning experience.⁸⁶⁰

9.1.4. Medical examinations

At common law, there is no power to conduct a medical examination without the consent of a suspect, either before or after arrest.⁸⁶¹ However, section 138 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (formerly section 353A(2) of the *Crimes Act 1900*) provides that police may request a medical practitioner to examine a person in custody who has been charged with an offence. The consent of the person is not required.

The power to conduct a medical examination has been interpreted quite narrowly – it permits "no more than an external examination by sight or touch."⁸⁶² The courts have commented that the legislation authorises an infringement of fundamental rights (the privilege against self incrimination and the right not to be assaulted), and therefore must be read restrictively.⁸⁶³

Police also have a limited power to conduct internal searches, under the Part 11, Division 3 of the *Law Enforcement* (*Powers and Responsibilities*) *Act 2002* (formerly under the *Police Powers (Internally Concealed Drugs) Act 2001*). Police may take a suspect to a medical facility to be searched by way of medical imaging, if there are reasonable grounds to suspect the person has swallowed or is otherwise internally concealing a prohibited drug for the purpose of supply. Searches can be conducted by X-ray, MRI, CT scans or other forms of medical imaging.⁸⁶⁴ The Act does not permit any intrusion into a person's body cavities, or authorise police or medical practitioners to remove any internally concealed matter from a person's body.⁸⁶⁵

Apart from the cavity search issue, we are not aware of any problems with the interaction of the medical examination powers and the forensic procedures legislation.

9.1.5. Urine samples

Nothing in the *Crimes (Forensic Procedures) Act* allows police to take urine samples. However, under the *Road Transport (Safety and Management) Act 1999* police have the power to require a driver who refuses to submit to a sobriety assessment, or who police reasonably believe is under the influence of a drug, to provide a blood and urine sample (whether or not the person consents to them being taken) in accordance with the directions of a medical practitioner.⁸⁶⁶

We are aware of some instances where police have taken urine samples and recorded them as forensic procedures. However, it appears that the samples were taken under the provisions of the *Road Transport (Safety and Management) Act 1999* and were recorded incorrectly. It does not appear that police have taken urine samples ostensibly under the *Crimes (Forensic Procedures) Act.*

9.2. Covert DNA sampling

Police sometimes take covert DNA samples, by retrieving an item discarded by a person who is under investigation (such as a cigarette butt, drink container or tissue) or through some other type of investigative procedure (such as a random breath test).⁸⁶⁷

The Act does not specifically prohibit police from taking a covert DNA sample, and this type of conduct is essentially unregulated. However, a court may find the evidence inadmissible, if it has been obtained improperly.

9.2.1. Case law

This issue was considered in *R v Daley* (2001),⁸⁶⁸ where police used a supposedly random breath test as a pretext for obtaining a DNA sample from a man suspected of multiple robbery and sexual assault offences. Police arrested the suspect for driving an unregistered vehicle, and took him to the police station, where they took his clothes and submitted them for DNA analysis. Two weeks later police were advised that the DNA profile obtained from the breath

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test container and the man's t-shirt matched the profile obtained from the clothes and body of two of the victims. Police arrested the man again, and took a buccal swab. Again, the profile from the swab matched the profile obtained from the victims. At trial, defence counsel argued that because the original DNA sample was obtained by trickery, all the DNA evidence should be excluded.

The court found that the true purpose of the random breath test and arrest was not to enforce traffic laws, it was to obtain samples of the accused's bodily fluids for the purpose of DNA analysis. Despite having "misgivings" about the conduct of police, the court admitted the evidence, on the basis that it was highly probative, and that the offender was likely to strike again, unless apprehended quickly. The court stated that only in an exceptional case would it condone the use of the power of arrest and detention for an ulterior purpose - and that this was such a case.

Covert DNA sampling was considered again in R v Nicola (2002).869 In that case, police interviewed the accused about a sexual assault allegation. He denied having had sex with the victim. Police asked him to provide a DNA sample, but he declined. Some time later, the accused went to the police station to ask for the return of some boxer shorts which had been taken for forensic examination. While he was there, he asked for a cup of coffee. One of the police officers who saw him throw his styrofoam cup in the bin retrieved it and submitted it for DNA analysis. The profile obtained from the cup matched the profile obtained from the victim's body and clothes and the accused was convicted on this evidence.

On appeal, the defence argued that the DNA evidence should not have been admitted, as the accused had made it clear that he did not want to provide a DNA sample, but police ignored his express wishes, and examined the cup anyway. The court dismissed the appeal, upholding the trial judge's conclusion that there was nothing improper about police retrieving the cup and submitting it for DNA analysis.

Both Daley and Nicola dealt with DNA samples which were taken before the Act commenced, and the admissibility of evidence was determined according to section 138 of the Evidence Act 1995. The Crimes (Forensic Procedures) Act specifically provides, in section 82, that evidence obtained through a forensic procedure is inadmissible where there has any breach of any provision of the Act, unless the court is of the opinion that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

R v Kane (2004) considered covert DNA sampling in the context of the Act.⁸⁷⁰ The accused was convicted for armed robbery of a TAB. Police retrieved a cigarette butt the accused dropped on the footpath, after TAB staff identified the offender as a regular customer. The profile obtained from the butt was found to match remnants of skin left on a balaclava discarded by the robber just after he committed the offence.

On appeal, the accused argued that the retrieval and forensic examination of the cigarette butt amounted to a 'forensic procedure' for the purposes of the Act, and that as the requirements of the Act had not been met, the evidence should have been excluded. The appeal was peremptorily dismissed, on the basis that this argument misconceived the purpose and scope of the Act:

What is contemplated by the notion of a forensic procedure, whether intimate or non-intimate, is that it is a procedure actually carried out on the person of some specific individual. The chance circumstance that a person throws away, relevantly, a cigarette butt which is retrieved without any reference to, or interference with the person, and which turns out to have significant probative value in terms of what it says about the relevant DNA profile, does not seem to me to satisfy, either in principle or in practice, either in law or in fact, what is contemplated by the Crimes (Forensic Procedures) Act 2000.871

The issue was considered again in R v White (2005).⁸⁷² This was a murder case, where a DNA profile of the offender was obtained from material found under the fingernails of the deceased. This profile was put on the DNA database, and was found to match DNA from an unsolved break and enter. Police investigated the break and enter offence, and narrowed their investigation down to six people. On the basis that none of the people met the threshold of being a suspect for the purposes of the Act, police took covert DNA samples from each "person of interest", in the hope of obtaining a match. One of these samples, again taken from a discarded cigarette butt, matched the profile obtained from the deceased's fingernails. Police then arrested the accused and took a subsequent sample - a buccal swab - under the provisions of the Act. At trial, the DNA evidence was held to be admissible, for the same reasons as in Kane - that obtaining a DNA profile from an item discarded by a suspect is not a 'forensic procedure', and so is not evidence to which section 82 of the Act applies.

However, the court did go on to consider whether police took a covert sample in order to circumvent the requirements of the Act. The court was satisfied that the police conduct was not in defiance of the Act, accepting that the officer in charge was of the view there was insufficient evidence available at that time to identify the accused as a suspect for the purposes of the Act.873

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9.2.2. Police policy on covert DNA sampling

FPIT has the following advice on its intranet site:

The provisions of the Crimes (Forensic Procedures) Act 2000 do not cover the obtaining of covert DNA. Advice should be sought on a case-by-case basis. It is important to avoid possible criticism in relation to circumventing provisions of the Crimes (Forensic Procedures) Act in obtaining DNA from suspects.⁸⁷⁴

Another policy guide on the intranet states:

If the collection of a covert sample was used to circumvent the provisions of the Act any evidence obtained from that sample may not be admissible at court. In any case if a covert sample results in a match to a crime scene sample, a sample from the suspect should be obtained pursuant to the Act. The evidence from this sample should form part of the brief.⁸⁷⁵

There are a number of reasons why police may prefer to take covert samples than conduct forensic procedures under the Act. First, police may not want to alert people to the fact they are under investigation. Second, police may decide they cannot ask for a sample, if the person falls short of the definition of 'suspect'. Third, it may be much easier to submit a discarded item for analysis than to comply with the various requirements of the Act, which some police officers find quite onerous.

9.2.3. How covert DNA samples are handled at the lab

We asked DAL whether DNA samples taken covertly are treated as "person samples" or "crime scene samples". DAL advised that the police officer who submits the sample may mark it either as a crime scene sample, or as 'other' on the accompanying form. However, DAL treats samples taken covertly as a different category entirely. If a DNA profile is obtained, it is put on the database, but is not searched against any of the indexes. It is only compared to other evidence within the particular case.⁸⁷⁶

We note that while the Act does not specifically deal with covert DNA sampling, comparison of profiles from covert samples against any of the indexes on the database is effectively prohibited.⁸⁷⁷ For this reason we support DAL's approach to the issue. We do however note that if a sample taken covertly is linked to the offence in relation to which it was taken, police may take a further sample under the provisions of the Act, which may then be searched against the other indexes.

9.2.4. Discussion

The Australian Law Reform Commission has discussed the issue of police collecting genetic material by stealth, and has expressed concern about covert sampling resulting in "a parallel system for the collection and use of genetic samples falling outside the formal regulatory framework established under Part 1D of the [Commonwealth] *Crimes Act*", which is substantially similar to our Act. The Commission commented that the Commonwealth legislation "provides a formal framework for collecting samples from suspects," and that "it is likely that Parliament intended that this legislation should be the sole authority by which police might collect such samples." However, it noted that there was no specific prohibition on police obtaining forensic samples through the collection of discarded samples, or through other lawful investigative procedures. It recommended that the legislation be amended so that police could only obtain genetic samples from individuals either through the forensic procedures legislation, or from a stored sample (with the individual's consent or by court order).⁸⁷⁸

We do not know how often police in New South Wales are submitting covert DNA samples for analysis, or the circumstances in which covert samples are being taken. Unless the accused objects to the evidence being admitted, as happened in *Kane* and *White*, it is unlikely the reasons for taking a covert sample will be reviewed.

For this reason, in our view it is important that NSW Police keep and publish records of the number of covert DNA samples which are submitted for analysis; the reasons for the sample being taken covertly rather than through the provisions of the Act; and the results of the analysis – whether the covert sample implicated the person under investigation or not.

In addition, this is a matter that we consider should be specifically considered by Parliament in considering this report. If it was not intended that covert samples be permitted, the Act should specifically provide for this. Conversely, if it is considered that for some persons (for example, persons who are not yet suspects) covert sampling should be permitted, the appropriate regulation (such as permitted matching) should be considered. We note the considerable criminal justice outcomes achieved in at least two matters, which will obviously be a significant factor in those

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considerations. Alternatively, the Australian Law Reform Commission has made recommendations which are against current police practice and require due consideration. A middle course may be for courts to be permitted in certain circumstances to order that covert samples be collected by police officers.

Recommendation 53

NSW Police keep records of the number of covert DNA samples submitted for analysis, the reason why the sample was taken covertly, and the results of the analysis, and includes these in its annual report.

Recommendation 54

Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.

NSW Police is still considering recommendation 53, but supports recommendation 54.⁸⁷⁹ The Minister for Police commented that he could not endorse this recommendation until he had the opportunity to consult further with operational police. Given the complexity of the legislation, the Minister did not support any further restrictions on police collecting covert samples, and advised that admissibility of such evidence should be left to the courts.⁸⁸⁰ In its submission, the Attorney General's Department noted the courts' view that any investigative conduct not specifically mentioned in the Act is unregulated, and commented:

The current state of affairs provides little incentive for investigating police officers to work within the confines of the Act, rather than arranging their investigation so that the Act does not apply at all. This issue may need to be considered in due course.⁸⁸¹

9.3. Obtaining DNA from deceased persons

The Act does not specify the circumstances in which police can take a DNA sample from a deceased person. However, it does specify that forensic material "taken from the body of a deceased person" may be supplied for the purpose of DNA analysis, for inclusion on one of the indexes of the DNA database.⁸⁸² Profiles from deceased persons can be put on the "volunteers (unlimited purposes)" index where the person's identity is known, and on the "unknown deceased persons" index where the person's identity is not known.⁸⁸³

Case Study 62

Police were reinvestigating a sexual assault and murder which had been committed almost 20 years before. Police took covert DNA samples from a number of suspects – in one case by retrieving a glass the suspect had used, in another by buying a baseball cap from the suspect. Police identified a fifth suspect, who had recently been killed in a road accident. Police obtained a blood sample which had been taken during the autopsy, and submitted it for DNA analysis. Relying on DNA evidence, the coroner concluded that the deceased committed the murder. A relative of the deceased made a complaint about a number of aspects of the police investigation.

In our oversight role, we indicated that police investigating the complaint should consider why covert samples were taken from suspects when the Act provides the regulatory framework for taking DNA samples from suspects. The police investigator advised that the strategies used by police in reinvestigating the murder depended on the operation remaining covert in its early stages, and further, that all of the living suspects were interstate, so samples could not be taken under the Act. The investigator concluded that "police were entirely within their powers to take such samples and analyse those samples in a criminal investigation through common law powers to seize exhibits."

We also indicated that the police investigation should consider what authority NSW Police used to obtain the blood sample taken during the autopsy, when it appeared the blood had not originally been taken for the purpose of DNA analysis. The investigator noted that the Act only deals with forensic procedures conducted on people, by consent or by order, and that there is no provision for taking samples from deceased persons. He concluded that the sample had been taken for a lawful purpose (that is, for tests carried out by the forensic pathologist conducting the autopsy), and that police had seized the sample under their common law power to seize exhibits relevant to the investigation of the offence. The investigator also pointed out that under the *Coroners Act 1980*, a coroner may give a police officer directions concerning investigations to be carried out for the purposes of an inquest. The investigator concluded that as the sample had been lawfully taken, police were entitled to examine it for the purpose of DNA analysis.

The investigator made no adverse findings against the police officers who were involved. We were satisfied with the explanations provided.

9.4. Victims of crime and other "excluded volunteers"

The Act does not apply to forensic procedures carried out on people who are deemed to be "excluded volunteers". This includes:⁸⁸⁴

- victims of offences against the person
- · victims of robbery offences, and
- people who volunteer their fingerprints or handprints for elimination purposes in relation to a property offence.

For example, if police wish to photograph a victim's injuries, to use as evidence in criminal proceedings, this procedure is not governed by the *Crimes (Forensic Procedures) Act.*

NSW Police has developed its own policies for carrying out forensic procedures on victims of crime and other "excluded volunteers." In many ways these procedures reflect the legislative position on volunteers.

Because "excluded volunteers" are not covered by the Act, the way police conduct forensic procedures in these circumstances is beyond the scope of this review. However, we did identify some concerns through our monitoring activities, and have included these for the consideration of NSW Police.

Many police officers we interviewed criticised the application of forensic procedures policies to victims of crime. Some argued it was inappropriate to ask a victim of crime to sign a consent form when police proposed to photograph injuries. Some were surprised to learn that victims of crime are not covered by the Act, and that the policy for conducting forensic procedures on victims a matter for NSW Police to determine.

Although we did not specifically ask about forensic procedures conducted on victims, many officers we surveyed argued that the current policy should be changed:

The photographing of victims is a difficult process... The Act was not really meant for this, it was for securing suspect, volunteer and inmate samples.⁸⁸⁵

The fact that photographing injuries of a victim is now interpreted as falling under the ambit of this Act causes an unnecessary impediment on police especially when these are all taken with consent.⁸⁸⁶

The current requirement of a victim being photographed to be treated as a forensic procedure needs to be removed.⁸⁸⁷

The process for dealing with victims needs to be streamlined or the legislation clarified.888

Remove the strict SOP and conditions when it comes to obtaining forensic samples from victims of crime... especially photographs of victims injuries.⁸⁸⁹

Forensic procedures on victims is too complex, time consuming for offences involving high volume crime. Police are still confused on this issue.⁸⁹⁰

We reviewed a small proportion of the forensic procedures conducted on volunteers, to see in what types of circumstances police are asking people to voluntarily undergo forensic procedures. We found many instances where

police appear to have treated victims of crime as volunteers for the purposes of the Act. For example, the following people were recorded on COPS as being 'volunteers':

- the manager of a car wash who was held up and had the weekend's banking stolen⁸⁹¹
- a woman who was sexually assaulted while staying at a friend's house⁸⁹²
- a man who was stabbed in the shoulder and abdomen during a fight⁸⁹³
- a woman who was assaulted by her partner's ex girlfriend⁸⁹⁴
- a man who was assaulted by an acquaintance who had come to his house to return some property,⁸⁹⁵ and
- a middle aged woman who was assaulted by a young woman in a café.896

It appears that some police officers are not clear about how the forensic procedures legislation applies to victims. This may be because the policies NSW Police has developed for conducting forensic procedures on victims largely mirror those developed for volunteers.

In light of these findings, NSW Police may wish to consider SOPs which are specific to victims. Our view is that those SOPs need not necessarily reflect the processes in the Act, especially as regards to formal consent and information requirements. They should be as streamlined as possible, so that victims are dealt with sensitively and appropriately.

In our draft report, we recommended that "NSW Police consider amending SOPs for forensic procedures conducted on victims in particular as concerns consent and information requirements." NSW Police did not support our recommendation, as the police SOPs are based on the Attorney General's Department's Victim's Protocol.⁸⁹⁷ It appears NSW Police and the Attorney General's Department need to work together to resolve this issue.

Recommendation 55

The Attorney General's Department and NSW Police consider whether the current protocol for conducting forensic procedures on victims is appropriate, particularly in relation to consent and information requirements, and make changes to the Victim's Protocol and NSW Police SOPs as necessary.

9.5. Children under the age of 10

Section 111 of the Act provides, "This Act does not authorise the carrying out of a forensic procedure on a person who is under 10 years of age."

While the Act does not authorise the carrying out of forensic procedures on children under 10, it does not prohibit it either. It would seem that 'forensic procedures' carried out on children under the age of 10 are not covered by the Act. Indeed, the legislative heading for section 111 is, "Act does not apply to persons under 10."

Despite this provision, we found 16 instances of police conducting forensic procedures on children under the age of 10.

Case Study 63

A woman was found strangled in her car. During the investigation, DNA was located on the inside of the car, on some double sided tape which had been stuck to the door handle. The deceased's 9 year old nephew said that he had put the tape there. To eliminate the nephew's DNA from the investigation, police took a DNA sample by buccal swab from the child. This sample was used to confirm that the only DNA on the tape was from the nephew. This aided the police investigation by eliminating one line of inquiry and ensuring that the DNA evidence on the tape did not come from anyone else, such as the offender.⁸⁹⁸

Almost all of the forensic procedures conducted on children under the age of 10 were DNA samples taken from babies or toddlers, where police were investigating sexual assaults on young girls which had resulted in pregnancies.

Case Study 64

A woman in her late twenties told police that her father had sexually assaulted her on a regular basis since she was 11. She had six children, aged between 3 and 15. Four of the children had been placed in foster care by DOCS, and the other two had been adopted at birth by other families. The woman alleged that her father was the father of some if not all of her children.

Police explained that the paternity of the children could be verified through DNA analysis. The woman agreed to provide a DNA sample, and gave written consent for DNA samples to be taken from each of her children.

Police took DNA samples from the four children who were in the care of DOCS, but not the two who had been adopted, as their adoptive parents indicated they did not want the samples to be taken. A DNA sample was also taken from the suspect.

DNA analysis revealed that there was an extremely strong probability that the suspect was the biological father of one of the children. The child had been conceived when the woman was 16, and was born with medical problems associated with genetic complications. The suspect was charged with the offence.

In the above case study, the woman, for the purposes of the Act, was an "excluded volunteer" (being a victim of personal violence offence), and the man was a 'suspect'. However, the basis on which the children were sampled is less clear. Arguably, children over the age of 10 could be treated as 'volunteers' for the purpose of the Act. In the case of a child, a volunteer is defined as a person other than a suspect or excluded volunteer (victim) whose parent or guardian volunteers to police that the child undergo a forensic procedure.⁸⁹⁹

However, as the Act does not authorise the carrying out of forensic procedures on children under the age of 10, taking DNA samples from the younger children appears to fall outside the scope of the Act.

We watched the video of the DNA sampling of the three year old in case study 64. The police officer taking the sample read the volunteer information sheet to the mother of the child, and in all other respects treated the procedure as an ordinary forensic procedure under the Act. Although the Act did not apply in the circumstances, it appears police acted as though it did, in much the same way as the NSW Police policy on conducting forensic procedures on excluded volunteers (victims) reflects the legislative position on volunteers.

While there appears to be no legal reason why police should not do this, NSW Police may wish to consider whether treating young children as forensic procedure volunteers is the most appropriate way of obtaining the evidence they seek. For example, it may not be necessary to conduct the procedure in a police station.

It seems that occasions will arise where police investigating an offence have a good reason for wanting to take a DNA sample from a child under the age of 10. These appear to fall into two distinct categories – where the paternity of the child is of evidentiary value in the prosecution of a criminal offence (as in case study 64), or where police seek a child's DNA profile for elimination purposes (as in case study 63). In these examples, we recognise the need exists to obtain DNA samples from a child under the age of 10. However, we feel that these elimination samples should only be taken if a court order has been made and that the Act should be amended to reflect these special circumstances for obtaining volunteer samples from a person under the age of 10 years.

As discussed above, the current position appears to be that the taking of DNA samples from children under the age of 10 is essentially unregulated. It is not authorised by the forensic procedures legislation, but is not specifically prohibited either. In our view there would be considerable merit in clarifying whether police are able to conduct forensic procedures on children under the age of 10, and if so, in what circumstances.

9.5.1. Young children who have come to the adverse attention of police

The Act defines a child as "a person who is at least 10 years of age but under 18 years of age", and provides that "a child cannot consent to a forensic procedure". However, it does not specify that a person under the age of 10 (who is not a "child" for the purposes of the Act) cannot be asked to undergo a forensic procedure, or cannot consent to it. It simply states that the Act does not authorise the carrying out of a forensic procedure on a child under the age of 10. For this reason, it would not be unlawful for police to ask a person under the age of 10 who had come to their attention to undergo to a forensic procedure.

We found no evidence to suggest that police have asked any people under the age of 10 to undergo forensic procedures in this context, and it would certainly be contrary to the spirit of the legislation if this were to occur.

We also note that children under the age of 10 cannot be convicted of an offence, being conclusively presumed to be below the age of criminal responsibility, so there would be no evidentiary value in police conducting a forensic procedure on a child this young.⁹⁰⁰ However, if a young child had come to the adverse attention of police, then taking a DNA sample for intelligence purposes may be of interest to police. The young child's profile could not be put on the DNA database, but could be analysed within a particular case.

While we are of the view it is highly unlikely this would occur, given section 111 of the Act, in our view there would be merit in specifying that conducting a forensic procedure on a suspect or person of interest under the age of 10 is prohibited.

Recommendation 56

The Crimes (Forensic Procedures) Act 2000 be amended to specifically provide the following:

- a. the taking of a DNA sample from a child under the age of 10 be prohibited except when a court order authorises the sample having given due consideration to the age of the child and where:
 - i. the paternity of the child is of evidentiary value in an indictable or prescribed offence; or
 - ii. the DNA is required for exclusionary purposes.
- b. the only permitted matching for a DNA profile obtained from a DNA sample from a child under the age of 10 is within case matching, and that the profile not be placed on any index of the DNA database.

This recommendation is supported by NSW Police.901

Endnotes

- ⁸³³ Crimes (Forensic Procedures) Act 2000 s 3(1).
- 834 Law Enforcement (Powers and Responsibilities) Act 2002 s 133 and 136.
- ⁸³⁵ Crimes (Forensic Procedures) Act 2000 s 3.
- ⁸³⁶ The Crimes (Forensic Procedures) Act 2000 does not apply to the taking of photographs under Part 10 of the Crimes Act 1900: Crimes (Forensic Procedures) Act 2000 s 112.
- ⁸³⁷ "Taking photographs of suspects for use in identification procedures", NSW Police Law Notes (12 of 2002).
- ⁸³⁸ "Photographing of suspects", advice on NSW Police intranet dated 25 June 2004 and accessed on 8 September 2005.
- ⁸³⁹ Confidential interview with police officer, 3 August 2004.
- ⁸⁴⁰ Confidential LAC survey response.
- ⁸⁴¹ Confidential LAC survey response.
- ⁸⁴² Confidential LAC survey response.
- ⁸⁴³ Responses to Ombudsman LAC survey.
- 844 Complaint 11.
- 845 Complaint 12.
- ⁸⁴⁶ See Williams v R (1986) 161 CLR 278 and R v Dungay [2001] NSWCCA 443. See also former section 352 of the Crimes Act 1900, which has been replaced by section 99 of the Law Enforcement (Powers and Responsibilities) Act 2002.
- ⁸⁴⁷ Law Enforcement (Powers and Responsibilities) Act 2002 s 99.
- ⁸⁴⁸ See DPP v Nicholls [2001] NSWSC 523; and R v Daley [2001] NSWSC 2111 at paragraph 153 (Simpson J). These discuss the equivalent provisions of the Crimes Act 1900, which preceded Part 10 of the Law Enforcement (Powers and Responsibilities) Act 2002.
- ⁸⁴⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁸⁵⁰ Crimes (Forensic Procedures) Act 2000 s 3(1). We note that police in some other jurisdictions can conduct cavity searches, under the equivalent forensic procedures legislation. See Police Powers and Responsibilities Act 2000 (Qld) s 318ZA and schedule 4; Police Administration Act (NT) s 4 and 145; Misuse of Drugs Act (NT) s 35A; and Forensic Procedures Act 2000 (Tas) s 3.

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- ⁸⁵¹ The Law Enforcement (Powers and Responsibilities) Act 2002, which codifies police search powers, specifies that a strip search does not allow police officers to search body cavities: see section 3.
- ⁸⁵² Information obtained through Ombudsman review of COPS records.
- ⁸⁵³ Letter from local area commander, 21 October 2005.
- ⁸⁵⁴ Letter from T Collins, Deputy Commissioner Specialist Operations, 15 November 2005.
- 855 Letter from the Chief Magistrate of the Local Court, 26 August 2005.
- ⁸⁵⁶ Advice from NSW Health, 15 December 2005.
- ⁸⁵⁷ NSW Health Circular, "NSW Health Position on the Carrying Out of Forensic Procedures", 22 December 2000.
- 858 NSW Police submission to Ombudsman review of the Police Powers (Internally Concealed Drugs) Act, 23 August 2004.
- ⁸⁵⁹ NSW Health submission to Ombudsman review of the Police Powers (Internally Concealed Drugs) Act, 25 August 2004.
- ⁸⁶⁰ Australian Law Reform Commission, *Privacy*, Volume 2 (1983) at paragraph 1107.
- ⁸⁶¹ R v Boulton (1871) 12 Cox CC 87 at 92 to 93 (Cockburn CJ).
- ⁸⁶² Fernando v Commissioner of Police (1995) 36 NSWLR 567 at 593 (Powell JA).
- ⁸⁶³ Fernando v Commissioner of Police (1995) 36 NSWLR 567 at 573 (Priestly JA) and 592 (Powell JA); Dickson v Commissioner of Police [1999] NSWSC 1100 (16 November 1999) at paragraph 19 (Bell J).
- ⁸⁶⁴ MRI is Magnetic Resonance Imaging. CT scans use Computerised Axial Tomography.
- ⁸⁶⁵ The Ombudsman reviewed the Police Powers (Internally Concealed Drugs) Act 2001 and found that it was used only once in its first two years of operation. We found the Act was not meeting its objectives and recommended that Parliament consider whether it should remain in force. See NSW Ombudsman, Review of the Police Powers (Internally Concealed Drugs) Act 2001 (July 2005).
- 866 Road Transport (Safety and Traffic Management) Act 1999 s 27.
- ⁸⁶⁷ For example, in *R v Nicola* [2002] NSWCCA 63 (11 March 2002) police retrieved a styrofoam cup from the bin after the suspect had asked for a coffee at the police station. In *R v Daley* [2001] NSWSC 1211, police conducted an ostensibly random breath test, to obtain a sample of the suspect's saliva.
- 868 R v Daley [2001] NSWSC 1211.
- 869 R v Nicola [2002] NSWCCA 63 (11 March 2002).
- ⁸⁷⁰ R v Kane [2004] NSWCCA 78 (19 March 2004).
- 871 R v Kane [2004] NSWCCA 78 (19 March 2004) at paragraph 13 (Sully J).
- 872 R v White [2005] NSWSC 60.
- ⁸⁷³ R v White [2005] NSWSC 60 at paragraph 30(d) (Studdert J).
- ⁸⁷⁴ Advice on the NSW Police intranet, accessed 8 September 2005.
- ⁸⁷⁵ NSW Police Legal Services, "Carrying Out Forensic Procedures: A guide for Criminal Investigators" (11 November 2001). Accessed 8 September 2005.
- ⁸⁷⁶ Telephone advice from DAL, 3 March 2005.
- ⁸⁷⁷ Section 91(2) of the *Crimes (Forensic Procedures) Act 2000* prohibits the supply of forensic material (other than permitted forensic material) for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system; section 93 sets out the different types of permitted forensic material and does not include covert DNA samples; and section 92 sets out the limited circumstances in which a person may access information on the DNA database which includes access for the purpose of forensic matching permitted under section 93 but, relevantly, no other type of matching.
- ⁸⁷⁸ Australian Law Reform Commission, *Essentially Yours*: The Protection of Human Genetic Information in Australia, Report 96 (2003) at 41.197 to 41.213.
- 879 NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁸⁸⁰ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ⁸⁸¹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- 882 Crimes (Forensic Procedures) Act 2000 s 91.
- ⁸⁸³ Crimes (Forensic Procedures) Act 2000 s 90.
- 884 Crimes (Forensic Procedures) Act 2000 s 76A.
- ⁸⁸⁵ Confidential LAC survey response.
- 886 Confidential LAC survey response.
- 887 Confidential LAC survey response.

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888 Confidential LAC survey response.

⁸⁸⁹ Confidential LAC survey response.

⁸⁹⁰ Confidential LAC survey response.

⁸⁹¹ Information obtained through Ombudsman review of COPS records.

892 Information obtained through Ombudsman review of COPS records.

⁸⁹³ Information obtained through Ombudsman review of COPS records.

⁸⁹⁴ Information obtained through Ombudsman review of COPS records.

⁸⁹⁵ Information obtained through Ombudsman review of COPS records.

⁸⁹⁶ Information obtained through Ombudsman review of COPS records.

⁸⁹⁷ NSW Police response to Ombudsman draft report, 2 June 2006.

⁸⁹⁸ Information obtained through Ombudsman review of COPS records.

⁸⁹⁹ Crimes (Forensic Procedures) Act 2000 s 76(1).

⁹⁰⁰ Children (Criminal Proceedings) Act 1987 s 5.

⁹⁰¹ NSW Police response to Ombudsman draft report, 2 June 2006.

Chapter 10. DNA analysis

We set out the arrangements for the DNA analysis service at 4.3.1. This chapter details our audit and investigation findings on how the laboratory handles DNA samples, and how the DNA database is used. We examined a number of areas, including the receipt of DNA samples, analysis results, permitted matching, delays in DNA analysis and the accuracy of information on the database. Our findings are discussed below.

10.1. Our investigation of DAL

Through our monitoring of the Act, we became aware of concerns held by some stakeholders about the DNA analysis service provided by DAL. Many of the police officers we interviewed raised concerns about the length of time taken to obtain DNA analysis reports from DAL. The Chief Magistrate of NSW also raised concerns about delays, commenting that delays in obtaining DNA analysis "undoubtedly are significantly contributing to the disappointing level of compliance with time standards."⁹⁰² There have also been various reports in the media about the impact of DNA processing times on court delays.⁹⁰³

Having regard to these concerns, we decided it would be appropriate to initiate an own motion investigation into DAL. We issued a notice of investigation in January 2005, requiring DAL to produce certain information and documents, and giving DAL the opportunity to outline any problems it has with the way the Act is being implemented, and any steps it has taken to address these. DAL provided responses in February and March 2005.

We provided DAL with our statement of provisional findings and recommendations in August 2005 and discussed it with representatives of DAL at a meeting in October 2005. We subsequently met representatives from DAL, NSW Police and the Ministry of Police, to discuss the issues affecting both DAL and NSW Police. We incorporated information supplied during this meeting and provided our report to the Minister for Health in December 2005.

10.1.1. Follow up audit of forensic procedures

Through our investigation of DAL, we followed up 180 of the 371 forensic procedures we examined during our audit of police local area commands, to assess consistency between data held by police and data held by the laboratory, to review the amount of time taken to transport samples from police stations to the laboratory, and to review turnaround times between police submitting DNA samples to the laboratory and the laboratory providing an analysis report to police. For each procedure we checked:

- that DAL received the sample
- whether the profile was on the DNA database and, if so, that it was on the correct index
- whether the profile should have been destroyed, and
- that the identifying information on the database was consistent the identifying information held by NSW Police.

Our audit findings are discussed in more detail below.

10.1.2. Our findings

We found that DAL has delivered some good results in providing a DNA analysis service to NSW Police. During the review period, DAL loaded over 25,000 DNA profiles from people onto the DNA database, including 8,699 from suspects and 831 from volunteers.⁹⁰⁴ DAL has also loaded over 14,000 DNA profiles derived from crime scene samples onto the database.⁹⁰⁵

During the review period, DAL made cold links in over 4,207 cases. The majority of these were for high volume offences, but a significant number were for serious offences, including murder and sexual assault. DAL estimates that about 3,170 warm links were made during the review period, and about 480 suspects were eliminated from investigations through DNA analysis.⁹⁰⁶

While these outcomes demonstrate that DAL is achieving good results, it is clear that DAL experiences significant difficulties in providing its DNA analysis services to NSW Police. DAL receives more crime scene samples for analysis than it has the capacity to process, which results in a growing backlog of unexamined crime scene samples. While DAL is generally able to meet urgent requests on an ad hoc basis, it is unable to meet the turnaround times set out in

the initial agreement between NSW Police and DAL. DAL is also concerned about staff shortages, lack of space and ageing infrastructure at the laboratory.

It is clear that DNA analysis is not reaching its potential in New South Wales. NSW Police and DAL have achieved some good results in obtaining evidence for the prosecution of crime and in linking suspects and convicted offenders to other unsolved crime scenes. However, DAL is unable to meet the demand for DNA analysis, and many crime scene samples remain unexamined. This seriously limits the efficacy of DNA analysis both in prosecuting offenders and as an intelligence tool.

We also found that it is difficult to track DNA samples through the system from receipt to destruction or case finalisation; there needs to be a better way of measuring and recording results of DNA analysis; some of the information on the DNA database is inaccurate or incomplete; and the destruction requirements in the Act are not being met. These issues are discussed in more detail below.

Through our investigation, we found that DAL has made great efforts to address the problems it faces, and where possible has implemented strategies to improve its service delivery. However, it appears that DAL cannot significantly improve its DNA analysis service without additional resources. We identified a number of areas where DAL could make changes to improve its service delivery. These changes can be presently considered, and would enhance the DNA analysis service already provided by DAL.

10.1.3. Consideration by the DNA Advisory Committee

The DNA Advisory Committee discussed our investigation report at its February 2006 meeting. However, it did not address our findings or recommendations in any significant way.⁹⁰⁷ It is clear there are major problems with the provision of DNA analysis services in New South Wales, which require consideration at a senior government level as a matter of urgency.

10.2. Between the police station and the laboratory

The local area commands we audited treated DNA samples obtained through forensic procedures like other police exhibits. This process ensures the location and movement of DNA samples is clearly documented, and the evidentiary chain of custody is preserved. Samples are generally kept in the fridge until they are transported to the laboratory.

Some commands used a separate exhibit book for exhibits relating to forensic procedures, which appeared to work well. We expect this will occur in every command in future, with the introduction of the new forensic procedures book being developed by the NSW Police Audit Group.

10.2.1. Transportation to DAL

Most metropolitan commands have one of their police officers transport DNA samples directly to the laboratory. Regional commands generally use couriers to transport DNA samples to the laboratory, unless an officer is otherwise coming to Sydney.

The NSW Police standard operating procedures state that DNA samples taken from suspects should be sent to DAL "as soon as possible."908 and that samples taken from volunteers should be sent to DAL "within five days." In order to assess compliance with this policy, we asked DAL to provide the date each of our 180 audit samples was received at DAL. DAL provided dates, which referred to the date the sample was entered onto the system at DAL, rather than date the sample was actually received. DAL advised that to obtain the actual dates of receipt, it would have to look up the hardcopy records for each. We reconsidered our request and identified 48 procedures where the difference between the date the procedure was conducted⁹⁰⁹ and the date the sample was entered onto the system at DAL appeared to be greater than five days, and asked DAL for the dates these samples were actually received.

With this further information we identified 19 forensic procedures where NSW Police took longer than five working days to deliver the DNA sample to DAL. Four samples took over 20 days to deliver, and one sample took over 80 days. We made inquiries about the reasons for the delay in the sample which was not taken to DAL for over 80 days. The relevant command advised that the forensic procedures was conducted on a child, by interim court order, and the sample was not sent to the laboratory for analysis until the final order was made, some months later. Another reason for the delay in transporting samples was the limited availability of couriers on particular days in particular areas.

We do not have particular concerns about delays in transporting DNA samples to the laboratory, provided samples are kept secure while at the police station, police record the location and movement of samples, and the delay is not significant.

10.2.2. Adequacy of systems for handling DNA exhibits

The processes outlined above usually work to ensure the location and movement of DNA samples is clearly documented. However, it depends on individual police officers keeping proper records of exhibit movements. As the following case study illustrates, this does not always occur.

Case Study 65

Police in a country town took a DNA sample from a young suspect in relation to a sexual assault investigation. As the suspect was a child, the sample was authorised by court order. It was recorded in the DNA register and the exhibit book at the police station, and was put in a cardboard box in the exhibit room. Police arranged for the courier to collect the sample the following day, for transportation to DAL.

It appears the DNA sample was taken out and left on a counter in the exhibit room, ready for collection by the courier. But when the courier arrived to collect the sample, it could not be found. The police station was searched but the DNA sample could not be located anywhere.

After discussing the situation with an officer from the DPP, the investigating police officer applied for a court order authorising a further sample to be taken from the suspect under section 27 of the Act, which provides that a forensic procedure can be repeated if the forensic material originally obtained is "insufficient for analysis or has been contaminated." The court rejected the police officer's application to take the second sample, on the basis that the first sample was neither insufficient nor contaminated, but had simply been lost.

The suspect ultimately pleaded guilty to the sexual assault, without police relying on the DNA evidence. Section 27 has since been amended, so police can apply for a forensic procedure to be repeated if the forensic material originally taken "has been lost or is for any other reason not available for analysis." However, this is subject to the requirement that carrying out the forensic procedure a second time is justified in all the circumstances.⁹¹⁰

NSW Police investigated the matter as a complaint as not only had the suspect's DNA sample been lost, but it appeared that a police officer may have lied in his affidavit in support of the application to take a second sample. The officer stated that the first sample "was entered into the Exh. [exhibit] Book and placed in a Fail Safe Delivery bag and forwarded to DAL," but that "there is no evidence of that sample arriving at DAL," implying the sample had actually been collected by the courier and had been lost at some point between leaving the police station and arriving at DAL. When questioned about his capacity to give such a definitive answer, despite the lack of evidence of the exhibit ever being collected for transportation to DAL, the officer said that at the time he believed the sample had been collected. He attributed the confusion to the fact that another officer had written the date in the column in the exhibit book headed "to DAL." The officer maintained that "it was very ambiguous as to what had occurred... according to the exhibit book, it is still on hand at the police station [but] according to the bag register it's been forwarded." Ultimately, no adverse findings were made against the officer. However, the police officer who investigated the complaint did identify a number of systems failures:

- DNA samples were kept in a box in the exhibit room as opposed to a lockable refrigerator, as required
- the supervising sergeant did not take possession of the exhibit and ensure that the exhibit was stored in the exhibit room
- · control and accountability of exhibit keys was 'virtually non-existent'
- the supervisor's keys were all on the one key ring, which meant that any officers requiring the keys to the firearm room also had the keys to the exhibit room
- checking of exhibits on a regular basis did not occur, and
- recording of TNT Failsafe security bags was not recorded on DNA Forensic Bag Register or in the exhibit book for cross referencing.

The local area command developed new SOPs for the handling of DNA exhibits. It also bought a lockable refrigerator and implemented better security arrangements, in particular by limiting access to keys to a small number of supervisory staff.⁹¹¹

10.3. Receipt of DNA samples

DNA samples submitted to DAL for analysis fall into two categories, person samples and crime scene samples. Person samples are taken directly from the person through a forensic procedure. The biological material will be a saliva or blood sample on an FTA card, or a sample of hair. Crime scene samples may be swabs of biological material, like blood, or may be any type of item obtained from a crime scene, and include clothes, hats, bed sheets, cigarette butts, bottles, weapons and housebreaking implements.

10.3.1. Receipt of person samples

Person samples are delivered to DAL either directly by NSW Police or by TNT Failsafe Couriers. Each person sample is entered onto the DNA Laboratory Information Management System (LIMS) and given a unique "A" number. Person samples taken in relation to the investigation of a particular offence should be given an "FS" case number which links the sample to the relevant crime scene evidence.

All items submitted to the laboratory are received in accordance with the procedures detailed in DAL's "Forensic Biology Procedures Manual." Person samples are checked for sample integrity, which involves a review of the sample bag and the tamper evident seals, and confirmation that the correct documentation is present. If the sample information form is incomplete or appears to be incorrect, DAL seeks clarification from FPIT before proceeding.

If the sample is acceptable, barcodes are printed. For samples taken by buccal swab, barcodes are placed on the yellow envelope containing the FTA paper, the protective plastic sheet and the sample information form. For blood samples and hair samples, barcodes are placed on the envelope containing the FTA paper or hair, the protective plastic sheet, the sample information form and the DNA submission sheet.

Any samples which do not meet the sample integrity criteria are marked as rejected on LIMS. They are, in the first instance, returned to FPIT, along with the reasons for the sample being rejected.

10.3.2. How many person samples have been received?



We asked DAL to provide the number of samples taken from suspects and volunteers, received at DAL during the review period.

Figure 10 shows that the number of samples taken from suspects each month has increased since the legislation commenced, but appears to have stabilised over the last 12 months of the review period, at between 200 and 300 samples a month. The number of samples taken from volunteers each month is much lower than the number of samples taken from suspects, and has remained stable at between 14 and 32 samples a month.

10.3.3. Date of receipt

As discussed above, the date of receipt recorded by DAL refers to the date the sample is entered onto DAL's case management system, rather than the date the sample is actually received by DAL. However, DAL has also advised that all exhibits are barcoded on receipt, and that "since the barcodes are scanned the date of receipt is recorded as are the dates of all movements of the exhibits."⁹¹² It is not clear why, if samples are barcoded on receipt, the actual date of receipt is not being recorded electronically. It may be because DAL checks every item for sample integrity, and ensures the correct documentation is present, before the sample is barcoded. If this is not done straight away, there will be a delay between the sample being received and it being entered onto the system at DAL.

10.3.4. Rejection of person samples by DAL

We sought information about how many DNA samples DAL rejected during the review period, and for what reasons. DAL advised that it could provide electronic records of the samples it had rejected since 1 June 2003, but that records would have to be accessed manually for the period before this. We decided that for the purposes of our review it would be sufficient to examine the electronic records, which covered the last 17 months of the review period. During this period, DAL rejected 123 DNA samples. In most cases this was because there was insufficient DNA on the FTA card.

Table 04: Person samples rejected between 1 June 2003 and 30 November 2004.

Reason for rejection	Number
The sample failed to amplify as there was insufficient DNA in the sample.	107
The bag was sealed incorrectly or the contents were accessible.	8
The sample information form was absent, was stapled to the outside of the bag, or had not been filled in.	4
The FTA card appeared damaged or was not sealed inside the FTA envelope.	3
There was no barcode on the sample information form.	2
The sample took over 3 months to reach the laboratory.	2
A hair sample contained insufficient hairs for DNA analysis.	2
The sample was submitted in a plain plastic sleeve.	1
The officer who took the sample advised of procedure errors.	1

Source: DAL advice received 28 February 2005 in response to investigation notice. The reasons for rejection exceed the total number of samples rejected as some samples were rejected for more than one reason.

We checked the details of these procedures and found that 60 of these samples were from suspects and volunteers (the rest being from convicted offenders or victims).⁹¹³ Over this period, DAL received 5,040 samples from suspects and volunteers.⁹¹⁴ These figures suggest that DAL rejected 1.2 per cent of the DNA samples it received from suspects and volunteers. While this is only small, in our view it is still a significant issue, especially since some police officers we interviewed advised that where a suspect sample is rejected, they would rarely follow the matter up by seeking a further sample. Perhaps FPIT could include in its training, that the most common reason for DNA samples to be rejected is that there is insufficient material on the FTA card.

Recommendation 57

Training for forensic procedures include information that the primary reason for rejecting DNA person samples is that there is insufficient material on the FTA card and therefore reinforce the need to obtain sufficient forensic material when taking a DNA sample by buccal swab.

NSW Police supports this recommendation.915

10.3.5. Samples classified by police as 'other'

During the review period, DAL received 868 person samples which were categorised as 'other' - rather than, for example, as having come from a 'suspect', 'volunteer' or 'convicted offender'.⁹¹⁶ DAL advised that these are often samples taken from suspects by court order, or from police officers for elimination purposes, and have been erroneously classified as 'other'.

DAL routinely sends lists of samples classified as 'other' to FPIT, who determines the true status of the person who provided the sample. DAL would like the 'other' category to be removed from the sample information form so that the person completing the form does not have this option.

DAL still accepts samples marked as 'other'. To minimise delays, DAL obtains the DNA profile from the sample and puts the profile on the database. However, person samples marked 'other' are not matched against any of the indexes on the database until NSW Police advises DAL of the correct status of the sample.917

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This practice by NSW Police of marking person samples as 'other', especially in relation to elimination samples, places police officers in jeopardy of acting in contravention to section 91(2) of the Act, which provides:

A person:

- (a) whose conduct causes the supply of forensic material (other than permitted forensic material) to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system, and
- (b) who intends or is reckless as to the supply of material of that kind,
- is guilty of an offence.918

In this respect, we note there is no 'other' index (see 10.4). Nor is the legal basis for storing 'other' profiles on a separate index of the database entirely clear.

To ensure that officers' actions are consistent with the Act, we support DAL's suggestion that the category of 'other' be removed from the sampling information form.

Recommendation 58

NSW Police remove the option of 'other' on the sample information form.

NSW Police has already implemented recommendation 58.

In our draft report, we also recommended that the Attorney General consider including an additional index in the regulations to allow DAL to continue its practice of segregating profiles that are used for in case matching purposes.

NSW Police indicated that it did not support this recommendation, commenting that "in case matching is being removed from the volunteer's documentation and the 'limited purpose' index will be used in all appropriate instances."⁹¹⁹ The Attorney General's Department similarly commented that once other problems relating to the use of volunteer profiles have been resolved, there would be no need for an additional index for 'other' samples. The Attorney General's Department also argued that adding a further index to the New South Wales DNA database would further complicate and delay the implementation of the national DNA database.⁹²⁰

As NSW Police has removed the option of 'other' from the sample information form, and DAL puts volunteer profiles on the limited purposes index unless advised they have been provided for unlimited purposes, we agree there should not be any need for an 'other' index. However, we note that DAL's current practice is to use the 'other' index as a holding index for samples arriving at the lab with incomplete or incorrect documentation. The improved processes should reduce the number of profiles being put on the 'other' index, but we anticipate police will continue to send some samples where the status of the person providing the sample will need to be clarified before DAL can put the profile on the correct index of the database. In our view, the practice currently adopted by DAL is generally sound. It does not add to the delay in processing samples, but ensures that profiles are not put onto the wrong index. We disagree that recognising the 'other' index would complicate the implementation of the national DNA database, as profiles on this index would not be uploaded onto the national database, unless they were transferred onto one of the other New South Wales indexes first. Although we support DAL's approach, there is currently no legal basis for DAL dealing with profiles in this way. For this reason we remain of the view that the 'other' index should be given legislative recognition.

Recommendation 59

The Attorney General consider including in the regulations provision for an additional index on the New South Wales DNA database that allows DAL to continue its practice of holding profiles where the purpose for which the sample was provided is not clear from the documentation accompanying the sample.

10.3.6. Samples unconnected to a case

DAL has advised that sometimes police officers deliver person samples without indicating the case to which the sample is connected. DAL accepts these, provided there is sufficient documentation to allow the continuity of the sample to be followed.⁹²¹ We note that, while some DNA samples may not be connected to a particular case – for example, where the sample has been taken from a convicted offender – all samples taken from suspects and volunteers should be connected to a case.

In our view, DAL should consider not accepting DNA samples taken from suspects or volunteers unless there are sufficient details enabling DAL to identify the case to which the sample belongs, so that DAL can allocate a case number at the time of receipt. NSW Police should ensure there is or will definitely be crime scene evidence available for comparison before forwarding the sample to DAL. The person sample would still have to arrive at DAL with the tamper evident bag intact.

Recommendation 60

NSW Police and DAL implement a process so that DAL only accepts DNA samples from suspects and volunteers where there are sufficient details enabling DAL to identify the case to which the sample belongs.

NSW Police does not support this recommendation, on the basis it would be "severely detrimental to current operations."⁹²² NSW Health does not support the recommendation either, commenting:

If samples are legally taken then DAL is obliged to accept them. It is therefore a Police policy issue whether they would want DAL to refuse to accept victim and/or suspect person samples for which crime scene evidence has not as yet been received. This matter has been discussed by the DNA advisory committee which agreed that DAL should accept samples submitted to them by Police and should not be required to conduct a vetting process to attempt to determine the legality of the sample.⁹²³

10.3.7. Covert samples

In some circumstances police may take a DNA sample covertly, for example by retaining a cigarette butt discarded by a known person of interest.⁹²⁴ As noted at 9.2, the Act does not specifically deal with covert samples.

We asked DAL whether such samples are treated as "person samples" or "crime scene samples".

DAL advised that the police officer who submits the sample may mark it either as a crime scene sample, or as 'other' on the accompanying form. However, DAL treats samples taken covertly as a different category entirely. If a DNA profile is obtained, it is put on the database, but is not searched against any of the indexes. It is only compared to other evidence within the particular case.⁹²⁵ We note that supplying forensic material obtained through covert sampling for the purpose of delivering a profile for matching against crime scene evidence is possibly inconsistent with part 11 of the Act including section 91(2). Part 11 of the Act operates to prohibit comparison of DNA samples taken covertly against any of the indexes on the database. For this reason we support DAL's approach to the issue. Our recommendation 59 for the addition of an "in-case" database together with our earlier recommendation 54 that Parliament consider regulating the collection of covert samples will go some way towards rectifying any potential issues related to this policing technique.

10.3.8. Receipt of crime scene samples

Police officers deliver crime scene exhibits to DAL for forensic analysis either directly, or using couriers. Upon receipt, DAL staff check that the accompanying documentation has been completed in full (including the name of the submitting officer, details of the case and any relevant court dates), all the items listed have been received, and the bags containing the items are properly sealed. DAL also clarifies what is required in the examination.⁹²⁶

DAL sometimes receives items which are not listed on the police form, or fails to receive items which are listed. In these cases, DAL staff notify the relevant police officer and amend the form to verify what was or was not received. If for any reason an item is not accepted into the laboratory the staff member notes this against the item and initials the fact. After completing these checks, DAL staff register the case, sign and date the police form, and put barcodes on the form. If the exhibits were hand delivered, a copy of the form is also given to the submitting officer.

In 2004, FSG conducted a review of all casework being submitted to DAL. This included reviewing the documentation accompanying crime scene samples submitted. The review found that one in five cases submitted had significant errors or omissions in the accompanying paperwork.⁹²⁷ FSG has recommended changes to the submission form, so that it has to be completed electronically, in full, on the FSG intranet site, before the relevant items will be accepted.⁹²⁸

10.3.9. Tracking crime scene samples at DAL

DAL currently barcodes all exhibits on receipt, and is able to track their progress through the laboratory. Exhibits are linked to investigations through the relevant COPS Event number. While this is generally sufficient, if a COPS number has been incorrectly transcribed by the submitting police officer, or is difficult to read, DAL staff may have considerable difficulty locating the exhibit at a later date. This problem is exacerbated by the length of time between an exhibit being received at DAL and its examination, and also by the lack of storage space at the laboratory.

As discussed later in this report, at 12.2.2.2, FSG proposes to introduce a barcoding system, which would presumably be used in the screening, storage and analysis of exhibits. If this were introduced, it would make it easier for DAL to track exhibits awaiting analysis. NSW Police has advised it is consulting with DAL on the use of barcoding for all exhibits and tracking of cases and samples within the laboratory.

10.3.10. Storage of firearms at DAL

DAL keeps exhibits awaiting analysis in boxes in a large storeroom. There are no separate procedures for storing firearms; they are kept in boxes along with all the other crime scene exhibits. We are concerned that this is not safe, and in addition may breach DAL's legislative obligations under the *Firearms Act 1996*. Having raised this matter with DAL, DAL has agreed with the proposal to store firearms in a safe.⁹²⁹

Recommendation 61

DAL reviews its processes for storing firearms and takes all reasonable precautions to ensure they are kept safely, in accordance the Firearms Act 1996.

NSW Health supports this recommendation and advised that DAL is purchasing a suitable firearms cabinet to be installed in July 2006.⁹³⁰

10.4. Permitted matching

Part 11 of the Act deals with the DNA database system. The DNA database contains the following indexes:

- crime scene index
- missing persons index
- offenders index
- suspects index
- unknown deceased person's index
- volunteers (limited purposes) index, and
- volunteers (unlimited purposes) index.

The New South Wales DNA database also contains a statistical index. DNA profiles derived through forensic procedures or from crime scenes are stored on the relevant index of the DNA database. Section 93 of the Act specifies the circumstances in which DNA profiles can be matched against others on the database. In our investigation of DAL, we examined the laboratory's compliance with the legislative provisions for permissible matching.

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10.4.1. Suspect-suspect matching

Suspect profiles can be matched against the unsolved crime scenes, convicted offenders and unknown deceased persons indexes, but cannot be matched against profiles taken from other suspects, volunteers or missing persons.⁹³¹

DAL has advised that prohibiting the comparison of new suspect profiles with suspect profiles already on the database is a significant problem, for two reasons. First, it is not possible to state how many people have their DNA sample on the database. DAL advised that in February 2005, there were 6,066 suspect profiles on the database.⁹³² However, this figure includes samples from people who are represented more than once on the database, so the number of individual suspects who have their DNA on the database will actually be lower. Given that a new DNA sample is taken in relation to each cold link which results in prosecution, there are a significant number of suspects who have had their DNA profile put on the database more than once.

Second, DAL cannot detect inconsistencies on the database in identifying information relating to suspects. The information DAL enters onto the database comes from the sample information form completed by the submitting police officer. If any of that information is incorrect – for example, if the suspect uses an alias, or the officer makes a transcription error – there is no way DAL can identify this.

Being able to compare suspect samples against the suspect index would allow DAL to state how many suspects have their DNA profile on the database at any given time, and to identify multiple submissions from the same person where there are discrepancies in the identifying information.

We note that the report on the independent review of Part 1D of the *Crimes Act 1914* (Cth) made similar comments. It also pointed out that "it is not uncommon for persons who engage in criminal conduct to use different identities. Matching suspects to suspects will assist in determining whether persons with different identities are in fact the same person," and recommended that suspect-suspect matching should be permitted.⁹³³

NSW Police has also indicated that it would welcome a change in the legislation to allow suspect-suspect matching.⁹³⁴

We agree with NSW Police and DAL that limited suspect-suspect matching of a type which would address the issues discussed above should be permitted in New South Wales.

Recommendation 62

Part 11 of the *Crimes (Forensic Procedures) Act 2000* be amended to permit the matching of DNA profiles within the suspects index.

NSW Police and NSW Health both support this recommendation.⁹³⁵ The Attorney General's Department advised it did not object to the recommendation but noted:

Not only the Commonwealth, but all jurisdictions that have legislation containing a 'matching table', currently prohibit matching suspect samples to the suspect index. Therefore, ultimately progressing this recommendation might best be achieved at a national level.⁹³⁶

10.4.2. Volunteer profiles provided for limited purposes

Volunteer profiles which have been provided for a limited purpose can only be used for that purpose. They can be matched against the unsolved crime scenes, convicted offenders, missing persons and unknown deceased persons indexes, but only if the volunteer has consented to the profile being used for this purpose. These profiles cannot be matched against profiles taken from other suspects or volunteers.⁹³⁷

Volunteer profiles which have been provided for unlimited purposes can be matched against the unsolved crime scenes, convicted offenders, missing persons and unknown deceased persons indexes. They cannot, however, be matched against profiles taken from other suspects or volunteers.⁹³⁸

Through our scrutiny of the Act, we found that NSW Police and DAL had different understandings of how samples taken from volunteers are to be used.

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NSW Police had based its volunteer information sheet on clause 7A of the Crimes (Forensic Procedures) Regulation 2000, which provides that volunteers must be informed:⁹³⁹

- (a) that the DNA database system includes two indexes relevant to volunteers, a volunteers (limited purposes) index and a volunteers (unlimited purposes) index,
- (b) that the volunteer, or parent or guardian of the volunteer, may give consent subject to the condition that information obtained from the analysis of forensic material taken in accordance with the consent will only be placed on a specified index of that system, or will not be placed on either index.

In this way, the legislation essentially sets up three options for volunteer profiles - they can:

- 1) be placed on the volunteers (limited purposes) index
- 2) be placed on the volunteers (unlimited purposes) index, or
- 3) not be placed on any index.

However, DAL advised that it actually puts all DNA profiles obtained from volunteers on the DNA database. It considers that "samples taken for use within a case are a form of limited purposes volunteer," and advised that "we do not see a distinction between 'only matched within the case itself and placed on the limited purposes index' – the effect is the same."⁹⁴⁰ DAL essentially treats the first and third options as the same thing. Further, DAL very rarely uses the volunteers (unlimited purposes) index. It finds that police officers who have indicated that a volunteer's profile is to be used for unlimited purposes often do not have a good understanding of what this means. Before putting a volunteer profile on the unlimited purposes index, DAL always contacts the officer who took the sample, to confirm whether the volunteer did actually specify that his or her DNA sample could be used for unlimited purposes. Police usually advise that they cannot be sure of this and that the person's profile should only be matched within the case for which it was provided. Accordingly, DAL has only put volunteer profiles on the unlimited purposes index once or twice.⁹⁴¹

Through our scrutiny of the Act, we have found that some police officers have a very poor understanding of the distinction between suspects and volunteers. We have also identified serious problems with the provision of information about forensic procedures to both suspects and volunteers. We are not convinced that volunteers consenting to forensic procedures have a good understanding of the implications of the procedure, or that they fully understand what their DNA sample will be used for.

By treating all volunteers as having provided their DNA for the limited purpose of examination within a particular case, DAL is essentially applying a safeguard in case the police officer who conducted the forensic procedure has not complied with the legislation. Given the preliminary findings of our review, we support DAL's approach in relation to using volunteer samples for limited rather than unlimited purposes.

However, we are concerned that volunteers are providing DNA samples on the basis that they will not be put on the database, when in fact they will be.

We raised these concerns with both agencies in October 2005. NSW Police agreed to remove the references to 'within case matching' from the volunteer information sheet, to ensure that volunteers know their DNA profile will be put on the DNA database. DAL also agreed that profiles taken for 'within case matching' could be deleted from the database provided the relevant court proceedings have been finalised. NSW Police has since advised us formally that it will remove 'within case matching' from its standard operating procedures, and that all volunteers will, in future, be made aware that their profiles will be put on the DNA database.⁹⁴² We note as well as removing references to 'within case matching' from the volunteer information sheet, NSW Police should remove the option that a volunteer's profile not be placed on any index from the volunteer consent form.

Recommendation 63

DAL continues to use volunteer samples only within the case for which the sample was provided, unless it has confirmed with the relevant police officer that the volunteer did actually intend that his or her profile be placed on the "unlimited purposes" index.

Recommendation 64

DAL deletes all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.

Recommendation 65

NSW Police remove the option of samples not being placed on any index from the volunteer consent form.

NSW Police supports recommendations 63, 64 and 65.943

NSW Health supports recommendation 63 and will continue to use this protocol. NSW Health supports recommendation 64 in principle, but commented that it is a matter for NSW Police whether volunteer profiles should be removed from the database and the samples destroyed. NSW Health also indicated that DAL has held discussions with NSW Police to put in place mechanisms to ensure DAL is notified of finalised cases.⁹⁴⁴

10.5. Access to information on the DNA database

The Act prohibits access to information on the DNA database other than by an authorised person. An authorised person can only access or disclose information from the database or from a forensic procedure for one of the purposes specified by the Act. These include permissible database matching, providing information to the person who provided the sample, administering the database system, coronial inquiries, and the investigation of complaints against police officers or complaints relating to privacy.⁹⁴⁵

A person can only be authorised to access information on the database by the "responsible person." As discussed at 4.4, the Act does not specify who the responsible person is. For the avoidance of doubt, the Commissioner of Police and Chief Executive Officers of Western Sydney Area Health Service and ICPMR/DAL signed a minute of authorisation in January 2005. The 52 people who are currently authorised to access the database are listed in a schedule to the minute.

This arrangement is clearly not ideal, and means a new schedule has to be signed every time DAL takes on new staff that need access to the database. DAL has requested that this issue be clarified by the working group run by the Criminal Law Review Division of the Attorney General's Department, which formed in response to the Findlay review of the Act. In our view, there should be no question as to who is the 'responsible person'. This should be made very clear in relevant legislation and administrative arrangements. In keeping with this, it would be preferable if the Act specified who is the responsible person. We previously discussed this in chapter 4 where we made recommendation 9 about clarification of the responsible person.

10.5.1. Access to Guthrie cards

Since the 1970s, most children born in Australia have a blood sample taken by heel prick shortly after birth, to test for medical disorders. The blood samples are stored on Guthrie cards by health agencies around Australia. Although developed for a different purpose, this practice has resulted in a collection of DNA samples from almost all people born in Australia over the last 30 years or so. Each state's health service has its own policies for regulating access to and retention of Guthrie cards. NSW Health's cards are generally retained for 25 years.⁹⁴⁶

NSW Police has, on occasion, obtained access to Guthrie cards for investigative purposes.⁹⁴⁷ In 2002, NSW Health developed a protocol to govern access to Guthrie cards by police, in consultation with Privacy NSW. Privacy NSW emphasised the protocol should not enable police officers to circumvent the requirements of the Act. Accordingly, the protocol allows police officer to apply for access to Guthrie cards only in very limited circumstances – to identify bodies, and to identify remains where the victim is missing and presumed dead. Consent from the next of kin is also required.⁹⁴⁸

10.6. Analysis results

The Act provides that police can only ask a suspect to provide a DNA sample if there are reasonable grounds to believe that it might produce evidence tending to confirm or disprove that the suspect committed an offence.⁹⁴⁹ We sought to review how often DNA analysis produces evidence confirming the suspect committed the offence in question, and how often it eliminates the suspect from investigation.

In our investigation notice, we asked DAL to provide details of the number of suspect and volunteer samples analysed, which were received at DAL during the review period. Given that all suspect and volunteer samples are submitted in relation to the investigation of a particular offence, and sent to DAL for comparison against samples taken from the relevant crime scene, we wanted to know how many of the cases submitted had been finalised, and what the results of the comparison were.

DAL advised that for each suspect and volunteer sample received during the review period, the person's DNA profile had been derived, put on the database and (where relevant) matched against the appropriate index.⁹⁵⁰ However, DAL could not advise in how many cases it had compared the person profile against the crime scene evidence, or the results of the comparisons conducted.

10.6.1. Warm links

A warm link occurs where police take a DNA sample from a suspect, and it matches DNA from the crime scene or victim, as suspected.

Case Study 66

A man in a balaclava and gloves robbed a convenience store in the early hours of the morning. He was armed with an iron bar, and took \$1,200 in cash, 20 packets of cigarettes and the shop assistant's mobile phone. He drove off in a stolen car. The shop assistant hit the alarm and contacted police. Police identified a car matching the description given by the shop assistant, driving well above the speed limit. Police followed the car to a house where the suspect got out, and dropped a backpack on the footpath. Police arrested the suspect and took him to the police station. They found the cash and cigarettes in the backpack, and sent the backpack and the items in it to DAL, for analysis. They also examined the car for fingerprints and DNA. Police took a DNA sample from the suspect. DAL confirmed that the DNA obtained from the crime scene evidence matched the DNA profile obtained from the suspect, and he was subsequently convicted.⁹⁵¹

Case Study 67

Police attended an office, which had been broken into. It appeared the offender had scaled a high wall and broken a glass balcony door to get in, but had not taken anything. Police examining the crime scene located some blood on the wall, where the offender had broken in, and took a swab for forensic analysis. A short time later, police arrested a man at a nearby construction site, and police took him to the police station to charge him with trespass. They decided to take a DNA sample from him, after noticing that he had a small laceration on his forearm. DAL confirmed that the DNA profile derived from the blood stain matched the profile derived from the suspect's DNA sample. The suspect was charged with the break and enter, and the matter is currently before the courts.⁹⁵²

Where the victim's DNA is found on the suspect's clothes or body, this is also counted as a warm link.

Case Study 68

Four young people left a nightclub in a small country town just after midnight. A man walked towards them, yelling and swearing, and pushed one of the young people. The young people walked around the corner and called a taxi. The man was joined by two others, who followed the group around the corner and took their shirts off. One of them ran at the young man he had pushed, and punched him in the jaw. One of his companions tackled one of the young people and kicked and punched him while he was on the ground. Police attended the scene and took the four young people to hospital for treatment, and photographed their injuries. A short time later police stopped the others involved in the fight outside the nightclub. There was a red substance, which appeared to be blood, on the boot of one of the suspects, and took the boots for DNA testing. Police subsequently took a DNA sample from the victim, who alleged he had been kicked by the suspect during the assault. DAL confirmed that the DNA profile derived from the blood found on the suspect's boot matched the victim's DNA profile. The suspect was charged with the assault and was subsequently convicted.⁹⁵³

Case Study 69

A man alleged he had been stabbed outside a service station by his partner. She admitted being at the crime scene and arguing with the victim. She said she had punched him in the chest but denied stabbing him, telling investigating police that she believed he had subsequently inflicted the would himself. Police seized her clothes, which had blood spattering on them, and took a DNA sample from the victim. DAL found that the blood on the suspect's clothes was indeed from the victim, and the suspect was convicted.⁹⁵⁴

We asked DAL how many warm links were made, by offence type, each month during the review period. DAL advised that when the Act commenced, it recorded warm links within individual case records. It did not otherwise record them and so has no central record of warm links from that period. For this reason, DAL was unable to advise the number of links made each month, or the number of links made in the investigation of different types of offences. However, it estimated that it has made 3,170 warm links during the review period. We understand that DAL now records warm links on LIMS.

DAL reports warm links directly to the investigating police officer or police station. NSW Police does not have any way of centrally recording the number or details of warm links advised by DAL.

10.6.2. Cold links

A cold link is a link between the DNA of a suspect or convicted offender and DNA obtained from an unsolved crime scene, made when the second profile (whether the person sample or the crime scene sample) is loaded onto the database. The term cold link generally refers to links where the person linked to the crime had not previously been identified as a suspect.

Case Study 70

An unknown person broke into a house through the rear bedroom window, and stole various items belonging to the residents. On returning, one of the residents noticed that the lid was missing from a bottle of coke which they had left, with the lid on, in the fridge. A scene of crime officer examined the scene for fingerprints, and took swabs from the coke bottle. DAL obtained a DNA profile from the swab, and uploaded it onto the DNA database. It matched the profile of a person whose profile was already on the database. Police arrested the suspect, and took a further buccal swab to confirm the cold link. The suspect was then charged with the offence.⁹⁵⁵

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Case Study 71

An unknown offender broke into a house through the window, and stole a briefcase, handbag, keys and the owner's car. Police recovered the car the following afternoon, and found a partially eaten sausage roll inside. DAL obtained a profile from the sausage roll and uploaded it onto the DNA database. It matched the profile of a person who was already on the database. Police arrested the suspect, conducted a further forensic procedure to confirm the cold link, and commenced proceedings against the suspect.⁹⁵⁶

Cold links can also be made between crime scenes, where the same unknown offender has left DNA at more than one crime scene. Linking crime scenes is of significant intelligence value to investigating police officers.

Case Study 72

In June 2002, an unknown offender broke through the roof of a shopping centre, cutting both the telephone and alarm wires. The offender broke into a fruit and vegetable shop, and stole cash from the safe and cash registers. The offender also attempted to steal two ATMs, using the fruit shop's forklift to remove several pallets of fruit and vegetables, to make room for a stolen vehicle to be driven through the shop to the ATM. Investigating police attended the crime scene, and took swabs from the controls of the forklift. DAL derived a DNA profile from the swabs and uploaded it onto the DNA database. It did not match anyone already on the database.

A year later, police were investigating a break, enter and steal offence at a warehouse. Again, the unknown offender had cut the alarm wires, and had used the company's forklift to move the stolen goods, this time fishing reels. Investigating police officers took swabs from the forklift, and the DNA profile was put on the DNA database. It matched the DNA profile obtained from the fruit shop forklift, but again, did not match any of the profiles obtained from person samples on the database.

18 months later, police arrested and charged a suspect in relation to various property offences. While in custody, police took a DNA sample from the suspect by buccal swab. DAL uploaded the suspect's profile onto the database and found that it matched the DNA profile obtained from the forklifts used in the fruit shop and warehouse offences. Police made further inquiries and neither the fruit shop nor the warehouse were able to explain why the suspect's DNA was found at the controls of their respective forklifts. Investigating police subsequently interviewed the suspect about his involvement in those two offences too.

We asked DAL to provide the number of cold links, by offence category, made during the review period. DAL advised that cold links were made in 4,207 cases during the review period. The majority of these were for high volume offences, including break, enter and steal (2,884), stolen motor vehicle (585), steal from vehicle (245) and malicious damage (47). However, a significant number were for serious offences, including murder and manslaughter (13), sexual assault (68), robbery (267) and assault (25). These results are extremely good – they demonstrate that DNA analysis is providing further evidence in unsolved crimes, including the most serious types of offences.

DAL also provided information about the number of people who have been linked to crime scenes:

- 1,405 people were linked to only one crime scene
- 705 people were linked to between 2 and 4 crime scenes
- 124 people were linked to between 5 and 10 crime scenes
- 17 people were linked to more than 10 crime scenes, including one person who was linked to 25 different crime scenes.

In total, 2,251 people have been linked to crime scenes through cold links. These results show that DNA analysis is useful in identifying patterns of possible repeated criminal conduct.

We sought to analyse the number of cold links made each month, to see whether there were any trends in the number or types of cold links made since the Act commenced, but DAL was unable to provide this information. However, we understand that the number of cold links increased rapidly as large numbers of convicted offenders had their DNA profiles put on the database, but cold hits are being made at a slower rate now, since the database is no longer expanding so rapidly.957 The rate of cold links also fluctuates according to the number of cases DAL examines, the number of profiles uploaded onto the database and staff availability. DAL reported that the number of cold links spikes when staff work overtime.958

DAL reports scene to scene links to FPIT, but does not record these separately, the way it records person to scene links. DAL is of the view that counting scene to scene links is not particularly useful, given the large numbers involved - for example the 25 crimes scenes which were linked to the one person would result in hundreds of scene to scene links.959

We found that NSW Police and DAL count cold links in different ways. DAL calculates cold links according to laboratory standards, focusing on the number of links made on the database, while NSW Police uses the link information provided by DAL to calculate links from the perspective of clearing up crime. It appears NSW Police has a higher number of cold links than DAL, because certain links are counted more than once. DAL on the other hand does not add up the links, where they are simply different ways of measuring the same result.

As well as adopting different ways of counting cold links, it appears DAL and NSW Police are recording links under different sets of offence types. For example, NSW Police has separate categories for aggravated assault, aggravated robbery, aggravated sexual assault, attempted sexual assault and stealing, which DAL does not appear to use. DAL has categories for abduction, hit and run and fire cases, which NSW Police does not appear to use. It is not clear why NSW Police and DAL use different categories of crime in calculating cold links.

It may be more appropriate for NSW Police to report on cold links rather than DAL. DAL has indicated that the only reason it does report on cold links is because of the limited IT capabilities of NSW Police, and that DAL reporting on cold links is the only way NSW Police can get this information.⁹⁶⁰ In our view, it would be beneficial for NSW Police and DAL to develop an agreed method of how cold links are calculated.

10.6.3. Eliminations

As indicated above, we sought to discover how often powers available under the Act are used to eliminate suspects from investigation. DAL advised that it is not possible to report on the number of people eliminated from police investigations through DNA analysis, but estimates that about 480 suspects have been eliminated since the Act commenced.961

DAL explained that the fact that no warm link is made does not necessarily exclude a suspect from investigation. For example, it could be that no DNA was found on the item submitted for analysis, or that somebody else's DNA was found on the item. This does not mean the suspect was not involved. This is especially so in cases where there are multiple offenders - for example if a number of unknown offenders are involved in a home invasion, and the DNA of one of the suspects is not found on any of the exhibits submitted for analysis, this does not necessarily mean the suspect was not involved. By contrast, suspects can be eliminated from an investigation where the offender's DNA profile is known, and there was only one person involved in the commission of the offence. This is often the case in sexual assault investigations.

The estimates provided by DAL suggest that for every elimination, there are between six and seven warm links. Expressed another way, of all the cases where DNA analysis results in either a warm link or an elimination, 87 per cent result in a warm link and 13 per cent result in an elimination.⁹⁶² We note that this does not include the significant number of cases where there is no warm link but the suspect could not be eliminated either. However, it does suggest that DNA analysis is, in the majority of cases, used to produce evidence tending to confirm, rather than disprove, a suspect committed an offence.

Given that police must suspect on reasonable grounds that a person has committed an offence before asking the person to provide a DNA sample (and further, that to order a DNA sample be taken in the absence of consent, police must believe on reasonable grounds that the suspect committed an offence), we would expect that DNA analysis is used in the majority of cases to implicate rather than exculpate suspects.⁹⁶³

10.6.4. Provision of outcomes to NSW Police

In our statement of provisional findings, we recommended that DAL should provide FPIT with a copy of all case work sample reports at the time the report is provided to the investigating police officer or local area command. This would enable NSW Police to keep a centralised record of all analysis outcomes, in particular of all warm links and eliminations. NSW Police would then be in a much better position to assess whether its officers are using their power

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to conduct forensic procedures effectively. NSW Police acknowledged that it needs to improve its IT systems, data collection and intelligence before it can evaluate how the powers available under the Act are being used.⁹⁶⁴

After further discussions, DAL agreed to provide all DNA analysis results to FPIT, and to consider whether results should be provided electronically or in hardcopy.⁹⁶⁵ We note that if results are provided electronically, they could be provided automatically at the time the results are provided to the investigator. If provided in hardcopy, DAL could perhaps make copies of analysis results and send these regularly (say, on a monthly basis) to FPIT. Sending hardcopies may be a good interim measure until IT systems can be improved.

We also recommended that, for each case in which a suspect sample is submitted, DAL record a result – for example 'warm link', 'exclusion', 'no DNA' (where no DNA could be found on the exhibit) or 'no link' (where the suspect was neither implicated nor excluded by the analysis). During further discussions, DAL advised that it currently records outcomes for crime scene samples – 'warm link', 'exclusion', 'upload' (where a DNA profile is uploaded onto the database, but does not result in a warm link) and 'check' (where the exhibit is examined but there is no DNA located, or no suitable profile could be derived for placement on the database). DAL agreed that it could develop a set of outcomes for person samples so that for each person sample submitted, there is a result recorded when it has been compared to the relevant crime scene evidence.⁹⁶⁶

In addition to the above, NSW Police has asked for monthly reports detailing the number of samples received and the number of samples analysed in relation to suspects, volunteers, excluded volunteers, convicted offenders, missing persons and deceased persons. It has also asked for the number of cases received, the number of evidence samples analysed, and the number of evidence samples entered onto the database. NSW Police has also asked for various statistics relating to cases in the backlog, including the number of cases and crime scene samples awaiting analysis (divided into serious and volume crime) and the years in which the cases awaiting analysis were received. We understand that DAL is providing most of these, but is still considering some aspects of the request.

Recommendation 66

DAL and NSW Police standardise their methods of recording cold links, warm links and eliminations.

Recommendation 67

DAL in consultation with NSW Police develop a set of agreed outcomes for analysis conducted in relation to suspect samples, and record an outcome for each case in which a suspect sample is submitted.

Recommendation 68

DAL provide an appropriate central unit in NSW Police (such as FPIT or FSG) with DNA analysis results for each sample analysed.

NSW Police supports recommendations 66 to 68.967 In response to recommendation 66, NSW Health commented:

It is important that not only that DAL and the NSW Police have a standard approach to these recordings but also there is a national approach to the collection of such data. The Senior Managers of the Australian and New Zealand Forensic Laboratories (SMANZFL) have a draft programme in place that is currently under review. This matter will be raised at their next meeting and an assessment made of the terminology, and discussions of its national implementation. Once this is done DAL will implement the SMANZFL recommendations in collaboration with NSW Police.⁹⁶⁸

NSW Health supports recommendation 67 and advised that DAL will consult with FPIT to establish a set of agreed outcomes. DAL will need to make changes to its IT system, and expects that from March 2007, an outcome will be assigned to each suspect sample analysed.⁹⁶⁹

NSW Health supports recommendation 68 but commented:

Cost effective implementation of this recommendation involves a suitable IT interface between the NSW Police and DAL, as providing an additional hardcopy is a significant impost to DAL. The IT interface is currently being investigated, and will also require significant resources to be transferred to IT development for the process to be successful in providing a secure network that does not add to the time taken for DAL to complete cases. In the present staffing of both DAL and FPIT sending an additional 9,000 report to FPIT per year will significantly affect both areas performance.970

10.6.5. Results of our audit of DAL

As explained above, we followed up 180 of the 371 forensic procedures we examined during our audit of police local area commands, at DAL.

Given that all the samples included in our audit were taken in relation to the investigation of a particular offence. and sent to DAL for comparison against samples taken from the relevant crime scene, we expected that DAL would be able to provide results for each sample. These results would include any matches or links arising from the comparison, and for those which had not been finalised, an expected date of completion.

We asked DAL, in relation to the 180 audit procedures, for the following information:

- whether the person sample has been compared against a crime scene sample or samples from the particular offence police are investigating
- whether an analysis report has been sent to police, if so the results of the analysis (ie whether there was a link or not), and
- where samples had not already been compared with crime scene samples, the expected date a result would be reportable to police.

We disregarded 27 of the forensic procedures included in the audit, either because the sample had been destroyed pursuant to Part 10 of the Act, or because the forensic procedure was not a DNA sample. A further five we disregarded because they were DNA samples taken from victims (which we had initially included in our audit sample because the police records indicated that they were volunteers). Of the remaining 148 forensic procedures, 140 were DNA samples taken from suspects and eight were DNA samples from volunteers.

10.6.5.1. Suspects

Of the 140 suspect samples, we found:

- 41 resulted in warm links. This includes 33 forensic procedures where the suspect's DNA matched DNA from crime scene or the victim, and eight forensic procedures which otherwise implicated the suspect, for example, where the victim's DNA was found on the suspect's clothes or body.
- 25 resulted in exclusions. This does not necessarily mean that the suspect was positively eliminated from the investigation, only that the suspect was not implicated through the DNA analysis. It is not clear from the information available how many of these suspects were positively eliminated from the investigation.
- 20 resulted in a prior cold link being confirmed. We understand this means the forensic procedure included in the audit was taken by police to confirm a cold link which had already been made.
- In six cases no comparison could be made in five because insufficient biological material could be found on the crime scene sample to obtain a DNA profile, and in one because no crime scene exhibits were received from police.
- In 21 cases the suspect's profile was not compared against crime scene evidence because the case was withdrawn.
- DAL was not able to provide any information in relation to the remaining 27 cases.

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Figure 11 shows that where DNA analysis is conducted, it usually yields a result, and it is more common that DNA analysis implicates a suspect than not. It shows that NSW Police and DAL expend considerable resources taking further samples from suspects who have previously been identified through the DNA database (confirmed cold link). It also shows that a significant number of cases are withdrawn before the laboratory is able to complete its analysis.

Figure 11 also shows that DAL is unable to identify the relevant case for a large number of forensic procedures – almost a fifth of the suspect samples included in our audit sample. Given that police can only take a suspect's DNA if this is likely to confirm or disprove the suspect's involvement in a particular offence, in our view DAL should be able to identify the case to which each forensic procedures relates.

DAL explained that because person samples are much easier to process, they are completed before the crime scene samples being analysed. DNA profiles are obtained from person samples soon after receipt and suspect profiles are uploaded onto the database for comparison against the unsolved crimes index. The profile is put on the database without any record of the case it is attached to – the FS number relating to the offence for which the sample was taken is only added later.⁹⁷¹ Accordingly, DAL's inability to identify cases for 27 suspect samples may be because:

- the profile was deleted and no record was kept of this (DAL now keeps records of when profiles have been deleted, but has not always done this)
- police did not submit any exhibits from the crime scene and so DAL did not allocate a case number, or
- police did not provide DAL with an Event number.

It is of concern that in at least one of the procedures we audited, police did not submit any crime scene evidence to DAL (the facts of that matter are set out in case study 21, at 7.2.3.4). Given that police can only ask a suspect to provide a DNA sample for the purpose of obtaining evidence confirming or disproving the suspect's involvement in the relevant offence, this suggests there may not have been a proper basis for police taking the suspect's DNA. We reiterate our recommendation 60, that DAL should not accept DNA samples taken from suspects unless there are sufficient details enabling DAL to identify the case to which the sample belongs, so that DAL can allocate a case number at the time of receipt.

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10.6.5.2. Volunteers

For each of the eight forensic procedures conducted on volunteers included in the audit, we found that the person sample had been compared against the crime scene sample. In four of these, the volunteer's DNA was used for exclusion purposes. In the other four, it is not clear from the information available what the outcome was.

10.6.6. Are police officers using their powers under the Act effectively?

Our capacity to assess whether police officers are using their forensic procedure powers effectively was seriously limited by the fact that neither DAL nor NSW Police have maintained complete or accurate records for the whole of the review period. While record keeping has improved since the Act came into force in 2001, there are still a number of areas where complete records would enable both DAL and NSW Police to better measure their performance. In particular, it is not possible to gauge how often taking a DNA sample from a suspect confirms the person's involvement in the offence or eliminates the person from the investigation, although this would appear be a key indicator of whether the powers available under the Act are being used effectively.

This situation should improve as DAL has agreed, following our investigation, to provide FPIT with a copy of all case work sample reports at the time the report is provided to the investigating police officer or local area command. This will enable NSW Police to keep a centralised record of all analysis outcomes, in particular of all warm links and eliminations. It will permit monitoring across NSW Police, and indicate commands or areas where inquiries into the use of the Act should be initiated.

As discussed above, it would also be beneficial to both agencies to standardise their methods of recording and reporting links. The current difference between the way DAL and NSW Police record links makes it difficult to compare figures. Some forensic service providers in other jurisdictions regularly publish statistics of how many DNA samples they have analysed (including person samples and crime scene samples), how many profiles are on the database, the results of analysis, and how many samples have been rejected and the reasons for this. Some publish statistics in annual reports or on their website. Given the good results DAL has achieved, there may be some merit in DAL keeping better records of outcomes and providing this information to the public. We raised this issue in discussions with DAL, and DAL indicated that it used to provide this type of information to NSW Police.⁹⁷²

NSW Police provide some information in their annual reports on the number of DNA person samples collected, number of cold links made and the cumulative number of arrests and convictions since the New South Wales DNA database commenced. There are no accurate records reported regarding non-DNA forensic procedures and their effectiveness in aiding investigations. In our view, it would be beneficial for NSW Police to consider collecting information that reflects all aspects of the Act and publishing this information in their annual report.

Recommendation 69

DAL and NSW Police consider publishing outcomes from all links made from the New South Wales DNA database, not just cold links, in their respective annual reports

Recommendation 70

DAL and NSW Police include explanations on how they calculate links in their respective annual reports.

Recommendation 71

DAL and NSW Police consider regularly publishing this information on their respective websites.

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Recommendations 72

NSW Police, in addition to the information currently included in its annual report on the number of cold links and person DNA tests undertaken, include information on:

- a. how many DNA samples have been analysed (including person samples and crime scene samples)
- b. how many profiles are on the database
- c. the results of analysis
- d. how many samples have been rejected and the reasons for this
- e. how many samples are submitted to the National DNA database (NCIDD) when it becomes operational, and
- f. how many matches are made on the National DNA database (NCIDD) when it becomes operational.

Recommendations 73

NSW Police commence recording how many non DNA forensic procedures are undertaken by type and the results achieved following these procedures.

NSW Health supports recommendations 69 to 71 in principle. DAL does not issue an Annual Report, but NSW Health has advised it will liaise with NSW Police to consider the best method for conveying this information to the public.⁹⁷³

NSW Police has indicated it supports recommendations 69 to 72. It supports recommendation 73 in principle, but noted that its implementation would require amendments to its computer system.⁹⁷⁴

10.6.7. Tracking DNA samples through the system

In our statement of provisional findings, we recommended that DAL make changes to its case management system, so that each case can be tracked from its receipt, to DAL beginning its analysis, to DAL completing its analysis (and advising police of the result), to DAL finalising its analysis (and providing its analysis report to police). In its response, DAL advised that it already does this.

Our preliminary recommendation stemmed from DAL's inability to provide certain information we asked for in our investigation notice. This included general information about the number of samples analysed during the review period, which was crucial to establish the legislative basis for taking the samples in the first place – that there were reasonable grounds for believing that taking the sample would confirm or disprove the suspect committed an offence. We wanted to find out how many profiles obtained from suspects had been compared against the relevant crime scene evidence, to compare this to the number of samples taken from suspects overall. DAL subsequently confirmed that it could not provide any of this information.⁹⁷⁵

The information DAL was unable to provide also included information about specific forensic procedures included in our audit. For each procedure selected, we asked whether the person sample had been compared against a crime scene sample or samples from the particular offence being investigated, whether an analysis report had been sent to police, if so the results of the analysis and if not, the expected date a result would be reportable to police. As discussed above, DAL was unable to identify the relevant case for 27 of the DNA samples taken from suspects, either because the profile had been deleted and no record had been kept; police did not submit any exhibits from the crime scene so no case number was allocated; or police did not advise DAL of the relevant COPS Event number.

We anticipate that these problems will be adequately addressed through the measures discussed elsewhere in this report. In particular, DAL now keeps records of profiles which have been deleted. Further, DAL has agreed, following our investigation, to record a result for each suspect sample submitted, when it has been compared to the relevant crime scene evidence.⁹⁷⁶ In addition, we have recommended DAL should only accept DNA samples from suspects and volunteers where there are sufficient details enabling DAL to identify the case to which the sample belongs (Recommendation 60).

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10.6.8. DNA analysis in relation to old crimes

DAL advised that there are crime scene samples from about 1,500 criminal offences committed between years 1986 and 2000 which are being held in storage. DAL has examined 164 old cases, most of which were unsolved sexual assaults. DNA testing has been completed in relation to 100 of these. DNA profiles were obtained from 84. Half of these matched profiles already on the database – 33 to convicted offender profiles and the rest to other cases.⁹⁷⁷ DAL is of the view that many more unsolved crimes, particularly sexual assaults, could be resolved if the crime scene samples in the freezer could all be analysed.

DNA analysis of old crimes is outside the scope of our review of the forensic procedures legislation. However, we note the results DAL has achieved in this area, and that DAL's capacity to conduct further work in this area is limited because of resource issues.

10.7. Delays in DNA analysis

10.7.1. Why does DNA analysis take so long?

In our investigation of DAL, we made inquiries about the factors which contribute to the length of time taken to provide DNA analysis reports to NSW Police. DAL explained that processing a person sample is reasonably straightforward, and a profile can be obtained within a matter of days of the sample arriving at the laboratory:

Person samples are the easiest to work with. There are comparatively large quantities of DNA, the DNA is known to be from a single source, the sample has been placed freshly onto special paper designed to reduce breakdown of the DNA and the analysis has been modified to speed up the processing with the knowledge that there is plenty of sample available for repeating if necessary.

By contrast, obtaining a DNA profile from crime scene evidence can be difficult, and extremely time consuming. Some exhibits are tested numerous times in the hope of obtaining a good profile. As DAL explained:

A biology case is not simply a DNA test but a complex series of decision-making and scientific testing... In order to maximise the potential evidence from each item careful management of the recording and examination of the items, the use of best practice quality scientific examinations, the decision making process in continuing the testing beyond non-DNA levels, the DNA profiling methodology, the interpretation of the data in the context of the case scenario(s), the provision of a statistical weighting, and the application of benchmarked quality standards through casework reviews are essential for the provision of quality results. These processes take time.⁹⁷⁸

Even for reasonably straightforward crime scene samples, DAL has to locate forensic material on the exhibit (which may require examination of a number of different areas on the exhibit), conduct the DNA analysis, interpret the results, upload the profile onto the database and report on the results. If a profile suitable for upload to the database cannot be obtained first time around, DAL may retest the exhibit. This requires further processing and further interpretation. Trace DNA analysis is even more complicated and time consuming. DAL explained this in more detail:

There is an initial requirement to fully document the examination of the item, find potential biological material, possibly identify the origin of the biological material first and then submit the sample for DNA testing. These samples are often 'invisible' material containing only a few cells that are invisible to the naked eye and there may be insufficient material available to repeat. Evidence items may have been subjected to adverse environmental impact such as heat, sunlight, dirt and moisture and then deposited on items from which it is often very difficult to remove sufficient material for examination. DNA testing may be compromised where the DNA is being inhibited by dyes in the fabric or by other biological or chemical factors. Consequently, evidence samples often have to be reanalysed a number of times before a reportable result is obtained or before it is decided that a reportable result is not obtainable. It may take weeks or months simply to obtain a reportable DNA profile from one item. Then there are interpretation difficulties when dealing with low level samples or with samples that originate from more than one person. Such interpretation is not straightforward and may require discussion with a number of other scientists before it is determined whether a result is reportable or not...

The production of a DNA profile in a criminal investigation is not a simple one-step process. It can be a long complex task because of the age, the trace amounts of biological material present, the presence of inhibitors, the variability of sample types and the environmental conditions in which the material was kept prior to collection...

Objects on which only small amounts of DNA are present may require a number of resamples of the original item or retesting of the extracted DNA before a successful DNA profile is obtained. This may take many weeks or months. Further, the DNA profile that is obtained is often difficult to interpret because it contains evidence of DNA from more than two people or DNA at the lowest levels of reportability.⁹⁷⁹

Other factors impacting on the length of time taken to process a sample include the number of items submitted for analysis, the time frame over which police deliver these, the caseload of the reporting biologist and the priority given to the case.⁹⁸⁰ DAL also routinely reviews some of its cases as part of the quality checks required for its accreditation.

Serious cases are generally given priority, but these may also take months or even years to complete, given that DAL is more likely to continue testing in an attempt to obtain a profile which is good enough to use in court. DAL advised, in words to the following effect:

They do drag out, for example the murder samples take about a year or so. Police want more and more work - for instance you can tell police a result within a couple of weeks, so police have a suspect, but they may want more evidence. It really is a question of how much evidence they want. It can be difficult, there can be a pivotal item. For example, there was one matter where the sample was tested 24 times before we got a result, and even then it wasn't really good enough.981

Less serious cases tend to fall into two groups - those which are easy to process and are of high probative value, which are turned around quickly, and those which are complex or are of low probative value, which are not prioritised and take a very long time to be turned around, if they are processed at all.982

Case Study 73

A 19 year old man charged with murder spent 10 months in custody while police waited to obtain the results of DNA analysis from DAL. The committal hearing could not be held until police served the brief of evidence, including the DNA analysis results, on the suspect's legal representative. The magistrate criticised DAL for not giving the case priority. DAL spent considerable time trying to obtain a useable profile from the crime scene evidence, without success. In the end the man was committed to trial and found guilty on the other evidence.983

10.7.2. Effect of delays on police investigations

During our review, we surveyed each of the 80 police local area commands about various aspects of the forensic procedures legislation. One issue we asked about was the length of time DNA analysis takes and the impact this may have on the way the command manages investigations. Many responses expressed frustration about delays, especially in relation to high volume offences. They indicated that turnaround times for serious offences were generally better, provided that individual police officers actively pursued the matter with DAL. Commands expressed concerns about:

The length of time taken to obtain analysis results:984

Delays always inhibit the effectiveness to address crime issues promptly... In many instances, investigations cannot progress while awaiting forensic examination of samples. Cold links often come years after the crime, by which time the offender has possibly served a sentence for crimes committed around the time of the identified offence.'

'It would appear that matters are rated on a priority basis as such, many matters result in lengthy delays, for example multiple BES [break, enter and steal] offences, as there are constantly more serious matters arising that take priority."

Volume crime samples take up to 12 months to be returned. Usually the suspect is in custody for other offences by that time. By the time the hit comes back and the suspect arrested for the first response, follow up inquiries are required even though the suspect is in custody. Hits are still being received for up to months after. Victims have trouble remembering details of offence if BES [break, enter and steal] etc.'

'Depends on seriousness of offence and amount of harassment of DAL. Normal crime can take between 8 weeks and 3 months. High volume crime can be up to 6 months. If suspect in custody or serious crime then generally 1 or 2 weeks. Investigations are delayed and everything just takes that much longer.'

'Delays can be extensive. Investigators pursue results with DAL where they are aware of available DNA samples from crime scene and suspect... Where results are actively pursued delays are generally minimal.'

Suspects and victims of crime forgetting about the incident, or losing interest in the process:985

'Delay may mean suspect cannot recall movements at time of offence and/or reason for being at crime scene.'

'Witnesses and victims have moved on or forgotten the incident. Other evidence lost or destroyed. Some hits are not followed through with charge as it could be seen as a miscarriage of justice due to the lengthy delays.'

[Delays] can effect the investigation in relation to evidence gathering and direction of investigation.'

Suspects remaining at large while DNA analysis is pending, and the impact this has on crime levels within the command: $^{\rm 986}$

'Generally the delays enable the suspect to continue to offend until arrested. The shorter turnaround lessens the opportunity to commit more crime. Especially volume crimes such as BES [break, enter and steal] and SMV [steal motor vehicle].'

'Up to 6 months delay. In that period, offender is in community committing further offences.'

'Offenders can still be offending during that period where earlier matching may result in earlier detection and intervention. Cases may then be fairly old and may not receive high priority if current crime level is high.'

'DNA identifications... do not have the impact on providing quick clear ups for volume crime.'

'Delays allow an unknown offender to commit further crime.'

The impact of delays on victims of crime:987

'The main issue is customer service – it is very hard explaining to members of the public why there has been a delay in the investigation.'

We questioned whether, given the length of time taken to obtain DNA analysis results, any commands are deciding against using DNA, particularly in relation to high volume offences. However, we did not find any evidence of this through our monitoring activities. Rather, we found that police still submit exhibits for analysis, and factor associated delays into their management of the investigation. Where possible cases are pursued without relying on DNA evidence, but in these cases DNA is still submitted for analysis. As one command commented, the "investigation goes as it did prior to having the DNA technology," and when results are available they are added to the other evidence gathered.⁹⁸⁸

Many commands (25 out of 80) acknowledged in their survey responses that delays are largely due to DAL's limited resources and ever increasing workload. Despite their frustration with delays, many also commended DAL on the good results it achieves:⁹⁸⁹

'The service provided by DAL for a number of serious matters (murder and riot) has been ideal. Cold links are a timely issue, however considering the amount of samples to be examined, I do not have any criticism.'

'Greater funding needs to be given to DAL so that they can clear the backlog of cases. They are having extremely good results and it could be even better with more staff/resources, especially where serious crime is concerned.'

'The delays are often frustrating for investigators, however it is understood how much work is incumbent upon the forensic biologists. It appears that the only way to overcome this problem is to provide additional resources to the biologists.'

'The delays for less serious matters are generally several months, more serious matters can be processed more quickly on request. Unfortunately these delays also delay the investigation. It would be of great assistance to police if these delays were minimised by an increase of staff at DAL.'

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We note that DAL has raised similar concerns about the length of time taken to process crime scene samples, reporting that in some cases, an offender has been convicted of another offence, served a custodial sentence and been released before work on the evidence submitted has begun.⁹⁹⁰

We also note that delays in DNA analysis may result in innocent people remaining under investigation, or in some cases remaining in custody for an unnecessarily long time. The Ombudsman has previously reported to Parliament about an innocent person remaining in custody unnecessarily because of the length of time police took to get the relevant DNA samples to the laboratory.⁹⁹¹

10.7.3. Effect of delays on court proceedings

Lengthy delays in DNA analysis are undesirable for all involved in the justice system – police, the DPP, people awaiting trial (especially those in custody), and the courts. Many of the police officers we surveyed commented that they are unable to prepare briefs of evidence in time for court proceedings because of long turnaround times. Some had found that delays have an adverse impact on the prosecution of crime:

'High risk offenders or very active offenders can be arrested and charged and the results do not come through until well after the event when offenders have been dealt with through the court. If this is the case, and the offender doesn't admit to a crime, he gambles on it not being picked up or being lost within the system. The original offences he doesn't admit to may remain unresolved by the court and further action may have to take place.'

'Some investigators have found the delays significant and a hindrance to prosecution. One investigator believed the courts were becoming increasingly intolerant of DNA delays. Further the courts were placing less weight on DNA evidence.'

'Currently DAL advise 2 months plus in processing specimen. This adversely affects prosecution, courts not accepting delays.'

Other officers commented that matters were simply adjourned until the evidence is available:992

'[This command] has encountered significant delays in timely delivery of DNA results for supply to court, however DPP are aware of this and generally obtain lengthy adjournments for brief service.'

'There have been no incidents where court matters have been compromised due to delays at DAL. There have been some minor delays in the preparation of the statement.'

The Police Association of NSW also expressed frustration about delays:

[DAL] does not have the resources to keep up with the demand placed on it by police... NSW Police welcome the introduction of legislation that will help solve crime, but this must be matched by the physical capability to do the second part of the job – the analysis and production of documents.⁹⁹³

The magistrates we surveyed also commented on the effect delays in DNA analysis have on proceedings. Some argued that excessive delays are unfair to the accused, especially those in custody, and indicated their reluctance to allow adjournments because of delays in obtaining DNA analysis results:

Delays are the biggest source of unfairness [in the way the Act is being implemented.]994

I try to allow only short adjournments.995

The accused is often in custody, bail refused, and delays are significant. I have threatened to grant bail in a few cases if DNA evidence is not hurried up. So far this has produced results.⁹⁹⁶

Delays are notorious... almost always with a brief including DNA evidence it is the last part of a brief to be served. The only action that I have taken which has been fair to all interests is to reduce the strictness of bail conditions because the delay has made them harsh.⁹⁹⁷

One magistrate argued that court delays could be reduced if both the prosecution and defence could be more discerning about when DNA evidence is a pivotal issue in the case:

I am sure the nature or scope of the examination could be reduced if there was a provision for both the prosecution and defence to agree on the purpose of the analysis. If a DNA analysis of a blood stain is, for example, only to prove the defendant was at the scene when 10 witnesses say he was and the [defendant]

admits being there then what is the point. Even if the DNA relates to an issue that is at the end of the day (or otherwise) contentious, unfortunately in my experience, both the prosecution (and more so the defence) wish to have every potential piece of evidence disclosed before any significant decision is made regarding the future conduct of the case. One suspects that many defendants are sitting in gaol bail refused awaiting DNA results that are going to have absolutely no impact on the real issues in their cases.⁹⁹⁸

In 2002, the Public Accounts Committee found that DAL was not providing an effective, efficient and timely laboratory service to the criminal justice system, although the widespread use of DNA profiling in criminal proceedings meant that it was "an issue of the highest priority."⁹⁹⁹ In 2002 and 2003, the Chief Magistrate of the Local Court issued practice notes setting out procedures to ensure time standards are met for cases committed for trial. The practice notes specify that where results of DNA analysis are required for a brief, "directions will be given such as to ensure no undue delays occur, particularly where the defendant is in custody." They recommend the brief of evidence be served within six weeks of a suspect's first appearance in court.¹⁰⁰⁰ However, in its 2004 Annual Review, the Local Court again identified the provision of DNA analysis results as a factor contributing to delays in finalising committal proceedings.¹⁰⁰¹ DAL has advised it is unable to meet the recommended turnaround time of six weeks in all cases:

There are a large number of cases where this period is impossible to meet because of the delay that occurred between the time of the offence and the date of receipt of the case at [DAL]. Other cases are simply too large for analysis to be completed in the suggested time.¹⁰⁰²

10.7.4. The backlog

When DNA profiling started being used on a large scale, NSW Police trained its staff to conduct forensic procedures on eligible people and to collect forensic evidence from crime scenes. Police and scene of crime officers could be brought up to speed in a matter of months. By contrast, it takes years of training to become a forensic biologist. When the Act commenced, the laboratory had difficulty recruiting enough qualified staff, and could not meet the demand for DNA samples being submitted for analysis. Samples waiting to be processed quickly accumulated, and a backlog formed.

Since then, the use of DNA profiling in the investigation and prosecution of crime has continued to increase. More and more forensic evidence is being sent to DAL each year. Since 2000, the number of cases being submitted to DAL for analysis has increased more than eightfold:



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¹⁰ DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000

Further, more items are being submitted in each case. Before the Act commenced, FSG estimated that only one item would be submitted for each offence; and for serious crimes, such as murder, about five items would be submitted. However, DAL has advised that an average of 22 items are submitted in relation to a murder case, and that investigating police frequently request more than one item to be examined in relation to less serious, high volume offences, particularly where they suspect more than one offender was involved, or a profile could not be obtained from the first item examined.

The number of items submitted in relation to each case has also increased as DNA technology has advanced. Where police submit exhibits with only trace amounts of DNA, this may require multiple testing to obtain a usable profile. There are now more items being submitted which require retesting and interpretation of complex results.

Another factor contributing to the increased number of items submitted for analysis is that NSW Police has little control over which exhibits individual police officers or scene of crime officers are submitting for analysis. This leads to DAL receiving some unnecessary casework.¹⁰⁰³

Staff shortages at DAL also contributed to the backlog developing. When staff members leave DAL, they may not be replaced, which reduces its capacity. If staff members are replaced, training new staff members takes time, while the backlog continues to grow. When staff numbers were down in 2004, DAL was only working on urgent cases where the evidence was needed for court proceedings, and all other cases had to wait.¹⁰⁰⁴

10.7.5. What is in the backlog?

We understand that the term "backlog" includes all the cases DAL has not finalised, rather than a distinct set of matters which DAL has consciously decided should be allocated backlog status.

In August 2004, there were over 7,000 cases in DAL's backlog. We note that each case in the backlog may include any number of items. At that time, analysis of about half the cases in the backlog had been started.¹⁰⁰⁵

Most of the cases in the backlog are less serious, high volume offences, such as break, enter and steal (2,633 cases), stolen motor vehicle (1,188), steal from vehicle (279) and malicious damage (169). However, there are also a significant number of serious offences, including murder and manslaughter (116), attempted murder (42), sexual assault (504), robbery (903), assault (219) and home invasion (40).



NSW Ombudsman CNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000

Figure 13 indicates there are a large number of serious offences, such as sexual assault and robbery cases, which had not been started at that time.

10.7.6. Is the backlog still growing?

Although NSW Police and DAL have implemented some strategies to streamline service delivery, the backlog continues to grow, as NSW Police continues to submit more casework than DAL has the capacity to process. In August 2004, DAL estimated that it was receiving 30 per cent more casework than it could process.¹⁰⁰⁶ DAL has been negotiating to either receive more funding, or less casework, so far without success:

As the impact of DNA testing has grown so has the demand for it... New South Wales has the largest state police numbers, the highest crime rate and the highest population yet, pro rata, analysis on any of these indicators shows that it has the smallest investment in DNA analysis amongst all Australian jurisdictions. The courts and [NSW Police] now require us to examine more exhibits in serious cases, to examine a number of areas per exhibit, to increase the amount of high volume work so as to solve more property crimes, to perform more complicated trace DNA analyses on items that prior to the year 2000 were not examined, yet to provide all these analyses in a shorter time frame.¹⁰⁰⁷

We note that many forensic laboratories around Australia and overseas have developed backlogs as DNA analysis becomes used more widely in the investigation and prosecution of crime. In some jurisdictions, specific funding has been allocated to enable laboratories to reduce their backlogs.¹⁰⁰⁸

10.7.7. Turnaround times

The original Deed of Agreement between NSW Police and DAL specified the following agreed turnaround times for cases requiring DNA analysis:

- Person samples within one calendar month of receipt at DAL. For urgent person samples, 80 per cent would be finalised within three days and 95 per cent within five days.
- Cases (offences being investigated requiring comparison of person and crime scene samples):
 - for simple cases, typically volume crime, 80 per cent would be finalised within 30 days and 95 per cent within 120 days of receipt. For urgent cases 80 per cent would be completed within 10 days.
 - for complex cases, typically major crime, 60 per cent would be finalised within 30 days and 95 per cent within 120 days of receipt. For urgent cases 80 per cent would be completed within 20 days.

The Agreement specifically stated that these turnaround times were estimates based on DAL's understanding of the likely caseload and nature of cases to be examined. DAL indicated that it could provide more precise targets once the system was up and running. It quickly became clear that DAL could not meet the targets set out in the Deed of Agreement.

We understand that DAL and NSW Police have not been able to reach agreement on new turnaround times. Compliance with turnaround times is a key indicator of DAL's performance, and in our view new turnaround times, based on DAL's actual caseload, need to be negotiated as a matter of priority.

Recommendation 74

NSW Police and DAL agree on new turnaround times (for items as well as cases), based on DAL's current caseload.

NSW Police supports this recommendation.¹⁰⁰⁹ NSW Health supports the recommendation in principle, but commented:

NSW Health will negotiate with Police on developing agreed turnaround time for high priority cases. Samples accorded a lower priority are completed when resources permit.¹⁰¹⁰



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10.7.8. Turnaround time reports

DAL started providing monthly reports of turnaround times to NSW Police in January 2005. It does not have any turnaround time reports from before then. Each report details the number of cases (by offence type) which have been finalised in the previous month. Turnaround times are expressed in months, and are measured in four different ways:

- date received to date completed (the time from the sample being received at DAL to a verbal result being provided to NSW Police)
- date received to date filed (the time from the sample being received at DAL to the analysis report being provided to NSW Police)
- date started to date completed (the time from DAL beginning its analysis of the sample to a verbal result being provided to NSW Police), and
- date started to date filed (the time from DAL beginning its analysis of the sample to the analysis report being provided to NSW Police).

The reports also indicate the average turnaround time in days for each type of offence.

Figure 14 shows the average turnaround times for the cases DAL finalised in December 2004:



This shows that the more serious offences tend to take longer to finalise. We understand this is because there is a greater imperative to obtain a profile from non-ideal samples, more complex analysis will be undertaken, and more items will be tested.

DAL has also advised that pivotal items in exceptionally urgent cases can be turned around in between two and five days. This requires the case to be given immediate attention and may require lab staff to work through the night.¹⁰¹¹

We understand that DAL decided at the end of 2004 to report item turnaround time as well as case turnaround time to police.¹⁰¹² We support this approach, given that item turnaround times can be useful in explaining the length of case

turnaround times (in particular, where items remain unexamined for some time, pending results obtained from other items within the same case).

We note that the turnaround time reports provide only a snapshot of the cases which have been finalised in the previous month. They do not indicate how many cases or items are on hand at DAL, or how long they have been there. There is no way of measuring the length of time between a case being received, and the analysis starting. Nor do they provide any information about the length of time between a verbal result and the analysis report being provided to NSW Police.

In our view, it would be more useful to measure the turnaround time for each sample by tracking its progress, from receipt at DAL, to the analysis being started, to the case being completed and the case being filed. DAL could then provide details, each month, of the number of cases on hand, by offence type, and their status. This would better enable DAL and NSW Police to monitor how long cases have been on hand.

Recommendation 75

Appropriate changes be made to DAL's case management system, so DAL can state how many cases are on hand, and the status of each; and any cases which are overdue, according to any agreed turnaround times, are flagged.

NSW Police supports this recommendation.¹⁰¹³ NSW Health advised:

DAL's case management system can now provide data on the status of each case. Overdue notifications can be provided and will be routinely provided once the lab processing capacity matches the demand and the backlog has been curtailed.¹⁰¹⁴

Recommendation 76

As well as providing monthly reports detailing turnaround times for cases completed and cases finalised, DAL provide NSW Police with monthly reports detailing cases on hand. This should include the number of cases and items awaiting analysis, and how long they have been at DAL. For cases which have been finalised, the length of time between a case being received and it being started, and between it being completed and filed, should also be indicated.

NSW Police supports this recommendation.¹⁰¹⁵ NSW Health supports the recommendation in part, commenting:

DAL now provides almost all of this information. Monthly reports are provided covering turnaround time for cases completed, cases finalised and cases on hand. The reports include data concerning the time that a case takes to be started, completed and filed. For cases on hand (not yet started) we also provide information on the type of case and the approximate length of time since receipt at DAL.¹⁰¹⁶

However, NSW Health also advised:

DAL is not able to list how many items an unstarted case may involve because this is not known until the case is started.¹⁰¹⁷

10.7.9. Which cases are given priority?

Cases which will generally be used for intelligence purposes rather than prosecution are given a low priority. For example, police routinely submit cigarette butts in relation to break and enter or stolen vehicle offences. Butts are a good source of DNA and are reasonably quick to process, compared to other types of crime scene evidence. On their own they would generally not be sufficient to support a prosecution, but obtaining a DNA profile may still be of value to investigating police as it may help identify people who are criminally active, or link unsolved crime scenes. Complex crime scene samples which will only be used for intelligence purposes are given very low priority.

In our investigation of DAL, we examined the systems in place to determine what priority samples should be given. As would be expected, DAL gives serious crimes higher priority than less serious crimes. Priority is also given to cases where:

- NSW Police or the DPP has advised the analysis is urgent
- a deadline has been imposed by the courts
- DAL has been informed the person who provided the sample is in custody
- the sample was taken from a sexual assault victim (on the basis that DNA testing is useful in identifying unknown offenders), or
- the likelihood of obtaining a single DNA profile is very high (that is, simple rather than complex cases).

However, there is no formal system for prioritising cases. DAL has advised that "often case prioritisation fails because of the failure to inform the laboratory of the urgency of the case."¹⁰¹⁸ We understand that individual officers who are managing the investigation are responsible for notifying DAL if the suspect is in custody, or if court dates have been set, but this does not always happen. In fact, some of the police we interviewed during our audit of local area commands assumed that DAL had information like court dates, whether the suspect was in custody, and whether the evidence is crucial to the prosecution. Some also assumed that DAL would know if the matter had already been to court and DNA analysis was no longer needed. It appears that a better mechanism is needed to ensure DAL is informed about key information, and updated when this information changes.

Recommendation 77

NSW Police implement a reliable system for ensuring DAL is informed about key information affecting case prioritisation, including advice about when analysis is no longer needed.

NSW Police and NSW Health both support this recommendation.¹⁰¹⁹

10.7.10. Which items within each case are given priority?

Many of the crime scene samples received by DAL are never examined. DAL advised that it currently examines approximately two thirds of the items submitted for analysis.¹⁰²⁰ This is for two reasons – firstly, because police submit a significant amount of unnecessary casework; and secondly, because DAL does not have the capacity to analyse every item within a case, even if it is of significant probative value.

As discussed above, police and scene of crime officers are submitting far more items for each case than was originally estimated. Further, there is little consistency in the number or type of items DAL receives. Some officers send in everything which may be relevant, while others are more selective. FSG is of the view there should not be a predetermined number of exhibits which can be submitted in relation to a particular type of offence, and that it should continue to be determined on a case by case basis.¹⁰²¹

For high volume offences, DAL generally only processes simple samples, for example, bloodstains, or saliva from cigarette butts. They only process more complex samples for serious offences. DAL also makes a decision about which items within a case are likely to produce the most relevant evidence. For example, if police submit a bag of clothes in relation to an armed robbery, DAL will not examine every item of clothing. If DAL obtains a useable profile from one of a number of exhibits submitted, the others generally remain unexamined. In some cases, where the initial analysis results are compelling, examination of other items may be of little worth.

We note that in Queensland, in the case of R v Button (2001), the appellant was convicted of rape and spent 10 months in custody, because bedding which police provided to the laboratory for analysis was never examined, on the basis that it would not assist in identifying the appellant as the perpetrator. The appellant appealed, the bedding was examined, and somebody else was identified as the perpetrator. The court pointed out that "DNA testing has a two-fold purpose: that of identifying the perpetrator of a crime, and secondly, that of excluding a possible offender as being the perpetrator of the crime." It also commented, "today is a black day in the history of the administration of criminal justice in Queensland."¹⁰²² The Button case illustrates the danger of examining only a limited number of items submitted for analysis, particularly when the selection is motivated by the desire for a particular result.

In New South Wales, police or the DPP may request more items to be examined in particularly serious cases, for the sake of completeness. We note that some forensic scientists have been asked in court why they have only examined some of the evidence.¹⁰²³ However, due to DAL's limited capacity, many items submitted by police are never examined. Even for serious offences, including murder and sexual assault, many items received are not examined, despite them often having some probative value.¹⁰²⁴

DAL is well aware of the risk of examining only a limited number of items submitted for DNA analysis, and is aware that it is only providing, in its words, a "reduced service."¹⁰²⁵ However, at this stage, it is not in a position to examine all the items it receives. DAL notes that NSW Police preserves items which are not examined, which provides a limited safeguard, as items can always be examined at a later stage, as happened in the *Button* appeal.

10.7.11. Proposed system for casework submission

As a result of a review conducted in 2004, NSW Police has decided to screen all items submitted for DNA analysis, to filter out any unnecessary casework, and to determine what priority should be given to items within a case.

There will also be changes made to the way exhibits are submitted to DAL. The exhibit information form will have to be completed electronically, from the FSG intranet site (and will be designed so it cannot be printed until it has been completed). FSG will have to assess and authorise all crime scene samples before they can be submitted to DAL. DAL will not accept any cases which have not been authorised by FSG, and FSG will reject inappropriate cases and exhibits.¹⁰²⁶

DAL has expressed concern about FSG screening all items submitted:

Potential risks have been identified with the introduction of such a scheme through suggestions of bias and incomplete investigations based solely on financial restraint, police deciding which items are to be examined, and the perception that the laboratory loses its notional independence by only examining items that the police indicate will inculpate the accused.¹⁰²⁷

In addition, FSG intends to perform some of the preliminary analysis, for example by cutting out bits of material or obtaining swabs from evidence and sending them to the laboratory, rather than submitting the whole sheet or garment and DAL staff determining which parts should be examined. DAL has expressed concern that "it is at the cut-out stage where the majority of tampering allegations can be made."¹⁰²⁸

We note that police already play a significant role in determining which evidence to collect in the investigation of an offence. In our view, both DAL and NSW Police have a role to play in deciding which crime scene evidence should be analysed. It is clear that police and scene of crime officers need to be given better guidance about what types of exhibits should be submitted for analysis. However, there is considerable merit in DAL having a say in decisions about which items within a case should be examined. Further, DAL should be able to examine all items which are of probative value, to minimise the risk that relevant evidence is overlooked. The DNA Advisory Committee may want to consider monitoring this issue. We also note our Recommendation 78 that the question of independence is part of the review of the outsourcing trial discussed below.

10.7.12. Strategies adopted for improving timeliness

In addition to this proposed casework screening DAL and NSW Police have adopted the following strategies to speed up DNA analysis:¹⁰²⁹

- targeting crime scene samples with the highest success rates
- streamlining DNA analysis in relation to volume crime, for example through using pro forma DNA analysis reports, and
- introducing a barcoding system to manage the large number of cases.

We also note that DAL has prepared a detailed business case, which aims to improve forensic service delivery by reducing the backlog and improving turnaround times. It also addresses facilities and equipment, salary and wages, goods and services, research and development and examination of crime scene exhibits from before the Act commenced (known as 'backcapture cases'). DAL has also considered:

Introducing shift work, to maximise the use of lab space. Conditions are so cramped that more staff cannot be
recruited unless some staff work at night. DAL is reluctant to introduce shift work due to the cost, the increased
risk of contamination, staff preferences for working regular hours and the difficulties in supervising and training
staff working at night. However, DAL is considering introducing shift work as a short term solution to its
increase in casework.

- Refusing certain types of casework. In August 2004, DAL proposed to restrict the amount of casework being submitted by declining samples taken in relation to certain types of offences. Specifically, it proposed not to accept crime scene samples in relation to stolen vehicles, firearm possession, drug possession or cultivation, bag snatching and break and enter offences, unless the evidence is likely to yield a single-source DNA profile, such as a blood swab or cigarette butt. It proposed to focus its limited resources on DNA analysis in relation to serious crimes such as murder, assault and sexual assault. DAL recognised that this would significantly limit use of the DNA database for intelligence purposes in relation to volume crime. However, it was of the view that refusing some casework was necessary in order to continue to provide a high quality DNA analysis service in relation to serious crime. NSW Police did not support this proposal. We understand that it has not been implemented, but that it remains under consideration by DAL, should the laboratory's funding not increase.¹⁰³⁰
- Closing one of its six laboratories. DAL is extremely reluctant to close one of the serious crime labs, but has considered closing a high volume crime lab. We understand that at this stage, no labs have been closed, but again, the proposal remains under consideration.
- Introducing robotics to speed up DNA analysis, as some forensic laboratories in other jurisdictions have done.
 DAL is of the view that moving to robotics at this stage would not significantly improve turnaround times, as the delay is usually in the examination of the item, location of biological material on it and interpretation of evidence after profiles are generated, none of which can at this time be done through automation.

10.7.12.1. DNA Liaison Unit

In September 2004, NSW Police set up a DNA Liaison Unit on the premises at DAL. The purpose of the unit was twofold – firstly, to remove unnecessary casework from the system, by culling items in the backlog which no longer required analysis. They did this by checking the status of each case on COPS, and where necessary contacting investigating officers directly. This resulted in 527 cases (comprising 1,616 crime scene samples) being culled. Cases were culled where the exhibits submitted were of little evidentiary value, where there was enough other evidence for the matter to go to court without any DNA evidence, or where the case had already been resolved. At least half the backlog of sexual assault cases could be removed, because they had either been resolved, or consent became the issue at trial and DNA analysis would have little relevance.¹⁰³¹ We understand that not all items in the backlog were reviewed during the trial period. NSW Police has estimated that if the entire backlog were reviewed, up to 10,000 items could be culled.¹⁰³² In July 2004 after review of the backlog FSG estimated that 39 per cent of the backlog no longer required analysis.¹⁰³³

Secondly, the DNA Liaison Unit screened casework coming in, to ensure that only suitable items were submitted for DNA analysis. DAL reported that while this reduced the number of items being submitted by up to 16 per cent, the number of items submitted was still well over the number submitted in the same period the previous year. This suggests that having dedicated police officers vetting items submitted for analysis will not necessarily offset the large increase in the overall number of items being put forward for DNA analysis.

The Liaison Unit was initially set up as a trial but NSW Police has since advised that it has made an ongoing commitment with DAL to continue to staff this unit.¹⁰³⁴ FSG has proposed to assess the remainder of the backlog to cull any cases which have been resolved or discontinued.¹⁰³⁵ DAL has advised that even when a case is deemed active, unless the evidence is likely to be of significant probative value, DAL will cull the case and return the exhibits to NSW Police.¹⁰³⁶

DAL has emphasised the need for the laboratory to remain independent from NSW Police, and has expressed concern about the DNA Liaison Unit, which is staffed by police, being physically located at DAL. In particular, DAL is concerned about becoming too involved in the management of criminal investigations.

Given the difficulties faced by the laboratory, and what appears to be some good success in removing unnecessary work, the continuation of the liaison unit until the backlog project is finalised appears sensible. Provided any concerns about DAL's independence are adequately addressed in both physical conditions and work protocols, we are of the view that it should be permitted to complete the backlog task. This issue may be one the DNA Advisory Committee may want to consider. In addition, it is a measure that could be considered as part of the recommended review of the outsourcing trial outlined below.

10.7.12.2. New Forensic Science Services Branch

The NSW Government announced in March 2005 that it will provide \$26 million for a new forensic science centre, which will amalgamate a number of existing forensic services within NSW Police into one central branch. It will examine, prioritise and analyse crime scene exhibits. However, it will not conduct any DNA analysis – this will still be done by DAL.

The funding will be used to create 147 new forensic officer positions, in addition to the existing 345 scene of crime officers. NSW Police has explained that only 75 of these will be scene of crime officers; the rest will be photographers, vehicle inspectors and other specialist forensic officers. Further, some of the new positions will do forensic work which is currently being performed by general duties police officers. For these reasons it is likely that more exhibits will be sent to DAL, but not the equivalent of 147 new members of staff collecting exhibits from crime scenes.¹⁰³⁷

In the media release about the new funding, the Minister for Police, the Hon Carl Scully MP, stated:

There are a number of [DNA] cases that are backlogged and we will deal with it. Understandably the demand for DNA analysis and DNA evidence has been great over the years and that's why there is a backlog. Part of this initiative will contribute to narrowing that backlog.¹⁰³⁸

We understand that none of the funding is going directly to DAL. NSW Police anticipates that DAL will benefit indirectly, as the new Forensic Science Services Branch (FSSB) will assess all casework submitted for DNA analysis. The FSSB will filter out any unnecessary casework and determine whether the sample should be given any priority. The assessment will be based on factors such as the seriousness of the offence: whether analysis will be simple or complex; whether the defendant has been refused bail; and whether the evidence is crucial to the prosecution. NSW Police anticipates this will greatly improve the management of crime scene samples sent to DAL:

By establishing the FSSB as a focal point for all NSW Police forensic exhibits, the quality of exhibits forwarded for further analysis will be greatly enhanced. It will also triage exhibits so that only the best and most evidentially meaningful samples are forwarded to DAL. This will greatly reduce the amount of unnecessary exhibits being received at DAL and allow them to better concentrate their resources on DNA analysis and examination of backlog items.1039

However, we note that with significantly more scene of crime officers gathering evidence, there will likely be even more crime scene samples put forward for DNA analysis. It is not clear at this stage whether having the new forensic branch screen all samples submitted will reduce the amount of casework DAL ultimately has to examine. As noted above, DAL currently only examines about two thirds of the items submitted for analysis.¹⁰⁴⁰ It is in the interest of investigating police to have more rather than fewer items examined, and (as DAL has pointed out) it is not clear how having NSW Police acting as a gatekeeper would be any more effective in restricting the overall amount of casework received.

10.7.12.3. Outsourcing trial

Until recently, DAL was the only laboratory accredited to conduct DNA analysis for NSW Police. However, NSW Police is embarking on a three month, \$1.5m trial outsourcing some DNA analysis to a private laboratory, Genetic Technologies Corporation Pty Limited.

All straightforward, high volume crime scene samples collected during the trial period will be sent to Genetic Technologies for analysis rather than DAL. However, any complex volume crime scene samples will generally be sent to DAL for analysis.¹⁰⁴¹ Genetic Technologies will also provide reports for court proceedings, and analyse person samples taken to confirm cold links.¹⁰⁴² We understand that DAL will remain the only agency with access to the DNA database. Genetic Technologies will provide DNA profiles to DAL, and DAL will then upload them onto the database.1043

During the trial DAL should be free to work on backlogged crime scene samples as most of the incoming crime scene samples collected during the trial period will be sent elsewhere for analysis.¹⁰⁴⁴ NSW Police has advised that a further reason for conducting the trial is because outsourcing is being used in some other Australian jurisdictions. DAL has advised, however, that Queensland is the only other jurisdiction in Australia which is outsourcing DNA analysis, and that funding has been allocated specifically to outsource the backlogged samples.¹⁰⁴⁵

Before the trial began, DAL expressed the view that outsourcing is inappropriate, and will not result in any significant savings in time or money, as it would only be the simple samples which are outsourced, which DAL turns around guickly anyway.¹⁰⁴⁶ DAL expressed frustration that it was not able to tender for the job and argued that the funding allocated to the outsourcing trial would be better spent at DAL, where there is a clear need for further funding, and systems and processes have already been established.¹⁰⁴⁷ Further, there are implications for ensuring the chain of evidence is maintained, and in requiring staff from a private laboratory to give evidence in court.

The trial will run between May and August 2006 and is being oversighted by a steering committee, with representatives from DAL, the Attorney General's Department, NSW Police and the Police Ministry.¹⁰⁴⁸ It is also being evaluated by a New Zealand laboratory, Environmental Science and Research Limited, which will provide a report to Cabinet for consideration.1049

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10.7.12.4. Case conferencing

We understand that NSW Police is also considering case conferencing, where DAL, FSG and investigating police meet to discuss and agree on a forensic strategy for each complex case received.¹⁰⁵⁰ There is some merit in this approach, however it is not clear in how many of the thousands of cases submitted to DAL each year this would occur. Given that DAL's resources are already stretched, this proposal may not be realistic.

While case conferencing may enable DAL to ensure investigating police have clear expectations about what forensic analysis is possible, it may also compromise DAL's independence from the law enforcement agencies. This issue would need to be considered prior to case conferencing being introduced.

10.8. The future of DNA analysis in New South Wales

It is clear that while DAL is achieving some good results, there are significant problems with the DNA analysis service it provides to NSW Police. In particular:

- DAL is unable to process the amount of DNA casework submitted by NSW Police
- DAL cannot provide DNA analysis results in some cases, including some serious offences, in a reasonable ٠ timeframe
- the capacity to analyse crime scene samples from serious 'old' unsolved crimes is very limited
- there is an unknown amount of inaccurate information on the DNA database system
- DAL needs a better system for tracking samples from receipt through to destruction, and
- DAL could improve the way it measures and reports on outcomes.

We acknowledge that DAL has made significant efforts to improve its service delivery, and that many of the factors contributing to the situation are beyond DAL's control. We also note that the new procedures proposed by NSW Police, including screening all crime scene samples prior to submission, have the potential to lead to improvements in the system.

However, there are significant risks associated with the service DAL is currently providing. While DAL continues to receive more casework than it can process, exhibits (including some with significant probative value) will continue to remain unexamined. This negates some aspects of the Act, including the requirement that DNA samples can only be taken from suspects where this is likely to confirm or disprove the suspect committed an offence, if the relevant crime scene evidence cannot be examined prior to the retention period expiring. In addition, the risk of contamination increases and the use of the database as an intelligence tool is hampered. It appears that DAL cannot significantly improve its DNA analysis service without additional resources.

10.8.1. Preferred model for the DNA analysis service

NSW Police's preference is for DAL to maintain the DNA database and remain the principal service provider in DNA analysis, while some simple analysis is outsourced to a private laboratory and some of the preliminary examination of crime scene samples is conducted within NSW Police, in the new forensic service centre.

DAL's preference, on the other hand, is for a single, independent, adequately funded DNA analysis service. It also appears DAL supports direct funding rather than a fee for service model, on the basis that it provides a quality service including ongoing research and development, rather than simply providing the cheapest testing.¹⁰⁵¹

The proposal for a DNA analysis service that is not only financially independent but also self-governing provides the community with greater confidence in the justice system and the legitimacy of the analysis results provided. This is the approach adopted by a number of other jurisdictions, such as New Zealand's Environmental Science and Research Limited (ESR) and the United Kingdom's Forensic Science Service (FSS). Both of these agencies are self-funded organisations that have entered into contracts with their relevant police forces to provide analysis services.

Whilst New South Wales at this stage has a forensic service separate from NSW Police, the proposal by NSW Police to have some in-house analysis and examination of crime scene samples would be inconsistent with current trends. A recent report by the Law Reform Commission of Ireland recommended the establishment of an independent statutory body that would incorporate the Forensic Science Laboratory and the DNA database in one agency, which would be governed by a board of representatives such as:

- representatives from human rights organisations
- forensic experts who are independent of both the Forensic Science Laboratory and the government
- representatives with experience in data protection
- police representatives, and
- representatives from the DNA profiling laboratory.¹⁰⁵²

This model is also being considered in Victoria, where the Law Reform Committee has recommended that a separate forensic service that is "autonomous in its operations and accessible to prosecution and defence"¹⁰⁵³ should be established. The Committee further recommended that the independent service should be managed by an independent board made up of representatives from the client groups, and that it should be accountable through annual reporting to Parliament, be at arm's length from its major clients, and be funded by a body or department separate from Victoria Police. ¹⁰⁵⁴

The NSW Standing Committee on Law and Justice in its review of the Act has made similar recommendations for the development of a State Institute of Forensic Sciences. This Institute, if developed, would be responsible for the management of the use of technology in criminal investigations and prosecutions.¹⁰⁵⁵ The development of this Institute has also been raised by the Public Accounts Committee's Inquiry into Court waiting times, which recommended:

- As a matter of urgency, the establishment of a State Institute of Forensic Science be considered by the State Institute of Forensic Services Committee, and
- The Division of Analytic Laboratories (or a State Institute of Forensic Services) should be part of the Justice System Information Sharing project.¹⁰⁵⁶

The current proposal to outsource some DNA services provides a further opportunity to consider these issues, especially in analysing issues of independence, and the outcomes of any trial as against enhanced funding to DAL. In our draft report, we made a preliminary recommendation that the DNA Advisory Committee and/or the Attorney General's working group participate in any review of the outsourcing trial, and that this review should properly consider, in addition to the specific outcomes of the trial, the broader question of the long term position of DNA analysis services in New South Wales, including issues of funding, independence, and research and development.

The outsourcing trial has progressed since we made our preliminary recommendation, and is being scrutinised through the following mechanisms:¹⁰⁵⁷

- a steering committee, with representatives from DAL, the Attorney General's Department, NSW Police and the Police Ministry will oversight the trial
- the DNA Advisory Committee is monitoring the trial, and
- the New Zealand laboratory, Environmental Science and Research Limited, will conduct an independent evaluation of the trial and will report to Cabinet at the end of the trial.¹⁰⁵⁸

The outsourcing trial presents a good opportunity to consider the broader question of the long term position of DNA analysis services in New South Wales and we recommend that Cabinet consider these issues in its response to the independent evaluation report.

Recommendation 78

Cabinet consider, in addition to the specific outcomes of the DNA outsourcing trial, the broader question of the long term position of DNA analysis services in NSW, including issues of funding, independence, and research and development.

Recommendation 79

The Parliament give further consideration to the recommendations of the NSW Standing Committee on Law and Justice and the Public Accounts Committee regarding the establishment of an independent State Institute of Forensic Sciences.

1 O DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000

In response to our draft recommendations, NSW Health reiterated that it supports a financially independent DNA analysis service which is funded according to the nature and volume of the services provided. It also supports a separation between the DNA analysis service and NSW Police.¹⁰⁵⁹ NSW Police advised that it supports recommendation 79 in principle, and noted that the DNA Advisory Committee is currently considering the establishment of an Institute of Forensic Sciences.¹⁰⁶⁰

10.9. Interstate enforcement and CrimTrac

Part 12 of the Act deals with interstate enforcement of forensic procedure laws. It provides that the Attorney General may enter into arrangements with the responsible Minister in other Australian states and territories, so that police officers in New South Wales can conduct forensic procedures on behalf of police forces in other jurisdictions; and so information on the New South Wales DNA database can be shared with other jurisdictions.¹⁰⁶¹

To enter into an agreement, the participating jurisdiction must have a "corresponding law." Every Australian state and territory now has laws corresponding to the New South Wales Act.¹⁰⁶² However, the only arrangement New South Wales has entered into is with the Commonwealth. This enables DNA profiles on the New South Wales DNA database to be transferred to the national database, but the information can only be accessed by the Commonwealth, not by any of the other states or territories.

Some other jurisdictions have arranged to share information obtained through forensic procedures. In mid 2005, Queensland and Western Australia uploaded their DNA data onto the national database, and can now search each other's data for possible links. Comparing the 60,000 West Australian profiles with the 66,000 Queensland profiles reportedly resulted in over a hundred links.¹⁰⁶³ This has reportedly prompted Queensland to enter into negotiations with the Northern Territory, South Australia, Tasmania and the ACT to develop agreements with these states for sharing information obtained through forensic procedures.¹⁰⁶⁴

10.9.1. CrimTrac

The CrimTrac Agency was established in July 2000 as a national policing initiative. It plays a coordination and support role to police forces around Australia. It manages several national databases, including the National Automated Fingerprint Identification System, National Criminal Investigation DNA Database, National Criminal History Record Checking, National Handgun Buyback Support System, Minimum Nationwide Person Profile and National Child Offender Register.¹⁰⁶⁵

As discussed at 3.2, the National Criminal Investigation DNA Database (NCIDD) is essentially inoperative because the relevant Ministers have not entered into arrangements to share information obtained through forensic procedures with other states and territories. We understand negotiations have been hampered because of differences in the laws governing the circumstances in which DNA can be taken, and what it can be used for.

If fully operational, the NCIDD would contain DNA profiles from convicted offenders, unsolved crime scenes suspects and some volunteers, from each of the Australian states and territories. This would allow police forces around Australia to identify suspects, and link crime scenes, in much the same way as the New South Wales DNA database works. It would not replace state and territory databases, but would facilitate the investigation of crime in border areas, and crimes where offenders have moved interstate.

The national database has privacy and legal safeguards built in and would operate in accordance with relevant Commonwealth, state and territory legislation governing the collection and matching of DNA profiles. Each state and territory would provide DNA profiles for the database and these would be removed from the database in accordance with destruction dates notified by the jurisdictions.

Other safeguards within the national database include the requirement to remove the identities of persons who have supplied samples for DNA profiling. The only information available on the database will be the numeric representation of the DNA profile provided by the state or territory. CrimTrac explained:

Identity fields will be removed from records before they are transmitted to the national DNA database. Only State and Territory forensic laboratories supplying the DNA profiles will know the identities of the providers of the profiles. So, when a sample profile is matched to a crime scene profile on the database, the CrimTrac Agency will not have access to identity details. 1066

We sought information from CrimTrac on their role in managing the operation of the national DNA and fingerprint databases. We also asked how many DNA profiles and prints have been provided by participating states. CrimTrac advised it was unable to provide this information. We understand, however, that DAL has so far submitted only one

large batch of serious indictable offender profiles to the national DNA database. There are currently no arrangements in place for regular transfer of profiles to the national database. NSW Police anticipates that should the database become operative at a national level, it would transfer the profiles from the suspects index, volunteer (unlimited purposes) index and crime scenes index, as well as the new profiles from the convicted offender index, to the national database. NSW Police has advised that it is not clear whether profiles from the volunteers (limited purposes) index would be transferred. Our strong view is that profiles obtained from volunteers for limited purpose should not be transferred.

NSW Police in its submission to this review argued strongly that the Act should be amended to allow for the exchange of all legally obtained DNA profiles between New South Wales and other states and territories. NSW Police also suggested that mutual recognition legislation could be extended to facilitate the sharing of forensic information with certain overseas jurisdictions. DAL has also expressed frustration at the lack of interstate enforcement arrangements, arguing that the models proposed so far are too restrictive.¹⁰⁶⁷

Recommendation 80

The Attorney General and NSW Police take all necessary steps to permit the sharing of appropriate unlimited purpose volunteer, suspect and serious indictable offender DNA profiles via the National Criminal Investigation DNA Database (NCIDD).

NSW Police supports this recommendation.¹⁰⁶⁸ The Attorney General's Department advised that rolling out the national DNA database is a very high priority.¹⁰⁶⁹

Endnotes

- 902 Chief Magistrate's Circular #433.
- ⁹⁰³ "Magistrate Slams Cops", The Illawarra Mercury, 10 February 2004; "Rape Victim's long wait for DNA tests", *The Daily Telegraph*, 27 May 2004; "DNA wait leaves victims in limbo 'disgrace' as raped mum suffers", *The Sun-Herald*, 30 May 2004; and "Long-term trends in trial court delay in NSW"; NSW Bureau of Crime Statistics and Research media release issued 30 September 2004.
- ⁹⁰⁴ DAL response to Ombudsman investigation notice, 24 February 2005. This includes profiles taken from 421 volunteers after Part 8 of the Act commenced and 410 prior to Part 8 commencing.
- 905 DAL, Draft Business Case, January 2005.
- 906 DAL, Draft Business Case, January 2005.
- ⁹⁰⁷ Minutes of the DNA Advisory Committee, 3 February 2006.
- ⁹⁰⁸ During the review period we received one complaint involving a delay of 19 days for transportation of a suspect sample from the police station to DAL. The matter went before the court and no adverse findings were made. The complaint is discussed in more detail in chapter 15 as complaint number 3.
- ⁹⁰⁹ For some procedures, the date the procedure was recorded on COPS was not the same as the date the procedure was actually conducted. For this reason, we used hardcopy records, such as consent forms, to establish the date the procedure was conducted. Where no hardcopy records were available, we included the date as indicated by COPS.
- ⁹¹⁰ Crimes (Forensic Procedures) Act 2000 s 27(3).
- ⁹¹¹ This is also discussed as complaint number 8 in chapter 15.
- ⁹¹² DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ⁹¹³ 52 from suspects and eight from volunteers, according to information obtained through Ombudsman review of COPS records.
- ⁹¹⁴ 4,619 from suspects and 421 from volunteers: DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹¹⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁹¹⁶ DAL response to Ombudsman investigation notice, 24 February 2005.
- 917 Telephone advice from DAL, 3 March 2005.
- 918 Crimes (Forensic Procedures) Act 2000 s 91(2).
- ⁹¹⁹ NSW Police response to Ombudsman draft report, 2 June 2006.

- ⁹²⁰ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁹²¹ DAL response to Ombudsman investigation notice, 24 February 2005.
- 922 NSW Police response to Ombudsman draft report, 2 June 2006.
- 923 NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹²⁴ For example, see R v White [2005] NSWSC 60.
- 925 Telephone advice from DAL, 3 March 2005.
- ⁹²⁶ Excerpt from the Forensic Biology Procedures Manual, provided by DAL 24 February 2005.
- ⁹²⁷ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ⁹²⁸ "Changes to forensic exhibit submission procedures," Police Weekly, Volume 17 Number 9 (28 March 2005).
- ⁹²⁹ Discussion at meeting with representatives of FSG and DAL, 24 October 2005.
- 930 NSW Health response to Ombudsman draft report, 7 June 2006.
- 931 Crimes (Forensic Procedures) Act 2000 s 93.
- ⁹³² DAL response to Ombudsman investigation notice, 24 February 2005.
- 933 Report of Independent Review of Part 1D of the Crimes Act 1914 (Cth) p. 54 to 55.
- 934 Letter from NSW Police Forensic Services Group, 8 November 2005.
- 935 NSW Police response to Ombudsman draft report, 2 June 2006 and NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹³⁶ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- 937 Crimes (Forensic Procedures) Act 2000 s 93.
- 938 Crimes (Forensic Procedures) Act 2000 s 93.
- 939 NSW Police Forensic Procedures Information Sheet Volunteer, Version 2003/1.
- ⁹⁴⁰ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ⁹⁴¹ Telephone advice from DAL, 3 March 2005; and meeting at DAL, 5 October 2005.
- ⁹⁴² Letter from NSW Police Forensic Services Group, 8 November 2005.
- ⁹⁴³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁹⁴⁴ NSW Health response to Ombudsman draft report, 7 June 2006.
- 945 Crimes (Forensic Procedures) Act 2000 s 92 and 109.
- ⁹⁴⁶ NSW Health, Health Records And Information Manual For Community Health Facilities, page 228, October 1991 located at www.health.nsw.gov.au accessed on 25 August 2005.
- 947 For example, see R v McIntyre [2001] NSWSC 311 (11 April 2001).
- ⁹⁴⁸ Information on NSW Guthrie cards access policy available at <u>www.lawlink.nsw.gov.au</u> accessed on 4 October 2005.
- 949 Crimes (Forensic Procedures) Act 2000 s 12.
- 950 Except for those few which had been rejected: DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁵¹ Information obtained through Ombudsman review of COPS records.
- ⁹⁵² Information obtained through Ombudsman review of COPS records.
- ⁹⁵³ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁴ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁵ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁶ Information obtained through Ombudsman review of COPS records.
- 957 Telephone advice from DAL, 3 March 2005.
- ⁹⁵⁸ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ⁹⁵⁹ Telephone advice from DAL, 3 March 2005.
- ⁹⁶⁰ Discussion at meeting with DAL, 5 October 2005.
- ⁹⁶¹ DAL, Draft Business Case, January 2005.
- 962 Based on the estimates that during the review period, DAL made 3,170 warm links and 480 eliminations: DAL response to Ombudsman investigation notice, 24 February 2005 and Draft Business Case, January 2005.
- ⁹⁶³ Crimes (Forensic Procedures) Act 2000 s 3, 12(a) and 20(c).
- ⁹⁶⁴ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.

- ⁹⁶⁵ Discussion at meeting with DAL, 5 October 2005.
- ⁹⁶⁶ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- 967 NSW Police response to Ombudsman draft report, 2 June 2006.
- 968 NSW Health response to Ombudsman draft report, 7 June 2006
- ⁹⁶⁹ NSW Health response to Ombudsman draft report, 7 June 2006.
- 970 NSW Health response to Ombudsman draft report, 7 June 2006.
- 971 Telephone advice from DAL, 15 July 2005.
- 972 Discussion at meeting with DAL, 5 October 2005.
- 973 NSW Health response to Ombudsman draft report, 7 June 2006.
- 974 NSW Police response to Ombudsman draft report, 2 June 2006.
- 975 Email from DAL, 11 October 2005.
- 976 Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- 977 DAL, Draft Business Case, January 2005.
- 978 DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁷⁹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁸⁰ DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁸¹ Telephone advice from DAL, 3 March 2005.
- ⁹⁸² Telephone advice from DAL, 3 March 2005. This is illustrated by the turnaround times provided for cases finalised in December 2004. Of the 208 break, enter and steal cases finalised in the month, 91 had been there less than a month; while 59 had been there longer than 6 months: DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁸³ "Magistrate slams cops", *Illawarra Mercury*, 10 February 2004; and telephone advice from Director of Public Prosecutions (Wollongong) and DAL in February 2004.
- ⁹⁸⁴ Comments from confidential LAC survey responses.
- ⁹⁸⁵ Comments from confidential LAC survey responses.
- 986 Comments from confidential LAC survey responses.
- ⁹⁸⁷ Confidential LAC survey response.
- 988 Confidential LAC survey response.
- ⁹⁸⁹ Comments from confidential LAC survey responses.
- 990 DAL, Draft Business Case, January 2005.
- 991 NSW Ombudsman, The Norford Report (August 1999), available at www.ombo.nsw.gov.au.
- ⁹⁹² Comments from confidential survey responses.
- 993 Police Association of NSW submission, March 2005.
- ⁹⁹⁴ Confidential Magistrate survey response, 13 January 2005.
- ⁹⁹⁵ Confidential Magistrate survey response. 20 January 2005.
- ⁹⁹⁶ Confidential Magistrate survey response, undated.
- ⁹⁹⁷ Confidential Magistrate survey response, 13 January 2005.
- ⁹⁹⁸ Confidential Magistrate survey response, 13 January 2005.
- ⁹⁹⁹ Public Accounts Committee Inquiry into Court waiting times Report June 2002, p. 23.
- ¹⁰⁰⁰ Local Court Practice Notes 6/2001 (30 September 2002) and 9/2003 (13 August 2003).
- ¹⁰⁰¹ Local Court of New South Wales, Annual Review 2004, p. 11.
- ¹⁰⁰² DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰⁰³ We note that in 2002, the Public Accounts Committee's inquiry into court waiting times recommended, as a matter of urgency, that the NSW Police Forensic Services Group develop and distribute its proposed guidelines to assist investigating officers in screening and prioritising DNA exhibits: Public Accounts Committee, *Inquiry into court waiting times* (June 2002) p. 23 to 24.
- ¹⁰⁰⁴ Minutes of meeting between NSW Police Forensic Services Group and DAL, 20 July 2004.
- ¹⁰⁰⁵ Minutes of the DNA Advisory Committee, 6 August 2004.
- ¹⁰⁰⁶ Minutes of the DNA Advisory Committee, 6 August 2004.
- ¹⁰⁰⁷ DAL response to Ombudsman investigation notice, 24 February 2005.

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- ¹⁰⁰⁸ For example, in Queensland and Victoria. In the United States, a federal grant program was established, so individual states could apply for funding to increase their own capacity for DNA analysis, or to outsource forensic services to accredited private laboratories.
- ¹⁰⁰⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰¹⁰ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹¹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰¹² Minutes of meeting between NSW Police Forensic Services Group and DAL, 4 December 2004.
- ¹⁰¹³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰¹⁴ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰¹⁶ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹⁷ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹⁸ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰¹⁹ NSW Police response to Ombudsman draft report, 2 June 2006; and NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰²⁰ DAL, Draft Business Case, January 2005.
- ¹⁰²¹ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰²² R v Button [2001] QCA 133 (Williams JA).
- ¹⁰²³ Minutes of meeting between NSW Police Forensic Services Group and DAL, 10 May 2004.
- ¹⁰²⁴ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰²⁵ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰²⁶ "Changes to forensic exhibit submission procedures," *Police Weekly*, Volume 17 Number 9 (28 March 2005).
- ¹⁰²⁷ DAL, Draft Business Case, January 2005.
- ¹⁰²⁸ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰²⁹ DAL response to Ombudsman investigation notice, 24 February 2005; "Revised casework acceptance criteria", 6 August 2004; and Draft Business Case, January 2005.
- ¹⁰³⁰ DAL, Draft Business Case, January 2005.
- ¹⁰³¹ Minutes of the DNA Advisory Committee, 13 October 2004.
- ¹⁰³² Minutes of the DNA Advisory Committee, 13 October 2004.
- ¹⁰³³ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰³⁴ Letter from NSW Police, 12 July 2005.
- ¹⁰³⁵ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰³⁶ DAL. Draft Business Case, January 2005.
- ¹⁰³⁷ Discussion at meeting with representatives of NSW Police and DAL, 24 October 2005.
- ¹⁰³⁸ "NSW govt admits DNA backlog problem", *Ninemsn News* (19 March 2005) located at www.news.ninemsn.com accessed on 21 March 2005.
- ¹⁰³⁹ Letter from NSW Police, 12 July 2005.
- ¹⁰⁴⁰ DAL, Draft Business Case, January 2005.
- ¹⁰⁴¹ Legislative Assembly Hansard, 18 October 2005, the Hon Carl Scully MP. Minister for Police and Minister for Utilities; and letter from the Hon Carl Scully MP, 2 June 2006.
- 1042 Legislative Assembly Hansard, 18 October 2005, the Hon Carl Scully MP, Minister for Police and Minister for Utilities; and letter from the Hon Carl Scully MP, 2 June 2006.
- ¹⁰⁴³ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- ¹⁰⁴⁴ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ¹⁰⁴⁵ Email from DAL, 26 October 2005.
- ¹⁰⁴⁶ Email from DAL. 26 October 2005.
- ¹⁰⁴⁷ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰⁴⁸ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹⁰⁴⁹ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.

- ¹⁰⁵⁰ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰⁵¹ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰⁵² The Law Reform Commission of Ireland, The Establishment of a DNA Database (LRC 78-2005) (November 2005) p. 70, available from http://www.lawreform.ie/publications/reports.htm accessed on 3 February 2006
- ¹⁰⁵³ Victorian Parliament Law Reform Committee, Forensic Sampling and DNA Databases in Criminal Investigations, Government Printer, Melbourne 2004, p. 368.
- ¹⁰⁵⁴ Victorian Parliament Law Reform Committee, Forensic Sampling and DNA Databases in Criminal Investigations, Government Printer, Melbourne 2004, p. 361-369.
- ¹⁰⁵⁵ NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002)
- ¹⁰⁵⁶ Public Accounts Committee Inquiry into Court waiting times, Report June 2002 p. 23 to 24.
- ¹⁰⁵⁷ NSW Health response to Ombudsman draft report, 7 June 2006, Attorney General's Department response to Ombudsman draft report,
 5 May 2006 and NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁵⁸ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ¹⁰⁵⁹ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰⁶⁰ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁶¹ Crimes (Forensic Procedures) Act 2000 s 96 and 97.
- ¹⁰⁶² The corresponding laws prescribed by the regulations are the Crimes (Forensic Procedures) Act 2000 (ACT); Part 1D of the Crimes Act 1914 (Cth); Division 7 of Part VII of the Police Administration Act (NT); Part 4 of Chapter 8 of the Police Powers and Responsibilities Act 2000 (Qld); the Criminal Law (Forensic Procedures) Act 1998 (SA); the Forensic Procedures Act 2000 (Tas); Subdivision (30A) of Division 1 of Part 3 of the Crimes Act 1958 (Vic); section 236 of the Criminal Code (WA) as in force before its amendment and the Criminal Investigation (Identifying People) Act 2002 (WA).
- ¹⁰⁶³ See "Qld negotiating more DNA data swaps", ABC News Online, 6 July 2005 located at www.abc.net.au, accessed on 7 July 2005; Selina Mitchell "States break DNA roadblock", *The Australian*, 21 June 2005 located at www.australianit.news.com.au, accessed on 23 June 2005; and Tim Clarke, "DNA Database holds 130,000 profiles" located at www.news.com.au, accessed on 23 June 2005.
- ¹⁰⁶⁴ "Qld negotiating more DNA data swaps", ABC News Online, 6 July 2005 located at www.abc.net.au, accessed on 7 July 2005.
- ¹⁰⁶⁵ CrimTrac website, http://www.crimtrac.gov.au/aboutus.htm accessed 27 June 2005.
- ¹⁰⁶⁶ CrimTrac website, http://www.crimtrac.gov.au/dna.htm accessed 27 June 2005.
- ¹⁰⁶⁷ Dr John West, DAL response to investigation notice received 28 February 2005.
- ¹⁰⁶⁸ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁶⁹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.