



OmbudsmanSA

AUDIT REPORT

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

SEPTEMBER 2019

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To:

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

I present this report on the 2018-2019 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.

A handwritten signature in black ink, appearing to read 'E Strickland'.

Emily Strickland
**Deputy Ombudsman
Ombudsman SA**

30 September 2019

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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 11 May 2018 to 30 June 2019.

The audit process comprised 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, liaising with the Commissioner of Police and his delegates, and meeting with police officers from Forensic Services Branch, DNA Management Unit and Forensic Science SA. Records in relation to all of the types of procedures provided for in the CLFP Act were examined and most of the Act's requirements were considered.

The Commissioner of Police ensured that this Office was provided with all information requested. Assistance was also provided by the Chief Executive of Forensic Science SA.

The 2019 audit revealed widespread compliance with the CLFP Act. Indeed, the audit demonstrated a higher level of compliance than the previous year; in particular, I note improvements in terms of senior police officer orders for procedures on suspects.

Where individual cases gave rise to concerns these are detailed in the body of this report. Some of these procedures were technically compliant with the legislation but in my view improved practice could be achieved.

The CLFP Act does not provide the Ombudsman with specific power to make recommendations but I nevertheless have made suggestions where I consider improvements to practice are warranted. These are as follows:

- Recommendation 1** That consideration be given by the Commissioner of SA Police to amend the General Order to provide that, where reasonably practicable, interpreters should be professionally qualified interpreters.
- Recommendation 2** That documentation concerning sexual assault forensic examinations is amended so as to ensure that advice is provided regarding the volunteers/victims right to request the making of an audio-visual record of the procedure.
- Recommendation 3** That the SA Police consider issuing a reminder to staff that an appropriate representative must be present at an authorised forensic procedure where the subject is a protected person in accordance with section 25(2) of the CLFP Act.
- Recommendation 4** That the SA Police give consideration to amending relevant procedures to ensure that reasonable steps are taken to notify suspects of the results of the testing, whatever those results may be.

Background and 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 for 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 SA (**FSSA**)

and 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. Forensic testing is clearly a vital tool for law enforcement and the CLFP Act accordingly provides broad powers for the collection and storage of forensic evidence. The Act, however, also provides a number of safeguards and limits to those powers to ensure that the integrity of the process is maintained, and that procedures are conducted in a fair manner.
4. The key purpose of this audit, as I see it, is to ensure that those safeguards and limits are upheld. A failure to comply with the Act may undermine fundamental rights which the Act exists to protect. 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.
5. 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.¹
 6. This is the second CLFP Act audit the Ombudsman's Office has undertaken. The previous audit examined compliance with the CLFP Act during the period from 8 February 2019 to 10 May 2018.²
 7. This audit considers compliance with the CLFP Act and the *Criminal Law (Forensic Procedures) Regulations 2007* (**the Regulations**) made under that Act during the period 11 May 2018 to 30 June 2019 (**the audit period**).

Audit methodology

8. The CLFP Act together with the *Criminal Law (Forensic Procedures) Regulations 2007* (**the regulations**) sets out requirements in relation to the following types of forensic procedures:
 - volunteers and victims procedures
 - suspects procedures
 - offenders procedures
 - blood testing for communicable diseases
 - forensic procedures on deceased persons.
9. 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 the SA Police Forensic Services Branch. The role of DNAMU is described in SA Police General Order 'Forensic procedures' (**the General Order**) as follows:

The DNAMU is responsible for:

- managing SAPOL compliance with the CLFPA
- providing a central advisory and liaison point for police and other agencies
- providing advice on assimilation and retention orders
- consulting with [Forensic Services Branch] Training and Development Section regarding DNA training for SAPOL
- coordination of prisoner testing with Police Corrections Section
- liaison between SAPOL and FSSA regarding DNA mass testing

¹ 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.

²

<http://www.parliament.sa.gov.au/HouseofAssembly/BusinessoftheAssembly/RecordsandPapers/TabledPapersandPetitions/Pages/TabledPapersandPetitions.aspx?TPSelectedView=1&TPProperties=C&TPParliamentSession=54%2c1>

- providing effective and efficient working relationships between DNAMU, FSSA and other areas of SAPOL relevant to DNA matters
- improving timelines of sample collecting and processing
- timely reporting of DNA matches that provide leads and crime associations
- overall management of the quality of mouth swab sampling kits and fingerprick (blood) sampling kits, and liaising with the supplier on these issues
- processing red bags for quality assurance
- facilitating the destruction of a volunteer and/or victim sample on the request of the volunteer and/or victim
- providing instructions to FSSA regarding the period of storage of DNA profiles
- liaising with interstate and overseas jurisdictions, and Interpol in regard to DNA match details
- liaising with [the Australian Criminal Intelligence Commission] in regard to [National Criminal Investigation DNA Database] operational issues.³

DNAMU maintain a quality assurance function for all volunteer, victim, suspect and/or offender samples received as intelligence (red bag) samples⁴ or evidentiary reference samples⁵ 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 ensure the samples meet all legislative and procedural requirements. The samples will remain in the custody of Evidence Desk employees once vetted.

Once the samples have been quality assured the submitting member will receive a task advising the samples have been approved for submission to FSSA via the Evidence Desk.

10. 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). DNAMU retains records of all forensic procedures vetted by it.
11. Ombudsman SA Officers attended DNAMU offices and inspected randomly-selected records relating to forensic procedures conducted during the audit period. Spreadsheets provided prompts and enabled the recording of whether the procedures inspected had been carried out in compliance with the relevant requirements of the CLFP Act and the Regulations.

³ This material is taken from the General Order that was issued on 22 May 2019. The previous General Order described DNAMU's role in almost identical terms.

⁴ 'Intelligence (red bag) samples' are samples of biological material taken from a person via a mouth swab or fingerprick. They are taken in order to obtain a profile of a person's DNA. Once a police officer has conducted a mouth swab or fingerprick, the sample of biological material along with the paperwork relating to it, is placed in a local locked DNA red collection box. The local officer in charge is responsible for ensuring that the samples are removed from the collection box at least once a week and forwarded to DNAMU in a sealed red canvas bag.

⁵ 'Evidentiary reference samples' are samples taken for direct comparison with biological material located at a crime scene.

12. In addition to examining records of procedures stored at DNAMU's offices, Ombudsman SA Officers:
- viewed audio visual recordings of intrusive forensic procedures carried out on suspects during the audit period
 - obtained and inspected documents relating to senior police officers' authorisations of forensic procedures (other than simple identity procedures) carried out on suspects
 - sought further information from SAPOL regarding specific records inspected; for example further information from the relevant investigation or authorising officer
 - obtained copies of relevant general orders and standard operating procedures issued by the Commissioner of Police and the Officer in Charge of DNAMU and in force during the audit period
 - obtained a copy of the Memorandum of Administrative Agreement between the Commissioner of Police and the Director of Forensic Science SA, and details of FFSA's procedure and policies
 - met with the Assistant Director, Science and Support, Forensic Services Branch and with the Manager of the Database
 - obtained information from clinicians regarding their qualifications.
13. A summary of the results of these inspections measured against each legislative requirement audited is set out in **Annexure 1**. The 'Audit Discussion' sections of this Report set out details of any compliance issues identified (that is, where it appears from the documentation considered that the Act or Regulations have not been complied with). In addition, the 'Audit Discussion' sections identify:
- procedures which appear to have been non-compliant with the General Order
 - procedures which are compliant with the legislative requirements but which raise concerns in terms of good practice.
14. During this audit enquiries were also made in relation to the DNA database system which holds information relating to forensic material collected under the CLFP Act. Section 41 of the Act permits the Commissioner of Police to maintain a database on which DNA profiles obtained from forensic material are stored. The Commissioner has delegated the administration of this database to the Director of Forensic Science SA (FSSA). The terms of that delegation are set out in a Memorandum of Administrative Agreement, a copy of which was obtained from the Commissioner.⁶
15. Access to and use of the information stored on the database is governed by FSSA policies and procedures. During the audit, Ombudsman SA Officers met with FSSA's Assistant Director, Science and Support and DNA Database Program Manager and received written responses to questions regarding the systems and procedures FSSA has in place to protect the integrity of the DNA database system.
16. A draft copy of this Report⁷ was provided to SA Police and Forensic Science SA for comment prior to finalisation. I have considered submissions from both agencies and

⁶ The delegation is made pursuant to section 19(1) of the *Police Act 1998*, which provides that the Commissioner of Police may, by instrument in writing, delegate any of the powers or functions conferred on or assigned to him by or under any Act to a particular person or to the person for the time being occupying a particular position.

⁷ That copy contained some names of persons on whom procedures had been conducted so that SA Police could identify the procedures mentioned; the final version has replaced those names with [Redacted]

have amended the Report accordingly; in particular I note further information provided by SAPOL provided clarification in relation to a number of procedures that I had previously expressed concern about. I thank SAPOL and Forensic Science SA for responding to the draft report so promptly.⁸

17. Section 57 of the CLFP does not require the Ombudsman to make recommendations as part of the compliance audit. However, I have taken the liberty of making informal recommendations where I consider changes to procedures may improve compliance or practice.
18. In my 2018 report, I made seven recommendations and I am pleased that the Commissioner of Police has implemented all of them. Table 1 sets out the 2018 recommendations and the implementation action taken by SA Police.

Table 1: Recommendations from 2018 Audit Report

Recommendation 1	That the Commissioner of Police require that, when intimate procedures are carried out by a person who is not of 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.	Modification of relevant form.
Recommendation 2	That the Commissioner of Police amend the General Order 'Forensic Procedures' so as to direct that police officers should not act as interpreters under section 22 of the CLFP Act.	General Order amended.
Recommendation 3	That the Commissioner of Police amend the General Order 'Forensic Procedures' so as to direct that suspected co-offenders should not act as interpreters for suspects.	General Order amended.
Recommendation 4	That the Commissioner of Police give consideration as to how increased compliance with the CLFP Act can be achieved in cases of child suspects.	Modification of relevant forms and Aide Memoire for senior police officers.
Recommendation 5	That the Commissioner of Police require that, when intimate procedures are carried out by a person who is not of 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.	Modification of relevant forms.
Recommendation 6	That the Commissioner of Police give consideration as to how increased compliance with the CLFP Act can be achieved by senior police officers who authorise forensic procedures on suspects.	Modification of relevant forms and Aide Memoire for senior police officers.
Recommendation 7	That, where blood testing for communicable diseases takes place, suspects are provided with written notice of the procedure prior to the procedure being undertaken.	Modification of relevant form.

⁸ I note the agencies were provided with less than a week to consider the draft report and make submissions.

Audit Scope

19. During this audit, Ombudsman SA Officers examined records relating to each type of forensic procedure authorised by the CLFP Act with the exception of retention orders and assimilation orders (of which none were made during the audit period).
20. Prior to conducting the 2017/18 audit, the Ombudsman sought advice from an experienced audit firm to ensure that the approach adopted in relation to sample sizes aligned with accepted auditing standards. Table 2 sets out the volume of each type of procedure carried out by or on behalf of SA Police during the audit period and the sample size for each procedure type examined during the audit.

Table 2: Volume of procedures and audit sample sizes

Type of procedure/ Orders made	Number of procedures carried out/ Orders made during the audit period	Number of procedures/ Orders examined by Ombudsman SA	Percentage of procedures/ Orders examined by Ombudsman SA
Volunteers and victims procedures	802	79	9.8%
Retention orders	0	N/A	N/A
Assimilation orders	0	N/A	N/A
Suspects procedures ⁹	9,502	357	3.7%
Offenders procedures	10	10	100%
Forensic procedures on deceased persons	20	20	100%
Blood testing for communicable diseases	8	8	100%

21. Not all legislative requirements were audited¹⁰ and in some instances the records held by DNMAU were such that I could not establish whether or not there had been legislative compliance. I have recorded instances where a conclusion could not be reached in the comments section of the tables annexed to this report.
22. 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 embarrassment¹¹
 - forensic procedures are carried out in the presence or view of no more persons than are necessary¹²

⁹ As stated in the body of this report, DNAMU does not file records relating to simple identity procedures carried out on suspects separately from those relating to simple identity procedures carried out on offenders. It is therefore not possible to be precise about the numbers of each procedure carried out during the audit period. However, it appears likely that there were no more than 10 procedures carried out on offenders and that Ombudsman SA Officers therefore inspected records relating to each of those procedures.

¹⁰ For example, sections 15(2) and 17(1) of the CLFP Act.

¹¹ Section 21(1).

¹² Section 21(2).

- any subject of a forensic procedure who is not reasonably fluent in English is assisted by an interpreter¹³
- forensic procedures are carried out in a way that is consistent with appropriate medical and professional standards.¹⁴

23. As I observed in my first audit report, it is not possible to confirm that all forensic procedures examined met these standards. The CLFP Act only requires the making of audio-visual records of intrusive forensic procedures carried out on suspects (and intrusive forensic procedures carried out on victims or volunteers if such a recording is requested by the victim or volunteer).¹⁵ 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 covered by CCTV like a cells complex), I understand the identification and location of such records would be resource-intensive for SA Police. In light of this and in light of the fact I am able to audit these standards in relation to other types of procedures, I have not sought access to any such records.
24. When a police officer carries out a simple identity procedure on a suspect or offender, 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 of such procedures, I am unable to offer an assurance that the need for an interpreter was recognised and provided to each person who required that service.

¹³ Section 22.

¹⁴ Section 23.

¹⁵ Section 26.

Volunteers and victims procedures

Relevant definitions

Appropriate representative may be -

- (a) a relative or friend, chosen by, or acceptable to the protected person; or
- (b) if there is no available person within category (a) - an advocate for the protected person nominated by an agency with responsibilities for the care of protected persons of the relevant class; or
- (c) if there is no available person within either category (a) or (b) - a person, who is not a police officer or person involved in the investigation, chosen by a police officer in charge of a police station or the investigating police officer.¹⁶

Intrusive forensic procedure means -

- (a) 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 a transgender or intersex person who identifies as female; or
- (b) the taking of a dental impression; or
- (c) the taking of a sample of blood.¹⁷

Protected person means -

- (a) a child under the age of 16 years; or
- (b) a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure.¹⁸

Qualified person means -

- (a) a medical practitioner¹⁹; or
- (b) a registered nurse (for any procedure other than a dental impression)²⁰; or
- (c) a police officer authorised by the Commissioner of Police to take prints of the hands, fingers, feet or toes²¹; or
- (d) a police officer authorised by the Commissioner of Police to non-intrusively examine a part of a person's body²²; or
- (e) a person who has satisfactorily completed a course of training approved by the Attorney-General is qualified to carry out the following forensic procedures (provided they are non-intrusive):
 - (i) taking samples of hair from a person's body²³
 - (ii) taking samples of fingernails toenails, or material from under a fingernail or toenail²⁴

¹⁶ Section 25(3).

¹⁷ Section 3(1).

¹⁸ Section 6.

¹⁹ Section 24(1)(a).

²⁰ Regulation 5(1)(a).

²¹ Regulation 5(1)(b)(i).

²² Regulation 5(1)(b)(ii).

²³ Regulation 5(1)(c)(i).

²⁴ Regulation 5(1)(c)(ii).

- (iii) taking samples of biological or other material from an external part of the body²⁵
- (iv) buccal swabs²⁶
- (v) taking samples of blood by finger prick²⁷
- (vi) taking impressions of casts or wounds.²⁸

Relevant person means -

- (a) if the person on who the forensic procedure is to be carried out is not a protected person - that person
- (b) if the person in question is a child - the closest available next of kin²⁹
- (c) if the person is not a child but is a protected person by reason of their incapacity - their guardian³⁰, or if they don't have a guardian, the closest available next of kin.^{31 32}

Senior police officer means a police officer of or above the rank of inspector.³³

Legislative requirements

Volunteers and victims procedures can be carried out on people who are not suspected of having committed the offence that is being investigated (section 7(2)). They can only be carried out if the relevant person consents to the procedure, or a senior police officer authorises the carrying out of the procedure (section 7(2)).

A senior police officer can authorise the carrying out of a victims and volunteers procedure if satisfied that it is impracticable or inappropriate to obtain consent to the procedure from the relevant person for one of two reasons, and if satisfied that the carrying out of the procedure is justified in the circumstances of the case (section 9). According to the Act it will be impracticable or inappropriate to obtain consent from the relevant person if either it is difficult to locate or contact them, or the relevant person or a person related to or associated with them is under suspicion in relation to a criminal offence (section 9(a)(i) and (ii)).

A senior police officer's authorisation must be in writing and must specify the forensic procedure that is authorised (section 9).

A relevant person who gives consent to a forensic procedure can withdraw their consent at any time before completion of the procedure (section 10(1)). If they do so (either expressly or by their behaviour), the procedure can only be continued or resumed if a senior police officer authorises that continuation or resumption (section 10(3)).

There are special provisions for volunteers and victims procedures carried out on protected persons. Firstly, before such a procedure is carried out, it must be explained to the protected

²⁵ Regulation 5(1)(c)(iii).

²⁶ Regulation 5(1)(c)(iv).

²⁷ Regulation 5(1)(c)(v).

²⁸ Regulation 5(1)(c)(vi).

²⁹ Section 3(1) prescribes an order of priority for a child's closest available next of kin: (i) the child's parent; (ii) the child's brother or sister; (iii) the child's guardian. Note also that the next of kin cannot be a protected person themselves.

³⁰ Section 3(1) defines 'guardian' to mean a person acting or appointed under any Act or law as the guardian of another.

³¹ Section 3(1) prescribes an order of priority for a person who lacks capacity's closest available next of kin: (i) the person's spouse or partner; (ii) the person's son or daughter; (iii) the person's parent; (iv) the person's brother or sister. The next of kind cannot be a protected person themselves.

³² Section 6.

³³ Section 3(1).

person that the procedure will not be carried out if they object to it (section 11(1)). Secondly, the procedure must not continue if the protected person objects to or resists it (section 11(2)).

If forensic material is obtained from a victim or volunteer, the person who carries out the procedure must give the relevant person a written statement explaining their right to request destruction of that material (section 12(1)).

Requests for destruction of forensic material must be made in writing (section 39(2)). The Commissioner of Police must ensure that material obtained from the volunteer or victim - other than material obtained from them that consists of biological material from a different person e.g. the offender - is destroyed within 21 days of receiving the request (section 39(1)). Forensic material is taken to have been destroyed if it is no longer possible to identify the person from whom the material was obtained or to whom it relates (section 39(5)).

If reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or the breasts of a female person or a transgender or intersex person who identifies as female, must not be carried out by a person of a different sex to the victim or volunteer (section 21(3)).

If an intrusive forensic procedure is to be carried out on a victim or volunteer, they must be allowed a reasonable opportunity to arrange for the attendance, at their own expense, of a medical practitioner of their choice to witness the forensic procedure (section 25(1)).

In addition, if a senior police officer authorises the carrying out of an intrusive forensic procedure on a victim or volunteer who is a protected person, an 'appropriate representative' must be present to witness the procedure (section 25(2)).

A victim or volunteer who is the subject of an intrusive forensic procedure may request the making of an audio-visual record of the same (section 26(1)(b)).

Audit discussion

25. 802 volunteer and victim procedures were carried out by or on behalf of SA Police during the audit period. Ombudsman SA Officers inspected records relating to 79 (9.8%) of those procedures. In the vast majority of cases these procedures appeared to have been conducted in accordance with the legislative requirements.
26. Some of the records examined concerned victim and volunteer procedures carried out on 'protected persons'. In these cases the 'relevant person' who may consent to the procedure must be:
 - (i) in the case of a child - the closest available next of kin of the child; or
 - (ii) in any other case - the person's guardian or, if the person does not have a guardian, the closest available next of kin of the person.³⁴

'Closest available next of kin' is in part defined as:

- (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:

³⁴ Section 6.

- (i) a parent of the child;
- (ii) a brother or sister of the child;
- (iii) a guardian of the child...³⁵

'Guardian' is defined in section 3 of the CLFP Act as a 'person acting or appointed under any Act or law as the guardian of another'.

27. In my draft report I expressed a view that two cases involving children in the care of staff from the Department for Child Protection appeared not to comply with the consent provisions³⁶; consent was recorded as being provided by 'carer/house supervisor' and 'an employee of the Department for Child Protection' respectively. I noted that section 68 of the *Children and Young People (Safety) Act 2017* provides:

If the Court places a child or young person under the guardianship of the Chief Executive or any other person or persons under section 53, the Chief Executive or the other person or persons is, or are, the lawful guardian, or guardians, of the child or young person to the exclusion of the rights of any other person.

and stated:

Given this, it appears unlikely that a person matching the description of 'carer/house supervisor' would have been the protected person's 'guardian'. Although the Children and Young People (Safety) Act permits the Chief Executive to delegate such of her powers as she thinks fit to a child or young person's carer³⁷, it is not apparent that the power to consent to a forensic procedure being carried out on a person under guardianship has been delegated. Guidance issued by DCP appears to be silent as to this issue³⁸. Similarly, I am doubtful that a person described as 'an employee of the Department for Child Protection'³⁹ was in fact the child's 'guardian' for the purposes of the Act.

28. However, in response to my draft report, SAPOL submitted that it is of the view that consent was properly provided in these cases as the definition of 'guardian' includes a person 'acting' as such. I consider this interpretation of the Act to be reasonably open to SAPOL. However, I observe that the Commissioner may want to seek legal advice in relation to this question.
29. In a third case the relevant person was recorded as 'uncle'⁴⁰ and the son of the protected person's grandparents and guardians (who were also present); clearly he was not a 'relevant person' for the purposes of the Act. I note that the uncle was also the victim of the offence that had occurred; this in itself should have been reason not to have involved him in the process. I note SAPOL's submission to my draft report that in this case the form was filled out incorrectly. Nevertheless on the evidence before me the uncle provided consent rather than one of the child's guardians and accordingly I consider this procedure to have been non-compliant with the CLFP Act.

³⁵ Section 3.

³⁶ PPMS 19/B48420 and 19/A95872.

³⁷ Section 76 of the *Children and Young People (Safety) Act 2017*.

³⁸ See 'Who Can Say Ok?' issued by DCP and available at <https://www.childprotection.sa.gov.au/sites/default/files/who-can-say-ok.pdf?v=1508997882>.

³⁹ PPMS 19/A95872.

⁴⁰ PPMS 19/B11906.

30. Three records inspected during the Audit indicated that the victim or volunteer was not fluent in English and that assistance was provided by an interpreter⁴¹; it appears these procedures complied with section 22 of the CLFP. Enquiries were made of the Officer in Charge, DNAMU, in relation to a further three cases which, by virtue of the subjects' names, raised the possibility that the victim or volunteer may not have been reasonably fluent in English. Advice was provided that in one of these cases the victim or volunteer spoke fluent English⁴², in another the victim or volunteer could speak English⁴³ and in a third, the victim or volunteer spoke broken English but was assisted by a family member who was present.⁴⁴
31. Based on this information in the latter case the person would have been entitled 'to be assisted by an interpreter' under section 22 of the CLFP Act. 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.⁴⁵ I therefore consider that a family member interpreting for a victim or volunteer not reasonably fluent in English would amount to compliance with section 22.
32. However, I consider it preferable that, where an interpreter is utilised, that person is independent of the parties involved and the matter itself. Further, in my view SA Police would be best served if they were able to assure a court that a person had been assisted by a professional interpreter during the before and during the carrying out of a forensic procedure. I note that the Translating and Interpreting Service, Australian Government Department of Home Affairs describes the role of an interpreter as follows:

The role of the interpreter is to facilitate and ensure accurate communication between people of different languages, while taking into account any cultural sensitivities. Interpreters are bound by a professional code which requires them to:

- interpret accurately and honestly without adding or omitting anything being said
- maintain absolute confidentiality
- be impartial and objective
- act in a professional manner at all times.

...

On many occasions, relatives or acquaintances have been called upon to interpret because they speak the same language. However, they may be unfamiliar with the dialect being spoken, the specialist terminology used or cultural nuances involved. Furthermore, they are not bound by a professional code that requires them to be impartial and to maintain confidentiality.

Interpreting is a specialist skill that is not possessed just because a person speaks the language. It requires a high level of fluency in both languages and the ability to quickly, accurately and appropriately convey the whole message from one language to another.⁴⁶

⁴¹ PPMS 18/A72580, 18/A46633 and 19/B04440

⁴² PPMS 19/B20417.

⁴³ PPMS 19/B21607.

⁴⁴ PPMS 19/B24505.

⁴⁵ interpreter. (1993). In: *The New Shorter Oxford English Dictionary*, 4th ed. New York: Oxford University Press Inc, p.1399.

⁴⁶ See 'Bridging the communication gap', Translating and Interpreting Service, Australian Government Department of Home Affairs' at <https://www.tisnational.gov.au/About-TIS-National/Materials-to-help-you-access-an-interpreter/TIS-National-promotional-materials-catalogue.aspx>, last accessed 17 September 2019.

33. In saying this, I recognise that it will not always be practicable to obtain professional interpreter services in a timely manner. Nevertheless as this issue was also raised in the context of suspects procedure, I make the following recommendation:

That consideration be given by the Commissioner of SA Police to amend the General Order to provide that, where reasonably practicable, interpreters should be professionally qualified interpreters. **(Recommendation 1)**

34. My 2018 Audit found that 4 out of 69 volunteers and victims procedures examined did not appear to comply with 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 different sex (other than at the request of the person on whom the forensic procedure is to be carried out).

35. As a result, I recommended 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). I am pleased that the Commissioner has advised this recommendation has been adopted and, further, that this Audit did not identify any compliance issues in respect of this provision. The audit revealed a single procedure involving exposure of a female victim's genitals which was carried out by a male doctor.⁴⁷ However it was noted on the documentation that it had not been reasonably practicable for the procedure to be carried out by a female clinician and that the victim had consented to it being carried out by a male.

36. In the case of seven intrusive procedures⁴⁸, I was unable to form a view from the documentation held by DNMAU as to:

- whether victims or volunteers had been given the opportunity to arrange for the attendance of a medical practitioner of their choice to witness the procedure as required by section 25(1) of the CLFP Act; or
- whether victims or volunteers had requested that the procedures were recorded as contemplated by section 26(1)(b) of the CLFP Act.

37. SAPOL's response to my draft report was that in cases where a sexual assault examination is conducted by an employee of SA Health, the volunteer or victim is provided with a brochure prepared by the Commissioner for Victims Rights. This brochure includes advice regarding section 25(1) but does not include advice about rights arising from section 26(1)(b) of the CLFP Act. Accordingly I make the following recommendation:

That documentation concerning sexual assault forensic examinations is amended so as to ensure that advice is provided regarding the volunteers/victims right to request the making of an audio-visual record of the procedure **(Recommendation 2)**.

38. None of the records examined by Ombudsman SA Officers related to victims or volunteers who had subsequently requested destruction of their samples.

⁴⁷ Police Property Management System receipt number (PPMS) 19/B35535.

⁴⁸ PPMS 19/B35535, 19/B56124, 19/B63731, 19/B28502, 19/B29490, 19/A92142, 19/B09414.

Retention orders

Relevant definitions

Respondent means the person who requests the destruction of forensic material.⁴⁹

Senior police officer means a police officer of or above the rank of inspector.⁵⁰

Legislative requirements

When forensic material has been obtained from a victim or volunteer who was a protected person, a police officer can apply for an order that the material be retained even if the relevant person (who gave consent to the procedure) requests destruction of the material. Such an order is referred to as a 'retention order'.

An application for a retention order must be made in writing, by a police officer and must state the grounds on which the order is sought (section 38(1)). If the respondent can be located, a copy of the application must be given to them (section 38(2)).

A retention order may be made by a senior police officer if satisfied that the relevant person (who gave consent to the procedure and is now requesting destruction of the forensic material), or a person related to or associated with the relevant person, is suspected of a serious offence, that there are reasonable grounds to suspect that the forensic material in question could be of probative value in the investigation of that offence, and the order is justified in all the circumstances of the case.

A retention order can only be made on the basis of an informal hearing conducted in such manner as the senior officer thinks fit (section 38(4)). The hearing can be conducted in the absence of the respondent if the senior officer is satisfied that either the respondent could not be located to be served with a copy of the application, or was served with a copy of the application but has not attended the hearing (section 38(6)). If the respondent attends the hearing, they are entitled to be represented by a legal practitioner (section 38(5)). The respondent or their representative must be given a reasonable opportunity to make representations at the hearing (section 38(7)).

The senior police officer must make a written record of the order (section 38(9)). If the respondent can be located, a copy of that order must be given to them (section 38(10)).

Audit discussion

39. No retention orders were made during the audit period.

⁴⁹ Section 35 of the CL(FP) Act.

⁵⁰ Section 3(1) of the CL(FP) Act.

Assimilation orders

Relevant definitions

Respondent means:

- (a) if the person from whom the forensic material was obtained is a child - the closest available next of kin⁵¹ of the child;
- (b) if the person from whom the forensic material is a protected person but is not a child - the person's guardian⁵² or, if the person does not have a guardian, the closest available next of kin⁵³ of the person;
- (c) in any other case - the person from whom the forensic material was obtained.⁵⁴

Senior police officer means a police officer of or above the rank of inspector.⁵⁵

Legislative requirements

When forensic material is obtained from a victim or volunteer, a senior police officer can make an order that the material be treated as if it were material obtained as a result of a suspects procedure. There are two effects of this: Firstly, it means that the Commissioner of Police need not have the material destroyed even if the respondent requests destruction. Secondly, the DNA profile obtained from that material will be stored on the suspects/offenders index of the DNA database (section 37). These orders are referred to as 'assimilation orders'.

A senior police officer can make an assimilation order if satisfied: there are reasonable grounds to suspect that the volunteer or victim in question has committed a serious offence, there are reasonable grounds to suspect that the forensic material obtained from the victim or volunteer may be of value to the investigation of that offence, and the forensic material consists of material taken from the volunteer or victim for the purpose of obtaining a DNA profile from them (section 37).

An application for an assimilation order must be made in writing, by a police officer and must state the grounds on which the order is sought (section 38(1)). If the respondent can be located, a copy of the application must be given to them (section 38(2)).

An assimilation order can only be made on the basis of an informal hearing conducted in such manner as the senior officer thinks fit (section 38(4)). The hearing can be conducted in the absence of the respondent if the senior officer is satisfied that either the respondent could not be located to be served with a copy of the application, or was served with a copy of the application but has not attended the hearing (section 38(6)). If the respondent attends the hearing, they are entitled to be represented by a legal practitioner (section 38(5)). The

⁵¹ 'Closest available next of kin' means, in relation to a child, the first in order of priority of the following persons who is not a protected person and who 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.

⁵² 'Guardian' means a person acting or appointed under any Act or law as the guardian of another.

⁵³ 'Closest available next of kin' means, in relation to a person who is not 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) the spouse/domestic partner of the person; (ii) a son or daughter of the person; (iii) a parent of the person; (iv) a brother or sister of the person.

⁵⁴ Section 35 of the CL(FP) Act.

⁵⁵ Section 3(1) of the CL(FP) Act.

respondent or their representative must be given a reasonable opportunity to make representations at the hearing (section 38(7)).

The senior police officer must make a written record of the order (section 38(9)). If the respondent can be located, a copy of that order must be given to them (section 38(10)).

Audit discussion

40. No assimilation orders were made during the audit period.

Suspects procedures

Relevant definitions

Appropriate representative may be -

- (a) a relative or friend chosen by, or acceptable to the protected person; or
- (b) if there is no available person within category (a) - an advocate for the protected person nominated by an agency with responsibilities for protected persons of the relevant class; or
- (c) if there is no available person within either 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 police officer.⁵⁶

Intrusive forensic procedure means -

- (a) a forensic procedure that involves the exposure of, or contact with, the genital or anal area, the buttocks or the breast region of a female person or a transgender or intersex person who identifies as female; or
- (b) the taking of a dental impression; or
- (c) the taking of a sample of blood (other than for a simple identity procedure).⁵⁷

Investigating police officer means a police officer in charge of the investigation of a suspected offence.⁵⁸

Protected person means a child or a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure.⁵⁹

Qualified person means -

- (a) a medical practitioner⁶⁰; or
- (b) a registered nurse (for any procedure other than a dental impression)⁶¹; or
- (c) a police officer authorised by the Commissioner of Police to take prints of the hands, fingers, feet or toes⁶²; or
- (d) a police officer authorised by the Commissioner of Police to non-intrusively examine a part of a person's body⁶³; or
- (e) a person who has satisfactorily completed a course of training approved by the Attorney-General is qualified to carry out the following forensic procedures (provided they are non-intrusive):
 - (i) taking samples of hair from a person's body⁶⁴
 - (ii) taking samples of fingernails toenails, or material from under a fingernail or toenail⁶⁵

⁵⁶ Section 25(3).

⁵⁷ Section 3(1).

⁵⁸ Section 3(1).

⁵⁹ Section 3(1).

⁶⁰ Section 24(1)(a).

⁶¹ Regulation 5(1)(a).

⁶² Regulation 5(1)(b)(i).

⁶³ Regulation 5(1)(b)(ii).

⁶⁴ Regulation 5(1)(c)(i).

⁶⁵ Regulation 5(1)(c)(ii).

- (iii) taking samples of biological or other material from an external part of the body⁶⁶
- (iv) buccal swabs⁶⁷
- (v) taking samples of blood by finger prick⁶⁸
- (vi) taking impressions of casts or wounds.⁶⁹

Respondent means the person on whom it is proposed to carry out a forensic procedure (other than a simple forensic procedure).⁷⁰

Senior police officer means a police officer of or above the rank of inspector.⁷¹

Serious offence means an indictable offence or a summary offence that is punishable by imprisonment.⁷²

Simple forensic procedure means a forensic procedure consisting of one or more of:

- (a) a simple identity procedure;
- (b) a gunshot residue procedure.⁷³

Simple identity procedure means a forensic procedure consisting of one or more of:

- (a) taking of prints of hands or fingers;
- (b) taking of forensic material from a person by buccal swab or finger-prick for the purpose of obtaining a DNA profile of that person.⁷⁴

Legislative requirements

Suspects procedures can be carried out on persons who are suspected of a serious offence (section 14(2)(a)). The procedures can only be conducted if either they consist only of a simple forensic procedure or the procedure is authorised by a senior police officer (section 14(2)(b)),

For suspects procedures other than simple identity procedures, an application must be made to a senior police officer (section 15(1)). The application must be made in writing by a police officer, state the nature of the suspected offence and the grounds for suspecting the respondent committed the offence, state the nature of the procedure/s for which the order is sought and the grounds for suspecting the procedure/s could produce evidence of value to the investigation of the suspected offence (section 15(2)).

A copy of the application must be given to the respondent unless the application is of 'special urgency' (section 15(3)).

An application is taken to be of 'special urgency' if 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 (section 18(1)).

⁶⁶ Regulation 5(1)(c)(iii).

⁶⁷ Regulation 5(1)(c)(iv).

⁶⁸ Regulation 5(1)(c)(v).

⁶⁹ Regulation 5(1)(c)(vi).

⁷⁰ Section 13.

⁷¹ Section 3(1).

⁷² Section 3(1).

⁷³ Section 3(1).

⁷⁴ Section 3(1).

Before making an order the senior police officer must conduct an informal hearing in such manner as the senior police officer thinks fit (section 16)). In circumstances other than those of 'special urgency', the respondent may be represented by a legal practitioner at the hearing (section 17(1)).

Where the respondent is a protected person, they must be represented by an 'appropriate representative' at the hearing section 17(1)). (They may also be represented by a legal practitioner.) Section 17(3) of the Act sets up a hierarchy of appropriate persons, as follows: (a) a parent, relative or friend chosen by, or acceptable to, the protected person; (b) if there is no available person in category (a), an advocate for the protected person nominated by an agency with responsibilities for the care of protected persons of the relevant class; (c) if there is no available person in either category (a) or (b), a person who is not a police officer or a person involved in the investigation of the offence, chosen by a police officer in charge of a police station or the investigating police officer (section 17(3)).

The respondent or their representative must be given a reasonable opportunity to make representations at the hearing (section 17(4)).

A senior police officer may authorise the carrying out of the forensic procedure if, after conducting the hearing, they are satisfied that: (a) there are reasonable grounds to suspect the respondent has committed a serious offence, (b) there are reasonable grounds to suspect that the procedure could produce evidence of value to the investigation of that offence, and (c) the public interest in obtaining evidence to prove or disprove the respondent's guilt outweighs the public interest in ensuring that private individuals are protected from unwanted interference (section 19(1)).

In weighing where the public interest lies, the senior police officer must 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 respondent's welfare given their 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 or disprove that the respondent committed the offence, and (e) any other relevant factors (section 19(2)).

If the senior police officer authorises the carrying out of the forensic procedure, they must make a written record of their order and their reasons for making it (s,19(3)). A copy of this record must be given to the respondent (section 19(4)).

Suspects procedures can be carried out on a person whether or not they are in custody (s.14(3)).

In cases where the suspect is not in custody, a police officer may issue directions about (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 incidental manner (section 29(1)). A written record of those directions must be given to the suspect. In addition, the suspect must be informed that, if they fail to comply with the directions, a warrant may be issued for their arrest (section 29(2)).

Before a forensic procedure is conducted on a suspect, a police officer must inform them that (a) reasonable force may be used to carry out the procedure and (b) if the suspect obstructs or resists the person carrying out the procedure, evidence of that fact may be admissible in proceedings against them (section 30).

If reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or the breasts of a female person or a transgender or intersex person who identifies as female, must not be carried out by a person of a different sex to the suspect (section 21(3)).

If an intrusive forensic procedure is to be carried out on a suspect, they must be allowed a reasonable opportunity to arrange for the attendance of a medical practitioner of their choice to witness the procedure (section 25(1)).

When intrusive forensic procedures that are carried out on suspects who are protected persons, an appropriate representative must be present to witness the procedure (section 25(2)).

Intrusive forensic procedures carried out on suspects must be audio-visually recorded (section 26(1)(b)).

Section 33(1) of the Act requires the Commissioner of Police to ensure that, if forensic material is removed from a suspect, part of that material, sufficient for analysis, is set aside for the suspect. Reasonable care must be taken to ensure that the material set aside is protected from degradation and, if the suspect expresses a desire to have the material analysed, reasonable assistance is given to them so that they can prevent the material from degrading. However subsection (1) need not be complied with if it is not practicable to divide the material in question into separate parts (section 33(2)).

Audit discussion

Simple identity procedures

41. DNAMU does not file records relating to simple identity procedures carried out on suspects separately from those relating to simple identity procedures that are carried out on offenders. However, I understand that the numbers of procedures carried out on offenders is very small, given that (i) most offenders will have undergone simple identity procedures at the time of their apprehension and (ii) SA Police have for a number of years made concerted efforts to obtain samples from those offenders whose offending pre-dated the commencement of the CLFP Act.
42. A total of 9,512 simple identity procedures were carried out on suspects and offenders during the audit period. Ombudsman SA Officers inspected 304 records relating to simple identity procedures carried out on suspects and 10 such procedures carried out on offenders. This equates to 3.3% of the total number of procedures carried out. While this is a relatively low proportion, the records relating to simple identity procedures on suspects showed almost complete compliance with the terms of the CLFP Act. That being the case, it appeared to be of limited value to inspect records relating to more than three percent of those procedures.
43. Nine of the suspects upon whom simple identity procedures were carried out were identified as not being reasonably fluent in English. In one of these cases, the interpreter was the suspect's wife⁷⁵. I refer to my commentary above in relation to the use of interpreters for victims and volunteers. Consistent with that it is my view that, whilst the latter case does not represent a breach of section 22 of the CLFP Act,

⁷⁵ PPMS 18/A81028.

utilising a family member as an interpreter should be avoided where possible; I reiterate Recommendation 2.

44. In one case it was not clear from the records whether the police officer who carried out the simple identity procedure had first warned the suspect that (a) reasonable force could be used to carry out the procedure and (b) that if the suspect obstructed or resisted the procedure, evidence of that fact might be admissible in proceedings against the suspect⁷⁶. In response to my draft report SAPOL advised that the officer was satisfied that the warning was understood but the form did not provide room for recording an explanation.
45. In a further two cases, the suspect's response to the warning was not recorded by the police officer⁷⁷. In one case SAPOL have advised that this was because the suspect was non-compliant and would not verbalise. I comment that it is foreseeable that a lack of understanding on the part of a suspect could lead to them resisting the carrying out of a forensic procedure with the consequences mentioned above.
46. Only two sets of the records inspected related to cases where a simple identity procedure had been carried out pursuant to a police officer's directions to attend at a particular time and place to undergo such a procedure⁷⁸. In both cases, the police officers who issued the directions had done so in compliance with section 29 of the CLFP Act. I understand that, because patrol cars all carry simple identity procedure kits, it is rare for these sorts of directions to be issued.

Procedures carried out pursuant to orders of senior police officers

47. During the audit period, 117 suspects were the subject of forensic procedures that were carried out pursuant to orders made by senior police officers. Ombudsman SA Officers examined records relating to 53 or 45% of such orders. I refer to these as 'authorised procedures'.
48. In order to monitor compliance with the 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. In addition, 15 audiovisual records were viewed.
49. When an authorised procedure is to be carried out on a protected person, an appropriate representative must be present:
 - during the informal hearing that is conducted by the senior police officer who has been asked to make an order⁷⁹
 - during the procedure.⁸⁰
50. The Act provides for a hierarchy of persons who fulfil the definition of 'appropriate representatives'⁸¹:
 - (a) a parent, relative or friend, chosen by, or acceptable to, the protected person

⁷⁶ PPMS 18/A77840,

⁷⁷ PPMS 19/A82585 and 18/A79508.

⁷⁸ PPMS 19/B58684 and 19/A82600.

⁷⁹ Section 17(2).

⁸⁰ Section 25(2)

⁸¹ Sections 17(3) and 25(3).

- (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.
51. During the audit period, senior police officers ordered 15⁸² forensic procedures to be conducted on protected persons. Records in relation to all 15 of these procedures were inspected and in 7 cases audiovisual records of the authorised procedure were also viewed.
 52. Records indicated that appropriate persons present at hearings under s17(2) of the CLFP Act included nurses⁸³, a hospital doctor⁸⁴, an uncle⁸⁵, a carer⁸⁶, a legal representative⁸⁷ and the Aboriginal Visitor Scheme.⁸⁸ Given the broad terms of the definition of appropriate person and (in particular the discretion provided for police officers to choose someone in subsection (c)) it appears these cases complied with the legislation. That said I note the role of the appropriate person is to 'represent' the suspect at the hearing and accordingly I query whether in practice hospital staff who do not know the protected person would be able to fulfil that purpose.
 53. On some of these occasions, DNAMU advised that efforts had been made to contact a relative or a friend. For example in the case PPMS 19/B29053, the suspect had nominated his partner. However this was not appropriate as the partner was the victim of the offence. The suspect refused to nominate someone else. The police officer made several attempts to find a suitable representative, but none could be located and accordingly the hospital nurse was deemed an appropriate representative. In the case of PPMS 19/B34288, the suspect informed the police officer that her family was unavailable, but was happy for her lawyer to act as the appropriate representative.
 54. In one case a person's name was recorded but the relationship with the protected person was not specified.
 55. There were a similar range of appropriate representatives recorded as being present at the authorised procedures. In one case a nurse was the witness and I do not consider this to be problematic in terms of section 25(2) of the CLFP Act (the person in this case is merely required as a witness to the procedure as opposed to 'representing' the suspect as is the case for persons attending at hearings).
 56. In 2 cases, for which audiovisual evidence was viewed, it did not appear that there was any appropriate representative present as required by section 25(2) of the CLFP Act.⁸⁹ In response to my draft report SAPOL advised that in one of these cases the suspect requested that the appropriate representative leave the room during the procedure; however, I note the mandatory nature of section 25(2). Accordingly I recommend:

That the SA Police consider issuing a reminder to staff that an appropriate representative must be present at an authorised forensic procedure where the

⁸² PPMS 19/B34288, 19/B29053, 19/B34912, 19/B41126, 19/B42508, 19/B11112, 19/B11926, 19/B10520, 19/B20917, 18/A73458, 18/A57353, 19/A95872-35, 19/E57894, 19/B10227, 19/B07728 (this PPMS also included 19/B07756).

⁸³ PPMS 19/29053, 19/B34912

⁸⁴ PPMS 19/11112

⁸⁵ PPMS 19/B41126

⁸⁶ PPMS 19/ B42508

⁸⁷ PPMS 19/B34288

⁸⁸ PPMS 19/E57894

⁸⁹ PPMS E57894 and 19/B20917

subject is a protected person in accordance with section 25(2) of the CLFP Act.
(Recommendation 3)

57. In another case a hospital security guard acted as the witness to the procedure⁹⁰. Correspondence with DNAMU revealed that the suspect's parent could not be considered as she was the victim. Officers were not aware of other family members or friends. It appears, however that no further enquiries were made to ascertain whether the suspect could call a friend or other relative. I note that section 25(3) provides that a police officer can choose an appropriate representative only where 'there is no available person in category (a) or (b)' and accordingly efforts should be made to locate family members or friends in the first instance.
58. Further correspondence in relation to this procedure indicated that the suspect was deemed a protected person because of his condition at the time. Audio-visual records showed that the suspect was heavily medicated and falling in and out of sleep, incapable of understanding the nature or consequences of the forensic procedure.⁹¹
59. DNAMU informed my Office that a hospital doctor was appointed by police as the appropriate representative during the hearing. Their reasoning was that because the doctor was independent and not involved in the investigation, he could represent the suspect. However, the doctor could not remain for the collection of the samples. At this stage the hospital security guard was deemed an appropriate representative as he was not connected to the police investigation and deemed independent. It was the security guard who signed the orders and not the hospital doctor.
60. The records do not show whether the doctor was afforded an opportunity to make submissions on behalf of the suspect. Even if this opportunity was afforded, it seems unlikely that a doctor in the Emergency Section of a busy hospital would be equipped to make meaningful submissions on behalf of a suspect who was a stranger to them. In my view, in circumstances where no parent, relative, friend or advocate for a protected person can be found and a police officer needs to choose an appropriate representative under section 17(3)(c), care must be taken to brief the chosen person on their role as an appropriate representative. The suspect should also be given an opportunity to meet with the chosen person prior to the informal hearing so that they can convey their attitude towards the proposed forensic procedure.
61. Although on its face it appears that the choice to appoint a security guard was technically compliant with section 25(2)⁹², it did not appear from the audiovisual record that the security guard appreciated the process or his responsibilities as an appropriate representative of a protected person. The audio-visual record shows the security guard guarding the door and later on standing in the corner of the room. On several occasions he was not looking at the suspect or witnessing the procedure. Rather, he was looking away.
62. In summary, whilst it appears this procedure complied with the legislation, the detail provided by the audiovisual record raises questions about:
 - whether the doctor in practice could adequately 'represent' the suspect at the hearing

⁹⁰ PPMS 19/B1111

⁹¹ Section 3

⁹² Section 25(3)

- whether the doctor was given a reasonable opportunity to make representations at the hearing
 - whether the security guard was adequately briefed about his role as witness to the forensic procedure.
63. Section 21(3) of the CLFP Act requires that, if it is reasonably practicable, a forensic procedure that involves exposure of, or contact with, a person's genital or anal area or buttocks, or the breast region of a female person or person who identifies as female, must not be carried out by a person of a different sex (other than at the specific request of the person).
64. In all, 16 of the 53 records inspected related to procedures that involved exposure of, or contact with, the genital areas of male suspects. Of these, eight were carried out by a male doctor and so were compliant with section 21(3). A further two were carried out by a female nurse but it had been noted that a male was not available to carry out the procedure. In three cases the gender of the person who carried out the procedure could not be determined from the records inspected. The remaining three appeared to be non-compliant with section 21(3); there was no apparent reason why the procedures were not carried out on by a person of the same sex as the suspect.⁹³
65. This issue was highlighted in my 2018 report and was subject to a recommendation 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 suspect, a brief record be made of the reason it was not reasonably practicable to comply with section 21(3) of the CLFP Act.
66. It is pleasing to note that the Commissioner of Police has implemented this recommendation by amending General Order 'Forensic procedures' so as to require that notes are made as to why, in a particular case, it was not reasonably practicable for highly intrusive procedures to be carried out by a person of the same gender as the suspect.
67. I observe, however, that when suspects are arrested in metropolitan Adelaide, that there would be few circumstances in which it would be impracticable to have an intimate procedure carried out by a person of the same gender as the suspect; these sort of procedures are often carried out at major metropolitan hospitals where it could reasonably be expected that a number of registered nurses and doctors would be available.
68. As set out above, section 21(1) of the CLFP Act requires that all forensic procedures must:
- be carried out humanely^[4]
 - be carried out with care to avoid, as far as reasonably practicable, offending genuinely held cultural values or religious beliefs^[5]
 - be carried out with care to avoid inflicting unnecessary physical harm, humiliation or embarrassment^[6]

⁹³ PPMS references: 19/B33654; 19/B07728 & 19/B07756; 19/B19351

^[4] Section 21(1)

^[5] Section 21 (1)(a)

^[6] Section 21 (1)(b)

- not be carried out in the presence or view of more persons than are necessary for properly carrying out the procedure.^[7]
69. In addition, section 23 of the CLFP Act provides that forensic procedures must be carried out in a way that is consistent with appropriate medical or other professional standards.
 70. In order to monitor compliance with these requirements Ombudsman SA Officers viewed audio-visual records of 15 forensic procedures that had been conducted pursuant to an authorisation granted by a senior police officer.
 71. I consider that all of these procedures were compliant with sections 21(1) and 23 of the CLFP Act.
 72. Viewing these audio-visual records also provided Ombudsman SA Officers an opportunity assess compliance with other aspects of the CLFP Act. I note that each audio-visual record requested was produced by SA Police, suggesting a high level of compliance with section 26(1)(a).
 73. It was noted that in four recordings, the camera was turned away from suspects who were in a state of undress and forensic material was being collected from their penises. In another recording the medical practitioner who was carrying out the procedure intentionally stood in front of the camera so to provide some privacy to the suspect. In my view, this circumspection did not offend against section 26(1)(a) and furthermore complied with section 21(1)(b) in that these actions demonstrated that care had been taken to avoid inflicting unnecessary humiliation or embarrassment.
 74. However, two of the audio-visual records concerned me. The first concerned a suspect who was heavily sedated.⁹⁴ The recording commenced when the suspect appeared to be asleep or heavily sedated; he was leaning his body on the table. The suspect seemed to be either completely exhausted or under the effect of drugs. The suspect was woken by a Watch House nurse and asked to stand so photographs of his injuries could be taken. The suspect woke and managed to stand up. However, he could not stand steadily and it seemed that he would fall at any moment. The nurse had to help the suspect remain standing by propping him against the wall and holding him against it. A police officer with a camera approached the suspect and took photos of his injuries.
 75. At this stage the nurse reminded the senior police officer that a section 30 warning was required. The police officer gave the warning four times because the suspect was not responsive and kept falling asleep. The nurse then tried to swab the suspect's hand but even this proved a difficult exercise as the suspect was falling asleep and seemingly unable to cooperate. The suspect then fell asleep once more. At this stage the nurse decided to discontinue the procedure as the suspect was not conscious. The nurse expressed her concerns about the suspect's state and suggested that he be allowed to rest for a few minutes.
 76. A few moments later, the suspect was woken again and provided with a cup of coffee. He was informed that a blood sample was to be taken. The suspect did not respond and appeared to be asleep. The sample was taken while the suspect was asleep. The suspect almost fell off the chair he was seated on but the police officer prevented this.

^[7] Section 21(2)

⁹⁴ PPMS 19/B13246/48

77. During the procedure nurse expressed her concern about the suspect's state and the risks of him waking while she was taking the blood sample. Nonetheless the procedure was continued.
78. Although the contents of the audio-visual record did not suggest any lack of compliance with sections 21(1), 21(2) or 23 of the CLFP Act, the suspect's state in this matter calls into question whether he understood the compulsory warning that reasonable force could be used to carry out the procedures.⁹⁵ In addition, I am advised by SAPOL that the suspect was not provided with the opportunity to arrange for the attendance of a medical practitioner of his choice to witness the procedure⁹⁶; this is not compliant with section 25(1) of the CLFP Act.
79. The second audio visual that concerned me related to a culturally and linguistically diverse suspect.⁹⁷ The audio-visual recording starts when the police officer is reading the section 30 warning to an interpreter. The suspect is standing next to the interpreter. After the warning is given, the interpreter is asked to leave the room.
80. It did not appear from the record that the suspect was informed of the process of the procedure and what to expect. After the interpreter left the room, the medical practitioner explained the process the English. It is unclear whether the suspect understood the medical practitioner or what was happening.
81. The medical practitioner asked the suspect to undress so a penile swab could be taken. The suspect appeared to be confused by the process and unaware that a penile swab was to be part of the procedure. The suspect's face reddened and he shook his head, apparently indicating that he did not agree or consent. The medical practitioner explained that the process is fast and that the suspect was required to abide by it. The suspect reluctantly undressed and allowed the medical practitioner to collect the sample.
82. Again, although the audio-visual record did not demonstrate a failure to comply with sections 21(1), 21(2) or 23 of the CLFP Act, its contents did call into question:
- what the suspect understood as to the nature of the procedure that was to be carried out
 - whether the suspect requested to have the interpreter present during the forensic procedure (as he was entitled to do under section 22(b) of the CLFP Act).

I note however that SAPOL's response to my draft report was that the nature of the procedures was explained during the informal hearing.

83. In order to monitor senior police officers' compliance with section 19 of the CLFP Act, Ombudsman SA Officers examined nine records made by senior police officers in relation to orders made authorising forensic procedures to be carried out on suspects.
84. The orders are recorded on a form called a PD436. The form is accompanied by an Aide Memoire, which is designed to prompt the senior police officer to comply with sections 17 to 19 of the CLFP Act.

⁹⁵ Section 30.

⁹⁶ Section 25(1)

⁹⁷ PPMS 19/B21607

85. One set of notes related to an order authorising forensic procedures on a protected person who was suspected of having manufactured an explosive device.⁹⁸ The procedures authorised included taking of material from the suspect's hand and finger, taking a sample of his head hair and taking samples of his blood and urine. The informal hearing was conducted in a ward at the Women's and Children's Hospital. The suspect, who suffers from Asperger's Syndrome and was at the time provided with daily care under the National Disability Insurance Scheme, was under the influence of alcohol and Valium.
86. The senior police officer's notes reveal that the suspect was asleep at the time of the informal hearing and did not participate in it. He was represented by his uncle, who was asked whether he believed he was an appropriate representative for the suspect.
87. During the informal hearing, the suspect's uncle gave uncertain responses to the questions asked by the senior police officer:
- Q. You now have the opportunity to make a submission. Do you wish to make a submission?
- A. I don't know. No. Him being autistic - being on drugs (illegible) impact.
- Q. Do you understand the nature of the procedures being applied for? Went through the 3 procedures.
- A. I understand them.
- Q. Do you have any cultural, ethnic or religious beliefs that would be offended if the proposed forensic procedures are carried out?
- A. No.
- Q. Do you have any physical/mental conditions that I would need to be aware of in considering whether the proposed forensic procedures are carried out?
- A. Umm. Physiology not. Mental health - probably not. So I guess no.
- Q. Do you have any questions before I make my determination?
- A. No.
88. However, SAPOL's response to my draft response provided clarification that the suspect had been awake upon arrival at the hospital and had indicated he was satisfied with his uncle fulfilling the role of appropriate representative.
89. It was not apparent from the PD436 or the Aide Memoire that the senior police officer in this case weighed the public interest in obtaining evidence to prove the suspect's guilt against the public interest in ensuring that private individuals are protected from

⁹⁸ PPMS 19/B41126.

unwanted interference. SAPOL have since provided clarification of the factors the senior police officer took into account when providing authorisation.

90. In my 2018 report, I commented that the District Court of South Australia has held that a senior police officer's order should contain, at a minimum, some comment as to how they have weighed the public interest factors listed in section 19(2) of the CLFP Act and 'the reason the outcome was as it was'.^[12] Failure to properly weigh the specified public interest factors could lead to any evidence obtained from a forensic procedure being ruled inadmissible at a subsequent trial of the suspect.

Setting forensic material aside for analysis by suspect

91. The Commissioner has delegated to the Director of FSSA the responsibility for complying with section 33 of the CLFP Act. FSSA uses FTA68 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.
92. 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.
93. Samples that are not consumed during analysis are retained as extracts in freezers.
94. 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 four years.

^[12] *R v Houssaini* [2011] SADC 164.

Offenders procedures

Relevant definitions

Serious offence means an indictable offence or a summary offence that is punishable by imprisonment⁹⁹

Simple identity procedure means a forensic procedure consisting of one or more of:

- (a) taking of prints of hands or fingers;
- (b) taking of forensic material from a person by buccal swab or finger-prick for the purpose of obtaining a DNA profile of that person.¹⁰⁰

Legislative requirements

Section 20 of the CLFP Act permits simple identity procedures to be carried out on:

- (a) persons who are serving terms of imprisonment, detention or home detention in relation to an offence;
- (b) persons who are being detained as a result of being declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935 (the CLCA)* by a court dealing with a charge of an offence;
- (c) persons who have been convicted of a serious offence;
- (d) persons who are declared liable to supervision under Part 8A of the CLCA by a court dealing with a charge of a serious offence;
- (e) persons who are registrable offenders under the *Child Sex Offenders Registration Act 2006*.

As with suspects procedures, offenders procedures may be carried out whether or not the offender is in custody.

In cases where the offender is not in custody, a police officer may issue directions about (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 incidental manner (section 29(1)). A written record of those directions must be given to the offender. In addition, the offender must be informed that, if they fail to comply with the directions, a warrant may be issued for their arrest (section 29(2)).

Before a forensic procedure is carried out on an offender, a police officer must inform the offender that reasonable force may be used to carry out the procedure and that, if the offender obstructs or resists the procedure, evidence of that may be admissible in proceedings against them (section 30).

If the offender is not reasonably fluent in English, they are entitled (a) to be assisted by an interpreter and (b) to have an interpreter present during the procedure, if they so request (section 22).

⁹⁹ Section 3(1).

¹⁰⁰ Section 3(1).

Audit discussion

95. Ombudsman SA Officers examined records relating to simple identity procedure carried out on offenders. No instances of non-compliance were detected.

Forensic procedures on deceased persons

Relevant definition

Senior police officer means a police officer of or above the rank of inspector.¹⁰¹

Legislative requirements

A senior police officer may authorise the carrying out of a forensic procedure on the body, a body part, human tissue or human remains of a deceased person if satisfied that the evidence so obtained is likely to assist (a) in the investigation of a serious offence, or (b) in the identification of the deceased (section 55(1)).

The authorisation must be in writing and must specify the forensic procedure so authorised (section 55(1)).

A forensic procedure on a deceased person must be carried out by a medical practitioner or a person qualified to carry out forensic procedures of the relevant type (section 55(5)).

If the body of the deceased is at a hospital or other place at which a post-mortem examination is being or has been conducted, the occupier of the hospital or other place may agree (a) to arrange for the authorised procedure to be carried out and the forensic material so obtained to be provided to police OR (b) to arrange for forensic material already obtained to be provided to police (section 55(4)).

When a forensic procedure on a deceased person has been authorised by a senior police officer, this empowers police officers to (a) enter premises, using such force as is necessary, in which they reasonably believe the body of the deceased is located AND (b) search the premises for the body (section 55(2)). However, these powers cannot be exercised unless the police have made reasonable attempts to contact the occupier of the premises and advise them of their intention to exercise the powers (section 55(3)).

Audit discussion

96. Section 55 of the CLFP Act was utilised on 20 occasions during the audit period. Ombudsman SA Officers examined all 20 sets of records. No cases of non-compliance were detected.

¹⁰¹ Section 3(1) of the CL(FP) Act.

Blood testing for communicable diseases

Relevant definitions

Affected person means a person engaged in prescribed employment who likely came into contact with/was exposed to biological material of the person on whom the forensic procedure is carried out.¹⁰²

Emergency work means work carried out (whether or not in response to an emergency) by or on behalf of an emergency services provider i.e.

- (a) SA CFS;
- (b) SA MFS;
- (c) SA SES;
- (d) SA Ambulance Service;
- (e) St John Ambulance Australia SA Incorporated;
- (f) Surf Life Saving SA Incorporated;
- (g) a volunteer marine rescue association accredited by the State Marine Rescue Committee to perform search and rescue functions;
- (h) the accident or emergency department of a public or private hospital which provides 'live-in' services.¹⁰³

Prescribed employment means-

- (a) employment as a police officer;
- (b) employment in emergency work (whether paid or voluntary);
- (c) employment as a medical practitioner in a hospital;
- (d) employment as a nurse or midwife in a hospital;
- (e) employment in the provision of assistance/services, in a hospital, to a medical practitioner, nurse or midwife;
- (f) employment as an officer/employee of the Department for Correctional Services.¹⁰⁴

Prescribed serious offence means -

- (a) assault¹⁰⁵ where the victim is a person engaged in prescribed employment acting in the course of their official duties;
- (b) causing serious harm¹⁰⁶ where the victim is a person engaged in prescribed employment acting in the course of their official duties;
- (c) causing harm¹⁰⁷ where the victim is a person engaged in prescribed employment acting in the course of their official duties;
- (d) endangering life or creating a risk of serious harm¹⁰⁸ where the victim is a person engaged in prescribed employment acting in the course of their official duties;
- (e) riot, affray, or possessing information for terrorist acts;¹⁰⁹

¹⁰² Regulation 4(3) of the *Criminal Law (Forensic Procedures) Regulations 2007*.

¹⁰³ Section 20A of CL(FP) Act.

¹⁰⁴ Section 20A of the CL(FP) Act.

¹⁰⁵ Section 20 of the *Criminal Law Consolidation Act 1935 (the CLCA)*.

¹⁰⁶ Section 23 of the CLCA.

¹⁰⁷ Section 24 of the CLCA.

¹⁰⁸ Section 29 of the CLCA.

¹⁰⁹ Part 3A of the CLCA.

- (f) assault or hinder police;¹¹⁰
- (g) violent disorder.^{111 112}

Senior police officer means a police officer of or above the rank of inspector.¹¹³

Legislative requirements

A senior police officer may authorise the taking of a blood sample from a person if satisfied that (a) the person is suspected of a prescribed serious offence and (b) it is likely that a person engaged in prescribed employment came into contact with, or was otherwise exposed to, biological material of that first person as a result of the suspected offence (section 20B(1)).

The authorising officer is required to make a written record of the grounds on which they determined that the sample of blood should be taken (section 20B(2)). A copy of this written record must be given the suspect (section 20B(2)).

Before the procedure is carried out, the authorising officer must give the person written notice that (a) a sample of their blood is to be taken pursuant to section 20B of the CLFP Act and (b) that the blood will be tested for communicable diseases. The authorising officer must also invite the person to nominate a medical practitioner to receive a copy of the results of the testing (Regulation 4A).

The Commissioner of Police must take reasonable steps to notify the tested person (or their nominated medical practitioner) of the results of the test (Regulation 4B). In practice this task is undertaken by the Officer in Charge of Health Safety and Welfare Branch. Reasonable steps must also be taken to notify each affected employee of the results of the testing (Regulation 4C).

Blood samples taken under section 20B must not be used for any purpose other than testing for communicable diseases (section 34A).

Audit discussion

97. During the audit period, blood samples were taken from eight suspects for the purpose of testing those samples for communicable diseases. Ombudsman SA Officers inspected records relating to each of those eight procedures.¹¹⁴
98. All of these procedures appeared to comply with section 20B(1) of the CLFP Act and further, in each case, the senior police officer had made a record of the grounds on which they had determined that the procedure should be carried out in accordance with section 20B(2) of the Act. However, I note that
 - in one case, the authorising officer had not signed his authorisation¹¹⁵
 - in five cases the documentary evidence was such that a conclusion could not be reached either way as to it whether a copy of the written record was provided to the suspect.¹¹⁶

¹¹⁰ Section 6 of the *Summary Offences Act 1953*.

¹¹¹ Section 6A of the *Summary Offences Act*.

¹¹² Section 20A of the CL(FP) Act.

¹¹³ Section 3(1) of the CL(FP) Act.

¹¹⁴ [Redacted]

¹¹⁵ [Redacted]

¹¹⁶ [Redacted]

99. Regulation 4A(1) provides that suspects must be provided with written notice prior to a procedure comprising the taking of a blood sample that a sample of their blood is to be taken under section 20B of the CLFP Act and that it will be tested for communicable diseases. In my 2018 report, I noted the apparent practice of only providing suspects with written notice *after* a blood sample had been taken and recommended that this be addressed. SA Police have advised me that the relevant form has been modified to ensure that notice is given prior to the procedure taking place.
100. However, it appears that the amended form had not been introduced at the time that the 8 procedures inspected during this Audit period were undertaken. Given the form used at the time did not allow for a record to be made that the form had been given to the suspect, and given that SA Police advised this Office that it is usual practice for a copy of the form to be given to the suspect after the procedure, I am inclined to the view that these procedures did not comply with Regulation 4A(1). I expect the implementation of the 2018 recommendation will rectify this however.
101. I also note by way of comment that the authorising officer does not usually attend the place where the blood sample is taken. The physical provision of the written notice therefore falls to the police officer who is present at that place.
102. Regulation 4A(1)(b) provides that the authorising officer must invite the suspect to nominate a medical practitioner to receive a copy of the test result. In 3 cases it was evident from the records that the police officer present had invited the suspect to do so; in the remaining 5 cases the records did not indicate whether or not this occurred.¹¹⁷ It is not clear to me how these cases complied with the Regulation because the authorising officer did not make this invitation.
103. Regulations 4B and 4C require that reasonable steps are taken to notify the suspect or nominated medical practitioner and the affected person or nominated medical practitioner respectively of the test results of the procedure. The sample size for these provisions comprised 7 procedures because in one case blood was not able to be taken.
104. SA Police advised that suspects are not notified of test results when those tests are negative. I consider this practice is non-compliant with Regulation 4B(1) which appears to apply whatever the results of the testing. The audited records indicated that in two cases the suspect was not notified of the results¹¹⁸ and in three cases the affected person was not notified.¹¹⁹ These included one case where a sample returned a positive result for Hepatitis C but the 'viral load' test was negative, meaning that the disease was not infectious at that stage.¹²⁰ Accordingly I recommend that:
- SA Police give consideration to amending relevant procedures to ensure that reasonable steps are taken to notify suspects of the results of the testing, whatever those results may be. **(Recommendation 4)**
105. In another case, a blood sample was taken from a child.¹²¹ No appropriate representative was present contrary to section 25(2) of the CLFP Act. Neither was an audio-visual recording of the procedure made; this is contrary to section 26(1) of the Act.

¹¹⁷ [Redacted]

¹¹⁸ [Redacted]

¹¹⁹ [Redacted]

¹²⁰ [Redacted]

¹²¹ SAP 1900069127 refers.

The DNA database system

Relevant definitions

Corresponding law:

- (a) the *Crimes (Forensic Procedures) Act 2000 (ACT)*
- (b) Part 1D of the *Crimes Act 1914 (Cth)*
- (c) the *Crimes (Forensic Procedures) Act 2000 (NSW)*
- (d) Part 2 Division 3 of the *Youth Justice Act (NT)*
- (e) Part VII Division 7 of the *Police Administration Act (NT)*
- (f) Chapter 17 of the *Police Powers and Responsibilities Act 2000 (Qld)*
- (g) the *Forensic Procedures Act 2000 (Tas)*
- (h) Part III Division 1 Subdivision 30A of the *Crimes Act 1958 (Vic)*
- (i) the *Criminal Investigation (Identifying People) Act 2002 (WA)*¹²²

Crime scene index means an index of DNA profiles derived from material found -

- (a) at any place where an offence was, or is reasonably suspected of having been, committed;
- (b) on or within the body of a victim, or a person reasonably suspected of being a victim, of an offence;
- (c) on anything worn or carried by the victim at the time when an offence was, or is reasonably suspected of having been, committed;
- (d) on or within the body of any person, on any thing, or at any place, associated with the commission of an offence.¹²³

Missing persons index means an index of DNA profiles derived from biological material of persons who are missing.¹²⁴

Quality assurance register means a register maintained for quality assurance purposes that contains DNA profiles derived from biological material obtained from police officers, person involved in the conduct of forensic procedures and persons involved in the analysis of forensic material¹²⁵

Relevant person in relation to a forensic procedure proposed to be carried out on a volunteer or victim means -

- (a) if the person on whom the procedure is to be carried out is not a protected person - that person; or
- (b) if the person on whom the procedure is to be carried out is a protected person -
 - (i) in the case of a child - the closest available next of kin of the child; or
 - (ii) in any other case - the person's guardian or, if the person does not have a guardian, the closest available next of kin of the person¹²⁶

Statistical index means an index of information that -

¹²² Regulation 4.

¹²³ Section 40 of the CL(FP) Act.

¹²⁴ Section 40.

¹²⁵ Section 3(1).

¹²⁶ Section 43(8).

- (a) has been derived from the analysis of material obtained by carrying out forensic procedures; and
- (b) has been compiled for statistical purposes; and
- (c) cannot be used to discover the identity of persons from whom the material was obtained.¹²⁷

Suspects/offenders index means an index of DNA profiles derived from forensic material of -

- (a) volunteers or victims if an assimilation order has been made or a court/authority has ordered under a corresponding law that the material be treated as if it were obtained from a person suspected of an offence;
- (b) suspects, where material obtained under CLFP Act or a corresponding law;
- (c) offenders, where material obtained under CLFP Act or a corresponding law.¹²⁸

Unknown deceased persons index means an index of DNA profiles derived from biological material of deceased persons whose identities are unknown.¹²⁹

Volunteers (limited purposes) index means an index of DNA profiles derived from volunteers or victims, where specific consent has been given to the information being stored on this index but a condition prohibiting the information being compared with one or more specified indexes has been imposed on the consent.¹³⁰

Volunteers (unlimited purposes) index means an index of DNA profiles obtained from -

- (a) volunteers or victims where specific consent has been given to the information being stored on this index and being used for any purposes for which the DNA database system may be used; and
- (b) biological material of deceased persons whose identity is known.

Legislative requirements

Part 5 of the CLFP Act deals with the DNA database system and creates a number of offences.

Section 41(1) gives the Commissioner of Police the power to maintain a DNA database system. A series of administrative agreements between the Commissioner and the Director of Forensic Science SA (**FSSA**) whereby the Commissioner has delegated the maintenance and administration of the database to the Director has been in place since the enactment of the current Act's precursor, the *Criminal Law (Forensic Procedures) Act 1988*. The current Memorandum of Administrative Agreement was executed on 20 November 2014.

By virtue of section 42(2)(a) of the current Act, the Attorney-General is permitted to enter into arrangements with her counterparts in other Australian jurisdictions for the exchange of information recorded in the South Australian DNA database system and databases kept under corresponding laws.

Further, section 42(2)(b) allows the Attorney-General to enter into arrangements with the Minister responsible for the administration of a corresponding law of the Commonwealth or with the Australian Crime Commission, providing for transmission of information recorded in

¹²⁷ Section 40.

¹²⁸ Section 40 of the CLFP Act.

¹²⁹ Section 40 of the CLFP Act.

¹³⁰ Section 40.

the South Australian database to the Commission for the purpose of the Commission doing any, or all, of the following:

- (a) causing the information transmitted to form part of a national database
- (b) comparing the information transmitted with other information on a national database
- (c) identifying any matches between the information transmitted and other information on a national database
- (d) transmitting information about matches to the Commissioner of Police
- (e) any other thing required to be done under the corresponding law or otherwise authorised by law.

The Australian Crime Commission is now known as the Australian Criminal Intelligence Commission (**the ACIC**).

Section 42 of the CLFP Act makes it an offence for any person to access information stored on the South Australian database except in accordance with that section. Provided a person is authorised by the Commissioner of Police to do so, they may access the South Australian database for the purpose of, inter alia, comparing a DNA profile stored on the South Australian database with any other profiles stored on that database¹³¹, or for the purpose of an arrangement entered into by the Attorney-General with another Australian jurisdiction¹³².

I understand that the Attorney (or her predecessor) has entered into ministerial arrangements with other Australian jurisdictions, known as the Ministerial Arrangement for the Sharing of DNA Profiles and Related Information.

Since September 2017, FSSA has used a database known as the Laboratory Information Management System (**LIMS**) to store DNA profiles and their identifying information. However, LIMS is not used to search for and match DNA profiles. Rather, FSSA uploads samples obtained in South Australia onto the national database, known as the National Criminal Intelligence DNA Database (**NCIDD**)¹³³.

The NCIDD has been operated by the ACIC since 2001 and contains profiles from samples collected from crime scenes, convicted offenders, suspects, volunteers, items belonging to missing persons and unknown deceased persons. Once FSSA have obtained a DNA profile from material collected by or on behalf of SA Police, they upload it onto the NCIDD. The NCIDD searches to detect whether the profile that has been uploaded matches any profiles previously uploaded to the database. If a match is found, this match information is provided to FSSA. FSSA validates the match information and then notifies DNAMU of the match. DNAMU then passes this information onto the relevant investigating officer.

The DNA profile information stored on the NCIDD is de-identified. Therefore if a recently uploaded profile is found by the NCIDD to match with a profile uploaded by a jurisdiction other than South Australia, SAPOL must seek the information about the person whose profile was uploaded from that other jurisdiction.

¹³¹ Section 45(2)(a) of the CL(FP) Act. Note that the authorisation to compare DNA profiles stored on the South Australian database with each other does not extend to profiles stored on the volunteers (limited purposes) index if the victim or volunteer whose profile is so stored has imposed a condition on their consent to storage that prohibits such a comparison. See section 45(3)(a).

¹³² Section 45(2)(g) of the CL(FP) Act.

¹³³ Provision for the NCIDD is found in Division 8A of Volume 2 of the *Crimes Act 1914* (Cth).

It is an offence to store DNA profiles derived from forensic procedures carried out under the CLFP Act on any database other than the DNA database system (section 42(1)). There are four exceptions to this general provision.

- the first arises if the profile is stored in such a way that it is not possible to identify the person from whom the material was obtained or to whom it relates (section 42(1)(a))
- the second exception allows DNA profiles to be stored on databases kept under corresponding laws or kept by the Commonwealth pursuant to an arrangement entered into by the South Australian Attorney-General and Ministers responsible for the administration of corresponding laws or with the Australian Crime Commission (section 42(1)(b))
- the third exception allows the Commissioner of Police to store a DNA profile on a database kept for the sole purpose of preserving backup copies of DNA profiles (section 42(1)(ba))
- the final exception allows DNA profiles to be temporarily stored on another database maintained for purposes connected with the administration of the CLFP Act (section 42(1)(c)).

It is also an offence to cause the supply of biological material for the purpose of storing a DNA profile on the DNA database system or to store a DNA profile on the DNA database system in circumstances in which such storage is not authorised by the CLFP Act or a corresponding law (section 42(2)).

As stated above, section 45(1) of the CLFP Act creates a general offence of accessing information stored on the DNA database system except in accordance with the terms set out in that section. Section 45(2) allows the Commissioner of Police to authorise persons to access information stored on the database for one or more of the following purposes:

- to compare a DNA profile stored on the database with other DNA profiles so stored (section 45(2)(a))
- for the purpose of proceedings for a serious offence or proceedings under the *Criminal Assets Confiscation Act 2005* (section 45(2)(b))
- to determine whether it is necessary to carry out a forensic procedure under the CLFP Act or a corresponding law (section 45(2)(c))
- for the purpose of a coronial inquest or inquiry (section 45(2)(d))
- to make the information available to the person to whom it relates (section 45(2)(e))
- to administer the database (section 45(2)(f))
- for the purpose of an arrangement entered into by the South Australian Attorney-General and Ministers responsible for the administration of corresponding laws (section 45(2)(g))
- for the purpose of the *Mutual Assistance in Criminal Matters Act 1987 (Cth)* or the *Extradition Act 1988 (Cth)* (section 45(2)(h))
- for an Ombudsman's investigation (section 45(2)(i))
- for an investigation under the *Police Complaints and Discipline Act 2016* (section 45(2)(ia))
- for this audit (section 45(2)(j)).

DNA profiles derived as a result of volunteers or victims procedures may only be stored on the DNA database system if the relevant person has consented to such storage (section 43(1)). That consent must be obtained in the following manner:

- a police officer must complete a written statement explaining the options for storage under the CLFP Act, including the person's right to refuse consent to such storage and to impose conditions (A) limiting the period for which such storage can occur or (B) prohibiting the comparison of their DNA profiles stored on other specified indexes of the DNA database system (section 43(2)(a)(i))
- a police officer must read that statement to the relevant person and give them a copy of the statement (section 43(2)(b) and (c)). If the relevant person is not reasonably fluent in English, the statement must be read to them with the assistance of an interpreter (section 43(3))
- consent may be given expressly in spoken or written form or by giving some other unequivocal indication of consent (section 43(4)). However if consent is not given in written form, an audio or audio visual record must be made of the reading of the statement and the giving of consent (section 43(5)).

If a victim or volunteer gives consent for their DNA profile to be stored on the volunteers (limited purposes) index of the database, persons who have access to the database are not permitted to compare that profile with profiles stored on other indices of the database if the victim or volunteer has imposed a condition to that effect (section 45(3)(a)). There is an exception to this rule where such a comparison is made solely for the purpose of administering the database (section 45(4)). Any comparison of a DNA profile stored on an index of the database with a DNA profile stored on the quality assurance register is to be taken to have been made for the purpose of administering the database system (section 45(5)).

If a victim or volunteer's DNA profile is stored on one of the victims and volunteers indices and an assimilation order is made in relation to that profile, the profile must be transferred to the suspects/offenders index (section 44)).

In certain circumstances DNA profiles must be destroyed. For instance, volunteers and victims can request the destruction of their profiles. Similarly a volunteer's or victim's forensic material that is the subject of a retention order must be destroyed at the end of the retention period if that destruction is requested and the retention order is not renewed. Section 46(1)(a) of the CLFP Act requires the Commissioner of Police to ensure that DNA profiles derived from forensic material obtained under the CLFP Act are not retained on the database beyond the time that destruction is required under the CLFP Act. The Commissioner must also ensure that DNA profiles derived from material obtained under corresponding laws are not retained on the database beyond the time that destruction is required under the relevant corresponding law (section 46(1)(b)).

Missing persons who are found may make written requests to have their DNA profiles removed from the missing persons index of the database. Such requests must be actioned as soon as practicable (section 46(2)).

It is an offence for a person to intentionally or recklessly cause information to be retained on the DNA database in contravention of section 46 (section 46(3)).

A DNA profile is taken to have been removed from the database or from an index of the same if the database or index is altered so that it is no longer possible to identify the person from whom the forensic material was obtained (section 46(4)).

Audit discussion

106. In the course of this audit, FSSA was asked to provide details of systems in place to prevent the unauthorised storage of DNA profiles on LIMS. The Assistant Director, Science and Support, advised as follows:

- before samples are received by FSSA, SA Police have determined which index of the database they are to be assigned to. This is not changed by FSSA
- the software in LIMS only permits FSSA analysts to upload DNA profiles that have been assigned to one of the indices set out in section 40 of the CL(FP) Act, namely, a crime scene index, a missing persons index, an unknown deceased persons index, a suspects/offenders index, a volunteers (unlimited purposes) index and a volunteers (limited purposes) index
- to ensure the correct assignment of a profile, LIMS is configured to require independent double entries of the index. While there remains a possibility of human error at the point of both entries, FSSA takes the view that this would rarely occur
- once a profile has been uploaded onto LIMS and assigned to the correct index, there are few individuals with a sufficient level of access and understanding to enable them to either inadvertently or deliberately change the index on which the profile has been stored. These individuals comprise five FSSA Biology Editors and 34 IT staff members, working within both FSSA and the wider Attorney-General's Department
- each of these FSSA staff members have successfully completed internal training modules
- all FSSA staff are required to obtain a National Police Clearance certificate every second year
- FSSA view a scenario where a DNA profile obtained otherwise than under the CL(FP) Act or a fabricated DNA sample is uploaded onto LIMS as being rare. This is because it would require the involvement of multiple complicit individuals to falsify entries into LIMS. In addition, because DNAMU monitor all uploads onto LIMS, it is likely that they would identify any unexpected upload.

107. FSSA was also asked to advise how many persons were authorised to access information stored on LIMS during the audit period. FSSA advised that there are several different access levels for FSSA staff. These are as follows:

- six LIMS System Administrators and five Biology Editors have access to all LIMS functions
- eight Database Scientists have access to LIMS for the purpose of assessing profiles in LIMS and to upload to and remove profiles from the NCIDD
- 18 Reporting Scientists and 16 Technical Officers can assess and flag profiles in LIMS as suitable for upload but cannot themselves upload profiles onto the NCIDD
- five administrative staff members can enter administrative data into LIMS and can delete profile information

- although a total of 28 IT staff members (from both within FSSA and the wider Attorney-General's Department) have access to FSSA servers and could access LIMS, they lack the technical knowledge necessary to understand any information they might view on LIMS.

108. In responding to a question about the systems in place to prevent unauthorised access to LIMS, FSSA referred to the systems in place to prevent unauthorised storage of DNA profiles on the system. In addition, it was pointed out that:

- FSSA's Laboratory Operations Manager undertakes six monthly audits of access to LIMS
- staff members access LIMS through their individual computers. Access to the computers requires entry of a username and password. Each password must be eight characters long and include a number, an upper case letter and a special character. Passwords must be changed every 120 days
- separate log ins are required to access the SA Police portal into the LIMS and to access the NCIDD.

109. FSSA was asked to detail any systems in place to prevent unauthorised disclosure of information stored on LIMS. The Assistant Director, Science and Support, advised that FSSA is unable to prevent a wilful act by an employee with access to LIMS to release profile information. However risk mitigation strategies in place include:

- limiting access to the database to staff who are operationally required to perform certain functions
- those staff members have completed internal training
- staff members are required to obtain a National Police Clearance certificate every two years
- staff are regularly reminded of their obligations under the Code of Ethics for the South Australian Public Sector¹³⁴.

¹³⁴ The Code relevantly states: 'Public sector employees will not disclose official information acquired through their employment other than is required by law or where appropriately authorised in the agency concerned'. See <https://publicsector.sa.gov.au/wp-content/uploads/20180411-Code-of-Ethics-for-the-South-Australian-Public-Sector.pdf> (last accessed on 23 August 2019).

Annexure 1: Summary of results

Tables 2.1 to 2.4 summarise the principal findings made on the audit.

Table 2.1: Volunteers and victims procedures:

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Person was not suspected of having committed the offence that was being investigated (s.7(2))	79	100%	Nil	N/A
Relevant person consented to procedure (s.7(2))	9	89%	In one case where person on whom procedure was carried out was a child, person who consented to procedure was other than the child's closest available next of kin or guardian (contrary to definition of 'relevant person' in section 6)	
Relevant person withdrew consent and procedure discontinued (s.10(1))	79	N/A	N/A	
Relevant person withdrew consent but senior police officer authorised continuation of procedure (s.10(3))	79	N/A	N/A	
Senior police officer authorised carrying out of procedure (s.7(2))	1	100%	NIL	
Senior police officer satisfied that it was impracticable/inappropriate to obtain consent from relevant person and that carrying out of procedure is justified (s.9)	1	100%	NIL	
Senior police officer's authorisation was in writing and specified procedure authorised (s.9)	1	100%	NIL	
Procedure carried out on protected person	9	N/A	N/A	
Explained to protected person that procedure would not be carried out if protected person objected to it (s.11(1))	9	100%	In two of the nine cases, it was not evident from the record whether the explanation had been given; however SAPOL subsequently advised that the explanation had been given in both cases.	
Procedure discontinued where protected person	9	N/A	N/A	

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
objected to or resisted it (s.11(2))				
Procedure involves exposure of, or contact with, genital or anal area, buttocks, or breasts of female person and carried out by person of same sex as victim or volunteer (s.21(3))	7	100%	N/A	
Person not reasonably fluent in English is entitled to be assisted by an interpreter (s.22)	4	100%	In 1 case involving a person who was not fluent in English, they were assisted by a family member rather than a professional interpreter. Whilst this complied with the CLFP Act, ideally an interpreter should be an independent and professionally qualified person.	Recommendation 1 made; that consideration be given to amending the General Order to provide that, where reasonably practicable, a professional interpreter be utilised.
Intrusive procedure on protected person and appropriate person present to witness procedure (s.25(2))	0	N/A	N/A	
Procedure an intrusive procedure and victim or volunteer requested making of audio-visual record of the same (s.26(1)(b))	7	N/A - It was not possible to determine compliant.	N/A	Recommendation 2 made: That documentation concerning sexual assault forensic examinations is amended so as to ensure that advice is provided regarding the volunteers/victims right to request the making of an audio-visual record of the procedure.
Procedures an intrusive procedure and victim or volunteer allowed reasonable opportunity to arrange for attendance of medical practitioner of their choice to witness procedure (s.25(1))	7	Unclear from information available during inspection of records.	N/A	
Relevant person given a written statement explaining their right to request destruction of forensic material (s.12(1))	79	100%	0	In every case examined the victim/volunteer or the person who represented them was given the written statement. These figures put

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
				to one side the issue of whether the person who represented the victim/volunteer was an appropriate representative.
Request for destruction received	0	N/A	N/A	
Forensic material destroyed within 21 days of receipt of request (s.39(5))	N/A			

Table 2.2 Suspects procedures

All 357 suspects procedures considered in the audit were conducted on person suspected of a serious offence in accordance with section 14(2)(a) of the CLFP Act.

Table 2.2a: Simple forensic procedures

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Suspect assisted by interpreter because not reasonably fluent in English (s.22)	9	100%	In 1 case involving a person who was not fluent in English, they were assisted by a family member rather than a professional interpreter. Whilst this complied with the CLFP Act, ideally an interpreter should be an independent and professionally qualified person.	Recommendation 1 reiterated; That consideration be given to amending the General Order to provide that, where reasonably practicable, a professional interpreter be utilised.
Warning provided to the suspect that (a) reasonable force could be used to carry out the procedure and (b) that if the suspect obstructed or resisted the procedure, evidence of that fact might be admissible in proceedings against the suspect (s.30)	304	100%	In one case it was not clear from the record that compliance occurred. In a further 2 cases the suspect's response to the warning was not recorded by the police officer.	

Table 2.2b: Procedures authorised by senior police officers

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Senior police officer satisfied that there were reasonable grounds to suspect respondent had committed serious offence (s.19(1)(a))	53	100%	0	It was not clear from the records relating to 3 of the 53 cases that the senior police officer had satisfied themselves that there were reasonable grounds to suspect that the subject had committed a serious offence. ¹³⁵
Senior police officer satisfied that there were reasonable grounds to suspect that procedure could produce evidence of value to investigation (s.19(1)(b))	53	100%	0	In four cases it was not clear from the record whether the senior police officer had satisfied himself that the procedures authorised could produce evidence of

¹³⁵ PPMS 19/B19351 & 19/B08906 & 19/BB1906.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
				value to the investigation. ¹³⁶
Senior police officer satisfied that public interest in obtaining evidence outweighed public interest in ensuring individuals are protected from unwanted interference (s.19(1)(c))	9	100%	0	
In weighing public interest, senior police officer had regard to the seriousness of the suspected offence (s.19(2)(a))	9	100%	0	
In weighing public interest, senior police officer had regard to the extent to which procedure necessary for proper investigation of the offence (s.19(2)(b))	9	100%	0	In two cases it was not clear from the records that the senior police officers had had regard to the extent to which the procedure was necessary for the proper investigation of the offence. ¹³⁷
In weighing public interest, senior police officer had regard to any likely effects of the procedure on the respondent's welfare (s.19(2)(c))	9	100%	0	In a single case it was not clear from the records that the senior police officer had had regard to the likely effects of the procedure on the suspect's welfare. ¹³⁸
In weighing public interest, senior police officer had regard to whether there was less intrusive but reasonably practicable way of obtaining evidence of similar probative value (s.19(2)(d))	9	100%	0	
In weighing public interest, senior police officer had regard to any other relevant factors (s.19(2)(e))	9	100%	0	
Written application for senior police officer's order made (s.15(2))	53	100%	0	In four cases it was not clear from the records whether a written application had been made. ¹³⁹

¹³⁶ PPMS 18/A71827, 18/A76713 and 19/B19351.

¹³⁷ PPMS 19/B41126 and 19/B00836.

¹³⁸ PPMS 19/B41126.

¹³⁹ PPMS 19/B34288, 19/B33654 and 19/B21607.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Copy of application given to respondent (s.15(3))	53	100%	0	In six cases, it was not clear from the records whether a copy of the application had been given to the respondent. ¹⁴⁰
Senior police officer conducted informal hearing (s.16)	53	100%	0	In two cases it was not apparent from the records examined whether a hearing had been conducted. ¹⁴¹
Protected person respondent represented by appropriate representative at hearing (s.17(2))	15	100%	0	In one case the relationship between the protected person and the representative was not clear ¹⁴² . In practice it may be difficult for hospital to staff to adequately 'represent' the suspect at the hearing.
Respondent or representative given reasonable opportunity to make representations at hearing (s.17(4))	9	100%	0	
Senior police officer made written record of order and reasons for making it (s.19(4))	53	100%	0	
Copy of order given to respondent (s.19(4))	53	100%	0	
Suspect informed by a police officer that reasonable force might be used to carry out the procedure (s.30)	53	100%	0	In one case it was not clear whether the suspect understood the warning. ¹⁴³
Suspect informed by a police officer that if suspect obstructs/resists procedure, evidence of that fact may be admissible in proceedings against them (s.30))	53	100%	0	In one case it was not clear whether the suspect understood this information. ¹⁴⁴

¹⁴⁰ PPMS 19/B34288, 18/A73458, 18/A71827, 19/A82082 and 19/B21607.

¹⁴¹ PPMS 19/B19351 and 19/B21607.

¹⁴² PPMS 19/B20917.

¹⁴³ PPMS 19/B13246/48.

¹⁴⁴ PPMS 19/B13246/48.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Forensic procedures to be carried out humanely (ss21(1) and (2))	15	100%	0	
Duty to observe relevant medical or other professional standards (s.23)	15	100%	0	
Procedure involved exposure of, or contact with, genital or anal area, or buttocks, or breasts of female and carried out by person of same sex as suspect (s.21(3))	16	81%	3	In three of the 16 cases, it was not clear from the records that there was any particular reason why the procedures could not have been carried out by a person of the same sex as the suspect. ¹⁴⁵
Suspect assisted by interpreter because not reasonably fluent in English (s.22)	1	100%	0	In one case it was not clear whether the suspect requested to have an interpreter at the procedure. ¹⁴⁶
Intrusive forensic procedure and suspect allowed reasonable opportunity to arrange for attendance of medical practitioner to witness same (s.25(1))	42	100%	0	In 7 cases it was not clear from the records whether the suspect had been given an opportunity to arrange for a medical practitioner of their choice to be present during the procedure. ¹⁴⁷
Authorised procedure on protected person and appropriate representative present to witness procedure (s.25(2))	15	87%	2	In two cases, it did not appear that an appropriate representative was present ¹⁴⁸ . Recommendation 3 made: That the SA Police consider issuing a reminder to staff that an appropriate representative must be present at an authorised forensic procedure where the subject is a protected person in accordance with section 25(2) of the CLFP Act.
Suspect not in custody and police officer issued directions to undergo procedure (s.14(3))	2	100%	0	

¹⁴⁵ PPMS 19/B33654, 19/B07728 & 19/B07756 and 19/B19351.

¹⁴⁶ PPMS 19/B21607.

¹⁴⁷ PPMS 19/B34912, 19/B35535, 19/B08906, 19/A92142, 19/A98915 and 19/E78904. And 19/B13246/48.

¹⁴⁸ PPMS 19/E57894 and 19/B20917.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Written record of directions given to suspect (s.29(2))	2	100%	0	
Suspect informed that, if they fail to comply with directions, warrant for arrest may be issued (s.29(2))	2	100%	0	

Table 2.3 Offenders procedures

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Simple identity procedure carried out (s.20)	10	100%	0	
Police officer informed offender that reasonable force could be used to carry out procedure (s.30)	10	100%	0	
Police officer informed offender that if offender obstructed/resisted procedure, evidence of that fact may be admissible in proceedings against them (s.30)	10	100%	0	
Offender assisted by interpreter because not reasonably fluent in English (s.22)	0			
Offender not in custody and police officer issued directions about undergoing forensic procedure	0			
Written record of directions given to offender (s.29(2))	N/A			
Offender informed that if they fail to comply with directions warrant for arrest might be issued (s.29(2))	N/A			

Table 2.4: Blood testing for communicable diseases

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Comment
Senior police officer satisfied that person suspected of a prescribed serious offence (s.20B(1)(a))	8	100%	0	
Senior police officer satisfied that it is likely that a person engaged in prescribed employment came into contact with, or was exposed to, biological material of the suspected person (s.20B(1)(b))	8	100%	0	
Senior police officer made written record of grounds on which they determined that sample of blood should be taken (s.20B(2))	8	100%	0	In one case the authorising officer had not signed the authorisation.
Copy of written record given to suspected person (s.20B(2))	8	100%	0	In the cases of 5 of the eight sets of records inspected, it was not possible to ascertain if a copy of the senior police officer's record had been given to the suspects.
Before procedure carried out, senior police officer gave suspected person written notice that a sample of their blood was to be taken and tested for communicable diseases (reg.4A)	8	0%	8	
Before procedure carried out, senior police officer invited suspected person to nominate a medical practitioner to receive copy of test results (reg.4A)	8	100%	0	Not clear whether or not senior police officers themselves invited suspects to nominate medical practitioners noting that the authorising officers are rarely present with the suspect.
Reasonable steps taken by SAPOL to notify suspected person/nominated medical practitioner of results of testing (reg.4B)	7	71%	2	Recommendation 4 made: That the SA Police give consideration to amending relevant procedures to ensure that reasonable steps are taken to notify suspects of the results of the testing, whatever those results may be.
Reasonable steps taken by SAPOL to notify affected person/nominated medical practitioner of results of testing (reg.4C)	7	57%	3	Recommendation 4 made.

