



The Forensic DNA Sampling of
Serious Indictable Offenders under Part 7
of the *Crimes (Forensic Procedures) Act 2000*

A report to Parliament under s121 of the
Crimes (Forensic Procedures) Act 2000

August 2004

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30th July 2004



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Dear Attorney General

Under Section 121 of the *Crimes (Forensic Procedures) Act 2000*, I have been required to keep under scrutiny the exercise of the functions conferred on police with respect to the Act and report to you, the Minister for Police and the Commissioner of Police on the activities undertaken for that purpose.

I am pleased to provide you with this report, dealing with the DNA sampling of serious indictable offenders under Part 7 of the Act. In addition to reporting on the activities undertaken to monitor the operation of this part of the Act, I have, as the Act provides, made a number of recommendations to enhance its operation.

I draw your attention to s 121(6) of the Act, which requires you to lay a copy of this report before both Houses of Parliament as soon as practicable after receipt.

Yours faithfully

A handwritten signature in black ink, appearing to read "B. Barbour".

Bruce Barbour
Ombudsman

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NSW Ombudsman

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Dear Minister

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Yours faithfully

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30th July 2004



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Dear Commissioner,

Under Section 121 of the *Crimes (Forensic Procedures) Act 2000*, I have been required to keep under scrutiny the exercise of the functions conferred on police with respect to the Act and report to you, the Attorney General and the Minister for Police on the activities undertaken for that purpose.

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Bruce Barbour
Ombudsman

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Victims Services, NSW

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Executive Summary

Background to this report

The *Crimes (Forensic Procedures) Act 2000* (the Act) commenced on 1 January 2001. The Act created new police powers to carry out forensic procedures - such as taking DNA samples - from suspects, volunteers and certain correctional centre inmates and detainees known as "serious indictable offenders".

The Act incorporated a three-pronged scheme to monitor, review and inquire into its operation. A Parliamentary Committee was to inquire and report on the operation of the Act. The Attorney General was to review the Act to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate.

The NSW Ombudsman was charged with scrutinising the functions of police under the legislation. Distinct from the other review provisions, the focus of the Ombudsman scrutiny role is on how police have set about implementing the provisions of the Act. Although it was initially envisaged the Ombudsman review would end in 2002, because some provisions of the Act - and in particular the volunteer provisions - did not commence until 2003, the review period has been extended until December 2004.

A primary focus at the time of commencement of the Act was on obtaining DNA samples from serious indictable offenders - the laws permitting the taking of samples from these persons are contained in Part 7 of the Act. A primary purpose in obtaining these DNA samples was so that a database of offenders' samples could be created, and then compared to DNA samples obtained from crime scenes. This would provide an important new resource for police when investigating past and future crimes.

Because our review of this aspect of police functions is largely completed, it is appropriate that a report be made at this time. In 2005, a further report will be made focusing on forensic procedures conducted on suspects and volunteers.

Our review has included an analysis of NSW Police and other agencies' policies, an examination of videos of actual DNA forensic procedures conducted on serious indictable offenders, interviews with police, custodial officers and serious indictable offenders, a review of police statistics, an audit of how DNA forensic samples are handled, and an examination of procedures, training and education. Our approach has included raising concerns with NSW Police and other agencies when they are identified, so that problems can be rectified without awaiting our final reports. We believe this approach is in the interest of the community and consistent with Parliament's intention.

We issued a discussion paper in 2001 highlighting our approach and research at that time, and placing the significant issues on the table. In finalising this report, we have considered the responses to that paper. In finalising this report, we have also sought comments from NSW Police, the Department of Corrective Services and other agencies about our views and recommendations.

The report is structured to reflect the process of undertaking a forensic procedure, beginning with pre-sampling issues such as education and legal advice, moving on to the obtaining of consent or authority to obtain a sample, and then examining the actual collection of the DNA sample. We finally consider post sampling issues, such as transporting the sample for analysis, and matters connected with future sampling of serious indictable offenders.

Significant findings

Police have conducted a mass DNA sampling of over 10 000 serious indictable offenders in NSW correctional facilities during the period of our review.

Overall, we are satisfied that NSW Police have conducted this sampling in a fair and reasonable manner. In no small part, this has been due to the use of a small team of police officers who, from the information collected in our review, have conducted the sampling program in a generally professional and appropriate manner.

Another significant contribution has been the back-up provided to this team, both by NSW Police and custodial agencies. In particular, the Department of Corrective Services and NSW Police have adopted a co-operative approach to agree on how testing will be conducted, and providing information to serious indictable offenders about the DNA testing program. Below we outline some specific matters raised in the report

Legislative and procedural matters

Our review has found that the definition of serious indictable offender is not free from doubt – especially as it concerns home detainees and, to a lesser extent, children. We have made recommendations to clarify the application of Part 7 of the Act to these persons. In addition, while we are satisfied that Part 7 enables the mass sampling of serious indictable offenders, the Act is not clear that this was Parliament's intention. We have recommended that this be considered by the Attorney General.

NSW Police and custodial agencies have drafted agreements and procedures to assist in implementing Part 7 of the Act. Our view is that, while draft agreements may have been necessary to provide flexibility at the commencement of the Act, those agreements should now be formalised.

Pre-sampling functions and issues

We have detailed the education provided to serious indictable offenders – we believe this has been key in the successful implementation of the Act. We have observed that some education initiatives, such as the DNA video, have had significant success. We recognise, however, that the success of inmate education will continue to depend on the expertise of custodial officers. We have made recommendations to support their work.

We have closely reviewed the period of notice provided to serious indictable offenders prior to a request being made for the person to consent to a DNA procedure. This was important if the serious indictable offender was to be provided with a real opportunity to contact a legal practitioner for advice. It is acknowledged that when sampling first commenced in 2001, that this period of notice was minimal, but that as sampling progressed, NSW Police and the Department of Corrective Services established better methods of identifying eligible inmates and providing greater notice of the intended sampling date. However, we think that this is an area which would benefit from some agreed minimum period for notice, following consultation with relevant legal representatives (for example, the Prisoners' Legal Service).

Obtaining consent

Our review has convinced us that, in general, the consent provisions in Part 7 mean very little. In short, a serious indictable offender (other than a child or incapable person) is given an opportunity to consent to the carrying out of a forensic procedure. If this is not given, and unless blood is required (which is not usually the case), a senior police officer may order the taking of the sample. The primary criteria, other than that consent has not been given, is that the Act authorises the taking of the forensic sample. In practice, if consent is not given, an order will be made.

Our recommendation is that this consent provision be removed. We have recommended that it be replaced by a provision authorising a police officer to make an order for the taking of a forensic sample from a serious indictable offender (other than a child or incapable person) if the Act authorises the taking of the sample.

We remain of the view that additional safeguards should be in place to protect the interests of children and incapable persons, and that a court order should be required for the taking of a forensic sample from these offenders. However, we believe that the same threshold (that the Act authorises the taking of the sample) should be applied. In addition, because we are concerned that not all incapable persons have been identified prior to the taking of a sample, we have recommended that NSW Police consult with the Guardianship Tribunal to review its present procedures.

If these recommendations are not accepted, we have made some suggestions as to how present anomalies in the Act where samples are provided by consent – as opposed to samples taken following the making of an order - may be rectified. In particular, we have recommended that the information provided to serious indictable offenders prior to asking for consent be simplified. We have also recommended that the same legislative protections apply to all samples taken from serious indictable offenders, whether by consent or order.

Taking the DNA sample

A primary focus of our review has been to examine the sampling process and issues that arise during sampling.

A significant concern about taking DNA samples from serious indictable offenders is the potential for force to be used to obtain the sample if the serious indictable offender will not consent to or comply with the taking of a sample.

Largely, this concern has not been realised in our review. Less than one in every 1000 serious indictable offenders was subjected to the use of force in collecting the sample.

A significant reason for this very low rate of use of force was the adoption by NSW Police and custodial agencies of 'cooling-off' periods to permit serious indictable offenders to rethink whether they would resist the taking of the sample. So successful is this strategy that we have recommended that it be enshrined in the Act.

However, a small number of serious indictable offenders were subjected to force. We have made recommendations that should reduce this number further, and ensure a close review and full accountability of every sampling where force is used. We have also made recommendations to further reduce the prospect of injury to the serious indictable offender, police officers and custodial officers where force is used.

Our review has made recommendations to streamline the collection of samples – such as recommending changes to the Act to permit non-consenting but complying inmates to provide a sample by buccal swab rather than a hair sample. We have also recommended that those serious indictable offenders who are to have hair samples taken, be given the option of deciding the site from which the hairs will be pulled.

We have reviewed hundreds of video recordings of DNA sampling. We made recommendations to improve the recording. For example, we recommended that police video record the opening and the sealing of the tamper evident bags in which DNA samples are placed, so as to provide independent evidence should there be any allegation of contamination or tampering.

Actions after taking the DNA sample

We audited the handling of a number of DNA samples collected from serious indictable offenders. Firstly, we examined how NSW Police transported samples to the DNA laboratory. Secondly, we audited whether NSW Police confirmed the destruction of certain samples not permitted to be taken or required to be destroyed. Thirdly, we compared records of the DNA laboratory and NSW Police for any inconsistencies.

We found that NSW Police had prompt and secure processes for forwarding DNA samples to the laboratory. While we confirmed that samples which should have been destroyed have been, we recommended that NSW Police have in place procedures to ensure this happens in every case.

We also found discrepancies in the records of NSW Police and the DNA laboratory. It is important here to emphasise NSW Police advice that DNA samples from serious indictable offenders are only used for 'intelligence' purposes, and any match between a sample from a serious indictable offender and a crime scene would result in a further DNA sample being taken from the person as a suspect. However, we are concerned that one DNA sample was entered onto the NSW Police COPS computer system in the name of another person. We are also concerned about other anomalies evidently due to poor handwriting. We have recommended that NSW Police and the DNA laboratory conduct internal audits, and that the Attorney General consider external oversight and accountability for records relating to DNA samples.

Future issues

In the final part of the report, we examine issues such as the proposed transfer of DNA sampling of serious indictable offenders from NSW Police to the Department of Corrective Services, the use of DNA to prove innocence, and some early results from the matching of DNA samples with DNA located at crime scenes.

Conclusion

This review has outlined what, in our view, has been a generally successful implementation of new powers by police.

In our next review of the Act, we will focus on the sampling of suspects and volunteers. In addition to closely scrutinising the collection of the DNA samples, we will focus on the records of DNA sampling and analysis.

Summary of Recommendations

Recommendation 1

It is recommended that the Attorney General consider if it was intended that Part 7 of the Act include not only children and young people convicted of, and sentenced to, imprisonment for a serious children's indictable offence, but also for an offence that carries a maximum penalty of 5 or more years' imprisonment. To the extent that this intention is unclear in the present Act, it is recommended that consideration be given to clarifying the application of Part 7 of the Act to children and young people.

Recommendation 2

It is recommended that the Act be amended to provide a definition of 'other place of detention' for the purpose of determining the eligibility of serious indictable offenders subject to forensic procedures under Part 7 of the Act.

Recommendation 3

It is recommended that the Attorney General consider whether Parliament intended Part 7 of the Act include the mass sampling of serious indictable offenders by NSW Police. To the extent that Parliament's intention is unclear in the present Act, it is recommended that consideration be given to clarifying the application of Part 7 to all eligible serious indictable offenders.

Recommendation 4

It is recommended that NSW Police and the Department of Corrective Services (DCS) finalise and formalise their agreement in relation to the forensic DNA sampling of serious indictable offenders as soon as possible.

Recommendation 5

It is recommended that NSW Police and the Department of Juvenile Justice (DJJ) finalise and formalise their agreement in relation to forensic procedures conducted in juvenile detention as soon as possible.

Recommendation 6

It is recommended that the DNA Sampling Education Programs continue to be implemented as part of the forensic DNA sampling of serious indictable offenders.

Recommendation 7

It is recommended that Correctional Centre Liaison Officers (CCLO), Juvenile Detention Officers and Home Detention Supervising Officers be provided, or continue to be provided, with adequate training, time and resources to implement the education programs.

Recommendation 8

It is recommended that every correctional and juvenile justice centre, and every Home Detention supervising officer, ensure that a copy of the Act and related regulations are readily available for staff, inmates and detainees to examine, should they wish to.

Recommendation 9

It is recommended that DCS provide CCLOs with a regularly updated list of serious indictable offences for use during the DNA Sampling Education Program and Pre-Test Interviews.

It is also recommended that a copy of the updated list be kept with the Act and regulations, and be readily available for staff, inmates and detainees to examine.

Recommendation 10

It is recommended that NSW Police, DCS and DJJ provide serious indictable offenders with additional information about:

- the integrity of the DNA samples, including the transportation, storage, analysis and destruction of forensic material
- information about who they can contact about the destruction of their sample.

Key stakeholders should be consulted as part of the development of this information, where appropriate.

Recommendation 11

It is recommended that NSW Police, DCS and DJJ ensure that information provided to serious indictable offenders includes information about appeal rights and avenues of complaint, including any time limitations on the exercise of those rights.

Recommendation 12

It is recommended that DCS provide accurate and timely information to the Inmate Development Committees in NSW correctional centres about the DNA Sampling Education Programs.

Recommendation 13

It is recommended that, wherever possible, serious indictable offenders be provided with the DNA Sampling Education Program information at the time at which they are given notice that they will be asked to provide a DNA sample.

Recommendation 14

It is recommended that NSW Police consult with relevant stakeholders, such as Aboriginal Legal Services, the Prisoners Legal Service, the Children's Legal Service, the NSW Legal Aid Commission and the NSW Combined Community Legal Centres Group, to determine an appropriate period of notice for serious indictable offenders from whom NSW Police plans to collect a DNA sample.

Recommendation 15

It is recommended that NSW Police, DCS, DJJ and the Home Detainees Program amend their Standard Operating Procedures to provide for an appropriate period of notice to be given to serious indictable offenders, wherever reasonably practicable, in order to provide serious indictable offenders with a meaningful opportunity to communicate, or attempt to communicate, with a legal practitioner of their choice.

Recommendation 16

It is recommended that NSW Police, DCS, DJJ and the Home Detainees Program inform serious indictable offenders, legal aid organisations and other legal practitioners of this policy.

Recommendation 17

It is recommended that NSW Police, the DCS and the DJJ continue, where required by s 98 of the Act, to arrange for on-site interpreters, wherever possible and appropriate. It is also recommended that this involve ongoing liaison with the NSW Community Relations Commission, the Deaf Society of NSW and other agencies providing interpreting/signing services to ensure that timely access to on-site interpreters and signers is obtained.

Recommendation 18

It is recommended that the Attorney General consider whether the Act should be amended to prevent interview friends being called as a witness for the prosecution for matters directly relating to the taking of a forensic procedure.

Recommendation 19

It is recommended that the Attorney General urgently prepare a plain English version of the information that is required to be provided to serious indictable offenders by the Act. It is also recommended that the Attorney General consider whether this information should be prescribed by the regulations or included in a Schedule to the Act.

Recommendation 20

It is recommended that the Act be amended to extend the legal protection offered under s 87 to cover all serious indictable offenders whether their sample was obtained by consent, or as a result of a senior police officer order or a court order.

Recommendation 21

It is recommended that the Act be amended to remove the consent provisions for serious indictable offenders. It is also recommended that the Act be amended to provide that forensic procedures (excluding blood samples) carried out under Part 7 of the Act on serious indictable offenders who are not children or incapable persons may be authorised either by a senior police officer or a court order.

Recommendation 22

It is recommended that the Act be amended to allow a person to provide a DNA sample by means of a self-administered buccal swab, if it is authorised by a senior police officer order.

Recommendation 23

It is recommended that the Act be amended to include a requirement for police to provide at least one cooling off period, prior to force being used, to give serious indictable offenders an opportunity to reconsider their decision not to comply with the DNA sampling, and to obtain further information and legal advice.

Recommendation 24

It is recommended that the Act be amended to require that wherever possible, police provide a copy of the record of a senior police officer order or court order to the serious indictable offender before the forensic procedure is carried out.

Recommendation 25

It is recommended that s 74(7) and s 87 of the Act be amended to apply to all forensic material obtained from serious indictable offenders under Part 7 of the Act.

Recommendation 26

It is recommended that NSW Police consult with the Guardianship Tribunal and custodial agencies to review its current processes for identifying serious indictable offenders who may be incapable. These processes should include guidance as to:

- the information to be considered in assessing an inmate's capacity
- factors to be considered in assessing an inmate's capacity
- the role of each agency in this process.

It is further recommended that following this review, and to the extent that any legislative change is required to permit the exchange of information, that this be considered by the Attorney General following consultation with relevant stakeholders including the Privacy Commissioner.

Recommendation 27

It is recommended that NSW Police amend its Standard Operating Procedures (SOPs) for the forensic DNA sampling of serious indictable offenders to include a requirement to electronically record the giving of the caution required by s 46 of the Act.

Recommendation 28

It is recommended that NSW Police amend its SOPs for the forensic DNA sampling of serious indictable offenders to provide for the cautioning of serious indictable offenders to be given after the provision of information and immediately before the forensic DNA sampling, unless it is appropriate because of comments made by the offender, to provide the caution before this time.

Recommendation 29

It is recommended that the Attorney General consider including a reason for the caution required by s 46 of the Act in the plain English version of the information provided to serious indictable offenders about the DNA sampling under Part 7 of the Act.

Recommendation 30

It is recommended that NSW Police amend its SOPs to require police officers to state (for the record) the date and time at the beginning of recorded interactions with serious indictable offenders in relation to DNA sampling.

Recommendation 31

It is recommended that the Act be amended to require that the electronic recording of forensic procedures be both video and audio recorded, unless it is not practicable to do so or the serious indictable offender objects to the recording.

Recommendation 32

It is recommended that NSW Police amend its SOPs to require that wherever possible the opening of DNA sampling kits, the placing of the DNA sample inside the tamper-evident bag and the sealing of the tamper-evident bag is electronically recorded. This should occur even where the forensic sampling itself is not recorded due to the objection of the person being sampled. In this respect, if an amendment is required to s 57 of the Act to permit the taping of this process, we recommend that such an amendment be made.

Recommendation 33

It is recommended that NSW Police liaise with all relevant custodial/supervisory agencies (DCS, DJJ and the Home Detainees Program) to ensure, as far as possible, that the inmate testing areas provided are suitable to meet the video recording requirements of the NSW Police SOPs and the Act.

Recommendation 34

It is recommended that NSW Police amend its SOPs to require Inmate Testing Team (ITT) Leaders ensure that Inmate Testing Areas (ITA) satisfy the requirements of section 44 of the Act.

Recommendation 35

It is recommended that NSW Police amend its SOPs to require, where practicable, ITTs to video record the entire ITA before or after a series of forensic procedures under Part 7 of the Act to provide viewers with a perspective of the ITA used.

Recommendation 36

It is recommended that NSW Police amend its SOPs to require, where practicable, that police conducting the DNA sampling provide the name and place of duty, and explain the role of, all persons present to the person who is the subject of the procedure. This should be done at the beginning of the interaction and be electronically recorded.

Recommendation 37

It is recommended that the Attorney General consider amending the Act to provide that a person can indicate a preference as to the body part from which the hair is taken, for the purpose of forensic DNA analysis.

Recommendation 38

It is recommended that NSW Police amend the SOPs and the information provided to inmates to provide that a person can indicate a preference as to the body part from which the hair is taken, for the purpose of forensic DNA analysis.

Recommendation 39

It is recommended that NSW Police, the DCS, DJJ and the Home Detainees Program amend their standard operating procedures to require officers to:

- review and consider alternatives prior to force being used to carry out, or facilitate the carrying out of, forensic procedures upon inmates and detainees and
- document their consideration of alternatives to the use of force and the reasons why they believe that these options are not practicable in the circumstances.

Recommendation 40

It is recommended that NSW Police, the DCS, DJJ and the Home Detainees Program commence and/or continue to ensure that regular and timely reviews of documents and recordings of the use of force are carried out so as to assess the:

- appropriateness of the use of force
- reasonableness of the use of force
- appropriateness of the methods applied by the officers concerned
- any training needs for the officers concerned.

Recommendation 41

It is recommended that NSW Police and custodial agencies ensure that forensic procedures carried out on non-compliant serious indictable offenders are carried out in an appropriately sized and equipped area, which minimizes the likelihood of injury to ITT members, correctional officers, security/Emergency Response Unit officers and serious indictable offenders.

Recommendation 42

It is recommended that NSW Police review its SOPs to emphasise that, wherever possible, all actions taken by ITT officers, including communication and negotiation with the serious indictable offender, are to be electronically recorded.

Recommendation 43

It is recommended that the DCS amend its SOPs relating to forensic procedures to require officers to identify all persons present and explain each person's role to the person who is the subject of the search, controlled movement, use of force or other actions. This should be done at the beginning of the interaction and be electronically recorded.

Recommendation 44

It is recommended that NSW Police, DCS and DJJ clarify the role of the officers of each agency in the event that force is used to carry out the DNA sampling of serious indictable offenders when finalising their interagency agreements.

The finalised agreements should include a clear statement of the necessary qualifications and experience for officers to be deployed in use of force situations. The information given to serious indictable offenders by the relevant custodial agency to comply with a direction to attend the ITA should also be clarified.

Recommendation 45

It is recommended that NSW Police (and Division of Analytical Laboratories (DAL) if required) conduct internal audits of their records relating to forensic material obtained under the Act to ensure that all information relating to the collection and analysis of DNA samples is consistent and correct.

Recommendation 46

It is recommended that the NSW Attorney General consider implementing, and/or facilitating the implementation of, recommendations 15 to 20 made by the Commonwealth Independent Review as they relate to the functions of the NSW Government.

It is also recommended that:

- the Act be amended to enable the implementation of recommendations 15 to 20 made by the Commonwealth Independent Review, as they relate to NSW
- the NSW Parliament consider establishing a scheme similar to that in the *Law Enforcement (Controlled Operations) Act 1997* and the *Telecommunications (Interception) (New South Wales) Act 1987*, to regulate external audits of records relating to forensic material obtained under the Act.

Recommendation 47

It is recommended that NSW Police review its procedures for ensuring that forensic material required by the Act to be destroyed is destroyed, with particular attention to documentation and the retention of original written confirmations of destruction signed by DAL.

Recommendation 48

It is recommended that the NSW Parliament consider what, if any, regulation is required of the way in which material obtained from forensic procedures may be analysed and compared.

Part A: Background

Chapter 1: Introduction

The Crimes (Forensic Procedures) Act 2000

The *Crimes (Forensic Procedures) Act 2000* (the Act) commenced on 1 January 2001.¹ The Act created new police powers to carry out forensic procedures - such as taking DNA samples - from suspects, volunteers and certain prison inmates and detainees known as 'serious indictable offenders'.

The Act sets out the circumstances in which NSW Police can conduct forensic procedures. Some of the forensic procedures that the Act provides for are:

- taking DNA samples eg saliva, hair or blood
- taking prints eg finger, hand, toe and foot prints
- taking other samples eg swabs from hands or finger nail scrapings
- taking photographs eg of tattoos or scars
- external examinations eg of a person's body to look for injuries or other distinguishing features
- taking impressions and casts eg dental impressions.

The Act also sets out how the forensic material from those procedures may be used and when that material must be destroyed. The Act outlines the rules for NSW's participation in the National Criminal Identification DNA Database.²

The Act incorporated a three-pronged scheme to monitor, review and inquire into its operation.

1. Section 121 of the Act requires that the NSW Ombudsman scrutinise the functions of police under the legislation for two years and then report to the Attorney General, the Minister for Police and the Commissioner for Police. The Attorney General must provide a copy of this report to Parliament.
2. Section 122 of the Act requires the Attorney General (the Minister administering the Act) to review the Act to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate to securing those objectives.
3. Section 123 of the Act requires the Standing Committee on Law and Justice to undertake an inquiry into the operation of the Act, and report to Parliament as soon as possible after 18 months after 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.

1 With the exception of s 121 of the Act, which commenced on the date of assent (5 July 2000) and Part 8, which commenced on 1 June 2003.

2 A DNA database is an organised collection of DNA profiles (eg from suspects, offenders and volunteers) for comparison with other DNA profiles (eg from crime scenes). Many Australian states and territories already have DNA databases. The National Criminal Investigation DNA Database has been established by the Commonwealth CrimTrac Agency to facilitate the sharing of DNA profile information between police throughout Australia.

The role of the NSW Ombudsman

Section 121 of the Act sets out our role. Originally our review period was for a period of two years from the date of assent (5 July 2000). However, Part 8 (which relates to volunteers) did not commence until it was amended by the *Crimes (Forensic Procedures) Amendment Act 2002* (the Amendment Act). In order for us to review the Act as it relates to volunteers, the Amendment Act extended our review period for a period of 18 months from the commencement of Part 8 (1 June 2003). Section 121 of the Act now states:

- 1) *For the period of 18 months after the commencement of Part 8 the Ombudsman is to keep under scrutiny the exercise of the functions conferred on police officers under this Act.*
- 2) *For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.*
- 3) *The Ombudsman must, as soon as practicable after the expiration of that 18-month period, prepare a report of the Ombudsman's work and activities under this section and furnish a copy of the report to the Minister³, the Minister for Police and the Commissioner of Police.*
- 4) *The Ombudsman may identify, and include recommendations in the report to be considered by the Minister about, amendments that might appropriately be made to this Act with respect to the exercise of functions conferred on police officers under this Act.*
- 5) *The Ombudsman may at any time make a special report on any matter arising out of the operation of this Act to the Minister.*
- 6) *The Minister is to lay (or cause to be laid) a copy of any report made or furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.*
- 7) *If a House of Parliament is not sitting when the Minister seeks to furnish a report to it, the Minister may present copies of the report to the Clerk of the House concerned.*
- 8) *The report:*
 - a) *on presentation and for all purposes is taken to have been laid before the House, and*
 - b) *may be printed by authority of the Clerk of the House, and*
 - c) *if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and*
 - d) *is to be recorded:*
 - (i) *in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and*
 - (ii) *in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,*

on the first sitting day of the House after receipt of the report by the Clerk.

This document reports on our work and activities scrutinising the implementation of Part 7 of the Act, which deals with the obtaining of DNA samples from serious indictable offenders. It documents our activities carried out under this section, identifies issues that have arisen and recommends some changes to legislation, policies and procedures.

3 The Minister who has responsibility for the administration of the Act is the NSW Attorney General.

Forensic DNA sampling of serious indictable offenders

In NSW, DNA and certain other forensic samples can be obtained from inmates and detainees who are serving a sentence of imprisonment for a 'serious indictable offence'. A serious indictable offence is defined in the Act as an offence that carries a maximum penalty of 5 years (or more) imprisonment. Inmates and detainees convicted of a serious indictable offence are referred to by the Act and throughout this report as 'serious indictable offenders'.⁴ If a serious indictable offender does not consent to the DNA sampling, police can apply for either a 'senior police officer order' or a court order to authorise the sampling.

The DNA profiles obtained from these samples can be placed on a DNA database. The database facilitates the comparison of these profiles with DNA profiles obtained from samples found at crime scenes.

Since the commencement of the Act in January 2001, NSW Police have attempted to obtain DNA samples from all serious indictable offenders in order to build a substantial archive of profiles for the DNA database. NSW Police anticipates that this 'mass sampling' of serious indictable offenders will provide a valuable tool to assist in the investigation of crimes and increase the speed at which crimes are solved.

People who have been convicted of serious indictable offences make up approximately 75% of the NSW prison population. During our first review period⁵ (1 January 2001 to 5 July 2002), NSW Police obtained DNA samples from:

- 9,952 prisoners in adult correctional centres
- 49 detainees in juvenile detention centres
- 402 detainees in periodic detention centres.

Our approach

In contrast to the other reviews of the Act, which were required to examine broader issues such as the policy objectives and social and legal implications of the Act⁶, our role is to focus upon the actual implementation of the new police powers, scrutinising the functions of police under the Act. In order to do this, we obtained information directly from the people subject to forensic procedures, and the people responsible for coordinating and carrying out the forensic procedures. In this sense, our review describes and analyses the logistics of the implementation of the Act.

The Act creates different police powers in relation to different people and different circumstances. The issues relating to forensic procedures carried out on suspects and volunteers vary considerably from those arising from the forensic DNA sampling of serious indictable offenders. For this reason we decided to examine Part 7 of the Act separately.

We met regularly with the NSW Police Forensic Procedures Implementation Team (FPIT) and used this forum as an opportunity to identify areas where improvements could be made. We found that there was a genuine commitment from NSW Police to address any areas of concern.

We have made some recommendations for changes to the forensic procedures legislation and the involved agencies' policies and practices. These recommendations focus upon the formalising of policies, promoting consistency in practice, and build upon the valuable initiatives introduced by the agencies involved in implementing the legislation.

4 A person who has been sentenced to a period of imprisonment that is less than five years is still considered to be a 'serious indictable offender' if the offence they have been convicted of carries a maximum penalty of 5 years or more imprisonment.

5 Our review period is discussed above in 'The Role of the NSW Ombudsman'.

6 More detailed information about these and other reviews of forensic procedures legislation can be found in Chapter 2.

Public confidence in forensic DNA sampling and DNA databases will largely depend upon the transparency and accountability of the functions and activities involved. For this reason we discuss the recommendations relating to the oversight and accountability of forensic DNA sampling by the Commonwealth's Independent Review of Part 1D of the *Crimes Act 1914 – Forensic Procedures*.⁷

We acknowledge the cooperation of NSW Police, Department of Corrective Services (DCS), Department of Juvenile Justice (DJJ) and the Division of Analytical Laboratories, NSW Health (DAL) in providing us with the information we required to carry out our role. We are particularly grateful to a number of individuals who were extremely helpful, and have acknowledged them separately.⁸

Structure of this report

This report describes how police obtain DNA samples from serious indictable offenders. Following our discussion of the background to the Act, the other Australian reviews of forensic procedures legislation and our methodology, the structure of this report is based as far as possible upon the sequence of the functions, actions and issues that occur during the forensic DNA sampling of serious indictable offenders under Part 7 of the Act. These functions and activities are summarised in the flowchart at the start of Part B.⁹

The parts of the report are:

Part A – Background

Part A establishes the context for the legislation and our review. The approach and findings of other reviews of the Act and similar legislation are discussed. Our methodology is outlined.

Part B – Framework

Chapter 5 discusses which people can be subject to forensic procedures under Part 7 of the Act, and canvasses issues relating to children and home detainees. Chapter 6 explains the arrangements between NSW Police who carry out the sampling, and the relevant custodial agencies that are responsible for the care and control of serious indictable offenders.

Part C – Pre-sampling functions and issues

Chapters 7 and 8 discuss how serious indictable offenders are prepared for the DNA sampling by the relevant custodial agencies. It examines the experiences of serious indictable offenders in relation to the amount of notice and the type of information they were provided with, and their rights to obtain legal advice and have an interview friend and/or legal representative present during the sampling.

Part D – Obtaining consent or orders to authorise the DNA sampling

Part D discusses the different types of authority that are required to obtain DNA samples from serious indictable offenders. Chapter 11 examines the issue of informed consent. Chapter 12 discusses the compulsory nature of the DNA sampling and the factors that may influence the consent of serious indictable offenders. Chapter 13 discusses the authorisation requirements for DNA sampling serious indictable offenders who are children or who are incapable of consenting.

7 Commonwealth of Australia, *Report of the Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003.

8 See 'Acknowledgments'.

9 Flowchart: Taking DNA Samples from Serious Indictable Offenders at page 25.

Part E - Sampling functions and issues

This section of the report deals with the functions involved in carrying out the forensic procedures. We discuss the way in which police undertake their obligations to caution serious indictable offenders before the sampling, electronically record the forensic procedure and ensure reasonable privacy. We also examine the way in which different DNA samples (buccal swabs, hair and blood samples) are obtained. Chapter 18 discusses the way in which force has been used to obtain DNA samples from serious indictable offenders who refuse to comply with an order by a senior police officer or court. Chapter 19 examines the integrity of DNA samples taken from serious indictable offenders.

Part F – Post-sampling functions and issues

Part F deals with the functions of police officers after the samples have been taken from serious indictable offenders. We examine how the samples are transported to the DNA laboratory and the importance of accurate and timely recording of information about the DNA sampling. We also explain the obligations of NSW Police to destroy certain information about the DNA sampling in particular circumstances, and how we monitored this responsibility. Chapter 22 discusses the way in which NSW Police meet their obligation to provide serious indictable offenders with access to certain information about the DNA sampling.

Part G – The future of the DNA sampling of serious indictable offenders

Chapter 23 examines proposals to transfer the DNA sampling of serious indictable offenders from NSW Police to DCS. Chapter 24 discusses the use of DNA to prove innocence. Chapter 25 reports on the number of DNA database links, charges and prosecutions since the commencement of the Act.

For each stage of the process, we examine what the Act says, how NSW Police (and the other relevant agencies) have implemented the requirements of the Act and how we monitored the implementation of those parts of the Act. We then discuss the issues that were raised in relation to those functions and activities and the way in which NSW Police and the other relevant agencies dealt with those issues. Where appropriate, we have recommended changes to the Act or its implementation.

Timing of this report

Although forensic science has been used to assist in the investigation of crime for many years, the introduction of laws to allow police to take, compare and retain body samples from broad categories of people is a rapidly evolving phenomenon.

At the time of writing, more than 60 amendments had been made to the NSW legislation relating to forensic procedures since the commencement of our review.

The Act has been amended by:

Statute Law (Miscellaneous Provisions) Act (No 2) 2000

Crimes Legislation Further Amendment Act 2000

Crimes Legislation Amendment (Penalty Notice Offences) Act 2002

Crimes (Forensic Procedures) Amendment Act 2002.

The Crimes (Forensic Procedures) Regulation 2000 (the Regulation) has been amended by:

Crimes (Forensic Procedures) Amendment Regulation 2001

Crimes (Forensic Procedures) Amendment Regulation 2002

Crimes (Forensic Procedures) Amendment (Corresponding Laws) Regulation 2002

Crimes (Forensic Procedures) Amendment (Informed Consent) Regulation 2002

Crimes (Forensic Procedures) Amendment (Disclosure of Information) Regulation 2003

Crimes (Forensic Procedures) Amendment (Informed Consent) Regulation 2003.

In addition, the Innocence Panel – a panel of experts whose role is to enable DNA testing for people who have been convicted of crimes and believe that DNA evidence may help them to prove their innocence - has been established and suspended¹⁰, Australian states and territories are still negotiating the extent of their participation in the National Criminal Investigation DNA Database (NCIDD) and the Premier has announced that the powers to obtain DNA samples from serious indictable offenders would be increased and partially transferred to the DCS.¹¹

The framework in which forensic procedures are carried out is clearly in a state of change.

Whilst these factors did not directly affect our review of Part 7 of the Act, some created uncertainty about the scope of our review at different times in our review period. For example, the commencement of Part 8 of the Act relating to volunteers was postponed in order to address specific issues relating to victims. The *Crimes (Forensic Procedures) Amendment Act 2002* made significant amendments to Part 8 and aimed to address these issues, but its commencement was delayed in order for NSW Police to consult with victims groups and develop appropriate procedures for carrying out forensic procedures on victims of personal violence.

In light of these issues, we decided to report upon the forensic DNA sampling of serious indictable offenders under Part 7 of the Act separately.

Next phase of our review

The next phase of our review will focus upon forensic procedures carried out on suspects and volunteers. This will allow us to more comprehensively review police functions under those Parts of the Act, including the legislative amendments and other changes that have been made.

To date we have carried out a pilot audit of forensic procedures conducted on suspects and the next phase of our review will include comprehensive audits of police records in relation to suspects and volunteers. We will also continue to monitor the use and destruction of DNA profile information.

At the end of our second review period, we will report on our activities, findings and any recommendations for change relating to forensic procedures carried out on suspects and volunteers.

10 Stephen Gibbs, 'Appeal panel shut down after Balding killer's action', *Sydney Morning Herald*, 12 August 2003; Saunders, M, 'Prison "innocence panel" on hold', *The Australian*, 12 August 2003.

11 Australian Labor Party (NSW Branch), *Bob Carr and NSW Labor...getting on with the job, Criminal Investigation and DNA Labor's Public Safety Plan: Stage One*, (Policy for the 2003 State Election) p1.

Chapter 2: DNA and Criminal Investigations

This report documents the Ombudsman's scrutiny of the way in which NSW Police have carried out forensic procedures on serious indictable offenders under Part 7 of the Act.

This chapter provides a background to the Act, including the:

- significance of forensic DNA evidence
- international context
- national context
- NSW legislation
- implementation of Part 7 of the Act by NSW Police
- role of the Ombudsman.

What is a forensic procedure?

A forensic procedure is a way to obtain evidence that relates to the investigation and prosecution of crime. The Act authorises a variety of forensic procedures, including:

- taking DNA samples eg saliva, hair or blood
- taking prints eg finger, hand, toe and foot prints
- taking other samples eg swabs from hands or finger nail scrapings
- taking photographs eg of tattoos or scars
- external examinations eg of a person's body to look for injuries or other distinguishing features
- taking impressions and casts eg dental impressions.

The Act divides the different forensic procedures into three categories: 'intimate', 'non-intimate' and 'buccal swabs'. Police must fulfil different requirements depending on the category of the forensic procedure they want to use.

NSW Police has used Part 7 of the Act to obtain DNA samples from serious indictable offenders. DNA samples can be obtained by:

- taking a sample of blood (intimate forensic procedure)
- taking a sample of hair (non-intimate forensic procedure) or
- obtaining mouth and cheek cells (buccal swab).

What is DNA?

DNA stands for 'deoxyribonucleic acid'. There are two types of DNA: mitochondrial DNA and nuclear DNA.

Mitochondrial DNA

A person inherits mitochondrial DNA only from her or his biological mother. Mitochondrial DNA will be the same in all people who share the same maternal genetic material. For example, siblings who have the same biological mother will all have the same mitochondrial DNA.¹²

Nuclear DNA

In contrast, nuclear DNA is inherited in different combinations from both biological parents, and therefore more combinations are possible. It is believed that - with the exception of identical twins - the possibility of two people having exactly the same nuclear DNA is extremely unlikely.¹³ For this reason, the preferred type of DNA for establishing identity is nuclear DNA. DNA databases use mainly nuclear DNA - DNA obtained from the nucleus of a cell.

Most cells in the human body contain a nucleus.¹⁴ Inside the nucleus are strands of genetic material called chromosomes. Arranged along these chromosomes, like beads on a thread, are nearly 100,000 genes.¹⁵ Each gene is composed of DNA, which is often described as 'the blueprint of life'.

This genetic or 'coding' DNA instructs the body cells to make proteins that determine everything from hair colour to our susceptibility to diseases. There is very little difference in these coding areas of DNA between different people. It has been estimated that 99.9% of a person's DNA is the same as the DNA in all other human beings.¹⁶

Some areas of the DNA, found between the coding DNA, are made up of DNA that does not code for physical features or chemical processes. Scientists have not yet identified the function of these non-coding regions, although they have discovered that these areas of DNA vary extensively from person to person. It is this variability that provides the basis for distinguishing between individuals through DNA profiling.

What is a DNA profile?

The areas of DNA that are non-coding have been labelled 'junk' DNA. Current scientific knowledge cannot use junk DNA to identify the physical features of a person, such as their race, hair colour, eye colour, or height. DNA profiles consist of a list of the variations obtained from certain sites (called loci) on the junk DNA plus the sex gene (XX for female, XY for male).

The areas on the junk DNA that are examined are called Short Tandem Repeats (STRs). These are small sections of DNA that are repeated end on end. Different people have a different number of repeats, and therefore have different lengths of DNA. Analysing and measuring the different lengths of DNA at these sites is the basis of DNA profiling.¹⁷

12 Richard Saferstein, *Criminalistics: An Introduction to Forensic Science*, Seventh Edition, Prentice Hall, New Jersey, 2001.

13 Robert Goetz, 'DNA For Lawyers: Unravelling the Mystery', Paper presented at the Sixth International Conference and General Meeting of the International Association of Prosecutors, Sydney, 2-7 September 2001.

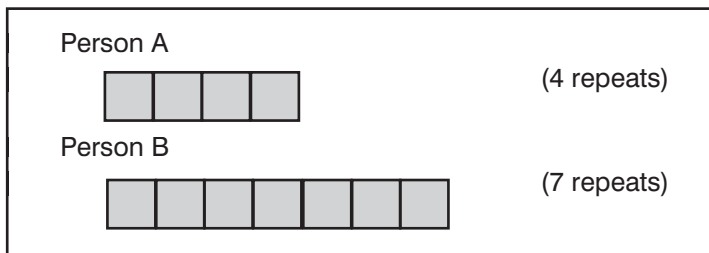
14 The main exception is red blood cells.

15 Saferstein, Op. Cit.

16 Roger Highfield, "DNA survey finds all humans are 99.9% the same", <http://www.telegraph.co.uk/news>, 20 December 2002.

17 NSW Police, Forensic Services Group, DNA Sampling, presentation, 2001.

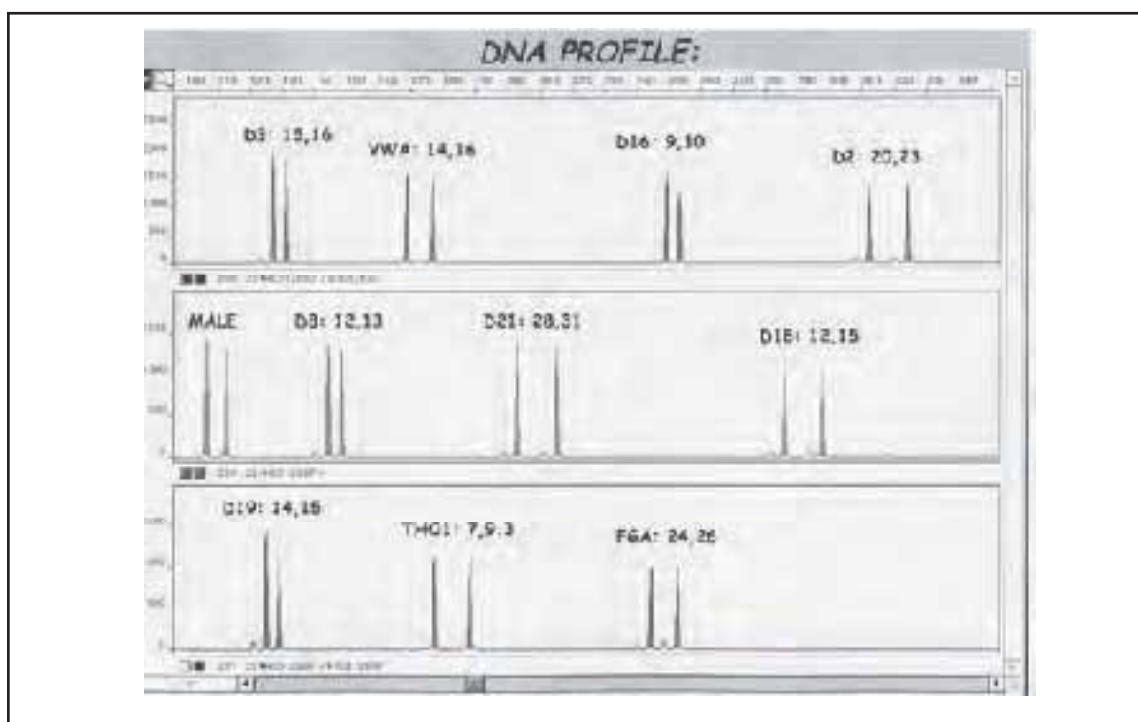
Figure 2.1: Visual representation of short tandem repeats



Source: NSW Police Forensic Procedures Implementation Team (FPIT).

A DNA profile is usually presented as a list of numbers and letters based on the number of short tandem repeats found at each relevant locus. The following diagrams show what a DNA profile could look like.

Figure 2.2: DNA Profile



Source: The Forensic Science Service, UK.¹⁸

Figure 2.3: DNA Profile

Name of Locus (region of DNA)	D3S1358	vWA	FGA	Amelogenin (sex)	D18S51	D21S11	D18S51	D5S818	D13S317	D7S820
Profile	15, 16	14, 17	21, 21	X, Y	11, 14	29, 30	14, 16	12, 13	8, 10	10, 10

Source: Goetz.¹⁹

¹⁸ <http://www.forensic.gov.uk/forensic/entry.htm>.

¹⁹ Goetz. Op. Cit.

DNA profiles are compared to other DNA profiles obtained from crime scenes, suspects, offenders and volunteers, in order to identify possible links between people and offences.

DNA laboratories in all Australian jurisdictions use the 'Profiler Plus' system of DNA profiling.²⁰

Forensic scientists do not examine the whole DNA, but only a certain number of loci on the DNA. A match between a person's DNA profile and a DNA profile found at a crime scene represents only a chance or probability that the two samples came from the same person.

In a recent case, forensic experts gave evidence that the probability that the DNA profile in question came from a person randomly selected from the population, as opposed to from the suspect, was 90 billion to one.²¹

The significance of forensic DNA evidence

'Forensic' DNA evidence relates to the use of DNA profiles for the investigation and prosecution of crime. DNA can also be used for other purposes such as medical research or determining biological parentage.

All DNA extracted from the nucleus of any cell from the one person is the same, whether it is taken from white blood cells, hair root cells or cells from the inside of a person's mouth. A person's DNA remains the same throughout their life. This means, for example, that the DNA from blood or other biological material found at a crime scene can be compared with the DNA taken from a person's mouth or hair to determine whether the blood at the crime scene is likely to have come from that person.

DNA evidence is 'circumstantial' evidence.²² The fact that a person's DNA matches that found at a crime scene is not necessarily significant. For example, the person may have a legitimate reason for having been at that place or they may have visited the place, leaving their DNA at the scene, long before the crime was committed. It is also possible that their DNA may have been transferred to the scene without them having physically been there, such as by another person (either unintentionally or deliberately).

Police use DNA profiling and DNA databases during investigations to link persons to crime scenes. DNA can also be helpful during the investigation stage to exclude people as suspects, thereby preventing unnecessary investigations and saving valuable police resources.

DNA evidence has been used as a tool in many high profile criminal investigations, including the identification of Bali bombing victims, the 'Backpacker Murders Case'²³, the investigation of the attempted extortion of Arnotts Biscuits and the investigation into the disappearance of English backpacker, Peter Falconio.

The Australian Federal Police has reported successes in linking DNA found at 10 to 15 different burglaries to a suspect through a matching DNA profile.²⁴ DNA profiles have also been obtained from some unusual samples, including an apple core, a smudged fingerprint, dentures, a half-eaten sausage roll, and a false fingernail from a burglary scene.²⁵

20 The scope of this report does not allow a comprehensive discussion of how DNA profiles are obtained. Readers can obtain a description of the profiling process used in NSW from the decision in *R v Gallagher*, judgement of Barr J., [2001] NSWSC 462.

21 *R v Karger* [2002] SASC 294 Court of Criminal Appeal (Doyle CJ, Prior & Gray JJ).

22 Circumstantial evidence is evidence of a fact (or facts) from which the decision maker is asked to conclude that a further fact existed. Circumstantial evidence is sometimes contrasted with direct evidence, which is evidence given by a person that s/he actually saw, heard or otherwise perceived that a particular fact existed.

23 *R v Milat* (NSW Sup Ct, No 70114/1994, Hunt CJ at CL, 22 April 1996, unreported).

24 Julie Sutton, 'DNA Profiling: present capabilities and future developments', *Platypus: The Journal of the Australian Federal Police*, No 72, September 2001 at 11.

25 Sutton, J, *Ibid*.

Napper, A National DNA Database: The United Kingdom Experience²⁶

Extract

In November 1983 a 15 year old schoolgirl, Lynda Mann, was raped and murdered in Leicester, England. The killer was never caught. Three years later another 15 year old, Dawn Ashworth, was also raped and murdered within one mile of where Lynda Mann's body was found. Police believed that they were looking for the same murderer and stepped up their investigations in the wake of the second murder.

Subsequently a 17 year old youth, Richard Buckland, was arrested in 1986 and confessed to the murder of Dawn Ashworth, however he denied any involvement in the first murder of Lynda Mann. So determined were the detectives to prove that the same person had killed both girls that they looked for ways to link Buckland to the Lynda Mann murder. The head of the investigation had heard of the work of Professor Alec Jeffreys at the local Leicester University. Professor Jeffreys was undertaking long term research into diseases caused by mistakes in our DNA, and had developed a more sophisticated blood test than had hitherto been available. The police asked for Professor Jeffreys' help to link Buckland to both murders.

Professor Jeffreys really stunned the detectives. Far from linking Buckland to either murder, his results cleared him of both murders. Furthermore, he did indicate that the same person had killed both girls – but it was not Buckland. Why Buckland had confessed in the first place has never been established. Professor Jeffreys went on to tell the police that if they identified the killer and could supply a blood sample from him he was confident his test could confirm the fact for them.

The police then launched their first mass screen by taking blood from 600 men in three small villages that surrounded the murder sites. During the course of this exercise a local baker, Colin Pitchfork, persuaded a friend to stand in for him during the blood tests. He even altered his passport, which the friend used as identification, telling him he did not want his wife to find out that he was having an affair. This deception was discovered when the friend told somebody at work and they alerted the police. Pitchfork was interviewed and a blood sample taken. It was sent to Professor Jeffreys. He confirmed that Pitchfork was the killer. Pitchfork was later sentenced to life imprisonment for the two murders. The age of DNA in crime investigation had begun.

Forensic DNA sampling has the potential to affect many aspects of the criminal justice system. We note that the draft Criminal Appeal Amendment (Double Jeopardy) Bill 2003 was released recently for public comment.²⁷ One of the objectives of this proposed law is to enable a person acquitted of an offence to be retried (in some cases) if there is 'fresh and compelling evidence of guilt'.²⁸ In February 2003, the Premier proposed that consideration be given to the legislative overturning of the double jeopardy rule in cases 'where compelling new evidence, such as DNA, comes to light after acquittal'. The Premier stated 'it is the arrival on the scene of DNA more than any other factor that has driven this process'.²⁹

International Context

In 1995 the UK set up the first national DNA database for the purpose of comparing DNA profiles obtained from crime scenes with those obtained from suspects and convicted offenders. Since that time police in many jurisdictions have established reference databases of DNA profiles from offenders with which they can compare DNA profiles obtained from crime scenes.

26 Robin Napper, R, "A National DNA Database: The United Kingdom Experience", *Australian Journal of Forensic Sciences*, Vol 32, 2000, pp 65-66.

27 Consultation Draft Bill: Criminal Appeal Amendment (Double Jeopardy) Bill 2003, 3 September 2003.

28 Explanatory Note, Criminal Appeal Amendment (Double Jeopardy) Bill 2003.

29 The Hon. R Carr MP, NSWPD, Legislative Assembly, 3 September 2003 p 3076.

In 1998 Interpol (the International Criminal Police Organisation) passed a resolution to adopt guidelines promoting the 'harmonization of the use of DNA technique worldwide', and emphasising that 'national DNA databases of offenders and crime scene stains should be as comprehensive as possible, within the existing legislative limits, both nationally and internationally'.³⁰ Australia has been a member country of Interpol since 1948.³¹

The FBI set up the National DNA Index System in the USA in 1998. This database aimed to enable city, county, state and federal law enforcement agencies to compare DNA profiles electronically.

During the three years between 1999 and 2002, the number of countries with an operational DNA database increased by 14% to 41. In 2002 a further 27 countries reported plans to implement a DNA database.³²

National Context

In 1998 the Commonwealth Government committed \$50m to establish the 'CrimTrac Agency', a central element of which was the creation of a national DNA database. The CrimTrac Agency aims to support Australian police services through the provision of national information systems and investigative tools.

In Australia, the constitutional arrangement is such that the general criminal law is a matter for the states and territories rather than a matter for the Commonwealth. This system has resulted in some significant differences in the various criminal laws of the states and territories.³³

In order to develop an Australian National DNA Database, it was important to try to ensure that the laws regulating the sharing of database information between the different states and territories were compatible.³⁴ Since 1991 a national committee³⁵ consisting of representatives from most Australian jurisdictions has been working on a national criminal code. One of the tasks of the committee was to develop a 'model forensic procedures bill' for adoption by all Australian jurisdictions. The adoption of the model bill would ensure consistency in the laws relating to forensic procedures across Australian jurisdictions. This would overcome major obstacles to sharing DNA database information. In February 2000 the committee released the final draft of the Model Forensic Procedures Bill (hereafter, the Model Bill).³⁶

However, through the parliamentary process of law making, all jurisdictions departed from the Model Bill to a greater or lesser extent. NSW is considered to be one of the few jurisdictions in which the forensic procedures legislation is largely consistent with the Model Bill.³⁷ The effect of these legislative variations has resulted in the stalling of the operation of the National Criminal Investigation DNA Database. This is because it is not clear whether information obtained from forensic procedures can be legally shared between jurisdictions with such different laws governing the taking of forensic DNA samples. This issue falls outside the scope of this review and has been examined in detail in other publications.³⁸

30 ICPO Interpol – General Assembly, 67th Session, Resolution No AGN/67/RES/8.

31 'Interpol Grows Towards Next Millennium', *Platypus*, June 1999.

32 These figures relate only to Interpol Member States. Interpol DNA Unit, *Global DNA Database Inquiry: Results and Analysis 2002*, ICPO Interpol, General Secretariat, 2003.

33 Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', 26(3) *Criminal Law Review* 152 (2002).

34 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), *Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, preface at 11.

35 The National Model Criminal Code Officers Committee, which consists of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. The National Model Criminal Code Officers Committee (or MCCOC) is a sub-committee of the Standing Committee of Attorneys-General.

36 MCCOC. Op. Cit. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill – DNA Database Provisions – Explanatory Notes*, February 2000.

37 Standing Committee on Law and Justice, Report No 18: *Review of the Crimes (Forensic Procedures) Act 2000*, February 2002; Australian Law Reform Commission and the National Health and Medical Research Council (ALRC/NHMRC), *Discussion Paper 66: Protection of Human Genetic Information*, August 2002.

38 See for example, ALRC/NHMRC, Op. Cit. and *Report of the Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003.

NSW context - before the *Crimes (Forensic Procedures) Act 2000*

Prior to the 1995 decision in *Fernando v Commissioner of Police*³⁹, it was thought that the police in NSW could legally take blood samples from people accused of offences without their consent. However, the NSW Court of Appeal decided that neither the *Crimes Act 1900* (as it was written at that time) nor the common law authorised the taking of forensic samples, without consent, from accused persons.

In response, the NSW Parliament amended the *Crimes Act* to provide for the taking of blood, hair and saliva samples from accused persons who are 'in lawful custody upon a charge' without their consent. This was intended to be an interim measure until a new law was drafted that dealt with this issue and the National DNA Database.⁴⁰

The NSW *Crimes (Forensic Procedures) Act 2000*

The *Crimes (Forensic Procedures) Bill 2000* was introduced into the NSW Parliament in May 2000. The amended bill was passed and assented to on 5 July 2000. Most of the provisions in the NSW Act came into operation on 1 January 2001.⁴¹

During the second reading debates, some NSW parliamentarians hailed the Act as 'probably the most important legislation to come before the House this session.'⁴² Members of both houses were impressed by the impact of the UK DNA database upon the clear-up rates of crimes. For example, the Leader of the Opposition in the Legislative Council stated:

*The figures from the United Kingdom speak for themselves: DNA testing has assisted to solve more than 212 murders, 868 sexual assaults, 479 serious robberies and 34 murders that were previously recorded as unsolved. The paper presented to the Sydney Forensic Society states that police now have 740,000 suspected (sic) samples with a hit rate of 92 per cent. In fact, some 400 crimes are solved each week using DNA testing.*⁴³

However, many members expressed some concern about the Act. Some concerns related to the breadth of the legislation, including the number of suspects and volunteers that would be subject to DNA sampling.⁴⁴ Other concerns related to the sampling being carried out by police, and the potential for perceived bias or corruption by police who are also responsible for the investigation of crimes.⁴⁵ Some members expressed the view that magistrates, not police, should be authorised to order compulsory forensic procedures upon a non-consenting person:

*If police have the power to authorise DNA testing, all semblance of fair, impartial and independent administration of DNA testing will be lost.*⁴⁶

It was partly due to the concerns raised by members of Parliament that the Act ultimately provided for three oversight mechanisms⁴⁷:

- an inquiry by the Standing Committee on Law and Justice (s 123)
- a review by the Attorney General (s 122)
- the scrutiny of police functions under the Act by the NSW Ombudsman (s 121).

39 *Fernando v Commissioner of Police* (1995) 36 NSWLR 657 (78 A Crim R 64)

40 The Hon J W Shaw, MLC, , NSWPD, Legislative Council, 20 June 2000 p 7101.

41 The exceptions were section 121 relating to the NSW Ombudsman's role, which commenced operation on the date of assent, and Part 8 of the Act relating to volunteers. Part 8, which was amended by the *Crimes (Forensic Procedures) Amendment Act 2002*, commenced on 1 June 2003.

42 For example, Mr M Richardson MP, NSWPD, Legislative Assembly, 7 June 2000 p 6736.

43 The Hon. M J Gallacher MLC, NSWPD Legislative Council, 21 June 2000 p 7275.

44 For example, Mr Richardson MP NSWPD, 7 June 2000 p 6738.

45 The Hon R S L Jones MLC , NSWPD, Legislative Council, 28 June 2000 p 7658.

46 Ms L Rhiannon NSWPD, Legislative Council, 28 June 2000 p 7662.

47 See, for example, NSWPD, Legislative Council 28 June 2000, p 7678; NSWPD, Legislative Assembly, 8 June 2000 p 6917.

Implementation of Part 7 of the *Crimes (Forensic Procedures) Act 2000* by NSW Police

The Act received assent on 5 July 2000, and the new police powers came into effect in January 2001.

Throughout 2000, NSW Police concentrated its resources on managing the Sydney Olympics. Almost 5,000 sworn officers were dedicated to work on the preparations for, and the period of, the Olympics.⁴⁸

There were just over two months between the end of the Olympic/Paralympic period and the commencement of the DNA sampling of serious indictable offenders. During this time NSW Police prepared interagency agreements with NSW Health and DCS, drafted policies and procedures for the DNA sampling, obtained appropriate DNA sampling equipment and trained relevant staff.

The Forensic Procedures Implementation Team (FPIT) is part of the Forensic Services Group and was established to support the operational implementation of the Act within the NSW Police Service.

The role of FPIT includes:

- developing Standard Operating Procedures (SOPS)
- coordinating the DNA testing of serious indictable offender inmates within NSW correctional centres
- establishing, implementing and monitoring quality control mechanisms for both suspect and inmate forensic testing
- developing and monitoring the operation of the Memorandum of Understanding between the Police Service and the Division of Analytical Laboratories and the Department of Corrective Services
- monitoring the uploading of profiles to the CrimTrac database, the dissemination of matches and the destruction of samples/profiles as required
- providing support and timely advice to operational police through the Forensic Procedures Help-Line
- establishing and maintaining a Forensic Procedures Intranet Website
- developing and implementing systems and processes to support the exchange of DNA matching information.⁴⁹

NSW Police decided that Operational Support Group (OSG) officers⁵⁰ would conduct the DNA sampling of serious indictable offenders due to their training and experience in dealing with both volatile situations and prisoners in correctional and juvenile justice environments. These officers constituted the Inmate Testing Teams (ITTs), and were crucial to the successful implementation of the DNA sampling of serious indictable offenders.

Initially, there were four ITTs – each consisting of four police officers from OSG. These teams travelled to all the correctional centres in NSW taking DNA samples from eligible inmates and detainees. As time progressed, there were fewer serious indictable offenders in the correctional system who had not provided a DNA sample for the purpose of the DNA database. NSW Police reduced the number of ITT officers accordingly and by January 2003, there were only two dedicated ITT officers for the forensic DNA sampling of serious indictable offenders.

During the training of the ITTs, DCS emphasised the importance of carrying out the DNA sampling ‘as if you were conducting the forensic procedure in someone else’s home’.⁵¹ NSW Police policies and procedures aimed to reflect this approach. For example, the OSG officers were required to swap their blue overalls and boots for plain clothes and name badges when conducting compliant sampling.⁵²

The DNA sampling of serious indictable offenders commenced on 8 January 2001.

48 NSW Police, *Annual Report, 2000-2001*.

49 Forensic Procedures Implementation Team page, NSW Police Intranet (as at August 2003).

50 The Operational Support Group provides 24-hour operational support to Local Area Commands in emergency situations or events involving large crowds.

51 Tom McLoughlin, Department of Corrective Services, Training provided to ITTs, Westmead, 5 December 2000.

52 Compliant sampling is defined as any DNA sampling where the inmate does not physically resist the procedure, regardless of whether he or she has consented to it.

Chapter 3: Other reviews of forensic procedures legislation

As stated earlier, our role was to ‘keep under scrutiny the exercise of the functions conferred on police officers’ under the Act. Because the Act raises different issues relating to serious indictable offenders than those affecting suspects and volunteers, and because NSW Police initially focused upon the DNA sampling of serious indictable offenders, we decided to examine and report on the implementation of Part 7 of the Act first.

NSW Legislative Council Standing Committee on Law and Justice⁵³

To address concerns about the scope and operation of the proposed Act, the Crimes (Forensic Procedures) Bill 2000 was amended to require the Legislative Council Standing Committee on Law and Justice (the Standing Committee) to inquire into the operation of the Act and report to Parliament as soon as possible after the end of the period of 18 months from the date of assent.

In particular, the Standing Committee was asked to look at:

- the relevant provisions of the Model Forensic Procedures Bill
- the wider social and legal implications of use of information from matching DNA profiles obtained from forensic material
- the effectiveness of matching DNA profiles as an investigative tool
- the reliability of the matching of DNA profiles for the purposes of forensic identification.

The Standing Committee was also tasked with considering any additional safeguards that might be put in place to protect the civil liberties and privacy of persons on whom forensic procedures might be carried out. The review was conducted over 2000 and 2001, and the report was tabled in February 2002.

The Chair of the Standing Committee, The Hon. Ron Dyer MLC, said that the focus of the inquiry was the:

*reliability and effectiveness of DNA evidence, and the legal and social implications of its use in criminal investigations.*⁵⁴

The Standing Committee considered it important to emphasise that DNA profiling had its limitations and that of itself, DNA profiling cannot sustain a conclusion that the suspect is the offender. It highlighted the risks of laboratory errors, contamination and tampering. In response to these concerns, the Standing Committee heard evidence from NSW Police on processes to minimise the likelihood of DNA evidence being tampered with to make a case against an offender. While the Standing Committee acknowledged the value of DNA in association with other evidence, it expressed the opinion that a conviction based solely on DNA would be unsafe, and recommended that the Attorney General consider requiring judges to warn juries of this risk.

The Standing Committee considered that it was unqualified to reach a definitive view on the impact and effectiveness of DNA matching, and felt that this was a matter that would best be followed up by the Bureau of Crimes Statistics and Research (BOCSAR). The Standing Committee accepted that there were concerns about the impact of DNA testing and matching on such fundamental legal rights as the right to silence; the privilege against self-incrimination; the right to privacy; and the right to a fair trial. The Standing Committee recommended that such issues be addressed through judicial and legal education to ensure that lawyers and judges were aware of the impact of forensic evidence on these principles.

53 NSW Legislative Council Standing Committee on Law and Justice (“Standing Committee”), *Review of the Crimes (Forensic Procedures) Act 2000*, Parliamentary Paper No 1118, February 2002. This summary was approved by the Standing Committee on 25 November 2003.

54 The Hon. Ron Dyer MLC. NSWPD, Legislative Council, 13 March 2002. p. 298.

The Standing Committee considered the thresholds required to obtain forensic samples, as set out in the Act, were inadequate compared to the provisions in the MCCOC Model Bill, and suggested that the NSW Act would be improved by introducing guidelines that required officers and magistrates to consider whether a DNA sample request was justified in all the circumstances.

The Standing Committee heard concerns about the use of mass testing, where DNA samples are taken from every member of a given group. In response the Standing Committee considered that mass testing should only be conducted as a last resort, confined as narrowly as possible, and that consideration be given to requiring a court order for voluntary mass screening.

The Standing Committee had concerns about the then failure to commence Part 8 of the Act (which did not commence until 1 June 2003), dealing with volunteers. The Standing Committee expressed concern that victims of crimes were to be treated in a similar manner to suspects when they volunteered to have a DNA sample taken, and recommended specific procedures for victims of crime. The Standing Committee criticised the consent procedures as excessively complex and incomprehensible. In the case of prisoners, consent procedures were seen to be unnecessary and unhelpful, given that samples could be forcibly obtained and that some prisoners felt a deal of duress if even consenting to samples being taken, putting the validity of the samples into question.

The Standing Committee also suggested that a new regime of safeguards and offences be established to prevent the misuse of DNA samples and databases, and inappropriate retention of samples. It also proposed stricter rules for the admissibility of DNA evidence, which would allow consideration of the evidence when there had been minor breaches in its collection, but would exclude evidence obtained in contravention of the Act.

While some of the recommendations made by the Standing Committee were addressed through the *Crimes (Forensic Procedures) Amendment Act 2002*, most were held in abeyance until such time as the Attorney General's review was completed or referred to other agencies for consideration, and implementation if thought appropriate.

NSW Attorney General⁵⁵

Section 122 of the Act required the Attorney General to 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 May 2002, the Attorney General's Department commissioned an independent review, conducted by Professor Mark Findlay, Deputy Director of the Institute of Criminology, who took as his brief:

- *the identification of the operational and policy objectives for the Act, and the establishment of a comparative framework to assess the validity and appropriateness of these objectives*
- *the evaluation of the crime control objectives of the Act including:*
 - *improvements of police investigative 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 have traditionally had low clearance rates*

⁵⁵ Professor Mark Findlay, *Independent Report of the Crimes (Forensic Procedures) Act 2000*, University of Sydney, 2003. This report was tabled in Parliament on 19 November 2003.

- *the evaluation of process objectives including:*
 - *the complexity of the provisions of the Act regulating the collection of samples from suspects, serious indictable offenders and volunteers (and the obtaining of consent)*
 - *whether the collection scheme is intended to achieve an appropriate balance between the individual's right to privacy and the needs of law enforcement officials, and if so, is the objective achieved in practice*
- *the evaluation of operational measures including:*
 - *data on the testing of suspects held by police and other agencies*
 - *making of compulsory orders by judicial officers on the application of the police*
 - *the views of the Department of Corrective Services and the Division of Analytical Laboratories concerning the operation of the Act*
- *the analysis of the recommendations of the Standing Committee, and where appropriate, specific responses to their content, application and consequences*
- *the evaluation of the operation of the Act against the experience of the primary stakeholders, and recommend legislative, administrative and procedural changes as appropriate to improve the operation of the Act and*
- *comment on the manner in which the Act and its operations should be monitored and evaluated on an ongoing basis.*

The Independent Review was completed in April 2003, and tabled in Parliament in November 2003. In considering it for our review, we gave particular attention to its examination of three aspects of the Act: police investigation, scientific analysis and criminal trial. In dealing with issues arising from the collection and use of DNA evidence, it recommends legislative amendments, the development of an interagency best practice strategy, and a more integral role for the proposed State Institute of Forensic Sciences, provided it is under the jurisdiction of NSW Health and the Attorney General's Department and not NSW Police.

The Independent Review gives extensive coverage to the effect of DNA evidence in trials, particularly before juries. Its emphasis on a best practice approach for the coordination and management of forensic procedures focuses on the development of best practice strategies at a Summit, with agencies developing Standard Operating Procedures, policies, procedures and guidebooks from an integrated best practice approach.

In November 2003, the Government tabled its response to this report. It indicated that an interdepartmental working group will consider some of the Independent Review's recommendations in detail. The working group includes representatives from the Attorney General's Department, the Ministry for Police, NSW Police, NSW Health, DCS, DJJ, the Department of Aboriginal Affairs and Privacy NSW and since the report was tabled has been extended to include representatives from the Office of the Director of Public Prosecutions and the Legal Aid Commission.

Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council⁵⁶

The terms of reference for this inquiry required the Australian Law Reform Commission and the Australian Health Ethics Committee to consider how to best protect privacy, protect against unfair discrimination and ensure the highest ethical standards of research and practice for human genetic information, and the samples from which such information is derived. In March 2003, it provided the Commonwealth Attorney General and Minister for Health and Aged Care with a two volume report dealing with a myriad of issues in respect of human genetic information.

In relation to law enforcement and evidence gathering procedures, the report articulated a concern that there was a lack of harmony in Commonwealth, state and territory forensic procedures laws and practices in spite of MCCOC's Model Forensic Procedures Bill. The report recommended the development of national minimum standards in Australian forensic procedures legislation with respect to the collection, use, storage, destruction and index matching of forensic material (and the DNA profiles created from such material) to facilitate an effective national approach to sharing genetic information.

The report recommended that the legislative definition of 'destruction' for genetic samples and profiles should provide for the physical destruction of genetic samples or permanent and irreversible de-identification of profiles. It also recommended that the Commonwealth develop and publish guidelines for the authorisation and the conduct of 'mass DNA screening' programs.

The report also asked the Commonwealth to consider whether to remove 'consent' provisions for the taking of DNA samples from suspects and serious offenders, so that a forensic procedure could be conducted only pursuant to an order made by a judicial officer or an authorised police officer in accordance with existing provisions. These recommendations were said to better reflect the inherently coercive nature of the procedures in these circumstances, and would remove potential arguments about the validity of consent given.

The report further recommended the clarification of arrangements for the use of DNA testing and genetic information for the purpose of identifying missing and deceased persons; that the Commonwealth take reasonable steps to ensure that information stored on a DNA database system that is disclosed to Interpol or another foreign agency will be held, used or disclosed consistently with Australian minimum standards; and changes to the oversight framework for DNA database systems used in law enforcement, to ensure public confidence in their integrity.

In addition, the report recommended better education about the use of DNA evidence for lawyers and judges involved in criminal proceedings, and that a model jury direction be developed to provide better guidance in evaluating DNA evidence.

The report also recommended the long term retention of forensic material found at the scene of serious crimes, and the establishment of a process to consider applications for post conviction review from any person who alleges that DNA evidence may exist that calls his or her conviction into question.

Commonwealth Independent Review of Part 1D of the Crimes Act 1914⁵⁷

This report was required by section 23YV of *Crimes Act 1914* (Cth), and focused on the operation of forensic procedures systems at the national level, the extent to which these have contributed to the conviction of suspects, the effectiveness of oversight and accountability mechanisms, disparities in the legislative and regulatory regimes in the various jurisdictions and issues relating to privacy or civil liberties. It reported to the Minister for Justice in March 2003.

The report's major concern was that the national DNA database system was not yet in operation, with only NSW having loaded profiles onto the relevant CrimTrac database, NCIDD. This adversely affected the review's capacity to examine the national operation of the DNA database system.

⁵⁶ Australian Law Reform Commission and the National Health and Medical Research Council Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia, Report 96, March 2003*. The Australian Law Reform Commission approved this summary on 24 November 2003.

⁵⁷ Commonwealth of Australia, *Report of the Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003. This summary was approved by the Commonwealth Forensic Procedures Review on 25 November 2003.

It addressed the need for enhanced accountability arrangements for forensic procedures systems across Australia in terms of improved complaint handling, reporting and internal and external audits. It recommended that the external scrutiny mechanisms be based upon existing cooperative processes between the Commonwealth and state Ombudsman offices, with the involvement of Privacy Commissioners and other monitoring bodies. It also recommended that the Ombudsman or equivalent in each jurisdiction report within twelve months as to whether there were any legislative impediments to cross referral of matters between jurisdictions.

The report noted that a future review, contemplated for two years time, may be in a better position to consider the operation of the national DNA database.

Western Australian Parliament – Legislation Committee⁵⁸

A parliamentary committee inquiry followed minor changes to legislation in Western Australia to permit the taking of forensic samples. This led to a more detailed inquiry into the area of forensic procedures and DNA profiling in anticipation of more comprehensive state legislation. The parliamentary Committee examined interstate and international approaches and looked into such issues as the establishment of a DNA database, the collection, analysis, access to and storage of DNA samples and DNA profiles, and the uses that might be made of DNA information.

The Committee emphasised that its reports on these matters represented largely preliminary views, and that the issues could warrant further examination. Among the most significant recommendations, the Committee recommended that persons who have been convicted of an indictable offence (whether before or after the commencement of legislation enabling the conduct of a forensic procedure) and who are in prison, on parole, serving suspended sentences or who have been deemed unfit to plead be required to provide samples. The Committee also recommended that the functions of police investigation, and forensic and DNA analysis, should be functionally autonomous and operationally and financially independent from each other. The Committee further recommended that regulatory oversight of, and the roles of database manager and custodian of any Western Australian DNA database, be separate to law enforcement authorities and be fulfilled by a functionally autonomous public agency.

Victorian Parliament Law Reform Committee⁵⁹

The Law Reform Committee of the Victorian Parliament has received a referral from the Governor in Council to consider and report on:

The collection, use and effectiveness of forensic sampling and the use of DNA databases in criminal investigations, with particular emphasis on identifying areas and procedures which would more effectively utilise forensic sampling and improve investigation and detection of crime.

The reference was first made during the 54th Parliament but lapsed when Parliament was prorogued in October 2002. The reference was reinstated in the 55th Parliament in April 2003. The inquiry has produced a brief discussion paper and commissioned three expert papers. In March 2004, a report covering: the legal aspects of the regime; the practical and scientific dimensions of obtaining DNA samples and profiles; and the potential impact on the Victorian Aboriginal community of DNA sampling was released.

The inquiry reviewed the current legislative and procedural regimes regulating the use of DNA sampling for criminal investigative purposes. This included all stages of the process from sample collection, through to storage and destruction. The inquiry particularly focused on the use made of samples and the resultant profiles produced, and the effectiveness of the existing DNA sampling regime. Recommendations to improve the investigation and detection of crime, while maintaining adequate protection of the rights of those providing samples and safe guards against misuse, have been made.

⁵⁸ Western Australia Legislative Council, *Report No. 46 – Forensic Procedures and DNA Profiling*, 1998 and *Report No. 48 - Forensic Procedures and DNA Profiling: The Committee's Investigations in Western Australia, Victoria, South Australia, the United Kingdom, Germany and the United States of America*, 1999. This summary was approved by the current Legislative Council Standing Committee on Legislation in November 2003.

⁵⁹ Victorian Parliament Law Reform Committee, *Inquiry into Forensic Sampling and DNA Databases* (References made 21 November 2001 and 15 April 2003). This summary was approved by the Victorian Parliament Law Reform Committee on 2 December 2003.

Chapter 4: Methodology

This report documents our work and activities scrutinising the exercise of police functions under Part 7 of the Act. Part 7 allows police to obtain DNA samples from serious indictable offenders.

Our research was guided by the scope of our review of these new police powers, which is described in s 121 of the Act. There were some functions that relate to the DNA sampling of serious indictable offenders that we did not examine in detail because they were not within the scope of our review. The Innocence Panel, for example, is not one of the functions of police under the Act. The forensic DNA sampling of home detainees under Part 7 of the Act commenced after the end of our review period. We have, however, included some information about these activities.

Government agencies other than NSW Police carried out functions that were required to obtain forensic DNA samples from serious indictable offenders. Custodial and supervisory agencies, such as DCS, DJJ and the Home Detainees Program played a significant role in facilitating the DNA sampling under Part 7 of the Act. In addition, the Division of Analytical Laboratories (DAL) was contracted by NSW Police to analyse the forensic material obtained from serious indictable offenders and manage the NSW DNA database.

We are very grateful to these and other agencies for providing us with the information that we required to carry out our review. In particular, we acknowledge the assistance of the NSW Police Forensic Procedures Implementation Team (FPIT) and the members of the Inmate Testing Teams, the DCS DNA Testing Unit and Correctional Centre Liaison Officers, and the Forensic DNA Laboratory at the Institute of Clinical Pathology and Research/Division of Analytical Laboratories. We would also like to thank the Police Association of NSW and those police in other jurisdictions that generously provided us with information about DNA sampling in their jurisdictions.

In order to conduct a thorough and balanced review of the implementation of the Act, we sought the views of those people who were directly affected by the legislation. Those affected included serious indictable offenders, police who carry out the DNA sampling, correctional officers who coordinate the DNA sampling in the prisons and detention centres, and FPIT which coordinated the DNA sampling at a management level.

To do this we adopted a multifaceted research strategy to obtain information from a range of sources on the central research question of whether police exercised their functions under Part 7 of the Act in a proper, effective and fair manner. By adopting this method we also aimed to minimise the limitations of any one source of information or research method.

In some of our activities, time and resources limited us to auditing small, rather than large, samples. The size of the samples we examined made it impossible to draw conclusions about the experiences of all of the 10,403 serious indictable offenders sampled during our review period. However, these audits were extremely useful in providing context for the findings from our other research activities.

From time to time during our review, we discovered areas of police practice or policy that caused us concern. Our approach in these situations was to first obtain a clear picture of the issue from the available research evidence, and then to bring the matter promptly to the attention of NSW Police. We met regularly with FPIT to facilitate these discussions. This provided NSW Police with the opportunity to respond to our concerns, and to take appropriate action to rectify or ameliorate identified problems. This report describes the actions taken by NSW Police and the other relevant agencies in response to these concerns.

This approach is consistent with our corporate goal to assist agencies to remedy deficiencies and improve service delivery.

We treated all the information that could identify a person or people as confidential. In the report we have attempted to omit all information that could be used to identify individual serious indictable offenders, police, correctional and other officers to ensure their anonymity.

Our main research strategies are summarised below.

Computerised Operational Policing System

Information from NSW Police's Computerised Operational Policing System (COPS) was central to our review. The COPS database provides a structure for police to record incidents and other details such as the name of the serious indictable offender, the type of forensic procedure carried out, the date that the sample was taken and the location of the sampling.

We discussed the limitations of COPS in an earlier legislative review report, *Policing Public Safety*⁶⁰, and we found similar problems during this current review. The main problems were incorrect entries of information about forensic procedures into the COPS database system, or the failure to record that information. However, in relation to the DNA sampling of serious indictable offenders, data entry was carried out by a small number of police officers – the Inmate Testing Teams - and so the errors were fewer in type and number.

Consultation leaflet

Early in our review period, we distributed 3,000 copies of a leaflet⁶¹ that explained the role of the NSW Ombudsman under the Act. The leaflet included a detachable reply-paid portion to provide an opportunity for individuals and organisations to provide comments and register their interest in our review. The replies assisted in our formulation of our consultation strategy.

Discussion paper

In November 2001 we released a discussion paper inviting the community to comment on the DNA sampling of serious indictable offenders. We distributed over 500 copies of the discussion paper to a range of key stakeholders, including:

- NSW Police
- Correctional Centre Inmate Development Committees
- Correctional Centre Liaison Officers
- Centre Managers of all NSW Juvenile Detention Centres
- Correctional Centre libraries
- Official visitors
- Prisoners' rights groups
- Legal practitioners.

We received 49 responses from a range of stakeholders, including inmates, police, correctional centres, government agencies and peak organisations. Often the issues raised in these responses then became the subject of further inquiry.

60 NSW Ombudsman, *Policing Public Safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, November 1999.

61 A copy of the leaflet is attached at Appendix B.

Interviews with serious indictable offenders

In November and December 2001 we interviewed 192 serious indictable offenders⁶² on a confidential basis after police had asked them to provide a DNA sample. We conducted the interviews on 15 occasions at 12 different correctional centres in NSW. The serious indictable offenders interviewed were from maximum, medium and minimum security centres, the only private centre in NSW, women's centres, rural and metropolitan centres and remand facilities.

The aim of these interviews was to obtain information directly from prisoners about their experiences of the DNA sampling.

Focus group with NSW Police Inmate Testing Teams

We were keen to hear about the experiences and the views of the Inmate Testing Team (ITT) members. To provide the ITT officers with the opportunity to voice their views about the DNA sampling of serious indictable offenders, we held a 'focus group' with ITT members with the assistance of the Police Association of NSW.

At the time of the focus group, the ITT consisted of 16 police officers, who had carried out over 7,000 forensic procedures on serious indictable offenders. It was therefore very important for us to learn from their experiences. Fourteen of the 16 ITT members attended our voluntary focus group.

To encourage open and frank discussion we assured the ITT members that we would not identify individuals in our report, and we held separate focus groups for the ITT officers and the managers of the Inmate Testing scheme.

Focus groups with prison officers and prison welfare officers

We held focus groups with the Correctional Centre Liaison Officers who coordinate the DNA sampling in adult correctional centres. DCS staff have a unique insight into the environment in which the forensic sampling of serious indictable offenders takes place. The agreement between NSW Police and the DCS in relation to the DNA sampling of serious indictable offenders imposes new responsibilities upon correctional staff and has a direct impact on their work.

We canvassed the issues with correctional centre welfare staff because of their role to provide support to inmates. The welfare officers told us about the kinds of questions inmates asked them about the DNA sampling and some of the effects that the DNA sampling had upon inmates.

Interviews with managers of juvenile detention centres

We contacted all NSW juvenile detention centres and spoke to either the centre manager or another senior officer. We asked about the procedures employed to facilitate the DNA sampling of young serious indictable offenders, and any issues that may have arisen at their centres as a result of the DNA sampling.⁶³

Interviews with police in other jurisdictions

We spoke to police in all Australian states and territories and also police in the United Kingdom and Canada about the way that DNA samples were taken from prisoners in their jurisdictions. We were able to obtain statistics and policies from other jurisdictions with which we could compare the approach taken by NSW Police.⁶⁴

62 Of the 192 interviews conducted, 184 interviewees met our criteria and were included in the results. For more detail, see Appendix C.

63 A copy of the questionnaire used to interview Juvenile Justice Centre managers and senior staff is attached at Appendix D.

64 A copy of the questionnaire used to interview police in other Australian jurisdictions is attached at Appendix E.

Audit of NSW Police video recordings of forensic DNA sampling

During our review period, NSW Police obtained DNA samples from over 10,000 serious indictable offenders. We audited 265 video recordings of interactions between the NSW Police Inmate Testing Team and serious indictable offenders. These included videos of DNA samples identified by NSW Police as being taken by force. Examining these recordings assisted us in assessing whether the police carrying out the sampling were adhering to the legislation and to NSW Police policies and procedures.⁶⁵ We were also able to identify the common questions that serious indictable offenders asked during the sampling process and feed this information back to NSW Police and DCS.

Audit of DCS video recordings of non-compliant inmate escorts

If a serious indictable offender does not comply with the DNA sampling process, and refuses to go to the Inmate Testing Area, it is the responsibility of the DCS Security Unit to deliver these non-compliant serious indictable offenders to police. The DCS Security Unit may use chemical agents for this purpose. All actions by the DCS Security Unit are required to be recorded on video.

We examined all available video recordings of the escorts, by the DCS Security Unit, of non-compliant serious indictable offenders from their cells to the Inmate Testing Area.⁶⁶

Audit of records held by the DNA laboratory

We conducted an audit of 164 randomly selected DNA samples taken from serious indictable offenders by NSW Police.⁶⁷ We checked the records held by NSW Police and compared them with records held by the DNA laboratory to confirm that the DNA samples had been safely received at the DNA laboratory. We also examined the amount of time that the DNA samples were in police custody before being submitted to the laboratory.

Analysis of complaints and inquiries received at our office

We analysed all complaints and inquiries received about forensic samples taken from serious indictable offenders. We were able to identify trends in the kinds of complaints and whether there were systemic issues that needed to be addressed.

Examination of police exhibits systems

We examined the systems used by NSW Police Forensic Services Exhibits Store and the ITT to record the use of forensic DNA sampling kits to determine whether these systems provided for the accurate recording of the movement of DNA samples from the time they were obtained to their delivery at DAL.

Examination of systems and procedures at the DNA laboratory

NSW Police contracted the analysis of DNA samples to DAL, which is operated by Western Sydney Area Health Service. We wanted to gain an insight into the way in which DAL managed, stored and recorded information about DNA samples obtained under the Act. To do this we visited DAL on several occasions. DAL provided us with a 'walk through' of their processes: from the point at which the sample is received from police to the point at which police may be notified of a 'link' or 'hit' between two DNA profiles on the database.⁶⁸

Observation of Crimes (Forensic Procedures) Act Implementation Committee meetings

In October 2000, NSW Police established the Interdepartmental Committee on the *Crimes (Forensic Procedures) Act 2000* to deal with interagency issues arising from the implementation of the Act. NSW Government organisations such as the Office of the Director of Public Prosecutions, Local Courts, the DCS, the DJJ and NSW Health were represented on the Committee. We attended these meetings as an observer, to monitor the issues that arose for each agency and how the Committee dealt with them.

65 For more information see Appendix F.

66 For more information, see Chapter 18.

67 For more information, see Appendix G.

68 Ultimately the CrimTrac Agency will perform this role. We have been advised that until the CrimTrac National Criminal DNA Database is operating effectively, the DNA Database at DAL will be used to identify links between DNA profiles.

Court proceedings

We monitored the outcomes of prosecutions involving the use of the Act and challenges by accused persons to the evidence obtained by forensic procedures.

Statistical analysis of forensic procedures

We received and analysed regular statistical reports from NSW Police, which provided details about how many buccal, hair and blood samples had been obtained from serious indictable offenders in each correctional, periodic and juvenile detention centre.

We also monitored the accreditation of police officers who had been trained to carry out forensic procedures.

Interviews with key stakeholders overseas

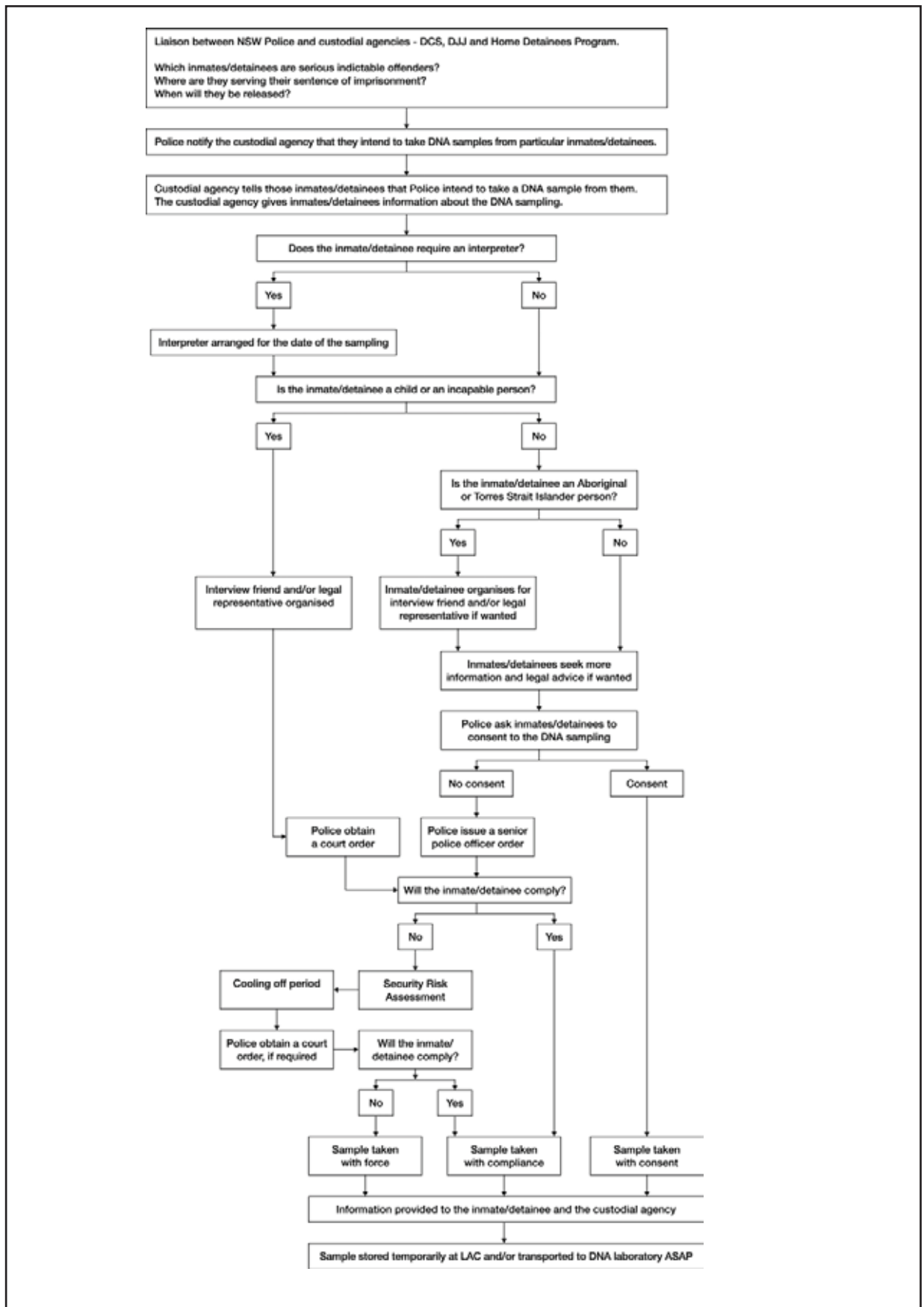
The officer who undertook the majority of our research for this review attended the Toronto Police 15th Annual Forensic Identification Seminar. This provided her with the opportunity to discuss the implementation of forensic procedures legislation with police representatives from a variety of jurisdictions, including the UK and several states of the USA. These discussions gave our office access to a range of ideas and experiences in other jurisdictions.

Our officer also observed the evidence management procedures at the Canadian National DNA Databank and the provincial Toronto DNA laboratory. She interviewed and held meetings with key police and government stakeholders from Toronto and Ontario and discussed how other jurisdictions managed controversial issues and problems in relation to forensic procedures and the maintenance of a DNA database.

The officer provided a report of our Canadian research to NSW Police and the Interdepartmental Committee on the *Crimes (Forensic Procedures) Act 2000*.⁶⁹ She also brought back a variety of information about the Canadian experience and made this available to many legal, government and community stakeholders in NSW.

⁶⁹ A report of our Canadian research is attached at Appendix H.

Part B: Framework



Chapter 5: Who can be DNA sampled under Part 7 of the Act?

As discussed earlier, a key objective of the Act was to facilitate NSW's participation in the National DNA Database. One of the indices (or categories) of DNA profiles on the DNA Database is offenders who have been convicted of serious crimes.

Part 7 of the Act provides police with powers to perform forensic procedures on 'serious indictable offenders'. Section 61(4) provides that:

A person is authorised to carry out a forensic procedure under this Part on a person who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention whether or not the offender was convicted of the offence before or after the commencement of this section.

Therefore, the criteria that must be satisfied before a forensic procedure can be carried out under this Part of the Act are:

- 1. the person must have been convicted of a serious indictable offence*
- 2. the person must (at the time of the forensic procedure) be serving a sentence of imprisonment for the serious indictable offence*
- 3. the sentence of imprisonment must be being served in a correctional centre or other place of detention.*

These criteria have been the subject of differing interpretations and debate. This chapter examines each of these criteria separately, and the approach taken by NSW Police to carry out mass sampling of all eligible serious indictable offenders.

Convicted of a serious indictable offence

A serious indictable offender is a person who has been convicted of a 'serious indictable offence'. In NSW, indictable offences are considered to be either 'serious' or 'minor'.⁷⁰

A serious indictable offence is defined in s 3(1) of the Act, which states:

"serious indictable offence" means:

- (a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or*
- (b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.*

Section 95 of the Act defines 'participating jurisdiction' as:

The Commonwealth, or a state or Territory, in which there is a corresponding law in force.

⁷⁰ Section 580E *Crimes Act 1900*.

Section 95 defines 'corresponding law' as:

A law relating to the carrying out of forensic procedures and DNA databases that substantially corresponds to Part 11 or that is prescribed by the regulations for the purposes of this definition.

As noted later, since June 2002, the Regulation has prescribed corresponding laws for all states and territories.

The definition of 'serious indictable offence' is dependent upon several factors, including:

- a) for NSW indictable offences, the maximum penalty being five or more years' imprisonment
- b) for indictable offences in other jurisdictions, whether that jurisdiction is a 'participating jurisdiction' within the meaning of the Act.

NSW indictable offences with a maximum penalty of 5 or more years' imprisonment

The number of serious indictable offences in any jurisdiction may vary considerably from time to time. When the Act commenced on 1 January 2002 there were at least 1,258 NSW offences that fell within the definition of 'serious indictable offence'. Between the commencement of the Act and the end of our first review period (5 July 2002), 101 new serious indictable offences were introduced in NSW and 34 were repealed.⁷¹

The definition of 'serious indictable offence' includes most personal violence, drug, theft, fraud, firearm and arson offences. It also includes some more obscure offences such as interfering with or obstructing the flow of a river or canal with the intention of obstructing or hindering navigation,⁷² corruptly taking a reward in relation to stolen property⁷³ and some bribery offences.⁷⁴

On 30 June 2002, the total population of offenders in DCS custody was 7,667.⁷⁵ However, the volume of people entering and leaving the system, or turnover, provides a more accurate picture of the number of inmates for whom DCS are responsible. For example, during the 2001-2002 financial year, the number of (sentenced and unsentenced) people received into correctional centres was 15,091.⁷⁶ DCS has estimated that approximately 75 per cent of the sentenced inmate population, on any given day, is likely to be comprised of serious indictable offenders.⁷⁷

The average number of young people in juvenile detention centres on any given day in 2001-2002 was 297.⁷⁸ On average, there were 170 young people serving custodial orders representing approximately 57.2 per cent of the overall numbers in custody.⁷⁹ Some of these custodial orders do not concern serious indictable offences.

Indictable offences that are dealt with summarily

An indictable offence is one that can be dealt with by the District Court before a judge and jury. A large number of indictable offences in NSW can be dealt with by a local court magistrate (unless either the accused person or the prosecuting authority elects to have the matter dealt with by the District Court).⁸⁰ A local court is limited to sentencing a person to a maximum penalty of two years' imprisonment.

⁷¹ Based on information provided by the Judicial Commission of NSW, 15 November 2002.

⁷² Section 202, *Crimes Act*.

⁷³ Section 186, *Crimes Act*.

⁷⁴ Part 4A, *Crimes Act*.

⁷⁵ Department of Corrective Services, *Annual Report, 2001-2002*.

⁷⁶ *Ibid*.

⁷⁷ Department of Corrective Services, Submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 7 July 2001.

⁷⁸ This figure is based on the number in custody on the last day of each month.

⁷⁹ Department of Juvenile Justice, *Annual Report 2001-2002*.

⁸⁰ See s 260 and Schedule 1 of the *Criminal Procedure Act 1986*.

For example, the offence of break and enter with intent to commit an indictable offence (without aggravation or actual stealing) carries a maximum penalty of 10 years' imprisonment.⁸¹ The majority of persons charged with this offence are dealt with summarily. In practical terms this means they cannot be sentenced to a period of imprisonment of more than 2 years. Nevertheless, because the Crimes Act states that the maximum penalty is 10 years' imprisonment, the offence is still considered to be a serious indictable offence.

Indictable offences in other jurisdictions, whether that jurisdiction is a 'participating jurisdiction' within the meaning of the Act

Approximately two per cent of the NSW inmate population is comprised of inmates whose most serious offence was heard in a court in another Australian state or territory.⁸² The majority of these inmates were convicted in the ACT, but serve their term of imprisonment in NSW because the ACT does not have suitable facilities for inmates of certain levels of security.

As with NSW offences, regular changes to laws in other jurisdictions make it difficult to establish the number of non-NSW offences that can be categorised as serious indictable offences. For example, between 1 January 2001 and 5 July 2002, the Commonwealth introduced 354 new serious indictable offences and repealed 260 serious indictable offences.⁸³

Until June 2002 it was unclear whether or not NSW police could conduct forensic procedures upon inmates convicted of serious offences that were not offences under NSW laws.⁸⁴ The legality of taking samples from these inmates depended upon a variety of factors such as whether the other jurisdiction had a similar law permitting a DNA database, when that law was passed and when the sample was taken from the inmate.

The legal environment at that time was changing rapidly. To allow the sharing of DNA profiles between jurisdictions, many Australian states and territories introduced new legislation and made amendments to existing legislation to reflect the Model Bill.

NSW Police recognised the difficulties for Inmate Testing Officers making decisions about the legality of testing these inmates. Consequently, at the end of March 2001, NSW Police issued the following guidelines about the sampling of serious indictable offenders:⁸⁵

*Until legal advice on this issue is available, no serious indictable inmate who is in custody within a NSW Correctional facility solely on the conviction of an offence from another state will be forensically tested. This includes Commonwealth offences.*⁸⁶

During the review period, we received 18 complaints from people who had been DNA sampled in prison. Some of these people said that they were Commonwealth or ACT prisoners at the time of the forensic DNA sampling. They claimed that there was no authority for their samples to have been taken by NSW Police.

We asked the police to investigate these complaints and to provide us with the following details:

- which (if any) inmates had DNA samples taken contrary to the March guidelines
- whether these samples had been destroyed
- if so, confirmation of the date that they were destroyed
- what advice had been provided to any inmates who had been wrongly sampled
- what steps NSW Police had taken to prevent future errors in the identification of serious indictable offenders.

81 Section 113(1) *Crimes Act*.

82 See Table 1.2 in Corben, Simon, *NSW Inmate Survey 2001: Summary of Characteristics*, Statistical Publication No 23, NSW Department of Corrective Services, April 2002.

83 Based on information provided by the Judicial Commission of NSW, 15 November 2002.

84 Such as the *Commonwealth Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* or the *Customs Act 1901*.

85 Advice provided by NSW Police FPIT, 12 June 2002.

86 NSW Police, Inmate Testing Team Standard Operating Procedures: Forensic DNA Sampling of Inmates, November 2001, p10.

NSW Police acknowledged that they had taken DNA samples from 30 Commonwealth or ACT offenders contrary to their guidelines. The NSW Police stated that these inmates had been sampled during the confusion about the lawfulness of taking samples from these offenders. NSW Police confirmed that these samples had been destroyed and their related profiles removed from the NSW DNA Database. We sighted DAL's original destruction certificates to confirm that it had destroyed all relevant samples. NSW Police said that they had written to all the complainants informing them that their sample had been destroyed.

In relation to the prevention of future errors, we were informed that DCS had made changes to their database that allowed the identification of NSW and other inmates for the purposes of forensic DNA sampling. This new system was in place on 1 April 2001. However, our scrutiny of this issue showed that DNA samples had been taken from eight serious indictable offenders contrary to the guidelines beyond this date. Information provided to us by NSW Police FPIT indicates that samples taken incorrectly have since been destroyed.

As stated above, a 'serious indictable offence' under the Act includes some offences under a law of a 'participating jurisdiction'. One case in NSW resulted in the fast tracking of the clarification of which Australian jurisdictions should be treated as 'participating jurisdictions' for the purposes of the Act.

In June 2002 a man who had been DNA sampled by NSW Police in relation to a Sydney matter was identified as a possible suspect in the high profile case of Peter Falconio, an English tourist who had disappeared in the Northern Territory 12 months earlier. The DNA profile of the Sydney man could not legally be compared to the profile thought to belong to the offender in the Falconio case. This was because the Northern Territory was not considered to be a 'participating jurisdiction' as its legislation is substantially different to the NSW Act. On 15 June 2002 the NSW Attorney General and the Minister for Police, Fire and Emergency Services for the Northern Territory entered into an agreement to share DNA profile information and the comparison was made in the Northern Territory.

Australian Associated Press, 14 June 2002

DNA no match in Falconio case

A DNA sample taken from a NSW murder suspect was not a match in the case of the missing British backpacker Peter Falconio, Northern Territory Police said today.

The sample had been cross-matched with a blood sample taken from the clothing of Mr Falconio's girlfriend Joanne Lees.

"Northern Territory police have received the profile in relation to the Falconio investigation and is (sic) does not match the DNA profile located on Joanne Lees' clothing", Mr Daulby said.

A sample, taken from a 29-year-old drifter being held in custody in relation to a murder last week at Smithfield in Sydney's west, was sent to the NT today.

The NSW Government last night cleared the way for NT authorities to access the DNA information from the suspect, who had been named a person of interest in the presumed murder of Mr Falconio.

It was cross-matched with a spot of blood believed to belong to the man suspected of murdering Mr Falconio, 28, and attempting to abduct Ms Lees, at Barrow Creek, north of Alice Springs last year.

Mr Falconio's body has never been found.

Source: *news.com.au*. Reproduced with permission from Australian Associated Press

In June 2002, the Crimes (Forensic Procedures) Amendment (Corresponding Laws) Regulation 2002 amended the Crimes (Forensic Procedures) Regulation 2000 (the Regulation) to prescribe the forensic procedures legislation of all other Australian jurisdictions as 'corresponding laws' for the purposes of the Act. Clause 12 of the Regulation states:

For the purposes of the definition of corresponding law in section 95 of the Act, the following laws are prescribed:

Crimes (Forensic Procedures) Act 2000 of the Australian Capital Territory.

Part 1D of the Crimes Act 1914 of the Commonwealth.

Division 7 of Part VII of the Police Administration Act of the Northern Territory.

Part 4 of Chapter 8 of the Police Powers and Responsibilities Act 2000 of Queensland.

Criminal Law (Forensic Procedures) Act 1998 of South Australia.

Forensic Procedures Act 2000 of Tasmania.

Subdivision (30A) of Division 1 of Part 3 of the Crimes Act 1958 of Victoria.

section 236 of The Criminal Code of Western Australia (as in force before its amendment by Schedule to the Criminal Investigation (Identifying People) Act 2002 of Western Australia).

the provisions of the Criminal Investigation (Identifying People) Act 2002 of Western Australia (as in force on and from their commencement).

This meant that NSW Police could compare DNA profiles in NSW with those in other jurisdictions, and take forensic DNA samples from prisoners in NSW notwithstanding that they were convicted of a serious indictable offence in another jurisdiction.

Legal commentators, such as Dr Jeremy Gans, have criticised the Crimes (Forensic Procedures) Amendment (Corresponding Laws) Regulation 2002 as circumventing the objective of the Act to only permit the sharing of DNA profile information between jurisdictions that have similar laws (and safeguards) in place.⁸⁷

The Legal Aid Commission of NSW has also expressed concern that a law enforcement agency in one jurisdiction may have access to forensic information obtained in another jurisdiction to which they would not have had access if they were limited to information collected, used and destroyed in accordance with their own legislation.⁸⁸

At the time of writing, NSW Police has informed us that its policy in relation to non-NSW inmates and detainees has not changed, and that it does not intend to take DNA samples from serious indictable offenders convicted in other jurisdictions until requested to do so by those jurisdictions.⁸⁹

⁸⁷ Gans, Dr J, Submission to the Independent Review of Part 1D (Forensic Procedures) of the *Crimes Act 1914* (Cth).

⁸⁸ Legal Aid Commission of NSW, Submission to the Independent review of Part 1D of the *Crimes Act 1914* (Commonwealth), 13 September 2002.

⁸⁹ Correspondence from the NSW Police FPIT, 26 November 2002.

‘Serious indictable offences’ or ‘serious children’s indictable offences’?

In our discussion paper we reported that there were differing interpretations of which children and young people in detention can be subjected to forensic DNA sampling under Part 7 of the Act.

We said:

Another issue relating to which juvenile detainees can have samples taken from them is the definition of ‘serious indictable offence’. Section 3(1) of the Children (Criminal Proceedings) Act 1987 provides a separate category of ‘serious children’s indictable offences’. A ‘serious children’s indictable offence’⁹⁰ is defined narrowly and includes only:

- *homicide*
- *an offence punishable by penal servitude for life or for 25 years*
- *some sexual assault offences.*

This is quite different to the definition of ‘serious indictable offence’ under the Act, which is those offences that ‘are punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment’. Under the definition in the Act, the theft of a stick of bubble gum from a milk bar is larceny⁹¹ and would, prima facie, fall into the category of a ‘serious indictable offence’.

The Department of Juvenile Justice has indicated that it is of the view that serious children’s indictable offenders are the only group caught by the provisions of the Act.⁹²

In the Discussion Paper we invited comment on the correct interpretation of the legislation in light of the definition of ‘serious children’s indictable offences’ used in other legislation.⁹³

There were some discrepancies between the responses we received from DJJ and NSW Police. In order to clarify the positions of these agencies, we hosted a meeting with NSW Police and DJJ at which the issue was resolved. DJJ later provided us with the following advice:

It certainly was our interpretation that only serious children’s indictable offenders are caught by the Act. As you are aware, the Police Service had a different view. The Department has cooperated with the Police in providing the names of all detainees sentenced according to law and subject to orders made pursuant to s. 19 of the Children (Criminal Proceedings) Act 1987. In relation to detainees under the age of eighteen years, the Police then apply to the Children’s Court for appropriate orders. All identified detainees have been provided with access to legal advice and information regarding the DNA testing process.⁹⁴

90 Advice received from the Attorney General’s Department indicates that this definition has changed since the publication of the Discussion Paper. *The Crimes Legislation Amendment Act 2002* (N0130) took effect on 24 February 2003 and now includes as (c1) an offence under the *Firearms Act 1996* relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years.

91 Punishable by imprisonment for five years, see s 117 *Crimes Act*.

92 Correspondence from DJJ, 24 October 2001.

93 NSW Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders Under Part 7 of the Crimes (Forensic Procedures) Act 2000*, December 2001, questions 3(a) – 3(c).

94 Correspondence received from the Department of Juvenile Justice on 22 May 2002.

The majority of responses to our discussion paper suggested that the Act should be read strictly. For example, the then Senior Children's Magistrate stated:

I am not aware of any reason why Part 7 of the Crimes (Forensic Procedures) Act would only apply to those persons aged 10-17 years who have been convicted of a 'serious children's indictable offence' as defined by the Children (Criminal Proceedings) Act 1987. There are several circumstances in which a young person can be committed for trial or sentence to the District Court in respect of indictable offences which are not 'serious children's indictable offences' (see s. 31 Children (Criminal Proceedings) Act). The young person may then be convicted and sentenced to terms of imprisonment at the District Court for offences which meet the definition of 'serious indictable offence' in the Crimes (Forensic Procedures) Act.⁹⁵

However, some respondents were of the view that Part 7 of the Act only applied to serious children's indictable offences.⁹⁶ More were of the view that even if Part 7 *did* apply to all serious indictable offences, it *ought* only apply to serious children's indictable offences.⁹⁷

The NSW Police interpretation arrived at in 2001 after discussions with FPIT, Court and Legal Services, DJJ and the Chief Magistrate of the Children's Court is that the *Children (Criminal Proceedings) Act 1987* has no bearing and that juvenile detainees convicted of a serious indictable offence as defined by the *Crimes (Forensic Procedures) Act 2000* are eligible for testing.

There was some indication that the different views and interpretations could be due to the variety of ways that juvenile offenders can be dealt with by the criminal justice system.⁹⁸ Some respondents expressed a view that *legally* those children and young people convicted of serious indictable offences (as defined by the Act) would be eligible for DNA sampling, but *in reality* the only young people who are sentenced to a period of *imprisonment* are those who are convicted of a serious children's indictable offence.⁹⁹ This is discussed later in relation to control orders.

It is possible that in practice the only juvenile detainees that fall within the definition of 'serious indictable offender' are children and young people who have been convicted and sentenced to imprisonment for a serious children's indictable offence. It does, however, appear that the correct interpretation of the Act is the broader one, that is, that the Act allows for the DNA sampling of children and young people convicted of and sentenced to imprisonment for an offence that carries a maximum penalty of 5 or more years' imprisonment.

Recommendation 1

It is recommended that the Attorney General consider if it was intended that Part 7 of the Act include not only children and young people convicted of, and sentenced to, imprisonment for a serious children's indictable offence, but also for an offence that carries a maximum penalty of 5 or more years' imprisonment. To the extent that this intention is unclear in the present Act, it is recommended that consideration be given to clarifying the application of Part 7 of the Act to children and young people.

Serving a sentence of imprisonment

As stated above, Part 7 of the Act requires that a person be serving a sentence of imprisonment at the time of the forensic DNA sampling.

Department of Corrective Services

There are four categories of inmates in NSW correctional centres:¹⁰⁰ those who are convicted – 'sentenced inmates', 'appellants' and 'periodic detainees' – and those who are not convicted or 'on remand'. The following table shows the number of inmates in each of these categories in correctional centres as at 30 June 2000.

⁹⁵ Response from JR Dive, Senior Children's Magistrate, Deputy Chief Magistrate.

⁹⁶ NSW Law Reform Commission, Legal Aid Commission of NSW.

⁹⁷ NSW Law Reform Commission, NSW Legal Aid Commission, Youth Justice Coalition, NSW Commission for Children and Young People, Department for Women.

⁹⁸ See for example, s 33 of the *Children (Criminal Proceedings) Act 1987*.

⁹⁹ Telephone advice from Children's Legal Service.

¹⁰⁰ Statistics provided by the DCS Research and Statistics Unit, 25 November 2002. These figures relate to gazetted correctional centres only and do not include inmates housed temporarily in police and court complexes.

Table 5.1: Preliminary results from NSW Inmate Census 2003¹⁰¹**Inmates in correctional centres as at 30 June 2003**

Most Serious Offence	Legal Status			
	Sentenced	Appellant	Unconvicted	Total
Murder	387	23	116	526
Attempt Murder	36	0	56	92
Conspiracy to Murder	12	1	4	17
Manslaughter	121	3	3	127
Major Assault	527	51	313	891
Other Assault	284	26	227	537
Rape	2	0	0	2
Serious Sexual Assault	356	37	60	453
Incest/Carnal Knowledge	72	9	6	87
Indecent Assault	42	2	14	58
Buggery/Bestial	23	2	0	25
Robbery Major Assault	558	39	141	738
Other Robbery	302	23	77	402
Fraud	136	19	43	198
Break Enter and Steal	690	55	221	966
Other Steal	429	26	209	664
Driving/Traffic	424	47	31	502
Offences against Order	296	10	59	365
Breach Parole/Licence	340	1	0	341
Drug Offences	682	88	171	941
Other Offences	74	2	86	162
Total	5793	464	1837	8094

Inmates with active periodic detention orders as at 30 June 2003

Most Serious Offence	Legal Status	
	Sentenced	Total
Attempt Murder	1	1
Manslaughter	1	1
Major Assault	76	76
Other Assault	54	54
Serious Sexual Assault	8	8
Incest/Carnal Knowledge	1	1
Indecent Assault	17	17
Buggery/Bestial	2	2
Robbery Major Assault	21	21
Other Robbery	15	15
Fraud	83	83
Break Enter and Steal	49	49
Other Steal	71	71
Driving/Traffic	260	260
Offences against Order	32	32
Drug Offences	86	86
Other Offences	10	10
Total	787	787

¹⁰¹ Provided by the Corporate Research, Evaluation and Statistics Unit, DCS, 26 November 2002.

The forensic DNA sampling of sentenced full-time inmates began on 8 January 2001. During the review period 9,952 full time sentenced inmates (including appellants) were sampled. The DNA sampling of periodic detainees (who are all sentenced) began on 25 May 2002. During the review period 402 periodic detainees were sampled.

Because the legal status of inmates and detainees can be so varied, police must be sure that they are *currently* serving a sentence of imprisonment for a *serious indictable offence*. A person who is on remand and waiting to be tried for a serious indictable offence, whilst also serving a sentence of imprisonment for a minor indictable offence is not eligible to be sampled. Police appear to have been alert to this issue and we are aware of only one person who was sampled by NSW Police during our review period whilst still on remand.¹⁰²

Parolees

Parole is the discharge of prisoners from custody prior to the expiry of the maximum term of imprisonment imposed by the sentencing court. To qualify for parole, prisoners must agree to abide by certain conditions, such as good behaviour and supervision by parole officers.

People who are on parole cannot be sampled under Part 7 of the Act as they are not currently serving a sentence of imprisonment.

Department of Juvenile Justice

There is a broad range of options available to police and others when dealing with children and young people accused of committing an offence.¹⁰³ For a variety of reasons some offences are referred to court to be dealt with. Depending upon the type of offence, children and young people may be dealt with by the District Court or the Children's Court.

The Children's Court has jurisdiction to deal with the majority of people aged 10-18 years who are accused of offending. Section 7 of the *Children (Criminal Proceedings) Act* provides that a local court¹⁰⁴ should not deal with a matter if the Children's Court has jurisdiction. Offences that cannot be dealt with by the Children's Court (including homicide, offences punishable by penal servitude for life or 25 years, some sexual offences and some traffic offences), that is, serious children's indictable offences, are usually dealt with by the District Court.

Unlike the District Court, the Children's Court does not have the authority to sentence children and young people to a period of imprisonment. It can, however, issue an order committing the child or young person to the control of the Minister for Juvenile Justice.¹⁰⁵ This option results in the person being detained in a juvenile detention centre and is used where the court considers that there is no appropriate accommodation or care in the community.¹⁰⁶

If a young person pleads guilty to, or is found guilty of, an offence carrying a maximum penalty of five years or more imprisonment, the sentencing court can deal with the young person in a variety of ways. However, only the following outcomes would satisfy the requirements of Part 7 in relation to the need for the person to be *convicted of a serious indictable offence and sentenced to a period of imprisonment*:

- the child/young person is convicted of a serious indictable offence (including a serious children's indictable offence) and a sentence of imprisonment is ordered or¹⁰⁷
- the child/young person is convicted of a serious indictable offence (including a serious children's indictable offence), a control order is issued, and the control order becomes a sentence of imprisonment.¹⁰⁸

102 Information provided by NSW Police FPIT, 1 November 2002. That person's sample has been destroyed.

103 For example, cautioning and youth justice conferencing.

104 Or 'justice or justices'.

105 Section 33(1), *Children's (Criminal Proceedings) Act*.

106 Section 9, *Children (Detention Centres) Act 1987*.

107 'According to law' under the adult sentencing principles operating in the District Court and the Supreme Court.

108 See s 28B(4) of the *Children (Detention Centres) Act*.

Section 19 of the *Children (Criminal Proceedings) Act* provides for a court which sentences a person under 21 years of age to imprisonment in respect of an indictable offence, to make an order directing that the whole or any part of the term of the sentence of imprisonment be served in a detention centre (as opposed to an adult correctional centre).¹⁰⁹

In a correctional centre or other place of detention

The meaning of 'other place of detention' under Part 7 of the Act is not a matter of certainty. The Act does not define 'place of detention' or 'other place of detention'. Other NSW laws¹¹⁰ provide limited assistance in interpreting this phrase, and as far as we are aware 'other place of detention' has not been interpreted by the courts or discussed in case law.

Home detention

The NSW Home Detention Scheme commenced in February 1997. It provided an alternative manner of serving a term of full-time imprisonment of up to eighteen months. Offenders subject to home detention are required to remain within their residences unless undertaking approved activities, such as work or training. Participants may be required to perform community service, enter treatment programs, submit to urinalysis and breath analysis and seek and maintain employment. Probation and Parole Officers monitor offenders' compliance with home detention conditions on a 24-hour-a-day basis, using a variety of monitoring means. Breaches of conditions result in further penalties, including return to court. Further offences or unauthorised absences result in imprisonment.¹¹¹

On 30 June 2001 there were 395 persons in NSW subject to Home Detention Orders. On the same day in 2000 there were 385 home detainees. DCS reported that in 2001-2002 the number of offenders admitted to home detention was 416.¹¹²

Between the commencement of the Act and the end of our first review period (5 July 2002), 840 persons commenced new home detention orders.¹¹³ Of these, 47% had been sentenced to the equivalent of a full-time sentence of imprisonment of six months or less, 43% had been sentenced to the equivalent of a full-time sentence¹¹⁴ of imprisonment of six to 12 months, and 10% had been sentenced to the equivalent of a full-time sentence of imprisonment of more than 12 months. Only two home detainees had been sentenced to more than 18 months.

We were concerned about whether a person's home is an 'other place of detention' in circumstances where a person is subject to a home detention order. If the home was not a place of detention (as defined by the Act), then Part 7 of the Act would not apply to home detainees and the legitimacy of their DNA sampling could be questioned.

We asked NSW Police to obtain an independent legal opinion from the Crown Solicitor prior to commencing the DNA sampling of serious indictable offenders.

NSW Police responded that the sampling procedures were imminent and so it would commence the sampling as planned, but would obtain legal opinion from the Crown Solicitor on an urgent basis. On 26 September 2002 NSW Police began to take forensic DNA samples at Probation and Parole Offices from home detainees who had been convicted of a serious indictable offence.

109 Division 4 of the *Children (Criminal Proceedings) Act* includes additional criteria in relation to this provision.

110 See for example, the definitions of 'correctional centre' and 'full time detention' in the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999*.

111 DCS, Probation and Parole, website, http://www.dcs.nsw.gov.au/probation/home_detention.asp, 1 October 2002.

112 DCS, *Annual Report, 2001-2002*.

113 Based on information provided by the Home Detention Program, 31 December 2002.

114 The length of the home detention order was provided in days. We have converted the length of the order to the equivalent of full-time detention in months.

As at 7 November 2002 NSW Police had taken forensic DNA samples from 41 home detainees.

On 15 January 2003 we received a copy of the Crown Solicitor's advice to NSW Police on this matter. The Crown Solicitor noted that the term 'other place of detention' is not defined in the Act. The Crown Solicitor stated:

It appears to me that two possible constructions are available: a broad construction that would include the home of a person subject to a periodic detention order within the expression 'place of detention' on the basis that the person is there subject to a form of detention, and a more narrow construction that would confine the meaning of the term to an institutional place of detention in which the offender is in lawful custody.

....

The factors outlined above have drawn me, albeit with some hesitation, to prefer a construction that a home detainee is a person serving a sentence of imprisonment in a 'place of detention' and that Part 7 accordingly permits forensic procedures to be carried out on home detainees. Other indicators identified in the advice are more consistent with the narrow interpretation and I must therefore acknowledge that the matter is not free from doubt.¹¹⁵

We agree with the Crown Solicitor that the question of whether a home detainee is a person serving sentence of imprisonment at an 'other place of detention' as defined by the Act is not free from doubt. This is a matter that should be finally determined by the Parliament. We recommend that the Act is amended to clarify what constitutes an 'other place of detention', for the purposes of sampling serious indictable offenders.

Recommendation 2

It is recommended that the Act be amended to provide a definition of 'other place of detention' for the purpose of determining the eligibility of serious indictable offenders subject to forensic procedures under Part 7 of the Act.

Mass sampling of serious indictable offenders

In NSW, forensic procedures can be carried out on inmates and detainees serving a sentence of imprisonment for a serious indictable offence.

Section 61(4) states:

A person is authorised to carry out a forensic procedure under this Part on a person who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention whether or not the offender was convicted of the offence before or after the commencement of this section.

NSW Police have attempted to obtain DNA samples from all eligible inmates and detainees in order to build a substantial archive of DNA profiles which can be compared to DNA profiles found at crime scenes. NSW Police anticipates that this 'mass sampling' of serious indictable offenders will provide a valuable tool to assist the investigation of crimes and increase the speed at which crimes are solved.¹¹⁶

There is a major difference between the Act and the Model Bill relating to which serious indictable offenders can be subject to forensic procedures.

¹¹⁵ Crown Solicitor, Advice: Meaning of 'place of detention' in Part 7 of the *Crimes (Forensic Procedures) Act 2000*. Copy provided to this Office by NSW Police on 15 January 2003.

¹¹⁶ Dugandzic, Natalie, NSW Police, 'Inmate Testing – *Crimes (Forensic Procedures) Act 2000*', paper presented at Use of DNA in the Criminal Justice System, Institute of Criminology Seminar, 11 April 2001.

The Model Bill is more discriminating in that it requires a police officer to be satisfied that the request was 'justified in all the circumstances' before asking an offender to consent to a forensic procedure. In making this determination, the Model Bill requires the officer to balance the public interest in obtaining the evidence against the public interest in upholding the physical integrity of the person concerned.¹¹⁷ The officer is required to consider the seriousness of the circumstances surrounding the commission of the offence, the degree of participation by the person, the age, physical and mental health and the cultural background of the person, the reasons for non-consent (if any) and other matters.

The Model Bill's emphasis on the public interest aspect of forensic procedures is reflected in its inclusion of *released* serious indictable offenders who have served their sentence of imprisonment and have been released back into the community.¹¹⁸ In this regard the Model Bill reflects the Canadian approach, which requires that the public interest element be satisfied prior to retrospective DNA sampling being carried out.¹¹⁹

The Act does not require such an assessment to be made by police prior to asking an offender to participate in a forensic procedure. Examination of the Parliamentary debate suggests that this omission was deliberate.

In his second reading speech for the Crimes (Forensic Procedures) Bill 2000, the then Police Minister stated that there were, at that time, approximately 5,400 serious indictable offenders in NSW correctional centres and that:

*This will be the first group the police will start testing when the Act commences in January 2001. Why? Evidence from overseas has shown that less than 10 per cent of the population is responsible for over 90 per cent of crime committed.*¹²⁰

The Hon J W Shaw MLC, the then Attorney General, stated in his second reading speech that 'the rationale for targeting serious indictable offenders is the likelihood that they have committed or will commit other offences.'¹²¹

A number of Members of Parliament referred to the statistics quoted by the then Police Minister and reasserted that most crime is carried out by repeat offenders. Members also referred to the 'UK experience' as presented by Detective Superintendent Robin Napper to the Sydney Forensic Science Society in May 1999.¹²² According to Napper, the DNA sampling of prisoners in Britain assisted police in resolving 60 per cent of major unsolved crimes. Napper also claimed that forensic procedures in the UK play a role in solving more than 400 crimes per week.¹²³

It is, of course, very difficult to estimate the percentage of crimes that repeat offenders are responsible for, as there are many crimes that are not detected, not reported or where no offender is identified. For example, the Australian Bureau of Statistics found that only 34% of assault victims and 11% of sexual assault victims reported to police the last incident of assault they experienced.¹²⁴ Data provided to us by BOCSAR shows that of all persons appearing in local and district criminal courts (336,000 individuals) between 1996 and 2000, 71% appear before the courts only once.¹²⁵

117 Although Division 7 of the Model Bill does not include the matters to be considered by police in determining this, Division 4 does. Section 14, Division 4, Forensic Procedures Model Provisions, 2000.

118 See Division 7, Forensic Procedures Model Provisions, 2000.

119 DNA Retroactive Scheme, under the *DNA Identification Act (1988, c.37)*. In Canada, consideration was given to the possibility that taking DNA samples from every offender in custody, regardless of their level of public safety risk, could undermine the practical effectiveness of the data bank by directing limited forensic laboratory resources away from the most serious cases where DNA evidence is most likely to be useful. Meeting with staff at the Canadian National DNA Databank, Royal Canadian Mounted Police, Ottawa, Canada and meeting with staff at the Department of the Solicitor General, Ottawa, Canada.

120 The Hon. P Whelan, NSWPD, Legislative Assembly, 31 May 2000 p 6294.

121 The Hon J W Shaw, NSWPD, Legislative Council, 20 June 2000 p 7103.

122 Mr A Stoner MP NSWPD Legislative Assembly, 7 June 2000 p 6807; Mr B Collier MP NSWPD, Legislative Assembly, 7 June 2000 p 6736; Mr Richardson MP NSWPD, Legislative Assembly, 7 June 2000 p 6738.

123 Robin Napper, A National DNA Database: The United Kingdom Experience, paper presented to the Sydney Forensic Science Society, 13 May 1999.

124 Australian Bureau of Statistics, Crime & Justice - *Crime Levels: Reported crimes, Australian Social Trends*, 1997.

125 Unreported data provided to us by BOCSAR, 2002.

A number of people with whom we have consulted raised concerns about the mass sampling of serious indictable offenders. For example, the then Privacy Commissioner stated:

I have major concerns over the manner in which Part 7 has been interpreted to mandate across the board testing of all inmates with serious convictions. This approach strikes me as being inconsistent with the overall intention of the legislation, which implicitly recognises that taking generic samples is a form of intrusion on personal autonomy and that the circumstances justifying such collection should be precisely defined, communicated to the individual and so far as possible mediated through informed consent.

....

I appreciate that Part 7 as tabled in Parliament was worded in such a way as to exclude important requirements of the offence and whether the collection was justified in all circumstances and that this departure has been relied on to sanction mass testing.

*I am not convinced that the mass testing of serious indictable offenders is justifiable or appropriate.*¹²⁶

The Commonwealth Attorney General's Department made the following observations:

The NSW provision differs slightly from clause 62 of the Model Bill which requires that, in determining whether to make the order, a court is to take into account, amongst other things, 'the seriousness of the circumstances surrounding the commission of the offence.' If that requirement was included in the NSW Act, it will unlikely (sic) that a court would order a forensic procedure in the example given of a case of a child stealing a stick of bubble gum.

*The Department also notes that requiring a court to take into account the seriousness of the circumstances surrounding the commission of the offence is consistent with recommendation 18 of the Report of the Standing Committee on Law and Justice Inquiry into the Crimes (Forensic Procedures) Act 2000.*¹²⁷

Other respondents indicated that an even narrower approach should be taken with respect to juvenile offenders.¹²⁸ For example, the NSW Public Defenders Office and the NSW Bar Association asserted:

The Act draws a distinction between adult and child offenders. Adult offenders can be DNA tested and placed on the database because they are serious indictable offenders.

Children on the other hand can only be tested if that testing can be justified. It is unlikely that a court would find that a test requested merely to place a person on the general database was "justified in all the circumstances". Examples of testing that may be justified would be repeat offenders with a real risk of recidivism.

When it comes to the identification of those for whom orders could be sought it would appear that the authorities who are trying to find out a class of children who might be eligible for testing are approaching their task in the wrong way.

It is unnecessary for a general class of children to be identified as before any order was made each child would need to be individually examined in order to see if testing was justified.

Accordingly the police should approach child testing in a different way to adults.

¹²⁶ Privacy Commissioner, response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 1 March 2002.

¹²⁷ Commonwealth Attorney General's Department, response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 1 March 2002.

¹²⁸ NSW Public Defenders, The Bar Association of NSW, NSW Legal Aid Commission, NSW Law Reform Commission, Justice Action.

They must:

- *First, identify a child in detention whom they believe should be tested.*
- *Secondly, they must have reasons which would justify the test.*
- *Thirdly, they must show (and now an individual's case records can be checked) that the child has been convicted of a serious indictable offence ie; dealt with according to law and received a sentence of imprisonment.*

Only then should they attempt to get a court order.

If police follow this procedure we see no reason to deny them the right to apply to test an individual child in justifiable circumstances.

*The Act however does not provide for general testing of convicted children so that their DNA data can be placed on the database. There is simply no need to identify a generic class of possible testable children.*¹²⁹

During our interviews with serious indictable offenders, several expressed surprise at being asked to provide a forensic DNA sample, as they believed that their offence was not serious enough. For example, one interviewee stated:

*I'm in for shoplifting. I am not a violent person. I do not molest children. I do not rape women. I do not rob banks. I do not carry a gun. I have been put in the same category as the above people, and I feel it's a waste of taxpayers' money. I think if you surveyed the public and asked if shoplifting was a serious indictable offence they would laugh at you. If I'm going to be tested for shoplifting I feel the whole public should be. And I really think that the police should consent to it. The police should be DNA tested before they get the job. It should be taken on an actual sentence. They brought in truth in sentencing, but they want to treat you like you're doing 5 years when you're only in for 2 months. They can't have it both ways.*¹³⁰

Despite these concerns, the legislation permits the collection of DNA samples from all serious indictable offenders serving sentences of imprisonment. No refining 'other circumstance' requirement is included. NSW Police have taken a broad approach to the implementation of Part 7 of the Act, and have attempted to obtain DNA samples from as many serious indictable offenders as practicable.

There is some evidence that Parliament intended this approach, although only one non-violent serious indictable offence¹³¹ (theft) was mentioned in the Second Reading debates.

NSW Police has decided to obtain DNA samples from as many serious indictable offenders as possible under Part 7 of the Act, and this appears to be consistent with both the legislation and Parliament's intention. Police believe the intention of the Act is clear and that it was established to encompass the testing of any person 'who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention'.¹³²

However, we consider that the legislation and the parliamentary debates on the implementation of Part 7 are not beyond alternative interpretations.

¹²⁹ Submission from NSW Public Defenders, Bar Association of NSW concurred.

¹³⁰ Interviewee No 227.

¹³¹ Other non-violent serious indictable offences include, for example, shoplifting (s 117 *Crimes Act*), making a false statement in an affidavit (s 33(1) *Oaths Act 1900*) or in evidence to Parliament (s 13 *Parliamentary Evidence Act 1901*) soliciting or receiving a bribe as a NSW police officer (s 200 *Police Act 1990*) and disposing of waste in a manner likely to cause harm to the environment (s 115(1)(a) *Protection of the Environment Operations Act 1997*).

¹³² Section 61(4) of the Act

The advantage of obtaining a greater number of samples from serious indictable offenders is that the DNA database will hold more DNA profiles with which DNA profiles obtained from crime scenes can be compared.

The disadvantages include the resources required to obtain and analyse DNA samples from serious indictable offenders who are not considered to be at a 'high risk' of recidivism.

With regard to these disadvantages, NSW Police raised the question of who would be responsible for determining offenders that had a 'high risk' of recidivism and deciding who would and would not be tested if these disadvantages were addressed in the Act.

We consider that the Attorney General should assess the implementation of Part 7 of the Act by NSW Police in light of Parliament's intentions. If the Attorney General considers that the intention of Parliament differs from current NSW Police policy to take DNA samples from all eligible serious indictable offenders, we recommend that consideration should be given to appropriate amendments to the Act, such as those recommended by the Standing Committee.¹³³

Recommendation 3

It is recommended that the Attorney General consider whether Parliament intended Part 7 of the Act include the mass sampling of serious indictable offenders by NSW Police. To the extent that Parliament's intention is unclear in the present Act, it is recommended that consideration be given to clarifying the application of Part 7 to all eligible serious indictable offenders.

¹³³ Standing Committee, Op. Cit., Recommendations 17 and 18.

Chapter 6: Development of policies and procedures

As discussed earlier, Part 7 of the Act authorises forensic procedures to be carried out on a person if they are 'serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention'. This sampling requires a high level of cooperation between NSW Police and those charged with the care and management of serious indictable offenders. Although the NSW Police ITTs conduct the sampling, these teams are dependent upon correctional supervisors to facilitate the sampling; for example, escorting serious indictable offenders to and from the Inmate Testing Area (ITA).

Policies and procedures for adult correctional centres

Prior to the commencement of the Act, NSW Police and DCS met regularly and drafted policies and procedures to minimise any disruption in correctional centres that may be caused by the DNA sampling. Issues facing DCS included the possibility that the DNA sampling could cause unrest amongst inmates and that some might even try to escape to avoid the forensic procedures (and the potential of being linked to other crimes). DCS also had to make logistical arrangements, including how serious indictable offenders would be informed about the DNA sampling and where it would take place.

Representatives from both agencies travelled to other jurisdictions (Victoria and Queensland) which had already begun to take forensic DNA samples from inmates. They researched the DNA sampling of inmates and explored the problems faced by police and correctional officers in those jurisdictions.

A Memorandum of Understanding (MOU) between NSW Police and DCS was drafted. It outlined the process and the areas of responsibility of the respective agencies. For example, the responsibilities of DCS included:

- providing an area within the correctional centre suitable for DNA sampling
- ensuring that all inmates are advised of their right to seek, or attempt to seek, legal advice from a legal practitioner of their choice
- ensuring that Aboriginal, Torres Strait Islander and 'incapable' inmates are provided with the opportunity to arrange for interview friends and legal practitioners to be present during the sampling
- providing the Correctional Centre Liaison Officer (CCLO) as an independent witness if the procedure is not video-taped
- arranging for the presence of accredited interpreters.

NSW Police responsibilities included:

- conducting the forensic sampling
- videotaping procedures
- following Governors' instructions relating to the management and safety of inmates.

Our review included scrutinising all policies and procedures relating to the forensic DNA sampling and monitoring the implementation of those procedures. We also attended the training provided to the ITTs and followed the development of the NSW Police Standard Operating Procedures (SOPs).

Neither the NSW Police SOPs nor the MOU were finalised before the commencement of the DNA sampling. NSW Police informed us that this was due to the complexity of the issues and to allow for flexibility and adjustments that may have been required in the early stages of implementation. In our discussion paper we noted that NSW Police had informed us that the draft SOPs and MOU were being adhered to.

On 15 April 2002 NSW Police provided us with the approved version of the SOPs, which had been signed off in November 2001.

Police acknowledged that the process of signing the MOU had taken longer than anticipated and stated:

The issues captured in the document are extremely complex and both agencies were keen to ensure that the document accurately reflects correct policies and procedures. Both agencies have agreed to the document 'in principle' prior to the commencement of inmate testing and the document was forwarded to the Legal Section of the Department of Corrective Services for its review in October 2001.

At the time of writing this report, the MOU had still not been signed off by the agencies. We believe that it would be beneficial for the MOU between NSW Police and DCS to be finalised and formalised as soon as possible, for a number of reasons.

First, the MOU provides for a 'cooling off' period - an initiative that is not included in the Act. The 'cooling off' period is discussed in more detail in Chapter 12. It is, in our view, an important and effective arrangement for the overall implementation of DNA sampling.

Second, some aspects of the MOU do not reflect current policy. For example, the MOU states that the CCLO will arrange for an accredited interpreter to be present where necessary while the sample is taken, whereas in practice it is NSW Police that organises interpreters.¹³⁴

Third, some aspects of the MOU are ambiguous and should be clarified. For example, the MOU states that 'In the case of non-compliant testing, Correctional Centre Security Unit staff will be responsible for bringing the inmate to the testing area. The need to have the inmate secured in a restraint will be determined by Correctional Centre Security Unit staff'. NSW Police has informed us that 'the decision about whether or not to take the handcuffs off an inmate rests with Corrective Services personnel'.¹³⁵ However, the DCS SOPs state:

Inmates who comply with the proclamation must still be restrained in a security belt. Removal of the security belt from a compliant inmate will be at the discretion of the police team leader.

Lastly, the MOU states that when a link (known as a 'cold hit') has been made between an inmate's DNA profile and the DNA profile found at a crime scene, NSW Police will notify DCS of the cold hit before investigating officers attend the Correctional Centre to interview the inmate concerned. DCS stated that it would like to be notified of any cold hits for security purposes. For example, an inmate who discovers that s/he is being investigated for additional offences may become an escape risk and DCS may wish to reconsider her or his security classification.

¹³⁴ This is reflected in the NSW Police Standard Operating Procedures (SOPs), version 5.0, November 2001.

¹³⁵ Correspondence, NSW Police FPIT, 30 June 2003.

Recommendation 4

It is recommended that NSW Police and DCS finalise and formalise their agreement in relation to the forensic DNA sampling of serious indictable offenders as soon as possible.

In respect of the last point noted above, one DCS officer told us that whilst listening to an early morning radio program s/he learned of NSW Police's intention to charge a particular inmate as a result of a cold hit.¹³⁶ The DCS officer was worried that the inmate concerned might have been in minimum security and could have been alerted to the impending charge from the media. The concern was that the inmate could have absconded from the centre to avoid further prosecution before DCS had the opportunity to take extra security precautions.¹³⁷

Section 109 of the Act prescribes the purposes for which information obtained from a forensic procedure can be disclosed. However, there is no clear power under s 109 to release the information to DCS, and originally there was no regulation permitting the release for the purpose of notifying a custodial/supervisory agency about a cold hit to an inmate or detainee. This meant that the MOU could not legally be adhered to until changes were made to the regulations within the Act. DCS sought an amendment to the Act to enable the MOU to be fully implemented. The Crimes (Forensic Procedures) Amendment (Disclosure of Information) Regulation 2003 came into effect from 21 February 2003 and inserted subclauses (3) to (7) to Clause 11 of the Regulation.¹³⁸ This amendment allowed disclosure of information on the DNA database about a serious indictable offender who has been sampled under Part 7 of the Act for any purpose relating to the prisoner's security classification, placement or management. Recent advice from the DCS states that NSW Police are not actively implementing this regulation.¹³⁹

NSW Police have stated that they do not believe it is necessary to advise DCS of all cold links and that the security issues for warm and cold links are likely to be the same. Alternatively, NSW Police propose that DCS could amend their "Local Leave Order" to require police making an application "pursuant to section 25(1) of the *Crimes (Administration of Sentences) Act*" to advise whether the application relates to a warm or cold link. NSW Police have also advised that there is now greater consultation between the Police Media Unit, FPIT and DCS prior to any media releases being issued that relate to current inmates.¹⁴⁰

Policies and procedures for home detainees

The terms and conditions of home detention orders are not only set by the sentencing court. Home Detention Officers can give home detainees a 'reasonable direction' to do something or not to do something.¹⁴¹

NSW Police negotiated an agreement with NSW Home Detainees Program, Probation and Parole to obtain access to home detainees who had received a home detention order for a serious indictable offence. The Home Detainees Program agreed to facilitate DNA sampling by providing NSW Police with the details of home detainees who 'met the criteria for testing',¹⁴² providing detainees with information about the sampling and directing home detainees to attend Probation and Parole Offices for the purpose of DNA sampling. A failure by the home detainee to comply with the direction to attend their scheduled DNA sampling would be a breach of their home detention order¹⁴³ and as such could be referred to the Parole Board who may consider revoking the home detention order. A revocation of the person's home detention order could result in their transfer to full-time custody in a correctional centre.

¹³⁶ The NSW Police believe that the media release only mentioned that as a result of a 'cold link' an unnamed inmate was shortly to be charged in relation to a particular (identified) offence.

¹³⁷ DCS representative, 9 December 2002.

¹³⁸ Correspondence from Director General, NSW Attorney General's Department, 1 March 2004.

¹³⁹ Correspondence from the Commissioner, DCS, 27 February 2004.

¹⁴⁰ Correspondence from NSW Police, 19 April 2004.

¹⁴¹ Clause 200(v) Crimes (Administration of Sentences) Regulation 2001.

¹⁴² That is, home detainees who are serving a sentence of imprisonment (by way of a home detention order) due to being convicted of a serious indictable offence.

¹⁴³ Under cl 200(v) of the Crimes (Administration of Sentences) Regulation 2001.

Policies and procedures for juvenile detention centres

The forensic DNA sampling of juvenile detainees commenced on 31 October 2001, more than 10 months after it began in adult correctional centres. In our discussion paper we indicated that part of the reason for the delay was difficulties in identifying which children and young people were eligible to be sampled under the Act.¹⁴⁴ Earlier in this report we discussed the difference between 'serious indictable offences' and 'serious children's indictable offences'.¹⁴⁵ In addition to this debate, there were also discussions about whether it should be NSW Police or DJJ officers who bring non-compliant detainees to the Inmate Testing Area.¹⁴⁶

NSW Police advised us that its preference was for DJJ officers to use force to bring non-compliant detainees to the ITA. We were advised that after some months of discussions, DJJ decided that its officers would not use force to facilitate the forensic procedures, and that if a detainee refused to attend the ITA, then it would be up to police to bring that detainee to the ITA and to restrain the detainee.

The NSW Police submission to the Standing Committee stated that an MOU between police and DJJ was being drafted at that time (July 2001). We were advised that NSW Police and DJJ decided in May 2001 that in lieu of NSW Police SOPs, an MOU between the two agencies would suffice. We were later informed that NSW Police did not develop an MOU on juvenile sampling and instead relied upon agreements made in meetings.¹⁴⁷

We wrote to both NSW Police and DJJ requesting that they confirm that their current policies in relation to the use of force in juvenile detention centres were compatible.

NSW Police responded:

*I can confirm that the information contained in ... the Inmate Testing Standard Operating Procedures ... reflects current procedures in relation to the 'use of reasonable force' on non-compliant inmates. Following extensive negotiation with the Department of Juvenile Justice, however, it has been agreed that officers of that Department will not be required to use force on detainees within Detention Centres in relation to the obtaining of forensic samples.*¹⁴⁸

In fact, during our review period, only 49 people in juvenile detention centres were sampled under Part 7 of the Act. Not one of these detainees was non-compliant and so force did not need to be used.¹⁴⁹

Notwithstanding these statistics, our view is that the best interests of NSW Police and DJJ require that their procedures¹⁵⁰ and policies are both transparent and unambiguous. This may be of particular importance if a situation of non-compliance arises in future.

Recommendation 5

It is recommended that NSW Police and the DJJ finalise and formalise their agreement in relation to forensic procedures conducted in juvenile detention as soon as possible.

144 NSW Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders*, December 2001.

145 Refer to previous discussion in Chapter 5.

146 Non-compliant inmates are those who physically resist the forensic procedure.

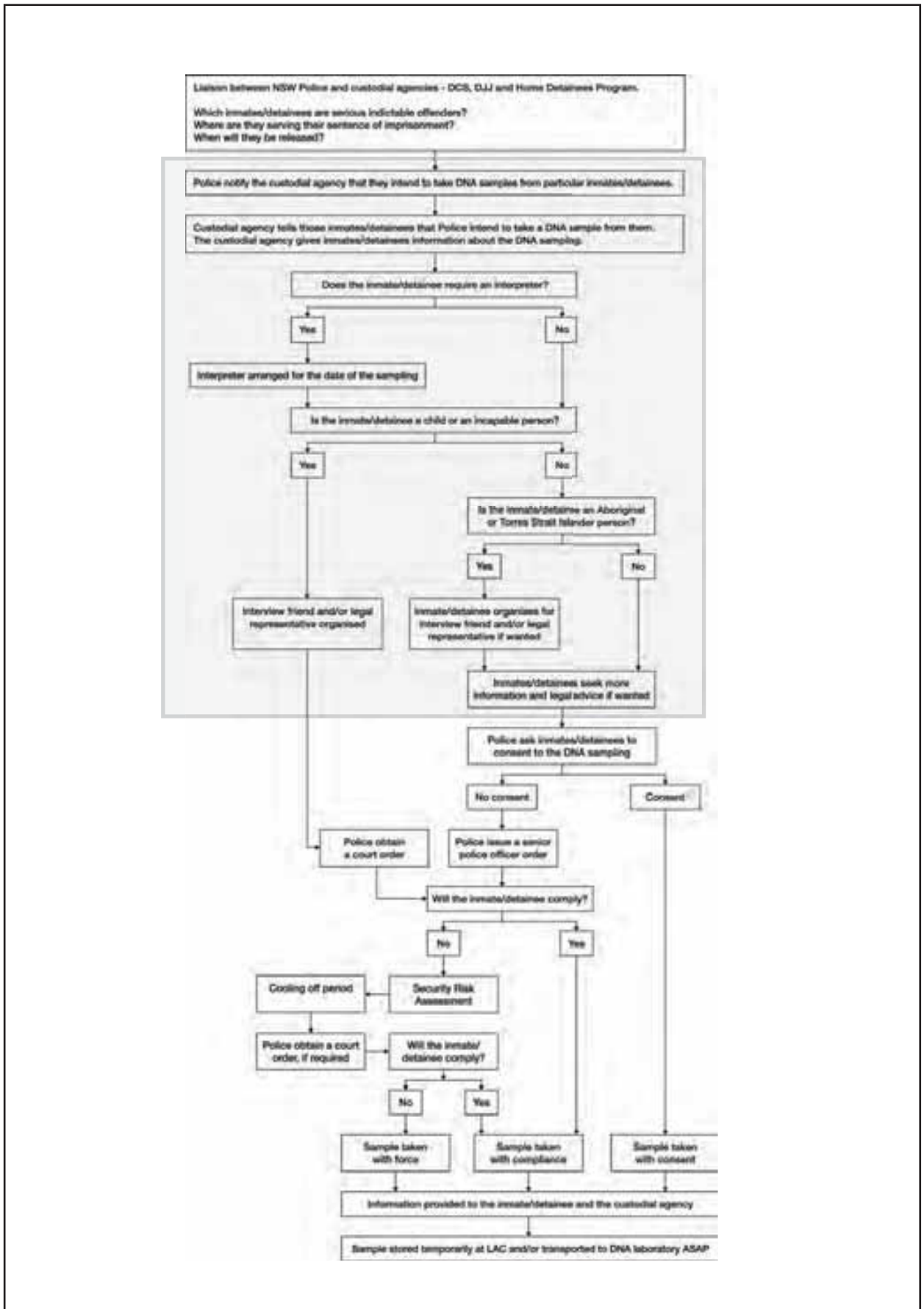
147 Information provided by FPIT, 3 May 2002.

148 Correspondence from Acting Deputy Commissioner Jeffries, received 22 July 2002.

149 Information provided by NSW Police FPIT.

150 Operational Procedures for Juvenile Justice Centres: DNA Testing in Juvenile Justice Centres has been in effect for the Department since February 2002.

Part C: Pre-Sampling Functions and Issues



Chapter 7: DNA Sampling Education Programs

What the Act says

The Act requires that certain information be provided to a serious indictable offender prior to a police officer officially asking the offender to consent to a forensic procedure. The implementation of this requirement will be discussed later under 'Obtaining consent'. Before serious indictable offenders see the ITT about the DNA sampling, they are provided with background information about the sampling by the custodial/supervisory agency that is responsible for them. This section of the report is about this background information provided to serious indictable offenders by DCS, DJJ and the Home Detention Program.

Inmates in adult correctional centres were the first group of serious indictable offenders to be sampled under Part 7 of the Act. NSW Police began taking DNA samples from adult prisoners on 8 January 2001. As part of the preparation for this, DCS and NSW Police consulted with police and correctional officers in Victoria. At that time Victoria was the only Australian jurisdiction conducting DNA sampling on prisoners. Victoria had experienced some problems¹⁵¹ with achieving the cooperation of inmates who had been provided with little information about the sampling. The Senior Victorian Correctional Officer advised DCS and NSW Police that 'the best thing to do was to saturate inmates with education'.¹⁵²

As a result of these consultations, DCS and NSW Police decided to make the sampling process as transparent as possible.¹⁵³ DCS established an 'education program' to provide serious indictable offenders with information about the DNA sampling and the DNA Database before the offender was asked by police to provide a sample. The DCS DNA Sampling Education Program consisted of a leaflet, a video, a seven-page handout and 'pre-test interview' with inmates. DJJ adopted a similar program when NSW Police began sampling detainees in October 2001.

It is important to recognise that the information provided by these education programs was above and beyond the requirements of the Act. However, our review found that NSW Police came to assume that certain parts of the education programs for DNA sampling had already been conducted before they took samples. To this extent, aspects of the education programs have become an integral part of the DNA sampling of serious indictable offenders. For this reason, we monitored the implementation of the education programs provided to inmates and detainees.

The education program in adult correctional centres

Commander Middlebrook of DCS described the DCS education program as follows:

A senior officer of each correctional centre was nominated as the correctional centre liaison officer and their main duties were to deliver an education campaign to inmates and staff, to act as a first point of contact for inmates with queries or concerns about the legislation or testing process, to liaise with the two departmental officers appointed about the implementation process or any other issue, and to assist inmates in obtaining legal advice, organising the interview friends and interpreters if required, act as an independent person within the context of the legislation, act as the delegate of the governor or superintendent of each correctional centre to ensure that tests are carried out in accordance with legislation and in a manner that will not cause unrest among the inmates in those correctional centres.

151 See for example, Insight, shown on SBS TV, 31 May 2001 and *Lednar & Ors v Magistrates' Court & Anor* (2000) VSC 549 (22 December 2000).

152 Evidence given by Commander Middlebrook, DCS to the Standing Committee on Law and Justice Review of the Operation of the *Crimes (Forensic Procedures) Act 2000*, Monday 24 September 2001.

153 DCS, Interdepartmental Committee on the *Crimes (Forensic Procedures) Act 2000*, Meeting 15 December 2000.

The education campaign incorporated face-to-face information sessions. Information videos, brochures and handouts were delivered simultaneously at all correctional centres on Monday, 27 November 2000 and that education is ongoing.

The inmate development committees, which are made up of representatives from inmates in correctional centres and all those correctional centres, were consulted in relation to the legislation and testing procedures. Standard operating procedures for staff involved in the implementation process were developed and distributed. There were 140 copies of the legislation distributed to correctional centre libraries for use by inmates.¹⁵⁴

We were advised that the on-going education program involved the CCLOs preparing or 'prepping' inmates from whom NSW Police planned to collect samples. The 'prepping' and pre-test interviews with inmates involved:

- assessing inmates' knowledge about the forensic DNA sampling and providing additional information where required
- assessing inmates' capacity to consent to the forensic DNA sampling¹⁵⁵
- showing a video specially prepared for inmates – 'The DNA Database and the Law'
- providing inmates with the opportunity to obtain legal advice about the DNA sampling¹⁵⁶
- assisting Aboriginal/Torres Strait Islander inmates to organise the presence of interview friends and legal practitioners, if required
- assisting 'incapable' inmates to organise the presence of interview friends and legal practitioners, if required
- assessing inmates' intention to consent or comply with the forensic DNA sampling.¹⁵⁷

If inmates required further information about the DNA sampling, they were provided with a seven-page handout¹⁵⁸, referred to the Act and/or advised to obtain legal advice.

We were advised that DCS implemented the same process for both periodic detainees and full-time inmates.

It is usually at the point of the pre-test interview that inmates are informed of the approximate date that police will ask them to provide a forensic DNA sample. The amount of notice provided to inmates is important with respect to their ability to obtain legal advice and other information about the sampling. This will be discussed separately below under 'Notice provided to serious indictable offenders'.

¹⁵⁴ Evidence given by Commander Middlebrook, DCS to the Standing Committee on Law and Justice Review of the Operation of the *Crimes (Forensic Procedures) Act 2000*, Monday 24 September 2001.

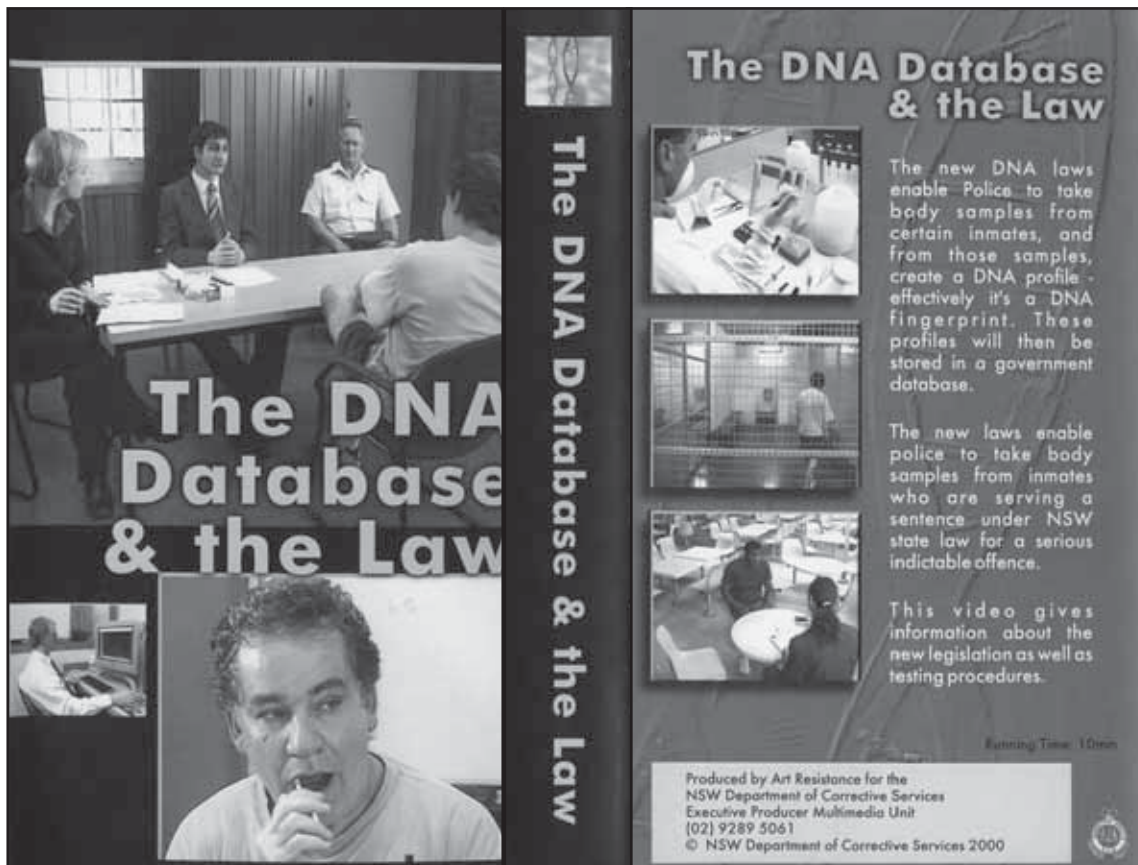
¹⁵⁵ See chapter 11.

¹⁵⁶ This included providing access to a telephone and a free phone call, if required. Phone calls to the Legal Aid Commission and Prisoners Legal Service are free.

¹⁵⁷ See Appendix I.

¹⁵⁸ See Appendix J.

Figure 7.1: “The DNA Database and the Law” video cassette cover



Source: NSW DCS, *The DNA Database and the Law*, Video, 2000¹⁵⁹

The education program in juvenile detention centres

Between 1 January 2001 and 5 July 2002, 49 serious indictable offenders in juvenile detention centres were sampled by police. The majority of these detainees were over the age of 18, and could be requested to consent to a procedure in the same manner as inmates in adult correctional centres. For the six detainees who were under the age of 18, the Act required a court order to authorise the DNA sampling and an interview friend to be present throughout the procedure.

The procedure for forensic DNA sampling in juvenile detention centres is set out in the DJJ Operational Procedures for Juvenile Justice Centres.¹⁶⁰ The Procedures state that when NSW Police advise DJJ of their intention to sample particular detainees, the Operations Coordinator should notify the detainee that s/he ‘will be required to participate in a forensic procedure conducted by NSW Police’.

The detainee must be provided with a copy of the information leaflet prepared by DJJ and the Children’s Legal Service, and the Operations Coordinator should ensure that the detainee understands the information in the leaflet. The Operations Coordinator is responsible for arranging for the detainee to obtain legal advice, an interpreter (if required) and the attendance of an interview friend (where the detainee is under 18 years) prior to the DNA sampling. The detainee is asked to complete and sign a ‘Pre-test Interview Form’.¹⁶¹

¹⁵⁹ Reproduced with permission from DCS.

¹⁶⁰ DNA Testing in Juvenile Justice Centres: Operational Procedures for Juvenile Justice Centres, February 2002.

¹⁶¹ Forensic Testing – Detainee Pre-Test Interview Form. Attached at Appendix K.

The education program for home detainees

The forensic DNA sampling of home detainees began in September 2002.

The Home Detainees Program is operated by NSW Probation and Parole and aims to replicate the forensic DNA sampling arrangements between NSW Police and DCS (where applicable).¹⁶²

The agreement between NSW Police and the Home Detainees Program states that home detainees identified as being serious indictable offenders should be interviewed by their Home Detention supervising officer at least one week prior to the scheduled date for sampling. At the time of the interview, home detainees should be shown the DCS video 'The DNA Database and the Law', provided with a copy of the DCS leaflet 'Forensic Procedures – information for detainees' and asked to complete and sign the 'Forensic Testing Pre-Test Interview Form'.¹⁶³

According to the agreement, Home Detention officers are responsible for determining whether a home detainee has the capacity to consent to the forensic DNA sampling. These officers are also required to advise 'incapable' detainees¹⁶⁴ and Aboriginal/Torres Strait Islander detainees of their right to have an interview friend and/or legal representative accompany them during the sampling. Home Detention supervising officers are required to assess the language skills of the home detainee and advise NSW Police if an interpreter is required.

How we monitored the implementation of the education programs

In order to assess the implementation of the education programs we consulted with representatives of people directly affected by the forensic DNA sampling. This included a sample of serious indictable offenders, the NSW Police ITT, DCS correctional officers, DCS welfare staff and Juvenile Justice Centre Managers. We also liaised with the Children's Legal Centre, policy officers from the relevant agencies and prisoner advocacy groups.

Interviews with serious indictable offenders

We spoke to 209 serious indictable offenders in adult correctional centres after their appointment with the ITT to have a DNA sample taken. We held interviews with 192 serious indictable offenders, and based our results on the 184 who met our criteria. The results of our interviews with serious indictable offenders are attached at Appendix C.

The information provided by DCS as part of the education program should be readily accessible to all inmates. This includes the DCS video, the DCS leaflet and a seven-page document called *Forensic Procedures: Handout for staff and inmates*.

In order to assess whether interviewees had accessed this information, we asked if they had obtained information from a number of sources and if so, how helpful they found that information.

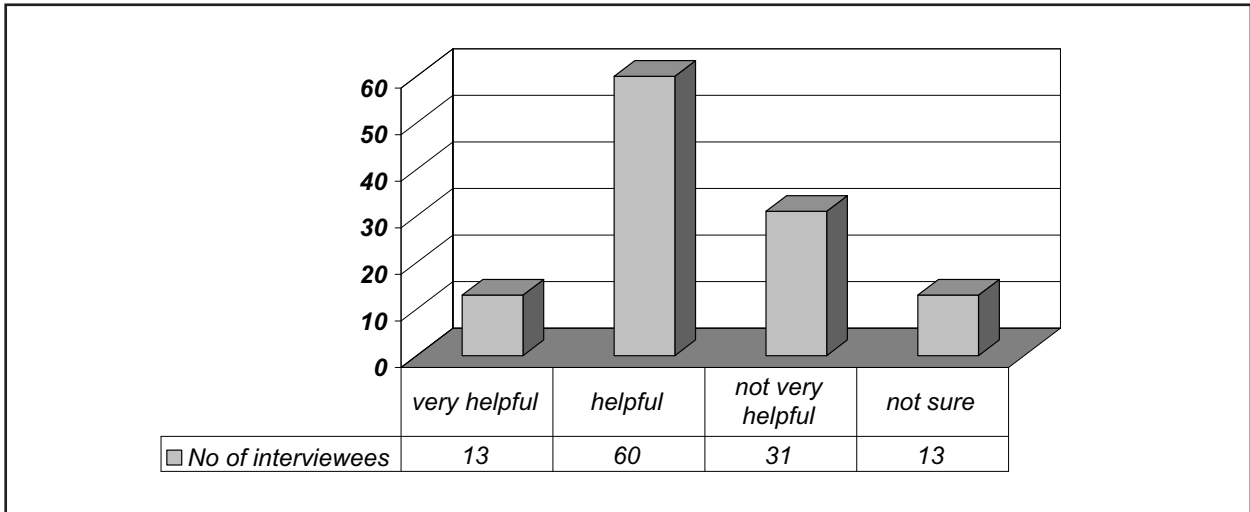
Most interviewees (63% or 117 out of 184) obtained information from the DCS leaflet. Over half of these said that they first got that information 'less than one week ago'. That is, less than one week prior to their sample being taken by the ITT. The majority of the interviewees who obtained information from the leaflet (62% or 73 out of 117) found the leaflet to be either 'helpful' or 'very helpful'. Some inmates were not sure how helpful the information was. For example, six interviewees had seen the leaflet but could not read, and several others told us that they had not read it for other reasons.

¹⁶² Agreement between the NSW Home Detainees Program, Probation and Parole and the NSW Police Service for the DNA Testing of Home Detainees.

¹⁶³ See Appendix I.

¹⁶⁴ See discussion of who is defined as an 'incapable adult' in Chapter 10.

Figure 7.2: How helpful was the information in the DCS leaflet?

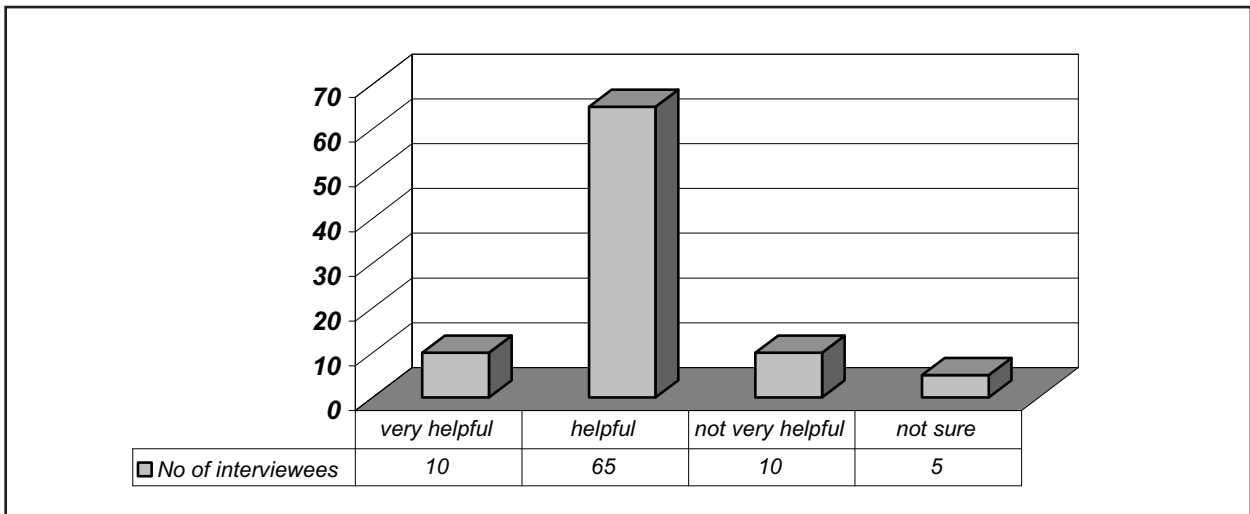


n= 117

Source: Ombudsman’s Office interviews with serious indictable offenders, 2002

Our interviews indicated that the DCS video was judged to be the most useful source of information provided by DCS. However, less than half of the inmates surveyed reported seeing the video. Only 90 (or 49%) of interviewees said that they had either seen or obtained information from the DCS video. Of those who had seen the video, more than 83% found it to be either ‘helpful’ or ‘very helpful’. Only ten interviewees stated that they did not find the video helpful.

Figure 7.3: How helpful was the information in the DCS video?

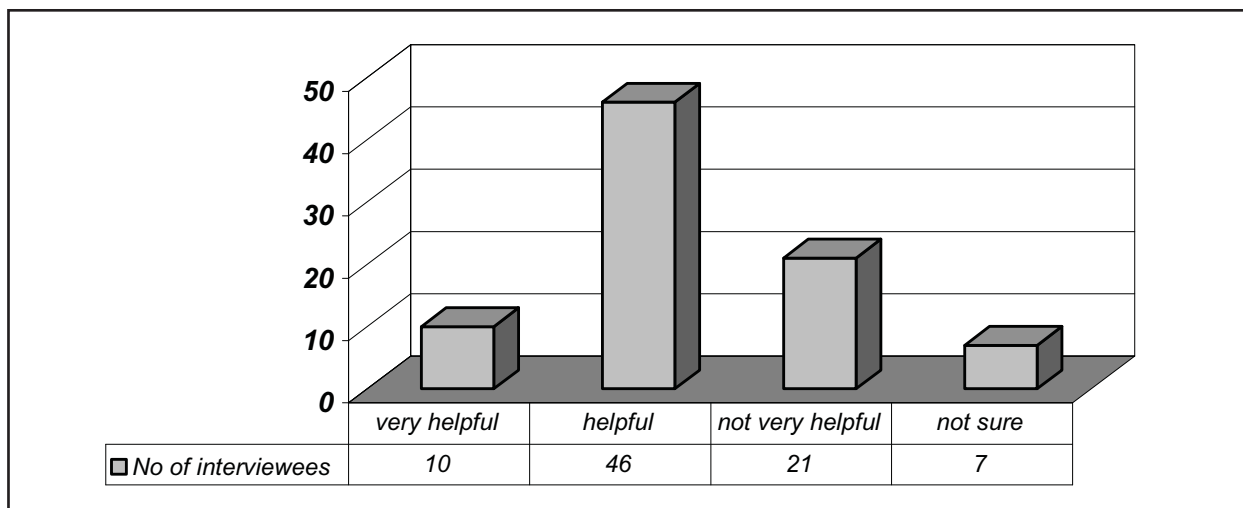


n=90

Source: Ombudsman’s Office interviews with serious indictable offenders, 2002

Approximately 46% (84 out of 184) of interviewees said that they had obtained information about the DNA sampling from the CCLO or another DCS worker. 63% (53 out of 84) of the interviewees who obtained information from a CCLO or other DCS worker said that they found that information to be ‘helpful’ or ‘very helpful’.

Figure 7.4: How helpful was the information from the CCLO or other DCS worker?



n=84

Source: Ombudsman’s Office interviews with serious indictable offenders, 2002

In contrast, only 20 interviewees considered that they obtained information about the DNA sampling from the police. As stated earlier, it is a legal requirement that NSW Police provide certain information prior to requesting a DNA sample. It is possible that the information being provided by the ITT is so complex that it is not even recognised as ‘information provision’ by the interviewees. This issue is discussed later under ‘Obtaining consent’

39% (71 out of 184) of interviewees said that they had obtained information about the DNA sampling from another inmate. 60% (43 out of 72) of these interviewees said that they found that information either ‘helpful’ or ‘very helpful’.

Very few interviewees said that they had obtained information about the DNA sampling from their Inmate Development Committee (4 interviewees) the Ombudsman’s leaflet on forensic DNA sampling¹⁶⁵ (2 interviewees), or publications by the Justice Action lobby group (2 interviewees). No interviewees had obtained information about the DNA sampling from the Official Visitor.

When asked if there was anything else that they would have liked to have known before they saw the police about the DNA sampling, 71 (39%) of interviewees answered ‘Yes’. The type of information that inmates would have like to have had prior to the DNA sampling is summarised below in Table 7.5.

¹⁶⁵ This leaflet was distributed early in our review period. It explained the role of the Ombudsman under the Act and encouraged comments and contributions to our review.

Table 7.5: What interviewees would have liked to have known prior to seeing the police about the DNA sampling

Number of interviewees	Categories of information
43	<p>Legal advice <i>How come someone who has been in a car accident has to give their DNA? Fair enough if you're a bank robber.</i>¹⁶⁶</p>
19	<p>Information about DNA and the DNA Database <i>What DNA is and a bit more about it. Fingerprints are easy, but this is microscopic so you don't know whether to believe it or not.</i>¹⁶⁷</p>
9	<p>Information about the safeguards to protect the integrity of DNA samples <i>My only concern was about whether or not police could set you up for a crime – then the police showed me the tamper proof bags and that made me feel better about it.</i>¹⁶⁸ <i>If anyone wants to 'frame' you for a crime, its easy.</i> <i>For example, a hair sample is easy to obtain from your house and leave at a crime scene. How can prisoners then prove that it wasn't them? Would they need more evidence than just a DNA sample.</i>¹⁹⁶</p>
9	<p>Information about the procedure itself <i>It's a pity that no-one could have shown me this (the DCS video) because otherwise I would have been much better informed before the procedure.</i>¹⁷⁰</p>

N=71 (more than one category of responses to this answer were allowed).

Source: Ombudsman's interviews with serious indictable offenders, 2002

Focus groups with ITT members

Our focus groups with the ITT members revealed that they relied heavily on CCLOs to prepare and inform the inmates about the DNA sampling. The education program appears to be crucial to the straightforward conduct of the sampling.

Focus groups with DCS correctional and welfare staff

We held focus groups with CCLOs and welfare staff at each of the four regional DCS centres.

The CCLOs stated that they adapted the DCS education program to suit the needs of their particular centre and inmates. One CCLO explained:

Liaison officers were called in [to] Head Office, for a half a day meeting. We were told to go back to our centres and implement a procedure that would work for our centre, identifying the testing area, ensuring privacy and that the area is appropriate for testing, appropriate access to the inmates, etc.

From [name of centre]'s point of view, we made up an actual booklet that we presented to the original implementation team. The booklet took us through our training process with the inmates, where we were going to do the testing, and how we were going to do it. And that it is why we have been so successful: because we looked at it from a legality point of view from the word go. What could go wrong, what could go right.

¹⁶⁶ Interviewee No 92.

¹⁶⁷ Interviewee No 149.

¹⁶⁸ Interviewee No 164.

¹⁶⁹ Interviewee No 158.

¹⁷⁰ Interviewee No 125.

I know that the interview sheet has originated from [name of centre], and ended up state-wide. We formulated the booklet (other people had involvement in it) and it was set out to give these inmates the maximum opportunity to address what was going on... It was up to the centres to come up with the best method. And being professional people, I think that's the way it's gone.

The DCS education program is therefore implemented differently in each centre. In some centres, the video is shown to inmates upon their arrival at the centre. In others it is shown during the Pre-Test Interview. Some centres arrange for the video to be streamed through the prison TV/video system several times per week, or on specific days leading up to the visit by the ITT.¹⁷¹ Some CCLOs provide the information to inmates on an individual basis and others provide it to the group of inmates identified by NSW Police as being serious indictable offenders.

The CCLOs spoke about the challenges they faced in preparing inmates and implementing the DCS education program. They indicated that the high level of mobility of prisoners between the different centres means that the list of inmates from whom police intend to take a sample will always be out of date. The CCLOs stated that if they prepared the inmates too early, then most of the inmates would have been transferred to other centres by the time of the ITT visit. Similarly, additional serious indictable offenders would have been transferred to their centre, and would need to be 'prepped' prior to seeing the ITT. One CCLO explained:

I get a list sent of who [DCS and Police] think are serious indictable offenders and what I then do is go and check that, because usually their list is a week or so old. So usually three days or so before, or whatever time I'm available to do it, I'll go and print out a new list of my own – a current one – and nine times out of 10 I can scrap half the people they had on the list. Once I have a current one I can then go and interview them all.¹⁷²

Many CCLOs interviewed were acutely aware of the lack of DCS resources available to facilitate the DNA sampling. They emphasised the necessity of CCLOs being provided with training in their role and adequate time to prepare and interview inmates.¹⁷³ They also stated that there was a great deal of clerical work involved in the DNA sampling.

We asked the CCLOs and DCS welfare staff what sort of questions inmates asked them about the DNA sampling.

The CCLOs indicated that inmates were sometimes confused about their status as serious indictable offenders. One CCLO recalled a conversation he had with an inmate:

Inmate: *'I've only got 6 months, what am I being [sampled] for?'*
CCLO: *'You're in for shoplifting.'*
Inmate: *'Yeah, but I only lifted \$5.50 worth of stuff.'*
CCLO: *'Well I'm sorry. It's a serious indictable offence.'¹⁷⁴*

A few CCLOs suggested that it would be useful if they had a list of serious indictable offences so that they could actually demonstrate to the inmate that the offence for which the inmate had been convicted was a serious indictable offence. We note that this information would probably be provided by a legal practitioner if the inmate asked for an explanation about their serious indictable offender status.

171 Focus Group Nos 2, 3, 4 and 5.

172 Focus Group No 3.

173 Focus Group No 3.

174 Focus Group No 2.

Many CCLOs and welfare staff indicated that a considerable number of inmates were mistrustful of police and were worried about what would happen to their DNA sample.¹⁷⁵ Apparently inmates were concerned that their DNA sample would be 'planted' at a crime scene by police. One CCLO suggested that the video could have reconstructed the transportation of the samples to DAL, emphasising the security features of the process and equipment.¹⁷⁶ During our video audit we noted that most ITT members explained the safeguards to the inmates whilst sealing the DNA sample in the tamper-evident bags. However, this explanation was not always provided and inmates are not provided with information about who they should contact should they have questions about their sample.

Random audits of availability of access to the legislation

DCS provided 140 copies of the Act to adult correctional centres throughout NSW for access by inmates and staff.¹⁷⁷ DCS informed us that these documents were placed in the library and/or made readily available to inmates upon request.

As part of our role in relation to DCS under the *Ombudsman Act 1974*, we visit NSW correctional centres regularly to take complaints from inmates. In order to assess inmates' access to the Act we conducted random audits during our regular visits to correctional centres. Without giving notice, we asked correctional centre staff to produce a copy of the Act.

Five of the 14 centres asked to produce a copy of the Act produced it upon request. In four centres we were informed that the Act was available to inmates upon request, but could not be produced at that time because either the person who had custody of the Act was not available or the centre was in 'lockdown'.¹⁷⁸ In an additional four cases the Act could not be located at all. These centres undertook to ensure that a copy was readily available for inmates in future.

Interviews with DJJ Centre Managers

We contacted every juvenile detention centre in NSW and spoke to either the Centre Manager or another senior officer about the process of the DNA sampling. Forty-nine detainees in juvenile detention centres were sampled during the period of our review and the centres reported that that the sampling had not impacted heavily upon their centres.

Centre representatives stated that DJJ asked each centre to nominate a liaison officer for the sampling. NSW Police attended a meeting of the liaison officers and explained the sampling process. DJJ and the Children's Legal Service produced a leaflet about the sampling to inform detainees about the process, and detainees had the process explained to them by the ITT and the Centre representatives.

Interview friends are required to be present during the DNA sampling of people under 18 years of age. Serious indictable offenders who are over 18 years (and who are not Aboriginal or Torres Strait Islanders or considered to be 'incapable') have no right to have an interview friend present during the forensic procedure. Despite this, the Centre representatives informed us that all detainees, whether or not they were under 18 years of age, were provided with the option of having an interview friend. Detainees were permitted to choose between a family member or a person from the Centre. The most commonly used interview friend was either the Centre nurse, the Centre Manager or the detainee's case manager.

175 Focus Group Nos 2, 4.

176 Focus Group No 2.

177 Evidence given by Commander Middlebrook, DCS to the Standing Committee on Law and Justice Review of the Operation of the *Crimes (Forensic Procedures) Act 2000*, Monday 24 September 2001.

178 'Lockdown' refers to the securing of inmates in their cells or unit/wing common areas as a result of a security issue or staffing levels. The official term is 'restricted correctional centre activity' which is conducted in line with an RCCA agreement negotiated between staff and management at each centre, and is signed off by either the Senior Assistant Commissioner Custodial Services, or the Commissioner, the centre governor and the relevant unions.

All Centres reported that the DNA sampling had occurred without problems or incidents. The following statement sums up the responses from the DJJ Centres about the DNA sampling:

From all reports it seems that the sampling went with the least amount of stress. The staff were educated. The ITT met with the relevant staff and spoke to them at a meeting in the morning and conducted the sampling in the afternoon.

Centre representatives indicated that the main issue for detainees was the possibility of a 'cold hit' on the database. That is, the possibility that the detainee's DNA profile might match a profile found at a crime scene.

Analysis of complaints and inquiries

We did not receive any written complaints about the DNA sampling education programs during our review period. We did receive 77 telephone inquiries from serious indictable offenders (or their representatives) relating to information provided about the DNA sampling. Approximately 12% (9 out of 77) of these callers' main concern was that they had not received enough information about the DNA sampling. Of the remaining callers, the main concern of 28% (22 out of 77) was about their legal rights¹⁷⁹ and 60% (46 out of 77) rang mainly to obtain general information about the DNA sampling procedures.

Discussion

Under the Act, neither DCS nor DJJ are legally obliged to provide any information to serious indictable offenders about the forensic DNA sampling. Our research found that the DNA Sampling Education Programs has been a valuable and useful initiative for serious indictable offenders, CCLOs and the ITT.

The education programs were conducted to provide inmates with a better understanding of the sampling process. The responses from serious indictable offenders during our interviews indicated that the timely provision of this information may assist in achieving this objective.

It is evident from our focus groups with members of the ITTs that they rely on the education programs for the sampling to be conducted without delay or incident and that the education program has therefore become a critical component of DNA sampling in juvenile and adult correctional centres.

The thorough implementation of the DNA Sampling Education Programs usually promotes the level of communication between the custodial/supervisory agency and serious indictable offenders. This provides an opportunity for serious indictable offenders' concerns and questions about the DNA sampling to be dealt with at an early stage.

For these reasons we recommend that the DNA Sampling Education Programs continue to be implemented.

Recommendation 6

It is recommended that the DNA Sampling Education Programs continue to be implemented as part of the forensic DNA sampling of serious indictable offenders.

¹⁷⁹ These callers were referred to the Prisoners Legal Service as we are not able to provide legal advice.

Unfortunately, we found that not all aspects of the DNA Sampling Education Program were thoroughly implemented at all adult correctional centres. This may have been a result of inadequate resourcing. We note the advice to this office that no additional resources were provided to DCS to facilitate the procedures or the DNA Sampling Education Programs and that DNA sampling appears to have had a significant impact on the operation of DCS centres.¹⁸⁰ In contrast, the resourcing impact of the DNA sampling and the corresponding education program in juvenile detention centres is reported to be negligible.¹⁸¹

If the DNA Sampling Education Programs are not implemented thoroughly, there are concerns that serious indictable offenders may not fully understand the purpose of the DNA sampling or misunderstand their rights.

In turn, these things may impact upon the smooth implementation of the DNA sampling in NSW correctional centres. For these reasons, it is important that the education program continues.

Recommendation 7

It is recommended that CCLOs, Juvenile Detention Officers and Home Detention Supervising Officers be provided, or continue to be provided, with adequate training, time and resources to implement the education programs

Our research has found that the DNA Sampling Education Programs would benefit from some enhancements, particularly in relation to the type of information provided, the way in which the information is provided and when the information is provided.

The type of information provided

When we asked interviewees what else they would like to have known before they saw the ITT about the DNA sampling, 61% told us that they would have liked to have had more legal information. DCS distributed 140 copies of the Act throughout the NSW correctional centre for use by inmates and detainees. However, our audit of the availability of the Act in correctional centres found that the legislation was not always available to serious indictable offenders.

Access to legal information is an important part of the DNA Sampling Education Programs. Making the legislation available to inmates assists those who wish to know more about the laws relating to the DNA sampling and their status as a serious indictable offender. For this reason we recommend that all custodial/supervisory agencies ensure that the relevant legislation (the Act and the related regulations) are readily available to serious indictable offenders.

Recommendation 8

It is recommended that every correctional and juvenile justice centre, and every Home Detention supervising officer, ensure that a copy of the Act and related regulations are readily available for staff, inmates and detainees to examine, should they wish to.

We also consider the suggestion by some CCLOs that they be provided with a list of serious indictable offences so that they can demonstrate to the inmate that the offence for which the inmate had been convicted is a serious indictable offence, to be worthwhile. We recommend that DCS make this list available to staff, inmates and detainees.

¹⁸⁰ DCS gave evidence to the Standing Committee on Law and Justice to this effect and has raised this issue at the meetings of the Interdepartmental Committee on the implementation of the *Crimes (Forensic Procedures) Act 2000* and also with us during the focus groups.

¹⁸¹ Interviews with Juvenile Justice Centre Managers and senior officers.

Recommendation 9

It is recommended that DCS provide CCLOs with a regularly updated list of serious indictable offences for use during the DNA Sampling Education Program and Pre-Test Interviews.

It is also recommended that a copy of the updated list be kept with the Act and regulations, and be readily available for staff, inmates and detainees to examine.

Several stakeholders, including CCLOs and ITT members, indicated that additional information could be useful as part of the education programs. Whilst clarification of a person's status as a serious indictable offender may be obtained from legal advice or examining the relevant legislation, detailed information about what happens to a person's DNA sample once it is obtained by NSW Police was not always available.

The serious indictable offenders we interviewed indicated that they would like more information about what happens to their DNA sample after the ITT have obtained it. This could include:

- how their DNA sample is transported to the DNA laboratory
- what safeguards are in place to ensure that their DNA sample will not be tampered with
- how their DNA sample is analysed
- what will happen if a DNA profile cannot be obtained from their DNA sample
- how their DNA sample is stored
- who they can contact to obtain more information about the DNA sampling
- who is responsible for the destruction of their DNA sample if their conviction is overturned.

During our video audit, we observed many of the ITT officers explaining some of this information to serious indictable offenders as they sealed the tamper-evident bag. Despite this, we believe that the early provision of this information to serious indictable offenders may allay some of their fears about the DNA sampling and/or assist them in their decision as to whether to comply with the DNA sampling.

Recommendation 10

It is recommended that NSW Police, DCS and DJJ provide serious indictable offenders with additional information about:

- the integrity of the DNA samples, including the transportation, storage, analysis and destruction of forensic material
- information about who they can contact about the destruction of their sample.

Key stakeholders should be consulted as part of the development of this information, where appropriate.

We also support the recommendation of the Independent Review of the Commonwealth's forensic procedures legislation to require that all of the information that is provided to people subject to forensic procedures should include information relating to appeal rights and avenues of complaint, including any time limitations on the exercise of these rights.

Recommendation 11

It is recommended that NSW Police, DCS and DJJ ensure that information provided to serious indictable offenders includes information about appeal rights and avenues of complaint, including any time limitations on the exercise of those rights.

The way in which the information is presented

Our interviews with serious indictable offenders found that most inmates found the different elements of the DCS DNA Sampling Education Program (the interview with the CCLO, the DCS leaflet, the DCS video) to be either 'helpful' or 'very helpful'. On the whole, interviewees stated that they were assisted by other inmates and the DCS video and leaflet.

Aboriginal and Torres Strait Islander interviewees and interviewees who spoke a language other than English at home were more likely than other interviewees to find the information communicated by the video and other inmates 'helpful' or 'very helpful' compared to other forms of information. In addition, the video is of use to people with lower literacy levels.

For these reasons we support the involvement of the Inmate Development Committees and encourage DCS to continue to provide Inmate Development Committees with accurate and timely information about the DNA sampling so that this information can be distributed throughout the inmate population on a peer basis. This is in addition to the other aspects of the DNA Sampling Education Programs.

Recommendation 12

It is recommended that DCS provide accurate and timely information to the Inmate Development Committees in NSW correctional centres about the DNA Sampling Education Programs.

When the information is provided

The DNA Sampling Education Program assists serious indictable offenders in understanding why and how NSW Police intend to obtain a DNA sample from them. Our view is that this is appropriate and useful. It follows that the DNA Sampling Education Program should be implemented at a point that provides serious indictable offenders sufficient time to obtain further information about the sampling if they wish to do so.

The amount of notice provided to serious indictable offenders about the DNA sampling is discussed in Chapter 8. In that chapter, we recommend that an appropriate period of notice be determined and established, to provide serious indictable offenders with sufficient opportunity 'to communicate, or attempt to communicate with a legal practitioner of the offender's choice'.¹⁸²

Recommendation 13

It is recommended that, wherever possible, serious indictable offenders be provided with the DNA Sampling Education Program information at the time at which they are given notice that they will be asked to provide a DNA sample.

¹⁸² As required by s 67 of the Act.

Chapter 8: Providing notice and the opportunity to obtain legal advice

The next two chapters in this report discuss arranging the presence of interpreters, interview friends and legal practitioners. This chapter focuses upon providing serious indictable offenders with sufficient notice about the DNA sampling and the opportunity to communicate with a legal practitioner of their choice.

What the Act says

The Act does not provide for a specific period of notice about the DNA sampling to be given to serious indictable offenders. Instead, section 67 of the Act states that:

- (1) *A serious indictable offender gives informed consent to the carrying out of a forensic procedure under this Part if the offender consents to the carrying out of the procedure after a police officer:*
 - (a) *requests the offender to consent to the forensic procedure under section 68, and*
 - (b) *informs the offender about the forensic procedure in accordance with section 69, and*
 - (c) *gives the offender the opportunity to communicate, or attempt to communicate, with a legal practitioner of the offender's choice.*
- (2) *The police officer must allow the offender to communicate, or attempt to communicate, with the legal practitioner in private unless the police officer suspects on reasonable grounds that the offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.*¹⁸³

In practical terms, the amount of notice provided to serious indictable offenders about the DNA sampling could be minimal.¹⁸⁴ The NSW Legal Aid Commission pointed out that the requirement to provide the serious indictable offender with the opportunity to communicate with a legal practitioner could be satisfied by providing access to a telephone.¹⁸⁵ The Act provides for 'time outs' (or suspension of the forensic sampling procedure) to allow extra time for a person to obtain, or attempt to obtain, legal advice.

Implementation by DCS

To streamline the forensic DNA sampling, DCS agreed¹⁸⁶ to provide inmates with the opportunity to contact legal practitioners prior to a visit by the ITT. This usually occurs at the point of the Pre-Test Interview, at which formal notice is provided to the serious indictable offender that NSW Police intends to request a DNA sample.¹⁸⁷ If an inmate tells NSW Police at the time of the sampling that s/he has not yet had that opportunity, the ITT would suspend the procedure so that s/he can attempt to obtain legal advice at that time.

¹⁸³ Section 103 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

¹⁸⁴ Provided that the attendance of interpreters, interview friends and legal practitioners has been organised, if required.

¹⁸⁵ Evidence given by Ms Margaret Allison, Chief Executive Officer, Legal Aid Commission of NSW to the Standing Committee on Law and Justice's Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 8 August 2001.

¹⁸⁶ This agreement is in the Draft Memorandum of Understanding regarding Serious Indictable Offender DNA Sampling between NSW Police and DCS.

¹⁸⁷ See Appendix I.

Implementation by DJJ

DJJ Operational Procedures state that the managers of juvenile detention centres should liaise with NSW Police about the intended visit by the ITT and should 'ensure that sufficient time exists for the detainee to seek legal advice prior to testing and for designated interview friends (if applicable) to be contacted'.¹⁸⁸

Officers at juvenile detention centres are responsible for notifying detainees about the sampling, and should ensure that 'where possible seven days notice should be provided'. The Procedures state that 'If this is not possible, the detainee should be notified as soon as the advice is received from NSW Police Service'.

Implementation by NSW Probation and Parole Home Detainees Program

The forensic DNA sampling of home detainees began in September 2002, after the end of our first review period.

The Agreement between NSW Police and the NSW Probation and Parole Home Detainees Program states that home detainees identified as being serious indictable offenders will be interviewed by their supervising officer at least one week before the scheduled date for sampling.

Home detainees are provided with a letter informing them of the time and place of the intended DNA sampling (usually a Probation and Parole Office). The letter states that home detainees are directed to attend the place of sampling at the designated day and time. It states that failure to do so will be reported as a breach of their detention order and could lead to the revocation of their Home Detention Order. The letter also informs home detainees that they should obtain legal advice prior to the scheduled date.¹⁸⁹

Implementation by NSW Police

The ITT have a list of standard questions that they ask every serious indictable offender prior to making a formal request for the DNA sample. These questions relate to the person's Aboriginal or Torres Strait Islander status, whether the person is in the process of appealing their conviction and whether the person has had the opportunity to obtain legal advice.

The NSW Police SOPs for the forensic DNA sampling of inmates states:

If it is identified by the Testing Team that an inmate has not had the opportunity to seek legal advice prior to the testing taking place, the testing procedure can be either temporarily suspended whilst the inmate seeks legal advice or the test can be rescheduled to another time during the visit.

How we monitored the period of notice provided to inmates and detainees

Inmate Survey

In November and December 2001 we interviewed 184 inmates in adult correctional centres. We spoke to inmates directly after they had seen the ITT.

Inmates and detainees may become aware of DNA sampling and the possibility that they are eligible to be sampled in a number of ways, including the media, other inmates, their legal adviser or correctional centre officers. We wanted to establish the point at which the interviewees were officially put on notice that they would be asked to provide a sample, and that they may therefore exercise their rights to obtain legal advice and arrange the presence of interview friends or legal representatives (if entitled).

¹⁸⁸ DNA Testing in Juvenile Justice Centres in NSW Department of Juvenile Justice, Operational Procedures for Juvenile Justice Centres, February 2002.

¹⁸⁹ See Appendix L.

It appears that the earliest official notice to serious indictable offenders occurs at the 'Pre-Test Interview' with the CCLO. This interview involves the CCLO taking the inmate aside and asking whether they wish to obtain legal advice about the forensic sampling. CCLOs use a 'Pre-test Interview Form', which is dated and signed by the serious indictable offender, to provide a written record of the interview.

A large proportion (72%) of interviewees told us that they found out that they were going to be sampled less than one week prior to the sampling. When we discussed these results with NSW Police and DCS, they suggested that interviewees were in fact being notified about the DNA sampling much earlier, but that the inmates did not act on the information (for example, by attempting to obtain legal advice) until a few days before the sampling.

In order to assess the accuracy of the interviewees' responses and the information provided by DCS and NSW Police, we compared the dates on the Pre-Test Interview forms to the answers provided by the interviewees. We asked CCLOs to provide us with a copy of the Pre-Test Interview forms for all the inmates we interviewed.

The Pre-Test Interview Forms were provided in 138 cases. In 46 cases, the CCLO did not provide the form. The CCLOs informed us that in some cases this was because the inmate had been transferred to another correctional centre, along with his or her case file containing the Pre-Test Interview form and the CCLO could no longer access it. In other cases, no explanation was provided.

In calculating the period of notice provided we relied on the signed and dated Pre-Test Interview Form where it was available. Where DCS could not provide a signed and dated Pre-Test Interview Form, we relied on the information provided to us by the interviewee.

We found that the Pre-Test Interview Forms supported the interviewees' responses. Of the 138 cases where we were provided with the Pre-Test Interview Forms, 103 of the interviewees (75%) told us in the interviews that they had been provided with less than one week's notice. According to the Pre-Test Interview Forms relating to these interviewees, more than 88% (122) were provided with less than one week's notice.

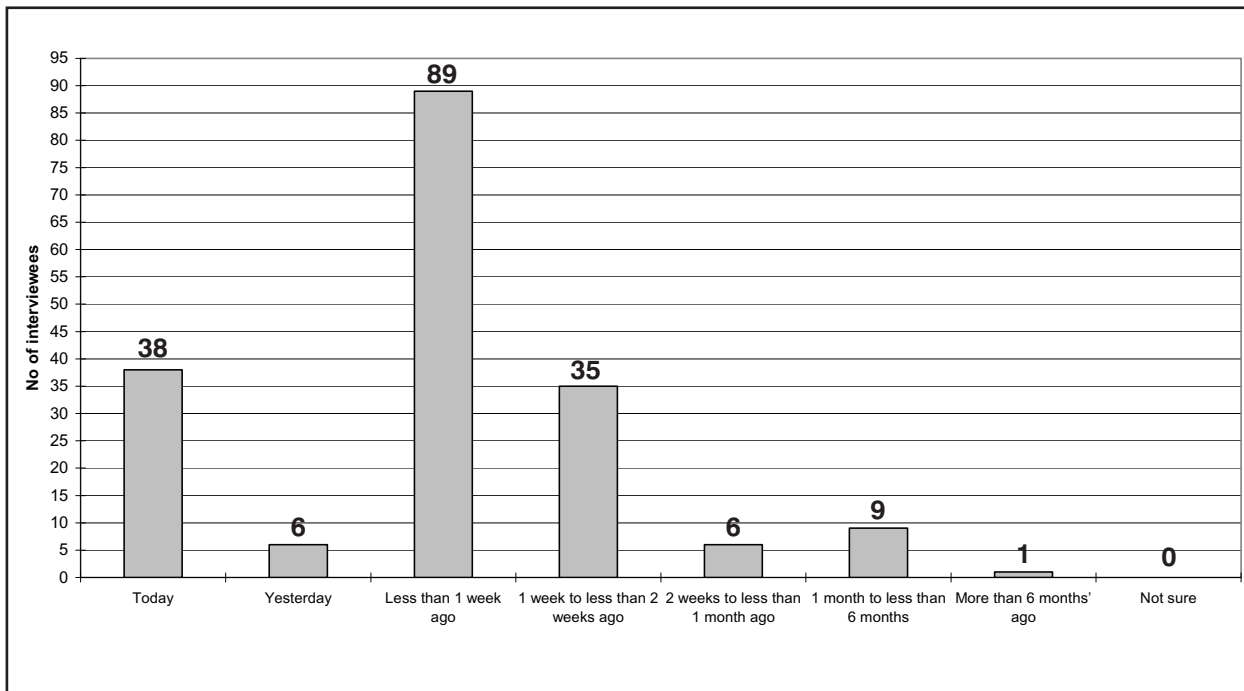
Where the period of notice given to us by the interviewee could not be verified by a Pre-Test Interview Form, we found that:

- 54% of interviewees (25 out of 46) had told us that they found out about the DNA sampling the same day that they were sampled.
- 80% of interviewees (37 out of 46) had told us that they had found out about the DNA sampling less than one week before they were sampled.¹⁹⁰
- 74% of interviewees (34 out of 46) were from centres where our staff had witnessed¹⁹¹ the CCLO conducting the Pre-Test Interview with some interviewees immediately before the DNA sampling.

¹⁹⁰ This figure includes those inmates who told us that they had found out about the DNA sampling the same day that they were sampled.

¹⁹¹ This occurred when we visited correctional centres to conduct our inmate survey.

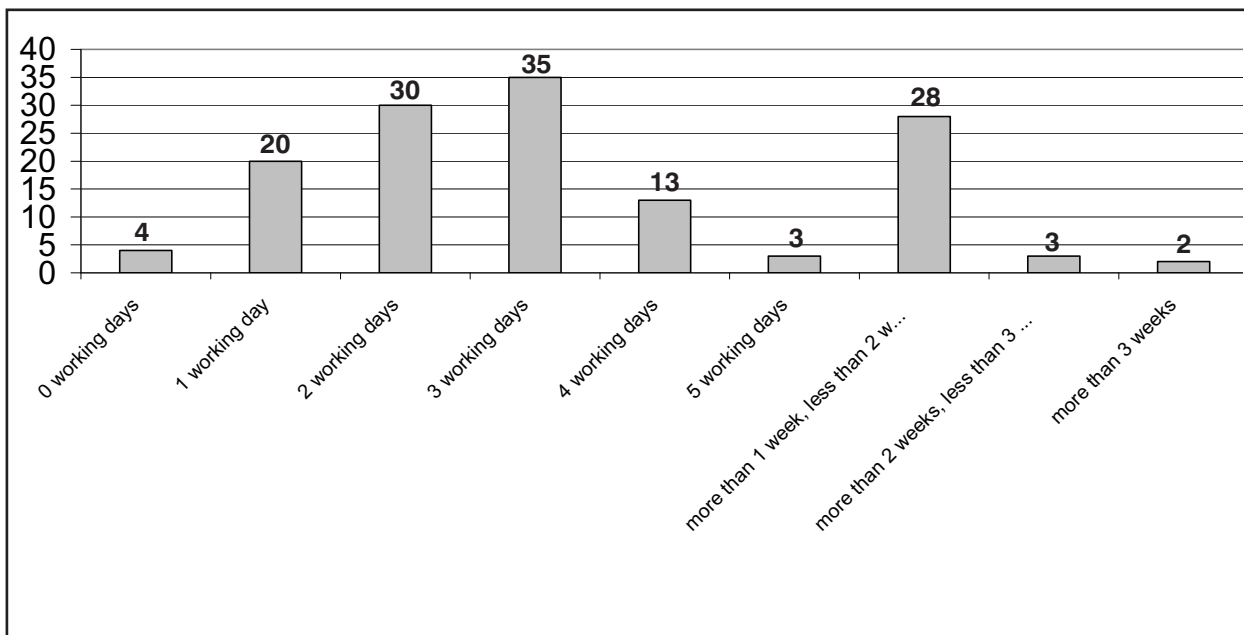
Figure 8.1: Period of notice provided to interviewees (based on interviewee response)



n=184

Source: Ombudsman's interviews with serious indictable offenders, 2002

Figure 8.2: Period of notice provided to interviewees (based on Pre-Test Interview Form)



Source: Ombudsman's interviews with serious indictable offenders, 2002

We asked interviewees whether or not they had obtained legal advice about the sampling, whether or not they had wanted to obtain legal advice and whether or not they had experienced any difficulties in obtaining legal advice.

Only ten per cent of interviewees (19 out of 184) told us that they had obtained legal advice prior to the sampling. The main reasons given by interviewees for obtaining legal advice were to find out if they were obliged to provide a sample, and to check that the offence they were convicted of was a 'serious indictable offence'.

Eighteen per cent of interviewees (33 out of 184) told us that they wanted to obtain legal advice but were unable to do so. Of these, 22 interviewees stated that they had problems obtaining legal advice. Four of the 22 who had problems were Aboriginal/Torres Strait Islander people, who are also entitled to have a legal representative present during the DNA sampling if they wish.

Interviewees reported the following types of problems in obtaining access to their legal representative:

- insufficient money for the telephone call
- the legal representative's telephone number not yet programmed into the interviewee's phone card¹⁹²
- telephone out of order
- telephone unavailable due to too many inmates and only one telephone.

81.5% (150 out of 184 interviewees) told us that they did not want to obtain legal advice.¹⁹³ The table below shows the reasons that these interviewees gave for not wanting to obtain legal advice prior to the sampling.

Table 8.3: Interviewees' reasons for not wanting to obtain legal advice before the DNA sampling

Number	Example of reasons
40	Believed it would be futile <i>'There's no point.'</i> <i>'They're going to get it (my DNA sample) anyway.'</i> <i>'The police already have my DNA.'</i>
37	Reasons relating to innocence <i>'I've got nothing to hide.' 'It doesn't bother me.'</i> <i>'I don't consider myself to be a criminal in that sense.'</i>
22	Felt it was not necessary <i>'It wasn't necessary.'</i> <i>'I didn't need to.'</i> <i>'The DCS leaflet explains everything'</i>
21	No reason provided
11	Miscellaneous <i>'I thought that if I said that I wanted legal advice, they might think that I'm trying to hide something.'</i> <i>'I've got other things to worry about.' 'Not sure.'</i>
9	Support for the DNA sampling program <i>'I agree with the DNA testing.'</i> <i>'I think what's going on is good.'</i>
7	Time constraints <i>'I just wanted to get it over and done with.'</i> <i>'It takes too long.'</i>
3	Problems accessing legal advice such as a lack of knowledge or lack of availability of legal aid <i>'I don't know who my legal aid is. I don't have one.'</i>

n=150

Source: Ombudsman's interviews with serious indictable offenders, 2002

¹⁹² Many correctional centres use the 'Arunta' telephone system. In order for inmates to use the telephone, they must be issued a phone card which holds a limited number of programmed telephone numbers. Before they can make phone calls, inmates must request that the relevant telephone numbers are programmed onto their phone card, and that money is transferred onto the card. Phone calls to our Office and Privacy NSW are already programmed into the card and are free.

¹⁹³ Of the 150 interviewees who told us that they did not want to obtain legal advice, a small number subsequently informed us that they did, in fact obtain legal advice about the DNA sampling. For example, when NSW Police suspended the DNA sampling in order for them to do so.

Video Audit

We audited 252 video recordings of the interactions¹⁹⁴ between the ITT and serious indictable offenders. These interactions included the forensic DNA sampling of people in adult correctional centres, juvenile detention centres and periodic detention centres.

As part of the standard request by police, the inmate is asked whether s/he has had the opportunity to contact a legal representative of her or his choice. We recorded the answers given by inmates and detainees as recorded on video.

We observed 20 interactions where the inmate/detainee clearly stated that s/he had not been given the opportunity to obtain legal advice prior to the ITT visit. In most of these cases, the ITT readily offered the inmate/detainee the opportunity to telephone a legal practitioner (such as Legal Aid). In seven cases, the ITT questioned the person further about the amount of notice they had received, and whether they had had the opportunity to make a telephone call.¹⁹⁵ Some ITT members interpreted the requirement narrowly, and if they were satisfied that the inmate/detainee had been given the opportunity to make a telephone call, the procedure was not suspended. In the majority of cases, however, the ITT ultimately provided the inmate/detainee with an opportunity to telephone a legal practitioner.

Example of serious indictable offender being provided with an opportunity to obtain legal advice

Interaction No 235

The inmate/detainee complained that he did not have a chance to speak to a legal representative.

Inmate/detainee: *I have been locked up for 24 hours for the last few days. I am due for release tomorrow. I have had no opportunity to talk to a legal practitioner. I don't have money to put on my phone [card] to call.*

Correctional officer: *We have had 150 inmates and no one but you has complained.*

Inmate/detainee: *I am not 150. I am me and I am telling you that I had no opportunity.*

Correctional officer: *Give me the number and we'll call them on the spot.*

The ITT then asked the correctional officer to give the inmate/detainee the opportunity to seek legal advice outside the ITA and the procedure was suspended. When the inmate/detainee came back he stated that he was locked up in a cell during the suspension and could not contact Legal Aid.

ITT: *All we need to do is to give you an opportunity. You could have asked to speak to Legal Aid.*

The inmate/detainee then said that it 'did not matter'.

¹⁹⁴ We have used the term 'interaction' to distinguish between the whole interaction between the ITT and serious indictable offenders, and the forensic procedure itself. We have used the term 'forensic procedure' to describe the actual DNA sampling until the forensic sampling kit is sealed.

¹⁹⁵ Videod Interaction Nos 194, 223, 235, 244, 245, 253 and 254.

Example of serious indictable offender being provided with an opportunity to obtain legal advice

Interaction No 254

ITT: *How long have you known that you were going to be tested?*

Inmate/detainee: *Since yesterday afternoon.*

ITT: *Did they give you enough time to contact legal advice if you wanted to?*

Inmate/detainee: *Yes.*

ITT: *Do you want to ring them now?*

Inmate/detainee: *No.*

ITT: *So you're happy?*

Inmate/detainee: *Yes.*

We observed 27 interactions where we were unable to record the response from the inmate/detainee when asked whether s/he had been given the opportunity to contact a legal practitioner. This was due to various reasons. For example, in some cases the question was not asked during the interaction as videoed. In other cases the inmate/detainee had objected to the video recording and so this part of the interaction was not recorded. In other cases the question or the answer was not audible due to background noise or poor recording.¹⁹⁶

Discussion paper

In our discussion paper we asked respondents whether inmates were being given sufficient notice to obtain information, seek legal advice and organise the attendance of an interview friend and legal practitioners. We also asked respondents to provide reasons for their view and any suggestions for improvements.

NSW Police responded that it notifies Governors of correctional centres about their intention to conduct DNA sampling weeks or months in advance. NSW Police stated:

Prior to being asked whether he or she will consent to a forensic procedure, an inmate is asked: 'Have you been given the opportunity to communicate, or attempt to communicate, with a legal practitioner of your choice?'. If an inmate answers 'no', the testing procedure is suspended until the opportunity is provided. The inmate will be provided with this opportunity regardless of the amount of time that has elapsed since the inmate was first spoken to by Corrective Services' staff.¹⁹⁷

DCS responded that inmates are likely to become aware of the program soon after his or her incarceration. DCS stated that:

Importantly, inmates are usually interviewed by correctional staff, in relation to the forensic procedures program, some 7 to 10 days prior to the carrying-out of a forensic procedure.¹⁹⁸

¹⁹⁶ This issue will be discussed below under 'Video recording issues'.

¹⁹⁷ Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders* by NSW Police, 14 March 2002.

¹⁹⁸ DCS, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 25 March 2002.

We also received responses from several CCLOs. All CCLOs stated that inmates were provided with sufficient notice. One CCLO stated that he received four to six weeks' notice prior to the ITT visiting his correctional centre. He stated that this gave him enough time to interview all inmates being tested and provide them with the opportunity to obtain legal advice.¹⁹⁹ Another CCLO reported that the inmates at his centre are interviewed at least one week prior to the DNA sampling. He also stated:

*All inmates are shown the video and given the opportunity to ask any questions. All inmates are given a pamphlet and counselled individually.*²⁰⁰

In contrast, the responses from inmates indicated that serious indictable offenders were often not provided with sufficient notice. One inmate reported:

*In my experience most inmates are not given adequate opportunity to contact legal representatives as they are poor and do not have the ability to phone and ask the advice of a lawyer and/or other tactics may be used such as an inmate will be notified at 15:30 hours on Friday and tested on Monday morning so no contact can be made over the weekend and/or when advice is obtained the lawyers do not or can not advise on a law that is new.*²⁰¹

Another inmate responded:

When the police began taking DNA samples in early 2001, they gave minimal notice to inmates – usually only a couple of hours. This satisfied the requirements of the Act. As most inmates did not choose to seek legal advice this did not appear to be a problem. But for those inmates wishing to seek legal advice there was insufficient time to contact a legal representative.

It appears that over the course of the year the police and DCS have either increased the notification period or allowed inmates additional time where necessary to consult their legal representatives.

I was informed by DCS officers on the night of Friday [date]²⁰² (long after my solicitor's office had closed for the weekend) that I would be giving a DNA sample on the following Monday. I indicated to the DCS officers that I would not be consenting to a buccal swab without a court order. They allowed me time to consult with my solicitor and I eventually gave a DNA sample on Tuesday [the next day].

However, the Act is new and complex. Many lawyers do not have a full understanding of it and need to make additional inquiries. I had difficulties reaching my solicitor and he could only offer limited advice given the short period of time I was allowed.

*Inmates are not being given sufficient notice to obtain information, seek legal advice and organise the presence of interview friends and legal practitioners. I believe inmates should be given 5 working days notice before the procedure is carried out.*²⁰³

The Youth Justice Coalition indicated that the notification period could be rendered meaningless unless all inmates and detainees have easy access to free legal advice. The Coalition stated that not all inmates are fortunate to have their own private solicitor. It responded:

In general, detainees have been given the opportunity to see a visiting solicitor or to ring the Legal Aid Hotline.

*However, we have heard of some problems with a small number of detainees who were initially thought by the police to be 18 or over, but were in fact under 18. In these cases, when the police found out the detainees' true age, they rushed to obtain a court order. The young people were not given an adequate opportunity to make submissions to the court, and the making of the court order in these circumstances appears to have been a mere formality.*²⁰⁴

199 Response No 7.

200 Response No 12.

201 Confidential. Response No 23.

202 Date has been omitted to protect the identity of the inmate.

203 Confidential. Response No 1.

204 Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders* by Youth Justice Coalition, 28 February 2002.

A number of respondents suggested that these issues would be resolved by having a legal aid solicitor available to inmates and detainees before and during the DNA sampling.²⁰⁵ We note that the Report of the Standing Committee on Law and Justice of its Review of the Operation of the *Crimes (Forensic Procedures) Act* recommended that the Attorney General consider the establishment and funding of a 24-hour telephone legal advice hotline, run by the Legal Aid Commission, for access by persons requested to consent to a forensic procedure.²⁰⁶

Interviews with DJJ Centre Managers

We contacted every juvenile detention centre and spoke to either the Centre Manager or another senior officer about the process of the DNA sampling. Only 49 detainees in juvenile detention centres were sampled during the period of our review and the centres reported that the sampling had not impacted heavily upon their centres.

We asked juvenile centre representatives about detainees' access to legal representatives. Most centres stated that there were weekly or fortnightly visits from either the Children's Legal Service, Aboriginal Legal Services or private solicitors acting on behalf of Legal Aid.²⁰⁷ One representative indicated that 'there are no problems getting hold of the Children's Legal Service by phone'.²⁰⁸ The Centre Manager at one juvenile detention centre stated that because his centre is attached to a children's court, Legal Aid Solicitors are there most days, in addition to their visits twice per week.²⁰⁹

Focus groups with CCLOs

In our focus groups, CCLOs reported that everyone who wanted access to Legal Aid managed to do so. One CCLO reported having difficulties contacting their local Aboriginal Legal Service.²¹⁰ Several CCLOs reported that they, or inmates, had experienced difficulties in contacting the Prisoners Legal Service.²¹¹ We asked CCLOs how much notice they provided to inmates prior to the DNA sampling. The responses varied greatly between different correctional centres.

One CCLO stated that he was provided with a list of eligible inmates at his centre on a Tuesday, that he interviewed the inmates on the Thursday, and that they were sampled on the following Tuesday.²¹² Another CCLO stated that a week's notice was not sufficient. Similarly another CCLO stated, 'the more notice the better'.²¹³ At another focus group there was a consensus that providing inmates with a minimum of one week's notice was sufficient for the inmates to obtain legal advice.²¹⁴

Focus groups with ITT members

As stated earlier, our focus groups with the ITT members revealed that they relied on the CCLOs to inform inmates about NSW Police's intention to obtain a DNA sample from them. If the inmates have not been provided with the opportunity to obtain legal advice before they see the ITT about the DNA sampling, the interaction must be suspended to provide them with this opportunity. This can impact upon the efficiency of the sampling process.

205 Response from Youth Justice Coalition, NSW Commission for Children and Young People, Australian Association of the Deaf, Justice Action and confidential responses from NSW inmates (Response No 1 and Response No 23).

206 Recommendation 27, Standing Committee. Op Cit.

207 Telephone interviews with Riverina (10 July 2002), Keelong (10 July 2002), Acmena (11 July 2002), Orana (11 July 2002), Kariong (15 July 2002) and Cobham (23 September 2002) juvenile detention centres.

208 Telephone interview with Gerald Peggs, Acting Manager, Keelong Juvenile Detention Centre, 10 July 2002.

209 Telephone interview with David Kirwan, Centre Manager, Cobham Juvenile Detention Centre, 23 September 2002.

210 Focus Group No 2.

211 Focus Group No 4.

212 Focus Group No 3.

213 Focus Group No 3.

214 Focus Group No 4

NSW Police often provides DCS with a schedule of intended DNA sampling prison visits weeks or months in advance. Consequently, ITT members sometimes assume that inmates have been informed about the DNA sampling weeks before the actual sampling process. This is often not the case, as is discussed in Chapter 7. ITT members stated that they were often sceptical if inmates said that they had not had sufficient time to contact their legal representative. However, they also emphasised that when this occurred, they suspended the procedure to provide the inmate with the opportunity to contact a legal representative.²¹⁵

On the other hand, ITT members stated that in some instances the CCLO ‘prepped’ or conducted the pre-test interview with inmates immediately prior to the DNA sampling. In some cases this ‘prepping’ occurred in the doorway of the ITA.²¹⁶ During the Ombudsman’s inmate survey we observed CCLOs providing information to inmates outside the ITA, immediately before the inmate’s interaction with the ITT.²¹⁷ The ITT members stated that the DNA sampling of serious indictable offenders had been cancelled at two centres because the inmates had not been ‘prepped’ by DCS officers. When asked how often inmates were not being prepped prior to the ITT DNA sampling visit, one member stated that it was ‘more common than not’.²¹⁸ The other ITT members indicated their agreement. The ITT members acknowledged that this was mainly the result of DCS staff shortages and the high mobility of inmates between centres.

We note that DCS were not provided with any additional funding to undertake their role in the DNA sampling process.

The ITT members recommended that DCS ensure that inmates are ‘prepped’ before the ITT attend the centre to conduct the sampling and that CCLOs remain in the ITA during the procedure.

Analysis of complaints and inquiries received

We received three telephone inquiries from inmates who said that they had not been allowed to obtain legal advice before being sampled. One inmate complained to us in writing about this, but when we examined the video recording of his DNA sampling, it was apparent that he had in fact been provided with an opportunity to obtain legal advice.

We also received one telephone inquiry from an inmate who complained that inmates were not being provided with sufficient notice about the DNA sampling.

Discussion

The law in some jurisdictions requires that the forensic DNA sampling of offenders be authorised by a court order, and that the offender be given the opportunity to be represented at court at the hearing of an application for the order.²¹⁹ This would clearly require that some notice be provided to the offender.

In the UK the *Criminal Evidence (Amendment) Act 1997* provided for a ‘General Notice to Prisoners’ and for a letter to be sent to individual prisoners informing them that they would be sampled.

The threshold for providing serious indictable offenders with an opportunity to communicate with a legal practitioner of her/his choice appears to be satisfied by providing a person access to a telephone. Reasonable notice is required if inmates and detainees are to meaningfully exercise their right to communicate with a legal practitioner of their choice. The environment in some correctional and detention centres may not be conducive to the easy access of legal advice.²²⁰

²¹⁵ Focus Group No 1.

²¹⁶ Focus Group No 1.

²¹⁷ We observed this at two centres.

²¹⁸ Focus Group No 1.

²¹⁹ For example, Canada.

²²⁰ Our interviews with serious indictable offenders found that eighteen per cent of interviewees wanted to obtain legal advice but were unable to.

The evidence from our review activities suggests that when the DNA sampling of serious indictable offenders began in early 2001, inmates and detainees were provided with little notice. It appears that as the sampling progressed, NSW Police and DCS established a method of identifying most eligible inmates weeks and months in advance of the intended sampling date.

We found that the DCS policy of interviewing inmates 7 to 10 days prior to the DNA sampling is not always complied with. During our interviews with serious indictable offenders, 72% of interviewees reported that they had been provided with less than one week's (five working days) notice. When we examined the DCS records, 88% of the available Pre-Test Interview Forms (122 out of 138) indicated that these interviewees had been provided with less than five working days notice.

A number of factors can affect the amount of notice provided to serious indictable offenders. These include the transient nature of the inmate population and that CCLOs were not always provided with adequate time and resources to undertake the 'preparation' of inmates in a meaningful manner.

We note the comment made by one CCLO during our focus groups explaining why the Pre-Test Interview sometimes takes place shortly before the DNA sampling:

I get a list sent of who [DCS and Police] think are serious indictable offenders and what I then do is go and check that, because usually their list is a week or so old. So usually three days or so before, or whatever time I'm available to do it, I'll go and print out a new list of my own – a current one – and nine times out of 10 I can scrap half the people they had on the list. Once I have a current one I can then go and interview them all.²²¹

The correctional environment is a unique one, and there are many factors that may inhibit an inmate's ability to communicate with a legal practitioner of their choice. Inmates may face problems such as limited access to the telephone and financial constraints. Inmates are often prevented from making more than a few phone calls every week, and may not wish to 'waste' their phone calls on accessing legal advice.

We acknowledge that in our video audit, most of the recorded interactions we examined in which there was doubt about the inmate's opportunity to access legal advice, the ITT suspended the forensic procedure to allow the inmate to attempt to do so. However, both serious indictable offenders and CCLOs have informed us that legal practitioners are not always available at such short notice. Both have reported problems accessing solicitors by telephone. Some inmates have found that private solicitors are not familiar with the legislation and as such cannot provide legal advice at short notice.

We note the recommendation of the Standing Committee on Law and Justice that a 24-hour telephone legal advice hotline, run by the Legal Aid Commission, for access by persons requested to consent to a forensic procedure be established and funded,²²² and consider that this has the potential to partially resolve this issue. However, serious indictable offenders are also dependent upon the provision of operational and affordable telephone services by custodial agencies.

We also acknowledge that the majority of inmates we interviewed told us that they did not want to obtain legal advice prior to the sampling.²²³ However, the law requires that the opportunity be provided. It makes sense that this opportunity should be a meaningful one.

We believe that there is evidence to indicate that less than five working days' notice is insufficient notice for inmates and detainees to have a meaningful opportunity to communicate, or attempt to communicate with a legal practitioner of their choice.

²²¹ Focus Group No 3.

²²² Recommendation 27, Standing Committee, Op Cit.

²²³ Interestingly, several of these inmates also told us that they did, in fact, obtain legal advice.

We propose that NSW Police, DCS and DJJ – in consultation with relevant bodies such as Aboriginal Legal Services, the Prisoners Legal Service, the Children’s Legal Service, NSW Combined Community Legal Centres Group and the NSW Legal Aid Commission - reconsider the issue and agree upon a minimum period of notice to be provided to serious indictable offenders who will be requested to consent to a forensic procedure. We acknowledge that there may be circumstances in which it is not possible to provide serious indictable offenders with the agreed notice. For example, the ITT visit some centres just a few times a year, and the prison population is essentially transient in nature. At the time of the ITT’s visit, some serious indictable offenders may be due for release before the end of the agreed notification period. It may be that it is in the public interest that these offenders are sampled with less than the agreed period of notice. However, in these situations care should be taken to ensure that these inmates are provided with a meaningful opportunity to exercise their rights to legal advice, interview friends and legal practitioners, as prescribed by the Act, even if the agreed period of ‘notice’ cannot be met.

To allow for some flexibility, we do not suggest that the period of notice be established by an amendment to the legislation. Instead, we propose that an adequate period of notice be required by agreements between NSW Police and the relevant correctional agency, and that this be reflected in all Standard Operating Procedures relating to the forensic DNA sampling of serious indictable offenders.

We also propose that inmates and detainees, interpreters, legal practitioners and persons who are to act as interview friends be informed of the agreed minimum period of notice.

We acknowledge that the task of determining a reasonable notification period is not easy. Inmates in periodic or minimum security centres may be in a different position. One legal practitioner we met with told us that the amount of time required:

Depends upon the inmate. Some inmates have the ability to contact Legal Aid very quickly. For some people a month would not be long enough, whereas for others two days is plenty.²²⁴

Our review suggests that at least five working days would be the minimum timeframe between providing advice and appropriate education to inmates and the conduct of the sampling.

Recommendation 14

It is recommended that NSW Police consult with relevant stakeholders, such as Aboriginal Legal Services, the Prisoners Legal Service, the Children’s Legal Service, the NSW Legal Aid Commission and the NSW Combined Community Legal Centres Group, to determine an appropriate period of notice for serious indictable offenders from whom NSW Police plans to collect a DNA sample.

Recommendation 15

It is recommended that NSW Police, DCS, DJJ and the Home Detainees Program amend their Standard Operating Procedures to provide for an appropriate period of notice to be given to serious indictable offenders, wherever reasonably practicable, in order to provide serious indictable offenders with a meaningful opportunity to communicate, or attempt to communicate, with a legal practitioner of their choice.

Recommendation 16

It is recommended that NSW Police, DCS, DJJ and the Home Detainees Program inform serious indictable offenders, legal aid organisations and other legal practitioners of this policy.

224 Meeting with Solicitor, Newcastle Legal Aid, 25 February 2002.

Chapter 9: Arranging the presence of interpreters during the DNA sampling

What the Act says

Section 98 of the Act requires that a police officer must arrange for the presence of an interpreter if the police officer:

believes on reasonable grounds that the suspect or serious indictable offender is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in the English language.

Section 98 also requires that the police officer must *not* do any of the following until the interpreter is present:

- a) *ask a serious indictable offender to consent to a forensic procedure*
- b) *order the carrying out of a non-intimate forensic procedure on, or taking of a sample by buccal swab from, a serious indictable offender*
- c) *apply to a Magistrate or other authorised justice for an order for the carrying out of a forensic procedure on a serious indictable offender*
- d) *caution a serious indictable offender*
- e) *carry out, or arrange for the carrying out of, a forensic procedure on a serious indictable offender*
- f) *give a serious indictable offender an opportunity to view a video recording made under this Act.*

Section 3(4) of the Act states:

*For the purposes of this Act, a person **informs** another person of a matter if the person informs the other person of the matter, through an interpreter if necessary, in a language (including sign language or Braille) in which the other person is able to communicate with reasonable fluency.*

Implementation by NSW Police

The NSW Police SOPs state that it is the role of DCS to identify inmates who require an interpreter for the forensic DNA sampling, and the language of the interpreter. The SOPs state that this information will be provided to NSW Police who will organise the attendance of appropriate interpreters. This is in contrast to the MOU between NSW Police and DCS (see below).

Implementation by DCS

The MOU between NSW Police and DCS states that it is the responsibility of DCS to arrange for an accredited interpreter to be present while the sample is taken, where required.²²⁵ However, NSW Police has informed us that in practice, it is NSW Police that organises the attendance of interpreters.²²⁶

The DCS SOPs do not reflect current practice. Instead, the SOPs state that the CCLO is responsible for ensuring that accredited interpreters attend, with the assistance of the Department's Ethnic Affairs Policy and Project Officer where possible.²²⁷ DCS has informed us that inmates and staff who are accredited under the Community Language Assistance Scheme are not permitted to act as interpreters/signers for the DNA sampling of serious indictable offenders.

²²⁵ Draft Memorandum of Understanding between the Commissioner of Corrective Services and NSW Police, Serious Indictable Offender Testing.

²²⁶ Information provided by NSW Police FPIT, 26 June 2003.

²²⁷ DCS SOPs.

Implementation by DJJ

The DJJ Operational Procedures state that it is the responsibility of DJJ officers to ascertain whether interpreters are required and to arrange for the presence of an interpreter where necessary.²²⁸

Implementation by NSW Probation and Parole

The Agreement between NSW Police and the Home Detainees Program states that Home Detention Program Officers will assess the English language skills of detainees before testing and advise NSW Police if it appears that an interpreter will be required.²²⁹

How we monitored the use of interpreters

Analysis of statistics

We obtained statistics on a regular basis regarding the DNA sampling of serious indictable offenders from NSW Police. These statistics identified whether the sampling had been conducted with the assistance of an interpreter and the languages used. Between January 2001 and June 2003, 108 DNA samples were taken from serious indictable offenders in the presence of an interpreter.²³⁰

Discussion Paper

In our discussion paper we asked for information about instances in which serious indictable offenders who required the use of an interpreter/signer had been sampled without one. No respondents gave examples of this occurring.

One CCLO responded that, in contrast, some inmates stated that they did not require the use of an interpreter but, despite this, an interpreter was present.²³¹

The Australian Association of the Deaf (AAD) stated that it was concerned that the information provided to inmates and detainees in languages other than English may not be understood by people being sampled due to its complexity. AAD pointed out that interpreters are bound by ethics to only translate the actual spoken English into the required language. Interpreters do not break the information down into language that may be more easily understood by the inmate/detainee. The AAD suggested that Relay Interpreters or Deaf advocates could be used to ensure that inmates and detainees have full access to information.

AAD suggested that at least 14 days notice would need to be provided to ensure that interpreters/signers and Deaf advocates could attend the sampling. The AAD suggested that alternatively, the relevant agency could check the availability of the interpreters/signers and Deaf advocates prior to booking the DNA sampling.²³²

Interviews with serious indictable offenders

As part of our interviews with serious indictable offenders, we interviewed five inmates who had been sampled with the assistance of an interpreter.²³³ The languages spoken by these interviewees were Hindi, Cantonese, Mandarin, Polish and Vietnamese.

We compared the answers provided by these interviewees with those provided by interviewees generally. We did not find any major differences between the answers given by interviewees who utilised an interpreter and those who did not.

228 DJJ, Operational Procedures for Juvenile Justice Centres: DNA Testing in Juvenile Justice Centres, February 2002.

229 Agreement between the NSW Home Detainees Program, Probation & Parole and the NSW Police Service For the DNA Testing of Home Detainees.

230 Information provided by NSW Police FPIT, 20 June 2003.

231 Response No 12.

232 Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders* by Australian Association of the Deaf, 26 February 2002.

233 We used the same interpreter that had assisted with the provision of information by NSW Police during the DNA sampling.

The video, leaflet and other documents produced by DCS as part of the education program are only provided in English, and have not been translated into other community languages. Despite this, three of the five interviewees who had the assistance of an interpreter had seen the DCS leaflet about the sampling and told us that they had found it either 'helpful' or 'very helpful'.²³⁴ The other two interviewees stated that they could not read English, and so could not understand the leaflet.

Three of the five interviewees had seen the DCS video. All three said that they found the video 'helpful' or 'very helpful'. Their responses indicated that they had watched the video with the assistance of an interpreter.

We asked if there was anything else they would have liked to have known before seeing the police about the DNA sampling. One interviewee stated that s/he would have liked to have had more information about the DNA sampling:

*It's a pity that no-one could have shown me this (pointing to the video) because otherwise I would have been much better informed before the procedure ... I feel that the actual procedure was carried out correctly but I feel that I should have had better information, full information, about this matter.*²³⁵

It was apparent that two of the interviewees who were sampled with the use of an interpreter did not fully understand the purpose of the DNA sampling:

*I want to know the results of the test. They will tell me which disease I have or what.*²³⁶

*I don't really understand what's going on. I don't want anything to interfere when I get out in my normal life ... I don't want to cause the police any difficulties or make their jobs harder. I'm still not sure even though I agreed to it. I'm still not sure how good or how bad for me.*²³⁷

We asked the interviewees whether they had asked the ITT any questions and what the response was. Two interviewees reported that they had asked questions. One interviewee reported that s/he had asked the ITT if the DNA sampling would cause her/his body any harm. S/he told us that ITT replied that it would not. The other interviewee told us that s/he asked about health issues. That interviewee told us that the ITT had replied that this was 'not the right forum' to ask those questions during the DNA sampling. We noted that the interpreter and the CCLO dealt with these issues after the DNA sampling.

Video Audit

During our video audit we examined 252 interactions between the ITT and serious indictable offenders. Five of these interactions were conducted with the use of an interpreter.

We examined the way in which police read out the information sheet and dealt with questions asked by the interviewees. In each case the information was read out slowly and clearly in sections, allowing the interpreter time to translate it for the inmate/detainee.

The interactions were generally conducted in a respectful and professional manner.

Focus groups

During our focus groups, the ITT members indicated that there were some problems organising interpreters for some languages.²³⁸ They told us that it was also difficult arranging for the presence of accredited interpreters in centres outside of Sydney, as this required several hours of travelling for the interpreter. The ITT members stated that in these cases, DCS had assisted by transporting the serious indictable offenders to Sydney where interpreters were available for the sampling.

One CCLO stated that transferring offenders to Sydney for this purpose raised security issues and required additional staff to provide an escort.²³⁹

234 We understand that the interpreter for the inmate/detainee translated the information from the leaflet.

235 Survey No 125.

236 Survey No 77.

237 Survey No 125.

238 Namely, Vietnamese, Mandarin and Persian. Focus Group No 1.

239 Focus Group No 3.

Analysis of complaints and inquiries received

We did not receive any complaints or inquiries about the use of, or failure to use, interpreters during the DNA sampling of serious indictable offenders.

Discussion

Earlier in this report we noted that in general, interviewees who spoke a language other than English at home found the information they obtained from the video and other inmates more helpful than the information they obtained from other sources, such as the DCS leaflet or the CCLO. We recommended that CCLOs be provided with adequate training, time and resources to implement the DNA Sampling Education Programs.

Although our sample of serious indictable offenders who spoke a language other than English at home was relatively small, we are concerned that our interviews with two of these interviewees indicated that they did not have a full understanding of the nature and effect of the forensic procedures. It seems that these offenders may not have a correct understanding of what their sample will be used for and this raises the possibility that their consent to the forensic procedure could be challenged.

The comprehensive and timely implementation of the DNA sampling education programs could assist in reducing the possibility that serious indictable offenders whose first language is not English may not fully understand the nature and effect of the forensic DNA sampling. It would be particularly useful if the DNA Sampling Education programs were conducted in a language in which the offender is reasonably fluent with the assistance of an interpreter.

We note that the right to have an interpreter present is strengthened by restrictions on the admissibility of evidence gleaned from forensic procedures that are carried out in breach of the Act.²⁴⁰ If a police officer believes or suspects that an offender is unable to communicate orally with reasonable fluency in the English language, an interpreter must be present.

One of the changes made by the Amendment Act that commenced on 1 June 2003 was to permit the use of a telephone interpreter where it is not practicable to arrange for the presence of an interpreter.²⁴¹ Our interviews with serious indictable offenders whose language is not English suggest that on-site interpreters are necessary for the interpretation of the elements of the DNA Sampling Education Programs, such as the DCS leaflet and video. For this reason, we recommend that, wherever possible, on-site interpreters continue to be used for the DNA sampling of serious indictable offenders, and that they are also used to interpret the materials associated with the DNA Sampling Education Programs.

We also note the advice from NSW Police regarding some of the difficulties in ensuring that on-site interpreters are available. These include the travel concerns relating to visits to regional correction centres and the fact that many interpreters do not want to enter correctional centres due to their desire to remain anonymous and not to be seen assisting police by other members of their community.²⁴² In these cases the use of a telephone interpreter would be recommended.

Earlier in this report we recommended that NSW Police consult with relevant stakeholders, such as Aboriginal Legal Services, the Prisoners Legal Service, the Children's Legal Service, the NSW Legal Aid Commission and the NSW Combined Community Centres Group, to determine an appropriate period of notice for serious indictable offenders from whom NSW Police plans to collect a DNA sample.

²⁴⁰ See s 82 of the Act. This section relates to the inadmissibility of evidence obtained from an improper forensic procedure.

²⁴¹ Section 98(1A) of the Act.

²⁴² Correspondence from NSW Police, 19 April 2004.

In light of any agreement reached during these consultations, the relevant custodial/supervisory agencies may need to consult with interpreting and signing services in order to ensure that, wherever possible, an on-site interpreter can be arranged.

Recommendation 17

It is recommended that NSW Police, the DCS and the DJJ continue, where required by s 98 of the Act, to arrange for on-site interpreters, wherever possible and appropriate. It is also recommended that this involve ongoing liaison with the NSW Community Relations Commission, the Deaf Society of NSW and other agencies providing interpreting/signing services to ensure that timely access to on-site interpreters and signers is obtained.

Chapter 10: Arranging the presence of legal representatives and interview friends during the DNA sampling

What the Act says

Part 6 of the Act sets out general rules for conducting a forensic procedure on a serious indictable offender. These general rules include a requirement for a legal representative and/or interview friend to be present during the forensic DNA sampling of people who are children, incapable or Aboriginal or Torres Strait Islander. Section 65 of the Act states that Part 6 applies to the carrying out of a forensic procedure on a serious indictable offender as if the references to the suspect in Part 6 were references to a serious indictable offender.

Children and 'incapable' people

If a serious indictable offender cannot legally consent to the forensic procedure, that is, if s/he is a child or an 'incapable adult', either an interview friend or a legal representative **must** be present during the forensic procedure, if reasonably practicable. If the serious indictable offender wishes, both an interview friend and a legal practitioner may be present.²⁴³

Section 3 of the Act defines a child as 'a person who is at least 10 years of age but under 18 years of age', and defines an 'incapable adult' as an adult who:

- (a) is incapable of understanding the general nature and effect of a forensic procedure, or
- (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.'

Section 54 of the Act states:

(1) This section applies if the suspect is:

- (a) a child, or
- (b) an incapable person.

(2) Either an interview friend or a legal representative (if he or she is not the interview friend) of the suspect must, if reasonably practicable, be present while the forensic procedure is carried out. Both an interview friend and a legal representative may be present.

(3) An interview friend (other than a legal representative) of the suspect may be excluded from the place where the forensic procedure is being carried out if:

- (a) the interview friend unreasonably interferes with or obstructs the carrying out of the procedure, or
- (b) the investigating police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend may be a co-offender of the suspect or may be involved in some other way, with the suspect, in the commission of the offence.

(4) If an interview friend is excluded under subsection (3), a suspect may choose another person to act as his or her interview friend. If the suspect does not choose another person as an interview friend, the police officer may arrange for any person who may act as an interview friend under section 4 to be present as an interview friend.

²⁴³ Section 54 of the Act.

Aboriginal and Torres Strait Islander people

A similar provision exists in relation to serious indictable offenders who are Aboriginal or Torres Strait Islander people. However, if the Aboriginal/Torres Strait Islander person is an adult with legal capacity to consent, s/he can waive the right to have an interview friend or legal representative present. Section 55 of the Act relevantly provides:

- (1) This section applies if the investigating police officer concerned believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander not covered by section 54.*
- (2) Either an interview friend or a legal representative (if he or she is not the interview friend) of the suspect must, if reasonably practicable, be present while the forensic procedure is carried out. Both an interview friend and a legal representative may be present.*
- (3) Subsection (2) does not apply if the suspect expressly and voluntarily waives his or her right to have an interview friend present. If a suspect so waives his or her right to have an interview friend present, a legal representative of the suspect may still be present.²⁴⁴*

Similar exclusion provisions to s 54(3) and (4) also apply.

Interview friends

Section 4 of the Act lists the people who may act as an interview friend of a serious indictable offender. It states:

- (1) This section lists the people who may act as an “interview friend” of a suspect or serious indictable offender for the purposes of a provision of this Act referring to an interview friend. Different people may act as interview friends of a suspect or offender for the purposes of different provisions of this Act.*
- (2) If the suspect or serious indictable offender is a child or an incapable person, the following people may act as “interview friends”:*
 - (a) a parent or guardian, or other person, chosen by, or acceptable to, the suspect or offender,*
 - (b) a legal representative of the suspect or offender,*
 - (c) if the suspect or offender is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available — a representative of an Aboriginal legal aid organisation or a person whose name is on the relevant list maintained under section 116 (1) who is chosen by, or acceptable to, the suspect or offender,*
 - (d) if none of the previously mentioned persons is available — a person who is not a police officer or in any way involved in the investigation of an offence in relation to which a forensic procedure is proposed to be carried out, or is carried out, on the suspect or offender.*
- (3) Where the suspect or serious indictable offender is an Aboriginal person or a Torres Strait Islander not covered by subsection (2), the following people may act as “interview friends”:*
 - (a) a relative or other person chosen by the suspect or offender,*
 - (b) a legal practitioner acting for the suspect or offender,*
 - (c) if none of the previously mentioned persons is available — a representative of an Aboriginal legal aid organisation, or a person whose name is included in the relevant list maintained under section 116 (1).*
- (4) A suspect or serious indictable offender who has a legal representative may also have an interview friend who is not the suspect’s or offender’s legal representative.*

²⁴⁴ Section 106 relates to providing a waiver.

Section 116 of the Act provides for the Attorney General to establish lists of appropriate interview friends for this purpose. It states:

- (1) *The Minister must, so far as is reasonably practicable, establish, and update at such intervals as the Minister thinks appropriate, a list, in relation to a part of the State where there are likely to be persons under arrest or serving sentences of imprisonment in a correctional centre or other place of detention, of the names of persons (not being police officers) who:*
 - (a) *are suitable to help Aboriginal persons or Torres Strait Islanders under arrest or serving a sentence of imprisonment, and*
 - (b) *are willing to give such help in that part of the State.*
- (2) *In establishing and maintaining a list in relation to a part of the State, the Minister must from time to time consult with any Aboriginal legal aid organisation providing legal assistance to Aboriginal persons or Torres Strait Islanders in that part of the State.*
- (3) *The Minister may, in writing, delegate to a person employed in the Attorney General's Department all or any of the functions of the Minister under this section.*

Such a list had not been established at the time of writing. The Attorney General's Department has advised that in February 2002, the Attorney General sent letters to all Aboriginal Legal Services in NSW seeking nominations to be included on the list of interview friends required under s 116. There were no nominations received. In June 2002, the Coalition of Aboriginal Legal Services advised the Criminal Law Review Division that nominations would only be provided if the Act were amended to prevent interview friends being called as witnesses for the prosecution.²⁴⁵ It is also noted that neither the Standing Committee nor the Independent Review recommended an amendment of this type.

As forensic procedures are generally video recorded and there are at least a minimum of two police officers present during the forensic procedures, the need to call interview friends as witnesses for the prosecution from events arising at the forensic procedures would be limited. As this is a reason why s 116 remains essentially inoperable, we recommend that consideration be given to amending the Act to ensure that interview friends are exempt from being called as a witness for the prosecution for this limited purpose. If the Act is amended, a further invitation seeking nominations for interview friends under s 116 could be extended to relevant support agencies and organisations.

Recommendation 18

It is recommended that the Attorney General consider whether the Act should be amended to prevent interview friends being called as a witness for the prosecution for matters directly relating to the taking of a forensic procedure.

Implementation by DCS

The Draft MOU between NSW Police and DCS states that DCS will assist eligible inmates with organising the attendance of interview friends and legal practitioners where required. DCS has indicated that it will not permit any person who has been classified as a 'prohibited visitor'²⁴⁶ to be an interview friend.²⁴⁷

²⁴⁵ Correspondence from Director General, Attorney General's Department 1 March 2004.

²⁴⁶ The DCS Operations Procedures Manual explains that prohibit/prohibition refers to the imposition of a sanction preventing any access to inmates and/or correctional centre.

²⁴⁷ Evidence given by DCS to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 24 September 2001.

Implementation by DJJ

The DJJ Operational Procedures (OPs) state that juvenile detention centre staff are responsible for arranging the attendance of legal representatives and interview friends nominated by the detainees.²⁴⁸ The DJJ OPs state:

*It is the responsibility of detainees to nominate an interview friend to be present during the forensic procedure. An interview friend cannot be another detainee, but it can be a staff member who has a good relationship and rapport with the detainee and is available at the time. If the detainee requests an interview friend who is external to the centre, the detainee or the centre must meet all costs associated with this request.*²⁴⁹

Implementation by NSW Probation and Parole

The agreement between NSW Police and NSW Probation and Parole states that during the 'preparation' interview eligible home detainees will be informed of their right to have an interview friend or legal representative accompany them to the DNA sampling.²⁵⁰ It also states that Aboriginal/Torres Strait Islander detainees will be asked to provide 24 hours notice if they intend to bring an interview friend and/or a legal representative. If the home detainee's supervising officer has any doubt about the home detainee's capacity to consent, then they are required to:

*Assist the detainee to identify a suitable 'interview friend' (not a departmental officer) and arrange for him/her to accompany the detainee for testing.*²⁵¹

Implementation by NSW Police

The ITT have a list of standard questions that they ask every serious indictable offender prior to making a formal request for the DNA sample. Some of these questions relate to the person's Aboriginal or Torres Strait Islander status. If the person identifies as being Aboriginal and/or Torres Strait Islander and they are an adult who is capable of giving consent, they are asked if they would like to have an interview friend or legal representative present. If they do not wish to have someone present during the sampling, the inmate/detainee is asked to verify this fact with her/his signature.

The NSW Police SOPs state:

A forensic procedure must not be carried out on an ATSI serious indictable offender unless:

- *an interview friend and/or legal representative is present, if reasonably practical, or*
- *the serious indictable offender has expressly and voluntarily waived his or her right to have an interview friend and/or legal representative present.*

*If the Team Leader is satisfied that every reasonable and practical opportunity to seek legal advice as been provided to the inmate and that every reasonable and practical opportunity has been given to have a legal representative and/or interview friend present, the forensic procedure may proceed in their absence.*²⁵²

248 DNA Testing in Juvenile Justice Centres in NSW DJJ, Operational Procedures for Juvenile Justice Centres, February 2002.

249 DJJ OPs.

250 See Appendix L.

251 Agreement between the NSW Home Detainees Program, Probation & Parole and the NSW Police Service For the DNA Testing of Home Detainees, provided to us by the Home Detention Program, 22 January 2003.

252 NSW Police SOPs.

The SOPs also require that:

An Interview friend and/or legal practitioner must be present when a sample is taken from an inmate who is identified as 'incapable.'

An inmate who is identified as 'incapable' cannot waive their right to the presence of an interview friend or legal representative.

...

A child under this Act cannot give informed consent to submit to a forensic DNA sample and therefore must be treated the same as an 'incapable' person.

How we monitored the use of legal representatives and interview friends

We monitored the extent to which legal representatives and interview friends were present during the DNA sampling of eligible serious indictable offenders by:

- examining statistics
- interviewing serious indictable offenders
- auditing videos of the DNA sampling
- raising the issue in our discussion paper
- canvassing the issue in our focus groups with ITT members and CCLOs
- interviewing senior juvenile justice centre staff
- analysing complaints and inquiries received by our office.

The presence of legal representatives and interview friends during the DNA sampling of children and young people

During our review period, police obtained DNA samples from 49 detainees in juvenile justice centres. Six of these were under 18 years at the time of the sampling.²⁵³

At the time that our video audit was carried out²⁵⁴, DNA samples had been taken from 38 detainees in juvenile justice centres. We examined the videoed interactions involving all these children and young people. Six of these children and young people were under 18 years at the time of the sampling.

In Chapter 16 we discuss the limitations of the video recordings of the ITA and the sampling. In Chapter 17 we discuss the effect that these limitations had on identifying the roles of the people present during the videoed DNA sampling interactions, and that our auditor relied on audio and other indicators to assess whether an interview friend or legal representative was present.²⁵⁵ Using these indicators, our auditor concluded that no legal representatives were present during the DNA sampling of the 38 detainees in juvenile justice centres.

Police are required to have an interview friend present (if reasonably practicable) if they obtain a DNA sample from a young person who is under the age of 18. In all but one of these cases our auditor was sure that an interview friend was present during the DNA sampling. In one case our auditor was unable to determine whether or not an interview friend was present.

²⁵³ Information received from NSW Police FPIT, July 2002.

²⁵⁴ April 2002.

²⁵⁵ In that chapter we recommend that NSW Police amend its SOPs to require that police conducting the DNA sampling introduce all persons present and explain each person's role to the person who is the subject of the procedure.

Of the 11 young people over the age of 18 who were Aboriginal or Torres Strait Islander (and as such were entitled to an interview friend) our auditor was able to identify that an interview friend was present in four cases. Of these 11 young people who were entitled to an interview friend, three explicitly stated that they wanted an interview friend present (and our auditor noted that an interview friend was actually present). In the remaining eight cases our auditor could not determine whether the young people wished to have an interview friend present or not.²⁵⁶

Our auditor was asked to note any input into the procedure by the interview friend, such as requests and comments made, and questions asked, by the interview friend. None of the interview friends had any input during the videoed interaction between the ITT and the children and young people in juvenile justice centres.

We interviewed the centre manager or another senior staff member at all NSW Juvenile Justice Centres about the DNA sampling. They informed us that an interview friend was provided for all detainees in juvenile detention centres, regardless of their ethnicity and age.²⁵⁷ The interview friend was usually a nurse or a youth worker.

In response to our discussion paper the Legal Aid Commission stated that solicitors at the Children's Legal Service had not been requested to attend any of the forensic procedures in juvenile justice centres.²⁵⁸ Legal Aid suggested that this may be partly due to the fact that detainees are not told of the exact date that the sampling is to occur.

The presence of legal representatives and interview friends during the DNA sampling of incapable people

NSW Police informed us that all serious indictable offenders who were identified as being 'incapable' of consenting had an interview friend present and that this was usually a nurse or other support person.

In our discussion paper we asked if inmates were exercising their rights to have an interview friend and/or legal representative present during the forensic procedure.

The Guardianship Tribunal stated:

The issue of cost is a concerning one. By virtue of their disability, the incapable person may not have been able to work prior to their incarceration. Their only source of income may have been Centrelink entitlements. I believe that these entitlements are not paid whilst a person is in custody so there is a real question as to whether a person could afford the cost of paying a person to attend, especially a lawyer at over \$200 per hour.

People who are incapable may not have the skills to organise their own interview friend or legal representative. Indeed they may have no-one involved in their life that they could call on to act as an interview friend. There is therefore a need for a roster of available independent advocates who are willing to make themselves available for this purpose. Such a roster should be funded by, but independent from the NSW Police Service. Indeed, I believe that a similar roster exists for the purpose of police interviews.²⁵⁹

²⁵⁶ This was usually because the video recording provided very little coverage of the ITA and not all of the people present were introduced.

²⁵⁷ Interviews with senior staff at NSW Juvenile Justice Centres, July – September 2002.

²⁵⁸ Legal Aid New South Wales, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 1 March 2002.

²⁵⁹ Guardianship Tribunal, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 28 February 2002.

The Department of Ageing, Disability and Home Care (DADHC) responded to the discussion paper as follows:

Short notification times, and lack of appropriate assistance may limit people with an intellectual disability or cognitive impairment asking for and securing this assistance

...

The low number of people deemed incapable has an impact on the data for people who ask for an interview friend or legal representative to be present. It may be that inmates who would seek to have an interview friend or legal representative present are those who are currently deemed capable, but whose disability limits their understanding

The Discussion Paper indicates that this could be a daunting process that may cause negative reactions particularly for vulnerable people. The presence of an interview friend may assist both the inmate and those taking the samples.²⁶⁰

For the purpose of our interviews with serious indictable offenders, we judged that it was not appropriate for us to attempt to determine whether interviewees were 'incapable' as defined by the Act. We made this decision based on the fact that our staff did not have the relevant expertise to identify 'incapable' people. In order to ensure that we obtained information from incapable interviewees, we asked all interviewees about the presence of interview friends and legal practitioners, because we were not in a position to determine which interviewees were entitled to them.

We later requested statistics from NSW Police relating to the centres at which the interviewees were based. Those records showed that none of the serious indictable offenders who were DNA sampled by the ITT during the period of our interviews were identified as being incapable.²⁶¹

The presence of legal representatives and interview friends during the DNA sampling of Aboriginal and Torres Strait Islander people

DCS reported that as at 7 July 2001:

Less than 23% of inmates, who identified as being of Aboriginal or Torres Strait Islander descent for the purposes of the testing program, exercised their right to have an interview friend present while the sample of forensic material was obtained.²⁶²

During our interviews with serious indictable offenders we asked interviewees if they were an Aboriginal or Torres Strait Islander person and several questions about their use of interview friends and legal practitioners.

15.8% (29 out of 184) of interviewees identified as being Aboriginal and/or Torres Strait Islander. Only five of these told us that they had an interview friend present during the DNA sampling. Only one of these interviewees told us that they chose who their interview person was.²⁶³ The reasons interviewees gave us for having an interview friend present included:

Because I was entitled to.²⁶⁴

Just to make sure nothing goes wrong.²⁶⁵

Cause they asked him to come up [and they] put him there with me.²⁶⁶

²⁶⁰ Department of Ageing, Disability and Home Care, Response to NSW Ombudsman's Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders, 5 March 2002.

²⁶¹ Information provided by NSW Police FPIT, 21 February 2002.

²⁶² DCS, Comments: *Crimes (Forensic Procedures) Act 2000*, submitted to the Standing Committee on Law and Justice inquiry, 7 July 2001.

²⁶³ Interviewee No 136.

²⁶⁴ Interviewee No 108.

²⁶⁵ Interviewee No 96.

²⁶⁶ Interviewee No 114.

We asked the 24 Aboriginal/Torres Strait Islander interviewees who did not have an interview friend present during the DNA sampling if they would have preferred to have had one present if they could have. 11 of these answered 'yes' to this question. The reasons that interviewees provided for preferring to have had an interview friend present included:

*They did ask me (if I wanted a support person)... [The interviewee explained that s/he did not want to have the particular person that was offered as an interview friend]... Mainly to make you feel comfortable. A neutral person, Koori or non-Koori, someone that makes you feel comfortable. When you don't have the time to organise it and you don't have the number you can't organise it.*²⁶⁷

*So he could tell me what is the meaning of DNA.*²⁶⁸

*Two witnesses are better than one.*²⁶⁹

Although the Act allows Aboriginal and Torres Strait Islander serious indictable offenders to have a legal representative present during the DNA sampling, none of the 29 Aboriginal/Torres Strait Islander interviewees told us that they had a solicitor present. We asked these interviewees if they would have preferred to have had a solicitor present during the DNA sampling. Almost half of the Aboriginal/Torres Strait Islander interviewees (13 of the 29) stated that they would have preferred to have had a solicitor present if they could have had one. One of these had an interview friend present.²⁷⁰ Over half of the Aboriginal/Torres Strait Islander interviewees (16 of the 29) stated that they would not have preferred to have had a solicitor present if they could have had one. Four of these interviewees had an interview friend present during the DNA sampling.²⁷¹

We did not ask interviewees why they did not have an interview friend present, but we noted that:

- eight of the 13 Aboriginal/Torres Strait Islander interviewees who would have preferred to have a solicitor present had been given less than one weeks' notice
- three stated that they found out that they were to be tested 'today'
- one stated that they found out 'yesterday'
- only one had been given more than two weeks' notice.

The reason most often provided by Aboriginal/Torres Strait Islander and non-Aboriginal/Torres Strait Islander interviewees for preferring to have had a solicitor present during the DNA sampling was a desire to obtain specific legal information about the DNA sampling and to be sure that the sampling was conducted according to law. The second most commonly stated reason was to obtain the information about the sampling in plain language.

Some of the other reasons given by Aboriginal and Torres Strait Islander serious indictable offenders are as follows:

*Just to find out whether I had to do it. They said I could wait but I thought they'd think I was hiding something.*²⁷²

*Because you would come away understanding more of what they are talking about.*²⁷³

*Because I don't know if they're breaking any of your rights. I didn't know what they were and were not allowed to do.*²⁷⁴

*[It's] easier to ask the solicitor questions than ask the police.*²⁷⁵

²⁶⁷ Interviewee No 9.

²⁶⁸ Interviewee No 43.

²⁶⁹ Interviewee No 144.

²⁷⁰ Interviewee No 108.

²⁷¹ Interviewee Nos 136, 114, 107 and 96.

²⁷² Interviewee No 170.

²⁷³ Interviewee No 9.

²⁷⁴ Interviewee No 122.

²⁷⁵ Interviewee No 30.

The responses from CCLOs indicated that few Aboriginal/Torres Strait Islander inmates were exercising their right to have an interview friend present and even fewer had requested that their legal representative attend the DNA sampling. CCLOs stated that they believed that the DCS Education Program provided inmates with enough information to feel confident about the process without requiring the presence of a support person or solicitor.

Most inmates who responded suggested that it would be useful for a legal aid lawyer to be present to provide legal advice and to be an independent witness to the DNA sampling. One inmate responded as follows:

Inmates who are entitled to legal representation do not do so because:

- i. Inmate's lawyers reside primarily in the major cities and prisons are not only in the towns.*
- ii. Most convicted inmates do not have any money*
- iii. Most inmates are not aware that they have rights and if they do they do not know where to find advice or representation.*
- iv. Lawyers charge large amounts of money to drive to [location of centre] and [location of centre] especially during the week. Fees can be as much as \$2,000 to attend a 15 minute DNA sampling.*
- v. I was told that if I had a lawyer attend the Department of Corrective Services could not guarantee that the day the lawyer attends would be the day I was tested.²⁷⁶*

The response to our discussion paper from the Aboriginal and Torres Strait Islander Commission (ATSIC) also indicated that the cost involved to the inmate in organising the presence of an interview friend or legal representative of their choice may be prohibitive.²⁷⁷

In response to our discussion paper one CCLO raised the issue of fear of stigma in correctional centres as a possible reason for the low number of requests for interview friends and legal representatives from Aboriginal/Torres Strait Islander inmates. He stated:

The majority of non-Aboriginal inmates have indicated to me that they resent the fact that Aboriginal inmates are given the opportunity to have friends present. I believe that some Aboriginal inmates are uncomfortable with the issue of them being seen as to being given preferential treatment.²⁷⁸

When the Standing Committee raised this issue with ATSIC representatives during its inquiry, they replied:

ATSIC is particularly happy that those options are made available or that those services are provided. Again, without harping on the disproportionate representation aspect, I think it again gets back to the fact that two per cent of the population makes up 18 per cent of the prison population and that there needs to be some affirmative action, if I can use that term, to assist Aboriginal and Islander people in the custody system.²⁷⁹

²⁷⁶ Confidential, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 26 February 2002.

²⁷⁷ Aboriginal and Torres Strait Islander Commission, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 27 February 2002; Guardianship Tribunal, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 28 February 2002.

²⁷⁸ Confidential, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 16 December 2001.

²⁷⁹ Evidence given by ATSIC to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 15 August 2001.

This issue also arose during our focus groups. We asked CCLOs how they dealt with concerns that Aboriginal and Torres Strait Islanders received preferential treatment. CCLOs gave the following as examples of how they dealt with the issue:

*That's my most asked question: 'How come they get to have an interview friend or a legal representative and I don't?' I just say: 'The government legislates for minority groups. So, like, if we have a person who is Asian and they can't speak English, they've obviously got to have someone there for them. So the government legislates for minority groups. I can't change that.'*²⁸⁰

*The way that I have dealt with it is to say that the percentage of Aboriginal inmates in custody in relation to the (general) population is greater. Some treatment that they get hasn't been appropriate. So therefore the government's making sure that the treatment here is appropriate.*²⁸¹

*I tell them: 'You've got me!'*²⁸²

This issue was also raised during our focus groups with ITT members. Some members stated that the provision for Aboriginal and Torres Strait Islander inmates to have an interview friend or legal representative present was resented by non-Aboriginal/Torres Strait Islander inmates. Some ITT members stated that other minority groups indicate that they believe the system to be unfair:

*I'm Lebanese, what's the difference?*²⁸³

One ITT member said that some Islander²⁸⁴ inmates complained:

I'm black too. Why can't I have one?

The reasons for additional safeguards for Aboriginal and Torres Strait Islanders throughout the criminal justice system are abundant and well documented.²⁸⁵ It is clear from our focus groups that some CCLOs are well prepared for this question and have the skills to diffuse objections from inmates in this regard. We did not observe any inmates or detainees raising objections on this basis during our examination of videoed interactions.

Interviews and video audits – some further observations

We asked all interviewees, however, if they had an interview friend with them when they saw the police about the DNA sampling. Seven of the 184 inmates we interviewed answered 'yes' to this question. As stated earlier, we did not inquire as to whether any of the interviewees were 'incapable' as defined by the Act. We did, however, ask interviewees why they had an interview friend with them. The reasons that interviewees gave for having an interview friend present included:

- to be a witness
- to provide information
- to provide support
- to ensure that the sampling was conducted properly
- to verify the inmate/detainee's identity.

280 Focus Group No 2.

281 Focus Group No 2.

282 Focus Group No 2.

283 Focus Group with ITT, 13 December 2001.

284 We assume that this related to Pacific, South Sea and other Islanders, as Torres Strait Islanders also have the right to have an interview friend and/or legal representative present.

285 See, for example, The Honourable J.H. Wootten, *Royal Commission into Aboriginal Deaths in Custody: Regional report of inquiry in New South Wales, Victoria and Tasmania*, Australian Government Publishing Service, Canberra, 1991 and Sir Ronald Wilson, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, April 1997.

We asked interviewees how useful they found it having an interview friend with them. The majority of the seven interviewees answered that they found it either 'useful' or 'very useful' having an interview friend present. One interviewee told us that s/he found it 'useless'.

We asked all interviewees if they would have preferred to have had an interview friend with them during the sampling. We asked them this question regardless of whether they were legally entitled to have an interview friend present.

Almost thirty per cent (54 out of 177) interviewees who did not have an interview friend present stated that they would have preferred to have had an interview friend with them during the DNA sampling. Of these, 11 were Aboriginal or Torres Strait Islander people (as noted above), 14 spoke a language other than English at home and five were under the age of 21.

The reasons given by interviewees for preferring to have an interview friend with them during the sampling are summarised in the table below.

Table 10.1: Reasons for preferring to have had an interview friend during the DNA sampling²⁸⁶

Number (total = 54)	Categories and examples of reasons for preferring to have had an interview friend present if could have
14	To explain the procedure or provide information.
13	For support.
13	As a witness.
10	To ensure the legality of the procedure.
4	No reason provided.

We have not attempted to generalise these findings to draw conclusions about the experiences of all serious indictable offenders throughout the corrections system. We did note, however, that interviewees who spoke a language other than English at home were more likely to give the reason that they wanted to have someone 'to explain the procedure' or 'provide information' about the DNA sampling to them, than any other reason compared to the other groups.

None of the interviewees told us that they had a solicitor or legal representative with them when they saw the police about the DNA sampling. forty per cent (73 out of 184) of interviewees said that they would have preferred to have had a solicitor present when they were asked to provide a DNA sample.

Table 10.2: Reasons for preferring to have had a solicitor during the DNA sampling²⁸⁷

Number (total = 73)	Categories and examples of reasons for preferring to have had a solicitor present if could have
35	To obtain specific legal advice about the DNA sampling.
21	To provide the information in plain language.
9	To be an independent witness.
5	Miscellaneous.
3	To provide support.

²⁸⁶ Information based on our interviews with serious indictable offenders, November and December 2001.

²⁸⁷ Based on information from our interviews with serious indictable offenders, November and December 2001.

Our video audit of the inmate/detainee DNA sampling examined the number of persons present in the testing area, the role that they appeared to play and the times that they were present. Our auditor concluded that no legal representatives were present at any of the 265 forensic procedures we examined during our video audit.

Our auditor was able to identify that an interview friend was present in 38 of the 265 audited forensic procedures. In a further 28 cases (out of 265) our auditor was unable to determine whether an interview friend was present, and in the remaining 199 cases, our auditor concluded that no interview friend was present.

In 12 of the 38 procedures where an interview friend was present, the interview friend had some kind of input into the procedure. For example, our auditor noted the following actions by some of the interview friends:

Videoed Interaction No 14

The interview friend encouraged the inmate: she was supportive, hugged the inmate and smiled. In relation to the video recording question [whether the inmate objects to the video recording], she said, *'It's up to you'*.

Videoed Interaction No 54

The interview friend explained to the inmate how the buccal swab would be taken.

Videoed Interaction No 233

The inmate was very emotional and confused before the interview friend was called in. The inmate spoke to the interview friend [briefly] and then decided s/he wanted to do the buccal swab.

Persons not presently entitled to a support person/legal representative

A significant number of interviewees told us that even though they did not have an interview friend or a legal representative present during the DNA sampling, they would have preferred to. We found that the most common reasons given by interviewees for preferring to have a legal representative or an interview friend present were to:

- a) obtain legal advice about the DNA sampling
- b) obtain information about the DNA sampling in plain language
- c) have a witness present during the DNA sampling.

We note the suggestion by a number of serious indictable offenders that a legal aid representative should be present to provide legal advice about the sampling and be an independent witness. We are conscious that there would be considerable expense involved in arranging for a legal representative to be present and available to all serious indictable offenders during the DNA sampling. It is our view that the needs identified by interviewees, who are not otherwise entitled to an interview friend or legal representative, can be met by a combination of the existing legislation and policies and enhancements by our recommendations.

(a) obtain legal advice about the sampling

The Act provides for all inmates and detainees to be provided with the opportunity to obtain legal advice prior to being asked to consent to a forensic procedure. We have recommended that adequate notice be provided to serious indictable offenders so that they have a meaningful opportunity to access legal advice about the sampling. We have also made recommendations to enhance existing education programs.

(b) obtain information in plain language about the DNA sampling

Serious indictable offenders can currently obtain information about the DNA sampling through the DNA Sampling Education Programs, legal practitioners and the ITT. There are some improvements that could be made to the clarity of the information that is provided by police and this is discussed in Chapter 11.

(c) have a witness present during the DNA sampling

The role of an independent witness differs from that of a legal representative or an interview friend. A witness simply witnesses the event, rather than advocating, intervening or contributing to the procedure in some way. The role of an independent witness is usually to provide an objective account of the event or procedure in the case of a complaint or a challenge at court.

The legislation provides for the DNA sampling to be recorded electronically, unless the serious indictable offender objects. It appears that if the recording is adequate, it has the potential to fulfil a similar role to that of an independent witness. Issues relating to the recording of forensic procedures and recommendations to improve procedures are canvassed below under 'Recording issues'.

In order for children, incapable adults and Aborigines and Torres Strait Islanders to exercise their right to have an interview friend and/or legal representative present, they must be:

1. identified as eligible
2. clearly informed about their rights
3. provided with assistance and adequate opportunity to organise for an interview friend and/or legal representative to be present.

1. Identified as eligible to have an interview friend and/or legal representative present

The issue of identifying 'incapable' serious indictable offenders is dealt with later in Chapter 13.

NSW Police rely on the relevant custodial agency to identify serious indictable offenders who are under the age of 18 or who are Aboriginal or Torres Strait Islander people. This issue should arise at the time of the 'Pre-Test Interview' carried out by CCLOs or youth workers in juvenile justice centres. If for some reason this does not occur the ultimate responsibility lies with NSW Police and we note that at the beginning of the interaction, the ITT ask all serious indictable offenders their date of birth and whether they are Aboriginal or Torres Strait Islander.

2. Clearly informed about their rights

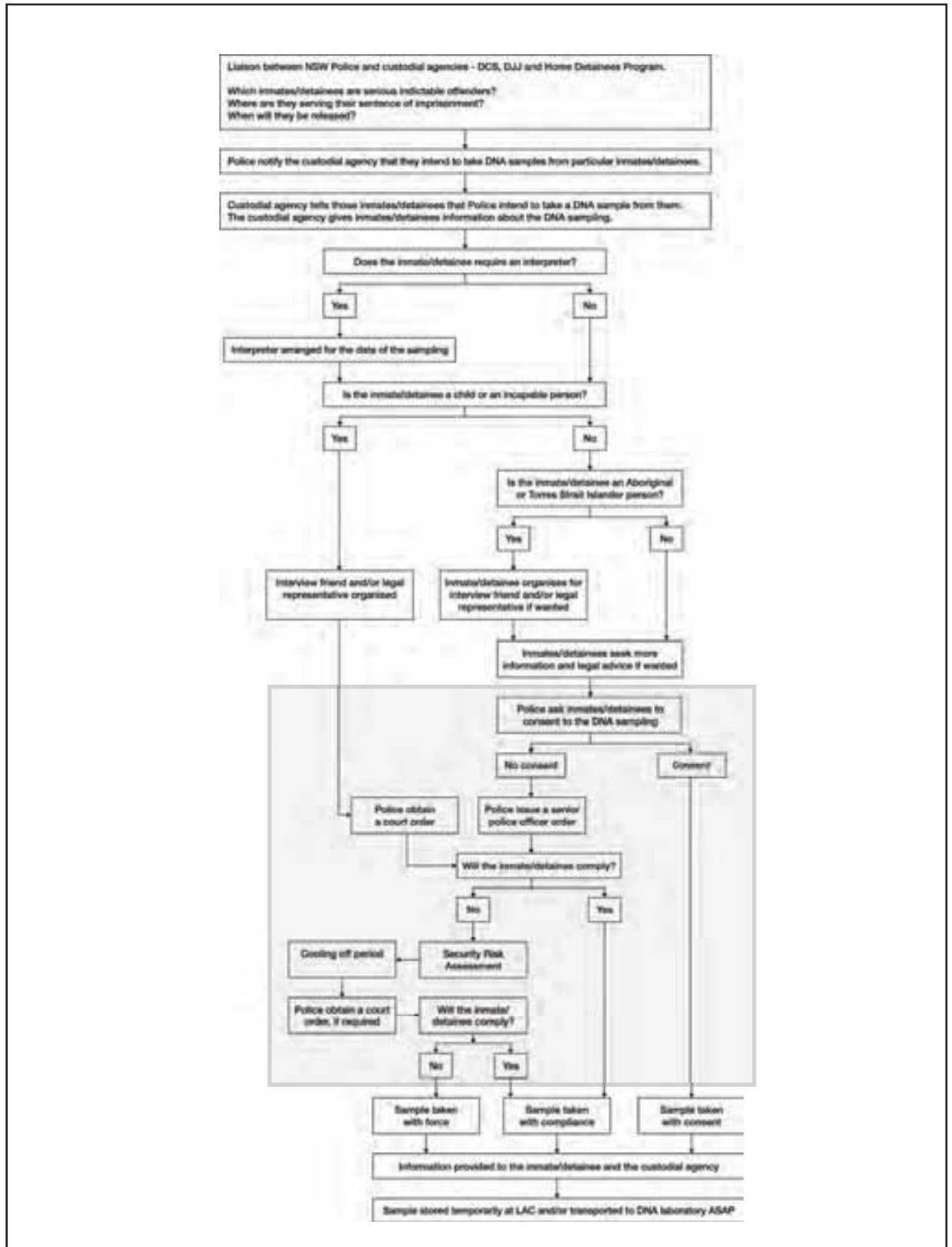
The DNA Sampling Education Programs include information about the rights of eligible serious indictable offenders to have a legal representative and/or interview friend present during the sampling. We discussed the DNA Sampling Education Programs in a previous chapter and recommended that those Education Programs be implemented comprehensively and consistently, and that the relevant staff be provided with adequate training, time and resources to implement the Pre-Test Interviews and the Education Programs. The need for adequate assistance and facilities to be provided to eligible serious indictable offenders who wish to have an interview friend and/or a legal representative present provides further support for these recommendations.

In addition to the DNA Sampling Education Programs, serious indictable offenders may also be informed about their rights by both the ITT officers and legal advisors. The NSW Police SOPs provide the opportunity for the serious indictable offender to access information from both of these sources.

3. *Provided with assistance and adequate opportunity to organise for an interview friend and/or legal representative to be present*

We believe that the comprehensive, consistent and timely implementation of the DNA Sampling Education Programs by appropriately resourced CCLOs, Home Detention Officers and youth workers has the potential to address this issue. We have also recommended that a certain minimum time be provided between when an inmate is advised that they are to be tested, and the date of the test. This issue therefore provides further support for these earlier recommendations.

Part D: Obtaining consent or orders to authorise the DNA sampling



Summary

What the Act says

Under the Act, the authority to conduct a forensic procedure upon a serious indictable offender depends upon:

- the type of forensic procedure to be carried out
- the capacity of the person to consent to the procedure and
- the provision of 'informed consent' or the legitimacy of a relevant order.

The Act requires that the following different samples taken from adult serious indictable offenders who are capable of consenting to the procedure be authorised in the following ways.

Section	Type of sample	Authorisation
64	Buccal swab	Informed consent An order of a court or authorised justice
62	Hair sample	Informed consent Senior police officer order
63	Blood sample	Informed consent An order of a court or authorised justice

If a serious indictable offender is an adult capable of consenting to the forensic procedure, police must first ask the serious indictable offender to consent to the procedure. If the serious indictable offender does not consent, police may then seek an order from a senior police officer or an authorised justice (a court order).

If a serious indictable offender is a young person (aged 10 - 17 years of age) or is 'incapable' as defined by the Act, the Act does not permit them to provide consent to the DNA sampling. Instead, a police officer must apply to a court for an order authorising the forensic procedure.

This Part of the report examines the functions and issues that relate to obtaining informed consent or other appropriate authority to obtain forensic DNA samples from serious indictable offenders.

Table D1: Type of authority obtained by NSW Police to take DNA samples from serious indictable offenders between 1 January 2001 and 5 July 2002

	Consent	Senior police officer order	Court order	Total
Adults capable of consenting	9,865	465	7	10,337
Adults 'incapable' of consenting	-	-	17	17
Young people over 18 years in juvenile detention centres	43	-	-	43
Young people under 18 years in juvenile detention centres	-	-	6	6
Total	9,908	465	30	10,403
Percentage (approx)	95%	4.5%	0.5%	100%

Source: NSW Police FPIT (n = 10,403)

The issue of consent is one of the most contentious aspects of the forensic DNA sampling of serious indictable offenders. The consent provisions in the Act have been described by one judge as 'legislative arm twisting'²⁸⁸ and by an academic commentator as 'a sham'.²⁸⁹

During our review, several factors emerged as key issues affecting the obtaining of appropriate authorisation to carry out forensic procedures on serious indictable offenders, and we monitored them accordingly. As these factors are relatively complex, we will examine them in the next three chapters. They are:

- obtaining informed consent and the complexity of information
- compulsory DNA sampling and the factors influencing consent
- taking DNA samples from serious indictable offenders who are children, or who are 'incapable' of consenting.

²⁸⁸ Sides J, *R v VM*, voir dire, 01/21/3378 at 50.

²⁸⁹ Gans, Jeremy, 'A Critique of the Police's Right to Ask for DNA', Paper presented at the *Use of DNA in the Criminal Justice System Seminar*, Institute of Criminology, Sydney, 11 April 2001.

Chapter 11: Obtaining informed consent and the complexity of information

What the Act says

Several sections of the Act and clause 7 of the Regulation relate to the form and content of informed consent. We have set out some of the Act's provisions in this respect to illustrate the complexity of the statutory requirements.

Section 67 *Informed consent to forensic procedures*

- (1) *A serious indictable offender gives informed consent to the carrying out of a forensic procedure under this Part if the offender consents to the carrying out of the procedure after a police officer:*
 - (a) *requests the offender to consent to the forensic procedure under section 68, and*
 - (b) *informs the offender about the forensic procedure in accordance with section 69, and*
 - (c) *gives the offender the opportunity to communicate, or attempt to communicate, with a legal practitioner of the offender's choice.*
- (2) *The police officer must allow the offender to communicate, or attempt to communicate, with the legal practitioner in private unless the police officer suspects on reasonable grounds that the offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.*

Note: Section 103 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

Section 68 *Police officer may request offender to consent to forensic procedure*

A police officer may request a serious indictable offender (other than a child or an incapable person) to consent to a forensic procedure to which this Part applies being carried out on the offender.

Section 69 *Matters that offender must be informed of before giving consent*

- (1) *The police officer must (personally or in writing) inform the serious indictable offender of the following:*
 - (a) *the purpose for which the forensic procedure is required,*
 - (b) *if the police officer wants the forensic procedure carried out in relation to an offence - the offence concerned,*
 - (c) *the way in which the forensic procedure is to be carried out,*
 - (d) *that the forensic procedure may produce evidence against the offender that might be used in a court of law,*
 - (e) *that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 65,*
 - (f) *if the forensic procedure is the taking of a sample of blood - that the offender may request that the correctional centre medical officer be present while the blood is taken,*
 - (g) *that the offender may refuse consent to the carrying out of the forensic procedure,*
 - (h) *the consequences of not consenting, as specified in subsection (2), (3) or (4) (whichever is applicable),*

- (i) *the effect of section 84 (if applicable),*
- (j) *that information obtained from analysis of forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and used for the purposes of a criminal investigation or for any other purpose for which the DNA database system may be used under Part 11 or 12.*

(2) *Failure to consent to non-intimate forensic procedure*

The police officer must (personally or in writing) inform a serious indictable offender requested to undergo a non-intimate forensic procedure to which this Part applies that, if the offender does not consent, a senior police officer may order the carrying out of the forensic procedure under section 70 if the senior police officer has taken into account the matters set out in section 71.

(3) *Failure to consent to intimate forensic procedure*

The police officer must (personally or in writing) inform a serious indictable offender requested to undergo an intimate forensic procedure to which this Part applies that, if the offender does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

(4) *Failure to consent to taking of sample by buccal swab*

The police officer must (personally or in writing) inform a serious indictable offender requested to permit the taking of a sample by buccal swab, that, if the offender does not consent:

- (a) *a senior police officer may order the taking of a sample of hair other than pubic hair under section 70, or*
- (b) *that an application may be made to a court for an order authorising the taking of a sample by buccal swab or some other forensic procedure.*

Section 72 Form of consent

The consent of a serious indictable offender to the carrying out of a forensic procedure under this Part is not effective unless:

- (a) *the consent is in writing and in a form containing the particulars prescribed by the regulations, and*
- (b) *the consent is signed by the offender, and*
- (c) *the signature is witnessed by a person other than a police officer, and*
- (d) *the offender is given a copy of the consent as soon as practicable after it is signed and witnessed.*

Clause 7 of the Regulation prescribes the form of consent by a serious indictable offender:

For the purposes of section 72 (a) of the Act, the following are the prescribed particulars:

- (a) *the name of the serious indictable offender giving consent to the carrying out of the forensic procedure,*
- (b) *a description of the forensic procedure,*
- (c) *the name of the police officer who has requested consent to the carrying out of the procedure,*
- (d) *a statement as to whether or not the police officer has informed the offender (personally or in writing) of the matters set out in section 69 of the Act,*
- (e) *a statement as to whether or not the offender has been given the opportunity to communicate, or attempt to communicate, with a legal practitioner of the offender's choice.*

Section 84 Admissibility of evidence relating to consent to forensic procedure

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a police officer or another person investigating the commission of the offence concerned acted contrary to law in carrying out that investigation.

Section 92 Use of information on DNA database system

- (1) *A person must not access information stored on the DNA database system unless the information is accessed in accordance with this section.*

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) *A person authorised by the responsible person for the DNA database system may access information stored on the DNA database system for one or more of the following purposes:*
- (a) *the purpose of forensic matching permitted under section 93,*
 - (b) *the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates,*
 - (c) *the purpose of administering the DNA database system,*
 - (d) *the purposes of any arrangement entered into between the State and another State or Territory or the Commonwealth for the provision of access to information contained in the DNA database system by law enforcement officers or by any other persons prescribed by the regulations,*
 - (e) *the purposes of and in accordance with the Mutual Assistance in Criminal Matters Act 1987, or the Extradition Act 1988, of the Commonwealth,*
 - (f) *the purpose of a review of, or inquiry into, a conviction or sentence under Part 13A of the Crimes Act 1900,*
 - (g) *the purposes of the investigation of complaints about the conduct of police officers under Part 8A of the Police Service Act 1990,*
 - (h) *the purposes of a coronial inquest or inquiry,*
 - (i) *the purpose of the investigation of a complaint by the Privacy Commissioner,*
 - (j) *any other purposes prescribed by the regulations.*
- (3) *This section does not apply in relation to information that cannot be used to discover the identity of any person.*

Implementation by NSW Police

NSW Police has provided the ITT with a step-by-step guide to the questions that must be asked of, and the information that must be provided to, serious indictable offenders.

NSW Police advised us that before making a formal request for consent, the ITT members must:

- ensure that inmates/detainees have had the opportunity to seek legal advice²⁹⁰
- determine whether the inmate/detainee has appealed against their conviction²⁹¹
- ask the inmate/detainee if they are an Aboriginal or Torres Strait Islander person and, if they are, whether they wish to have an interview friend or legal representative present²⁹²
- ensure that every reasonable and practical opportunity has been given to eligible inmates/detainees to have an interview friend or legal representative present²⁹³
- assess any difficulties that the inmate/detainee may have in understanding the information provided²⁹⁴
- respond appropriately to points of clarification required by the inmate/detainee²⁹⁵
- ask the inmate/detainee if they object to the forensic procedure being electronically recorded and record the reasons if they do object²⁹⁶
- read the information sheet about the DNA sampling to the serious indictable offender.²⁹⁷

The NSW Police information sheet for serious indictable offenders is set out on the next page.

290 NSW Police SOPs.

291 NSW Police, Forensic Procedure Consent Form – Serious Indictable Offenders.

292 Ibid

293 NSW Police SOPs.

294 Correspondence from A/Deputy Commissioner Jeffries, NSW Police, received 22 July 2002.

295 Ibid

296 NSW Police, Forensic Procedure Consent Form – Serious Indictable Offenders.

297 NSW Police SOPs.

NSW Police Serious Indictable Offenders Forensic Information Form

For the purpose of the forensic procedures legislation you are informed of the following:

- a) You are here to undergo a forensic procedure to supply a DNA sample that will be placed on the DNA database system.
- b) The procedure is being carried out because you have been convicted of a serious indictable offence, namely...[name of offence]
- c) The procedure will be carried out by way of a buccal swab/taking of a sample of hair other than pubic hair/taking of a sample of blood/taking of a hand print, finger, foot print or toe print.*delete whichever is irrelevant
- d) This forensic procedure may produce evidence against you, which may be used in a court of law.
- e) The forensic procedure will be carried out by a person authorised to do so under the Crimes (Forensic Procedures) Act 2000.
- f) If the forensic procedure is a sample of blood you may request that a correctional centre medical officer be present whilst the sample of blood is being taken.
- g) You may refuse to consent to the carrying out of this procedure at any time.
- h) **Read whichever paragraph is relevant**

If you do not consent to the taking of a buccal swab, a senior police officer may order the taking of a sample of hair with root, other than pubic hair under section 70, or an application may be made to the court for an order authorising the taking of a sample by buccal swab or some other forensic procedure.

If you do not consent to the taking of a sample of hair other than pubic hair, or the taking of a hand print, finger print, foot print or toe print, a senior police officer may order the carrying out [of] the forensic procedure under section 70 if the officer has taken into account the matters set out in section 71.

If you do not consent to the taking of a sample of blood, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

a. Evidence of your refusal, or failure to consent, or withdrawal of consent to this forensic procedure is not admissible in proceedings against you, except to establish or rebut an allegation that a police officer or another person investigating the commission of an offence concerned acted contrary to law in carrying out that investigation.

b. The information obtained from analysis of forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and used for the purposes of a criminal investigation or for one or more of the following purposes:

1. forensic matching;
2. making information available to you;
3. administering the DNA database system;
4. under arrangements between New South Wales and another State or Territory of the Commonwealth to provide access to other law enforcement agencies or other prescribed persons;
5. for and in accordance with the Mutual Assistance in Criminal Matters Act 1987 or Extradition Act 1988 of the Commonwealth;
6. review of, or inquiry into, a conviction or sentence under Part 13A of the Crimes Act 1900;
7. investigating complaints about police conduct under Part 8A of the Police Service Act 1990;
8. a coronial inquest or inquiry;
9. investigation of a complaint by the Privacy Commission;
10. investigation of, and proceedings in respect of, offences in other jurisdictions with whom the Minister has entered into arrangements concerning the exchange of information on the DNA Database system;
11. or any other purpose which has been prescribed by the regulations.

How we monitored the obtaining of consent

Most of the stakeholders we consulted during our review raised concerns about the complexity of the information that must be provided to an inmate in order to obtain 'informed' consent. NSW Police has illustrated the problem as follows:²⁹⁸

*Section 13(1)(k) requires police to inform a suspect of the rules concerning the disclosure and use of DNA profiles on the national database. This requires an explanation of sections 92 and 109. Section 109 alone has some 22 points that need to be addressed, including reference to disclosure of information in accordance with the provisions of the Mutual Assistance in Criminal Matters Act and the Extradition Act.*²⁹⁹

The Chief Executive Officer of the Law Society of NSW gave the following evidence to the Standing Committee on Law and Justice about the complexity of the information provided to serious indictable offenders:

*Having been a criminal lawyer for many years, and having acted for people in circumstances like this, I wonder what levels of comprehension convicted persons in prison have about matters such as those contained in the forensic provisions that are the subject of your examination. I suggest to you that the overwhelming majority of them have no idea what they mean, what is going on and why these things are happening*³⁰⁰...

Discussion Paper

Our discussion paper asked whether the information that must be provided to serious indictable offenders before they consent to a forensic procedure is too complex.³⁰¹

The majority of respondents were of the view that the information was too complex. A small number of respondents did not agree that the information was too complex. For example, some CCLOs referred to the Offender Education Program as providing adequate background information about the sampling.

Several respondents, including the Youth Justice Coalition and the Legal Aid Commission of NSW, asserted that the information was particularly onerous for young people.³⁰²

The then NSW Privacy Commissioner responded:

A form of notification which is overly technical or which inadequately reflects the purpose of notification makes a mockery of the functions which notification is intended to achieve.

*In this context, notification serves two functions. It ensures that an individual's consent to what would otherwise amount to an invasive physical procedure is fully informed. It also provides individuals with a level of awareness about how their personal information will be processed, so that they are able to exercise any privacy rights in relation to such further processing. Consent is not fully informed if the notification is so garbled or confusing that offenders have only a limited concept of what they are being asked to consent to. The privacy purpose of notification is similarly frustrated unless the information provided helps offenders to understand the consequences of not giving consent and how their information will be stored and used.*³⁰³

The Department of Ageing, Disability and Home Care (DADHC) suggested that consideration should be given to linking the assessment for 'incapability' to consent, to an inmate's ability to understand the information provided,³⁰⁴ rather than focussing upon their incapacity to understand the nature and effect of the forensic procedure.

298 Section 69(1)(j) provides for similar information to be provided to serious indictable offenders.

299 NSW Police, Submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*.

300 Mark Richardson, Chief Executive Officer of the Law Society of NSW, Evidence provided to the Standing Committee on Law and Justice, Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 31 July 2001.

301 Response Nos 7, 12 and 39.

302 Response Nos 27 and 34.

303 Privacy NSW, response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, December 2001.

304 NSW Department of Ageing, Disability and Home Care, response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, December 2001.

DADHC also stated that appropriate communication strategies should be employed to assist people with intellectual disabilities or cognitive impairment. These people may not be considered to be 'incapable' as defined by the Act. DADHC noted that the NSW Police CRIME Code of Practice³⁰⁵ recommends that police avoid the use of questioning which invites 'yes/no' answers. The CRIME Code encourages police to check the understanding of the person being interviewed by asking them to paraphrase or explain the information back in their own words. DADHC suggested that a similar approach could be used in communications about forensic DNA sampling.

The NSW Public Defenders Office and the NSW Bar Association responded that the information provided to serious indictable offenders provides an essential check of matters which are relevant to the issue of informed consent. However, both organisations criticised the current form of the information provided:

*There is nothing in the Act which prevents a plain English version of the Act being prepared or presented to inmates. This should be done.*³⁰⁶

The Youth Justice Coalition stated that the only way to ensure informed consent is to require mandatory legal advice for all people before they consent to a forensic procedure.³⁰⁷

The NSW Attorney General's Department responded that it would consider the issue of complexity of information required to be given to individuals during its review of the Act.³⁰⁸ In subsequent advice, the Attorney General's Department has advised that as stated in its review report, the Department has engaged a plain English expert to draft revised versions of the required forms.³⁰⁹

Interviews with serious indictable offenders

Some statistics from our interviews with serious indictable offenders

29% (54 out of 184) told us that they did not understand some or all of the information provided by police.

81% (44 out of 54) of those who did not understand told police that they had understood the information.

30% (16 out of 54) stated that they did not understand the information because it was read to them too quickly.

63% (34 out of 54) stated that it was the legal or technical concepts that they did not understand.

We asked interviewees if they had understood the information given to them by the ITT.

29% (54 out of 184) of interviewees told us that they did not understand some or all of the information provided by police. Of the 54 interviewees who told us that they did not understand the information given to them by police, 30% (16 out of 54) told us that the reason they did not understand was that the ITT had read the information sheet too quickly.

Interviewee No 232

It was pretty rushed. For example, if I was to sit here and read you a page of information, you are not going to absorb it straight away are you? I don't have a photographic memory like that.

305 NSW Police, CRIME Code of Practice, February 1998. This document can be viewed or downloaded at the NSW Police internet site – www.police.nsw.gov.au.

306 NSW Public Defenders, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, December 2001. The response from the NSW Bar Association supported this submission.

307 Youth Justice Coalition, response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, December 2001.

308 Criminal Law Review Division, NSW Attorney General's Department, response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, December 2001.

309 Correspondence from the Director General, Attorney General's Department 1 March 2004.

Interviewee No 140

It was like a broken record. How can I take all that in? I don't think Einstein could have. You didn't have time to let things sink in. It would have been better if you could sit down and read it yourself, even the night before.

Interviewee No 205

Everything just happened too quickly in there. I didn't really know what was going on.

When we asked interviewees what they had not understood, 63% (34 out of 54) told us that it was the legal or technical concepts that they did not understand.³¹⁰

Before conducting the DNA sampling, the ITT ask serious indictable offenders if they understand the information.³¹¹ We asked interviewees whether they told the police that they had not understood. The majority of interviewees (81% or 44 out of 54) who had not understood informed us that, despite not understanding, they had in fact told the ITT that they had understood the information.

Most of the interviewees who did not fully understand the information provided by the ITT told us that they did not raise their questions with NSW Police. Many interviewees stated words to the effect that they 'just wanted to get it over and done with'.³¹²

Interviewee No 122

Because I knew they would have put another explanation to me that I didn't understand.

Interviewee No 114

They told me that anything I do or say will be held against me, so I just tried to shut up.

Video Audit

The complex information included in the NSW Police information sheet is difficult for many people to understand. This could be exacerbated by poor delivery of the information, such as reading the information quickly without providing adequate opportunity to ask for clarification, background noise, or other distractions.

We audited 252 video recordings of interactions between the ITT and inmates and detainees to examine the way in which the information sheet was read to serious indictable offenders. In 40 of these video recordings the information sheet was not read out to the inmate/detainee. In some cases, this was because the person was under 18 or 'incapable' and police had already obtained a court order so informed consent was not an issue. In other cases, it appeared that the information sheet could have been read to the inmate/detainee on a previous occasion and this interaction followed a 'cooling off' period or 'time out' in the procedure.³¹³

310 For example, interviewees commented that they did not understand what the DNA sample would be used for, who would have access to it, and why they were being sampled if they were not currently under investigation.

311 NSW Police, Forensic Procedures Information Sheet – Serious Indictable Offenders.

312 Survey Nos 209, 222, 241, 232, 229, 131, 125, 122, 117, 114.

313 'Cooling off' periods are explained in the Glossary and later in this report.

Some statistics from our video audit

In **8%** of cases, our video auditor had a high degree of difficulty understanding the information being read out from the information sheet.

In **31%** of cases, our video auditor had some difficulty understanding the information being read out from the information sheet.

In **9%** of cases, the ITT member took additional steps to ensure that the inmate or detainee had understood.

In **7.5%** of cases, the serious indictable offender indicated that s/he had not understood the information.

In approximately 8% (18 out of the 212) of interactions where the information sheet was read out to the inmate/detainee, our video auditor had a *high degree of difficulty* in understanding the information provided. This was due to the sheet being read out too quickly, or the ITT member mumbling or speaking in a low voice. In some of these interactions the auditor could not comprehend the information because there was so much background noise, and we noted that the inmate/detainee appeared to be distracted by it.

In 31% (65 out of 212) of interactions where the information sheet was read out, our video auditor experienced *some difficulty in understanding* the information provided. In these cases the problems were mainly due to background noise.

Our auditor did not take into account those interactions where our difficulties in understanding the information were caused by poor video or audio recordings.

In 9% (19 out of 212) of the recordings examined, the ITT member took additional steps to ensure that the inmate or detainee had understood. This was usually in the form of pausing regularly and checking that key points had been understood. ITT members sometimes paraphrased sections of the information sheet once they had been read.

In 16 interactions it was clear that the inmate/detainee had not understood the information provided by the ITT. In these cases the inmate/detainee clearly stated that s/he had not understood or asked questions or made comments indicating that they had not understood. In these cases the ITT answered their questions and provided additional information.

Focus Groups

The ITT members stated that the most important amendment to the Act that was required was the simplification of the information provided to inmates and detainees.

There was general agreement that the information needs to be provided in plain English. One member articulated the problem as follows:

And when you say, 'Do you understand what I've just told you?' they all roll their eyes and go 'yeah' [sarcastically]. And I've got to agree with them. Does anyone here understand what we're reading? Considering they're contacting their legal advice who's telling them, 'Do not consent. You don't have to do this' and 'They'll have to get a court order': They don't even understand the spiel we're reading out. So if lawyers can't understand it, how are inmates supposed to understand it?'³¹⁴

314 Focus Group No 1.

Another ITT member commented:

*Some things can be explained, but when you get to the bottom bit ... who knows what the Mutual Assistance of Criminal Matters Act is. I just don't have a clue what it is.*³¹⁵

Court proceedings

The information provided to suspects under the Act is similar to that provided to serious indictable offenders. In a voir dire challenge to the admissibility of evidence obtained from a forensic procedure conducted on a suspect, Sides J commented that:

*The legislation puts a suspect between a rock and a hard place it seems to me. A fair amount of legislative arm twisting when it comes to the issue of consent.*³¹⁶

He also stated,

I do note that [the information sheet's] setting out has the potential to lead to confusion. Consideration should be given to a much clearer form of setting out of this particular document.

Interviews with police from other jurisdictions

We contacted police from all other Australian jurisdictions and asked how they dealt with the issue of providing complex legal information to inmates and detainees in order to obtain informed consent.

Some jurisdictions had not yet begun taking samples from convicted offenders in a systematic way.³¹⁷ Some jurisdictions informed us that consent was not required to take DNA samples from offenders in their state or territory.³¹⁸ Police in South Australia informed us they were developing plain English versions of the legislation in their jurisdiction. A police representative explained why plain English information was necessary:

*The form for informed consent included a checklist – the wording was the same as the wording in the Act. For example, they had to be advised of the requirements. But it actually said that in legalese, so it's been a problem for us. While the intention was good – to make sure they covered the issue carefully – the understanding was difficult.*³¹⁹

The Queensland Police Service informed us that:

*All consent forms used by officers prior to the taking of a sample have the rights and obligations of the person giving the informed consent clearly shown on the form. This is written in plain English and the DNA sampler must satisfy himself that the subject person has read the forms and that they clearly understand what was written and spoken to them by the officer. In addition it must be signed by that person.*³²⁰

Liaison with NSW Police, DCS and DJJ

In late 2000, before the DNA sampling of serious indictable offenders had begun, we raised the issue of the complexity of the information in s 69 of the Act with NSW Police and suggested that they consider drafting a plain English version of the information. The NSW Police CRIME Code of Practice³²¹ is an example of a plain English version of complex legislation conferring various police powers. NSW Police told us that they had raised with the Attorney General's Department the urgent need for the information to be simplified.

315 Focus Group No 1.

316 *R v VM*, Voir dire, 11 March 2002, 01/21/3378 at 50.

317 For example, ACT and the Commonwealth.

318 For example, Tasmania and the Northern Territory.

319 Advice provided by Superintendent Andy Telfer, Forensic Services, South Australia Police, 16 August 2002.

320 Correspondence from Assistant Commissioner Nolan, Operations Support Command, Queensland Police Service, received 11 September 2002.

321 NSW Police, CRIME Code of Practice, February 1998.

Later, we asked NSW Police to clarify what actions police took to ensure that the information had been understood by a person who is not 'incapable', but nonetheless has difficulties in understanding the information that is required for informed consent. NSW Police responded:

NSW Police is of the opinion that all of the inmates and detainees tested to date (apart from those for whom Court Orders were obtained) have understood the general nature and effect of the forensic procedure that they were being asked to undertake.

...

During the reading out of the information required under section 69 of the Act, the inmate or detainee will be assessed by the Inmate Testing Team in relation to any difficulties he/she may be having in understanding all of the information that is being provided. The Inmate Testing Team will respond appropriately to any points of clarification required by the inmate or detainee. Prior to proceeding with the forensic procedure, the inmate or detainee will be asked whether he/she understands the information that has just been read out. A negative response will elicit further clarification from the Inmate Testing Team prior to the test proceeding.

However, if at any point the Inmate Testing Team believes that an inmate or detainee:

- is incapable of understanding the general nature or effect of the forensic procedure that he/she is being asked to undergo, or*
- is incapable of indicating whether he/she consents or does not consent to the forensic procedure being carried out*

*the forensic procedure will not proceed until a Court Order has been obtained.*³²²

Discussion

There is broad agreement amongst interested parties that the information currently provided to serious indictable offenders before they give consent is too complex.

We note that the Standing Committee recommended that the consent provisions for serious indictable offenders be abolished.³²³ We broadly agree with this proposal and will discuss it later in this report.

Whether or not Parliament acts on this recommendation, we believe that serious indictable offenders be provided with clear and accurate information about the purpose, nature and effect of the DNA sampling. We strongly recommend that a plain English version of the consent requirements be prepared and utilised as soon as possible. We note the preference of NSW Police that this be prescribed by the regulations or included in a Schedule to the Act and acknowledge NSW Police's willingness to contribute to the implementation of this recommendation.

Recommendation 19

It is recommended that the Attorney General urgently prepare a plain English version of the information that is required to be provided to serious indictable offenders by the Act. It is also recommended that the Attorney General consider whether this information should be prescribed by the regulations or included in a Schedule to the Act.

³²² Correspondence from Acting Deputy Commissioner Jeffries, received 22 July 2002.

³²³ Recommendation 25. Standing Committee on Law and Justice. Op. Cit.

Chapter 12: Compulsory DNA sampling and the factors influencing consent

This chapter examines the way in which police obtain appropriate authority to carry out forensic procedures upon adult serious indictable offenders who are capable of consenting. The next chapter discusses the authorisation of forensic procedures upon children/young people and people who are 'incapable' of consenting.

As discussed earlier,³²⁴ a forensic procedure carried out on a serious indictable offender under Part 7 of the Act may be authorised by informed consent, a senior police officer order or a court order, depending upon the circumstances. The Act provides for adult serious indictable offenders who are capable of consenting to be asked to consent to the forensic procedure before police obtain other authorisation.

In the event that the serious indictable offender does not consent to the procedure, police may then seek an order from a senior police officer or a court to authorise the procedure. The NSW Police SOPs state that the leader of the ITT (a sergeant) will be responsible for both issuing senior police officer orders and applying for court orders.

If the inmate/detainee will not consent to a buccal swab, but intends to comply with the taking of a hair sample, the team leader will issue a senior police officer order to obtain a hair sample.

If the inmate/detainee will not consent, and indicates that s/he does not intend to comply with the testing process, the ITT will inform the inmate/detainee that they will receive a cooling off period. The team leader will ensure that the ITT conducts a follow-up visit at the end of the cooling off period. At this time the ITT will assess the consent/compliance status of the inmate/detainee. It may be that the inmate/detainee has reconsidered her/his decision and has decided to consent to a buccal swab or comply with a senior police officer order for a sample of hair.³²⁵

According to the SOPs, if the inmate/detainee still does not want to comply, the ITT will take a sample of hair or blood. A blood sample can only be taken if it is authorised by a court order. Police will only take a blood sample if the inmate/detainee does not have sufficient hair for a hair sample.

Our research has found that there are a number of factors that may affect a serious indictable offender's decision to consent to the DNA sampling. These include:

- the compulsory nature of the procedures
- the strategies to reduce the use of force: cooling off periods and the category of 'non-consenting, but compliant'
- the type of sample taken by NSW Police
- the desire to preserve legal rights by having the procedure authorised by a court order
- miscellaneous or personal reasons.

In order to explore these factors, it is necessary to examine in detail the actions available to the relevant agencies if a serious indictable offender does not consent. At the end of this chapter we suggest an alternative scheme for authorising forensic procedures on adult serious indictable offenders who are capable of consenting.

³²⁴ See discussion in Chapter 11.

³²⁵ NSW Police SOPs.

What the Act says

Section 68 Police officer may request offender to consent to forensic procedure

A police officer may request a serious indictable offender (other than a child or an incapable person) to consent to a forensic procedure to which this Part applies being carried out on the offender.

Section 69 Matters that offender must be informed of before giving consent

(1) The police officer must (personally or in writing) inform the serious indictable offender of the following:

- (a) the purpose for which the forensic procedure is required,*
- (b) if the police officer wants the forensic procedure carried out in relation to an offence---the offence concerned,*
- (c) the way in which the forensic procedure is to be carried out,*
- (d) that the forensic procedure may produce evidence against the offender that might be used in a court of law,*
- (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 65,*
- (f) if the forensic procedure is the taking of a sample of blood---that the offender may request that the correctional centre medical officer be present while the blood is taken,*
- (g) that the offender may refuse consent to the carrying out of the forensic procedure,*
- (h) the consequences of not consenting, as specified in subsection (2), (3) or (4) (whichever is applicable),*
- (i) the effect of section 84 (if applicable),*
- (j) that information obtained from analysis of forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and used for the purposes of a criminal investigation or for any other purpose for which the DNA database system may be used under Part 11 or 12.*

(2) Failure to consent to non-intimate forensic procedure

The police officer must (personally or in writing) inform a serious indictable offender requested to undergo a non-intimate forensic procedure to which this Part applies that, if the offender does not consent, a senior police officer may order the carrying out of the forensic procedure under section 70 if the senior police officer has taken into account the matters set out in section 71.

(3) Failure to consent to intimate forensic procedure

The police officer must (personally or in writing) inform a serious indictable offender requested to undergo an intimate forensic procedure to which this Part applies that, if the offender does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

(4) Failure to consent to taking of sample by buccal swab

The police officer must (personally or in writing) inform a serious indictable offender requested to permit the taking of a sample by buccal swab, that, if the offender does not consent:

- (a) a senior police officer may order the taking of a sample of hair other than pubic hair under section 70, or*
- (b) that an application may be made to a court for an order authorising the taking of a sample by buccal swab or some other forensic procedure.*

Section 70 Circumstances in which senior police officer may order non-intimate forensic procedure

(2) A police officer may take a sample of hair other than pubic hair from a serious indictable offender if:

- a) the offender has been requested under section 68 to consent to the taking of a sample by buccal swab, and*
- b) the offender has not consented, and*
- c) a senior police officer has ordered that the sample be taken after taking into account the matters set out in section 71.*

Section 71 Matters to be taken into account by senior police officer

In determining whether to make an order under section 70, the senior police officer concerned is to take into account whether this Act would authorise the forensic procedure to be carried out in the absence of the order.

Section 73 Record of order of senior police officer

(1) The senior police officer must, at the time of, or as soon as practicable after, making an order under section 70, make a record of:

- a) the order, and*
 - b) the date and time when the order was made, and*
 - c) the reasons for making it,*
- and sign the record.*

(2) The senior police officer must ensure that a copy of the record is made available to the serious indictable offender as soon as practicable after the record is made.

Section 74 Court order for carrying out forensic procedure on serious indictable offender

(1) A police officer may apply to any court for an order directing a serious indictable offender serving a sentence of imprisonment in a correctional centre or other place of detention to permit an intimate forensic procedure to which this Part applies to be carried out on the offender.

(2) A police officer may apply to any court for an order for the carrying out of a non-intimate procedure to which this Part applies on a child or an incapable person who is a serious indictable offender.

(3) A police officer may apply to any court for an order for the taking of a sample by buccal swab or the carrying out of any other forensic procedure on a serious indictable offender.

- (4) A police officer may make such an application to the court that is sentencing a serious indictable offender or to any court at a later time.
- (5) A court may order the carrying out of a forensic procedure under this section if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
- (6) In determining whether to make an order under this section, a court is to take into account whether this Act would authorise the forensic procedure to be carried out in the absence of the order.
- (7) An order under this section takes effect immediately. However, any forensic material taken must not (unless the sample is likely to perish if analysis is delayed) be analysed:
- a) until the expiration of any appeal period or after the final determination of any appeal in relation to the serious indictable offence committed by the serious indictable offender concerned, whichever is the later, or
 - b) if the conviction is quashed.

Implementation by NSW Police

NSW Police and DCS have initiated a number of policies that attempt to minimise the number of forensic procedures involving force. Those initiatives include procedures for ‘non-consenting, but compliant inmates’ and use of a ‘cooling off’ period.

‘Non-consenting, but compliant inmates’

The category ‘non-consenting, but compliant’ was developed to describe those inmates who want to exercise their right to refuse consent, but would still be compliant and not actively resist the compulsory taking of a hair sample authorised by a senior police officer order.

At the outset both DCS and NSW Police policies assumed that where an inmate did not consent, it was inevitable that they would be non-compliant and resist (perhaps violently) the taking of a forensic DNA sample. Following consultations with the Prisoners Legal Service, our office and Justice Action their policies were changed.

The ‘cooling off’ period

The cooling off period is an extra period of notification time provided to inmates who initially indicate that they will actively resist if the police attempt to take a forensic DNA sample. This cooling off period can be anything between a few hours and a few weeks for an inmate to seek further information before they are requested to consent again.

The length of the cooling off period is jointly determined by NSW Police and the relevant custodial/supervisory agency and varies according to factors such as the date that the inmates are to be released, any possible disruption to the correctional centre and the ability of the ITT to return to the centre at a later date.

The NSW Police SOPs state that if an inmate or detainee declines to consent to a buccal swab, and indicates to the ITT that s/he will not comply with a senior police officer order for a sample of hair (including roots), then a ‘cooling off’ period of 7-10 days will be given. In rural centres, this period may be adjusted so that the ITT does not need to make a return trip, whilst allowing the offender as much time as possible to reconsider.³²⁶

326 NSW Police SOPs.

During the cooling off period, the governor of the correctional centre or the manager of the juvenile justice centre will speak to the serious indictable offender on at least three occasions. The SOPs provide that 'reasonable force' may be used to take the sample as a last resort if the offender refuses to comply at the end of this period. Samples taken by reasonable force should be hair samples, unless the serious indictable offender has 'shaved down'.³²⁷ In this case, the procedure carried out will involve the taking of a sample of blood, authorised by a court order.

Implementation by DCS

The DCS SOPs state that if an inmate or detainee declines to consent to a buccal swab, and indicates to the ITT that s/he will not comply with a senior police officer order, the governor of the correctional centre will inform the offender 'that they are compelled to adhere to the legislation and to undergo a forensic test'.³²⁸

Further, the governor must counsel inmates who refuse to comply with the sampling on at least three occasions. A security risk assessment is carried out and the governor assesses the potential for self-harm by the inmate/detainee and the risk of escape. If it is deemed appropriate, the inmate/detainee is transferred to a more secure environment.

If the inmate does not change her/his mind by the end of the cooling off period, the DCS Security Emergency Response Team³²⁹ is made available to assist when the ITT returns to take a sample from the inmate/detainee. The involvement of the DCS Security Emergency Response Team at this stage is discussed in chapter 18.

Implementation by DJJ

Under the Act police are not permitted to ask serious indictable offenders who are under the age of 18 to consent to a forensic procedure: the forensic procedure can only be authorised by a court order. However, there are some serious indictable offenders in juvenile justice centres who are over the age of 18, and therefore may be asked to consent to the DNA sampling as an adult.

The DJJ policy states that if a detainee declines to consent to a buccal swab, and indicates to the ITT that s/he will not comply with a senior police officer order, then a cooling off period of up to seven days will be provided.

During the seven day cooling off period, the Centre Manager or delegate will speak with the detainee 'to ascertain their reasons for not complying and any fears should be addressed by further education or counselling'.³³⁰

Implementation by NSW Probation and Parole

The written notification about the DNA sampling that is provided to home detainees by the Home Detention Program contains the following information

*You are directed to attend _____ (location) _____ at _____ (time) _____ on _____ (date) _____. You should obtain legal advice before the scheduled date for your testing. Should you fail to comply with this direction, your failure to do so will be reported to the Parole Board as a breach of your home detention order under clause 200(v) of the Crimes (Administration of Sentences) Regulation 2001 and could lead to revocation of your Home Detention Order.*³³¹

327 That is, where a person has removed all of their body hair to prevent a sample of hair from being taken

328 Department of Corrective Services SOPs, 21 December 2000.

329 The Emergency Response Unit is a team of correctional officers trained to deal with serious incidents and emergencies at NSW correctional centres, such as riots and violent inmates. Emergency Response Unit officers may be located centrally, regionally or at a local correctional centre. The Emergency Response Unit is sometimes referred to as the 'Security Unit' or the 'Crisis Emergency Team'.

330 Memorandum to Centre Managers, Director Operations, Regional Directors, Senior Solicitor, 26 October 2001.

331 For full text see Appendix L.

According to the agreement between the NSW Home Detainees Program and NSW Police, the Home Detainees Team will follow up non-attendance by home detainees at the scheduled sampling. The agreement states:

Should this appear to be a culpable failure, the detainee will be considered to be in breach of their [Home Detention] Order. Where the detainee's order has substantial time remaining and the detainee is otherwise in good standing, the supervising officer may - in consultation with the [NSW Police Forensic Procedures Implementation Team] - seek to reschedule testing of the detainee. When a detainee has twice failed to attend for testing as scheduled or has failed to attend once and it otherwise appears necessary to ensure compliance, a report will be prepared for the Parole Board recommending that the detainee's order be revoked.³³²

How we monitored compulsory DNA sampling

Analysis of statistics

We asked NSW Police to provide us with regular statistics relating to the issuing of senior police officer orders, applications for court orders and whether the court orders were granted or refused. NSW Police advised us that all applications for court orders in relation to serious indictable offenders were granted.

During our review period police issued 465 senior police officer orders and obtained 30 court orders.³³³

Examination of senior police officer orders and court orders

Section 74(5) of the Act states that a court may order the carrying out of a forensic procedure under this section if satisfied that the carrying out of the forensic procedure is 'justified in all the circumstances'.

We examined all of the 30 court orders for the carrying out of forensic procedures on serious indictable offenders issued during our review period. These orders were issued on standardised forms. The pro forma court order incorporates some reasons and provides space for the magistrate or judicial officer to record the grounds upon which the court order was made. A copy of the pro forma court order is attached at Appendix M.

We found that whilst some of the court orders explicitly stated that the order was 'justified in all the circumstances', others stated that the relevant grounds for making the order were that 'consent of court is required'³³⁴ or that the procedure was 'necessary to capture the information'.

We also examined 60% (281 of 465) of the senior police officers orders for the carrying out of forensic procedures on serious indictable offenders issued during our review period. A copy of the pro forma senior police officer order is attached at Appendix N.

It is noted that the senior police officer need only be satisfied that the Act authorise the taking of the sample, and not that it is justified in all the circumstances.

Discussion Paper

One inmate informed us that he requested that police obtain a court order to obtain a forensic sample from him because a sample provided with his consent would not be required to be destroyed if his conviction was later overturned. He explained:

Under the Act the police have the sole discretion as to whether or not to apply for a court order, or simply make a 'senior police officer' order ... The refusal to obtain a court order can have ramifications in the future for the inmate concerned. If any subsequent appeal is successful the right to have the DNA sample destroyed is lost should the police decide to [take a DNA sample] without a court order.³³⁵

332 Agreement between the Home Detainees Program, Probation and Parole and the NSW Police Service, for the DNA Testing of Home Detainees.

333 Information provided by NSW Police FPIT.

334 Other details about this and other orders, such as the date, location and name of the magistrate, cannot be provided to preserve the anonymity of the serious indictable offenders.

335 Confidential, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 20 February 2002.

The NSW Public Defenders Office and the NSW Bar Association argued that only court orders should sanction the use of force in carrying out a forensic procedure. They stated, 'It is inappropriate that the use of force by police be sanctioned by police'.³³⁶

The Law Society of NSW suggested the following:

- Section 74 should be amended to require the court to give reasons for making an order for a forensic procedure.
- The Act should require that serious indictable offenders are notified when police intend to apply for a court order.
- The Act should require that the police serve a copy of the court's decision on the serious indictable offender personally before the forensic procedure.
- Applications for court orders should be supported by evidence on oath.³³⁷

Video Audit

Section 73(1) of the Act states that at the time that a senior police officer order is made, or as soon as practicable after it is made, the senior police officer must make a signed record of the order, including the date, time and reasons for making it.

Section 73(2) requires the senior police officer to make a copy of the record available to the serious indictable offender 'as soon as practicable after the record is made'. Unless there are extenuating circumstances, we believe that this is after the relevant officer has signed the senior police officer order and before the DNA sampling takes place.

There is no requirement to make available a copy of a court order obtained under s 74 of the Act.

However, the NSW Police SOPs state that:

*Copies of the signed and witnessed consent form, and where applicable the senior officer order, will be given to the inmate at the end of each procedure and the Correctional Centre at the end of each day of testing.*³³⁸

We examined the video recordings of police taking DNA samples from 265 serious indictable offenders. In 29 of the video recordings, the DNA sample had been authorised by a court, and in 32 of the recordings, the DNA sample was authorised by a senior police officer. As part of the video audit, we noted whether a copy of the record of the senior police officer or court order was served on the inmate/detainee before the forensic procedure and whether or not it was read out to the inmate/detainee.

In those cases where the DNA sampling was authorised by a senior police officer order, our auditor found it difficult to establish whether or not police gave inmates and detainees a copy of the order because the video did not record all aspects of the interaction. It is possible that the police gave it to the inmate/detainee before or after the video recording.

There were only two cases where our auditor was sure that a copy of the record of the senior police officer order was given to the inmate/detainee *before* the forensic procedure. This was because the video showed the non-consenting inmate/detainee signing the order to acknowledge receipt.³³⁹

In 20 of the 31 videoed interactions we examined where the sampling was authorised by a senior police officer order, the order was read out to the inmate/detainee before the sampling. Of the remaining 11 cases, two senior police officer orders were not given to the serious indictable offender and in nine cases the video did not show the senior police officer order being given to them.

³³⁶ NSW Public Defenders, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 12 March 2002, NSW Bar Association, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 21 March 2002.

³³⁷ Law Society of NSW, 4 April 2001.

³³⁸ NSW Police SOPs.

³³⁹ Videoed Interaction Nos 51, 198.

Of the 29 videoed interactions we examined where court orders had been obtained, 20 showed the offenders being given the orders before they were sampled. Of the remaining nine cases, four were not given to the serious indictable offender and in five cases we were unable to determine whether or not the order was given to them.

Focus groups

Some members of the ITTs told us that different magistrates prefer to hear the applications for court orders in different ways. Some magistrates wish to have the inmate/detainee present at the hearing. In this case they either go to the correctional or juvenile justice centre or ask that the inmate/detainee be taken to court. The ITT said that taking inmates and detainees to court could be resource intensive.

Analysis of complaints and inquiries received

We received nine telephone inquiries from serious indictable offenders about orders during our review period.

One caller told us that he wanted to be represented in court in order to challenge the application for an order for the DNA sampling. Three callers indicated that they refused to consent to the DNA sampling because they believed that police required a court order in order to obtain a DNA sample.

How we monitored the factors influencing consent

Compulsory nature of the procedures

Officers from all agencies involved in the DNA sampling face the challenge of providing accurate and full information about the consequences of non-consent in a manner that is not perceived to be coercive.

The following evidence provided by Chief Superintendent Middlebrook³⁴⁰ and Senior Assistant Superintendent McLoughlin³⁴¹ of DCS to the Standing Committee on Law and Justice illustrates this difficult task:

The Hon. J. F. RYAN: *How have you handled the issue of force?*

Mr McLOUGHLIN: *I have spoken to inmates who have originally said they were not going to consent to the interview. They have said they were not going to comply with the hair order. The cooling off period has been given. If I am in the area I will call in and speak to the inmate and just ask him what the problems are, has he contacted a solicitor, does he realise he is a serious indictable offender, does he realise under section 70, once the police issue an order, force can be used to obtain the sample and he should maintain his dignity and not let that occur. He can certainly not consent, but he must comply with the legislation.*

The Hon. J. F. RYAN: *There would never be circumstances in which it would ever be put to an inmate, some description like there will be a number of people in boiler suits around to pick you out of your cell and drag you across?*

Mr McLOUGHLIN: *No.*

The Hon. J. F. RYAN: *I only use this expression because it has actually been used to the Committee, that it has happened to people. It would be irresponsible of us not to put this to you.*

340 Chief Superintendent Middlebrook was the Commander of Security and Investigations (DCS) at the time of the Inquiry.

341 Senior Assistant Superintendent McLoughlin was the Officer in Charge, Forensic Testing Team (DCS) at the time of the Inquiry.

Mr McLOUGHLIN: *I have told inmates that if they fail to comply, that the security unit will come around and place them in a security belt and they will be taken down to the testing unit where the test will be conducted.*

The Hon. J. F. RYAN: *Some detail is in fact given to the inmates what form the force will take?*

Mr McLOUGHLIN: *That is right.*

The Hon. J. F. RYAN: *The security unit, is this one person or a group of people?*

Mr McLOUGHLIN: *Mr [Middlebrook] spoke about the regional security units. At least four people from that unit will come around.*

The Hon. J. F. RYAN: *They are certainly made to understand that a group of people will visit them, and it will be the security unit and from the description of people it is immediately apparent to the inmate so they know what the security unit was, and they would be taken in a belt and they would be physically restrained.*

Mr MIDDLEBROOK: *Yes.*³⁴²

It has been alleged that some serious indictable offenders are consenting to the forensic DNA sampling to avoid being subject to force and to avoid the loss of their security classification and privileges (such as the number of phone calls, visits and consumables they have access to).³⁴³

Our research found that there is some evidence to support this view and this is discussed below.

Under the Crimes (Administration of Sentences) Regulation 2001 DCS can legally transfer an inmate to a higher security centre or increase the inmate's security status if it has information that suggests that the inmate may be a security risk. DCS can base its decision on a reasonable suspicion, and does not need to have definite proof that the inmate is a security risk.

Many responses to our discussion paper expressed concern that the consent of inmates is being heavily influenced by the possibility that if they do not intend to consent, they may be considered a security risk and could be subject to reclassification, transfer to a higher security centre and/or loss of privileges.

For example:

*The Prisoners Legal Service has been advising inmates to require a police order before complying with the request to provide a DNA sample. Some inmates have told the Prisoners Legal Service that they have been told by Department of Corrective Services staff that if they follow this advice and require a police order, their failure to consent to the procedure will be regarded by the Department of Corrective Services as an indication that they are a security risk, and they will be transferred to another gaol and their classification increased.*³⁴⁴

The responses from several inmates indicated that they and others perceived the environment in which consent was obtained to be intimidating.

³⁴² Department of Corrective Services, Evidence provided to Standing Committee on Law and Justice, Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 24 September 2001.

³⁴³ See, for example, Use of DNA in the Criminal Justice System: Papers from a public seminar presented by the Institute of Criminology, University of Sydney, Wednesday 11 April 2001.

³⁴⁴ Legal Aid Commission of NSW, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 1 March 2002.

Response from serious indictable offender³⁴⁵

When the police began taking DNA samples in early 2001, it was routine for DCS staff to threaten inmates who refused to consent to the taking of a DNA sample with a change in classification and/or transfer minimum security inmates to maximum security jails, or transfer minimum security inmates to less "comfortable" minimum security institutions. In many cases DCS staff followed through on their threats.

...

DCS staff can make life difficult for inmates through various means of intimidation. Having custodial staff in charge of DNA sampling is a mistake. DCS staff involved in the DNA sampling should be staff not known to the inmate and who have no influence over the inmate's day-to-day activities.

Response from serious indictable offender³⁴⁶

Most people put in the situation of confronting a panel of people whom are intent on causing you harm [referring to the section of the documentation that states that 'anything you say or do may be used against you in a court of law'] will consent to almost anything that panel requests in order to avoid any adverse consequences. A person whom merely nods his head in agreement just to avoid intimidation or out of fear of what may happen if they don't is not freely giving consent.

Response from serious indictable offender³⁴⁷

Whilst waiting to be called into this forensic procedure, I was warned by a department of corrective services officer, that the police were removing hair fibres from inmates on the spot for not consenting. In my own opinion this is to the contrary of information provided in the forensic procedure handout for staff and inmates for non-compliant testing of having 10 days after compliant testing. Knowing beforehand if I did not consent to this mandatory DNA forensic procedure that the police officers would forcibly remove my hair fibres on the spot anyway. Being in a no win situation with the gathering of 3 male corrective service officers in the visiting area and having 4 police officers in the management section. Under the circumstances, I willingly consented to this mandatory DNA forensic procedure to avoid any conflict between the officers and myself. As well as avoiding any future retribution by the department of corrective services officers.

DCS submitted that the recommendation by the Standing Committee to abolish the consent provisions for serious indictable offenders would address this issue. DCS further submitted that it was aware that some individuals and organisations have made broad allegations in relation to this issue, but that it was not aware of an individual case in which such a claim has been substantiated.³⁴⁸

As part of our interviews with inmates, we asked interviewees if they had consented to the forensic procedure and, if so, what their reasons were for doing so. 98% (181 out of 184) of interviewees told us that they had consented. Their reasons have been categorised in the table over the page.

³⁴⁵ Confidential. Response No 1.

³⁴⁶ Confidential. Response No 23.

³⁴⁷ Confidential. Response No 43.

³⁴⁸ NSW Department of Corrective Services, response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 25 March 2002.

Table 12.1: Interviewee's reasons for consenting to the DNA sampling

Number of interviewees	Category of reasons
62	Compulsory nature of the procedure <i>No choice. There is a choice but there isn't.</i> <i>There's a catch.</i> ³⁴⁹ <i>We've got no choice in this matter.</i> ³⁵⁰
32	So as not to be 'difficult' <i>Not to cause any obstacles in anyone's work, if they have to do that why would I need to cause them any trouble?</i> ³⁵¹ <i>I didn't want dramas with the police.</i> ³⁵²
32	The procedure will not affect them <i>I've got nothing to hide.</i> ³⁵³
30	To avoid being subject to force <i>Because I heard if you don't give it they'll hold you down and pull your hair out.</i> ³⁵⁴
6	Support for the DNA sampling <i>Because I think it's a good idea and everybody should give a sample including babies.</i> ³⁵⁵
4	Reasons relating to innocence <i>Because it's not hurting me and the best thing for me is that they'll know I'm not a rapist, a child molester or a murderer.</i> ³⁵⁶
1	The police already have a sample of her/his DNA
1	To avoid losing privileges, being reclassified or transferred
13	Miscellaneous: response incomprehensible or no reason provided <i>I don't know.</i> ³⁵⁷

Source: NSW Ombudsman's interviews with inmates

The responses provided by approximately half (93 out of 184) of interviewees indicated that they consented because they did not perceive that they had any meaningful alternative or that they consented to avoid the use of force. Similarly, 32 interviewees (17%) told us that they consented to avoid 'hassles' or 'dramas', or because they did not want to 'make anyone's life difficult'.

Only one interviewee specifically stated that s/he consented to avoid the loss of privileges, the possibility of being reclassified or transferred to a higher security centre.

The types of reasons provided by Aboriginal and Torres Strait Islander interviewees did not differ significantly from those of all other interviewees, except that Aboriginal and Torres Strait Islander interviewees were more likely to give reasons indicating that they did not have any alternative or that they consented to avoid the use of force against them (68% - 19 out of 28).

349 Interviewee No 100

350 Interviewee No 42

351 Interviewee No 125

352 Interviewee No 115

353 Interviewee No 105.

354 Interviewee No 154.

355 Interviewee No 39.

356 Interviewee No 162

357 Interviewee Nos 241, 107, 7.

During our video audit, we noted the questions and comments made by inmates and detainees during their interaction with the ITT. Several serious indictable offenders expressed concern that they might be punished or reclassified if they did not consent to the procedure.

Videod Interaction No 36

Inmate/detainee: *Will I be segregated or punished if I ask for cooling off, and do not consent?*

NSW Police suspended the procedure in order for the inmate/detainee to speak to DCS officers regarding her/his consent and a cooling off period. The camera was still on, but discussions happened out of the camera view and hearing. The inmate/detainee then came back to the ITA.

Inmate/detainee: *I am foolish, but not a fool.... The fact of the matter is that if I exercise my right, things are going to be looked at differently by DCS.*

The ITT Officer explained the law regarding consent, reasonable force etc.

Inmate/detainee: *You have not put in the equation that I am in jail and I am at the mercy of people who administer the jail.*

The ITT Officer responded that the law also applies to DCS officers.

Videod Interaction No 144

The inmate/detainee referred to the section of the information sheet that relates to the limitations on the admissibility of her/his refusal to consent.³⁵⁸

Inmate/detainee: *It is not true that I can refuse ... and that it won't be used against me, because they will put me in maximum security.*

The ITT officers responded that the section refers to a court of law, and they have no influence over the way in which DCS manages the centre.

We consulted with correctional officers and welfare staff employed by DCS. We asked CCLOs how they achieved an appropriate balance between explaining to the inmates and detainees the consequences of not consenting without it being perceived to be a threat.

Several CCLOs stated that they simply remind the inmate/detainee that it is the serious indictable offender's choice whether to consent or comply with the DNA sampling. CCLOs explained that they tried to provide as much information as possible in order that the inmate/detainee could make an informed decision about whether or not to consent or comply.

One CCLO provided the following example:

You just take yourself out of the equation and say: 'Look mate, I didn't do this. I didn't make the legislation. If you want to contest it, you take it up with the legal people'.³⁵⁹

Another CCLO stated:

We had one [...] who was due for release nine days after he was to be tested. The Governor went through the procedure of talking to him on three occasions [during the cooling off period] and it was explained to him that he could object and that was fine and he could take whatever action that he felt that he needed to take ... But what would probably happen was that instead of him being released at the end of the nine days he would then go from being a sentenced inmate to a remand inmate on 'assault police' charges and then he would go into a maximum security area. And instead of getting out he could take whatever action he wanted to take against the police, but ultimately the police would win, because he'd still be in jail.³⁶⁰

³⁵⁸ See section 84 of the Act.

³⁵⁹ Focus Group No 2.

³⁶⁰ Focus Group No 2.

Some CCLOs suggested that the consent provisions should be removed from Part 7 of the Act. Others disagreed, and expressed concern that if inmates were no longer asked to consent this could impact upon the current high level of inmate cooperation with the DNA sampling:

*It has to stay. It is a choice for them. If you make it compulsory ... inmates have always got to save face with the other inmates. If there's that option to comply but not consent, they can save face with the other inmates but still comply.*³⁶¹

*If you remove the consent, I totally disagree with it because it is a lot easier to say to somebody, you need to do this, I would prefer your consent with regards to doing it, you've got the opportunity to consent to this as opposed to you will supply a DNA sample. ... If somebody says to me, 'Would you walk through that door?' 'Yes, not a problem!' [compared to] 'You **will** walk through that door'... If Australians in general are told they have to do something, they won't do it – whether it's to their benefit or not.*³⁶²

*If you remove consent ... you're throwing a red rag at them. Inmates will rebel.*³⁶³

Welfare officers from a particular region were concerned that an inmate had been reclassified and transferred solely as a result of exercising his right to deny consent to the forensic procedure. The CCLOs responded that this transfer was as a result of intelligence that indicated that the inmate was an escape risk.³⁶⁴

During our focus group with members of the ITTs, officers raised issues relating to the use of force and the cooling off period. One member of the ITT stated:

*If you say to them that you'll be given a 10 day cooling off period at which time the [DCS] Emergency Unit will come in, blah blah blah ... it's been considered a threat and a few of them have said exactly that: 'Do not threaten me'.*³⁶⁵

During our review period, 10,403 serious indictable offenders were sampled. Of the 10,380 adult serious indictable offenders (in adult, periodic and juvenile centres), who were considered to be capable of consenting:

- 9,908 gave consent and provided a buccal swab
- 467 did not consent, but complied and provided a hair sample
- 4 did not consent and refused to comply and a hair sample was taken by force
- 1 did not consent and refused to comply and a blood sample was taken by force.³⁶⁶

361 Focus Group No 2.

362 Focus Group No 2.

363 Focus Group No 2.

364 Focus Group No 4.

365 Focus Group No 1.

366 Based on information provided by NSW Police FPIT.

Table 12.2: Types of DNA samples taken from serious indictable offenders 1 January 2001 - 5 July 2002

Category of inmate/ detainee	Buccal	Hair	Hair (by force)	Blood	Blood (by force)	Total
Adult capable(in correctional centre)	9,467	457	4	6	1	9,935
Adult capable(in periodic detention)	398	4	-	-	-	402
Adult 'incapable'	15	2	-	-	-	17
Under 18 years (in juvenile justice centres)	6	-	-	-	-	6
Over 18 years (in juvenile justice centres)	43	-	-	-	-	43
Total	9,929	463	4	6	1	10,403

Based on statistics provided by FPIT, NSW Police

Strategies to reduce the use of force – cooling off periods and the category of 'non-consenting, but compliant'

Some ITT members expressed frustration with the 'cooling off' period. They alleged that some inmates/detainees were using the cooling off period as a tactic to delay the sampling. Other ITT members argued that the cooling off period was extremely useful and suggested that the cooling off policy had resulted in the very low number of DNA samples being taken by force.³⁶⁷

Many CCLOs told us that they viewed the cooling off period to be a useful tool in avoiding conflict.³⁶⁸

It stops the public perception that all we do is bash and crash. I mean, in the true reality of it, the police pulling them down to take a hair or whatever [sample] is the final stage – the stage that no one wants to visit because of what's involved. People can get hurt etc. That is where the cooling off period gives you that room to move, and the appropriate people can speak to the inmate and reassure them. At the end of the day, if they still don't comply, then everyone's tried their best.³⁶⁹

According to the statistics provided to us by NSW Police, between 3 March 2001 and 5 July 2002,³⁷⁰ 71 serious indictable offenders were given cooling off periods. The length of the cooling off periods ranged from – six to ten days, with the average length being about eight days. At the end of the cooling off period:

- 29 serious indictable offenders gave consent and provided a buccal swab
- 20 serious indictable offenders complied and provided a hair sample
- 13 serious indictable offenders were released prior to the return of the ITT to conduct the sampling
- 4 serious indictable offenders complied and provided a blood sample
- 2 serious indictable offenders refused to comply and a hair sample was taken by force
- 1 serious indictable offender refused to comply and a blood sample was taken by force
- 1 serious indictable offender was tested as a suspect
- 1 serious indictable offender died prior to being sampled.

³⁶⁷ Focus Group No 1.

³⁶⁸ Focus Group Nos 2, 3 and 4.

³⁶⁹ Focus Group No 2.

³⁷⁰ Generally, data in this report covers the period from 8 January 2001 to 5 July 2002. However, NSW Police did not begin recording data relating to cooling off periods until 3 March 2001.

We examined the NSW Police COPS system³⁷¹ to find out whether the 13 serious indictable offenders who had been released from imprisonment had been sampled subsequent to their release. We found that:

- seven serious indictable offenders had been charged with offences since their release. Of these:
 - two had been sampled as a suspect since their release
 - five had not been sampled since their release.
- four serious indictable offenders had not been charged with offences since their release. Of these:
 - one had been sampled since his release
 - three had not been sampled since their release.
- two serious indictable offenders could not be found on the COPS system.

During our review period approximately 4.5% (465 out of 10,380) of adult capable offenders were non-consenting, but compliant. That is, they exercised their right not to give their consent to the forensic procedure, but did not actively resist the taking of a sample authorised by a senior police officer order or court.

We asked CCLOs if they had found the category of ‘non-consenting, but compliant’ useful. The overwhelming response from the CCLOs was that this concept was extremely useful in preventing the DNA sampling escalating to a situation where force is used. The following comments were made at the CCLO focus groups:

*Very, very useful. It gives them an ‘out’.*³⁷²

*It puts a little power back in the inmate’s court. A bit of control over what’s happening to them.*³⁷³

*For some prisoners, it’s like a personal protest.*³⁷⁴

We contacted police in all other Australian jurisdictions and asked them how they dealt with inmates and detainees who did not consent to the procedures.

The Tasmanian representative told us that in Tasmania consent is not required of prisoners. Forensic procedures carried out on ‘prescribed offenders’ in Tasmania can be authorised by a senior police officer order. However, police allowed people to refuse three times before force was used. The result was that force was not used at all during the sampling of the 317 prisoners in Tasmania.³⁷⁵ He explained:

*Our understanding of prison culture is that people simply sometimes want to register their objection to the testing and they eventually cooperate ... If a person refused they were sent away, provided with more information about the procedures, given more opportunities to speak to people and get legal advice and so on. In the end they all conceded – even the maximum security prisoners.*³⁷⁶

Police in Western Australia (where serious offenders are also asked to consent before a police order is issued) provide prisoners with up to three cooling off periods prior to using reasonable force to carry out the forensic procedure. At the time of the interview, Western Australian police had obtained 1,719 DNA samples from prisoners, and had used force on one occasion.³⁷⁷

371 Computerised Operational Policing System database.

372 Focus Group No 2.

373 Focus Group No 4.

374 Focus Group No 3.

375 These offenders were sampled between 12 March 2001 and 4 July 2001. Thirteen of these were under the age of 18 at the time of sampling.

376 Interview with Project Director, CrimTrac Project Team, Tasmania Police, 11 September 2002.

377 Interview with Daniel Mulligan, Forensic Division, DNA Implementation, Western Australia Police, 26 August 2002.

At the time of the interview the Queensland Police Service had carried out 4,699 forensic procedures on prisoners, using force on one occasion. In Queensland a person must be given a reasonable opportunity to give informed consent to the forensic procedure. A cooling off period is provided to prisoners in Queensland:

*The prisoner is provided with a copy of the relevant legislation (section 311 of the Police Powers and Responsibilities Act). The prisoner is then given an opportunity to contact a solicitor for further advice. After this advice is obtained the prisoner is then informed of the previous requirement to provide a DNA sample. If the prisoner refuses they are warned that reasonable force will be used to take the sample. If the prisoner still refuses they are physically restrained and a hair sample is taken from them.*³⁷⁸

In the four years prior to our interview with the Victorian Police representative, Victorian police had conducted 3,775 forensic procedures on adult prisoners. Force had been used on 14 occasions.³⁷⁹

Type of sample taken

The policy developed by NSW Police adopts the following approach:

- A buccal swab can only be taken if a serious indictable offender consents to the DNA sampling.
- A senior police officer order can only be used to take a DNA sample of hair.
- Only a court can authorise the taking of a sample of blood.³⁸⁰

Some ITT members suggested that the legislation could be more flexible in relation to the range of samples that could be taken with the different types of authorisation. They suggested that this would provide more options to inmates who did not want to sign the consent form, but would prefer a buccal swab to the (potentially) more painful hair sample.³⁸¹

The responses by CCLOs at our focus groups reiterated this suggestion. CCLOs gave the example of Muslim inmates who were happy to consent, but who did not want to provide a mouth swab during Ramadan.³⁸²

During our interviews with inmates, 12 interviewees identified the prospect of having a hair sample taken as their reason for consenting to a buccal swab.

To preserve legal rights

Before the Amendment Act commenced on 1 June 2003, only serious indictable offenders whose DNA sample was authorised by a court order had the following legal entitlements.

First, s 87 required that if a serious indictable offender's DNA sample was authorised by a court order, and her/his conviction was quashed, then the police must ensure that the forensic material is destroyed.

Second, s 74(7) prevented forensic samples taken with the authority of a court order from being analysed:

- (a) until the expiration of any appeal period or after the final determination of any appeal in relation to the serious indictable offence committed by the serious indictable offender concerned, whichever is the later, or
- (b) if the conviction is quashed.

³⁷⁸ Advice provided by Assistant Commissioner Nolan, Operations Support Command, Queensland Police Service, received 11 September 2002.

³⁷⁹ Interview with Doug Cowlishaw, DNA Forensic Services, Victorian Police, 26 August 2002.

³⁸⁰ NSW Police SOPs.

³⁸¹ Focus Group No 1.

³⁸² Prior to a forensic procedure being carried out by a buccal swab, a person must rinse out their mouth with water to prevent the DNA sample being contaminated. Some people who practice fasting during the month of Ramadan believe that nothing (including water) should pass through the mouth between dawn and sunset.

The Amendment Act extended the first of these protections to serious indictable offenders whose DNA sample was authorised by a senior police officer order. Section 87 now provides:

- 1) *If an order is obtained under section 70 or 74 for the carrying out of a forensic procedure on a serious indictable offender and the offender's conviction is quashed after the making of the order, the police officer who obtained the order (or some other police officer) must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.*
- 2) *If a forensic procedure was carried out on a serious indictable offender under Part 7 and the offender's conviction is quashed after the making of the order, the police officer in charge of the investigation of the offence must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.*

Our research found evidence that some serious indictable offenders preferred to have the procedure authorised by a court order, rather than by consent or a senior police officer order. Sometimes serious indictable offenders would go to some lengths to preserve their rights in this respect. For example, in one videoed interaction we examined during our video audit, we noted that the serious indictable offender had shaved off all of his body hair, so police had obtained a court order authorising a blood sample.

The inmate/detainee explained why he had done this, saying:

Justice Action has released a leaflet and told [serious indictable offenders] that they should not consent and they should get a court order.³⁸³

In a submission to our discussion paper, one inmate explained that he would have preferred to have had his DNA sample authorised by a court order to ensure its destruction if his conviction was overturned. He told us:

I was 'non-consensual, but compliant' because I wanted to preserve my right to have the DNA sample 'destroyed' in the future should my conviction be quashed. Given the relatively small number of inmates in this category the police should obtain a court order for those requesting it.³⁸⁴

Videod Interaction No 235

Inmate/detainee: *My understanding is that if I get a court order my sample will be destroyed.*

ITT: *We destroy all the samples after they are tested and the DNA is recorded in the database.*

Inmate/detainee: *I would rather get a court order.*

ITT: *We don't have to take a court order. We can take a sample.*

Inmate/detainee: *Are you saying you are going to take it from me by force, rather than giving yourself and me the opportunity to get more information?*

After some discussion, the procedure was suspended to provide the inmate with an opportunity to obtain legal advice. When the procedure resumed that afternoon, the inmate stated that he had simply been taken to his cell and that he had not, in fact, been given an opportunity to obtain legal advice.³⁸⁵ The inmate also said that when the DCS officers told him that if he did not provide a sample, he would not be allowed to mix with the rest of the prison community. The inmate asked the ITT if that was true. The ITT responded that it might be prison policy. The inmate ultimately consented.

Inmate/detainee: *I consent, but I don't agree with it. I will give you a buccal swab.*

³⁸³ Videod Interaction No 201.

³⁸⁴ Confidential, Response no 1.

³⁸⁵ This part of the interaction was discussed earlier in Chapter 8.

Videoed Interaction No 166

Inmate/detainee: *Can I get a court order? I spoke to my solicitor and he said it is better if I get a court order.*

ITT officer: *You can elect to do a buccal swab, but if you do not consent we get an order for a hair sample. We don't need a court order unless we take blood, but we don't do blood. I can give you a senior police officer order to take hair.*

During our focus groups ITT members stated that there were a number of serious indictable offenders who would have preferred to do the buccal swab, but had been advised by their legal representative not to sign anything.³⁸⁶

The NSW Police FPIT has informed us that NSW Police is destroying forensic material taken from *all* inmates/detainees under Part 7 of the Act where their conviction has been quashed, regardless of whether the DNA sample was authorised by consent, a senior police officer order or a court order. From our video audit it does not appear that all serious indictable offenders have been informed of this policy. However, NSW Police have confirmed that it is standard practice for ITT members to advise all inmates of this policy.³⁸⁷ In addition, the Forensic Procedure Consent Form includes the following question: 'Are you the subject of an appeal proceedings against your current conviction?'. The samples of all inmates that answer 'yes' to this question are marked as 'Appellant' and will not be placed on the searchable database until all appeal proceedings have been finalised. The only variation is if the Appellant is only seeking to appeal severity of sentence and not conviction. ITT members advise all inmates with 'Appellant' samples of this policy.³⁸⁸

NSW Police also advised that in one case an inmate asked for written advice regarding this policy and ITT members suspended the sampling process to seek advice from FPIT. The Manager of FPIT provided faxed written advice to the inmate confirming that the inmate's sample, any DNA profile derived from the sample and any identifying data linking the inmate to the sample would be destroyed if the appeal against conviction was upheld.

Miscellaneous

In addition to the above factors that may affect a serious indictable offender's decision to consent, a range of personal reasons may also play a role.

By way of example, several CCLOs suggested that some serious indictable offenders refuse to consent or comply with the procedure because they had an aversion to police in general:

*Most inmates, when you talk to them, if they have got a problem with the procedure, it's never with Corrective Services. They've just got a beef with the police themselves. The one refusal we had ... he just hated police. He was a staunch bank robber. He just had a general hate of coppers.*³⁸⁹

*[To inmates] there's a clear differentiation between the police and us. They understand that we take control of them whilst they're in here. We don't put them in here.*³⁹⁰

386 Focus Group No 1.

387 Correspondence from NSW Police, 19 April 2004

388 Correspondence from NSW Police, 19 April 2004

389 Focus Group No 2.

390 Focus Group No 2.

During our video audit, we noted that several serious indictable offenders were concerned that they could be ‘framed’ or ‘set up’ for offences that they have not committed:

*I only don't want to do it because it is violation of human rights, also, what is to prevent someone taking a sample of hair and placing it at a crime scene to frame you? There are people here in jail that might do it.*³⁹¹

During our interviews with inmates, 17% of interviewees seemed to be of the view that the DNA sampling would have no effect upon them personally. In contrast, four interviewees said that they consented for reasons relating to their innocence. For example, one interviewee who maintained her/his innocence told us that s/he consented, ‘So I can get out of here’.

Six interviewees said that they consented because they support the forensic DNA sampling and the establishment of a DNA database.

Discussion

Our review found that there are a number of factors influencing serious indictable offenders’ decision whether or not to consent to a forensic procedure. We discuss these reasons below and then propose a new scheme for authorising forensic procedures on adult serious indictable offenders who are capable of consenting.

Compulsory nature of the procedures

ITT members are obliged to inform the inmate of the consequences of non-consent. CCLOs also provide this information to inmates during the Pre-Test Interview. This information is provided to inmates in the context of a correctional environment and is reflected in the policies of custodial agencies, which provide for possible disciplinary action in the event that an inmate/detainee does not cooperate.³⁹² It is therefore reasonable to expect that some serious indictable offenders feel pressured to consent, even if the pressure is unintentional on the part of the custodial agency or police officers.

Over half of the serious indictable offenders we interviewed told us that the reason they consented to the DNA sampling related to the compulsory nature of the procedures. Force was used to obtain a DNA sample in a relatively small number of instances during our review period³⁹³ (less than 0.5%). It is possible that this was a persuasive deterrent to other serious indictable offenders. Later in this report we examine in more detail the way in which force has been used to obtain DNA samples.³⁹⁴

We agree with the assessment of the Standing Committee that:

*It appears to the Committee that offenders feel pressured to consent, whether or not pressure is in fact placed upon them. The Committee is concerned about the potential for courts to overturn consent given by prisoners in circumstances that could be interpreted to be coercive. The Committee is of the opinion that the process of requesting consent from offenders is a mere procedural formality, since a test will be performed without consent in all cases where a request for consent is refused. In practice the consent procedures offer no real protection, and may therefore be omitted. The problems connected with obtaining consent from prisoners make the removal of consent even more desirable.*³⁹⁵

Strategies to reduce the use of force

NSW Police and the relevant custodial/supervisory agencies have implemented procedures to reduce the incidence of force used when a serious indictable offender indicates that s/he will not comply with the DNA sampling.

³⁹¹ Videod Interaction No 182.

³⁹² See, for example, Appendix L.

³⁹³ NSW Police identified five instances where force was used to obtain a DNA sample from serious indictable offenders during our review period. Our video audit found seven instances. This is discussed in Chapter 18.

³⁹⁴ See Chapter 18.

³⁹⁵ Standing Committee on Law and Justice. Op. Cit.

The first of these measures is the ‘non-consenting, but compliant’ category. During our review period 4.5% of serious indictable offenders took advantage of this by exercising their right to refuse consent to the sampling, but ultimately did not actively resist the procedure.

The second initiative is the cooling off period. During the cooling off period serious indictable offenders are provided with opportunities to obtain further information about the DNA sampling. The cooling off period effectively reduced the number of samples that were taken by force from 56 to three. Of the 56 serious indictable offenders who were asked to provide a DNA sample under Part 7 of the Act at the end of their cooling off period:

- 52% consented
- 43% complied
- 5% refused to comply and force was used to obtain a sample.

The majority (95%) of serious indictable offenders who were provided with a cooling off period ultimately consented or complied with the DNA sampling when asked a second time. In addition, the majority of those serious indictable offenders who were released prior to being sampled nevertheless came to the attention of police in other circumstances and police had a further opportunity to sample them under the Act.

Type of sample taken by NSW Police

We found evidence to suggest that some serious indictable offenders consent because they wish to avoid having a hair sample taken, which they perceive to be more painful.

Desire to preserve legal rights

There is also evidence to suggest that some serious indictable offenders are concerned that unless their DNA sample is authorised by a court order, they will lose certain rights in relation to the analysis and destruction of the forensic material obtained from that sample.³⁹⁶ As stated above, the Amendment Act extended the protections offered in s 87 from inmates who had samples taken as a result of a court order to also include those inmates who had their sample taken as a result of a senior police officer order. The Amendment Act still fails to provide the same legal protections to the inmates who provide a sample by consent. While NSW Police procedure is to destroy samples from any inmate who has their conviction overturned, the Act does not specifically provide for this and it is recommended that the Act be amended to require the destruction of these samples.

Recommendation 20

It is recommended that the Act be amended to extend the legal protection offered under s 87 to cover all serious indictable offenders whether their sample was obtained by consent, or as a result of a senior police officer order or a court order.

Proposal for new scheme to authorise forensic procedures carried out on serious indictable offenders (other than children or incapable adults) under Part 7 of the Act

Having taken into account all of these issues, we believe that the Standing Committee’s recommendation that consideration be given to abolishing the consent provisions for serious indictable offenders is a persuasive one. With the exception of a very small number of serious indictable offenders who are enthusiastic about the DNA sampling, the only incentive to serious indictable offenders to consent to the forensic procedure is to avoid being subject to (real or perceived) negative consequences. These might include the use of force, an increase in their security classification or a more painful procedure. In addition, serious indictable offenders who do consent ‘lose’ their legal right to have their DNA sample destroyed if their conviction is subsequently quashed.

³⁹⁶ Examples of serious indictable offenders’ concerns are discussed in Chapter 18.

In this respect, the consent provisions do appear to be artificial. We propose that the Act be amended to remove the consent provisions for forensic procedures carried out under Part 7 of the Act.

In making this recommendation, we do not consider any additional considerations beyond those already set out in Part 7 be required to make an order. This is subject, of course, to the Attorney General's consideration of our recommendation regarding Parliament's intent regarding mass testing. We also note the advice provided by the Attorney General's Department that the Interdepartmental Working Group will be considering this issue in Professor Findlay's Independent Review.³⁹⁷

We also remain of the view that a court order should still be required for blood samples, in view of the highly invasive nature of this procedure. We recommend that the court only have regard to whether the forensic procedure is authorised, and whether a hair sample or buccal swab cannot be reasonably taken, in making a decision as to whether to make an order. We also remain of the view that court orders are necessary for children and incapable adults, and we consider this further in the following chapter.

Recommendation 21

It is recommended that the Act be amended to remove the consent provisions for serious indictable offenders. It is also recommended that the Act be amended to provide that forensic procedures (excluding blood samples) carried out under Part 7 of the Act on serious indictable offenders who are not children or incapable persons may be authorised either by a senior police officer or a court order.

We do, however, acknowledge the concerns raised by correctional staff about the dangers of removing the consent provisions from the legislation, and we make additional recommendations that seek to address these concerns.

The removal of the consent provisions does not negate the need to provide clear and accurate information to all serious indictable offenders about the DNA sampling, and the Act's requirements relating to information should be retained.

Earlier in this report we made a number of recommendations relating to the type of information that should be provided to serious indictable offenders, and the time and manner in which it should be provided. If the consent provisions in Part 7 of the Act are removed, the implementation of these recommendations becomes all the more important.

Using buccal swabs

Whether or not Parliament decides to remove the consent requirements, we believe that there is a persuasive argument for permitting a self-administered buccal swab to be authorised by a senior police officer order. We note the recommendation of the Standing Committee that the Act be amended to distinguish between self-administered buccal swabs and buccal swabs administered by another person, and that 'self-administered buccal swabs be classified as a non-intimate sample'.³⁹⁸

We also note that NSW Police has stated that the only buccal swabs taken in NSW are self-administered buccal swabs. This issue is discussed in more detail in Chapter 17, but it is appropriate to make our recommendation at this point, as there is evidence to suggest that this provision affects the decision of some serious indictable offenders to consent.

Recommendation 22

It is recommended that the Act be amended to allow a person to provide a DNA sample by means of a self-administered buccal swab, if it is authorised by a senior police officer order.

³⁹⁷ Correspondence from Director General, Attorney General's Department, 1 March 2004

³⁹⁸ Recommendation 11. Standing Committee on Law and Justice. Op. Cit.

NSW Police supports Recommendations 21 and 22, and believes the Act should be amended to allow Senior police officers to order samples to be taken by self administered buccal swabs. However, it prefers the removal of consent procedures altogether (including for children and incapable persons) as stated in Recommendation 21 and believes that the provision of a DNA sample should become a mandatory part of the DCS admission process. The possible transfer of responsibility for testing of serious indictable offenders from NSW Police to DCS is discussed further in Chapter 23.

Cooling off periods

We also conclude that continuing to provide serious indictable offenders with a cooling off period to obtain further information and legal advice about the forensic DNA sampling when inmates and detainees indicate that they will not comply with the forensic DNA sampling, will go some way towards preventing the escalation of conflict predicted by some CCLOs if the consent provisions are removed from the Act.

We recommend that the valuable initiatives introduced by NSW Police, DCS, DJJ and the Home Detainees Program to reduce conflict during DNA sampling should be added to, and strengthened, in the Act. These include the cooling off period and the 'non-consenting, but compliant' status, which are discussed later in Chapter 18. However, it is appropriate to make the recommendation here in the context of the removal of the consent provisions.

Recommendation 23

It is recommended that the Act be amended to include a requirement for police to provide at least one cooling off period, prior to force being used, to give serious indictable offenders an opportunity to reconsider their decision not to comply with the DNA sampling, and to obtain further information and legal advice.

Serving orders

The Act does not require police to serve an order on a serious indictable offender before the forensic procedure is carried out. Instead, s 73(2) requires that police must ensure that a copy of a senior police officer order is made available to the serious indictable offender 'as soon as practicable' after the record is made. There is no such requirement in relation to court orders.

A forensic procedure ordered by a senior police officer or a court can be carried out with reasonable force (if necessary). There are penalties for an offender who does not comply with a court order.³⁹⁹ Without proper authorisation a forensic procedure can technically be an assault and may be lawfully resisted.⁴⁰⁰ It is only fair and appropriate that serious indictable offenders should be provided with the opportunity to examine the authorisation for the forensic procedure and have it explained to them prior to being subject to a forensic procedure.

We acknowledge that in some circumstances it may be difficult for police to give the inmate/detainee a copy of the order before the procedure and explain its effect to the inmate/detainee. An example of this is where the person is actively resisting the forensic procedure and force is being used. However, in the overwhelming majority of cases this simple act of procedural fairness can be easily observed. We brought this issue to the attention of NSW Police who undertook to tell all police officers that orders should be given to serious indictable offenders before the forensic procedure wherever this is possible.⁴⁰¹

We will be monitoring this issue in relation to suspects during the next phase of our review.

399 Maximum penalty is 50 penalty units or 12 months imprisonment, or both: Section 75(2).

400 See, for example, *Lednar & Ors v Magistrates' Court & Anor* [2000] VSC 549 (22 December 2000), Gillard J at 282.

401 Information provided by NSW Police FPIT.

Recommendation 24

It is recommended that the Act be amended to require that wherever possible, police provide a copy of the record of a senior police officer order or court order to the serious indictable offender before the forensic procedure is carried out.

Destroying samples

There is evidence indicating that many inmates/detainees preferred to have their DNA sample authorised by a court order. Some inmates and detainees told us that this was because they wanted to gain the opportunity to have their sample destroyed should their appeal be successful or their conviction be overturned.

Section 74(7) of the Act currently places limitations on the analysis of forensic material taken from serious indictable offenders with the authority of a court order. These limitations generally⁴⁰² prevent forensic material obtained by the authority of a court order from being analysed until such time as the appeal period expires or the appeal is determined, and prohibits the material from being tested if the conviction is quashed. No such limitations exist in relation to samples authorised by consent or a senior police officer order.

We anticipate that the changes to the Act by s 87(2) relating to the destruction of forensic samples (taken with the authorisation of a senior police officer order) will allay some serious indictable offenders' fears about the fate of their DNA sample should their conviction be quashed, particularly because these provisions will apply retrospectively to samples already taken.

However, we can see no reason why the Act should distinguish between samples authorised by consent, a senior police officer order and a court order in terms of destruction in light of a serious indictable offender's conviction being quashed, and the prohibition on the analysis of an appellant's DNA sample. For this reason, and to formalise current NSW Police policy, we recommend that the requirements of s 74(7) and s 87 be extended to all DNA samples taken under Part 7 of the legislation.

Recommendation 25

It is recommended that s 74(7) and s 87 of the Act be amended to apply to all forensic material obtained from serious indictable offenders under Part 7 of the Act.

⁴⁰² The exception occurs where the sample is likely to perish if analysis is delayed.

Chapter 13: Taking DNA samples from serious indictable offenders who are children or 'incapable' of consenting

The Act contains special provisions for people who may have difficulties in understanding information about forensic procedures: children and 'incapable' people.

What the Act says

A child is defined by s 3 of the Act as 'a person who is at least 10 years of age but under 18 years of age'.

Section 3 of the Act defines an 'incapable person' as an adult who:

- a) is incapable of understanding the general nature and effect of a forensic procedure, or*
- b) is incapable of indicating whether or not he or she consents or does not consent to a forensic procedure being carried out.*

If a serious indictable offender is a child/young person or is 'incapable' as defined by the Act, the Act does not permit them to consent to the DNA sampling. Instead, a police officer must apply to a court for an order authorising the forensic procedure.

Section 68 Police officer may request offender to consent to forensic procedure

A police officer may request a serious indictable offender (other than a child or an incapable person) to consent to a forensic procedure to which this Part applies being carried out on the offender.

Section 74(2) provides for a police officer to apply for a court order authorising a forensic procedure upon a serious indictable offender who is a child or an incapable person.

Section 74 Court order for carrying out forensic procedure on serious indictable offender

- (1) A police officer may apply to any court for an order directing a serious indictable offender serving a sentence of imprisonment in a correctional centre or other place of detention to permit an intimate forensic procedure to which this Part applies to be carried out on the offender.*
- (2) A police officer may apply to any court for an order for the carrying out of a non-intimate procedure to which this Part applies on a child or an incapable person who is a serious indictable offender.*
- (3) A police officer may apply to any court for an order for the taking of a sample by buccal swab or the carrying out of any other forensic procedure on a serious indictable offender.*
- (4) A police officer may make such an application to the court that is sentencing a serious indictable offender or to any court at a later time.*
- (5) A court may order the carrying out of a forensic procedure under this section if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.*
- (6) In determining whether to make an order under this section, a court is to take into account whether this Act would authorise the forensic procedure to be carried out in the absence of the order.*

(7) *An order under this section takes effect immediately. However, any forensic material taken must not (unless the sample is likely to perish if analysis is delayed) be analysed:*

(a) *until the expiration of any appeal period or after the final determination of any appeal in relation to the serious indictable offence committed by the serious indictable offender concerned, whichever is the later, or*

(b) *if the conviction is quashed.*

By virtue of s 65, forensic procedures carried out on a serious indictable offender under Part 7 of the Act must be carried out in accordance with Part 6 'as if the references to the suspect in Part 6 were references to a serious indictable offender'. The provisions relating to interview friends and legal representatives (discussed in more detail in Chapter 10) therefore apply.

Identifying 'incapable' serious indictable offenders in adult correctional centres

Initially, the advice provided to us by NSW Police was that DCS officers identified 'incapable' inmates. Correctional centre officers informed police of the inmates' status and location prior to a visit by the ITT so that a court order could be obtained.

Later, in response to our discussion paper, NSW Police advised:

*The determination of whether an inmate is incapable in accordance with the definition of the Crimes (Forensic Procedures) Act is made by Corrective Services medical staff who are appropriately qualified to make such an assessment. NSW Police is of the view that the current arrangements are sufficient and that there is no need to alter current practices in relation to such persons.*⁴⁰³

The DCS response, however, did not entirely reflect this policy:

At present, the identification of an incapable inmate is a subjective judgement made by the police officers collecting the DNA sample. Corrective Services are not aware of the existence of any guidelines to assist in the making of a determination on whether an inmate is incapable of understanding the general nature and effect of a forensic procedure. ...

... Police officers must make a determination on whether an inmate is an incapable person on the basis of their assessment of the inmate. In some cases, police will liaise with correctional centre staff in relation to the 'status' of a particular inmate ...

*... A CCLO is not, however, in a position to make a clinical assessment on whether an inmate is able to understand the general nature and effect of a forensic procedure. It is the Department's contention that its correctional officers should not be expected to make such a determination.*⁴⁰⁴

Also, the NSW Corrections Health Service advised us that:

Corrections Health Service does not have anything to do with the forensic DNA sampling of serious indictable offenders. Corrections Health Service does not provide any advice to anyone about a person's capacity to give informed consent.

As a result of this inconsistency, we held a meeting with NSW Police, DCS and NSW Health to clarify their respective roles and expectations. We asked NSW Police and DCS to clarify their roles and to confirm (in writing) that their policies reflected the policies of the other relevant agencies.

403 NSW Police, Response to Ombudsman's *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders*, 15 March 2001.

404 DCS, Response to Ombudsman's *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders*, 25 March 2001.

405 Policy Statement by Dr Richard Matthews, Chief Executive Officer, Corrections Health Service, 17 May 2002.

We were advised that the process for identifying incapable persons in adult correctional centres is as follows:

1. The legal responsibility for identifying 'incapable' inmates ultimately rests with NSW Police.
2. DCS has agreed to assist Police to identify serious indictable offenders wherever possible.
3. The CCLO identifies inmates who may be 'incapable' through personal interaction and observations, particularly during the Pre-Test Interview. The CCLO is a correctional officer and does not have specialist training in this respect. The CCLO informs the ITT leader of their opinion.
4. DCS will inform NSW Police if an inmate is housed in specialised units for inmates with intellectual disabilities.
5. The ITT will consider an inmate to be 'incapable' if they do not understand that:
 - i. a forensic DNA sample will be taken from them
 - ii. that the forensic DNA sample will be analysed
 - iii. the forensic DNA sample will be placed on a database
 - iv. that the forensic DNA sample may be used in evidence against them
 - v. they are unable to indicate consent to the forensic sampling procedure being conducted.⁴⁰⁶
6. Whilst the ITT read out the information required by s 69 of the Act to be provided for informed consent,⁴⁰⁷ the ITT will assess the inmate in relation to any difficulties he/she may be having in understanding the information. The ITT members are Operational Support Group (OSG) police officers and do not have specialist training in this respect.

After reading out the information required to be provided by the Act, the ITT ask the inmate, 'Do you understand that?'
7. If an inmate has not been identified as 'incapable' by DCS, but presents to the ITT as being unable to understand⁴⁰⁸ when asked to consent to a buccal swab, the ITT leader can decide that the inmate will be treated as an 'incapable' person, and the forensic procedure will not proceed until a court order has been obtained.

Identifying 'incapable' serious indictable offenders in juvenile detention centres

We wrote to DJJ requesting formal advice about how an incapable detainee would be identified. DJJ informed us that the detainees being sampled would have been assessed as being fit to plead prior to being sentenced. DJJ also stated that all detainees are assessed by a health professional either on admission or shortly following admission, and that all young people coming into custody have a case plan prepared, which is regularly monitored and reviewed. DJJ advised:

Further to this, before a young person is presented to the police for a forensic procedure, the young person is given the opportunity to seek legal advice and the procedure is explained to the young person individually by DJJ staff using an information pamphlet. This pamphlet is in simple English and was specifically designed to be easily understood by a young person.⁴⁰⁹

A copy of the leaflet that is provided to children and young people in juvenile detention centres is attached at Appendix O.

406 NSW Police SOPs.

407 This information is discussed in more detail in the next chapter.

408 As defined by s 3(1) of the Act.

409 Correspondence from David Sherlock, Director General, Department of Juvenile Justice, 4 July 2002.

Identifying 'incapable' home detainees

The Agreement between NSW Police and the NSW Home Detainees Program states:

[Home Detention] *Officers will consider whether a detainee scheduled for test may - on all the evidence available - be 'incapable' of giving informed consent to the DNA testing procedure. Police must apply for court orders to DNA test these inmates. If the capability of a detainee is questionable, the supervising officer will assist the detainee to identify a suitable "interview friend" (not a departmental officer) and arrange for him/her to accompany the detainee for testing.*

*FPIT will be advised of our judgement that the detainee may be incapable and will be given details of the person who will accompany the detainee for testing.*⁴¹⁰

How we monitored the identification of serious indictable offenders who are 'incapable' of consenting

Police statistics

We asked NSW Police to provide us with statistics for the number of incapable serious indictable offenders sampled. Between 1 January 2001 and 6 July 2002, only six young people under the age of 18 were DNA sampled under Part 7 of the Act. During the same period, 17 (or approximately 0.16%) of the 10,403 inmates sampled had been deemed to be 'incapable' and were entitled to the safeguards for incapable people. All of these people were adult males.

In contrast to the objective task of identifying children and young people aged between 10 and 18 years, it can be very difficult to identify people who would be considered 'incapable' under the Act. One reason is that many people who have difficulties understanding the information about the forensic procedures may be skilled at concealing their problem, and may appear quite competent, particularly if they have had previous experience of the criminal justice system.⁴¹¹

There do not appear to be any guidelines, for police or other professionals, to assist in identifying a person who is 'incapable' as defined by the Act. Similarly, a report commissioned by the Intellectual Disability Rights Service found that there is no systematic or reliable process for identifying people with an intellectual disability.⁴¹²

We acknowledge that a person is not 'incapable' simply because he or she has, for example, an intellectual disability, a brain injury, a mental illness or dual diagnosis. However, in the absence of clear and reliable statistics about 'incapable' people in NSW correctional and juvenile justice centres, reference to related studies and research is useful for comparative purposes.

It is therefore interesting to note that although only 0.16% of serious indictable offenders subjected to DNA sampling were identified as being 'incapable', according to the DCS Annual Report for 2000-2001:

Current research shows that in the overall inmate population:

- 13% have an intellectual disability
- 75% have an alcohol or other drug problem
- 21% have attempted suicide
- 40% meet the diagnosis of Personality Disorder
- 60% are not functionally literate or numerate

410 Agreement between the NSW Home Detainees Program, Probation & Parole and the NSW Police Service for the DNA Testing of Home Detainees, received 19 September 2002.

411 Cockram, J, R Jackson and R Underwood, 'People with an intellectual Disability and the Criminal Justice System: The family perspective', paper presented at Partnerships for the Future, 6th Joint National Conference of the National Council of Intellectual Disability and the Australian Society for the Study of Intellectual Disability (26-30 October 1994, Perth), as quoted in NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, December 1996.

412 Simpson J, M Martin, J Green, *The Framework Report: Appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*, NSW Council for Intellectual Disability, Sydney, July 2001.

In the female population:

- 23% are on psychiatric medication
- 73% were previously admitted to psychiatric or mental health units

Similarly, a 1988 study for the Criminology Research Council estimated that 13% of the NSW prison population had an intellectual disability.⁴¹³

Discussion Paper

We raised the issue of the identification of ‘incapable’ people in our discussion paper and a large number of responses addressed this issue. Concerns were raised that the low number of inmates treated as ‘incapable’ for the purpose of DNA sampling suggested that there are problems with the current procedure for identifying those who are incapable of consenting.

The Guardianship Tribunal commented:

*The figures quoted in the Discussion Paper indicate that there is a systematic failure to identify those who are incapable of consenting to the forensic procedure. ... The Framework report suggests a starting point of approximately 690 people in NSW who have an intellectual disability and criminal justice system involvement.*⁴¹⁴

The Intellectual Disability Rights Service (IDRS) pointed out:

*It needs to be recognised that this definition requires a very high level of incapacity. It would not, for instance, cover all inmates with intellectual disability, mental illness or brain injury. The test is substantially the same as the test of capacity to consent to medical treatment in the Guardianship Act (s33). Just as there are many people with a disability who can consent to medical treatment themselves, there are many inmates who will not be deemed to be incapable persons even though they have a disability. For this reason, we would expect the number of people deemed incapable to be lower than one would expect from the incidence of people with intellectual disability in correctional facilities. However, 17 (the figure quoted in the discussion paper) is still surprisingly low.*⁴¹⁵

The IDRS also explained the difficulties that face untrained staff attempting to identify ‘incapable’ people, particularly in a correctional environment:

...people with intellectual disability commonly try to hide their disabilities and may feign comprehension where they have none. As a result people often assess a person’s ability from more observable features such as the person’s daily living skills. The consequence of this for the consent procedures is that, without appropriate training, the Testing Team and the Department [of Corrective Services] may assume a person’s communication skills to be much greater than in fact they are and fail to take adequate steps to facilitate the consent process. They may also proceed to conduct a forensic test from an incapable person on the mistaken basis that that person has provided an informed consent.

The IDRS made 11 recommendations in relation to the identification of ‘incapable’ inmates and detainees aimed at improving the identification of ‘incapable’ serious indictable offenders and reviewing the capacity status of serious indictable offenders already sampled who are at high risk of having provided an invalid consent. For example, IDRS suggested that NSW Police consult with the Guardianship Tribunal to establish that persons under guardianship orders in respect of medical and/or dental treatment do not have forensic procedures conducted upon them in the absence of a court order.

413 Hayes, SC and D McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An empirical study*, Criminology Research Council, Canberra, 1988.

414 Guardianship Tribunal, Submission No 22.

415 Intellectual Disability Rights Service, Submission Number 10.

We provided these recommendations to NSW Police for consideration. NSW Police responded:

Re: Recommendations made by the Intellectual Disability Rights Service:

The Standing Committee on Law & Justice Recommendation 25 is that “the Attorney General consider abolishing the consent provisions for serious indictable offenders” from the Act. This is based on the contradictory nature of the Act in that it requires that consent be given for a procedure that is actually compulsory. The NSW Police Service supports the Standing Committee recommendation and is pursuing this amendment.⁴¹⁶

As is clear from our discussion below, we do not agree that this approach will resolve the issue.

Video Audit

In our video audit we examined the videos of all the interactions between the ITTs and those inmates identified as incapable. We also observed a large number of randomly selected procedures, which included:

- Six interactions where our auditor formed the preliminary view that the inmate had some cognitive difficulties that would have limited his/her ability to understand the information presented. However, due to the limitations of this type of audit⁴¹⁷ our auditor was unable to determine with confidence whether the inmate was ‘incapable’.⁴¹⁸
- One interaction where the inmate had been identified as incapable by DCS and he had an interview friend present, but on the basis of a brief discussion with the inmate, the ITT treated the inmate as capable of giving consent.⁴¹⁹
- One interaction where the inmate had a severe speech impediment and stated that he had legal advice that police should obtain a court order prior to obtaining a sample from him. The ITT disputed the inmate’s assertions and argued that he appeared to understand ‘well enough’ and that having the inmate’s particular illness (cerebral palsy) did not necessarily make the inmate incapable.⁴²⁰ This particular interaction did not result in a forensic procedure: the ITT decided that a court order would be obtained and the procedure was postponed.

We raised these concerns with both NSW Police and DCS, and invited them to examine these videos with us and with the assistance of an appropriately trained professional, if necessary. To date, however, neither agency has taken up this invitation.

The NSW Police SOPs require that the ITT ask the inmates if they have understood the information prior to conducting the forensic DNA sampling. Inmates are asked ‘Do you understand that?’ In only 1.7% of interactions⁴²¹ (or 4 out of 233) viewed in the video audit did the inmate give more than a monosyllabic ‘yes’ or ‘no’ to this question. To their credit, in most cases the ITT members offered to provide further information, and some went on to explain the information in plain English even though the serious indictable offender claimed to understand the information sheet.

416 Correspondence from NSW Police FPIT, 15 August 2002.

417 Including the fact that the audit was restricted to observing recordings of interactions that had already taken place, and the auditor could not seek clarification of statements made by the inmate/detainee.

418 These interactions included those in which the inmate appeared confused by the explanations provided by the ITT or became agitated and confused by the standard questions at the beginning of the interaction. Videoed Interaction Numbers 42, 187, 137, 134, 233 and 58.

419 Videoed Interaction number 118.

420 Videoed Interaction number 256.

421 That is, interactions where the person was asked to consent.

During the video audit our auditor observed some exceptional efforts by the ITT to explain the information in a clear and respectful way. For example:

Videod Interaction No 118

The ITT member read the information sheet very slowly and stopped to explain certain points. He ensured that the inmate understood everything and said, *'Tell me if you don't understand anything'*. The inmate appeared to read his own information sheet and the officer asked, *'Can you read and write?'* The inmate responded, *'A little bit'*. At the end of the information sheet, the police officer asked if there was anything that the inmate did not understand. The inmate said *'Yes'*. And the police officer explained each point on the information sheet again separately. The police were very patient and put considerable effort into ensuring that the inmate understood everything that they told him.

Videod Interaction No 145

This inmate had been deemed to be 'incapable'. The police were professional, calm, friendly and patient. The inmate became agitated at times and complained about being treated as 'incapable': *'What's this about me being treated as disabled?'* In response the police explained the meaning of 'incapable' under the Act. The inmate said, *'You think I am brain dead'*. The police replied, *'No, we don't think that. All it means is that you may not understand some of the questions we are going to ask you'*. The police handled the procedure very well.

Interviews with inmates

As discussed in the previous chapter, 29% of interviewees told us that they did not understand some or all of the information provided by police.

At some centres during the survey we witnessed the CCLO conducting the Pre-Test Interview with inmates in the doorway of the ITA immediately prior to being sampled. The environment was not conducive to the assessment of the person's ability to understand the information provided.

In a number of other centres we found that the vast majority of inmates had found out about the sampling 'today' or '10 minutes ago'. We discussed the issue of notice provided to serious indictable offenders in Chapter 8.

Analysis of complaints and inquiries received

During the period of our review we did not receive any written complaints about the DNA sampling of inmates deemed to be 'incapable'.

Focus group with the ITT members

Members of the ITT expressed the view that the term 'incapable' needs to be clarified and that ITT members should not be responsible for assessing an inmate's capacity to consent.⁴²²

Focus groups with CCLOs

We asked CCLOs how they would identify an 'incapable' serious indictable offender. There were no consistent responses to this question. Some CCLOs stated that they 'would just know'.⁴²³ Others indicated that 'the Clinic' or 'Welfare' would know,⁴²⁴ but when questioned further it became clear that there was no established process in place for the CCLO to systematically consult with the Clinic (run by Corrections Health Service) or welfare officers about the status of an inmate's capacity to consent to a DNA sampling procedure. It appeared that it was left up to the individual CCLO to make any such enquiries. However, the Corrections Health Service has told us that it will not provide any information to DCS about the status of an inmate's capacity to consent to a forensic procedure because it considers its role to be health care rather than law enforcement.⁴²⁵

⁴²² Focus Group 1.

⁴²³ Focus Group No 1 with DCS CCLOs.

⁴²⁴ Focus Group No 2 with DCS CCLOs.

⁴²⁵ Policy Statement from Dr Richard Matthews, Chief Executive Officer, Corrections Health Service.

Earlier in this report we discussed the fluctuating inmate population, and the difficulties that CCLOs experienced in having sufficient time to conduct their Pre-Test Interviews with serious indictable offenders.⁴²⁶ These factors are also likely to have a bearing on the ability of CCLOs to accurately assess the capacity of an inmate to consent.

Interviews with senior staff at juvenile justice centres

We contacted all juvenile justice centres and spoke to the Centre Manager or another senior officer. We asked about their method of identifying 'incapable' detainees. They provided more details about the DJJ assessment and case management systems. The centre representatives indicated that centres need to be provided with at least one week's notice of intended DNA sampling of detainees, to allow sufficient time to provide the detainee with information about the sampling and to identify any mental health issues.

One Centre Manager stated that the ideal would be to defer the sampling of detainees until they had been at the centre for at least three months. This would provide enough time to observe and assess detainees and better identify 'incapable' detainees. He said that this should be possible as most detainees sentenced to a period of imprisonment are serving sentences of more than three months.⁴²⁷

Discussion

NSW Police has informed us that police have identified 17 out of 10,403 serious indictable offenders (0.16%) to be 'incapable' as defined by the Act. This figure is very low and following our consultations with relevant stakeholders and other research, we are of the view that some 'incapable' serious indictable offenders may not have been identified and treated accordingly.

In creating safeguards for 'incapable' serious indictable offenders in the Act, such as the requirements for a court order and the right to a support person, Parliament acknowledged that some people may be incapable of understanding the information required to be provided to them, and that this could affect their ability to provide 'informed consent'. If serious indictable offenders who are 'incapable' are not identified as such, and are routinely sampled without the benefit of the safeguards provided by the Act, then the protection afforded by those safeguards is rendered meaningless.

In addition, if a DNA sample is taken from an 'incapable' person without a court order, any evidence obtained from that DNA sample (including links to DNA found at a crime scene) could be challenged in court. This may mean that police and prosecutors could be required to expend considerable resources to justify their assessment that the person was a capable person at the time of the DNA sampling.

Provision of information

In the previous chapter we recommended that the consent provisions for adult serious indictable offenders who are capable of consenting should be removed, and that this amendment should be accompanied by reinforced DNA Sampling Education Programs and additional, but simplified, information provided to serious indictable offenders.

Our rationale was partly based on the view that the removal of informed consent does not negate the need to provide serious indictable offenders with information about the DNA sampling.

Similarly, the agencies involved in the DNA sampling of serious indictable offenders will have a continued responsibility to identify 'incapable' inmates and those who have difficulties with (as opposed to those who are incapable of) understanding the nature and effect of the DNA sampling, to provide those serious indictable offenders with appropriate information, and meet other procedural requirements.

This issue provides further support for our earlier recommendations relating to the DNA sampling education programs and adequate resources for CCLOs.

⁴²⁶ See Chapter 7.

⁴²⁷ Interview with Juvenile Detention Centre Manager No 5.

Requirement for court orders for children and incapable adults

We remain of the view that a court order should be obtained before obtaining a DNA sample from children and incapable adult serious indictable offenders.

Unlike 'capable' offenders, someone who is incapable may be unable to object by pointing out that they do not in fact fall into the category of serious indictable offender. In contrast with adult serious indictable offenders who are capable of providing informed consent, serious indictable offenders who are 'incapable' or children may have difficulty in understanding the long-term consequences of the DNA sampling. In addition, they may have difficulties in accessing legal and other advice. The Act takes these factors into account and provides additional safeguards for these people, including the requirement for the forensic procedure to be authorised by a court order, and the requirement for an interview friend and/or legal representative to be present.

Protections for these more vulnerable persons should not readily be taken away in the absence of compelling reasons. In this instance, there is no such case for removing the protections afforded these persons. However, if it is Parliament's intention that there be a mass testing program of serious indictable offenders, there seems little reason to place a higher threshold for the testing of this class of offender. To the extent that the court must be "satisfied that the carrying out of the forensic procedure is justified in all the circumstances", it is our view that this additional threshold should not be continued if mass testing is intended. In this respect, we note that reasons provided by courts in granting orders do not suggest reasoning much beyond that the court's authorisation is required.

The requirement for a court order will, however, protect those persons who are not serious indictable offenders, and because of age or incapacity are not able to question the procedure, by ensuring evidence is provided that the Act authorises the carrying out of the forensic procedure. If this approach is adopted, some amendment to the definition of 'incapable adult' in s 3 of the Act, as this relates to serious indictable offenders, may be required. This includes, for serious indictable offenders, removal of the consent provision (s 3) and insertion of an additional criteria to the present "is incapable of understanding the general nature and effect of a forensic procedure" to also include, as a separate criteria, words to the effect "is incapable of understanding whether the Act authorises the carrying out of forensic procedure." Consistent with our recommendations for other serious indictable offenders the court should only order a blood sample be taken where it is not practicable to take a hair sample or buccal swab.

Identifying incapable persons

The NSW Police SOPs provide some guidance to the ITT in determining whether a person is 'incapable'. The SOPs state:

An inmate will be considered 'Incapable' if they do not understand that:

- *a forensic DNA sample will be taken from them, and*
- *that the forensic DNA sample will be analysed, and*
- *the forensic DNA sample will be placed on a data base, and*
- *that the forensic DNA sample may be used in evidence against them, and*
- *they are unable to indicate consent to the forensic sampling procedure being conducted.*

However, our research found that the interactions that occur between the ITT and serious indictable offenders do not necessarily provide an appropriate environment to assess these criteria. Serious indictable offenders are sometimes simply provided with the information and asked 'Do you understand that?'. Information provided to this Office by a number of stakeholders, including the Guardianship Tribunal, suggests that the type of interactions that occur between the ITT and serious indictable offenders are not conducive to the accurate identification of incapable serious indictable offenders.

DCS has informed us that it is developing a new aspect to its Offender Management System (OMS) which will identify inmates with diagnosed disabilities and the data will also be used to flag the record of any inmate classified as a serious indictable offender. However, DCS continues to emphasise that it considers that the identification of incapable inmates to be a police responsibility.⁴²⁸

Our interviews with senior staff at juvenile justice centres found that the low number of detainees in juvenile justice centres and the case planning process are likely to assist in the assessment of children and young people's capacity to consent in detention.

A review of the history and present understanding of all agencies involved in DNA sampling strongly indicates that the identification of incapable serious indictable offenders is a difficult issue, and one that would benefit from a clear process established by persons with some expertise in identifying incapable persons. In this respect, we agree with the recommendation of the Intellectual Disability Rights Service that consultation with the Guardianship Tribunal may be of some benefit.

Recommendation 26

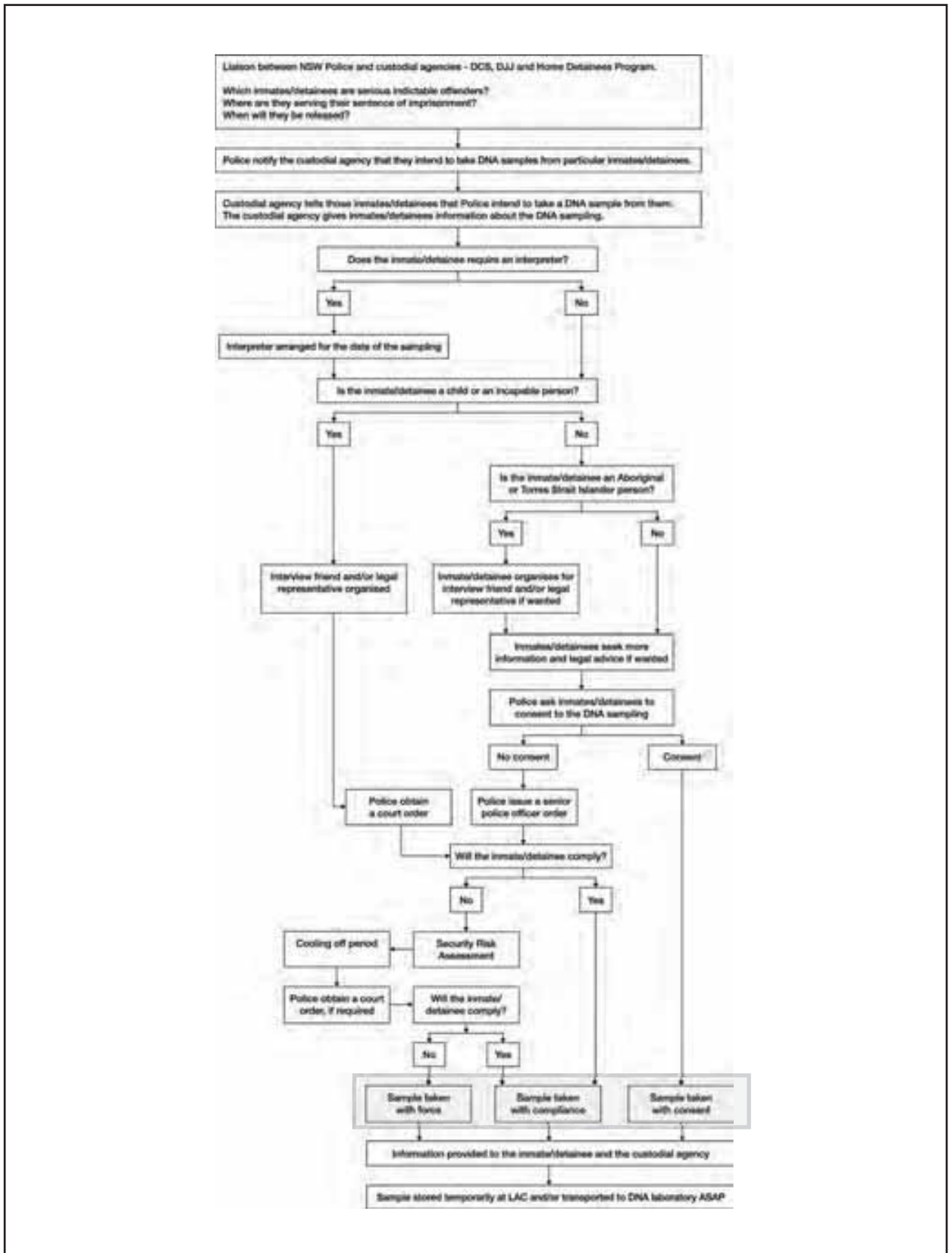
It is recommended that NSW Police consult with the Guardianship Tribunal and custodial agencies to review its current processes for identifying serious indictable offenders who may be incapable. These processes should include guidance as to:

- a) the information to be considered in assessing an inmate's capacity
- b) factors to be considered in assessing an inmate's capacity
- c) the role of each agency in this process.

It is further recommended that following this review, and to the extent that any legislative change is required to permit the exchange of information, that this be considered by the Attorney General following consultation with relevant stakeholders including the Privacy Commissioner.

⁴²⁸ Correspondence from the Commissioner, DCS, 11 July 2002.

Part E: Sampling Functions and Issues



Chapter 14: Cautioning serious indictable offenders before carrying out DNA sampling

What the Act says

The Act states that before anyone starts to carry out a forensic procedure on a serious indictable offender, a police officer must officially caution the serious indictable offender that he or she does not have to say anything while the procedure is carried out, and that anything the serious indictable offender does say may be used in evidence.⁴²⁹

The Act does not state that the cautioning of serious indictable offenders must be electronically recorded.

Implementation by police

Although the Act does not require the electronic recording of the caution, this appears to be police practice. The physical set up of the video recording equipment and the sequence of the information that is provided to serious indictable offenders mean that it would be quite unusual for cautions to be given but not recorded.

The standard operating procedures for the taking of buccal swabs by consent state:

*Before the forensic DNA sample is taken, caution the inmate that they do not have to say anything while the procedure is being carried out but that anything the inmate does say may be used in evidence.*⁴³⁰

There is no similar guidance for ITTs taking samples authorised by senior police officer orders or court orders.

How we monitored the cautioning of serious indictable offenders

Video Audit

We examined 252 video recordings of the interactions between the ITT and serious indictable offenders. Wherever possible, we made a note of whether police cautioned the inmate/detainee as required by s 46.

Our auditor found that in 88% (221 out of 252) of interactions, the police cautioned the inmate/detainee as required. In one case, the ITT cautioned the inmate/detainee after the DNA sampling.⁴³¹

In the remaining 30 cases (almost 12%) it was impossible for our auditor to determine if the inmate/detainee was or was not cautioned by the ITT.⁴³² This uncertainty was because the videoed interaction showed no evidence that the inmate/detainee had been cautioned. In some cases, this could be because the serious indictable offender had objected to the video recording of the DNA sampling, and the video was turned off before the point at which the caution was usually given. In two cases, the quality of the video recording was so poor that our auditor could not be sure that the police had given the caution.⁴³³

The majority of serious indictable offenders did not comment when the caution was given. Some inmates/detainees, however, seemed to become concerned or confused by the caution.⁴³⁴ They appeared to relate being cautioned in this manner with being arrested or charged by police officers. In these cases the ITT clarified that the cautioning was for the protection of the inmates/detainees. The ITT explained that the interaction was electronically recorded, and that the caution was to inform them of the consequences of any disclosures.

429 Section 46 of the Act.

430 NSW Police SOPs.

431 Videoed Interaction No 51.

432 Interaction Nos 3, 243, 244, 54, 55, 192, 56, 48, 96, 145, 152, 156, 200, 219, 220, 221, 225.

433 Videoed Interaction Nos 131 and 239.

434 Interaction Nos 19, 50, 143, 154, 175, 179, 191.

In some cases, the ITT cautioned inmates earlier than usual in the interaction, when inmates started to talk about particular offences. We observed one interaction where the inmate continued to talk about the offence (for which he had already been convicted) throughout the DNA sampling. This was despite his being cautioned and warned a number of times by police officers.⁴³⁵ Police wish to retain flexibility of when the caution is given to ensure that in circumstances such as these the rights of the individual are ensured.

Discussion

The object of the s 46 cautioning is to put a person on notice that anything they say could be used in evidence against them. Our research found that in the large majority of cases the ITT cautioned the serious indictable offender on video before the DNA sampling. However, it was not clear whether or not the ITT had cautioned the serious indictable offender in 30 cases we observed. In those cases where the inmate/detainee was not cautioned before the DNA sampling, the inmate/detainee did not appear to say anything that was likely to be used in evidence. However, to ensure that the Act is complied with, police officers should ensure that they correctly caution serious indictable offenders before the DNA sampling.

In our opinion the cautioning of serious indictable offenders should be electronically recorded to provide objective evidence in the event that there is a disagreement between police and the serious indictable offender about whether a caution was given.

Recommendation 27

It is recommended that NSW Police amend its SOPs for the forensic DNA sampling of serious indictable offenders to include a requirement to electronically record the giving of the caution required by s 46 of the Act.

Earlier in this report we noted the response of one serious indictable offender who we asked what steps s/he took to clarify the information provided by the ITT:

Interviewee 114

They told me that anything I do or say will be held against me, so I just tried to shut up.

We note the high number of interviewees (29%) who told us that they did not understand all of the information given to them by the ITT, and that despite not understanding the information, 81% of these interviewees told police that they *had* understood the information.

In light of this issue, we suggest that NSW Police caution serious indictable offenders after the ITT has provided the relevant information, immediately before carrying out the forensic procedure, to minimise the effect of the caution upon serious indictable offenders' willingness to raise concerns and ask questions about the DNA sampling.

Current police practice is compatible with this recommendation; however, NSW Police would prefer to retain flexibility regarding when the caution is provided. This is because some serious indictable offenders may begin to discuss previous offences before the caution is offered. If there is a prescribed order of events with the caution to be offered at a particular point in the sampling process, it would be possible for an individual to give away information prior to the caution being offered.

435 Interaction No 181.

Recommendation 28

It is recommended that NSW Police amend its SOPs for the forensic DNA sampling of serious indictable offenders to provide for the cautioning of serious indictable offenders to be given after the provision of information and immediately before the forensic DNA sampling, unless it is appropriate because of comments made by the offender, to provide the caution before this time.

Earlier in this report we recommended that the Attorney General prepare, as a matter of urgency, a plain English version of the information that is required to be provided to serious indictable offenders.⁴³⁶ The Attorney General may wish to consider including in this information a brief reason why the caution is given, to avoid serious indictable offenders mistakenly believing that they are being charged. Whilst NSW Police support the development of a plain English version of the information, they do not support adding in information about the cautioning. NSW Police feel that this is uncalled for as serious indictable offenders are already overloaded with the current level of information. It is clear, however, that there is ground for confusion, which, in our view, could be clarified by a simple explanation.

Recommendation 29

It is recommended that the Attorney General consider including a reason for the caution required by s 46 of the Act in the plain English version of the information provided to serious indictable offenders about the DNA sampling under Part 7 of the Act.

⁴³⁶ See Chapter 11.

Chapter 15: Electronically recording the DNA sampling

What the Act says

Part 6 of the Act sets out general rules for conducting a forensic procedure on a serious indictable offender. Section 65 of the Act states that Part 6 applies to the carrying out of a forensic procedure on a serious indictable offender as if the references to the suspect in Part 6 were references to a serious indictable offender. Therefore, s 57 of the Act, relating to the electronic recording of forensic procedures, also applies to serious indictable offenders.

Section 57 Recording of forensic procedure

(1) *The carrying out of a forensic procedure (other than the taking of a hand print, finger print, foot print or toe print) must be recorded by electronic means unless:*

(a) *the suspect objects to the recording, or*

(b) *the recording is not practicable.*

(2) *Before the forensic procedure is carried out, the suspect must be informed:*

(a) *of the reasons for recording the carrying out of the forensic procedure, including the protection that the recording provides for the suspect, and*

(b) *that the suspect may object to the recording.*

(3) *Despite section 99, an interview friend of an Aboriginal person or a Torres Strait Islander not covered by section 54 has no right to object to the recording of the forensic procedure.*

Note. Section 99 gives interview friends and legal representatives general powers to act on behalf of suspects. Section 54 applies to children and incapable persons, including children or incapable persons who are Aboriginal persons or Torres Strait Islanders, but does not apply to other Aboriginal persons or Torres Strait Islanders.

(4) *If the carrying out of the forensic procedure is not to be recorded by electronic means, the forensic procedure must be carried out in the presence of an independent person who is not a police officer.*

(5) *Subsection (4) does not apply if the suspect expressly and voluntarily waives his or her right to have an independent person present.*

(6) *Nothing in this section prevents any recording of a forensic procedure being made for the purpose of maintaining good order, discipline and security in a correctional centre or other place of detention.*

Section 100 of the Act obliges police to provide the serious indictable offender with an opportunity to watch and/or listen to the recording. This obligation extends to the legal representatives of all inmates/detainees, and the interview friends of inmates/detainees who are Aboriginal and Torres Strait Islander people, under 18 years or 'incapable'. The opportunity to watch the video and/or listen to the audio recording must be free of charge.

Section 100 Obligation of investigating police officers relating to recordings

- (1) *If a recording is made as required by a provision of this Act, the investigating police officer concerned must ensure that:*
 - (a) *if an audio recording only or a video recording only is made---the suspect, offender or volunteer concerned is given the opportunity to listen to or view the recording, and*
 - (b) *if both an audio recording and a video recording are made:*
 - (i) *the suspect, offender or volunteer concerned is given an opportunity to listen to the audio recording, and*
 - (ii) *the suspect, offender or volunteer concerned is given an opportunity to view the video recording, and*
 - (c) *in any case, if a transcript of the recording is made---a copy of the transcript is made available to the suspect, offender or volunteer concerned.*
- (2) *Where an investigating police officer is required to ensure that a suspect, offender or volunteer is given an opportunity to view a video recording made under this Act, the investigating police officer must ensure that the same opportunity is given to:*
 - (a) *in any case---the suspect's, offender's or volunteer's legal representative, and*
 - (b) *if the suspect, offender or volunteer is a child or an incapable person---an interview friend of the suspect, offender or volunteer, and*
 - (c) *if the investigating police officer believes on reasonable grounds that the suspect, offender or volunteer is an Aboriginal person or a Torres Strait Islander---an interview friend of the suspect, offender or volunteer.*

Section 110 of the Act allows police to retain the electronic recording of the forensic procedure 'for such a period, as the Commissioner of Police directs', provided that it is stored securely.

Section 110 Retention of electronic recordings

- (1) *A recording made by electronic means by a police officer in accordance with this Act that is no longer required for investigative or evidentiary purposes may be retained for such other purposes, and for such period, as the Commissioner of Police directs.*
- (2) *A recording that is retained under this section is to be stored so as to protect it against unauthorised access or use by any person.*

NSW Police implementation

According to NSW Police policy, the DNA sampling of all serious indictable offenders is to be electronically recorded by video unless the inmate/detainee objects. The procedures state that if the person objects to the recording, this objection must be recorded in writing. In addition, all aspects of the 'consent-seeking process' must be recorded before the video is turned off.⁴³⁷

NSW Police purchased special video equipment for the DNA sampling. The new cameras do not have to be hand-held and have the potential to capture a wide area, such as those spaces used as ITAs.

⁴³⁷ That is, the provision of information, the obtaining of consent or the issuing of orders, and the objection to the recording. In this case, it is only the actual DNA sampling that will not be recorded. NSW Police SOPs.

In practice, the ITT often set up a television monitor in the ITA which displayed what was being recorded whilst it was being recorded. This allowed the ITT to check that the recording equipment was working properly and the inmate/detainee to see what was being recorded. It also provided serious indictable offenders who wished to watch the video with the opportunity to do so immediately.

NSW Police policy is that the video recordings of forensic procedures carried out on serious indictable offenders are kept indefinitely. They are stored in a secure area and are sealed with 'evidence tape'.

In addition to the video recording, NSW Police maintains written records relating to date and time of the forensic procedure, the inmate responses to questions asked and the names of the ITT members present during the procedure. These records are stored on numbered information forms and are kept with the consent form signed by the serious indictable offender.

How we monitored the video recording of forensic procedures

Video audit

A clear video recording of an interaction between police and an inmate or detainee during the DNA sampling can be an objective record of what occurred. In this way, it can be an important resource in relation to any allegation that the sample was not taken in accordance with the Act.

During our video audit it became apparent that poor positioning of the camera and bad video/audio quality can serve to undermine this protection. Our auditor noted the following problems with some of the video recordings, and these issues are discussed further below:

- The video recording did not include the whole ITA or the camera focussed solely upon the inmate/detainee and not the other people in the room.
- The quality of the recording was very poor, making it very difficult to hear and/or see the interaction.
- Police did not stop recording after the inmate/detainee had objected to the recording.
- Background noise made it difficult to comprehend what was going on.
- DNA sampling and/or packaging of the sample was conducted out of view of the camera.

The video recording did not include the whole ITA or the camera focussed upon the inmate/detainee and not the other people in the room

The Act requires that forensic DNA sampling be carried out in an area that provides reasonable privacy for the serious indictable offender. If only a limited portion of the ITA is captured by the video, then it is not possible to determine whether police have adhered to this requirement.

In 96% (243 out of 252) of the interactions examined in the video audit, at no point did the video camera not cover the whole inmate testing area. In the remaining nine cases, our auditor could not be sure that the whole of the ITA was covered by the video.

Section 44 of the Act states that the DNA sampling must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure (or otherwise required or permitted by the Act). In over 88% of the interactions, our auditor could not tell how many people were in the room.

The quality of the recording was very poor, making it very difficult to hear and/or see the interaction

Eight per cent (20 out of 252) of the electronic recordings examined in our audit were of such poor video or audio quality that our auditor experienced a high degree of difficulty in examining them. There were two interactions that included no audio recording at all.

Police did not stop recording after the inmate/detainee had objected

Seven per cent (17 out of 252) of serious indictable offenders said that they did not want the forensic procedure to be recorded. Some gave reasons for not wanting to be videoed. For example:

*Because I don't want to be on national TV.*⁴³⁸

*Because of freedom of choice in a democratic society.*⁴³⁹

In 21 interactions our auditor was not able to determine whether or not the inmate/detainee had objected to the video recording. In over half (11 out of 21) of these cases, the police did not appear to ask the serious indictable offender if they objected to the recording. In eight cases, our auditor was not able to determine whether the serious indictable offender had objected to the recording because that part of the interaction had not been recorded, or the visual and audio quality was too poor.

There were two interactions in which the interaction was electronically recorded despite the inmate's stated objection to the recording.⁴⁴⁰ In one of these interactions, police told the inmate, 'As you can see, the video is turned off.' However, the audio recording continued.⁴⁴¹ The reason for the continued recording was not apparent.

Background noise made it difficult to comprehend what was going on

Our auditor experienced a high degree of difficulty in examining 6% (15 out of 252) of video recordings due to the poor audio quality of the video recordings.

DNA sampling and/or packaging of the sample was conducted out of view of the camera

In 81% of interactions where the forensic DNA sampling itself was recorded on the video, our auditor established that the DNA sample was taken and packaged according to the NSW Police SOPs. For the other recordings (19%, or 45 out of 237), our auditor noted issues including:

- ten cases where the DNA sampling, the opening of the sampling kit or the sealing of the tamper-evident bag was obscured by police or DCS officers⁴⁴²
- four cases in which the DNA sample was removed from the view of the camera before it had been sealed in the tamper-evident bag.⁴⁴³

Some, but not all, of the video recordings showed the date and time of the recording. When we asked NSW Police why this was the case, they answered that the date and time 'stamp' on the video was not always reliable for two reasons. First, the date/time stamp required continual power (even when the camera was turned off), reducing the life of the battery. Second, the date/time stamp could be set incorrectly, either by mistake or intentionally.⁴⁴⁴

Interviews with inmates

We interviewed almost 200 serious indictable offenders after they had provided a DNA sample. We asked them if they had formally objected to the video recording of the sampling. Eleven interviewees said that they had objected. When we asked them why, the most common answer was that they did not think it was necessary.

Only six interviewees told us that they chose to watch the video at the end of the procedure. Most of these interviewees said that they just wanted to check it. One interviewee said that he watched it to 'kill a bit of time'.⁴⁴⁵

438 Videod Interaction No 191.

439 Videod Interaction No 250.

440 Videod Interaction Nos 54 and 191.

441 Videod Interaction No 191.

442 Videod Interaction Nos 16, 31, 48, 68, 70, 71, 85, 166, 174, 229.

443 Videod Interaction Nos 138, 166, 176, 253.

444 Information provided by NSW Police FPIT.

445 Interview No 144

Focus groups

In our focus groups with the ITTs and FPIT, we were told that many correctional centres in NSW do not have adequate rooms for the DNA sampling. The spaces provided are often too small for the whole testing team, the inmates/detainees and a properly positioned camera.⁴⁴⁶

Discussion

The ITT's provision of a TV monitor to show what is being recorded is a useful initiative that can make the procedure more transparent and efficient.

Real time viewing of the video can alert the ITT to any visual problems with the recording, and allow the person being sampled to see exactly what is being recorded. Our interviews with serious indictable offenders indicated that some did not see the need to watch the video as they had already seen what was being recorded. This may reduce the amount of time police spend in correctional centres.

As discussed above, there are practical problems with using the date/time stamp on the video recording. To address this, we suggest that NSW Police state the date and time at the beginning of the interaction with serious indictable offenders. We note that this is police practice for ERISP (Electronic Recording of Interviews with Suspects) interviews. NSW Police have confirmed that they would be willing to implement this recommendation.

Recommendation 30

It is recommended that NSW Police amend its SOPs to require police officers to state (for the record) the date and time at the beginning of recorded interactions with serious indictable offenders in relation to DNA sampling.

We acknowledge that it will not always be possible for the video recording to capture the whole ITA and all persons present. To provide objective evidence in the event of any allegation of unreasonable or harsh conduct by police and other officers who are not visible on the video recording, we suggest that electronic recordings include both visual and audio recording. We note this is usual police practice in terms of indictable offenders.

Recommendation 31

It is recommended that the Act be amended to require that the electronic recording of forensic procedures be *both* video and audio recorded, unless it is not practicable to do so or the serious indictable offender objects to the recording.

Later in this report we recommend that police conducting the DNA sampling introduce all persons present and explain each person's role to the person who is the subject of the procedure.⁴⁴⁷ We also suggest a method for providing the viewer with a general overview of the type of area that was used as the ITA.

Our video audit found that in a number of cases, the video recording did not capture key aspects of the activities relating to the integrity of the forensic sample, such as the opening and the sealing of the tamper-evident bag or the taking of the sample. The failure to record all persons and activities involved in forensic DNA sampling may provide opportunities for serious indictable offenders to challenge the lawfulness of the procedure or the integrity of the sample.

⁴⁴⁶ Focus Group Nos 1 and 5.

⁴⁴⁷ See Chapter 16.

One of the factors affecting the video recording of forensic procedures are the differing interpretations of when a procedure commences. NSW Police views the forensic procedure as commencing immediately after the inmate has provided consent and ending after the bag has been sealed. As s 57 allows the inmate to decline the recording of the forensic procedure, police will not record any aspect of the interaction after the consent has been provided. NSW Police feel that by continuing to record beyond this point with serious indictable offenders that have declined permission to record they not only breach the provisions in s 57 but also risk increasing tension between the inmate and the ITT.⁴⁴⁸

In providing this information NSW Police reiterated that it is the serious indictable offender's choice to have the procedure filmed or not, and that this is as much for the inmate's protection as it is for the ITT members. In addition, the standard practice for the forensic procedure involves the sampling kit being sealed in the presence of both the inmate and the CCLO. A final form of protection is offered for all samples in that any kit that has been incorrectly sealed or shows any evidence of being tampered with will be rejected by DAL.

In our view, the integrity of the forensic sample is further enhanced by the video taping of the process of sealing a DNA sample bag wherever possible. If s 57 acts to prevent this, which in our view is far from certain, consideration should be given to an appropriate amendment. If there are the occasional circumstances where the video taping of this process would increase the tension between the inmate and ITT, it would be appropriate to consider not recording this. In our view, this would be a rare event.

Recommendation 32

It is recommended that NSW Police amend its SOPs to require that wherever possible the opening of DNA sampling kits, the placing of the DNA sample inside the tamper-evident bag and the sealing of the tamper-evident bag is electronically recorded. This should occur even where the forensic sampling itself is not recorded due to the objection of the person being sampled. In this respect, if an amendment is required to s 57 of the Act to permit the taping of this process, we recommend that such an amendment be made.

We understand that some custodial/supervisory agencies may face difficulties in providing an appropriate venue for the DNA sampling. However, the proper recording of forensic procedures may be crucial to confirm or disprove allegations that the DNA sampling was not taken in accordance with the Act. Ensuring that the DNA sampling is carried out in an appropriate space is also important for occupational health and safety reasons for the staff involved, and to minimise any discomfort to the person undergoing sampling.

Recommendation 33

It is recommended that NSW Police liaise with all relevant custodial/supervisory agencies (DCS, DJJ and the Home Detainees Program) to ensure, as far as possible, that the inmate testing areas provided are suitable to meet the video recording requirements of the NSW Police SOPs and the Act.

448 Correspondence from NSW Police, 19 April 2004.

Chapter 16: Ensuring reasonable privacy during DNA sampling

What the Act says

Part 6 of the Act sets out general rules for conducting a forensic procedure on a suspect. Section 65 of the Act states that Part 6 applies to the carrying out of a forensic procedure on a serious indictable offender as if the references to the suspect in Part 6 were references to a serious indictable offender.

Section 44 General rules for carrying out forensic procedures

A forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect and except as permitted (expressly or impliedly) by any other provision of this Act, must not be carried out in the presence or view of a person who is of the opposite sex to the suspect, and *
- (b) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Act, and*
- (c) must not involve the removal of more clothing than is necessary for the carrying out of the procedure, and*
- (d) must not involve more visual inspection than is necessary for the carrying out of the procedure.*

Section 48 Forensic procedures not to be carried out in cruel, inhuman or degrading manner

Nothing in this Act authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner but the carrying out of a forensic procedure on a suspect in accordance with this Act is not of itself taken to be cruel, inhuman or degrading to the suspect.

Section 56 Presence of police officers

- (1) The number of police officers who may be present during the carrying out of a forensic procedure must not exceed that which is reasonably necessary to ensure that the procedure is carried out effectively and in accordance with this Act.*
- (2) Where the presence of a police officer (other than a police officer who is carrying out or helping to carry out the procedure) is reasonably necessary to ensure that a forensic procedure is carried out effectively and in accordance with this Act, the police officer is, if reasonably practicable:
 - (a) if the suspect is a child---to be a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, a person of the same sex as the suspect, or*
 - (b) in any other case---to be of the same sex as the suspect unless it is not practicable for such a police officer to attend within a reasonable time.**

Note. *Section 51 provides that, if practicable, most forensic procedures are to be carried out by persons of the same sex as the suspect.*

(3) This section does not apply to the following forensic procedures:

- (a) the taking of hand prints, finger prints, foot prints or toe prints,*
- (b) any non-intimate forensic procedure that may be carried out without requiring the suspect to remove any clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes, scarf or hat.*

Implementation by DCS

DCS and NSW Police agreed that DCS would provide a suitable area within each correctional centre where police could carry out the DNA sampling. Their agreement states that the area will be large enough for the ITT and its equipment.⁴⁴⁹

DCS policy is that the CCLO should act as an independent witness to the DNA sampling. The CCLO should also be available to witness documents relating to the procedure.⁴⁵⁰

Implementation by DJJ

The DJJ Operating Procedures state that the juvenile justice centre should designate a room for the sampling. This room 'should be reasonably sound-proof and private to ensure confidentiality'.⁴⁵¹

The DJJ procedures do not mention the routine presence of DJJ staff during the forensic procedures. Instead, they indicate that a staff member 'who has a good relationship and rapport with the detainee' can be an interview friend for those detainees who are under 18.

Implementation by the Home Detainees Program

The agreement between the Home Detainees Program and NSW Police assumes that the DNA sampling will be conducted at a police station or a courthouse. It does not mention what type of area will be used to carry out the DNA sampling.⁴⁵² Both NSW Police and the Home Detainees Program have informed us that the sampling actually takes place at the detainee's local probation and parole office.⁴⁵³

The home detainee's supervising officer is required by the procedures to accompany the home detainee to the location of the testing. A Home Detainee officer should also observe the sampling as an independent witness.

Implementation by NSW Police

The NSW Police standard operating procedures state that the ITA should be 'within the correctional centre, an area separate from the main prison and out of sight of other inmates' and 'of sufficient size and layout to maximise officer safety whilst conducting the forensic DNA sampling and address any occupational health and safety issues'.⁴⁵⁴

The procedures state that the CCLO will remain in the ITA to act as a witness to the process.

How we monitored the Inmate Testing Areas and reasonable privacy

Video Audit

Our video audit of the inmate/detainee DNA sampling examined the number of persons present in the testing area, the role that they appeared to play and the times that they were present.

In the previous section, 'Electronic recording of DNA sampling', we discussed the limitations of the video recordings of the ITA and the sampling. In 88% (223 out of 252) of cases our auditor was not able to determine exactly how many people (other than the serious indictable offender) were in the room.

449 Draft Memorandum of Understanding between the Commissioner of Corrective Services and NSW Police, Serious Indictable Offender Testing.

450 Department of Corrective Services, Forensic Procedure – Compliant Testing of NSW Inmates, 21 December 2000.

451 Department of Juvenile Justice, Operational Procedures for Juvenile Justice Centres: DNA Testing in Juvenile Justice Centres, February 2002.

452 Agreement between the NSW Home Detainees Program, Probation & Parole and the NSW Police Service for the DNA Testing of Home Detainees, received 19 September 2002.

453 Information obtained during telephone conversations with Ken Studerus and Wayne Tosh.

454 NSW Police SOPs.

However, when relying on audio indicators to estimate the number of people present during the interaction, our auditor estimated that the number of people present ranged from three to more than nine. The most common, and the average, number of people present was four. Clearly this method would not account for any people in the room who were not identified and who remained silent and out of video range during the videoed interaction.

Because of the limitations of the video recordings, our auditor also relied on audio indicators to determine the roles of the people present. These included the introduction of people present at the beginning of the interaction and people who were audible in the background.

The forensic procedures we audited were commonly conducted in an interview or meeting room, a common room, a cafeteria/kitchenette or an exercise room. As the placement of the video camera limited a full view of the whole testing area, our auditor was unable to clearly determine whether these testing areas afforded reasonable privacy to the person being sampled.

In 11% (27 out of 252) of interactions there were people present who did not appear to have a role. Some of these interactions are described below.

Videoed Interaction Nos 83, 164, 165

Two or three people who were off camera were heard chatting very loudly about personal matters not associated with the sampling. Their talking and laughing made it very difficult to hear the interaction between the sampling police officer and the inmate/detainee.

Videoed Interaction Nos 13, 66, 76, 139

Other inmates passed through the testing area, which seemed to be a cafeteria or exercise area. These inmates were escorted by correctional officers. They spoke quite loudly as they passed through the area. This temporarily distracted the inmate whilst the police read him the information sheet.

Videoed Interaction 96

DCS officers and two/three other people stood in the doorway of the ITA watching the DNA sampling for a short time. They were possibly members of an official delegation or visit to the correctional centre.

Discussion Paper

Our discussion paper canvassed the issue of how many people should be present during the taking of a forensic DNA sample from inmates. We received 17 responses on this issue.

The responses from DCS and NSW Police focussed upon issues relating to efficiency and the safety of the officers present. Several inmates, the Australian Association for the Deaf, the Guardianship Tribunal, the NSW Commission for Children and Young People, Justice Action and Legal Aid New South Wales raised the possibility of inmates and detainees being intimidated by large numbers of officers. They were of the view that the number of persons should be kept to the minimum.

One inmate gave his views as follows:

I do not believe it is necessary for that many police officers or a DCS officer to be present. The video camera was already positioned and was operated by remote control by one officer. One police officer did all the talking and paperwork. Another pulled my hair out. The fourth played no role whatsoever (other than to offer 'legal advice').

The DCS officer stood behind me to one side, in the doorway – he did not formally confirm my identity (the police checked my ID card). The police positioned themselves in front of me. I was seated with my back into the corner of the room. Essentially I was surrounded with my back to the wall. No doubt this was done deliberately to apply maximum intimidation.

....

The number of people present should depend on the compliance status of the inmate. For consensual or 'non-consensual, but compliant' inmates there should be no more than 2 police officers present in the room itself. If the procedure is to be video taped then there should be no DCS staff present in the room.⁴⁵⁵

The Legal Aid Commission of NSW responded:

The Commission is of the view that the number of people present when taking a forensic DNA sample, especially from a juvenile, should be kept to a minimum. A maximum of two persons, in addition to the inmate and an interview friend or legal representative, would be reasonable. A large number of people present is intimidating, especially to a young person.⁴⁵⁶

Interviews with serious indictable offenders

During our interviews with almost 200 inmates and detainees who had been sampled, we asked them how many other people were in the room when they were sampled. Five interviewees could not remember or did not know. Of those interviewees that could remember, almost two thirds (115 out of 179) told us that there had been four people (usually three police and one CCLO) with them in the ITA. According to the responses to this question, the number of people present in the ITA (apart from the interviewee) ranged from one to eight.

Focus Groups with ITTs

The ITTs raised concerns that some of the correctional centres were old and did not have adequate facilities for DNA sampling. They complained that some of the ITAs were too small:

That tiny little room they give us at [name of centre]! You can't even fit the liaison officer in there let alone three people testing.

Visits to NSW correctional centres

As part of our role in relation to DCS under the Ombudsman Act, we regularly visit NSW correctional centres to take complaints from inmates. During one visit a correctional officer informed us that they had experienced difficulties because of the lack of privacy afforded by the ITA.⁴⁵⁷ The correctional officer told us that on one occasion inmates waiting to be sampled outside the ITA heard what was being said inside. These inmates discovered that the person being sampled had been convicted of a sex offence. As a result of this, the inmate concerned was transferred to protective custody for her/his safety.

Discussion

Section 44(a) of the Act requires that a forensic procedure be carried out in circumstances that afford reasonable privacy to the person. Our video audit revealed that in some cases this obligation was not being met. Reasonable privacy would not seem to be afforded in circumstances in which people with no direct role in the forensic procedure can see or hear what is being done. As noted above, breaches of this requirement can have very serious consequences for inmates and detainees.

DCS have stated that unless additional resources are provided they are not presently in a situation where they can guarantee access to other areas or spaces. Police have noted that the ITAs currently used are the most suitable locations made available by DCS.

455 Confidential. NSW inmate's response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 20 February 2002.

456 Legal Aid Commission of NSW, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 1 March 2002.

457 Confidential.

The most appropriate way to address this is prior to a visit by the ITT, NSW Police consult with Correctional Centre Managers to ensure access to an appropriate space that complies adequately with the requirements of s 44. In our view, testing should not occur unless an appropriate level of privacy is guaranteed.

Recommendation 34

It is recommended that NSW Police amend its SOPs to require Inmate Testing Team (ITT) Leaders ensure that Inmate Testing Areas (ITA) satisfy the requirements of section 44 of the Act.

We suggest that at the beginning or end of a series of interactions between the ITT and serious indictable offenders, the ITT 'pan and scan' the whole ITA with the video camera to enable viewers to gain a perspective of the ITA, and the privacy it affords. This, coupled with both audio and video recording, and our other recommendations, should provide adequate protection (in the form of objective evidence) in the event of any disagreement between the serious indictable offender and the ITT over the events that occurred.

Recommendation 35

It is recommended that NSW Police amend its SOPs to require, where practicable, ITTs to video record the entire ITA before or after a series of forensic procedures under Part 7 of the Act to provide viewers with a perspective of the ITA used.

Section 56 requires that the number of police officers present should not exceed that which is reasonably necessary to ensure that the procedure is carried out effectively and in accordance with the Act.

Our video audit found that there were often people present who were neither introduced nor visible on camera. Due to the difficulties caused by the limited video coverage, our auditor could not assess the necessity, or otherwise, of the presence of these people.

We note that upon commencement the *Law Enforcement (Powers and Responsibilities) Act 2002* will require police in certain circumstances to provide a person who is subject to certain powers with their name and her/his place of duty.

We agree with NSW Police⁴⁵⁸ that it is not desirable to prescribe the maximum number of people who can be present during the DNA sampling. Different circumstances require different responses. However, in order for NSW Police to be able to demonstrate that they have satisfied their obligations under s 44(b), to reflect the similar responsibilities required by the *Law Enforcement (Powers and Responsibilities) Act*. Indeed, as a common courtesy, it would be prudent for police to identify the people present to the person who is being sampled and to make use of the video facility to document their adherence to these requirements of the Act.

Recommendation 36

It is recommended that NSW Police amend its SOPs to require, where practicable, that police conducting the DNA sampling provide the name and place of duty, and explain the role of all persons present to the person who is the subject of the procedure. This should be done at the beginning of the interaction and be electronically recorded.

⁴⁵⁸ NSW Police, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 15 March 2002.

Advice received from NSW Police has stated that this is already the current practice and has been in place since testing first commenced in January 2001.⁴⁵⁹ However, as this recommendation arises from our video audit there is some concern regarding the level of compliance in the actual video recordings. By including this recommendation we hope to ensure that this practice is video recorded in all instances.

⁴⁵⁹ Correspondence from NSW Police, 19 April 2004.

Chapter 17: Taking different types of DNA samples

What the Act says

Types of samples

Sections 61, 62, 63 and 64 of the Act state the types of forensic procedures that can be carried out on serious indictable offenders. Serious indictable offenders can only have the following types of samples taken:

- hand print, finger print, foot print or toe print
- buccal swab
- hair (other than pubic hair)
- blood.

Who can take the samples

Section 50 of the Act specifies which persons can carry out a forensic procedure. The type of person who can carry out a forensic procedure on a serious indictable offender depends upon the type of sample being taken. Those people are set out in the table below.

Table 17.1: Who can carry out forensic procedures on serious indictable offenders?

Type of sample	Person who can carry out the forensic procedure
hand, finger, foot or toe print	appropriately qualified police officer appropriately qualified person
buccal swab	medical practitioner dentist dental technician nurse appropriately qualified police officer appropriately qualified person NB: A buccal swab may also be self-administered.
hair sample (not pubic hair)	medical practitioner nurse appropriately qualified police officer appropriately qualified person
blood sample	medical practitioner nurse appropriately qualified police officer appropriately qualified person

Based on information in s 50(4) of the Act.

Clause 6 of the Regulation defines an ‘appropriately qualified’ person:

Clause 6 Appropriately qualified persons

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.

Who may be present

If a sample of blood is to be taken, the serious indictable offender⁴⁶⁰ can request that a medical practitioner of her/his choice is present during the sampling. Section 53(2) requires that if the serious indictable offender (or their interview friend or legal practitioner)⁴⁶¹ makes this request:

The expert chosen is to be present at the forensic procedure unless he or she:

(a) is unable, or does not wish, to attend, or

(b) cannot be contacted,

within a reasonable time or, if relevant, within the time in which the person responsible for the effective carrying out of the forensic procedure considers the forensic procedure should be carried out if it is to be effective in affording evidence of the relevant offence.

NSW Police advise that this section is not applicable, however nothing in the Act appears to qualify the rights of serious indictable offenders under s 53(1) to seek the attendance of an expert of their choice.

Section 69(1)(f) provides, if the forensic procedure is to be the taking of a blood sample, that the serious indictable offender may request that the correctional centre medical officer be present while the blood is taken. If the sample to be taken is a buccal swab, hair sample or prints, the offender cannot request the presence of a medical practitioner.⁴⁶²

Hair roots – only as much as is necessary

Section 49 of the Act states that a sample of hair (which includes removing the root of the hair) can only be taken if:

(a) the person takes only so much hair as the person believes is necessary for analysis of the sample, or other examination of the hair, to be carried out for the purpose of investigating:

(i) a prescribed offence, or

(ii) another prescribed offence arising out of the same circumstances as that offence, or

(iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and

(b) strands of hair are taken using the least painful technique known and available to the person.

460 Or their legal practitioner or interview friend – see s 99 of the Act.

461 See s 99.

462 See s 53(1).

Sharing samples

Sections 58 and 60 of the Act require police to share samples taken if there is sufficient sample material to be analysed by both parties.

58. Samples---sufficient material to share

- (1) *This section applies to a sample taken from a suspect under this Act if there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect.*
- (2) *The investigating police officer concerned must ensure that:*
 - (a) *a part of the material sufficient for analysis is made available to the suspect as soon as practicable after the procedure has been carried out, and*
 - (b) *reasonable care is taken to ensure that the suspect's part of the material is protected and preserved until the suspect receives it, and*
 - (c) *reasonable assistance is given to the suspect to ensure that the material is protected and preserved until it can be analysed.*

(Note. Part 13 contains provisions about making material available to the suspect.)

This section reflects a similar provision in the Model Bill.

Section 60 of the Act provides that:

If material from a sample taken from a suspect is analysed in the investigation of an offence, the investigating police officer must ensure that a copy of the results of the analysis is made available to the suspect.

Implementation by NSW Police

NSW Police interpret ss 58 and 60 to mean that they are not required to share samples or analysis reports with serious indictable offenders. As both ss 58 and 60 refer to samples being taken in relation to 'the investigation of an offence' and action being taken by an 'investigating police officer' NSW Police feels that samples collected from serious indictable offenders are exempt from these provisions. The samples taken from serious indictable offenders are not being collected for the purposes of the investigation of a specific offence, instead they are being collected to be placed on the database for comparison against all available crime scene evidence. On this basis, police do not share samples with serious indictable offenders or provide copies of analysis reports unless the sample is being collected as a suspect sample under Part 6 of the Act where the serious indictable offender is being investigated in relation to a specific offence.

NSW Police are not taking prints under Part 7 of the Act for two reasons.

First, the objective of the forensic sampling of serious indictable offenders is to obtain DNA profiles to add to the DNA database. These profiles will be compared to profiles obtained from material found at crime scenes to assist the investigation of offences. DNA profiles cannot easily be obtained from hand, finger, foot or toe prints.⁴⁶³

Second, the comparison of finger and palm prints is an established method of linking people to crime scenes. All serious indictable offenders have had their finger and palm prints taken before starting their sentence of imprisonment.

⁴⁶³ Scientists are currently exploring the possibility of obtaining 'trace' DNA from touched objects. See van Oorschot and Katrin Both, 'The Applications and Limitations of DNA Technology', paper presented at *DNA Evidence: Prosecuting Under the Microscope* - International Conference, South Australia, September 2001.

Accreditation of police officers

NSW Police designed a special education package for the ITTs, which included practical training in taking different DNA samples.

NSW Police's preferred method of taking a DNA sample is by a self administered buccal (or mouth) swab.⁴⁶⁴

The NSW Police SOPs state that a sample of hair will be taken if the inmate/detainee does not consent to the forensic procedure. NSW Police has informed us that samples of blood are taken only as a last resort, such as when the inmate does not consent, and has 'shaved down' in order to avoid a hair sample being taken.

Buccal (or mouth) swabs

In some jurisdictions, the police administer the buccal swab for the person being sampled. NSW Police do not. A buccal swab in NSW involves the inmate/detainee gently scraping the inside of her/his cheek using a foam-tipped plastic swab.



From: NSW Police Buccal (Mouth) Sampling Kit – A Step by Step Guide⁴⁶⁵

The foam swab is then pressed onto special paper (FTA® paper)⁴⁶⁶ so that the saliva and cheek cells are transferred onto the paper. It is the DNA on the paper that will be analysed by the laboratory. The paper is sealed in an envelope and placed in a tamper-evident bag.⁴⁶⁷

Police then put the foam swab back in its packaging and place it in the tamper-evident bag with the relevant documentation. If the serious indictable offender requests a share of the sample, police will seal the foam swab in its packaging with a barcode and give it to the inmate/detainee.

Hair samples

During the public consultations for the preparation of the Model Bill, it became clear that in order to conduct 'proper forensic analysis', it is necessary for a hair sample to contain the roots of the hair. This is because it is the roots of the hair that contain the type of DNA that is analysed for the DNA database.⁴⁶⁸ NSW Police officers are trained to avoid grey hairs or hair from balding areas, the roots of which may contain less DNA. 'Healthy' arm hair is preferable to balding or grey head hair. Police in NSW have been taught that grey hair should only be taken if that is all that is available.⁴⁶⁹

464 NSW Police Service, Mandatory Continuing Police Education M020 – *Crimes (Forensic Procedures) Act 2000*, January 2001.

465 Reproduced with permission from NSW Police.

466 FTA stands for 'Flinders Technology Associates'. FTA Technology is a chemical treatment that was designed by scientists at Flinders University in South Australia. FTA cards are treated with chemicals that assist in stabilising the DNA for analysis and protecting it from harmful bacterial and viruses. This allows the DNA to be stored at room temperature, instead of being refrigerated. DNA stored on FTA paper reportedly lasts for more than 11 years. FTA was patented and is owned by the international company, Whatman.

467 The tamper-evidence bags used by NSW Police are discussed in the next chapter.

468 See Background, and Model Criminal Code Officers Committee, Final Draft – Model Forensic Procedures Bill and the Proposed National DNA Database, February 2000, p9.

469 NSW Police, Scene of Crime Officer training, December 2000.

The Memorandum of Understanding between NSW Police and the DNA laboratory, DAL states that:

Person Samples taken using the designated Hair Sampling kits must contain at least six (6) plucked hairs. Kits which contain less than six plucked hairs, or contain cut hairs, will be rejected as 'insufficient sample'.

Hair samples in NSW are taken using the 'lever arch' method. This involves the police officer grasping a few hairs between her/his thumb and forefinger, and pulling the hairs out in a 'rolling' motion. NSW Police described the lever arch method in their evidence to the Standing Committee as follows:

Ms WILSON-WILDE (NSW Police):

...We teach them a way to take hair samples in the least painful manner possible. I have had a bit of experience in taking hair from people, and I found that if you pluck the hair, yank it out or if you are very rough it is very painful. But we have a method termed the 'lever arch method' where you lever the hair out, and it puts an even pressure on the hair you are pulling it is painless or not very painful. It is a reduced amount of pain by using that method. They all use that method.

CHAIR: *Is it just one strand of hair that is removed?*

Ms WILSON-WILDE (NSW Police): *It is virtually impossible to remove one strand of hair at a time because they stick together. You remove a few each time, either 15 or 20 in total. Because the hair is in different growing phases, you need the plucked hair. Even if you use the lever arch method and pluck it out, some of that hair may be dying and about to fall out, so you need to take a few hairs.*

CHAIR: *When you say 'a few', you say up to 15 to 20 times?*

Ms WILSON-WILDE (NSW Police): *Up to 15 to 20 hairs. You need to take a few hairs to ensure that you are going to get a profile because the last thing you want to do is go back and get more hair or do the whole thing again. We probably take more than we need, but enough to ensure a result. The police are not trained to identify the right growing phase. The way we get around that is to take a good 15 hairs and you are right.⁴⁷⁰*



From: NSW Police Hair Sampling Kit – A Step by Step Guide

If the inmate/detainee requests a sample for her or himself, the ITT either give them some of the hairs to the inmate/detainee or take another sample for them to keep. Fresh gloves are used for each sample taken.

⁴⁷⁰ Evidence provided to Standing Committee, 31 July 2001.

Blood samples

Only police officers who have achieved Red Cross accreditation can take blood samples.⁴⁷¹

Blood samples involve taking a few drops of blood. The inmate/detainee’s finger is pricked using a fingerprick device, similar to that used for obtaining a blood sample to monitor diabetes. The person’s finger is then placed on the FTA paper, which soaks up the blood from the pierced skin. The NSW Police SOPs state that the ITT should collect two circles of blood ‘about the size of a five-cent coin’ in this manner.

The fingerprick device is sealed in the tamper-evident bag with the sample and sent to the laboratory.

Simulation of blood sampling method used by NSW Police (based on standard operating procedures)



Fingerprick device used by NSW Police

How we monitored the taking of different types of samples

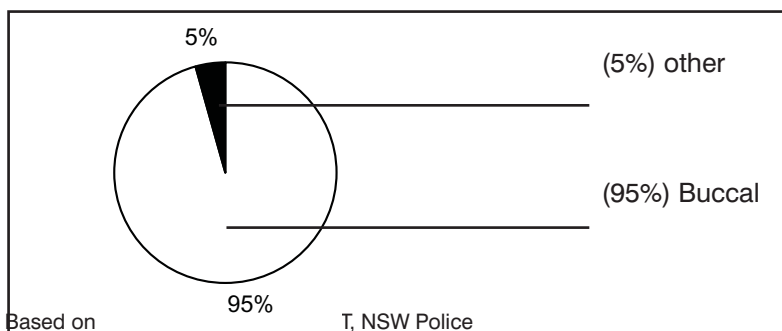
Participation in police training

Ombudsman’s officers attended the NSW Police training for the ITTs.⁴⁷² We also participated in the accreditation training of police and learned how to take buccal swabs⁴⁷³, hair samples⁴⁷⁴ and blood samples.⁴⁷⁵

This gave us valuable insights into the practicalities of carrying out forensic procedures.

Analysis of statistics

We obtained regular statistics from NSW Police about the different types of samples taken from serious indictable offenders. The chart and table below summarise that information.



471 NSW Police SOPs.

472 NSW Police, Operational Support Group – Inmate Testing Teams Training, December 2000.

473 NSW Police, Mandatory Continuing Police Education: Forensic Procedures, January 2001.

474 NSW Police, Scene of Crime Officer training, December 2000.

475 Centre of Forensic Sciences, Ontario, Canada, DNA Warrant Sample Collection Training, March 2001.

Table 17.2: Types of DNA samples taken from serious indictable offenders 1 January 2001 – 5 July 2002

Category of inmate/ detainee	Buccal	Hair	Hair (by force)	Blood	Blood (by force)	Total
Adult capable (in correctional centre)	9,467	457	4	6	1	9,935
Adult capable (in periodic detention)	398	4	-	-	-	402
Adult 'incapable'	15	2	-	-	-	17
Under 18 years (in juvenile justice centres)	6	-	-	-	-	6
Over 18 years (in juvenile justice centres)	43	-	-	-	-	43
Total	9,929	463	4	6	1	10,403

Based on statistics provided by FPIT, NSW Police

Discussion Paper

Early in our review period, the community-based organisation, Justice Action, raised concerns with us about the method used by police to carry out hair sampling. Justice Action alleged that this method of taking hair was more painful than that used in other jurisdictions. The organisation cited UK policies which specify that the hair must be taken one strand at a time and that the serious indictable offender or suspect should be allowed to specify from which part of the body the hair is to be collected.⁴⁷⁶

The President of the NSW Council for Civil Liberties indicated his concerns in his evidence to the Standing Committee. In reference to the unavailability of buccal swabs where consent is withheld, he said:

*The way the Act is operating at the moment, if you do consent you get a lesser treatment in terms of the DNA extraction. If you do not consent you have a harsher procedure.*⁴⁷⁷

In our discussion paper we asked if the current method of taking a hair sample was appropriate. We received 14 responses on this issue.

The NSW Commission for Children and Young People objected to the current method on the basis that it would breach Australia's obligations under the Convention on the Rights of the Child. The Commission stated:

*The Convention on the Rights of the Child states that no child deprived of his or her liberty shall be subjected to degrading treatment (article 37(c)). It is considered that pulling out a child or young person's hair from the root in the manner described above is subjecting them to a degrading treatment particularly if this was without the child or young person's practical consent.*⁴⁷⁸

The NSW Public Defenders Office and the NSW Bar Association asserted that the current method was not consistent with the Act.

Section 49(b) of the Act requires that hair be taken by the 'least painful technique known'. It would appear that police are taking hair samples by the lever arch method. This is not the least painful technique known. In England the single hair removal technique is used and is reportedly less painful. It is also the method recommended by the MCCOC.

*The police are not complying with the Act. They must.*⁴⁷⁹

⁴⁷⁶ Note 5D of the UK Codes of Practice (Revised Edition) of the *Police and Criminal Evidence Act 1984*.

⁴⁷⁷ Mr Cameron Murphy, evidence given to the NSW Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 7 August 2001.

⁴⁷⁸ NSW Commission for Children and Young People, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 26 March 2002.

⁴⁷⁹ NSW Public Defenders, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 12 March 2002, NSW Bar Association, Response to the NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 21 March 2002.

Justice Action responded by reiterating its concerns about the method.

Justice Action ... notes that the number of hairs collected by NSW police (15-20) is more than twice the number usually considered adequate for reliable PCR DNA testing, even though NSW prisoners are told that there is insufficient forensic material collected to allow the 'sharing' of the sample with the subject as provided for in the Act.

[A representative] of the Division of Analytical Laboratories has stated under oath (in R v Rees) that he can obtain reliable results from degraded crime scene samples containing as little as 0.3 nanograms of DNA ... So typing the DNA from a single hair root taken under clinical conditions should be a piece of cake for him.

....

Anyone who is in doubt as to whether the NSW police method of collecting hair samples is more painful than removing hair one strand at a time should perform the obvious experiment upon themselves.⁴⁸⁰

One NSW inmate suggested:

Inmates should be allowed to specify from which part of the body the hair is to be collected as per the UK method. To minimise pain perhaps a numbing spray can be used.⁴⁸¹

The responses from NSW Police and DCS officers pointed out that inmates and detainees had themselves expressed little, if any, concern about the method of hair sampling.

NSW Police responded:

As stated on previous occasions, NSW Police remains committed to the view that the lever arch method is considered to be the least painful method available. Furthermore, there has been minimal complaint by suspects and inmates concerning the use of this method. The current procedure requires the removal of fifteen to twenty hairs (with root) to ensure that there is sufficient DNA for analysis. The 'lever arch method' is both quick and relatively painless.⁴⁸²

DCS told us:

In 2001 approximately 5% of all DNA samples collected from inmates were collected by means of a hair sample. The method of taking hair has not been an issue of concern to inmates.⁴⁸³

Interviews with serious indictable offenders

We asked the interviewees who had consented to the DNA sampling why they had consented. Less than three per cent (5 out of 181) of interviewees who consented gave reasons that indicated they were reluctant to have a hair sample taken.

One interviewee said that he would have preferred to have the hair taken from his arm. He told us:

He goes, if I don't sign it, he has to take hair.

I said: 'Take it from my arm.'

He said 'No. From [your] head.'

Why didn't he take it from my arm?⁴⁸⁴

Video audit

During our audit we observed the ITT carrying out 200 buccal swabs and 35 hair samples. We also examined all seven of the forensic procedures involving a blood sample.

480 Justice Action, Response to the NSW Ombudsman's Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders, 15 March 2002.

481 Confidential Response to the NSW Ombudsman's Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders.

482 NSW Police, Response to the NSW Ombudsman's Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders, 15 March 2002.

483 NSW Department of Corrective Services, Response to the NSW Ombudsman's Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders, 25 March 2002.

484 Interviewee No 231.

Buccal swabs

All buccal swabs were administered by the inmates and detainees themselves, under the guidance of an ITT officer. Buccal swabs involve the inmate taking a foam-tipped plastic swab from a packet that is opened in front of him, putting it on the inside of her/his cheek and moving it in a 'tooth brushing' motion in order to soak up the saliva and cheek cells.

Generally, inmates/detainees appeared to understand the ITT's instructions without any difficulty. We only observed two interactions where the inmate/detainee did not seem to understand instructions for use of the buccal swab and placed it on the outside of her/his cheek or touched the foam tip of the swab with her/his fingers.

We observed two cases where the inmate/detainee appeared to push the buccal swab too far into her/his mouth and start to gag or choke.⁴⁸⁵ In these cases the ITT offered to carry out a hair sample instead. One of the inmate/detainees agreed to a hair sample and the other eventually succeeded in completing the buccal swab.

Hair samples

We found that by observing the videos it was impossible to ascertain how many hairs were taken during these procedures. Instead we noted the number of times the ITT pulled hair and any reaction by the inmate/detainee to the hair sampling.

The hair samples our auditor observed usually involved police pulling hair one to three times. This appeared to be because the first pull either did not include the roots or did not include enough hair. In some cases the inmates/detainees asked why more than one sample of hair was being taken.

Videoed Interaction No 48

The ITT officer pulled hair from the inmate/detainee's head once. The officer then indicated that he needed to take more hair.

The inmate/detainee refused, arguing, '*How many do you need to take? You took once.*'

The DCS officer who was there told the inmate/detainee to comply by giving him a direct order to sit down.

The ITT officer explained that sometimes the first pull of hair does not contain enough hair roots. The officer also explained that they could not pull out large chunks of hair, because this might hurt.

The inmate/detainee seemed to be satisfied with this explanation and allowed the ITT to pull more hair.

Videoed Interaction No 17

In this case the inmate/detainee had very short hair. The ITT officer attempted to pull head hair 10 times. Only three of these attempts appeared to be successful. The officer then pulled hair once from the inmate/detainee's arm, and once from her/his leg.

Our auditor observed one procedure where the ITT appeared to take an unnecessarily large number of hairs. In this case the inmate/detainee objected, saying that they had taken 50-60 hairs and not 10-15.⁴⁸⁶ In another three cases our auditor observed the ITT 'yanking' or 'jerking' the hair, rather than applying the 'lever arch' method.⁴⁸⁷ Our auditor noted that the hair sampling in these four cases looked painful for the inmate/detainee.

⁴⁸⁵ Videoed Interaction Nos 150 and 271.

⁴⁸⁶ Videoed Interaction No 197.

⁴⁸⁷ Videoed Interaction Nos 156, 232 and 244.

In the majority of cases inmates/detainees had no apparent verbal or physical reaction to the procedure. Most of the ITT members explained the procedure clearly before and during the sampling.

Videoed Interaction No 232

Hair was pulled from the inmate/detainee's head. The ITT officer conducted the procedure very well. She explained every part of the procedure as she carried it out, and warned the inmate/detainee before she pulled the hair.

ITT officer: *'The hair I've got hold of now, that is what I'm pulling. One, two three, I am pulling it now, ok?'*

And so on.

Blood samples

According to NSW Police and DAL records, there were only seven forensic procedures carried out between 1 January 2001 and 5 July 2002 that involved a sample of blood. We examined the videos of all seven of these samples. The sample was taken from the inmate/detainee's index finger after piercing the skin with a small fingerprick device.

Videoed Interaction No 199

The inmate/detainee was already seated when the recording began. S/he had 'shaved down', to avoid a hair sample being taken. However, s/he did not resist and was not restrained during the procedure. The ITT officer stated that the procedure was authorised by a court order and that the inmate was present in the local court when order was made. The inmate/detainee was offered the opportunity to have a medical practitioner present. The ITT took the sample from the inmate/detainee's finger and put a 'band aid' on the broken skin at the end of the procedure.

Videoed Interaction No 224

The inmate/detainee asked the ITT to release her/him from the handcuffs whilst the sample was being taken, but this request was refused.

Inmate/detainee: *Are you authorised to take blood?*

ITT: *Yes.*

Inmate/detainee: *Can I request to have my own doctor here?*

ITT (laughing): *No.*

Unfortunately, it was not possible to ascertain from the video recording whether the correctional centre medical officer was present during this serious indictable offender's sampling, as not every person present was introduced on camera.

We asked NSW Police to comment on this interaction. The Manager of the NSW Police FPIT replied:

I have viewed the video and [name of inmate] was in a relatively good mood (despite the fact that he was being restrained) and was joking with the members of the Inmate Testing Team. I think that his request to have his own doctor present was made 'tongue in cheek' and it was taken that way by [name of ITT member]... As [name of ITT officer] indicated during the forensic procedure, he has been appropriately accredited (by the Red Cross) in relation to the taking of blood.⁴⁸⁸

⁴⁸⁸ Written correspondence from the NSW Police FPIT.

The Manager, FPIT also confirmed that the correctional centre medical officer was in fact present for the collection of this sample (as was the Magistrate, Centre Governor and Deputy Governor) and that this information is recorded in the COPS forensic procedure incident.

As discussed earlier, the ITT take blood samples as a last resort. Four of the inmates/detainees were restrained during the procedure and police used force to take one of these samples.

We will discuss the use of restraints and force later in this report.

Audit of records held by the DAL

As noted earlier, the Memorandum of Understanding between NSW Police and DAL states that if a hair sample does not contain a minimum of six hairs, the sample will be considered to be 'insufficient' and will be rejected.⁴⁸⁹

We conducted an audit of the records held by the DAL to identify if the samples taken from serious indictable offenders by the ITT had contained enough DNA for analysis. The results are set out in the table below.

Table 17.3: Number of samples taken from serious indictable offenders that contained insufficient DNA for analysis (1 January 2001 to 5 July 2002)⁴⁹⁰

Type of sample	Number of samples containing insufficient DNA	Percentage of samples containing insufficient DNA
Buccal	15	<0.2%
Hair	2	<0.5%
Blood	0	-

The DAL records show that less than 0.5% (2 out of 465) of hair samples taken from serious indictable offenders during our review period had contained insufficient DNA for analysis.⁴⁹¹ Less than 0.2% (15 out of 9,936) of buccal swabs contained insufficient DNA for analysis.

Comparison with laws and methods in other jurisdictions

We contacted police agencies in all other Australian jurisdictions to find out how they took samples from serious indictable offenders. All Australian jurisdictions preferred to take DNA samples by buccal swab.⁴⁹²

In Canada, the Royal Canadian Mounted Police (RCMP) National DNA Data Bank prefers blood samples. The reason given for this is that blood has a higher probability of containing sufficient DNA for analysis. This reduces the need for offenders to be sampled a second time. In Canada, blood samples are taken in a similar manner to those in NSW. The RCMP also requires that the offender's fingerprints be submitted with the blood sample. This is to confirm the person's identity and reduce the chance of erroneous matches. In less than one year of the Canadian DNA Data Bank's operation, the RCMP had taken DNA samples from three sets of identical twins.⁴⁹³ The DNA profiles from identical twins are identical, whereas their *fingerprints* will differ.

489 Schedule Four, Deed of Agreement Between the Commissioner of Police and Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database, 22 December 2000.

490 Based on information provided by the DAL, 25 October 2002 and March 2003.

491 Based on information provided by the DAL, 25 October 2002 and March 2003.

492 The only exception is the Australian Federal Police in the ACT, who had not yet started sampling serious indictable offenders and could not answer our questions. However, the Federal Police also conduct the sampling on behalf of the Commonwealth, which prefers buccal swabs.

493 Dr Ron Fourney, Officer in Charge, National DNA Data Bank, Royal Canadian Mounted Police, Ottawa, Ontario, 27 March 2001.

The laws of the Commonwealth, ACT and Tasmania have adopted the Model Bill approach, and require that:

*Each strand of hair is taken individually using the least painful technique known and available to the person.*⁴⁹⁴

A representative of the Australian Federal Police explained their procedure as follows:

*Because the Commonwealth Act requires that hairs be taken one hair at a time (which is extremely difficult), it is preferable that a mouth or blood sample be taken. If the person does not consent to a buccal swab, the police obtain a court order for a mouth, hair or blood sample. If the only sample available is a hair sample, then officers take 20 hairs by the Lever Arch Method one hair at a time.*⁴⁹⁵

Police in Tasmania advised us that their laboratory requires at least four hairs for analysis. The hairs are taken one strand at a time by being held close to the scalp and then pulled.⁴⁹⁶

The legislation in Western Australia does not specify how hair samples should be taken. Western Australian police informed us:

*We use the lever arch method. A survey of sampled officers (during training) identified this as the least painful and preferred method. It is also extremely difficult to try and isolate one hair whilst wearing rubber gloves.*⁴⁹⁷

The *Queensland Police Powers and Responsibilities Act 2000* also does not specify how hair samples should be taken. Queensland Police described their procedure as follows.

*Hair is removed from the head or legs of the Prisoner. 10 hairs is the number desired. The preferred method is to take one hair at a time. This of course depends on the scenario, eg if the prisoner is struggling and there is any chance of someone being injured. In this case a number of hairs would be taken at once.*⁴⁹⁸

Discussion

Types of samples

Buccal swabs appear to be the least intrusive current method of DNA sampling and we agree with NSW Police's approach, which prefers buccal swabs to other sampling methods.

Over 460 serious indictable offenders took advantage of the 'non-consenting, but compliant' policy and gave a hair sample without resistance. It could be the case that if the Act were changed to allow a buccal swab to be taken with the authority of a senior police officer order, 'non-consenting, but compliant' serious indictable offenders would prefer a buccal swab.

Our earlier recommendation that the Act be amended to allow a person to provide a DNA sample by means of a self-administered buccal swab, if it is authorised by a senior police officer order, would address this issue.

Earlier in this report we noted concerns that the types of samples that may be obtained from serious indictable offenders who are incapable or who are children or young people appears to be limited to hair samples and prints. Hair sampling can be more painful than the carrying out of buccal swabs and blood sampling. We recommended that the Act be amended to clarify which forensic procedures may be carried out on serious indictable offenders who are aged 10-17 years or who are considered to be 'incapable' under Part 7 of the Act, so as to make it clear that buccal swabs are included.

494 Section 52 *Crimes (Forensic Procedures) Act 2000* (ACT), s 52 *Crimes (Forensic Procedures) Act 2000* (Cth) and s 37 *Forensic Procedures Act 2000* (Tas).

495 Linzi Wilson-Wilde, Team Leader, Biological Criminalistics, Australian Federal Police, 27 September 2002.

496 Warren Lewis, Project Director, Department of Police and Public Safety, Tasmania Police, 25 October 2002.

497 Inspector Daniel Mulligan, Forensic Division, DNA Implementation, Western Australia Police, 29 August 2002.

498 Assistant Commissioner G A Nolan, Operations Support Group, Queensland Police Service, advice received 11 September 2002.

There may be instances in which serious indictable offenders do not prefer buccal swabs. There is also some evidence to suggest that some people may not wish to provide a buccal swab sample during Ramadan.⁴⁹⁹ The Act should therefore retain some flexibility in its approach to what forensic procedures may be carried out on serious indictable offenders.

NSW Police method of taking samples of hair

Some concerns have been raised with us about the NSW Police method of taking a sample of hair.

During our participation in the accreditation training of police, we had occasion to experience the ‘lever arch’ method of hair sampling, with the officer concerned saying that it was neither painful nor overly uncomfortable. However, pain is a subjective phenomenon. Whilst the ‘lever arch’ method may not be painful to some, it may be painful to others, particularly if carried out by less experienced police officers.

Four of the 35 videoed hair samples examined in our audit ‘looked painful’ to our auditor. NSW Police has informed us that their policy is that hair samples are taken from a person’s head, but that if requested, they can be taken from an arm or a leg. Our research found some evidence that this policy may not be consistently applied. Some inmates/detainees indicated that hair was taken from their head despite requests for it to be taken from their arm.

We asked NSW Police what research it undertook prior to reaching the conclusion that the lever arch method was the least painful method. We have not yet received a complete response to this question. Accordingly, at this time, we do not believe we are able to reach a conclusion one way or the other on the pain caused by the lever arch method used by NSW Police as against other methods.

We also asked if NSW Police would consider using an alternative method of taking hair if the person objected to that method. NSW Police reiterated that an inmate or detainee can request that hair be removed from his/her arm instead.

The hair sampling provision of the Act is unusual in that it is rare for the state or government to authorise (what could be) a painful procedure upon a person without their consent. We suggest that a person should be able to indicate a preference as to the body part from which hair is taken and the method used.

We accept that not all hair is suitable for DNA analysis, and that in some circumstances it may be very difficult for police to take one hair at a time. In these instances, the police may not be able to abide by the serious indictable offender’s wishes. However, we believe it is reasonable for a person to be able to indicate a preference, and for police to carry out the procedure in that way if it is reasonably practicable.

Recommendation 37

It is recommended that the Attorney General consider amending the Act to provide that a person can indicate a preference as to the body part from which the hair is taken, for the purpose of forensic DNA analysis.

Recommendation 38

It is recommended that NSW Police amend the SOPs and the information provided to inmates to provide that a person can indicate a preference as to the body part from which the hair is taken, for the purpose of forensic DNA analysis.

499 Focus Group No 1.

Concerns have been raised that NSW Police are taking more hair than is necessary for forensic DNA analysis. We acknowledge that it may be very difficult to ensure that only as much hair as police believe is necessary for the analysis of the hair root is taken during the taking of a hair sample. We also accept that the amount of hair root necessary may vary according to the method of analysis and technological changes.

Sharing samples

The Model Bill includes provisions similar to those in s 58 of the Act relating to the sharing of samples. The drafters of the Model Bill – the Model Criminal Code Officers Committee – explained their reason for including this requirement as follows:

...the requirement is for all samples. The provision of a spare sample at the same time should improve confidence in the procedure and will allow the person from whom it is taken to have tests done not only on the DNA but other indicators that may be relevant.

Whilst we agree with the Model Criminal Code Officers Committee on this point, NSW Police do not. NSW Police interpret ss 58 and 60 so as to not require them to share samples with serious indictable offenders or provide analysis reports unless the serious indictable offender is being treated as a suspect. At this point we do not recommend any change to police practice in this respect. However, if a request was made for the provision of a spare sample in our view it should be provided; we understand that this has been police practice.

Chapter 18: Using force to obtain DNA samples

This chapter of the report examines the forensic DNA sampling of serious indictable offenders who have indicated (to either a DCS officer or an ITT officer) that they will not comply with the DNA sampling, even if it is authorised by a senior police officer or court order.

What the Act says

Part 6 of the Act sets out general rules for conducting a forensic procedure on a serious indictable offender. As noted earlier, s 65 of the Act states that Part 6 applies to the carrying out of a forensic procedure on a serious indictable offender as if the references to the suspect in Part 6 were references to a serious indictable offender.

Section 47 of the Act states:

- (1) *Subject to subsection (2) and section 48, a person authorised to carry out a forensic procedure on a suspect, or a police officer, may use reasonable force:*
 - (a) *to enable the forensic procedure to be carried out, or*
 - (b) *to prevent loss, destruction or contamination of any sample.*
- (2) *All forensic procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards.*

Section 48 of the Act states that:

Nothing in this Act authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner but the carrying out of a forensic procedure on a suspect in accordance with this Act is not of itself taken to be cruel, inhuman or degrading to the suspect.

Section 52 of the Act permits an authorised person to obtain assistance to carry out the DNA sampling:

- (1) *A person who is authorised to carry out a forensic procedure under the table to section 50 is authorised to ask another person to help him or her to carry out the procedure, and the other person is authorised to give that help.*
- (2) *A person who is asked to help carry out a forensic procedure need not be a person mentioned in the table to section 50.⁵⁰⁰*
- (3) *A person who is asked to help carry out a forensic procedure may use reasonable force to enable the forensic procedure to be carried out.*

Part 7 deals in part with the requirement for a serious indictable offender to permit a forensic procedure to be carried out where ordered by a court.

Section 75 Carrying out of forensic procedure following conviction

- (1) *If a court orders a serious indictable offender who is serving a sentence of imprisonment in a correctional centre or other place of detention to permit a forensic procedure to be carried out, the court may order that a police officer, together with a person who, under Part 6 as applied by section 65, may carry out the forensic procedure, be permitted to attend on the offender in the correctional centre or place of detention to allow the forensic procedure to be carried out.*

⁵⁰⁰ That is, a person who is authorised to carry out the particular forensic procedure.

- (2) *A serious indictable offender ordered under section 74 to permit the carrying out of a forensic procedure must not, without reasonable excuse, refuse or fail to permit the forensic procedure to be carried out.*

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.

Glossary

The procedures that are used in the event that a serious indictable offender refuses to comply involve several terms that have specific meanings to the affected agency in this context. These are:

NSW Police

Use of force

A DNA sample carried out with the use of force is one that involves some physical restraint of the inmate to facilitate the DNA sampling. NSW Police has informed us that its definition of 'use of force' only relates to force used by a member of the ITT. That is, actions taken by correctional staff do not fit within the NSW Police definition of 'use of force'.⁵⁰¹

Department of Corrective Services

Emergency Response Unit

The Emergency Response Unit is a team of correctional officers trained to deal with serious incidents and emergencies at NSW correctional centres, such as riots and violent inmates. Emergency Response Unit officers may be located centrally, regionally or at a local correctional centre. The Emergency Response Unit is sometimes referred to as the 'Security Unit' or the 'Crisis Emergency Team'.

Controlled movement

A controlled movement relates to the way in which inmates are escorted to the ITA by DCS officers. If the serious indictable offender is restrained (for example by handcuffs, a security belt or other means) by DCS officers when arriving at the ITA, NSW Police considers this to be a 'controlled movement'.

Security belt

A security belt is a belt made of leather and/or canvas webbing which has metal loops through which a handcuff chain can be looped. A security belt is used by DCS to restrain an inmate's hands at the waist either in front of, or behind, the inmate's body.

Body search

This term is used by DCS to describe a search of an inmate whilst s/he is clothed. It involves a 'frisk' or 'pat down' search and the removal, and thorough search of, the inmate's shoes, socks, jacket, false teeth (if worn) and the contents of all pockets.⁵⁰²

Strip search

This term is used by DCS to describe a search of both the inmate's clothes and the inmate's naked body (for example, an examination of the person's armpits, soles of the feet etc). The DCS Operations Procedures Manual emphasises that strip searches must be done:

- with due regard to privacy,
- under the supervision of a Senior Correctional Officer, and
- in accordance with the relevant legislation.⁵⁰³

⁵⁰¹ The reason provided for this is that NSW Police ITTs may not be aware of any force used by the Emergency Response Unit or correctional officers before the serious indictable offender is brought to the ITA.

⁵⁰² This is a summary of the instructions provided by the DCS Operations Procedures Manual, 7 July 2003, at 12.9.8.

⁵⁰³ This is a summary of the instructions provided by the DCS Operations Procedures Manual, at 12.9.10.

Implementation by NSW Police

Earlier in this report we discussed the strategies introduced by NSW Police to reduce the number of instances where force is used: that is, the use of cooling off periods and the category of 'non-consenting, but compliant'.⁵⁰⁴

The draft Memorandum between the Commissioner for Corrective Services and the Commissioner for Police (MOU) states that 'only such force as is reasonably necessary will be used to obtain a sample' if the inmate will still not comply at the end of the cooling off period.⁵⁰⁵

The MOU indicates that the ITTs 'will not exercise their authority under s 47 of the Act to use reasonable force to obtain a DNA sample on the first occasion an inmate refuses to comply with the DNA sampler's request to do so'. It states:

Where there is enough time prior to the release of the inmate a cooling off period of up to 10 days will be given to the inmate to consider the issue...⁵⁰⁶

....

The ITT will be responsible for restraining the inmate for the purposes of taking hair root samples or a blood sample.

The ITT will be responsible for containing inmate disruption within the designated inmate testing area.

Correctional officers will provide support and back up services to the ITT where it alone cannot contain the situation.

If it is necessary for the Team Leader to order that hair root samples be taken the order or a copy thereof shall prior to the sample being taken be shown to the inmate and a copy of the record of the order will be provided to the inmate as soon as practicable after the test, and before the inmate is escorted from the testing area.

In the case of non-compliant testing, Correctional Centre Security Unit staff will be responsible for bringing the inmate to the testing area. The need to have the inmate secured in a restraint will be determined by the Correctional Centre Security staff.

If the serious indictable offender will not comply at the end of the cooling off period, however, the NSW Police SOPs state that reasonable force may be used to obtain a DNA sample. The NSW Police SOPs state:

The Crimes (Forensic Procedures) Act 2000 allows Police officers to use reasonable force if necessary to take inmate DNA samples– Part 6, Section 47.

All Inmate DNA Testing Team Officers are adequately trained and are competent in a system of defensive tactics and control techniques that are tactically, medically and legally researched with objectives of effective and humane subject control.

This training is delivered by qualified Instructors from the NSW Police Service Operational Safety Training Unit.

Adult inmates who assert that they will not comply with the DNA test at the end of the "cooling off period" are presented to Police in a restraining belt by Corrective Services Security and Investigations Branch officers.

504 See Chapter 12.

505 Draft Memorandum of Understanding between the Commissioner of Corrective Services and NSW Police, Serious Indictable Offender Testing.

506 In determining the length of the cooling off period several factors are taken into consideration, including the ability for the Police team to revisit the facility again prior to the inmate's release.

Juvenile inmates who assert that they will not comply with the DNA test at the end of the “cooling off period” are presented to Police in hand-cuffs by Department of Juvenile Justice officers.⁵⁰⁷

In practice, once the testing procedure has begun, most inmates presented in a restraining belt or hand-cuffs change their minds and decide to consent and/or comply with the procedure.

- *Reasonable force may only be used as a last resort and in line with recognised and approved techniques;*
- *At all times, individual members of the Inmate Testing Team are responsible and accountable for their actions when using reasonable force;*
- *The Inmate Testing Team will be responsible for restraining the inmate for the purposes of taking a forensic DNA sample;*
- *The forensic DNA sample will be carried out in any manner that is not cruel, inhuman or degrading to the inmate;*
- *Pursuant to the Memorandum of Understanding between the Department of Corrective Services and the NSW Police Service, after bringing the inmate to the testing area, the Corrections Security Unit staff will remain in close proximity to the testing area until after the testing is completed;*
- *The Inmate Testing Team will be responsible for all aspects of inmate management while the inmates are in the testing area, unless additional assistance is required by the Department of Corrective Services when situations of violence cannot be contained by the Testing Team alone.⁵⁰⁸*

When the ITT return to a correctional centre to take a DNA sample from an inmate/detainee who has been given a cooling off period, they usually wear NSW Police OSG uniforms rather than plain clothes, which they wear for standard DNA sampling. These uniforms consist of blue ‘cargo’ style jumpsuits.

NSW Police provided us with the course outline for the ITT training on operational skills and defensive tactics. The stated aim of the course was to:

provide the necessary knowledge and physical skills for Police officers to maintain good order, discipline and harmony within correctional institutions whilst performing DNA Testing Procedures in accordance with the Legislation.⁵⁰⁹

NSW Police carries out a review and a ‘debrief’ of all uses of force. The review considers legal and policy requirements during the use of force. The debrief is to address any concerns that the ITT officers may have had about using force.

NSW Police policy is that the ITT team leader makes the decision whether or not to charge a serious indictable offender under s 75 of the Act with refusing to permit a court ordered forensic procedure to be carried out. The standard operating procedures provide guidance to team leaders making this decision. The procedures state:

As a general guide in deciding to charge an inmate, the Team Leader might consider:

- *the level of violence or resistance displayed by the inmate during the procedure;*
- *whether a sample was successfully taken from the inmate;*
- *the likely impact such a charge may have on the inmate; and*
- *the general circumstances in which the testing was undertaken.*

⁵⁰⁷ This does not reflect the agreement between NSW Police and DJJ that police officers will carry out any force required to facilitate the DNA sampling of detainees in juvenile justice centres. See Chapter 6.

⁵⁰⁸ NSW Police SOPs.

⁵⁰⁹ NSW Police Academy, School of Operational Safety and Tactics, Training day for DNA Testing Teams, 24 November 2000.

Implementation by DCS

The MOU states that it is the responsibility of DCS to deliver non-compliant inmates to the ITA to be sampled by the ITT. The DCS SOPs state that non-compliant inmates are to be managed by the DCS Emergency Response Unit, and that Emergency Response Unit officers must develop a strategy for non-compliant testing which has regard for the safety of all people involved, minimises any disruption to the centre and reduces the visibility of non-compliant tests to the remainder of the inmate population.

The procedure for facilitating the attendance of a non-compliant inmate at the ITA is set out in the DCS SOPs as follows.

The Officer in Charge of the Security Unit must ensure that all of the following actions are recorded on video:

The inmate must be identified by the Governor or CCLO.

Prior to moving to the test area, the inmate is given a final opportunity to comply with the legislation. A proclamation [see below] to comply which includes the fact that force will be used if the inmate fails to comply is read to the inmate by the Governor or the CCLO. The inmate is then given one minute to consider the proclamation.

Once entry to the cell is gained, only sufficient force to control the movements of the inmate will be used. The inmate is to be restrained in a security belt. Inmates who comply with the proclamation must still be restrained in a security belt. Removal of the security belt from a compliant inmate will be at the discretion of the police team leader.

Inmates must be searched before being escorted to the test area by security unit officer.

If chemical agents are used, the inmate will be taken to an area for decontamination and medical assessment. The inmate will then be taken to the test area.

The Officer in Charge of the Security Unit shall decide whether to hand over the inmate to police at the test area or maintain restraint during the forensic procedure.

The inmate is to be moved to a secure area after the test. The inmate's behaviour is to be assessed before consideration is given to returning him/her to normal living unit accommodation.

When force is used the inmate is to be given the opportunity to seek medical attention.

The DCS SOPs include a proclamation that must be read to non-compliant inmates to warn them that if they do not comply, force may be used. A copy of this proclamation is set over the page.

Department of Corrective Services Proclamation to serious indictable offenders who have previously indicated that they will not comply with the DNA sampling

PROCLAMATION

(TO BE READ TO AN INMATE PRIOR TO A FORENSIC PROCEDURE WHERE FORCE MAY BE USED BY CORRECTIVE SERVICES OFFICERS TO MOVE THE INMATE TO AN AREA TO FACILITATE A FORENSIC PROCEDURE. THE READING OF THE PROCLAMATION MUST BE VIDEO/AUDIO RECORDED)

(INMATES FULL [name]) **I AM** (IDENTIFY OFFICER NAME AND RANK READING THE PROCLAMATION)

YOU HAVE BEEN IDENTIFIED AS A SERIOUS INDICTABLE OFFENDER AS DEFINED IN THE CRIMES (FORENSIC PROCEDURES) ACT 2000.

BECAUSE YOU ARE A SERIOUS INDICTABLE OFFENDER YOU ARE BOUND BY THE ACT TO SUPPLY A BODY SAMPLE TO POLICE.

YOU HAVE PREVIOUSLY INDICATED THAT YOU WILL NOT CONSENT TO THE TAKING OF A BODY (D.N.A) SAMPLE BY POLICE.

IS THAT CORRECT?

DO YOU STILL REFUSE TO COMPLY?

I AM NOW OBLIGED TO INFORM YOU THAT IN ACCORDANCE WITH THE CRIMES (FORENSIC PROCEDURES) ACT 2000 FORCE MAY BE USED TO OBTAIN A BODY SAMPLE FROM A SERIOUS INDICTABLE OFFENDER. DO YOU UNDERSTAND?

I WILL NOW GIVE YOU ONE MINUTE TO CONSIDER THE SITUATION. AFTER ONE MINUTE IF YOU DO NOT COMPLY WITH MY DIRECTION FORCE WILL BE USED TO REMOVE YOU FROM THIS CELL AND TAKE YOU TO THE POLICE TESTING AREA.

(AFTER ONE MINUTE) THE MINUTE IS NOW UP. I AM ORDERING YOU TO COMPLY WITH MY DIRECTION TO MOVE TO THE POLICE TESTING AREA AND TO PROVIDE A SAMPLE AS REQUIRED BY THE POLICE. WILL YOU COMPLY WITH THIS DIRECTION.

(IF YES, INFORM THE INMATE THAT THE CELL WILL BE OPENED AND THAT HE WILL BE PLACED IN A SECURITY BELT AND MOVED TO THE TEST AREA. INFORM THE INMATE THAT THE SECURITY BELT MAY BE REMOVED BUT ONLY AT THE DISCRETION OF THE POLICE TEAM LEADER).

(IF NO). I AM NOW DIRECTING SECURITY UNIT OFFICERS TO ENTER THE CELL AND TO RESTRAIN AND MOVE YOU TO THE TEST AREA. DO YOU UNDERSTAND? (GIVE DIRECTION TO SECURITY UNIT)

The DCS SOPs require the officer in charge of the Emergency Response Unit to ensure that all actions associated with the movement of inmates to the ITA are video taped. DCS requires that these videotapes be dealt with as evidence (eg sealed, catalogued and secured) and that copies of the videos be forwarded to the Commander, Security and Investigations.⁵¹⁰

Chapter 13 of the DCS Operations Procedures Manual sets out the procedures to be used when incidents at correctional centres are recorded. This procedure requires:

Whenever an incident occurs in a correctional centre, court or PDC,⁵¹¹ which may involve an investigation (no matter how minor it may appear), the original video tape/s of the incident are to be retained as they may be required for evidence.

The original video tape/s of an incident will be catalogued and maintained in a central, secure location by the Director, Security and Investigations, who will also be responsible for the provision of the tapes to the Police or any other investigative body, should they be required as part of an investigation.

In correctional centres with facilities to copy tapes, a copy of the tape is also to be forwarded to the Director, Security and Investigations with the original tape, and a further copy is to be retained at the centre.

The Operations Procedures Manual requires that the officer operating the recording device will:

- advise the Deputy Governor or most senior custodial officer in charge that he/she has removed a VHS or DAT tape from the recording device;
- seal the tape in an envelope;
- complete the Serious Incident Video Recording Record and the Video Recording Evidence Movement Sheet, ensuring that he/she and the officer witness signs the Sheet adjacent to the place where their names are recorded;
- attach the Serious Incident Video Recording Record and the Video Recording Evidence Movement Sheet to the envelope containing the tape;
- deliver the tape to the Deputy Governor or the most senior custodial officer in charge.

....

NB. the tape is to be delivered by hand and the Video Recording Evidence Movement Sheet is to be completed and witnessed each time the evidence is moved.

The DCS SOPs state that inmates who breach correctional centre discipline rules during the sampling are to be charged with a correctional centre offence⁵¹² unless the incident results in the laying of criminal charges by police. We asked DCS to provide us with details about any charges resulting from the DNA sampling of serious indictable offenders, but were informed that this information had not been collated and was therefore unavailable.

Implementation by DJJ

DJJ provided us with the following advice about their policies relating to the forcible DNA sampling of detainees:

The Department of Juvenile Justice determined that if force were necessary to facilitate the taking of a DNA sample from a young person, that police would undertake the use of force. This includes force necessary to move a person to the testing area.

⁵¹⁰ DCS Operational Procedures Manual also requires serious incidents and uses of force to be video taped, see Chapters 12 and 13, Operations Procedures Manual, 7 July 2003.

⁵¹¹ Periodic detention centre.

⁵¹² A correctional centre offence is defined by the Crimes (Administration of Sentences) Regulation 2001 as a contravention by an inmate (whether by act or omission) of a provision of that regulation (specified in Part 1 or Part 2 of Schedule 2 of the Regulation. Correctional centre offences include 'throw article', 'resist or impede search' and 'assault'.

However, as agreed with the police, before force is applied the young person will be given a seven day 'cooling off' period. This will allow both DJJ (and Police if applicable) to counsel and reassure the young person regarding the procedure. If after the cooling off period the young person continues to be non compliant they would then be informed that force would be used to obtain a forensic sample.

These arrangements have been made in full consultation with the Police Service.⁵¹³

We have noted earlier in this report that the NSW Police SOPs do not currently reflect this agreement.

Implementation by the Home Detainees Program

The Agreement between the NSW Home Detainees Program, Probation & Parole and NSW Police for the DNA Testing of home detainees provides that if home detainees fail twice to comply with a direction to attend the DNA sampling, their home detention order may be revoked.⁵¹⁴ The Agreement also states that the ITT will be responsible for all aspects of inmate management while the inmates are in the testing area, unless additional assistance is required when situations of violence 'cannot be contained by the Testing Team alone'. However, it does not specify who might provide assistance in such a scenario, nor what training or qualifications these people would have.

How we monitored the use of force to take DNA samples

Analysis of statistics

In our discussion paper we reported that (at the time of publication) NSW Police had advised us that reasonable force had been used in 10 out of 7,636 forensic procedures carried out on serious indictable offenders. Since then, NSW Police has changed the way that it classifies the use of force. NSW Police now distinguishes between the use of force to carry out the DNA sampling and a 'controlled movement' used by the DCS Emergency Response Unit officers to escort the serious indictable offender to the ITA. The result of this change is that the number of samples considered by NSW Police as being taken by police officers with the use of force during our review period decreased to five.

NSW Police's rationale for this change is that DCS may use a controlled movement to deliver the inmate to the ITA, but it may not be necessary for the ITTs to use force or restrain the inmate in order to obtain the sample.

NSW Police informed us that all of the uses of force were carried out in adult correctional centres, and that no serious indictable offenders have been charged with refusing to permit a forensic procedure to be carried out.⁵¹⁵

Discussion Paper

We asked respondents if they were aware of any instances in which the ITT used force to take DNA samples in circumstances that could be considered to be unreasonable.

No one gave us examples of unreasonable force being used by the NSW Police ITT. Justice Action alleged that they had received reports of unreasonable force used by DCS officers for the purposes of DNA sampling. However, Justice Action could not provide us with the details of these incidents as the inmates concerned had asked not to be identified.⁵¹⁶

The Australian Association of the Deaf stated that if force is used, it is essential that deaf inmates' arms and hands are not hindered so that they can communicate in Auslan or sign language.⁵¹⁷

513 Correspondence from David Sherlock, Director General, DJJ, 4 July 2002.

514 Agreement between the NSW Home Detainees Program, Probation & Parole and NSW Police for the DNA Testing of Home Detainees. See Appendix P.

515 Written communication from FPIT, NSW Police, 8 April 2003.

516 Justice Action, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 15 March 2002.

517 Australian Association of the Deaf, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 26 February 2002.

The Department for Women raised concerns about the potential danger of using force upon women, particularly where there is a possibility that they may be pregnant. The Department suggested that procedures should be developed to outline the dangers of using excessive force on pregnant women.⁵¹⁸ We raised these issues with DCS who informed us that its policies relating to force were, at that time, being reviewed.⁵¹⁹

Analysis of complaints received

We received one written complaint by an inmate/detainee alleging that unreasonable force had been used during the DNA sampling. During our investigation of this complaint, we were informed by DCS that the video of the Emergency Response Unit's use of force had been lost. This issue is discussed below. We received numerous telephone inquiries from inmates requesting clarification about the right of NSW Police to use force to obtain DNA samples without a court order. We provided these callers with a brief outline of the Act in this regard and strongly recommended that they obtain legal advice.

Interviews with police agencies from other jurisdictions

We contacted police agencies in all Australian jurisdictions to ask how they dealt with non-compliant inmates and detainees, and how many DNA samples had been obtained from prisoners with the use of force. The results of these interviews are shown in the table below.

Jurisdiction	Action taken when inmates do not consent	Number of samples taken	Number of samples taken with force
NSW	Cooling off period of up to 10 days	10,404 1 Jan 01 – 5 Jul 02	5
Queensland	Cooling off period to allow offender to obtain legal advice	4,699 1 Jul 00 – Sep 02	1
Victoria	Cooling off period of 48 hours	3,500 approx Feb 00 – 30 Jun 02	14
Western Australia	Up to 3 cooling off periods	1,719 1 Jul 02 – 23 Aug 02	1
Northern Territory	No similar program at date of interview. Persons sampled at point of arrest or charge. No consent required.	750 Feb 99 – Aug 00	0
Commonwealth	Cooling off period	264 20 Jun 01 – 27 Sep 02	0

Source: NSW Ombudsman's Office interviews with police in Australian jurisdictions regarding prisoner DNA sampling, 2002

Focus Group with ITT members

During our focus group with the NSW Police ITTs, the officers discussed the distinction between DNA samples taken with the 'use of force' versus 'controlled movements'. The following is an extract from that debate.

Officer 1: *When we physically have to wrestle with the person – that is a use of force...*

Officer 2: *So when their Emergency Unit's all done up with their riot gear ready to go...*

⁵¹⁸ NSW Department for Women, Response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 14 March 2002.

⁵¹⁹ Meeting with Commander Middlebrook, Security and Investigations Branch, DCS, 9 December 2002.

Officer 1: *That is a controlled movement*

....

Officer 2: *That's a play on words. The guy's in handcuffs. He's brought in by the Security Unit. That's a play on words.*

Officer 1: *That's not a use of force.*

Officer 2: *Well, he wouldn't have walked into the room had it not been.*

[Officer 1 then gave an example of an inmate who was taken to the ITA in handcuffs, escorted by a number of corrective services officers as a result of her/his security classification rather than her/his compliance status. All ITT members agreed that this case was not a use of force.]

Officer 1: *A use of force is when the prisoner has to be restrained by the police officers whilst the hair or the blood is taken.*

[The ITT then discussed a number of instances where correctional or Emergency Response Unit officers held or restrained the inmate/detainee in order for the ITT to take a sample. Officer 1 clarified that this should not occur.]

Officer 1: *There's only been one occasion ... where corrective services officers at [name of centre] held the person down. It was the first ever use of force. After that incident, DCS ... said that at no stage will the prison officer emergency unit ... be involved in the use of force whilst the hair or blood is being taken from the inmate. They are only to deliver [the inmate] to the police and then hand them over to the police. And when the police have got the DNA sample by whichever means, they will then take them back to their cell... The DCS security unit is to assist the ITT if the ITT lose control.*

Officer 1: *...A controlled movement is:*

After we've gone back after the cooling off period, with court orders and all, the person's turned around and said 'I'm happy with that. I'm going to give you a DNA sample'.

Prison staff then say, 'Because you were initially reluctant to do it and you resisted, you are still coming handcuffed. Is that understood?' The inmate says, 'Yes, understood'.

And the Emergency Unit is still there. They walk [the inmate] in. [The inmate] freely gives the DNA sample and then goes back. The emergency unit is still there, [the inmate] is handcuffed, but they freely give the sample. That's a controlled movement. That is not a use of force.

Video audit

Our video audit involved a careful examination of over 260 video recordings of interactions between inmates and the ITT. Our audit included the examination of the video recordings of all DNA samples identified by NSW Police as being taken with the use of force or controlled movements and a random sample of more than 120 videos of DNA samples carried out on serious indictable offenders between 1 January 2001 and 5 July 2002. In addition, we examined all of the available video recordings of the actions taken by the Emergency Response Unit to deliver serious indictable offenders to the ITA during this period.

Because we found some issues arising from the use of force, we extended our audit to include all available videos of interactions identified by DCS and NSW Police as involving a controlled movement or use of force for a further 12 months (up to 29 July 2003).

It is important to realise that the number of instances in which force was used to obtain a DNA sample from serious indictable offender was very low – force was required to take less than 0.1% of all samples in our audit period.

Out of the 14,283 serious indictable offenders sampled between 1 January 2001 and 29 July 2003:⁵²⁰

- eighteen were escorted in handcuffs and/or a security belt by correctional or Emergency Response Unit officers to the ITA to be sampled⁵²¹
- ten subsequently had a DNA sample forcibly taken by the ITT.⁵²²

Practice issues: use of force by correctional and Emergency Response Unit officers

Two of the ten instances observed in which force was used raised practice issues about the use of force by correctional and/or Emergency Response Unit officers.

In the first instance,⁵²³ three Emergency Response Unit officers and two correctional officers entered the inmate's cell. A struggle ensued, with the inmate underneath the DCS officers. There were indications that one officer was possibly either punching or elbowing the inmate from above. The inmate was not visible on the video recording at all, as he appeared to be underneath between three and five officers throughout the interaction. In addition, the video stopped shortly after the entry of officers into the cell meaning that the whole interaction was not recorded.

In the second instance,⁵²⁴ and without any apparent explanation or attempt to use other options recorded on video, four Emergency Response Unit officers used force to remove another inmate from the cell of the inmate who was to undergo sampling. Following this, officers entered the cell, including one officer who was holding a dog, which barked continuously through the video recording. The Emergency Response Unit officers used CS gas on the inmate, with the spray being directed at the inmate's eyes from an apparent distance of less than one foot, whereas the recommended distance is 8 to 12 feet.⁵²⁵ A protracted struggle to get the inmate into a security belt and handcuffs ensued. The inmate was then forcibly escorted to the ITA. It appeared from the video that one officer sought to intervene to reduce the force applied at this time. The inmate was not provided with 'decontamination' from the CS Gas or offered medical attention before he was taken to the ITA, where a DNA sample was forcibly taken from him.

We acknowledge that for the officers involved, situations that involve non-compliance or physical resistance by inmates may be extremely difficult to handle. However, we found the use of force by the Emergency Response Unit in these two videoed interactions to be of concern.

We viewed these videoed interactions with the DCS Officer in Charge of the Emergency Response Units, the Deputy Superintendent, Security and Investigations Command. He identified a number of actions that breached the DCS SOPs, training and best practice. He also commented that the videoed interactions revealed:

- 'bad techniques'
- lack of leadership
- lack of communication with the inmates
- lack of strategy and teamwork.

The Deputy Superintendent informed us that he is currently reviewing the SOPs for security and Emergency Response Unit officers, including those procedures relating to the use of force, and that DCS plans to increase its training of officers in this regard. He explained that all security and Emergency Response Unit officers are trained by a DCS specialised training unit that has accreditation as a training organisation. The specialised training unit also trains local officers who may be first response officers at an incident.

520 Figure provided by the NSW Police FPIT, 4 September 2003.

521 Based on information provided by the DCS.

522 These figures are based on information provided by the DCS, NSW Police and the results of our video audit, using NSW Police definitions of 'use of force' and 'controlled movement'.

523 Videoed Interaction No 176.

524 Videoed Interaction No 155.

525 Information provided by Security and Investigations Branch, DCS, 9 April 2003.

In contrast to these matters of concern, another instance saw the Emergency Response Unit successfully de-escalating a volatile situation by communicating and negotiating with the inmate concerned:

Videoed Interaction No 193

The recording began with a correctional officer reading the proclamation to the inmate. The inmate did not answer any of his questions. The senior correctional officer then stated that he would provide the inmate with one minute to reconsider his decision.

The inmate became agitated, stating that he had already provided a DNA sample. He repeatedly told the senior correctional officer to check the records. At one point the inmate threw something at the camera.

After a minute, the senior correctional officer directed the inmate to go to the ITA and supply a sample to police as required by the Act. The inmate continued to protest that he had already provided a DNA sample. The senior correctional officer did not respond to these objections and informed the inmate that he had directed the Emergency Response Unit officers to take over.

The inmate repeated his objection that he had already provided a DNA sample to the officer in charge of the Emergency Response, and stated that he did not believe he should have to provide a second sample. The officer said that he would ask the senior correctional officer to check his records, but stated that the Emergency Response Unit was still required to move the inmate to the ITA. He also stated that he would prefer not to use force to do so. The inmate replied:

*You don't have to come in here and use force if, for one minute, you listen to what I am saying: That I've already done it, and in my cell is my brief, and in the brief it states the f**king serial number, the date and time where I've already done the mouth swab at f**king [name of correctional centre].*

The officer then negotiated with the inmate and they agreed that the Emergency Response Unit officers would take the inmate to his cell to collect his documents, which he could then take to show the police at the ITA. This was done without incident, and the inmate cooperated with all directions.

When the inmate explained his position to the ITT, the Team Leader of the ITT informed him that the previous DNA sample was taken from him as a suspect, and that this DNA sample would be taken from him as a serious indictable offender under Part 7 of the Act.

The inmate, satisfied with this explanation, consented to a buccal swab.

This document is a report of our work and activities scrutinising 'the exercise of the functions conferred on police officers'⁵²⁶ under the Act, and as such it is not the appropriate forum to discuss what actions we are taking in relation to the use of force by correctional and Emergency Response Unit Officers. It is sufficient to state here that we will be following up this issue under our jurisdiction in relation to the DCS under the Ombudsman Act. We also note here that, in his submission to our draft final report, Commissioner Woodham has initiated a review of the use of force by the Commander of Security and Investigation.

In addition to the above issues, we noted that the DCS policies in relation to the searching and restraint of non-compliant inmates were not implemented consistently.⁵²⁷ We also noted that the wording of the DCS proclamation, and its delivery by some of the correctional officers, appeared to confuse (a) consent to the DNA sampling, versus compliance with the DNA sampling, and (b) compliance with the DCS officer's direction to move to the ITA, versus compliance with the senior police officer order to provide a DNA sample.⁵²⁸

526 See s121(3) of the Act.

527 For example, there were differences in the way in which inmates were searched (Interaction Nos 244, 264, 265 and 262) and the level of restraint employed by correctional and Emergency Response Unit officers during the escorting of inmates to the ITA (Interaction Nos 176, 155, 193, 261).

528 For example, Videoed Interaction Nos 263, 257 and 225.

Video issues: use of force by correctional and Emergency Response Unit officers

Incomplete video recordings

As discussed above, DCS requires that all relevant actions taken by the Emergency Response Unit be recorded on video. Our audit found that this policy was not always complied with. In particular nine videos did not include the whole interaction between DCS officers and the inmate,⁵²⁹ while six videos were not marked with a date/time stamp, nor was the time or date announced on camera.⁵³⁰

In some cases, the failure to continuously record the interaction has made it impossible to assess whether the inmate was provided with adequate time to reconsider her/his decision not to comply (for example, whether the one minute period for the inmate to consider the proclamation was actually one minute).

In one case, the video recording was suspended after approximately 1 minute and 29 seconds, at which time the inmate was being subjected to force. The recording resumed after an unknown period of time and then terminated when the inmate was still on the floor of his cell beneath three Emergency Response Unit officers. After viewing this video, we re-examined the NSW Police video of this inmate being DNA sampled. This recording commenced with the inmate (who was restrained in a security belt and handcuffs) being brought into the ITA by several Emergency Response Unit officers.⁵³¹ In the NSW Police video, the inmate appeared flustered, dishevelled and was wearing only a pair of shorts, socks and one shoe. Although neither the DCS nor the NSW Police video showed the use of chemical munitions (eg CS gas) upon this inmate, we noted that all the Emergency Response Unit officers wore gas masks throughout the procedure, and that the inmate's eyes appeared red and the skin around his eyes appeared puffy.

Another aspect of incomplete records was the inconsistencies in the video recording of the searches of serious indictable offenders by correctional and Emergency Response Unit officers. In only one case, was the full strip search of the inmate recorded on video.⁵³² While the recording of a strip search gives rise to obvious privacy concerns, the protection afforded to both the inmate and the officers in the event of any allegations of impropriety or inappropriateness during the search, may, in some circumstances, warrant such recording.

To deal with legitimate concerns about any recording of strip searches, the intrusion upon inmates' dignity, self respect and personal privacy must be minimised by procedures ensuring that the:

- search is not carried out in the presence or view of people who are not necessary for the conduct (and the recording) of the search
- search is not carried out in a place that affords the inmate unnecessary discomfort
- videos created are subject to strict evidence handling procedures that ensure the integrity of the evidence
- videos are only viewed for lawful purposes (eg by an investigative body or an inmate's legal representative).

We asked the DCS Officer in Charge of the Emergency Response Units to view the DCS videos with us, and provide us with advice on the interactions in light of DCS SOPs, policies and training. He informed us that DCS have a new procedure⁵³³ that established a Professional Conduct Management Committee (PCMC) whose role includes the review of all video recordings of the use of force by correctional/ Emergency Response Unit officers. He expressed some concern about the lack of continuity in the recordings. He stated that under this new procedure, this problem would be identified and be the subject of investigation.

529 Videod Interaction Nos 176, 156, 193, 256, 244, 262, 263, 264 and 265.

530 Videod Interaction Nos 268, 265, 155, 264, 176 and 267.

531 Videod Interaction No 176.

532 Videod Interaction No 264.

533 This policy commenced on 2 September 2002.

Lost video recordings

We were very concerned when DCS informed us that three of the video tapes involving the use of force by correctional and/or Emergency Response Unit officers had been lost,⁵³⁴ particularly because DCS believe that one of these videos was lost by a courier whilst being transported to another correctional centre.

Another of the lost videos was a recording of the use of force to facilitate the DNA sampling of an inmate who had complained in writing to our office that he had been assaulted 'during the DNA sampling'.⁵³⁵

At our meeting with the DCS Officer in Charge of the Emergency Response Units, we were informed that under the new PCMC system, the fact that the videos were missing would be identified at an early stage and would be the subject of investigation.

Practice issues: use of force by NSW Police ITT

In three of the 260 videoed interactions we observed, the force used by the NSW Police Inmate Testing Team raised practice issues.

In the first case,⁵³⁶ when the ITT officers took over the restraint of the inmate from the Emergency Response Unit officer, a struggle ensued between the three ITT officers and the inmate. Up until this point, the inmate had been complying with all directions from the DCS officers without any resistance. There appeared to be very little communication with the inmate by the ITT officers prior to their taking over the restraint of the inmate. During the resulting struggle, the inmate fell into the corner of the cell onto his knees. From the angle of the video, it appeared that his face and/or head may have hit the corner of the cell. The corner consisted of one wall of brick and the other of steel bars, and a concrete floor. The Manager of FPIT has advised that the ITT members present stated that the inmate did not make any contact with the corner of the cell and that the inmate did not at any time complain of any injuries.

After the DNA sampling, whilst the inmate was lying face-down on the cell floor with his hands handcuffed behind his back, one of the ITT officers pulled the inmate's crossed legs up behind his back, and held them there whilst the other two ITT officers exited the cell. When the Emergency Response Unit officers returned to the cell to resume their restraint of the inmate, they immediately relaxed this hold of the inmate's legs, and then assisted him to his feet. A nurse came to speak to the inmate whilst he was still being restrained, and he did not appear to complain about any injuries. The inmate was then released from his restraints and walked back to his cell.

In the second case,⁵³⁷ an ITT officer applied a wristlock on the inmate, despite the fact that four officers were already restraining the inmate and other officers were ready to provide assistance.

In the third case⁵³⁸ a wristlock was applied to each of the inmate's hands despite the fact that the inmate was already restrained by three officers, was handcuffed, and had provided no indication, verbally or otherwise, that he intended to resist the hair sampling. There were also other correctional officers present who could have provided assistance if necessary. The inmate appeared to be from a language background other than English, and it appeared from the video that the inmate did not understand why the ITT were taking a sample of hair.

534 Interactions 266, 243 and 166, correspondence from the Officer in Charge, Forensic Testing Team, DCS, 11 July 2003.

535 Videoed Interaction No 266.

536 Videoed Interaction No 167.

537 Videoed Interaction No 264.

538 Videoed Interaction No 266.

Video issues: use of force by NSW Police ITT

It was not only DCS videos that were incomplete. In particular, in one of the NSW Police videos of a forensic procedure involving the use of force,⁵³⁹ there were four key actions that had not been recorded on the NSW Police ITT video, but were recorded by the correctional/Emergency Response Unit officers. These actions were:

- a struggle that ensued between the three ITT officers and the inmate when the ITT officers took over the restraint of the inmate from the Emergency Response Unit officers
- one ITT officer's knee making contact with the inmate's upper leg area
- the inmate, while on his knees, falling head first into the corner of the cell
- one of the ITT officers forcing the inmate to cross his legs, then placing his lower legs behind his back, and holding them there whilst the other two ITT officers exited the cell.

Discussion

Our review of the use of force by police in taking DNA samples indicates that the requirement to use force is very infrequent – less than 1 in every 1,000 serious indictable offenders was subject to force. This is a very positive result and reflects the efforts of police and other agencies (including DCS) to explore other options prior to the use of force.

However, the use of force in any circumstances gives rise to risks of physical injury to both the inmate and the officers involved, and potential controversy about the appropriateness or reasonableness of both the actual exercise of force, and the degree of force used. Our recommendations, arising from the small number of instances where force was applied, are intended to minimise any risks and prevent any lessening of the community's confidence in the appropriateness of the forensic DNA sampling of serious indictable offenders.

There were also some deficiencies in making and retaining video records by DCS and NSW Police with respect to inmate testing. Again, while the instances of this were relatively few, any substantial deficiency in these areas is likely to give rise to concern and criticism. While few in number, the breaches identified must be addressed and future instances avoided.

Strategies to diffuse and de-escalate the situation

We appreciate that NSW Police and the relevant custodial/supervisory agencies have introduced the cooling off period and the category of 'non-consenting, but compliant' in order to reduce the number of times that force is required to obtain a DNA sample. However, we believe that there were instances where the ITT could have engaged in further negotiation with the serious indictable offender before taking the DNA sample by force.

For example, in the first case⁵⁴⁰ there was a stark contrast between the way in which the ITT officers interacted with the inmate compared to the way in which the Emergency Response Unit officers interacted with him. The team leader of the Emergency Response Unit spent some time negotiating with the inmate and explained all of the actions that the unit intended to take in order to restrain him, and the reasons why those actions were being taken. The inmate was warned that if he did not comply at any time with the directions, force would be used. In contrast the ITT officers engaged in limited communication with the inmate.

In the third case⁵⁴¹ the ITT officers appeared to use force to obtain a DNA sample where the inmate had given no verbal or physical indication that he intended to resist the DNA sampling. In fact, the inmate had previously complied with all the correctional officers' directions to position himself on his knees and up against the wall. This inmate appeared only to start protesting when the ITT applied wristlocks and began to take a sample of hair. From the interaction, it appeared that this inmate did not understand exactly how the DNA sample would be taken and that this could have been due to language differences or because the ITT did not explain their intended actions.

539 Videod Interaction No 167.

540 Videod Interaction No 167.

541 Videod Interaction No 266.

In two of the interactions involving force, the inmate clearly stated that he would not comply with the DNA sampling unless it had been authorised by a court order.⁵⁴² In one of these cases, the inmate also argued that the SOPs had not been followed and that he should be given a further opportunity to speak to the Governor. In these cases, the inmates concerned were not due to be released from imprisonment for another 10 months and three months respectively.

One of our proposals is to remove the consent provisions from Part 7 of the Act relating to forensic procedures carried out on serious indictable offenders. If accepted, it is imperative that police and other officers ensure that the level of communication and negotiation with serious indictable offenders does not decrease. In the event that a serious indictable offender indicates that s/he will not comply with the forensic procedure, police officers should explore and consider the options available, including the provision of additional time or cooling off period. The use of force to obtain DNA samples from serious indictable offenders should continue to be a last resort, and it should never be unreasonable.

NSW Police have commented that of the 15,595 tests carried out to 27 February 2004 only seven instances have involved force.⁵⁴³ Whilst we recognise the success of Police and DCS in keeping the use of force to a minimum through the use of cooling off periods, we recommend that separate records be made by both ITT officers and correctional, security and emergency response officers to maintain accountability and transparency in relation to any use of force. These records should indicate the officers' consideration of other options, and provide reasons why these alternatives are not appropriate in the circumstances. Any review should consider specifically the needs of particular inmates, for example, deaf inmates or those who are or may be pregnant.

We strongly recommend that NSW Police and custodial agencies ensure that the records relating to all uses of force in relation to forensic procedures carried out on serious indictable offenders are thoroughly reviewed in a timely manner.

Recommendation 39

It is recommended that NSW Police, DCS, DJJ and the Home Detainees Program amend their standard operating procedures to require officers to:

- review and consider alternatives prior to force being used to carry out, or facilitate the carrying out of, forensic procedures upon inmates and detainees, and
- document their consideration of alternatives to the use of force and the reasons why they believe that these options are not practicable in the circumstances.

Recommendation 40

It is recommended that NSW Police, the DCS, DJJ and the Home Detainees Program commence and/or continue to ensure that regular and timely reviews of documents and recordings of the use of force are carried out so as to assess the:

- appropriateness of the use of force
- reasonableness of the use of force
- appropriateness of the methods applied by the officers concerned
- any training needs for the officers concerned.

⁵⁴² Videod Interaction Nos 167 and 264.

⁵⁴³ Correspondence from NSW Police, 19 April 2004.

Appropriate environment for carrying out forensic procedures with the use of force

In two of the videoed interactions involving the use of force it appeared that the space in which the forensic procedure took place was unsuitable in that it may have exacerbated the discomfort for all people involved.⁵⁴⁴ Small cells with hard surfaces such as brick walls, concrete floors and steel bars are more likely to cause injury to both the ITT officers and the serious indictable offenders if the situation were to get out of hand.

We appreciate that many NSW correctional centres are old and may not be equipped with appropriate areas. However, it would appear in the interests of all parties involved, that forensic procedures on non-compliant serious indictable offenders are best carried out in larger areas that are not dominated by hard surfaces. DCS acknowledges that some of the areas currently being utilised for forensic procedures are not entirely suitable for the purposes of sampling. The main focus of DCS has been to ensure that the areas used are close to inmate accommodation areas and are secure in order to minimise inmate movement and disruption to the correctional facility. DCS advised that additional funding would be required to enable sufficient staff numbers to be assigned to assist with movement of inmates to more suitable testing areas than those currently used. The allocation of staff and resources is a matter for DCS. Because of the potential for injury to officers and inmates, and the few occasions force is required, it is not unreasonable to expect appropriate areas are made available.

Recommendation 41

It is recommended that NSW Police and custodial agencies ensure that forensic procedures carried out on non-compliant serious indictable offenders are carried out in an appropriately sized and equipped area, which minimizes the likelihood of injury to ITT members, correctional officers, security/Emergency Response Unit officers and serious indictable offenders.

Video recordings

As noted above, the Emergency Response Unit is required to video record its actions taken in relation to the DNA sampling, including the entry into an inmate's cell, searches, restraint, force used and the provision of medical attention. DCS requires that the original video tapes are 'catalogued and maintained in a central, secure location by the Director, Security and Investigations, who will also be responsible for the provision of the tapes to the Police or any other investigative body, should they be required as part of an investigation'.

In light of the kind of activities that are recorded on video by the Emergency Response Unit, we find it of significant concern that three videos of this nature have been lost. We note that the current DCS SOPs provide for these recordings to be dealt with as potential evidence. Clearly, in these cases the policy was not adhered to. We are also concerned that in some instances not all of the actions taken by correctional and Emergency Response Unit officers were video recorded.

We note the new DCS policies in place to review video recordings. Again, because this report is limited to reviewing the exercise of functions of police officers, we will be following up these matters under our jurisdiction in relation to DCS under the Ombudsman Act.

We have noted above the failure to record, in one video, all key actions by police. We note that the NSW Police SOPs in relation to the DNA sampling of serious indictable offenders require that all videos of DNA samples taken with the use of force are to be reviewed by FPIT, the Inmate DNA Testing Management Team and an Instructor from the Operational Safety Training Unit who is an expert in the area of 'use of reasonable force'. Such a review mechanism is not entirely useful if not all of the actions taken by the ITT are videoed.

⁵⁴⁴ Videoed Interaction Nos 167 and 264.

Earlier in this report we made several recommendations relating to the electronic recording of forensic procedures. In addition to these, we recommend that NSW Police amend its SOPs to emphasise that, wherever possible, all actions taken by ITT officers, including communication and negotiation with the serious indictable offender, are to be videoed.

Recommendation 42

It is recommended that NSW Police review its SOPs to emphasise that, wherever possible, all actions taken by ITT officers, including communication and negotiation with the serious indictable offender, are to be electronically recorded.

We found that in conducting our video audit it was not always possible to distinguish between the DCS officers and NSW Police ITT officers. This was mainly due to the fact that their uniforms are very similar and the different people present were not identified on camera. Earlier in this report we recommended that NSW Police ensure that all people present are introduced and their role explained for the benefit of the video recording. Our research relating to the use of control and/or force supports this recommendation, and we consider that correctional and Emergency Response Unit officers should also implement this policy.

Recommendation 43

It is recommended that the DCS amend its SOPs relating to forensic procedures to require officers to identify all persons present and explain each person's role to the person who is the subject of the search, controlled movement, use of force or other actions. This should be done at the beginning of the interaction and be electronically recorded.

Lack of clarity in the roles of officers involved in the use of force

Earlier in this report,⁵⁴⁵ we noted some inconsistencies between the policies and procedures of the different agencies involved in the DNA sampling of serious indictable offenders. We recommended that these agencies review these discrepancies and revise their policies accordingly. The discrepancies highlighted in this chapter support our recommendation that these agencies finalise and approve their policies relating to the DNA sampling of serious indictable offenders as soon as possible.

Our focus group with the ITTs indicated that there is some confusion about the role of the DCS Emergency Response Unit during the DNA sampling. This situation should be rectified.

The DCS proclamation, as it is currently worded, may lead some inmates to believe that they are being asked if they still refuse to consent to the DNA sampling, rather than comply with the correctional officer's direction to move to the ITA. An amendment to the DCS proclamation may be required to clarify this.

At the time our focus groups were held in 2001, we were concerned that in the event that ITT officers required assistance in using force to carry out the DNA sampling of serious indictable offenders, the roles played by officers from custodial agencies were not clearly stated in these agencies' policies and procedures, and that the qualifications and experience required of these officers was not defined. NSW Police have since informed us of their view that there is no confusion amongst the ITT, and that confusion has not existed for some time.

As stated above in response to Recommendations 38, 39, 42 and 43 DCS has advised that they are currently reviewing the procedures for use of force. DCS expects to complete this review towards the end of May 2004.

545 See Chapter 6.

In our view, and on the evidence we have collected, the roles of officers of the various agencies are not entirely clear. Because of the potential for injury to staff and inmates, it ought to be clarified.

Recommendation 44

It is recommended that NSW Police, DCS and DJJ clarify the role of the officers of each agency in the event that force is used to carry out the DNA sampling of serious indictable offenders when finalising their interagency agreements.

The finalised agreements should include a clear statement of the necessary qualifications and experience for officers to be deployed in use of force situations. The information given to serious indictable offenders by the relevant custodial agency to comply with a direction to attend the ITA should also be clarified.

Chapter 19: Avoiding contamination of the DNA sample

What the Act says

The Act is silent on the issues relating to the scientific analysis of DNA samples. There is no direction as to how forensic procedures should be carried out to minimise the possibility of contamination. Issues relating to the integrity of evidence (such as the chain of custody⁵⁴⁶ and possible contamination) would ordinarily be dealt with by a court if raised by the defence.

Implementation by NSW Police

The Mandatory Continuing Police Education on forensic procedures that is provided to all police officers emphasises the minimisation of contamination. Officers are told that they must:

- use clean disposable gloves throughout the sampling procedure
- use disposable instruments to handle each sample
- avoid touching their face, nose and mouth when collecting and packaging evidence
- not insert their fingers into the mouth of the subject
- wash their hands thoroughly with soap on completion of the procedure.⁵⁴⁷

The training emphasises that any evidence obtained must be:

- properly taken in the first instance
- correctly identified and labelled
- properly stored and transported to DAL
- properly analysed by DAL
- correctly certified and matched to the correct person
- not tampered or interfered with by any person in any way during this process.

The SOPs state that DCS officers will ensure that inmates/detainees rinse out their mouths with water immediately before the sampling. This is to reduce the possibility of buccal samples being contaminated by food or other substances.

Tamper-evident bags

The tamper-evident bags used by NSW Police consist of one continuous piece of plastic folded over, with both sides double heat-sealed and continuous printing between the seals. If the printing is missing, then it is evident that the bag has been opened and resealed.

The glue on the top seal has at least five different security features: if the glue/seal is tampered with in any of several ways, the word “VOID” appears clearly in large letters on the seal.⁵⁴⁸ The laboratory will not accept voided sample bags/kits for analysis.

The buccal, hair and blood sampling kits used by NSW Police include two tamper-evident bags. The first tamper-evident bag contains all the equipment necessary for taking one DNA sample, including a second tamper-evident bag. The second bag is used to store and transport the DNA sample to the laboratory. Officers at the laboratory check the bags and reject the sample if they find any evidence of damage/tampering.

⁵⁴⁶ Chain of custody is the term used to describe the documentation relating to the protection of physical evidence, including a list of all people who have handled or otherwise had access to that evidence. The chain of custody must be established whenever evidence is presented in court as an exhibit.

⁵⁴⁷ NSW Police, Mandatory Police Continuing Education Scheme, M020: *Crimes (Forensic Procedures) Act 2000*, January 2001.

⁵⁴⁸ NSW Police, Scene of Crime Officer training, December 2000.

DNA buccal and hair sampling kits used by NSW Police



From: NSW Police DNA Mouth Swab and Hair Sampling Kit Step-by-Step Guides

The tamper-evident bags (or DNA sampling kits) are stamped with a unique identifying number. NSW Police treats these bags/kits as 'accountable items'. This means that their journey and location can be tracked through NSW Police records and ultimately to DAL. When a DNA sample is sealed in a tamper-evident bag and transported to DAL, a form that contains information about the sample and the person from whom it was obtained must accompany it. This form is known as the sample information form.

Police officers are required to ensure that the sample information form contains the number of the tamper-evident bag in which it is sealed. If it does not, DAL will reject the DNA sample and will not analyse it.

How we monitored contamination issues

Attendance at police training

The ITTs are trained to minimise the possibility of contamination throughout the DNA sampling process. The SOPs include the following instructions for ensuring that the DNA sample is not contaminated:

- the camera must be placed to show a clear view of the sampling process
- before the procedure, the sampling kit must be checked for any damage to the external bag, and to ensure that the kit is complete and has no contents missing. Defective kits must be voided and forwarded to DAL unused
- the ITT member must wear gloves throughout the sampling
- fresh gloves must be worn for each sample taken
- the ITT member must minimise contamination by avoiding touching things other than the packaging (eg their own face and hair). ITT officers must also avoid coughing and talking over the sample
- the barcodes must be placed on all relevant parts of the sample and kit (ie on the packaged sample, the form for the laboratory, the consent form and/or orders)
- ITT officers must seal the tamper-evident bag in the presence of the inmate/detainee and must explain the security aspects to the serious indictable offender
- if at any time during the sampling process the ITT considers that the forensic sample has been contaminated in any way, a new sample must be taken. The contaminated sample must be sealed in its bag and clearly marked 'contaminated'.

Interviews with serious indictable offenders

During our interviews with serious indictable offenders, many inmates raised concerns about the security of their DNA sample. Interviewees mainly wanted to be reassured that their sample would not be tampered with in any way.

*Inmates should have more rights and control about the sampling. We don't know what happens to the bag when it leaves here. We don't know if the DNA can be placed in other places.*⁵⁴⁹

*What happens if the bag gets tampered with? They told me that they throw it away but I don't know. I just want to know that it's all safe and can't be tampered with.*⁵⁵⁰

*The only thing I'd like to say is that from past experience I don't trust police with this type of information. An 'up to two year' penalty for tampering with the evidence is not long enough, because the [person concerned] is looking at getting more than two years. It doesn't make me feel safe.*⁵⁵¹

Interviewees were also concerned that their DNA could be planted at crime scenes by police or other people.

*I don't think it's right. Because it's very private and they could be using it for anything these days. There's that much corruption in the system you don't know what's going on. It's like giving your body away, you know what I mean. They could be doing anything with it. They could make a different me and send the real me to Mars!*⁵⁵²

*[They] passed the law under false pretences: said it was for violent crimes. It can be used against us to set us up: can use hair from hair brush at scene of crime to set people up.*⁵⁵³

*It's going to make it easier for them to load you up. Corruption greases the wheels as we all know. That's just my greatest fear - getting loaded up for something that I haven't done (such as is the case now).*⁵⁵⁴

Audit of records held by the DAL

We asked DAL to provide us with their criteria for 'culling' or rejecting forensic DNA samples. If the DNA samples are rejected by DAL then they are not analysed, the DNA profile is not obtained and cannot be placed on the DNA database. We were provided with the rejection criteria.

DAL Rejection Criteria for Samples Received

549 Interviewee No 42.

550 Interviewee No 55.

551 Interviewee No 54.

552 Interviewee No 145.

553 Interviewee No 26.

554 Interviewee No 150.

DAL will reject and will not process any DNA sampling kits that are received by them in the following condition:

- void messages have been triggered across the seal of the bag
- the “DNA Sampling Kit” printing is missing from one or both sides of the bag
- there is a seam visible at the bottom of the bag
- the bag has been sealed incorrectly and it is possible to access the kit contents
- the bag number is not written on the sample information form
- barcodes have not been placed on the FTA card or envelope.

DAL will put samples aside and contact FPIT for clarification before deciding to process them in the following circumstances:

- where the information written on the Sample Information form is unclear and needs to be double-checked before entering onto data systems
- if any field other than the one for “Bag Number” is blank, eg the cost centre or Event number has not been written on the form
- the swab has not been sent inside the Mouth Swab Sampling Kit. While this does not affect the integrity of the sample, it may affect any subsequent crime scene samples submitted in connection to that buccal swab.

If FPIT can clarify any of the information for the staff at DAL, the sample is normally processed.

The Forensic Biology Department at DAL notify FPIT when any of the above events occur. A record is kept of these calls and staff members notify the police officers responsible for taking the samples that they have been rejected or that they had been submitted in an incomplete manner. FPIT will reiterate to the officer the correct mechanisms and methods for taking and submitting the DNA sampling kits to DAL to avoid any reoccurrence.

Source: Information provided by NSW Police FPIT

In late 2001, NSW Police became concerned that the above rejection criteria were being applied too stringently, particularly in relation to the sealing of the bags.⁵⁵⁵ NSW Police raised their concerns in a meeting with the Deputy Director of DAL. NSW Police informed us that this meeting decided the following:

*There was no question that where it was evident that a bag had been tampered with, the bag would be rejected and FPIT advised immediately. However, we clarified that where small gaps were evident in the seal but were of such a size that they would not permit items to be removed from, or placed in, the bag, the bag should not be rejected. Despite this clarification, the ultimate decision about whether or not to reject a bag still remains with DAL.*⁵⁵⁶

We conducted an audit of records of the samples received at DAL between 1 January 2001 and 5 July 2002. We examined the number and type of samples that were rejected by DAL and compared them to the above rejection criteria. We also inspected the actual sample bags that had not been analysed by DAL to see if police had made any mistakes in packaging or sealing the samples. We could not examine the sampling kits that had been accepted by DAL, as they had already been processed.

There were four serious indictable offender samples⁵⁵⁷ that had been rejected by the laboratory. DAL rejected these samples for the following reasons:

⁵⁵⁵ Advice provided by NSW Police FPIT, 18 December 2002.

⁵⁵⁶ Advice provided by NSW Police FPIT, 18 December 2002.

- the bag number on the sample information form was incomplete (1)
- the bag was not sealed properly (1)
- there was insufficient information about the person from whom the sample was obtained (1)
- 'other' (1).

NSW Police have asked the ITT to forward all voided sampling kits to DAL for safekeeping. Voided samples/kits are usually those where the ITT officer recognised problems with the kits that could result in them being rejected by DAL. In these cases, the police officer marks the kit 'VOID' and uses a new sampling kit. We examined the records and the samples held by DAL relating to void sampling kits.

We were unable to assess how many of the sampling kits were voided by the ITT as it was not possible for us to distinguish between serious indictable offender, suspect and volunteer samples. This was because in many cases the police had voided the sample before completing the sample information sheet.

Video audit

As part of our audit of 252 videos of forensic procedures carried out on serious indictable offenders we noted whether or not the ITT:

- avoided touching things other than the packaging (eg their own face and hair), and coughing and talking over the sample
- opened and sealed the tamper-evident DNA sampling bag in the presence of the inmates/detainees
- explained the security aspects of the tamper-evident bag to inmates and detainees
- answered questions about the security of the DNA sample.

In an earlier chapter we discussed the problems with the video recordings of the DNA sampling. Some of these problems, and the fact that a number of serious indictable offenders objected to the electronic recording of the DNA sampling procedure, meant that our research relating to the actual taking of the DNA sample (but not the opening and sealing of the tamper-evident bag) was limited to 189 videos.

Avoiding touching things other than the packaging, and coughing/talking over the sample

Our auditor noted that in explaining the sampling technique to inmates and detainees, the ITT officer sometimes held her/his gloved hand close to their own mouth in order to illustrate how it is done. This occurred in 8% (15 out of 189) of procedures.⁵⁵⁸

In 1% (2 out of 189) of procedures, the police officer leaned close over the sample.⁵⁵⁹ In 2% (3 out of 189) of cases, the foam swab came into contact with a person's hand, or the outside of the inmate/detainee's cheek.⁵⁶⁰

In 10% (19 out of 189) of procedures, the sampling, or part of it, was obscured from the view of the camera or taken away from the view of the camera.⁵⁶¹ In a further two cases, the video recording of the procedure was very poor.⁵⁶²

Opening and sealing kits in the presence of the inmates/detainees

The only way we could ascertain whether the sampling kits were opened and sealed in the presence of

⁵⁵⁷ These were the only samples that had been identified as originating from a serious indictable offender. Where police failed to include information about the origin of the sample, we could not be sure whether the sample originated from a serious indictable offender, a suspect, a victim or other volunteer.

⁵⁵⁸ Videoed Interaction Nos 3, 246, 54, 40, 133, 72, 80, 119, 9, 66, 122, 62, 95, 187, 252.

⁵⁵⁹ Videoed Interaction Nos 124, 144.

⁵⁶⁰ Videoed Interaction Nos 233, 22, 23.

⁵⁶¹ Videoed Interaction Nos 16, 127, 166, 85, 134, 138, 30, 71, 141, 87, 175, 176, 34, 229, 48, 68, 70, 174, 253.

⁵⁶² Videoed Interaction Nos 140, 197.

inmates/detainees was if this was recorded on video. Our auditor observed that 81% (153 out of 189) of DNA sampling kits were both opened and sealed in the presence of the serious indictable offender.

As discussed earlier in Chapter 15, our auditor could not be sure that the DNA sample was taken and packaged properly in 19% (45 out of 237⁵⁶³) of interactions. Our auditor noted:

- nine cases where the DNA sampling, the opening of the sampling kit or the sealing of the tamper-evident bag was obscured by police or DCS officers⁵⁶⁴
- four cases in which the DNA sample was removed from the view of the camera before it had been sealed in the tamper-evident bag⁵⁶⁵
- five cases in which the sampling kit was neither opened nor sealed on camera
- five cases in which the sampling kit was not opened on camera.⁵⁶⁶

Providing an explanation of the security aspects of the tamper-evident bags

In 82% (156 out of 189) of interactions the ITT explained the security aspects of the bag to the inmate/detainee. In 11% (20 out of 189) of interactions no explanation to the serious indictable offender about the security aspects was recorded, and in the remaining 7% (13 out of 189) of cases, our auditor was unable to determine whether or not an explanation was provided.⁵⁶⁷ In some interactions the ITT took the further step of providing the inmate/detainee with an opportunity to check that all the barcodes were the same, and to inspect the sealed bag.

Answering questions about the security of the DNA sample

We noted any questions that the inmates/detainees asked about the security aspects, and the answers given by the ITT in response. The following illustrate some of the questions and answers we observed.

Videod Interaction No 15

Inmate: *My barcodes are all put in there so they can't be mixed?*

ITT: *Yes. The barcodes are stuck [in the relevant places] and all the remaining ones are placed in the bag.*

Videod Interaction No 27

Inmate: *Is there any chance of a 'Roger Rogerson' getting to my DNA sample?*

ITT: *No.*

The ITT officer then explained the security aspects of the sample and the review requirements in the legislation.

⁵⁶³ Seventeen serious indictable offenders objected to the recording of the forensic procedure. However, as stated above, in two of these cases, the ITT did not terminate the recording. This meant there were only 15 forensic procedures that we could not examine as part of our audit.

⁵⁶⁴ Videod Interaction Nos 16, 31, 48, 68, 70, 71, 85, 166, 174, 229.

⁵⁶⁵ Videod Interaction Nos 138, 166, 176, 253.

⁵⁶⁶ Videod Interaction Nos 234, 243, 167, 191, 193, 142, 175, 176, 197, 156.

⁵⁶⁷ For example, because the quality of the video or audio recording was poor.

Videoed Interaction No 204

The ITT Police failed to place the barcode on or seal the bag appropriately. To remedy this, the sample was placed and sealed in a new tamper-evident bag. This was fully explained to inmate/detainee.

Focus group

The ITTs indicated that serious indictable offenders often ask questions about what happens to the sample once they have provided it, what happens to the buccal swab that was used to take the sample, if the sample gets destroyed, and who has access to it. The ITT members stated that many inmates do not trust police, and this makes them suspicious about the security of their sample.

The ITT members emphasised the importance of ensuring that all activities associated with the sampling took place in front of the video camera. They also recognised the importance of reassuring inmates and detainees about the security aspects of the tamper-evident bags, and that the samples are held by NSW Health and not police.

Discussion

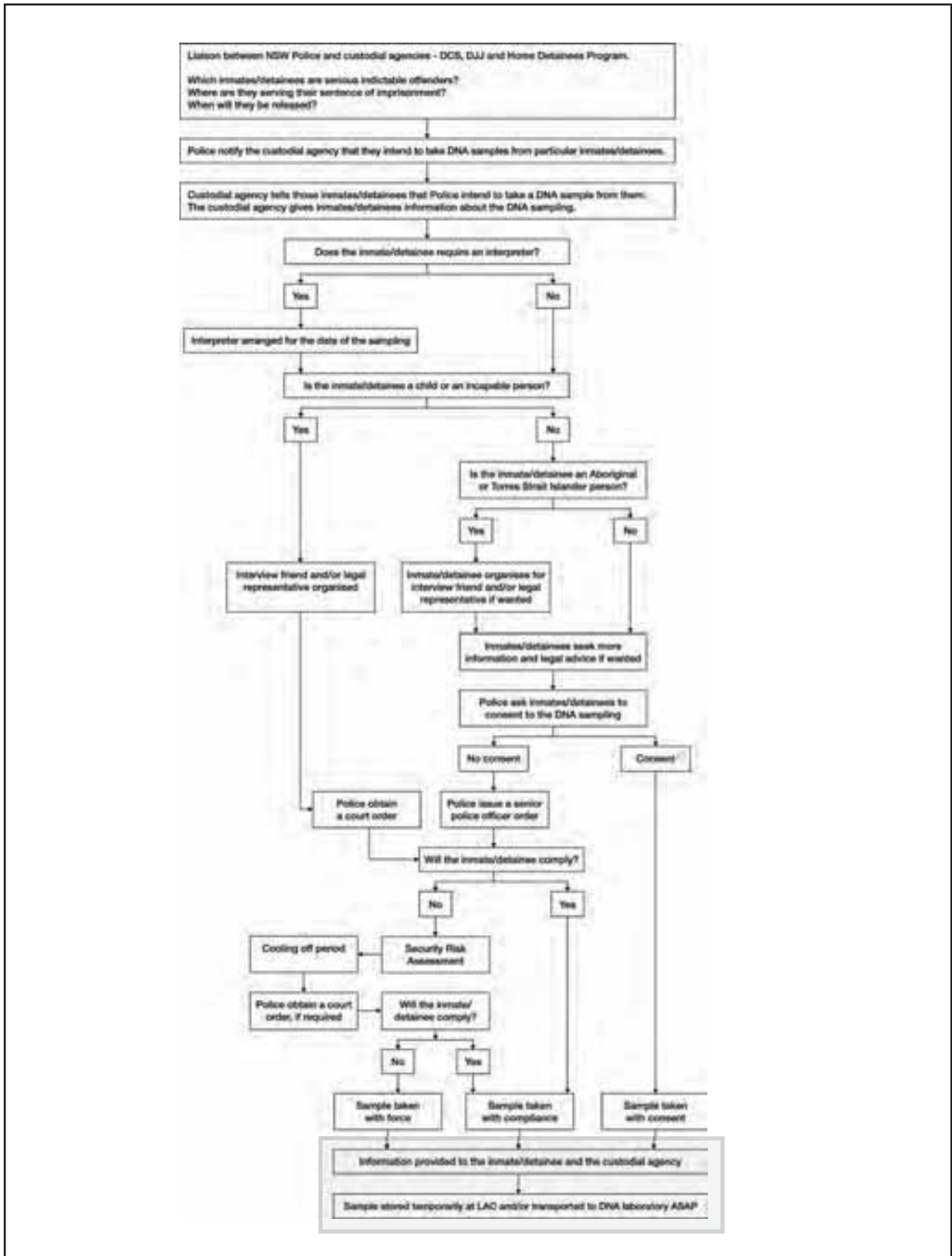
We discussed the results of our video audit with NSW Police who informed us that DAL had not found any evidence of contamination during their analysis of the DNA samples. Nonetheless NSW Police undertook to remind officers to follow the SOPs guidelines relating to minimising the risk of contamination.⁵⁶⁸

We found that very few serious indictable offender samples submitted to DAL for analysis had been rejected by DAL. This appears to be due to the experience and expertise of the ITT members, who are a group of police officers who have been dedicated to offender DNA sampling. As a result, the ITT officers have had experience in carrying out hundreds or thousands of forensic procedures.

We will be carefully examining this issue in our next report because procedures carried out on suspects and volunteers will, on the whole, be carried out by less experienced officers.

⁵⁶⁸ Meeting with NSW Police, 19 December 2002.

Part F: Post-Sampling Functions and Issues



Chapter 20: Transporting samples to the DNA laboratory

What the Act says

The Act is silent on how samples obtained from forensic procedures should be transported, stored or analysed. It does, however, create certain offences for the disclosure or misuse of information obtained from forensic procedures and this is discussed later in 'Recording information about the DNA sampling'.

NSW Police has contracted DAL to carry out the analysis of forensic DNA samples taken under the Act. DAL is a unit of the Institute of Clinical Pathology and Medical Research, which is operated by the Western Sydney Area Health Service.

Implementation by NSW Police

NSW Police policy is that the ITT team leader is responsible for ensuring the security and continuity of DNA samples taken from serious indictable offenders.⁵⁶⁹

DNA sampling kits are 'accountable items' and as such, must be signed and accounted for throughout their use by NSW Police.

The NSW Police SOPs state that all forensic samples should be entered into the Field Specimen Register (an exhibits book). The policy states that wherever possible, the DNA samples should be transported to DAL at the end of each day of sampling. If the sampling is conducted in rural or remote areas, or there is insufficient time for the ITT to take the samples to the laboratory,⁵⁷⁰ the following applies:

If circumstances do not permit sufficient time to convey the forensic DNA samples to DAL on the same day the samples were taken, the forensic DNA samples will be:

- *Placed in the Testing Teams padlocked security bag.*
- *The security bag containing the forensic DNA samples must then be entered into an Exhibit Book and lodged as an exhibit at a Local Area Command.*

At the end of the sampling, the padlocked security bag containing the samples is collected from the Local Area Command by the ITT and transported to DAL. The procedures emphasise that the samples should be conveyed to DAL within 72 hours or as soon as is reasonably practicable.

Implementation by DAL

When DNA samples are received at DAL, they are first checked for evidence of tampering. If the tamper-evident bag containing the sample is in any way damaged, showing attempted tampering or not sealed correctly, DAL will reject the sample. DAL notifies NSW Police of any samples that are rejected and the current procedure is for DAL to keep them at the laboratory.

After examining the integrity of the forensic sample submitted by NSW Police, DAL records details about each forensic sample, including the number of the tamper-evident bag and the sample barcode. Each sample is then given a unique laboratory number by which it is identified throughout the process of analysis.⁵⁷¹

⁵⁶⁹ NSW Police SOPs.

⁵⁷⁰ There is little chance that the DNA will degrade as it is stored with chemicals that assist in stabilising the DNA for analysis and protecting it from harmful bacterial and viruses. These chemicals also allow the DNA to be stored at room temperature, instead of being refrigerated.

⁵⁷¹ Information provided by DAL, 14 May 2001.

How we monitored the transportation of DNA samples to DAL

Examination of NSW Police exhibits systems

We examined the way in which the NSW Police Forensic Services Exhibits Store and the ITT recorded the use of forensic DNA sampling kits. We noted that the system provides for kits to be accountable throughout their use by NSW Police.

Examination of DAL systems and administration

Our role under the Act is limited to the scrutiny of the functions of police. It does not extend to the monitoring of the way in which DNA samples are used by DAL. However, because NSW Police has contracted the analysis of the DNA samples to DAL, we wanted to gain an insight into the way in which DAL managed, stored and recorded information about DNA samples obtained under the Act. To do this we visited DAL on several occasions.

DAL provided us with a 'walkthrough' of their processes: from the point at which the sample is received from police to the point at which police are notified of a 'link' or 'hit' between two DNA profiles on the database.⁵⁷²

We note that in August 2001 DAL established a DNA Advisory Committee to oversee the operation of its DNA profiling laboratory. The DNA Advisory Committee consists of representatives from key stakeholders: NSW Health, National Institute of Forensic Sciences, Privacy NSW, NSW Legal Aid Commission, Office of the Director of Public Prosecutions, NSW Innocence Panel and NSW Police.

Audit of delivery of DNA samples by NSW Police to DAL

We conducted a small audit of NSW Police and DAL records of forensic procedures carried out on serious indictable offenders between 1 January 2001 and 5 July 2002.⁵⁷³ We examined 164 randomly selected NSW Police records of forensic procedures and noted the date that the sample was obtained from the serious indictable offender. We then compared this date with the corresponding DAL record to:

- confirm that the DNA samples had been received at DAL
- assess whether the samples had been delivered to DAL within 72 hours as required by NSW Police policy.

It was not immediately obvious that all the samples had been received at DAL, due to differences in the records held by DAL and NSW Police. As a result of these differences, we carried out further searches on the COPS database and made inquiries with DAL and NSW Police. This issue is discussed in the next chapter.

From the information provided to us by DAL, it initially appeared that only 40% (66 out of 164) of the DNA samples taken from serious indictable offenders had been delivered to DAL within 72 hours, as required by the NSW Police SOPS. It also appeared that some samples had been substantially delayed beyond one week.

We asked NSW Police and DAL to comment on these findings.

NSW Police responded:

The Forensic Procedures Implementation Team has reviewed ... the DNA samples that allegedly took 9 days or longer to be delivered to the Division of Analytical Laboratories. This review has revealed the dates that the DNA samples were delivered to the Division of Analytical Laboratories to be incorrect. These dates possibly reflect the dates that details of the samples were entered by the Division of Analytical Laboratories into its computer system rather than the actual date of receipt. The actual dates of receipt have been verified by the Forensic Procedures Implementation Team by reference to the 'Forensic Services Group – Specimen/Item Register' entries...

⁵⁷² Ultimately the CrimTrac Agency will perform this role. We have been advised that until the CrimTrac National Criminal DNA Database is operating effectively, the DNA Database at DAL will be used to identify links between DNA profiles.

⁵⁷³ The audited samples consisted of approximately two per cent (164 out of 10,403) of all samples taken from serious indictable offenders during our review period.

...the average length of time [for the reviewed samples] is in fact 1.7 days, with the longest time being 6 days for a DNA sample obtained from an inmate at [name of rural correctional centre].

NSW Police provided us with copies of the relevant 'Specimen/Item Registers' signed by the receiving officer at DAL.

When we contacted a representative from DAL about the NSW Police response, he confirmed that the dates that DAL had provided us with were the dates that the details were entered onto the DAL laboratory information management system, rather than the date that the sample was received by the laboratory.⁵⁷⁴ He responded as follows:

*The samples on the list that had 14 or more days between sampling and entry into the DAL system were examined and all were delivered to DAL in 4 days or less.*⁵⁷⁵

We asked DAL to comment on:

- the delays between the samples being delivered to DAL and the recording of the relevant records on the DAL records system
- details about how these samples are stored and what security systems are in place.

DAL responded as follows:

*Samples are received from the Police at the Division of Analytical Laboratories and kept in sealed bags within secure premises until they are recorded on the Laboratory Database (LIMS). The samples are retained within the secured laboratory complex for analysis and subsequent storage.*⁵⁷⁶

Discussion

Short delays in transporting the forensic DNA samples to DAL should not affect the integrity of the evidence. If samples are properly lodged into exhibits systems, their chain of custody is accountable. The tamper-evident bags used by NSW Police are designed to reveal if tampering has been attempted. We understand that properly sealed evidence stored on FTA paper⁵⁷⁷ should not degrade if stored under appropriate conditions.⁵⁷⁸

Following clarification from both NSW Police and DAL in relation to those audited samples which appeared to take nine or more days to be delivered to DAL, we found that the great majority of DNA samples (from serious indictable offenders) were delivered to DAL within the 72 hour period required by the NSW Police SOPs. However, our sample was small (164 samples out of a possible 10,403).

Prompt delivery of DNA samples to DAL is important to:

- promote public confidence in the forensic DNA sampling process, and reduce the possibility of allegations of tampering
- reduce the possibility of samples being lost or misplaced whilst in police custody
- allow for the DNA profiles to be placed on the DNA Database at an earlier date and thus assist in the timely investigation of crime.

This is an issue we will consider again in our further review of the Act.

574 Director of Criminalistics, DAL, emailed correspondence, 17 July 2003 and telephone communication, 4 September 2003.

575 Director of Criminalistics, DAL, emailed correspondence, 19 September 2003.

576 Director of Criminalistics, DAL, emailed correspondence, 19 September 2003.

577 FTA is a chemical treatment that was designed by scientists at Flinders University in South Australia. The chemicals in the paper assist in stabilising the DNA for analysis and protecting it from harmful bacterial and viruses. This allows the DNA to be stored at room temperature, instead of being refrigerated. For further information, see chapter 17.

578 Whatman, *Application Note: Techniques and Technical Insight to Optimize Use of Whatman Products*, FTA-001B 02/02.

Chapter 21: Recording and destroying information about the DNA sampling

What the Act says

Accurate and timely recording of data about forensic procedures on NSW Police information systems is critical to ensure that breaches of the Act do not occur.

The Act creates a number of offences relating to the failure to destroy forensic material (such as samples) and inappropriate disclosure of information relating to forensic procedures.

Destruction of information and forensic material

A DNA sample is the term used for a sample of biological material that can be analysed to obtain a DNA profile, for example, cheek cells from a buccal swab, hair roots or blood. A DNA profile is usually presented as a list of numbers and letters that represent the different lengths of DNA at particular loci (sites) on the genetic material.⁵⁷⁹

In certain circumstances the Act requires the destruction of any information that could be used to link the DNA profile to the person from whom a DNA sample came. It should be noted, however, that the Act does not require the DNA profile (as opposed to the DNA sample) itself to be destroyed.

Section 3(5) of the Act explains the process of destruction. It states:

For the purposes of this Act, a person “destroys” forensic material taken from another person by a forensic procedure, the results of the analysis of the material or other information gained from it (including information placed on the DNA database system) if the person destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.

In general, DNA samples and DNA profiles obtained from serious indictable offenders under Part 7 of the Act may be held indefinitely. However, the Act requires police to ensure that any forensic material obtained is destroyed as soon as practicable in the following circumstances.

Section 87 - Destruction of forensic material taken from offender after conviction quashed

(1) If an order is obtained under section 70 or 74 for the carrying out of a forensic procedure on a serious indictable offender and the offender’s conviction is quashed after the making of the order, the police officer who obtained the order (or some other police officer) must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.

(2) If a forensic procedure was carried out on a serious indictable offender under Part 7 and the offender’s conviction is quashed after the making of the order, the police officer in charge of the investigation of the offence must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.⁵⁸⁰

Section 89 – Destruction of forensic material where related evidence is inadmissible

(1) If a court finds that evidence described in section 82 relating to a forensic procedure is inadmissible under that section, the Commissioner of Police must, as soon as practicable after the end of the proceedings before the court (including any re-trial and any period during which an appeal may be made), ensure that the forensic material taken from the suspect by that forensic procedure is destroyed.

⁵⁷⁹ See Chapter 2.

⁵⁸⁰ Section 87 of the Act.

(2) *This section does not require the destruction of a DNA profile derived from forensic material.*

Section 94(3) of the Act states:

The responsible person for the DNA database system must remove any identifying information relating to a DNA profile of an offender on the offenders index of the system from the system as soon as practicable after becoming aware that the offender has been pardoned or acquitted of the offence concerned or if the conviction has been quashed.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

NSW Police advised that the Attorney General's Department is currently considering the issue of the "responsible person". In the interim, a "Minute of Authorisation" has been signed and given force until 2005 to address this.⁵⁸¹

Disclosure or misuse of information and forensic material

The Act also creates several offences for the disclosure or misuse of information obtained from forensic procedures in certain circumstances (see ss 91, 93 and 94). If a person's conduct (either intentional or reckless) gives rise to such disclosure or misuse, they could be guilty of an offence and could face a maximum penalty of two years imprisonment or 100 penalty units (currently \$11,000)⁵⁸² or both.

Implementation by NSW Police

In order for NSW Police to assess whether a sample taken under Part 7 of the Act is required to be destroyed, police must keep accurate records about:

- whether the serious indictable offender is in the process of, or intends to, appeal her/his conviction
- the relevant dates of any appeal period/s
- the outcomes of any appeals
- the date that the sample was taken.

It is FPIT's role to ensure the timely destruction of forensic material and information where required. FPIT monitors court outcomes and if required, FPIT requests that DAL destroy the DNA sample, and remove the identifying link from the DNA database. Once this link has been removed, the DNA profile cannot be linked to the person from whom it was taken.

The Agreement between NSW Police and DAL states that NSW Police will notify DAL of required destructions at least two working days prior to the date that the destruction must take place.⁵⁸³

The Act only requires that NSW Police ensure the destruction of any forensic material obtained as a result of the carrying out of a forensic procedure on a serious indictable offender if the sample was obtained under the authority of a senior police officer order or a court order (and the offender's conviction is quashed after the making of the order.)⁵⁸⁴ However, FPIT has advised us that it is NSW Police policy that if an inmate/detainee's conviction was quashed on appeal, the forensic material obtained from that person is destroyed, regardless of whether the sample had been authorised by consent, a senior police officer order or a court order.⁵⁸⁵

581 Correspondence from NSW Police 19 April 2004

582 Section 17 *Crimes (Sentencing Procedure) Act 1999*.

583 Deed of Agreement between the Commissioner of Police and Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database, 22 December 2000.

584 Section 87 of the Act.

585 Communication from FPIT, NSW Police, 23 April 2003.

Implementation by DAL

The Agreement between NSW Police and DAL states that:

*DAL may destroy samples and links to DNA profiles only by express permission, in writing or electronically, of the Manager, FPIT or the Director, Forensic Services Group. The FPIT will use its best endeavours to ensure that requests for destruction of samples/profiles arrive at DAL in sufficient time for the destruction to be carried out by any stipulated date.*⁵⁸⁶

The current policy of DAL is to destroy the:

- link to the identifying information on the database and identifying details (name, date of birth, barcode etc)
- hard copy DNA profile (as held by DAL)
- actual person sample and any extracts.⁵⁸⁷

How we monitored this issue

Audit of DAL and NSW Police records

We conducted a small audit of NSW Police and DAL records of 164 forensic procedures carried out on serious indictable offenders between 1 January 2001 and 5 July 2002.⁵⁸⁸ We compared the records held by NSW Police with the corresponding DAL record.

In 14% (23 out of 164) of cases, we found differences between the identifying information recorded by NSW Police and that recorded by DAL. In these cases we searched the live COPS system for aliases, and made further inquiries with NSW Police and DAL.

Following further investigation, we found that of the 23 records with discrepancies:

- 17 related to serious indictable offenders who had been known to police by a different name. Police had entered the details about the forensic procedure onto the COPS record of the 'alias' of that person, rather than onto the COPS record that matched the DAL record.
- five involved an incorrect name being entered onto the DAL laboratory information management system. At our request, DAL re-examined the 'sample information sheet' and concluded that the discrepancy was as a result of unclear handwriting on the Sample Information Sheet provided by NSW Police.
- one had been erroneously entered onto the COPS record of a relative of the serious indictable offender.

We discovered the last of these anomalies (the sample that had been erroneously entered onto the COPS record of the wrong person) because DAL could not find any record of receiving a sample taken from a particular person (Person A). We contacted NSW Police, who conducted its own inquiries. NSW Police informed us that the sample had actually been taken from another person (Person B), and that the records relating to the forensic procedure had been entered onto the COPS record of Person A by mistake. Person A had a different name, date of birth and criminal history to Person B. Person A had never served a sentence of imprisonment. However, the sample had been taken from a serious indictable offender – Person B. NSW Police informed us that:

*Details of the DNA sample were subsequently incorrectly recorded against [Person A] [on COPS]. The confusion may have arisen out of the fact that [Person B] was initially charged as [Person A]. [Person A] and [Person B] would appear to be brothers and formerly resided at the same address. Action will be taken to ensure that the recording error is rectified.*⁵⁸⁹

586 Deed of Agreement between the Commissioner of Police and Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database, 22 December 2000.

587 DAL, Discussion Paper – Destruction of Samples under the Crimes (Forensic Procedures) Act 2000, October 2002.

588 The audited samples consisted of approximately two per cent (164 out of 10,403) of all samples taken from serious indictable offenders during our review period.

589 Correspondence from Dr Tony Raymond, Director, Forensic Services Group, NSW Police, 30 June 2003.

FPIT told us that this error would have been identified if this sample had resulted in a 'hit' on the DNA database, because the DNA sample taken from Person A (as a suspect) to verify the cold hit would have resulted in a different DNA profile to the original sample (actually obtained from Person B). This is explained below.

Police action in the event of a 'cold hit'

If a person's DNA profile is linked to the DNA derived from a crime scene by the DNA database, this is called a 'hit'. A 'cold hit' is the term used when there is no previous police intelligence linking the person to the crime scene. A 'warm hit', is the term used when there is some previous police intelligence linking the person to the crime scene.

NSW Police has informed us that:

If an inmate's sample is matched to crime scene material, the investigating officer will determine the evidentiary value of that match e.g. is the match with a beer bottle located outside the house or a blood smear located inside the house. This and other available information e.g. a description obtained from a witness, will determine whether the person is arrested or not, and what questions are asked of him/her. The first sample is regarded as an intelligence sample, the second sample as a suspect sample. There are a number of reasons for taking a second sample: to verify the correct profiling of the first sample and to confirm that both samples originated from the same person and to avoid having to raise the suspect's antecedence in court. In effect, the finding of a person's DNA at a crime scene will create a reasonable suspicion that that person was at the scene and, depending on where DNA was located, could create sufficient evidence to suggest that the person committed the crime.⁵⁹⁰

FPIT have also advised that the process for a cold link involves a report being issued that details the name of the person, their date of birth and the barcode of the sample. This can then be cross-checked against COPS and any identified anomalies can be investigated and rectified at this time.

Analysis of complaints and inquiries received by this office

We received two written complaints and two inquiries complaining that the records regarding the DNA sampling of serious indictable offenders were inaccurate. One inmate complained that the police (a) misspelt his name on the consent form, and (b) recorded the wrong type of sample obtained. We asked NSW Police to investigate this issue. The investigation confirmed that the spelling of the inmate's name was incorrect on some documentation, but found that the correct spelling appeared on both the DAL records and on COPS. The investigation also found that the type of sample was, in fact, recorded correctly.⁵⁹¹

The other complaint is set out over the page.

⁵⁹⁰ Correspondence from NSW Police FPIT, 4 August 2003.

⁵⁹¹ Correspondence from Forensic Services Group, NSW Police, 5 September 2001.

Case study

We received a complaint from an inmate who alleged that after providing a DNA sample as a serious indictable offender under Part 7 of the Act, he had been asked to provide another sample on two occasions. He refused on the grounds that he had already provided a DNA sample as a serious indictable offender.⁵⁹²

The complainant was concerned that he had been asked to provide additional samples. He wanted to know:

- if his original sample had been placed on the DNA database
- why he was asked to provide a second sample
- if the second sample would also be placed on the DNA database
- if he would be repeatedly asked to provide further samples.

We asked NSW Police to investigate this matter. NSW Police informed us that they had received confirmation from DAL that the complainant's first sample had been successfully analysed and his DNA profile placed on the DNA database. NSW Police found that the requests to the complainant to provide further samples had been made in areas of the correctional centre that the ITTs do not occupy when conducting DNA sampling of inmates. NSW Police concluded that the requests to the complainant to provide additional samples were possibly made by DCS staff.

We then wrote to DCS and asked them to provide us with information about the issues raised by this complainant and how DCS ensures the accuracy and currency of records relating to inmates who are eligible for DNA sampling. The NSW Corrective Services Commissioner replied that the second request made to this inmate was the result of an oversight. He stated that when the inmate concerned was originally DNA sampled, *'this fact was inadvertently not recorded on the Department's Offender Management System (OMS) and, as a result, his name was not removed from future DNA testing schedules'*.⁵⁹³

The Commissioner informed us that new procedures had been implemented to improve the accuracy and currency of the records relating to the DNA sampling of inmates.⁵⁹⁴ The new procedures require the updating of inmate records about DNA sampling to be carried out by the centralised DCS Forensic Testing Team (FTT), which 'limits the number of people involved in the recording of this type of information'.

The Commissioner explained that:

Schedules or lists of inmates who require testing are forwarded to the CCLO and to the Forensic Procedures Implementation Team (FPIT) of the NSW Police Service. These are checked by both FTT and FPIT in order to highlight offenders who have imminent dates of release or concerns with their serious indictable offender status

....

The Department is not informed if an inmate's sample has resulted in a successful DNA profile and therefore recorded on the DNA database. FTT is notified by FPIT only when the sample fails to amplify (ie. There is not enough sample or the sample has been contaminated).

....

Upon receipt of this information, the record of an inmate as having been tested is removed from the [OMS] database. The offender's name then automatically appears on the next testing schedule

⁵⁹² In some cases, a person may be sampled as a suspect, and then again later as a serious indictable offender.

⁵⁹³ Commissioner, DCS, written communication, 3 July 2003.

⁵⁹⁴ Commissioner, DCS, written communication, 3 July 2003.

The CCLO notifies FTT if an inmate states that he has been tested previously. Upon receipt of this information, FTT contacts FPIT to confirm the details of information received. Confirming this information can sometimes be difficult due to communication gaps in the process of relaying information through the various people involved. Sometimes, it is more convenient and effective for the Police Sergeant to speak to the inmate in person while on the telephone to their COPS specialists to ascertain details such as correct/approximate dates, the nature of the offence, whether the inmate was tested as suspect for the actual offence, etc.

There have been occasions when offenders have stated that they have already been tested but no records exist of their DNA samples taken by the police. In those instances where an offender was not able to provide a consent form, he was tested.

We contacted DCS to clarify their response in relation to the removal of the DNA sampling details from an inmate's records.⁵⁹⁵ We were concerned that if a serious indictable offender objects to providing a DNA sample on the grounds that s/he has already provided one, and yet there was no DCS record of the first sample having been taken (because, for example, the record had been removed as no DNA profile was obtained from her/his sample), this could undermine inmates' confidence in the DNA sampling system and the security of their DNA samples.⁵⁹⁶

The Commissioner advised us as follows:

I can advise that CCLOs, subsequent to notification from the Police Forensic Implementation Team of a test failure, immediately inform the inmate concerned of the failure. This action is designed to alleviate any concern the inmate may have regarding his retesting. The Forensic Testing Team then reschedules the test at a time convenient to the centre in which the inmate is housed.⁵⁹⁷

As a result of our inquiries and this advice, we were satisfied that DCS has adequate procedures in place to minimise, as far as possible, the outcome of similar errors occurring in the future.

Examination of NSW Police records

We examined NSW Police records relating to the destruction of forensic material and information obtained from convicted offenders. Between 1 January 2001 and 5 July 2002, 32 DNA samples taken from serious indictable offenders were destroyed. All of these samples had been taken erroneously:

- 30 samples were from offenders convicted of a Commonwealth or ACT offence⁵⁹⁸
- one sample was from an offender who was on remand pending a re-trial
- one sample was from a forensic patient.⁵⁹⁹

We were able to sight the original written confirmation of destruction signed by DAL for all but three of these DNA samples.⁶⁰⁰ Later, NSW Police provided us with copies of the written confirmation signed by DAL for two out of these three DNA samples, and told us that the third profile had been removed from the DNA database. NSW Police stated that DAL had not yet provided them with written confirmation of the destruction of the third sample.⁶⁰¹

595 Written communication to Mr Ron Woodham, Commissioner, DCS, 5 September 2003.

596 During our video audit, we noted that some inmates raise objections to the DNA sampling on the grounds that police could plant their DNA at a crime scene. If there is no record of the inmate's first sample on the DCS system, these suspicions could be unnecessarily exacerbated.

597 Commissioner, DCS, written communication, 31 October 2003.

598 This issue is discussed in Chapter 5.

599 A Forensic Patient is a person:

- (a) who has been found by a Court to be unfit to be tried for a criminal offence, and is detained in a hospital, prison or other place, or
- (b) who is detained in a hospital after being transferred there from a prison, or
- (c) who has been found not guilty by a Court, because of mental illness.

600 Meeting with NSW Police FPIT, 24 June 2003.

601 Written advice from NSW Police FPIT, 30 June 2003.

Report of the Independent Review of Part 1D of the Commonwealth Crimes Act 1914

As discussed earlier in this report,⁶⁰² the Commonwealth forensic procedures legislation (Part 1D of the *Crimes Act 1914*) required an independent review to be carried out of the operation of those provisions, particularly the use of DNA material for law enforcement purposes.

The report of the Commonwealth Independent Review stated that ‘the most important issue has been the need to improve accountability arrangements both within and across Australia’s jurisdictions’.⁶⁰³

The report made several recommendations in this regard, including that there be:

- regular internal audits of systems and procedures by police and database custodians
- regular external audits of systems and procedures by accountability bodies in all participating jurisdictions
- consolidation of powers and procedures of oversight bodies in all participating jurisdictions in order to ensure the effective handling of cross-jurisdictional complaints, audits and own motion investigations
- adequate resources provided to law enforcement agencies, forensic laboratories and oversight bodies to implement these recommendations.⁶⁰⁴

In relation to point three above, we note that the NSW Ombudsman has the power, in certain circumstances, to:

- deal with complaints about public sector agencies⁶⁰⁵
- oversight, monitor and carry out investigations into complaints about NSW Police and police officers⁶⁰⁶
- refer complaints to, and share information with, ‘relevant agencies’⁶⁰⁷
- delegate functions to, and accept delegations from, a person exercising functions similar to those exercised by the NSW Ombudsman in another jurisdiction⁶⁰⁸
- furnish information relating to a matter in another Australian jurisdiction, to a person exercising functions similar to those exercised by the NSW Ombudsman in that jurisdiction.⁶⁰⁹

It is also useful to note certain existing scrutiny functions of the NSW Ombudsman. The Ombudsman is currently responsible for auditing NSW Police and other law enforcement agencies’ records in relation to certain matters. For example, section 160 of the *Police Act 1990* requires this Office to regularly inspect the NSW Police records relating to complaints to ascertain whether NSW Police is complying with its legislative obligations in its handling of complaints.

The Ombudsman is the NSW ‘state inspecting authority’ for the purpose of the Commonwealth accountability scheme of the ‘tapping’ or interceptions of telecommunications by law enforcement agencies.⁶¹⁰ Part 3 of the *Telecommunications (Interception) (New South Wales) Act 1987* requires the Ombudsman to inspect the records of NSW Police, NSW Crime Commission, the Independent Commission Against Corruption and the Police Integrity Commission at least twice in every financial year.

602 See chapter 3.

603 Commonwealth of Australia, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003, Executive Summary.

604 The full text of recommendations 15-20 is set out in Appendix Q.

605 See the *Ombudsman Act 1974*.

606 See the *Police Act 1990* and the *Ombudsman Act*.

607 See Part 6 of the *Ombudsman Act*.

608 See s 10A and s 10B of the *Ombudsman Act*.

609 See s 34(2) of the *Ombudsman Act*.

610 See s 92A(1) *Telecommunications (Interception) Act 1979* (Cth) and the *Telecommunications (Interceptions) (New South Wales) Act 1987* (NSW).

The Ombudsman is also the agency responsible for the independent monitoring and inspection of records relating to ‘controlled operations’ in NSW. ‘Controlled operations’ are operations to investigate crime that might otherwise involve unlawful activities (for example drug purchases from suspected drug suppliers). Part 4 of the *Law Enforcement (Controlled Operations) Act 1997* requires that the Ombudsman inspect and report on the compliance of NSW law enforcement agencies with this Act’s requirements at least once every 12 months.

Discussion

Audit of samples

During our review period NSW Police obtained almost 10,500 samples from serious indictable offenders in NSW. Our audit of NSW Police and DAL records consisted of less than two per cent (164 out of 10,403) of all samples obtained by police under Part 7 during our review period.

It is of significant concern that our small audit revealed that the details about a forensic procedure had been entered onto the records of the wrong person on COPS. In addition, the existence of a further 22 discrepancies between the information held by DAL and that held by NSW Police about the forensic procedures is also of concern.

At the very least, it could cause delays in identifying a potential suspect in the event that there is a cold hit between the DNA profile of a serious indictable offender and a crime scene. More seriously, the discrepancies could result in the investigation of a person who is not associated with the crime scene. This may cause undue distress to that person, result in wasted police resources and ultimately lessen confidence in the efficacy of DNA sampling as a criminal investigation tool.

The importance of accurate and timely recording of data about forensic procedures carried out on serious indictable offenders is important to ensure that:

- serious indictable offenders can be provided with accurate information about the status of any previous DNA samples that they claim they have provided to NSW Police
- the Act’s requirements to destroy DNA material can be adhered to in a timely manner.

For these reasons, we recommend that both NSW Police and DAL conduct internal audits of their records relating to forensic material obtained under the Act to ensure that all information relating to the collection and analysis of DNA samples is correct and consistent.

In response to our draft report, NSW Police have advised that the Deed of Agreement presently in operation between it and the Western Sydney Area Health Service requires DAL to provide NSW Police with a “Receipts Report” that highlights discrepancies. Once fully operational, NSW Police state that the report will enable past and future discrepancies for suspects, serious indictable offenders, volunteers and victims to be identified and rectified. In conjunction with our recommendation this should go a significant way to ensure the accuracy of profiles held on the database.⁶¹¹

Recommendation 45

It is recommended that NSW Police (and DAL if required) conduct internal audits of their records relating to forensic material obtained under the Act to ensure that all information relating to the collection and analysis of DNA samples is consistent and correct.

We recommend that the NSW Attorney General consider implementing, and/or facilitating the implementation of, recommendations 15 to 20 made by the Commonwealth Independent Review as they relate to the functions of the NSW Government.

611 Correspondence from NSW Police 19 April 2004

In accordance with the principle that new police powers should be subject to at least the same oversight and accountability mechanisms as existing police powers, we support the spirit of the recommendations made by the Commonwealth Independent Review.

We note that a Deputy Ombudsman working group is examining the recommendations of the Commonwealth Independent Review. We also note that the NSW Ombudsman is currently well placed to obtain and share information with other (appropriate) agencies about complaints relating to the carrying out of forensic procedures by NSW Police and the maintenance of the NSW DNA database by DAL. In light of our current role in relation to NSW Police, we believe that it would create unnecessary duplication and/or confusion to appoint the oversight and monitoring of NSW Police functions in relation to forensic procedures to another agency.

Recommendation 46

It is recommended that the NSW Attorney General consider implementing, and/or facilitating the implementation of, recommendations 15 to 20 made by the Commonwealth Independent Review as they relate to the functions of the NSW Government.

It is also recommended that:

- the Act be amended to enable the implementation of recommendations 15 to 20 made by the Commonwealth Independent Review, as they relate to NSW
- the NSW Parliament consider establishing a scheme similar to that in the *Law Enforcement (Controlled Operations) Act 1997* and the *Telecommunications (Interception) (New South Wales) Act 1987*, to regulate external audits of records relating to forensic material obtained under the Act.

Destruction of samples

Our review suggests that samples taken without authority have been destroyed by DAL on request from NSW Police. To ensure this continues to happen in all relevant cases, we believe that it is important for the original written confirmations of destruction to be obtained and stored securely by NSW Police. Despite the advice of NSW Police that this can be done 'as and when required' our view is that this is insufficient and it should occur in a systematic and accountable manner. In the event that there is a question about the destruction of a sample obtained from a serious indictable offender, NSW Police must, in our view, be able to show that they complied with the legislation. Section 87 of the Act requires a police officer 'to ensure that any forensic material obtained' has been destroyed. It is not enough for a police officer to show that s/he made a request to DAL to destroy the forensic material.

Recommendation 47

It is recommended that NSW Police review its procedures for ensuring that forensic material required by the Act to be destroyed is destroyed, with particular attention to documentation and the retention of original written confirmations of destruction signed by DAL.

Apart from the anomalies described above, it appears that the recording and destruction of information about the DNA sampling of serious indictable offenders has been effectively and properly implemented. We believe that this is for two reasons:

First, the input of data about the DNA sampling of inmates and detainees is the responsibility of ITT. The use of an experienced and dedicated team of police officers is likely to have provided greater consistency in the recording of information than that undertaken by a broader base of officers.

Second, the requirements for the destruction of information relating to forensic material obtained from serious indictable offenders is simpler than that relating to suspects and volunteers. There are only two circumstances in which forensic material obtained from serious indictable offenders is required to be destroyed: if the person's conviction is quashed (s 87) or evidence is found to be inadmissible (ss 82 and 89).

During the next phase of our review we will closely examine the recording and destruction of information about the DNA sampling of suspects and volunteers.

Chapter 22: Making material obtained from the DNA sampling available to serious indictable offenders

What the Act says

Part 6 of the Act sets out general rules for conducting a forensic procedure on a serious indictable offender. By virtue of s 65 of the Act, these requirements apply to the carrying out of a forensic procedure on a serious indictable offender as if the references to the suspect in Part 6 were references to a serious indictable offender.

Although the Act does not specify what tests may be carried out on the samples obtained from serious indictable offenders or how they may be analysed, it does provide that if the sample is analysed in the investigation of an offence, police must provide the serious indictable offender with a copy of the results of the analysis.

Section 60 Results of analysis

- (1) *If material from a sample taken from a suspect is analysed in the investigation of an offence, the investigating police officer concerned must ensure that a copy of the results of the analysis is made available to the suspect.*
- (2) *Subsection (1) does not require a copy of the results of an analysis to be made available to a suspect at any time when to do so would prejudice the investigation of any offence. However, the copy must be made available to the suspect a reasonable time before evidence of it is adduced in any prosecution of the suspect for the offence.*
- (3) *This section does not require the destruction of a DNA profile derived from a sample.*

Part 13 of the Act contains provisions relating to how information and material must be provided to the serious indictable offender.

Section 100 Obligation of investigating police officers relating to recordings

- 1) *If a recording is made as required by a provision of this Act, the investigating police officer concerned must ensure that:*
 - a) *if an audio recording only or a video recording only is made---the suspect, offender or volunteer concerned is given the opportunity to listen to or view the recording, and*
 - a) *if both an audio recording and a video recording are made:*
 - i) *the suspect, offender or volunteer concerned is given an opportunity to listen to the audio recording, and*
 - ii) *the suspect, offender or volunteer concerned is given an opportunity to view the video recording, and*
 - b) *in any case, if a transcript of the recording is made---a copy of the transcript is made available to the suspect, offender or volunteer concerned.*

- 2) *Where an investigating police officer is required to ensure that a suspect, offender or volunteer is given an opportunity to view a video recording made under this Act, the investigating police officer must ensure that the same opportunity is given to:*
 - a) *in any case---the suspect's, offender's or volunteer's legal representative, and*
 - b) *if the suspect, offender or volunteer is a child or an incapable person---an interview friend of the suspect, offender or volunteer, and*
 - c) *if the investigating police officer believes on reasonable grounds that the suspect, offender or volunteer is an Aboriginal person or a Torres Strait Islander---an interview friend of the suspect, offender or volunteer.*

Section 101 Material required to be made available to suspect, offender or volunteer

- 1) *Without limiting the way in which material from samples, copies, or any other material, that must be made available to a suspect, offender or volunteer under this Act may be made available, it:*
 - a) *may be sent to the suspect, offender or volunteer at his or her last known address (if any), or to the suspect's, offender's or volunteer's legal representative (if any) at his or her last known address, or*
 - b) *if there is no known address as mentioned in paragraph (a)---may be made available for collection by the suspect, offender or volunteer at the police station where the investigating police officer concerned was based at the time the forensic procedure was carried out.*
- 2) *Material of any kind (other than material from samples and copies of records made under section 36) that is required by this Act to be made available to a suspect, offender or volunteer must be made available in accordance with subsection (1):*
 - a) *within 90 days after the material comes into existence, or*
 - b) *if the material is requested by the suspect, offender or volunteer or the suspect's, offender's or volunteer's interview friend or legal representative, within 90 days of the request.*

Note. *The timing of making copies of section 36 records available is covered in section 36 (5).*

Section 102 No charge to be made for material or viewing video

If a provision of this Act requires material of any kind to be given to a suspect, offender or volunteer, or an opportunity to view a video recording to be given to a suspect, offender or volunteer, the material or the opportunity to view the video recording must be given without charge.

Implementation by NSW Police

As discussed in Chapter 17, NSW Police does not interpret s 60 of the Act as applying to serious indictable offenders, and as such do not provide copies of analysis reports on the results of inmate tests. NSW Police has informed us that it does not provide serious indictable offenders with a copy of the results of the analysis unless a serious indictable offender is prosecuted for an offence, in which case this information is made available as a part of the brief of evidence.⁶¹²

612 Information provided by NSW Police FPIT.

NSW Police suggests that the results of the analysis only be made available to serious indictable offenders upon request for the following reasons.

- it would place an unreasonable administrative burden on NSW Police, particularly where serious indictable offenders are no longer in the custody of DCS
- the results of the analysis may be meaningless to the serious indictable offender without an associated brief of evidence
- a serious indictable offender can obtain an independent analysis of his or her own DNA at any time
- the results of analysis take the form of a scientific report, which is technical and cannot be readily understood by a layperson.⁶¹³

The ITT use a television monitor to display what was being recorded whilst it was being recorded. This allows the inmate/detainee to see what was being recorded. The SOPs require that inmates and detainees be provided with the opportunity to view the recording at the end of the DNA sampling.

Video audit

During our video audit our auditor noted that eight serious indictable offenders asked the ITT for a copy of the video tape.⁶¹⁴ In all of these cases, the ITT members explained that police only provided the opportunity to watch the video, and that the video would be stored centrally. In some cases, the ITT officer suggested that the serious indictable offender could ask her/his legal representative to send a written request to NSW Police, or to obtain a copy under the *Freedom of Information Act 1989*.

Interviews with serious indictable offenders

Only six interviewees said that they chose to watch the video at the end of the procedure. Most of these interviewees said that they just wanted to check it. One interviewee said that he watched it to 'kill a bit of time'.⁶¹⁵

Almost 97% of interviewees said that they did not choose to watch the video. The reasons that interviewees gave for not wanting to watch the video recording were as follows.

Table 22.1: Interviewees' reasons for not wanting to watch the video recording⁶¹⁶

Number of interviewees (total = 178)	Category of reasons for not wanting to watch the video
64	I was there. I saw what happened (on the monitor whilst it was being recorded).
47	There's no point.It's a waste of time.
36	I don't know. No reason provided
19	I'm too busy. I have other things to do. I wanted to get it over and done with.
6	I didn't want to see myself on video.
4	It was too hot for the people who were waiting to be sampled. ⁶¹⁷
2	I wasn't asked/cannot remember being asked if I wanted to watch it.

⁶¹³ NSW Police, written correspondence, 16 January 2003.

⁶¹⁴ Videod Interaction Nos 109, 162, 166, 143, 175, 48, 198 and 123.

⁶¹⁵ Interview No 144

⁶¹⁶ Information based on our interviews with serious indictable offenders, November-December 2001.

⁶¹⁷ Several interviewees told us that they had to wait in the sun to be sampled. It was a particularly hot day.

During our interviews with serious indictable offenders, we asked interviewees whether they thought that they should be provided with a copy of the results of the analysis of their DNA sample. Eighty per cent (148 out of 184) of interviewees answered 'yes' to this question. Twenty per cent (36 out of 184) of interviewees answered 'no'.

Discussion Paper

The response to our discussion paper from the Office of the Federal Privacy Commissioner raised the importance of balancing the private interests of individual freedom and privacy and the public interest of law enforcement opportunities and initiatives. The Office of the Federal Privacy Commissioner discussed the use of DNA sampling either as means of identifying an individual with respect to a crime or crime scene, or to inquire after more detailed genetic data about that person. The response then noted:

As it stands, it is the former identification function that law enforcement agencies cite as the intention behind forensic DNA testing as currently practised.

....

Things become more complicated, however, if the testing leads to the search for, or discovery of, other information about the person inferred from more detailed genetic analysis.⁶¹⁸

We note that there is the potential for a DNA sample to reveal much more information about a person than just their DNA profile. The Australian Law Reform Commission and the National Health and Medical Research Council have reported that developments in science indicate that physical characteristics and health information may soon be available from non-coding/junk DNA.⁶¹⁹

Other information

DNA profiles are, in essence, a series of 18 numbers and two letters.⁶²⁰ As noted earlier, the Act does not specify *which* tests may be carried out on the samples obtained from serious indictable offenders or how they may be analysed. NSW Police and DAL have informed us that the only tests that are carried out on forensic DNA samples relate to 'non-coding' DNA.⁶²¹

The Act as it is currently drafted does not prohibit the analysis of DNA for purposes other than to obtain a DNA profile from junk DNA.

Some scientists have reported the development of DNA tests to identify the physical features of a person such as their race, hair colour and eye colour.⁶²² The UK Forensic Science Service provides a 'race identification service' and a 'red hair service', which apparently detects approximately 85% of redheads.⁶²³ A DNA sample also has the potential to reveal behavioural characteristics such as whether a person has been exposed to particular diseases, and familial relationships between individuals.⁶²⁴

A related issue is the information or intelligence that may be obtained from the relatives of people who may be, or may become, suspects. NSW Police has informed us that some of the DNA profiles obtained from serious indictable offenders resulted in 'close hits',⁶²⁵ providing intelligence to police that the serious indictable offender was a close relative – for example a sibling – of the person whose DNA profile matches that found at a crime scene.⁶²⁶

618 Office of the Federal Privacy Commissioner, response to NSW Ombudsman's *Discussion Paper on the Forensic DNA Sampling of Serious Indictable Offenders*, 25 March 2002.

619 Australian Law Reform Commission and National Health and Medical Research Council, *Report 96: Essentially Yours: The protection of Human genetic information in Australia*, March 2003.

620 See Chapter 2.

621 This is explained in Chapter 17.

622 See, for example, 'Beyond DNA Databases: physical identification using DNA', by van Oorschot, Bandler-Hudson and Mitchell, Paper presented at international conference, *DNA Evidence: Prosecuting Under the Microscope*, Adelaide, 9-11 September 2001.

623 Human Genetics Commission, *Inside Information: Balancing interests in the use of personal genetic data*, May 2002.

624 See, for example, van Oorschot, Bandler-Hudson and Mitchell, *op cit*.

625 A 'close hit' is where many, but not all of the loci on the DNA profiles match. The fact that the DNA profiles are not identical means that the person (eg serious indictable offender) could not be the source of the DNA profile found at the crime scene. However, if the two DNA profiles are very similar, it could be that the source of the crime scene profile is a close relative of the person.

626 Dr Tony Raymond, Director, Forensic Services Group, NSW Police, verbal communication.

Similar questions about the intention of the Act are raised when police carry out the 'covert' DNA sampling of suspects, without their knowledge and without the protections set out in the Act.⁶²⁷ This is an issue outside the scope of this report, but it will be considered in the next stage of our review.

Discussion

As we noted earlier in this report, the ITT's provision of a TV monitor to show what is being recorded is a useful initiative that can make the procedure more transparent and efficient.

We accept that there is no legal requirement for NSW Police to routinely provide a copy of the DNA profile to serious indictable offenders. However, providing a copy of the results of any tests/analyses carried out upon a sample to the person concerned may lend a degree of transparency to the way in which police are using DNA material collected under the Act. That said, we also acknowledge the force of the reasons given by NSW Police for not providing this information, including administrative issues and the scientific complexity of the results. A more significant issue is the regulation of how the DNA samples are analysed, and what tests may be carried out on them.

We note the concerns raised regarding this issue by the Australian Law Reform Commission and the National Health and Medical Research Council and the recommendation made by the Commonwealth Independent Review that:

*Part 1D [of the Commonwealth Crimes Act 1914] be amended to specifically exclude testing of DNA for the purpose of detecting phenotypically expressed information including health or medical conditions.*⁶²⁸

Given that genetic and forensic technology is a rapidly evolving industry, it would be a formidable challenge for any legislature to proscribe the types of analyses and tests that may be carried out on samples obtained from forensic procedures. DNA results may be used in criminal investigations beyond mere profile matching. It would be shortsighted to prohibit such testing without a full debate of the matter. That is not the function of the Ombudsman or the purpose of this review. However, if the community is to have confidence in the use of forensic procedures and forensic samples by NSW Police, some regulation as to the use of forensic material may be appropriate. This is clearly a matter for Parliament.

Recommendation 48

It is recommended that the NSW Parliament consider what, if any, regulation is required of the way in which material obtained from forensic procedures may be analysed and compared.

⁶²⁷ For example, during the investigation into the death of Stacey Lee Kirk. See O'Shea, 'Death solves murder of a schoolgirl', *Daily Telegraph*, 6 August 2003 and the findings of Coroner J Abernathy, *Inquest into the death of Stacey Lee Kirk*, East Maitland Coroner's Court, 6 August 2003.

⁶²⁸ Recommendation 23, Commonwealth of Australia, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003.

Part G: The future of the DNA sampling of serious indictable offenders

Chapter 23: Responsibility of the DNA sampling of serious indictable offenders to be transferred to DCS

We note that in March 2003 the NSW Premier made two significant election commitments relating to the DNA sampling of serious indictable offenders.

The first was the amendment of the Act to allow police to DNA sample individuals charged with a serious indictable offence who have previously been convicted of a serious indictable offence. The DNA profiles obtained from these procedures will be placed and stored indefinitely on the DNA database.⁶²⁹

The second commitment was to transfer the responsibility of the DNA sampling of adult serious indictable offenders to DCS within 12 months. The stated aim of this commitment is to 'free up six police for frontline policing and investigative work'.⁶³⁰

As our review considered the DNA sampling of serious indictable offenders under Part 7 of the Act in detail, some of our findings may be useful to consider in the implementation of the latter of these commitments.

Currently NSW Police are responsible for the DNA sampling of serious indictable offenders under Part 7 of the Act. In practice, a specially trained team of police officers currently carry out forensic procedures on serious indictable offenders. According to the Act, a person who actually carries out the DNA sampling may be a person other than a police officer.⁶³¹ However, the Act currently requires many of the functions associated with the DNA sampling to be carried out by a police officer. These include:

- making an assessment of the person's Aboriginal and Torres Strait Islander and capability status
- requesting the serious indictable offender to consent
- providing information about the sampling
- giving the offender an opportunity to communicate with a legal practitioner of choice
- explaining the consequences of non-consent
- obtaining a senior police officer orders (only issued by a police officer of the rank of sergeant or above)
- applying for a court order.

The role of DCS is currently restricted to the facilitation of the DNA sampling at correctional centres by NSW Police. Earlier in this report we have outlined DCS responsibilities in relation to the education and preparation of inmates, and the arrangement of interpreters, interview friends and legal practitioners.

The issue of DCS assuming the responsibility for the DNA sampling of serious indictable offenders was raised in some of our focus groups with correctional officers and ITT members. One ITT officer stated that s/he did not understand why it was only police officers who could take DNA samples from serious indictable offenders. Other ITT officers suggested that DCS officers, Probation and Parole Officers or Corrections Health staff could carry out the DNA sampling instead of NSW Police.

629 Premier of NSW, *News Release: Premier Carr releases \$39.6 million plan targeting repeat offenders*, 6 March 2003.

630 Australian Labor Party NSW Branch, Labor Bob Carr and NSW Labor...getting on with the job, *Criminal Investigation and DNA Labor's Public Safety Plan: Stage One*, p1.

631 Clause 6 of the Regulation defines an 'appropriately qualified' person as a person who:
a) has suitable qualifications or experience to carry out the forensic procedure, or
b) has been authorised in writing by the Commissioner of Police to carry out the forensic procedure.

When the DCS officers discussed this possibility during our focus groups, there were a variety of views on the subject.

One CCLO stated that he agreed with the concept because correctional officers have a better rapport with the inmates than police and correctional officers 'do most of the work as it is, as far as pre-interviewing, organising the inmates for police to conduct the DNA, and they're under our environment'.⁶³²

Other CCLOs stated that it would be better if an agency independent from DCS carried out the DNA sampling because such a responsibility would have hidden implications for correctional officers who have to manage inmates on a daily basis. They were concerned that the DNA sampling of inmates by correctional officers who know the inmates would 'open it up to corruption'.⁶³³

Some CCLOs stated that if DCS were to assume the responsibility for sampling serious indictable offenders, the DNA sampling should not be carried out when the inmates are received into the correctional centre. They stated that not all inmates are convicted at that stage and so teams of sampling officers would still need to visit centres once they had been convicted. The officers were also concerned that the majority of inmates they received 'from the street' were intoxicated, or had far more pressing concerns such as who will take care of their children. They stated that their priority was to deal with those concerns in order to settle the inmate down.⁶³⁴

We did not raise this issue with serious indictable offenders during our interviews, but one serious indictable offender raised concerns about being provided with the DNA Sampling Education Program during his intake process at his correctional centre. He stated:

*You just come to reception. You're sitting there all day waiting to be processed. You're not really taking it all in, even if they do tell you about the DNA sampling. You're just hot and sweaty and tired. You just want to get into your cell and relax. Each jail works differently at their reception process. At [name of centre] I arrived at 10.30am, didn't finish the process until 3.30pm. I was just buggered. I didn't really take any notice of what they were telling me. That was five hours without lunch. I just say, 'yeah' to get the process over and done with and get out of there.*⁶³⁵

Following a request by the NSW Ministry for Police, we outlined a number of issues relating to the transfer of the responsibility for DNA sampling to DCS. We restate these views to assist the Parliament in considering any transfer of responsibility for DNA sampling from NSW Police to DCS:

Conflict of interest

We raised concerns that if DCS performed the forensic DNA sampling of inmates this would present a conflict of interest between DCS' role as the carer/custodian of inmates and the investigative role of DNA sampling. In addition, DCS could be vulnerable to allegations of corruption if the inmates being sampled had an existing relationship with the DCS staff conducting the sampling.

Funding and resources

We emphasised that adequate funding should be provided to any agency that is responsible for the DNA sampling of offenders. Our research found the DNA Sampling Education Programs and the preparation of inmates by CCLOs to be a valuable initiative fundamental to the smooth implementation of the forensic DNA sampling of serious indictable offenders. We recommended that CCLOs be provided with adequate training, time and resources to implement the DNA Sampling Education Program.

632 Focus Group No 4.

633 Focus Group No 4.

634 Focus Group No 5.

635 Interviewee No 9.

Potential for problems with the chain of custody

Preserving the integrity of evidence is of prime importance in obtaining and transporting DNA samples. Police officers receive special training in evidence collection techniques and giving evidence about this in court.

We have been informed that NSW Police policy is that where a cold hit results from a DNA profile taken from a serious indictable offender under Part 7 of the Act, police will then take a suspect sample from the person. Police anticipate that this will reduce challenges by the accused to the evidence collected by DCS and prevent the need for DCS officers to attend court.

Accuracy of records held by DCS

To ensure that inmates are not repeatedly asked for DNA samples, accurate and current records must be kept about the DNA sampling. The Act provides restrictions on the access and disclosure of information obtained from forensic material.

The results of the DNA analysis can only be disclosed in certain circumstances. Currently, DCS does not obtain information about whether the forensic DNA sampling of an offender resulted in a successful DNA profile being placed on the DNA database. If DCS were to manage the DNA sampling, they may need to have access to this information in order to assess whether a repeat sample is required. This would require further amendments to the Act.

Minimising disruption to correctional centres

We also recognise that having police officers attend correctional centres to carry out the DNA sampling could cause more disruption than it being conducted by DCS officers who are already known to the inmate population.

Other issues

Our research found that the establishment of a dedicated team of officers to carry out the sampling promoted consistency in the DNA sampling process and its related functions.

Advice received from the DJJ indicates that if the responsibility for testing of serious indictable offenders was to be removed from NSW Police they prefer that the responsibility for testing detainees be transferred to their own staff. DJJ feel that their own staff are better placed and skilled to deal with detainees in custody and would not like to see the responsibility for testing transferred from NSW Police to the DCS.⁶³⁶ DJJ indicate that they are happy with the current arrangements with NSW Police using dedicated testing teams and would prefer to see this system continue.

DCS has drawn attention to the Government's election commitment that responsibility for the DNA sampling of serious indictable offenders be transferred from NSW Police to DCS. DCS has advised us that the resources allocated to this function will largely determine the extent of implementation of the recommendations within this report.⁶³⁷ DCS also notes that they have not been provided with any assistance to date regarding the costs involved with the education of inmates, training staff and assisting police with testing.

In considering the transfer of responsibility from it to DCS, NSW Police have suggested that the forensic testing of inmates become part of the DCS admission process.⁶³⁸ This suggestion is an aspect of the NSW Police submission, should consent provisions be removed from the Act.

⁶³⁶ Correspondence from Director General, DJJ 2 March 2004.

⁶³⁷ Correspondence from Commissioner, DCS 27 February 2004.

⁶³⁸ Correspondence from NSW Police 19 April 2004

Chapter 24: Using DNA to prove innocence

In the Parliamentary debates relating to the Act many Members of Parliament commented upon the ability of DNA evidence to exclude, as well as include, people as suspects during the investigation of crimes.⁶³⁹

Overseas, DNA evidence has proved to be a useful tool to exonerate people convicted of serious offences. Over 130 convicted offenders have been exonerated in the United States of America following an examination of DNA evidence.⁶⁴⁰

Case - Frank Button⁶⁴¹

On 18 February 1999, a 13-year-old girl from a Queensland country town told police that she had been sexually assaulted in her bed in the early hours of that morning. The police investigation resulted in the arrest of 28-year-old Frank Button, who was living in the same house as the complainant at the time of the attack. The prosecution case against Button included evidence that the complainant had identified him as her attacker.⁶⁴²

When the forensic biologist analysed the samples taken from the girl's body, he found sperm, but he was unable to obtain a DNA profile from the sample. The girl's outer clothing and bed linen were not analysed at that time because the biologist believed they were unlikely to reveal evidence that would identify the offender. This belief was based on the knowledge the suspect, Button, had enjoyed unrestricted access to the complainant's bedroom, and, accordingly, the presence of his sperm on those items would not necessarily prove his guilt.

On 17 August 2000, a District Court jury convicted Button of the rape, and he was sentenced to imprisonment for seven years. He appealed against his conviction to the Court of Appeal on the grounds that the girl's sheet had not been scientifically analysed, and 'no other tests going to identify the rapist were undertaken'.⁶⁴³ The forensic biologist then undertook further DNA analysis, which included examining the semen found on the sheet taken from the girl's bed. This analysis concluded that Button had not been the donor of the seminal stains on the sheet. After further testing of the swabs taken from the girl, the biologist was able to conclude that 'there seems little doubt the same male donated sperm to the sheet and the vulval swab'.⁶⁴⁴

The DNA profile was searched on a DNA database of known offenders and linked to another person who was, at that time, serving a sentence of imprisonment for rape.

On 10 April 2001, the Court of Appeal quashed Button's conviction and directed an acquittal on the sexual assault charge. The Court referred to the testing of the bed sheets, which established '... a sufficient match between the male staining on the sheets and the spermatozoa to conclusively establish that the appellant was not the perpetrator of this crime'.⁶⁴⁵

Frank Button had spent 10 months in jail, where he said he was beaten and raped. In determining the outcome of the appeal, the Justice Williams stated:

*Today is a black day in the history of the administration of criminal justice in Queensland.*⁶⁴⁶

639 See, for example, Mr Whelan, then Minister for Police, NSWPD, Legislative Assembly, 31 May 2000 p 6295; The Hon J W Shaw, then Attorney General, NSWPD, Legislative Council, 20 June 2000 p 7104.

640 As at 19 June 2003, 131 prisoners were exonerated from offences that they had been convicted of following the analysis of DNA evidence. See the Cardozo School of Law Innocence Project website: <http://www.innocenceproject.org/>.

641 This summary is based on the following documents: Judgement of Williams, JA, in *R v Button*, Court of Appeal, CA No 247 of 2000, 10 April 2001; Crime and Misconduct Commission, *Forensics Under the Microscope, 2002*; TV Program Transcript, Four Corners, *A Black Day for Justice*, ABC TV, 18 March 2002.

642 She did not immediately name Button as the offender. At first, she said she was unable to identify her assailant. After some hours, she made a second statement naming Button as the offender. At Button's trial, the prosecution contended that the girl's initial reluctance to identify Button was borne of timidity and embarrassment.

643 Crime and Misconduct Commission, *Forensics Under the Microscope, 2002*, p13.

644 Ibid.

645 Ibid.

646 Williams JA, *R v Button*, Queensland Court of Appeal, CA No 247 of 2000, 10 April 2001.

What the Act says

The Act provides guidelines for the carrying out of forensic procedures upon suspects, volunteers and serious indictable offenders. It also deals with how information obtained from these forensic procedures can be accessed and how it must be destroyed. Neither the Act nor its regulations establish a process for convicted people who wish to demonstrate their innocence.⁶⁴⁷ As a consequence of this, the Innocence Panel is not within the scope of our scrutiny under s 121 of the Act, and we did not examine its functions. This chapter is solely descriptive and it is provided for information only.

NSW Innocence Panel

On 16 August 2000, the then Police Minister, Mr Whelan, announced the establishment of an independent innocence panel to review applications in which DNA may assist in establishing grounds of wrongful conviction.⁶⁴⁸ In an interview in June 2001, Mr Whelan cited the possibility of wrongful convictions as one of the main reasons for the establishment of the Innocence Panel. He stated:

*It's too early for any results to come through, but if overseas experience [with DNA tests] is reflected in NSW, quite a few prisoners will be cleared of offences.*⁶⁴⁹

The NSW Innocence Panel is an initiative of the Police Minister. It currently does not have a legislative basis and it does not have the power to quash convictions. Its terms of reference are set out below.

The NSW Innocence Panel – Terms of Reference⁶⁵⁰

- (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;
- (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.

The NSW Government's pamphlet about the Innocence Panel describes its functions:

The Innocence 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.

647 At time of writing.

648 Mr Whelan, then Minister for Police, NSWPD, Legislative Assembly, 16 August 2000 p 8253.

649 Les Kennedy, Police cheating system, Whelan says fearlessly', *Sydney Morning Herald*, 9-10 June 2001.

650 The Hon J A Nader, 'The NSW Innocence Panel', paper presented to the Eighth International Criminal Law Congress, 2 October 2002.

....

After the Innocence Panel has accepted an application, it will ask NSW Police and NSW Health to undertake searches for the specified items or samples taken from those items. If samples still exist, they will be analysed to see whether a useable DNA profile can be extracted. If useable DNA can be extracted from the crime scene sample it will be compared to the applicant's DNA.

For currently serving inmates, if a DNA sample has not already been taken, the Prisoner Testing Team will take a sample next time they visit the prison.⁶⁵¹

There is a \$20 administration fee for applications to the Innocence Panel, although this fee may be waived in cases of special hardship. The Innocence Panel began taking applications from convicted offenders in November 2002.

The NSW Innocence Panel was originally chaired by the Honourable John Nader RFD QC and consisted of representatives from the Office of the Director of Public Prosecutions, NSW Police, Legal Aid Commission of NSW, Privacy NSW, the Victims Advisory Board, NSW Public Defenders Office, DAL and a criminal law specialist. Following Judge Nader's resignation, the Minister for Police directed the new Chair, the Honourable Mervyn Finlay QC and the Panel to report 'on its performance and on its procedures and processes put in place for its operation'.⁶⁵² The Panel was suspended in August 2003 pending the outcome of this review.

The Panel completed its report in September 2003 and made a number of recommendations, including that amendments to the Act establish the legislative basis for the Innocence Panel and make provisions for its membership, principal functions and powers.⁶⁵³ We have been advised that the suspension of the Panel will continue until the responsibility for its administration has been transferred to the NSW Attorney General.⁶⁵⁴

651 NSW Government, The Innocence Panel (leaflet), September 2001. Further information about the Innocence Panel can be obtained from: www.nsw.gov.au/innocencepanel

652 The Hon Mervyn Finlay QC, *Review of the NSW Innocence Panel*, September 2003.

653 Ibid.

654 Oral communication, representative from the Ministry for Police, 12 January 2004.

Chapter 25: The results: DNA database links, charges and prosecutions

During the second reading debate of the Act, the then Attorney General and Minister for Police warned that the Act was not a magic solution to crime in NSW.

The Police Minister stated:

*It is important to note that DNA will be only one tool in the police officer's kit. They will still need to assemble a brief of evidence against the offender; DNA alone will not convict!*⁶⁵⁵

The Attorney General stated that:

*Linking a sample of a person's DNA to a sample found at a crime scene does not necessarily prove guilt; nor does it necessarily prove that the person was present at a crime scene. The popular viewpoint is that forensic evidence is infallible and that if a DNA match has been made, then the culprit has been found and a conviction will follow. This is an oversimplification.*⁶⁵⁶

The first NSW 'cold hit'⁶⁵⁷ between a serious indictable offender's DNA and DNA found at the scene of a murder illustrates the Attorney General's point. The following extract from a newspaper article provides a background to this case.

Extract: Murder charge first for DNA data bank

Sydney Morning Herald, 25 November 2002

By Les Kennedy, chief police reporter

Mass DNA testing of prisoners has led to the first NSW case of a person being charged with a previously unsolved murder as a result of a controversial gene-matching data bank.

The *Herald* has learned a DNA saliva swab led to the charging of a former prisoner with the bashing murder of a woman.

Police had been unable to find any witnesses or suspects following the murder in Sydney's inner city two years ago. Detectives had admitted they faced a tough job finding the killer.

But now the man has made criminal history in NSW by becoming the first person to be linked to an unsolved homicide through the prison DNA data bank.

During a brief court appearance last week, police did not release any details as to what type of DNA was recovered at the murder scene linking the man to the homicide. Nor were there any details about the unrelated crime for which he had been in prison at the time he provided his DNA sample.

His DNA is among almost 13,000 such samples taken from inmates in NSW's 28 jails since January 2000, when the collection scheme was introduced.

....

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655 Mr Whelan, NSWPD, Legislative Assembly, 31 May 2000 p 6294.

656 The Hon J W Shaw, NSWPD, Legislative Council, 20 June 2000 p 7104.

657 That is, a match between two DNA profiles on the DNA database where there was no previous police intelligence linking the donor/s of the DNA. A cold hit can be a match between DNA from crime scenes, or people and crime scenes.

The person in question was charged with murder. At the committal hearing, the magistrate dismissed the matter because the defendant could have left the DNA on the objects in question before the murder, and also because there was a possibility that other persons could have been present at the time of the murder. The magistrate stated:

I don't think there's any issue in these proceedings that the strength of the prosecution case lies fairly and squarely with the DNA and on very little else.

....

*I am not of the view that the evidence is capable of satisfying a jury beyond reasonable doubt as to the commission of the indictable offence in the forms charged before this court.*⁶⁵⁸

In April 2000 police in NSW indicated that they hoped that new police powers provided by the Act would assist them to further the investigations into several high profile unsolved cases: the murders of Donna Hicks, Rebecca Bernauer and Rachel Campbell, and a series of sexual assaults on the Central Coast.⁶⁵⁹ We contacted NSW Police, the Director of Public Prosecutions, the relevant coroners and courts to obtain information about the outcomes of these cases. We were informed that none of these cases has resulted in a successful prosecution.⁶⁶⁰

Cold hits from DNA obtained from serious indictable offenders under Part 7 of the Act

Anecdotal evidence from other jurisdictions is that it takes at least five years before the establishment of a DNA database begins to produce results such as regular 'cold hits'.⁶⁶¹

However, the NSW DNA database has already linked a significant number of people to crime scenes where police had no other information linking that person to the offence. At the time of writing, NSW Police indicated that the NSW DNA Database has produced over 2,800 cold hits since 1 January 2003, including links to serious crime scenes such as murder and sexual assault.⁶⁶²

More detailed information about the cold hits resulting from DNA samples obtained from serious indictable offenders is below. The statistics show that the large majority of cold hits have been in relation to property, rather than personal violence offences.

658 Magistrate Henson, *DPP v Ivers*, 26 May 2003.

659 We Know Who Killed Them, *Sun Herald*, 9 April 2000.

660 Written correspondence, NSW Police FPIT, 5 June 2003 and 11 June 2003.

661 Detective Superintendent, Robin Napper, Presentation to Western Sydney Area Health Service Breakfast Forum, Westmead Hospital, 19 October 2000.

662 Dr Tony Raymond, Director, Forensic Services Group, NSW Police, 'Using Forensic Science to Solve Crime', Public Lecture, Adult Learner's Week, 4 September 2003.

Table 25.1: DNA Database Link Results as at 24 June 2003

TOTAL Database Links		2003 2001 - 2003																					
DNA DATABASE LINKS	TOTAL	Offences																					
	Linked Scenes (No Suspect)	275	Murder	BFS	Armed Robbery	Steal MV	Malicious Damage	Drugs	Assault	Sexual Assault	Att Sex Aslt	Attempt Murder	Steal from MV	Agg BES	Agg Robbery	Stealing	Aggr Assault	Fail to Stop	Dangerous Driving	Agg Sex Aslt	Firearms	Arson	Malicious Wnd
	Scenes linked to Persons	600	1	421	17	82	7	1	4	2	0	1	41	4	7	7	2	0	0	2	0	0	1
Total Links	2311	875	1	619	22	117	13	1	4	3	1	58	4	9	11	2	0	0	7	0	0	2	0
		2003 2001 - 2003																					
Outcomes of actions following DNA Database links	TOTAL	Offences																					
	¹ Arrests	109	Murder	BFS	Armed Robbery	Steal MV	Malicious Damage	Drugs	Assault	Sexual Assault	Att Sex Aslt	Attempt Murder	Steal from MV	Agg BES	Agg Robbery	Stealing	Aggr Assault	Fail to Stop	Dangerous Driving	Agg Sex Aslt	Firearms	Arson	Malicious Wnd
	Charges	110	0	85	1	10	1	0	1	0	0	0	8	1	1	2	0	0	0	0	0	0	0
	Offences	129	0	101	1	10	1	0	1	0	0	0	11	1	1	2	0	0	0	0	0	0	0
	² Convictions	36	0	23	0	7	0	0	0	0	0	0	6	0	0	0	0	0	0	0	0	0	0
Database Index Name	"Cold" Links																						
Crime Scene - Crime Scene	747																						
Crime Scene - Suspects	364																						
Crime Scene - Offenders	1200																						
TOTAL:	2311																						

Cumulative Number of persons linked to Scenes	1232
Inmates	965
Suspects	267

Total Number of Individuals linked to scenes	905
Inmates	716
Suspects	189

¹ includes where the same person is arrested more than once in relation to separate database links.
² Convictions = the number of convictions received for each offence.

Appendix A: Glossary of terms

Term	Definition/background
the Act	<i>Crimes (Forensic Procedures) Act 2000</i>
body search	This term is used by DCS to describe a search of an inmate whilst s/he is clothed. It involves a 'pat down' search and the removal, and thorough search of, the inmate's shoes, socks, jacket, false teeth (if worn) and the contents of all pockets. ¹
buccal swab	A mouth swab taken to collect a sample of cells from the inner cheek lining.
close hit	A 'close hit' is where many, but not all of the loci on the DNA profiles match. The fact that the two DNA profiles are not identical means that the person (eg serious indictable offender) could not be the source of the DNA profile found at the crime scene. However, if the two DNA profiles are very similar, it could be that the source of the crime scene profile is a close relative of that person.
cold hit	A match between two DNA profiles on the DNA database where there was no previous police intelligence linking the donor/s of the DNA. A cold hit can be a match between DNA from crime scenes, or people and crime scenes.
controlled movement	A controlled movement relates to the way in which inmates are escorted to the ITA by DCS officers. If the serious indictable offender is restrained (for example by handcuffs, a security belt or other means) by DCS officers when arriving at the ITA, NSW Police considers this to be a 'controlled movement'.
cooling off period	Is defined in the NSW Police Service Draft Standard Operating Procedures as a period of up to 7-10 days (in Metropolitan correctional centres only) given to inmates who indicate that they will resist police when they attempt to take a DNA sample. If the inmate resides in a correctional centre outside the Metropolitan area, or if the inmate is due for release before the end of the 7-10 day cooling off period, the inmate will be given a shorter period of time to reconsider.
CCLO	Correctional Centre Liaison Officer
Correctional Centre Liaison Officer	The correctional centre staff person who liaises with the ITT about the DNA sampling of inmates. The CCLO usually remains in the Inmate Testing Area to witness the DNA sampling.
CrimTrac	National shared information system to provide Australia's police services with enhanced access to operational information. Not fully operational as only some states have provided data. Will include the National DNA Database, National Sex Offenders Register and the National Automated Fingerprint Identification System.
CrimTrac Agency	The CrimTrac Agency was established as an Executive Agency in the Commonwealth Attorney-General's portfolio on 1 July 2000. The federal government has committed \$50 million over a 3-year period for its establishment. The Agency is underpinned by an agreement of all Australian police ministers. The Australasian Police Ministers' Council is responsible for defining the Agency's strategic directions and key policies. The CEO, Mr John Mobbs, reports to the Federal Minister for Justice and Customs.

¹ This is a summary of the instructions provided by DCS, Operations Procedures Manual, 7 July 2003, at 12.9.8.

Term	Definition/background
CS Gas	Orthochlorobenzylmalononitrile. Also called 'Federal Streamer Aerosol munition'. A 'pepper type' spray. CS Gas is one of the chemical agents used by DCS to control inmates. If it is used in a 'one-to-one' situation, officers have a 3.76 oz wt container and the maximum range is 8-12 feet. In riot situations, it is administered differently.
DAL	The Division of Analytical Laboratories is part of Western Sydney Area Health Service and is contracted by NSW Police to analyse forensic samples and maintain the NSW DNA database.
DCS	The Department of Corrective Services
DJJ	The Department of Juvenile Justice
DNA	Deoxyribonucleic Acid (either nucleic or mitochondrial). Often called the genetic 'blueprint of life'. Most DNA analysis involves the analysis of nucleic DNA.
DNA analysis	DNA analysis involves several stages: <ul style="list-style-type: none"> • extraction (of DNA from cellular material) • quantitation (of available DNA) • amplification (of specific sites of 'junk' DNA) • electrophoresis (separation and detection of areas of variability of the DNA sites) • analysis and verification of results • interpretation (genetics, comparison to probability of random match)
DNA laboratory	See DAL.
DNA profile	A DNA profile is usually presented as a list of numbers and letters which represent the different lengths of DNA at particular loci (sites) on the genetic material. These different lengths are called Short Tandem Repeats (STRs).
DNA sample	A sample of biological material that can be analysed to obtain a DNA profile. For example, cheek cells from a buccal swab, hair roots and blood.
DNA Sampling Education Program	We have used this term to describe the actions taken to prepare serious indictable offenders before they are formally asked by police to provide a DNA sample. The DNA Sampling Education Programs are carried out by the relevant custodial/supervisory agencies (DCS, DJJ and the Home Detainees Program). The DNA Sampling Education Programs include: <ul style="list-style-type: none"> • the provision of information (video and written information about the DNA sampling) • the assessment of a serious indictable offender's capacity to understand the information • assisting the person with access to legal advice, • organising the attendance of interpreters (if necessary), • assisting the person to organise the attendance of interview friends and legal practitioners (if applicable).

Term	Definition/background
Emergency Response Unit	The Emergency Response Unit is a team of correctional officers trained to deal with serious incidents and emergencies at NSW correctional centres, such as riots and violent inmates. Emergency Response Unit officers may be located centrally, regionally or at a local correctional centre. The Emergency Response Unit is sometimes referred to as the 'Security Unit' or the 'Crisis Emergency Team'.
FPIT	Forensic Procedures Implementation Team. This team is part of the NSW Police Forensic Services Group and was established to support the operational implementation of the Act by NSW Police.
FTT	Forensic Testing Team. This team is part of the DCS Security and Investigations Command. It was established coordinate the management of DNA sampling at correctional centres throughout NSW.
Incapable person	Is defined in s 3(1) of the Act as an adult who: <ul style="list-style-type: none"> (a) is incapable of understanding the general nature and effect of a forensic procedure, or (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.
Independent Review (NSW)	Independent Review of the <i>Crimes Procedure (Forensic Procedures) Act 2000</i> . This review, conducted for the Attorney General by Professor Mark Findlay, Institute of Criminology, Sydney, was established pursuant to s 122 of the Act. It was tasked to review the Act to determine whether the policy objectives remained valid, and whether the terms of the Act remained appropriate to meet those objectives. The report was provided to the Attorney General in March 2003, and tabled in Parliament in November 2003.
Independent Review (Commonwealth)	Independent Review of Part 1D of the <i>Crimes Act 1914 – Forensic Procedures</i> . This was a review established by the Commonwealth Attorney General in 2002 to examine the operation and effectiveness of the forensic procedures provisions in Part 1D of the <i>Commonwealth Crimes Act</i> . It reported to the Minister for Justice in March 2003.
Inform	Is defined in section 3(4) of the Act and requires that a person be informed: <p style="margin-left: 40px;"><i>through an interpreter if necessary, in a language (including sign language or Braille) in which the other person is able to communicate with reasonable fluency.</i></p>
Informed consent	In relation to a serious indictable offender is defined in section 67 of the Act and requires that the police officer who asks the inmate to consent: <ul style="list-style-type: none"> a) Makes the request in accordance with the Act, b) Informs the inmate about the matters identified by the Act, and c) Gives the inmate the opportunity to communicate, or attempt to communicate with a legal practitioner in accordance with the Act.
Inmate Testing Area	Specific location within a correctional centre that is separate from the main prison and out of sight of people not involved in the DNA sampling of inmates.

Term	Definition/background
Inmate Testing Team	Team of specially trained police from the Operational Support Group section of the Police Service. The teams can consist of three or four people.
Interaction	We have used this term to describe the whole interaction between the Inmate Testing Team/correctional officers and the serious indictable offender.
Interview friend	Section 4 of the Act lists the people who may act as an interview friend (or support person) of a suspect or serious indictable offender. Different people may act as interview friends of a suspect or offender depending upon the circumstances.
ITA	Inmate Testing Area
ITT	Inmate Testing Team
LAC	Local Area Command - an operational policing region. There are 80 Local Area Commands throughout NSW.
Model Bill	Model Forensic Procedures Bill drafted by the Model Criminal Code Officers Committee
MOU	Draft Memorandum of Understanding between the Commissioner of Corrective Services and NSW Police, Serious Indictable Offender Testing.
OSG	NSW Police Operational Support Group
The Regulation	Crimes (Forensic Procedures) Regulation 2000
security belt	A security belt is a belt made of leather and/or canvass webbing which has metal loops through which a handcuff chain can be looped. A security belt is used by DCS to restrain an inmate's hands at the waist either in front of, or behind, the inmate's body.
senior police officer order	An order made by a police officer who holds the rank of sergeant or above to authorise the taking of a non-intimate sample (eg. hair) without a person's consent. NB. Senior police officer orders cannot be used to obtain samples from children or 'incapable' people – whose sampling must be authorised by a court order.
serious children's indictable offence	Is defined in s3(1) of the <i>Children (Criminal Proceedings) Act 1987</i> as: <ul style="list-style-type: none"> (a) homicide, (b) an offence punishable by imprisonment for life or for 25 years, (c) an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the <i>Crimes Act 1900</i> (or under section 61B of that Act before the commencement of Schedule 1 (2) to the <i>Crimes (Amendment) Act 1989</i>), (d) the offence of attempting to commit an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the <i>Crimes Act 1900</i> (or under section 61B of that Act before the commencement of Schedule 1 (2) to the <i>Crimes (Amendment) Act 1989</i>), or (e) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.

Term	Definition/background
serious indictable offence	<p>Is defined in s3(1) of the Act as:</p> <ul style="list-style-type: none">(a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or(b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years' imprisonment.
serious indictable offender	<p>Is defined in s3(1) of the Act as 'a person who has been convicted of a serious indictable offence.</p>
SOPs	<p>Standard Operating Procedures. This term is used by both Police and DCS to describe the organisation's current policies and procedures for a given process or situation.</p>
Standing Committee	<p>The Standing Committee on Law and Justice of the NSW Legislative Council. It was tasked by s 123 of the Act to inquire into the operation of the Act, and in particular, examine the implications, effectiveness and reliability of DNA matching. The inquiry took place over 2001 and 2002, and a final report was tabled in February 2002.</p>
strip search	<p>This term is used by DCS to describe a search of both the inmate's clothes and the inmate's naked body (for example, an examination of the person's armpits, soles of the feet etc). The DCS Operations Procedures Manual emphasises that strip searches must be done:</p> <ul style="list-style-type: none">• with due regard to privacy,• under the supervision of a Senior Correctional Officer, and• in accordance with the relevant legislation.²

² This is a summary of the instructions provided by the DCS, Operations Procedures Manual, 7 July 2003, at 12.9.10.

Appendix B: Leaflet - The new forensic procedures law and the NSW Ombudsman



THE NEW FORENSIC PROCEDURES LAW

and the
NSW Ombudsman

If you prefer, this leaflet can be provided in languages other than English, Braille, large print, on disk and In-audio format

COMPLAINTS

If you wish to make a complaint to the NSW Ombudsman about unreasonable or improper conduct by police officers or other public officials in relation to the administration of the *Crimes (Forensic Procedures) Act 2000*, you are welcome to do so. We will deal with such complaints in the usual manner.

Complaints in themselves will not be treated as submissions for the purposes of our Forensic Procedures Project. However, the results of complaint investigations will be a useful source of information for the Project.

FOR MORE INFORMATION, CONTACT:

**Forensic Procedures Project
NSW Ombudsman
Level 24, 580 George St
Sydney NSW 2000**

General enquiries: **02 9286 1000**
Toll free (outside Sydney Metro Area): **1800 451 524**
Facsimile: **02 9283 2911**
Telephone typewriter (TTY): **02 9264 8050**
E-mail: **nswombo@nswombudsman.nsw.gov.au**
Website: **www.nswombudsman.nsw.gov.au**
Hours of business: **9am–5pm Monday to Friday** or at other times by appointment

This brochure is also available in alternative formats, including audio. Please contact the Royal Blind Society on 1800 644 885.



This brochure is one of a series of information brochures produced by the NSW Ombudsman. For more information, contact the Publications Officer on 9286 1072. Feedback is welcome. Printed March 2001.

Delivery Address:
Level 24
580 George Street
SYDNEY NSW 2000



Forensic Procedures Project
NSW Ombudsman
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THE NEW FORENSIC PROCEDURES LAW AND THE NSW OMBUDSMAN

The *Crimes (Forensic Procedures) Act 2000* creates new police powers to carry out forensic procedures — such as taking DNA samples.

The Act requires the NSW Ombudsman to monitor and report on the implementation of the new law by the Police Service. This leaflet explains our role and how we intend to conduct our research.

The new law

Some of the people affected by the new law are:

- people suspected by police of having committed an offence
- people convicted of a serious indictable offence.*

The new law sets out the circumstances in which NSW Police can conduct forensic procedures. Some of the forensic procedures that the Act provides for are:

- taking DNA samples (e.g., saliva, hair or blood sample)
- taking prints (e.g., finger, toe, foot)
- taking samples by swabs (e.g., from hands or under a finger nail)
- taking photographs (e.g., tattoos, wounds)
- external examinations
- taking impressions and casts (e.g., dental impressions).

* A serious indictable offence is an offence that carries a maximum penalty of 5 years (or more) imprisonment. A person who has been sentenced to a shorter period of imprisonment is considered to be a serious indictable offender if the offence they have been convicted of carries a penalty of 5 years or more imprisonment.

The law also sets out how the forensic material from those procedures may be used and how and when that material must be destroyed. The law also outlines information about the rules for NSW's participation in the National DNA Database.

Our role under the Crimes (Forensic Procedures) Act 2000

Our role to monitor the use of the new powers by police is defined in section 121 of the *Crimes (Forensic Procedures) Act 2000* which states:

For the period of 2 years after the commencement of this section the Ombudsman is to keep under scrutiny the exercise of the functions conferred on police officers under this Act.

After the end of the review, we must report to Parliament. The report can include any recommendations that we think are appropriate.

Our **Forensic Procedures Project** includes research in a number of areas including:

- analysis of complaints and inquiries
- consultation with relevant stakeholders
- inspections of records of the use of the new powers.

We will also be distributing a discussion paper for comment.

Your suggestions are welcome

If you have any suggestions about possible sources of information and strategies we could use, please post or fax the attached page to us. Alternatively, you could email your suggestions. You can make your suggestions in a language other than English.

FORENSIC PROCEDURES PROJECT NSW Ombudsman

Name: _____ Position (if applicable): _____

Organisation (if applicable): _____

Main function of organisation (if applicable): _____

Address: _____

Phone: _____ TTY: _____

Fax: _____ Email: _____

Comments: _____

- I am interested in receiving further information about the Ombudsman's research into the *Crimes (Forensic Procedures) Act 2000*.
- I am interested in participating in consultations for the Ombudsman's research relating to the *Crimes (Forensic Procedures) Act 2000*.

Appendix C: Summary report of Interviews with Serious Indictable Offenders regarding their experiences of DNA sampling under Part 7 of the Crimes (Forensic Procedures) Act 2000

Introduction

Section 121 of the *Crimes (Forensic Procedures) Act 2000* (the Act) requires the NSW Ombudsman to monitor and report on the implementation of the new law by NSW Police. Some of the people directly affected by the Act are serious indictable offenders.¹

A serious indictable offender is a person who has been convicted of a 'serious indictable offence'. In NSW, indictable offences are considered to be either 'serious' or 'minor'.² A serious indictable offence is defined in s 3(1) of the Act which states:

"serious indicatable offence" means:

- (a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or*
- (b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.*

Who can be sampled as a serious indictable offender under Part 7 of the Act is discussed in more detail in Chapter 5 of this report.

In order to conduct a balanced review, it was necessary to obtain information directly from serious indictable offenders about their experiences of the DNA sampling. One of the methods we used to achieve this was to conduct interviews with almost 200 serious indictable offenders after they had been asked to provide NSW Police officers with a DNA sample.

This appendix set out a summary of the interviews. It is emphasised that this is a synopsis of inmate's responses. We have not sought a response from NSW Police or DCS in respect of each inmate's interview, and therefore the views here are the inmates' views only. The main body of the report includes conclusions or recommendations based on information including these interviews.

Background

NSW Police, the Department of Corrective Services (DCS), the media, complainants, lobby groups and the available literature have raised a number of issues about the implementation of Part 7 of the Act by police. These issues include:

- Are serious indictable offenders being correctly identified?
- Are serious indictable offenders from vulnerable groups being identified correctly and afforded their statutory rights accordingly?
- Is the use of force to obtain DNA samples from serious indictable offenders reasonable?
- Are serious indictable offenders consenting to the provision of DNA samples because they believe if they do not they will experience negative consequences?
- What information are serious indictable offenders relying on to assist them in making their decision whether or not to consent to the sampling?

¹ As defined in s 3(1) of the Act.

² Section 580E *Crimes Act 1900*.

- Are serious indictable offenders being provided with adequate opportunity to obtain legal advice?
- Do serious indictable offenders understand the information that is required to be provided to them by police?

In addition to the interviews with serious indictable offenders we also examined these issues through:

- distribution of an initial consultation document – a leaflet about the Ombudsman’s role in relation to the Act
- distribution of a discussion paper about the forensic DNA sampling of serious indictable offenders
- an audit of the videos of serious indictable offenders being DNA sampled
- analysis of statistics provided regularly to the Ombudsman by the Forensic Procedures Implementation Team (FPIT)
- focus groups with FPIT, the Inmate Testing Teams (ITT), DCS Correctional Centre Liaison Officers (CCLO) and non-custodial DCS staff.

Rationale for interviewing serious indictable offenders

We believed it was necessary to obtain information directly from serious indictable offenders. The interviews had to be sensitively managed in a corrections/prison environment where inmates report concern about being able to fully express their views about their experience of imprisonment. In order to overcome the difficulties associated with this, we interviewed inmates on an individual basis in a private setting after they had been requested by the ITT to provide a DNA sample to the police. Our rationale for interviewing serious indictable offenders in this way included:

- the importance of seeking the views of people who are directly affected by the legislation
- there are few opportunities to directly consult with serious indictable offenders on issues affecting them
- there were not many submissions to MCCOC or to the NSW Parliament by serious indictable offenders
- the difficulty in obtaining information from this stakeholder group – correctional centres can be intimidating environments and few serious indictable offenders were expected to respond to our discussion paper
- the interviewing of serious indictable offenders after they have provided a forensic DNA sample would have little or no impact upon the testing procedure employed by the police and
- the interviewing of serious indictable offenders immediately after the request would ensure that the event is fresh in their memory.

Context

The interviews with serious indictable offenders were conducted in the four weeks between 20 November 2001 and 19 December 2001. This was approximately ten months following the commencement of inmate testing by NSW Police. Prior to the interviews, NSW Police had obtained almost 8,000 DNA samples from serious indictable offenders in NSW correctional centres. It was therefore expected that at the time of our interviews both the DCS staff and the Police Service would be very experienced in the DNA sampling process.

We conducted the interviews on 15 occasions at the following correctional centres:

- Cessnock Correctional Centre
- Emu Plains Correctional Centre
- Goulburn Correctional Centre
- Junee Correctional Centre
- Metropolitan Medical Transit Centre (MMTC)
- Metropolitan Remand and Reception Centre (MRRC)
- Malabar Special Programs Centre (MSPC)
- Mulawa Correctional Centre
- Parklea Correctional Centre
- Parramatta Correctional Centre
- Silverwater Work Release Centre
- St Heliers Correctional Centre

The correctional centres were chosen in order to obtain a representative sample of serious indictable offenders. They included maximum, medium and minimum security centres, the only private centre in NSW, women's centres, rural and metropolitan centres and remand facilities.

Methodology

Inmates who had been asked by police to provide a DNA sample were asked to participate in a face-to-face interview with one or two Ombudsman's officers (depending upon how many interviewees there were). Informed written consent was obtained from interviewees prior to the interview and wherever possible this consent was witnessed by an independent non-custodial officer. Inmates were informed that the interview was completely voluntary and that they could withdraw consent at any time. A copy of the consent form is attached.

The interviews canvassed questions that had previously been raised by various stakeholders. It consisted of a mixture of open and closed questions on a range of subjects, including:

- how much notice interviewees received about the DNA sampling
- what information interviewees accessed about the DNA sampling
- whether interviewees understood the information that was provided by NSW Police
- whether interviewees obtained legal advice about the DNA sampling
- whether interviewees had a legal representative or an interview friend present during the DNA sampling
- the reasons why interviewees consented or did not consent
- the number of times interviewees were asked to provide a DNA sample
- how many people were present during the DNA sampling
- demographic information about the interviewee.

A copy of the interview form is attached.

Each interview form was marked with a unique identifying number that correlated with the interviewee's consent form. This enabled us to separate identifying information (such as the consent forms) from the interviewees' responses and ensure that each document was accounted for. Identifying information was recorded and stored separately from the interviewee's responses in a secure environment.

Each interview took approximately 15 minutes to complete. At the time of the Ombudsman's interviews, the average time for the ITT to obtain a DNA sample was approximately 8 minutes, which meant that sometimes inmates had to wait for a short period if they wanted to participate and the interviewers were busy. Consequently, not all inmates chose to wait.

Interviewers

All interviewers were special officers of the NSW Ombudsman. As the interviews took place in a number of centres throughout NSW, sometimes on the same days, a team of interviewers worked in pairs. All interviewers were provided with training about the Act and an explanation of purpose of the study. In order to maintain consistency they were also provided with:

- instructions about the methodology
- an annotated interview form
- standard answers to potential questions by interviewees, the ITT and DCS staff
- a list of appropriate referral agencies
- how to handle complaints about misconduct by police or DCS staff
- advice about how to handle difficult situations.

The team of interviewers met regularly to deal with issues and concerns and to ensure that, as far as possible, issues arising were dealt with appropriately and consistently.

Interviewees

Prior to being asked to consent to the interview, interviewees were informed that:

- their responses may be included in our report to Parliament, but if so they will be anonymous
- the interview was separate to the complaints process, and that the information they provided would not be treated as a complaint
- interviewers could not answer questions about the inmates' legal rights, or the rights of police or DCS
- we could refer inmates to appropriate organisations, if requested
- their participation in the interview was voluntary, and that they could withdraw their consent to participate at any time
- any concerns about their involvement in the interview or the conduct of the interviewers should be raised with the NSW Ombudsman
- information about how to obtain a copy of the final report on our review.

Copies of publications (such as leaflets and videos) were shown to inmates to illustrate the items referred to in our interview questions. However, these were not handed out to the inmates.

Strengths of the study

The interviews provided direct contact with a stakeholder group that is rarely afforded the opportunity to have input into policy issues and is unlikely to make submissions to any other manner of inquiry into, or review of, the operation of the legislation.

The accuracy of the inmates' accounts of their interactions with the ITTs could be tested against an examination of police records such as the videos of inmate DNA sampling and/or the associated paperwork.

Limitations of the study

As notice was provided to both DCS and NSW Police prior to the visits to correctional centres, there was an opportunity for those agencies to influence which inmates were requested to provide a forensic DNA sample on those particular days (and consequently which serious indictable offenders were actually interviewed). However, as the NSW Police mainly prioritises those inmates who are due for release, it is highly unlikely that the sample of interviewees could be, or was, manufactured in this manner.

The accuracy of the inmates' accounts of the events that occurred prior to their arrival at the Inmate Testing Area (ie those that are not recorded) were very difficult or impossible to verify.

Sample

On the days that we conducted the interviews, police obtained DNA samples from 231 inmates at the relevant centres. This represents approximately 43% of all inmates sampled in NSW during the four week period of our interviews.

We attempted to interview all inmates who were requested to provide a DNA sample on the day that we attended the centre. Of the 231 inmates tested, we were able to speak to 209 inmates and ask them if they wished to participate in the Ombudsman's Office interviews. Wherever possible, we approached the inmates directly to request their participation in the interviews. These inmates were provided with information about the Ombudsman's role under the Act, the purpose of the interview and assurances of confidentiality and anonymity. If they then wished to participate in the interview, they signed and received a copy of the consent form which outlined the above and identified who they should contact if they had concerns about the interview or their participation in it.

Participation rate

The participation rate of inmates was 92%. Of the 209 inmates approached, 17 declined to participate. Nine of these stated that they could not participate due to other commitments, fatigue or illness. The remaining eight simply did not wish to participate.

We interviewed 192 inmates in total. Of these, 184 inmates met our criteria and only their responses are included in the results. Our criteria were:

- the interviewee was a serious indictable offender as defined by the Act
- the interviewee had been asked by the NSW Police Service ITT to provide a DNA sample under the Act
- the interviewee had been asked to provide a sample either on the day of the interview or the previous day
- an appropriate interpreter was available (for our interview) if requested by the interviewer or the interviewee
- the interviewee had a support person available (for our interview) if s/he desired
- the interviewee gave written consent to the interview and was happy to participate.

The responses that were excluded from our quantitative results were those where the interviewees were DNA sampled more than 24 hours prior to the interview or the ITT decided that they were not eligible to be sampled.

Demographics

Young people

Nine per cent (17 out of 184) of interviewees were under the age of 21. Of these, five identified as being Aboriginal or Torres Strait Islander, and six reported as speaking a language other than English at home.

LBOTE (language background other than English)

Twenty eight per cent (52 out of 184) interviewees reported that they spoke a language other than English at home. Of these, six were under 21 years of age and two identified as being Aboriginal or Torres Strait Islander.

Five of these used an interpreter to participate in the interview. We used the same interpreter that had been used by the ITT for the DNA sampling.

Table C1: Languages spoken at home by interviewees

Language	Number of interviewees who spoke this language at home
Arabic	5
Armenian	1
Biripi	1
Cambodian	1
Cantonese	2
Chinese	3
Cook Islander	1
Croatian	3
Fijian	2
French	1
Greek	1
Hindi/Punjabi	1
Indian	1
Indonesian	1
Korean	1
Laos	1
Lebanese	3
Macedonian	1
Maltese	2
Mandarin	2
Maori	1
Persian	1
Polish	1
Samoan	4
Spanish	3
Tagalog	2
Tongan	1
Vietnamese	9

n=184

Source: Ombudsman's interviews with serious indictable offenders, 2001

Aboriginal and Torres Strait Islander

Sixteen per cent (29 out of 184) of interviewees identified as being Aboriginal and/or Torres Strait Islander. Of these, two reported as speaking a language other than English at home, and five were under 21 years of age.

Incapable

The issue of whether inmates had been determined to be ‘incapable’ or not was not canvassed with the interviewees, as we determined that it was not appropriate for us to try to assess interviewees’ capacity as defined in the Act. All interviewees who had a support person or interview friend present during the DNA sampling were provided with the opportunity to have that person present during our interview. According to the statistics provided to us by NSW Police, no incapable inmates were sampled during the period that the interviews were conducted.

Summary of findings

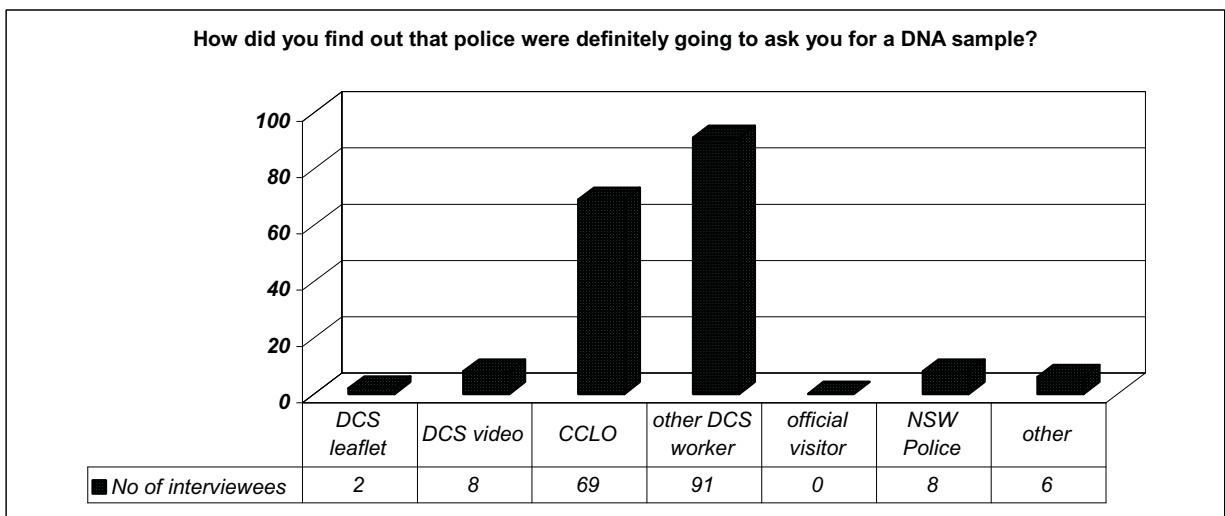
How much notice interviewees received about the DNA sampling

Inmates and detainees may become generally aware of DNA sampling and the possibility that they are eligible to be sampled in a number of ways, including the media, other inmates, their legal adviser or correctional centre officers. We wanted to establish the point at which the interviewees were officially put on notice that they would be asked to provide a sample, and that they may therefore exercise their rights to obtain legal advice and arrange the presence of interview friends or legal representatives (if entitled).

It appears that the earliest official notice to serious indictable offenders occurs at the ‘Pre-Test Interview’ with the Correctional Centre Liaison Officer (CCLO). This interview involves the CCLO taking the inmate aside and asking whether they wish to obtain legal advice about the forensic sampling. CCLOs use a ‘Pre-test Interview Form’, which is dated and signed by the serious indictable offender, to provide a written record of the interview.

A large proportion (72%) of interviewees told us that they found out that they were going to be sampled less than one week prior to the sampling. When we discussed these results with NSW Police and DCS, they suggested that interviewees were in fact being notified about the DNA sampling much earlier, but that the inmates did not act on the information (for example, by attempting to obtain legal advice) until a few days before the sampling.

Figure C2: How did you find out that police were definitely going to ask you for a DNA sample?



n=184

Source: Ombudsman’s interviews with serious indictable offenders, 2001

In order to assess the accuracy of the interviewees’ responses and the information provided by DCS and NSW Police, we compared the dates on the Pre-Test Interview forms to the answers provided by the interviewees. We asked CCLOs to provide us with a copy of the Pre-Test Interview forms for all the inmates we interviewed.

The Pre-Test Interview Forms were provided in 138 cases. In 46 cases, the CCLO did not provide the form. The CCLOs informed us that in some cases this was because the inmate had been transferred to another correctional centre, along with his or her case file containing the Pre-Test Interview form and the CCLO could no longer access it. In other cases, no explanation was provided.

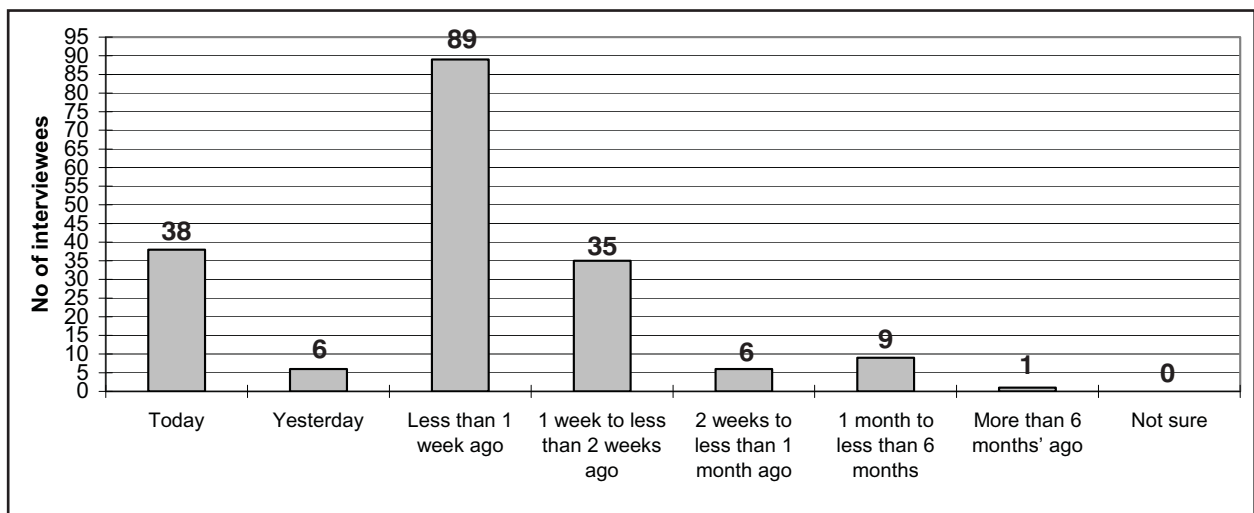
In calculating the period of notice provided we relied on the signed and dated Pre-Test Interview Form where it was available. Where DCS could not provide a signed and dated Pre-Test Interview Form, we relied on the information provided to us by the interviewee.

We found that the Pre-Test Interview Forms supported the interviewees’ responses. Of the 138 cases where we were provided with the Pre-Test Interview Forms, 103 of the interviewees (75%) told us in the interviews that they had been provided with less than one week’s notice. According to the Pre-Test Interview Forms relating to these interviewees, more than 88% (122) were provided with less than one week’s notice.

Where the period of notice given to us by the interviewee could not be verified by a Pre-Test Interview Form, we found that:

- 54% of interviewees (25 out of 46) had told us that they found out about the DNA sampling the same day that they were sampled
- 80% of interviewees (37 out of 46) had told us that they had found out about the DNA sampling less than one week before they were sampled³
- 74% of interviewees (34 out of 46) were from centres where our staff had witnessed⁴ the CCLO conducting Pre-Test Interview with inmates immediately before the DNA sampling.

Figure C3: Period of notice provided to interviewees (based on interviewee response)

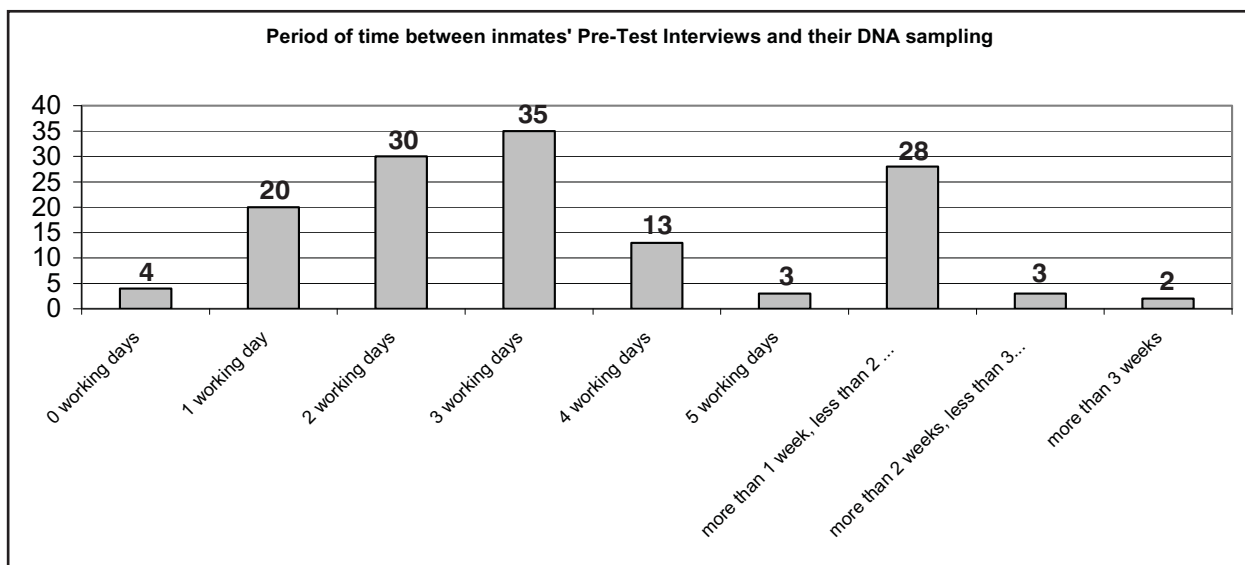


n=184

Source: Ombudsman’s interviews with serious indictable offenders, 2001

3 This figure includes those inmates who told us that they had found out about the DNA sampling the same day that they were sampled.

4 This occurred when we visited correctional centres to conduct our Inmate Survey.

Figure C4: Period of notice provided to interviewees (based on Pre-Test Interview Form)

n=138

Source: Ombudsman's interviews with serious indictable offenders, 2001

Interviewees' access to information about the DNA sampling

The information provided to us by interviewees suggests that the DCS DNA Sampling Education Program is not, and is probably unable to be, carried out in a uniform manner throughout the corrections system. Some interviewees were shown the DCS video about the forensic sampling on reception, some correctional centres play the video several times a week and interviewees could choose when (or if) to watch it. Other interviewees were briefed immediately prior to seeing the ITT.

A range of information is available about forensic DNA sampling. Inmates obviously do not have access to all of this information, but DCS has informed us that its staff ensure that inmates are shown the DCS video and receive the DCS leaflet. These information sources should therefore be accessible to all inmates as part of the DCS DNA Sampling Education Program.⁵ Also available to DCS staff and inmates was a seven page document called *Forensic Procedures: Handout for staff and inmates*, but we understand from our focus groups with CCLOs that this was not distributed by DCS as systematically as the video and leaflets.

We asked interviewees if they had obtained information from particular sources, and if so, how helpful they found that information. Some inmates were not sure how helpful the information was. For example, some interviewees had seen the leaflet but had not, or could, not read it.

DCS leaflet

The DCS leaflet seemed to be the primary source of information about the DNA sampling for most interviewees. 66% (122 out of 184) interviewees told us that they had obtained information from the DCS leaflet. More than half of these said that they first got that information less than one week before they saw the police about the DNA sampling. In addition: 13 interviewees stated that they didn't read the leaflet, while 6 interviewees told us that they could not read.

Of the valid responses, 62% found the DCS leaflet helpful or very helpful while 26% found the leaflet not very helpful.

DCS video

⁵ Correspondence from Ron Woodham, Commissioner, DCS, 11 July 2001.

DCS video

52% (95 out of 184) of interviewees said that they have either not seen, or did not obtain information from the DCS video. Of those that had seen the video, approximately one quarter had seen it less than a week before they saw the police about the DNA sampling.

From the responses from those who had seen the video, 83% found it helpful or very helpful while 11% found the video not very helpful.

[CCLO or other DCS worker – three lines – retain]

Of those who had received information from the CCLO or other DCS worker, 67% found the information helpful or very helpful while 25% found it not very helpful.

Correctional Centre Liaison Officer or other DCS worker

52% (95 out of 184) interviewees said that they had obtained information about the DNA sampling from the CCLO or another DCS worker. 59% of these interviewees told us that they had obtained information from the CCLO or other DCS worker less than one week ago.

Inmate Development Committee, Official visitor, other inmates

Very few interviewees said that they had obtained information about the DNA sampling from their Inmate Development Committee (4), the Ombudsman's leaflet (2), publications by the Justice Action lobby group (2) or the NSW Police Service (20). No interviewees had obtained information about the DNA sampling from the Official Visitor.

Is there anything else that you would like to have known before you saw the police about the DNA sampling?

When asked if there was anything else that they would have liked to have known before they saw the police about the DNA sampling, 39% (71 out of 184) of interviewees answered 'Yes'. Examples of the type of information that interviewees would like to have known are set out below in *Table C8*.

Access to information by interviewees who do not speak English

The video, leaflet and other documents produced by DCS as part of the education program are only provided in English, and have not been translated into other community languages. Despite this, three of the five interviewees who had the assistance of an interpreter had seen the DCS leaflet about the sampling and told us that they had found it either 'helpful' or 'very helpful'.⁶ The other two interviewees stated that they could not read English, and so could not understand the leaflet.

Three of the five interviewees had seen the DCS video. All three said that they found the video 'helpful' or 'very helpful'. Their responses indicated that they had watched the video with the assistance of an interpreter.

It was apparent that two of the interviewees who were sampled with the use of an interpreter did not fully understand the purpose of the DNA sampling:

*I want to know the results of the test. They will tell me which disease I have or what.*⁷

*I don't really understand what's going on. I don't want anything to interfere when I get out in my normal life ... I don't want to cause the police any difficulties or make their jobs harder. I'm still not sure even though I agreed to it. I'm still not sure how good or how bad for me.*⁸

⁶ We understand that the interpreter for the inmate/detainee translated the information from the leaflet.

⁷ Interviewee No 77.

⁸ Interviewee No 125.

Table C8: What interviewees would have liked to have known prior to seeing the police about the DNA sampling

Number of interviewees	Categories of information
43	<p>Legal advice</p> <p><i>How come someone who has been in a car accident has to give their DNA? Fair enough if you're a bank robber.⁹</i></p>
19	<p>Information about DNA and the DNA Database</p> <p><i>What DNA is and a bit more about it. Fingerprints are easy, but this is microscopic so you don't know whether to believe it or not.¹⁰</i></p>
9	<p>Information about the safeguards to protect the integrity of DNA samples</p> <p><i>My only concern was about whether or not police could set you up for a crime – then the police showed me the tamper proof bags and that made me feel better about it.¹¹</i></p> <p><i>If anyone wants to 'frame' you for a crime, it's easy. For example, a hair sample is easy to obtain from your house and leave at a crime scene. How can prisoners then prove that it wasn't them? Would they need more evidence than just a DNA sample?¹²</i></p>
9	<p>Information about the procedure itself</p> <p><i>It's a pity that no-one could have shown me this (the DCS video) because otherwise I would have been much better informed before the procedure.¹³</i></p>

n=71 (more than one category of responses to this answer were allowed)

Source: Ombudsman's interviews with serious indictable offenders, 2001

Whether interviewees understood the information provided by NSW Police

Did you understand the information that the police gave you today?

84% (155 out of 184) interviewees answered 'yes' to this question. However, several of these interviewees then made comments that suggested that they didn't actually understand the information that was given to them. For example:

Interviewee No 222

Q25. Did the Police Inmate Testing Team ask you if you understood the information that they provided to you?
Q26 What did you say?

'Sort of', the first time.

He said that 'We'll have to go through it again if you don't understand it', but I couldn't be bothered so I just signed it.

Interviewee No 241

Q25. Did the Police Inmate Testing Team ask you if you understood the information that they provided to you?
Q26 What did you say?

Yeah, a bit of it, but not all of it.

He just read it out again, so I just said 'yeah', get it over and done with.

9 Interviewee No 92.

10 Interviewee No 149.

11 Interviewee No 164.

12 Interviewee No 158.

13 Interviewee No 125.

Interviewee No 209

Q25. Did the Police Inmate Testing Team ask you if you understood the information that they provided to you?

Q26 What did you say?

'Sort of'

Then he [the ITT officer] said, 'You've got to make up your mind', and so I said I understood it.

Twenty nine per cent (54 out of 184) interviewees told us that they did not understand some or all of the information provided by police. Of the 54 interviewees who told us that they did not understand the information given to them by police, 30% (16 out of 54) told us that the reason they did not understand was that the ITT had read the information sheet too quickly.

Interview 232

It was pretty rushed. For example, if I was to sit here and read you a page of information, you are not going to absorb it straight away are you? I don't have a photographic memory like that.

Interview 140

It was like a broken record. How can I take all that in? I don't think Einstein could have. You didn't have time to let things sink in. It would have been better if you could sit down and read it yourself, even the night before.

Interviewee No 53

Ran through everything pretty quick. They said it was for my benefit as well as theirs. They also said that once the sample went to the Health Clinic, the involvement of police stops there and police would no longer have access.

Interview 205

Everything just happened too quickly in there. I didn't really know what was going on.

Was there anything you didn't understand? If so, what?

When we asked interviewees what they had not understood, 63% (34 out of 54) told us that it was the legal or technical concepts that they did not understand. For example, interviewees commented that they did not understand what the DNA sample would be used for, who would have access to it, and why they were being sampled if they were not currently under investigation.

Interviewee No 112

They give you one sentence then another paragraph and it contradicts itself. They just kept on showing me different paragraphs and different books.

Interviewee No 218

I didn't understand the part about 'this may be used against you in court.' I get the impression that they already had charges to lay against me and they just wanted my DNA. That's the impression you get from what they say. To me it was the same as being arrested. That's exactly what they say to you – 'This can be used in evidence against you.'

Interviewee No 31

The whole sheet that they read out. I have no idea about what it can be used for. The whole page is just a blur. I understood everything about the test, like how it was done and sealed up. But I have no idea about what it can be used for.

Interviewee No 41

He went through it really quick because there were a few blokes waiting. I understood it but I just wanted to get out of there. What's Part 13A and Part 8A and section 71 of the Act? How are we supposed to know these parts and laws?

Before conducting the DNA sampling, the ITT are required to ask serious indictable offenders if they understand the information.¹⁴ Where an interviewee told us that they had not understood some or all of the information, we asked them whether they told the police that they had not understood.

81% (44 out of 54) of interviewees who told us that they had *not* understood the information, informed us that, despite not understanding, they had told the ITT that they had understood the information. Some interviewees gave us reasons for not telling the police that they had not understood the information. For example:

Interviewee No 232

I just said yes because I couldn't be bothered asking anything. You know that they are just going to do what they're going to do.

Interviewee No 122

Yes, because I knew that they would have put another explanation to me that I didn't understand.

Most of the interviewees who did not fully understand the information provided by the ITT told us that they did not raise their questions with NSW Police. Several interviewees told us that they 'just wanted to get it over and done with'.¹⁵

Interviewee No 114

They told me that anything I do or say will be held against me, so I just tried to shut up.

Interviewees' access to legal advice

Did you get legal advice about the DNA sampling?

Only 10% (or 19 out of 184) of interviewees told us that they had obtained legal advice prior to the sampling. The main reasons given by interviewees for obtaining legal advice were to find out if they were obliged to provide a sample, and to check that the offence they were convicted of was a 'serious indictable offence'.

Did you want to get legal advice?

Eighty two per cent (150 out of 184 interviewees) told us that they did not want to obtain legal advice.¹⁶ The table below shows the reasons that these interviewees gave for not wanting to obtain legal advice prior to the sampling.

¹⁴ NSW Police, *Forensic Procedures Information Sheet – Serious Indictable Offenders*.

¹⁵ Interviewee Nos 209, 222, 241, 232, 229, 131, 125, 122, 117, 114.

¹⁶ Of the 150 interviewees who told us that they did not want to obtain legal advice, a small number subsequently informed us that they did, in fact obtain legal advice about the DNA sampling. For example, when NSW Police suspended the DNA sampling in order for them to do so.

Table C9: Interviewees' reasons for not wanting to obtain legal advice before the DNA sampling

Number	Example of reasons
40	Believed it would be futile <i>'There's no point.'</i> <i>'They're going to get it [my DNA sample] anyway.'</i> <i>'The police already have my DNA.'</i>
37	Reasons relating to innocence <i>'I've got nothing to hide.'</i> <i>'It doesn't bother me.'</i> <i>'I don't consider myself to be a criminal in that sense.'</i>
22	Felt it was not necessary <i>'It wasn't necessary.'</i> <i>'I didn't need to.'</i> <i>'the DCS leaflet explains everything'</i>
21	No reason provided
9	Support for the DNA sampling program <i>'I agree with the DNA testing.'</i> <i>'I think what's going on is good.'</i>
7	Time constraints <i>'I just wanted to get it over and done with.'</i> <i>'It takes too long.'</i>
3	Problems accessing legal advice such as a lack of knowledge or lack of availability of legal aid <i>'I don't know who my legal aid is. I don't have one.'</i>
11	Miscellaneous <i>'I thought that if I said that I wanted legal advice, they might think that I'm trying to hide something.'</i> <i>'I've got other things to worry about.'</i> <i>'Not sure.'</i>

n=150

Source: Ombudsman's interviews with serious indictable offenders, 2001

Did you have any problems getting legal advice?

Eighteen per cent (33 out of 184) of interviewees told us that they wanted to obtain legal advice but were unable to do so. Of these, 22 interviewees stated that they had problems obtaining legal advice. Four of the 22 who had problems obtaining legal advice were Aboriginal/Torres Strait Islander people, who are also entitled to have a legal representative present during the DNA sampling if they wish.

Interviewees reported the following types of problems in obtaining access to their legal representative:

- insufficient money for the telephone call
- the legal representative's telephone number had not yet been programmed into the interviewee's phone card¹⁷
- telephone out of order
- telephone unavailable due to too many inmates and only one telephone.

¹⁷ Many correctional centres use the 'Arunta' telephone system. In order for inmates to use the telephone, they must be issued a phone card which holds a limited number of programmed telephone numbers. Before they can make phone calls, inmates must request that the relevant telephone numbers be programmed onto their phone card, and that money is transferred onto the card. Phone calls to the NSW Ombudsman's Office, and Privacy NSW are already programmed into the card and are free.

Whether interviewees had a legal representative or an interview friend present during the DNA sampling

Presence of legal representatives

None of the interviewees told us that they had a solicitor or legal representative with them when they saw the police about the DNA sampling. We asked all interviewees if they *would have preferred to* have had a solicitor with them during the sampling if they could have.

Forty per cent (73 out of 184) of interviewees said that they would have preferred to have had a solicitor present when they were asked to provide a DNA sample.

Although the Act allows Aboriginal and Torres Strait Islander serious indictable offenders to have a legal representative present during the DNA sampling, none of the 29 Aboriginal/Torres Strait Islander interviewees told us that they had a solicitor present.

- 45% (13 of the 29) Aboriginal/Torres Strait Islander interviewees stated that they would have preferred to have had a solicitor present if they could have had one. One of these interviewees had an interview friend present.
- 55% (16 of the 29) Aboriginal/Torres Strait Islander interviewees stated that they would not have preferred to have had a solicitor present if they could have had one. Four of these interviewees had an interview friend present during the DNA sampling.
- 62% (8 out of 13) of those Aboriginal/Torres Strait Islander interviewees who would have preferred to have a solicitor present had been given less than one weeks' notice. Three stated that they found out that they were to be tested 'today' and one stated that they found out 'yesterday'.
- Only one of the Aboriginal/Torres Strait Islander interviewees who would have preferred to have had a solicitor present had been given more than two weeks' notice.

Forty nine per cent of interviewees who spoke a language other than English at home would have preferred to have had a solicitor with them when they saw the police about the DNA sampling.

Nineteen per cent of interviewees aged 18-20 years would have preferred to have had a solicitor with them when they saw the police about the DNA sampling.

Table C10: Reasons for preferring to have had a solicitor during the DNA sampling¹⁸

Number	Categories and examples of reasons for preferring to have had a solicitor present if could have
35	<p>To obtain specific legal advice about the DNA sampling and to be sure about the legality of the sampling.</p> <p><i>Just to find out whether I had to do it. They said I could [organise to have a solicitor present] but I thought they'd think I was hiding something.</i>¹⁹</p>
21	<p>To provide the information in plain language.</p> <p><i>Because I don't really know what they're going on about.</i>²⁰</p>
9	<p>To be an independent witness.</p> <p><i>Just to make everything nice and legal.</i>²¹</p>
3	<p>To provide support.</p> <p><i>Realistically, it's very intimidating walking into a room with seven people there, firing things at you that you don't understand. They say 'Anything you do or say will be held against you'. We should have the right to have counsel there if they are reading that. It's a violation of our rights not having one there.</i>²²</p>
5	<p>Miscellaneous.</p> <p><i>To talk to them in person, not on the phone.</i>²³</p>

n=73

Source: Ombudsman's interviews with serious indictable offenders, 2001

There were no major differences in the reasons provided by Aboriginal/Torres Strait Islander and non-Aboriginal/Torres Strait Islander interviewees for preferring to have had a solicitor present during the DNA sampling. A desire to obtain specific legal information about the DNA sampling and to be sure that the sampling was conducted according to law was the reason most often provided by interviewees. The second most commonly stated reason was to obtain the information about the sampling in plain language.

Presence of interview friends

The Act requires that an interview friend be present (unless it is not reasonably practicable) during the DNA sampling of children and incapable people. Aboriginal and Torres Strait Islander serious indictable offenders are entitled to have an interview friend present if they wish.

We asked interviewees if they had an interview friend with them when they saw the police about the DNA sampling. Seven of the 184 inmates we interviewed answered 'yes' to this question. Five of the interviewees who had an interview friend present were Aboriginal or Torres Strait Islander people. As stated earlier, we did not inquire as to whether any of the interviewees were 'incapable' as defined by the Act.²⁴

¹⁸ Based on information from our interviews with serious indictable offenders, November and December 2001.

¹⁹ Interviewee No 170.

²⁰ Interviewee No 147.

²¹ Interviewee No 35.

²² Interviewee No 128.

²³ Interviewee No 102.

²⁴ We were later informed by NSW Police that no 'incapable' interviewees were DNA sampled during our interview period.

We did, however, ask interviewees why they had an interview friend with them. The reasons that interviewees gave for having an interview friend present included:

- to be a witness
- to provide information
- to provide support
- to ensure that the sampling was conducted properly
- to verify the inmate/detainee's identity.

We asked interviewees how useful they found it having an interview friend with them. The majority of the seven interviewees answered that they found it either 'useful' or 'very useful' having an interview friend present.

We asked *all* interviewees if they would have preferred to have had an interview friend with them during the sampling. Almost 30% (54 out of 177) interviewees who *did not* have an interview friend present stated that they would have preferred to have had an interview friend with them during the DNA sampling. Of these, 11 were Aboriginal or Torres Strait Islander people, 14 spoke a language other than English at home and five were under the age of 21.

The reasons given by interviewees for preferring to have an interview friend with them during the sampling are summarised in the table below.

Table C11: Reasons for preferring to have had an interview friend during the DNA sampling

Number (total = 54)	Categories and examples of reasons for preferring to have had an interview friend present if could have
14	To explain the procedure or provide information.
13	For support.
13	As a witness.
10	To ensure the legality of the procedure.
4	No reason provided.

n=54

Source: Ombudsman's interviews with serious indictable offenders, 2001

It is impossible to generalise these findings to make conclusions about the experiences of all serious indictable offenders throughout the corrections system. We did note, however, that interviewees who spoke a language other than English at home were more likely to give the reason that they wanted to have someone 'to explain the procedure' or 'provide information' about the DNA sampling to them, than any other reason.

Reasons why interviewees consented or did not consent

As part of our interviews with inmates, we asked interviewees if they had consented to the forensic procedure and, if so, what their reasons were for doing so. 98% (181 out of 184) of interviewees told us that they had consented. Their reasons have been categorised in the table below.

Table C12: Interviewee's reasons for consenting to the DNA sampling²⁵

Number	Category of reasons (and examples)
62	<p>Compulsory nature of the procedure</p> <p><i>Because I felt pressured and if I didn't do it they would think I'm trying to hide something.</i>²⁶</p> <p><i>No choice. There is a choice but there isn't. There's a catch.</i>²⁷</p> <p><i>We've got no choice in this matter.</i>²⁸</p>
32	<p>So as not to be 'difficult</p> <p><i>'Not to cause any obstacles in anyone's work, if they have to do that why would I need to cause them any trouble?'</i>²⁹</p> <p><i>I didn't want dramas with the police</i>³⁰</p>
32	<p>The procedure will not affect them</p> <p><i>I've got nothing to hide</i>³¹</p>
30	<p>To avoid being subject to force</p> <p><i>Because I heard if you don't give it they'll hold you down and pull your hair out.</i>³²</p>
6	<p>Support for the DNA sampling</p> <p><i>Because I think it's a good idea and everybody should give a sample including babies</i>³³</p>
4	<p>Reasons relating to innocence</p> <p><i>So I will have a chance to have my conviction reviewed.</i>³⁴</p> <p><i>So I can get out of here.</i>³⁵</p>
1	The police already have a sample of her/his DNA
1	To avoid losing privileges, being reclassified or transferred
13	<p>Miscellaneous: response incomprehensible or no reason provided</p> <p><i>I don't know</i>³⁶</p>

n=181

Source: Ombudsman's interviews with serious indictable offenders, 2001

The responses provided by over half (51%) of interviewees indicated that they consented because they did not perceive that they had any meaningful alternative or that they consented to avoid the use of force. Similarly, 17% (32 out of 184) of interviewees stated that they consented to avoid 'hassles' or 'dramas', or because they did not want to 'make anyone's life difficult'.

²⁵ Based on information from our interviews with serious indictable offenders, November and December 2001.

²⁶ Interviewee No 22.

²⁷ Interviewee No 100.

²⁸ Interviewee No 42.

²⁹ Interviewee No 125.

³⁰ Interviewee No 115.

³¹ Interviewee No 105.

³² Interviewee No 154.

³³ Interviewee No 39.

³⁴ Interviewee No 43.

³⁵ Interviewee No 18.

³⁶ Interviewee Nos 241, 107, 7.

Only one interviewee specifically stated that s/he consented to avoid the loss of privileges, the possibility of being reclassified or transferred to a higher security centre.

The types of reasons provided by Aboriginal and Torres Strait Islander interviewees did not differ significantly from those of all other interviewees. However, Aboriginal and Torres Strait Islander interviewees were more likely to give reasons indicating that they did not have any alternative or that they consented to avoid the use of force against them (68% - 19 out of 28 interviewees).

All interviewees who were under the age of 21 consented to the procedure. A larger proportion of this group (35% - 6 out of 17 interviewees) stated that they consented to avoid the use of force than interviewees in general (17% - 32 out of 184 interviewees).

There were no significant differences in the reasons provided for consenting by interviewees who spoke a language other than English at home compared with interviewees as a whole.

Of the three interviewees who told us that they did not consent to the DNA sampling, only two gave a reason for not consenting. One of these interviewees objected to the DNA sampling and the other told us:

I just said "I'll give you hair and that's it". What's the point in signing? They're doing the same thing anyway.³⁷

Number of times interviewees had been asked to provide a DNA sample

Eighty four per cent (155 out of 184) of interviewees answered 'Once, today' when asked how many times they had been asked to provide a DNA sample. 15% (27 out of 184) of interviewees told us that they had been asked by police 'more than once' to provide a DNA sample. The aim of this question was to see how often the cooling off period was being used. However, it was difficult to determine whether these interviewees had been given an official cooling off period, or whether they had been originally asked by police to provide a DNA sample as a suspect. Only five of those interviewees who said that they had been asked more than once said that they had been asked less than 2 weeks' ago.

People present during the DNA sampling

Five interviewees could not remember or did not know how many people were present in the room with them when they were asked to provide a DNA sample. Of the interviewees that could remember, 63% (115 out of 179) told us that there had been four people (usually three police and one CCLO) with them in the Inmate Testing Area (ITA). According to the responses to this question, the number of people present in the ITA (apart from the interviewee) ranged from one to eight.

³⁷ Interviewee No 232.

Questions asked by interviewees

Twenty per cent (37 out of 184) interviewees answered 'yes' to the question 'Did you ask the police anything today?' The questions asked by interviewees have been categorised below.

Q67. *Did you ask the police anything today?*

Q68. *What did you ask the police?*

Q69. *What did they tell you?*

Table C13: Interviewees questions and responses by the police about the DNA sampling

No of interviewees	Category of questions (and examples)	Example of response by police (as recalled by interviewee)
13	<p>Legal issues</p> <p><i>I asked them why they were testing me because I'm not in jail for over three years.</i></p> <p><i>Also asked them what they were doing with sample, and</i></p> <p><i>Why they kept saying 'anything I say can be used in evidence against me'.³⁸</i></p>	<p><i>They said your charge is a serious indictable offence</i></p> <p><i>Sending the sample to the database.</i></p> <p><i>They said they were warning me in case I wanted to confess something.³⁹</i></p>
11	<p>Issues relating to the security of their sample</p> <p><i>If anyone is going to tamper with the DNA (the scientists).⁴⁰</i></p> <p><i>Asked them about how you might contaminate it. How it's not faultless.⁴¹</i></p>	<p><i>No, nobody can, except the scientist.⁴²</i></p> <p><i>They said they hope that I am not kissing anyone in jail. I said I was only joking.⁴³</i></p>
6	<p>Nature of the sampling/procedure and results</p> <p><i>How do I find out about my test?⁴⁴</i></p>	<p><i>Just ring someone and give them the [barcode] number. But I've forgotten who I have to ring - some office.⁴⁵</i></p>
3	<p>For copies of information/video</p> <p><i>I asked for a copy of the video.⁴⁶</i></p>	<p><i>They said, 'No copy. Watch it or get out'.⁴⁷</i></p>
5	Miscellaneous or no response	

n=38

Source: Ombudsman's interviews with serious indictable offenders, 2001

Do you have anything you would like to say about the DNA sampling of inmates?

Almost half (90 out of 184) of the interviewees made additional comments about the forensic DNA sampling of serious indictable offenders. These comments were diverse. Some of the comments are set out on the next page.

38 Interviewee No 170.

39 Interviewee No 170.

40 Interviewee No 28

41 Interviewee No 18.

42 Interviewee No 18.

43 Interviewee No 18.

44 Interviewee No 147.

45 Interviewee No 147.

46 Interviewee No 177.

47 Interviewee No 177.

*The security side of things really needs to be looked at.*⁴⁸

*If it's gotta be, it's gotta be. You've got no choice in the matter.*⁴⁹

*I hope nothing comes back and bites me on the arse.*⁵⁰

*In one regard I do believe in it. When it comes to pretty bad crimes I do believe in it. But when it comes to people who've just done petty crimes such as B&E [break and enter], goods in custody, possess stolen goods etc: depending on the severity of the crime - it should be done another way. You feel discriminated against. Child molestations, rape, armed robbery, bad assault, etc. I'm fully with it in those categories.*⁵¹

*It's going to make it easier for them to load you up. Corruption greases the wheels as we all know. That's just my greatest fear: getting loaded up for something that I haven't done (such as is the case now).*⁵²

*It's causing a lot of stress for prisoners. A lot of people are trying to do good for their future but are being put on their arse by their past.*⁵³

*It's just a joke. If anything they should get themselves tested first so we can see what crimes they've done.*⁵⁴

*It should be for all first offenders. If it's going to be a database of all criminal offenders, catch them from day one.*⁵⁵

*I think they should have a Legal Aid person here when they do it, because if you have to organise it, you can't in a week. It's not very long. Should give you more information about it. I didn't have access to a television so I couldn't watch the video. They need to explain more about it.*⁵⁶

*I think it's wrong. It's a waste of money. There are better ways to spend government money: refuges for women, drug rehabilitation*⁵⁷

*It's bullshit. They are too overexcited about it. They said they got my DNA off a knife, but there wasn't even a knife at the crime. They can get DNA off anything and then, BANG!*⁵⁸

*I think there should be more information given to us about it so we know what they are allowed to do. We don't know if the police are doing the wrong thing. We give each other information about it that isn't true and it causes all sorts of problems.*⁵⁹

*Too much trust is put in the hands of police. They're human beings. They're not to be trusted.*⁶⁰

*I'm just happy that it's out of the way. I just want to settle down and do my time.*⁶¹

*If they want to test inmates, inmates need more information about DNA testing.*⁶²

*You don't get the opportunity to ask questions about the DNA. The government and the police should be more honest. They should be saying you don't have the right to object. Need to make it clear that they are not asking you for your permission.*⁶³

*On the video it looks like a cotton bud, but it looks different today.*⁶⁴

*Should be an independent person there to sit down and explain the Act and the repercussions, rather than just read it 'bang bang bang'. I still don't understand how it can be used against you. I can see the good in it, but everyone should be given a choice.*⁶⁵

48 Interviewee No 23.

49 Interviewee No 2.

50 Interviewee No 41.

51 Interviewee No 14.

52 Interviewee No 16.

53 Interviewee No 54.

54 Interviewee No 67.

55 Interviewee No 76.

56 Interviewee No 80.

57 Interviewee No 89.

58 Interviewee No 100.

59 Interviewee No 101.

60 Interviewee No 112.

61 Interviewee No 124.

62 Interviewee No 159.

63 Interviewee No 182.

64 Interviewee No 171.

65 Interviewee No 72.

INTERVIEW FORM - Annotated version for interviewers
Interviews with serious indictable offenders about their experiences of forensic DNA sampling under Part 7 of the *Crimes (Forensic Procedures) Act 2000*

Introduction

I am from the NSW Ombudsman’s Office.

You are probably aware that there are new laws which give police the power to ask for DNA samples from some inmates.

The Ombudsman’s Office is researching the way that police are carrying out their new powers and we are going to report to Parliament. We want to find out what inmates think about some aspects of the DNA sampling.

We have a list of questions that we would like to ask you. It should take only about 10 minutes. You don’t have to answer any of the questions if you don’t want to.

We might decide to include what you say in our report, but if we do, we won’t include any information that could identify who you are.

We are not here to take complaints. If you want to make a complaint, you will need to telephone our office or fill out a blue form as usual.

We also cannot answer any questions about your legal rights or the rights of the NSW Police Service or the Department of Corrective Services, but we can refer you to people who may be able to answer your questions.

1. Are you happy to answer these questions?

YES NO
Signature on consent form then Go to Q2
Go to Q3

2. Just out of interest, why you don’t want to answer these questions? (Optional).

END.

Demographic information

It will be useful for us to have some information about the people who have been asked to provide a DNA sample to the police. If you want to, please could you answer the following questions about yourself.

3. How old are you?

Go to Q4

4. Are you an Aboriginal or Torres Strait Islander person?

YES

Go to Q5

NO

Go to Q5

5. Do you speak a language other than English when you are at home?

YES

Go to Q6

NO

Go to Q8

6. What language do you speak when you are at home?

Go to Q7

7. (if no interpreter) Would you like us to use an interpreter to ask you these questions?

Explanation: "As I can only speak English, I would prefer to use an interpreter to ask you these questions. Would you mind if we tried to get an interpreter and did this interview a bit later on today or on another day?"

YES

END

NO

Assess language need for an interpreter. If in doubt, postpone interview

Go to Q8

Notice given to inmates about forensic DNA sampling

The first few questions are about when you were told that police were going to ask you for a DNA sample.

8. When did you find out that the police were definitely going to ask you for a DNA sample?

(tick most appropriate answer)

- Today
- Yesterday
- Less than 1 week ago
- 1 week to less than 2 weeks ago
- 2 weeks to less than 1 month ago
- 1 month to less than 6 months ago
- 6 months ago or more
- NS

Go to Q9

9. How did you find out that police were definitely going to ask you for a DNA sample?

(tick one box only)

- DCS Leaflet
- DCS Video
- DCS Forensic Procedures Liaison Officer
- Other DCS worker
- Member of the Inmate Development Committee
- NSW Police Service
- Other (please state)

Go to Q10, Q11 and Q12

Information received by, and relied upon by inmates about forensic DNA sampling

The next questions are about the information that you may have seen or heard about DNA sampling. Copies of these materials should be available to remind inmates of their content.

10. Have you obtained information about DNA sampling from any of the following?	11. (If yes) When did you first get that information?								12. How helpful was that information?			
	Open question – most appropriate answer.								Closed question – read out first three alternatives only			
	No	Today	Less than a week ago	1 week to less than 2 weeks ago	2 weeks to less than 1 month ago	1 month to less than 6 months ago	More than 6 months ago	NS	Very helpful	Helpful	Not very helpful	Not sure
DCS Leaflet												
DCS Video												
DCS Forensic Procedures Liaison Officer												
Other DCS worker (role?)												
Inmate Development Committee												
Official Visitor												
Another inmate												
NSW Police Service												
NSW Ombudsman's Office leaflet												
Justice Action article												
Other (please state)												

Go to Q13

13. Is there anything else that you would like to have known before you saw the police about the DNA sampling?

YES NO
Go to Q14 Go to Q15

14. What would you like to have known?

Go to Q15

Legal advice about DNA sampling

The next few questions are about whether or not you obtained legal advice before you saw the police about the DNA sampling.

15. Did you get legal advice about the DNA sampling?

YES NO
Go to Q16 Go to Q17

16. When did you get legal advice?

- Today
- Yesterday
- Less than 1 week ago
- 1 week to less than 2 weeks ago
- 2 weeks to less than 1 month ago
- 1 month to less than 6 months ago
- 6 months ago or more
- NS

Go to Q20

17. Did you *want* to get legal advice?

YES NO
Go to Q1 Go to Q18

18. Why not?

Go to Q23

19. What did you want to know?

Go to Q21

20. What did you want to know?

Go to Q21

21. Did you have any problems getting legal advice?

YES NO
Go to Q22 Go to Q23

22. What were they?

Go to Q23

Information provided by the NSW Police Inmate Testing Team

The next few questions are about the information that police gave you before they asked you for a DNA sample.

23. Did you understand the information that the police gave you today?

YES OTHER (eg 'not sure', 'some', sort of')
Go to Q24 Go to Q24

24. Was there anything you didn't understand? If so, what?

Go to Q25

25. Did the Police Inmate Testing Team ask you if you understood the information that they provided to you?

YES NO
Go to Q26 Go to Q27

26. What did you say?

Go to Q27

Consent and non-consent

The next few questions are about whether you consented or did not consent to giving a DNA sample to police.

27. Did the police ask you to give a DNA sample today?

YES

Go to Q28

NO

Go to Q31

28. When the police asked you for a DNA sample today, did you sign a consent form?

YES

Go to Q29

NO

Go to Q30

29. Why?

Explanation: "Why did you give your consent?"

Go to Q31

30. Why not?

Explanation: "Why didn't you give your consent?"

Go to Q31

31. How many times have the police asked you for a DNA sample?

Once, today

Go to Q36

More than once

Go to Q32

32. Apart from when you saw the police just before, when was the last time that the police asked you for a DNA sample?

Today

Yesterday

Less than 1 week ago

1 week to less than 2 weeks ago

2 weeks to less than 1 month ago

1 month to less than 6 months ago

6 months ago or more

NS
Go to Q33

33. The last time that the police asked you for a DNA sample, did you sign a consent form?

YES NO
Go to Q34 Go to Q35

34. Why?

Explanation: "Why did you give your consent?"

Go to Q36

35. Why not?

Explanation: "Why didn't you give your consent?"

Go to Q36

36. At any time, have any Department of Corrective Services staff asked you if you are intending to provide a DNA sample to the police?

YES NO
Go to Q37 Go to Q42

37. How many times have they asked you?

ONCE MORE THAN ONCE
Go to Q38 Go to Q38

38. When was the last time that they asked you?

Alternative option: When was that one time that they asked you?

- Today
 - Yesterday
 - Less than 1 week ago
 - 1 week to less than 2 weeks ago
 - 2 weeks to less than 1 month ago
 - 1 month to less than 6 months ago
 - 6 months ago or more
 - NS
- Go to Q39

39. When they asked you the last time, did you say you were *intending* to provide a sample, or *not intending* to provide a sample to police?

Explanation: That one time that they asked you, did you say you were intending to provide a sample, or not intending to provide a sample to police?

Intending to provide sample
Go to Q40

Not intending to provide sample
Go to Q41

NS
Go to Q42

40. Why?

Explanation: "When the Department of Corrective Services asked you last time, why did you say that you were intending to provide a sample?"

Go to Q42

41. Why not?

Explanation: "When the Department of Corrective Services asked you last time, why did you say that you were not intending to provide a sample?"

Go to Q42

People present

The next few questions are about who was there when you saw the police today.

42. Apart from you, how many people were in the room when you saw the police today?

Go to Q43

43. How many police were there?

Go to Q44

44. How many DCS officers were there?

Go to Q45

Solicitors

Some inmates are allowed to have a solicitor with them when they see the police about a DNA sample. The next few questions are about that.

45. Did you have a solicitor with you today?

YES

Go to Q46

NO

Go to Q47

46. Why?

Explanation: "Why did you have a solicitor with you today?"

Go to Q49

47. If you *could* have had a solicitor with you today, would you have preferred to have had a solicitor with you?

YES

Go to Q48

NO

Go to Q51

48. Why?

Explanation: "Why would you preferred to have had a solicitor with you?"

Go to Q51

49. Did you choose which solicitor was with you today?

YES

Go to Q50

NO

Go to Q50

24

50. How useful do you think it was having a solicitor with you?

- Very useful
 - Useful
 - Not sure
 - Not useful
 - Useless
- Go to Q51

Interview friends

The law allows *some* inmates to have a support person or an interview friend with them when they see the police about a DNA sample. The next few questions are about that.

51. Did you have a support person/interview friend with you today?

- YES NO
Go to Q52 Go to Q53

52. Why?

Explanation: "Why did you have a support person/interview friend with you today?"

Go to Q55

53. If you *could* have had a support person/interview friend with you today, would you have preferred to have had a support person/interview friend with you?

- YES NO
Go to Q54 Go to Q57

54. Why?

Explanation: "Why would you preferred to have had a support person/interview friend with you?"

In asking this question we must not give the impression that inmates are automatically entitled to have an interview friend present. Only children, incapable inmates and ATSI inmates are entitled to have an interview friend present. Incapable inmates and children cannot waive their right to have an interview friend present, whereas ATSI inmates can.

Go to Q57

55. Did you choose who that person was?

- YES NO
Go to Q56 Go to Q56

56. How useful do you think it was having a support person/interview friend with you today?

- Very useful
- Useful
- Not sure
- Not useful
- Useless

Go to Q57

57. Some inmates have been a support person/interview friend for other inmates. Have you been a support person/interview friend for another inmate when they saw the police about a DNA sample?

YES

Go to Q58

NO

Go to Q60

58. Who asked you to be a support person/interview friend?

(can tick more than one box)

- Inmate
- Governor of your centre
- DCS Forensic Procedures Liaison Officer
- Another DCS staff member
- Official Visitor
- Legal practitioner
- Police officer
- Other, please state

Go to Q59

59. What information or guidance were you given before you acted as a support person/interview friend? *(explore answer if necessary)*

Go to Q60

Questions asked by inmates

The next few questions are about things you may have asked about the DNA sampling.

60. Did you formally object to the police making a video recording of what happened today?
(NB: A 'yes' answer to this question means that the police should not have videoed the procedure. A 'no' answer will mean that there is a video of the procedure)

YES

Go to Q61

NO

Go to Q62

61. Why did you object?

Go to Q66

62. Were you told that you could object?

YES

Go to Q63

NO

Go to Q63

63. Did you choose to watch the video of what happened today?

YES

Go to Q64

NO

Go to Q65

64. Why?

Explanation: "Why did you choose to watch the video?"

Go to Q66

65. Why not?

Explanation: "Why did you choose not to watch the video?"

Go to Q66

66. Do you think that you should be provided with a copy of the results of your DNA test?

YES

Go to Q67

NO

Go to Q67

67. Did you ask the police anything today?

YES

Go to Q68

NO

Go to Q70

68. What did you ask the police?

Go to Q69

69. What did they tell you?

Go to Q70

70. Do you have anything you would like to say about the DNA sampling of inmates?

YES NO

(Use the space on the other side of this page to write the answer).

Thank you very much for taking part in our survey.

We will be writing our report to Parliament in the second half of next year. If you are interested in receiving a copy, please contact our office towards the end of next year.

Explanation: "Try contacting the Office about this time next year."

END.

Consent Form

Ombudsman's Interviews with serious indictable offenders



NSW Ombudsman

Level 24 580 George Street
Sydney NSW 2000
Phone 02 9286 1000
Fax 02 9283 2911
Tollfree 1800 451 524
TTY 02 9264 8050
Web www.ombo.nsw.gov.au

I, _____

understand that the Ombudsman's Office is researching the way that police are using their new powers to ask some inmates for DNA samples.

I understand that the *Ombudsman's Inmate Survey about DNA Sampling* is to find out what inmates think about some aspects of the DNA sampling.

I also understand that I do not have to answer any or all of the questions in the Ombudsman's Inmate Survey.

I understand that all information will be confidential, and that if any thing I say is included in the Ombudsman's Report, that it won't include any information that could identify who I am.

I understand that the Ombudsman's Inmate Survey is separate to the complaints process, and that the information I give today will not be treated as a complaint.

I am participating in this survey voluntarily.

I understand that if I have any concerns about my participation in this research or how it was done, I can tell the interviewers or contact the NSW Ombudsman's Office in the first instance. If I am still concerned, I can write to the NSW Ombudsman at the address above.

Signed _____ **Date** _____

Witness – name _____

Witness – signature _____ **Date** _____

INTERVIEW FORM - Annotated version for interviewers

Responses to potential questions

Ombudsman's Interviews with serious indictable offenders

Why is the Ombudsman doing this survey?

The police have been given new powers to ask for DNA samples from some inmates. The law that gives the police these new powers also requires the Ombudsman to monitor the way that the police are using their new powers and then report Parliament on our findings.

Can I have a copy of the questionnaire?

No. Unfortunately we cannot give out copies of the questions to anyone, and that includes inmates, police officers and DCS officers.

What happens to the surveys?

The surveys are strictly confidential. We will take them back to the Ombudsman's Office and look at the answers that inmates have given. Only a small number of people who work at the NSW Ombudsman's Office will see the surveys. No one from the Department of Corrective Services or the NSW Police Service will see the surveys.

We might decide to include what you say in our report, but if we do, we won't include any information that could identify who you are.

Why do you want my name and MIN?

Your name and MIN number will not be written on the survey.

We are keeping your name and MIN number quite separately from the surveys so that we can identify later on which police officers asked you for a sample, or took your sample, and which DCS officers were involved in giving you information. We may decide to watch the video of when the police took your DNA sample. We are allowed to do this because of our role under the new law.

Should I have got legal advice?

If you are unsure about anything to do with the DNA sampling, you should get advice from a solicitor. We cannot answer any legal questions.

Should they have told me that I should get legal advice?

If you are unsure about anything to do with the DNA sampling, you should get advice from a solicitor. We cannot answer any legal questions.

Why did you ask me what else I wanted to know if you are not going to answer my questions?

We are trying to find out what information inmates need in order to make decisions about the DNA sampling. We will give feedback to both the Police Service and the Department of Corrective Services about the information that inmates say that they need.

What happens to my DNA sample now?

You should speak to the police about this. You can telephone the Public Assistance Line and ask for the Forensic Procedures Implementation Team responsible for implementing the testing programme.

Can you give us any feedback about the DNA sampling so that we can improve our systems?

We cannot give you any feedback today. When we have finished the Inmate Survey we will be writing a report for the Ombudsman. After he has seen the report, the Ombudsman will give feedback to the Commissioner of Corrective Services and the Commissioner of Police.

Can you tell me about the Innocence Panel and how it works?

We do not have any information about the Innocence Panel. If you want to know more, you need to write to:

The Director-General
Ministry for Police
Level 19, Avery Building
14-24 College Street
Darlinghurst NSW 2010

The inmates/police/DCS may try to mislead you and tell you things that aren't true about the DNA sampling. You should check with us whether what they have said is correct or not.

The Inmate Survey is just one component of a comprehensive research study which will obtain the views of all participants in relation to particular forensic procedures, including police officers working as part of Inmate Testing Teams, Department of Corrective Services officers and inmates. We have also been liaising with the Forensic Procedures Implementation Team to access relevant videos of the inmate procedures. I believe that this holistic approach will provide a complete picture in respect of collection processes .

Have any of the inmates complained?

We are not here to take complaints. We are telling all inmates that if they want to make a complaint, they need to telephone our office or fill out a blue form as usual.

Everything the inmates tell us today is confidential. We might decide to include what they say in our report, but if we do, we won't include any information that could identify who they are.

Appendix D: Questionnaire – Interviews with Juvenile Justice Centre Managers and Senior Staff

1. Current process

- (a) How would you describe the whole process of the forensic DNA sampling of detainees from start to finish of the Inmate DNA Testing (ie including liaison between DJJ and Police)?
- (b) Are there any aspects of the process that you find particularly difficult?
- (c) What are they?
- (d) Why are they difficult?
- (e) Do you have any suggestions for improvements?

2. Incapable detainees

- (a) How do you know when a detainee is 'incapable'? Who decides if a detainee is 'incapable' or not?
- (b) Are there any guidelines, procedures or directions to assist in determining whether or not a detainee is 'incapable'?
- (c) Are there any difficulties in identifying detainees who are 'incapable'?
- (d) Do you have any suggestions for improvements?
- (e) Have you noticed any detainees who seem not to understand the information that is given to them by the police inmate testing team?

3. Detainees whose language is other than English

- a) How do you know when an inmate requires an interpreter?
- b) Are there any difficulties in identifying inmates who require an interpreter?
- c) Do you have any suggestions for improvements?

4. Notice

- a) How much notice do CCLOs need to 'prep' inmates about the DNA testing?
- b) How much notice do inmates need about the DNA testing to obtain information, seek legal advice and organise for the attendance of interview friends and legal practitioners?
- c) Have there been instances where – for whatever reason – inmates were not given this amount of notice?
- d) Are inmates being given sufficient notice to obtain information, seek legal advice and organise for the attendance of interview friends and legal practitioners?
- e) What are the reasons for your views?
- f) Do you have any suggestions for improvements?

5. Detainees' rights

- (a) What is the attitude of the detainees towards the DNA sampling?
- (b) Why do you think this is the case?

- (c) What sort of questions do inmates ask you during the DNA sampling process?
- (d) How do you answer those questions?

- (e) Are ATSI detainees exercising their rights to have an interview friend and/or legal representative present during the forensic procedures?
- (f) What are the reasons for your view?

- (g) What was the process of choosing who the Interview Friend for those detainees who are under 18 or incapable?
- (h) Who performed this role?

- (i) With detainees who are over 18, are you aware of any detainees who have consented because they were worried about having their security classification changed, being transferred to another correction centre, or losing privileges?
- (j) Please give details about the particular case/s.

6. Future directions

Can you suggest any improvements that could be made to the system?

Appendix E: Questionnaire: Interviews with police officers responsible for DNA sampling in other Australian jurisdictions

1. Informed consent

How have the police in your jurisdiction dealt with the provision of complex legal information to people which they must understand in order to give informed consent or cooperate with the procedure? (eg. have you converted this information into a plain English document, etc).

If available, please provide copies of the information sheets (information about the forensic procedure) provided and/or read to suspect/offender prior to the forensic procedure being carried out.

2. People incapable of giving consent

How do police in your jurisdiction identify/determine when a person is not legally capable of providing informed consent?

If available, please provide copies of guidelines/standard operating procedures (SOPs) in relation to incapable people.

3. Notice provided to convicted offenders about forthcoming DNA sampling

(a) How are convicted offenders in your jurisdiction informed that they will be asked/required to provide a forensic DNA sample (for example, are they informed by letter).

(b) Are they entitled to be heard at a hearing for an application for a court order authorising the forensic procedure?

(c) How much notice are convicted offenders provided with?

4. Use of force

(a) How many prisoners in your jurisdiction had their DNA sample taken with the use of force?

(b) What happens if a convicted offender does not consent?

(c) What happens if they physically resist the taking of a DNA sample?

5. Number of inmates sampled

(a) How many adult prisoners were sampled between 1 Jan 2001 and 5 July 2002, or another period of time, eg 6 months, 12 months etc?

(b) How many detainees in juvenile detention centres were sampled during the same periods?

6. Order of priority for the types of DNA samples obtained from prisoners

(a) Please explain whether there is a preferred order of priority for samples obtained, eg buccal swabs the first preference, then hair, then blood as a last resort?

(b) Please describe the method used to take samples of hair from people. (eg, some jurisdictions do it one hair at a time, whereas NSW employs the 'Lever Arch method', removing 15-20 hairs at once).

7. Hits

(a) Please provide (to the extent possible) the number of 'cold' and 'warm' hits obtained from DNA profile matching. Please clarify your jurisdiction's definition of cold/warm hits.

(b) How often do you scan the databases for hits between crimes scenes and suspects/ offenders?

8. Duration of forensic DNA sampling in correctional centres

- (a) Approximately how long does it take to take a forensic DNA sample from inmates in your jurisdiction?
- (b) Do police video-record all cases where a DNA sample is taken from a convicted offender?

9. Involvement of Corrective Services

What part does Corrective Services play in the DNA sampling of convicted offenders?

10. Provision of results to convicted offenders

- (a) Do you provide the results of the analysis to convicted offenders?
- (b) At what point in time is this information made available?

11. Exchange of information with other jurisdictions

- (a) Has your jurisdiction entered into agreements with other Australian jurisdictions to exchange DNA information?
- (b) If so, which jurisdictions? Also, are these agreements available to the public?

If available, please provide a copy of any publicly released material about the exchange of information between jurisdictions.

Appendix F: Summary report – Audit of video recordings of interactions between serious indictable offenders and NSW Police Inmate Testing Teams

Summary

We audited the video recordings of interactions between the NSW Police Inmate Testing Team (ITT) and 265 serious indictable offenders. The sample of video recordings was both targeted and random in that every video of a certain demographic or procedure was viewed in some instances while in other instances a sample of videos was selected and viewed.

Examining these recordings assisted us in assessing whether the police carrying out the sampling were adhering to applicable legislation, policies and procedures. From the recordings, we were also able to identify the common questions asked by serious indictable offenders during the sampling process.

We emphasise that this is a synopsis of our observations. We have not sought a response from NSW Police or Department of Corrective Services (DCS) in respect of each of our individual observations, or comments made by inmates or others in video recordings we observed. The main body of the report includes conclusions or recommendations based on information including our video audit.

Background

Section 57 of the *Crimes (Forensic Procedures) Act 2000* requires that the carrying out of a forensic procedure must be recorded by electronic means. The forensic procedure does not have to be recorded if this would not be practicable or if the person objects to the recording. An interview friend or a legal representative of a serious indictable offender who is a child or is an 'incapable' adult may object to the recording on behalf of the serious indictable offender. If the procedure is not to be recorded, an independent person who is not a police officer must witness the procedure.

Rationale for conducting the audit of video recordings

Staff from our Office examined a small sample of videos of Part 7 forensic procedures on 8 February 2001. It was clear from this sample that the videos would provide a unique insight into:

- the extent to which inmates are being provided with the opportunity to communicate with a legal practitioner of their choice
- whether eligible interviewees chose to have a legal representative or an interview friend present during the DNA sampling
- the extent to which inmates appear to understand the information provided
- the questions that inmates ask about the process and the legislation
- the type of interaction between the ITTs and the inmates during the procedure
- how many people were present during the DNA sampling
- the consistency of procedures and the scope for the exercise of discretion in conducting forensic procedures and
- the extent to which the use of force appears to be reasonable.

Methodology

The audit took place from 3 April 2002 to 13 May 2002. We examined a sample of 265 video recordings of forensic procedures carried out on serious indictable offenders between 1 January 2001 and 3 April 2002. The audit included an examination of over 110 hours of videoed interactions and documentation.

The sample

Our sample included the videoed interactions of the following categories of forensic procedures. Unless otherwise indicated, the selection of videoed interactions included in the audit were recorded prior to April 2002:

1. All forensic procedures conducted upon serious indictable offenders in **juvenile detention centres** (38 videoed interactions).
2. All forensic procedures conducted upon serious indictable offenders who were deemed **incapable persons** (17 videoed interactions).
3. All forensic procedures identified by NSW Police as involving the **use of force or a 'controlled movement'** (recorded up to July 2003, 30 videoed interactions).
4. All forensic procedures where **blood** was taken (6 videoed interactions).
5. A random selection from the 427 forensic procedures carried out on serious indictable offenders who were **'non-consenting, but compliant'** (31 videoed interactions).
6. A selection from the 77 forensic procedures carried out on serious indictable offenders that were brought to the attention of our office through **other review activities** (35 videoed interactions).
7. A random selection from the 102 forensic procedures carried out on serious indictable offenders in **periodic detention** (11 videoed interactions).
8. A random selection from the forensic procedures carried out on the 184 eligible interviewees of **our interviews with serious indictable offenders** (21 videoed interactions).
9. A random selection of the 8,294 forensic procedures in **all correctional centres between 1 January 2001 and 31 December 2001** (72 videoed interactions).
10. A random selection of forensic procedures in **all correctional centres since the restructuring of the NSW Police Inmate Testing Team, ie January 2002 – April 2002** (19 videoed interactions).

It should be noted that in some cases, the forensic procedures examined fell into more than one category. For example, a blood sample may also have been categorised as a 'controlled movement' by NSW Police. In fact, during our audit period, all blood samples were taken during samples classified by NSW Police as controlled movements, with one blood sample taken with the use of force.

It is also important to note that the total number of videos we examined was more than the number of forensic procedures carried out. For example, if a serious indictable offender told the ITT that s/he was not going to comply with a senior police officer order, and a cooling off period was given, we watched both the first interaction when the inmate was offered the cooling off period and the second interaction when the sample was actually taken after the cooling off period.

Locations

Our audit was structured to include videos of forensic procedures carried out in every type of correctional setting covered by the legislation, including maximum, medium and minimum security centres, the only private correctional centre in NSW, women's centres, rural and metropolitan centres, remand facilities, periodic detention centres and juvenile justice centres.

We examined videoed interactions of forensic procedures carried out in the following correctional/justice facilities:

Adult correctional centres

- Bathurst
- Berrima
- Broken Hill
- Cessnock
- Emu Plains
- Glen Innes
- Goulburn
- Grafton
- John Moroney
- Junee
- Kirkconnell
- Lithgow
- Long Bay Correctional Complex
- Long Bay Hospital
- Long Bay Special Purpose Centre
- Malabar Special Programs Centre
- Metropolitan Medical Transit Centre
- Metropolitan Remand and Reception Centre
- Mulawa
- Oberon
- Parklea Young Offenders Correctional Centre
- Parramatta Correctional Centre
- Silverwater
- St. Heliers

Juvenile justice centres

- Acmena
- Frank Baxter
- Kariong
- Orana
- Riverina
- Yasmar

Periodic detention centres

- Tomago
- Parramatta

Random Selection method

We chose for our audit the first, last and middle forensic procedures conducted and video recorded by the ITTs during each of their visits¹ to correctional centres in the following months:

- January
- April
- July and
- October.

If there were no forensic procedures conducted during a particular month that met our sampling criteria, we substituted the next appropriate month (ie. if no forensic procedures were conducted in January, we examined procedures conducted in either February or March that met the same criteria and method).

¹ It should be noted that a visit may last for a number of days.

The instrument

The audit tool consisted of a checklist based upon the legislative requirements as well as issues that had been raised as matters of concern by the:

- Standing Committee on Law and Justice Inquiry into the *Crimes (Forensic Procedures) Act 2000*
- Commonwealth Senate Inquiry into the *Crimes Amendment (Forensic Procedures) Act 2000*
- NSW Police Inmate Testing Teams, the NSW Police Forensic Procedures Implementation Team and DCS Correctional Centre Liaison Officers and welfare staff
- inquiry calls, complaints, comments and submissions made to this office by inmates and other stakeholders.

Where necessary, we compared the information we received from the audit against NSW Police hard copy and COPS records.

Our auditor spent approximately 85 hours examining the videoed interactions. A second officer spent approximately 25 hours examining the videoed interactions.

A copy of the audit tool can be found at the end of this appendix.

Strengths of the study

The audit provided material on which to base an assessment of the nature of the interactions between inmates and the NSW Police ITTs, Correctional Centre Liaison Officers (CCLOs), interview friends and legal practitioners (where present) in the Inmate Testing Area (ITA).

The audit provided an opportunity to compare with relevant video recordings accounts of inmates of their interactions with the police provided to our Office, submissions to our discussion paper, and complaints and inquiries received by our Office.

The audit also provided information to compare (to a more limited extent) the accounts of police and CCLOs of their interactions with inmates provided to this Office in the context of our focus groups.

Limitations of the study

While carrying out the audit we identified a number of limitations occasioned by the consistency and quality of the recordings themselves. Whilst the majority of recordings were adequate, it became apparent early on that the placement of the video camera and the subsequent poor quality of the video recording could be an impediment in clearly observing parts of some interactions, or a number of the key elements examined by this audit, such as: the ITA persons present during the interaction, the conduct of the procedure etc. We recorded all difficulties with observing and recording data that were due to the way the interaction had been recorded.

Results

1. Demographics of serious indictable offenders sampled

Of the serious indictable offenders who were sampled in the audited recordings:

- 237 were male
- 28 were female
- 38 identified as Aboriginal or Torres Strait Islander people
- 5 were provided information in another language with the assistance of an interpreter
- 6 were 'children' as defined by the Act (over 10 and under 18 years of age).

Gender of serious indictable offenders

We observed 200² interactions involving male serious indictable offenders and 28 interactions with female serious indictable offenders. We did not observe interactions with transgender inmates.

The Act and the Standard Operating Procedures (SOPs) set out procedures for conducting forensic procedures in a way that is appropriate to the gender of the inmate. We found that in the majority of interactions with female inmates, a female police officer was involved in the giving of information or in administering the forensic procedure. There were some interactions with female serious indictable offenders where these roles were carried out by male police officers, and we could not determine whether a female officer was present during the interaction.

We could not identify any significant difference between interactions with female inmates where the procedure was conducted by a female officer and those where all police officers visible on camera were male.

Inmates who were Aboriginal or Torres Strait Islander

The Act sets out specific requirements in respect of serious indictable offenders who are Aboriginal or Torres Strait Islander (ATSI), namely, that an interview friend or a legal representative, or both, can be present while the forensic procedure is carried out, unless the inmate waives this right. ATSI serious indictable offenders who are incapable or children cannot waive their right to have an interview friend or a legal representative, or both, present during the procedure.

Aboriginal or Torres Strait Islander inmates were identified in the information provided to the ITT by DCS officers. An inmate's claim to be Aboriginal or Torres Strait Islander was verified in the information available to police officers, who then asked the inmate whether he or she wanted to have an interview friend present. If the inmate waived their right to have an interview friend present, they signed the consent form to this effect.

We observed 38 interactions involving Aboriginal or Torres Strait Islander inmates. Fourteen of these chose to have an interview friend present during the procedure. Even though the occupation or role of the interview friend was not always identified on video, we determined that the interview friends to ATSI inmates were most often other inmates, or friends, however, there were instances of this role being performed by DCS workers and a legal worker.

Serious indictable offenders who were incapable

Under Section 74 of the Act, a police officer is required to apply for a Court Order for the carrying out of a forensic procedure on a serious indictable offender who is incapable. Section 54 of the Act also requires that an interview friend be present during the procedure. All procedures examined as part of this category were conducted after a Court Order had been obtained and in the presence of an interview friend. The interview friend was generally a health or welfare officer from the prison and in most cases they seemed to have a friendly and supportive relationship with the inmate.

Interactions between police from the ITT and inmates who were incapable were generally friendly and supportive. Police made efforts to explain the information in a simple and non-confronting manner and to answer questions in an understandable way. In the majority of procedures, the standard information sheet was not read to inmates who were incapable. However, an explanation of the content of the information sheet was given to inmates who were identified as incapable.

Examination of these procedures showed that police were generally patient and professional with inmates. In one procedure involving an incapable inmate, the inmate appeared to be upset and emotional and he commented that he was unhappy because *'they thought he was brain dead'*.

² Figure is for interactions other than those involving juvenile detainees.

The police officer responsible for providing the information said in a very gentle voice: *"we don't think that... all we say is that you may not understand all of the information"*. The inmate accepted this answer. During the procedure, the inmate appeared to become upset with the interview friend who was attempting to assist him in understanding the information and the police officer calmed him again and explained the information in a simple manner. The inmate subsequently calmed down.

During our observation of random interactions, we observed some inmates who appeared to have some cognitive difficulties that might have rendered the inmate 'incapable' for the purposes of the Act, that is, incapable of understanding the information provided. However, the ITT did not treat these inmates as incapable.

We examined six interactions where we suspected that the inmate had some cognitive difficulties that would have limited his/her ability to understand the information provided, but we were not able to determine whether the inmate was incapable for the purposes of the Act. In one of these interactions, the inmate seemed to become agitated and confused as police officers asked him the standard questions before the procedure. The inmate also stated that he had committed the offence under psychosis and this was recognised by the court during his conviction.

We examined one procedure where the inmate had been recognised as incapable by DCS for the purposes of the procedure and an interview friend was present. However, based on a prior brief discussion with the inmate and provision of information to him that the inmate appeared to understand, the ITT treated the inmate as a capable inmate for the purposes of giving consent under the provisions of the Act.

Serious indictable offenders who were children or young people

For the purposes of the Act, children are persons aged between 10 and 18 years of age. According to the Act, an assumption is made that children are not able to give informed consent to a DNA sample. The Act requires that a Court Order be obtained to allow the taking of a DNA sample from serious indictable offenders who are children.

The Department of Juvenile Justice has advised us that DNA samples were taken from 38 detainees. We observed all of these procedures as part of this audit. Thirty six interactions occurred in juvenile detention centres and two occurred in adult correctional centres. All of the samples taken were buccal swabs. Six of the detainees were children for the purposes of the Act and court orders had been obtained for all of these detainees.³

Interactions between members of the ITT and juvenile detainees were generally professional and conducted in a supportive manner. Specific requirements in the Act in relation to serious indictable offenders who are children, such as the requirement to obtain a Court Order and a requirement to have an interview friend present were fulfilled.

In the majority of interactions, police officers informed detainees about the procedure by reading the standard information sheet (as printed on the consent form) and police officers ensured that detainees understood the information provided. The information sheet was not read to detainees in four interactions. These were instances where a Court Order had been obtained to take a DNA sample, as the detainees were children. However, police discussed the procedure with the detainees and they were encouraged to ask for clarification during the procedure.

3 Under the Children (Criminal Proceedings) Act offenders who are under the age of 21 (but were under the age of 18 at the time of the offence) may be sentenced to detention in a juvenile justice centre, therefore not all detainees in a juvenile justice centre are children.

The interactions with detainees generally occurred in interview rooms or common rooms that seemed to be similar to the ITAs we observed in adult prisons. We did not observe any major differences between interactions with adult inmates and interactions with juvenile detainees in respect of issues relating to the inmate testing area. Generally, there were around three or four police officers and a youth worker present in the area where the forensic procedure occurred. In the majority of interactions we were unable to determine whether the testing area offered reasonable privacy to detainees during the procedure, although in the majority of cases the area was reasonably quiet. We observed two interactions where we believed that the testing area did not offer reasonable privacy to the detainee, as it appeared that there were a number of people present in the room who had no part to play in the procedure, and there was a high level of background noise that could have interfered with the procedure.

The interactions between police officers and juvenile detainees had the following features:

- interactions were generally shorter in length, usually because there were no extended discussions between police officers and detainees
- police officers interacted with detainees in a friendly and supportive manner and attempted to explain the information in a simple form
- detainees did not ask many questions or make comments during the interaction and they generally only talked if asked direct questions by police officers. Detainees made questions/ comments in 6 interactions, and these related to clarification of some points contained in the information sheet and security aspects of keeping and testing of the DNA sample. The questions and comments of detainees were similar to those from adult inmates and
- we did not observe any negative behaviour in the interaction between police officers and detainees, such as threats or abuse.

2. Characteristics of serious indictable offenders

Eligibility of inmates from whom DNA samples were taken

Given the Act's specific rules about which serious indictable offenders can have a DNA sample taken under Part 7 of the Act, we created a specific question in the audit tool to ensure that we captured data in relation to this issue.

The inmate's offence was stated in the majority of interactions when the information sheet was read out to the inmate. We also recorded any comments or questions from the inmate or others present in the testing area that might raise any doubt in the auditor's mind that the inmate was not a serious indictable offender for the purposes of the Act. There were a number of interactions where we were not able to hear the type of offence because of the poor audio quality of the videotape, or similar reasons; because the offence was not mentioned; or because that part of the interaction was not recorded upon request of the inmate. All of these instances are recorded as 'unable to determine'.

NSW Police advised us that there were 27 inmates who were convicted of an offence under Commonwealth jurisdiction and from whom a DNA sample was taken. The majority of these interactions occurred in the early stages of implementation of the Act, January to March 2001, while seven of these occurred from March to December 2001. NSW Police advised us that these samples were destroyed on 8 January 2002, in accordance with legislative provisions that require that samples can be taken only from serious indictable offenders from participating jurisdictions.

We observed one procedure that was suspended and did not result in testing because it became apparent during the interaction that the inmate was not a serious indictable offender for the purposes of the Act. This occurred after the inmate objected to being identified as a serious indictable offender during the reading of the standard information sheet. After the inmate's objection police officers verified the inmate's offence with the assistance of DCS officers. It was confirmed that the inmate's offence was not a 'serious indictable offence' for the purposes of the Act and the interaction was suspended. We were unable to record the reasons for the inmate's attendance in the ITA and whether he had been identified on the list of 'eligible' inmates provided by DCS to the ITT.

Appellant inmates

The Act requires that forensic samples be destroyed if a conviction is quashed. Police SOPs require that DNA samples taken from inmates who are currently appealing their conviction and/or sentences be stamped with a red appellant stamp. The SOPs state that: *"Appellant samples will not be analysed by the Division of Analytical Laboratories until after the appeal has been settled. Inmates who are appealing against their convictions and/or the severity of their sentence/s will be tested."*⁴ Our interpretation of the term 'tested' as used here is that a DNA sample will be taken from the inmate, but does not include the sample being examined.

Inmates are asked whether they are subject to a current appeal as part of the standard procedure of providing information prior to the carrying out of the forensic procedure. If the inmate states that they are currently appealing their conviction and/or sentence, this is verified against DCS records. In some cases, the 'appellant' information about an inmate was provided to police officers prior to the interaction with the inmate.

We observed 36 interactions where the inmate had a current appeal against their conviction and/or sentence. In the majority of these instances, police officers explained to inmates that their DNA samples would be taken, the sample bags would be stamped with the red appellant stamp and they would not be opened until after their appeal is finalised. Police also explained that if the inmate's conviction was quashed, the samples would be destroyed without having been tested.

Only in those instances where a current appeal was recorded on the DCS files, or had been confirmed by a DCS officer during the interaction, were the sample bags stamped with the appellant stamp. We observed interactions where inmates claimed that they had ongoing appeals but these were not recorded in DCS files and could not be confirmed. In these instances inmates were advised to retain the barcode number of the sample they had provided and to contact their legal practitioner for advice and possible action in relation to the DNA sample.

We observed one interaction where police officers did not stamp the inmate's documentation and sample with the 'Appellant' stamp and were reminded by the inmate of this fact after the sample bag was sealed. Police officers opened the bag, stamped the documentation and resealed the sample and documentation in another bag.

Serious indictable offenders in periodic detention

We observed 11 interactions involving serious indictable offenders who were serving their sentences in periodic detention.

4 NSW Police Standing Operating Procedures, p.31.

In general, we did not observe any major differences between these interactions and the interactions involving other inmates. The length of the interactions and the type of information provided to the periodic detainees were very similar to those involving other inmates. All detainees were male and one identified as ATSI. We did not observe any interactions where the periodic detainee was an incapable person or used an interpreter in another language. We observed one interaction where a sample of hair was taken, while the remaining interactions involved the taking of a buccal swab.

Some inmates in periodic detention felt that they were treated unfairly as they did not consider themselves serious indictable offenders. We noted the following comment from an inmate who was in periodic detention:

my sentence is not a full custodial sentence. How come there are guys here for drink driving and they don't have to do it, but I have to do it? How come shoplifting carries 5 years, and drink driving does not?

Police explained that they were administering the Act, and that it was up to Parliament to legislate on the issue of who is a serious indictable offender. The inmate seemed to accept the answer and consented to the taking of a DNA sample.

3. Consent and compliance

Informed consent to the forensic procedure

We observed 168 interactions where the inmate consented to the forensic procedure in accordance with the provisions of 'informed consent', that is, the inmate was provided with information about the procedure, he or she had been offered an opportunity to seek legal advice, he or she signed a consent form which was witnessed by a DCS officer and he or she was provided with copies of the consent form and barcodes of the DNA sample provided.

Questions that inmates ask about the process and the legislation

Our auditor observed a wide range of questions and comments asked by inmates during their interaction with the ITT. We did not observe any significant differences in the types of questions asked and comments made between different groups of serious indictable offenders, such as male/female, Aboriginal and Torres Strait Islander, young people/adult, those who did not speak English and those who were 'incapable'.

The types of questions asked by serious indictable offenders related to the following:

- the way in which the sample would be transported and analysed
- the operation of the database
- the potential for the sample to be tampered with by police officers or others
- the potential for the serious indictable offender to be 'framed' for an offence by police officers or others.

In the majority of these circumstances, police explained the security aspects of the sample bag, and the strategies put in place to prevent contamination, mix-up of samples or intentional tampering, such as the system of using barcodes for samples, rather than names of inmates, the testing of samples in an independent laboratory and the administration of the DNA database by the NSW Health.

A number of serious indictable offenders expressed concerns and dissatisfaction during the interaction, relating to the following issues:

- the DNA sampling was a breach of their civil liberties
- there were no, or insufficient opportunities, provided to inmates to make informed decisions about the process
- they did not trust police officers not to tamper with the DNA samples.

We noted the following questions or comments in relation to the conduct of the forensic procedure:

- *"I only don't want to do it because it is violation of human rights. Also, what prevents someone to take a sample of hair and place it at a crime scene and frame you - there are people here in jail that might do it".*
- *"I have major concerns in how these samples are going to be used... Who will open this [referring to the sample bag]?"* Police: *"Department of Health laboratories."* Inmate: *"In the presence of whom?"* Police: *"Themselves, people in the laboratory."* Inmate: *"Also, what if someone takes a hair from my brush and then use it to frame me?"* Police: *"We are not going to go and get a hair from your cell or your home. I can guarantee it. We have better things to do..."*
- Inmate discusses the legality of the DNA testing with a visiting Magistrate who is issuing a Court Order for the taking of a blood sample. Inmate: *"My interpretation of the Forensic Procedures Act is that I am on appeal, you have to be investigating a case in which I am a suspect to take my blood..."* Police explained to the inmate that the test was because he was a serious indictable offender. They explained that the sample will be secured in a 'tamper evident bag' and that if the inmate's appeal is successful, the sample will be destroyed.
- Inmate: *"No one explained to us anything about the procedure".* Police: *"Did you see the video?"* Inmate: *"No."*

We observed the following questions and comments in relation to consenting to the forensic procedure:

- Inmate: *"Justice Action has released a leaflet and told that they should not consent and they should get a court order."*
- Inmate: *"Some inmates said they have refused to give a sample".* Police: *"They can refuse, but the legislation allows us to take a DNA sample from inmates who have committed serious indictable offences."*
- One inmate said that he had obtained legal advice that police needed to obtain a Court Order to take a sample from him. Police officer: *"without being threatening, one way or another we are going to get it - it is best to do it consensually, but if your solicitor advised you not to do it, then we get a Senior Police Officer order ... We can take hair by force if necessary. The only thing you need a court order is for blood."*

Some inmates seemed concerned that the sample taken from them would be for the purpose of testing whether the inmate had used drugs or alcohol in prison. ('D&A' in correctional facilities refers to a 'drug and alcohol test').

- One inmate claimed that he believed that DNA meant ‘drug and alcohol test’ and blocked the entrance to his cell when DCS officers came to take him to the Inmate Testing Area, as he did not want to be subject to such test. The inmate had removed all hair from his head, arms and legs and was issued with a Court order by a visiting Magistrate for the taking of a blood sample. The inmate had an opportunity to explain to the Magistrate that he was confused about the meaning of the ‘DNA test’ and his previous reasons for not complying with the test. During the interaction he said: *‘For a long time in prison, DNA is known as ‘drug and alcohol’ [test]. Had I known what the test was for, I would have supplied it. We did not have to go through this...’*

Some inmates expressed concern that they may be punished or reclassified as a result of their decision not to consent to a forensic procedure:

- *“Will I be segregated or punished if I ask for cooling off, and do not consent?”*
- One inmate responded in relation to the information contained in the standard information sheet stating that refusal to consent to the taking of the sample will not be used as evidence against him in any criminal proceedings: *“It is not true that I can refuse and that it won’t be used against me, because they will put me in maximum security.”* Police explain that the section refers to a court of law, and they have nothing to do with how DCS manages the process.

We noted the following questions and comments in relation to the recording of the interaction:

- Inmate: *“What happens to the video?”* Police: *“It is sealed and stored on file, it is kept to be used in court if necessary”*. Inmate: *“I am asking because I am afraid that it is going to be used as a form of identification if it goes in my unit.”*⁵
- *“Why should the video be kept on police premises, when the DNA database is not?”*
- When one inmate was asked whether he agreed to the recording of the procedure he said: *“Provided that the video is kept confidential, it is not advertised, not shown in public.”*

We noted the following comments and questions in relation to legal advice:

- One inmate was argumentative during the interaction. He was allowed a time out to seek legal advice. After seeking legal advice we noted the following interaction between the inmate and police officers:

Inmate: *“I need to have the Act in front of me, that is signed. This [the information sheet] is not signed and I have every right to fight, if you lay a hand on me I will defend myself.”*

Police: *“We can take a sample using reasonable force.”*

Inmate: [in relation to the information sheet] *“How do I know this is in the Act? This piece of paper is not even signed. My legal advice said that you should show me a copy of the Act, signed by Parliament.”*

Police allowed the inmate to read Section 70 relating to use of reasonable force and other related sections and further explained the implications of these sections.

- In another interaction the inmate said: *“I want to see a solicitor.”* The DCS officer advised him that he was not permitted by the Act to see a solicitor. The inmate said: *“I watched the video and it said that I am.”* DCS officer: *“You can speak to a solicitor [over the phone], but you are not allowed to see them”*.
- Inmate: *“Can I get a court order, I spoke to my solicitor and he said it is better if I get a court order.”* Police officer: *“You can elect to do a buccal swab, but if you do not consent we get order for a hair sample we don’t need a Court Order unless we take blood, but we don’t [want] blood... I can give you a Senior Police Officer Order to take hair.”*

⁵ Inmate seems to be a former police officer.

Legal advice

Section 67 (2) of the Act requires that informed consent to a forensic procedure include an opportunity for the inmate to seek legal advice in relation to the procedure.

As part of the standard request for information from the inmate during an interaction, the inmate is asked whether he or she had an opportunity to contact a legal representative of his or her choice. We noted this information separately in the audit questionnaire.

We observed 208 interactions where the inmate indicated an opportunity had been given to him/her to seek legal advice. We observed 27 procedures where we were not able to establish whether an opportunity to obtain legal advice had been afforded to the inmate for a number of reasons including: the video did not show the question being asked of the inmate, we could not hear the answer of the inmate because of poor recording or background noise, or there was no video recording of this part of the interaction due to the inmate's objection to the interaction.

We were unable to determine the number of inmates who took up the opportunity to contact a legal practitioner, since inmates were not asked to provide that information on video.

Cautioning of inmates

Police SOPs require that the inmate be cautioned before the procedure and 45 of the Act requires that inmates must not be questioned for the purpose of an investigation during the conduct of the forensic procedure.

In the majority of interactions we observed, the inmate was cautioned before the carrying out of the procedure. We observed 16 interactions where police cautioned the inmate after the procedure, however, the inmate did not say anything during the procedure. In six interactions we were unable to determine whether or not the inmate was cautioned for a number of reasons, including: the poor quality of the video-audio recording; the caution could not be heard or was not recorded by the examiner and the video had been turned off during that part of the interaction upon the inmate's request.

While the majority of inmates did not comment in relation to the caution, some inmates seemed to become concerned or confused by the cautioning because they seemed to relate the process of cautioning to being arrested or charged by police officers. In these instances, inmates questioned police officers about the reasons for being cautioned. Police officers explained that the cautioning was for the inmate's protection as the interaction was electronically recorded, and to ensure that the inmate 'did not talk about or admit any crimes.'

In some situations police officers cautioned inmates earlier in the interaction, such as during the provision of information about the procedure, as inmates appeared to mention particular offences. We observed one interaction where the inmate continued to talk during the forensic procedure about the offence for which he was serving a sentence, despite being cautioned and warned a number of times by police officers.

Alternatives to consent

The Act provides for taking of DNA samples from inmates who do not consent to the forensic procedure. In line with these provisions, NSW Police SOPs establish a number of alternative ways for taking DNA samples from inmates who do not consent to taking of a sample, such as:

- procedures for inmates who do not consent but comply
- 'cooling off' periods for inmates who indicate that they will resist the taking of the sample
- 'controlled movements' or use of reasonable force as a last resort.

Once an inmate has indicated that they will not consent, these alternative procedures come into play.

We found that these alternative procedures for taking a DNA sample were generally successful in obtaining the sample from inmates.

'Non-consenting but compliant'

'Non-consenting but compliant' refers to interactions where the inmate has not signed a consent form for the taking of a DNA sample, but has indicated that he/she will not resist the taking of the sample.

According to s 70 the Act, if an inmate has been requested to consent to providing a DNA sample and refused, a police officer may order the taking of a sample of hair, other than pubic hair, or apply for a court order to authorise the taking of a sample by buccal swab or some other forensic procedure, under s 74.

According to the SOPS, if an inmate does not consent to providing a DNA sample by buccal swab, the following process occurs:

The inmate will be asked if they intend to comply with taking of a hair sample [comply here means 'submit without resistance']; The Team Leader will issue a Senior Police Officer Order for the taking of hair sample with root.⁶

If the inmate indicates that he or she will comply, the interaction continues and the inmate is cautioned before a hair sample is taken. A hair sample can be taken from the head, arm or leg and the sample is sealed in an envelope, before it is placed and sealed in the 'tamper-evident' bag. Inmates are provided with a copy of the Senior Police Officer Order before they leave.

According to our examination of interactions, police generally fulfilled the requirements of the Act in relation to inmates who had not consented but complied. However, the Act and the NSW Police procedures are not clear about what happens if the inmate changes his or her mind about consenting during the interaction. We observed a number of interactions where inmates indicated that they would not consent but would comply with the procedure. Police then advised these inmates that they needed to be sure about their decision because after a Senior Police Officer Order (needed for the taking of sample from non-consenting inmate) was issued, 'there is no going back'.

'Cooling off' period

If the inmate indicates that they **do not** intend to comply with the taking of sample of hair, the SOPs state that police should inform the inmate that they will receive a seven to ten day 'cooling off' period to reconsider their decision.

We did not seek to record the 'cooling off' period given to inmates for two reasons:

- 1) the issue whether an inmate has been given a cooling off period and how long it has been is not always discussed on video
- 2) the 'cooling off' period is administered by the DCS in association with NSW Police and as such, it is not directly subject to this review.

However, we attempted to examine all discussion between the inmate, police officers and DCS officers that occurred in relation to 'cooling off period' on video. We also observed a number of 'follow up' interactions with inmates who did not consent and comply during the first interaction with the ITT.

⁶ Standard Operating Procedures, p. 34

It appeared that the inmates thought that a 'cooling off' period of seven to ten days would automatically be given to them if they did not consent or comply to the taking of a DNA sample, and that the 'cooling off' period was a requirement of the Act. Some inmates seemed to complain that the 'cooling off' period given to them was less than 10 days. We observed a number of inmates who appeared before the ITT only one day after they had initially indicated that they would not comply with the procedure.

In most circumstances police officers explained to the inmate that the 'cooling off' period was not a requirement in legislation and was 'only a courtesy' that the DCS gave to inmates to allow more time for the inmate to consider the procedure. Police sometimes said that they could take a DNA sample from a non-compliant inmate by force if necessary, without having to stop the interaction.

Use of force or a 'controlled movement'?

According to the Act, a police officer can use reasonable force to carry out a forensic procedure in order to enable the forensic procedure to be carried out or to prevent loss, destruction or contamination of any sample. The Act further specifies that all forensic procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards and they are not to be carried out in a cruel, inhuman or degrading manner. The Act specifies that a police officer may request for a capable adult inmate's consent to carry out a forensic procedure to obtain a DNA sample. If the consent is not given, police can either make a senior police officer order or apply for a court order to carry out a non-intimate forensic procedure without the inmate's consent.

Examination of procedures has indicated that the use of force is generally seen as the last resort for taking a DNA sample from an inmate. In all procedures examined under this category, other strategies that aimed at preventing the use of force had been employed prior to the use of force. These included:

- informing an inmate about his/her choices in giving the sample
- providing opportunities to seek legal advice
- allowing some time for an inmate to make a decision – a 'cooling off' period.

Even though we did not directly observe any interactions between DCS officers and non-consenting inmates prior to their interaction with the ITT, the use of such strategies were mentioned on video once the inmate met with the ITT.

We attempted to 'follow up' the interactions of inmates who had been issued with a 'cooling off' period in order to observe the forensic procedure with the inmate. We observed that before a controlled movement or a use of force was employed, the inmate usually had at least one previous interaction with the ITT team, where he/she was introduced to the team, the information sheet read out and the team had ensured that an opportunity to seek legal advice had already been provided.

If the inmate did not consent to the procedure, the police officer advised the inmate that a Senior Police Officer Order would be issued to take a sample of hair, and asked the inmate if such an order was obtained whether the inmate would submit to the taking of a sample without resistance.

If the inmate indicated that he/she was not going to resist, a Senior Police Officer order was issued and a hair sample taken from the inmate. This procedure is generally described as 'non-consensual but compliant'. In some circumstances, the inmate indicated their reasons for not consenting but complying to the procedure. However, given that police did not question inmates about their reasons for not consenting, we were not able to thoroughly investigate inmates' reasons for not consenting.

In incidents where the inmate indicated that he/she was going to resist the taking of sample, we observed that the procedure was suspended and the inmate allowed to leave the room. In some circumstances, the inmate was advised that because police were entitled under the Act to use reasonable force to take a sample, he/she may be charged with assault if he/she resisted police. However, this advice does not form part of the standard information provided to inmates. Inmates were then allowed some time before they were required to provide a sample. The audit tool did not seek to collect specific information in relation to the 'cooling off' period provided to inmates, particularly as the 'cooling off' period has been put in place by DCS policies and not by police.

Use of force is discussed in more detail in Chapter 18 of the main body of the report.

4. Samples

Forensic DNA samples

Sections 62, 63 and 64 of the Act provide for the types of forensic procedures that can be carried out on serious indictable offenders. Serious indictable offenders can only be subjected to the following forensic procedures:

- the taking of sample of blood
- the taking of samples of hair (other than pubic hair)
- the taking of hand print, finger print, foot print or toe print
- the taking of sample by buccal swab.

During the audit, we observed interactions where samples of blood, hair and buccal swab were taken. We did not observe any interactions that involved the taking of hand prints, finger prints, foot prints or toe prints.

Buccal swab

We observed 193 procedures where a buccal swab was taken. 172 of these were taken after an informed consent from the inmate and 21 were taken with a Court Order for inmates who were incapable or inmates who were children.

All procedures involving the provision of a DNA sample by buccal swab involved the inmate self-administering a buccal swab, on the instructions of a police officer. Generally, inmates appeared to understand well police instructions on how to use the buccal swab, and we did not observe any major issues of concern in relation to the self-administration of the buccal swab. We only observed two interactions where the inmate did not seem to understand instructions for use of the buccal swab and may have contaminated the sample by placing it on the outside of the cheek or touching the sponge-covered tip of the swab with their fingers.

We observed one interaction where the inmate asked for the interview friend to carry out the buccal swab. This involved an incapable inmate who attempted to self-administer the buccal swab but was not successful.

We observed one interaction where a Magistrate was present and issued a Court Order for the taking of a DNA sample from an inmate who had previously not consented to the procedure and had removed all body hair. The inmate seemed to prefer, and was willing, to provide a sample by buccal swab, but the Magistrate rejected this and issued a Court Order for the taking of a blood sample.

Hair sample

We observed 31 interactions where a sample of hair was taken. The majority of these interactions involved an inmate who had not consented to providing a buccal swab and a Senior Police Officer Order had been issued for the taking of hair sample. However, we observed one interaction where the inmate consented to the forensic procedure, but asked that a hair sample be taken from him, as he said: *"I consent to a hair sample."*

We could not determine from the videotape whether the inmate meant that he did not consent, but that he was compliant. However, the inmate was observed signing a consent form and for the purposes of this audit, the inmate was consenting to the procedure. We also observed one procedure involving an inmate who was incapable, where police officers believed that it would be more effective if a hair sample was taken from the inmate after a failed attempt of the inmate to self-administer a buccal swab.

The NSW Police Service procedure for taking a hair sample is the 'lever arch method', where 15 to 20 hairs are taken, placing even pressure on the hairs that are being pulled out. Due to limitations of the video recording, we were unable to determine the number of hairs taken. It was in most circumstances almost impossible to determine whether a particular procedure was painful for the inmate. In the majority of procedures the taking of hair did not appear to cause discomfort for the inmate, as there was no indication by the inmate, such as a verbal or physical reaction, to suggest otherwise. However we observed a small number of procedures where inmates complained about the taking of the hair, including that too much hair had been taken and that more than one attempt was made to take hair.

The taking of hair often involved up to three attempts as the police officer taking the hair would examine the hair to ensure that it contained a hair root. One procedure involved 10 attempts to take a hair sample from the inmate's head and arms. The inmate in this procedure had very short hair on his head, and the police officer seemed unable to gain a sufficient 'grip' on the hair in order to extract it. The inmate made no verbal or physical signs to indicate discomfort, and we were unable to determine whether the inmate had any concerns about the manner in which the sample was taken. Police officers did not provide an explanation to the inmate for the many attempts to take the sample.

Blood sample

We observed seven interactions involving the taking of blood samples. All of these procedures were authorised by a Court Order from a Magistrate who had visited the correctional facility. In some of these interactions the issuing of the court order by the Magistrate was recorded on video, while in other interactions the issuing of the Court Order was not recorded.

All of the interactions involved inmates who had not consented to the taking of a DNA sample and had removed all the hair from their head, arms and legs, so that taking a hair sample was not possible. In two of these interactions the inmates were not ATSI and in four interactions we could not determine whether they were ATSI because the question was not asked on video. There were no inmates of non-English speaking backgrounds or incapable inmates in this category. In all of the interactions we observed the blood sample was taken by a police officer, and in the majority of these (where the inmate was compliant to the procedure) the police officer explained to the inmate that he/she was a registered nurse or accredited in taking of blood samples.

We observed one interaction that involved restraint and the use of force. We did not observe any actions by police officers that lead us to believe that the use of force in this instance was excessive or inappropriate.

Security of the sample

We collected data to establish whether all security procedures were undertaken to ensure that the sample was not contaminated and that the procedure was not adulterated in any way. Although NSW Police SOPs do not specifically require that the bag in which the sample is contained is unsealed and sealed in front of the inmate and on video, we observed that this was generally the practice during the majority of interactions. We also collected data to determine whether inmates were informed of the security aspects of the bag and of the collected sample.

5. Nature of interaction between the Inmate Testing Team and inmates

We sought to record specific information about the nature of the interaction between police officers who were members of the ITT and inmates by developing a specific checklist of behaviours observed. The auditor also recorded other information about the nature of the interaction through the observation of the whole interaction.

Interactions in general occurred in controlled and structured environments where police officers were in a position to direct the interaction and control the conditions. Police officers provided information to inmates or answered inmates' questions, however, in the majority of interactions police officers did not engage in protracted debates or arguments with inmates that may not have been conducive to the effective taking of the DNA sample.

The majority of interactions appeared to be conducted well and in accordance with police procedures and the Act. We acknowledge that these interactions, by their nature, can be intimidating or uncomfortable for inmates. However, we believe that the procedures put in place by NSW Police and DCS attempt to ensure that the interactions are conducted without intimidation or discomfort for the inmate. For instance, all police officers who are members of ITT wore plain clothes rather than police uniforms during interactions. Even though we understand that this is because of occupational and safety concerns for police officers visiting correctional facilities, this policy does reduce the likelihood that inmates will be intimidated by a police uniform.

We observed 214 interactions that involved requests for information. These interactions involved the provision of information to inmates according to the requirements in the Act and police SOPS; obtaining of informed consent; collection of the DNA sample and securing of the sample bag; and providing of all the prescribed documentation about the procedure to the inmate (usually a copy of the consent form, or copies of the Senior Police Officer order or the Court Order).

Fifteen interactions involved some form of control by police. These included interactions where force was used, the inmate was restrained, or the inmate was held by police officers.

We observed 61 interactions where we noted that police officers had engaged in additional efforts to ensure a friendly and supportive environment for the inmate. For example, police officers chatted to inmates in a friendly manner or they provided additional information about the forensic procedure without being asked.

We observed at least 15 interactions where inmates were in conflict with the police, were abusive towards police officers, or refused to speak and answer questions during the interaction. In the majority of these interactions police were observed to have handled the situation in a highly professional manner, not engaging in arguments with the inmate and attempting to placate the inmate. For example, we observed one interaction where the inmate appeared argumentative with police because of the number and nature of questions asked during the interaction. Police officers attempted to explain the forensic procedure, and provided a 'time out' for the inmate to speak to a legal representative. The inmate seemed to be calm and more cooperative after the 'time out'.

The consistency of procedures and the scope for the exercise of discretion in conducting forensic procedures

The audit showed that generally those police officers who were members of the ITT appropriately applied legislative requirements and their discretion according to police procedures and guidelines. We did not observe any major discrepancy in the way police applied legislative and policy requirements.

We identified some inconsistency in the level of training and expertise between different police officers and different ITTs, particularly in relation to the quality of information provided to inmates or managing and defusing challenging situations such as where inmates were non consenting or argumentative. These inconsistencies were particularly apparent in the early stages of conducting of forensic procedures.

There were also differences in the level of skill exhibited by officers when dealing with difficult or challenging situations in the ITA, such as when inmates were argumentative, uncooperative or abusive. For example, some officers successfully defused challenging situations by speaking in a supportive and friendly manner to inmates and addressing their questions and concerns while other officers were less skilled in dealing with argumentative or concerned inmates.

AUDIT TOOL

BACKGROUND	
Demographic info	<p>Inmate's name</p> <p>Inmate's MIN</p> <p>Inmate's sex</p> <p>Tape No.</p> <p>COPS Event No.</p> <p>Correctional Centre</p> <p>Date:</p>
Time taken	<p>START TIME: (time inmate entered the room or video turned on)</p> <p>STOP TIME: (time all actions completed, ie:</p> <ul style="list-style-type: none"> ○ information provided ○ consent form signed or order served on inmate ○ DNA sample taken ○ sample bag is sealed <p>TOTAL TIME:</p>
Inmate Testing Area	<p>Did the Inmate Testing Area appear to afford reasonable privacy to the inmate?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p> <p><input type="checkbox"/> Unable to determine (Give details)</p> <p>Provide a brief description of the Inmate Testing Area</p> <p>Did the video provide coverage of the whole Inmate Testing Area?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p> <p><input type="checkbox"/> Unable to determine (Give details)</p>

<p>CONSENT FORM QUESTIONS ATSI</p>	<p>ATSI</p> <p>Did the inmate identify as ATSI? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>If yes, was this accepted by DCS and/or Police? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>Did the inmate indicate that s/he wished to have an interview friend present? (NB: That is, whether or not they identify as being ATSI) <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>APPELLANT</p> <p>Did the inmate indicate that s/he was the subject of appeal proceedings against her/his current conviction? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details, eg 'all grounds appeal', 'appeal against severity of sentence, etc)</p> <p>LEGAL ADVICE</p> <p>OPPORTUNITY TO OBTAIN LEGAL ADVICE</p> <p>Did the ITT provide the inmate with an opportunity to communicate or attempt to communicate with a legal practitioner of her/his choice? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details, eg inmate indicated that s/he had already been given this opportunity)</p>
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<p>CONSENT</p>	<p>Did the inmate consent to the procedure? NB: Consent is determined by the inmate signing the consent form <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>If yes, did the inmate sign the consent form BEFORE the forensic procedure was conducted? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>If the inmate consented, did the inmate appear to withdraw consent at any stage? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>CAUTION/QUESTIONING</p> <p>Was the inmate cautioned prior to the procedure being conducted? (ie. Was the inmate told that anything s/he says may be used in evidence?) <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (If no, give details)</p>
<p>CAUTION</p>	<p>Was the inmate questioned by police or DCS officer during the procedure? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p>

ORDERS	<p>Did it appear that the forensic procedure was authorised by either a Senior Police Office Order or a Court Order?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details and whether SPO or Court order)</p> <p>If yes, did it appear that the order was served on the inmate prior to the sample being taken?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>Despite the order, did the inmate appear to sign a consent form and consent to a buccal swab?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p>
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DNA SAMPLE	<p>Sample Barcode No.</p> <p>Sample Bag No.</p> <p>Was the bag opened on video? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>Was the bag opened in the presence of the inmate? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>Was the bag sealed on video? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>Was the bag sealed in the presence of the inmate? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>Did the officer explain the security aspects of the bag design, storage and transportation to the inmate? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>Did there appear to be any contamination issues? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>What type of DNA sample was taken? Buccal <input type="checkbox"/> Hair <input type="checkbox"/> Blood <input type="checkbox"/> Other <input type="checkbox"/> (please state which)</p> <p>Briefly describe the way in which the DNA sample was taken</p>
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	<p>Did the video recording appear to be continuous throughout the whole procedure?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>If it appeared to be turned off – record all stop times and start times (if available) (Were reasons given for the switching off of the video? If so, provide details)</p>
<p>MISCELLANEOUS</p> <p>Persons present</p>	<p>Did the number of people who were present vary throughout the procedure?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>Did the procedure appear to be conducted in the presence or view of a person who did not appear to have a role?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p>
<p>MISCELLANEOUS</p> <p>Interview friends</p>	<p>Did the inmate appear to have an Interview Friend present?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine Give details (ATSI, incapable, child)</p> <p>If yes, was interview friend present during:</p> <p>The giving of the information <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine The request for consent <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine The DNA sampling itself? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>Who was the Interview Friend?</p> <p><input type="checkbox"/> Another inmate <input type="checkbox"/> DCS worker (please state role) <input type="checkbox"/> CCLO <input type="checkbox"/> Legal practitioner</p>

- Other Other (please state)
 Unable to determine

Did the Interview Friend have any input into the procedure? For example:

- Provided advice to inmate YES NO Unable to determine
Asked questions on behalf of inmate YES NO Unable to determine
Made request on behalf of inmate YES NO Unable to determine
Made objection on behalf of inmate YES NO Unable to determine
Other (give details) YES NO Unable to determine

(if yes to any of the above, give details)

Did the inmate make any comments about Interview Friends?

- YES
 NO
 Unable to determine

(Give details of comments and responses)

<p>MISCELLANEOUS</p> <p>Legal Advice and representation</p>	<p>Did the inmate appear to have a Legal Representative present?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>If yes, was Legal Representative present during:</p> <p>The giving of the information <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine The request for consent <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine The DNA sampling itself? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details)</p> <p>Did the Legal representative have any input into the procedure? EG</p> <p>Provided advice to inmate <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine Asked questions on behalf of inmate <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine Made request on behalf of inmate <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine Made objection on behalf of inmate <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine Other (give details) <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p> <p>(if yes to any of the above, give details)</p> <p>Did the inmate make any comments about access to legal advice? (eg accessibility, what advice had been given etc)</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine (Give details of comments and responses)</p>
<p>MISCELLANEOUS</p> <p>Interpreters</p>	<p>Was an interpreter used?</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> Unable to determine</p>

<p>MISCELLANEOUS</p> <p>Provision of information and material</p>	<p>PROVISION OF INFORMATION/MATERIAL</p> <p>Did the inmate choose to watch the video of the forensic procedure?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p> <p><input type="checkbox"/> Unable to determine</p> <p>(Give details)</p> <p>Did the inmate ask for copies of any information or material?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p> <p><input type="checkbox"/> Unable to determine</p> <p>(Give details of requests and responses)</p>
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MISCELLANEOUS	
Nature of interaction	<p>Briefly categorise the types of behaviours of police officers and inmates throughout the whole interaction</p> <p>Officer behaviours</p> <ol style="list-style-type: none">1. Information seek2. Information give3. control4. reject5. threat6. support7. physical <p>Inmate behaviours</p> <ol style="list-style-type: none">1. Information seek2. Information give3. Self defence4. Refuse5. Reject6. Physical

Other/Comments	
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Appendix G: Audit of delivery of forensic DNA samples to the Division of Analytical Laboratories (DAL) May 2003

Introduction

This audit examined a random selection of 164 NSW Police and DAL records regarding forensic procedures carried out on serious indictable offenders during our review period (1 January 2001 to 5 July 2002).

The purpose of the audit was to:

- confirm that the samples had been received at DAL
- note the period of time that had lapsed between the taking of the DNA sample and the sample being received at DAL.

Background

NSW Police Standard Operating Procedures (SOPs) for inmate sampling require that wherever possible, DNA samples be transported to DAL on the same day that they are obtained. If this is not possible, the sealed forensic samples are to be placed in a lockable security bag and lodged as an exhibit at a Local Area Command.

The procedures emphasise that the samples should be conveyed to the DAL (the DNA laboratory) within 72 hours or as soon as is reasonably practicable.¹

This 72 hour delivery period has been NSW Police policy since the Ombudsman's investigation that resulted in the "Norford Report". In our Norford Report (1999),² we reported that:

The Director of Forensic Services has advised that all staff within his command have adopted the recommendation that samples be delivered to the laboratory within three days.

Method

We first randomly selected 164 records from the COPS records of forensic procedures. These records were provided to us by FPIT for the purposes of our review. We noted the:

- date that the sample was taken
- name, Criminal Names Index (CNI) number and date of birth of the serious indictable offender from whom the sample was taken
- event number
- location of the sampling.

Unfortunately the COPS records provided to us did not include the sample barcode number.

We then compared these records to those provided by DAL pursuant to a requirement notice issued by our Office. The DAL records did not contain CNI numbers. We searched for the DAL record of the 164 samples by examining a combination of the name, DOB and Event number. We made a note of the date that the sample was received at DAL according to DAL's records.

1 NSW Police, Standard Operating Procedures: Forensic DNA Sampling of Inmates, Version 5.0, November 2001, pp 44-45.

2 NSW Ombudsman, The Norford Report: A Special Report to Parliament under section 31 of the Ombudsman Act 1975, 1999.

Results

Minor anomalies

There were 15 minor anomalies.

These minor anomalies related to the DAL record containing a similar, but not exact, match to the COPS record (for example the recorded name of the person was not identical on both records). In these cases we examined the live COPS system for aliases. In 13 of these cases the entry on COPS was attached to an alias of the person sampled by NSW Police. In the remaining two cases, no alias could be found and DAL was contacted. DAL advised us that these discrepancies were the result of unclear handwriting on the Sample Information Sheets provided by NSW Police. On further scrutiny of the Sample Information Sheets, DAL decided that the NSW Police record was correct. We assessed these discrepancies as being 'minor'.

Major anomalies

There were two major anomalies in relation to one sample.

First, DAL could not identify any record of receiving a sample taken from an individual ('Person A') on 5 June 2002. We raised this issue with Forensic Procedures Implementation Team (FPIT) who conducted their own inquiries. FPIT informed us that the records relating to the forensic procedure were entered onto the COPS record of the wrong person. The person whose DNA sample was submitted to DAL was in fact, a convicted offender ('Person B'). This person had a different name, date of birth and criminal history to Person A, who had never actually been a corrective services client.

Second, despite this clarification, the sample taken from convicted offender Person B on 5 June 2002 still could not be found on DAL records as being received by the laboratory.

Response to anomalies from NSW Police

NSW Police addressed the two major concerns identified in the audit and clarified the issues relating to the samples from Person A and Person B. The sample collected on 5 June 2002 was taken from Person B and it was confirmed that this sample was received by DAL on the same date. The mix up on the COPS record appears to have occurred, because Person A and Person B are brothers who formerly resided at the same address. The confusion was compounded by the fact that Person B was initially charged under the name of Person A. NSW Police agreed to take action to rectify these records. It was also confirmed that this sample was located and processed by DAL and the profile accurately recorded on the database.

Delays in transporting DNA samples to DAL

Our first review of audit data suggests that in only 40% (66 of 164) of cases, the sample was received at DAL within 72 hours of it being taken.

When we raised this with NSW Police we were advised that members of the ITT deliver all samples collected from inmates to DAL. For correctional centres in Sydney, these would normally be delivered on the day the sample is taken. For regional correction centres, samples are booked in as exhibits at the nearest police station at the end of each day's testing. An ITT member would then take all the samples to DAL once testing at the correctional centre had been completed for that visit. As a result, some samples may take a week to be delivered to, and receipted by DAL.

Further advice was provided in relation to delivery timeframes for samples. Police reviewed their own records regarding samples that appeared to take longer than nine days to be received at DAL. The NSW Police records revealed that the longest time a sample was held in police custody before being delivered to DAL was six days. This was for a sample from a serious indictable offender held at Ivanhoe. It appears that the original suggestion that only 40% of samples met the 72 hour time frame arose from errors in date entry that reflect the date the data is being entered on the DAL database rather than the date the sample is received at the laboratory. The great majority of samples met the '72 hour' benchmark.

Appendix H: Summary – NSW Ombudsman’s research on forensic procedures legislation in Canada - March 2001

Background

Early in our review period it was important for us to learn from other jurisdictions about the challenges faced by police and oversight agencies relating to the implementation of forensic procedures legislation.

In March 2001 one of our officers, Juliet Dimond, attended an international conference in Toronto, Canada, in order to meet with representatives from jurisdictions where forensic procedures legislation had been operational for longer than in NSW. Our officer also visited Ottawa, where she visited the Canadian National DNA Databank and met with both police and oversight agencies involved in the implementation of Canadian forensic procedures legislation.

Upon return, Ms Dimond met with the NSW Interdepartmental Committee on the Implementation of the *Crimes (Forensic Procedures) Act 2000*, NSW Police and DAL to provide details about our Canadian research. Copies of interesting and relevant Canadian material were also distributed to a variety of stakeholders in NSW.

This appendix summarises Ms Dimond’s work during her visit to Toronto and Ottawa.

Forensic Identification Seminar

19-23 March 2001

The conference was well-attended (approximately 250 delegates) and included participants from several provinces in Canada, several regions in the UK, several states in the USA, Taiwan, Iran, Japan and South Australia.

Key Speakers

- Dr Henry Lee, Director, Forensic Science Laboratory, Connecticut State Police
- David Coffman, Director, DNA Database Laboratory, Florida Department of Law Enforcement
- Detective Chief Inspector Richard Leary, Director, Forensic and Information Systems Research
- Jonathan Newman, Section Head, Biology Section, Ontario Centre of Forensic Sciences
- Richard W Vorder Bruegge, Forensic Audio, Video and Image Analysis Unit, Federal Bureau of Investigation Laboratory, Washington
- June Fitz, President, Fitzco (manufacturer of a variety of forensic instruments and DNA collection kits used by the RCMP)
- Dr Joel Mayer, Deputy Director, Centre of Forensic Science, Ontario
- Ricardo Federico, Former Crown Attorney, Ontario
- Detective Sergeant Brian Ward, Provincial DNA Coordinator, Ontario

Met with:

- David Coffman, Director, DNA Database Laboratory, Florida Department of Law Enforcement
- Detective Chief Inspector Richard Leary, Director, Forensic and Information Systems Research
- Matthew Barrett, CME Software Systems Limited, UK (designs case management software for many UK police services)
- Alan Morrison, SOCO case manager, Forensic Identification Services, Toronto Police Service

- David Wieland, SOCO coordinator, Forensic Identification Services, Toronto Police Service
- Greg Schofield, Drafting Technician, Forensic Identification Services, Toronto Police Service
- Les Noble, Forensic Identification Investigator, Special Investigations Unit, Ontario
- Anne Wamsley, Latent Print Section Supervisor, Police Department Laboratory Services, City of Phoenix, Arizona, USA
- Colin Dobson, Detective Superintendent, Crime Management Department, Northumbria Police, UK

DNA Warrant Sample Collection Training

Centre of Forensic Sciences, Ontario

Ms Dimond was briefed on collection of DNA samples under the DNA Warrant Scheme (suspects) by police.

Visits

All of the organisations visited by Ms Dimond were given a copy of the NSW Ombudsman's Office Annual Report, the NSW legislation and a selection of Australian materials on the forensic use of DNA in Australia.

Forensic Identification Services, Toronto Metropolitan Police (Toronto)

Ms Dimond was given a tour of the laboratory and the services available.

Ontario Centre of Forensic Sciences and Ontario State Coroner's Court (Toronto)

Ms Dimond was given a tour of the laboratory and the services available.

Met with:

- James G Young, Assistant Deputy Minister Public Safety Division and Chief Coroner
- Raymond J Prime, Director, Centre of Forensic Sciences
- Joel M Mayer, Director, Scientific Affairs, Centre of Forensic Sciences
- Jonathan Newman, Section Head, Biology Section, Centre of Forensic Sciences

Osgoode Hall Law School of York University (Toronto)

Met with:

- Ricardo Federico, Barrister at Law

National DNA Data Bank, Central Forensic Laboratory, Royal Canadian Mounted Police Headquarters (Ottawa)

Ms Dimond was given a tour of the laboratory and the services available.

Met with:

- Dr Ron Fourney, Officer In Charge, DNA Data Bank, Central Forensic Laboratory
- Joel S Harris, Forensic Document Examiner, Central Forensic Laboratory
- Frances Porelle, DNA Training and Collections Manager

Department of Justice Canada (Ottawa)

Met with:

- Michael Zigayer, Senior Counsel, Criminal Law Policy Section

Department of the Solicitor General Canada (Ottawa)

Met with:

- Marian Harymann

Office of the Privacy Commissioner of Canada (Ottawa)

Met with:

- Julien Delisle, Executive Director
- Brian Foran, Director, Strategic Analysis
- Brian Stewart, Strategic Policy Adviser

Commission for Public Complaints against the Royal Canadian Mounted Police (Ottawa)

Met with:

- Jon Holland, Director General, Review and Policy
- Glenn Hansen, Director, Enquiries and Complaints
- Sherri Davis-Barron, Senior Reviewer Analyst
- Susan Mills, Senior Reviewer Analyst
- Garry Wetzel, Senior Reviewer Analyst

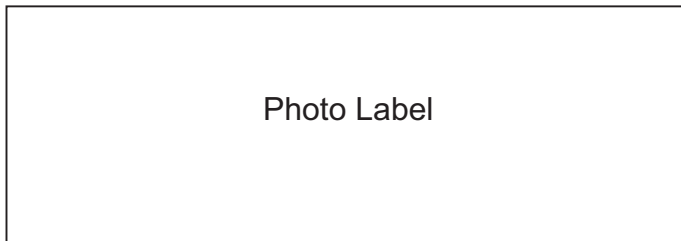
Other meetings

- Linda Kahn, Department of Justice, Canada
- Ontario DNA Retroactive Team

The team consists of crown attorneys and detectives and is tasked to obtain court orders for all persons who are classed as retroactive offenders.

Appendix I: Summary – Department of Corrective Services - Forensic Testing - Pre-Test Interview Form

Annexure C



FORENSIC TESTING – INMATE PRE TEST INTERVIEW

INMATE NAME: **MIN:**

CORRECTIONAL CENTRE:

The police forensic testing team will require you to undergo a forensic procedure which will involve providing a body sample during the week commencing Monday __ / __ / __.

- | | |
|---|--------|
| 1) Are you aware of forensic testing? | YES/NO |
| 2) Have you seen the information video and received an information brochure? | YES/NO |
| 3) Are you aware that you should obtain legal advice if you have any concerns about providing a sample? | YES/NO |
| 4) Do you require an interview friend to be present (ATSI inmate only)? | YES/NO |
| 5) Do you require your legal representative to be present (ATSI inmate only)? | YES/NO |
| 6) Do you intend to provide a sample when requested to do so by police? | YES/NO |

Signed Inmate

Date

Appendix J: Department of Corrective Services Forensic Procedures - Handout for staff and inmates

BACKGROUND

The Crimes (Forensic Procedures) Act 2000, will commence on 1 January 2001. The Act provides for the collection of forensic material from inmates who are 18 years of age and over and have been convicted of a serious indictable offence under NSW state law.

Forensic testing of inmates is carried out in many countries throughout the world. In Australia forensic testing is already being conducted in Victoria and similar legislation commenced in Queensland on 1 July 2000.

Inmates in these states have readily accepted forensic procedures with a non compliance rate of approximately 1%.

DEFINITIONS

The following terms are considered relevant to inmates and staff:

- 1) Serious Indictable Offender;
- 2) Forensic procedure;
- 3) Interview friend;
- 4) Informed consent;
- 5) Sample;
- 6) Incapable person

Serious Indictable Offender

A serious indictable offender is an offender who has been convicted for an offence that is punishable by imprisonment for a maximum term of 5 years or more. For example, an inmate may be serving 9 months for car stealing. However, the maximum term for this offence in NSW is 10 years. This inmate is therefore considered a "serious indictable offender";

Forensic Procedure

There are three types of forensic procedures, the taking of a sample by buccal swab, non intimate and intimate forensic procedures.

- 1) Buccal Swab.

A sample by buccal swab simply involves a swab from the inside of the mouth. This will be the type of test used for all compliant inmates (those inmates who consent to a forensic procedure). The swab can be self administered under supervision.

- 2) Non Intimate.

There are a number of non intimate forensic procedures specified in the Act. The only non intimate forensic sample that police will collect from inmates will be a hair sample. This test will be used for all non compliant inmates (inmates who refuse to consent to a buccal swab). It is a simple procedure of plucking 6-10 strands of hair (not pubic hair) from the head or body. The hair is plucked by hand, tools are not used;

3) Intimate.

There are a number of intimate forensic procedures specified in the Act. The only intimate forensic sample that police will collect from inmates will be a blood sample. This will only be done if difficulty is experienced obtaining a hair sample. A court order must be obtained which authorises police to take a blood sample;

Interview Friend

Aboriginal and TSI inmates and 'incapable' inmates may have an interview friend present during the test. An interview friend may be a friend, relative, legal representative or any other person chosen by the inmate. Inmates other than Aboriginal and TSI and 'incapable' inmates are not permitted to have an interview friend present;

Informed Consent

The police officer is required by the Act to formally request an inmate to consent to a forensic procedure. Before the inmate consents the police officer must also inform the inmate about the forensic procedure in accordance with the Act and must give the inmate an opportunity to communicate or attempt to communicate with a legal practitioner of the inmate's choice;

Sample

A sample is defined as 'matter from a persons body'. The same definition applies to forensic material;

Incapable Person

An incapable person is a person who cannot understand the general nature or effect of a forensic procedure or is incapable of indicating that he/she consents or does not consent to a forensic procedure.

APPLICATION AND IMPLEMENTATION OF THE ACT

The Act

The Act gives police the power to enter any correctional centre or place of detention for the purpose of carrying out a forensic procedure on any inmate classified as a serious indictable offender.

Implementation (effect on staff)

The Department of Corrective Services must allow police to enter correctional centres to carry out forensic procedures in accordance with the Act. DOCS is committed to providing every assistance to police to ensure compliance with the Act. A Memorandum of Understanding (MOU) has been signed by the Commissioner of Police and the Commissioner for Corrective Services. The MOU sets out each Departments responsibilities in relation to forensic testing.

DCS responsibilities are:

- 1) Provide a test area in each correctional centre;
- 2) Ensure inmates attend the test area as required by police;
- 3) Educate/inform inmates;
- 4) Assist inmates with their entitlements under the Act (interview friends, legal representatives, etc);
- 5) Provide an officer who will act as an independent observer and witness at forensic tests;
- 6) Provide an officer at each centre who will be the contact for staff and inmates for education/information and who will also be the liaison officer with police during actual testing;

- 7) The Department has also appointed an officer who will act as liaison officer between DOCS and the Police Service;
- 8) Duty of care, some inmates may be distressed at the prospect of providing a sample. Inmates are to be closely monitored pre and post testing.

Implementation (effect on inmates)

Police intend to test all inmates who are classified as serious indictable offenders.

Initially all inmates will be asked to consent to a forensic procedure, if consent is given a sample will be taken by buccal swab.

If inmates refuse to consent police have the power to order that a sample be taken and if necessary force will be used. If this is the case a hair sample will be taken.

If a hair sample is not available a court order will be obtained authorising a blood sample to be taken.

Testing

Testing will commence in January 2001. Initially testing will only target those serious indictable offenders who will be released during the first months of 2001.

The testing of all serious indictable offenders at a correctional centre is unlikely to commence before June 2001.

There will be two types of testing conducted by police:

1) Compliant.

Compliant testing refers to the testing of inmates who willingly consent to a test. All serious indictable offenders will be requested to attend compliant testing and formally consent or refuse consent;

2) Non Compliant.

Non compliant testing refers to the testing of inmates who did not attend compliant testing or refused to consent to a test.

Non compliant testing will be conducted up to but not later than 10 days after compliant testing. All non compliant inmates will be tested. Force may be used to conduct the test.

INMATES RIGHTS AND ENTITLEMENTS

Inmates should be advised to consult with their legal representative, the Legal Aid Commission or the Aboriginal Legal Service if they have any concerns about consenting to a forensic procedure or any other issue in relation to the Act.

The following are the basic rights and entitlements inmates have under the Act:

- the forensic procedure must be carried out with due regard to decency and privacy, and by a person of the same sex;
- police must not question the offender in relation to the investigation of a crime;
- the offender must be cautioned by police prior to commencement of the procedure;
- if blood is taken an inmate is entitled to have a medical practitioner of the inmate's choice present at the procedure (inmate will incur the cost);
- Aboriginal and Torres Strait Islander inmates and 'incapable' inmates may have a legal representative and/or a interview friend present during the procedure.

A fellow inmate may act as an interview friend for an Aboriginal or TSI provided they are housed in the same correctional centre.

Note: Inmates are responsible for arranging the attendance of their interview friends and legal representatives at the forensic procedure. All interview friends and legal representatives must provide proof of identity and satisfy Departmental policy in relation to visitors to correctional centres. The approval of an interview friend will ultimately be up to the Governor of the correctional centre. All costs (travel, accommodation etc) are to be met by the inmate or interview friends;

- Police must obtain a court order to carry out a forensic procedure on an 'incapable' person. The court order will be for a hair sample or blood sample;
- if there is sufficient forensic material (sample) to share with the inmate and inmate may be given a part of the sample sufficient for analysis.

Note: Police have determined that a buccal swab will not provide sufficient material and therefore will not be sharing forensic material;

- prior to consenting to a forensic procedure police must inform the inmate about the forensic procedure and give him/her the opportunity to communicate or attempt to communicate with a legal practitioner of the inmate's choice;
- The Act provides for police to inform the inmate of certain matters about the forensic procedure;
- inmates are entitled to have an interpreter present if they are unable to communicate with reasonable fluency in the English language.

Note: Interpreters will be arranged by DCS.

FORENSIC SAMPLES AND THE DNA DATABASE

The Act provides severe penalties for the misuse of forensic samples and/or information stored on the DNA database.

Forensic Samples

Forensic samples taken from inmates are recorded, bar coded and then placed in tamper proof sealed bags in the presence of the inmate.

Forensic samples will be transported by police to the Department of Health laboratories at Lidcombe in Sydney. The sample then becomes the responsibility of the Department of Health, police have no more involvement.

DNA Database

A DNA profile is obtained from the analysis of the sample. A DNA profile is like a genetic fingerprint, it is unique.

A DNA profile is simply a numeric code which identifies the owner of the DNA. No other information can be obtained.

The DNA profile is entered onto the DNA databases by forensic scientists attached to the Department of Health. The database is managed by the Department of Health, police have no access to it.

A national database will be set up as mentioned in the Act. This will happen during mid 2001.

DNA profiles of inmates will be cross matched with crime scene DNA.

INFORMATION AND ADVICE ABOUT FORENSIC TESTING FOR INMATES AND STAFF

There are copies of the Crimes (Forensic Procedures) Act 2000 available for inmates in the library. The nominated officer will provide access to a copy for staff or it may be accessed through the Department's intranet facility.

The nominated officer will be available to answer any questions staff or inmates may have about forensic testing.

An information brochure for inmates 'Forensic Procedures' will be available for inmates from 27 November. This will be available in seven languages.

Information sessions will be organised for inmates by the nominated office at each centre.

An information video for inmates will be available during the second week of December. The video will be screened at all centres.

The advice given to inmates is an interpretation of the Act by DCS staff. It must be stressed to inmates that they should seek legal advice from a legal practitioner if they have any concern whatsoever about the Act or consenting to a forensic procedure.

Appendix K: Department of Juvenile Justice, Forensic Testing Detainee Pre-Test Interview

DEPARTMENT OF JUVENILE JUSTICE

FORENSIC TESTING – DETAINEE PRE-TEST INTERVIEW

DETAINEE NAME: _____ CIDS NO: _____

JUVENILE JUSTICE CENTRE: _____

The police forensic testing team will require you to undergo a forensic procedure, which will involve providing a specified body sample during on ____/____/____

1. Are you aware of forensic testing? YES / NO
2. Have you read and received a copy of the department's Information brochure? YES / NO
3. Are you aware that you should obtain legal advice if you have any concerns about providing a sample? YES / NO
4. If you are ATSI or under 18 years of age, have you nominated who your interview friend will be? YES / NO
5. Do you require your legal representative to be present? (Detainees who are ATSI or under 18 years of age) YES / NO
6. Do you intend to provide a sample when requested to do so by police? YES / NO

Detainee's Signature: _____ Date: ____/____/____

Staff Members Name/Position (Print): _____

Staff Members Signature: _____

Copy: NSW Police DNA Testing Unit (Original)
D file (copy)

Appendix L: Letter to Home Detainees subject to DNA Testing

As outlined in the attached pamphlet *Forensic Procedure: Information for Detainees and the video The DNA Database and the Law* shown to you on _____, Part 7 of the Crimes (Forensic Procedures) Act 2000 requires NSW police to take a DNA sample from inmates who have been convicted of and are currently serving a sentence of imprisonment under NSW law for a serious indictable offence. The Act applies to offenders serving their sentences of imprisonment by way of either periodic detention or home detention as well as those in full-time confinement to a correctional centre.

You have been identified as a person who meets the criteria under the Act for providing a DNA sample. Arrangements have been made for you to report to the _____ Police Station/Courthouse at (address) on (date). The procedure will take approximately 15 minutes and with your consent, will involve a self-administered buccal (mouth) swab. Should you not consent to undertake the buccal swab, the testing officer will issue an order for the taking of a sample of hair or apply for a court order for a sample of blood.

You are directed to attend ____ (location) ____ at ____ (time) ____ on ____ (date) ____ . You should obtain legal advice before the scheduled date for your testing. Should you fail to comply with this direction, your failure to do so will be reported to the Parole Board as a breach of your home detention order under clause 200(v) of the *Crimes (Administration of Sentences) Regulation 2001* and could lead to revocation of your Home Detention Order.

HD Team Leader

Enc * Forensic Procedures: Information for Detainees

* Forensic Testing Pre-Test Interview form

DETAINEE NAME _____ MIN _____

HD TEAM _____

The Police Inmate Testing Team will require you to provide a DNA sample.

- 1. Have you seen the information video and received an information brochure? YES/NO
- 2. Do you understand that you are to provide a DNA sample? YES/NO
- 3. Are you aware that you should obtain legal advice if you have any concerns about providing a sample? YES/NO
- 4. Do you intend to provide a sample when requested to do so by Police? YES/NO

ATSI/'Incapable' detainees only:

- 5. Do you require an interview friend to be present? YES/NO
- 6. Do you require your legal representative to be present? YES/NO

NB: Home Detainees who are identified as being 'incapable' of giving informed consent to providing a DNA sample do not have the right to waive the presence of an interview friend.

Signed inmate _____

Date ____ / ____ / ____

Appendix M: Pro Forma Court Order

Form 7

Order for Forensic Procedure Crimes (Forensic Procedures) Act 2000

ORDER

I, _____ (name of Magistrate) at the Local Court at

having been satisfied of the matters referred to under the *Crimes (Forensic Procedures) Act 2000* make orders authorising the carrying out of an intimate/non intimate forensic procedure being,

on _____ of _____

I order that _____ (name of person to undergo forensic procedure) attend at the time and place directed for the carrying out of the forensic procedure.

I make the following directions as to the time and place at which the procedure is to be carried out:

This order is made under section _____ of the *Crimes (Forensic Procedures) Act 2000*.

REASONS FOR ORDER

The relevant grounds upon which I relied to justify the making of the order are as follows:

Information to Person undergoing Forensic Procedure:

1. The police may use reasonable force to ensure that you comply with the order for the carrying out of the forensic procedure.
2. The police are required to comply with the provisions of Part 6 of the *Crimes (Forensic Procedures) Act 2000* in carrying out the forensic procedure.

Magistrate

Date:

Time:

Appendix O: information brochure - DNA testing: What does it mean for young people

At the start of 2001 new laws came in about DNA testing. The law allows police to collect samples of saliva, hair and/or blood to do scientific testing called DNA testing.

What is DNA testing?

DNA (deoxyribonucleic acid) is a very tiny but most important material found in all cells of our bodies. It is DNA that determines our physical make-up, such as the colour of our hair, eyes and skin; whether we are short or tall-in fact most of the basic things that form our appearance. Like fingerprints, everybody's DNA is different and unique.

Who is tested?

Anyone who is convicted and is serving a sentence of imprisonment for a serious indictable offence will be tested. This means that if you have been convicted on a charge that carries with it the possible maximum sentence of five years' gaol or more - even if you are not serving this period yourself - you will be tested. Offences like robbery or break and entry could carry such sentences. If police require a test from you, it does not necessarily mean you are under investigation about a specific crime.

If you are under 18, the police will need to get a court order before you can be tested and Legal Aid will represent you in court. If you are *18 years or over* and agree to be tested, police do not have to get a court order. If you are over 18 and you do not agree to be tested, the police will need a court order to take a sample of your blood or saliva.

Police use DNA samples that you take yourself from saliva from your mouth (called a buccal swab). You can ask to have a friend with you when you give the sample.

A specially trained police officer collects the sample, not the officer in charge of your case. They will video what they do to prove they are doing it properly. The sample is sealed in an evidence bag and given to the Department of Health for testing.

If the police want to take any other type of sample, such as hairs from your head or a blood sample, call the Legal Aid HotLine on 1800 10 18 10 for advice on your rights.

Can I refuse?

If you refuse a sample the police can use reasonable force to get the sample. It is an offence to refuse to give a sample if a court has made an order that you be tested. If you do refuse, you can get up to 12 months detention.

Why test?

Just as fingerprints have been used as evidence at a crime scene, DNA samples can now be sent for testing and your DNA compared with any samples found at a crime scene. DNA testing can be used to assist in any unsolved cases and stored for investigating new crimes.

DNA testing can be used not only to find people guilty-it can also prove you are not guilty. You would have a good argument to have your case reviewed if DNA testing showed you were wrongly convicted.

Want some help?

Staff at Juvenile Justice Centres will help you call your own lawyer, or you can call the Legal Aid Hotline service on **1800 10 18 10**. The Legal Aid Hotline can also put you in touch with the Aboriginal Legal Service nearest to you.

Each Juvenile Justice Centre has someone appointed to handle these cases. Do not hesitate to ask them for help.

Appendix P: Agreement between the NSW Home Detainees Program, Probation & Parole and the NSW Police Service for the DNA Testing of Home Detainees

The Home Detainees Program has small numbers of detainees who meet the criteria for testing and have nominated to replicate the arrangements for testing between Police and Corrective Services where appropriate.

Identification of detainees that meet the criteria for DNA testing:

The Home Detainees Program will provide a list to FPIT of any home detainees that meet the criteria for testing under the *Crimes (Forensic Procedures) Act 2000*. The list will include the following details:

- Name
- DOB
- CNI Number
- MIN Number
- Sentence Number
- Release Date
- Home Suburb
- ATSI/Ethnicity
- Offence
- Release Date

The records of any home detainees that appear with the offence as “PDC revoked” will be checked by the Home Detention Program to ascertain the underlying offence for which they are currently serving a sentence of home detention and this will be added to the list.

FPIT will then check the list details on COPs to ascertain if the home detainee has been previously tested as a suspect or as an inmate and if the offence is Federal or State.

Testing Timeframes:

Once the list details are confirmed, FPIT will then negotiate dates for testing with the Home Detainees Program in accordance with release dates, numbers and locations of detainees to be tested.

Home detainees will be prioritised by earliest release date.

Preparation of Home Detainees:

Detainees identified as subject to DNA testing will be interviewed at least one week prior to the scheduled date. On that occasion they will be shown the video “The DNA Database and the Law”, provided a copy of the pamphlet “FORENSIC PROCEDURES - Information for Detainees” and asked to complete and sign the “Forensic Testing Pre-Test Interview” form.

ATSI detainees will be informed of their right to have an “interview friend” or legal representative accompany them to the test. Detainees will be instructed to inform us of the details 24 hours before testing if they elect to have someone accompany them so that the FPIT can be advised to expect them.

Officers will consider whether a detainee scheduled for test may - on all the evidence available - be “incapable” of giving informed consent to the DNA testing procedure. Police must apply for court orders to DNA test these inmates. If the capability of a detainee is questionable, the supervising officer will assist the detainee to identify a suitable “interview friend” (not a departmental officer) and arrange for him/her to accompany the detainee for testing.

FPIT will be advised of our judgement that the detainee may be incapable and will be given details of the person who will accompany the detainee for testing.

Officers will assess the English language skills of detainees before testing and advise the FPIT if it appears that an interpreter will be required.

Non-Attendance:

The HD team will follow-up any instance of failure to comply with a direction to attend for DNA testing. Should this appear to be a culpable failure, the detainee will be considered to be in breach of their HD Order. Where the detainee's order has substantial time remaining and the detainee is otherwise in good standing, the supervising officer may - in consultation with the FPIT - seek to reschedule testing of the detainee. When a detainee has twice failed to attend for testing as scheduled or has failed to attend once and it otherwise appears necessary to ensure compliance, a report will be prepared for the Parole Board recommending that the detainee's order be revoked.

Support for Testing:

The supervising HD Officer will either accompany a detainee subject to testing to the Police Station or courthouse designated as the testing site or coordinate the detainee's attendance. HD teams will designate an officer to observe as an independent witness on all occasions when testing of detainees is scheduled at a site in their area.

Use of Reasonable Force:

The *Crimes (Forensic Procedures) Act 2000* allows Police Officers to use reasonable force if necessary to take inmate DNA samples - Part 6, Section 47.

All Inmate DNA Testing Team Officers are adequately trained and are competent in a system of defensive tactics and control techniques that are tactically, medically and legally researched with objectives of effective and humane subject control.

This training is delivered by qualified Instructors from the NSW Police Service Operational Safety Training Unit.

Reasonable force may only be used as a last resort and in line with recognised and approved techniques;

At all times, individual members of the Inmate Testing Team are responsible and accountable for their actions when using reasonable force;

The Inmate Testing Team will be responsible for restraining the inmate for the purposes of taking a forensic DNA sample.

The forensic DNA sample will be carried out in any manner that is not cruel, inhuman or degrading to the inmate;

The Inmate Testing Team will be responsible for all aspects of inmate management while the inmates are in the testing area, unless additional assistance is required when situations of violence cannot be contained by the Testing Team alone;

Statistics

Both FPIT and the Home Detainees Program will maintain statistics and records of detainees tested including:

- Name
- DOB
- CNI Number
- MIN Number
- Sentence Number
- Release Date
- Home Suburb
- ATSI/Ethnicity
- Offence
- Date Tested
- Location of test
- Type of test - buccal, hair, blood
- Court Order details

New Home Detainees to be tested:

The Home Detainees Program will notify FPIT of home detainees that meet the criteria for DNA testing as they are admitted to the program.

Appendix Q: Recommendations 15 –20 From Commonwealth Independent Review of Part 1D of the *Crimes Act 1914*

Recommendation No 15

Audits

The Review recommends that so far as the AFP and CrimTrac are concerned, there should be an internal audit of systems and procedures relating to DNA sampling (in the case of the AFP) and to maintenance of the NCIDD (in the case of CrimTrac) at least once every two years. The Review also believes it would be appropriate for police in the participating jurisdictions to be subject to a similar requirement.

(paragraph 5.122)

Recommendation No 16

Audits

The Review recommends that the Ombudsman and Privacy Commissioners, or equivalents from each jurisdiction should report in twelve months to their respective responsible ministers on whether there are any legislative impediments in any participating jurisdiction including the cross referral between relevant accountability bodies (as defined in paragraph 5.22) of cases and complaints or supporting evidence and information regarding the national DNA database system. The test for this report should be that it is possible to:

- (a) resolve complaints in such a way that no complainant is disadvantaged because the complaint involves conduct in more than one participating jurisdiction; and
- (b) conduct audits or own motion investigations that cover cross jurisdictional issues where data leaves one participating jurisdiction and goes to another participating jurisdiction.

The Review notes that should any legislative change be found necessary to achieve these objectives, participating jurisdictions should move promptly to fill the gaps.

(paragraphs 5.80 to 5.81 and 5.123 to 5.128)

Recommendation No 17

Audits

The Review recommends that relevant accountability bodies of all participating jurisdictions should reach agreement on the conduct of external audits of the relevant systems and procedures in the national DNA database system both as a whole and for each of its component parts; and report on the outcome of the audits in their annual reports. The Review considers that there should be such an audit in each participating jurisdiction at least once every two years. The audits should pay particular attention to issues arising from data flows between participating jurisdictions.

(paragraphs 5.123 to 5.124)

Recommendation No 18

Audits

The Review recommends that relevant accountability bodies should reach agreement on the conduct of investigating complaints and own motion investigations, making the use of existing powers as might be amended in the light of Recommendation 16 to exchange information and evidence or refer complaints in order to ensure that:

- (a) no complainant is disadvantaged because the complaint involves conduct in more than one participating jurisdiction; and
- (b) for any one issue or complaint being investigated, law enforcement authorities have one point of contact and are subject to only one investigation.

(paragraphs 5.123 to 5.128)

Recommendation No 19

Audits

The Review recommends that participating jurisdictions should allocate sufficient resources to law enforcement agencies, forensic laboratories and accountability bodies to implement these recommendations.

(paragraphs 5.123 to 5.128)

Recommendation No 20

Independent preliminary audit of the NCIDD

The Review recommends the adoption of the recommendations contained in the report of the preliminary audit report of CrimTrac (Appendix J).

(paragraphs 5.129 to 5.132)

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