



OmbudsmanSA

**AUDIT REPORT**

Audit of compliance with the Criminal Law (Forensic Procedures) Act 2007

**28 September 2018**

Ombudsman SA  
Level 9, 55 Currie Street  
Adelaide SA 5000

General enquiries: (08) 8226 8699  
Toll free (outside Adelaide Metro Area) 1800 182 150

Email: [ombudsman@ombudsman.sa.gov.au](mailto:ombudsman@ombudsman.sa.gov.au)  
web: [www.ombudsman.sa.gov.au](http://www.ombudsman.sa.gov.au)



To:

**The Honourable Vickie Chapman MP**  
**Attorney-General (South Australia)**

I present this report on the 2017/18 audit to monitor compliance with the *Criminal Law (Forensic Procedures) Act 2007*, as required by section 57 of that Act.

I note your obligation under the same provision to cause copies of this report to be laid before each House of Parliament within 12 sitting days of receiving it.

Emily Strickland  
**Deputy Ombudsman**  
**Ombudsman SA**

28 September 2018

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## Executive summary

This report concerns an audit undertaken by Ombudsman SA to monitor compliance with the provisions of the *Criminal Law (Forensic Procedures) Act 2007 (CLFP Act)* during the period 8 February 2017 to 10 May 2018.

The audit process comprised seeking expert auditing advice, liaising with the Commissioner of Police and his delegates, meeting with police officers from Forensic Services Branch, DNA Management Unit and Forensic Science SA, examining records relating to hundreds of forensic procedures, viewing audio-visual records of procedures being carried out and making follow up enquiries of individual police officers responsible for making orders authorising the carrying out of procedures and for communicating the results of blood tests aimed at detecting communicable diseases. Records in relation to all of the types of procedures provided for in the CLFP Act were examined and the vast majority of the Act's requirements were considered.

The Commissioner of Police ensured that this Office was provided with all information requested.

The audit revealed that there is widespread compliance with the CLFP Act and that, for the most part, records are made in relation to forensic procedures which demonstrate that compliance. Individual cases did give rise to concerns and these are detailed in the body of this report.

The main area for concern raised by the audit comprised suspects procedures that were authorised by senior police officers. 43 records were examined, including 33 sets of notes made by senior police officers, and in doing so 30 instances of apparent non-compliance were detected. I consider many of these failures meant that suspects were not afforded fairness. I also note that the failures, by virtue of being in respect of suspects procedures, would be likely to adversely affect the admissibility of the evidence pursuant to section 47 of the CLFP Act. I express concern that some of the failures occurred where the suspects were children.

Despite these issues, I note each of the eleven audio-visual records of intrusive forensic procedures viewed demonstrated that the procedures were carried out in a respectful, humane and sometimes very kind manner.

Section 57 of the CLFP does not require the Ombudsman to make recommendations as part of the compliance audit. However where it has been identified that greater compliance could be achieved through change, I have taken the liberty of making informal recommendations to that effect.

## Background and Ombudsman Jurisdiction

### *Ombudsman Jurisdiction*

1. The *Criminal Law (Forensic Procedures) Act 2007* (**the CLFP Act**) provides for the carrying out of forensic procedures to obtain evidence relevant to the investigation of criminal offences and other purposes. It imposes obligations on a number of persons and classes of person including:
  - the Commissioner of Police
  - police officers and other persons who carry out forensic procedures
  - senior police officers
  - Forensic Science SAand specifies how forensic procedures must be authorised and carried out, and how forensic material is to be dealt with.
2. Section 57 of the CLFP Act provides that the Ombudsman must audit compliance with the Act on an annual basis. In particular, it provides:
  - (1) The Ombudsman must conduct an annual audit to monitor compliance with this Act.
  - (2) The Commissioner of Police must ensure that the Ombudsman is provided with such information as it may require for the purpose of conducting an audit under this section.
  - (3) A report on an annual audit must be presented to the Attorney-General on or before 30 September in each year.
  - (4) The Attorney-General must, within 12 sitting days after receipt of a report under this section, cause copies of the report to be laid before each House of Parliament.
3. Pursuant to section 9(1) of the *Ombudsman Act 1972*, the Ombudsman delegated his powers under the CLFP Act to myself as Deputy Ombudsman to conduct this audit. He did so having declared a potential conflict of interest and out of an abundance of caution.<sup>1</sup>
4. This is the first CLFP Act audit the Ombudsman's Office has undertaken; until 19 April 2017 such audits were the responsibility of the Police Ombudsman. The Police Ombudsman most recently audited compliance with the CLFP Act on 3 February 2017.<sup>2</sup>
5. This audit considers agencies' compliance with the CLFP Act during the period 8 February 2017 to 10 May 2018 (**the audit period**).

### *Audit Methodology and Scope*

6. The CLFP Act sets out requirements in relation to the following types of forensic procedures:
  - Volunteers and victims
  - Suspects procedures

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<sup>1</sup> Mr Wayne Lines declared a potential conflict of interest on the grounds that his son-in-law is a Senior Constable with SAPOL whose duties involve conducting procedures that could be subject to the audit.

<sup>2</sup> See <http://www.parliament.sa.gov.au/HOUSEOFASSEMBLY/BUSINESSOFTHEASSEMBLY/RECORDSANDPAPERS/TABLEDPAPERSANDPETITIONS/Pages/TabledPapersandPetitions.aspx?TPSelectedView=1&TPProperties=C&TPParliamentSession=53%2c2> last accessed 11 July 2018.

- Offenders procedures
  - Blood testing for communicable diseases
  - Forensic procedures on deceased persons.
7. The vast majority of forensic procedures carried out in SA are conducted by police officers. Each sample taken by or on behalf of SA Police is vetted by DNA Management Unit (**DNAMU**), which sits within SA Police Forensic Services Branch. The role of DNAMU is described in SA Police General Order 'Forensic procedures' as follows:
- DNAMU maintain a quality assurance function for all volunteer, victim, suspect and/or offender samples received as intelligence (red bag) samples<sup>3</sup> or evidentiary reference samples<sup>4</sup> submitted through the Evidence Desk.
- All intelligence (red bag) samples must be submitted through the red bag process. DNAMU will ensure the samples meet all legislative and procedural requirements. The property will be receipted on PPMS and subsequently forwarded to FSSA,
- All other evidentiary reference samples obtained from volunteers, victims, suspects and/or offenders will be conveyed to the Evidence Desk where a member will assure the samples meet all legislative and procedural requirements. The samples will remain in the custody of the Evidence Desk employees once vetted,
- Once the samples have been quality assured the corresponding [Request for Scientific Examination form] will receive a notation endorsing the samples as approved for submission to FSSA and the samples can be conveyed to FSSA for analysis ...
8. Samples are rejected by DNAMU if they are taken in circumstances other than those permitted by the CLFP Act or if they have been contaminated. The general order requires DNAMU to coordinate the destruction of all such forensic material gathered as a result of simple identity procedures (usually buccal swabs).
9. DNAMU keeps records of all forensic procedures vetted by it and stores these in folders kept in a compactus in its offices. My Officers attended these offices and selected at random folders containing records relating to forensic procedures conducted during the audit period. These records were inspected in order to ensure that, as far as possible, the procedures to which they related had been carried out in compliance with the requirements of the CLFP Act.
10. In some circumstances it was necessary to request further records from SAPOL. Eleven audio-visual records of intrusive forensic procedures were also viewed.
11. Records in relation to a sample of each of the types of procedures were examined. The table below summarises how many records were examined in relation to each procedure type. Advice was sought from an expert consultant<sup>5</sup> to ensure that the approach adopted in relation to sample sizes aligned with accepted auditing standards.

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<sup>3</sup> The term 'intelligence (red bag) samples' refers to forensic material obtained as a result of simple identity procedures (buccal swabs and finger pricks). Sampling kits containing such forensic material are placed into red canvas bags kept at police stations throughout the State. These red bags are sealed and then transferred to DNAMU at least once a week.

<sup>4</sup> The term 'evidentiary reference samples' refers to forensic material which has been taken with the intent of comparing it with material obtained from a crime scene or a victim of crime.

<sup>5</sup> BDO Australia, Adelaide Office.

Type of procedure	Total number carried out by or behalf of SA Police	Number of records examined
Volunteers and victims	935	69 (7%)
Suspects - simple procedures	10,477	303 (3%)
Suspects - authorised procedures	2,150	43 (2%)
Offenders	86	48 (56%)
Deceased	31	17 (55%)
Communicable diseases	7	7 (100%)

12. A checklist of the relevant legislative requirements was completed for each procedure audited. A copy of the template checklist is provided at **Annexure 1**.
13. A summary of the results of the audit measured against each legislative requirement is provided at **Annexure 2**.
14. Measuring compliance with some of the legislative requirements was not possible due to the nature of those requirements. Division 1 of Part 3 of the CLFP Act contains provisions that apply to all forensic procedures. These require that:
  - forensic procedures are carried out humanely and with care (a) to avoid, as far as reasonably practicable, offending genuinely held cultural values or religious beliefs; and (b) to avoid inflicting unnecessary physical harm, humiliation or embarrassment<sup>6</sup>
  - forensic procedures are carried out in the presence or view of no more persons than are necessary<sup>7</sup>
  - any subject of a forensic procedure who is not reasonably fluent in English is assisted by an interpreter<sup>8</sup>
  - forensic procedures are carried out in a way that is consistent with appropriate medical and professional standards.<sup>9</sup>
15. It was not possible to confirm that all forensic procedures audited met these standards. The CLFP Act only requires the making of audio-visual recordings of intrusive forensic procedures carried out on suspects (and intrusive forensic procedures carried out on volunteers or victims if such a recording is requested by the volunteer or victim).<sup>10</sup> While I am aware that there may exist recordings of simple identity procedures being carried out (for instance because they were conducted during a recorded police interview or in an area like a cells complex, which is covered by CCTV) I have not sought access to any such records. I did not consider it reasonable to ask SA Police to

<sup>6</sup> Section 21(1).

<sup>7</sup> Section 21(2).

<sup>8</sup> Section 22.

<sup>9</sup> Section 23.

<sup>10</sup> Section 26.

make the time and resource intensive inquiries that would have been involved in identifying and locating such records.

16. When a police officer carries out a simple identity procedure they are required to complete a form, referred to in the general order as a PD429. This form prompts officers to turn their minds to the question of whether the subject of the procedure is reasonably fluent in English and to record the identity of any interpreter who is brought in to assist. Again however, in the absence of audio-visual records, I am unable to offer an assurance that the assistance of an interpreter was recognised and provided to every person who required those services.
17. Section 41 of the CLFP Act permits the Commissioner of Police to maintain a database on which DNA profiles obtained under the Act are stored. I understand that the Commissioner has delegated the administration of this database to the Director of Forensic Science SA (**FSSA**). I further understand that the terms of that delegation are set out in a Memorandum of Administrative Agreement.
18. Access to and use of the information stored on the database is governed by FSSA policies and procedures. Due to time and resource constraints, I have not examined those policies and procedures or made enquiries of FSSA's director in the course of this compliance audit. My Officer did however meet with the FSSA officer responsible for management of the DNA database, and an inspection of the database was conducted to ensure the fundamental legislative requirements were met. This has allowed me to make some observations in relation to the DNA database in the final section of this report.

## Volunteers and victims procedures

### *Relevant definitions*

**protected person** means (a) a child under the age of 16 or (b) a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure<sup>11</sup>

**relevant person** means:

(a) if the person on whom the procedure is to be conducted is not a protected person - that person

(b) if the person on whom the procedure is to be conducted is a child under 16 - the child's closest available next of kin

(c) in any other case - the person's guardian or, if the person does not have a guardian, the person's closest available next of kin<sup>12</sup>

**senior police officer** means a police officer of or above the rank of inspector<sup>13</sup>

**serious offence** means (a) an indictable offence or (b) a summary offence that is punishable by imprisonment

### *Authorisation of Volunteers and Victims procedures*

19. A volunteer or victim forensic procedure can only be carried out on a person who is not suspected of the serious offence which is being investigated. Such a procedure can only be carried out if the relevant person consents to the procedure or if the procedure is authorised by a senior police officer.<sup>14</sup>
20. In cases where consent is given by the relevant person, that consent may be withdrawn at any time before completion of the procedure.<sup>15</sup>
21. A senior police officer can authorise the carrying out of a forensic procedure on a victim or volunteer who is a protected person if the officer is satisfied that:
  - it is impracticable or inappropriate to obtain consent from the relevant person
    - because of the difficulty of locating or contacting the relevant person; or
    - because the relevant person or a person related to or associated with him or her, is under suspicion in relation to a criminal offence; and
  - the carrying out of the procedure is justified in the circumstances of the case.<sup>16</sup>
22. Before a forensic procedure is carried out on a volunteer or victim who is a protected person, it must be explained to the protected person that the procedure will not be carried out if the protected person objects to the procedure. (However such an explanation need not be given if the protected person is less than 10 years old or does not appear to be capable of 'responding rationally' to the information.)<sup>17</sup>

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<sup>11</sup> Section 6.

<sup>12</sup> Section 6.

<sup>13</sup> Section 3(1).

<sup>14</sup> Section 7(2).

<sup>15</sup> Section 10(1).

<sup>16</sup> Section 9.

<sup>17</sup> Section 11.

23. When forensic material is obtained from a victim or volunteer, the relevant person must be given a written statement explaining their right to request destruction of that material.<sup>18</sup>
24. During the audit period, 935 forensic procedures were conducted on victims or volunteers.<sup>19</sup> During the audit, my Office examined records relating to 69 (or 7.4%) of those procedures.
25. Issues about consent arose in three of the cases examined:
- a) The first concerned a procedure carried out on a child.<sup>20</sup> The person who consented to that procedure was described on the relevant form as the child's 'auntie'. Unless the auntie was also the child's guardian she was not entitled to give consent. This is due to the definition of the term 'closest available next of kin' appearing in section 3(1) of the CLFP Act:
 

*closest available next of kin* means -

    - (a) in relation to a child, the first in order of priority of the following persons who is not a protected person and is available at the time:
      - (i) a parent of the child;
      - (ii) a brother or sister of the child;
      - (iii) a guardian of the child; ...
  - b) The second case concerned a procedure carried out on a woman who had reported that she had been sexually assaulted<sup>21</sup>. At the time the procedure was carried out, the victim was a patient at the Margaret Tobin Centre, which is a mental health inpatient area at Flinders Medical Centre consisting of a psychiatric intensive care unit and two acute care units.<sup>22</sup> Given this I query whether the victim was capable of giving informed consent or whether she ought to have been treated as a protected person.
  - c) The third case also concerned a procedure carried out on a victim of sexual assault. The victim was described as alcoholic and as suffering from severe depression, schizophrenia and multiple personality disorder.<sup>23</sup> Again this gives rise to the question of whether she was capable of giving informed consent.
26. In the case referred to in subparagraph (b) above the forensic procedure carried out on the victim was a sexual assault examination and was carried out by a male. This may have been contrary to section 21(3) of the CLFP Act, which provides:

If reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or the breast region of a female person or transgender person or intersex person who identifies as female, must not be carried out by a person of a

<sup>18</sup> Section 12.

<sup>19</sup> This number does not include 323 forensic procedures which were carried out on SA Police recruits.

<sup>20</sup> Police Property Management System (PPMS) reference: 18/A07407.

<sup>21</sup> PPMS reference: 18/B95336.

<sup>22</sup> See <http://www.sahealth.sa.gov.au/wps/wcm/connect/public%20content/sa%20health%20internet/health%20services/hospitals%20and%20health%20services%20metropolitan%20adelaide/flinders%20medical%20centre/services%20and%20clinics%20at%20flinders%20medical%20centre/services%20at%20flinders%20medical%20centre/margaret%20tobin%20centre%20at%20flinders%20medical%20centre> last accessed on 1 August 2018.

<sup>23</sup> PPMS reference: 18/A07813.

different sex (other than at the request of the person on whom the forensic procedure is to be carried out).

27. Three other cases I examined also raised issues of compliance with section 21(3).<sup>24</sup> In light of these apparent failures I recommend that the Commissioner of Police require that, when such intimate procedures are carried out by a person who is not the same gender as the victim, a brief record be made of the reason it was not reasonably practicable to comply with section 21(3) (**Recommendation 1**).
28. Unlike suspects and offenders, victims and volunteers have the right to request the destruction of any forensic material obtained from them in one of those capacities.<sup>25</sup> When police officers or SA Police employees carry out a volunteer or victim procedure they are prompted by the form they complete to provide the volunteer or victim with a written statement explaining their right to request destruction of the forensic material.
29. I was initially concerned that a similar statement might not be routinely given to victims or volunteers who are the subject of forensic procedures conducted by persons other than police officers or SA Police employees. However, as a result of enquiries, I am now satisfied that in such circumstances victims and volunteers are provided with a pamphlet produced by the Commissioner for Victims' Rights, which explains those persons' rights.<sup>26</sup>
30. In one of the cases I examined a police officer who carried out a forensic procedure on a hospitalised victim provided the written statement about the victim's right to request the destruction of his forensic material to a person other than the victim.<sup>27</sup> The nature of the relationship between the victim and the person who received the statement was not clear from the records relating to the procedure but she was not the 'relevant person' for the purpose of giving consent to the procedure. The failure to provide the written statement to the victim himself appears to have been in breach of section 12(1) of the CLFP Act.
31. Only one set of the volunteer and victim records I examined related to a forensic procedure carried out in accordance with a senior police officer's authorisation.<sup>28</sup> The order in question authorised a 'full medical examination including rape kit' and photographs of the victim's body. The victim involved was 15 years old. The forensic procedures were authorised by a senior police officer on the grounds that (i) it was inappropriate to obtain consent from the relevant person because that person, or a person related to or associated with them, was under suspicion in relation to a criminal offence; and (ii) the carrying out of the procedures was justified in terms of obtaining material of value and ensuring the welfare of the victim, who had been experiencing pain and bleeding since the commission of the offence. On the face of it, it appears the authorisation complied with section 9 of the CLFP Act.

### ***Requests for destruction of forensic material***

32. In order to monitor compliance with the provisions relating to destruction of forensic material obtained from victims and volunteers, Ombudsman Officers also examined a file kept at DNAMU, which contains volunteers' and victims' requests for destruction of

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<sup>24</sup> PPMS references: 18/B95053, 18/A02767 and 18/A10112.

<sup>25</sup> Section 39.

<sup>26</sup> See <http://voc.sa.gov.au/sites/default/files/Forensic%20Procedures%20DL%20WEB.pdf> last accessed on 1 August 2018.

<sup>27</sup> PPMS reference: 18/A07754.

<sup>28</sup> PPMS reference: 18/A10534.

forensic material obtained from them, as well as email correspondence between DNAMU and FSSA relating to the destruction of that material.

33. As stated, volunteers and victims from whom forensic material is obtained may request that such material be destroyed. Such a request must be made in writing.<sup>29</sup> Upon receipt of a written request the Commissioner of Police must ensure that the material is destroyed within 21 days.<sup>30</sup>
34. Forensic material is taken to have been destroyed if it is dealt with in such a way that it is no longer possible to identify the person from whom it was obtained or to whom it relates.<sup>31</sup> Physical destruction is achieved by incinerating the material obtained from the victim or volunteer. Electronic destruction is achieved by deleting the link between any DNA profile obtained from the victim or volunteer and that person's name and date of birth.<sup>32</sup>
35. During the audit period the Commissioner of Police received 12 written requests for destruction of forensic material obtained from victims and volunteers. In each case the records showed that the forensic material had been destroyed within 21 days of receipt of the request.

#### ***Retention and assimilation orders***

36. In certain circumstances, the CLFP Act permits SA Police to depart from the usual provisions governing forensic material obtained from volunteers and victims.
37. Retention orders can be made to retain forensic material obtained from a victim or volunteer who was a protected person even if the person who gave consent to the procedure (the relevant person) requests destruction of that forensic material. A retention order can only be made by a senior police officer on the written application of a police officer<sup>33</sup> and only if the senior officer is satisfied that:
  - the person who gave consent for the procedure, or a person related to or associated with them, is suspected of a serious offence<sup>34</sup>
  - there are reasonable grounds to suspect that the forensic material could be of probative value in relation to the investigation of that offence<sup>35</sup>
  - the order is justified in all the circumstances.<sup>36</sup>
38. I am informed that no retention orders were sought during the audit period.
39. Assimilation orders can be made so that forensic material obtained as a result of victim or volunteer procedures cannot be the subject of requests for destruction. An assimilation order can only be made by a senior police officer on the written application of a police officer and only if the senior police officer is satisfied that:

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<sup>29</sup> Section 39(2).

<sup>30</sup> Section 39(1)(a).

<sup>31</sup> Section 39(5).

<sup>32</sup> Advice from FSSA DNA database manager.

<sup>33</sup> Section 38(1).

<sup>34</sup> Section 36(2)(a).

<sup>35</sup> Section 36(2)(b).

<sup>36</sup> Section 36(2)(c).

- there are reasonable grounds to suspect that the victim or volunteer has committed a serious offence<sup>37</sup>
  - there are reasonable grounds to suspect that the forensic material may be of value to the investigation of that offence<sup>38</sup>
  - the forensic material in question was taken from the victim or volunteer for the purpose of obtaining that person's DNA profile.<sup>39</sup>
40. When an assimilation order is made, the DNA profile of the victim or volunteer is stored on the suspect/offenders index of the DNA database rather than on a volunteers index.<sup>40</sup>
41. I am informed that no assimilation orders were made during the relevant period.
42. However, during Ombudsman's Officers' examination of records stored at DNAMU it was brought to their attention that investigating police officers had failed to seek an assimilation order in circumstances where that was indicated.<sup>41</sup> The police officers were investigating a murder. An apparent witness to the murder consented to various volunteer forensic procedures. As the investigation progressed, the apparent witness was identified as a suspect rather than a witness and he was arrested. Following the arrest, suspects forensic procedures were conducted on the now suspect. Subsequently a number of items obtained as a result of both sets of forensic procedures were submitted to Forensic Science SA for analysis. They were submitted on the basis that the person to whom they related was a suspect.
43. SA Police recognise that, to ensure procedural fairness, the investigating officers ought to have sought an assimilation order before seeking analysis of the material seized from the person on the basis that he was a volunteer. In fact such an order was not made until two months after the material was submitted for analysis. I note the failure may also have prevented the admissibility of the evidence under section 47 of the CLFP Act. That provision states that if there is a contravention of a requirement of the Act the relevant evidence is not admissible in court unless certain criteria are met.

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<sup>37</sup> Section 37.

<sup>38</sup> Section 37(a).

<sup>39</sup> Section 37(b).

<sup>40</sup> Section 37.

<sup>41</sup> PPMS reference: 17/B56113.

## Suspects procedures

### *Relevant definitions*

**application of special urgency** means an application for a forensic procedure on a suspect that is made in circumstances where (a) the suspect cannot be located at the time the application is made and (b) evidence or the probative value of such evidence may be lost or destroyed if the forensic procedure is not carried out urgently<sup>42</sup>

**appropriate representative** means -

- (a) a relative or friend chosen by, or acceptable to, a protected person
- (b) if there is no such person, an advocate for the protected person nominated by a government or private agency with responsibilities for the care of protected persons of the relevant class
- (c) if there is no person falling within (a) or (b), a person, who is not a police officer or involved in the investigation of the suspected offence, chosen by a police officer in charge of a police station or the investigating officer<sup>43</sup>

**protected person** means (a) a child under the age of 16 or (b) a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure<sup>44</sup>

**senior police officer** means a police officer of or above the rank of inspector<sup>45</sup>

**serious offence** means (a) an indictable offence or (b) a summary offence that is punishable by imprisonment<sup>46</sup>

**simple identity procedure** means a forensic procedure consisting of (a) the taking of prints of a person's hands or fingers and/or (b) the taking of forensic material by way of buccal swab or finger-prick for the purpose of obtaining a DNA profile<sup>47</sup>

### *Legislative requirement for suspects procedures*

- 44. A suspects forensic procedure may only be conducted on a person who is suspected of a serious offence and either (a) the procedure consists only of a simple identity procedure or (b) the procedure is authorised by a senior police officer's order.<sup>48</sup>
- 45. While section 14 of the CLFP Act provides that a forensic procedure 'may be carried out on a person who is suspected of a serious offence', the general order directs that all members of SA Police 'shall ensure that where the offence is a serious offence a simple identity procedure is conducted on the suspect'. It is a well-recognised rule of statutory interpretation that the use of the word 'may' in a provision conferring power implies that the power may be exercised or not, at discretion, whereas the word 'shall' implies that the power conferred must be exercised.<sup>49</sup> In issuing his general order therefore the Commissioner of Police has in effect issued a policy, the effect of which is

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<sup>42</sup> Section 18.

<sup>43</sup> Section 25(3).

<sup>44</sup> Section 6.

<sup>45</sup> Section 3(1).

<sup>46</sup> Section 3(1).

<sup>47</sup> Section 3(1).

<sup>48</sup> Section 14(2).

<sup>49</sup> Section 34 of the *Acts Interpretation Act 1915*.

that a sample of DNA will be taken from every person whom the police suspect has committed a serious offence.

46. The observation could be made that this policy position gives rise to some contradictory outcomes. For instance, section 6 of the *Young Offenders Act 1993* provides that, if a youth admits the commission of a minor offence<sup>50</sup>, and a police officer is of the opinion that the matter does not warrant any formal action, the officer may informally caution the youth against further offending and proceed no further against them. The record of the provision of such an informal caution does not constitute a criminal record and may not be referred to in a criminal record check or in any judicial proceedings. However, although a police officer might classify the offence as minor, due in part to the improbability of the youth re-offending, they would still be required to obtain a sample of the youth's DNA, which will remain on the DNA database in perpetuity.
47. Similarly the Police Drug Diversion Initiative diverts people detected by police for simple possession drug offences to health services instead of the justice system.<sup>51</sup> If the person successfully completes the health program their offence does not proceed through the criminal justice system.<sup>52</sup> While this initiative may have arisen from recognition that illicit drug use by an individual is more of a health issue than one that is properly the concern of the criminal justice system, a police officer who suspects a person of a simple possession offence will be obliged to obtain a sample of that person's DNA and ensure it is stored on the database. I raise this issue simply for consideration by SAPOL as to whether this is a desirable outcome of the general order.
48. A suspects forensic procedure can be conducted on a suspect whether or not they are in custody.<sup>53</sup> So for instance a suspect who attends a police station on a voluntary basis to answer questions could be the subject of a buccal swab. If a police officer wishes to carry out or cause to be carried out a forensic procedure on a suspect who is not in custody, they may issue directions to the suspect to attend a particular place at a particular time so that the procedure can be carried out.<sup>54</sup> If a suspect fails to comply with those directions, police may apply to the Magistrates Court for a warrant to have the suspect arrested and brought to a police station for the purpose of carrying out the forensic procedure.<sup>55</sup>
49. Persons who are authorised to carry out forensic procedures and any persons assisting such a person are permitted to use reasonable force to carry out suspects procedures and to protect any forensic material thereby obtained.<sup>56</sup> Before suspects procedures are conducted a police officer must warn the suspect that such force may be used and that, if the suspect obstructs or resists the procedure, evidence of that fact may be admissible in proceedings against them.<sup>57</sup>

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<sup>50</sup> A 'minor offence' under the *Young Offenders Act* would in almost all circumstances amount to a 'serious offence' under the CLFP Act.

<sup>51</sup> See <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/clinical+resources/clinical+programs/drug+and+alcohol+programs/police+drug+diversion+initiative+pddi> last accessed 17 August 2018.

<sup>52</sup> See [https://www.sahealth.sa.gov.au/wps/wcm/connect/8e9fec004a4f3cda9ebfdb0cfc4074a/Undertakings+factsheet\\_FINAL\\_26Oct2015.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-8e9fec004a4f3cda9ebfdb0cfc4074a-m9lPhvq](https://www.sahealth.sa.gov.au/wps/wcm/connect/8e9fec004a4f3cda9ebfdb0cfc4074a/Undertakings+factsheet_FINAL_26Oct2015.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-8e9fec004a4f3cda9ebfdb0cfc4074a-m9lPhvq) last accessed 17 August 2018.

<sup>53</sup> Section 14(3).

<sup>54</sup> Section 29(1).

<sup>55</sup> Section 29(3).

<sup>56</sup> Section 31(1).

<sup>57</sup> Section 30.

50. As stated, if a suspects forensic procedure is other than a simple identity procedure, it must be authorised by a senior police officer on written application by a police officer.<sup>58</sup> Except in circumstances of special urgency, a copy of the application must be given to the suspect.<sup>59</sup>
51. Before making an order authorising a suspects forensic procedure, the senior police officer must conduct an informal hearing of the application during which the respondent and any representative are given a reasonable opportunity to make representations.<sup>60</sup> If the suspect is a protected person, they must be represented by an appropriate representative at the hearing.<sup>61</sup> A suspect may also be represented by a legal practitioner at the hearing.<sup>62</sup>
52. A senior police officer may only make an order authorising the carrying out of a forensic procedure on a suspect if, after conducting the informal hearing, they are satisfied that:
- there are reasonable grounds to suspect that the suspect has committed a serious offence
  - there are reasonable grounds to suspect that the forensic procedure could produce material of value to the investigation of the offence
  - the public interest in obtaining evidence tending to prove or disprove the suspect's guilt outweighs the public interest in ensuring that private individuals are protected from unwanted interference.<sup>63</sup>
53. In weighing the public interest mentioned in the third dot point above, the senior police officer is required to have regard to the following:
- the seriousness of the offence
  - the extent to which the forensic procedure is necessary for the proper investigation of the offence
  - any likely effects of the procedure on the welfare of the suspect, having regard to that person's age, physical and mental health, and cultural and ethnic background
  - whether there is a less intrusive but reasonably practicable way of obtaining evidence of the same or similar probative value
  - any other relevant factors.<sup>64</sup>

If the senior police officer makes the order that is sought, they are obliged to make a written record of the order and their reasons for making it.<sup>65</sup> The District Court of South Australia has held that the order should contain, at a minimum, some comment as to how the senior police officer has weighed the public interest factors and 'the reason why the outcome was as it was'.<sup>66</sup>

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<sup>58</sup> Section 15(2)(a).

<sup>59</sup> Section 15(3).

<sup>60</sup> Sections 16 and 17(4).

<sup>61</sup> Section 17(2).

<sup>62</sup> Section 17(1) and (2).

<sup>63</sup> Section 19(1).

<sup>64</sup> Section 19(2).

<sup>65</sup> Section 19(3).

<sup>66</sup> *R v Houssaini* [2011] SADC 164.

54. A copy of the order must be given to the suspect.<sup>67</sup>
55. Section 33(1)(a) of the CLFP Act requires the Commissioner of Police to ensure that where forensic material is obtained from a suspect or an offender, part of the material, sufficient for analysis, is set aside for the person so that they can have it independently analysed if they wish. However, subsection (2) of section 33 states that subsection (1) need not be complied with if it is not practicable to divide the material into separate parts for analysis.
56. Reasonable care must be taken by the Commissioner to ensure that any material set aside is protected from degradation until it is independently analysed.
57. I understand from Forensic Science SA that FSSA uses FTA<sup>68</sup> cards to obtain DNA profiles from material gathered via buccal swabs. Obtaining a DNA profile from a card does not destroy the card; it is capable of being sampled again. Once DNA has been extracted from an FTA card, the card is stored. FTA cards are stable at room temperature and can therefore be easily stored. The cards are kept indefinitely.
58. Some material obtained from forensic procedures is destroyed by the testing process. Examples of such material include samples of fingernails and semen. I understand this is because DNA is not densely located in such samples so the entire sample needs to be processed in an effort to obtain a profile from it. In such cases it is not practicable for a part of the sample to be set aside for independent analysis.
59. According to FSSA requests for access to a part of a sample obtained via a forensic procedure are very rare. None have been made for at least three years.

### *Simple identity procedures*

60. My Office examined records relating to 303 simple identity procedures carried out on suspects. Each of the 303 suspects simple identity procedures that were considered consisted of a buccal swab.
61. I am satisfied that each of the 303 simple identity procedures were carried out on a person who was suspected of having committed a 'serious offence'.
62. It appeared one of these procedures had been conducted after a police officer had issued directions to a person who was not in lawful custody.<sup>69</sup> In that case the directions given were in compliance with section 29 of the CLFP Act and a copy of the same had been given to the suspect.
63. It appeared that before each of the 303 procedures had been conducted a police officer had warned the suspect that reasonable force could be used to carry out the procedure in accordance with section 30 of the CLFP Act.
64. Three of the 303 sets of records examined related to simple identity procedures carried out on suspects who were not considered to be reasonably fluent in English. In such

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<sup>67</sup> Section 19(4).

<sup>68</sup> 'FTA' appears to be a trademark rather than an acronym. See <https://www.sigmaaldrich.com/catalog/product/sigma/whawb120205?lang=en&region=AU> last accessed 24 August 2018.

<sup>69</sup> PPMS 18/A48219.

circumstances a suspect is entitled to be assisted by an interpreter.<sup>70</sup> The term 'interpreter' is not defined in the CLFP Act so should be given its ordinary meaning, which is a person, especially an official, who translates orally the words of people speaking different languages.<sup>71</sup>

65. However, one of these three records showed that the interpreter was a police officer from Holden Hill Police Station.<sup>72</sup> I consider that the police officer who acted as interpreter in this situation placed himself in a position where he could have been perceived as having a conflict of interest. Accordingly, I recommend that the Commissioner of Police amend the general order so as to direct that police officers should not act as interpreters under section 22 of the CLFP Act (**Recommendation 2**).
66. Another of the three records examined related to a simple identity procedure carried out with the assistance of an interpreter involved SC, who was suspected of having committed theft.<sup>73</sup> The assisting interpreter was ACW, who was also suspected of having committed theft and who had been the subject of a simple identity procedure carried out by the same police officer almost immediately before.<sup>74</sup> I do not consider it good practice to permit persons who are themselves suspects to act as interpreters for suspected co-offenders. Accordingly, I recommend that the Commissioner of Police amend the general order so as to direct that suspected co-offenders should not act as interpreters for suspects (**Recommendation 3**).

#### ***Suspects procedures other than simple identity procedures***

67. During the audit my Office inspected records relating to 43 forensic procedures that had been conducted pursuant to an authorisation granted by a senior police officer.
68. In order to monitor compliance with those provisions of the Act concerning such procedures, this Office used the records kept by DNAMU to identify cases in which senior police officers' orders had been made. SA Police were then requested to forward notes made by those senior police officers prior to making their orders. Notes relating to 33 such orders were considered.
69. Six of the 43 sets of records inspected at DNAMU concerned forensic procedures conducted on children.
70. Prior to making an order authorising a forensic procedure other than a simple identity procedure the senior police officer is required to conduct an informal hearing. By virtue of section 17(2) of the CLFP Act a child suspect must be represented by an appropriate representative at the hearing.
71. Section 17(3) of the Act sets up a hierarchy of persons who fulfil the definition of 'appropriate representative' as follows:
  - (a) a parent, relative or friend, chosen by, or acceptable to, the protected person

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<sup>70</sup> Section 22(a).

<sup>71</sup> interpreter. (1993). In: *The New Shorter Oxford English Dictionary*, 4th ed. New York: Oxford University Press Inc, p.1399.

<sup>72</sup> 18/A55776.

<sup>73</sup> 18/A54932.

<sup>74</sup> 18/A54930.

- (b) if there is no available person in category (a) - an advocate for the protected person nominated by a government or private agency with responsibilities for the care of protected persons of the relevant class
  - (c) if there is no available person in category (a) or (b) - a person, who is not a police officer or involved in the investigation of the offence, chosen by a police officer in charge of a police station or the investigating police officer.
- 72. One set of records related to a child who was suspected of rape.<sup>75</sup> A senior police officer had authorised forensic procedures consisting of a penile swab and pubic combings. The suspect had been staying in a United Communities residence as part of Ruby's Reunification Program.<sup>76</sup> Despite this he appears to have been represented by a field officer from Aboriginal Legal Rights Movement. It seems unlikely that the field officer was a parent, relative or friend of the suspect.
- 73. The particular forensic procedures conducted in this matter were carried out by a female nurse at the City Watch House. This was despite the suspect having stated that he would prefer the procedures to be carried out by a male. This may have been contrary to section 21(3) of the CLFP Act, which provides that, if reasonably practicable, a forensic procedure that involves exposure of or contact with the genital area must not be carried out by a person of a different sex.
- 74. Another set of records related to a child who was suspected of incest.<sup>77</sup> The order that had been made authorised penile swabs and pubic combings. The appropriate representative in this matter appears to have been a 19 year old Red Cross worker or volunteer. Again it seems unlikely that the worker was a parent, relative or friend of the suspect.
- 75. Another Red Cross worker or volunteer appears to have acted as the appropriate representative of another child, who was suspected of rape.<sup>78</sup> Again the authorised forensic procedures included taking samples from the suspect's penis. This procedure was also carried out by a female nurse at the City Watch House.
- 76. It is concerning to me that of 6 procedures examined that were conducted on children, 3 did not appear to be compliant and 2 of those appeared to be non-compliant in relation to 2 separate requirements. Ensuring that rights enshrined in legislation is particularly important where those rights are accorded to the vulnerable. I accordingly recommend that the Commissioner of Police give consideration as to how increased compliance with suspects procedures relating to children be achieved (**Recommendation 4**).
- 77. In all, 20 of the 43 records inspected related to procedures that involved exposure of, or contact with, the genital area of male suspects. Eight of these often extremely intimate procedures were carried out by a female registered nurse or female doctor.<sup>79</sup> It is not apparent whether, in each of those eight cases, it was not reasonably practicable to have a male nurse or doctor carry out the procedure. I recommend that the

<sup>75</sup> PPMS 17/B82873.

<sup>76</sup> The program involves family counselling with the young person spending some nights at supervised accommodation. See <https://www.unitingcommunities.org/youth-services/residential-care/> last accessed on 20 August 2018.

<sup>77</sup> PPMS 18/A10534.

<sup>78</sup> PPMS 18/B89279.

<sup>79</sup> PPMS 18/B89279, PPMS 17/B82873, PPMS 18/B98661, PPMS 17/B80934, PPMS 17/B75879, PPMS 17/B72444, PPMS 18/B89673 and PPMS 18/A20885.

Commissioner of Police require that, when such intimate procedures are carried out by a person who is not the same gender as the suspect, a brief record be made of the reason it was not reasonably practicable to comply with section 21(3) of the CLFP Act (**Recommendation 5**).

78. I am satisfied that each of the 43 forensic procedures examined complied with section 24 of the CLFP Act in that they were carried out by an appropriate person. Appropriate persons are:
- medical practitioners<sup>80</sup>
  - registered nurses - who are qualified to carry out forensic procedures of any sort other than the taking of dental impressions<sup>81</sup>
  - all police officers or other persons authorised by the Commissioner of Police - who are qualified to carry out non-intrusive forensic procedures consisting of (i) the taking of handprints, fingerprints, toe prints or footprints, or (ii) an examination of part of a person's body<sup>82</sup>
  - persons who have satisfactorily completed a course of training approved by the Attorney-General to carry out non-intrusive forensic procedures consisting of one or more of:
    - the taking of a sample of hair
    - the taking of a sample of a fingernail or toenail, or material from under a fingernail or toenail
    - the taking of a sample of material from an external part of the body
    - the taking of a sample by way of buccal swab
    - the taking of a sample of blood by way of finger-prick for the purpose of obtaining a DNA profile
    - the taking of an impression of a cast or wound.<sup>83</sup>
79. On 23 January 2018 the former Attorney-General Mr Rau approved training courses conducted by SA Police Forensic Services Branch: 'Forensic Procedures Sample Collection Course CRIM011', 'Forensic Procedures Finger-Prick Course CRIM022' and 'Forensic Procedures Buccal Swab Course CRIM10'.<sup>84</sup>
80. In circumstances where an intrusive forensic procedure is to be conducted on any person, including a suspect, the person must be afforded a reasonable opportunity to arrange for the attendance, at the person's expense, of a medical practitioner of the person's choice to witness the procedure.<sup>85</sup>
81. One of the set of records examined concerned intrusive forensic procedures conducted on a male adult suspected of attempted murder.<sup>86</sup> When this suspect was advised of his right to choose a medical practitioner to witness the procedures, he named two doctors. This request was recorded audio visually. This record shows that the investigating police officer then left the hospital room where the suspect was located, apparently to attempt to contact one of the named doctors. The record then stops, resuming when the forensic procedures are being conducted by a doctor at the

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<sup>80</sup> Section 24(1)(a).

<sup>81</sup> Section 24(1)(b) together with regulation 5(1)(a) of the *Criminal Law (Forensic Procedures) Regulations 2007*.

<sup>82</sup> Section 24(1)(b) together with regulation 5(1)(b) of the *Criminal Law (Forensic Procedures) Regulations 2007*.

<sup>83</sup> Section 24(1)(b) together with regulation 5(1)(c) of the *Criminal Law (Forensic Procedures) Regulations 2007*.

<sup>84</sup> South Australia, *The South Australian Government Gazette*, No.7, 30 January 2018, 408.

<sup>85</sup> Section 25(1).

<sup>86</sup> PPMS 17/B80775.

Wakefield Hospital. The suspect appears acquiescent. It is not clear what attempts were made to contact the named doctors.

82. The CLFP Act requires that all forensic procedures must:
- be carried out humanely<sup>87</sup>
  - be carried out with care to avoid, as far as reasonably practicable, offending genuinely held cultural values or religious beliefs<sup>88</sup>
  - be carried out with care to avoid inflicting unnecessary physical harm, humiliation or embarrassment<sup>89</sup>
  - not be carried out in the presence or view of more persons than are necessary for properly carrying out the procedure and satisfying any relevant statutory requirements.<sup>90</sup>
83. In order to monitor compliance with these requirements my Office viewed audio-visual records of 11 forensic procedures authorised by senior police officers.<sup>91</sup> Each of the records viewed demonstrated that the procedures were carried out in a respectful, humane and sometimes very kind manner.
84. By viewing the audio-visual records, Ombudsman officers also checked that intrusive forensic procedures conducted on suspects had been recorded as required by section 26(1)(a) of the CLFP Act. It was noted that in three cases where a urine sample was required, the suspect was afforded a degree of privacy while furnishing the sample. Similarly in two cases the camera was averted from the suspect while he was in a state of undress or while material was being taken from a suspect's penis. In my view, this circumspection did not offend against section 26(1)(a); in all five cases, what was occurring was clear from the record.
85. One of the audio-visual records concerned me.<sup>92</sup> The subject was suspected of two counts of attempted murder. A senior police officer had authorised hand and fingernail swabs, a full body examination and the taking of a blood sample. The audio-visual record showed the subject on a hospital bed with a drip in the crook of his right arm and a monitor attached to his forehead. He had facial injuries. The subject appeared to be asleep, semi-conscious or sedated. Photographs of the subject's head and arms were taken while he was in this state; he did not appear to be aware of the photography. A doctor then interfered with the bandages attaching the drip to the suspect's arm so that a blood sample could be taken. This roused the subject who objected to what was occurring, saying it hurt. He then appeared to slip back into sleep or unawareness.
86. The subject's state calls into question a number of matters including:
- whether he was given a reasonable opportunity to make representations to the senior police officer at the informal hearing
  - whether he was allowed a reasonable opportunity to arrange for the attendance of a medical practitioner of his choice to witness the procedure

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<sup>87</sup> Section 21(1).

<sup>88</sup> Section 21(1)(a).

<sup>89</sup> Section 21(1)(b).

<sup>90</sup> Section 21(2).

<sup>91</sup> PPMS 18/B90745, PPMS 17/B73691, PPMS 17/B72604, PPMS 17/B74750, PPMS 17/B73883, 17/B80775, PPMS 18/85531, PPMS 17/B82783, PPMS 18/B94411, PPMS 18/B98661 and PPMS 18/A06175.

<sup>92</sup> PPMS 18/B85531.

- whether he was given and understood the compulsory warning that reasonable force could be used to carry out the procedures
- whether he consented to the taking of his blood.<sup>93</sup>

87. As previously stated, Ombudsman SA examined 33 sets of notes made by senior police officers before they made orders authorising the conduct of forensic procedures on suspects. Examination of these records revealed 15 instances of apparent non-compliance with the CLFP Act:

- three of the sets of notes did not satisfy me that the senior police officer had satisfied himself that there were reasonable grounds to suspect that the suspect had committed a serious offence<sup>94</sup>
- one set of notes showed that, while the suspect had requested legal advice about the proposed procedures, the informal hearing proceeded without such advice having been obtained<sup>95</sup>
- six of the sets of notes did not satisfy me that the suspect or his representative had been given a reasonable opportunity to make representations during the informal hearing<sup>96</sup>
- one set of notes revealed that the victim of the offence had told police that the suspect had been calling on a 'devil spirit' while he had been attacking her and that the suspect had not slept for three or four days.<sup>97</sup> This raises the issue of whether the suspect ought to have been treated as a protected person for the purposes of the informal hearing yet no appropriate representative was present
- another set of notes showed that the senior police officer had treated the suspect as a protected person because of his mental incapacity.<sup>98</sup> The notes recorded that the suspect had been unable to locate an appropriate person to represent him during the hearing but that a nurse at the Wakefield Hospital had agreed to assist
- a further set of notes also showed that the senior police officer had decided to treat the suspect as a protected person.<sup>99</sup> Although this suspect was represented by a legal practitioner during the informal hearing, no appropriate representative appears to have been present
- in another case the senior police officer noted that the suspect suffered from bipolar disorder and was 'currently unmedicated'. The senior police officer also noted that the suspect appeared to have 'limited cognitive ability'.<sup>100</sup> Despite these factors, the senior police officer determined that the suspect was not a protected person and he was not represented by an appropriate person during the hearing. The records also showed that the suspect was not given a copy of the senior police officer's order until after the forensic procedure had been carried out.

<sup>93</sup> While section 31 of the CLFP Act provides that a person authorised to carry out a forensic procedure or to assist such a person may use reasonable force to carry out the procedure, I note that the Australian Medical Association's position is that non-treating doctors who are engaged to perform a medical examination for evidentiary processes have an obligation to ensure that the prisoner understands the purpose of the examination and its implications and has consented to the same. Consent should be sought before any examination unless the prisoner lacks decision-making capacity and requires surrogate consent or the situation is an emergency. See <https://ama.com.au/position-statement/medical-ethics-custodial-settings-2013> last accessed 22 August 2018.

<sup>94</sup> PPMS 18/B90745, 17/B82873 and 18/A16559.

<sup>95</sup> PPMS 17/B58527.

<sup>96</sup> PPMS 17/B80453, 17/B80934, 18/B85531, 18/B86794, 18/B89279 and 18/A16559.

<sup>97</sup> PPMS 17/B80775.

<sup>98</sup> PPMS 18/B86794.

<sup>99</sup> PPMS 18/A14850.

<sup>100</sup> PPMS 18/A03233.

88. I consider the relatively high proportion of non-compliance with respect to suspects procedures authorised by a senior police officer warrants consideration as to how to improve practice in this area. I accordingly recommend that the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police officers can be achieved (**Recommendation 6**).

## Offenders procedures

### Relevant definitions

**protected person** means a child or a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure<sup>101</sup>

**serious offence** means an indictable offence or a summary offence that is punishable by imprisonment<sup>102</sup>

**simple identity procedure** means a forensic procedure consisting of either the taking of prints of a person's hands or fingers, or the taking of forensic material from a person by buccal swab or finger prick for the purpose of obtaining a DNA profile<sup>103</sup>

89. Section 20 of the CLFP Act authorises the carrying out of simple identity procedures on persons who:
- are serving a term of imprisonment, detention or home detention
  - are being detained as a result of being declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935* (the **CLC Act**)
  - have been convicted of a serious offence
  - have been declared liable to supervision under Part 8A of the CLC Act by a court dealing with a charge of a serious offence
  - are registrable offenders under the *Child Sex Offenders Registration Act 2006*.
90. I understand that during the relevant period, SA Police officers carried out 86 offenders procedures. Ombudsman SA officers examined records relating to 47 of those. Each of the records showed that only a simple identity procedure had been carried out<sup>104</sup>. Four of the 47 procedures were carried out on persons who were serving sentences of imprisonment. 31 were carried out on persons who had been convicted of serious offences. (One such person had been convicted of murder in 1966.<sup>105</sup>) The remaining records related to persons who were registrable offenders under the Child Sex Offenders Registration Act.
91. Only one of the offenders procedures examined was conducted on a protected person.<sup>106</sup> That procedure was appropriately witnessed by the subject's father.
92. Like suspects procedures, offenders procedures can be carried out on a person whether or not they are in custody.<sup>107</sup> It was clear from the records relating to 11 of the forensic procedures that the offenders were not in custody at the time the simple identity procedures were carried out. In each case:
- a police officer had issued written directions to the offender about the time, place and manner in which the procedure was to be carried out
  - a copy of those written directions had been given to the offender

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<sup>101</sup> Section 3(1).

<sup>102</sup> Section 3(1).

<sup>103</sup> Section 3(1).

<sup>104</sup> Section 20(1).

<sup>105</sup> PPMS 18/A22837.

<sup>106</sup> PPMS 17/B49120.

<sup>107</sup> Section 29.

- the offender had been informed that if they failed to comply with the directions, a warrant could be issued by the Magistrates Court for the arrest of the offender.

## Blood testing for communicable diseases

### Relevant definitions

**biological material** means a person's blood or bodily fluids or any other biological material of a person that is capable of communicating or transmitting disease<sup>108</sup>

**prescribed employment** means employment (a) as a police officer; (b) in 'emergency work' (including emergency work carried out on a voluntary basis); (c) as a medical practitioner in a hospital; (d) as a nurse or midwife in a hospital; (e) in the provision of assistance or services to a medical practitioner, nurse or midwife working in a hospital; and (f) as an officer or employee of the Department for Correctional Services<sup>109</sup>

**emergency work** means work carried out (whether or not in response to an emergency) by or on behalf of an 'emergency services provider'<sup>110</sup>

**emergency services provider** means (a) the CFS; (b) the MFS; (c) the SES; (d) SA Ambulance Service; (e) St John Ambulance; (f) Surf Life Saving South Australia; (g) a volunteer marine rescue association accredited by the State Marine Rescue Committee to perform search and rescue functions; and (h) the accident or emergency department of a hospital, whether public or private<sup>111</sup>

**prescribed serious offence** means (a) an offence against section 20 of the CLCA<sup>112</sup>; (b) an offence against section 23 of the CLCA<sup>113</sup>; (c) an offence against section 24 of the CLCA<sup>114</sup>; (d) an offence against section 29 of the CLCA<sup>115</sup>; (e) an offence against Part 3A of the CLCA<sup>116</sup>; (f) an offence against section 6 of the *Summary Offences Act 1953 (the SO Act)*<sup>117</sup>; (g) an offence against section 6A of the SO Act<sup>118</sup>; and (h) any other serious offence prescribed by the regulations<sup>119</sup>

**senior police officer** means a police officer of or above the rank of inspector<sup>120</sup>

93. Division 4 of Part 2 was inserted into the CLFP Act by the *Criminal Law (Forensic Procedures) (Blood Testing for Diseases) Amendment Bill 2014*. In his Second Reading Speech the then Minister for Police said:

Day in, day out, police officers perform a vital service to the people of South Australia. All too often, however, officers are placed at risk through the criminal actions and recklessness of others. Approximately 700 police officers are assaulted in the line of duty each year. Many of these assaults - between 250 and 300 a year, according to SAPOL figures - result in one or more offenders being spat on, or even bitten.

It is an unfortunate fact of life that many of those who seek to do harm to our police in these circumstances are at high risk of having an infectious disease. Currently, SAPOL offers blood testing to any officer who has had contact with an offender's bodily fluids and is

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<sup>108</sup> Section 20A.

<sup>109</sup> Section 20A.

<sup>110</sup> Section 20A.

<sup>111</sup> Section 20A.

<sup>112</sup> Section 20 of the CLC Act deals with the offence of assault.

<sup>113</sup> Section 23 of the CLC Act deals with the offence of causing serious harm.

<sup>114</sup> Section 24 of the CLC Act deals with the offence of causing harm.

<sup>115</sup> Section 29 of the CLC Act deals with the offences of endangering life and creating a risk of serious harm.

<sup>116</sup> Part 3A of the CLC Act deals with public order offences including riot and affray.

<sup>117</sup> Section 6 of the SO Act deals with the offences of assaulting and hindering police.

<sup>118</sup> Section 6A of the SO Act deals with the offence of violent disorder.

<sup>119</sup> There are no offences prescribed by the regulations.

<sup>120</sup> Section 3(1).

therefore at risk of having been exposed to, or contracted, a communicable disease. There is currently, however, no obligation on an offender to be tested.

At the last state election, the government committed to introduce legislation to require an offender who bites or spits at a police officer to undertake a blood test for infectious disease. This bill ... delivers on this commitment.<sup>121</sup>

94. The provisions of Division 4 of Part 2, however, extend to any circumstances in which a person engaged in any prescribed employment comes into contact with or was exposed to biological material of persons suspected of specified offences. In this regard I refer the reader to the relevant definitions set out above.
95. A senior police officer may require that a sample of blood be taken from a person if they are satisfied that the person is suspected of a prescribed serious offence and it is likely that a person engaged in prescribed employment came into contact with or was otherwise exposed to biological material of the suspect.<sup>122</sup> The senior police officer must make a written record of the grounds on which they determine that the person's blood should be tested and give a copy of that record to the suspect.<sup>123</sup>
96. Before the blood sample is taken the senior police officer must:
- give the suspect written notice that:
    - a sample of their blood is to be taken<sup>124</sup>
    - the blood will be tested for communicable diseases<sup>125</sup>
  - invite the suspect to nominate a medical practitioner to receive a copy of the results of the testing.<sup>126</sup>
97. After the blood sample is tested, the regulations require the Commissioner of Police to take reasonable steps to notify:
- the suspect of the results of the testing<sup>127</sup>
  - the person who was engaged in prescribed employment and who likely came into contact with or was exposed to suspect's biological material, of the results of the testing.<sup>128</sup>
98. While the provisions of Division 4 of Part 2 of the CLFP Act do not use the term 'communicable disease', the Division itself is headed 'Blood testing of certain persons for communicable diseases'. The regulations also use the term. Despite this, the term is not defined in either the Act or the regulations. According to the Merriam-Webster Medical Dictionary the term means 'an infectious disease transmissible (as from person to person) by direct contact with an affected individual or the individual's discharges or by indirect means (as by a vector)'.<sup>129</sup> It is therefore a term of very wide definition, encompassing everything from the common cold to hepatitis. I am unable to advise what diseases are searched for when suspects' blood samples are tested.

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<sup>121</sup> See <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-16904> last accessed 22 August 2018.

<sup>122</sup> Section 20B(1).

<sup>123</sup> Section 20B(2).

<sup>124</sup> Regulation 4A(1)(a)(i).

<sup>125</sup> Regulation 4A(1)(a)(ii).

<sup>126</sup> Regulation 4A(1)(b).

<sup>127</sup> Regulation 4B(1).

<sup>128</sup> Regulation 4C(1).

<sup>129</sup> See <https://www.merriam-webster.com/medical/communicable%20disease> last accessed 22 August 2018.

99. I understand that senior police officers required a suspect to undergo a blood test under Division 4 of Part 2 on seven occasions during the relevant period. My Office inspected records relating to each of those procedures.
100. In relation to the seven records of these procedures inspected by my Office, I initially considered there was insufficient information for me to assess whether all procedures had been undertaken in accordance with the CLFP Act and the regulations.
101. The first issue of concern was whether suspects, in accordance with regulation 4A(1)(a), were given written notice prior to undertaking the procedure that:
- a blood sample would be taken pursuant to s20B of the CLFP Act
  - the blood would be tested for communicable diseases.
102. In response to enquiries by my Office, I was advised by the agency that:
- Suspects were not given written notice prior undertaking the procedure. Each suspect was given a copy of the application (PD430A) at the conclusion of the procedure. The PD430 does include a section confirming that the suspect was advised that the procedure had been taken pursuant to the legislation and would be tested for a communicable disease. The PD430A can be amended to ensure this advice is provided in writing before the procedures takes place
103. In light of this response, it appears that all seven procedures were not undertaken in compliance with the regulations.
104. Accordingly, I recommend that, where blood testing for communicable diseases takes place, suspects are provided with written notice *prior* to undertaking the procedure in the form of a separate document in accordance with Regulation 4A(1)(a) (**Recommendation 7**).
105. The remaining issues of concern were whether:
- suspects were advised on each occasion that they could nominate a medical practitioner to receive a copy of the results in accordance with regulation 4A(1)(b)
  - suspects were provided with a copy of the written record of grounds for undertaking a forensic procedure provided to suspects in accordance with section 20B(2) of the CLFP Act
  - the Commissioner took reasonable steps to notify each affected person/nominated medical practitioner of the test results in accordance with regulations 4B and 4C.
106. In response to further enquiries by my Office, the agency provided sufficient evidence to demonstrate that it had on each occasion complied with these provisions.
107. The agency also demonstrated compliance with section 39A of the CLFP Act across all seven procedures, which sets out that blood samples must be destroyed as soon as practicable, by highlighting that all samples are held by SA Pathology and that SA Pathology destroys all samples within seven days.
108. It is also necessary to note that all seven records inspected related to procedures conducted on affected/exposed workers who were police officers. As Division 4 of Part 2 of the CLFP Act applies to other emergency workers, my Office sought to clarify whether any additional records existed in relation to procedures carried out on other emergency workers.

109. In response to that enquiry, I was advised that:

As each procedure can only be authorized by a Senior Police Officer, all requests must be processed by SAPOL. No records have been received for procedures other than the nominated 7.

## Forensic procedures on deceased persons

### *Relevant definitions*

**forensic procedure** means a procedure carried out by or on behalf of SA Police or a law enforcement authority consisting of (a) the taking of prints of the hands, fingers, feet or toes; or (b) an examination of part of a person's body (without disturbing their clothing and without physical contact with them); or (c) the taking of a sample of biological or other material from a person's body; or (d) the taking of an impression or cast of a part of a person's body<sup>130</sup>

**persons who are qualified to carry out forensic procedures:**

(a) registered nurses are qualified to carry out any forensic procedure except taking dental impressions

(b) police officers or other persons authorised by the Commissioner of Police are qualified to carry out the taking of prints of the hands, fingers, feet or toes, and examining part of a person's body

(c) persons who have satisfactorily completed training approved by the Attorney-General are qualified to carry out non-intrusive forensic procedures consisting of:

- the taking of hair samples
- the taking of fingernail and toenail samples, or material from underneath fingernails or toenails
- the taking of a sample of material from the external part of a person's body
- the taking of a sample of blood by finger-prick for the purpose of obtaining a DNA sample
- the taking of an impression of a cast or wound<sup>131</sup>

**senior police officer** means a police officer of or above the rank of inspector<sup>132</sup>

110. A senior police officer may authorise the carrying out of a forensic procedure on the body, body part, human tissue or other human remains of a deceased person. This authorisation may be given if the senior officer is satisfied that the evidence obtained from carrying out such a procedure is likely to assist in the investigation of a serious offence or in the identification of the deceased.<sup>133</sup>
111. If the body of the deceased is located at a hospital or another place where a post-mortem examination is being or has been conducted, the occupier of that hospital or place can agree to (a) arrange for the authorised procedure to be carried out and to provide the forensic material to the Commissioner of Police, or (b) to provide forensic material already obtained during the post-mortem to the Commissioner.<sup>134</sup> This requirement was not audited.
112. The senior police officer's authorisation must be in writing<sup>135</sup> and the forensic procedure must be carried out by a medical practitioner or a person who is qualified to carry out forensic procedures of the relevant type.<sup>136</sup>

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<sup>130</sup> Section 3(1).

<sup>131</sup> Regulation 5.

<sup>132</sup> Section 3(1).

<sup>133</sup> Section 55(1).

<sup>134</sup> Section 55(4).

<sup>135</sup> Section 55(1).

<sup>136</sup> Section 55(5).

113. I understand that forensic procedures on deceased persons were carried out by or on behalf of SA Police on 31 occasions during the audit period. My Office examined the paperwork associated with 17 of those instances.
114. Each of the 17 procedures were carried out on the basis that the evidence obtained therefrom would be likely to assist in the investigation of a serious offence. All 17 were carried out by a person qualified to do so.
115. 16 of the 17 procedures had been authorised by a senior police officer. The remaining one had been authorised by a Detective Acting Inspector. I query whether a person acting in an inspector's position meets the definition of 'senior police officer' as set out in the CLFP Act. I am not sure that such a person is properly regarded as being of the rank of inspector. In questioning this, I have had regard to section 47 of the Police Act 1998 and regulation 44 of the Police Regulations 2014. These respectively state:

**Section 47 - Power to transfer**

- (1) The Commissioner may, without conducting selection processes, transfer a member of SA Police from the member's current position to another position (and such transfer may be for an indefinite period or for a specified term).
- (2) Except as authorised under this Act or the regulations, a member may not be transferred to a position of higher rank.

**Regulation 44 - Transfer to a position of higher rank**

- (1) Subject to this regulation, the Commissioner may, under section 47 of the Act, transfer a member of SA Police to a position of a higher rank -
  - (a) until a person on leave from or otherwise temporarily unable to perform the duties of the position returns to the position; or
  - (b) if the position has been permanently vacated, until the position is filled by selection processes.
- (2) A transfer as authorised under subregulation (1) -
  - (a) may be made on such conditions as are approved by the Commissioner; and
  - (b) must not be for a period exceeding 2 years.
- (3) If a member has been transferred to a position of a higher rank as authorised under this regulation, the Commissioner may, under section 47 of the Act, transfer the member to a position of a lower rank in order to return the member to a position of a rank the same as that of his or her original position.

116. The general order is silent on this issue.

## The DNA database

### Relevant definitions

**crime scene index** means an index of DNA profiles obtained from material found:

- at any place where an offence was, or is reasonably suspected of having been, committed
- on or within the body of a victim of an offence
- on anything worn or carried by a victim at the time when the offence was committed
- on or within the body of any person or any thing or at any place associated with the commission of an offence<sup>137</sup>

**missing persons index** means an index of DNA profiles derived from biological material of persons who are missing<sup>138</sup>

**statistical index** means an index of information that has been derived from the analysis of material obtained by carrying out forensic procedures but cannot be used to discover the identity of persons from whom that material was obtained, and has been compiled for statistical purposes only<sup>139</sup>

**suspects/offenders index** means an index of DNA profiles derived from:

- victims of offences or volunteers (in cases where an assimilation order has been made)
- suspects
- offenders<sup>140</sup>

**unknown deceased persons index** means an index of DNA profiles derived from the biological material of deceased persons whose identities are unknown<sup>141</sup>

**volunteers (limited purposes) index** means an index of DNA profiles derived from volunteers or victims who have given specific consent to their profile being stored on this index but have imposed a condition that prohibits their profile from being compared with profiles on one or more of the other indices<sup>142</sup>

**volunteers (unlimited purposes) index** means an index of DNA profiles derived from:

- volunteers or victims who have given specific consent to their profile being stored on this index and being used for any purpose for which the database may be used
- biological material of deceased persons whose identity is known.<sup>143</sup>

117. The DNA database contains various indices of DNA profiles and information that may be used to identify the person from whose biological material each such profile was obtained. The database contains a crime scene index, a missing persons index, an unknown deceased persons index, a suspects/offenders index, a volunteers (unlimited purposes) index, a volunteers (limited purposes) index and a statistical index.

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<sup>137</sup> Section 40.

<sup>138</sup> Section 40.

<sup>139</sup> Section 40.

<sup>140</sup> Section 40.

<sup>141</sup> Section 40.

<sup>142</sup> Section 40. Section 43 of the CLFP Act provides that a DNA profile obtained from a victim or volunteer must not be stored on this index or the volunteers (unlimited purposes) index unless the relevant person has consented to such storage. The manner in which such consent must be obtained is set out in subsections (2)-(5) of section 43. The general order requires that a form 'Volunteers & victims consent form to store DNA profile on the volunteers (unlimited purposes) index' is provided to volunteers and victims so that they understand their options for storage and use of their DNA.

<sup>143</sup> Section 40.

118. Information stored on the database can only be accessed by persons authorised by the Commissioner of Police.<sup>144</sup> It is an offence punishable by up to two years imprisonment for an unauthorised person to access the database.<sup>145</sup> I understand that police officers do not have direct access to the database.
119. I am informed that FSSA has internal policies and procedures in place that govern access to the database, as follows:
- under FSSA's general computer systems access review, the Laboratory Operations Manager, the Biology Manager and the Database Manager are required to approve persons having access to the database. Access rights are reviewed every six months
  - persons who are approved to access the database must complete a training module before they do so
  - FSSA staff who are not involved in obtaining or comparing DNA profiles do not have access to the database
  - different levels of access are approved depending on the requirements of staff members' roles.
120. The database can only be accessed for certain prescribed purposes, namely:
- for comparing DNA profiles stored on the database
  - for proceedings for a serious offence or under the *Criminal Assets Confiscation Act 2005*
  - for determining whether it is necessary to carry out a forensic procedure
  - for a coronial inquest or inquiry
  - for making it available to the person to whom the information relates
  - for administering the database
  - for an arrangement entered into by the Attorney-General under section 41(2) of the CLFP Act
  - for the purpose of the *Mutual Assistance in Criminal Matters Act 1987* (CW) or the *Extradition Act 1988* (CW)
  - for an investigation by my Office
  - for an investigation under the *Police Complaints and Discipline Act 2016*
  - for this compliance audit.<sup>146</sup>
121. While the database is used mainly to link DNA profiles obtained from samples taken from suspects and offenders with DNA profiles uploaded onto the Crime Scene Index, SA Police occasionally use it to compare a profile from that index with DNA samples uploaded onto the Suspects/Offenders Index to identify suspects and offenders with DNA profiles that are similar to the profile on the Crime Scene Index. This is known as a DNA familial search and is based on the premise that the sources of two DNA profiles having a significant number of common genetic markers may be close relatives, particularly if the markers in question are rare. If two such profiles are found this may provide a line of enquiry for investigating police officers.
122. SA Police only countenance the conduct of a DNA familial search:
- where it is not possible to obtain a forensic sample from the person who is of interest to investigators

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<sup>144</sup> Section 45(2).

<sup>145</sup> Section 45(1).

<sup>146</sup> Section 45(2).

- when all other courses of investigation have been exhausted
- for very serious offences.<sup>147</sup>

123. Applications for a DNA familial search are considered by the Familial Testing Advisory Group, which comprises officers from SA Police and FSSA and are only to be recommended if the advisory group considers that the overall public interest in solving the crime in question outweighs individuals' rights to privacy. The final determination is made by the Assistant Commissioner, Operations Support Service.<sup>148</sup>
124. I have not audited individual instances where DNA familial searches have been conducted, but, in light of the policies provided, consider it likely the requirements of section 45 of the CLFP Act are being met.
125. In addition to having a policy on DNA familial searches, SA Police have a 'DNA Profile Off Database Comparison Policy'.<sup>149</sup> The purpose of this policy is to govern the comparison of a DNA profile that cannot be uploaded onto the database with a profile that has been so uploaded. Some DNA information cannot be uploaded onto the database because it contains mixed or partial DNA profiles, or because it consists of a Y chromosome DNA profile. An off database search may exclude a person of interest as a contributor or source of the crime scene DNA. On the other hand, if a comparison between the crime scene DNA and an uploaded profile suggests that a person of interest is linked to the crime scene, a determination may be made to carry out a forensic procedure on the person of interest.
126. SA Police only permit off database comparisons to be made in association with serious offending. Comparisons can only be conducted between the uploaded DNA profile of a nominated suspect and one or more profiles that have not been uploaded. Applications for off database comparisons must be made in writing and must be approved by the Assistant Commissioner, Operations Support Service.<sup>150</sup>
127. Whilst I consider section 45(2)(a) of the CLFP Act does not permit access for the purpose of comparing a DNA profile stored on the database with one that is not, it is likely accessing the database in these circumstance is permissible under section 45(2)(b).

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<sup>147</sup> SA Police, Operations Support Service, 'DNA Familial Search Authorisation Policy', 13 April 2016.

<sup>148</sup> SA Police, Operations Support Service, 'DNA Familial Search Authorisation Policy', 13 April 2016.

<sup>149</sup> SA Police, Operations Support Service, 'DNA Profile Off Database Comparison Policy', 1 March 2016.

<sup>150</sup> SA Police, Operations Support Service, 'DNA Profile Off Database Comparison Policy', 1 March 2016.

## Conclusion

128. Of the 487 procedures examined, there were 48 instances where it appeared the CLFP Act had not been complied with. I do not consider the volume of non-compliant procedures to be concerning; in fact I commend the SA Police for its use of general orders and template forms which clearly assist in ensuring and recording compliance.
129. That said, any failure to comply with the CLFP Act tends to raise issues of fairness and may undermine fundamental rights which the Act exists to protect. I highlight these areas of concern in relation to each type of procedure below. Non-compliance can also adversely affect the admissibility of the evidence in court; section 47 of the CLFP Act provides:
- (1) If a police officer or other person with responsibilities under this Act (other than a person acting as an appropriate representative of a protected person under this Act) contravenes a requirement of this Act in relation to—
    - (a) a forensic procedure; or
    - (b) forensic material obtained from a forensic procedure; or
    - (c) a DNA profile derived from such forensic material,  
evidence obtained as a result of the forensic procedure is not admissible in evidence against the person on whom the procedure was carried out unless—
      - (d) the person does not object to the admission of the evidence; or
      - (e) the court is satisfied that the evidence should be admitted in the interests of the proper administration of justice despite the contravention.
130. Of 69 volunteers and victims procedures examined, 5 raised a total of 7 issues of apparent non-compliance with the CLFP Act. Three raised issues as to whether consent was properly obtained, and whilst such failures would be unlikely to affect the admissibility of evidence, I consider the failure to properly obtain consent from vulnerable persons to be concerning.
131. There were 4 procedures involving an intimate forensic procedure which was carried out by a person who was not the same gender as the victim in possible contravention of section 21(3) of the CLFP Act. Accordingly, I make **Recommendation 1**.
132. In addition, the audit of volunteers and victims procedures revealed a case where it appears investigating police officers failed to seek an assimilation order in circumstances where material collected from a volunteer was subsequently submitted for analysis on the basis the person was now a suspect. This clearly raises an issue of procedural fairness and could have prevented the admissibility of the evidence under section 47 of the CLFP Act.
133. The audit examined 303 simple identity suspects procedures and concluded that all of these complied with all of the provisions specific to simple identity procedures. Two of the procedures raised issues as to whether the right to be assisted by an interpreter

prescribed by section 22 of the CLFP Act was complied with. Accordingly, I make **Recommendations 2 and 3**.

134. The main area for concern raised by the audit comprised suspects procedures that were authorised by senior police officers. 43 records were examined, including 33 sets of notes made by senior police officers, and in doing so 30 instances of apparent non-compliance were detected. I consider many of these failures meant that suspects were not afforded fairness. I also note that the failures, by virtue of being in respect of suspects procedures, would likely adversely affect the admissibility of the evidence pursuant to section 47 of the CLFP Act. I reiterate the concern I expressed in the body of this report that some of the failures occurred where the suspects were children. Accordingly I make **Recommendations 4 and 6**.
135. The audit also revealed that 8 out of 20 intimate forensic procedures examined were carried out by females on male suspects, again raising possible issues of non-compliance with section 21(3) of the CLFP Act. Accordingly, I make **Recommendation 5** (in similar terms to Recommendation 1).
136. Despite these issues, I note each of the eleven audio-visual records of intrusive forensic procedures viewed demonstrated that the procedures were carried out in a respectful, humane and sometimes very kind manner.
137. 47 of a total of 86 offenders procedures were examined during the audit and all of these appeared compliant with the relevant legislative provisions.
138. During the audit period 7 blood tests were conducted pursuant to Division 4 of Part 2 of the CLFP which provides for the testing of a suspect where a police officer has come into contact with biological material of a person suspected of a specified offence. All of the provisions in this Division and the associated Regulations were complied with, with the exception of Regulation 4A(1)(a) which provides that suspects must be given written notice of the procedure prior to the procedure being undertaken. In all 7 cases written information was provided at the conclusion of the procedure, and accordingly I recommend that this practice be amended (**Recommendation 7**).
139. Forensic procedures were carried out on deceased persons on 31 occasions during the audit period, and records were examined in relation to 17 of those. It appeared that all of the relevant legislative requirements were complied with apart from a possible issue arising from the fact that one of the procedures was authorised by a person acting in the role of a senior police officer.
140. The CLFP Act does not provide the Ombudsman with a specific power to make recommendations, but I nevertheless have made some suggestions where I consider improvements to practice are warranted. These are as follows:

Recommendation 1: That the Commissioner of Police require that, when intimate procedures are carried out by a person who is not the same gender as the **victim**, a brief record be made of the reason it was not reasonably practicable to comply with section 21(3) of the CLFP Act.

Recommendation 2: That the Commissioner of Police amend the general order so as to direct that police officers should not act as interpreters under section 22 of the CLFP Act.

Recommendation 3: That the Commissioner of Police amend the general order so as to direct that suspected co-offenders should not act as interpreters for suspects.

Recommendation 4: That the Commissioner of Police give consideration as to how increased compliance with suspects procedures relating to children be achieved.

Recommendation 5: That the Commissioner of Police require that, when intimate procedures are carried out by a person who is not the same gender as the **suspect**, a brief record be made of the reason it was not reasonably practicable to comply with section 21(3) of the CLFP Act.

Recommendation 6: That the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police officers can be achieved

Recommendation 7: That, where blood testing for communicable diseases takes place, suspects are provided with written notice *prior* to undertaking the procedure in the form of a separate document in accordance with Regulation 4A(1)(a).



Emily Strickland  
**Deputy Ombudsman**  
**Ombudsman SA**

28 September 2018

## Annexure 1 - Check lists for audit

### Volunteers and victims procedures checklist

1. Did the relevant person consent to the procedure? [Note that the relevant person may expressly consent orally or in writing, or give some other unequivocal indication of consent.]
  - If Yes, go to Q6.
  - If No, go to Q2.
2. Did a senior police officer authorise the carrying out of the procedure?
  - If Yes, go to Q3.
  - If No, non-compliant forensic procedure. Go to Q3.
3. Was the authorisation made by a written instrument?
  - If Yes, go to Q4.
  - If No, non-compliant forensic procedure. Go to Q4.
4. Was the procedure authorised because the senior police officer was satisfied that it was impracticable or inappropriate to obtain the consent of the relevant person? [Note that it will be impracticable if it is too difficult to locate/contact the relevant person. It will be inappropriate if the relevant person (or a person related to or associated with them) is under suspicion in relation to a criminal offence.]
  - If Yes, go to Q5.
  - If No, non-compliant forensic procedure. Go to Q
5. Was the senior police officer satisfied that carrying out the procedure was justified in the circumstances of the case?
  - If Yes, go to Q9.
  - If No, non-compliant forensic procedure. Go to Q
6. Did the relevant person withdraw their consent for the procedure? [Note that if the relevant person behaves in a way that would indicate withdrawal of consent to a reasonable observer, they are to be taken to have withdrawn consent.]
  - If Yes, go to Q7.
  - If No, go to Q9.
7. Was the procedure discontinued?
  - If Yes, go to Q9.
  - If No, go to Q8.
8. Was the continuance of the procedure authorised by a senior police officer?
  - If Yes, go to Q2.
  - If No, non-compliant forensic procedure. Go to Q9.
9. Was the procedure carried out on a protected person?

- If Yes, go to Q10.
  - If No, go to Q13.
10. Did the person who was to carry out the procedure explain to the protected person that the procedure would not be carried out if the person objected to it? [Note there is no requirement for explanation if the protected person is under the age of 10 or is not capable of responding rationally to information.]
    - If Yes, go to Q11.
    - If No, non-compliant forensic procedure. Go to Q11.
  11. Did the protected person object to or resist the procedure?
    - If Yes, go to Q12.
    - If No, go to Q13.
  12. Was the procedure carried out/continued despite the objection/resistance?
    - If Yes, non-compliant forensic procedure. Go to Q13.
    - If No, go to Q13.
  13. Was the volunteer or victim given a written statement explaining their right to request destruction of the forensic material obtained from them?
    - If Yes, go to Q14
    - If No, non-compliant forensic procedure. Go to Q14.
  14. Has the relevant person (who gave consent to the volunteer or victim procedure) requested the destruction of forensic material obtained from that procedure? [Note that request must be in writing and cannot relate to forensic material from a different person e.g. an offender.]
    - If Yes, go to Q 15.
    - If No, complete.
  15. Did the Commissioner of Police ensure that the forensic material was destroyed within 21 days after receiving the request? [Note that forensic material is taken to have been destroyed if it is no longer possible to identify the person from whom the material was obtained.]
    - If Yes, complete.
    - If No, go to Q16.
  16. Was a retention order or assimilation order made within 14 days of receiving the request?
    - If Yes, complete retention order checklist or assimilation order checklist as appropriate.
    - If No, non-compliant.

### Suspects procedures checklist

1. Was the person suspected of a serious offence?
  - Yes, go to Q2.
  - No, non-compliant procedure.
2. Was the procedure only a simple forensic procedure?

- Yes, go to Q17.
  - No, go to Q3.
3. Did a senior police officer make an order authorising the forensic procedure?
- Yes, go to Q4.
  - No, non-compliant forensic procedure. Go to Q17.
4. Was a compliant application for the senior police officer's order made? [Note that the application must be in writing; it must be made by a police officer; it must state the nature of the suspected offence and the grounds for suspecting that the respondent has committed the offence; it must also state the nature of the forensic procedure sought and the grounds for suspecting the procedure could produce evidence of value to the investigation of the suspected offence.]
- Yes, go to Q5.
  - No, non-compliant application. Go to Q5.
5. Was a copy of the application given to the respondent?
- Yes, go to Q7.
  - No, go to Q6.
6. Was the non-provision of the application to the respondent due to the fact that the application was of special urgency? [An application of special urgency can be made when the respondent cannot be located at the time the application is made and evidence (or the probative value of evidence) may be lost or destroyed if the forensic procedure is not carried out urgently.]
- Yes, go to Q7.
  - No, non-compliant order. Go to Q7.
7. Did the senior police officer conduct an informal hearing before making the order? [Note that the hearing can be conducted by telephone or other electronic means.]
- Yes, go to Q9.
  - No, go to Q8.
8. Was an informal hearing not held because the application was of special urgency? [Note that an order made in these circumstances only remains in force for a period of 12 hours.]
- Yes, go to Q12.
  - No, non-compliant order. Go to Q12.
9. Was the respondent a protected person?
- Yes, go to Q10.
  - No, go to Q11.
10. Was the protected person represented by an appropriate representative at the hearing? [An appropriate representative may be (a) a parent, relative or friend chosen by, or acceptable to, the protected person; or (b) if there is no available person in category (a), an advocate for the protected person nominated by a government or private agency with responsibilities for care of protected persons of the relevant class; or (c) if there is no available person within category (a) or (b), a person, who is not a police officer or person involved in the investigation of the offence, chosen by a police officer in charge of a police station or the investigating officer.]
- Yes, go to Q11.

- No, non-compliant order. Go to Q11.
11. Was the respondent or the respondent's representative/s given a reasonable opportunity to make representations at the hearing?
- Yes, go to Q12.
  - No, non-compliant order. Go to Q12.
12. Did the senior police officer who made the order satisfy themselves that there were reasonable grounds to suspect that the respondent had committed a serious offence?
- Yes, go to Q13.
  - No, non-compliant order. Go to Q13.
13. Did the senior police officer who made the order satisfy themselves that there were reasonable grounds to suspect that the forensic procedure could produce material of value to the investigation of the offence?
- Yes, go to Q14.
  - No, non-compliant order. Go to Q14.
14. Did the senior police officer who made the order satisfy themselves that the public interest in obtaining evidence outweighed the public interest in ensuring that private individuals are protected from unwanted interference? [Note that, in balancing the public interests, the senior police officer is required to have regard to: (a) the seriousness of the suspected offence; (b) the extent to which the procedure is necessary for the proper investigation of the offence; (c) any likely effects of the procedure on the welfare of the respondent given his/her age, physical and mental health, and cultural and ethnic background; (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence of the same or similar probative value to confirm/disprove that the respondent committed the offence; and (e) any other relevant factors.]
- Yes, go to Q15.
  - No, non-compliant order. Go to Q15.
15. Did the senior police officer make a written record of the order and the reasons for it?
- Yes, go to Q16.
  - No, non-compliant order. Go to Q17.
16. Was a copy of the order given to the respondent?
- Yes. Go to Q17.
  - No, non-compliant. Go to Q17.
17. Before the procedure was carried out did a police officer inform the person that reasonable force could be used to carry out the procedure and that, if the person obstructed or resisted the procedure, evidence of that fact might be admissible in proceedings against the person?
- Yes, go to Q18.
  - No, non-complaint procedure. Go to Q18.
18. Was the respondent not in lawful custody and directed to attend a particular place at a particular time to undergo the forensic procedure?
- Yes, go to Q19.

- No. Complete.
19. Was the respondent given a written record of the directions? [Note that the directions should encompass (a) the time, place and manner in which the forensic procedure is to be carried out, (b) the custody of the person while the procedure is being carried out and (c) any other incidental matter.]
    - Yes, go to Q20.
    - No, non-compliant direction. Go to Q20.
  20. Was the respondent informed that if they failed to comply with the directions, a warrant might be issued by the Magistrates Court for the respondent's arrest?
    - Yes. Go to Q21.
    - No, non-compliant direction. Go to Q21.
  21. Did the Commissioner of Police ensure that a part of the forensic material, sufficient for analysis, was set aside for the subject?
    - Yes, go to Q 22.
    - No, non-compliant. Complete.
  22. Did the Commissioner ensure that reasonable care was taken to ensure that the material set aside was protected from degradation?
    - Yes, go to Q23.
    - No, non-compliant. Go to Q23.
  23. Did the subject express a desire to have the material analysed?
    - Yes, go to Q24
    - No. Complete.
  24. Did the Commissioner of Police ensure that reasonable assistance was given to the subject to ensure that the material was protected from degradation until it was analysed?
    - Yes. Complete.
    - No, non-compliant. Complete.

### Offenders procedures checklist

1. Was the procedure only a simple identity procedure?
  - Yes, go to Q2.
  - No, non-compliant procedure. Go to Q2.
2. Was the offender serving a term of imprisonment, detention or home detention?
  - Yes, go to Q7.
  - No, go to Q3.
3. Was the offender being detained as a result of being declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935*?
  - Yes, go to Q7.
  - No, go to Q4.

4. Had the person been convicted of a serious offence?
  - Yes, go to Q7.
  - No, go to Q5.
5. Had the person been declared liable to supervision under Part 8A of the Criminal Law Consolidation Act?
  - Yes, go to Q7.
  - No, go to Q6.
6. Was the person a registrable offender under the *Child Sex Offenders Registration Act 2006*?
  - Yes, go to Q7.
  - No, go to Q7.
7. Before the procedure was carried out did a police officer inform the person that reasonable force could be used to carry out the procedure and that, if the person obstructed or resisted the procedure, evidence of that fact might be admissible in proceedings against the person?
  - Yes, go to Q8.
  - No, non-compliant procedure. Go to Q8.
8. Was the offender not in lawful custody and directed to attend a particular place at a particular time to undergo the forensic procedure?
  - Yes, go to Q9.
  - No. Complete.
9. Was the offender given a written record of the directions? [Note that the directions should encompass (a) the time, place and manner in which the forensic procedure is to be carried out, (b) the custody of the person while the procedure is being carried out and (c) any other incidental matter.]
  - Yes, go to Q10.
  - No, non-compliant direction. Go to Q10.
10. Was the offender informed that if they failed to comply with the directions, a warrant might be issued by the Magistrates Court for the respondent's arrest?
  - Yes. Go to Q11.
  - No, non-compliant. Go to Q11.
11. Did the Commissioner of Police ensure that a part of the forensic material, sufficient for analysis, was set aside for the subject?
  - Yes, go to Q 12.
  - No, non-compliant. Complete.
12. Did the Commissioner ensure that reasonable care was taken to ensure that the material set aside was protected from degradation?
  - Yes, go to Q13.
  - No, non-compliant. Go to Q13.
13. Did the subject express a desire to have the material analysed?

- Yes, go to Q14
  - No. Complete.
14. Did the Commissioner of Police ensure that reasonable assistance was given to the subject to ensure that the material was protected from degradation until it was analysed?
- Yes. Complete.
  - No, non-compliant. Complete.

### Blood testing for communicable diseases checklist

1. Did the forensic procedure that was carried out consist only of the taking of a sample of blood from the subject?
  - Yes, go to Q2.
  - No, non-compliant. Go to Q2.
2. Did a senior police officer authorise the forensic procedure?
  - Yes, go to Q3.
  - No, non-compliant. Go to Q3.
3. Was the authorising officer satisfied that the subject was suspected of a prescribed serious offence?
  - Yes, go to Q4.
  - No, non-compliant. Go to Q4.
4. Was the authorising officer satisfied that a person engaged in prescribed employment came into contact with/was exposed to the subject's biological material?
  - Yes, go to Q5.
  - No, non-compliant. Go to Q5.
5. Did the authorising officer make a written record of the grounds on which they determined that the forensic procedure should be carried out on the subject?
  - Yes, go to Q6.
  - No, non-compliant. Go to Q7.
6. Was a copy of the record given to the subject?
  - Yes. Go to Q7.
  - No, non-compliant. Go to Q7.
7. Before the procedure was carried out, did the authorising officer give the subject written notice:
  - a) that a blood sample was to be taken from the subject pursuant to s20B of the Act? (Regulation 4A)
  - b) that the blood would be tested for communicable diseases?
  - c) inviting the subject to nominate a medical practitioner to receive a copy of the results?
  - Yes, go to Q8.
  - No, non-compliant. Go to Q8.

8. Was the procedure carried out by a medical practitioner or a person who is qualified as required by the regulations?
  - Yes, go to Q9.
  - No, non-compliant. Go to Q9.
9. Was the person given an opportunity to have a witness present (see s25 of the CLFPA Act)?
  - Yes, go to Q10.
  - No, non-compliant. Go to Q10.
10. Did the Commissioner take reasonable steps to notify each affected person/nominated medical practitioner of the test results?
  - Yes. Go to Q11.
  - No, non-compliant. Go to Q11.
11. Did the Commissioner ensure that the blood sample was destroyed as soon as practicable after it was tested?
  - Yes. Complete.
  - No, non-compliant. Complete.

### Forensic procedures on deceased persons

1. Was the forensic procedure authorised by a senior police officer?
  - Yes, go to Q2.
  - No, non-compliant. Go to Q2.
2. Was the procedure authorised by an instrument in writing?
  - Yes, go to Q3.
  - No, non-compliant. Go to Q3.
3. Was the authorising officer satisfied that the evidence obtained from carrying out the procedure was likely to assist in the investigation of a serious offence or the identification of the deceased person?
  - Yes, go to Q4.
  - No, non-compliant. Go to Q4.
4. Was the forensic procedure carried out by a medical practitioner or a person who is qualified as required by the regulations to carry out forensic procedures of the relevant type?
  - Yes. Complete.
  - No, non-compliant. Complete.

## Annexure 2 - Summary of audit results

### Volunteers and victims procedures

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s7(2)	The procedure is not to be carried out on a person who is suspected of a serious offence and if the relevant person consents to the procedure or if the procedure is authorised by a senior police officer	69	3 procedures raised issues as to whether consent was properly obtained.	Non-compliance does not affect admissibility of evidence but the failure to obtain consent of vulnerable persons is concerning.
s8	Manner in which relevant person may consent	69	0	N/A
s9	Senior police officer to authorise carrying out of forensic procedure in certain circumstances	1 (Only 1 of 69 victims and volunteers procedures was authorised by a senior police officer)	0	N/A
s10	Consent may be withdrawn by relevant person	0 (Nil of 69 victims and volunteers procedures involved withdrawal of consent)	N/A	N/A
s11	Before a forensic procedure is carried out on a protected person, it must be explained to them that	69	0	N/A

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
	the procedure will not be carried out if they object to the procedure			
s12	The relevant person must be given a written statement explaining their right to request destruction of the forensic material	69	1 - The police officer who carried out a forensic procedure on a hospitalised victim provided the written statement about the victim's right to request the destruction of his forensic material to a person other than the victim (and not the relevant person).	N/A
s21(3)	If reasonably practicable, a forensic procedure that involves exposure of, or contact with intimate areas of a female person or transgender person or intersex person who identifies as female, must not be carried out by a person of a different sex	69	4	Recommendation 1: that, where intimate procedures are carried out by a person who is not same gender as victim, a record should be made as to why it was not reasonably practicable to comply with s12(3).
s26(1)(b)	Audiovisual recording of an intrusive forensic procedure must be made if requested	0 (Circumstance did not arise in audit)	N/A	N/A
s36(2) s38(1)	A retention order can only be made by a senior police officer on the written	0 of 69 (No retention orders were sought during the audit period)	N/A	N/A

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
	application of a police officer			
s37	An assimilation order can only be made by a senior police officer on the written application of a police officer	0 of 69 (No assimilation orders were sought during the audit period)	1 - In one case it appears investigating police officers failed to seek an assimilation order in circumstances where material collected from a volunteer was subsequently submitted for analysis on basis person was now a suspect.	Raises issue of procedural fairness. May also affect admissibility of evidence under s47 of the CLFP Act.
s39(1)(a)	Upon receipt of a written request for forensic material to be destroyed the Commissioner of Police must ensure that the material is destroyed within 21 days	12 of 69	0	N/A
s39(3)	Protected person may request destruction of forensic material	0 (Circumstance did not arise in audit)	N/A	N/A

## Suspects procedures - simple identity procedures

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s14(2)	A simple identity procedure may only be conducted on a person who is suspected of a serious offence (or the procedure is authorised by a senior police officer's order	303	0	N/A
s22	Right to be assisted by an interpreter	3 of 303 simple identity procedures (suspects)	2: (1) The interpreter was a police officer, placing him in a position where he could have been perceived as having a conflict of interest. (2) The assisting interpreter was also suspected of having committed theft and who had been the subject of a simple identity procedure carried out by the same police officer almost immediately before.	Recommendations 2 and 3: that general order be amended so as to direct that: <ul style="list-style-type: none"> <li>• police officers not assist as interpreters</li> <li>• suspected co-offenders should not act as interpreter for suspects.</li> </ul>
s29(1)	If a police officer wishes to conduct a forensic procedure on a suspect who is not in custody, they may issue directions to the suspect to attend a particular	1 of 303	0	N/A

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
	place at a particular time			
s30	Before suspects procedures are conducted a police officer must warn the suspect that force may be used and that, if the suspect obstructs or resists the procedure, evidence of that fact may be admissible in proceedings against them	303	0	N/A
s31(1)	Reasonable force to carry out suspect procedures is permitted	303	N/A No evidence that force was required in any of the procedures audited	N/A

## Suspects procedures - procedures other than simple identity procedures

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s15(2)(a)	Suspects forensic procedures must be authorised by a senior police officer on written application by a police officer	43	0	N/A
s15(3)	Except in circumstances of special urgency, a copy of the application must be given to the suspect	43	0	N/A
s17(1)	A suspect may be represented by a legal practitioner at a hearing	33	1 - One set of notes showed that, while the suspect had requested legal advice about the proposed procedures, the informal hearing proceeded without such advice having been obtained.	Recommendation 6: that the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police officers can be achieved.
s17(2) s17(3)(a) s17(3)(b) s17(3)(c)	If the suspect is a protected person, they must be represented by an appropriate representative at the hearing (and may also be represented by a legal practitioner)	43	7 (1) One of the records shows a child had been represented by a field officer from the Aboriginal Legal Rights Movement. It seems unlikely that they were also a parent, relative or friend of the suspect. (2) In two records it appears that a child was represented by a Red Cross worker or volunteer. Again it seems unlikely that the workers were a parent, relative or friend of the suspect. (3) One set of notes revealed that the	Recommendation 4: that the Commissioner of Police give consideration as to how increased compliance with suspects procedure relating to children could be achieved. Recommendation 6: that the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
			<p>victim of the offence had told police that the suspect had been calling on a 'devil spirit' while he attacked her. This raises the issue of whether the suspect ought to have been treated as a protected person, yet no appropriate representative was present at the informal hearing.</p> <p>(4) Another set of notes also showed that the senior police officer had decided to treat the suspect as a protected person because of his mental incapacity. The suspect was unable to locate an appropriate person to represent him but a nurse at the Wakefield Hospital agreed to assist</p> <p>(5) A further set of notes also showed that the senior police officer had decided to treat the suspect as a protected person. Although the suspect was represented by a legal practitioner during the informal hearing, no appropriate representative appears to have been present.</p> <p>(6) In another case the senior police officer noted that the suspect suffered from bipolar disorder and was 'currently unmedicated' and also noted that the suspect appeared to</p>	officers can be achieved.

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
			have 'limited cognitive ability'. Despite this, the senior police officer determined that the suspect was not a protected person and he was not represented by an appropriate person during the hearing.	
s17(4)	The respondent and any representative must be given a reasonable opportunity to make representations during the informal hearing conducted by the senior police officer	43	7 (1) An audio-visual record showed a semi-conscious suspect on a hospital bed. It was not clear how he could have been given a reasonable opportunity to make representations. (2) Six sets of notes did not evidence that the suspect or their representative were given a reasonable opportunity to make representations during the informal hearing.	Recommendation 6: that the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police officers can be achieved.
s19(1)	Suspects forensic procedures authorised by a senior police officer must be conducted on a person suspected of a serious offence	33	3 - Three sets of notes did not satisfy me that the senior police officer had satisfied himself that there were reasonable grounds to suspect that suspect had committed a serious offence.	Recommendation 6: that the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police officers can be achieved.
s19(3) s19(4)	If the senior police officer makes the order that is sought, they are obliged to make a written record of the order and their reasons for making it. A copy of the order must be given to the suspect.	33	1 - In one case the suspect was not given a copy of the order until after the forensic procedure had been carried out.	It is unlikely this would cause the evidence to be inadmissible.

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s21(1)	A forensic procedure must be carried out humanely and with care	11 audio-visual records of suspects procedures authorised by senior police officers	0	N/A
s21(3)	If reasonably practicable, a forensic procedure that involves exposure of, or contact with intimate areas of a female person or transgender person or intersex person who identifies as female, must not be carried out by a person of a different sex.	20	8 Eight of the 20 procedures were carried out by a female on a male suspect. It is not apparent whether in each of those cases it was not reasonably practicable to have a male carry out the procedure. In one case the suspect was a male child and the forensic procedures were carried out by a female nurse at the City Watch House. This was despite the suspect having stated his preference for the procedures to be carried out by a male. In another case the suspect was a male child and the forensic procedures was also carried out by a female nurse at the City Watch House.	Recommendation 5: that where intimate procedures are carried out by a person who is not the same gender as the suspect, a record should be made as to why it was not practicable to comply with s21(3).
s24	Forensic procedures must be carried out by an appropriate person	43	0	N/A
s25(1)	In circumstances where an intrusive forensic procedure is to	43	2 (1) One of the audio-visual records showed that when a suspect was advised of his right to choose a	N/A

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
	be conducted on any person, including a suspect, the person must be afforded a reasonable opportunity to arrange for attendance, at the person's expense, of a medical practitioner of the person's choice to witness the procedure		<p>medical practitioner to witness the procedures, he named two doctors. The investigating police officer leaves the room apparently to attempt to contact one of the named doctors. The record stops and resumes when the forensic procedures are being conducted. The suspect appears acquiescent. It is not clear what attempts were made to contact the named doctors.</p> <p>(2) One audio-visual record showed a semi-conscious suspect on a hospital bed. It is not clear how he could have been allowed a reasonable opportunity to arrange for the attendance of a medical practitioner of his choice to witness the procedure.</p>	
s26(1)(a)	There must be an audio-visual record of intrusive procedures	11	0	N/A
s30	Before suspects procedures are conducted a police officer must warn the suspect that force may be used and that, if the suspect obstructs or resists the procedure, evidence of that fact may be admissible in	43	1 - In an audio-visual record showed a semi-conscious suspect on a hospital bed. It is not clear how he could have been given and understood the compulsory warning that reasonable force could be used to carry out procedures	Recommendation 6: that the Commissioner of Police give consideration as to how increased compliance with suspects procedures by senior police officers can be achieved.

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
	proceedings against them			
s33(1)(a)	Part of material obtained from a suspect or offender must be set aside for independent analysis unless not practicable	N/A	Appears compliant. FTA cards for buccal swabs are kept by Forensic Science SA. Not practicable to set aside a sample of some material (e.g. fingernails and semen)	N/A

## Offenders procedures

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s20(1)	Only a simple identity procedure is authorised as an offenders procedure	47	0	N/A
s20(2)	The procedure is only carried out on persons who are serving a term of imprisonment. detention or home detention; are being detained as a result of being declared liability to supervision; have been convicted of a serious offence; or are registrable offenders	47	0	N/A
s25	Right to have witness present; protected persons must have appropriate person present to witness the procedure	1 of 47 offenders procedures examined	0	N/A
s29	Offenders procedures carried out on a person who is not in custody must be done so in accordance with s29 of the CLFP Act	11 of 47 offenders procedures examined	0	N/A
s30	Warnings to be given by police officer	47	0	N/A

### Blood testing for communicable diseases

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s20B(1)	Senior police officer requiring blood sample must be satisfied person suspected of prescribed offence and likely exposed to biological material of the suspect	7 of 7 blood tests required during audit period	0	N/A
s20B(2)	The senior police officer must make a written record of the grounds on which they determine that the person's blood should be tested and give a copy of that record to the suspect	7 of 7 blood tests required during audit period	0	N/A
Regulation 4A(1)(a)(i) Regulation 4A(1)(a)(ii)	Before a blood test is taken a senior police officer must give written notice that a sample of their blood is to be taken and the blood will be tested for communicable diseases	7 of 7 blood tests required during audit period	7 - In each case the suspects were not given written notice prior undertaking the procedure. Each suspect was given a copy of the application at the conclusion of the procedure advising the blood sample had been taken pursuant to the legislation and would be tested for communicable diseases.	Recommendation 7: that suspects be provided with written notice in a separate document prior to undertaking the procedure.
Regulation 4A(1)(b)	Before a blood sample is taken a senior police officer must invite the suspect to nominate a	7 of 7 blood tests required during audit period	0	N/A

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
	medical practitioner to receive a copy of the results of the testing			
Regulation 4B(1) Regulation 4B(2)	After the blood sample is taken the Commissioner of Police must take reasonable steps to notify the suspect and their nominated medical practitioner of the results of the testing	7 of 7 blood tests required during audit period	0	N/A
Regulation 4C(1)	After the blood sample is taken the Commissioner of Police must take reasonable steps to notify the person who was engaged in prescribed employment and who likely came into contact with or was exposed to suspect's biological material of the results of the testing	7 of 7 blood tests required during audit period	0	N/A
s39A	After the blood sample has been tested the Commissioner of Police must ensure that blood samples are destroyed as soon as practicable	7 of 7 blood tests required during audit period	0	N/A

## Forensic procedures on deceased persons

CLFP Act	Requirement	Sample Size	Non-Compliant Procedures	Comment / Recommendation
s55(1)	A senior police officer may, by instrument in writing, authorise the carrying out of a forensic procedure on a deceased person	17 of 31 procedures in total	1 - One authorisation was made by a Detective Acting Inspector.	N/A
s55(1)	A senior police officer may authorise the procedure if they are satisfied that the evidence obtained is likely to assist in the investigation of a serious offence or in the identification of the deceased	17 of 31 procedures in total	0	N/A
s55(5)	The forensic procedure must be carried out by a medical practitioner or a person who is qualified to carry out forensic procedures of the relevant type	17 of 31 procedures in total	0 - All procedures conducted as part of post-mortem	N/A