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Independent Review of the Crimes (Forensic Procedures) Act 2000

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Chapter 1 – Executive Summary

This Report focuses on the use of forensic procedures in the criminal justice system. It arises out of the requirement under section 122 of the *Crimes (Forensic Procedures) Act 2000* (the Act) that the Minister (the Attorney General) review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

In Chapter 2, we examine the Second Reading Speech introducing the Act to determine its objectives, and this assessment informs the basis of following Chapters in the Report. We also present an overview of our approach and methodology in conducting this Review. We then conduct a brief summary of an earlier review of the Act, conducted by the Legislative Council's Standing Committee on Law and Justice (the Standing Committee Report). There follows a brief history of the Act, including ways in which it diverges from the Model Forensic Procedures Bill developed by the Model Criminal Code Officers Committee, and amendments to the Act and its Regulations.

We then present a summary of representations made to the Review team for further legislative amendment. At this stage it is relevant to note that we support proposals to amend and/or clarify the definitions of '*forensic material*', '*establishing the identity*', '*intimate forensic procedures*', '*time-out*' and '*destroys forensic material or information*'. In addition, we support amendments in relation to the taking of identification photographs (discussed in further detail in Chapter 3) and surrounding the issue of informed consent (see Chapter 4). We also endorse changing the threshold for a forensic procedure from '*might*' to '*is likely to*' produce evidence, and the development of guidelines to assist police officers and magistrates in determining whether a forensic procedure '*is justified in all the circumstances*'. Suggested amendments in relation to volunteers and children are also canvassed, as well as issues relating to the destruction of evidence.

Chapter 3 presents the central themes of the legislation. We commence with a discussion of crime control themes, such as police investigation, the impact on the prosecution and defence, as well as on juries, the potential challenges to the value of DNA evidence and offences under the Act. In particular, we support the creation of an offence covering the unauthorised and illegal use of a person's genetic material (without their consent). We also examine process themes, for example, aspects of the collection process, the balance between individual rights and the law enforcement requirements, and evidentiary requirements. We present some data on the use of forensic evidence in our discussion of analysis themes, and make comment on the agencies currently involved in the collection, analysis and application of this evidence, and argue for ongoing independent auditing of these agencies. We then provide a brief overview of science themes, such as independence, client focus and access to analysis.

There follows a discussion of some issues arising under the Act. In particular, we examine the thresholds for forensic testing, and make some suggestions for change, including adoption of limits on the testing of '*serious indictable offenders*'. We also look at the use of photographs as a forensic procedure, and advise modifications to the present model. We then consider how special consent provisions, plain language instructions, the authorisation process and the use of interview friends could be better utilised to enhance the operation of the Act.

Chapter 4 analyses the balance between the rights of individual sample providers and law enforcement. We critique the notion of consent under the Act, especially as it applies to volunteers and vulnerable persons, and suggest it may be dangerous to equate acquiescence with free consent. We examine the position of children and young people under the Act, whether as suspects, offenders, or volunteers. We suggest additional protections and advise amendment of the Act to provide that there must be an independent person present when a forensic procedure is carried out on a juvenile (currently this protection is discretionary). We advocate limiting the carrying out of forensic procedures on juvenile offenders to those convicted of a serious children's indictable offence and currently serving a sentence in a juvenile justice center. We also consider that a magistrate should be required to rule on a police request for a forensic sample from child '*volunteers*' (ie, those who are neither suspects nor serious indictable offenders), and that compulsion orders should only be available where the child is reasonably suspected of having committed an offence.

We also review the special positions of victims and volunteers in the context of mass testing, and support greater protections for the latter group, as well as discussing sampling populations more generally. We then move to discuss the effectiveness of DNA matching, for example, the calculation and use of probability ratios, as well as dealing specifically with mixed samples and '*cold link*' matching. In light of these observations, we consider the impact of forensic (and specifically, DNA) evidence on criminal trials.

We then discuss one of the most significant areas for development in the context of forensic procedures, namely, the establishment of an independent scientific laboratory. We present various models for delivering forensic science services, both in Australia and overseas, and provide an overview of the current NSW model at the Division of Analytical Laboratories (DAL). We then examine the need for financial, scientific, organisational and operational independence, and make some suggestions for the organisational structure for the proposed State Institute of Forensic Sciences (SIFS). We also suggest areas of research for the proposed Institute, for example, analysis of database referencing, and consider it appropriate that the Institute have an inbuilt audit function.

Another key area where a balance must be struck is in the context of privacy considerations. We discuss the right to privacy, in terms of the integrity of the DNA databases, and data protection and ownership, especially in terms of ownership and misuse by third parties. We suggest that the Act needs to specifically address the issue of sample and profile ownership, the terms and consequences of the transfer of possession and the extent of bailment. We also examine the right to a fair trial, and the effect of DNA evidence on guilty pleas. In this context, defence access to independent analysis and the opportunity of challenging expert evidence are also critical. On the other side of the adversarial process, issues arise for prosecutors in terms of protecting the presumption of innocence, as well as facilitating access to forensic analysis and evidence, and prosecutors need to be mindful of the advantages they have in this context.

We also discuss developments in the innocence dimension of DNA evidence, for example, Innocence Projects and the NSW Innocence Panel. Here, we critique the progress of the Panel to date, and make some suggestions for its further development. We recommend that the Panel should be brought under the auspices of the Act, and thereby within the Attorney General's portfolio, with a power to refer cases to the Court of Criminal Appeal. We also canvass the need for better storage and retention policies, and the potential for extending the

Panel to a wider miscarriages of justice model. Finally, in this Chapter, we examine the current frameworks for ensuring accountability, for example, the role of reviews, such as the present one, and scientific protocols, with special emphasis on the need on data protection and database integrity and destruction (especially in relation to CrimTrac). We also consider the role of the adversarial trial and judicial determinations of admissibility for ensuring accountability.

In Chapter 5, we present a summary of the insights of some participants to the Review. The issues raised by the relevant stakeholders informed our consideration in other parts of the Review, but here we reproduce some observations from the police, prosecutors, defence lawyers, judges and magistrates, juries, DAL and the Department of Corrective Services, as well as providing a synopsis of one of the trials we observed where DNA was a key aspect of the case.

Chapter 6 sets out some important themes for the future use of forensic procedures in NSW, in the form of what we term 'best practice'. In our view, legislative safeguards, bureaucratic regulation and judicial oversight should be supported by the best practice approach in order to ensure a more comprehensive and practically viable accountability strategy. We provide a brief overview of best practice strategies generally, and explain the limitations of legislative regulation in this area. We also set out some shared themes of best practice models, for example, integrity, transparency, ownership and natural justice.

As best practice models work most effectively when developed by representatives of the organisations to whom they are to apply, we do not prescribe the form these should take, but make some observations about best practice investigations and science and analysis. We also discuss aspects of best practice trial process such as the difficulties of managing DNA evidence at trial, presenting the evidence in court, challenges to DNA evidence, and best practice developments in trial advocacy. We consider some future trends in best practice forensic procedures as they relate to the trial process, and advise that the Attorney General commence discussions with appropriate interest groups in the form of a 'summit' to develop a best practice code for the use of forensic procedures.

The final part of this Report, Chapter 7, provides a detailed response to each of the 56 recommendations of the Standing Committee. We note here our support for the following recommendations:

- *Recommendation 1* – Prioritise the creation of a State Institute of Forensic Sciences, which should be requested to further examine methods of calculating the significance of DNA samples;
- *Recommendations 3 to 5* – Request and fund data collection by an independent agency;
- *Recommendation 6* – Provide judicial training in relation to the forensic use of DNA, its accuracy and interpretation of the evidence;
- *Recommendation 7* – Include practical and continuing legal education on DNA evidence for solicitors and barristers;
- *Recommendation 8* – Incorporate guidelines on DNA in judicial Benchbooks;
- *Recommendation 9* – Examine defence access to crime scene samples and funding to enable independent analysis;
- *Recommendations 10 and 11* – Change test for consent requests and orders by senior police and magistrates from '*might produce*' to '*is likely to produce*' evidence tending to confirm or disprove the suspect committed an offence;

- *Recommendation 12* – Prohibit testing on suspects unless evidence producing a profile is found at the crime scene or on the victim;
- *Recommendation 13* – Ensure no additional offences are prescribed;
- *Recommendation 14* – Remove delegated legislation provisions;
- *Recommendation 15* – Insert balancing guidelines similar to the Model Bill: this is supported in respect of magistrates, but not police officers;
- *Recommendation 16* – Consider deleting sections 71 and 74(6) of the Act;
- *Recommendation 17* – Require police to only test offenders where justified in all the circumstances;
- *Recommendation 18* – Introduce guidelines for police and magistrates for the justification of sampling serious indictable offenders, but they should not be inserted in the Act;
- *Recommendation 23* – Require a court order for voluntary mass screenings; judicial officer to be satisfied order is justified in all the circumstances;
- *Recommendation 24* – Draft plain English consent information;
- *Recommendation 26* – Amend volunteer consent provisions;
- *Recommendation 27* – Establishment and funding of a 24-hour legal advice hotline is endorsed in principle;
- *Recommendation 30* – Advise suspects that a refusal to consent is not admissible evidence and that the making of a court order is discretionary;
- *Recommendation 33* – Amend ATSI provisions to apply where the suspect self-identifies as ATSI;
- *Recommendation 36* – Review of ALS funding and ensuring police awareness of ALS requirements are supported in principle;
- *Recommendation 37* – Amend Act so that ALS need not be notified for ATSI suspect if suspect has arranged for a legal practitioner to be present or has waived the right;
- *Recommendation 40* – Amend Act in respect of child serious indictable offenders;
- *Recommendation 42* – Amend section 356F of the *Crimes Act* to allow forensic procedures to be classified as a '*time-out*';
- *Recommendation 45* – Develop provisions regulating victims' DNA profiles;
- *Recommendation 47* – Remove the delegated legislation provisions of section 92(2)(j)
- *Recommendation 50* – Amend Act to require destruction of forensic sample and profile where profile does not match crime scene, prosecutions do not proceed, accused is acquitted or is convicted but no conviction is recorded;
- *Recommendation 51* – Amend Act to provide that evidence gathered in contravention of the Act is inadmissible; retain balancing test of section 82(5) for minor breaches;
- *Recommendations 53 and 54* – Amend sections 12, 20 and 25 and correct drafting problems in the Act;
- *Recommendation 55* – Clarify the prohibition on body cavity sampling and forensic procedures for the sole purpose of establishing a person's identity;
- *Recommendation 56* – Amend definition of '*permitted forensic material*' in section 91(3) to clarify whether this includes samples from victims.

We do not support the following recommendations, or propose a significant variation on the Standing Committee recommendation:

- *Recommendation 2* – Amend Act to require standard jury directions
- *Recommendation 21* – Ensure that volunteers are only asked to consent if the procedure is likely to be useful for the investigation of a prescribed offence;
- *Recommendation 25* – Abolish consent provisions for serious indictable offenders;
- *Recommendation 28* – Abrogate the common law of consent;

- *Recommendation 29* – Clarify that consent cannot be assumed from a suspect's silence or compliance;
- *Recommendation 31* – Amend Act in relation to buccal swabs;
- *Recommendation 32* – Amend Act in relation to the taking of hair samples;
- *Recommendation 38* – Amend child volunteer provisions to provide children with consent information;
- *Recommendation 39* – Amend Act in respect of consent for child volunteers;
- *Recommendation 46* – Amend Act to prohibit certain breaches of the Act;
- *Recommendation 48* – Amend Act to require destruction of profiles and samples where evidence ruled inadmissible;
- *Recommendation 52* – Amend Act to prevent further sampling of the accused when evidence deemed inadmissible.

The Amendment Act and other developments have already given effect to the following recommendations:

- *Recommendation 19* – Incorporate specific provisions for forensic procedures on victims of crime;
- *Recommendation 20* – Proclaim the volunteer provisions as a matter of priority;
- *Recommendation 22* – Provide additional information for volunteers regarding available database indexes;
- *Recommendation 34* – Provide criteria for rejecting an interview friend;
- *Recommendation 35* – Clarify that waiving legal representation doesn't prevent interview friend from attending and vice versa;
- *Recommendation 41* – Enable forensic procedures on child victims of crime under the age of 10 years;
- *Recommendation 43* – Amend sections 51, 57, 69, 70 and 98(1);
- *Recommendation 44* – Address the problems of matching crime scenes and DNA profiles of relatives of missing persons;
- *Recommendation 49* – Amend Act to require destruction of forensic sample and profile after convictions are quashed.

Chapter 2 – Report Outline

This section of the Report discusses the foundations of the Review, its brief, and the manner in which the *Crimes (Forensic Procedures) Act 2000* (the Act) has assumed its current form. The institutional and process considerations for reform are introduced and a summary of claims for legislative change is set out.

2-1 Introduction

The Act (except for Part 8) commenced on 1 January 2001. Section 122 of the Act requires the Minister (the Attorney General) to review the legislation to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. The Review is to be conducted as soon as possible after 18 months from the date of assent, and a report of the Review's outcomes is to be tabled in both Houses of Parliament 12 months after that period.[1]

The Legislative Council's Standing Committee on Law and Justice was required under section 123 to report on the operations of the Act and its regulations. The Committee released its report, *Review of the Crimes (Forensic Procedures) Act 2000* (the Standing Committee Report) in February 2002.[2] The Committee received 26 written submissions from interested parties and took evidence over seven days of hearings, in which the major institutions and organisations responsible for, or affected by, the Act presented their views and were examined.[3] The report made recommendations consistent with its brief to enhance the operations of the Act and to provide further safeguards for the privacy and civil liberties of persons on whom the forensic procedures provided for under the Act are to be carried out. Many of these recommendations have particular legislative impact or require a specific response from the Attorney General and the Government.[4] The Government chose to defer a detailed response to the majority of these recommendations awaiting the conclusions of this Report.

Another important review mechanism is the direction under section 121 for the Ombudsman to monitor the workings of the Act and to report to Parliament following a two year scrutiny of the exercise of police powers under the Act.[5] It appears that the methodology adopted by the Ombudsman's office for its interrogation of the workings of the Act is to concentrate on particular legislative Parts, initially addressing the impact of Parts 6 and 7.

The extent of independent overview provided for in the Act is testament to the significance and sensitivity of the powers, procedures and obligations created by the legislation. The

[1] The Act was assented to on 5 July 2000. The letter of engagement from the Attorney General's Department refers to a report date of 5 January 2003. We have now received advice that the Report must be tabled when Parliament is sitting.

[2] Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000*, Report 18, February 2002 (Standing Committee Report).

[3] We thank the Standing Committee for giving us access to these submissions for the purposes of our Review.

[4] At the time of writing this Report, the Government has prepared and circulated a draft response to the recommendations of the Standing Committee Report. These will be referred to later in this Report, as is our detailed evaluation of the Standing Committee's recommendations.

[5] At the time of preparing this report, the Ombudsman's inquiry was in progress and the Review team have had detailed communications with the officers responsible for this inquiry.

Review team was mindful from the outset that consolidation and reform would be likely if the aims and the objectives of the legislation were to be confirmed and enhanced.

Coincidentally, at the time of the independent review of the Act, the Commonwealth Attorney General's Department announced a review of its comparable legislation.[6] The present Review team had discussions with the Commonwealth review team, who indicated that for contextual reasons, the operational focus of their review would be limited, and they intended to focus on an examination of themes of accountability.

Late in March 2002, the Director of the Criminal Law Review Division (CLRD), of the NSW Attorney General's Department, invited Professor Mark Findlay, Deputy Director of the Institute of Criminology, University of Sydney, to conduct the Review required under section 122 of the Act on behalf of the Attorney General. In his letter of invitation, the Director described the Act as:

> *(establishing) a regime for the carrying out of forensic procedures on suspects, serious indictable offenders and volunteers, the use that may be made of material derived from those procedures including the retention of DNA profiles on a Database system and the comparison of that material with other material including that on a national DNA database.*

In identifying the Attorney General's expectations for the Review, the Director continued:

> *The review by the Attorney General's Department should assess what impact the legislation has had in improving the capacity of the NSW Police Service to identify and successfully prosecute offenders. The review will involve interviewing (with the assistance of a solicitor from the Criminal Law Review Division, in the Attorney General's Department)*[7] *detectives, police prosecutors as well as prosecutors in the Office of the Director of Public Prosecutions, Legal Aid solicitors and defence counsel in order to elicit information on the frequency with which DNA information is used and the way it is being viewed by the courts.*

In commenting on the draft research outline submitted to the CLRD as part of the settlement of the tender process, the Director observed:

> *The review should focus primarily on the collection of DNA evidence. It should be noted that the Act regulates the conduct of all forensic procedures on suspects (eg. photographs). Problems in the application of the Act to those other forensic procedures may still be relevant in the Review.*[8]

In addition, the following were nominated as areas of concern for the Review:

- Data on the testing of suspects held by the police and other agencies[9];

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[6] This seemed relevant to our work as both the Commonwealth and NSW Acts could be traced back to common legislative models. The Review team had cooperative meetings with the Commonwealth review and discussed methodologies as well as issues for examination.

[7] The survey instruments were drafted and administered with direct involvement and assistance from CLRD. In addition, the cooperation of the Supreme and District Courts of NSW, the Sheriffs office, individual judicial officers, jurors, the DPP and Crown Prosecutors, Public Defenders, and an array of interested and committed lawyers, police officers and officers of various departments made a difficult and sensitive empirical exercise possible.

[8] As will become apparent as this Report develops, many of these problems were brought to the attention of the Review from interest groups with powers and responsibilities under the Act.

- Police applications to a judicial officer for a compulsory forensic procedure and the success of such applications;
- Views of the Department of Corrective Services and the Division of Analytical Laboratories (DAL) concerning the operation of the Act[10].

CLRD enunciated some particular objectives for the Review in terms of a series of questions:

> *Are the provisions of the Act regulating the collection of samples from suspects and serious indictable offenders unnecessarily complex? In order to try and address this question the Review will need to consider:*
>
> - *What problems do the police experience in applying/following the collection scheme set out in the Act?*
> - *Do those problems hinder the police in the investigation of crime?*
> - *Do those problems then create issues in relation to the admissibility of evidence in subsequent court proceedings?*
> - *Would those problems exist even if different types of collection schemes (for example a scheme in which all procedures are subject to order rather than first seeking the provider's consent) were created?*
> - *The Act regulates the conduct of all forensic procedures, not just those in relation to DNA. Should the collection scheme in the Act be limited to DNA evidence?*
> - *Are there any measurable benefits/advantages from the collection scheme used under the Act?*
>
> *The collection scheme in the Act is intended to create an appropriate balance between the individual's right to privacy and the needs of law enforcement organisations. Does the collection scheme actually achieve this objective in practice? While the focus of the review is not to be on the provider of samples (those interests to be canvassed amongst other issues in the Ombudsman's review) the question is still relevant to the overall question of whether the provisions of the Act are unnecessarily complex.'* (Emphasis added)[11]

Soon after the commencement of the Review, it became clear that another area of interest in the Review was the construction of particular and specific responses to recommendations arising out of the report of the Standing Committee.[12]

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[9] The Review team is indebted to NSW Police, and in particular, Wayne Tosh, Manager of the Forensic Procedures Implementation Team (FPIT) and Roderick Marsh, Project Officer, External Agencies Response Unit (EARU), for providing access to, and the interpretation of, such data.

[10] Both the Division of Analytical Laboratories (DAL) and the NSW Department of Corrective Services (DCS) were interviewed in detail by the Review team, and representatives from both organisations participated in the focus groups conducted during the later phase of the Review.

[11] It would appear from the emphasis of these questions that CLRD has a particular interest in the objectives of the legislation which enhance the investigation and prosecution of offences, and the police powers and practices associated with these in particular.

[12] In discussions between CLRD and the Review team, it was agreed that CLRD was at liberty to respond early to any of the recommendations directed to the attention of the Attorney General and his Department by the Standing Committee. The Review could consider and respond to the additional recommendations along with any of the Attorney General-directed recommendations that it felt had relevance for important themes in the Review.

2-2 Logic and Essential Themes

The Review, and this Report of its work and findings, is guided by an obvious logic: to be sensitive to the experience of the principal stakeholders in the Act and thereby to project ways in which the Attorney General (and the Government) might facilitate the better achievement of the legislation's legitimate aims through such individuals and agencies. The Review, therefore, is a practical and applied endeavour, while at the same time critiquing contemporary practice.

Fortunately, the applied focus of our work is assisted by:

- The normative framework of the Act, its amendments and delegated legislation;
- Other review documentation and its supporting evidence;
- The observations and experiences of those working within the Act;[13]
- The future expectations of these stakeholders;
- Available empirical representations about the workings of the Act; and
- Similar experiences in other jurisdictional contexts.

The Review team also utilised its practical experience to focus on procedural aspects of the Act and areas of possible tension in the operation of the Act.

The identification of an applied focus as the logic for the Review was not to deny the essential consideration of wider themes. The Standing Committee in its report set the scene for the recognition of broad human rights concerns, access to justice issues, fairness in the treatment of the vulnerable, and responsibility in the exercise of state power. This was placed against a recurring critical interest in the protections provided within the Act, and the potential for accountability. We have done little more than build on this important background of balance between the efficient operation of criminal justice and the confirmation of fundamental individual rights, although it may in practical terms be difficult to obtain and maintain.

The most significant new theme to be added by this Review is the notion of 'best practice'. The Report advances this in the proposed context of better integration in forensic procedures, from a point at which such integration is sorely absent. Advocating best practice strategies is neither a soft option, nor a defeatist recognition of the failure of legislative and bureaucratic regulation. Rather, it is a rational and optimistic approach to the reconciliation of powers and responsibilities from many different institutional directions. The generous and cooperative spirit with which stakeholders greeted and participated in this Review gives us confidence that a complementary best practice strategy may succeed in the search for balance, where excessive bureaucratic regulation may simply invite subversion and suspicion. For those confronted with the best practice option, however, there will need to be a paradigm shift, and the initial acceptance of an atmosphere of trust and mutuality.

[13] On this point it became necessary early on in the Review process to interpret such relationships with the Act in the broadest sense. The Review team did not diminish the input from individual and institutional stake-holders which might have been deemed ancillary to the Act. This is in recognition that the Act builds on pre-existing powers and procedures, informs wider criminal justice processes, and is not the only legislative or administrative regime which shapes forensic procedures.

2-3 Review Brief

Section 122 asks the Minister to review the Act. However, as much of the responsibility for the operation of the Act rests with the Attorney General and other Ministries in Government, it is logical that the Review should be carried out by independent experts, working with the assistance of CLRD, and with the cooperation of other Government agencies.[14]

The tender process for the Review was consistent with this appreciation. While responsibility for the Review is given to the Minister, the manner in which the work of the Review was put to tender suggests that the Attorney intended the Review to be an independent and objective legislative and policy evaluation. In particular, the Institute of Criminology accepted the invitation to carry out the Review on the clear understanding that it would act as an independent reviewing agency.

The wording of section 122 suggests that there are enunciated policy objectives for the Act and that these can be evaluated in terms of their validity and appropriateness. The initial task for the Review, therefore, was to identify these objectives and to construct a comparative framework against which validity and appropriateness are to be established.

When looking for these objectives, the initial area of investigation is the legislation itself, and any supporting documentation arising out of the process of enactment. The long title of the Act, for instance, suggests its purposes as being:

- To make provision for powers to carry out forensic procedures on certain persons (the implication being that these powers relate to nominated procedures and nominated persons);[15]
- To make provision with respect to a DNA database system (emphasising the unique importance of DNA evidence amongst other forensic material);[16] and
- To amend pre-existing powers and obligations for the purpose of the Act (indicating that new law enforcement powers would be required to achieve the investigative, evaluative and probative expectations for the Act).

The Second Reading Speech[17] is traditionally an occasion on which the sponsors of legislation identify its purposes and objectives. In respect of this legislation, the then Attorney General, Jeff Shaw QC, highlighted the following crime control objectives:

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[14] Principal amongst these are the NSW Police and Police Ministry, the Office of the Director of Public Prosecutions, the Ombudsman's Office, the Department of Corrective Services, the Public Defenders Office, the Legal Aid Commission, the Division of Analytical Laboratories (NSW Department of Health) and the Sheriff's Office.

[15] See the interpretation section of the Act (s3), which distinguishes forensic procedures as intimate and non-intimate, and indicates that these procedures are not to be carried out solely for identification purposes, nor as intrusions into body cavities beyond the mouth. The people that are designated as subjects for the procedures are distinguished on the basis of Aboriginality, age and capacity with special provisions applying to each category of provider. In addition, whether the person is a suspect, in custody, a volunteer, or associated with a serious indictable offence will predetermine forensic procedures. Therefore, the stage in the criminal justice process at which the subject is identified also has significance, as does the reaction of the subject to the proposed exercise of the powers.

[16] This hierarchy of interest is reflected throughout this Review. While the definition of forensic material includes a range of physical imprints and representations (eg fingerprints and photographs), it is the sampling of DNA with which the body of the legislation is most concerned and with which the Review's methodology was most engaged. The contemporary public appreciation of forensic evidence also undoubtedly focuses on DNA and therefore its priority in this report is reflective of community and political interest.

> *The Government is committed to clearing up crime and will use this legislation to provide law enforcement agencies with a valuable investigative tool to assist in this process. The bill confirms the Government's commitment to addressing crime and improving the operation of the criminal justice system in New South Wales. It will enable law enforcement agencies to identify or exclude suspects by comparing forensic material taken from them with material found at crime scenes. It will link seemingly unrelated crimes by comparing DNA profiles found at different crime scenes. Furthermore, it will allow for the targeting of crimes that have historically had low clearance rates using only traditional methods of investigation.*[18]

It should be understood also that these primary crime control objectives need to be viewed within the context of rights-protection, as well as the obligation on those managing forensic evidence to do so in a sensitive and accessible fashion. Law enforcement obligations may predominate but they do not override fundamental and prevailing procedural fairness, and community accountability requirements essential in all aspects of law enforcement and crime control in NSW. Consistent also with 'best practice' models of criminal justice espoused by the major criminal justice institutions in the State, the exercise of the powers of the Act needs to rely on a balanced approach between crime control and justice imperatives.

The roots of the legislation in the work of the Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys General (SCAG), is regularly recognised throughout the Second Reading Speech. The Attorney General indicated that the discussions and consultations which influenced the drafting of the Model Forensic Procedures Bill (the Model Bill), were crucial to the formulation of the Act, which was '*largely based on the model provisions developed by the Model Criminal Code Officers Committee*'.[19]

The Second Reading Speech clearly emphasised the criminal investigation dimension of the legislation. Its impact on those suspected of serious indictable offences was reiterated in the speech along with the undertaking that the offence-based limitation on providers was not to be changed within the period of the Review.[20]

A theme of balance, mentioned above, is reiterated throughout the speech, and the Attorney noted that the Act '*sets out a number of safeguards to ensure that the rights of suspects, offenders and volunteers are balanced against the need for the police to have adequate and effective law enforcement powers*'. Children and incapable persons are especially protected in terms of consent and court orders. In addition, by providing for interview friends and legal representation for Aboriginal and Torres Strait Islander providers, the Act '*takes into account*

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[17] The Hon JW Shaw QC MLC (Attorney General and Minister for Industrial Relations), *Crimes (Forensic Procedures) Bill 2000*, Second Reading Speech, *Hansard*, Legislative Council, 20 June 2000, at p7101ff (Second Reading Speech).

[18] When measuring whether these objectives have been met, it would be fair to assume that empirical evidence especially from the police in particular should reveal the relationship between forensic evidence (DNA in particular) and improved selective clearance rates, more successful prosecutions, old file closures, and better elimination of suspects.

[19] Second Reading Speech, *supra*, n17.

[20] This could be read as an implied invitation for the Review to consider the expansion of this threshold, beyond the expansion that the Act already represents when compared with the Model Forensic Procedures Bill. The issue of thresholds for sampling and their appropriateness is covered later in the Report.

the special needs of the more vulnerable members of our community and makes provision to protect their interests.'[21]

The Second Reading Speech is also important for the manner in which it highlights the threshold sampling population to be covered by the powers of the Act. For instance, all persons in custody in NSW for serious indictable offences are candidates for testing.[22] Justification for this target group is provided along the lines that these offenders are likely to have committed at least one offence already and thus will commit other offences. In addition, '*it is reasonable for society to expect that the person be required to give samples to assist with the detection of repeat offences*.'[23]

The carrying out of sampling on volunteers was also discussed in the speech. A detailed series of information obligations on the police in these circumstances were identified and the importance of verification by an independent person of the volunteer's consent was reiterated. It was said that '*these safeguards are necessary to ensure that volunteers have confidence in providing samples for DNA analysis*.'[24]

The Second Reading Speech proceeded to discuss evidentiary requirements in the context of safeguards. Significant in light of popular impressions that DNA evidence is a powerful proof, the Attorney General emphasised that '*it is clearly stated that the probative value of the evidence in itself does not justify the admission of improperly obtained evidence*.'[25] Further, the onus of proving that certain safeguards are not practicable rests with the prosecution.

The safeguards theme extended through the Speech with reference to the destruction of sample material obtained from persons acquitted or where convictions are quashed.[26] In addition, there is in principle a twelve month life-span in place for profile information about suspects against whom matters are not proceeded with in that time. Limitations as to the cross-matching of DNA information against specific and separate databases was also discussed.

Following on from a discussion of offences and penalties attaching to the misuse of DNA, the Attorney General observed that '*clearly, it is in the interests of law enforcement agencies to exercise their powers under the legislation, reasonably, judiciously and lawfully*.'[27]

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[21] Second Reading Speech, *supra*, n17.

[22] The Review has been advised that the Forensic Procedures Implementation Team takes a broad view of custody. Not only are inmates in the State's prisons routinely tested, but so too are periodic detainees and home detainees convicted of serious indictable offences. The police are regularly informed by the Probation and Parole Service, and courts administration, about the nature and location of these populations. In addition, juvenile detainees in juvenile custodial institutions are also being sampled, if they are children's serious indictable offenders.

[23] Second Reading Speech, *supra*, n17.

[24] *ibid*

[25] *ibid*

[26] The difficulties associated with the constant implementation of a convincing destruction policy are detailed later in the report. Representatives of the Division of Analytical Laboratories put the Review on notice that this was not simply about sample destruction. In fact, it involves competing imperatives for profile removal and de-identification, and the complications added by the sharing of profile information across databases.

[27] Second Reading Speech, *supra*, n17.

The Standing Committee Report also recognised the theme of balance: between the protection of the right to bodily integrity, and rights to a fair trial, to privacy and presumptions against retrospective liability on the one hand, while meeting society's law enforcement requirements on the other. This theme of balance is reiterated in the Chair's Foreword, where he says '*the use of DNA technology necessarily involves some interference with the civil liberties of individuals. Accordingly a balance needs to be struck between protecting the rights of the individual and society's law enforcement needs*.'[28] This Review has adopted the theme of balance as a central feature of its brief and in its attempt to reconcile the crime control and individual rights concerns in the legislation.

In summary, it follows from the foregoing discussion on the introduction of the Act that the brief for the Review is:

- To identify the operational and policy objectives for the Act and to construct a comparative framework against which validity and appropriateness are to be established;
- To evaluate crime control objectives including:
  - Improvement of police investigation capacity to identify or exclude suspects through the use of crime scene DNA;
  - Improvement of investigation and prosecution capacity by linking otherwise unconnected crimes through crime scene DNA;
  - Improvement of police practice and investigation capacity by a more refined targeting of crimes which, using traditional investigation processes, have had low clearance rates;
- To evaluate process objectives such as:
  - Whether the provisions of the Act regulating the collection of samples from suspects, serious indictable offenders, and volunteers (and the obtaining of consent in particular) are unnecessarily complex;
  - Whether the collection scheme in the Act, is intended to create an appropriate balance between the individual's right to privacy and the needs of law enforcement organisations, and if so, does the collection scheme actually achieve this objective in practice;
- To evaluate operational measures such as:
  - Data on the testing of suspects held by the police and other agencies;
  - Making of compulsory orders by judicial officers on the application of the police;
  - The Department of Corrective Services, and the Division of Analytical Laboratories' views concerning the operation of the Act;
- To analyse the recommendations of the Standing Committee and where appropriate to respond specifically to their content, application and consequences;
- To evaluate the operation of the Act against the experience of the primary stake-holders and to recommend legislative change, where necessary, to ensure the more appropriate and effective achievement of the legislation's objectives;
- To evaluate the operation of the Act against the experience of the primary stakeholders and to recommend administrative and procedural change, where necessary, to ensure the more appropriate and effective achievement of the legislation's objectives; and
- To comment on the manner in which the Act and its operations should be monitored and evaluated on an ongoing basis.

[28] Standing Committee Report, *supra*, n2, p x.

All this is to be achieved against the invocation that the safeguards contained in the Act ensure subjects have confidence in providing samples for DNA analysis. The operation of forensic procedures under the Act, whether in relation to suspects, serious offenders or volunteers, should continue to be governed by legislative requirements '*to ensure that the procedures are carried out safely and with respect for the person's physical integrity*.'[29] In large measure, this can only be achieved through the operation of efficient and unambiguous statutory frameworks for the application of forensic procedures which enhance appropriate criminal justice outcomes.

2-4 Outline of the Review

It is clear from the Attorney General's expectation that this Review should be wide reaching and retain the purpose of legislative and policy refinement. For instance, the Government's draft response to the Standing Committee Report (dated 30 July 2002) indicated that the Review should address the majority of issues raised by the Report's recommendations, many of these requiring legislative and policy implementation.

On 2 May 2002, the Attorney General's Department engaged Professor Mark Findlay to carry out this Review. In so doing, the Department accepted an outline of work which involved the following:

- Contacts and interviews with certain investigation and trial agencies in order to ascertain opinions on the use of forensic evidence for investigation and prosecution;
- Examination of retrospective data collection on the use of forensic evidence;
- Administration of surveys to prosecutors, defenders and verdict deliverers regarding their attitudes to forensic evidence and the operation of the Act;
- Administration of an information sheet to police investigators and prosecutors in order to secure data ongoing;
- Contacts and interviews with other agencies involved in scrutinising and monitoring the use of forensic evidence, or the Act in particular;[30]
- Holding focus group evaluations;[31]
- Examination of the Standing Committee Report and responding, where appropriate, to its recommendations;
- Observation of trials in which forensic evidence was used; and
- Reporting on findings.

The Review expected, from the experience of the Standing Committee, that there would be difficulty in relying on official information on the use of forensic evidence in terms of the

[29] Second Reading Speech, *supra*, n17.

[30] We had ongoing dialogue with the Office of the NSW Ombudsman, Standing Committee on Law and Justice and the Commonwealth Attorney General's Department. It is also relevant to note that although not a review of the Act per se, during the course of this Review, the Australian Law Reform Commission and the National Health Medical Research Council released a Discussion Paper, which examined, amongst other things, the forensic use of genetic information, the harmonisation of forensic procedures legislation, criminal investigations and proceedings and the post-conviction use of genetic information. See Australian Law Reform Commission and the National Health Medical Research Council, *Protection of Human Genetic Information*, Discussion Paper 66, 2002 (ALRC DP 66). The Report is due in mid-2003 and the Review exhorts consideration of the issues covered therein.

[31] It was intended that separate groups should be constituted to cover 1) the evaluation and scrutiny of the forensic evidence and its investigative application, 2) the trial potential of forensic evidence, and 3) balancing the use of forensic evidence against the rights of the provider.

Act.[32] The NSW Police, the ODPP and DAL all maintain statistics in the area but these are not integrated or common to any extent that would allow for credible efficiency evaluation. Therefore, the Review went about gathering data from official sources (and attempted its integration), from surveys, interviews, and information instruments.[33] Retrospective data collection was limited, and the tight time-frame for the Review meant that original data collection would always be selective and far from representative.[34]

To facilitate data collection, the following agencies were contacted with requests for retrospective data, and information concerning data collection procedures:

- NSW Police;
- NSW Office of the Director of Public Prosecutions;
- NSW Department of Corrective Services;
- The Division of Analytical Laboratories; and
- The Sheriff's Office.

Police data proved particularly illuminating. By interrogating certain data retained by the Forensic Procedures Implementation Team it was possible for the Review to understand:

- The extent of forensic sampling;
- Its exponential growth;
- The sample provider focus (breakdown between inmate and suspect populations);
- The socio-demographics of individual providers;
- The offences with which they are associated;
- The Local Area Commands (LACs) responsible for the sampling; and
- The outcomes for some samples.

In respect of the last of these, the Forensic Procedures Implementation Team (FPIT) has carried out some limited analysis on '*cold*' and '*warm*' links resulting from the matching of certain sample profiles and the growing database (see 3-3-1).[35]

The Review team also had to the empirical information discussed in the Standing Committee Report. Even with this information, however, it was not possible to achieve the specific evaluative objectives nominated for the Review. We were, therefore, reliant on the product of our survey instruments and initiatives. Due to limitations in this methodology (limited survey periods and poor response rates, for instance)[36] this data required augmentation through supportive methods such as unstructured and semi-structured interviews.

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[32] See Standing Committee Report, *supra*, n2, pp52-58.

[33] The NSW Police was helpful here in facilitating access to their data, as well as incorporating the Review's information instruments into a convenient and accessible format.

[34] Recognising this limitation, there was a 'catch-all' methodology employed for the distribution of survey instruments. Total coverage of investigator, prosecutor, verdict deliverer and defender populations was obviously not possible. In the construction of survey populations, the administration of survey instruments and control over response rates, the survey was ultimately reliant on cooperation from the administration of the agencies involved.

[35] A '*cold link*' refers to a match on the DNA database between a crime scene sample and the sample of an individual not previously suspected of that crime. A '*warm link*' is the matching of a suspect's DNA with a crime scene sample.

[36] With postal surveys such as these and the professional respondents we were surveying, low response rates are common. In our Review, this was exacerbated by the misunderstanding of some respondents that the operation of the Act, and some of our concerns with it, did not apply to them.

In particular, we were set the task of examining forensic evidence, its production, analysis and management in several fluid process settings. Police investigation, the analytical laboratory, and the criminal trial, were the main such contexts. For the former, we relied on the experience and recollections of associated professionals. With criminal trials we were able to augment the views of lawyers, jurors and judges with detailed trial observations. Coincidentally, the trials observed, served to demonstrate a range of approaches to DNA in particular. This mix of professional opinion and process observation proved to be a particularly useful methodology for the eventual construction of 'best practice' reflections.

Another problem confronted by the more formal empirical endeavour of the Review is the relatively brief period over which the Act has operated and consequently the limited and selective experiences of agencies involved. If this Review were to be revisited in 12 months time it is our view that professional knowledge in the field would have expanded to such an extent as to make the results of formal surveying far more meaningful.[37]

The data which the Review saw as most useful included:

- The instances in which DNA samples were acquired (with a view to examining, frequency, thresholds, consent etc);
- The nature of the investigation/prosecution for which samples were acquired (to examine thresholds, evidentiary relevance, admissibility etc);
- The collection and dissemination of samples and profiles (examining procedural requirements, resource demands etc.);
- The purpose of collection (to evaluate against the purposes of the Act);
- The application of samples and analysis (to interrogate the collection and dissemination process. (On this issue we expected the opportunity of tracing sampling through analysis to prosecution/investigation outcome, as well as to storage and access outcomes);
- The forensic utility (to comparatively evaluate the status and impact of forensic evidence within the Act and across other forms of evidence. This would lead to speculation on significance and use trends in relation to forensic evidence);
- The status of this evidence within the prosecution brief (again to provide insights into comparative significance and the way in which this evidence requires corroboration. Also, problems with interpreting the analysis, and related judicial directions would be of interest); and
- The presentation in court (how is the evidence interpreted, argued for, challenged and explained).

It was hoped to gain census-type information on the forensic application of samples covered by the Act, originating from the professional agencies employing the samples. Due to the process through which the sampling and analysis passed, and the various agencies involved in its application, it was anticipated that such outcome-directed data would be difficult to secure.

The three formal surveys conducted with prosecutors[38], defenders[39], and verdict deliverers (juries) were settled in consultation with senior officers in the agencies where they would be administered.[40]

[37] It would also, no doubt, reveal that issues like police collection and sampling practice had become more uniform and consistent as a result of experience and confidence with forensic evidence becoming more grounded.

[38] These were Crown Prosecutors and Police Prosecutors.

2-5 Work Program

The work program set at the commencement of the Review took the following form:

1. Foundation Phase (May 2002)

- Liaise with CLRD to establish the parameters of the study;
- Establish counterparts in the Police Service (investigators/prosecutors/forensic services/legal services), DPP, Legal Aid Commission, Aboriginal Legal Service, public defenders, Department of Corrective Services (DCS);
- Meet with counterparts to establish data sources, discuss data collection and survey instruments, critically analyses review content;
- Settle information templates and survey instruments; and
- Gain necessary approvals for the application of surveys (Attorney General, Chief Justice of the Supreme Court, Chief Judge of the District Court, Chief Magistrate of the Local Court, DPP, Police Commissioner, Public Defender, Chair of the Legal Aid Commission).

2. Information Gathering Phase (June-October)

- Prepare and settle information templates for retrospective and prospective information gathering exercise;
- Administer retrospective information gathering to police (and perhaps DPP);
- Administer prospective information gathering to police (investigators/prosecutors) DPP, Magistrates, LAC, Defenders;
- Collect and evaluate demographic (census data) on DNA usage;
- Determine trials to be observed, the extent and focus of the observation process and the manner in which information on relevant up-coming trials was to be obtained; and
- CLRD follow-up.

3. Survey Phase (July-October)

- Prepare and settle survey instruments (approval and client ownership feedback);
- Seek notification from prosecutors regarding future cases in which DNA evidence to feature – administer questionnaire to verdict deliverers (jury/judge alone) (assistance of Sheriffs office) (postal or exit surveys);
- Administer retrospective surveys to police (investigators/prosecutors), DPP, LAC, Defenders (postal) – two surveys (Investigators - police) (Evidence presenters - Prosecutors/Defence Advocates);
- Administer retrospective surveys (judges/magistrates) (postal) (two surveys – magistrates includes compulsory order information);
- Require that each survey be completed prospectively for the life of the Review; and
- CLRD follow-up.

[39] Public defenders, defenders from the private bar and some lawyers from the Legal Aid Commission, the Prisoners' Legal Service, and the Aboriginal Legal Service.

[40] These were, respectively, the Senior Crown Prosecutor, Senior Public Defender, and the NSW Sheriff. For jurors we were required to seek the approval of the Jury Task Force (Supreme Court), the Attorney General, the Chief Justice of the Supreme Court, the Chief Judge of the District Court, and the NSW Sheriff. In particular, we wish to thank the Sheriff and his staff for facilitating the administration of the juror questionnaires and without whose help that survey would not have been possible. In addition, the support and endeavours of Professor Eric Magnusson, who was administering an expert evidence survey on behalf of the Australian Institute of Judicial Administration during the course of our Review, secured approval from the necessary sources.

4. Detailed Interview Phase (July – October) - Identify several celebrated cases in which DNA evidence has featured; and - Administer detailed unstructured interviews with police (investigators/prosecutors), Magistrate at committal (compulsory orders?), prosecutors, defence advocates, judges.
5. Focus Group Phase (October-November) - Hold three focus group sessions (half day) with principal stakeholders (police, DPP, Magistrates, LAC, Defenders, private bar, analytical laboratories, civil rights groups, law reform/CLRD, Premier's Office); and - Contextualise census and survey data, and critically analyse the operation of the Act, alternative procedures, potential law reform.
6. Report (November - February) - Draft report for comment – CLRD – Settle final report.

After this work program was settled and implemented, three areas of modification became necessary:

- The formal questionnaires needed to be more flexibly administered and the relevant survey populations adjusted, in order to target respondents with a high degree of familiarity and working knowledge of the issues. In order to refine these populations, we relied on the advice obtained during the personal interview phase.
- With particular reference to the verdict deliverers (jurors) survey, it proved extremely useful to observe trials in which DNA evidence was contested and jurors surveyed. Through the observational experience the Review team were able to gain more rounded insights and to engage in a deeper analysis of issues for comprehension and access.
- The retrospective and prospective information sheet approach became too difficult to implement in the Review period. In any case, much of the information expected to be obtained through this process became available in more conventional forms. Where this was not the case, simpler methodologies such as interviews with specialist investigation units within the Crime Command, and the targeting of several local area commands (LACs) exhibiting differential forensic evidence practice, became more appropriate.

2-6 Methodology

It is worthwhile examining in more detail the Review methodologies and their intentions. The outcomes of these methodologies, their integration and analysis has been distributed through the body of this Report.

Interviews

The Review team was conscious from the outset to give people their say, and to offer those who work with the legislation adequate opportunity to influence its improvement. In doing this, we wished to focus on practitioners and policy-makers. We wished to engage competing perspectives and interests, as well as talk with people in the process of applying the legislation, its powers and responsibilities.

Over the six months of the Review, we conducted dozens of unstructured interviews, individually and collectively, with:

- NSW Police (Department, Ministry, disciplined service and policy officers);
- The ODPP (Crown Prosecutors, solicitors, district managers);
- Public Defenders and defence advocates;
- The Division of Analytical Laboratories (Directorate and analysts);

- Judges and magistrates;
- The Legal Aid Commission (Criminal Division, Prisoners' Legal Service, Children's Legal Service);
- The Department of Corrective Services;
- The NSW Sheriff's Office;
- The NSW Ombudsman's Office (Review team);
- The President of the Council for Civil Liberties
- Members of the Innocence Panel; and
- The Director of the Innocence Project.

In addition to the designated interviews, we maintained with some agencies, such as the police an open dialogue about a range of interests as they arose for the Review, and had several additional interviews over that time, as well as extensive email discussions with interested parties.

Surveys

This methodology was, for a variety of predictable reasons, less successful than other components of the methodology, but nevertheless, necessary from the point of view of rigour. The methodology for each survey varied to suit the exigencies of the survey and the idiosyncrasies of each survey population.[41] The most successful survey was the one which might have seemed at the outset the most difficult – our survey of jurors was diverse and comprehensive. Only juries in which DNA evidence featured were selected for survey. This in itself posed difficulties, and we were reliant on the local knowledge of DPP solicitors and Crown Prosecutors to contact the Review and indicate when such a trial was on its way.

Official data collection

At the commencement of the Review, we were, on the experience of the Standing Committee, expecting limited official data on forensic procedures, however, with the Forensic Procedures Implementation Team (FPIT) and the External Agencies Response Unit (EARU) of NSW Police,[42] we became aware of a wealth of police data.[43] Unfortunately, we were not able to consolidate or integrate police data with that maintained by the DPP or by DAL and did not have the capacity to test the accuracy of police data in the area.

Trial observations

A method of selective trial observation complemented the survey exercise and 'road-tested' many of the issues raised during the interview sessions. The nature of the observations varied depending on the trial and Review resources. The Review team observed complete trials, as well as select components of others, such as the evidence in chief and cross-examination of expert witnesses on DNA issues, and the trial Judge's summing-up and directions to the jury in relation to such issues. In some trial observations, we had the benefit of discussions with the Judge and counsel during significant stages of the trial's development.

[41] For instance, we were reliant on the facilitation of the police and ODPP bureaucracies to identify who would be appropriate to survey in terms of their experience of forensic procedures. This 'grab sampling' technique meant that the results would be anything but representative, and the erratic response rate compounded this difficulty.

[42] Our understanding of police data in the area is almost entirely due to the generous and creative assistance of Roderick Marsh, who provided much of the data analysis for the Review.

[43] This result suggested to the Review that for the purposes of retrospective police data collection at least, the information sheet exercise might not be essential.

Focus groups
CLRD organised three focus group sessions comprising representatives of the major stakeholders the Review had identified through the other methodologies. The division of the focus groups into 'forensic operatives', 'special interest and policy' and 'legal professionals' was somewhat arbitrary, but designed to create a non-confrontational atmosphere and one wherein participants might feel free to exchange ideas rather than 'putting their case'. The sessions were recorded and transcribed. The sessions were semi-formal, comprising a consistent format, focus points for discussion and hypotheticals, as well as sessions for free discussion.

2-6-1 Outcomes

The methodology described above produced:
- A series of transcribed interviews with stakeholders;
- Questionnaires from prosecutors, defenders and jurors;
- Court observation notes to complement some of the questionnaires, supported by Trial transcripts and specific consultations with the judicial officers concerned;
- Transcriptions of video recordings of the focus group sessions;
- Evaluations of police data;
- A digest of cases in which forensic procedures and/or the Act had been considered; and
- A catalogue of policy documentation and critical secondary sources.

This material has been integrated into most major aspects of the Report to follow.

2-7 The Standing Committee's Recommendations – General Discussion

Section 123 of the Act requires the Standing Committee to undertake a review of the operation of the Act and to report to Parliament as soon as possible after 18 months from the Act's assent. The terms of reference suggested by the Act and adopted by the Committee focus on the social and legal implications of the use of DNA profiling and its reliability and effectiveness as an investigative tool. The Standing Committee as part of its Review consulted widely with individuals and organisations responding to calls for submissions.

An important responsibility of the Standing Committee was to make recommendations in its report about amendments that might appropriately be made to the Act to enhance its operation and provide further safeguards for the privacy and civil liberties of persons on whom forensic procedures are carried out, or proposed to be carried out, under the Act. The Committee reported in February 2002 and made 56 recommendations, many of which were directed towards changes in policy associated with the Act's operation. In broad terms, the Recommendations appear in four forms:
- Recommendations that require specific legislative change in the Act or other ancillary legislation;
- Recommendations requiring the investment of addition resources in the area of forensic procedures and their regulation;
- Recommendations regarding education about the legislation and its impact, as well as public information associated with the legislation; and
- Recommendations that the Government, or particular Ministers, sponsor administrative and policy change in association with the Committee's Report.

This Review has been informed by the comprehensive research and findings of the Standing Committee and will respond to each of the Recommendations in Chapter 7.

2-8 The *Crimes (Forensic Procedures) Act 2000*

The Attorney General accepted in his Second Reading Speech that the Act is largely based on the Model Forensic Procedures Bill (the Model Bill), so it may be informative before commencing on our analysis of forensic procedures under the Act to examine the Act's origins in the Model Bill.

There is a significant threshold difference between the Model Bill and the Act, which will have an essential influence over the interpretation of the objectives for both. The Model Bill retains a commitment to sample persons (and to a lesser extent, populations) suspected of having committed a criminal offence. The Act, on the other hand, goes beyond this in its coverage of potential providers. While in the Act the suspect has an important position, there is also ample opportunity for the sampling of 'census' populations in order to narrow down to suspects and offence links. In addition, section 5 of the Act allows for the sampling of suspects (amongst others), broadly defined, with or without their consent, whether or not under arrest and including children, Aboriginal and Torres Strait Islanders (ATSIs) and incapable persons.

Parts 7 and 8 of the Act take the potential sample population beyond suspects, to include persons convicted of a serious indictable offence (including children), and volunteers. A volunteer includes a child whose sample is volunteered on their behalf by a parent or guardian.

Therefore, at least at such a fundamental and crucial level as thresholds for sampling (and from these, the governance of the Act) it would be wrong to simply assume that the aims and objectives of the Act remain a clear reflection of those for the Model Bill. Following a tracing of the emergence of these legislative models it becomes necessary to explain why the Act diverges from the Model Bill. The legislative and policy intentions for such divergence are instructive for the later critical evaluation of recommendations for change.

2-8-1 From the Model Bill to the Act

In 1994, the Model Criminal Officers Committee (MCCOC) of the Standing Committee of Attorneys General (SCAG) circulated drafts of the Model Forensic Procedures Bill for comment. Sixty-eight submissions were received in response to the draft Bill. In July 1995, the majority of SCAG endorsed the 1995 Model Forensic Procedures Bill and forwarded a proposal to establish a national DNA database to the Australasian Police Ministers' Council (APMC) for consideration.

On 17 November 1998, APMC agreed to the drafting of model provisions and recommended that MCCOC prepare a Discussion Paper for the purpose of public consultation. The Discussion Paper, *Model Forensic Procedures Bill and the Proposed National DNA Database* was released on 27 May 1999. Following the receipt and consideration of further submissions in response to the Discussion Paper, in February 2000, a final Report and the Model Forensic Procedures Bill were released.

The position in NSW during this process was as follows:

- In October 1998, the NSW Cabinet approved amendments to the *Crimes Act* to comprehensively regulate police powers with regard to the taking of forensic samples from arrested persons. The decision was expressed to be substantially in accord with the existing Commonwealth legislation and the Draft of the MCCOC Model Bill (1995 version);
- A draft Bill was prepared, however it was clear that Commonwealth and technological developments had overtaken the NSW Cabinet decision, particularly the announcement by the Commonwealth that they would fund the establishment of a National DNA Data Base; and
- In conjunction with MCCOC, the NSW Attorney General's Department then provided instructions to Parliamentary Counsel to draft a fresh Bill, taking into account the developments at MCCOC and consistent with the proposed MCCOC Model, as well as police proposals. Ongoing discussion between the Attorney General's Department and NSW Police resulted in the *Crimes (Forensic Procedures) Bill 2000*, which will be discussed in further detail below.

There are two main differences between the Act and the Model Bill in their treatment of offenders. First, while the Act is limited to serious indictable offenders currently serving a term of imprisonment, the Model Bill is not. Under the Model Bill, released offenders may be asked to consent to a forensic procedure. Secondly, and this to some extent cancels out the first difference, the Model Bill imposes criteria for the testing of offenders, that is, consideration of the seriousness of the circumstances surrounding the offence committed by the offender and whether carrying out the procedure is justified in all the circumstances, which are not present in the Act.[44]

2-8-2 Key differences between the Model Bill and the Act[45]

Model Bill	*NSW Act*
Buccal swabs are classified as an intimate forensic procedure	Buccal swabs are categorised as a separate procedure (neither intimate nor non-intimate)[46]
Before requesting or ordering a forensic procedure, a magistrate or police officer must be satisfied that the procedure *is likely to* produce evidence tending to confirm or disprove the suspect committed the relevant prescribed offence.	Before requesting or ordering a forensic procedure, a magistrate or police officer must be satisfied that the procedure *might* produce evidence tending to confirm or disprove the suspect committed the relevant prescribed offence.
The request or order must be justified in all the circumstances. Certain factors *must* be taken into	The request or order must be justified in all the circumstances. No guidance given to factors to be

[44] Recognition of a legislature's capacity to diverge from the Model Bill and to create other approaches to the balance between law enforcement priorities and individual rights has been examined in the case law: *Lednar & Ors v The Magistrates' Court & Anor* [2000] VSC 549

[45] Broadly speaking, NSW is considered to be, together with the Commonwealth and the ACT, a jurisdiction that closely follows the Model Bill. Tasmania, Victoria and South Australia follow the Model Bill in some respects, and Victoria has recently amended its legislation to bring it closer to the Model Bill, as has Western Australia. Queensland and the Northern Territory do not presently follow the Model Bill at all, however it has been suggested that both jurisdictions are considering bringing their legislation more into line with the Model Bill.

[46] For all intents and purposes, they are treated as intimate procedures. The significance of the difference is in what circumstances the procedure may be carried out, ie on a person suspected of a '*prescribed*' offence, for intimate procedures and buccal swabs, whereas non-intimate procedures (other than hair root samples) may also be carried out on a person suspected of a summary offence. The second difference between the various categories relates to the process for authorising the carrying out of forensic procedures without consent.

account under clauses 8(2) and (3), (see also clauses 14 and 19). These factors are: (2) In determining whether a request is justified in all the circumstances, the police officer [or magistrate] must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence against the public interest in upholding the physical integrity of the suspect. (3) In balancing those interests, the police officer [or magistrate] must have regard to the following matters: (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence, (b) the degree of the suspect's alleged participation in the commission in the relevant offence, (c) the age, physical and mental health and cultural background of the suspect to the extent that they are known to the police officer [or magistrate], (d) whether there is a less intrusive but reasonably practical way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence, (e) if the suspect gives any reasons for refusing to consent – the reasons, (f) any other matter considered relevant to balancing those interests.	considered in arriving at this decision, and there is no specific requirement of balancing competing public interests in determining this issue.
No guidelines as to seeking consent from Aboriginal and Torres Strait Islanders (ATSI) suspects.	There are certain safeguards in relation to seeking the informed consent of ATSI suspects, including: (a) the right to have an interview friend present during the consent process and the forensic procedure; and (b) a requirement that an Aboriginal legal aid organisation be informed that a request to consent to a forensic procedure is to be made.
A sample of forensic material may be taken from *all* serious offenders (those convicted of offences carrying a maximum penalty of five years or more) – including those who have been released, who are in prison for another offence or who have not received a sentence of imprisonment.	A sample of forensic material may only be taken from those serious offenders currently serving a term of imprisonment *for that serious offence*.
Before seeking the consent of the serious offender, the police officer must be satisfied that the request is *justified in all the circumstances*.	The power of NSW police to seek consent for non-intimate forensic procedures of serious offenders in prison is *unrestricted*.
If consent is not obtained, a police officer or court may grant an order for the procedure after considering: • whether the sample could be obtained under	If consent is not obtained, a senior police officer may grant an order for the procedure after considering whether the Act would authorise the forensic procedure in the absence of the order.

the Bill's provisions in the absence of the order; • the seriousness of the circumstances surrounding the offence; and • whether the carrying out of the procedure without consent is justified in all of the circumstances.	

2-8-3 Critique of the move from '*is likely to produce*' to '*might produce*' evidence

In referring to the move away from requiring that the forensic evidence needs to be '*likely to*' assist in the solving of a designated offence, some critics have suggested that the '*watered down standard*' is so weak as to be meaningless.[47] On the other hand, the police submit that the '*is likely to*' test of the Model Bill would be unworkable in practice, and have obtained advice from the Crown Solicitor's Office to that effect.

The debate about this example of divergence tends to demonstrate how a focus on what appears to be a diminution of legislative protections may mask more fundamental problems with the Act. For instance, there are significant difficulties with the language of drafting in section 12, and subsections (ii) and (iii) may be redundant to the test and impugn the workability of the threshold from the outset.

Dr Jeremy Gans has presented a well developed critique of both the Model Bill and the NSW Act,[48] and suggests that by focusing on issues of divergence, the more perceptive critique has been deflected away from the flaws in the initial Model Bill, and the concept of model legislation in the area more generally. On the 'might versus is likely' contest, he indicates the dangers associated with the lower standard.[49] The Gans critique rests on a challenge to the logic of the legislation, the poverty of drafting and the inability of the legislators and policymakers to contemplate the outcomes of their initiatives.

We also have reservations regarding the watering down of this protective provision. However, our approach is typical of the applied nature in which we are addressing this Review. Juxtaposed against the realisation that much more crime scene material is being imposed upon DAL and its analysts by the police without considered qualitative evaluation, there is a commitment by this Review to utilise legislative sieves to better encourage best practice and guarantee the efficient use of limited resources, along with any concerns for the appropriate protections of the suspect. We do not simply accept that a higher standard here makes it tougher for the police to do their job. In fact, the reverse may be true, and a return to the '*is likely*' approach, consistent with other such legislative provisions in NSW, may require more considered and eventually effective investigation practice.

2-9 The *Crimes (Forensic Procedures) Amendment Act 2002*

As stated above, except for Part 8, the Act commenced operation on 1 January 2001. The Standing Committee released its Report in February 2002. Partly as a result of the

[47] See Justice Action in its submissions to the Standing Committee, *supra*, n2, p74. This position was also supported by the NSW Privacy Commissioner in the Standing Committee Report at p74 and the Young Lawyers in their submission to this Review.

[48] See for example J Gans, 'The Quiet Devolution: How the Model Criminal Code Officer's Committee botched the NSW's DNA Law' (2002) 14(2) *Current Issues in Criminal Justice* 210.

[49] Standing Committee Report, *supra*, n2, p75.

recommendations contained therein, some minor amendments were enacted in the *Crimes (Forensic Procedures) Amendment Act 2002* (the Amendment Act). A summary of the provisions of the Amendment Act, which together with Part 8 of the Act will commence on 1 June 2003, is set out below.[50]

Section	*Effect of new provision*
3	The class of investigating police officers who may make applications for orders for the carrying out of forensic procedures is extended.
9	The means of providing consent to a suspect is extended from '*a written statement*' to '*personally or in writing*'.
10(9)(b)	The provisions for interview friends for ATSI suspects were amended so that police can also exclude an interview friend where he/she forms a reasonable belief that that person may be a co-offender or involved in the commission of the offence.[51]
10(10)	If an interview friend is excluded, the suspect may choose another. If the suspect does not waive their right to a friend and doesn't choose another, police may arrange for an interview friend.
27(3)(b)	The circumstances in which a Magistrate may make a second order for the carrying out of a forensic procedure are extended.
32(3), (4)	The effect of a person's consent on an interim order and the conditions to be met before an interim order can be confirmed are clarified.
33(1), (4), (9)	Aspects of the application process for interim orders are clarified.
36, 36A	The recording requirements for the application and making of interim orders where not in person are simplified/clarified.
43A	This provision makes it an offence for a person to knowingly give false or misleading information in an application for an interim or final order.
49A	When a suspect self-administers a buccal swab, it may be carried out in the presence or view of a person of the opposite sex to the suspect.
55(3)	Where an ATSI suspect waives their right to an interview friend, they may still have a legal representative present.
57(2)(b)	A suspect may object to any form of electronic recording of the carrying out of a forensic procedure, not merely to a video recording.
57(6)	Nothing in the section prevents any recording of a forensic procedure for the purpose of maintaining good order, discipline and security in a correctional centre or other place of detention.
69 – 73	These sections limit the powers for authorising the carrying out of a non-intimate forensic procedure on a serious indictable offender to senior police officers.
76A	Excluded volunteers are defined as victims of personal violence offences and certain property offences..
77(2)(c)	Certain information requirements are imposed in respect of volunteers providing samples to be placed on the missing persons index.
83A	Evidence arising from forensic material volunteered for the purposes of the missing persons index is inadmissible in proceedings against the person who volunteered it.
87(2)	Forensic material taken from a serious indictable offender is to be destroyed as soon as practicable following the quashing of the person's conviction.
87A	Finger or handprints voluntarily taken for the purpose of elimination in relation to property offences must be destroyed or returned to the person as soon as practicable

[50] The provisions of Schedule 1 are set out here. Schedule 2 amends the *Police Service Act 1990*, now the *Police Act 1990*, in respect of taking fingerprints and handprints from police officers.

[51] Note that this provision should have been replicated in other similar provision, see for example ss54 and 55. This Review understands that these omissions will be corrected miscellaneous legislation.

	after they have been used to eliminate the person from inquiries in relation to the event.
89	The destruction of forensic material where related evidence is inadmissible is to be confirmed as soon as practicable after the end of the proceedings before the court.
96	Amendments are made in respect of registering order with participating jurisdictions.
98(1A)	A telephone interpreter service may be used where an interpreter is required.
109(2)(f)	The circumstances in which information stored on the DNA database system may be disclosed are extended to informing a volunteer of any match on the missing person's index between their DNA profile or that of a missing blood relative and that of a person on a DNA database index.
114(b1)	This clarifies that the Act is not intended to limit or exclude the operation of another NSW law relating to the taking of finger or handprint of applicants seeking employment under any Act.
121	The period for the Ombudsman monitoring the operation of the Act is extended to 18 months after the commencement of Part 8.

2-10 The *Crimes (Forensic Procedures) Regulation 2000*

The *Crimes (Forensic Procedures) Regulation 2000* (the Regulation), commenced on 1 January 2001, except for clauses 7A and 8, which will commence when Part 8 of the Act does. The Regulation has been amended by the following regulations:

- *Crimes (Forensic Procedures) Amendment Regulation 2001* (commenced 23 February 2001)
- *Crimes (Forensic Procedures) Amendment Regulation 2002* (commenced 7 June 2002)
- *Crimes (Forensic Procedures) Amendment (Corresponding Laws) Regulation 2002* (commenced 14 June 2002)
- *Crimes (Forensic Procedures) Amendment (Informed Consent) Regulation 2002* (18 October 2002, although in practice, the regulation will commence at the same time as Part 8 of the Act).

In brief, the Regulation makes the following provisions:

Clause 5 prescribes certain organisations for the purposes of the definition of 'Aboriginal legal aid organisation' in s 3(1) of the Act.

Clause 6 – for the purposes of paragraph (b) of the definition of 'appropriately qualified' in section 3(1) of the Act, a person is qualified to carry out a forensic procedure if the procedure is one the Commissioner of Police has authorised the person in writing (either generally or in a particular case) to carry out.

Clause 7 prescribes particulars in the form of consent for the consent of serious indictable offenders (SIOs) for the purposes of section 72(a) of the Act.

Clause 7A prescribes matters for the informed consent of a volunteers or their parent or guardian for the purposes of section 77(2)(e) of the Act.[52]

Clause 8 prescribes particulars for the informed consent of a volunteer or their parent or guardian for the purposes of section 78(a) of the Act.

Clause 9(1) - For the purposes of section 92(2)(b) of the Act, a person may access information stored on the DNA database system for the purpose of making it available to the person to whom it relates if an application in writing to make the information available is made to the responsible person for the DNA database system by or on behalf of the person, including providing any

[52] This was inserted pursuant to Recommendation 22 of the Standing Committee Report.

required proof of identity to the responsible person. Under cl 9(2), for the purposes of s 109(2)(b) of the Act, information stored on the DNA database may be disclosed in similar circumstances.

Clause 10(1) prescribes the purpose of facilitating the assessment of the validity of a claim of apparent or possible wrongful conviction for a serious indictable offence made by or in relation to a serious indictable offender as a purpose for which a person authorised by the responsible person for the DNA database system may access information stored on the DNA database system under section 92(2)(j) of the Act, whether that information relates to the offender or any other person. Under subclause (2), this provision applies whether a person was convicted before or after the commencement of this clause.

Clause 11(1) provides for the disclosure of the information for the purposes of section 109(2)(g) of the Act in the same circumstances as set out in clause 10, and also applies irrespective of when the person was convicted of the offence.

Clause 12 prescribes the legislation of other Australian jurisdictions which deal with forensic procedures as a corresponding law for the purposes of section 95 of the Act.

2-11 Representations for Further Legislative Amendments

In summary, the following is a selection of representations made for amending the Act which have been brought to the attention of this Review. Where appropriate, we have provided comments on the proposals.

Section	*Proposal*	*Review's response*
	PART 1	
3	The definitions of '*corresponding law*', '*DNA database system*', '*forensic material*', '*forensic procedure*' and '*prescribed offence*' should be amended.	
	The definition of '*forensic material*' should be amended to exclude suspect photographs, to give police the power to order the taking of such pictures for the purposes of an identification parade where the person has refused to participate in a line-up.	We qualify this proposal: see 3-5-2.
	The phrase '*taken from or of a person's body*' should be redrafted to clarify that (a) and (b) also apply to inanimate objects from crime scenes.	
	'*Buccal swabs*' should be redefined either intimate or non-intimate. NSW Police have suggested that they be classified as non-intimate, but also suggest that forensic procedures which can yield DNA should be classed as intimate and those which do not classed as non-intimate.	We do not see the need to alter the current provisions.
	The taking of *fingernail scrapings* should be amended. Apparently it is very difficult to obtain DNA from these (DAL have not obtained a single profile). A better position from the sampling point of view would be to allow for fingernails to be cut as samples.	The Review has received no additional evidence on this.
	The phrase '*establishing the identity*' should be clarified, as at the moment it is open to be read too broadly.	We support the principle that DNA testing should only be carried out for the sole purpose of identification in exceptional

		circumstances.
	In relation to *intimate forensic procedures*, Dr Jeremy Gans suggests adding '*from a person's body*' after '*taking*'; otherwise taking from inanimate objects would be covered by the legislation.	Though the Act is not intended to cover investigation at crime scenes, we see merit in clarifying the scope of the Act in this way.
	The police want time for preparing an application and applying for a court order to count as '*time-out*'.	We support this argument.
	Both NSW Police and DAL suggest the Act would be clearer in relation to '*destroys forensic material or information*' if the provision stipulated '*sufficient for the purposes of the Act if the link is destroyed*'.	We see merit in this clarification, but have reservations about the assumption that '*de-identification*' means '*destruction*'. Providers need to be made aware that de-identification is the likely outcome of the destruction provisions
4	The ALS will not permit its staff to act as an '*interview friend*' unless the Act is amended to provide immunity from being called as a witness for the prosecution.	We concede the potential for a conflict of interest in such circumstances.
PART 2		
5	The police argue that photographs should be able to be taken by the order of a senior police officer (rather than a magistrate) for a suspect not under arrest.	We do not accept this position and maintain the importance of a magistrate's order in respect of suspects not under arrest.
PART 3		
9	Issues in relation to informed consent have produced broad criticism.	We recognise informed consent as crucial to many of the protections in the Act, and discuss the provisions further at 4-1-2.
10	The police want the requirements for interview friend for ATSIs to be only '*if reasonably practicable*'.	Like the Standing Committee, we reject this proposal.
12	This section is very complex and could be reworded.	We have received advice from Parliamentary Counsel's Office that this section, and sections 20 and 25, could be redrafted in a more user-friendly manner.
	The Standing Committee recommends amending the '*might produce*' to '*is likely to produce*'.	We support this recommendation, mainly in the spirit of best practice.
	The police suggest that subsections (c)(iii), (d)(iii), (e)(iii) and (f)(iii) be clarified and furthermore that the consent information be prescribed in the Regulation.	We believe that clear obligations regarding consent information are crucial to investing reality in the notion of informed consent.
13	The police would like less information to be provided to suspect, while Dr Gans and Justice Action would like additional information provided.	We note the impact of the Amendment Act in this context and reiterate the importance of providing full information for

		consent.
	The Standing Committee suggested that the police be required to inform the suspect that a refusal to consent is not admissible as evidence and the making of a court order is discretionary.	We support this recommendation as part of the plain English proposals.
14	The position should be clarified as to what must be done with forensic material obtained prior to or during the withdrawal of consent.	We agree with the need for such clarification.
15	If electronic recording doesn't occur, the suspect's signature (ie consent) should be obtained in presence of non-police witness.	We support this.
PART 4		
19	The police argue that this section should be amended to permit a Senior Police Officer to order a buccal swab (rather than hair sample) where suspect has refused consent. Dr Gans suggests listing the various procedures from least to most intrusive and requiring officers to use the least intrusive procedure practicable.	We support both these positions.
20	The Standing Committee recommended that guidelines be inserted to assist police officers in determining whether the forensic procedure is *justified in all the circumstances*.	The Review supports the spirit of this recommendation as a component of the best practice strategy. We also support this in respect of magistrates in section 25.
PART 5		
27	It should be clarified that while an order may be made a second time, it shall not be made a third time.	We do not see the need to state this.
37	The police request the power to prevent the destruction or contamination of evidence from the time the suspect comes to attention of police (while waiting for interim order). They also seek to clarify whether the power allows police to detain a suspect not under arrest to make an application for an interim order.	No such power exists as we read the Act.
PART 6		
49	Subsections (a)(i) and (ii) are arguably redundant.	We agree (see section 12).
57	The police require the power to record an objection to the carrying out of a forensic procedure (to avoid allegations that police refused to record). Where a person waives the right to an independent person, they suggest they should have the right to insist on having a non-police witness present.	We see the wisdom in this.
58	The police suggest the defence should only be given results of analysis on request.	We do not see this as compatible with the spirit of best practice.
60	NSW Police argue an amendment is required to allow a medical practitioner to remove a suspect's bandages prior to carrying out a forensic procedure (in the context of wounded suspects).	Any such amendment would require the agreement of the Department of Health.

PART 7[53]		
64	The police argue that a Senior Police Officer should be able to order a self-administered buccal swab, not just a hair sample.	We see the wisdom in this.
66	Dr Gans says that this should be deleted and there is no reason why the offender provisions should not be available, simply because an offender happens to volunteer or is a suspect. The police counter by suggesting that '*the person knows*' be inserted before '*serious indictable offender*'.	The Review has advised a significant tightening up of the protections as they apply to volunteers – see 4-1-4, 4-4, 7-2-18, 7-2-19 and 7-2-23.
67 – 70	It is suggested that consent by an offender should be abolished as it doesn't constitute real consent.	In our view, informed consent remains crucial to the essential information provisions of the Act.
71	The Act should either make it compulsory for SIOs to be tested or insert a '*justified in all the circumstances*' provision. The section as worded doesn't really make any sense.	We support the insertion of justifications.
74(2) and (3)	There is the potential for confusion between these subsections. Is the intention that it apply only for non-intimate forensic procedures, and if so, what about the fact that buccal swabs may be less painful that hair samples?	We do not share the confusion.
PART 8		
76(1)	The Young Lawyers suggest the definition of volunteer is misleading and should provide instead for '*a person, other than a suspect, who consents to a request by a police officer to undergo a forensic procedure*'.	The Review wants to see provision for a more stringent interrogation of consent by '*volunteers*'.
76(2)(b)	The Young Lawyers suggest this section incorrectly assumes that the interests of the parent/guardian and the child are aligned. Section 76(3) effectively overrides s76(2)(b)(i).The consent provisions as they are here should be removed.	We agree, with modification.
76(4)	The police suggest there is no need for information to be provided in relation to volunteers, as required in Part 6 for people detained or arrested.	We disagree.
77 and 78	Dr Gans suggests that volunteers should be provided with same level of consent information as suspects and offenders.	In some contexts, the information won't be required, eg in respect of cautions, but we agree this should be clarified.
79	The issue of what is to be done with a sample taken before consent is withdrawn needs to be clarified. There are also apparent contradictions between sections 76(3), 79(1)(a), 80(2), and 81.	We accept the need for clarification and note that volunteers should not be left in a worse position than suspects or offenders.
80(1)(b)(i)	This should be clarified as it now reads as if the child	We agree.

[53] NSW Police have a raft of requested amendments if responsibility for sampling inmate populations is not transferred to the Department of Corrective Services (DCS). The Review is advised that there is a joint NSW Police and DCS proposal for this transfer, and hence we do not examine the legislative amendments the police would require in the absence of such a transfer.

	or incapable person could be a suspect.	
80(2)(a)	This provision should be deleted.	We agree.
PART 9		
82	This section is inconsistent with the *Evidence Act*, especially regarding the terminology as to '*desirability*'. The section also applies where there has been *any breach*, no matter how technical.	The exercise of judicial discretion needs to be tightened. The technicality of any breach can be recognised through the application of the discretion.
	The Young Lawyers want this section amended to apply to evidence obtained from *any* forensic procedure, including samples collected from crime scenes. In addition, they suggest the considerations in subsection (5) should be mandatory where prescribed procedures have been breached.	We support these proposals.
PART 10		
86	The provisions for the destruction of forensic material where an interim order is disallowed are more stringent than where the sample is taken in contravention of the Act.	This is a matter which should be settled through the best practice strategy for investigators.
87	The police want the obligation that forensic material be destroyed following quashing of a conviction to fall on the Commissioner, not the individual officer.	We support this proposal.
88	This section should be redrafted to provide for automatic de-identification or destruction. The police also suggest that only samples obtained from suspects and SIOs should be subject to the destruction provisions, otherwise material vital to the investigation might be destroyed.	Protocols in relation to de-identification and destruction, including the retention of evidence for the purposes of exculpation, need to be settled as a matter of urgency as part of the best practice strategy.
PART 11		
90	The police suggest that the definition of *DNA database system* be amended to make for easier inter-jurisdictional (in particular, overseas) matching.	We have not received evidence to support this, but suggest any amendments involve consultation with the Privacy Commissioner.
93	The police suggest the matching tables should be simplified, and further argue that suspects should be able to be matched against suspects.[54]	We would like the Act to operate with the benefit of the tables as they are, in order that the Attorney General could gain more specific details (individual evidence) of the complications which the police cite.
94(2)	The police suggest that the responsible person for the DNA is DAL, and hence, they should destroy the information. The provision should therefore be amended to '*becomes aware that the identifying period has ended*'.	We consider that the resolution of this issue lies in the redefinition of '*responsible person*'.

[54] The Act does not in fact define '*forensic matching*', and accordingly, it is not currently clear whether the term covers comparisons to establish familial relationships, eg paternity. The Review sees this as an appropriate concern for the best practice code.

PART 12		
95	The definition of '*corresponding law*' causes problems in respect of overseas jurisdictions, as they are not likely to have a single statute that '*substantially corresponds*' to Part 11 (see also s90).	Any extension of this definition should bear in mind privacy considerations.
PART 13		
109	The police request a new subsection in (3) to allow for matching of fingerprints and photographs with other Australian jurisdictions.	Further cross-jurisdictional disclosure must be an issue for the settlement of third party disclosure protocols as part of the code of best practice
PART 15		
116	This list can't be established without of the cooperation of the Aboriginal Legal Services, which presently refuse to act in this capacity in the absence of immunity from being called as a witness for the prosecution.	We support the need for clarifying the position of interview friends.

Chapter 3 – Central Themes in the Legislation

This Chapter explores the essential themes emerging from the Act. In a general sense, these themes indicate the aspirations for its workings, and should suggest those issues most pressing for reform.

3-1 Crime Control Themes Arising out of the Act

Much of the justification for the Act as it stands is about crime control, although the public and political confidence behind forensic procedures, and DNA analysis in particular, as a crime-fighting tool prevails without detailed empirical support.[55] Our surveys suggest that prosecutors and jurors at least believe that these powers should be expanded in order to more effectively deal with crime.

It has been put to the Review that the crime control motivations behind the legislation have led to a reversal of the onus of proof. At least in the practice of police investigation, the collecting and matching of forensic material appears at present to be much more about looking for the guilty than establishing innocence. If traditional presumptions as to innocence were paramount in the forensic procedure area, then the innocence dimension should not need authentication. It is when these presumptions are compromised that the innocence dimension bears much more significance.

3-1-1 The function of the Act in improving police investigation capacity

Broadly speaking, it appears to the Review that the police are happy with the expansion of investigative powers provided through the Act, but that they would like more power, less restriction in the exercise of these powers, lower accountability expectations, and a reduction in the complexity of interpreting and activating the power which the Act bestows.

Police Standard Operating Procedures (SOPs) and the instruction material which accompanies the provision of information about the Act within NSW Police promotes the use of forensic procedures, although this Review has become aware that the use of forensic procedures across the various Local Area Commands (LACs) is sporadic.[56] It seems that certain officers are comfortable with forensic procedures and use them widely, whereas others are reluctant to use these powers.[57] The specialist crime units and crime scene operatives are also more likely to use the powers under the Act than are more general duties officers. It would appear however that the selective use of forensic procedures is not a feature of rank, LAC or even specialisation (except in the case of FPIT).

The growth in the use of forensic procedures by police is exponential. This may be evidence of an increasing confidence in this investigation technique and evidence source. It might also be a realisation that unless forensic evidence is presented, many circumstantial cases will not

[55] The police data which the Review has consulted relies heavily on '*cold links*' as a success measure, and yet the reality of this investigation and clear-up technique depends on the crimes it is said to solve, the circumstances in which the matches are said to lead to a crime control outcome, and whether the same might have been achieved through more conventional and less expensive methods.

[56] Clear information on this is restricted by the location of correctional institutions within the catchment of certain LACs, thereby skewing use figures.

[57] Again, an accurate measure of officer use is compromised by the habit of certain duty officers entering into the NSW Police COPS data system several forensic procedures on behalf of other officers.

get a run, or will not be treated seriously by prosecutors and juries. As forensic procedures become a more common and more predictable feature of police investigation practice, then resource concerns as well as the critical attention of legal professionals and judicial officers will require police to embrace best practice strategies for this type of investigation technique. The pressure will be on police to sample more often, although if the forensic component of the investigation comes to be relied upon too much, then police investigations may suffer as much as benefit through shortcuts and compromise. The invitation to malpractice will be significant, bearing in mind the unique susceptibility of DNA in particular to abuse. Already serving police officers have admitted to this Review that DNA is very easy to obtain and would be easy to plant, and that such practices would be difficult to uncover. In this respect, best practice strategies will be important for the enhancement of police investigation sophistication and integrity.

Work clearly needs to be done on the capacity of forensic procedures to enhance and improve police investigation capabilities and outcomes. Against this, the specific powers provided under the Act may be more definitively evaluated. It is not enough to simply enable the police to require the production of certain evidence, in circumstances which otherwise might be deemed an invasion of individual freedoms. The justifications need to be established, both in terms of these powers and the investigation practices which they enable, in order to countenance arguments in crime control terms for their retention or expansion. In particular, it is our strong view that any suggestion by the police to relieve existing qualifications on police powers created under the Act, such as those connected with requiring photographs to be taken for identification purposes, need to have more than inconvenience and frustration at their core.

3-1-2 The function of the Act in improving prosecution capacity

Our observations suggest that, particularly in cases which are an amalgam of circumstantial evidence, DNA has a recognised impact on prosecution success, and is very high among the factors influencing conviction.[58] Our juror surveys indicate that jurors come to court expecting DNA to be very significant in the case argument and they mainly leave with that expectation confirmed.

Along with the enhanced capacity for the prosecution provided by forensic evidence[59] goes a responsibility for the clear and comprehensible presentation of this evidence in court. The Act says little on this. Our observations of trials confirm that where prosecutors are skilful in the management of forensic evidence, then they are rewarded by the manner in which this is treated by the jury.

These responsibilities however do not end with the judge or jury. Prosecutors have significant resource advantages in the acquisition and analysis of forensic evidence. If the spirit of the adversarial trial is to be maintained with respect to such evidence, then prosecutors need to be mindful of their disclosure conventions in particular, so as not to further disadvantage the accused. In the interests of a fair trial, prosecutors also need to utilise their 'preferred client'

[58] M Briody, 'The Effect of DNA Evidence on Sexual Offence Cases in Court' (2002) 14(2) *Current Issues in Criminal Justice* 159.

[59] With the science largely now conceded, we have been advised by defenders, much as was the case with fingerprints, that if there is a DNA component identifying their client, the pressure is there to plead guilty or reconstruct the defence away from issues of identity.

relationship with the laboratory conducting the analysis, in order to ensure that forensic evidence is both credible and accessible.

3-1-3 Defence capacity and effects

Despite what appears to have been taken by defence counsel as a defeat in the struggle over the science of forensic procedures,[60] they have enhanced their capacity to challenge these evidence forms. Later in this Report, we detail the manner in which challenging DNA may be integrated into best practice strategies for trial presentation and argument. In a climate of rising sentences and a growing reluctance to plead guilty to certain types of offences, defenders will be receiving more opportunity to challenge the tide of forensic evidence. In so doing, defence advocates need to be disabused of the 'wisdom' that confused juries will always acquit.[61]

While a strenuous defence and actively putting the Crown to proof is the hallmark of the adversarial trial system, our observations commend cooperation between the prosecution and the defence in the presentation of aspects of the forensic case which are not in question. Pre-trial contest and agreement, as well as common exhibits, may facilitate an atmosphere of understanding in the trial and avoid unnecessary confusion in the mind of the jurors.

The Standing Committee was concerned about the particular disadvantages faced by the defence in managing forensic evidence. This was seen as compounded by the provisions in the Act expanding thresholds and watering down probability tests for those compelling sampling. We share these concerns, along with the issues for defenders raised in the focus groups, including:

- Equity in sample access and independent analysis, especially for indigenous suspects;
- Retention of samples;
- Undue delay in forensic analysis;
- Financing and availability of alternative experts;
- Interpretation of mixed samples;
- Chain of custody integrity;
- Late prosecution disclosure;
- Inadequate disclosure by DAL; and
- Judicial directions.

We deal with these issues in turn later in the Report.

3-1-4 Impact of DNA evidence on juries and judges

In Part 5 of this Report, we mention briefly our insights from juries, and to a lesser extent, judges, regarding the significance of DNA evidence. In our limited empirical study of jurors, no response was clearer across the trials examined, than that jurors bring with them a confidence in the forensic significance of DNA evidence. This premise is confirmed - if not expanded - as a result of exposure to DNA in the trial, although in those trials where jurors

[60] We are mindful of how sudden the fall from grace of any major investigation technology can be, as occurred with the recent discrediting in the UK of fingerprints, which had for generations stood unchallenged as an identifier. A recent BBC Panorama program, 'Finger of Suspicion', aired on Four Corners, ABC, on 23 September 2002, exposed how flawed this assumption and the matching science may be. For further details, see http://www.abc.net.au/4corners/archives/2002b_Monday23September2002.htm

[61] See M Findlay, *Jury Management in NSW,* AIJA, Melbourne, 1994

were confused about the DNA[62] or where the DNA ended up playing a lesser role in proof than anticipated, jurors seemed less impressed by its forensic significance. The importance attached to forensic evidence prevailed despite judges instructing jurors that in circumstantial cases at least, it should not be treated differently from any other piece of evidence.

3-1-5 Potential challenges to the value of forensic evidence

Police investigators have conceded to this Review that there may be inducements to fabricate evidence through planting or corrupting forensic samples, particularly at crime scenes. We anticipate that increased pressure from advocates to have access to forensic evidence in their briefs, and the growing understanding by police of the significance of DNA in the mind of jurors, will exacerbate these pressures.

The defence is not currently well-placed to challenge crime scene sampling and in fact almost all the challenges mounted against DNA focus on the analysis stages.[63] As with admissions and confessions in the past, there is a significant chance that police will treat forensic evidence as the trigger for a successful brief, and once they have achieved this evidence, will be diverted from other more conventional and more demanding investigation techniques.

Also, as ultimately occurred with admissions and confessions to police, the courts may soon approach uncorroborated DNA with circumspection. Clearly such an outcome would diminish the respect for and utility of what this Review considers to be a potentially very important crime-fighting tool.

Yet it is not only loose police investigation practices which may tend to diminish the significance of DNA evidence. As a result of a successful challenge to the science (ie. analytical protocols and practice at DAL) or mathematics (incorrect probabilities and conclusions) the jury may be quick to withdraw its confidence in the evidence and its impact. The police, together with the scientists, therefore have a vested interest in protecting the integrity of this new and, as yet, seemingly convincing investigation tool.

3-1-6 Offences covered by the Act

The Review is not satisfied with an offence-based approach to the protection of forensic procedures, the punishment of any abuse of powers and the integrity of the legislation more generally. The Act does identify several offences, but makes these conditional and only accords their violation with summary offence status. For instance, it is an offence under section 109 to disclose forensic information outside the provisions of the section. However, DNA database information can be disclosed in a broad variety of circumstances and the conditions militating against the offence are very wide. Supporting privacy protection legislation may not compensate for the breadth of lawful disclosure. In fact, prisoners and their families may be specifically excluded from such protections and denied access to compensation for unauthorised use of DNA data.[64]

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[62] Even where jurors demonstrated some confusion about what forensic evidence was adduced and for what purpose, they still declared confidence in its significance.

[63] We have been informed of one District Court case where the prosecution was suspended when irregularities in the use of DNA by the police during the investigation were uncovered. Police disciplinary proceedings are proceeding in this matter and the Review has been unable to establish how this irregularity came to the notice of prosecutors and police.

[64] See *Privacy and Personal Information Protection Amendment (Prisoners) Act 2002*, assented to and commenced on 12 December 2002.

Another profound difficulty with prosecuting the offences under the Act is the difficulty for victims in knowing that their DNA information, for instance, has been used in an unauthorised fashion. The individuals and institutions essential to detecting such unauthorised use may be in fact the most likely perpetrators and data violators. Enforcement problems such as this will militate against the successful prosecution of such offences.

The ALRC in its reference covering the ownership and use of genetic materials[65] has advocated criminal sanctions and civil action for misuse. The NSW Council for Civil Liberties (CCL) advocates a general offence covering the unauthorised and illegal use of genetic material. This approach has found favour with the ALRC Inquiry, which suggested in its Discussion Paper that:

> *in light of the ready access by individuals to genetic testing services, there should be additional legal protection against the testing of genetic samples without the knowledge and consent of the individual concerned, or other lawful authority, and that this should take the form of a new criminal offence.*[66]

The ALRC goes on to say that particular attention is required to ensure that legitimate genetic testing practices '*for law enforcement purposes, including under regulatory frameworks for the forensic use of genetic samples and information*' would not be caught by the new criminal offence.

This Review is attracted to the general offence model, and suggests that there would be certain circumstances where the obtaining of someone's DNA without their knowledge and/or consent, although for the purposes of law enforcement, should nonetheless constitute an offence, where its intention is to subvert the spirit and protections of the Act. It is relevant to note, for example, that the Review was advised by a Crown Prosecutor of a case where a DNA sample was taken from a glass a suspect had drunk out of during a police interview without the provider's consent or knowledge. Accordingly, we advise that the offence should be drafted to prohibit the taking of forensic samples without the consent of the provider (without an order) where the provider is known to the sample collector, and where a request for consent could otherwise have been made.

3-2 Process Themes

In considering process themes, we are looking at how forensic procedures work and the measures of credibility for the process of its collection and use. The following brief discussion should be considered in the context of the ways in which the principal players in the process interact.

3-2-1 Complexity and vulnerability of the collection process

The Council for Civil Liberties (CCL) has argued persuasively before this Review that the process for collecting DNA samples is particularly susceptible to abuse and vulnerable to corruption and contamination, for example, where the same police officers obtain samples from multiple crime scenes before depositing the samples to the laboratory for analysis. Despite the detailed police instructions regarding careful forensic collection, the Review has

[65] See ALRC DP 66, *supra*, n30, Chapter 5: Regulating Access to Genetic Testing.
[66] *ibid* at para 5.98

become aware of crime scene collection practices which would compromise the integrity of the sample long before storage and analysis.

An essential safeguard for the maintenance of sample integrity at the point of collection is the potential to reference back during analysis to a police personnel DNA database. The police in NSW have strenuously resisted the compulsory testing and recording of DNA from police. It may be that this reservation is in part fuelled by an understanding of the potential for misusing DNA information, as well as a healthy suspicion about its integrity. Although we have reservations about the compulsory testing of any particular group in society, we would welcome the DNA testing of serving police officers and the establishment of a discrete database for crime scene comparison.

3-2-2 Balance between individual rights and the needs of law enforcement in the collection process

The issue of the establishment of a DNA database of serving police officers throws into stark relief the contest between law enforcement needs and the rights of the citizen. Police argue that the innocent individual should not be required to provide a DNA sample, either as a consequence of employment, or outside a legitimate law enforcement imperative.

The rights versus intrusion/compulsion debate is yet more significant in light of UK experience, where DNA information collected for law enforcement purposes was passed on to an insurance firm in relation to their arson investigations. Following the discovery of a disease potential in the sample, the insurer then used this information to disadvantage children of the sample provider when seeking insurance. The use of DNA data by third parties gives more credence to the CCL's blanket opposition to the taking, storage and dissemination of DNA samples from citizens.

If the crime control/law enforcement imperative is to remain the balance against concerns to protect the personal integrity and privacy of citizens, then the justification for sampling, and confidence in the limited use of profile information, needs to be narrowly confined and vigilantly guarded. In addition, we believe that the crime reduction and community safety arguments in support of DNA matching investigative technologies need more rigorous empirical support than has been presented before this Review.

3-2-3 Evidentiary requirements in the trial proofs of DNA

At paragraph 4-7, we suggest that the evidentiary significance of DNA and its unique susceptibility to misuse requires lawyers and the courts to approach this evidence with cautious cynicism. Besides the problems of such matters coming to light in the first place, there should be a practical recognition by the trial Judge that DNA evidence has greater probative significance (to juries at least) than any other form of evidence. This obviously advantages the prosecution in their arguments for inclusion, no matter how the sample was obtained.

As currently drafted, the Act does not provide a wealth of concrete triggers for the defence to argue against admissibility on the grounds of illegal or improper obtaining. This Review therefore argues for a selective strengthening of the Act in this regard. In doing this, we have a practical, rather than a rights-based, primary focus. If the police believe that the Act is too restrictive, and that in any case they will get DNA into evidence no matter how obtained,

there will be little to constrain the practice of obtaining forensic evidence through means outside the scheme of the Act. This would ultimately degrade forensic evidence in the eyes of the law, and police as crime investigators will ultimately be disadvantaged.

3-3 Analysis themes

Crime control outcomes from forensic evidence are influenced by the 'science' interpreting its relevance and meaning. The 'white coat' associations here are obvious, and the role of the expert witness crucial. With DNA in particular, it is the analysis of the evidence, more than its existence alone, which enriches its impact in the trial.

3-3-1 Adequacy and extent of data on the testing of providers, analysis and outcomes

The Report of the Standing Committee was concerned about the adequacy of data and its analysis with regard to forensic procedures. Recommendations 3, 4 and 5 of the Report canvassed the collection of data concerning the percentage of DNA database matches leading to arrests, prosecutions and convictions.

All of this implied the necessity for (and present inadequacy of) data on the 'process' ramifications of forensic procedures. The importance of such data and analysis is emphasised by the realisation that the understandings produced from such correlations are at the heart of many of the crime control justifications for forensic procedures. Without these understandings, such justifications remain apocryphal or merely suggestive.

This Review uncovered a greater and more diverse range of empirical information on law enforcement outcomes of sampling and analysis than was available to the Standing Committee.[67] But it is crucial, if the law enforcement objectives for the Act are to be evaluated beyond apocryphal examples of the effectiveness of DNA sampling, that a more complete and integrated set of forensic procedures process data be established and maintained.

Table 1- Development of Forensic Procedure Testing and Associated Databases (up to Oct/02)

Expr2	Expr1		Growth in database	CountOfCNI[68]
				24
2001	1	Jan-01	625	625
2001	2	Feb-01	1351	726
2001	3	Mar-01	2088	737
2001	4	Apr-01	2762	674
2001	5	May-01	3688	926
2001	6	Jun-01	4684	996
2001	7	Jul-01	5491	807
2001	8	Aug-01	6482	991
2001	9	Sep-01	7284	802
2001	10	Oct-01	8012	728
2001	11	Nov-01	8775	763
2001	12	Dec-01	9262	487

[67] This is mainly police-based data. We are aware that the DPP maintains a limited range of data on forensic procedures for trial and workload purposes. DAL also has data on the maintenance of its databases and concerning its analytical practices and the Review had access to some of this information.

[68] Each person charged has a case number identifier, or CNI.

2002	1	Jan-02	9449	187
2002	2	Feb-02	9978	529
2002	3	Mar-02	10482	504
2002	4	Apr-02	10857	375
2002	5	May-02	11442	585
2002	6	Jun-02	11945	503
2002	7	Jul-02	12712	767
2002	8	Aug-02	12726	14
2002	9	Sep-02	13393	667
2002	10	Oct-02	13823	430
				13855

The exponential growth in sampling is revealed in these figures, despite the occasional erratic frequency in recent testing patterns. This is particularly interesting as one could assume that the inmate population testing would decrease as the substantial component of sampling activity, as the months progress. The following figures reveal information on all DNA samples taken up to January 2003.[69]

Table 2- Total DNA samples by reason for sample and provider status

Involvement Type	ATSI status	Unique Parties
CORRECTIVE SERVICES CLIENT (CSC)	ATSI	2158
PERSON OF INTEREST (POI)	ATSI	310
		2468

Involvement Type	ATSI status	Unique Parties
CSC	Non-ATSI	10,647
POI	Non-ATSI	2,336
		12,983

Involvement Type	Unique Parties
CSC	12,805
POI	2,646
	15,451

The Department of Corrective Services (DCS) naturally provides the largest sample base. As mentioned previously, the threshold for sampling in the DCS environment is whether the provider is a serious indictable offender (SIO). The only way to explain the extent of this sampling against the general reception and daily average prison population figures is to speculate on repeat sampling (of the same offender) and some confusion about what prisoners may be classified as SIOs. The person of interest figures as against DCS clients become interesting when reflected against statistics on forensic sample matching (see Fig 8). There are 564 unique CNIs in the latest data provided by FPIT (to end December 2002).[70]

[69] The search is based around '*unique parties*', however, those tested more than once at different ages, at different places, under a different ATSI-status, under a different gender or listed under more than one involvement type will all be counted twice (or more).

[70] The following data does not refer to unique parties in this sense. Individuals will be double-counted if they were: listed as both ATSI and non-ATSI, tested as both POI and CSC, listed as both male and female and/or linked in more than one DAL report. The data has been corrected for age changes in testing: i.e. individuals tested at two different ages will have only been counted once.

Table 3- Unique CNIs

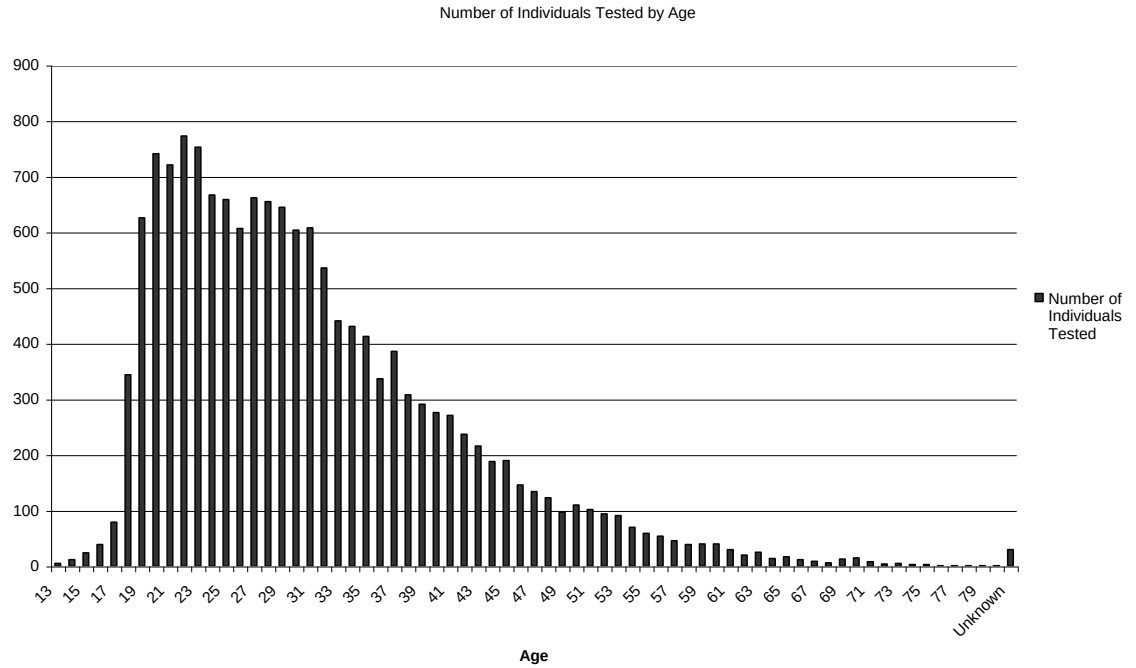
Involvement Type	SumOfCountOfPerson CNI
CSC	464
POI	183
	647

ATSI-Status	SumOfCountOfPerson CNI
ATSI	90
NON-ATSI	557
	647

Sex	SumOfCountOfPerson CNI
FEMALE	22
MALE	625
	647

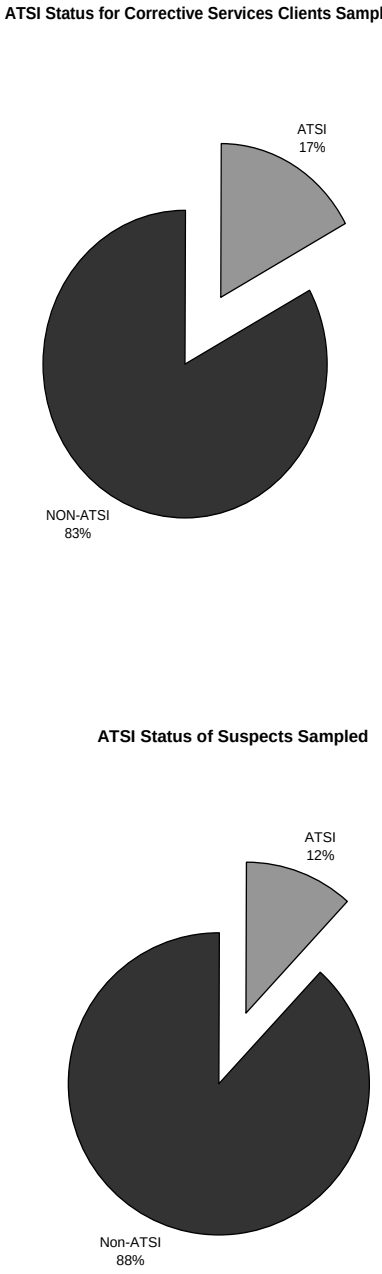
On the trends for sampling and the age of the provider, it would appear that by comparison with the figures for general criminal activity, the higher age ranges are more significantly represented in the sample populations.

Figure 1 – Testing by Age



Regarding the representation of ATSI and non-ATSI populations in the various sampling contexts, the figures tend to suggest a slightly greater over-representation of ATSI providers in forensic procedures.

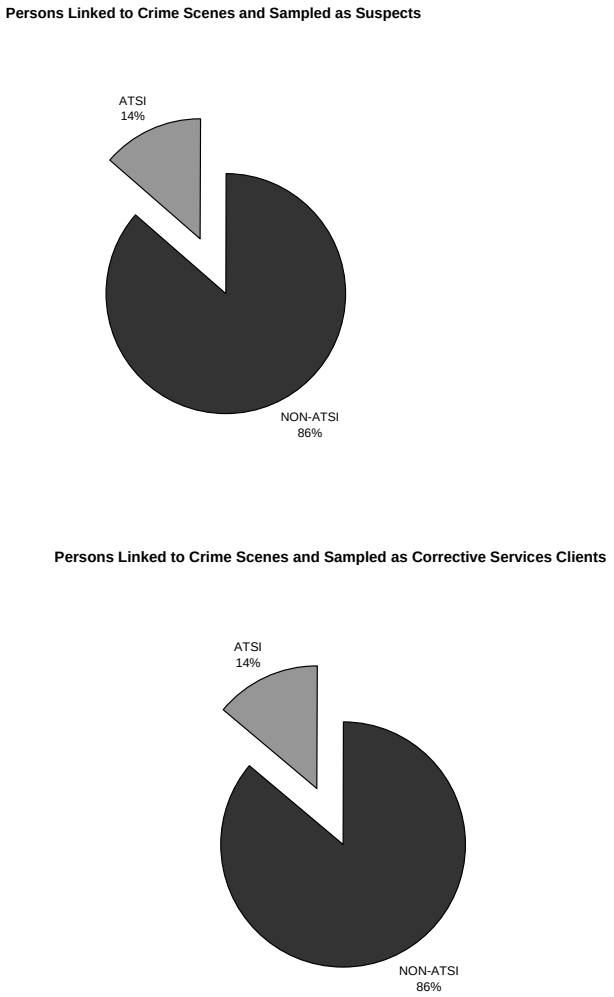
Figure 2 – ATSI Status for CSCs and suspects



The indication that ATSI providers are proportionally greater in the Corrective Services population supports the suggestion made to the Review that inmates are being tested more than once and that the SIO threshold is being interpreted incorrectly. This proportion does not equate with ATSI inmates in the prison population as of SIOs.

It might then be speculated that the larger proportion of ATSI sample providers may link in similar proportions with crime incidents. This seems to be the case, but, without knowing the nature of the offences concerned or attribution to multiple offenders, this may be a meaningless correlation.

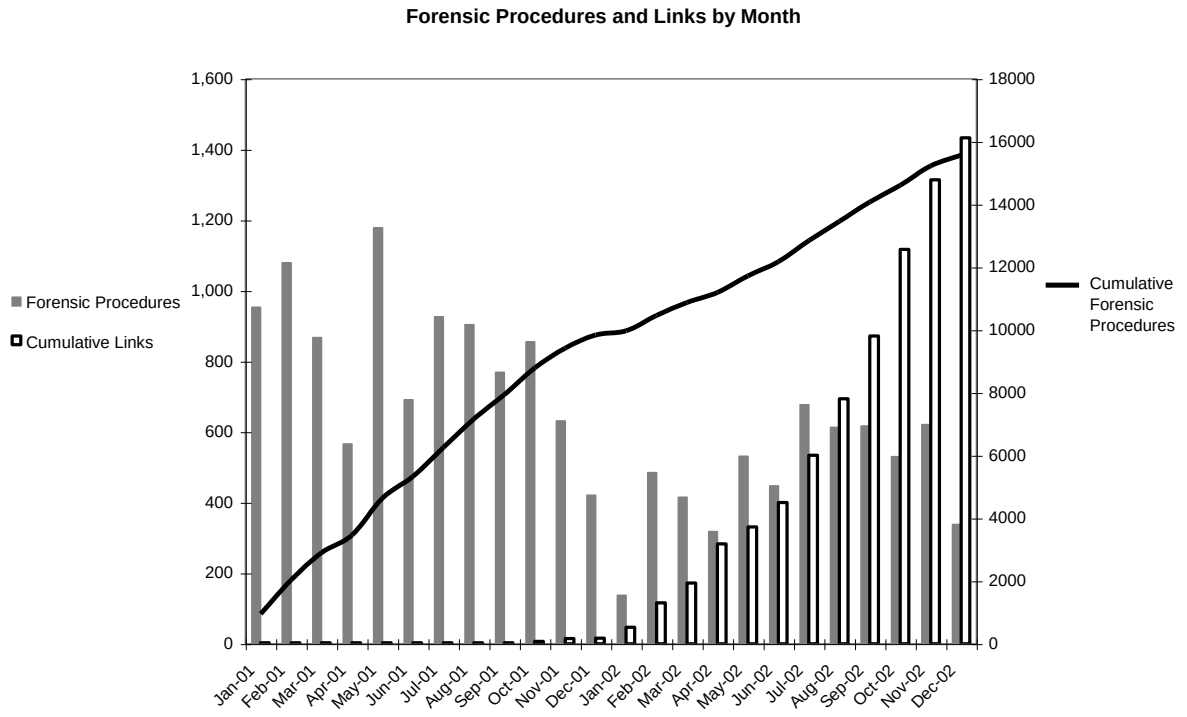
Figure 3 – Crime scene links with CSCs and suspects



The figures for links look impressive until they are considered against the information demonstrating that the vast majority of links are with break and enter offences and repeat offenders.

The following graph suggests that, in general, linking is now outstripping forensic procedure activity. This is to be anticipated as the database achieves and develops its optimal linking potential. The sources for linking are worth considering in order to determine the effectiveness of particular forensic procedures in certain contexts.

Figure 4 – Links



The following graph suggests that the significance of DCS sampling (in terms of crime scene links) is greater than for suspect and other sample sources. DCS sampling accounts for 10% less links than would be the case if this figure reflected the division of sample sources. An explanation for the significant majority of links from the DCS population may be the number of repeat and multiple offenders who end up in prison, and the correlation between inmates with a drug history and the prevalence of break and enter offences in both crime scene matches and the prison population.

The link outcome data is also problematic in that it does not reveal in any detail the nature of the crimes solved, the manner in which investigations were assisted through the forensic link, and the resources expended in the exercise.

Figure 5

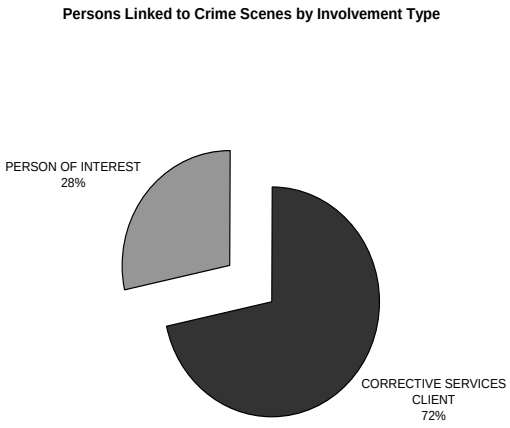


Figure 6 – 'Cold links'

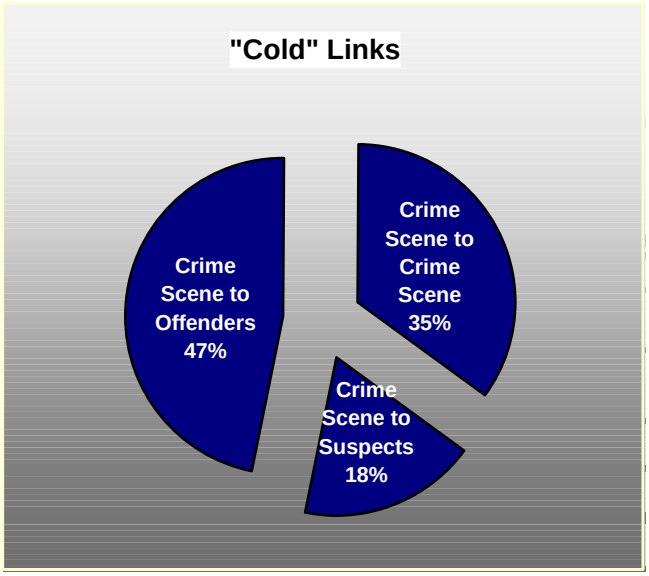
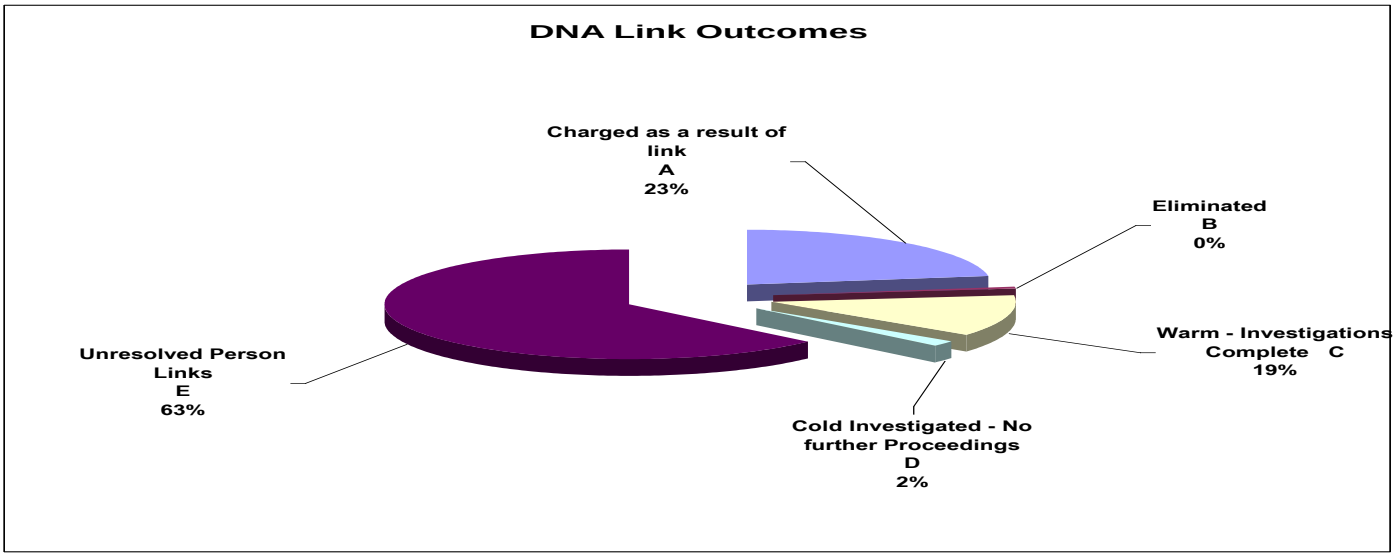


Figure 7 – 'Cold link' outcomes



'*Cold links*' seem numerous on the face of the figures below, but in reality they do not represent the matching circumstances which are often dramatised in popular culture. Rather than the case of a stranger/suspect being linked to a crime, it is generally a prisoner traced back to a similar crime to that for which s/he was imprisoned, or two crime scenes indicating a common (perhaps unknown) perpetrator, victim or participant.

Table 4- Cold Links

INDEX	**Database Index Name**	**'*Cold*' Links**
1	Crime Scene to Crime Scene	274
2	Crime Scene to Suspects	138
3	Crime Scene to Offenders	349
	TOTALS	761

The data provided by DAL concerning its forensic procedures activity follows. This data covers DNA samples received by DAL's testing facility from two sources, namely, hair and buccal samples from persons (designated as 'person' samples), and other samples tested by DAL's casework extraction stream and largely derived from Forensic Biology examinations of evidence ('casework' samples). In 2001-2002, the 17,708 person samples received were mainly buccal swabs. These samples originated from the following sources:

- Convicted offenders 12,380
- Suspects 3,045
- Appellants 478
- Others (mainly victims and volunteers) 1,805.

DNA tests completed by DNA unit

	Jan - Dec 2000	Jan. - Dec 2001	Jan 2002	Feb 2002	March 2002	April 2002	May 2002	June 2002	July 2002	August 2002	Sept 2002	Oct 2002	Nov 2002	Dec 2002	TOTAL for 2002	TOTAL since 1/2001
Person samples	Nil	8,977	580	657	453	511	545	522	691	603	723	819	723	644	7,471	16,448
Casework samples	2,663	6,396	555	616	698	800	970	754	1,328	1,073	1,134	1,218	883	666	10,695	17,091
Total DNA tests completed	2,663	14,489	1,135	1,273	1,151	1,311	1,515	1,276	2,019	1,676	1,857	2,036	1,606	1,310	18,165	32,654

DNA tests received by DNA unit

	Jan - Dec 2001	Jan 2002	Feb 2002	March 2002	April 2002	May 2002	June 2002	July 2002	August 2002	Sept 2002	Oct 2002	Nov 2002	Dec 2002	TOTAL for 2002	TOTAL since 1/2001
No. of Casework Cases Received	2,250	352	267	166	539	462	437	373	453	542	508	339	307	4,745	6,995
Total Person Samples Received	10,682	253	551	572	391	635	500	716	612	924	545	865	462	7,026	17,708
Total DNA Samples Received	5,804	687	651	470	940	958	875	1,004	1,093	1,158	1,089	879	659	10,463	16,267
Total DNA Tests Received	16,486	940	1,202	1,042	1,331	1,593	1,375	1,720	1,705	2,082	1,634	1,744	1,121	17,489	33,975

The Standing Committee's argument in favour of an independent collection agency, such as the Bureau of Crime Statistics and Research (BOCSAR), is supported by the recognition that, while NSW Police, DCS, DAL and the DPP have interests in the collection of certain related data, it is difficult to coordinate any such collections either in terms of their focus or their methodology. For instance, while DAL may have a record of samples received, analytical procedures and reports furnished, this is not connected with police data on the submission of samples and the use of reports.

The data collection needs to be process-directed, so that the stages from sampling, analysis, reporting, investigation, prosecution and deliberation can be identified, contextualised, linked and evaluated.[71] Later in this Report we support the call for integrated and expanded process data-collection in a centralised organisation (see 4-8).[72] The Government's initial draft response to the Standing Committee's recommendations envisaged that the empirical dimension of this Review would shed light on the currently available data, new data sources, and some interesting evaluative possibilities which might be enhanced through further data collection. While the Government hoped that our data collection might address the Standing Committee's concerns in this area, in actuality, difficulties with our data collection and the limitations of comparative data from other sources has heightened rather than answered these concerns. The police data referred to above goes some way to addressing the need for process data but it seems to suggest more problems than it answers. In addition, the data requires careful interrogation if the true process meanings are to be extracted. For instance, the '*cold link*' data (fig. 7) at first blush suggests a handsome success rate. However, when it is revealed that this is almost entirely comprised of 'break and enter' offences matched from inmate populations, and that break and enter is an individual/repeat offence with a largely conceded clear-up rate, this is not such an unconditional result.[73]

We agree that a permanent, independent and ongoing data collection agency should be established in order to address the evaluative concerns identified in the Report. The collection should be a collaborative endeavour, requiring the involvement and ownership of essential instrumentalities.

If such data collection were available, then regular reviews of the law enforcement objectives of the legislation would be possible. With the benefit of the insights such reviews might provide, informed and cost-effective policy development would be possible. Further, some of the revenue-sensitive recommendations of the Standing Committee Report might be better appreciated and assessed.

This Review is aware that, particularly in relation to crime scene sample analysis, DAL is drowning in demand and the backlog is growing. Crime scene data matching, we are advised, is a more complicated process for DAL than profile entry. One consequence of this is that crime scene investigators will become frustrated with forensic procedures if they feel that

[71] Such evaluation might be at any stage of the process against features of its context or against process measures of efficiency which are outcome-oriented. At present this is not possible.

[72] We are not convinced by the police concerns about duplication of data collection in light of the inadequacy of the data currently available through police sources.

[73] It would appear that a small number of offenders already in prison are being matched individually to many similar offences. The Police, without DNA testing, do not prioritise the investigation and clear-up of break and enter offences, particularly where adequate insurance compensates for material loss. DAL have advised that at present crime scene samples are matched only against offenders, suspects and other crime scenes.

their samples are taking so long to be analysed that the investigation is thwarted. One response to this is to increase resources to the laboratory. However, our suspicion is that this will not meet what is becoming an insatiable demand for forensic analysis, which will only increase if the delays for analysis are reduced.

Difficulties with data and data analysis in the forensic procedures area cannot be cured from the resources end alone. Also needed is what we term a 'smart data' approach. One example is that for those crimes (and crime scenes) where forensic matching with a largely inmate-centred database has been successful, such as break and enters, there should be priority given both in sampling and analysis, although it is recognised that this proposal flies in the face of pressure to analyse the most serious crimes first, including crimes which may not have had a successful match history.

In order to enable a 'smart data' approach to forensic procedures, and analytical resources in particular, it will be necessary to analyse forensic procedure data in a more sophisticated and contextual way. For instance, the police should not merely celebrate '*cold link*' matching, but investigate what other factors along with the match contribute to crime solving and successful prosecutions. Armed with this understanding and a greater appreciation of where forensic sampling is having its greatest impact on crime clear-up, police administrators and DAL can then come up with a more efficient resource management strategy. A targeted 'smart data' approach to resource use in the forensic area would allow for a more effective use of the available resources.

3-3-2 Data on the activity of agencies involved in the collection, analysis and application of forensic evidence

As part of this Review's commitment to integration in the field of forensic procedures, the proposed State Institute of Forensic Sciences (SIFS), discussed in more detail in 4-8, should, as a foundation priority, establish a framework for the integration of intra- and inter-agency process data. This will need to be preceded by a feasibility study concerning what data is held by each agency in the forensic procedure chain. This Review has only been able to establish the most rudimentary understanding of data types and location, namely:

DAL

- Inventories of samples received, and a library of samples processed;
- Profiles and their database records;
- Information on data access and de-identification;
- Information on analytical procedures;
- Analytical reports; and
- Records on 'client' requirements.

NSW Police

- Entries on COPS concerning samples acquired (recording officer, LAC, some details on sample provider, purpose for sample etc);
- Details from Forensic Procedures Implementation Team (FPIT) regarding process data (number of samples, from whom, where and why taken, matching outcomes etc.);
- Information on crime scene sampling by special agencies;
- LAC performance data; and
- Crime investigation file data and police briefs.

DCS

- Data on prisoner sampling regimes (consent/refusal, location, offender type etc); and
- Data on individual consent refusals and follow-up.

DPP

- Prosecution and trial brief data;
- Information on forensic evidence trials from solicitors and regional offices; and
- Limited outcome information.

Late in the Review, we received advice that BOCSAR is currently involved in a research project (Operation Vendas), which is interrogating in detail the forensic procedure practice in three Local Area Commands (LACs), and their outcomes. The brief for this project was developed based on experience of deficiencies in operational forensic practices and recording. This project is now evaluating forensic processes. The Bureau intends to report in mid-2003, after the completion of this Review. We suggest that this type of research/policy audit function should be ongoing rather than being confined to a project research model.

The Bureau describes the operation as follows:

> *Early in 2002, the Bureau was asked by Deputy Commissioner of Police Andrew Scipione to conduct an evaluation of Operation Vendas, a six month operation that commenced on July 1, 2002. The aim of the operation was to increase the identification and arrest of recidivist break and enter and motor vehicle theft offenders, and to subsequently reduce these and other types of crimes, in three NSW Local Area Commands. The broad thrust of the operation was to have scene of crime officers (SOCOs) attending 100% of Break and Enter and Recovered Stolen Motor Vehicle crime scenes to maximise the collection of DNA and fingerprint material, and to provide SOCOs with digital technology to reduce the turnaround time of fingerprint identifications from the crime scene laboratory. SOCOs, many of whom are not sworn officers, are employed by the Forensic Services Group and their specific role is to collect DNA and fingerprint evidence from crime scenes. The crime management units from each of the three LACs also agreed to provide a prioritised response to fingerprint and DNA identifications during the six month trial. The Bureau agreed to conduct a qualitative and quantitative analysis of Operation Vendas.*
>
> *The qualitative component of the evaluation will be a descriptive review of the processes and challenges faced in conducting a targeted Police operation and will include a detailed breakdown of the procedures that were planned to be put in place at the commencement of the operation, an evaluation of the degree to which each of these procedures was implemented, and a discussion of the factors that either facilitated or hindered the implementation of these procedures. The data for this part of the evaluation will be sourced from extensive field notes taken by a researcher during the course of the operation and in-depth interviews with NSW Police personnel involved in the operation. Hopefully the validity of these data will be verified by independent statistics taken from the Forensic Services Information Management System. The quantitative part of the evaluation will involve a statistical analysis of whether the intervention met the goals of the operation. Specifically, Police data will be used to assess whether there was an increase in the identification and arrest of break and enter and motor vehicle theft offenders, and whether there was a corresponding reduction in these and other types of volume crimes in the three LACs involved in the operation.*

3-3-3 Databases and data maintenance

In the course of the Review, we were frustrated with the limited information we were able to ascertain regarding the forensic databases maintained by DAL and the police. Other critics relate to difficulties of external access and suggest the need for auditing. In addition, some of the information we received seemed either in conflict with the spirit of the legislation or out of step with current political developments. For instance, DAL's practices on de-identification of profiles in preference to destruction seem at the very least to be at variance with the spirit of the Act.[74]

A detailed evaluation and audit of the databases maintained by DAL, their status and compliance with the Act should come as a crucial component of settling data sharing protocols with CrimTrac.[75] We would advise this, and suggest that such a review be carried out by an independent analytical facility. One reason for this is the fact that DAL has confirmed views about the appropriate size, structure and maintenance of the database, the evaluation of which may in fact need to be the substance of the review.

Even if this Review had sufficient information on the DNA databases, we doubt that our expertise would be sufficient to draw conclusive advice on issues such as:

- The appropriate size of the database;
- Its division and maintenance;
- De-identification and destruction;
- Access and accessibility; and
- Data sharing.

3-4 Science themes

The issues raised in this section are covered in more detail in the discussion of the proposed State Institute for Forensic Sciences (SIFS) (see 4-8).

3-4-1 Independence

The Review considers it of vital importance that the scientific and analytical dimensions of forensic procedures be independent, for as Justice Michael Kirby has cautioned, '*it is important that the relevant experts should not be entirely within the employ of the state*'.[76] Therefore independence must be real and actual. This is not just about bias and the appearance of bias, but also relates to the integrity of data maintenance, and the independent analysis of profile information outside the priorities of state agencies. This Review is particularly sensitive to the issue of actual independence as a condition of agreeing with the Standing Committee's recommendation that this organisation should have authority not only for data retention and scientific analysis, but also for process research, and community education. If this broad portfolio is to be given to the Institute, then in our view, it cannot be a quasi-governmental body managed by NSW Police.

[74] We are aware that the definition of destruction in the Act contemplates de-identification but this is far from its literal meaning. We believe that potential providers of DNA samples should be made specifically aware of the fact that profiles on the database are routinely de-identified, rather than destroyed.

[75] For further discussion of CrimTrac see 4-13-4.

[76] The Hon Justice Michael Kirby, 'DNA Evidence: Proceed with Care', based on a paper delivered to a seminar on science and digital/cyber crime delivered at the University of Technology, Sydney, 16 March 2000. The text of the paper is available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_dna.htm

In addition, when looking at independence as it relates to the science of forensic procedures, the innocence dimension is an area where compromise is evident (see 4-12-2 and 4-12-3). In the current model, we are asking the laboratory which may have been responsible for the initial and possibly flawed analysis to reinvestigate its procedures. With the establishment of the new SIFS and its audit functions, we would advise that active 'Chinese wall' structures be put in place to maintain the integrity and independence of the audit function.[77]

3-4-2 Client focus

One of the clearest indications of scientific and organisational independence is that the new Institute will not adopt a particular client focus either in its composition or service delivery. It is difficult to argue for true institutional independence when the Institute will be principally Government funded. However, as with the courts and the public hospital system, financial dependence on Treasury does not necessitate scientific compromise. The structure of the proposed Institute advised later in this Review ensures this.

3-4-3 Access to analysis – including defence and prosecution interest issues

The focus group discussion on data access equity was united in its support for equal access to analysis in practice. Equity of access means access to the original sample in adequate size for the purpose of additional independent analysis, which in turn requires adequate and comparable resourcing and a recognition of the limits in the local expert pool. It is the analytical interpretation of the sample, in the form of a report, and expert opinion presented in court, which provides an adequate and timely exposure of the prosecution's analysis documentation and records, as well as the protocols leading to the production of the report. Finally, fairness and equity in workload allocation and prioritisation of forensic services is crucial to the actuality of access. All these, we suggest, should be fed into the best practice strategy for the provision of analytical services.

3-5 Issues with the Act

This section indicates some key issues with the Act, as identified by submissions to the Review, to the Standing Committee and from the critical literature. Here we highlight some of the key reasons for change, and where appropriate, identify a particular response from this Review. In order that our views should be appreciated in an integrated rather than an 'issue-led' fashion, this section should be considered in particular against the arguments presented in our response to the Standing Committee recommendation.

3-5-1 Thresholds

Generally there were four criticisms raised concerning thresholds in the Act:

- That suspects should only be requested to give a sample when it is reasonably believed that this evidence *is likely* to assist in the resolution of an offence. We agree with this concern as an important frame of reference for police investigation best practice.

- Where crime scene investigation is associated with the request for a sample, then it should only be made in a situation *where other evidence is available from the scene against which the sample can be compared*. Due to concerns regarding best practice in police investigations, our view that forensic science resources should be appropriately expended,

[77] The divisional structure which we later recommend will, in part, facilitate this.

and that suspect sample providers should only be exposed to compulsory forensic testing in otherwise justified consequences, we agree with this revision of the threshold.

- That serious indictable offenders (SIOs) should also only be tested *when the offender is involved in offences where recidivism is high and the circumstances are serious*. While we appreciate the argument that prisoners should not face greater rights infringement than other citizens in this context simply as a consequence of their custody, we also understand that the determination of likely re-offending, and offence seriousness on a case by case basis would only be within the capacity of the DCS when offender populations to be sampled are reduced and more routine. At this stage, we would advise that the DCS runs a trial exercise associated with best practice here. For six months, only those SIOs who are in custody for offences identified as serious and high in re-offending potential, should be sampled. The process should be monitored by DCS in terms of its administrative capacity, and inmate reaction. The police may also measure statistics on matching for the period, against the preceding six months and the Ombudsman could be required to incorporate this evaluation within its ongoing review of the Act.

- That the problems associated with *the issue of consent from volunteers* argue for additional checks and balances. We accept the evidence of problems associated with persons consenting on behalf of children and young people. We note the difficulties with consent in mass screening scenarios. It seems illogical to us that suspects under the Act may have more discretionary protections than those available to volunteers. Finally, we appreciate that from the perspective of a citizen confronted with an authority 'requesting' his/her cooperation, acquiescence may be different to genuine volition and free will.

3-5-2 Photographs as a forensic procedure

The definition of forensic procedures has been contested from the outset and the inclusion of photographs and the consequent recording requirements, in particular, have drawn sharp and constant criticism from the police. The NSW Police position on the matter is as follows:[78]

> *At present the taking of a photograph of a suspect for the purposes of a photograph identification parade is a non-intimate forensic procedure and thus governed by the Act. Police have raised concerns that this process is too time-consuming and complicated when balanced against the non-intrusive nature of having a photograph taken.*
>
> *Additionally, if a suspect not under arrest does not consent to the forensic procedure a court order must be obtained. This may have the effect of delaying an investigation and increasing the time delay between the witness seeing the offender and viewing the photograph which could affect the witness' ability to make a positive identification. It may also give the suspect the opportunity of changing his or her appearance once he or she becomes aware that an application for an order is being made to a court. Once again this could affect the effectiveness of the photograph identification parade.*
>
> *It is suggested that police be able to take a photograph of a suspect for the purposes of an identification parade where the person has refused to participate in a line-up.* (Emphasis added)

This issue received some media coverage as a result of an article in the *Illawarra Mercury*, which suggested that police powers in this area were more constricted under the Act than

[78] N Dugandzic of NSW Police, 'Consolidation of proposed amendments to the *Crimes (Forensic Procedures) Act* 2000' (not publicly available).

previously.[79] CLRD obtained advice from the Crown Solicitor's Office as to the operation of identification photographs under the Act, and the interaction with Part 10A of the *Crimes Act*.[80] The advice concluded that that police powers to take photographs, or carry out other procedures authorised by section 353A of the *Crimes Act*, and established common law principles as to the retention and use of such photographs, are unaffected by the Act. The advice in summary also stated that:

> *Police powers under s353A(3) are engaged once a suspect is in police custody for the purposes of Part 10A of the* Crimes Act. *The suspect need not have been charged.*
>
> *What may be taken under the authority of s353A(3) is "all such particulars as may be deemed necessary for the identification of such person"…this includes the taking of a photograph for the purpose of showing it to witnesses if the suspect refuses to participate in an identification parade.*
>
> *If a police 'mug shot' is to be taken of a suspect under arrest for purposes other than identification, or if the suspect is not under arrest, procedures under the Act must be followed.*

The advice also makes clear that '*police did <u>not</u> previously have the power to compel a suspect not under arrest to cooperate with police for the purpose of having a photograph taken*'(emphasis added). It follows that any suggestion that police powers have been restricted by the Act is erroneous.

As set out above, police seek a power to photograph all suspects without requiring a court order. As a logical extension of what the police propose, if police attended the home of a person they suspected of having committed an offence, they could request the person to participate in an identification parade. If the person refused to cooperate, police could request him or her to attend a police station to be photographed. If the suspect again refused, he or she would run the risk of being arrested for hindering police in the execution of their duty under section 546C of the *Crimes Act*. Accordingly, suspects could expose themselves to arrest in circumstances where the police do not have sufficient cause to arrest them for the offence in connection with which the photograph is being sought. In effect, police propose a 'back door' method of lawfully taking photographs which would otherwise be unlawful.

It seems to the Review that there is some inconsistency in the approach taken by police in relation to the issue of photographs. They are content with the photograph provisions under the *Crimes Act* governing persons in custody. They also appreciate the extended powers under the Act as they relate to photographing suspects, but they want to be relieved of the regulations which govern these. We would suggest that these regulations are essential, in recognition of the fact that the suspect retains a range of liberties which need protection, consistent with the prevailing presumption of innocence. If the police were given more compulsory powers (or those less regulated than currently exist) to require photography, then resistance from the suspect might amount to an offence of resisting police in the exercise of that power. Such an outcome could be seen as more intrusive than the consequences flowing from other instances where a suspect challenges a forensic procedure. The Review considers this to be a dangerous outcome when measured against the intentions of the Act to recognise

[79] L Carty, 'Sentencing Spotlight on judges, says Carr' *Illawarra Mercury*, 14 September 2002, p5

[80] It is acknowledged in the following information that Part 10A of the *Crimes Act* is reenacted in the *Law Enforcement (Powers and Responsibilities) Act 2002*, not yet commenced.

informed consent, and not to create inordinate consequences as a result of a refusal to consent.

The police submission fails to take into account that the Act's provisions relate to suspects and not accused persons. Logically this difference in status would imply some different circumstances governing the exercise of the photograph powers.[81] In settling our response, this Review is seeking the balance between effective law enforcement and recognition of the more significant rights of the suspect.

We do not consider that the police have demonstrated that the current law hampers them in their investigation of crime. In practical terms, we cannot see that there is a lacuna in the law as the police suggest, namely that there will be instances where the police require a photograph for the purposes of identification, but lack reasonable suspicion to arrest the person. We therefore advise retention of the current model, namely that photographs of suspects not under arrest may only be taken with the suspect's consent or following a magistrate's order. In the event that the police are able to demonstrate on an empirical basis that they are significantly impeded by the current law, we would nevertheless suggest that the requirement to refer this matter to a magistrate must at all costs be retained for children and young people, incapable persons and ATSI suspects.

Although we do not accept the problems with the Act which the police suggest, we do consider that the present model poses some difficulties. The Act states that it is '*clear that the Act only applies to samples taken for forensic purposes and not to samples taken purely to establish the identity of a person*', however the Children's Legal Service indicated to this Review that some police have interpreted the power as allowing them to photograph a young person in order to show what he was wearing at the time of the alleged commission of the crime[82], which the police have said is not for the purposes of identification. We would advise that the interaction between the Act and sections 353A and 353AA of the *Crimes Act* needs to be clarified.[83] In particular, for young people aged between 14 and 17, it will need to be clear whether the young person is in lawful police custody at the time of the request prior to the availability of the *Crimes Act* powers. The present situation, where police sometimes obtain a photograph under the *Crimes Act*, and at other times under the Act, depending on what is more convenient for them, is undesirable and requires rectification.

This Review advises:

- That it should be made clear that the provisions of the Act regarding photographs do <u>not</u> relate to police surveillance. In those legitimate, but presumably exceptional, circumstances where the police need to monitor a suspect without his or her knowledge, it would be foolish to suggest that consent to such surveillance be requested. As such, surveillance should be defined under the Act as narrowly relating to the random monitoring of persons in relation to an investigation, prior to them formally coming to police attention;

[81] This is particularly important when it is appreciated that photograph identification techniques can have a powerful influence in converting a suspect into an accused person on the visual identification of a witness or victim.

[82] In the case quoted, the photograph did not even concentrate on the face of the subject, but rather on the body wearing the clothes in question.

[83] The *Law Enforcement (Powers and Responsibilities) Act 2002* may require amendment for this purpose.

- That the Act should clearly indicate that the photography provisions of the *Crimes Act* apply to persons under arrest. The provisions of the Act, including the requirement for a magistrate's order where consent is refused, will apply in all other circumstances; and
- That the police should be relieved of the obligations under the Act which require that taking photographs of a suspect is to be visually recorded.

3-5-3 Sample categorisation

The issue here is what constitutes an intimate and non-intimate sample for the purposes of the Act. The distinction is important insofar as the justifications for it differ and the consequences of a refusal vary as well. Further, there is a progression in the Act through degrees of intimate intrusion depending on the seriousness of the suspicion, or whether lesser tests have been refused. The Review does not see this as sufficiently problematic an issue in practice to merit advice at this stage. We anticipate the report of the Ombudsman's inquiry will be helpful in clarifying this issue.

3-5-4 Sampling

The debate here concerns who should take the samples and what techniques should be used for compulsory sampling. Regarding buccal swabs, we agree with the current practice against compulsory swabbing in a situation where the individual provider refuses to take the swab. This should be a clearly expressed best practice protocol. The experience of the Ombudsman's investigation will be useful on the taking of hair samples. In the spirit of best practice, we advise that the least painful sampling technique which is conceded to by the subject, should be preferred where possible.

The other key issue in relation to sampling is the transfer of responsibility for inmate sampling from NSW Police to DCS. It would appear from the immediately interested groups that there is no other alternative being suggested at the level of ministerial approval. This is despite the reservations raised by Justice Action that inmates should not be asked by a prison officer to consent. This Review accepts that because of the special and ongoing authority relationship between prison officers and inmates, it may be inappropriate, and perhaps a conflict of interest, for forensic testing in prisons to be managed by prison personnel.

The DCS officers responsible for the implementation and consequences of the transfer seek as a basic condition that the sampling remain the responsibility of a specialist trained unit within DCS (rather than general custodial staff), as is now the case with FPIT in NSW Police, and that this unit should be appropriately funded. The separation of power here is a concession to concerns about the impact of the power relations exerted in the officer/prisoner daily organisational exchange. This seems sensible to this Review.

As regards crime scene sampling, there is an argument that having police responsible for this function presents potential conflicts of interest at many levels. For instance, the investigating officer has an operational commitment in most instances to building up a case against an identified accused. This is not a recipe for the objective management of crime scene forensic sampling. Also, the possibility of planting evidence to strengthen a particular inquiry is reduced if sampling is done by an independent crime scene team, properly trained to protect sample integrity. In respect of best practice initiatives, we advise that the police should work on their independent sampling strategies for crime scene management. We are aware that currently FPIT trains Scene of Crime Officers (SOCOs) to attend crime scenes and take

forensic samples often with the help of digital technologies. However, this does not happen within all crime scene management units within LACs. More comprehensive strategies would be in the form of best practice protocols publicly available and open to independent audit by SIFS as the custodians of forensic material, on a routine basis. We advise that the SIFS should be responsible for confirming quality control standards in all stages of the forensic sampling process. When the sample has been delivered to the laboratory, it becomes the bailee of the sample for and on behalf of its 'owner'. More than this, their analysis of the sample works from the assumption that it has integrity when it is received by DAL. It is only reasonable to expect that the laboratory should have some responsibility in auditing this integrity.

3-5-5 Special consent provisions

We acknowledge the concerns of those who believe that informed consent within the terms of the Act might be little more than a '*sham*'[84]. Where we differ is in the response to that appearance and realisation. This Review does not support the recommendation for the removal of the informed consent provisions in the Act. We do not accept that the answer to the pretence of free will in the consent regime is to simply do away with the need for informed consent. As we will further detail in Chapter 4, this Review seeks to strengthen the accountability conditions and components which follow a refusal of consent, as well as enhancing special approaches to the protection of children and the vulnerable.

In relation to indigenous providers, for example, the Review notes and is receptive to the recommendations submitted by the Coalition for Aboriginal Legal Services (COALS) that:

- Indigenous suspects be made aware of any possible implications before the samples are taken, including any customs or taboos that might relate to the taking of a DNA sample;
- Information is supplied by an Aboriginal Legal Service and that this procedure cannot be waived - to ensure that a rapport can be established with the indigenous suspect and that full comprehension of forensic procedures takes place;
- Indigenous suspects be informed that interview friends who are present when the suspect is asked to consent to a forensic procedure, during the hearing of an application for a court order and/or when a forensic procedure is carried out; may be used as witnesses, and the implications of this;
- That interview friends also be fully informed of the possibility that they may be used as witnesses and any implications relating to this; and
- That the responsibility for developing and maintaining lists of interview friends referred to in section 116 of the Act be shared by the Coalition for Aboriginal Legal Services.

3-5-6 Plain language instructions

There is common agreement that the language into which the information requirements of the Act have been translated is complex and requires simplification. The police argue that a simple solution would be to reduce the requirements to provide information to potential sample providers. We reject such a view and consider that clear, relevant and comprehensive information uniformly delivered to all potential providers can be achieved and is crucial to the credibility of informed consent.

[84] Standing Committee Report, *supra*, n2, p103.

3-5-7 Authorisation – magistrates or police?

The issues here are predictable. The police want to be able to authorise more forensic procedures, while critical of the need to rely on the intervention of an officer of senior rank. At the same time, they argue against more demanding justifications for forensic procedures, on the basis that complex guidelines might be beyond the understanding of most police officers.

Under section 25, a magistrate must be satisfied before ordering a forensic procedure, that, amongst other things, there are reasonable grounds to believe the forensic procedure might produce evidence tending to confirm or disprove the suspect committed the relevant offence. It was put to the Review that some courts are granting the application even where police can't show that there has been anything found which at a crime scene has yielded a DNA sample. In addition, the argument for ordering the procedure to disprove the suspect committed the offence has no basis where the suspect has not yet been charged.

Even so, those who oppose police discretion as a step in the authorisation process prefer the wider use of magistrates in this role. The Review sees a place for the development of both levels of discretion.

3-5-8 Orders

The two principal criticisms we have had presented to us regarding orders under the Act are that the awarding of orders by magistrates have become a matter of form; and that interim orders present a range of procedural difficulties for prosecutors. Beyond broad opinion, we have no evidence which would substantiate these concerns. Both these areas would benefit from research to identify and evaluate the extent of the problem before remedies might be suggested.

Legal Aid Commission advocates argued before us that orders should be in writing, specify the type of forensic procedure to be carried out, be made in the presence of the suspect; and be supported by evidence on oath or by affidavit dealing with matters referred to in section 25(a) (and if relevant, subsections (b)-(e)).

3-5-9 Interview friends

The essential issues concerning third party support and interview friends in particular relate to facilitation, appropriateness and conflict of interest. On the latter issue, legal representatives have expressed a reluctance to be called and relied upon as interview friends, where they might later be called as witnesses in an application for an order where they might also wish to represent the subject of the application. Concern has also been expressed regarding the opportunity and ability for the police to determine who is an appropriate and acceptable interview friend.

3-5-10 '*Might produce*' test

As discussed elsewhere by the Review (2-8-3 and 7-2-8), it has been argued that the threshold of '*might produce*' evidence tending to confirm or disprove the suspicion is too low, and that it should be altered to the standard of '*is likely to produce evidence*'. The police, on the other hand, submit that such a change would unduly restrict the investigative utility of forensic procedures. The Review is not convinced that such a change would either significantly interfere with legitimate police work, or provide a major protection for the suspect. Even so,

the language of '*likely*' rather than '*might*' sets a higher standard of interrogation which should precede the making of a request for forensic material.

3-5-11 Delegated legislation

The issue of forensic procedures and their development is in our mind so significant for responsible Government, that we believe no essential elements of the Act should have the capacity to be augmented by regulation alone.

3-5-12 Consolidation of legislation

Not enough thought has been given in the drafting of the Act to the manner in which its provisions relate to similar, dependant, or competing provisions in the *Crimes Act 1900*, the *Evidence Act 1995*, and (once it comes into effect) *the Law Enforcement (Powers and Responsibilities) Act 2002*.

Chapter 4 – Balance between the Rights of the Individual Sample Provider and Appropriate Law Enforcement Needs

4-1 Consent

4-1-1 Reality of consent and critique

It is interesting to note that in the submissions put to the Standing Committee, parties who would normally not share a common view about the reform of the legislation were united in their criticism of the provisions concerning consent, although their criticisms arose for different reasons. The essential theme of the criticism is that the consent provisions in the Act, while claiming to provide opportunities for the exercise of informed consent, and recognising its significance, have no practical effect, as the Act provides for several processes whereby a forensic procedure may be carried out in spite of a provider refusing consent. The critique goes further by saying that potential providers, particularly among custodial populations, may be confused into believing that their consent or its withholding is meaningful, with consequential misunderstanding and misapprehension about the role of the individual in the sampling process.

Further issues arise with mass screenings and the involvement of 'volunteers'. This Review has noted occasions where the possibility to refuse consent (or to refuse to volunteer) has been confounded, as the potential provider understands that such a course of action might suggest to the wider community a degree of guilt, or a reluctance to assist legitimate inquiries and eventual prosecution. The community safety angle puts pressure on all participants to comply with the mass screening agenda. Experience has shown with invitees and police questioning that it is dangerous to equate acquiescence, particularly in situations of authority imbalance, with volition or free consent.

As a result of the concerns about the actuality of informed consent, and the potential misunderstanding caused by the apparent compulsory nature of forensic procedures, some critics believe that consent should be removed from the legislation.[85] We do not adopt this suggestion and will argue later in this section that there are important positive values which attend on the consent provisions, which not only require maintenance but enhancement. Before that discussion, however, it would be useful to briefly examine consent as it appears in the legislation.

4-1-2 Informed consent under the Act

Part 3 of the Act focuses on the conduct of forensic procedures on suspects by consent. Pursuant to section 3(4), '*informs*', for the purposes of the Act, is where one person informs another of a matter (through an interpreter if necessary), in a language in which the other person is able to communicate with reasonable fluency. To that extent, the notion of informed consent requires appreciation as well as conveying of information.

[85] This is also the position taken by the ALRC, which proposes that '*except in relation to volunteers, the consent provisions should be removed from forensic procedures legislation so that an order by the appropriate Australian Federal Police officer or judicial officer required before a forensic procedure can be carried out on a suspect or serious offender*' (Proposal 36-1), ALRC DP 66, *supra,* n30.

The Review accepts that some of the information to be provided as authorised under the Act is not sufficiently digestible in its present form to stand as a foundation of informed consent. We are advised that the Attorney General, through CLRD, has engaged experts to evaluate the plain English needs of persons delivering and receiving such information and to prepare plain English versions of such information. We commend these developments.

Section 7 requires that the carrying out of a forensic procedure on a suspect or its authorisation is dependent on informed consent.[86] Certain individuals such as children and incapable persons are determined by the Act as not competent for the purposes of consent (s8). Section 9 indicates where informed consent procedures are required and their application. The process of informed consent is determined in that section and requires a written statement which informs the suspect of the details concerned, and gives the suspect a '*reasonable opportunity to communicate or attempt to communicate with a legal practitioner*'. Particular procedures are determined under the Act in relation to Aboriginal persons and Torres Strait Islanders (ATSIs) (s10).[87]

Section 11 empowers a police officer to request a suspect to undergo a forensic procedure and this acts as a trigger to the informed consent provisions. The matters to be considered by police officers before requesting a suspect's consent to a forensic procedure are listed in section 12. The process here is premised on a reasonable belief that the forensic procedure might produce evidence tending to confirm or disprove the suspect's commission of an offence, and is then distinguished on the basis of the level of intimacy of the forensic procedure contemplated or the sampling technique employed for that forensic procedure. This is juxtaposed against the nature of the type of offence reasonably suspected of having been committed and the consequences of that suspicion (such as whether the offence is indictable or summary, and on the basis of any such categorisation, the types of forensic procedures which might flow). It is fair to say that generally, the more serious the offence suspected, the more intrusive forensic procedure to follow. As mentioned earlier, the nature of the forensic procedure will also be qualified by the characteristics of the potential provider.

The matters about which a suspect must be informed before giving consent are listed in detail in section 13.[88] These issues, which focus around the nature of the procedures, their consequences and the impact that they have on the rights of the individual, are what comprise the '*informed*' component of the consent procedure. This information is detailed and important, and must be provided in an accessible form for the potential provider. In addition, it should be recorded by the individuals who deliver the information as required. In respect of vulnerable groups, the provision of support is envisaged as part of the information process, which may give comfort to the potential provider during the sampling process. Subsections 13(3)-(7) identify the consequences of a failure to consent to a variety of forensic procedures (depending on their degree of intimacy), and whether or not the suspect is under arrest.[89]. It is

[86] Informed consent in respect of suspects is defined in section 9. See section 67 for informed consent in respect of serious indictable offenders (SIOs) and section 77 for the informed consent of a volunteer or their parent or guardian.

[87] Notwithstanding this protection, it has been submitted to the Review by the Coalition for Aboriginal Legal Services (COALS) that a major issue for ATSI persons is ensuring that '*consent for DNA procedures is <u>real</u>. Gaining informed consent from an indigenous suspect requires an understanding of the particular needs of indigenous persons and the potential barriers to understanding the issues at hand and their implications*.'

[88] See section 69 for SIOs and section 77(2) for volunteers.

[89] See sections 69(2)-(4) for failure to consent for SIOs.

these subsections which give critics cause for concern about the reality of consent and its outcomes, as they make it quite clear that in most circumstances, the refusal of consent will not result in avoidance or cessation of the forensic procedure. Similar consequences flow for the withdrawal of consent under section 14.[90]

The conditions associated with a failure to consent (or withdrawal of consent) anticipate some degree of review either by a senior police officer or by a magistrate, depending on the degree of intimacy of the procedure and the nature of suspicion associated with the request. Our Review is aware that such applications to review are successful, but it would be wrong to suggest that these procedures are nothing but a matter of form, bearing in mind the deliberations required by the Act in processing such applications. We would suggest that a best practice strategy discussed further in Chapter 6 would enhance the value of this process.

The position of this Review regarding consent is that not only is it necessary for the consent provisions to remain in order that information is adequately provided to those from whom samples are requested,[91] but also that the legislation should not be considered as a compulsory exercise of police powers. To simply assume that consent is of no consequence might open the door to a whole range of other intrusive possibilities indirectly supported by the argument that it is difficult to give meaning to informed consent in the context of law enforcement and crime control rhetoric.

Coming from this position, the Review has attempted, wherever possible, to argue that more specific meaning should be given to the consent process under the legislation. In so doing, we do not simply rely on the legislation to support consent at whatever level. The best practice strategy also has an important role to play in creating a more conscientious approach to police and judicial review.

A significant argument in support of the enhancement of informed consent under the legislation is the distinctions which the Act makes between general sample populations, and those which it considers special because of their vulnerability or reduced capacity. In our responses to the Standing Committee Recommendations, we pick up this theme, and particularly in relation to vulnerable groups, recommend a mandatory second stage in the decision to sample, on the understanding that in many situations where consent may be required under the Act, the circumstances surrounding a request to sample may themselves diminish the actuality of consent. These circumstances, and their implications, require re-evaluation by a magistrate in order to confirm the actuality of the consent.

Another line of development which we advise throughout this Review is the firming up of guidelines and justifications for decisions to request a sample and/or to make an order in that regard. We are not merely willing to accept that justification for the exercise of discretion to sample will be little more than a matter of form, irrespective of what requirements are placed for justification or evaluation. To accept this would also be to deny the capacity of best practice strategies to influence a legitimate and credible evaluation and review process, which we advocate to allow for a more flexible and realistic approach to evaluation and review.

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[90] See section 79 for withdrawal of consent in respect of volunteers.

[91] Cf. however ALRC DP 66, *supra*, n30, Proposal 36-2, that notwithstanding the proposal that consent be abolished for suspects and offenders, they should be provided with information about the nature and consequences of the forensic procedure prior to it being carried out.

4-1-3 Recording the information given to suspects

Section 15 of the Act requires that recordings should be made of the information given to persons requested to provide samples under the legislation. This Review sees the recording process (other than in the context of taking photographs, see 3-5-2) as much more than a matter of form. We believe that the recording of this information is crucial not only to the validation of the process, but also to any analysis which may be carried out regarding the impact of such information and the manner in which it is addressed by the parties involved.

4-1-4 Volunteers, information and consent

We are surprised at suggestions which tend to take at face value the consent of adults to forensic procedures. It seems particularly unbalanced to provide certain protections (or qualifications and justifications at least) to suspects and offender populations, which are then not extended to volunteers, simply because it is assumed that they are happy to cooperate with forensic procedures. We appreciate the argument that if someone freely and enthusiastically volunteers to provide a sample and they fully appreciate the consequences of such a decision, there may be little need to present them with a range of protections in that context. However, the only way to proceed on this basis with comfort is to adopt a consistent approach that volunteers in all circumstances freely consent, and the Review has sufficient evidence to cast doubt on such a generalisation.

Initially, in relation to volunteers, it is necessary that consent be as informed as it may be for other classes of sample populations. It has been suggested to us by the police that if a volunteer is to be sampled and there is no intention to record the resulting profile on a database (instead keeping all such information within the file of the specific case to which it relates), information regarding the recording and database process is not necessary for the volunteer. We would disagree. It is our belief that volunteers should be provided with full information about the actuality and potential for sampling and its analytical outcomes, in order to make an informed decision. This is particularly so when it will be possible in the future for authorities to review their needs in relation to samples from volunteers and their application. In any case, no harm is done by making volunteers fully aware of all the ramifications of forensic procedures, as these may impact on their decision making. This approach is not about discouraging a cooperative citizen, but rather ensuring that consent is informed in every case and to a common level of understanding.

The other issue regarding consent and volunteers is the actuality of consent in situations of implied authority and compulsion. This Review believes that there is sufficient evidence even from the treatment by police of volunteers in other circumstances of investigation which may amount to detention (particularly with children and young people) to require a second stage of review for the consent process. The police will no doubt argue that this is inconvenient and a waste of resources. However, we would counter with the view that if the volunteer provisions of the legislation are to retain their integrity, then, particularly in the initial period of their application, an objective evaluation of the reality of consent should be constant.

4-1-5 Vulnerable persons

The Act already identifies Aboriginal and Torres Strait Islanders, children and young people, transgender persons, and those people who are deemed '*incapable*', as vulnerable under the Act. These parties are provided with special consideration when it comes to consent. These

considerations include the assistance of a friend or adviser at the time when consent is requested, additional levels and components of review, and tighter justifications for the requesting of samples. We support this particularisation of the legislation's powers, and we have endeavoured to give additional impact to its application. We note however that the legislation does not clearly express a protection on the basis of mental age, and suggest that this is an area for best practice by police officers, legal representatives and judicial officers.

The Review observes that the reasons behind the identification of special needs populations their vulnerability in the context of authority and the impact this may have on their consent,[92] and more particularly, to their capacity to consent or otherwise. We have addressed both these dimensions in our considerations about consent.

4-1-6 '*Interview friends*'

Our views regarding interview friends, as provided for under the Act, are discussed in more detail in another part of the Report. However in terms of their role in protecting vulnerable people in situations of implied authority, they should not be underestimated. It has long been recognised, for instance, in relation to children and young people that the counsel of a responsible adult is important as a validation of their rights when placed in situations of intrusion or compulsion. The presence of an independent third party is more than mere form, and as such the status of the interview friend should be accorded respect by police in particular when exercising their powers under the Act.[93]

The Act demonstrates some confusion in the roles of interview friends. For instance, legal advisers may have an important role in assisting potential providers to understand their rights, and the ramifications in any legal sense of agreeing to the sampling process. However, it may be inappropriate for a legal adviser to be seen as an interview friend. In particular, there is a potential conflict of interest for an Aboriginal Legal Service (ALS) solicitor to be treated both as an interview friend and a legal representative. Should the representative of the ALS be deemed an interview friend and called as a witness for the prosecution in any later proceedings, then their position as a legal adviser would be compromised. In our view there needs to be further clarification on this point.

4-1-7 Compulsory orders

This Report deals with compulsory orders in a variety of different circumstances. The police argue that they have difficulties with the structure of compulsory orders as it exists under the present legislation. The use of interim orders, in particular, is said by police and prosecutors to present complications, and prosecutors have suggested that the practice by magistrates of refusing adjournments on interim order applications presents them with difficulties. This is perhaps a good example of where the interest of particular parties in relation to forensic procedures may become unbalanced against the wider interests of the administration of

[92] It was suggested to the Review by COALS that indigenous styles of interpersonal interaction differ markedly from those styles found among non-indigenous Australians. Such differences often lead Aborigines to give information that is misleading, unreliable and self-incriminating. See also D Eades, *Aboriginal English and the Law*, Queensland Law Society Inc, Queensland, 1992.

[93] The sections relevant to interview friends are sections 3, 10, 13, 21, 30, 33, 34, 54, 55, 57, 99-101 and 116. Section 99 provides for the rights and entitlements of interview friends. Under section 10, an ATSI suspect can only be asked to consent to a forensic procedure if an interview friend is present, though s/he may waive that right. COALS considers that ATSI persons should not be able to waive this right, as they may do so due to a lack of understanding of the process. The Review is persuaded by this concern.

justice. This Review believes that the circumstances in which interim orders are requested often provides justification for a refusal to accept adjournments where matters are incapable of proceeding.

4-1-8 Withdrawal of consent

Section 14 of the Act provides for the withdrawal of consent to the carrying out of a forensic procedure. It has been said to the Review that there is some confusion regarding the status of information obtained prior to the withdrawal of consent. This Review suggests that any information or portions of the sampling process which have been obtained prior to the withdrawal of consent, should be deemed as affected by that withdrawal and as if consent had not existed from the commencement of the process. Therefore, the conditions which would apply to the refusal of consent should pertain to all matters which preceded the withdrawal of consent.

4-2 Children and Young People

A forensic procedure can only be carried out on a child (other than a volunteer) by way of a magistrate's order. The child *must* have an interview friend present at the time the application is made to the court and *may* also have a legal representative present. Either an interview friend or a legal representative must also, if reasonably practicable, be present at the time the forensic procedure is carried out. Unlike with ATSI persons, a child cannot waive this right.

4-2-1 Capacity and vulnerability

Recommendations 38 to 41 of the Standing Committee's Report pertain to children and place much reliance on the submission from the Commissioner for Children and Young People (CCYP). The focus there is on empowering children and young people to make decisions on their own behalf. This is a valid consideration, while needing to be balanced against the recognition that children and young people remain vulnerable and should not be allowed to consent to things about which they cannot be fully informed, as they may not possess sufficient cognition to understand the nature and quality of what they are doing (or having done to them). In this respect, the consent provisions in the Act as they relate to children and young people must reflect these understandings.

Although the Act treats children as being legally incompetent to give or refuse consent on their own behalf, we believe that they have should be able to express a view or to participate in the decision-making process beyond responding to the inquiries of a magistrate. The validity of their views about an intervention such as a forensic procedure and the manner in which they react to any respect in respect of it should form part of the decision-making process.

It is the experience of the Children's Legal Service (CLS) of the Legal Aid Commission that juveniles need much better education in order to fully comprehend the ramifications of forensic procedures. In particular, because a child can't consent to a forensic procedure, police need to ensure that they follow procedures very carefully and abide by the spirit of the legislation[94]. It was put to the Review that *'kids will often say "I don't care" and effectively give their consent, if it were valid, without full knowledge of the ramifications'.*

[94] This ties in with the decision in *Phung and Huynh* [2001] NSWSC 115, where Wood CJ at CL noted in relation to the provisions under the *Crimes (Detention After Arrest) Regulation 1998* in respect of children that

Some child advocates observed that while there is strict compliance by police with the words of the Act, there is no such compliance with the spirit of the Act. This is more than a concern about the nature of informed consent. In our view, the obligation on the police to clarify the nature of the procedures weighs even more heavily when the sampling may occur in a compulsory context with potential providers who may fear authority and misunderstand the powers provided under the Act. Best practice is essential with the provision of information in such situations even where the Act does not require it as a precondition to the satisfaction of consent.

4-2-2 Child suspects

The Youth Justice Coalition (YJC) is concerned by the fact that the provision for a child to be legally represented during the hearing of an application for a forensic procedure is discretionary. Although a child or young person may choose not to be legally represented, it is suggested that they should nevertheless always be provided with legal advice before an application for a court order is dealt with. The Review agrees with this position and advises that the legislation be revised to reflect such a requirement. The Review also suggests that, consistent with other criminal legislation covering the investigation of juvenile suspects, the Act should provide that there *must* be an independent (ie, non-police) person present at the time the procedure is carried out.

The role of the legal practitioner when appearing before the court also requires further consideration, as it needs to be made clear that they cannot consent on the child's behalf, even when their client is willing to undergo the procedure. Legal practitioners, and even magistrates, also need to be aware of the protection of having an interview friend present at the time of applying for the order.

YJC also suggested that the age (or youth) of the suspect be a relevant consideration for a judicial officer before ordering a forensic procedure, and further that they should be ordered only in rare cases involving very serious offences. We support the requirement that each case should be considered by a judicial officer on its merits. The nature of the offence and the age of the potential providers would be significant individual concerns on which discretion should focus.

There is nothing in the Act to say that the forensic procedure has to be carried out for a legitimate purpose. Especially with children and young people it seems that police are getting DNA, even though they haven't got anything to link it to. Where it's for a serious children's indictable offence, the suspect's profile will then stay on the DNA database indefinitely. The LAC has argued that there is a real need to tighten up what is meant by '*tends to prove or disprove*' in the Act. At present there is a real tendency towards using forensic procedures as a fishing expedition. It was suggested that if police have no evidence to prove or disprove the

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'*The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law*.'
See also Dowd J in *ME* (Supreme Court, 3 October 2002, unreported), where his Honour held that the regulation had been breached and consequently that '*the desirability of admitting the evidence does not outweigh the undesirability of the evidence that has been obtained in this way, as the clear intention of the legislature to protect young people has been frustrated by the procedures adopted by the police.*' This Review suggests that similar principles apply in respect of forensic procedures.

child's involvement, they shouldn't be taking the sample. This is compatible with the more general Standing Committee recommendation on the point, one with which we agree.

4-2-3 Child serious indictable offenders

YJC is concerned in relation to section 74(2) that there is no requirement that the child be serving a sentence of imprisonment at the time the forensic procedure is conducted. This Review advises that this should be rectified in the Act, so that only children convicted of a serious children's indictable offence and currently serving a sentence in a juvenile justice centre are tested.

Section 88 governs the destruction of forensic material taken from children pursuant to a court order, and subsection (4) makes it clear that the material must be destroyed if no conviction is entered or the defendant is acquitted.[95] Under section 38 of the *Children (Criminal Proceedings) Act*, a children's court may order the destruction of photographs, fingerprints and palm prints if child is found not guilty. A destruction order can also be made '*if the circumstances of the case justify it*' after sentence. However there is no reference to other forensic samples, such as DNA, and none are prescribed in the regulations.

Given the major implications of being on the suspects index, the vulnerability of children and the provisions under the Act which ensure children are treated differently, the CLS has recommended to the Review that it would be appropriate, in the spirit of not stigmatising young offenders, to provide that once a child's DNA has been used in proceedings, it is to be destroyed, irrespective of the outcome. The Review would prefer a provision in the Act that if the DNA evidence obtained did not form part of the basis of the conviction, it should be destroyed.

4-2-4 Child volunteers

The Review has also received conflicting views as to whether young people, for example, 16- and 17-years-olds, should be able to consent on their own behalf. The Commissioner for Children and Young People (CCYP) has advocated for a graduated scheme which takes account of the fact that children at the age of 15 can be expected to have the capability to make their own decisions about giving a forensic sample if given sufficient information about the procedure and its implications.[96] YJC, by contrast, suggests that children should not be able to consent, as forensic procedures have no therapeutic value and have the potential to affect a child's interests well into the future. The advice of this Review is that in all cases, irrespective of the consent of a third party, a magistrate should be required to rule on the request by police for a sample from children who are neither suspects nor SIOs, and would otherwise be considered to be volunteers.

This approach also recognises the danger in giving parents/guardians power to consent on their children's behalf, and that they may not always act in the child's best interests. This may be because the parent has an interest in the results of the forensic procedure, for example if s/he is a suspect in the offence. Alternatively, a parent may erroneously believe that their child was not involved in the commission of an offence and that by consenting to a forensic

[95] Note that under the *Children (Criminal Proceedings) Act 1987*, the children's courts have no power to convict those under 16, and a discretion in respect of children over 16 (s14).

[96] The *Minors (Property and Contracts) Act 1970* provides that children have the right to consent to medical treatment on their own behalf from 14 years of age.

procedure on their behalf, they will be helping to exculpate them. Allowing parents to '*volunteer*' their children may also create conflict between a parent and an older child, who may resent a parent giving consent on his/her behalf.

The Act provides that information about the nature of any proposed procedure and its possible consequences must be given to the parent (or guardian) of the child. The only information required to be given to the child is that they have the right to object or resist the procedure. This may be deemed as contrary to Article 13 of the Convention of the Rights of the Child. We support the CCYP recommendation that section 77 be amended to require that all children be entitled to receive the information set out in this section and that the information shall be provided in a manner and language that the child can understand.

Under section 80, if the consent of a parent/guardian cannot reasonably be obtained, or has been withdrawn, application can be made to a magistrate to make a order for the carrying out of the procedure, even where the child is not a suspect. This provision also treats children less favourably than adults, as there is no equivalent power to obtain a compulsion order against an adult who is not a suspect. The Review advises that the section should be amended to provide the opportunity for a compulsion order only in circumstances where the child is reasonably suspected of having committed an offence.

The issue of the recognising the child's wishes is rather illogically addressed under the Act. While children can avoid a forensic procedure if they '*object or resist*', the onus is on the child to show dissent. Whereas adult volunteers are given a free choice to agree or refuse, children are not offered this choice, but must take positive action to express their opposition or refusal. This treats children less favourably than adults, and as such, is discriminatory. We also note that children are socialised to agree with adult authority figures and may be too shy or embarrassed to demonstrate their unwillingness to undergo a forensic procedures. There are cultural factors involved here as well: many children believe it is rude to comply with the request of a police officer or health official.

As set out above, we advise that children and young people should have their status as 'volunteers' determined by the courts and therefore the provisions of the Act will not rely on their dissent. The provision that a child can still defeat a compulsion order should be retained. In so saying, we consider it odd that even if the matter has been argued before the court and the magistrate makes a compulsion order, the child can frustrate the order through objection or resistance. As a result, the police, the court, the family and the child may all be imposed upon when in the end the child can say 'no' and all the effort comes to naught. The Act, having denied the child the opportunity to give consent at the start of the process, effectively permits the child to have the final say after the matter has been adjudicated by a magistrate. A better course of action would be for the magistrate to recognise the child's resistance at the time of the hearing, and where it is manifest, refuse the application.

4-3 Victims

Part 8 of the Act deals with the conduct of forensic procedures on volunteers. Part 8 has not yet commenced, due to concerns that it would apply to victims of crime. There are procedural requirements in Part 8 that are inappropriate for victims of personal violence offences, who may be traumatised at the time that they are asked to undergo a forensic procedure. The Amendment Act seeks to remedy this situation by excluding victims of personal violence offences from the definition of '*volunteers*' under the Act. Instead, it was agreed that a

Protocol would be drafted to protect victims of personal violence offences (as defined in sections 76A(a) and (b)).

The Protocol was developed by representatives of Attorney General's Department, including a representative from the Victims of Crime Bureau, NSW Police, the Department of Health and the Department for Women. The Protocol has been approved by the Ministers for the above portfolios and the CCYP, and will come into operation upon commencement of Part 8 of the Act and the Amendment Act on 1 June 2003. It is considered that the Protocol adequately ensures that the rights of victims of crime are respected, while maintaining a practical standard for police investigation of offences, and the Review is satisfied with the protections provided by the Protocol.

The Review tends to distinguish between volunteers and victims on the basis of consent and its safety and we are not concerned that consent should be verified by a magistrate, as is our opinion for 'volunteers'. In so saying, we recognise that in most situations, victims have a vested interest in cooperating with police investigations, and further, that the police are more likely to protect the interests of the victim and be particular about the necessity of requiring such an intervention.

4-4 Volunteers – Mass Testing

The first mass testing of volunteers in NSW occurred in Wee Waa in April 2000, before the commencement of the Act.[97] In order to assist police investigations into the brutal sexual assault of a 91 year old woman in the early hours of New Year's Day 1999, the entire male population of Wee Waa aged between 18 and 45 – some 600 men – were asked to submit to a 'voluntary' DNA test (by buccal swab).[98] As a result of the testing process, a local man, Stephen Boney, admitted his guilt to police a few weeks after the testing commenced, before the results of his test, which revealed a match, were in fact known, and ultimately pleaded guilty to aggravated sexual assault, amongst other offences.[99]

The move was widely welcomed in the community itself, and '*most indicated…they were willing to give the test a go*.'[100] The desire of the community to assist in locating the victim's attacker is understandable, although it could be argued that the reliance on this form of community participation diminishes the importance of participation in more conventional forms of crime investigation. At any rate, critics have concerns that this sort of testing '*is not really voluntary because any person who refuses to do it will obviously be deemed to be*

[97] For discussion of the DNA testing of Perth's 3500 taxi drivers in 1997, see G Tooth, 'The Courage of our Convictions – The Claremont Serial Killer', *Radio National's Weekly Investigative Documentary: Background Briefing*, 25 June 2000, http://www.abc.net.au/rn/talks/bbing/stories/s146359.htm

[98] More recently, in June 2002, nearly 2,500 men and boys in Bundaberg, Queensland, were to be asked to submit to DNA testing in relation to the death of an English backpacker, and police intended to record the name of any person who refused to submit to the test: A Wilson, 'City's Males Face DNA Testing in Hunt for Killer', *The Australian*, 10 June 2002, p3 and R Noble, 'Men line up for DNA tests', 17 June 2002, available at http://www.abc.net.au/widebay/stories/s583291.htm.

[99] B Saul, 'Genetic policing: Forensic DNA testing in New South Wales and the DNA Database' (2001) 13(1) *Current Issues in Criminal Justice* 92.

[100] 'Town agrees to rape test', Herald Sun 7 April 2000, p9. See also 'A small town, a rapist at large… 600 men called for DNA tests', *Sydney Morning Herald*, 6 April 2000, p3. A phone survey conducted by the *Daily Telegraph* revealed that 87% of responded agreed that '*mass DNA testing [is] acceptable in a criminal investigation*': Voteline, *Daily Telegraph*, 12 April 2000, p29.

guilty by the rest of the community'.[101] One local interviewed commented that he'd go to be tested '*because everyone's expected to, aren't they?*'[102], and many in the Wee Waa community believed it was their civic duty to submit to tests.[103] Assistant Police Commissioner Clive Small attempted to assure the community that '*the mere fact that a person doesn't wish to undertake the test doesn't mean that they become any more of a suspect than they were previously*.'[104] In effect, however, the presumption of innocence was reversed, with Commissioner Small also stating that '*equally important to identifying the offender is to eliminate those people who are innocent so they don't have a cloud hanging over their head*'.[105] Ultimately, very few of the men refused to submit to the test, however those that did so, including a local solicitor who considered the process a breach of civil liberties, came under increased police pressure when it became apparent that they fitted a profile of the attacker.[106]

As one critic has commented,

> *DNA request surveillance infringes the privilege against self-incrimination, which governs the relationship between investigators and citizens. Moreover, in contrast to other techniques pressuring citizens to reveal their criminal behaviour, DNA request surveillance permits investigators to prompt such revelations without any accusation of criminality.*[107]

In this context, the worn-out platitude that the innocent have nothing to fear only goes some part of the way towards understanding that police investigations of this nature radically alter hallowed principles in the criminal law such as the presumption of innocence, the right to silence and the privilege against self-incrimination. As President for the NSW Council of Civil Liberties noted, '*people need to understand that if they do decline to take the test there are no adverse consequences*.'[108]

Although it is all too clear that, especially in a close-knit community, citizens will feel compelled to assist in whatever way they can to clear up a crime committed in their midst, the law should protect the rights of those who choose not to volunteer. In light of the concerns set out above, we support the Standing Committee's recommendation that voluntary mass screenings be subject to a court order. In so suggesting, however, we endorse the position of the ALRC that the intention is not to inhibit people from volunteering for a forensic procedure where this would be of real value to a criminal investigation.[109]

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[101] Upper House MP Richard Jones, cited in 'All town's men face DNA test in hunt for rapist' *Courier Mail*, 7 April 2000, p3.
[102] E Wynhausen, 'To a man, town volunteers for DNA test case', *The Australian* 7 April 2000, p2.
[103] '330 in DNA rape hunt: Fewer than a dozen decline test' *The Daily Telegraph*, 11 April 2000, p10.
[104] *ibid*
[105] L Doherty and E Connolly, 'Frightening glimpse of future police state' *SMH*, 7 April 2000, p8. See also letters in *The Australian*, 12 April 2000, p 14: 'End of the presumption of innocence' and 'Guilt trip', *SMH*, 20 April 2000, p18.
[106] G Safe, 'Police pressure DNA test sceptics' *The Australian* 11 April 2000, p3
[107] J Gans, 'Something to Hide: DNA Databases, Surveillance and Self-incrimination', paper presented at the Sydney Institute of Criminology Seminar – Use of DNA in the Criminal Justice System, 11 April 2001.
[108] 'Human rights breach claim' *Northern Daily Leader* 7 April 2000, p2. The Young Lawyers submission to this Review echoed the position that '*the notion of a free and informed choice is…weakened by the common sense assumption on the part of the 'volunteer' that there will be adverse consequences for refusing to cooperate.*'
[109] ALRC DP 66, *supra*, n30, at para 36.55.

4-5 Sampling populations

4-5-1 Suspect threshold provisions

Besides custodial populations convicted of serious indictable offences, the suspect threshold is the most significant under the Act. The issues in this area relate to

- What matters should (must?) be considered in determining whether to seek a sample;
- What should (must?) comprise informed consent;
- What populations can be deemed to provide informed consent;
- The range of offences of which the person is suspected (the extent of the meaning of a prescribed offence, '*another prescribed offence*');
- Whether a suspect should (must?) only be asked/required to produce a sample when there is other evidence against which it can be compared; and
- What happens with the sample/analysis if the suspect moves beyond the attention of the police/courts?

4-5-2 Clandestine sampling

The protections under the Act, particularly in relation to sampling thresholds, amount to nothing if the police engage in the taking of samples from known potential providers without their consent or the authorisation of a magistrate's order. A best practice investigation strategy needs to confront this practice with the intention of bringing all such sampling under the auspices of the Act, and suggest the potency of a best practice regime either to avoid or prevent malpractice before it happens, or to create an atmosphere of compliance, accountability, openness and exposure. In those cases where this approach is unsuccessful, then the force of law through the offence of unauthorised or unlawful use must indicate how seriously the State views such behaviour, although it may be difficult to identify when and in what circumstances such offences are committed.

4-5-3 Census or suspect focus

'Census populations' refers to the situation where an investigation technique is mass testing. We have already expressed our concerns in relation to mass testing of '*volunteers*'. We are also opposed to census testing as a way in which databases can be built to the point of empirical and referential credibility. In this respect, the blanket testing of serious indictable offenders in custody, with no regard to their particular relevance to forensic matching or without the suspicion of the police, might be seen as a version of census testing. We have been critical of this and also the testing of inmates in a routine fashion where consent is problematic.

4-5-4 Ethnic populations

This issue raises concerns about the creation and maintenance of specialist databases around unique ethnic populations, and the appropriate comparative analysis. More work needs to be done in Australia regarding the groups which require (on the basis of unique DNA structures) their own databases, and in particular, regular review and evaluation of the comparative reliability of such databases when creating probability ratios is required. [110] Also, the special

[110] In this context, as with the forensic analysis to discover a so-called 'criminal gene', caution must be exercised in that the DNA information obtained is not used for improper secondary purposes. See the submission to the ALRC from the Aboriginal and Torres Strait Islander Social Justice Commissioner/Human Rights and Equal

challenges for matching in this environment need to be made clearer to practitioners who are charged with explaining probability ratios.

4-5-5 DNA and identification

There is some debate in the criminal justice system about whether DNA testing should be employed where nothing but identification is at issue. We have witnessed trials where DNA was crucial for the identification of the remains of the victim and this then linked the liability of the accused. In relation to the accused, however, the issue here seems to be around whether it is necessary to have some reasonable suspicion of a criminal offence having been committed by the prospective provider in order to require the intrusion of sampling.

4-6 Effectiveness of Matching

4-6-1 Case authorities

It appears incontestable through the observations of the cases covered by this Review that forensic evidence, and DNA in particular, have significance for the determination of criminal trials. The degree of significance will obviously vary from case to case, depending on the importance of the forensic evidence against the other evidence presented for either side. However, it is clear from our survey of jurors that forensic evidence is given particular importance beyond that which might be objectively argued for its status as evidence in any comparative sense. The case authorities appended to this Report identify a range of issues which might impugn the significance of forensic evidence and its treatment before the courts.

4-6-2 Probability ratios

With the development of forensic databases, the probability ratios quoted in many courts are becoming more and more unimaginable in the mind of juries. One judge observed to the Review that he felt more comfortable with the probability ratio referred to in his trial because it did not extend beyond the hundreds of thousands to one.

In looking at probability ratios and their representations, there is now significant case law authority which directs prosecutors in particular about the accurate conclusions they may draw from probability ratios, and what these ratios in fact establish. Careless reference to such staggering numbers can, as the courts have established, derail the understanding of jurors and put the significance of forensic evidence as an identifier beyond the reach of any competing evidence.

The main error that occurs with the use of DNA probabilities is known as the prosecutor's fallacy. This arises in response to the two questions '*what is the probability that the accused's DNA profile matches the crime scene sample profile, given that he is innocent?*' and '*what is the probability that the accused is innocent, given that his DNA profile matches the profile from the crime sample?*' The first question asks about the chances of getting a match, assuming the accused's innocence, while the second assumes a profile match and then asks

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Opportunity Commission at 36.7 that the '*indigenous genetic profile would…provide considerable saving for researchers in terms of clinical trials*'.

about the accused's guilt or innocence. The fallacy occurs when the answer to the first question is given for the second question.[111]

Another, seemingly less common, error is the defence fallacy, which occurs when the defence suggests that identification evidence involving a characteristic shared by a large number of people is of negligible value because '*a lot of people could have done it*'. Generally there will be additional evidence to exclude others from the pool of potential offenders.

There is also a need both for prosecutors and judges to address the notion of empirical evidence, and its relationship with identity, and from there, liability, with great care. Probability ratios, no matter how great, are no more than probabilities and can have several interpretations which will produce very different outcomes in the mind of the verdict deliverers.[112] As has been suggested to the ALRC Inquiry, small match probabilities (eg '*one in trillions*') may not be technically incorrect as a matter of mathematics, but are without real meaning and lack credibility in the context of criminal proceedings.[113] Judges in particular need to be familiar with the science of probability, and the degree to which credible comparisons and conclusions can be drawn by experts on these outcomes.[114]

4-6-3 Mixed samples

Several cases observed during the progress of the Review involved DNA profiles from what have become known as mixed samples, where more than one DNA profile can be drawn and from this it would appear more than one person has contributed to the sample. In such mixed samples it is not uncommon for there to be major and minor contributors, and this leads to particular problems in relation to the analysis of the sample and the conclusions which may be drawn therefrom.

In addition to the difficulties of profiling and analysis from mixed samples, there are particular complications as to how profiles drawn from a mixed sample are to be accurately referenced back to the database. One example put to us was where the analyst drew one profile from a mixed sample and referred it back to the sample profile of the accused, rather than the database which contained the accused's sample. The problems associated with such a limited approach to referencing make the analysis dangerously flawed.

There is an argument for greater care in the treatment of mixed samples, not only by scientists and analysts, but also by legal professionals involved in the explanation of such material to juries.

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[111] For discussion, see G Hazlitt, 'DNA Statistical Evidence: Unravelling the Strands' (2002) 14 (9) *Judicial Officers Bulletin*.

[112] An example is a case of sexual assault in the United States where the attack occurred at a party, DNA was found and the probability ratio that it was someone else present other than the accused, was extremely high. What significantly impacted on that ratio was the fact that most of the other potential attackers at the large gathering were males in the accused's family, each whom had DNA profiles very similar to that of the accused.

[113] ALRC DP 66, *supra*, n30, at para 37.34 and see also I Evet, 'DNA Profiling: A Discussion of Issues Relating to the Reporting of Very Small Match Probabilities' (2000) *Criminal Law Review* 341 at 347.

[114] The Review notes that the Judicial Commission has published several articles dealing with DNA evidence and relevant case summaries in the *Judicial Officers' Bulletin*. In addition, Judicial Commission staff have presented papers at several Judges' and Magistrates' conferences as part of their continuing education programs.

4-6-4 Referencing

In the analysis of forensic materials, the referencing back to large and thereby representative databases is essential in the establishment of probability ratios.[115] It is argued that a reason in support of the sampling of custodial populations is the development of a large database, which is said to enhance the accuracy of referencing and representational probability evaluations. The size and utility of the database is also an argument for the de-identification of profiles rather than their destruction. We suggest that the proposed SIFS should carry out detailed analysis of database referencing, particularly as it relates to the sub-databases being constructed on the basis of race or origin, and the sources of samples and their context.

4-6-5 '*Cold link*' matching

As this Report identifies, when it comes to justifications for forensic procedures, particularly by police, the potential for cold link matching is high. '*Cold links*' are where otherwise unidentified samples are related back to a database and a connection is made with an identified profile (whether of a crime scene sample or person). It might be said that this is the popular view of DNA matching in particular, where a cigarette butt may provide a sample at a crime scene which later identifies a known offender. As the data on cold links suggests, however, this is not the most popular scenario for cold link matching in New South Wales.

One problem with cold link matching is the fact that it is not necessarily supportive of best practice police investigation strategies, as it is, by its nature, sporadic and essentially unsupported by other more conventional sources of identification evidence. An over-reliance on cold link matching, particularly where the integrity of crime scene data is problematic, may create an invitation for malpractice and misunderstanding which needs to be regularly monitored.

4-6-6 Mass testing – Dragnets

The future of data obtained from mass testing of volunteers needs to be sensitively considered, particularly in cross-jurisdictional settings and where the data is possibly transferred to national databases. In the context of the Wee Waa testing, all samples were ultimately burned, with independent witnesses, including from the Ombudsman's Office, monitoring the destruction of all samples and profiles obtained.

4-6-7 Local and comparative data

On the issue of the maintenance of databases and their comparative significance, it is important for the proposed SIFS to research the development of the database in New South Wales and to reflect on similar developments in comparable jurisdictions. This is particularly important, bearing in mind the fact that NSW will probably be the principal provider to the centralised National DNA database (CrimTrac). In addition, the designation of various databases, their integrity, and their cross-referencing needs to be examined ongoing in order to confirm the appropriateness of data separation and use.

[115] It should be remembered that representativeness is also a conditional and contextual issue. Particular minority ethnic groupings, for instance, may have such distinctive DNA that they require their own distinct and smaller databases, but these in turn can be very representative of the group concerned.

4-6-8 Judicial directions

As stated above at 4-6-2, it is important that judges at trial be familiar with the effectiveness and implication of data matching in the forensic area. An absence of understanding in relation to the science, its analysis, and its limitations can produce a false confidence in the mind of juries and judges, with the potential for putting in question a class of convictions which were singularly or overly reliant on forensic evidence.

In order to avoid or minimise such problems, judges not only need to be educated about the realities of forensic evidence, but as part of the best practice strategy, and with the involvement of judges and magistrates, broad common judicial directions need to be developed which relate to the application of forensic evidence generally.

4-7 The Impact of Forensic Evidence on Criminal Trials

4-7-1 Significance

Our analysis of trials and juror surveys clearly endorses the view that forensic evidence, and in particular DNA evidence, is deemed to be disproportionately significant in the mind of verdict deliverers. Whether trial lawyers or judges are in the same way impressed by forensic evidence is not the issue. Advocates in particular are now aware that jurors give high regard to DNA evidence. One Crown Prosecutor, for instance, revealed to the Review that he would not have proceeded with a circumstantial case except for the fact that DNA was present. This was despite the prosecutor conceding that the DNA evidence was in no respect more convincing than any of the other circumstantial pieces, and in fact may have done little to fill the gaps or link the essential pieces in the prosecution case.

The role forensic evidence, especially DNA, plays in circumstantial cases in particular may be due to the fact that it might be the only evidence identifying the presence of the accused or connecting the identity of the accused with the other circumstances of the case. This identification may not, of itself, be sufficient to establish much more than the accused's presence at or near the crime scene, however as those of us who are familiar with the thinking of juries know, such presence may sufficiently strengthen any additional unconnected evidence to bring about a conviction. The dangers inherent in over-emphasising forensic evidence as an objective cornerstone in the circumstantial case should be apparent to legal professionals and should be a concern for best practice advocacy and judicial direction.

4-7-2 Jurors and Comprehension

While jurors indicate that they find forensic evidence significant, the impact of that evidence is heavily dependent on its comprehension. In those cases we observed where efforts were made to make DNA evidence accessible to the jurors, the correlation between that comprehension level and evaluations of evidentiary significance were apparent.

The responsibility to make otherwise complex scientific evidence comprehensible to jurors is not merely a matter for expert testimony. In fact, the production of competing expert opinion may tend to compound rather than alleviate comprehension problems. Much work has been done on the relationship between jurors and expert evidence, and it would seem that contest alone tends to undermine the confidence of jurors in expert opinion and therefore diminish its impact on comprehension. This realisation has provided argument in other jurisdictions as to why pre-trial conferencing of expert opinion is an advantage to juror comprehension. In

addition, the use of court appointed experts in order to diminish conflicting opinion and juror confusion occurs in civil jurisdictions and should be examined here. In saying this, one does not want to diminish the opportunity for conflicting expert opinion to challenge forensic evidence. Such challenges are crucial to the authenticity of the science and the analysis which emerges from it. However it is not, we believe, necessary to equate such legitimate challenge with the outcome of confusion and complexity. Judges and lawyers need to be mindful of their obligations to see that forensic evidence is both significant to jurors because of its status and, more particularly, because of its clarity and application to the issues before them.[116]

4-7-3 Admissibility

Reliant as forensic evidence is on expert opinion, it is uniquely exposed to challenges on admissibility. It would be unfortunate for a culture of challenge to develop simply around matters of procedure or form, because more substantive challenges by the defence are not possible due to a lack of access and equity in the sampling and analysis stakes. The lawyers' focus group discussion on this issue was clear and unequivocal: lawyers on both sides of an adversarial trial need adequate, independent, and timely access to forensic materials in order to construct informed arguments about the relevance or otherwise of the conclusions advanced. Only when this is possible would it be appropriate to regulate against challenges based more on form than substance.[117]

4-8 Independent Forensic Laboratory

4-8-1 Significance

The establishment of an independent state institute of forensic sciences was considered of vital importance by the Standing Committee on Law and Justice, placing as its first Recommendation that

> *the Government give priority attention to the creating of a State Institute of Forensic Sciences to, inter alia, manage the use of technology in criminal investigations and prosecutions. The Committee further recommends that, should a State Institute of Forensic Sciences be established, it be requested to further examine methods of calculating the significance of DNA matches.*

In further discussions during the Review focus group, the Chair of that Committee, the Hon Ron Dyer, MLC, suggested that he considered this issue to be the most important of the 56 recommendations made in the Review. This Review agrees with him on this and strongly urges the Government to implement this Recommendation as a matter of priority. To this end, the Review also notes the announcement by Premier Bob Carr on 6 March 2003 of the Government's proposal to introduce a Forensic Research Investigation and Science Centre (FRISC), as part of the police portfolio.

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[116] See the comments of the Honourable Justice Wood to the International Symposium on Forensic Sciences in relation to the establishment of expert witness institutes, codes of ethics, Rules of Court or Practice Directions and joint conferencing: 'Forensic Sciences from the Judicial Perspective', Paper delivered at the 16th International Symposium on Forensic Sciences, Canberra, 13-17 May 2002. Paper available at http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/Wood_May2002

[117] For discussion of 'deeming provisions' or conventions relating to the analytical protocols, see 4-11-3.

4-8-2 Models for delivering forensic science services

A recent decision by the Queensland Court of Appeal, upholding an appeal against a rape conviction, provided the impetus for the Crime and Misconduct Commission of Queensland to investigate the state of forensic services, resulting in the report, *Forensics under the Microscope: Challenges in providing forensic science services in Queensland*. The Report discusses models for delivering forensic services and recognises that many models are available in Australasia and internationally. These models may have been adopted and evolved according to the resources, local requirements, efficiency, economy, and the degree of separation desired between the investigators and scientific staff. Moreover, models appear to differ in terms of the management of the services provided. The principal models for service delivery are health-governed,[118] police-governed,[119] board managed,[120] or a mixture of these.[121] In deciding on an appropriate model for the delivery of such services, the available resources and the capacity to deliver such services need to be considered, as well as the historical organisation and current delivery of criminal justice professional services more generally.

4-8-3 The present NSW model

The Division of Analytical Laboratories (DAL), which amongst other things conducts all the forensic examinations in relation to criminal investigations in NSW, is part of the Institute of Clinical Pathology and Medical Research (ICPMR), which is in turn part of the NSW Department of Health. DAL and its predecessor laboratories have been supplying DNA-based evidence on specific cases to NSW Police since the technique was first developed in the late 1980s. The decision by NSW Parliament with the passage of the Act to develop a DNA database of criminal and crime scene samples led to ICPMR/DAL massively increasing its capacity to process DNA samples. The establishment of an enlarged DNA laboratory was funded by a special Government grant and the recurrent costs of the additional analysis were to be met out of the NSW Police budget.

NSW Health via ICPMR/DAL provides NSW Police with DNA profiling services pursuant to an agreement between the two agencies, which covers the cost of service provision and the

[118] New Zealand and Canada adopt this model, which has the benefit of operational independence and clearly defined management, but the funding may be uncertain, especially in circumstances where the forensic science service provider is small or operates in a competitive market.

[119] The USA is well represented in this regard. This model generates a close liaison between scientists and investigators but the independence of the scientists may be in question within such a model.

[120] This model removes responsibility for the provision of forensic science services from the police and government departments to a single purpose organisation, and is used in South Australia and the United Kingdom (excluding Scotland). Board governed models have perceived independence, but may lack financial security. Their principal benefit is that they may develop independent areas of excellence in forensic science.

[121] Queensland, Western Australia and New South Wales adopt a mixed model for delivery, where forensic services are governed both by the police and health bureaucracies, which allows for the division of effort, specialisation and the development of specialist staff. The model requires well-developed systems of communication and means of co-ordinating activity, and there may be questions about the balance of power between the two principal agencies involved, and how the scientists understand their role in terms of client relationships. Independence is an issue here, as might be the designated relationship between the laboratory and other legal and criminal justice professional agencies

requirements for maintaining DAL at arms' length from the police. Through independent management and governance, DAL ensures privacy, data security and laboratory integrity.[122]

There are quality control mechanisms in place at DAL to ensure the accuracy of results and interpretation, and these form part of the overall quality assurance measures, which monitor, verify and document the laboratory's performance. These measures also include proficiency testing and internal audits. The laboratory also has in place best practice procedures to minimise the chance of errors occurring, including that:

- The examination area of the reference samples and evidence samples are kept physically separate;
- DNA profiling of the reference and evidence samples are carried out in a separate 'runs';
- Sample transfers are checked separately;
- Quality control samples are included in tests;
- Randomly selected completed samples are selected for re-analysis to check for reproducibility;
- All cases are subject to peer review checking before finalisation;
- Laboratory scientists are tested by an outside agency each year to determine that they maintain their competency. It is to be noted that the laboratory's scientists have never obtained an incorrect DNA result in these competency tests.

There are also systems in place to minimise the risk of tampering with physical evidence, for example, by storing the evidence items and data derived from them in secure areas with access limited to authorised personnel, and transporting buccal swabs from prisoners in tamper-evident packaging, as well as a number of security measures in place to minimise the risk of tampering with the database.

4-8-4 Independence

When examining independence in relation to institutional structures for forensic services delivery, the notion has several dimensions:

Financial and resourcing independence – there is no doubt that the principal clients for any such organisation will be Government agencies, and consequently the core of funding for any such institution will be the Government Treasury. To this extent, it might be argued that claims for independent financial status in such circumstances are superficial. Such criticism however neither understands the complexity of public sector resourcing, nor the significance of institutional mechanisms to control internal budget allocations. An agency responsible for the provision of forensic services which is constructed either as a statutory body or under the function of an independent board will have the constitutional power to determine the manner in which it allocates the resources it receives from its client base. Independence, therefore, is as much concerned here with the allocation of resources as it is with their receipt. In addition, the independent body can choose to reposition its client base, should it wish to engage in the provision of services on a wider commercial basis.

Scientific independence – it is commonly understood that science professionals will carry out their duties within a framework of scholarly and ethical integrity. In this respect, it could be

[122] DAL is accredited by the National Association of Testing Authorities (NATA), which is recognised by the Commonwealth Government as the sole national accreditation body for establishing competent laboratory practice.

argued that scientists in any institutional context will claim independence for their research and analysis. Such a claim will however obviously be pressured, depending on a range of external considerations which may be brought to bear on the scientific exercise. These pressures can be subtle and sometimes relate to the assimilation of a culture generated by a principal client or by the nature of the majority of the work undertaken. If an organisational buffer is in place, which enables scientists to work independently of the interests of their principal clients, then the scientific independence of the laboratory will be fostered. Associated with this is the recognition that a more diversified client base will bring the scientist in contact with a range of alternative interests, which can only be positive in the creation of an unbiased and more open scientific environment.

Organisational independence – the importance of the institutional independence of SIFS beyond questions of funding and individual scientific commitments should not be underestimated. Organisational independence should be addressed at two levels, the first being the status of the Institute within the criminal justice and scientific communities, and the second, the internal structures of the Institute which commend its professional autonomy and all that goes with it. Organisational independence requires certain accepted organisational structures which enhance accountability and demonstrate a management capacity, which, while requiring the effective administration of the Institute's responsibilities, ensure the independence of the scientists who have the carriage of these responsibilities.

Operational independence – operational independence suggests the possibility of the Institute determining its priorities in part outside the interests of its principal clients/sponsors. It also suggests the necessity for the Institute to be responsible for the priorities it identifies and prefers, and the measures of efficiency and effectiveness it adopts.

Clearly, all of these dimensions are interrelated. In addition, it would be naïve to suggest that the SIFS would best achieve its core functions separate from the other significant stakeholders who participate in forensic procedures. The issue of independence therefore is a question of balance, but one which is about much more than appearances alone.

On the issue of appearances, many of the stakeholders with whom we had discussions stressed the crucial importance for the scientific institution and the public to be confident that the highest levels of impartiality, objectivity, and integrity were the essence of its operations. In that respect, the appearance of independence holds out a legitimacy which will permeate through all other aspects of forensic procedures. Not just at the level of appearance, but certainly recognising its importance for the future legitimacy of the new Institute, this Review opposes the suggestion that the bureaucratic and financial foundation for it should be within the Police Ministry. If the Institute must have a ministerial connection,[123] it cannot be with its principal client, as this would entirely destroy any claim to at least operational independence. In our view, it would be more appropriate for the Institute to be situated within the portfolios of the Department of Health and the Attorney General's Department.

The importance of SIFS's independence is all the greater if the Review's recommendations that the Institute should take on responsibility for the maintenance of 'systems' data associated with forensic procedures, and the wider monitoring of the major aspects of

[123] Statutory bodies can of course also be funded from a direct Treasury vote; see for example the NSW Ombudsman's Office.

forensic procedures in New South Wales, are adopted. In keeping with the Review's aspirations for best practice in the area, it could only be an independent institution which would credibly take the running for the creation of a code of best practice and the development of associated education and review functions.

4-8-5 Organisation

Bearing in mind that the Government is currently deliberating in detail on the proposal for the SIFS's establishment, it is not for this Review to determine the nuts and bolts of the organisation of any such Institute. For example, funding arrangements, whether they incorporate 'user pays' components and block funding elements, should be more appropriately determined when wider budget considerations have been settled. However, in keeping with the comments we have made regarding the importance of independence, it is useful to identify some organisational features which we suggest should appear in any such institution.

The Review considers it important that the SIFS develops as a centre of excellence for the provision of forensic services in the region. To facilitate this, it would be sensible that the Institute should associate itself (in an appropriate constitution) with a university or consortium of universities that would provide scholarly, scientific, and institutional support to the foundation phase of the SIFS. In addition, the Institute should adopt a model of governance involving an advisory council of senior scientists, stakeholders, and community representatives. Below this should be a management committee with operational responsibilities for the broad policy of the Institute, and below this, a scientific directorate involving the Institute's senior management.

Consistent with the functions which have been suggested for the Institute, such as those identified in the Standing Committee Report, and in associated submissions, the Institute might well exist in four divisions, as follows. These divisions obviously would have interrelated responsibilities, but would stand separate in recognition of their principal and particular objectives.

- The first division would be responsible for scientific analysis;
- The second division would be a data management unit, which would not only retain the databases associated with forensic evidence, but also carry out the necessary systems evaluations which would establish the efficiency and effectiveness of forensic services across associated agencies, as well as providing ongoing information necessary to ensure compliance with the Act;
- The third division would deal with external relations (including across Australia and overseas), and would liaise with principal clients, and would govern the connections between the Institute and other sections of the criminal justice system. It might also be appropriate to give this division responsibility for the regular monitoring of data management and data protection. In this respect, it would have a complementary role with the data management unit, but with a Chinese wall in place for process efficiency. This section could organise independent process audits of the Institute's data management, analysis and data retention/protection functions, and could also be employed to interrogate the forensic procedure capacity and management of other associated agencies;
- The fourth division, and one whose importance should not be understated, would be responsible for community education, servicing the interests and needs of the professional

community when education on forensic procedures is required, as well as developing a community education function which presents a balanced understanding of forensic procedures and their potential.[124] This division would also provide a significant revenue earning potential.

The Review is not in a position to detail the powers which should be given to the Institute in managing both forensic sampling and testing of crime scenes. Having discussed these issues at length however with the scientists involved, and with police investigators and legal practitioners, it would seem to us appropriate that the expanded role of the Institute in sampling and data comparison should be an important element of the best practice approach. The new Institute should have overall responsibility for stimulating discussions with stakeholders about such matters in a climate of compromise and the promotion of the Institute's independence.[125] With the development of the best practice model around specific obligations and responsibilities, an over-reliance on legislative prohibitions as the inadmissibility of improperly or inaccurately obtained evidence would be relieved.[126]

Again in keeping with the best practice strategy, the SIFS should also be responsible for the establishment of state-wide forensic protocols in all aspects of scientific analysis and interpretation. These protocols should include the method of calculation and the presentation of chance probability figures in court, and these protocols should be administered and regularly reviewed by the Institute on the basis of trial experience. In addition, the Institute should develop protocols as part of the best practice code for the collection and storage of and access to forensic samples.[127]

The Institute, as recommended by the Standing Committee, should also be responsible for the periodic evaluation and review of scientific methods and standards employed in laboratories which deal with forensic evidence, including the periodic review of the reliability and currency of Profiler Plus, compared to other available systems in the developing science. The findings of any Institute review based on such enquiries should be published for the purposes of public accountability, scientific scrutiny, and the availability of adverse information affecting reliability of incriminating evidence, both past and current.

The Institute should also be given responsibility to investigate and report on such matters as the effect of the size of the databases they maintain on the reliability of statistical calculations, the need for the establishment of separate sub-databases, etc. The maintenance of databases and the integrity of the data they contain should not simply be the Institute's concern in terms of scientific analysis, but also from the point of view of the interests of individual providers and their privacy. This is particularly important as wider cross-jurisdictional access to such data is becoming a reality. Along with this is the potential for information arising from such

[124] Such education would be best administered in association with professional agencies such as the Law Society, the Bar Association, and the Judicial Commission, as appropriate.

[125] The Review's experience in the focus groups would tend to suggest that such collaborations would be productive and would develop the generous spirit evidenced amongst practitioners at those meetings.

[126] This is not to say that the Review does not accept the need for a strengthening of the statutory provisions regarding improperly obtained evidence.

[127] It may be necessary for the Act to provide for specific periods through which samples are retained for the purposes of the Innocence Panel.

enquiries to test the appropriate development of potential sample populations and what the Standing Committee refers to as '*function creep*'.[128]

4-9 Right to privacy

The intrusiveness of DNA testing necessitates careful regulation of the circumstances in which a suspect or convicted offender should be required to supply DNA.

4-9-1 Integrity of databases

The issue of the integrity of DNA databases, in particular, ensuring that only appropriately obtained information is placed on the databases, has been considered recently by the ALRC. The Act (and the corresponding provisions of the Commonwealth *Crimes Act*) provides for the offences of supplying forensic material for DNA database system purposes (s91) and accessing or disclosing information stored on the DNA database other than in accordance with the purposes set out in the section (ss92 and 109 respectively). In addition it is an offence to match profiles other than in accordance with section 93; and there are also offences in relation to the recording, retention and removal of identifying information on the DNA database system (s94). Nevertheless, questions about the integrity of the databases remain, for as the ALRC observed, '*it is unclear whether information stored "in a DNA database system" includes the forensic material from which the profiles stored on the system are derived. If it does not, this may leave a regulatory gap in relation to these DNA samples*.'[129]

Second, the DNA profile of a suspect or serious offender will be stored on the National database, CrimTrac, and may be matched against other indexes until it is destroyed. If the individual is ultimately found not guilty of the relevant offence (eg if he or she is acquitted or the conviction is quashed), or the charges are withdrawn, the DNA profile of an innocent person will have been available for matching or sharing with other jurisdictions for a 12-month period. This may be considered an unacceptable invasion of an innocent person's privacy.[130]

This Review has reason to suspect that database integrity is an issue in the processing of forensic procedures.[131] While our policy approach to this is to rely on the creation and the development of the new Institute to address these concerns, databases continue to be developed and accessed for a variety of purposes under the present model. We were not able to obtain sufficient information on database processes in order to satisfy our concerns in this regard.[132] Therefore, there rests an onus with DAL to answer the specific issues raised by this Review with respect to data maintenance, and to confirm that these are at least in compliance with the Act, and that their protocols give the Attorney comfort that the vital information and science in their charge is appropriately protected.

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[128] Concern about function creep, for example the experience in Iceland and Tonga where citizens' genetic information has been sold by the respective governments to researchers without the subjects' consent, has been raised by the NSW Director of Public Prosecutions: N Cowdery QC, 'Forensic Science in Criminal Law', Annual DPP Solicitors' Conference 2002, 3 April 2002; available at http://www.odpp.nsw.gov.au/speeches/speeches.html

[129] Australian Law Reform Commission and the National Health Medical Research Council, *Protection of Human Genetic Information*, Issues Paper 26 (ALRC IP 26) at para 13.82.

[130] *ibid* at paras 13.82-.83.

[131] See G Ryle, 'Red Cross Edgy over DNA Blood Samples', *Sydney Morning Herald*, 16 November 2001

[132] Part of the problem here may rest with the Review, in that we specifically reiterated our request for this information from DAL late in the period of our deliberation.

4-9-2 Data protection and dissemination

The Privacy Commission of NSW recently revised its Data Protection Principles, which cover the following issues

- The manner and purpose of collection of personal information;
- Solicitation of personal information from the individual concerned;
- Solicitation of personal information generally;
- Storage and security of personal information;
- Information relating to records kept by record-keeper;
- Access to records containing personal information;
- Alteration of records containing personal information;
- Record-keeper to check accuracy etc. of personal information before use;
- Limits on use of personal information;
- Limits on disclosure of personal information; and
- Sensitive information.

It is of particular relevance to note in relation to the final Principle that '*information relating to ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual life shall not be used or disclosed by a record-keeper without the express written consent, freely given, of the individual concerned*.'

In the context of ensuring the privacy of victims, the ALRC noted

> *The Inquiry considers that the regulatory framework for dealing with DNA samples and profiles containing a victim's DNA is unclear. To the extent that a victim's DNA cannot be removed from the offender's sample, the victim's profile could be stored in a volunteers index, or the crime scene index of the DNA database system, depending on the circumstances in which it was found or collected. In light of the varying index matching rules, there are potentially significant privacy implications for the victim, depending on the respective index in which his or her profile is stored.*[133]

On 24 April 2002 the Privacy Commissioner of NSW, wrote to the Attorney General recommending that the following legislative prescriptions be put in place to regulate the dissemination of data:

- The circumstances in which NSW Police may provide DNA material and related information to the CrimTrac Board for inclusion on the CrimTrac database;
- The circumstances in which NSW Police may extract DNA material and related information from the CrimTrac database;
- The mechanisms by which the quality of NSW inputs may be assured (this could for example make reference to the DNA Advisory Committee which currently oversees the procedures and operations of DAL); and
- The complaint, investigative and audit powers of the oversight body.

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[133] ALRC DP, *supra*, n30, at para 36.43. The ALRC at para 36.60 also expressed concern about the use of DNA samples for identification in mass disaster situations, and especially the risk that by supplying a sample, relatives of victims may implicate themselves or the missing person as a suspect in an outstanding offence. The Review notes and accepts however the protection of s83A of the Amendment Act in this context, that any information so obtained is not admissible in any court proceedings against the person, unless adduced by the person him or herself.

This Review is not clear on any of these matters and does not believe that the present legislation adequately addresses these concerns. The connection between NSW data sources and CrimTrac is still formative, but as NSW will probably be the principal contributor to CrimTrac, NSW is in a potent position to dictate the data protection expectations for the shared database. This Review deems these concerns to be timely and advises that the CrimTrac negotiations should only proceed from NSW's point of view if there are answers being developed to satisfy the Privacy Commissioner's concerns. We would also advise that an extensive independent review and audit of police and DAL databases and protocols should be a condition of NSW's full accession to CrimTrac. The plan for SIFS should also be mindful of the role it could play in enhancing the privacy dimension of forensic procedures.

The Federal Justice Minister, Senator Ellison, emphasised in Parliament on 5 March 2001 the importance of monitoring procedures, in acknowledging that

> *…adequate and independent monitoring of a national DNA database system is critical if we are to have an effective system that ensures that any problems are quickly identified and remedied. The best way to do this is to ensure that there is adequate independent monitoring in each jurisdiction, and across the jurisdictions, which can, in turn, properly investigate complaints and pool information and better practices to safeguard information and ensure that DNA is collected and matched in accordance with procedures.*[134]

The NSW Young Lawyers submission also raises the fact that the Act '*does not create rights and responsibilities to safeguard against all cases of loss, misuse or wrongful disclosure*.' Accordingly, Young Lawyers submits that the *Privacy and Personal Information Act 1998* be extended to apply to all laboratories handling and storing DNA samples, for additional security of samples against loss, unauthorised access, use, modification, or disclosure, and against other misuse (s12(c)). In addition, it is suggested that section 4 of the *Privacy Act* be amended to include in the definition of '*personal information*' all forensic DNA samples collected from persons and DNA profiles held on the DNA database as a result of the operation of the Act. These are sound suggestions and worthy of reflection by the Attorney General.

4-9-3 Profile ownership – ownership of genetic material and compensation

The ALRC speaks more generally about the ownership of genetic samples, but what about the profile? The complex situation regarding ownership, possession and bailment of forensic material is not addressed in the Act and neither is the issue of whose data it is which is placed on file. These concerns would not be so pertinent, were it not for the issues of misuse and compensation. In many respects, misuse of samples or their derivative scientific analysis can only be understood if authorised use is justified. The Act provides for a range of authorised uses and these could only be countenanced if the police and DAL at the very least could claim possession and bailment, although it might be said that they are acting as if they were the owners of this material. The concept of eventual ownership will be crucial if claims for compensation arising out of misuse are to be actioned.[135] This issue assumed particular significance in the context of the Innocence Panel, which is discussed below in 4-12-2.

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[134] The Hon Senator Ellison, Minister for Justice and Customs, Second Reading Speech, *Crimes Amendment (Forensic Procedures) Bill 2001,* Senate Hansard, 5 March 2001, p22513

[135] Here one could imagine claims for significant damages if the use of this material or of its data analysis went into the hands of third parties and damaged the rights of the original sample provider. Compensation would

In a standard bailment situation, the sample provider could rightfully expect that the bailee would retain the samples and analysis on his or her behalf. If this were not the case, and the bailor was eventually disadvantaged, then there may be grounds for compensation. We suggest that the Act needs to specifically address the issue of sample and profile ownership, the terms and consequences of the transfer of possession and the extent of bailment.

4-9-4 Misuse by third parties and offences for misuse

We have already identified the possibility of misuse of sample information by third parties. In a world where the appetite for information about citizens, and the maintenance of personal databases is voracious, forensic records such as those covered by the Act are valuable in a wide variety of situations such as insurance, credit, paternity and employment. If this information, as with most criminal justice data, is to be covered by limited use regulations, and access is to be appropriately limited, then transactions of this information through illegitimate means will be lucrative and difficult to monitor. The use of these databases the needs to be scrupulous and vigilantly monitored. Otherwise it will be the civil courts that will be critically reviewing the inadequacies in the Act's conceptualisation of data ownership and appropriate use.

In other parts of this Report (see 3-1-6), we have discussed the offence protections for the violation of database restrictions. We recognise the limitations of the offence model, but we commend its careful reconsideration and evidence of the importance that the Act accords database integrity and the manner in which third party access is to be interpreted as a crime.

4-10 Right to Fair Trial

In the struggle for balance which engaged the Standing Committee, fair trial was important as identified in their Report. While the trial is a disproportionately small outcome in the criminal justice process in which forensic procedures may play a part, it is a particularly public event and thereby the opportunity to identify challenges to fairness and natural justice are significant. In addition, the concept of fair trial is obviously impacted upon by pre-trial events.

4-10-1 DNA identification and pleas

There is some conflicting opinion about the impact of DNA evidence on guilty pleas. In an environment where DNA evidence tends to prove identification in those offences where identification is regularly an issue, it would be logical to assume that the presence of DNA would be a significant factor in influencing accused parties to plead. In sexual assault for instance, where identification, a DNA match would, one might consider, be likely to persuade an accused person not to go to trial. However, in the current climate of radically increased sentencing, particularly for sexual assault, complemented by recognition of low conviction rates in that offence type, the impact of DNA may be less sensational. Research on sexual assault trials[136] would have it that the presence of DNA in sexual offence cases is not in any way the most significant influence on an accused's decision to plead guilty. It would seem, on the advice of defence lawyers who work in the sexual offence area, that DNA identifiers are

essentially depend on whether the secondary parties who transferred the sample or the information could claim any of the rights of ownership.

[136] M Briody, *supra*, n58.

as likely to encourage an accused to alter his defence to a challenge of consent, rather than simply bringing about a guilty plea.

4-10-2 Potential to challenge expert evidence

The ability to fairly put a defence is an essential component of our notion of fair trial. A defence however comprises two principal elements. The most significant of these is the challenging of the prosecution case.

In cases where forensic evidence is an important feature, the prosecution case may require the interpretation of expert evidence. Expert evidence for all intents and purposes is opinion based. We have observed DNA trials where the initial intention of the defence was to challenge in detail the expert evidence of laboratory analysts as scientific opinion. Some controversy has arisen in those cases about whether such opinion evidence is in any way unique and to what extent opinion as science needs to receive a different interpretation from other forms of opinion evidence.

4-10-3 Independent analysis

As stated elsewhere, equity of access to challenge crucial forensic evidence, or to present an alternative opinion, seems to be a vital feature of the presentation of a balanced defence, and hence confirms a fair trial. In a climate where trial fairness is as much about shared obligations between the prosecution and the defence as it is about protecting the rights of the accused, arguments about equity of access are often not given the merit they deserve. In this context we are speaking ideally of equal access to the resources for independent analysis, but at the very least, the defence must have access to the analysis conducted by DAL. We have been advised by both prosecution and defence counsel that the defence do not obtain the full analyst's report as a matter of course, a situation which we consider unacceptable. This position is strengthened by the proposal of the ALRC that forensic procedures legislation be amended to provide that the prosecution has a duty, amongst other things, to give defendants an opportunity to have DNA samples independently analysed.[137]

4-11 Prosecutorial Focus

4-11-1 Presumptions and DNA

Because of the impression exhibited by jurors that DNA evidence is uniquely probative, prosecutors have a special responsibility in the utilisation of this evidence. In addition, from the time of the taking of the sample, the role of the suspect is more particular when it comes to forensic evidence. Simply being a suspect under the Act justifies a range of interventions which normally would not be possible and provides police with powers that they would not possess under the common law. This opens up to prosecutors a unique responsibility in protecting the presumption of innocence.

The opportunity that sometimes extraordinary probability ratios present to unduly impress juries may tempt prosecutors to over-state their significance. The difficulty for prosecutors in this area does not stop with the avoidance of the prosecutor's fallacy. Responsible prosecutors need to precede the judge's caution concerning what these probability ratios represent, and how they can be used by juries.

[137] ALRC DP 66, *supra*, n30, Proposal 37-4.

The presentation of expert evidence when introducing forensic material and analysis into the trial is a distinct responsibility of the prosecution. The prosecutors need to enhance the understanding of jurors through a sensible and straight-forward process of explanation. The development of conventions in this regard is to be encouraged. This Review has witnessed in certain trials a constructive liaison between the prosecution and the defence to enable a significant reduction in the areas of contest, and to promote simplicity in the presentation of such evidence.

4-11-2 Access and expense of forensic analysis in the adversarial context

The present relationship between the police and DAL is a close one. The police, as DAL's principal clients, have unique access to the analytical facilities provided therein, and through this, the prosecutors are able to rely on the service of DAL analysts and scientists as experts for the prosecution cases. The Review has not seen a situation in New South Wales where DAL scientist or analysts were presented to argue the defence position, and the resource limitations on the defence may also make it more difficult for the defence to enlist the opinion of experts interstate and overseas. We suggest that prosecutors need to be mindful of the advantages they may have in this context.

4-11-3 Deeming provisions

It has been said to this Review that the trend by defence advocates to challenge the chain of custody of forensic samples[138] is something which is placing a difficult strain on DAL's limited resources. An answer to such challenges might be for 'deeming provisions' to be created, which present evidentiary presumptions about the accuracy and probity of laboratory protocols. These provisions would simply require in a general sense a report from DAL claiming compliance with its protocols and the onus would be then on the defence to indicate specific examples of where this may not be the case.

The difficulties inherent in such a position are apparent. It is important for prosecutors to appreciate the difficulties that defence counsel face in raising challenges against forensic evidence. More than this, the indications from laboratory experience in other jurisdictions tend to suggest that occasional problems arise with the custody and scientific processing of samples. The opportunity to challenge in these circumstances should not be denied.

The Review would currently be opposed to the introduction of deeming provisions, simply on the basis of the inconvenience connected with challenges to the chain of custody. While the Review notes that chain of custody challenges are often a last resort and in some circumstances not productive in a trial, occasional problems may arise with the custody and scientific processing of the samples and the opportunity to challenge this should not be denied. In addition, it would be wrong to limit defence access to this technique until the issues of equity and access to sampling and analysis are more effectively addressed.

[138] This trend has arisen in part as a result of the Court of Criminal Appeal decision in *R v Sing* [2002] NSWCCA 20.

4-12 Innocence Projects and the Innocence Panel

4-12-1 Innocence Projects

The first Innocence Project was established at the Cardozo School of Law in New York in 1992 by two attorneys, with the objective helping wrongly convicted inmates prove their innocence though DNA testing.[139] The Project runs as a non-profit legal clinic, with students handling the case work while being supervised by a team of attorneys and clinic staff. It only handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. Over 25 States in the United States now have projects of this nature established, and by the end of 2002, over 120 people had been exonerated on the basis of post-conviction DNA testing.

Inspired in large part by the American models, there are two university-based innocence projects in Australia (both established in 2001), the UTS Innocence Project, at the University of Technology, Sydney, and the Australian Innocence Project, based at Griffith University. The criteria for consideration by the Projects vary, but applicants must claim actual innocence, rather than merely applying in relation to aspects of their trial or sentence.[140] The UTS Innocence Project does not focus exclusively on DNA, but seeks to examine more broadly whether a person may have been erroneously convicted. If, for example, an offender alleges that they have been convicted on the basis of 'planted' DNA evidence, a further DNA test will not serve to exonerate the person, as it will only confirm that the results of the earlier DNA test were correct, an issue the offender would not contest.

The Australian Innocence Project deals principally with cases where the DNA evidence relied on at trial was questionable and/or where there was no DNA evidence at the trial and its use could bring about a fresh evidence point, but it may also investigate '*other situations of potential injustice with the goal to correct, expose, or educate the public on injustices that occur within the criminal justice system*.'[141]

4-12-2 The Innocence Panel

Separate from the Innocence Project, is the Innocence Panel, considered to be '*one of the first Government-initiated bodies of its kind in the world, if not the first*'.[142] The establishment of the Panel was announced by the then Minister for Police on 16 August 2000. Minister Whelan stated that its function would be to review claims of wrongful conviction, as '*DNA can be a silent witness – the vital piece of evidence that could set an innocence person free*'.[143] At the time it was first announced, the Minister claimed that 'DNA evidence will be used to free anyone wrongfully convicted of crimes under a Carr Government plan to establish a special panel to review criminal cases'[144], although initially the Panel will only accept applications from those convicted of serious offences in NSW such as murder,

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[139] http://www.innocenceproject.org/about/index.php

[140] The Review is grateful for the comments of the Director of the UTS Project, Ms Kirsten Edwards. For further information about the UTS Innocence Project, see http://journalism.uts.edu.au/subjects/oj1/oj1_a2001/innocence/index.html. For further information about the Australian Innocence Project, see http://www.gu.edu.au/school/law/innocence/home.html

[141] See http://www.gu.edu.au/school/law/innocence/home.html, *ibid*

[142] The Hon J A Nader QC RFD, Chair of the Innocence Panel, 'The NSW Innocence Panel', paper delivered at the Eighth International Criminal Law Conference, 2 October 2002, http://www.crimbarvic.org.au/hader3b.html

[143] Media release for the Hon Paul Whelan MP, Minister for Police, 16 August 2000.

[144] *ibid*

manslaughter, serious sexual assault (other than indecent assault) and where a person is subject to the Serious Offenders Review Council.[145] In special circumstances the Panel may accept applications from persons convicted of other crimes and the Panel will also accept applications from forensic patients (who have not been convicted of the offence charged). In addition, persons no longer serving a sentence may apply, though priority will be given to those serving a sentence.

Information on the Panel, which is available online and in brochures disseminated in Corrective Services facilities, makes it clear that the role of the Panel is to '*facilitate DNA testing for people who have been convicted of crimes and believe that DNA evidence may help them to prove their innocence*.' The Panel is '*responsible for facilitating searches to locate crime scene samples and, if DNA can be extracted from these samples, comparisons with the convicted person's DNA*'. It is also clear that the Panel is not a court and does not have the power to overturn a conviction.[146]

It was originally proposed that the Panel would be operative from 1 July 2001, six months after testing of prisoners in NSW jails commenced,[147] however the membership of the Panel was in fact only announced in September 2001, a regulation was required to allow for access to the DNA database and disclosure of information for this purpose.[148]

The Panel consists of John Nader QC, retired Judge of the District Court, as Chair, the DPP, the Deputy Commissioner of Police, the Director General of the Police Ministry, the Privacy Commissioner, the head of the Legal Aid Commission, a Public Defender, a criminal law lecturer and representatives of the Victims Advisory Board and the Department of Health.

The terms of reference of the Panel were prescribed by the then NSW Minister for Police as follows:

> *(a)To receive applications from persons who claim to have been wrongfully convicted of a serious indictable offence and believe that analysis of DNA evidence may assist in proving this;*
>
> *(b) To consider whether those applications meet the criteria established by the Panel from time to time;*
>
> *(c) To facilitate the location of any forensic material from the scene of the crime for which the applicant was convicted;*
>
> *(d) To facilitate the provision of that material, and DNA material obtained from the applicant, to the Division of Analytical Laboratories for analysis;*
>
> *(e) To provide information to the applicant on the outcome of any analysis of DNA material or inform the applicant that DNA material connected with the crime scene is not in existence;*
>
> *(f) To advise the applicant on what steps are available to him or her upon receipt of this information;*

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[145] NSW Innocence Panel information available at http://www.nsw.gov.au/innocencepanel/, published September 2002. Sentences of over 12 years come within the purview of the Serious Offenders Review Council.
[146] *ibid*
[147] ABC AM Program, Tanya Nolan interviews the Premier Bob Carr and Nick Marr (sic), of the Law Society, 30 April 2001, 'Inmates DNA review', *Daily Telegraph*, 1 May 2001, p13; 'DNA panel tests evidence of innocence', *Newcastle Herald*, 1 May 2001, p12, R Rose, 'DNA testing opens path of appeal' *West Australian*, 2 May 2001, p34.
[148] *Crimes (Forensic Procedures) Amendment Regulation 2002*

(g) To provide advice to the Minister for Police on systems, policies and strategies for using DNA technology to facilitate the assessment of innocence claims;

(h) To report to the Minister for Police on any matter relevant to its functions referred to it by the Minister; and

(i) To report to the Minister for Police by 30 June each year on its performance and on the procedures and processes put in place for its operation.[149]

The application process is entirely confidential, even to the extent that the identity of an applicant is not to be disclosed to the Panel. The Panel was concerned that due to the positions of some its members, conflicts of interest may be perceived and that the impartiality of panel members in some cases might be questioned, especially where an applicant has been involved in a high-profile case.

There is a $20 fee required on submission of an application, which it is hoped will deter mischievous applications, however does not present a prohibitive obstacle to authentic applicants. This fee does not in fact in any way cover the costs of the crime scene analysis, which is currently quoted at $300 per analysis.[150] In addition, the Panel may elect to waive the fees in cases of hardship.

4-12-3 Issues with the Innocence Panel

A number of issues with the Innocence Panel have been raised with this Review.

Firstly, it sits within the Minister for Police's portfolio, and thereby may be considered to lack true independence from NSW Police. It is arguable that there is a conflict of interest in the police undertaking the investigations for crime scene samples, especially where they may have a knowledge of the case and may therefore have a genuine belief in the guilt of the applicant (as all applications will be dealt with by way of a number, it is clear that this will be more of a problem in the context of high profile and/or highly unusual cases).

The Review recognises the potential for conflict of interest, however notes that the Panel does not presently make decisions about the merits of the applications, but merely facilitates access to information in the possession of the NSW Police or Department of Health (that is, DAL), and where applicable, makes a recommendation to the Commissioner of Police to reopen an investigation. Furthermore, the constitution of the Panel as including representatives from Legal Aid and Public Defenders will ensure that the rights of offenders are upheld.

Perhaps just as important as the issue of the Panel's independence from police is the issue of conflict of interest – whether real or perceived – in DAL retesting samples which they had previously been tested. It is not inconceivable that a DAL scientist would be embarrassed to discover that his or her earlier results, or those of a close colleague, were inaccurate. It is for this reason that the establishment of a SIFS which is truly independent is all the more important.

Further criticism of the Panel lies in the fact that since it does not function as an advocate for the applicant, it is unable to assist assisting the applicant even by way of explanation of any

[149] Nader, *supra*, n143.
[150] *ibid*

DNA analysis, its role being limited, as stated above, to merely providing information to the applicant on the outcome of any analysis and advising the applicant of the available steps. It is clear that if an applicant to the Panel is not currently legally represented and is in a correctional facility (which is one of the basic criteria for eligibility), it may be difficult for them to obtain access to legal and scientific advice and yet more difficult for the analysis of any relevant forensic material to be explained to them.

The Panel also has no referral powers, and in that sense may be seen as a somewhat ineffectual body with no statutory basis, notwithstanding its high-powered membership. Critics say that it contains a range of interests which might be implicated in innocence challenges and therefore it is not objective. Furthermore, it is too big and unwieldy, and if its function is merely as an administrative adjudicator, what role can it have in adjudicating the merit or priority of claims? It has therefore been argued that it is unnecessary to have constituted a 'panel' of experts whose function is largely limited to determining whether to recommend further police investigations. As one commentator suggested, to provide access for prisoners to retesting of DNA material (which could be facilitated by an Executive Officer), with no need for a 'panel' to consider whether this should be done, as it is unlikely in any event that there would be that many applications, and the remaining funds allocated to providing additional legal and scientific advice.

In any event, there is some concern that even if the Panel were to recommend in every case it considers that the DNA material in the case be retested, past and present police retention policies dictate that the necessary forensic evidence may no longer be available. Most American jurisdictions have implemented evidence preservation legislation, thereby ensuring that offenders who wish to have the DNA in their case retested (or tested for the first time, in the context of older cases), are more likely to have the relevant evidence available. In theory, in NSW, evidence is routinely destroyed or returned to a victim at the completion of a case, thereby rendering it unlikely that the Innocence Panel's recommendations of further police investigation yield results.

It is the advice of this Review that a best practice approach to the storage, retention and archiving of forensic samples needs to be settle and instituted as a matter of priority. We are not aware of the policies of the police or of DAL regarding storage and retention. It seems that there can be little more than misplaced faith in (and frustration for) the Innocence Panel if it cannot expect retention protocols which are uniform, constant, predictable and complementary of its mission.

Finally, the Innocence Panel by its terms of reference will deal only with those cases where DNA may play a role in proving someone's innocence. By inextricably linking the concepts of DNA testing and innocence, there is a danger that it will be forgotten that DNA evidence is but one piece in the jigsaw puzzle, not the puzzle itself.[151] Consequently offenders who claim their innocence on non-DNA grounds may be regarded as somehow 'less innocent' than those who have a DNA-basis for their claim (notwithstanding the fact that only certain types of offences and cases depend on DNA evidence). Furthermore, international experience with miscarriages of justice institutions shows that problems with forensic evidence may be just one small feature of the miscarriages picture.

[151] The Director of the NSW Innocence Project indicated to the Review that very few cases brought to her attention in fact have a contested DNA dimension.

From the foregoing, the Review recommends that at the very least, the Panel is brought under the auspices of the Act, and thereby within the Attorney General's portfolio, and that the Panel be provided with a power to refer cases to the Court of Criminal Appeal. In our view, however, it would be preferable for the Attorney General to extend the role of the Panel in the direction of a wider Criminal Cases Review Commission, as in the United Kingdom, or Miscarriages of Justice model as in Scotland, to examine all cases of wrongful conviction of innocent people, irrespective of whether DNA evidence formed part of the case. The best examples of these are independent community endeavours. What the Government can do here, we advise, is to create a wider institutional framework that can adjudicate on innocence claims brought before it and provide the resources for the appropriate testing of any such worthy claims.[152]

4-13 Accountability frameworks

4-13-1 Reviews

We have identified in other parts of this Report that the legislation has been reviewed by the Standing Committee on Law and Justice, and is currently being reviewed by the Office of the NSW Ombudsman. We are advised that the Ombudsman is awaiting our Report prior to the publication of their findings and recommendations.

It has been the experience of this Review that so many of the important issues arising out of the Act remain in their early stages of development, have not been considered by the courts, or depend on further experience in order to ascertain their most appropriate futures. Any legislative review is only productive to the extent that the various authorities and individuals dealing with the Act choose to provide – or are able to provide – the relevant information. At present, there is little empirical information in some areas, and consequently, what information exists takes on a heightened quality. Accordingly, we advise that another review of this type should be carried out in 18 months' time, in order to determine the impact of the Government's response to initiatives for change.

4-13-2 Scientific protocols

We have been advised that DAL operates under a series of laboratory protocols which relate to the reception and maintenance of samples, the profiling process, the use and development of databases, and the analysis of forensic material. A copy of these protocols has not been presented to the Review and therefore we are unable to comment on their adequacy or otherwise.

As stated above, in the context of information for reviews, the development of laboratory protocols is of course important, however if there is no inter-institutional transparency as to these protocols, and means for review, their utility in terms of integrated or process accountability is somewhat flawed. Although it is common for the DAL scientist in court to state that there are protocols in place for conducting analyses of forensic material, these are not readily available to the public. As an unintended result of this lack of transparency, detractors of the science and DAL in particular are likely to assume the worst about the

[152] See ALRC DP 66, *supra*, n30, Proposals 38-1 and 38-2, although this limits the scope of post-conviction review only to cases where DNA could support a claim of miscarriage of justice.

processes conducted by DAL, for there is no information to contradict this negative impression. As a bare minimum, the protocols should be readily available to the public, for example on-line, and subject to regular independent audit and evaluation.

4-13-3 Data protection requirements

As part of the best practice strategy, this Review anticipates that protocols on data maintenance and protection in relation to forensic procedures or forensic material would be a priority and would govern the maintenance of all forensic material databases maintained by those with an interest in the best practice project.

The data protection requirements under the Act are not easily examined and audited, and accordingly faith must be placed in the ability of DAL to ensure that its data is appropriately protected from unwarranted uses. While it is accepted that the security arrangements at DAL endeavour to protect against such improper uses, a reported instance where the blood of Red Cross donors was being up-loaded onto the database, provides some significant cause for concern.[153]

It also goes without saying that once CrimTrac is operational, and in the event of an amendment to the Act to allow for the provision of DNA information to other countries, whether or not by Interpol, it will be beyond the scope of DAL's ability to ensure that data transferred to other jurisdictions is dealt with appropriately. Reference should be made to the ALRC's proposals on this issue, and the need for greater integration of forensic data facilities in order to ensure data protection should be a key priority.

4-13-4 CrimTrac

In 1997, the various Australian police services endorsed the establishment of a national DNA criminal database and formed a working party to implement it. In 2000, as an initiative of the Federal Government, the Commonwealth 'CrimTrac' agency was established, as an executive agency of the Commonwealth Government. CrimTrac is now responsible for the national DNA database system as well as a national sex offenders register and national automated fingerprint identification system (NAFIS). Once operational, the database will hold digital profiles of DNA samples collected from convicted offenders and suspects that will be able to be matched against evidence left behind at crime scenes.

In spite of the development of the Model Bill, each State and Territory in Australia has different legislation, with different safeguards in relation to the use of DNA information. This lack of uniformity has created difficulties to date in establishing a national DNA database system. In fact, in spite of NSW's adoption of legislation similar to the Model Bill, recent advice from the Crown Advocate indicates that it would be unlawful for NSW to enter into an agreement with CrimTrac without changes to the Act. The current position is that none of the jurisdictions have entered into an agreement with CrimTrac. The Commonwealth Attorney General's Department has advised that the protocols to be developed with each jurisdiction will reflect the legislative provisions of each participating jurisdiction, and matching will be conducted on the 'least' permissive terms,[154] an assurance which may assuage some privacy considerations.

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[153] Ryle, *supra*, n132.

[154] See para 36.112 of the ALRC DP, *supra*, n30.

The ALRC Discussion Paper discusses issues as to the independence of CrimTrac and its oversight, ultimately proposing that:

> *Forensic procedures legislation should be amended to provide for independent, co-ordinated and nationally consistent monitoring of the operation of the entire national DNA database, and in particular the interaction of the forensic procedures regimes operating in each jurisdiction that participates in the national DNA database system.*[155]

In terms of data protection, we see wisdom in this recommendation and commend it to the Attorney General for his consideration.

4-13-5 Database integrity and destruction

As referred to above, the integrity of forensic databases is dependent upon provisions for destruction as measured under the Act. Responsibility for destruction is in practice conferred on those individuals and authorities responsible for the maintenance of these databases. These authorities, and DAL in particular, have expressed a preference for de-identification rather than profile destruction. We believe that such a practice needs clarification in the mind of sample providers, so that they are clearly aware of the future of any profile which relates to their sample. We have also suggested that in the creation of the proposed Institute, an audit function should be in-built, so that empirical data and process experience (including any instances of profiles being inappropriately placed on the database or on the wrong index of the database) can be drawn upon by those with an interest in database integrity and profile destruction.

4-13-6 Sampling thresholds

We have already received some evidence that thresholds for sampling have been breached either purposely or inadvertently. The Act places significant reliance on its creation and respective thresholds, and this Review has an expectation that the police in particular would institute procedures and administrative safeguards to ensure that in operational practice their officers respect the threshold they have designated under the Act.

The thresholds for sampling under the Act are, according to many critics, not least of all the Standing Committee, fundamentally flawed in that they set the bar too low. Although Dr Gans suggested that the threshold must be low because '*you can not require a proof of someone's guilt before you get the evidence that prove their guilt*',[156] it may be suggested that the '*is likely*' to test in the Model Bill more appropriately protects against police fishing expeditions. A higher threshold, no matter how semantic, would even ensure a better use of resources, so that police do not fall into the practice of taking samples for DNA testing even when there is no real likelihood of obtaining a profile from them. Certainly in the view of DAL, police investigations have become a matter of taking a 'vacuum cleaner' approach to crime scene management, and providing it to DAL for testing, even when it might not provide any relevant evidence in the circumstances of the case.

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[155] *ibid*

[156] Standing Committee Report, *supra*, n2, at p75

4-13-7 Authorisation of consent

The Act creates as the principal consequence of the refusal of consent (and in place of consent for children in certain circumstances) the routine review of applications for forensic material by senior officers, or magistrates. For such review mechanisms to maintain credibility and to provide accountability in practice, it is important that their deliberations do not simply rubberstamp the original request, but provide an opportunity for detailed evaluation and argument of the pros and cons associated with an application for sampling. This Review is not in a position, on the information given to us, to cast a view on the adequacy of this review mechanism beyond the impressions of advocates working particularly in the children's court jurisdiction, which would suggest that magisterial review is largely operating as a matter of form. Evidence before this Review also indicated that most magistrates would only have to make an order under the Act every few months, and consequently would be unfamiliar with its terms and requirements, as would be many practitioners. Confidence can only rest in judicial review as a crucial component of any accountability framework governing the Act where the results of that review will on occasions differ from the applications made by those wishing to obtain forensic samples.

It would be useful, in order to evaluate the veracity of these safeguards to have empirical data on the instances of such reviews over a nominated period, and their outcomes. Such information should be maintained by the police and court services. An evaluation of such outcomes and their real impact in the protection of informed consent would be an important topic for any later review of the legislation.

4-13-8 Third-party oversight

As detailed earlier in this Report, the Act provides for a variety of vulnerable or incapable parties the support of an independent adult, an interview friend and/or or a legal representative. The procedural facilitation of interview friends in particular has been raised as a matter of concern.

As set out above, the processes of independent oversight, similar to reviews, are in large part dependent on how much information the oversight body is provided with and whether the authority being audited – whether police, DCS or DAL – is successful in concealing any abuses of power under the Act. For this purpose, a random audit may ultimately provide the strongest protection.

4-13-9 Regulated police powers

The police have argued on many occasions that the exercise of their powers in relation to the taking of forensic samples under the Act is too prescriptive. Their argument ranges from concerns about bureaucratic complexity, through to the workability of certain regulations in contexts where the essential elements of police investigation are challenged by the need to comply with such regulatory detail.

The regulation of police powers under the Act is consistent with the legislative tradition on police powers in New South Wales. The creation of wide executive powers allowing for intervention into the lives of citizens, particularly preceding arrest and charge, has been one in which restriction and qualification has featured. These restrictions are designed as much to complement broad conceptions of democratic government as they are to protect the individual from the abuse of powers. We would argue along with those who support the importance of

such qualifications and their impact in practice that the principal obligations in the management and development of such powers should not simply be to complement the institutions and the individuals who exercise them. Complementing our theme of balance, we have approached representations for relief from such regulations and conditions in a circumspect fashion. It has been necessary in each instance for the police to argue for more than administrative convenience and the easier exercise of police functions. It rests also with the police to recognise, in advancing submissions which would reduce or alleviate such restrictions, the impact on the interests of those for whom the restrictions are in place.

It is known to the Review that the prevailing ethos in NSW Police appears to be that the Act is excessively complex and imposes too many restrictions and obligations on the police. It is conceded that the Act is complex and that absolute compliance with its detail on a day-to-day basis is challenging. Although this may therefore give rise to a lack of police compliance, it is considered that further regulating police powers alone will be of limited utility, as a culture of disobedience to the Act, or an adherence to its strict terms without enforcing the spirit of the Act, could ensue.

4-13-10 Adversarial trial oversight

The trial observations in which the Review team participated have confirmed for us the importance of the adversarial trial as an arena for testing the adequacy of forensic procedures and their evidentiary product, however the vast majority of matters in which forensic procedures and forensic evidence are used will not proceed to trial. Therefore the trial as a mechanism for accountability will have a limited impact, and must co-exist with other accountability measures at earlier stages in the criminal justice process. To this extent, the more conventional and prevailing criminal justice monitors, particularly within policing, should be educated to their responsibilities in relation to forensic procedures.

It has been acknowledged before this Review by both prosecution and defence advocates, as well as forensic scientists, that the model of adversarial trial oversight is not designed, and rarely achieves, a clear amplification and resolution of the issues at hand. To that end, the suggestion for example by NSW Police that any misapplication of the Act by police will regularly and effectively be revealed before the courts at trial, is a fallacy.

4-13-11 Judicial oversight and admissibility

This Review accepts the importance of the discretion under the *Evidence Act 1995* to exclude forensic evidence illegally or improperly obtained. We say in this Report, however, that the indicators of impropriety or illegality as expressed in the Act generally need strengthening, recognising the abnormally probative value of DNA evidence in particular. It is in our view preferable that the Act be amended than that the courts continue to rely on the discretions under the Evidence Act. In so saying, we note that to date, there have only been two cases before the Supreme Court which have examined the workings of the Act,[157] and none of the issues with the Act identified in this Review have yet received the attention of the appeal courts. Issues in relation to the admissibility of evidence obtained as a result of forensic procedures have to date been decided on the basis of the provisions in the *Evidence Act*, and section 82 of the Act has not been judicially considered as it specifically applies to the Act.

[157] *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637 and *L v Lyons & Anor; B and S v Lyons & Anor* [2002] NSWSC 1199, both single Judge decisions.

Chapter 5 – Insights from Participants

This section is in no way a complete record of the information and data made available to the Review through its various methodologies. What it does provide, however, is an insight into the themes and forms of qualitative understanding from which the Review was able to mount its considerations.

5-1 Police

The following insights came from several meetings and interviews with a range of police personnel and policy officers and were expanded on with consideration to extensive written material from police sources. In addition, the police were by far the most significantly represented agency in the focus group sessions.

A number of NSW Police representatives have argued that the Act is highly prescriptive, extremely complex and difficult to put into operation. There is particular concern that the police are unable to comprehend the matters set out in sections 12 and 13 of the Act, and thus are unable to accurately ensure that they are testing in appropriate circumstances. This also suggests that they are incapable of clearly conveying the information required under section 13 to suspects.

In our view, the importance of this issue cannot be overstated. If police feel uncomfortable with the complexity and sheer volume of information, they will feel more likely to present it in a rote manner. This does little to enhance the suspect's comprehension, and while it may conform to the strict requirements of the Act, does not promote its spirit. Accordingly, it is suggested that the information requirements under the Act be considerably simplified and this recommendation has been discussed elsewhere in this Review (see for example 4-1-2).[158]

It was suggested to us by the police that it is also very difficult in practice to comply with the Act in the evidence collection process. The police have accordingly submitted that what is required is a simplified process, but with certain and selective increased accountability. The Review endorses such an approach, so long as it does not rely on all accountability occurring at the trial stage. Instead, built-in accountability and best practice measures should occur throughout all stages of the forensic investigation process.

Another issue of concern to police as presented to the Review is the Act's coverage of photographs and the interaction between the Act and section 353A of the *Crimes Act*. This is discussed in more detail in 3-5-2, however we reiterate in this context that the important protections under the Act (for example the requirement for a court order if the suspect objects to the taking of a photograph) should not be seen as an inconvenience and burden, but rather as a necessary means of balancing the rights of the provider against the requirements of police investigators.

[158] It is noted however that NSW Police and CLRD are currently development plain English consent forms for suspects and offenders, which may go some way towards alleviating these problems.

The Act also presents complications for police in the context of inter-jurisdictional matching of forensic information.[159] In the context of DNA matching with other Australian jurisdictions, either by way of CrimTrac or under Ministerial arrangements under section 97 of the Act, these are currently being resolved by the police in cooperation with representatives of CLRD, the Crown Solicitor's Office and the Crown Advocate. However, once again, the valid policing objectives of being able to exchange forensic information with other jurisdictions, both in Australia and internationally, must be balanced against privacy and data integrity considerations.

Another issue, which is not so much one for legislative or external involvement, but an issue within police which, if left unchecked will impact on the entire criminal justice process, is that DNA should never be considered to constitute the entire brief. Although forensic evidence, and DNA evidence in particular, forms a vital part of modern investigation, it is imperative that police do not unduly rely on this technology. In particular, investigators should neither abandon cases where there is no DNA evidence, nor push on weak cases which happen to have DNA evidence. In particular in the context of circumstantial cases, the Review suggests that DNA evidence be regarded, as are other types of evidence, as a link in the chain of evidence, rather than as a rope which is to bind all other pieces of evidence together. Failure to recognise that DNA evidence, though in many respects unique, merely constitutes another type of evidence, will lead to police losing cases and may bring the entire use of DNA evidence into disrepute.[160]

Also in the context of policing practice (as opposed to concerns with the Act), it emerged from representations to the Review that it is the Commander at each Local Area Command (LAC) who essentially determines the extent to which DNA evidence is used. Furthermore, not all LACs have scene of crime officers (SOCOs), and it may be a very junior officer who actually takes the sample. Sample collection practice can be sporadic in motivation and quality control, which is clearly unacceptable for evidence which is so difficult to impugn. The impetus to gather evidence comes from the top down and is very much a budget-determined issue. It necessarily follows that the use (and potential abuse) of DNA evidence will vary significantly around the State, with the potential that differing levels of justice may ensue.

5-2 Prosecutors

As part of our approach to obtaining a wide group of respondents, we conducted a written survey with prosecutors with forensic procedures experience (both police prosecutors and Crown Prosecutors). We recognise that as a result of the selective sample population and poor response rate, the following summarised responses are in no way representative, but they do

[159] In this context, we are primarily concerned with the exchange of DNA information, but also note the police's problems with the exchange of photographic information and fingerprints under the National Automated Fingerprint Identification System (NAFIS).

[160] On the other hand, the fact that DNA evidence is in many respects unique has led some to suggest that there should be a separate system for dealing with this kind of evidence, compared with, for example, photographs and fingerprints. The Review does not support such an approach, partly due to the unforeseeability of future technological developments, and secondly because to do so would place DNA evidence in a class all of its own, an approach this Review rejects. The principles set forth in this Report are, it is suggested, merely a refinement of more general best practices in policing, advocacy and adjudicating.

provide interesting personal insights.[161] We also summarise the issues discussed by prosecutors in the lawyers' focus group.

Use of Forensic Evidence under the *Crimes (Forensic Procedures) Act 2000*

How frequently have you used DNA evidence in the preparation/development of a prosecution brief?

Of the ten responses received, four circled '*rarely*', and five '*never*', with only one respondent considering their use of DNA evidence as '*frequent*'. Considering the Review endeavoured to survey prosecutors with experience in this area, this result indicates just how new and unfamiliar this area of evidence is at present.

In your experience, for what sort of offences has DNA evidence been used?

The respondents nominated theft offences (including robbery), sexual assault and murder.

Have you ever requisitioned a DNA sample after an accused has been charged and a brief prepared? If so, were there any problems involved?

Only one person circled '*yes*', and commented that

> *About 80% of the time applications are after charging. … only three people can apply: the officer in charge, who is usually a senior detective with better things to do than attend a court to lodge an application, then sit around on the day of first mention until it is mentioned, only for Defence to say then need time to consider their position, have it adjourned and then to return if it is defended and they are required for cross-examination (which defence are entitled to as a right); the LAC - who is of course even busier than the Detective and frankly [this] is nonsense and the Custody Manager, who can't leave the cells and is at least equally ridiculous. There is also no procedure that I can find anywhere that allows for the application to be adjourned.*

Has forensic evidence (within the Act) or the matter in which it was acquired ever influenced your decision to prosecute/not prosecute? If so, comment.

Again, only one respondent circled '*yes*' (seemingly the same person) and added:

> *'Absolutely. We have had matters where ID has been tainted by photos not taken correctly. I don't think I had to withdraw it, but there was a very early matter, where police got an interim order which either wasn't granted as a final order or we had to fight for very hard. Defence solicitors continually try to adjourn applications for photos to stall the ID process. Magistrates are starting to support us, but it is a matter of educating and persuading them.'*

Should defendants have access to crime scene samples for the purpose of independent analysis? Comment on any problems this might cause for the preparation of the prosecution case.

Seven respondents circled '*yes*', two circled '*no*' and one did not answer, but commented:

> *I foresee refusing to give them access to samples as being an issue being raised in future hearings and trials, defence arguing the prejudice aspect that they are not entitled to obtain their own analysis. It would ultimately boil down to a question of fairness. The more serious the offence the more prejudice and may give rise to discretion sections being argued for exclusion of evidence.*

[161] We have excluded questions and answers where the majority of respondents did not respond or said that they did not know.

Of the respondents who said such independent testing should be available, this was qualified by the conditions that there was sufficient sample available, that this would have to be process- and funding-dependent, and so long as it did not delay finalisation of the matter.

In the event that there was insufficient sample for separate testing, one respondent suggested that '*the defendant could be offered the opportunity of having their own expert present to witness the testing of the sole sample by the prosecution. That way we would have protection against claims of faulty methodology*.'

The partiality of some respondents was evidenced in the following comment:

> *Police continuity of exhibits is at a very high level. Chances of contamination is virtually non-existent. There are too many variables for fabrication/contamination/ lack of continuity if defence are supplied with samples. Police are the evidence gatherers and bear the high standard of proof. Police should be considered independent. The defendant is not.*

In light of such views, it is all the more vital that there be scope for independent analysis by the defence, to refute any suggestion that police are infallible and incorruptible.

Sampling process

In your experience does the compulsory acquisition of a DNA sample present greater difficulty for the preparation and delivery of the prosecution case, than would be the case if the person had consented to the taking of the sample? If so, why?

Two responded '*yes*', three did not know and three said '*no*'. The associated comments suggested that '*the prosecution have to be extremely careful when presenting such matches to not let on the defendant's prior criminal history. If the defendant consents this is not an issue*', and also that

> *whether a sample was taken with consent, or taken forcibly, there is still room for "difficulty" at court. For example, was the consent as informed consent? If force was used, was it in compliance with the Act? There must be strict compliance with the legislation each step of the way and accurate records of those steps must be made to avoid "difficulty" at court - whether the sample is taken by consent or compulsory.*

Would you advocate an expansion of the powers to require DNA sampling of suspects/prisoners?

Here, half the respondents circled '*yes*', three circled '*no*' and two did not respond. One respondent in favour of expansion added that '*child suspects should be in a similar position to adults after a mandatory requirement to be informed by a solicitor of their legal rights, including the taking by force if necessary*.' On the other hand, one of the respondents opposed to expanding the powers thought that

> *the legislation…already [has] provision for taking of samples from suspects where there are reasonable grounds to believe it will yield material evidence - does this question contemplate more than that? Eg. Compulsory testing of people simply to exclude them from inquiries (such as compulsory testing of the whole population of a town/city where an offence has occurred in the area). If so, I would not advocate this - it would be akin to compulsory DNA sampling of all. To my mind, that would amount to a significant erosion of personal liberty in this state - the harm done to our quality of life would outweigh the potential benefit of solving more crimes.*

In relation to prisoners, this respondent added that '*"serious indictable" covers most offences of gravity - I do not feel it should be expanded to include, for example, anyone convicted of any purely summary offence*.'

Applications for orders[162]

Have you ever experienced any difficulty in making an application for an interim, final or second order for a forensic procedure under the Act? If you have, please provide details of the type of application (ie: for an interim, final or second order) and the nature of the problem?

Seven respondents had not experienced any difficulties, with only two responding '*yes*'. One added that the situation arose due to '*confusion over the ability of a senior officer to authorise certain DNA procedures and confusion over the final orders for the use of the material*'.

Issues of Admissibility

In your experience, has the admissibility of DNA evidence been challenged on the basis of consent? If so, comment on these issues.

Only one respondent said yes, adding that this was '*only when the police have taken something without complying with the Act*'. Five respondents circled '*no*', and three said they did not know.

In your experience, has the admissibility of DNA evidence been challenged on the basis of authority to take samples?

Here, six circled '*no*', three circled '*don't know*' and another responded '*not yet*'.

In your experience what sections of the Act (if any) create problems in relation to admissibility and why?

The only specific provision named was section 3.

Comment on any other common or recurring impediments to the admissibility of DNA or other forensic evidence within the Act.

The only specific problem mentioned was that '*photos for children are problematic*'.

Relative Evidentiary Credibility of DNA

If you have used DNA evidence in prosecutions, were there any charts, graphs, photos or visual aids used to assist in the presentation of DNA evidence? If so, which?

No respondents said that such aids had been used, although one suggested that

> *Charts/photos etc, would be of great benefit. The challenge with getting any evidence to be taken into account by the tribunal of fact (Jury/Magistrate) is to get them to understand it! If they don't, it will be disregarded, no matter how much probative value it has. In my experience with complex/voluminous evidence, the use of aids has been invaluable - the same must apply with DNA evidence.*

[162] The following question was only asked of police prosecutors.

Is it your experience that judicial officers are capable of adequately directing a jury (or themselves) concerning the relative evidentiary significance of DNA evidence?

Half of the respondents said they did not know. Only one respondent answered '*yes*', and suggested that '*if they understand it in lay terms, they ought be able to direct on/explain the evidentiary significance*'. Of the three who answered '*no*', one added that '*in many cases, [they have] insufficient knowledge and many admit it*'.

Use of Expert Evidence

Besides the availability of suitable expert opinion, comment on any problems associated with the presentation of expert evidence on DNA?

Of those who responded, two did not think any special issues arose. One suggested that '*no doubt the presentation of such evidence should be given by a suitable expert, having regard to the complexity of such evidence and it is relatively new concept*', and another felt that '*DNA [is] still new to most, therefore expert likely to be essential to convey meaning and significance of the evidence. This need may well diminish with time (e.g. fingerprint evidence requires much less, if any, explanation as generally well understood in the community).*'

General

The Act regulates the collection of forensic evidence other than DNA (eg: photographs of a suspect). Have you ever experienced problems in the application of the Act to these other types of evidence? If so, give details.

Six circled '*no*' and four did not answer, but two added the comments that '*photography is a problem - should not be included*' and that '*the only problems include the application to take a photograph to identify person as defendant. Rebuts presumption that no right not to be identified and may jeopardise an investigation. This needs consideration*.'

As stated earlier in this Report, we also conducted focus groups with, amongst others, Crown Prosecutors and DPP solicitors. The following is a summary of the major points raised by the prosecutors during that discussion:

Resources

- More resources are required for the laboratory;
- The DPP has difficulty obtaining the results or analysis from DAL, and yet prosecutors can't really run committals (let alone trials) without them;
- More time/money is required for the prosecution to prepare where technical DNA challenges arise; and
- DAL should try and publicise its willingness to do work for both sides, set out schedule of fees etc.

Evidence

- There are issues with the presentation of DNA evidence and its accessibility;
- Challenges to admissibility and the time taken up by technical challenges (eg on voir dire this can take 2-3 weeks);
- There should be discussion of a certificate system for DAL so the Crown doesn't have to call every person from the laboratory who dealt with a sample in a chain of custody situation;[163]

[163] See discussion at 4-11-3 and 6-8 in terms of a 'deeming provision'.

- Availability of experts, who sometimes have to be flown in from overseas to respond to the challenges, or require complex video linkages in the trial;
- In the CCA in particular there are problems in dealing with the technical difficulties of the evidence and the interpretation of the mathematics in probability calculations;
- The Crown needs more time to prepare and bring in witnesses (see also resources);
- There should be rules developed for disposing of the evidence in a less-than-adversarial way. There has to be some joining of issues in advance - it should be simplified and the challenges identified before the commencement of the trial. The Crown and defence experts should be willing to talk to each other where there is no substantial conflict.

5-3 Defenders

The following is a summary of the responses to the survey we conducted with seven Public Defenders.

General

Do you agree that an independent institute of forensic sciences should be established in NSW for the management and use of technology in criminal investigation and prosecution?

All circled '*yes*'.

Should judges be required to warn juries that the use of DNA evidence is only one aspect of the evidence required to convict someone?

All circled '*yes*'.

If yes, should such directions also include reference to the location of the sample?

Here, five circled '*yes*', one adding '*if relevant*'. One did not respond, but commented that it '*depends on the case*' and another suggested it '*may hurt the case*'.

Do you agree that the time taken to arrange for and acquire forensic samples from a suspect should be classified as time-out from the investigation period?

Six circled '*no*'. One circled '*yes*' and added '*assuming time outs should exist at all*'.

Should access to forensic samples and their analysis be provided as part as past of state funded legal aid?

All circled '*yes*'.

How should the special needs of child suspects be catered for in the operation of the Act?

It was suggested that the '*is likely to produce*' test be applied at a bare minimum or ideally, that the evidence be '*of strong/probative force to the Crown case*'. It was also proposed that samples should '*not be taken unless warrant obtained. Process of application be closely monitored and child to be represented by solicitor during entire process*'. The need to better inform older children of the process was also noted, and as part of this, it was suggested that '*children should be informed of the Legal Aid Children's helpline number. These samples are*

usually taken when the child is entered into the section 10A system. The Form 10A could include that number for children.'

Should interview friends be immune from being called as witnesses for the prosecution?

Four circled '*yes*' and two respondents circled '*no*', adding the words '*hard to see how this could be constructed*' and suggested that '*immune covers too much - there should be protections but there may be cases where it would be allowed*'.

Use of Forensic Evidence under the *Crimes (Forensic Procedures) Act*

Have you ever requisitioned a DNA sample after an accused has been charged and a brief prepared? If so, were there any problems involved?

Only two respondents circled '*yes*', with one respondent suggesting that there was '*no problem apart from delay in obtaining results*', while the other felt that this process '*has been consuming and required a number of adjournments. Sometimes as a result of testing already conducted difficult to conduct subsequent testing*'.

Have you ever employed expert testimony on DNA to address the presentation of such evidence in the prosecution case? If so, comment.

Four respondents said they had done so and mentioned problems of delay in getting the prosecution evidence and the current formula used for analysing DNA results. Two commented on their use of overseas experts, noting that it is '*unfortunate that the expert witnesses in NSW are quite limited in number*'.

In your experience, is the impact of DNA evidence reliant upon or enhanced through association with other types of forensic evidence?

Here, three circled '*yes*' and two circled '*no*', with one respondent adding that DNA evidence '*has its own power*'.

Did DNA or other forensic evidence (within the Act) ever contribute significantly to the Crown case? If so, provide details.

Five respondents circled '*yes*' and suggested this would be the case '*particularly in sexual assault cases where DNA evidence has been led to "establish" [the identity] of the offender*'. Another had acted in a case where matching DNA resulted in guilty plea, noting that non-matching DNA has also resulted in the DPP no-billing cases. Another respondent had DNA used to show that the accused had contact with the victim which was inconsistent with his version of events.

Should defendants have access to crime scene samples for the purpose of independent analysis? Comment on any problems faced.

Here, five circled '*yes*' and two did not answer this question. The main problem noted was the issue of security/integrity of the sample.

Sampling Process

Concerning the use of such evidence in court, are you satisfied with the forensic evidence sampling regimes provided for in the Act? If not, why?

Three respondents circled '*no*' and one circled '*yes*', with the remainder not answering the question. Those who were not satisfied were '*concerned about the level of understanding when the samples were taken*', '*would prefer the MCCOC model, which allows for more open analysis of why the sample required*' and suggested the threshold was too broad.

Particularly, are you satisfied with the DNA sampling regime provided for in the Act? If not, why?

Here, four circled '*no*', one did not know and a further two did not answer this question. Two of those who said they were not satisfied suggested that '*if NSW is to go for compulsion it should be explicit eg: Jeremy Gans' Model*' and also that '*section 20 is used as a means of gaining consent - because it undermines all the provisions relating to consent*'.

Would you advocate the removal of the consent requirement for serious indictable offenders?

Three circled '*no*', with one respondent adding that it was necessary to '*maintain all safeguards*'. On the other hand, two circled '*yes*', with one adding '*unless present regime made less rigorous*'.

Issues of Admissibility

In your experience, has the admissibility of DNA or any other forensic evidence covered by the Act been challenged on the basis of the recording of forensic procedures?

Here, three circled '*no*', two circled '*yes*' and two did not answer this question.

In your experience, has the admissibility of DNA or any other forensic evidence covered by the Act been challenged on the basis of analysis and reporting?

Five circled '*yes*' and two did not answer this question.

In your experience what provisions of the Act (if any) and their operation create problems regarding the admissibility of forensic evidence under the Act and why?

The specific provisions named were sections 10 and 20, in respect of interview friends and the validity of consent respectively. Another commented that '*there appears insufficient understanding by scientists re: analysis of results, which leads to exaggerated claims for matches*'.

Relative Evidentiary Credibility of DNA

Is it your experience that when DNA evidence is produced at trial it appears to be given greater significance by jurors and judges than other forms of forensic evidence? If so, comment.

Five respondents circled '*yes*', with two not answering this question. The comments suggested that DNA evidence '*is very powerful statistically and not easy to attack*', and accordingly, '*it is presented as though it proves the case and cannot be challenged*'. Compounding this was the view that '*there is little understanding of the procedures used for*

analysis and the subjective nature of the reporting. Many lay people (including judges) see DNA evidence as a piece of "scientific" evidence and therefore highly probative'.

If you have witnessed DNA evidence in prosecutions, were there any charts, graphs, photos or visual aids used to assist in the presentation of DNA evidence? If so, which?

Here, two circled '*no*', three circled '*yes*' and two did not answer this question. The examples cited were '*a booklet of words and diagrams explaining all aspects [of DNA]' and 'graphs and charts*'.

Use of Expert Evidence

In your experience is it essential in the presentation of the defence case to have DNA evidence assisted in court by expert commentary?

Five circled '*yes*' and two did not answer this question.

Besides the availability of suitable expert opinion, comment on any problems associated with the presentation of expert evidence on DNA.

The respondents commented on the difficulty of comparing analysis methods, presenting the experts' opinion and the need to use overseas experts.

If you have challenged DNA evidence did you receive adequate cooperation (when required) from the experts involved in the analysis, recording, reporting, matching and storage of DNA evidence?

Here, three circled '*yes*', with one adding '*just subpoenaed all documents – essential*' and another respondent noting that '*it came very late in the day - it was always slow and something the Crown washes their hands of on the provision of all material*'. One respondent commented that

> *until this year I experienced no difficulty in obtaining material from the Crown experts so that it could be looked at by our expert. However, in May this year we were told that we could not simply be provided with all the relevant paperwork and therefore had to subpoena the material.*

Another respondent suggested that

> *money and expertise problems mean that very often defence lawyers are at a disadvantage. Prosecution DNA experts should be giving more information, not less, as a matter of course. FSS [Forensic Science Service] in UK provides useful model for independent body available to all sides for a fee.*

The following is a summary of the issues raised at the lawyers' focus group by Public Defenders, members of the private defence Bar and Legal Aid and Aboriginal Legal Service solicitors. It should be remembered that these issues arose as part of the interchange in debate and may have been stimulated in response to matters raised by the prosecutors.

Resources

- More resources for DAL;
- An independent laboratory is required;
- Problems with availability of defence testing and limited number of defence DNA experts available;

- Problems with access (and timeliness of access) to DAL analysis. A 2-page statement from a technician is made available but the defence require disclosure of the tables as well as the certificate.

Evidence

- In what circumstances should forensic evidence be deemed inadmissible?
- Why is opinion evidence not open to challenge?
- Problems with understanding and challenging the evidence, including making the statistical evidence comprehensible to a jury;
- Less information available to defence now than before the Act. Certificates include less information and there are no tables provided. To get access, all materials must be subpoenaed;
- Information from DAL also now doesn't provide the tables when there's a mixture - it's essential to know whether there are indicators of a mixture and there should be a quick and easy way to get access to the raw results;
- Defence perspective is that the expert witnesses from DAL are very much in the prosecution camp;
- In response to suggestion of joint prosecution and defence experts: the gulf is there, and these are complex scientific processes/principles, so evidence has to be able to be tested.

Consent

- Issues in relation to children;
  - It is important for practitioners to be aware of the consent provisions;
  - As the child cannot consent, it needs to be clarified whether the advocate appearing on their behalf is able to for the child? If so, there's the potential for a conflict of interest.

- Offenders
  - There is no provision not to consent; in fact SIOs can only consent to the manner in which the sample is to be taken;
  - DCS have indicated that an inmate's security classification may be increased if an offender doesn't consent. Therefore there is a fear that if inmates don't consent they will be reclassified;
  - There is also some anecdotal evidence of inmates being asked to sit for a second or third test.

Thresholds

- A very wide definition is used, especially for SIOs, aimed at catching as many people as possible;
- They are now testing people on home and periodic detention, as well as children in juvenile justice centres.

Issues with the Act

- There are considerable drafting problems, eg '*taking*' and the interaction between section 82 of the Act and 138 of the *Evidence Act* is very vague;
- The relationship with the identification provisions of the Act and section 353A of the *Crimes Act* needs to be cleared up in respect of children;
- The subsequent use of fingerprints and photos generally should be clarified.

Subversion of the Act

- Police are involved in covert sampling processes where there's not enough evidence to get a sample under the Act;
- Is there genuine police compliance with the Act – rights are read out as if by rote. This process needs to be simplified and possibly presented by video;
- Covert sampling – in one case a cigarette butt discarded by the accused was collected. This was held not to be '*taking*' for the purposes of the Act, ie a forensic procedure was not '*carried out on a person*' under section 82(1)(a) – but isn't this an intrusion on basic civil liberties?

Interview friends

- It's inappropriate for solicitors to act in this role – it's a conflict of interest, similar to sitting in on an ERISP;
- In the children's court, the practitioner and magistrate may not know of the need for an interview friend at the time of applying for an order;
- There should be a document to tell interview friends what their role is.

5-4 Judicial officers

This Review has benefited from the advice of several District and Supreme Court judges with experience in criminal trials where forensic evidence has featured. Their views have been anonymously interwoven where appropriate throughout the Report. In addition, the District and Local Courts were represented at the focus groups, where the following themes were raised:

- Magistrates in the Local Courts are concerned with the interpretation of the orders/clarity. In fact, however, not many have a real working knowledge of the Act;
- Practitioners don't seem to be aware of their right to cross examine the applicant (ie police officer);
- There should be more visual presentation of the forensic evidence in court, while now it is done almost entirely orally;
- Experts need to put the evidence in terms that a jury will understand;
- There is no cause to abandon reasonable doubt, or the adversarial system for that matter, simply in order to accommodate a new science.

5-5 Juries

A unique feature of the methodology for this Review was the opportunity to interview jurors following the delivery of their verdict in a number of trials featuring DNA evidence.[164] Being mindful of what we can publicly release without endangering the integrity of each verdict, the Review thought it useful to present a selective representation of some of the data which the de-identified surveys produced.[165] We have used contextual analysis and incorporated trial observations and professional interviews where appropriate, which enhance the survey data by making us aware of the circumstances in which these answers were forthcoming. For

[164] The Review is indebted to the Sheriff's Office and the individual officers who administered the questionnaires on our behalf. We are also grateful to the support of the trial Judges, DPP solicitors and, of course, the jurors. Without their cooperation, these insights would have remained with them alone.

[165] The selection here was made to reveal the views of jurors who deliberated in trials where DNA evidence was contested on very different issues. In addition, the significance of the forensic evidence for the eventual verdict could be anticipated as quite different.

instance, if DNA was central to the establishment of liability and it was contested, this might produce distinctly different responses from those on a jury in a case where DNA was peripheral or uncontested.

In addition, we have incorporated opinion and observations from other methodology sources in a very minor comparative endeavour, largely to indicate trends and connections in thinking. Much remains to be done in order to gain full analytical benefit from the insights which the jury data contain.

Trial A

Explanatory material

Two exhibits in particular were noted during the court observation of this trial, namely, exhibit AC: the profile extracted from the bone fragments recovered; and AO: the table tendered by the DAL analyst. Supplementary visual aids were also used for the benefit of the jury, including a picture of a nucleus, which the Judge relied upon during his summing up.[166]

Circumstantial case

The prosecution's case was circumstantial. The DNA evidence was of paramount importance, as the victim's body was never recovered. Indeed, over the course of its closing submissions, the defence referred to the significance of the DNA evidence in the following way:

> *In my submission the DNA evidence is such an important piece of evidence, indispensable in this kind of case. It's so important to the Crown case, if the Crown didn't have DNA, it would be some bones in the backyard. That in itself is something incriminating. But the whole Crown case revolves around proving that these are (the victim's) bones. That is why DNA evidence has been so overwhelmingly important to the Crown case you might think …*

In his summing up for the jury, the Judge said that '*the DNA evidence is obviously an important part of the Crown case, and an aspect of the circumstantial case, such that it must be viewed in the context of all the other evidence in the case*.'[167]

Crown case

The Judge succinctly described the relevance of the DNA evidence for the Crown case in the following way:

> *The DNA evidence, the Crown suggests, is relevant in two ways. First, it is evidence which, in combination with other material, will satisfy you beyond a reasonable doubt that (the victim) is dead. That is the first way in which the Crown puts it. The second is that the DNA evidence, together with the fact that the bones were buried in a garden of the home at …. will, it is suggested, in the context of all the other evidence, and especially the description of their relationship, persuade you beyond reasonable doubt that the accused caused her death. That he acted on the threats which the Crown alleges that he had so often made.*[168]

[166] Lorana Bartels, Use of material supports for explanation.
[167] Summing Up: 14.10.02 at pp202.
[168] *ibid* at pp203.

His Honour's description is consistent with the court observation conducted during the opening address of the Crown in terms of the primacy of and significance placed upon the DNA evidence in the case.[169]

Defence case

The defence employed a variety of strategies to attack the DNA evidence presented by the prosecution, including:

- Continuity and contamination issues[170];
- Paternity of the victim (i.e., questioning the biological parents of the victim - and thus, suggesting that the calculations are invalid if they were premised on an erroneous assumption concerning paternity[171]; and
- Mutation rates, which effectively challenges the ultimate calculation of the likelihood ratio.[172]

In his summing up to the jury, the trial Judge dealt with the first two 'preliminary issues', that is, who were the parents of the victim; and secondly, whether the custody of the bones (i.e., continuity) could be properly accounted for. In regard to the paternity of the victim and its impact on the significance of the DNA evidence, his Honour said:

> *Now the tests undertaken were designed to determine whether there was a relationship of kinship between the bones and the persons said to be the parents of (the victim). You will remember that each offspring gets half his or her nuclear DNA from their mother, and half from his or her father, and a profile is obtained, which is Exhibit AC, and that is obtained from persons said to be the parents.*
>
> *That profile, where it is different, may exclude one or other or both persons as parents. However, there is a match, where the DNA profile is consistent, and I will come back to that term in a moment, with the DNA profile of persons who are said to be the parents, then the owner of the bones, may be the offspring of those parents. And depending upon how common the particular DNA profile may be, some indication may be given of the likelihood of the bones belonging to an offspring of those parents rather than simply happening by chance.*[173]

In regard to the calculation of statistics, the likelihood ratio and the database used, it was the observation of the Review team that the judge discussed the various viewpoints of the experts at length and in an impartial manner.[174]

Specific Observations[175]

(i) Forensic evidence

Almost all respondents identified bones as the type of forensic evidence put to them. In addition, the majority of participants also included '*blood*' (Q:1). All except one juror indicated that the forensic evidence was taken for the purpose of identifying the victim (Q:2). Seven out of the eight who responded, rated the importance of the forensic evidence for their

[169] Julia Grix, court observation.
[170] CPC at p 3195 ff. and DXX at 1942ff.
[171] CPC, *ibid*, at p3196ff.
[172] *ibid* at p 3215ff.
[173] Summing Up: 14.10.02, *supra*, n168, at pp203-206.
[174] *ibid* at pp220-248. Note that the case had earlier been the subject of a successful appeal on the basis of judicial directions which contained the prosecutor's fallacy.
[175] The following results were collated from eight surveys; four jurors chose not to participate.

deliberations at the highest end of the scale provided (Q:3). Half of the jurors indicated that the DNA evidence in the trial was made more important by being connected with other types of forensic evidence.

Of the seven jurors who responded to the question '*would it have helped your understanding of the case to have more forensic evidence put to you?*' (Q12), six responded in the negative and one juror was unsure. The majority also said that it would not have helped their understanding if there had been more information about the forensic evidence they received.

(ii) A '*match*'

Seven of the jurors indicated that the process of comparing DNA profiles to see if there was a '*match*' had been explained to them over the course of the trial. (Q:10). All jurors agreed that they understood what finding a '*match*' between two DNA profiles meant (Q:11).

(iii) Awareness

The majority of respondents indicated that they had been aware of DNA profiling evidence before the trial (Q:20). As with most other survey results, the majority of participants rated their expectations of DNA evidence in determining the guilt or innocence of an accused in the mid to high range of the scale provided (Q:21). Significantly, all those who indicated an awareness of DNA profiling evidence before the trial also indicated that they had the highest expectations of DNA evidence in determining guilt or innocence. Further, these high expectations were confirmed by their experience of DNA evidence in the trial at hand (Q:22).

Expert Evidence

All jurors agreed an expert was presented by the prosecution to explain the significance of the forensic evidence (Q:16).[176] Similarly, all correctly agreed that the defence also had an expert to challenge the significance of the DNA evidence (Q: 17). As to whether the forensic experts cooperated with the lawyers when they were questioned about the forensic evidence, most indicated that this was the case (Q:18).

The Defence

The jury were evenly divided as to whether the defence presented any forensic evidence of its own (Q:5). One interpretation of this result is that the jury was unclear as to the nature and purpose of the evidence presented by the defence. Of those jurors who answered '*yes*' to question 5, all indicated that this evidence did not outweigh the importance of the similar prosecution evidence (Q:6). It is worth noting that this case was the only one observed by the Review that involved the use of expert evidence by the defence.

In addition, one of the experts for the prosecution gave evidence which was considered by the prosecution to be inadvertently favourable to the defence.

General Observations

There were a number of factors that were specific to the way in which the DNA evidence was presented in this trial. For example, the prosecution relied on the evidence provided by four expert witnesses (as opposed to one in all of the other cases analysed). The prosecution was further assisted by the use of a video-satellite link-up which made presentation of the

[176] In fact, four experts provided evidence of this nature for the prosecution.

evidence from two United States witnesses possible. In addition, the defence presented their own expert witness. As in *Van der Baan*, discussed below, explanatory material was also provided to the jury to assist their understanding of, at times, highly technical scientific information. It is possible that the greater understanding of forensic evidence indicated by the responses in this survey may also be attributed to factors such as length of the trial, as this trial lasted ten weeks and thereby enabled in-depth analysis of the issues.

Trial B[177]
An important aspect of the prosecution's case in this matter was linking the accused to the crime scene. In relation to counts 1-3, the evidence consisted primarily of DNA evidence that was obtained from clothing left at or near the crime scenes. In counts 1 and 2, the accused allegedly lost a baseball cap as he fled the scene, and in the third count, police recovered a black balaclava near the scene.

During February 2002, surveillance was conducted on the accused, who was observed to flick a cigarette butt onto the street. Police recovered the cigarette butt and submitted it to DAL for analysis. The DNA profile extracted matched the DNA profile extracted from evidence at the crime scene, and it was then that a decision was made to arrest the accused. Following his arrest, forensic procedures were carried out under the Act. Two analysts' reports stated that the DNA derived from the accused's hair sample was found to match the major component of the DNA recovered from both the baseball cap (counts 1 and 2) and the balaclava (count 3).[178]

Circumstantial case
The prosecution case was mostly circumstantial. Without the inclusion of forensic evidence of this kind, the police, and in turn, the prosecution, would have faced considerable difficulties placing the accused at the crime scene. The importance of the forensic evidence in this case is demonstrated by the weight attributed to it in the deliberations of the jurors.

Juror comprehension
(i) Forensic evidence
All of the jurors identified, inter alia, hair and skin as the forensic evidence put to them during the trial. Most agreed that the reason for taking the forensic evidence was to identify the suspect and a smaller majority provided an additional reason of indicating that the person was at the crime scene. All of the jurors rated the importance of the forensic evidence in the deliberations of the jury in the mid to high end of the scale provided.

Ten of the twelve respondents said it would have helped their understanding of the case to have more forensic evidence put to them (Q:12). Six said it would have helped their understanding of the case if there had been more information about the forensic evidence they received (Q:13).

(ii) Consent
The jury was evenly divided as to whether or not the importance of consent in the taking of samples was explained in the trial (Q: 9). Five jurors said '*yes*', six said '*no*' and one was '*unsure*'. This result indicates some confusion on this issue.

[177] Responses were obtained from all twelve jurors in this case.
[178] Facts adapted from email correspondence: J S, 17 October 2002.

(iii) A '*match*'
All jurors except one agreed that the process of comparing DNA profiles to see whether there was a '*match*' was explained to them during the trial (Q: 10) and that they understood what a match between two DNA profiles meant (Q: 11).

(iv) Expansion of powers
All jurors agreed that they would like to see an expansion of powers to require DNA sampling of suspects and prisoners. This result demonstrates the very compelling nature of DNA evidence, which clearly was the experience of the majority of the jurors in this particular trial.

(v) Awareness
Nine of the jurors said they were aware of DNA profiling evidence before their participation in the trial (Q:20). In rating how important they expected DNA evidence to be in determining the guilt or innocence of an accused, all responses fell within the mid to high range of the scale provided. The overwhelming majority also said that the impression they had formed as to the importance of DNA was confirmed by their experience of the DNA evidence in this trial.

Expert evidence
Ten of the jurors correctly identified that the prosecution had presented an expert witness to explain the significance of the forensic evidence (Q:16) and all agreed that the forensic expert cooperated with the lawyers when questioned about the forensic evidence (Q:18).

The Defence
All twelve jurors agreed that the defence did not present an expert to challenge the significance of the DNA evidence (Q:14) and also did not present any forensic evidence of its own (Q:5).

General Observations
The survey results from this trial are distinguishable from the other survey results in a number of respects. For example, in contrast to the responses to question 12 from other juries, the jury in this case overwhelmingly believed that it would have helped their understanding of the case to have more forensic evidence put to them and to have more information about the forensic evidence they received.

In addition, the jury in this matter rated the importance of the forensic evidence at the mid to highest end of the scale. Specifically, eleven jurors responded in the top two tiers of the rankings provided. Along with the responses of other survey participants, this indicates that the consideration of DNA evidence in the deliberation process is largely context driven.

The potential for a more detailed comparative analysis of juror responses relative to important issues of contention, against the opinions of judges and advocates, is considerable. The Review benefited from such a consideration when employing the attitudinal elements of its methodology, using juror responses as a central focus.

5-6 Division of Analytical Laboratories

One of the first interviews that we carried out was with the Division of Analytical Laboratories (DAL) and the views of the scientists represented here are drawn from that interview, as well as the participation of their senior officers in the focus group.

One of the key themes to emerge from the DAL representatives the Review spoke with was the complication which has arisen as a result of the Court of Criminal Appeal decision in *Sing*[179]. The effect of that decision has been that all analysts at the laboratory who have been involved in the analysis of a sample have to be available to attend court, or risk the prosecution case. The time implications of this requirement are quite considerable, especially due to the location of the laboratory at Lidcombe. A lot of the scientists' time is now spent attending court, with the follow-on effect that there is less time than ever before available for actually conducting the analysis of samples. The DAL scientists suggest that a practical resolution of this situation would be to allow for only one analyst to attend court and defend the certificate. We have expressed our reservations concerning this.

This leads to another issue presented by the DAL representatives, namely that the adversarial system is the wrong way to go; rather, an inquisitorial model would be a better means of resolving the issues in dispute. Under the current system, the court is not apprised of the real key issues, with the focus mainly on accreditation and methodologies, and not, for example, on issues of evidence having been planted. Alternatively, the adversarial model means that the court is not in the best position to deal with these issues. One solution would be to have court-appointed experts. As our investigation and trial process is predicated on an adversarial model, it would be unrealistic to deprive the defence from putting the prosecution to proof on its case, including if necessary, calling all analysts for cross-examination. On the other hand, the Review suggests that the DAL scientists are correct in criticising the current system, and would prefer to see a more cooperative spirit between forensic experts, as it is evident from the jury surveys that protracted and complex battles over the minutiae of the scientific evidence do not enhance jury comprehension and may produce confused outcomes.

One possible solution to this issue, and one which the DAL scientists favoured, would be the introduction of an independent laboratory, discussed elsewhere in this Report (see 4-8). As we have stipulated, however, any independent testing facility would have to be adequately resourced. There is a perception in DAL at present that as a result of the database coming within the Health portfolio, even though it provides a justice function, there is reluctance to resource it appropriately. Another by-product of the development of the SIFS would be that it would better equip the scientists to place realistic limits on how people are using the service. At present, the DAL scientists feel that every time they come close to reaching expectations, these are raised by the police, with the end result that DAL will never manage to conduct the laboratory efficiently. There is a balance to be reached in scientific and law enforcement priorities against a background of finite resources at many levels. At the same time, DAL sees its responsibility as being to analyse the samples, and not to train their major client, the police, in appropriate prioritisation and resource deployment. It follows that a clearly established education arm of the SIFS which was better able to advise police evidence gathering practices, as well as the DPP staff who ultimately bring the evidence before the court, would have beneficial effects for the whole trial process where forensic evidence is involved.

[179] [2002] NSWCCA 20

Another issue raised with the Review in this context is that DAL may sometimes see utility in testing not just for whether someone's profile is included in, for example, a crime scene sample, but whether they could be excluded from a database.[180] Alternatively, they may wish to test evidence not presented by the police. Issues of responsibility to the client therefore arise. This Review does not make the case for court-appointed experts, but, in the event of such a model, the scientist would presumably be required to disclose information that was relevant to both sides of the case. The fact of the science is that DNA is primarily used to exclude people from potential liability, though there is a common perception that its main role is in implicating people in crime. Under the present model, it is difficult for the laboratory to do work for the defence because NSW Police is the main client and it is also difficult to proceed without a more diverse source of funding. A key aspect of any independent testing facility in our view would be the scope for conducting DNA tests and analysis on the behalf of defence, and ensuring sufficient funds for so doing. The Review was advised that DAL does in fact conduct some testing for the defence, when requested to do so, however we have been unable to obtain further details as to the frequency of such defence testing and the issues associated with it. At any rate, the present structure appears to us to be ill-suited for such situations, as a conflict of interest may arise, and the rate at which the defence is charged for the analysis would in effect render it prohibitive in most cases.

Another issue of concern to DAL is the legislative requirements for the destruction of samples and/or the link to the sample. The procedures undertaken in this regard are set out as follows in a document provided to the Review by DAL:

> *Person samples are submitted [by police] to ICPMR/DAL together with a submission form that details the donor sample. Relevant parts of this information are entered onto the laboratory system to identify the sample and manage the DNA testing. The Crimes (Forensic Procedures) Act requires that certain samples and the information derived from them be destroyed under specified conditions. Accordingly, on notification by the police that these conditions apply to a sample or when required by law, the sample, the submission form and the DNA profile and its links on the database are destroyed.*
>
> *A signed destruction request form is received by facsimile from FPIT, the sample identified, destruction actions performed, the destruction request form completed and returned to FPIT.*

In addition, DAL requires staff to '*check the sample details closely to ensure that the sample barcode, the surname, forename and date of birth match those given on the destruction request*.' Any discrepancies are to be reported to FPIT and written confirmation of the correct destruction details is to be obtained. Other details to be deleted are offence, sex, event, data taken, rank, registration number, name, location, COPS number and who delivered the sample to the laboratory.[181] Once the record is deleted, this action is final. Where the sample is related to casework, the Forensic Biology Laboratory is to be informed that the sample is being destroyed so their records can be noted accordingly. If the sample has been loaded onto CrimTrac, it is also to be deleted from there and staff are required to check the CrimTrac

[180] On this issue, it is apposite to have regard to the view of the Hon Justice Wood that '*it is important that police do not refrain from testing crime stains, or conceal their discovery, out of fear that they may exclude a suspect. The Justice System expects more than the bare compilation of impressive conviction statistics. It is degraded by unfair convictions*': Wood, *supra*, n117.

[181] This obviously has ramifications for sample tracing, should relevant requests be received from the Innocence Panel.

system every day until the record is no longer present. It is suggested that this indicates that the sample details have been removed from the searchable databases both at CrimTrac and locally (ie within DAL).

Batches of samples and associated paperwork are destroyed at the laboratory's convenience, and the numbers on the FTA or hair samples are to be incinerated. Extracts are to be disposed of by placing in contaminated waste bag and the submission form, profile print-outs and summary sheets are also to be destroyed. The destruction request form is then to be completed and returned to FPIT.

To date, 330 profiles have been removed from the database. At present, however, DAL is very much dependent on the police to provide them with up-to-date information about when they are required to destroy a profile, for example because a decision has been made to discontinue proceedings. If DAL fail to abide by the destruction provisions under the Act, they face criminal penalties, however the reality is that there is an imperfect flow of information between police, the ODPP and the laboratory.

In relation to destruction generally, the DAL scientists suggest that the legislation is unclear by what is meant by destruction.[182] Does this mean severing the 'link' between the databases, so that the profile is no longer searchable on the database, or is it necessary for the scientist to go and expunge the information from the whole file? On the one hand, if the identifier is removed, but the sample retained on the database, where an individual re-offends, the system doesn't enable the analyst to tell if the two matching profiles do in fact originate from the same person. This leads to the problem of being unable to say whether there are two different people with the same profile, which may be a failure of the DNA system. Thus, from a population database management system, it would be preferable to remove all profiles without an identifier.[183]

On the other hand, there may be some utility in retaining a de-identified profile, as this allows for the building up of population databases, so that frequencies of people in the population can be assessed. This was a more powerful argument at the beginning of the development of the databases, however, and has now lost some of its impact. It has also been argued that by retaining evidence of de-identified profiles, it will confirm a sample has been received, and enables records to be kept.

5-7 Department of Corrective Services

The following two main issues were distilled from interviews with senior DCS personnel and their contributions to the focus group session.

The key issue for the Department of Corrective Services is the proposal for DCS to take over testing of inmates. To date, over 13,000 prisoners have been tested, and thus far all testing has been conducted by FPIT, but with considerable involvement by DCS staff in preparing the prisoners prior to testing. It is the understanding of this Review that it has been agreed between NSW Police and the Minister for Corrective Services that DCS will take over testing of prisoners during 2003. Although it was originally suggested that it is not appropriate for

[182] This issue has also been raised by Dr Jeremy Gans, and Michael Strutt of Justice Action.

[183] Elsewhere in this Report we have discussed our reservations about children's, victims' and volunteers' profiles being retained on the system.

corrective officers to undertake what might be construed as an investigative role, representations were made to the Review that it would be easier for DCS to conduct the tests because they have an established relationship with the prisoners. As stated to us, they already conduct random urine analysis on prisoners, so this would merely be an extension of that role. In addition, there considerable resistance by the prisoners to police coming into the jails, so the testing could operate more smoothly as a DCS function. What would be important to DCS once the transfer occurs, however, is that they be properly funded not only to conduct the tests, but to continue to prepare the prisoners for the procedure and its ramifications. Of the thousands of prisoners tested to date, less than ten have been tested with the use of force, and it is the submission of DCS representatives that this is due to the extensive preparation and education in the lead-up to the testing, as well as the fact that every effort is made to give prisoners the maximum time possible to consider their decision. Although it is conceded elsewhere in this Review that consent in respect of prisoners in particular is a somewhat illusory process, the need for consent is advocated. It follows that all measures should ensure that the consent process is not whittled away. If the proposal that testing become a DCS function is implemented, it may become a routine part of the admission process, but the Review would support the allocation of resources to ensure that prisoners are still provided with the levels of information and access to legal advice as at present.

The other main issue is the testing of forensic patients. At present they are not allowed to be tested under the Act, and the Review is advised that a proposal in the Amendment Act to include such patients in the scope of the Act was rejected by Cabinet. It was put to the Review by a DCS representative that this would be a way of clearing up a number of unsolved crimes, as it is anticipated that the number of cold links against forensic patients would be high. The Review acknowledges the potential for high rates of recidivism for certain types of offences amongst the forensic patient population, however the Act is clear in its invocation that only people *convicted* of serious indictable offences will be tested (Part 7). Forensic patients naturally have not been convicted, but found not guilty on the grounds of mental illness. Any decision to test such patients would have ramifications for the criminal justice system more generally in terms of the meaning and effect of conviction of an offence. Accordingly, the Review suggests that the matter be referred to the Interdepartmental Committee on the *Mental Health (Criminal Proceedings) Act* and Cognate Legislation for consideration and advice.

5-8 Court Observations

Detailed court observations were an important and unique methodology in this Review. They enabled the Review team to witness the interaction of a range of interests within the trial setting, as forensic evidence was negotiated towards the resolution of a verdict. This technique, drawn as it is from ethno-methodology, allows for a transactional understanding of how different ‘meanings’ are established. The observational methodology includes:

- Witnessing the trial;
- Interviewing major players in the trial;
- Participating in discussions and conversations surrounding the trial process
- Benefiting from judicial reflection;
- Assimilating the tactics and dynamics of the adversarial environment; and
- Interrogating trial narrative.

The following is a report of one such trial observation, presented as an example of the methodology and its potential. For the sake of the integrity of the verdict, we have removed from this report our evidence from the juror survey which was administered following the trial.

R v Jason van der Baan

The accused was charged with having murdered the victim, whose body was found lying face down on her bed with her hands tied behind her back and a cord around her neck. The cord had apparently been tightened with a black pen. Marks on the victim's ankles indicated that her feet had also been tied. A cord that was found beside the bed was tested for DNA and found a mixture of profiles that did not exclude the accused and his then girlfriend.[184]

Explanatory material

The defence agreed to the prosecution tendering an explanatory plain English document for the jury which became known as Exhibit '*O*'. The document itself was prepared by an expert witness for the prosecution,[185] and was used by all courtroom participants during the hearing.

Exhibit '*O*' contained information about what deoxyribonucleic acid, or DNA, is, where it is contained in the body (in chromosomes) and explained that it is identical in all cells of the body. The cells in which it is located were explained (blood, semen, saliva, urine, hair, teeth, bone and tissue), as were aspects of the analysis, such as loci and alleles. DNA profiles were explained in plain English terms and the profiles of the accused, his ex-girlfriend and the profiles obtained from the cord found at the crime scene were depicted in a chart. The document also explained issues of identity, coincidence or random matches and the calculation of the Likelihood Ratio.

Circumstantial Case

The Crown case was circumstantial. Apart from the DNA evidence, the other evidence included:

- A false alibi for the night of the murder;
- Other lies concerning the accused's whereabouts that evening;
- That the accused's shoes were missing;
- That he was seen with cash that he had not had previously;
- The observation of injuries to the accused hands;
- An apparently blood stained shirt seen hanging on the washing line at the accused's house; and
- That the accused's jacket was found soaking in the laundry tub.

The Crown Prosecutor in his opening suggested that the Crown '*relies upon the united force of a number of circumstances to establish the guilt of the accused and in relation to those circumstances, the Crown asserts that there is no other reasonable explanation of the*

[184] This trial and the DNA evidence in particular received considerable media attention. An article in the *Daily Telegraph* by L Knowles headed 'DNA "links" nephew to cord that killed aunt' on 21 August 2002, p9, reported many aspects of the Crown's opening address and was the subject of a defence application for a discharge of the jury, on the basis that the journalist had committed the prosecutor's fallacy. The trial Judge declined to discharge the jury and instead issued directions that they were to disregard the article. See also L Knowles 'Murder cord "tied" to accused', *Daily Telegraph*, 4 September 2002, p17

[185] Day 10, 3 September 2002, at pp607.

evidence.'[186] Indeed, it was clear that the Crown would not have been in a position to prosecute the accused at all if the DNA evidence, the crucial circumstance, had been excluded.

The Prosecution Case

The Crown Prosecutor referred to the DNA evidence in his opening as one of the circumstances that comprised the Crown case.

> *Now, one of the circumstances that you will be asked to take into account, or the Crown at least, along with all the other circumstances is what's called DNA evidence. You'll hear some evidence from experts regarding DNA and …they examined portions of the white cord. It's not the one around the throat - it's the other cord. Now the testing of the cord showed a mixture of DNA profiles from male and female origins and was indicative of two contributors to the major components.*
>
> *Now, one thing that the DNA evidence establishes is that Michael Lucchese, … he was excluded as a major contributor, the accused is not excluded and Deborah Wilson is not even excluded.*
>
> *Now statistics have been worked out. Now before I give them to you, I should say this to you; it's not really a mathematical process at all, you don't get overawed by raw numbers, it's simply a factor, the circumstances of the DNA into the equation, into the altogether (sic) evidence and you see where the evidence points at the end of the day.*
>
> *Nevertheless, it's necessary for you to have some figures before you, because otherwise it would be difficult for you to assess the weight of the DNA evidence, and his Honour will give you directions about this in due course …*
>
> *Now I said the statistics had been worked out on the basis of two major contributors, comparing the probability of obtaining a mixed profile, if, and I emphasise 'if' it came from the accused and Deborah Wilson - Deborah Wilson being his girlfriend at the time, to the probability of obtaining the mixed profile, if it came from two persons selected at random.*[187]

The Crown closed on the strength of the DNA evidence. After going through much of the evidence in the context of a circumstantial case, the Crown Prosecutor made the following remarks:

> *If you look at the DNA evidence, in particular this likelihood ratio, in combination with the other evidence in the case, my submission to you is this, that you would readily conclude that the DNA actually originated from the accused and Deborah Wilson when you look at the totality of the evidence in the case. I'd go further than that members of the jury, I make the submission to you that you would conclude that beyond reasonable doubt. You would conclude that the accused's DNA was on that cord beyond reasonable doubt.*

The Defence

The defence originally made an (unsuccessful) application to have the DNA expert evidence excluded, on the basis that it is not open to give evidence in a mixture DNA case of the process of determination of the major contributors' profiles, as that process has a number of stages, and each one the analysing scientist must exercise their own subjective judgment.[188] In summary, the conclusion would be so tainted with subjectivity as to no longer be opinion, or

[186] Crown Opening, 20 August 2002.
[187] *ibid*
[188] Day 9, 2 September 2002, at pp587.

acceptable opinion evidence, as set out in the *Evidence Act*. Alternatively, it was argued that the evidence should be excluded under section 135 of the *Evidence Act*.[189] His Honour ruled against this objection on the basis that it was a process of fact, and suggested that '*every scientist to some degree or another is subjectively involved in reaching a judgmental conclusion and every expert reaches a judgmental conclusion so that this does not exceed the bounds and is admissible*'.[190]

Given the inclusion of this evidence, the defence approached the DNA evidence in the following manner:

> *The Crown expects expert scientific evidence to satisfy you that the DNA of the accused and his girlfriend, Deborah Wilson, was in a stain on one of the pieces of rope that the murderer used to tie up Mrs Wilson. We will be asking you to look hard at that evidence. Indeed, we expect that you will understand by the end of the case that it's not the usual sort of DNA evidence at all. Indeed, you will hear that it is evidence of a mixture of a number of people's DNA and that the state of the science is such that mixtures are actually quite hard to interpret and opinions as to what a DNA mixture shown in graphic form actually means can differ from expert to expert.*
>
> *The case for the accused will be that even the experts can't agree, then how could you, a jury, possibly use that evidence as a basis for finding the charge against the accused has been proved to your satisfaction beyond a reasonable doubt?*
>
> *We would suggest that you will find you are being asked to take a particular approach to the evidence about DNA - I won't go into the scientific ins and outs of that approach just at the moment but that at the end of the day you might find that approach a bit difficult to accept. If you're not satisfied that that approach is acceptable, then the statistical figures that you will be hearing in the Crown case will, of course, be worthless. In other words, at the end of the day we will be suggesting that you have no alternative but to put the Crown's DNA evidence to one side.*
>
> *... Even if the Crown's DNA evidence was incontestable - which we say it won't be - but, even if it were incontestable, the fact that there was that mixture of DNA in a stain on the cord was in Mrs Wilson's house doesn't prevent someone else from using it to help kill Mrs Wilson.*[191]

It is beyond the scope of this case summary to reproduce in full the extent to which the DNA evidence was dealt with in defence counsel's closing addressbut the following key issues were raised:

- If the cord had the DNA stain of the accused on it, this did no more than show that the murderer used a cord with such a stain (that is, a pre-crime stain);
- If the cord found around the victim's neck was in fact the boot lace of the accused, why was the DNA analysis inconclusive? (ie, there should have been a reportable result, given the presumable constant use by the accused);
- The likelihood ratio was challenged based on the interpretive role of the experts conducting the analysis;
- The inconsistencies in the interpretation were identified; and
- There was an issue in relation to the minor contributor, ie Michael Lucchese could not be excluded.

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[189] See further, Day 10, 3 September 2002, at pp606.

[190] *ibid*

[191] Defence Opening, 20 August 2002. The lawyers' focus group discussed the issue of 'mixture analysis' at length and it was agreed that there is a degree of subjectivity on this issue, which '*signals an alarm bell to investigate further*'.

Altogether, defence counsel suggested two different approaches that the jury could take in relation to the DNA evidence, namely by '*considering very carefully whether the evidence should be used by you at all - that's the first approach and secondly, if you decide that you can and should use it, what does it really mean in the context of this particular case?*'[192]

Expert evidence

Robert Goetz and Jennifer Burger from DAL gave evidence for the prosecution. The defence did not use their own expert. During the cross-examination of the experts, there was some suggestion of collusion between the two expert witnesses in regard to the evidence.[193] Further, reference was made to other sites where the results of the analysis were not reportable or not tested at all.[194] In addition, the specific charts referred to in Exhibit '*O*' were referred to in order to emphasise that result of the analysis that the mixture comprises three separate contributors. In this way, the interpretive role of the expert in analysing the results (and the inconsistencies therein) was the focus of much questioning by defence counsel.[195] Variables, that is, changeable facts to assist in determining whether or not DNA has been left on an item, were also examined.[196]

Specific Observations

We have removed all detail from the jury survey conducted in this trial to preserve the jurors' anonymity, but note that there was a question from the jury during the course of the trial about the lack of DNA analysis on the cord found around the victim's neck (as opposed to the cord found in the vicinity of her body). The jury asked '*was any testing for DNA performed on the black cord (found around the victim's neck) or on the pen found entangled in her hair and the cord? If there was testing done, are the results of such testing available to the jury?*'[197]

The Crown was allowed to re-open its case in response to this question and an agreed statement was read to the jury informing them that the analyst had provided the police with a statement to the effect that she '*tested the black cord and the pen and the tests were unsuccessful, due to insufficient DNA recovery*'.[198]

The surveys also presented detailed insights in relation to the defence, the accused, consent, the meaning of a '*match*', the case for or against an expansion of powers, expert evidence and awareness of DNA, which were then available to be contextualised within the fuller methodology.

[192] Day 14, 9 September 2002, at pp830.
[193] Day 10, 3 September 2002, at pp640-641.
[194] *ibid*, at p641.
[195] *ibid*, at pp645; 652; 679.
[196] *ibid*, pp647-8.
[197] Day 12, 5 September 2002, at pp702.
[198] *ibid*, at pp716.

Chapter 6 – Best Practice in the Use of Forensic Procedures

6-1 Introduction

The organisational philosophy of best practice has an established history in criminal justice institutions and policy, particularly in relation to policing. In their simplest sense, best practice organisational philosophies focus on the following:

- Accountable operational procedures emerging from an established and agreed code of practice;
- A consensus throughout the organisation claiming a best practice strategy that the best practice model is relevant and achievable;
- A broad level of 'ownership' of the best practice strategy, emerging as it does from a consultation process at its formulation; and
- Central binding themes, which identify best practice around issues such as efficiency, integrity, responsibility, and transparency.

Best practice organisational philosophies in the criminal justice setting usually operate in tandem with structures of legislative obligation and responsibility. The best practice approach recognises the limitations in singular over-reliance on legislative and bureaucratic regulation, while giving them added capacity by taking up those areas of organisational management which cannot be covered in every case by way of legislation or administrative documentation due to a reliance on discretion in the operation of the agency and its powers.

Another attraction of the best practice approach is its positive or pro-active dimension. Best practice advocates argue that individuals and agencies should be encouraged to discharge their duties in a context which complements high standards of operational integrity, rather than one which punishes deviation or malpractice. The best practice approach implies a workforce and management willing and committed to achieving shared objectives at the highest levels.

A best practice approach to organisational management in criminal justice can be targeted and specific. In the context of forensic procedures, a best practice predisposition can have direct impact on the investigation, analysis, and adjudication phases of a criminal prosecution and work towards the attainment of common goals for a just and effective outcome.

An early theme emerging as a problem in the efficient operation of forensic procedures in New South Wales appears to be the absence of integration agency-to-agency and stakeholder-to-stakeholder. In many respects this lack of integration is typical of the operations of the criminal justice system at large but an absence of integration in the application of forensic procedures presents unique difficulties when one is seeking to address accountability issues.

A case study of the absence of integration in the field is in the context of data management and the analysis of process data. DAL is the repository of forensic databases which to some extent are duplicated in miniature by the data held by police. Other agencies are critical of not having sufficient independent access to these databases or information on how they are operated and prioritised. The issue of prioritisation is what links this data and process data. The police, for instance, are dissatisfied with the delays they experience in getting back analytical results from the laboratory. They say they are not privy to how DAL prioritises its

work and they feel that they do not have sufficient influence on these decisions from an investigation point of view. The laboratory, on the other hand, would be fair in criticising the police and prosecutors for not keeping it routinely informed of what their analysis and matching produces in terms of investigation and prosecution outcomes. Without such knowledge, DAL would not be in a good position to confirm or refine its management decisions regarding priorities for analysis.[199]

The following discussion of a best practice approach to forensic procedures is built on the commitment to enhancing effective and responsible integration across agencies and stakeholders essential to the application of forensic procedures in New South Wales. In addition, the discussion of best practice is not meant to imply that the principal agencies involved are presently either ignoring or undervaluing best practice organisational philosophies. NSW Police, for instance, has extensive and detailed Standard Operating Procedures (SOPs) for the use of forensic evidence. DAL also has established protocols for the analysis and recording of forensic information and samples that come into its control.[200] Legal professionals who argue the relevance or otherwise of forensic evidence and analysis within the trial process are bound by ethical rules which might, in any context, be seen as the foundation for best practice. It is within this general climate that a more specific and comprehensive approach to best practice in the use of forensic procedures is advocated by this Review.

6-2 Limitations of Legislative Regulation

The Review has been impressed by criticisms from several agencies and individuals about the nature and impact of regulations created under the Act, which some suggest are too complex and burdensome, and as such, produce negative consequences which disable the legitimate intentions of the legislation. Others say that these regulations either do not go far enough, or cannot be given sufficient 'teeth' in order to guarantee the particular protections they envisage. Some say the references to certain protections in the legislation proceed no further from the symbolic, and as such are worse than of no value, in that they inspire confidence which cannot in any way be realised by the Act or its regulations.

It might be said that we exist in a society where there is increasing reliance on legislative safeguards to ensure the safety and satisfaction of certain fundamental individual and community rights. This is particularly so in Australia, where we do not have the benefit of general and all encompassing rights charters, or a background of constitutional legality where enforceable rights is a feature. In particular, in the areas of privacy and data protection, the Australian legislative framework has taken on a fairly narrow and particularist perspective, due to the inability of the legislation to return to more fundamental and generally expressed constitutional rights.

The Standing Committee report directed significant attention to the safeguards surrounding forensic procedures and identified the difficulty of protecting the right to privacy and the right to a fair trial through the legislation alone. They recognised the importance of the actions of

[199] It is also significant to note that if the police wish to take over the DAL record and data keeping dimension, they do not have a happy history when it comes to efficient and consistent quality in the management of crime and justice process and outcome data.

[200] As we have mentioned earlier, this Review has not sighted such protocols, despite requests of DAL to produce these for our examination. It is therefore impossible for us to observe and comment on their best practice directions or otherwise.

legal professionals and the police in ensuring that such rights may be maintained. In addition, the Committee commented upon the difficulty of a narrow reliance on legislative protections, and identifying when such protections were not active or where agencies chose to act outside these responsibilities.

The Standing Committee also identified what they referred to as '*function creep*', a process whereby forensic procedures and the uses to which they are put grow exponentially for a variety of different reasons. Accepting that the growth in the use of forensic procedures is exponential, then the demand for efficient, transparent and responsible institutional practice in the area confronts this Review in an expanding significance.

Organisations are generally resistant to bureaucratic regulation. Organisational and management theory indicates that with most big institutions, such as those involved in forensic procedures in New South Wales, there is an optimal point past which individuals and organisations resist or subvert complex bureaucratic regulations. From the discussions we have had with serving police officers in particular, there is little doubt that bureaucratic regulation in this area, if it is believed to be unduly complex, difficult to understand and operate, irrelevant, or interfering with legitimate crime control intentions, will be ignored or subverted. The existence of complex bureaucratic regulations which are avoided by those to whom they should apply creates a false sense of accountability and responsibility in the mind of the community, which is not aware of operational reality in the area. This Review is not interested in perpetuating any such divergence between legislation and practice. Having said this, the challenge is to devise an approach complementing the intentions of legitimate legislative regulation, while at the same time recognising the negative potential of bureaucratic over-regulation. A best practice approach, particularly one that involves those organisations to which it applies, has great potential in this regard.

Although the ultimate evaluation of forensic procedures in an adversarial trial setting provides an effective framework for accountability, those who are familiar with the literature on miscarriages of justice will be aware of the danger in relying too heavily on the courts to monitor practices associated with evidence and its delivery. This is particularly so when lawyers and the courts are seen as part of a process which finds value in endorsing rather than challenging earlier stages and institutions in the justice process. This is not to say, of course, that the courts and advocates do not expose the limitations of forensic procedures; our trial observations suggest that they are capable of doing so. What we argue, however, is that legislative safeguards, bureaucratic regulation and judicial oversight should be supported by the best practice approach in order to ensure a more comprehensive and practically viable accountability strategy.

6-3 Need for Greater Integration

As stated above, it became apparent in the Review's evaluation of the activities of the principal agencies associated with forensic procedures that there was an absence of integration between agencies and individuals in situations where such integration would obviously be beneficial. It should not be interpreted from this observation that such an absence of integration was either conscious or deliberate. The focus group exercise discussed in other parts of this Report evidences a generous interest amongst senior representatives from most of these agencies in the potential for integration and interaction. The participants in the focus groups recognised their implicit dependence on the manner in which forensic procedures operate in agencies external to their responsibility and control. They also

conceded some ignorance or misunderstanding of the manner in which other agencies carried out their responsibilities and the internal procedures in place that govern forensic procedures agency-to-agency.

The Review sees significant potential for a wider and more detailed integration of forensic procedures across the criminal justice agencies under the rubric of best practice. This model does not suggest that the best practice model should be uniform across agencies, as this would deny the unique structures and responsibilities of each agency and the extent to which they have individually and independently developed best practice foundations for forensic procedures in-house. There is no reason why integration could not proceed while recognising the individuality of the agencies in relation to each other through forensic procedures governed by the Act.

Beyond the police and Corrective Services, which the Review understands to liaise closely in the development of forensic procedures, judicial officers and legal professionals may be connected to the sampling process through arguments about compulsory orders, or representations and disputes about analysis. At this stage, the potential for best practice integration becomes more diverse and may involve judges, magistrates, advocates and legal representatives.

The reception, processing, analysis, reporting and recording of forensic sample material introduces the scientists from DAL. There is an explicit connection between the police investigators providing the sample and the DAL analysts who process and report upon such material. However, the scientists may not necessarily indicate to the police what happens to profile information beyond the reports that are transmitted to the investigators. The investigators are in turn unlikely in any routine way to return information to the analysts and the laboratory regarding the investigation outcome of the analyst's report. There will be communication of such information in circumstances where the report supports a prosecution and the analysts are required to appear as experts at trial. In a variety of other circumstances, however, the scientists may know little about what happens to the product of their analysis in terms of later criminal justice outcomes.

Even within certain agencies there may be limited information sharing when it comes to forensic procedures. For instance, crime scene investigators may take forensic samples and seek their analysis. These samples may then be compared with data from inmate populations sampled by FPIT. Matching may then be attempted through the services of the laboratory and the result may be so as to enable the crime investigators to eliminate a suspect from their inquiries. There does appear to us to be any routine procedure whereby the termination of any such interest is recorded centrally or measured as an outcome of a forensic procedure.

Prosecutors become involved in the forensic process when as part of forensic evidence is conveyed to them as part of the police brief. The prosecutor then may make a decision as to whether to proceed or to suspend the prosecution on the basis of the value of that evidence and the way it relates to other elements of the case. Again this information may not be conveyed to the police or to the analysts of the laboratory.

As more agencies, such as defence advocates, other professional experts and judicial officers, are added to the mix, the essence of integration particularly in relation to the outcome of forensic procedures in a trial sense is compounded. Without a clear indication of the

relationship between sampling and outcomes, it becomes very difficult to evaluate the impact that such evidence may have on prosecution and trial outcomes. More particularly however, without a process of integrated reporting back at various stages through which the forensic evidence may pass, it becomes impossible to conduct a detailed system analysis of the crucial phases in the forensic trial.

The idea of a routine and integrated tracing of sampling outcomes would assist in the monitoring of data dissemination and protection. A by-product of any such tracing would be a clear understanding of the way in which sample information becomes centrally indexed and the potential which exists for such indexes to be accessed for a variety of different processes. The appropriateness or otherwise of such access could be built in as a regular review of this monitoring process.

Recognised and agreed upon efficiency measures would emerge as an important consequence of any such integrated data collection and outcome evaluation. If, for instance, successful prosecution were to be taken as an efficiency and effectiveness measure when evaluating forensic procedures, it would be important to know what happens in the signification process of forensic evidence between investigation and trial. At present there is little of this information available to the Review.

Even on an issue like sample integrity and the quality control of sampling methods, if compromises are made down the line, then there is currently no way of measuring or ensuring that those who work with the sample further up the line will not also find their efforts diminished.

Along with more credible efficiency and effectiveness measures for forensic procedures would emerge credible resource allocation evaluators. Forensic procedures are expensive and the economic implications of the exponential growth in forensic procedures will require Treasury authorities to seek more detailed and reliable justifications in terms of return to investment. If such measures on financial return were available, then the Government would be better placed to prioritise limited resources for the development of forensic procedures. Furthermore, if budget allocations to the principal agencies involved in forensic procedures were tied to more responsible revenue measurement on return, then the agencies themselves would be able to better prioritise the way in which they called upon forensic resources to achieve their organisational goals.

It has been suggested to us, for instance, that the police are becoming more interested in taking a variety of samples from crime scenes for analysis at the laboratory. This has placed ever-increasing pressures on the limited analytical resources of the laboratory. Laboratory management is presently not in a position to impose investigation protocols which would prioritise forensic sampling and analysis upon the police. What may have precisely that impact on police investigation practice is if the time lag between sampling and reporting becomes so great as to impede the investigation process and discourage prosecutions, but this is not the way forward in responsible resource allocation and review when it comes to forensic procedures. The input/output balance should be adjusted and maintained by police and laboratory management being more aware of why they are seeking to use laboratory resources, and what the resources can be directed towards achieving. This can only effectively be established through better integration and wider understanding. As well as fostering a better understanding of inter-agency practices and expectations, and consequent maximising

of resources, client agencies might become more strategically enabled to invest in analytical resources.

A case study in all of this is the management of forensic procedures data. The vast bulk of forensic procedures data is maintained by the police, through FPIT. However, information concerning the analysis of forensic material in the laboratory, its application through prosecution agencies, the outcome of forensic analysis during the trial, and the way in which forensic conclusions would be challenged by defence teams, stands outside and beyond the police data. All this information could be available if from the time a sample was taken through to the time its eventual use was determined, and the nature and process of the application of evidence was constantly and routinely monitored and recorded. The Standing Committee recommended that the way to ensure a more comprehensive and complete data collection was to make it the responsibility of the Bureau of Crime Statistics and Research. We believe instead that such integration can be better ensured and supported if it becomes the responsibility of an essential agency within the process specifically budgeted for that purpose. In this respect the new SIFS would be the appropriate agency to maintain integrated data collection on forensic procedures.[201]

6-4 Shared Themes of Best Practice

The best practice philosophy of institutional, operational and organisational management is nothing new. It grows from the corporate compliance tradition of management thinking. When applied to a process that is as disjointed and dysfunctional as the criminal justice system, it requires clear and considered themes that can help bind the principal agencies in a common purpose.

6-4-1 Integrity

Integrity is required to participate in a best practice strategy. The agencies involved will need to reflect on their management of, and intentions for, forensic procedures if they wish to inculcate a best practice ethic throughout their respective organisations. Integrity also needs to be an individual and operational commitment, and would ideally flow through to all aspects of the organisations' operations.

Integrity is also the root for integration. A spirit of integrity should assist in integrating operations and management within an agency. If there is a common commitment to integrity across agency practice, then integration with any other crucial agency in forensic procedures that also exhibits an integrity commitment will be natural. To this extent, the issue of integrity has a material benefit (beyond benefits to professionalism and institutional morality) that can work right down to street level.

6-4-2 Transparency

Discretion features in all aspects of forensic procedures. The exercise of discretion, particularly on a one-to-one basis in criminal justice is notoriously resistant to transparency, which compounded within criminal justice agencies by the equating of accountability and penalty. It is only when criminal justice operatives can be convinced of the positive

[201] This does not prohibit any individual agency from maintaining its own discrete databases for internal purposes. However these data should be made available to the central agency to complement its data collection procedures.

operational outcomes resulting from openness and the responsible and accountable exercise of their powers that improper exercises of discretion can be avoided.

Transparency is crucial in the exercise of the powers under the Act because covert or subversive approaches to the subject matter of the Act are so difficult to uncover. Further, an atmosphere of transparency is, as we have identified, vital for confident and supportive data management across agencies where shared priorities and complementary resource allocations will continue to feature.

6-4-3 Ownership

Policy-makers and management cannot successfully impose best practice. Nor can it be demanded by one agency of another. Rather, it must be something which emerges from the operations of an agency, cognisant of its legitimate needs and complementary of best practice outcomes. It becomes most successful as layers of ownership for the strategy are confirmed at all levels of the organisation and in all situations of its operations.

Ownership of the strategy is also the only way to ensure compliance. While best practice strategies may be encouraged and promoted within organisational management, they are, in the end, voluntary. For the strategy to become all-inclusive, it must seem to make sense to the widest organisational audience. Therein lies the challenge for its promoters. The experience of the Review team in other contexts is that ownership is best achieved by making the audience aware of simple, applied benefits which accrue from the strategy. These might include, as relevant, community support and better information flow, higher levels of professional recognition, better transfer of responsibility up and down the management line, greater job satisfaction and more significant cross-institutional cooperation at all levels.

6-4-4 Natural Justice

Recognition of natural justice has particular significance in best practice models for criminal justice. This will not progress well if it is promoted in the traditional law and order paradigms (ie the competition between the rights of the accused and law enforcement imperatives). In a management model, the most effective way again to engage with natural justice is, initially, at the level of self-interest. If the employer is made aware of the benefits of a natural justice work environment, then it will not be difficult to draw from this an understanding of more universal issues such as data and privacy protection.

What follows is some description and speculation about best practice in the operations of various agencies and at stages of the forensic procedure process. Remembering that this Review believes it is for the partner agencies in forensic procedures to develop and own the details of their best practice strategies, these observations are suggestive rather than prescriptive. Also we spend more time on the trial stage and its parties as a consequence of our methodology. This should in no way be construed as a belief that the other stages are less important or less in need of detailed best practice management.

6-5 Best Practice Investigations

The police, particularly in the forensic procedures area, may argue that, through SOPs and education and training initiatives, they already have best practice in place. While these materials are instructive, and are to be encouraged, they are in our view not enough to ground best practice. It is the considered opinion of this Review that with police investigations, the

most effective way to commence the best practice approach is to get down to street level and investigate how true compliance with the Act is being avoided, why and what can be done about it. In this respect it is an intensely practical response to malpractice and the reasons which promote it.

Also, normative statements in policing are notorious for not percolating well down into the fabric of routine police work. Police culture is an impediment here, particularly in its 'anti-establishment/management' manifestations. Best practice strategies need first to take on this cultural reality, and then work with it in an attempt to draw from it its most productive components, while neutralising those which are subversive of change.

6-6 Best Practice Science and Analysis

Fortunately, in the science professions there will not be an overt culture of resistance to ethics and best practice. The occupational/professional culture which prevails can be easily adopted and adapted to promote best practice.

The difficulty here is with 'expertise' syndrome, where the scientist believes they 'know best' and that they cannot communicate with those beyond their language of knowledge. This practice must be addressed by exposing the networks of self-interest and mutuality, which need to work together in a complex environment such as forensic procedures. Even where the science professionals view themselves as superior to other agencies, the need for mutual assistance can become equated with self-interest, and then the environment of common best practice becomes a foundation for communication.

Unfortunately, the science dimensions for forensic procedures within NSW also have to combat the wider view that there is a problem with transparency and self-criticism. When dealing with the police and legal professionals, for instance, DAL cannot ask that their piece of the process should be taken on trust. The immediate pressures of resource allocation and client satisfaction will tear away at that. This works at least at two levels. The police, in their preferred client relationship with the laboratory, do not have the in-house scientific capacity or the insider-knowledge to require further and better particulars concerning the protocols and processes of analysis. They reluctantly take DAL's output on trust in an atmosphere where they would prefer more say in how its work was prioritised. At another level, the scientists are regularly required to justify their analysis and opinion in court as expert witnesses and this is not a context where trust is necessarily tolerated, as the adversarial process is set to challenge those issues which science may be more comfortable to advance on trust and convention. In situations where laboratory resources are stretched and trust is not always a buffer, then, without more generally accepted best practice strategies, the work of the laboratory is at risk.

The best practice agenda for the laboratory and its scientists will have to be addressed first and openly if the new Institute is to take the administrative running on best practice across the other associated agencies. To advance this process, the principles enunciated above must be identified and demonstrated in DAL's forensic procedures at all levels. We anticipate that they will need external assistance in this process.

6-7 Best Practice Trial Process

Due to the Review's concentration on the observation of trial practice, rather than the detailed examination of police investigation practices and scientific procedures, we feel better placed

to speculate on best practice in more detail within the trial context. Having said this, and consistent with our belief that integration and mutual assistance is crucial to best practice in a process sense, best practice trial process cannot exist or achieve its objectives isolated from optimal investigation and analytical practice.

6-7-1 What is difficult about managing DNA evidence in criminal trials?

The use of DNA evidence in criminal trials across Australia is still in its infancy. British and American court practice has a deeper grounding in this area, but there too it might still be viewed as a relative novelty. In *R v Dohemy and Adams*, [202] the English Court of Appeal recognised the overwhelming importance of forensic evidence such as DNA, particularly in cases where the prosecution rests on an aggregation of circumstantial evidence. In making this observation, the court recognised the difficulties inherent in explaining to juries the significance of such forensic evidence. These difficulties are a natural product of the manner in which DNA evidence is contested. Having now gone beyond the battle over the science used, the next issue is the need to explain what DNA analysis really means and what it says in any case. As the court noted,

> *The cogency of the DNA makes it particularly important that DNA testing is rigorously conducted so as to obviate the risk of error in the laboratory, that the method of DNA analysis and the basis of subsequent statistical calculation should – so far as possible – be transparent to the defence and that the true import of the resultant conclusion is accurately and fairly explained to the jury.* [203]

From our trial observations,[204] it is clear that particular difficulties with DNA recur, summarised as follows.

'White coat syndrome'
This occurs where the evidence can only be disentangled by expert witnesses, and the contest between experts in disagreement gives the foundation for a dispute between the prosecution and the defence. Juries find particular difficulty in reconciling the respect for expert opinion against contested expert evidence and challenges to expertise. It is one thing to suggest that expert evidence on DNA is confusing *per se*, but challenges to expertise appear to add significantly to the confusion of jurors and tends to undermine their comfort with either version of analysis.

Difficulties of language
A technical language of science, which is unfamiliar to most lawyers, and juries in particular, is required in order to demystify deoxyribonucleic acid (DNA). In addition, the language of analysis expects the lawyer and the juror to venture into the specialist and foreign realms of genetics and statistics, which even in their clearest representations can be confusing. It would appear from our juror insights that because DNA evidence is presented both as a statistical ratio (outcome of analysis), and as a physical exhibit (the material from which the sample was taken), confusion exists about what DNA evidence actually is. The argument as to its significance may be exacerbated by this confusion, particularly when it is being fitted into a circumstantial case.

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[202] *R v Dohemy and Adams* (1997) 1 Cr App R 369
[203] *ibid* at p372-3
[204] These have been augmented with trial narrative analyses of previous cases in which DNA has featured

Levels of legal/scientific authority

The analysis of DNA evidence in court rests on the expression of expert opinion. The authority of that opinion is established and challenged in a variety of different ways. Once settled, the expert then needs to persuade the juror that his or her science has authority. Along with this, lawyers and judges need to invest the contested evidence with legal relevance, evidentiary significance and contextual interpretation. The traditional tensions between law and science, particularly as they relate to processes of analysis, tend to evidence a divide between the expert's vision of DNA and the lawyers evaluation of its relevance. This in turn is another potential for juror confusion when they are asked to arbitrate what is fact.

Professional alliances

Lawyers and experts in criminal trials demonstrate professional alliances (no matter how strained or antagonistic). In so doing, the nature and language of the professional alliance presents a tendency, even in the least adversarial context, to alienate the lay juror from what is being communicated. Jurors will, in our experience, turn off when the lawyer and the expert are debating the intricacies of DNA analysis.

The novelty of forensic evidence and its analysis

As we have suggested earlier, DNA as an identifier in a criminal trial is fairly new. Even against the background of a high profile in crime and justice popular culture, DNA evidence will be unfamiliar to most lawyers and jurors for some time to come. Unlike fingerprint evidence and other more conventional forensic styles, DNA offers up new challenges in comprehension, the reward being greater levels of significance accorded to such evidence by lawyers and jurors. The novelty of the evidence and the expert opinion it requires means that there aren't yet well-established authorities or conventions on the appropriate way of delivering this evidence and its challenges.

The forensic intention for DNA

An oft-quoted justification for DNA analysis in criminal justice is that it has the potential to exclude the innocent from prosecution or conviction. However, the trend as we observe it is to incorporate DNA as an essential feature of certain prosecution cases. If DNA is to be the compelling evidence, and to possess the potential for a "knockout blow" when compared with other material evidence, then its positioning within the trial bears greater importance than other evidence on which it may crucially rely. The tendency to present DNA as the most compelling information attaches to it (and its presentation as evidence), we would suggest, unique issues of responsibility for lawyers in its management.

Furthermore, the juror's expectations are compounded through media representations of DNA as conclusive proof of a person's guilt. This highlights some of the difficulties about managing the representation and understanding of DNA evidence within the confines of a criminal trial, and suggests a responsibility on counsel to manage prejudice and employ it, or turn it around towards their preferred conclusions. It places lawyers in the unenviable role of presenting evidence beyond the ordinary purview of the law itself, to jurors who have already formed often incorrect ideas about its meaning and potential impact. Whilst such a dilemma is hardly unique to trial practice, it is particularly onerous, given the declared compelling nature of the evidence itself, or its perception as such, and its striking capacity to influence verdicts either way.

6-7-2 Presenting DNA evidence in court

The observations of criminal trials in which DNA has featured recently in New South Wales suggest several separate justifications for the inclusion of this evidence in the prosecution case. These justifications complement the tactics of the Crown, often tending to demonstrate the manner in which DNA evidence is used to shore up otherwise fragile prosecutions.

Lawyers with experience of DNA evidence have suggested it is now less likely that the science of DNA profiling will receive routine challenge in court, and the introduction of convincing DNA matches will find more and more acceptance.[205] The apparent reluctance to engage the science of DNA sampling, profiling and matching has given this evidence form a degree of legitimacy, which enhances its attractiveness as a crucial evidentiary element in the prosecution case.[206]

The following are some of the main situations in which DNA is relied upon in the investigation and prosecution of criminal trials. As DNA and forensic profiling become more common features of criminal investigations, the obligation on the prosecution in particular to ensure a transparent and accessible presentation of the evidence will be made clear.

Identification

It is trite to say that a DNA match is not conclusive evidence of identification. Lord Justice Phillips observed in *R v Dohemy and Adams*, when criticising the prosecutor's fallacy,

> *If one person in a million has a DNA profile which matches that obtained from a crime stain, then the suspect will be one of perhaps 26 men in the United Kingdom who shares that characteristic. If no fact is known about the defendant other than that he was in the United Kingdom at the time of the crime the DNA evidence tells us no more than there was a statistical probability that he was the criminal of one in 26.*[207]

Caution with the prosecutor's fallacy aside, jurors are persuaded by probability ratios, and without careful direction (including on the probability of a chance or coincidental match), may have a tendency to take DNA evidence as proof of identification. However, the difficulty of formulating such a direction is further compounded by the fact that, at this time, there does not appear to be a clear consensus on the most effective means of calculating the probability of a coincidental match.[208]

But what is it the DNA identifies? In most cases in which DNA is used, the probability ratio is directed towards the assumption that the accused was somehow located at the crime scene. This assumption may be derived from a discarded cigarette or material on which a matching DNA stain sample is found. The conclusion is then drawn that not only was the accused's DNA present on the sample, but the sample links the accused to the crime scene.

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[205] In a recent case, one lawyer commented that it seemed of little point to introduce evidence from their expert witness that might reduce the probability ratio arising out of the match from millions to hundreds of thousands. This is not meant to suggest that analytical conventions governing the chain of custody and the purity of the sample are not regularly challenged, see *Sing* [2002] NSWCCA 20

[207] *R v Dohemy and Adams*, *supra*, n203

[208] Standing Committee Report, *supra*, n2, at p xi. For this reason, the Standing Committee has recommended that the proposed forensic institute examine the best method of calculating the significance of a match.

Associated with location is the manner in which the presence of the accused at the crime scene would connect him or her to the crime in question. It is often argued that where a victim or witness is otherwise unclear about the identity of those present at a crime, DNA may add the critical piece to the puzzle, so as to suggest that the location of the accused amounts to an active involvement.[209]

Besides the identification of suspects and their matching with crimes and crime scenes through the use of DNA, the Review has observed cases in which the identity of the victim in a homicide trial has relied on DNA. This requires DNA extraction from evidence of human remains and relies on the capacity to scientifically link these remains back to a victim of crime. Despite such powerful applications of DNA technology, the problems associated with the identification of suspects or accused persons transfers with the same cogency to the identification of victims' remains.[210]

Circumstantial evidence

DNA evidence may be nothing more than one element of the prosecution case requiring the support of corroboration from other more conventional forensic forms. The significance of the DNA probability ratio in this instance is critically dependent on what else might be known about the accused's activities at the time of the crime. An alibi may be sufficient to deny the accused's responsibility, despite a matching DNA profile. If, however, the accused was near the scene of the crime when it was committed or had been identified as a suspect because of other evidence, the DNA evidence becomes very significant. The possibility of two people with the matching DNA being in the vicinity of the crime will seem almost incredible and a comparatively slight nexus between the defendant and the crime, independent of DNA, is likely to suffice to present an overall picture to the jury that satisfies them of the defendant's guilt.

In saying this, it would be wrong to assume that DNA evidence is just like any other piece of the circumstantial evidence puzzle. While corroboration of a convincing probability ratio may be necessary to remove doubt from the mind of the jury, the compelling nature of DNA gives it a special relevance for a circumstantial case, and it may in practice only require slight corroboration to confirm its significance.

In one trial reviewed by our team, the jury accepted the importance of DNA evidence, while at the same time having little difficulty in discounting the evidence within the amalgamation of a circumstantial case. It therefore appeared that DNA did not confirm the circumstantial mix, where corroborative evidence and the connection between DNA as an identifier and vital incriminator were challenged. In this trial, defence counsel conceded the relationship between the sample, the profile and the accused, but fundamentally disputed what this indicated, if in fact anything at all, concerning criminality. The presentation of DNA evidence in this trial

[209] This seems particularly to be the case in sexual assault trials, where the accused may initially dispute his presence at the scene of the assault, and then, following the disclosure and analysis of DNA evidence, convert his argument to a dispute about consent. According to media reports, this occurred in the trial of *Bilal Skaf*, see S Chricton, 'Sword of justice fells worst rapist', *Sydney Morning Herald*, 16 August 2002, p1

[210] Note the distinction drawn in *R v Keir* between mitochondrial DNA (mtDNA) and nuclear DNA, and the expertise relied upon to engage with it. The former process of analysis can only trace the maternal link, while the latter relies on parentage on both sides. In this case, the results were tendered to establish that the DNA result extracted from the bones was consistent with the DNA profile of any offspring of the parents of the missing woman.

was orchestrated around an agreed expert explanation of the science and its analysis. This clearly created an atmosphere of understanding for the jury. In so doing, however, the defence did not give up their acuity in impugning the place of DNA as corroborative circumstantial evidence. Rather, they were able to manage the jury's understanding of the science to introduce another plausible interpretation of its significance and thereby challenge the Crown's claim that it completed the circumstantial puzzle.

DNA evidence may also be introduced by way of corroboration**,** where other convincing identifiers exist, or where the introduction of evidence regarding an unknown minor contributor serves to cast doubt by inference on any assertion that DNA conclusively connects the accused with the crime. There is a danger for the Crown in running mixture DNA where it neither establishes guilt nor innocence per se, but may be consistent with an alternative theory of how an offence was committed and by whom. Such evidence can be employed as a defence tactic, to enable them to counter the introduction of DNA and co-opt it into their fabric of doubt.

6-7-3 Challenging DNA at trial

Initial defence attacks on DNA were mounted against the scientific credibility of the 'Profiler Plus' profiling science.[211] Attached to this issue were also more specific criticisms of the manner in which DNA evidence was sampled, matched, analysed and reported on, as well as more particularist criticisms of the laboratory processes involved. Occasionally such challenges will still occur in our courts, but the defence response to DNA evidence now takes on new forms. When the forensic laboratory is financed by or responsible to the police, then the independence and accountability beyond the prosecutor as the major client may also be in question. In such situations, not only is the objectivity of laboratory less than apparent, but there are also real issues regarding the need for equity in access.

Challenging the mixture

Even if one is to accept the overall reliability of DNA profiling, a "match" alone, without more, is inconclusive of a person's guilt. Again we must return to the important base question: "what does a match mean?" In the case of DNA mixtures (that is, where there is more than one contributor to a sample) a "match" can be used by the defence to posit an alternative argument of how an offence was committed, and by whom.

We recently observed a case that involved evidence of a DNA mixture which had been extracted from a crime stain. It was said that this mixture comprised the DNA of the accused and his girlfriend as major contributors, in addition to an unknown minor contributor. The defence challenged the prosecution's interpretation of this evidence both factually and scientifically. Factually, it was used by the defence to support the thesis that the unknown minor contributor was in fact responsible for the crime in question. Scientifically, conflicting interpretations by the experts as to the results obtained were said by the defence to undermine both the veracity and credibility of the DNA evidence as a whole.

[211] Profiler Plus, which is widely used in Australia and overseas, is based on the Polymer Chain Reaction Amplification or PCR model.

Enhancing DNA evidence

As with mixture samples, when profiling samples from suspects from small particularist (racially homogeneous) communities, the reference sample to be employed may have a crucial, and potentially distorting influence, on the resultant probability ratio.

There are at least two choices for the defence when confronted by jurors' seeming bias towards the compellability of DNA evidence and its confirmation through ridiculously high probability ratios: either attack DNA analysis and what it says, or further legitimate its impact for your argument by celebrating the science and expressing frustration at its outcome. The latter approach should enable the defence to incorporate into its position the juror's confidence about DNA, while at the same time casting doubt on why its potential was not fully achieved. Also, with mixed samples in particular, the defence could deflect the attention of the jury onto the unknown contributor, or cast doubt on why complete identification of crime scene participants was not possible.

Challenging the probability ratio and its representation

In addition to asking what a match means, there remains the important question of how the significance of a match is to be calculated. How do we arrive at the match probability, that is, the probability that a randomly selected, unknown, unrelated person would have the same DNA profile as the suspect? The difficulty here is that there are a myriad of ways of arriving at the match probability and the method chosen in the individual case, according to one commentator, '*must be seen to be as much a matter of opinion as one given in other areas of forensic science…[T]he match probability is personal. It is based on what the scientist considers to be the most appropriate calculation given the circumstances of the case*'.[212] In the absence of any consensus concerning the most effective means of calculating the probability of a coincidental match, evidence of this nature remains vulnerable to attack by defence counsel.

This is perhaps most clearly demonstrated in the debate about whether match probabilities should be calculated according to the different frequency of alleles within particular racial subgroups.[213] Again, there has been no resolution to this debate in Australia and the courts

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[212] I Evet and B Weir, 'Interpreting DNA Evidence: Statistical Genetics for Forensic Scientists', quoted in the Standing Committee Report, *supra*, n2, at p27

[213] See *R v To* [2002] NSWCCA 247, where one of the grounds of appeal was that the trial judge had erred in admitting evidence of the DNA analysis. The first submission on appeal was that the analyst's use of Chinese databases failed to comply with what was said by Hunt CJ at CL in *R v Pantoja* (1996) 88 A Crim R 554. In that case, the complaint was that the appellant was of a particular racial extraction and that the evidence did not establish whether the database used contained results of tests of DNA of persons of that extraction. His Honour said there that '*the submissions proceeded upon the wrong assumption that it was the appellant's race that was important. That is wrong because it must be the offender's race, not the suspect's race, which dictates the validity of the database.*'

In *To*, four witnesses all described the attacker as '*Asian*' and one said that he had a Vietnamese accent. It was submitted that since nobody described the attacker as being Chinese, it was inappropriate to use a Chinese database. That submission implied that the only valid database would have been an '*Asian*' database, although there was no attempt to explain precisely what the term '*Asian*' meant. Barr J, giving the judgment of the Court, held at para 44 that the trial Judge was obliged to have Hunt CJ at CL's words in mind, but that this did not lay down any rule of law. His Honour noted '*To say that the offender's race dictates the validity of the database is one thing. It is quite another to say that reliable evidence can never be produced by the use of a database which cannot precisely be described as of or including the offender's race. It would not be suggested, I think, that statistical evidence of the kind objected to would be altogether inadmissible if the race of the offender were not known.*'

have attempted to grapple with this issue in determining the validity of the databases used and the calculation methods employed. Another related issue is whether relatives should be factored into the calculation of probability ratio statistics. The reason for this is that relatives are far more likely to have a matching profile and their inclusion might significantly impact upon the result obtained in any given case. Indeed, it has been noted that '*[t]he current practice of ignoring close relatives, unless there are good reasons to suspect them, will often greatly overstate the weight of DNA evidence*'.[214] Given the difficulties that we have identified in calculating the probability ratio, what then are we to make of its representation to a jury? Chance or coincidental matches of profiles, while very unlikely, cannot be claimed to be impossible. In this way, the significance of a DNA match between a suspect and a crime scene is interpreted through the calculation of the likelihood of a chance match. The lack of consensus on the most effective means of calculating the probability of a coincidental match compounds the difficulty of directing the jury appropriately.

Challenging DNA evidence as opinion

In a recent case in NSW, the defence originally advanced the challenge of forensic expert evidence as opinion. The response to this might be that all expert evidence essentially rests on scientific opinion and therefore there is nothing different about the representation and analysis of DNA. In support of the opinion evidence critique, the defence suggested that particularly in the analysis of mixture samples, both the methodology of referencing, and the interpretation of results was so dependant on the particular opinion of the expert that the authority of the evidence needed to be seen in such terms. The challenge to the evidence was proposed beyond the simple presentation of competing or contradictory expert opinion, but rather that all opinion in this context required cautious acceptance.

Challenging the chain of custody

In the NSW authority of ***R v Sing***,[215] challenges to the 'chain of custody', as part of the process of sampling and analysis, were examined. Basically, this challenge is structured around the assumption that, for a DNA analysis to have integrity, each stage of the analytical process requires identification, and for each person associated with that stage to be made available for examination at trial. The logistical difficulties in this are obvious. In addition, the forensic relevance of such an approach is problematic, bearing in mind the number of hands through which the sample may pass and each analyst's limited familiarity with the particular sample, beyond routines and protocols. Because of the mechanical or technocratic nature of this format, some have argued for introducing deeming provisions to cover the custody chain, much the same as those which apply to traffic speed readings, and certain drugs analyses.

6-7-4 Best practice developments in trial advocacy

The following are some of the issues which would enhance the accessibility and transparency of DNA evidence in trials.

Disclosure

In NSW the requirement of disclosure in the prosecution of criminal cases is set out in a myriad of documents, including the Prosecution Guidelines and Prosecution Policy of the

[214]D Balding and P Donnelly, 'How convincing is DNA evidence?' quoted in the Standing Committee Report, *supra*, n2, at p31.
[215] [2002] NSWCCA 20.

DPP, the New South Wales Barristers' Rules and the Law Society of New South Wales Solicitors' Rules. The prosecution is placed under a continuing obligation to make full disclosure to the accused of all facts and circumstances and the identity of all witnesses reasonably to be regarded as relevant to any issue likely to arise at trial.[216] In regard to DNA evidence specifically, convenient and comprehensive disclosure by the prosecution is of the utmost importance, in order to provide the defence with every opportunity to prepare and develop a case using what is still relatively novel, potentially prejudicial and often extremely complex scientific evidence. In addition, in jurisdictions where expert resources are limited and often committed, the need to go further afield in order to address the prosecution case at that level is a further reason for early disclosure in the interests of a fair trial.

Pre-trial hearings

It is not uncommon for complex criminal trials to feature pre-trial (voir dire) hearings. With forensic evidence such as DNA recognised as having a potential for complexity, pre-trial hearings to test the detail of essential defence arguments, to interrogate expert witness testimony for signs of common ground or division, and to reach compromise on the presentation of evidence, appear in our experience to be productive.

Agreed evidence forms

The opportunity for establishing conventions about the form and content for the presentation of forensic evidence arises from pre-trial hearings and other mechanisms for agreed facts. Arguments in favour of such common or model tools for presentation mirror those which argue for standard judicial directions in the field. Particularly when it comes to introducing the less contested language and mechanisms of the science, expert evidence can be made more effective and far less confusing in an agreed template form. As we have said earlier, through evidentiary conventions where the issues in dispute become more focused and selective, both sides of the case have an arguably greater opportunity to influence the jury towards their interpretation of the science.

Court appointed experts

There is considerable and appreciable reservation about the suggestion that the 'court appointed expert' regime now common in certain civil jurisdictions should be adopted in criminal trials. In the case of forensic evidence in Australia, where the state laboratories are not uniform and the available pool of local expertise is small, predictable, and over-exposed, there might be a stronger argument to experiment with such a system. This should not be viewed as an invitation to deny legitimate contestation through shared experts. Rather, it recognises the problems which exist with contested evidence, and defence tactics in particular which rely on the confusion of the jury or the destruction of expert's credibility. The institutional bias and associations of expert witnesses in a small scientific community, as well as the spiralling costs of using international experts, are addressed to some extent through the court appointed expert model.

6-8 Future Trends in Best Practice Forensic Procedures as They Relate to the Trial Process

DNA more significant in investigation (best practice policing)

In the advent of technological advances in this field, we have seen a heightened reliance on DNA evidence in the investigation, as well as the prosecution, of an offence, and there is no

[216] NSW DPP Guidelines: http://www.odpp.nsw.gov.au/PolicyGuidelines/Guidelines.html#11.%20Disclosure

reason to believe that this will subside at any time in the foreseeable future. Indeed, we foreshadow the possibility that with the ever-greater reliance placed upon DNA evidence by the police and prosecution, comes the very real risk that evidence of this kind may be fabricated or tampered with in order to meet burgeoning expectations.

Particularly with reference to sexual assault, DNA evidence is becoming the pathway to conviction, through a reliance on, or a rejection of such devices, as similar fact evidence. However, the assumption that sexual assault is identified most strongly through DNA evidence does a disservice to the definitional scope of sexual assault, and promotes the misunderstanding that without DNA, other indicators of assault become problematic.

DNA evidence and agreed facts

Whilst it is acknowledged that agreement between the prosecution and the defence as to a common approach in regard to the presentation of DNA evidence has the potential to enhance, and indeed facilitate, a jury's understanding of complex scientific evidence, caution must be exercised regarding the development of any such convenience. Specifically, such a relationship between the prosecution and defence counsel has the potential to foster a familiarity that could render both parties complacent about the science itself, as well as its contestability.

Deeming provisions concerning expert protocols

The development and introduction of deeming provisions has the advantage of introducing some credibility in the synthesis of some of the more contentious aspects of DNA profiling and analysis. However, any such standardisation process risks insulating "experts" from defence challenges concerning, for example, sample contamination or the calculation of the match probability ratio. Put simply, the need for certainty and uniformity must be weighed up against the fact that standardisation itself may remain inherently problematic.

Census population testing

It is true to say that DNA dragnets may be used for exculpatory purposes. However, this purpose cannot be seen in isolation of the very real challenge such investigative "tools" pose to the fundamental tenets of our criminal justice system: that is, to the presumption of innocence. This erosion of rights was perhaps most clearly evidenced in the recent instances of mass testing in Wee Waa and Norfolk Island, where non-compliance became an act equated with the inference of guilt.

An independent laboratory

Calls for the establishment of an independent laboratory are premised on a number of concerns, in particular, ensuring equity in terms of access to, as well as the impartiality of, DNA analysis. However, caution remains as to the inherent problems associated with a small pool of experts and a prevailing confusion concerning the identification of the client.

Cross-jurisdictional data sharing

This is an issue that has received some attention of late concerning a suspect to the disappearance and presumed murder in the Northern Territory of British backpacker Peter Falconio. Obviously, the advantage of devising a system whereby DNA profiles may be shared between and among jurisdictions carries with it the potential to enhance police abilities to investigate crime on a national level. However, challenges may arise as to the best way of maintaining the integrity of any such national system. For example, how could

compliance with the legislative destruction provisions of DNA samples in one jurisdiction be ensured in another, or where the national database works on different protocols and legislative requirements from state and territory providers?

6-9 Code of Best Practice for the Use of Forensic Evidence

The output of best practice strategies in the field of forensic procedures should be a multifaceted operational code in which contributing parties can claim ownership. The code should complement the detail, direction and intent of the Act, while addressing the appreciation of the legislation which generally represents its operations as difficult and unproductive. The code will be a tool for managing the rigours of the legislation. It will empower the agencies involved, so that they are no longer slavishly reliant on legislative change to complement their interests.

It should also be given legitimacy in the parlance of each contributing agency. For judicial officers, it may take the form of Practice Directions; for the scientists, it may be protocols. The police may reinvent it as administrative guidelines, while lawyers may see the code worked into their professional rules. In whatever form, the code must be dynamic and welcoming of change and development to remain contemporary and ahead of the problems in the legislation.

6-10 Best Practice 'Summit'

In order to translate intent into best practice within an environment of ownership, we advise the Attorney General to commence discussions with other appropriate interest groups within the forensic procedures field in order to develop a 'Best Practice Future for Forensic Procedures in NSW'. With the code as its output, the discussion will need to be wide-ranging and inclusive. It will need to be facilitated professionally in a 'summit' format. Its organisation however will need to be owned by the police, the scientists and the legal professionals. Community interest will also play a crucial role in keeping the best practice exercise an honest and accountable endeavour from the outset. This Review sees the 'summit' as a high priority, and while the implementation role will need the active coordination of the new Institute, the conference should not be delayed awaiting its constitution.

Chapter 7 – Responses to the Standing Committee Report

7-1 The Government's Response to the Standing Committee

The Standing Committee Report was tabled in the Legislative Council in February 2002. Paragraph 31 of the resolution establishing the Standing Committees on Law and Justice and Social Issues (the Standing Committee) requires that if a report recommends action be taken by the Government, the Government has to report back to Parliament on any action it plans to take on the recommendations within six months of the report being tabled. In July 2002, the Attorney General circulated to the relevant Ministers and agencies a draft response to the Report on behalf of the Government. The response indicated that, of the 56 recommendations in the Report, 42 concerned proposals for amendment to the Act. In its draft response, the Government indicated that:

> *As a review of the Act is presently being conducted by the Attorney General's Department, the response to a number of the Committee's recommendations, is that while no immediate action has been taken in response to the recommendation, the recommendation will still be considered in the Attorney General's current review of the Act.*[217]

7-2 The Review's Response to the Standing Committee

We will now examine each of the Standing Committee's recommendations in turn and suggest possible responses open to the Government.

7-2-1 Recommendation 1 – Prioritise the creation of a State Institute of Forensic Sciences

The Committee recommended that the Government give priority to the creation of a State Institute of Forensic Sciences to manage the use of technology in criminal investigations and prosecutions. A common view presented by stakeholders to this Review was that the time was right for the creation (and adequate resourcing) of an independent scientific facility to manage forensic analysis in NSW and ***the Review supports this Recommendation***.

While DAL is to be congratulated for analysis of DNA and maintenance of the DNA databases, and in particular, the manner in which it has responded to the pressures imposed by the burgeoning significance of DNA evidence, there are several reasons why an institute should be established to manage the use of technology in criminal investigations, prosecutions and defence work, namely:

- To further examine the methods of calculating the significance of DNA sampling and matching;
- To ensure the objective legitimacy of forensic analysis for the courts and both sides of criminal proceedings;
- So that the appropriate budgeting and resourcing of such analysis and record keeping is not bound to the wider police or health administrations;
- So that those responsible for the analysis and record keeping of DNA information are directly involved in decision-making about national DNA databases; and

[217] The response specifically passed over to this Review recommendations 2, 9, 16, 21, 23, 25-31, 36-40, 42, 46, 48-50, 53, 54 and 56.

- So that independent record keeping through the institute can plot the utility and effectiveness of DNA testing and of the databases.

The Standing Committee also recommended that the proposed institute be requested to further examine methods of calculating the significance of DNA samples. ***The Review supports this Recommendation***, and would further suggest that the findings of its inquiries be published for purposes of public accountability, scientific scrutiny and availability of adverse information affecting reliability of incriminating evidence.[218]

7-2-2 Recommendation 2 — Amend Act to require standard jury directions

The Standing Committee recommended that the Attorney General give consideration to an appropriate legislative amendment to require judges to warn juries that DNA evidence is only one aspect of the evidence required to convict a person. The Bar Association opposes this view in favour of the Committee's Recommendation 8, suggesting if Recommendation 2 were implemented, it would be '*appropriate that it set out only a general rule that there must be warning. An example of this type of provision exists in Section 165 of the Evidence Act*'. The Young Lawyers submission advocates the drafting of '*model directions*' for juries in criminal trials where forensic evidence is used, with expert witnesses prohibited from making assertions about the nature and efficacy of DNA evidence that contradicted the model directions.

The Review team has discussed this issue with some judges and there seems to be divided opinion. Accordingly, ***we do not support this Recommendation***. It would in our view be more appropriate for the Attorney General, in consultation with the Chief Justice of the Supreme Court and the Chief Judge of the District Court, to determine the nature and extent of model directions for the use of forensic evidence, and in particular, core issues of language which might be applied by trial judges in order to assist in the general and simple understanding of the significance of such evidence.

7-2-3 Recommendations 3 to 5 — Request and fund data collection by an independent agency

Recommendations 3 to 5 recommend requesting and funding an independent agency such as the Bureau of Crime Statistics and Research (BOCSAR) to collect data and report on the role of DNA in law enforcement success, including but not limited to:

- The percentage of database matches leading to arrests,
- The percentage of database matches leading to prosecutions, and
- The percentage of DNA data of base matches leading to convictions.

In addition, such an agency should collect data and report on:

- The impact of DNA evidence on criminal trials, including but not limited to, their length and complexity, and
- The impact of the use of DNA technology on crime rates.

[218] As discussed at 4-8 and in Chapter 6, the Institute should be given wide research, data collection, maintenance, and monitoring responsibilities, from the taking of forensic samples through to the ultimate disposition of sample information. The SIFS should in addition act as the quality control centre for the best practice strategies advocated in this Review.

The Review considers that these important evaluators, amongst others, require a centralised and integrated approach to data collection.[219] The Review has had access to extensive police-based data, some of which the Standing Committee was not availed of, and is in addition familiar with BOCSAR's responsibilities and commitments.

We agree with the Standing Committee that a centralised agency should have responsibility for data collection and management in relation to forensic services, which should not only include the maintenance of inter- and intra-agency data, but also incorporate the policy evaluation of such information. We believe however, that it would be appropriate for the SIFS to have responsibility for such data collection and evaluation. What makes this particularly attractive is that such a responsibility could be purpose-designed into the framework of the new institution and appropriately funded, not simply on a project basis, but as an ongoing institutional responsibility.

7-2-4 Recommendation 6 — Provide judicial training in relation to the forensic use of DNA evidence, its accuracy and interpretation of the evidence

The Review is advised that the Commission has presented a number of papers at judicial conferences,[220] as well as regularly featuring articles on DNA evidence in the *Judicial Officers' Bulletin*. We would suggest that, in close consultation with the Judicial Commission, the proposed SIFS should have responsibility for the provision of such education. The judicial officers with whom the Review has had discussion strongly identified the importance of using judges who have an intimate understanding of the operation of forensic evidence within trials as the central players in any such judicial education in order for it to have the greatest impact.

7-2-5 Recommendation 7 — Include practical and continuing legal education on DNA evidence for solicitors and barristers

The Standing Committee proposes educational courses on DNA evidence as part of the practical and continuing legal education (CLE) for solicitors and barristers. The Law Society and the Bar Association regularly present information on forensic evidence by way of articles in the *Law Society Journal* and in CLE seminars conducted by their respective Committees. Information about the procedural aspects of the legislation is also factored into both the College of Law Practical Legal Training. The Review has been advised that the Bar Association intends to incorporate lectures on DNA analysis and its application in court in forthcoming professional lectures.

As the provision of continuing legal education is now a commercial and competitive enterprise, the proposed education division of the SIFS should plan and develop suitable professional courses for lawyers and make them available as CLE offerings. The Review agrees with the Standing Committee that the professional associations should mandate such sessions as crucial to litigation practice.

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[219] We would suggest that, recognising the many variables (evidentiary or otherwise), which impact first on conviction rates, and then the difficulty with relating conviction rates to crime rates, this may be a fruitless exercise. Interestingly, it demonstrates the popular expectation that DNA matching will impact on crime rates. The impression may be more powerful than the reality.

[220] Conference presentations on DNA evidence were included in the 2000 District Court Annual Conference, 2001 Supreme Court Annual Conference and 2002 Magistrates' Metropolitan Seminars Series II.

7-2-6 Recommendation 8 — Incorporate guidelines on DNA in judicial Benchbooks

The Judicial Commission has been responsible in New South Wales for the management of Bench Books for judicial personnel, and has advised the Review that it is currently considering whether directions on DNA evidence should be included in the Criminal Trial Courts Bench Book. Recommendation 8 states that guidelines for directions to juries about the interpretation of DNA evidence should be incorporated into such Bench Books. Provided that these directions are not mandatory, and are focused on the simplification of jury understanding, ***the Review supports this Recommendation***.

7-2-7 Recommendation 9 — Examine defence access to crime scene samples and funding to enable independent analysis

It became apparent from the discussions at the focus groups run by the Review that defence lawyers felt disadvantaged in terms of the access available to them for the independent analysis of crime scene samples and other crucial data. There are clear budgetary concerns if, as the Standing Committee recommends, Government funding should be made available to facilitate independent analysis for defence purposes.[221]

The Review is mindful of the difficulties posed for defence teams in Australia, where the scientific community capable of providing such expert evidence is quite small, and the potential for scientists to be 'branded' with a particular perspective, depending on the manner in which they are used by either side in the trial. There is nothing unique in this position in relation to the use of experts in criminal proceedings, however the Review suggests that the potential difficulties faced by defence teams in arranging for independent sample analysis and presenting contesting scientific opinion are unique to this area.[222]

The problem of adequate defence access should to some extent be relieved by the Review's recommendations concerning the establishment and function of the SIFS. Having said this, ***we agree with the spirit of this Recommendation*** and would endorse the further examination by the Attorney General of appropriate funding to enable adequate defence access. The Review also believes that access and equity in the adversarial presentation of forensic evidence is a potent area for the development of best practice standards.

7-2-8 Recommendations 10 and 11 — Change test for consent requests and orders by senior police and magistrates from '*might produce*' to '*is likely to produce*' evidence

The Standing Committee argues strongly for a return to conformity with the MCCOC Model Bill so that a suspect may only be requested to consent to a forensic procedure if there are reasonable grounds to believe that the forensic procedure *is likely* to produce evidence tending to confirm or disprove that the suspect committed an offence, rather than the current threshold of '*might produce*'. Obviously the NSW Police are not in favour of such a recommendation, while the Crown Solicitor advises that changing the test could give rise to challenges to the admissibility of evidence obtained by way of forensic procedures on the

[221] We note the Young Lawyers proposal for the establishment and funding of a '*panel of independent expert witnesses who may be used by the defence to provide a check on the evidence of expert witnesses for the prosecution*.'

[222] In several trials which we observed, experts were obtained at great expense from overseas and cross-examined through video link-up, which presented a range of comprehension difficulties for juries receiving the evidence.

basis that the test had not been satisfied.[223] We find this an intriguing view, bearing in mind the similar probability threshold throughout comparable '*reasonable suspicion*' discretions in many other enactments of police powers in NSW. The Review is not convinced that changing the test would necessarily bring about a significant change in police practice, however, there can be no doubt that such a change would provide a more difficult test when establishing, to the satisfaction of a judicial officer, that such a sample would be required where consent was refused.

As discussed earlier, the Review rests its belief in the necessity to retain the consent provisions in the legislation on the basis that in some circumstances where consent is refused, this may lead to the eventual withholding of approval for the taking of samples. If this were not the case, then the arguments by those who criticise the actuality of consent would be hard to counter.

The Review supports this Recommendation, consistent with our interest in best practice police investigations and the development of crime scene management in particular. Furthermore, this model sets the right tone for police investigations by asking the essential questions *before* sampling, so that the purpose and value of forensic evidence can be first evaluated, rather than sampling in an arbitrary and ad hoc fashion, in the vain hope that something of value may emerge. This is accordingly pro-active and informed, rather than reactive and lucky police investigation practice, and would arguably be a much more efficient use of police and analytical resources.

7-2-9 Recommendation 12 — Prohibit testing on suspects unless evidence producing a profile is found at the crime scene or on the victim

The Standing Committee recommends consideration of amending the Act to prohibit forensic procedures on suspects unless evidence producing a DNA profile has been found at the crime scene or on the victim. In this sense, the DNA testing process would not be suspect-generated, but rather would promote the importance of a crime scene link. In the material in the Report which supports this recommendation, it is argued that if the police request a DNA sample from a suspect prior to being in possession of other DNA material against which the profile may eventually be matched, they are not in fact employing the forensic procedure (at that time at least) for a legitimate investigation purpose. In other words, the request or order for DNA needs to be linked to its role as potential evidence in a crime.[224]

In several trials observed by the Review, judges have commented to juries on the importance of distinguishing between whether DNA established the presence of the accused at the crime scene and whether that presence could be connected through other evidence to the commission of the offence.

In the spirit of our earlier discussions regarding best practice, the Review is not willing to accept that police will simply use the test as a matter of course to come up with a positive response. It is our belief that, as with transition from '*might produce*' to '*is likely to produce*', the requirement that there be a pre-existing referent from the crime scene at the time a suspect

[223] Note that Queensland, the Northern Territory and South Australia all use the threshold test of '*may produce*' evidence.
[224] See Standing Committee Report, *supra*, n2, at p75

is requested to consent to a forensic procedure, is an important recognition of the appropriate purposes of such testing.

The police argue that resource issues are a major consideration here. It is accepted that at present there are such significant delays in the laboratory, that if the requirement were amended, suspects could not be tested for another two months or more after the crime scene/victim samples were sent to be analysed. The police have stated that adopting this proposal might also lead to more combing for evidence at the scene, out of concern that if they were unable to obtain a sample, they would not be able to test the suspect, potentially leading to DAL resources being diverted to test every piece of evidence found at the crime scene. This is a real concern, and one this Review has been at pains to address, not just for its resource implications, but more in light of good investigation practice.

The resourcing for analytical services, and consequent delay in analysis is an issue which goes well beyond this recommendation. The Review anticipates that, provided the proposed SIFS is adequately resourced, then delays will be significantly reduced. Information presented to the Review suggests that indiscriminate crime scene sampling is already becoming a reality in investigation practices in NSW. Again, the best practice strategy should address this specifically.

We are not satisfied that arguments about limited resourcing, or indiscriminate investigation practices, should stand in the way of a recommendation which is logical, when one considers the legitimate forensic purposes of sample procurement and analysis.

To reject the Committee's recommendation on the basis put forward by the police seems purely to endorse realities of bad practice, which this Review is committed to overcoming. In addition, the acceptance of sample procurement at a time where specific suspicions have not been contemplated would open up the opportunity for database expansion in currently inappropriate circumstances where matching is not immediately possible.

Representatives of the Children's Legal Service at the Legal Aid Commission highlighted the importance of this recommendation as it relates to children and young people. They put the view that if the police are required to genuinely determine 'likelihood' against the reasonable belief that the forensic procedure might provide evidence tending to confirm or disprove that the suspect committed an offence, then this would tend to avoid those situations where children or young people have their personal rights infringed too early or on unnecessary occasions. Bearing in mind that this also will, for children and young people, produce a requirement of an interlocutory hearing, as such a pre-emptive request has additional adverse consequences.

The Review does not think it is unreasonable that suspect samples should only be required when there is additional evidence against which the sample may confirm or disprove that the suspect committed an offence. Further, the Review believes that the requirement to confirm or disprove should be taken seriously by the police and in that respect ***the Review supports this Recommendation***.

Another attempt to dismiss the recommendation is by undermining the expectation that it would necessarily have a positive impact against the planting of evidence at a crime scene. It has been argued to us that such evidence could be planted in any case and then the police

could require the suspect to submit to a test. We reject such a line of argument and return to a confidence in best practice strategies, which would see police investigation protocols opposed to such behaviour and the evaluation of legal professionals and judicial officers sensitive to the identification and rejection of any such activity on the part of the police.

Even so, the Review is not comfortable with relying unduly on section 12 of the Act and the matters it designates that police should be satisfied of, to act as a protection against 'fishing expeditions' or inappropriate investigation practice. A stronger reliance on the existence of referential samples and a commitment to a best practice strategy is in the Review's opinion a more suitable framework for such confidence. In addition, section 138 of the *Evidence Act* and the manner in which it is exercised by courts does not provide comfort that evidence pre-emptively obtained would be excluded from later criminal proceedings. In any case, the exclusion of evidence may not be the remedy to a variety of other violations of individual rights which pre-emptive sampling may suggest.

7-2-10 Recommendation 13 — Ensure no additional offences are prescribed

The Standing Committee's concern here is with the expansion of the threshold for obtaining DNA samples. The Government indicated in the legislative process for the Act that no other offences would be prescribed for the first 18 months of the operation of the Act. The Committee stated that forensic testing for summary offences (the only additional offences which could be prescribed) would be inappropriate.

The Committee also had concerns about the use of delegated legislation to expand the type of offences that may cause a suspect be subject to forensic procedures. This concern is not solely based on concerns about individual rights, or even reservations about appropriate investigation practice. There are also very concrete reflections on the use of sophisticated and expensive scientific techniques becoming a part of routine crime investigation and policing practice. The Government during the legislative process reiterated that DNA analysis in particular should be directed only to serious offences, and we have been advised by the Attorney General's Department that there is at present no intention to prescribe any additional offences.

The Review supports this Recommendation, and would add that this prohibition should remain, at least until the SIFS has had time to effectively research the nature of the offences for which suspect testing is being carried out, and those offences where forensic evidence is having its most significant prosecutorial impact.

7-2-11 Recommendation 14 — Remove delegated legislation provisions

The Review supports the Recommendation that delegation legislation provisions in section 3 should be removed. The appropriate means of expanding any of the types of offences for which a suspect may be required to provide a forensic sample is by way of Parliamentary debate, and not by regulation. While regulations can be disallowed by Parliament this is not the same as the routine procedure whereby legislative amendment is scrutinised by the House. In that respect, the Review does not see the Parliamentary oversight of regulations and their formulation as sufficient to give comfort, should delegated legislation be used to amend section 3.

7-2-12 Recommendation 15 — Insert balancing guidelines similar to the Model Bill

The spirit behind this recommendation is at the core of the Standing Committee's concern to better ensure the balancing of competing interests around the taking of forensic samples. The Committee's belief was that magistrates and police officers could do with further assistance to specifically identify matters to be considered before a magistrate made an order for a forensic procedure or for a police officer determining whether such a procedure was justified.

The Law Society of New South Wales and the Legal Aid Commission also support the provision of guidelines. We are somewhat disappointed that NSW Police is opposed to this recommendation, and believe this opposition may demonstrate our concern that police believe legislative identification of such checklists present a burden, or imposition on the exercise of police investigation powers, rather than representing a structure to assist in the exercise of those powers.

It appears that at the time of drafting the Act, the decision was made to diverge from the Model Bill on this point because of concern that inserting such guidelines would further complicate the process of carrying out a forensic procedure on a suspect. It was considered that the task of balancing all the subjective factors listed in clause 8(2) of the Model Bill was not a task that police officers in particular should be expected to carry out.

The Review believes that if this is so, then the argument may not be so much against the appropriateness of the checklist, but rather whether operational police officers are suited to make such decisions in the first place. One cannot have it both ways if it is accepted by significant interest groups making representations to the Standing Committee that the themes in clause 8(2) are appropriate foundations for such determinations.

In addition, it was said that at the time of drafting the legislation there was concern that such a checklist may provide a basis for protracted legal argument in subsequent trials concerning whether the relevant police officer had regard to the matters listed, and as such, give rise to appeals from decisions by magistrates. This could have the potential to lengthen court proceedings, which is obviously undesirable. However, the same sort of argument could be raised in relation to any legislative requirements regulating the exercise of discretion in criminal justice.

This Review agrees that additional guidance in this area would be fruitful, although we recognise the potential for uniform checklists in certain circumstances diverting due attention from the particular situation of each individual case and the appropriateness of requesting or ordering the procedure to be conducted in those particular circumstances.

We would prefer a compromise position on this Recommendation. ***The Review supports the Recommendation*** in relation to magistrates exercising the power to order the taking of samples, and in this respect the legislation should be altered to include an appropriate drafting in line with the relevant provisions of the Model Bill. Regarding police officers, the matter seems more complex. In a climate of opposition, legislating these guidelines as applying to police decision-making may produce further resistance to the protections inherent in the Act, and invite their subversion in practice. Accordingly, we would prefer an approach whereby the police, through administrative guidelines or otherwise, should be actively encouraged to see the benefits contained in a systematic consideration of the Model Bill guidelines. The best

way for achieving this outcome, and its most appropriate form, should be a matter for early consideration by those responsible for the negotiation and settlement of a best practice code governing forensic procedures.

7-2-13 Recommendation 16 — Consider deleting sections 71 and 74(6) of the Act

These provisions were taken from the Model Bill, but they do not appear to serve any function, and ***the Review supports the Recommendation*** that they should be removed.

7-2-14 Recommendation 17 — Require police to only test offenders where justified in all the circumstances

This Recommendation also identifies a divergence from the Model Bill. Under the Model Bill, all persons convicted of a serious offence could be tested. Under the Act, only persons convicted of a serious indictable offence and serving a sentence of imprisonment can be the subject of compulsory testing. The drafters therefore believed that it was unnecessary to include the requirement that such compulsory testing be justified in all the circumstances. The assumption here is that the conviction and imprisonment of the provider is justification per se for submitting to a forensic procedure. This Review does not necessarily follow that logic and consider that classes of citizens (such as prisoners) should not be singled out for testing because of their status, without a more individual reflection on the need to test and its potential forensic outcome. This may be useful in producing a large reference database of profiles, albeit one unduly representative of an inmate population. It is not, however, productive of smart data for the tightest and most effective matching outcomes.

The NSW Police, in resisting this Recommendation, argue that it will further complicate the process of carrying out forensic procedures, at least in respect of suspects. This Review is reluctant to accept justifications such as these, which tend to go against a best practice model of police investigation.

It is possible that by requiring justification in all cases, the police may do no more than routinely ascribe standard justifications to each procedure. Even so, the process of justification is crucial to the development of efficient and accountable investigation practice. Investigators need to be able to justify why a sample was taken in order that all future stages of the investigation and prosecution process should benefit from reliance on such justification. Again, the justification process presents one of the limited occasions where the exercise of intrusive powers over state citizens is held accountable. Despite the acceptance that for custodial populations this justification may become nothing but a matter of form, ***the Review supports this Recommendation***. We do so recognising the problem presented by profiles taken where such strenuous justification did not necessarily prevail. Reality dictates that as with each Recommendation that would produce a new regime, past practices and their data may not lend themselves to retrospective curing.

7-2-15 Recommendation 18 — Insert guidelines for police and magistrates for the justification of sampling serious indictable offenders

This Recommendation echoes some of the reservations expressed in our preceding discussion regarding the sampling of custodial populations. The simple reality is that at present the police are testing all serious indictable offenders in custody, including those on periodic detention, home detention and juveniles in custody who have been convicted and sentenced

on serious indictable offences as adults. No justification therefore is currently exercised in this sampling process, beyond recognising the status of the offenders concerned.[225]

This Recommendation poses a fundamental dilemma between principle and practice. It seems logical that police officers and magistrates should follow certain formal or informal guidelines in justifying sampling if such justification is deemed important, regardless of whether the individual provider is in custody or not. To impose guidelines in these circumstances, however, would ignore prevailing practice and may bring the legislative requirement into disrepute.

This dilemma also goes to the heart of the reality of consent with custodial populations. The exchange before the Standing Committee concerning the impact of sections 71 and 74(6) identifies a lack of clarity and meaning here, regarding the issues to be taken into account in determining the granting of an order. An order to be granted by a magistrate needs to be determined as justified in all the circumstances but police orders are effectively unrestricted. Put against the fact that magistrates do not appear thus far to have refused requests for blood sample orders, it might be said that their consideration of the justification is at this stage little more than a matter of form.

Dr Jeremy Gans has argued that either sections 71 and 74(6) of the Act should be replaced by a requirement that the police officer (or magistrate) be satisfied that the carrying out of the forensic procedure is justified in all the circumstances,[226] or, if Parliament believes that the procedure should be compulsory in all cases for DNA sampling of serious indictable offenders by non-intimate forensic procedures, then the informed consent provisions for offenders should be abolished. We concede that the present drafting is an invitation to police and offender confusion and legal challenge without any real protection of the rights of the offenders.

This Review is faced with something of a dilemma. In reality, the mass testing of prisoners in New South Wales has been the single most significant contributor to the development of the current database. On the data available to the Review in relation to successful 'cold links' or 'warm links' matching, prisoner population matches feature significantly in the success range. On the other hand, the informed consent provisions for prisoners are of all the consent scenarios under the Act the most symbolic, and there seems to us scarce practical justification for treating all serious indictable offenders in a different way than suspects at large. This last point is particularly telling when placed against the simple possibility of categorising prisoners on the basis of likely re-offending against sentenced offence.

Consistent with our earlier discussion of consent, we are not willing, despite the problems of actuality, to give up the consent requirement as it relates to inmate populations. Officers of the Department of Corrective Services have indicated to us that the present climate of consent rather than compulsion has at least made what is a largely required process less confrontational from the point of view of inmate/prison officer relations, and in terms of the environmental comfort of the prisoner, this is to be supported.

[225] The discussions had with Department of Corrective Services officers indicate that some difficulties arise in the identification of who is a serious indictable offender in custody. It would seem therefore that this criterion at least is being treated seriously.

[226] The Law Society and Justice Action also support greater restrictions on the testing of SIOs.

This Review recommends that, consistent with its support for the overall justification of sampling procedures, guidelines for sampling SIOs should be developed, in consultation with police and judicial officers, and possibly in conjunction with the proposed SIFS. The guidelines affecting police officers and magistrates should be similar, and with respect to inmate populations should specifically recognise the likelihood of re-offending against a sentenced offence. We are not convinced that the development and routine consideration of clear and simply drafted guidelines around which the decision to justify sampling would be taken will interfere with legitimate investigation procedures. Consistent with our commitment to best practice, we do not support the incorporation of the proposed guidelines within the legislation.

7-2-16 Recommendation 19 — Incorporate specific provisions for forensic procedures on victims of crime

As discussed earlier in this Report, this has been achieved by the Amendment Act and the Victims' Protocol, which will both come into effect on 1 June 2003.

7-2-17 Recommendation 20 — Proclaim the volunteer provisions as a matter of priority

Part 8 of the Act was proclaimed on 26 February 2003 and will commence on 1 June 2003.

7-2-18 Recommendation 21 — Ensure that volunteers are only asked to consent if the procedure is likely to be useful for the investigation of a prescribed offence

This proposal is consistent with our reservations about volunteers expressed at 4-1-4 and 4-4-4. The justification relates to the sampling of non-suspects and the Standing Committee noted that Part 8 of the Act currently does not provide limits on, or guidelines for, requests for DNA samples from non-suspects. Bearing in mind that the main purpose of the Act was to facilitate the use of DNA profiles in investigations, the Committee felt that requests for samples from volunteers therefore should be limited to occasions where the volunteer's DNA profile is likely to provide evidence useful in the investigation of a prescribed offence.

NSW Police did not support this recommendation, as they saw it removing the right of volunteers to choose whether to consent to a forensic procedure in order to assist police to solve a particular offence (including a summary offence). This Review recognises but does not share that concern, provided the volunteer is genuine and acting on sufficient information.[227]

The Review is aware that in the lead-up to the commencement of Part 8 of the Act, the police are drafting training instructions concerning the manner in which information should be given to volunteers to inform their consent. They have shown some reservation about giving extensive information to volunteers (particularly as regards the retention of information on databases) in circumstances where they intend to do no more than to match the volunteer sample with already retained data.

[227] The genuineness of the status of a volunteer is a particular concern with mass screening. The Review is aware that in some situations where mass screenings have been carried out, participants have been classified as volunteers even where they believed that due to the consequence of public approbation and community suspicion, a refusal to cooperate was not an alternative.

In light of the restrictions imposed on the taking of samples from volunteers as set out in Part 8, particularly in relation to children and young people, and the role of parents and guardians, the Review would refine this Recommendation. We share the concern that even informed consent may not be a sufficient protection for non-suspect volunteers, particularly those who may be seen as vulnerable persons. The Review can appreciate the difficulties the police are having in interpreting and addressing the limitations imposed in Part 8 regarding informed consent and volunteers. The suggestion by the Standing Committee to add another condition, that such requests for samples should only be made where police are investigating a prescribed offence, would tend to exacerbate this confusion. We therefore suggest that the provisions of the Act allowing police officers to request a non-suspect volunteer to submit to a forensic procedure by giving informed consent should be removed. This would lead to a situation where applications to sample volunteer populations would come under the scrutiny of a judicial officer. As a necessary consequence, a person who is subject to such an order should be provided with the information about the procedures as prescribed in the Act prior to carrying out those procedures. ***We support this recommendation***, accepting the reality that in almost every occasion when applications for orders are currently made to a court, they are granted. We would anticipate that the practice would not be so routine in the consideration of non-suspect volunteers.

7-2-19 Recommendation 22 — Provide additional information for volunteers regarding available database indexes

The Committee recommends that consent information given to volunteers should include information about what database indexes are available, and that the volunteer be permitted to choose which index, on which their profile will appear.

Bearing in mind the Review's position on Recommendation 21, ***we would support this Recommendation***, which has in fact already been implemented in the *Crimes (Forensic Procedures) (Informed Consent) Regulation 2002*. However, as we have suggested that all volunteer non-suspect sampling should be on the review of a court order, then such information is not crucial to the notion of informed consent. Rather, if it is intended that a volunteer's profile be recorded on a database, the volunteer should be informed of what form that record will take, and should retain the right to nominate on which index (if any) the information should be maintained.

7-2-20 Recommendation 23 — Require a court order for voluntary mass screening; judicial officer to be satisfied order is justified in all the circumstances

Consistent with the Review's approach to Recommendations 21 and 22, ***the Review supports this Recommendation***. We believe that the requirement for a court to determine the justification for mass screening, taking into account whether a smaller number of potential suspects could instead be tested and whether any other less intrusive means are available to further the investigation is appropriate, will present a context in which those who wish to argue for exclusion from such mass testing can present a balanced argument. As mentioned earlier, the Review is aware of situations where individuals involved in mass testing have felt compelled to 'volunteer' due to any adverse community reaction as a result of a refusal to co-operate. In addition, the Review is concerned that failure to 'volunteer' may cause police to categorise a person as a suspect and subject him or her to further, potentially unwarranted, scrutiny as a result of a refusal to participate. Further, the requirement for judicial oversight reflects the unique and serious challenge that mass screening presents to both individual and

collective rights in Australia. If the Act provides opportunities for magistrates to rule on the appropriateness or otherwise of individual sampling, it is even more appropriate that judicial oversight should be required for mass screening.

The costs of undertaking voluntary mass testing should also be considered.[228] In particular, the Committee's recommendation that, in determining whether such an order, a judicial officer take into account whether a smaller number of potential suspects could be tested, would require police to use mass voluntary testing only when traditional police techniques have failed.[229]

7-2-21 Recommendation 24 — Draft plain English consent information

The Review is advised that CLRD is presently engaged in producing plain language versions of the consent information required under the legislation. In addition, the Review has seen constructive attempts by the NSW Police to improve upon the current information provided. We believe that plain English adaptations of the current information would improve the foundations of informed consent, particularly as they relate to suspect and inmate comprehension of the consequences of the sampling process.

7-2-22 Recommendation 25 — Abolish consent provisions for serious indictable offenders

This Review has received a number of submissions that informed consent under the Act, especially in the context of sampling inmates, is not truly a matter of free choice. The Bar Association, for example, suggests that '*the impressions of a discretion when in fact none exists is a fraud on those who are tested*.' On the other hand, the police argue for a removal of the consent provisions on the basis of efficiency. They state that the existing requirements of informing prospective providers are onerous, confusing and simply impede the eventual outcomes.

The Review is not persuaded, however, that the answer to this difficulty is to simply remove consent from the legislation. As we have argued in more detail earlier in this Report (see 4-1) the atmosphere of consent and the process of informing individual providers prior to giving the sample have a variety of positive outcomes. Not the least of these is that individual providers will be made aware of the circumstances in which the samples are to be acquired, and the consequences of the sampling process.

We are also attracted by the suggestion from Justice Action that if an inmate refuses consent, there should be a '*cooling off period*' between the refusal of consent and any further steps for compulsory testing. This would allow the individual concerned to contemplate any additional information given to him or her, and to seek the best legal advice regarding their position. Such provisions could be incorporated into best practice guidelines regarding the consequences of withdrawal of consent.[230]

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[228] For example, the Wee Waa tests were estimated to cost $17,000 and only a small proportion of the DNA swabs had been analysed at the time the offender turned himself in to the police.

[229] In a postscript, some critics have also voiced concern as to what was to be done with the DNA profiles analysed as a result of the Wee Waa testing. These were in fact all burned, with independent representatives, including from the Ombudsman's Office, monitoring the destruction of the samples and profiles obtained. L Kennedy, 'Wee Waa's DNA samples go up in smoke' *Sydney Morning Herald*, 20 September 2000, p5.

[230] We are advised by DCS that in practice they do allow a cooling off period between refusal and a renewed request.

The Review is confident that a commitment to best practice will give greater ancillary benefits to the provider arising out of pre-existing consent requirements. We consider the challenge to be to produce intermediate outcomes through a best practice regime which will benefit those who initially refuse consent, and add to the legitimacy of the testing process.

7-2-23 Recommendation 26 — Amend volunteer consent provisions

Volunteers require sufficient information not only to inform their consent or otherwise, but also to make them aware of the consequences that the sampling process may have for them. Consistent with the suggestion of this Review that applications to sample volunteers should be the subject of examination by a judicial officer, we accept the tenor of this Recommendation, in that it presumes volunteers should be no less well informed of their rights and responsibilities under a forensic procedure than may be the case with suspects and offenders. If the Review's suggestion concerning magisterial oversight of all applications to sample volunteers were to be proceeded upon, then the information provision would appropriately precede the determination of the order, or at the very least would arise as an essential part at the application process. ***The Review supports this Recommendation***.

7-2-24 Recommendation 27 — Establish and fund a 24-hour legal advice hotline

The Review understands the intention behind this Recommendation, it being essential, particularly in the case of vulnerable individuals, that the necessary information on which informed consent is to be established should be available in a convenient and accessible form at all times.[231] However, the simple reality is that with all such services, money is an issue. In a climate where resources to Legal Aid and community legal assistance programs are under strain, it would be unlikely that the Government would accede to such a recommendation. CLRD is currently engaged in discussion with co-ordinators from the Law Access unit, funded by the Attorney General's Department, in order to go some way to satisfying the spirit of this Recommendation. This agency has a free telephone legal advice service (LawAccess), which is available during business hours, and provides a 24-hour telephone information service (LawTalks), which provides legal information on a range of issues, as well making this information available on the internet. The Review is confident that as a result of these negotiations, information regarding forensic procedures and the structures pertaining to consent will in future be more broadly available through law access agencies. The Legal Aid Commission and the Prisoners' Legal Service, along with the Aboriginal Legal Service, have indicated to the Review strong commitments to providing advice to their clients regarding the ramifications of forensic procedures and their rights. ***We support the Recommendation*** that more Government resources should be directed towards information and advice services focused around forensic procedures.

7-2-25 Recommendation 28 — Abrogate the common law of consent

We see no reason for the Act to specifically abrogate common law provisions.[232]

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[231] It has been put to the Review by certain lawyers representing children and young people that it is not an uncommon investigation practice to seek forensic samples at a time when the legal aid advice hotline is not available.

[232] We note however the contention by Dr Gans that the Act's informed consent regime is more restrictive than the common law on consent, and to that extent, overrides the common law.

7-2-26 Recommendation 29 — Clarify that consent cannot be assumed from a suspect's silence or compliance

The NSW Police Standard Operating Procedures (SOPs) clearly instruct police officers that they must not assume consent from the silence of a suspect or imply from that silence the suspect's compliance with the procedure. The onus is always on the prosecution to establish beyond reasonable doubt that consent was given in accordance with the Act, although the Review accepts that due to the nature of the consent provisions under the Act, it is unlikely that the prosecution would be successfully challenged on consent. However, the prosecution, in principle at least, will not be able to establish consent in a situation where there is nothing to positively indicate that consent has been given.[233]

We have received no evidence that consent is being inappropriately inferred and therefore ***the Review does not support this Recommendation***, however the theme should be reiterated in the best practice guidelines to be developed for police investigators.

7-2-27 Recommendation 30 — Advise suspects that a refusal to consent is not admissible evidence and that the making of a court order is discretionary

The NSW Police response to this Recommendation is that any increase in the amount of information that they are required already to give a suspect should be avoided if possible. Adopting this Recommendation could, in their view, increase the complexity of the information about which the Committee was so critical.

Section 13(1)(j) of the Act already requires that a suspect be informed of the consequences of not consenting. The Recommendation that a suspect be informed of the making of a court order is discretionary, is therefore to be taken into account in the drafting of the plain English consent information referred to in Recommendation 24. The Review is of the opinion that the legal consequences of a refusal to consent should be deemed fundamental information around which informed consent is constructed. We would therefore support the requirement that such information also be included in the plain English formulation of consent information to be provided by the police.

7-2-28 Recommendation 31 — Amend Act in relation to buccal swabs

The Standing Committee recommended that the Act be amended to distinguish between self-administered buccal swabs and those administered by another person, and further that the former be classified as a non-intimate procedure, and the latter as an intimate procedure. The Review understands that in practice, almost all buccal swabs in New South Wales are self-administered, and the Department of Corrective Services position is that this is the preferred means of obtaining such a swab. Whether the Act should be amended to reflect what occurs in practice is arguable. The simpler solution may be to classify all samples that yield DNA as intimate, but this proposal may project a degree of unreality, in that, as the technology advances, so access to available DNA sites will broaden. On the understanding that the forcible taking of buccal swabs is not a practice in New South Wales, ***the Review does not support this Recommendation***.

[233] See section 15 for recording requirements in respect of suspects.

7-2-39 Recommendation 32 — Amend Act in relation to the taking of hair samples

The Committee recommended that hair samples be taken one strand at a time, which requirement is enunciated in the Model Bill but not the Act. The Act does contain safeguards to protect individuals subjected to an order for a hair sample, and pursuant to section 48, the procedure must not progress in a cruel, inhuman or degrading manner.

The police argue that the present '*lever arch*' method employed by them is considered to be '*the least painful method available*'. As the current procedure removes 15 to 20 hairs with their roots, we are surprised at this evaluation and not convinced by the argument that so many hairs are necessary to ensure '*sufficient DNA for analysis*'.

The Review at this stage defers to the information to be obtained as part of the Ombudsman's inquiry. Should that inquiry report, for instance, that inmates who have had hair samples taken indicate this to be a painful process, then alternative and less radical strategies should be put in place as a matter of urgency.

7-2-30 Recommendation 33 — Amend ATSI provisions to apply where suspect self-identifies as ATSI

The Committee recommended amending section 10 so that the ATSI provisions apply when a suspect identifies him or herself as an Aboriginal or Torres Strait Islander. The police argue that they should have a discretion to reject an individual's claim to be an Aboriginal or Torres Strait Islander where this is '*clearly incorrect*', and the person is only making the claim for the purpose of attempting to interfere with the carrying out of the forensic procedure. They suggest that if they incorrectly reject a claim, then the evidence that they obtain may subsequently be ruled inadmissible.

A problem with this position rests with the definition of an Aboriginal person under subsection 3(1) of the Act, which confirms as an element of the definition of Aboriginality the person's self-identification as an Aboriginal or Torres Strait Islander. The NSW Aboriginal Land Council suggested to the Standing Committee that if a person identifies him or herself as ATSI, then it should not be for the police to make any value judgments about whether or not that person is an Aboriginal or Torres Strait Islander. ***The Review agrees with this position and supports the Recommendation***.

7-2-31 Recommendation 34 — Provide criteria for rejecting an interview friend

The provisions referred to in the Recommendation were introduced in the Amendment Act.

7-2-32 Recommendation 35 — Clarify that waiving legal representation doesn't prevent interview friend from attending and vice versa

This is also embodied in the Amendment Act.

7-2-33 Recommendation 36 Review ALS funding and ensure police awareness of Aboriginal Legal Services requirements

The issue of funding the Aboriginal Legal Service (ALS) to ensure that it is adequately resourced to fulfil its role is crucial to the actuality of the protections it provides. Due to the fact that a sizeable proportion of ALS funding is Commonwealth-sourced, there will need to be discussions between State and Federal Treasury to facilitate appropriate resourcing.

However, due to the vital nature of such resources, and the fact that this protection for ATSI suspects and offenders is conditional on their existence, the ***Review supports this part of the Recommendation in principle.***

The further recommendation of the Committee that NSW Police ensure that police officers are aware of the requirements relating to advising Aboriginal Legal Services of indigenous suspects who are requested to supply a forensic sample is unassailable. The question is how best to ensure the general dissemination of such advice. Although information about police responsibilities and obligations in respect of ATSI suspects is already included in the SOPs, these may not be the best medium for guaranteeing wide dissemination. As part of the best practice strategy referred to in this Report, NSW Police delegates to the strategy should be required to identify the most effective procedure for notifying all relevant members of NSW Police about this requirement and its details.

7-2-34 Recommendation 37 — Amend section 10 so that ALS need not be notified for ATSI suspect if suspect has arranged for a legal practitioner to be present or has waived the right

This recommendation is supported by the Review, as it will in practice be both inefficient and a possible conflict of interests if the ALS organisation must be notified even when an ATSI suspect has arranged to have their own lawyer attend, or has elected to waive their right. In the latter case it is suggested that the suspect's wishes should be respected in this regard. The Minister for Juvenile Justice and NSW Police also support this recommendation. It should be recalled that the Standing Committee declares this to be the only circumstance in which the notification of the ALS should be waived, and the Review suggests that any legislative amendment should accordingly be worded in those terms.

The Review recommends however, that the police keep a record of how often ATSI suspects elect these options to waive this right, in order to determine whether ALS funding is appropriate, and in order to indicate the circumstances in which such elections are made.

7-2-35 Recommendation 38 — Amend child volunteer provisions to provide children with consent information

Understandably, the Standing Committee was interested in consent as it relates to children and incapable persons. This Review has had the benefit of advice from legal practitioners and magistrates working in the children's jurisdiction. It has also recognised the recent trend in criminal justice in New South Wales to identify child offenders or young people who offend as much in terms of the seriousness of their offence as what might be more conventionally thought of as against issues of welfare and rehabilitation. This Review is concerned that the relationship between age and the capacity to commit a criminal offence seems recently to have been overtaken by concerns for community safety and the control of dangerous behaviours amongst children and young people. The protections inherent in legislation such as this Act may be at risk in practice.

Recommendation 38 suggests amending the child volunteer provisions so that all children are provided with the consent information before a decision is made about whether a child will be a volunteer to undergo a forensic procedure. Consistent with our earlier position in relation to non-suspect volunteers, the Review recommends that forensic samples may not be obtained from a child volunteer in the absence of a court order. This is not meant to diminish the

importance of providing children and young people with the same information on which informed consent is required for other individual providers. Again, we believe that such information should be provided as part of any order requiring the taking of a sample from a child volunteer. To this extent, while we recognise the support for the proposal from the Minister for Juvenile Justice and the Commissioner for Children and Young People, we believe that our recommendation further strengthens the position of children and young people when confronted by intrusive procedures. In addition, the requirement that child volunteers only give forensic samples on the order of the court should reduce the concern that consent is given by a child's parent or guardian, or the legal representative of that child, without the child being fully aware of the circumstances surrounding the forensic procedure or the consequences of giving consent.

Obviously the consent of the child, and of guardians, may be a matter for the magistrate to consider in determining whether to grant an order. If this is the case, and the magistrate requires the child to indicate their view regarding consent as a volunteer, then the magistrate must ensure that the necessary information has been given to the child and to his or her guardian to provide the basis for informed consent.

7-2-36 Recommendation 39 – Amend Act in respect of consent for child volunteers

The Standing Committee recommended that the Attorney General consider amending the child volunteer provisions for children between the ages 10 and 14 to require the consent of both the child and their parent before the forensic procedure can be performed on the child. The Standing Committee further recommends that children between the ages of 15 and 17 should be able to consent on their own behalf.

In the construction of the Victims' Protocol, the following model has been adopted:

- Children under the age of 10 – consent is to be provided by a person who is legally responsible for the child;
- Children between the ages of 10 and 14 – consent is to be provided by a person legally responsible for the child *and* the child;
- Young people aged 14 and over - consent of the young person only is required.

Representations have been made to us by legal practitioners involved in the children's jurisdiction that a reliance on consent being given by children and young people, with or without the support of a legally responsible adult, may be naïve. The submission was forcefully put that in circumstances where children and young people are acting as volunteers, their interests would be best served by having forensic procedures determined by a court. The Review therefore recommends that the Attorney General consider amending the child volunteer provisions so that children and young people should only be required to provide a forensic sample following the determination of a magistrate.

7-2-37 Recommendation 40 – Amend Act in respect of child serious indictable offenders

The Standing Committee recommends the amendment of section 74(2) to clarify that only children who are serving a sentence of imprisonment for a serious indictable offence are eligible to be required to provide a DNA sample.[234] The Minister for Juvenile Justice and the

[234] The Department of Juvenile Justice agrees that only juvenile offenders in juvenile justice detention centres may be tested (pursuant to a court order), and not those detained in accordance with a control order.

Commissioner for Children and Young People support this Recommendation. Bearing in mind that testing on children and young people in juvenile detention centres already takes place, and the recent changes in sentencing legislation and practice in New South Wales, which we predict will produce a more significant number of offenders within this category, the ***Review supports this Recommendation.***

7-2-38 Recommendation 41 — Enable forensic procedures on child victims of crime under the age of 10 years

The new Victims' Protocol achieves this recommendation, which is supported by the Minister for Juvenile Justice.

7-2-39 Recommendation 42 — Amend section 356F of the *Crimes Act* to allow forensic procedures to be classified as a '*time-out*'

The Review supports this Recommendation, given the other '*time-out*' provisions in the Act. According to information and advice from the Department of Corrective Services, conducting a forensic procedure on inmates does not take more than 15 minutes, and hence would not intrude significantly on the investigation period. However, the situation in respect of suspects is likely to be more complex, as they will not in all likelihood have been forewarned that they are to be tested. The police also support this Recommendation.

7-2-40 Recommendation 43 —Amend sections 51, 57, 69, 70 and 98(1)

All these amendments were achieved under the Amendment Act.

7-2-41 Recommendation 44 — Address the problems of matching crime scenes and DNA profiles of relatives of missing persons

Section 77(2)(c1), inserted by the Amendment Act, seeks to address the potential problems of matching crime scenes and DNA profiles of relatives and missing persons.

7-2-42 Recommendation 45 — Develop provisions regulating victims' DNA profiles

The Committee recommended the development of provisions regulating the databasing of victims' profiles that ensure matches are not attempted between victims' profiles and other indices, for example, the one for crime scenes. The Review has been informed that there is no matching of victims' profiles with other indices. The requirements of this Recommendation form part of DAL's protocols, and no doubt will be transferred to the protocols of the SIFS. Victims' DNA profiles should be stored securely on the DNA database administered by the laboratory. Their storage should be for statistical purposes only. Victims' profiles should also not be placed on the crime scene index and there should continue to be no matching of victims' profiles with other indexes.

This Review has been told in general about DAL's protocols in relation to database maintenance and protection. In other section of the Report, we have indicated our views as to the satisfactory nature or otherwise of any such protocols and the extent to which the laboratory adheres to them. It is our suggestion that the SIFS, when it takes over responsibility for these databases, should, as a matter of priority, put in place research which confirms the adequacy or otherwise of database integrity.

7-2-43 Recommendation 46 — Amend Act to prohibit certain breaches of the Act

Not surprisingly, the police are opposed to this Recommendation and set out detailed arguments as to why they should not be so limited in their investigation techniques. They argue that, as with other forms of evidence improperly obtained or otherwise, it should be sufficient to leave the outcome and eventual status of such evidence to the determination of the courts under the *Evidence Act*. This Review is not so satisfied.

Our empirical analysis, and in particular the surveys we have done with juries in trials where DNA evidence has been presented, confirms that such forensic evidence has a disproportionate significance for the determination of trial outcomes. In that respect, its general probative value, no matter how obtained, would be hard ever to deny.

The Committee suggested a regulatory regime which would prohibit (by way of offences under the Act):

- The collection of DNA samples other than pursuant to the Act,
- The analysis of samples taken or retained in breach of the Act,
- Profiling for non-database purposes,
- The establishment of any DNA database not fitting the definition of section 90,
- Unauthorised access to the database,
- Unauthorised matching and non-database matching, and
- Non-database storage of profiles.

While this Review expresses reservations about the adequacy of a simple reliance on judicial discretion to exclude evidence improperly or illegally obtained, as with all other evidence under the *Evidence Act*, we are reluctant to impose a strenuous legislative regime on forensic evidence alone. It is our recommendation that, as part of the best practice strategy, legal representatives of the prosecution and defence, magistrates and judges, and representatives of NSW Police should meet together to determine a protocol for the exercise of judicial discretion to exclude based on the Committee's concerns identified here. This protocol could receive the status of a Practice Direction, should the Chief Justice and the Chief Judge deem this to be appropriate. In any other case, the protocol would be a crucial component of a best practice strategy informing police investigation practice and the exercise of judicial discretion. The protocol could be treated in court in a similar fashion to the way that lawyers recognise and refer to the Police Commissioner's instructions regarding appropriate investigative practice.

7-2-44 Recommendation 47 — Remove the delegated legislation provisions of section 92(2)(j)

The police argue against this recommendation, on the basis that it would impede the flexibility of the Act. They also suggest that there is no evidence that these provisions, or the information on databases to which they refer, are being used improperly.

The Privacy Commissioner, however, in his evidence before the Standing Committee, identified the seriousness of the issues at stake here. Consistent with the fact that the Act is replete with restrictions on the manner in which forensic information is stored on these databases, and regulations as to how the information itself may be used, this Review shares the Privacy Commissioner's evaluation.

What is being argued here is not that the information on the databases should never be used, but that decisions to justify purposes outside subsections 92)(2)(a)-(i) should receive the full scrutiny of legislative amendment. Consistent with the Review's position on the use of delegated legislation to change the impact of the Act in even less significant circumstances, ***we would support this Recommendation***.

7-2-45 Recommendation 48 — Amend Act to require destruction of profiles and samples where evidence ruled inadmissible

Currently, when evidence of a DNA profile is required to be destroyed under the Act, the DNA profile is retained but the link between the profile and the relevant individual is cut (also known as de-identification). Forensic scientists at the laboratory who maintain this data argue that the destruction of that link makes the profile meaningless, as there is nothing to identify the source of the DNA and there is no possibility that it can be used in evidence against the person concerned. Once the link is destroyed, it is argued that there is no possibility whatsoever that the link can be re-established some time in the future. This may be so under the present state of information technology, but there is nothing to suggest that future developments in data maintenance would not allow for possible reconnection.

The legislation refers to the destruction of '*forensic material*', which, as defined in the Act, clearly relates to the sample and not to the profile information taken from the sample. Having said this, one is inextricably connected to the other and it would be unconvincing to suggest that the profile should be treated as a separate entity. In section 89, the proposed destruction of forensic material rests on a finding that the evidence described in section 82, including '*any results of the analysis of the forensic material*', was inadmissible. The profile and its analysis therefore become the trigger, through their inadmissibility, for the destruction of the forensic material.[235]

In his submission before the Standing Committee, Dr Gans was critical of section 89(2), which allows for the retention of a DNA profile derived from forensic material in circumstances where the forensic material itself may be destroyed, as he saw this as an indefensible blanket exemption for DNA profiles from the section 89 destruction requirements. He said it would be wrong for investigators to continue to benefit from the original illegality, and therefore such profiles should be destroyed once the inadmissibility has become apparent. The Legal Aid Commission and the Law Society supported this view.

The police and the laboratory suggest that the retention of de-identified profiles on the database is useful for statistical purposes, and enhances the representative nature of the database through its size. A large DNA database is desirable as representative of the entire population of the State and improves the accuracy of calculations of chance-match probabilities, and therefore the reliability of DNA evidence presented before the court. In this argument, the de-identified profiles have no individual relevance, but facilitate the accuracy of the database in other legitimate matching circumstances.

The Review has some difficulties with the statistical and database size argument. We are not sure about the utility, beyond size and representation, of a database which contains within it a proportion of profiles which, if matched, would advance a police investigation no further. In

[235] We have discussed in other parts of this Report the dangers associated with the destruction of forensic material, particularly in respect of later challenges to convictions based on that material.

addition, we are concerned about any adverse circumstances which may pertain to a match where it could be said the provider is 'known on the database' by matching to a de-identified profile.

The Review however, has insufficient information on which to determine a view that de-identified profiles would have specific negative consequences for the original provider if later matches occurred. It would be useful for the proposed SIFS to research this point more fully, and to determine the administrative and resource problems associated with routine profile destruction rather than de-identification. This could then be put against the argued benefits of maintaining a larger database with the benefit of de-identified profiles.

The Review considers that until such information about the necessities of the database has been more clearly presented, then the legislation should remain as it presently reads.

7-2-46 Recommendation 49 — Amend Act to require destruction of forensic sample and profile after convictions are quashed

This recommendation was implemented by the Amendment Act.

7-2-47 Recommendation 50 — Amend Act to require destruction of forensic sample and profile where profile does not match crime scene, prosecutions do not proceed, the accused is acquitted or is convicted but no conviction is recorded

The situation here is somewhat different to the preceding two recommendations. The Standing Committee was concerned by the provisions in the Act that allow a suspect's profile to be placed on a database for 12 months, even if the suspect is cleared and proceedings do not commence. There is no requirement for the immediate physical destruction of samples taken if charges are not laid. The Legal Aid Commission called for such immediate destruction in those circumstances. The police have advised that their policy under the Standard Operating Procedures is to remove the profile if the suspect is not charged, even though this is not required by legislation. This Review agrees with the Standing Committee that despite this best practice approach by the police, the retention of samples in these circumstances is not justified, given that the individual is, in practice, no longer a suspect. In some of the circumstances listed in the recommendation, it is already a requirement for the sample to be destroyed. Insofar as the recommendation relates to the destruction of samples, ***the Review supports this Recommendation.***

7-2-48 Recommendation 51 — Amend Act to provide that evidence gathered in contravention of this Act is inadmissible; retain balancing test of section 82(5) for minor breaches

Section 82 of the Act provides that where the requirements in the Act have not been followed in relation to a forensic procedure, that evidence is inadmissible unless the court exercises its discretion to admit the evidence. This approach is consistent with the common law approach to illegally or improperly obtained evidence and the test applied to the admission of such evidence in section 138 of the *Evidence Act*. It has been argued before this Review that to adopt the Committee's recommendation would amount to an unnecessary and unfair restriction on the prosecution's ability to properly present its case. Courts should retain a discretion to admit improperly or illegally obtained evidence even in cases where the breach is not a minor one, as the interest of justice may dictate the evidence should nevertheless be admitted.

Section 82(5) of the Act sets out the matters the court must consider in exercising its discretion to admit such evidence. Requiring a court to consider all these matters is a significant step towards the protection of a defendant's right to fair trial and against improper or illegal investigation practice.

As we have stated earlier, this Review is not convinced that, particularly with DNA evidence, forensic evidence can be treated in the same way as any other form of evidence in a trial. Our jury research indicates that jurors consistently recognise DNA evidence as most influential when determining the outcome of their trials. In addition, because of the nature of DNA and its transferability, the possibilities for illegally or improperly obtaining and using DNA evidence are widespread. Put this against the fact that at present the defence is at a significant disadvantage to challenge DNA evidence in trials, and the need for specific protections against illegally and improperly obtained forensic evidence is strong.

Weighing all these things together and examining the representations made before the Standing Committee, ***the Review supports this Recommendation.*** The arguments regarding the inadequacy of the rules of inadmissibility, and the gravity and subject matter of illegal or improper actions surrounding forensic procedures, support this recommendation conclusively. We do not believe that it is inappropriate to regulate judicial discretion in this way, nor do we consider that the issue of admissibility in circumstances of illegal or improper forensic sampling should be left to the best practice dimension.

7-2-49 Recommendation 52 — Amend Act to prevent further sampling of the accused when evidence deemed inadmissible

The police argue that the implementation of this recommendation would unfairly restrict the proper investigation and prosecution of criminal offences. They say there should be scope for re-testing the suspect where there are merely technical breaches of the Act, but it is clearly undesirable that they are able to circumvent the intent of the legislation by having a second go when they have failed to adopt the relevant procedures. Such an approach would endorse and thus promote poor policing practices.

We accept the argument of the NSW Police here and ***do not support the recommendation***. In our view, the recommendation may simply lead to changes in form regarding the investigation, which would then enable the police to take new samples. Skirting the requirements of the Act through such technicalities should not be encouraged as a consequence of such amendments.

7-2-50 Recommendations 53 and 54 — Amend sections 12, 20 and 25 and correct drafting problems in the Act

The Standing Committee recommended that the Attorney General consider '*amendments to address the drafting problems identified by Dr Gans and Justice Action in their submissions to the Review*'.[236] These two submissions detailed on a section-by-section basis what the Committee referred to as '*many problems*' with the drafting of the legislation.[237] More particularly, the Standing Committee recommended that section 12, 20 and 25 be amended to make them clearer and easier to understand. In the opinion of the Committee, the thresholds

[236] Standing Committee Report, *supra*, n2, Recommendation 53.
[237] *ibid* at p161.

relating to suspects created by these sections are '*extraordinary*' and '*unnecessarily complex*'.[238] We are advised that Parliamentary Counsel's Office has agreed in principle to improve the drafting of these sections in order to make them more 'user friendly'.[239] This Review sees this as a crucial exercise in light of the justifiable argument by police that the matters they must take into account are too complex. If it is true that the police cannot understand these conditions, then how can they be applying them? If they are not applying them, then a central protection in the Act is failing and this can't be allowed to continue. ***The Review supports these Recommendations*.**

7-2-51 Recommendation 55 — Clarify the prohibition on body cavity sampling and forensic procedures for the sole purpose of establishing a person's identity

This recommendation arose from the Standing Committee's concern that if the Act did not apply for such intrusions, then these procedures would be excluded from the protections under the Act. However the express prohibition in section 3 of the Act against intrusion into a person's body cavities exists because there is no reason whatsoever why the Act should authorise intrusions into such body cavities. The amendments made by the Amendment Act make it clear that the Act will not apply to forensic procedures conducted on victims of personal violence crimes. The prohibition in section 3 therefore doesn't create any problems in relation to the conduct of forensic procedures on victims of sexual assault.[240] This anticipates the need for body cavity sampling in such circumstances.

It is also not the intention of the Act that police should be permitted to conduct a forensic procedure on a person for the sole purpose of establishing that person's identity. The intention of the Act is that forensic procedures such as obtaining a DNA profile from an individual can only be conducted by a police officer on an individual if the individual comes within the definitions of '*suspect*', '*serious indictable offender*' or '*volunteer*' when the threshold tests under the Act for conducting procedures are satisfied. This Review agrees that it is undesirable that police be permitted to obtain an individual's DNA profile solely for the purposes of establishing who that individual is, and this appears to be the rationale for this prohibition in the Act.

Having said all this, the Standing Committee's recommendation is that the definition of '*forensic procedure*' in section 3 be amended to further clarify this prohibition, particularly against the sole purpose of establishing identity and we see no reason why such clarification should not be made.

7-2-52 Recommendation 56 — Amend definition of '*permitted forensic material*' in section 91(3) to clarify whether this includes samples from victims

The Government's original draft response to the Standing Committee report argued that because the Act does not deal expressly with cavity searches, '*there is no reason whatsoever why the Act should authorise intrusions into a person's vagina or anus*'. If this is so, we see

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[238] *ibid*

[239] In particular, we would suggest that the notion of '*another prescribed offence*' needs to be disentangled.

[240] Under the Victims' Protocol, intrusions into body cavities are permissible in the context of sexual assault forensic examinations. Such forensic procedures may only be conducted by medical practitioners or nurses employed or contracted by NSW Health Services and appropriately qualified to undertake sexual assault forensic examinations may conduct the procedure.

no reason why the Act should not be amended to put these concerns to rest, particularly bearing in mind that powers for cavity searches are provided for in other legislation.[241]

Victims of personal violence offences are not covered by the Act, but by the Victims' Protocol. Section 91(2) provides that it is an offence to supply forensic material other than '*permitted forensic material*' for analysis for inclusion on the DNA database system. Permitted forensic material is defined as including material from a '*crime scene*'. The term '*crime scene*' is not defined, however the term '*crime scene index*' is defined in section 90 and includes materials 'on or within the body of the victim of such an offence'.

Arguably, by implication, '*permitted forensic material*' does include material taken from the victim. This interpretation seems a sensible one, as it permits an unknown offender's semen sample taken from the body of a sexual assault victim to be placed on a crime scene index of the database and matched against the suspects and serious indictable offenders indexes of that database. Clearly this is how the database was always intended to operate.

Recognising that victims' profiles are not placed on the crime scene index of the database, and that there is no matching of victims' profiles with other indexes, the use of victims' samples for the identification of crime perpetrators would appear to be a crucial component within the forensic procedure armoury. Provided that victim samples are guaranteed to be kept separate from all other forensic databases, the use of victims' samples should be possible, if it is clear in both best practice and operational reality that samples from victims are not to be cross-matched with databases beyond crime scene databases which have a specific connection to the crime in which the victim was involved. This Review accepts that victims' profiles need to be treated in a sensitive and secure fashion and recommends as part of the best practice strategy that the maintenance of victims' forensic material and profiles by the SIFS should be a matter for regular review.

[241] See *Police Powers (Internally Concealed) Drugs Act 2001*

Appendix – Relevant DNA Cases

R v Gallagher **[2001] NSWSC 462**

In this case, the deceased allegedly died from multiple stab wounds and blood, presumably his, was found widely distributed throughout the unit where he was attacked and in adjacent parts of the unit building. A single jogger shoe, which the Crown asserted did not belong to the deceased or to anyone else who might have resided in the unit, was found at the scene.

DNA was extracted from the shoe. Test results showed that DNA extracted from the shoe was consistent with having come from the accused and that the probability of a chance match with the DNA of anyone other than the accused in the general population was less than one in ten billion. The shoe also had blood on it and DNA extracted from the blood stain was consistent with having come from the deceased. The probability of a chance match with the DNA of any other person in the general community was less than one in ten billion. Furthermore, that DNA could not have come from the accused or any of the other persons known to have used the premises or to have been associated with the deceased at the time.

One of the deposits of blood was on a mirror on the eastern wall of the unit. Tests done on DNA extracted from a swab taken from that deposit showed that the DNA came from at least two persons. The accused and the deceased could not be excluded as contributors, but all other relevant persons could. Assuming that the mixture was of the DNA of only two persons, the DNA was sixty-three billion times more likely to have come from the deceased and the accused than from the deceased and an unknown, unrelated individual.

The defence objected to Crown tendering evidence of the test results by Mr Goetz (the DAL analyst). The test results were produced using the Profiler Plus system and the issue in dispute was whether or not evidence of DNA test results obtained by the Profiler Plus system were unreliable and therefore inadmissible.

The defence argued that the Profiler Plus system was not reliable because it had not been the subject of an acceptable validation exercise, which the defence submitted could only occur if the sequence or positioning of the primers were known. It was also submitted that it was for the Crown to show that the reliability of the Profiler Plus system was generally accepted in the scientific community. Because the court could not be satisfied about either of those matters, it was submitted that the evidence did not have the reliability required by the *Evidence Act* and was therefore not admissible. The defence submitted in the alternative that if the evidence were deemed admissible, it ought to be excluded in the court's discretion.

Barr J held the system had been satisfactorily validated and concluded that the evidence given by the analyst was based on his specialised knowledge, training, study and experience. The evidence had substantive probative value because it was produced by a validated system shown to yield consistent results. As such, there was no danger of unfair prejudice if the evidence was admitted. His Honour added:

> *I was not prepared to conclude that Mr Goetz's evidence lacked objectivity merely because it derived from the use of a scientific system he was responsible for installing, maintaining and using. The Court routinely accepts evidence from professional witnesses who in effect stake their reputation on the reliability of the opinions they put forward. In my opinion far more is needed to*

demonstrate bias than that a witness gives evidence about results from a system with which he or she is intimately connected.

I thought that if applied the approach contended for might work another mischief. So specialised is the nature of typing DNA profiles by systems using the methods of extraction, amplification and interpretation of results by fluorescent technology in computerised equipment as in Profiler Plus that no scientist not actually engaged in the work is likely to understand sufficient detail of it to be able to give reliable evidence about it. There appeared no reason to suppose that there existed university staff or scientists other than those using the system in their daily work who might be able to give evidence of the detail the Court might expect. If the principle contended for were right, the result might very well be that those who knew about the system because they used it in their work would be unable to give evidence because the Court thought them unreliable, whereas the remaining members of the scientific community would know too little to qualify as experts for the purposes of s 79. Nobody would be able to give evidence.

I concluded for the foregoing reasons that the Profiler Plus system as used by DAL had been properly validated, that DAL had not failed to follow any technique mandated by Applied Biosystems, that the accuracy of results reported from testing by Profiler Plus should not be doubted because of any confusion between homozygotes and null alleles and that it was not necessary to know the primer sequences in order to test the reliability of the system.

LEGAL PRINCIPLE

A DNA expert witness cannot be said to lack objectivity merely because the evidence derived from the use of a scientific system he or she was responsible for installing, maintaining and using.

R v GK **[2001] NSWCCA 413; (2001) 125 A Crim R 315**

The trial of GK concerned charges of sexual assault involving GK's step-daughter, the complainant. At trial, the Crown sought to prove that GK was the father of the complainant's baby by tendering evidence of certain DNA testing. Objection was taken to this evidence under s137 of the *Evidence Act*. Following a voir dire, Ford DCJ limited admissibility to evidence that the testing did not exclude the possibility of paternity. He refused to allow evidence of likelihood or the percentage of probability of paternity.

GK was re-presented for trial in February 2000 before Moore DCJ. The Crown sought to lead evidence of further DNA testing which had been carried out since the first trial. The trial Judge conducted a voir dire in which experts called by the Crown gave evidence about the interpretation of the DNA testing and held that legal principles required him '*not to disturb the exercise of the discretion from that which was exercised by his Honour Judge Ford*'. His Honour ruled that '*there should not be arithmetical figures put before the jury*'. This second trial aborted and a third was conducted on the basis of the rulings in the second. The jury finally returned a verdict of not guilty upon all eight counts in the indictment.

The issue that arose on appeal was whether the court was in error to admit evidence of the probability, in numerical terms derived from DNA testing, that GK was the father of the complainant's child, on the basis that there was a real risk of unfair prejudice to the accused.

The court held that the paternity index figures should not have been withheld from the jury. They should have gone to the jury accompanied by appropriate directions emphasising the need to avoid the prosecutor's fallacy. The direction would involve the judge telling the jury that evidence of paternity has been expressed as a high or very high probability and that the

jury should then be reminded that the evaluation of that evidence is a matter for them in light of the totality of the expert and non-expert evidence.

R v Galli [2001] NSWCCA 504; (2001) 127 A Crim R 493

The complainant was severely retarded and under Galli's care in an institution. She became pregnant but was incapable of giving evidence. The two other male carers and two other patients who had access to her were eliminated as possible fathers through DNA testing and profound physical disability.

The Court of Criminal Appeal emphasised the desirability for the trial Judge to warn the jury in every DNA case not to approach the question of guilt strictly on the basis of a mathematical calculation.

The evidence in the case and his Honour's directions to the jury, were expressed in terms of the combined effect of the various DNA markers tested, to the affect that it was 2.4 million times more likely that the accused was the father of the complainant's child than a person taken at random from the community. Spiegelman CJ rejected the submission that the trial Judge had committed the Prosecutor's Fallacy in his directions to the jury.

The court also affirmed that Bayes' theorem is not a permissible approach to employ in NSW courts. This is a method of mathematically calculating the probability of guilt by assigning odds to evidence in addition to the DNA evidence.

LEGAL PRINCIPLE

The trial Judge should warn the jury in every DNA case not to approach the question of guilt strictly on the basis of a mathematical calculation.

Kerr v Commissioner of Police [2001] NSWSC 637

The body of the deceased was found at premises where Kerr was residing. Examination of the deceased disclosed significant head wounds and stab wounds to the body, with a knife found protruding from the body.

Kerr was arrested the day after the death had occurred on unrelated matters. At the time forensic samples were from him, he had not been charged with the murder of the deceased but was suspected by the investigating police of being responsible for her death. Evidence implicating Kerr was circumstantial and he had made no admissions upon being interviewed.

The next day, a police officer involved in the investigations into the death made application to a justice for an order under s33 of the *Crimes (Forensic Procedures) Act* 2000, seeking an interim order authorising the carrying out of a forensic procedure. An interim order was made and the authorised forensic samples were taken later that day.

The following questions arose:

> *Whether Kerr could seek an order restraining the police from testing or examining forensic samples obtained from him; whether he could seek a declaration that the interim order for the forensic procedure was invalid; and whether he could obtain an order that the samples be destroyed.*

The Supreme Court refused the orders, holding that a civil court should be reluctant to interfere in criminal proceedings and that it would be inappropriate to make the orders sought.

***R v Daley* [2001] NSWSC 1211**

DNA evidence obtained through covert surveillance linked the defendant to assaults on two complainants, establishing that there existed only a one in ten billion chance that the accused was not the assailant. The accused sought the exclusion of the evidence of the DNA obtained

(1) As a result of a breath analysis test, on the grounds that the test resulted from the improper exercise of the power to arrest;
(2) From a sweat ingrained T-shirt, on the grounds that it was obtained in breach of the law governing the execution of search warrants; and
(3) From a buccal swab, on the grounds that it was also improperly taken.

The Judge was satisfied in relation to the breath analysis that the powers conferred on police officers under road traffic legislation were used for a purpose essentially extraneous to the purpose for which they were conferred. However, because the accused was driving a vehicle in breach of the road transport legislation, the police officers were entitled to arrest him, and charge him under that legislation.

Having been apprehended in the course of committing offences under that legislation, they were entitled to require him to submit to a breath analysis. There was, accordingly, no contravention of any Australian law. The Judge concluded that there was no impropriety, suggesting that:

> *It would be different if police had manufactured a false charge, or had arrested the accused purportedly for an offence which they knew he had not committed. That was not the case here. Police had good reason to believe that the accused had committed the offences charged, (ie the road transport offences) and, indeed, was in the process of continuing to commit the offences.*

The Judge commented that, in assessing whether there was any impropriety, it is relevant to consider the urgency of the task that police were performing. His Honour noted:

> *It is of some significance that surveillance police had observed the accused to be acting in a fashion that gave them reason to fear (if not believe) that, if he were the offender, there was a risk of a further, and imminent, attack or attacks. The protection of another victim, or other victims, is of no small moment in the assessment of the propriety of the conduct of the police officers.*
>
> *Ordinarily such a use of the power of arrest would properly be regarded as an abuse of power and amount to a significant impropriety. Two things counterbalance what would otherwise be an inevitable conclusion. Firstly, by engaging in the conduct (driving an unregistered and uninsured vehicle) the accused exposed himself to proper arrest and detention. It is not as though police fabricated an allegation for the purpose of the arrest. Secondly, police had good reason to believe, not only that the accused was the perpetrator of seven sexual assaults, and their associated armed robberies, but also that his behaviour was such that there was a real danger that he would attack again. A further female victim was (or further female victims were) at significant risk if the perpetrator was not stopped. This is a factor of considerable importance in the evaluation of the police conduct and in the measure of censure that ought to be attached to it.*

Moreover, it is relevant to consider the reliability of the evidence so obtained. The reliability of DNA evidence is, as I understand it, generally regarded as high. There was no real danger, by reason of the way in which the evidence was obtained, that its reliability would be affected. DNA is used, not only to obtain incriminatory evidence; it is capable, also, of exculpating the innocent, and it not infrequently does so. Obtaining samples of the accused's bodily fluids for the purpose of comparison with those samples the offender had left with two of his victims was likely to do one of two things: to eliminate the accused as a suspect, or to confirm, or at least heighten, the suspicion that he was the person responsible for at least two of the attacks.

Another consideration is the degree of intrusion involved in the way the sample of bodily fluid was taken. This was, in the case of the breath analysis, minimal.

Notwithstanding my misgivings about the police use of the powers of arrest in this case, having regard to all the circumstances I am not satisfied that the evidence it yielded was improperly obtained, or obtained in consequence of an impropriety.

Even if it were otherwise, I would be satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting evidence so obtained. My reasons for this conclusion are essentially the same as the reasons for doubting that it is evidence improperly obtained. I shall re-state them. They are:

(i) that the accused was in fact guilty of the offences under colour of which he was arrested and detained;

(ii) that police had reason to believe that, if their suspicions that the accused was the perpetrator of the assaults (or some of them) were correct, there was a danger that he would attack again;

(iii) that there was nothing in the manner in which the evidence was obtained that was likely adversely to affect its reliability;

(iv) that there was only minimal personal intrusion involved in obtaining the sample;

(v) that the evidence to be obtained was such that it was likely to confirm police suspicions and justify an arrest on the major charges, or to eliminate the accused from the enquiry.

Counsel for the accused also argued that obtaining the evidence in the way police did was contrary to or inconsistent with a right recognised by the International Covenant on Civil and Political Rights, a circumstance relevant to s 138(3)(f). The Judge then stated:

I am satisfied that, balancing all of the relevant factors, the desirability of admitting the evidence substantially outweighs the undesirability of admitting evidence obtained by the exercise of a power of arrest for an ulterior purpose.

In my opinion, the fears police held of another attack, and the reasons for those fears, constituted an important extenuating circumstance affecting whether the behaviour should be classed as an impropriety, and if it should, the level of the impropriety, and the consequences that should attach to any such impropriety. I would be much less inclined to take a benign view of what police did and to admit the evidence, if they were not under pressure, not only to identify and apprehend a man guilty of these serious offences, but to ensure that the pattern of offences did not continue and involve additional victims.

By repeating this, I intend to dispel any notion that the view I have taken in this case amounts to an endorsement of the use of the power of arrest for an ulterior purpose or to a finding that the end justifies the means. It would be only in a most exceptional case that I would consider that the use of the power of arrest and detention for an ulterior purpose could be condoned. This is such a case.

In relation to the T-shirt obtained pursuant to a search warrant, the Judge said:

> *The execution of the search warrant was a legitimate tool in the investigation of the sexual assaults. It was not executed for the purpose of obtaining a DNA sample from the accused, although its finding might have been manipulated to enable that to happen, and it is very unlikely that the warrant was executed in such a way as to cause some agitation to the accused, thereby making it more likely that he would perspire freely.*

Finally, the Judge held in relation to the buccal swab that:

> *It is obvious that the accused's argument in relation to the buccal swabs depends upon a finding that both of the previous samples were improperly or illegally taken. Given the conclusions I have reached and expressed in relation to those matters, there is little left of this argument.*
>
> *However, I would add that, even if I were wrong on all counts in relation to those matters, it would not affect my view that the buccal swab was taken lawfully in the exercise of the power conferred by s 353A(2). The accused was in lawful custody on a relevant charge at that time. Even if the arrest had been effected in reliance upon improperly or illegally obtained evidence, or evidence which would later prove to be inadmissible or rejected in the exercise of discretion, that did not affect the legality of his arrest. Accordingly, there is no place for the exercise of the s 138 evaluation. There is no impropriety or illegality in the taking of the buccal swab.*

LEGAL PRINCIPLES

A breath analysis is not necessarily an improper means of obtaining DNA evidence even if used for a purpose essentially extraneous to the purpose other than that conferred by the legislation. If the person in question was driving a vehicle in breach of the road transport legislation, the police are entitled to arrest that person and charge that person under that legislation.

The obtaining of DNA evidence by means of a search warrant is not necessarily improper, even if the warrant was not executed for the purpose of obtaining a DNA sample from the accused, and its finding was manipulated to enable the DNA evidence to be obtained. The obtaining of DNA evidence from a person in lawful custody is not improper if the custody relates to a relevant charge, even if the arrest is effected in reliance upon improperly or illegally obtained evidence, or evidence which later proves to be inadmissible or rejected in the exercise of discretion.

R v Sing **[2002] NSWCCA 20; (2002) 54 NSWLR 31**

At the trial, objection was taken to the evidence of Mr Weigner on the basis that the crucial DNA tests were not carried out by him, but only, as he put it, under his supervision. A similar objection was taken when Mr Goetz was called. At the conclusion of the prosecution case, counsel for the appellant sought an order that the DNA evidence either be withdrawn as inadmissible or else pursuant to s137 of the *Evidence Act*. On appeal, it was argued that the expert witnesses' evidence must be based on hearsay reports made to them, but this was not specifically put by counsel at the trial. Hodgson JA was not completely clear whether the evidence involved hearsay or was based on hearsay. He stated, however:

> *Whatever is the correct answer to the hearsay question, I think there is substance in the appellant's complaint that to admit evidence like that of Mr Weigner and/or Mr Goetz over objection, without the evidence from the persons who actually carried out the procedures that*

resulted in the print-outs, and indeed without any evidence that there was any difficulty in calling these persons, involved unfair prejudice to the appellant. It may be that these persons would have no recollection of exactly what they did and would have to rely on records; but that is not generally sufficient justification for not calling, in a criminal prosecution, a witness involved directly in a significant part of the prosecution case.

Counsel for the appellant at the trial said he had an expert present in court for the purpose of assisting him with questions to be put to the persons who actually carried out the procedures, and I think this Court should proceed on the basis that there were relevant questions which the appellant's counsel wished to put to these persons if they had been called. There is an obligation on the prosecution to call available witnesses of events alleged to constitute the offence and of essential parts of the prosecution case, at least unless there is some justification for not doing so: see for example R v Kneebone [1999] NSWCCA 279. I think this does extend to witnesses such as those in this case dealing with important links in the prosecution case. Particularly since DNA evidence can be so compelling, I do not think the matter of the correct carrying out of testing procedures should normally be proved, over objection, merely by evidence of the existence of the procedures and the giving of instructions, and otherwise left to inference. If for any reason the persons who actually did the work are unavailable, there may be justification for such a course. But there is no suggestion of that here.

The court accordingly held that even if the evidence of Mr Weigner and Mr Goetz were admissible, notwithstanding the possibility of hearsay, the admission of evidence involved unfair prejudice to the appellant because the evidence was given with evidence from the person who carried out the procedures, and in the absence of evidence that there was any difficulty in calling these persons.

LEGAL PRINCIPLES

The correct conduct of DNA testing procedures should not be proved merely by evidence of the existence of procedures and so otherwise left to inference. Furthermore, the prosecution is obliged to call all available witnesses of events unless there is a justifiable reason for not doing so.

R v Keir **[2002] NSWCCA 30; (2002) 127 A Crim R 198**

The Crown case claimed that Mr Keir murdered his wife and buried her body beneath the foundations of the house. Mrs Keir's body was never found, but some bones were found at Mr Keir's premises and these were the subject of DNA evidence.

At the trial, it was in issue whether Mrs Keir was in fact dead, as well as whether or not the DNA profile found in bones proved the identity of the deceased to be the child of X and Y.Mr Goetz gave evidence that it was approximately 660,000 times more likely to obtain the particular DNA profile found in the bones if they came from a child of X and Y than from the child of a random mating in the Australian population. There was no objection to this evidence at trial.

In his directions to the jury,the trial Judge said:

How is it that someone else's body might have got or part of it might have got to this ground? Well it is speculation of course. It is obviously not impossible. The Crown says however it is improbable and that improbability you would add to the rest of the evidence in the case but the Crown says we have got more than that, there is a 660,000 to one chance that those are the bones of Jean Keir as distinct from any other person.

Now I have slightly shortened it, what the experts say are the bones of the offspring of Mr Baan and Christine Strachan, but it is perfectly obvious in the context of this case we are only talking about one possible candidate, Jean Keir.

The accused's case, as I understand it to be put to you by Mr Zahra is, we do not dispute that the result of this DNA test was 660,000 to one but we say that was the result or you might think it was the result of contamination ...

After dealing with the question of contamination, the trial Judge turned to the significance of the DNA statistical evidence to the identification evidence. His Honour said:

The Crown would say at all events even if [contamination] were a remote possibility you would think that it was a very high probability indeed that the DNA came from the bones and you would therefore be entitled to rely on it. If you were satisfied about that matter, ladies and gentlemen, the Crown says to you that means in effect there is a 660,000 to one chance for example that Miss Soler's evidence about identification is accurate and reliable.

Some time later the trial Judge again referred to the DNA evidence in the course of a summary of what the Crown relied on, saying:

Reliance is placed on the discovery of the bones, on its identification as being at the odds 660,000 to one being the bones of Jean Keir, and if they are the bones of Jean Keir she is dead, and if they are the bones of Jean Keir, they were found in the house, and if they are the bones of Jean Keirthere is only one person who could have possibly put them there and that is the accused, and he would only have put them there, the Crown says, because he killed her, because he had something to hide so far as her body was concerned, and the Crown submits to your what he had to hid was the fact that he intentionally and deliberately killed her.

On appeal, Giles JA said:

On Mr Goetz's evidence, the likelihood ratio supported the hypothesis that the bones were those of Mrs Keir. But what the trial judge said, stating the Crown's position, went further. It amounted to saying that there was a 660,000:1 statistical probability that the bones were those of Mrs Keir, and so that there was a 660,000:1 statistical probability that the identifications by Mrs Joan Keir, Michael and Miss Soler were not correct. The jury was likely to be very much influenced by this in deciding whether Mrs Keir was dead and had been killed by the appellant, and to find the identification evidence unreliable or incredible.

The Crown had fallen into a version of what has come to be known as the prosecutor's fallacy. It was incorrect to move from (i) the probability of the bones being those of a child of Mrs Strachan and Mr Baan rather than of a random mating in the Australian population to (ii) the same probability that the bones were those of Mrs Keir.

The prosecution argued that the trial Judge later rectified this error by reminding the jury that the evaluation of DNA evidence was a matter for them in the light of the totality of expert and non-expert evidence. To this the court said:

Whether it was sufficient as such a reminder need not be decided, but it did not rectify the error. The prosecutor's fallacy was still not recognized. The misuse of the statistical probability was not corrected in relation to the identification evidence or otherwise, and more, was reinforced in relation to the identification evidence by the trial judge referring to "a 660,000 chance to one

that these bones were not those of Jean Keir …" and suggesting in that connection that the jury could see the statistical process as indicating "a very high degree of probability indeed". If it was proper to leave the jury with odds at all, the jury was left with the potentially misleading odds of 660,000:1 and without guidance on what the DNA statistical evidence really meant.

LEGAL PRINCIPLE

It may be that in certain cases (such as the present, not of the crime scene stain), it may not be easy to give proper guidance to the jury, and if that can not satisfactorily be done, it may be that discretionary considerations will arise in relation to admission of the DNA statistical evidence.

***R v Nicola* [2002] NSWCCA 63**

This case involved two counts of sexual intercourse without consent. The defendant sought the exclusion of the evidence of the DNA under section 138 of the *Evidence Act*. The defendant submitted that he made clear to the police that he did not wish to provide blood, and consequently DNA, for examination and analysis. The police, however, ignored his express wishes and acted improperly in obtaining a styrofoam cup and having it examined.

The trial Judge found that the DNA evidence was critical because there was no innocent way the accused could explain how his semen came to be in the complainant's vagina. If the evidence of the cup and subsequent DNA test results were received into evidence, there would be a high probability that the semen was the appellant's, since the DNA profile in the matching samples occurred so infrequently in the Australian population.

The Judge was also satisfied that it was the accused who asked the woman who produced the cup for a cup of coffee and not the other way round, as the accused had sworn. The Judge accepted that the woman was telling the truth when she said that she handed him a cup of coffee in a white styrofoam cup, that he sat down to drink it at the front counter of the police station and that as he did so, a detective arrived and took him upstairs.

Barr gave the judgment of the court that '*the finding of his Honour that there was no impropriety and no contravention of the requirements of s 138 is a conclusion that was open to his Honour on the evidence and one which the appellant cannot assail in this appeal*'.

***R v To* [2002] NSWCCA 247**

One of the grounds of appeal in this case was that the trial Judge erred in admitting evidence of DNA analysis. The appellant argued that the use by the forensic biologist of Chinese databases failed to comply with the law.

The authority is *R v Pantoja* (1996) 88 A Crim R 554. In that appeal the complaint was that the appellant was of a peculiar racial extraction and that the evidence did not establish whether the database used contained results of tests of DNA of persons of that extraction. His Honour in that case said that it must be the offender's race, not the suspect's race, which dictates the validity of the database. In the present appeal, four witnesses described the attacker as '*Asian*' and one said that he had a Vietnamese accent. It was submitted that since nobody described the attacker as being Chinese, it was inappropriate to use a Chinese database. That submission implied that the only valid database would have been an Asian

database. Counsel made no attempt to explain what such an Asian database might comprise or to explain precisely what the term '*Asian*' meant.

Barr J then said, in delivering the judgment of the court:

> *To say that the offender's race dictates the validity of the database is one thing. It is quite another to say that reliable evidence can never be produced by the use of a database which cannot precisely be described as of or including the offender's race. It would not be suggested, I think, that statistical evidence of the kind objected to would be altogether inadmissible if the race of the offender were not known.*

His Honour concluded that the trial Judge was entitled to come to the view that the statistical evidence had sufficient probative value.

LEGAL PRINCIPLE

It is incorrect to say that reliable evidence can never be produced by the use of a database that cannot precisely be described as of or including the offender's race.

***R v To* [2002] NSWCCA 252**

This was an appeal from convictions on a number of counts of sexual intercourse without consent and aggravated sexual intercourse without consent. At trial, there was evidence that in the assailant's semen had an identical DNA profile for each count and that it had the same profile as that of the accused. In addition,

> *there was expert evidence of the DNA profile that using a Queensland database for Asian people, "the chance of a person other than the accused Mr. To with the same DNA is round about one in 8.6 billion" (if one disregarded the chance of a full sibling being involved). The likelihood ratio was also expressed as referring to the chance of that profile being found in someone else and that chance was expressed by Mr. Goetz as "one in 8.6 billion", or "the profile is only found in one in 8.6 billion people". Mr. Goetz gave evidence that that ratio should be regarded as conservative and favourable to the accused.*

Both parties agreed that it would be appropriate for the judge to give a circumstantial evidence direction in relation to the DNA evidence. His Honour consequently gave the following directions to the jury:

> *The next direction on law relates to circumstantial evidence. The DNA evidence has been described as circumstantial evidence. It is not direct evidence. Instead, the Crown sets out to prove certain circumstances, that is facts and events which the Crown says prove beyond reasonable doubt that the accused is guilty because there is no other reasonable explanation in this case for the DNA results. Circumstantial evidence is not necessarily any less reliable than direct evidence such as the evidence of an eye witness, indeed in some cases it can be more convincing. However, before you can find an accused person guilty of a crime on the basis of circumstantial evidence you must be satisfied that such a finding is not only reasonable but that it is the only reasonable finding to make.*

When his Honour summarised for the jury the arguments of counsel, he referred to the submissions by the Crown Prosecutor that '*there was a general similarity between the crimes*' and commented on the Crown Prosecutor's references to the identification evidence

of one complainant and the overwhelming strength, as she described it, of the DNA evidence. The Crown Prosecutor submitted '*the DNA is enough by itself, but further, that the identification of [one complainant] would be strong enough to prove the Crown case beyond reasonable doubt by itself*.'

The trial Judge went on to refer to the Crown's argument as to the vivid recollection of that complainant when identifying the photograph:

> *She said that evidence, in her submission, would prove the case beyond reasonable doubt, but then on top of that we have the DNA evidence and she reminds you that Mr. Goetz gave his most conservative estimate of one in 8.6 million people having a similar DNA to those in this case.*

In this context, it was contended on appeal that the trial Judge fell into error in failing to give a more extensive direction on coincidence evidence. It was submitted that as there had been reference to the similarity between the crimes and consistency between features of the crimes, directions should have been given to the jury as to how to use what was described as the coincidence evidence.

Greg James J said, in dismissing the appeal:

> *Any more explicit direction as to coincidence or similarity evidence would have been bound to bring out in greater detail matters to the disadvantage of the appellant. It was for the jury to consider all of the circumstances and what they accepted of the evidence including the acceptability of the identification evidence in the light of all of the proved facts, see* Shepherd v The Queen *(1990) 170 CLR 573. It was open to the jury to conclude the identification evidence taken in conjunction with the DNA evidence and the evidence of similar behaviour and appearance established the appellant was the attacker beyond reasonable doubt. The jury did not have to be satisfied the identification evidence established that matter only if they were satisfied of that fact considering the identification in isolation. There was no application for re-direction because, as far as I can see, no further direction as to coincidence or similarity evidence could be seen to be to the advantage of the appellant.*

R v Baird **[2002] NSWCCA 460**

The appellant was convicted of sexual assault without consent. During the course of investigations, a condom was lost for 6 months and could therefore not be tested until after that time. Beazley JA stated, in dismissing the appeal:

> *An additional complaint is made that the appellant's permission to conduct DNA testing on the condom was not obtained. Again, no unfairness flows from this. The appellant has given blood samples consensually which he knew were to be subjected to DNA testing. He does not contest the result of the DNA testing on the condom. There is no requirement at law that once appropriate DNA matching material is obtained consensually from a person that that person's consent is then needed to conduct DNA testing on other evidence.*

R v Rose **[2002] NSWCCA 455**

The appellant was convicted of the murder of his wife some 18 years after the discovery of her body. Due to the elapsed time, critical pieces of evidence had been lost or destroyed including swabs taken from the vagina and panties of the deceased which disclosed that she had engaged in sexual intercourse within the 24 hours before her death. While blood

groupings were inconsistent with that of the appellant, the loss of the swabs, the panties and fingernail scrapings meant that DNA testing, not available in 1982, could not be carried out. The appeal was allowed on the basis that the verdict was unreasonable and could not be supported on the evidence. It was said in the judgment that the unavailability of the physical evidence denied both the Crown *and* the appellant the opportunity of DNA sampling.