



OmbudsmanSA

## AUDIT REPORT

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

SEPTEMBER 2020

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To:

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

I present this report on the 2019-2020 audit to monitor compliance with the *Criminal Law (Forensic Procedures) Act 2007*, as required by section 57 of that Act.

I was grateful for the passing of Regulation 8 of the *COVID-19 Emergency Response (Section 14) Regulations 2020* which provides an extension of the statutory time for presenting this year's annual report to 30 November 2020. I have nevertheless been able to complete the audit in accordance with the timeframe set out in section 57 of the CL(FP) Act (that is prior to 30 September 2020).

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

Emily Strickland  
**Deputy Ombudsman  
Ombudsman SA**

24 September 2020

# Contents

Executive summary .....	1
Background and Ombudsman jurisdiction.....	3
Volunteers and victims procedures .....	7
Suspects procedures .....	11
Retention orders .....	19
Assimilation orders .....	20
Offenders procedures .....	22
Forensic procedures on deceased persons.....	23
Blood testing for communicable diseases .....	24
The DNA database system .....	26
Annexure 1: Summary of audit results .....	30
Appendix 2: Assimilation Order form - PD434.....	52
Appendix 3: Relevant definitions.....	53

## 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 (CL(FP) Act)* during the period 1 July 2019 to 30 June 2020.

The audit identified very few instances of non-compliance. In particular, I note that:

- records of volunteers and victims procedures indicated there were no issues of non-compliance apart from 3 cases where records were not destroyed within 21 days of a request being made
- records of all simple identity procedures audited indicated full compliance
- there were no cases of non-compliance with requirements relating to suspect procedures authorised by senior police officers.

I commend the SA Police in relation to these results.

The CL(FP) Act does not provide the Ombudsman with specific power to make recommendations but I nevertheless have made suggestions where I consider improvements to practice or to the recording of procedures are warranted. These are as follows:

**Recommendation 1** That the Commissioner of Police consider amending the form used for recording volunteer and victims procedures to include a prompt to record whether the person is reasonably fluent in English and, if not, the details of the interpreter.

**Recommendation 2** That relevant documentation be amended to advise volunteers and victims that requests for destruction are to be made in writing to the attention of the Officer in Charge, DNAMU and that an email address be included.

**Recommendation 3** That consideration be given to amending relevant forms to prompt officers to consider and record consideration of the hierarchy for determining an 'appropriate representative' under sections 17(3) and 25(3) of the CLFP Act.

**Recommendation 4** That the Commissioner of Police consider amending General Order 'Forensic procedures' so as to require police officers making audio-visual records of intrusive procedures on suspects to:

- introduce themselves
- invite all other persons present to introduce themselves
- seek an acknowledgement from the suspect that no persons other than those identified are present in the room.

**Recommendation 5** That the Commissioner of Police consider the development of an information sheet to be provided to appropriate representatives so that they are informed of the nature and importance of their role.

**Recommendation 6** That Commissioner of Police consider amending the form used to make assimilation orders (PD434) to ensure that it includes the terms of an assimilation order.

**Recommendation 7** That the Commissioner of Police consider amending the form authorising the taking of a blood sample to test for communicable diseases under Regulation 4A to include an invitation for the suspect to nominate a medical practitioner to receive the results of the testing.

The Commissioner of Police has advised that he accepts 6 of these recommendations, and, in relation to recommendation 5, will give consideration as to how to most appropriately advise appropriate representatives about their role.

Compliance with the Act has greatly improved since the first audit conducted by Ombudsman SA in 2018. I consider this is in a large part due to the implementation of recommendations made in previous audits, and I commend SA Police for this also.

## Background and Ombudsman jurisdiction

1. The *Criminal Law (Forensic Procedures) Act 2007* (the **CL(FP) Act**) allows for the carrying out of forensic procedures to obtain evidence relevant to the investigation of criminal offences and for other purposes.
2. Section 57 of the CL(FP) 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. Whilst the CL(FP) Act provides police officers and others with extensive powers to facilitate the collection and management of forensic evidence, it also imposes safeguards or limits to those powers. These limits ensure, for example, that procedures are only conducted where necessary, that the integrity of the process is maintained, and that individuals' rights are balanced against the public interest in collecting and retaining evidence. Compliance with such statutory safeguards is clearly important in terms of protecting rights and in maintaining public confidence in law enforcement agencies. In addition, non-compliance may in some circumstances adversely affect the admissibility of the evidence in court; section 47 of the CL(FP) 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.
4. This audit considers compliance with the CL(FP) Act and the *Criminal Law (Forensic Procedures) Regulations 2007* (the **Regulations**) made under that Act during the period 1 July 2019 to 30 June 2020 (the **audit period**). It is the third audit undertaken by Ombudsman SA.
5. Pursuant to section 9(1) of the Ombudsman Act 1972, the Ombudsman delegated his powers under the CL(FP) Act to myself as Deputy Ombudsman to conduct the audit. He did so having declared a potential conflict of interest and out of an abundance of caution.<sup>1</sup>

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

## Audit scope and methodology

6. The vast majority of forensic procedures carried out in SA are conducted by police officers and records relating to these procedures are vetted and held by the DNA Management Unit (DNAMU) of the SA Police Forensic Services Branch.
7. Records relating to each type of forensic procedure authorised by the CL(FP) Act were inspected during the audit, and I thank the DNAMU for facilitating access to these records.<sup>2</sup> The table below 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.

### *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	659	65	10%
Suspects procedures <sup>3</sup>	7208	481	7%
Offenders procedures <sup>4</sup>	4	4	100%
Forensic procedures on deceased persons	21	21	100%
Blood testing for communicable diseases	15	15	100%

8. During the course of the audit Ombudsman SA officers also:
  - viewed 30 audio-visual records of intrusive procedures carried out on suspects and 15 procedures involving the taking of blood from persons for the purpose of testing for communicable diseases
  - inspected records regarding an assimilation order made during the audit period
  - inspected SA Police records relating to the destruction of forensic material obtained by carrying out victims and volunteers procedures
  - considered a response provided by Forensic Science SA (FSSA) regarding the systems and procedures in place to protect the integrity of the DNA database system<sup>5</sup>

<sup>2</sup> Records in relation to simple identity procedures carried out on suspects, offenders procedures and procedures carried out on deceased persons were inspected on site at DNAMU; copies of records of other procedures were provided to Ombudsman SA by the DNAMU.

<sup>3</sup> I am advised that 149 of these were authorised by senior police officers and accordingly I conclude that 7059 were simple identity procedures.

<sup>4</sup> 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. However, I am advised that there were a total of 7063 simple identity procedures carried out and as 7059 of these related to suspects, I have concluded that there were 4 offenders procedures conducted during the audit period.

<sup>5</sup> The DNA database system holds information relating to forensic material collected under the CL(FP) 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.



- considered additional information provided by SAPOL regarding specific records inspected; for example further information from the relevant investigation or authorising officer
  - considered the current SA Police General Order 'Forensic procedures'
  - considered current SA Police policies and procedures regarding the making and storage of audio-visual records.
9. This year I took the additional step of obtaining authorisation from the Officer in Charge of SA Police Ethical and Professional Standards Branch to inspect records relating to complaints arising out of forensic procedures. Such complaints are made and investigated under the *Police Complaints and Discipline Act 2016*. Strict confidentiality provisions<sup>6</sup> prevent me from providing details of these complaints. However, I can report that these records did not raise any issues of non-compliance with the CL(FP) Act.
  10. As I observed in previous audit reports, it is not possible to confirm that all of procedures audited complied with all relevant provisions of the CL(FP) Act. In some cases the record of the procedure does not adequately indicate whether compliance has been achieved. Indeed, in some cases the nature of the requirement is such that a determination as to compliance can only be achieved by viewing an audio-visual record of the procedure (for example; a written record is of limited value in determining whether compliance with sections 21(1) of the CL(FP) Act has occurred).<sup>7</sup> The CL(FP) 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)<sup>8</sup>.
  11. This report sets out my views in relation to compliance with the Act including where it was unclear whether compliance had been achieved or not.<sup>9</sup> Appendix 1 provides a summary in table format of these findings.
  12. As I have done in previous years, I have taken the liberty of making informal recommendations<sup>10</sup> where I consider changes to procedures may improve practice. I emphasise that the audit indicated very few instances of non-compliance and accordingly these seven recommendations are simply suggestions for improvements to practice; some are designed to assist in the audit process.
  13. A draft copy of this Report<sup>11</sup> was provided to SA Police and FSSA for comment prior to finalisation. This final report incorporates amendments made as a result of comments received from both parties. In addition, the Commissioner of Police advised that he accepts recommendations 1, 2, 3, 4, 6 and 7 and that he notes and will consider recommendation 5.

## 2019 Audit Report Recommendations

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<sup>6</sup> Section 45 of the *Police Complaints and Discipline Act 2016*.

<sup>7</sup> Section 21(1) of the CL(FP) Act provides that forensic procedures are carried out humanely and with care (a) to avoid, as far as reasonably practicable, offending genuinely held cultural values or religious beliefs; and (b) to avoid inflicting unnecessary physical harm, humiliation or embarrassment.

<sup>8</sup> Section 26 of the CL(FP) Act.

<sup>9</sup> I have redacted any references to specific procedures in this report to avoid disclosing information contrary to the section 50 of the CL(FP) Act.

<sup>10</sup> The CL(FP) Act does not require the Ombudsman to make recommendations.

<sup>11</sup> 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]

14. In my 2019 report, I made four recommendations all of which have been implemented by the Commissioner of Police. The table below sets out the 2019 recommendations and the implementation action taken by SA Police.

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.	Amendment of General Order 'Forensic Procedures' to draw members' attention to the requirements of General Order 'Interpreters'.
Recommendation 2	That documentation concerning sexual assault forensic examinations is amended so as to ensure that advice is provided regarding the volunteer/victim's right to request the making of an audio-visual record of the procedure.	Amendment of Forensic Procedures brochure produced by the Commissioner for Victims' Rights so as to include the necessary advice.
Recommendation 3	That 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 CL(FP) Act.	Amendment of PD430 and PD431 forms to provide expanded advice regarding the need for an appropriate representative to be present when procedures are conducted on protected person suspects.
Recommendation 4	That SA Police give consideration to amending relevant procedures to ensure that reasonable steps are taken to notify suspects of the results of testing for communicable diseases, whatever those results may be.	Procedures put in place to follow up all test results, including making notifications to SA Health and flagging of suspects on police systems in the event they cannot be located.

## Volunteers and victims procedures

15. Volunteers and victims procedures can be carried out on people who are not suspected of having committed the offence that is being investigated.<sup>12</sup> 659 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 65 of those procedures. In the vast majority of cases these procedures appeared to have been conducted in accordance with the legislative requirements.
16. Volunteers and victims 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.<sup>13</sup> All records inspected indicated the relevant person had consented to the procedure.

### *Protected persons*

17. There are special provisions for volunteers and victims procedures carried out on 'protected persons'.<sup>14</sup> Firstly, before such a procedure is carried out, it must be explained to the protected person that the procedure will not be carried out if they object to it. The procedure must not continue if the protected person objects to or resists it.<sup>15</sup>
18. Five records were inspected relating to procedures conducted on protected persons and I determined it was likely that the requisite explanation had been given in all cases.<sup>16</sup>
19. An appropriate representative must be present to witness a procedure on a protected person.<sup>17</sup> There were no issues of non-compliance in this respect.

### *Intimate procedures*

20. 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.<sup>18</sup>
21. In one volunteers and victims procedure<sup>19</sup> the victim was a female protected person under the age of 16, the procedure carried out was a sexual assault examination, and this was completed by a male medical practitioner. Information provided (by the medical practitioner who conducted the procedure) indicated that it was not reasonably practicable for the procedure to be carried out by a medical practitioner of the same sex. As I understand it, there are three paediatricians, one male and two female, who conduct the procedures at the Child Protection Services at the Women's and Children's Hospital. The victim attended the hospital on a weekend when the male

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<sup>12</sup> Section 7(2) of the CL(FP) Act.

<sup>13</sup> Section 7(2) of the CL(FP) Act.

<sup>14</sup> Protected person means a child or a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure.

<sup>15</sup> Section 11 of the CL(FP) Act.

<sup>16</sup> [REDACTED]

<sup>17</sup> Section 25(2) of the CL(FP) Act.

<sup>18</sup> Section 21(3) of the CL(FP) Act.

<sup>19</sup> [REDACTED]

paediatrician was on-call and the two female paediatricians were not working that weekend.

22. In the circumstances, given that no female paediatrician was available at the hospital who was qualified/appropriately trained to conduct the procedure, and noting the importance of timeliness in conducting the examination and collecting forensic evidence, I consider that it was not reasonably practicable in the circumstances for a female practitioner to conduct the procedure.
23. I therefore consider that compliance occurred in relation to all 12 procedures audited in relation to section 21(3) of the CLFP Act.

### *Intrusive procedures*

24. 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<sup>20</sup>
  - they may request the making of an audio-visual record of the same and in that event such a record must be made.<sup>21</sup>
25. In relation to these requirements, the 12 records inspected comprising victim or volunteer procedures that were intrusive reflected limited information to enable auditing of compliance with these sections. I note that the form used in relation to sexual assault examinations<sup>22</sup> does not include a specific reference to the right to have a medical practitioner witness the procedure or to any request that an audio-visual record of the procedure be made.
26. I do understand however, that in cases where a sexual assault examination is conducted by SA Health, the volunteer or victim are generally provided with an information brochure prepared by the Commissioner for Victims' Rights which includes an explanation of these rights.<sup>23</sup> Of the records inspected, all but one person<sup>24</sup> was provided with a copy of this brochure.
27. Discussions between my officers and some clinic staff suggest that, aside from the practice of providing victims with a copy of the forensic procedures brochure, it appears that there is some professional judgment exercised by practitioners in relation to providing oral advice to victims of their rights under the CL(FP) Act. Information provided from the Medical Coordinator at one clinic indicated that in relation to explaining rights to victims, the main focus is on consent to the procedure, the right to withdraw consent, and the right to request destruction of the material obtained (meaning attention is not always drawn to a victim's right to have a medical practitioner present or the right to request an audio-visual recording).
28. In my view, this is understandable given the sensitivity of circumstances surrounding the procedure, and given the nature of the procedure being not only a forensic procedure, but also a therapeutic one. That said, in circumstances where victims, who

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<sup>20</sup> Section 25(1) of the CL(FP) Act.

<sup>21</sup> Section 26(1)(b) of the CL(FP) Act.

<sup>22</sup> PD184A.

<sup>23</sup> My 2019 Audit Report recommended that the right to request an audio-visual record of the procedure be included in the brochure and this has been implemented.

<sup>24</sup> [REDACTED].

are no doubt presenting to a clinic in a time of crisis, are required to read and absorb a multiple page brochure in order to be informed about their rights, and where there is no further explanation provided by the practitioner, I query whether a reasonable opportunity has been afforded to the victim to fully understand their rights and properly exercise them.

### ***Right to Interpreter***

29. None of the volunteer and victim procedures inspected appear to have been carried out on persons not reasonably fluent in English.<sup>25</sup> I understand that where an interpreter is required, details are recorded on the relevant consent form for volunteers and victims procedures<sup>26</sup> under witness details and on an electronic record. I also note that the preliminary information on the consent form includes a reminder about the interpreter requirement. There is, however, no section in the form which requires a record to be made in regards to the fluency of the person. I note that PD429 which is used for simple identity procedures includes such a prompt.
30. Whilst I do not find any issues of non-compliance in this area, I consider it would be useful if the relevant consent form includes a prompt to record whether the volunteer or victim required an interpreter and if so details of that person. This would ensure police officers turn their mind to this important requirement and would also assist in the auditing process. Accordingly I RECOMMEND:

That the Commissioner of Police consider amending the form used for recording volunteer and victims procedures to include a prompt to record whether the person is reasonably fluent in English and, if not, the details of the interpreter.  
(Recommendation 1)

### ***Destruction of forensic material obtained by carrying out volunteers and victims procedure***

31. Forensic material obtained from a person by carrying out a volunteers and victims procedure must be destroyed (a) within 21 days after receiving a request for destruction from the person who consented to the procedure or (b) if a retention order has been made in relation to the material - at the time directed in the order.<sup>27</sup>
32. Nine records were inspected where the volunteer or victim requested destruction of forensic material obtained during the procedure.<sup>28</sup> One request for destruction was identified as being completed 267 days after the request was received.<sup>29</sup> I understand this was a result of the material being compared with other forensic material and that SAPOL sought 'permission' from the volunteer/victim not to destroy the material until this comparison had occurred. In my view the Act does not allow for the suspension of destruction once a request is received and I note with some concern the amount of time which lapsed between the request and the destruction. That said, I assume the comparison of the material was useful. Accordingly, I invite the Commissioner of Police to consider how non-compliance in such situations can be avoided in the future.
33. Two requests for destruction were completed outside of the 21 day period it appears because there was a delay in passing the request internally from head office to the

<sup>25</sup> Section 22 of the CL(FP) Act provides that a person not fluent in English is to be assisted by an interpreter.

<sup>26</sup> PD425.

<sup>27</sup> Section 39(1) of the CL(FP) Act.

<sup>28</sup> I note the requests for destruction did not necessarily relate to procedures carried out during the audit period.

<sup>29</sup> [REDACTED].

DNAMU (indeed the requests were not received by the DNAMU until after 21 days period had expired).<sup>30</sup> The advice currently given to volunteers and victims via the relevant consent form<sup>31</sup> and information brochure<sup>32</sup> provides that requests for destruction are to be made in writing to the Commissioner of Police at the relevant GPO Box. The Officer in Charge, DNMAU, suggested increased compliance with the 21 day requirement could be achieved if requests were made directly to the DNAMU. Accordingly, I RECOMMEND:

That relevant documentation be amended to advise volunteers and victims that requests for destruction are to be made in writing to the attention of the Officer in Charge, DNAMU and that an email address be included. (Recommendation 2)

34. 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.<sup>33</sup> 95% of records inspected indicated compliance with this requirement; the remaining records were unclear.

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<sup>30</sup> [REDACTED] (51 days) and [REDACTED] (25 days).

<sup>31</sup> PD425.

<sup>32</sup> Forensic Procedures, Information for victims and volunteers.

<sup>33</sup> Section 12(1) of the CL(FP) Act.

## Suspects procedures

35. Suspects procedures can be carried out on persons who are suspected of a serious offence.<sup>34</sup> All records of suspects procedures audited indicated that the person was suspected of a serious offence.
36. Suspects procedures can only be conducted if they consist only of a 'simple forensic procedure' or the procedure is authorised by a senior police officer.<sup>35</sup>

### Simple forensic procedures

37. Simple forensic procedures comprise forensic procedures consisting of one or more of a simple identity procedure and a gunshot residue procedure.<sup>36</sup> Simple identity procedures comprise forensic procedures 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.<sup>37</sup>
38. A total of 7,063 simple identity procedures were carried out on suspects and offenders during the audit period. Ombudsman SA Officers inspected 414 records relating to simple identity procedures carried out on suspects and four such procedures carried out on offenders. This equates to 5.9% of the total number of procedures carried out. The records relating to simple identity procedures on suspects and offenders showed almost complete compliance with the terms of the CL(FP) Act, as has been the case in previous years.
39. Section 22 of the CL(FP) Act provides that a forensic procedure cannot be conducted on a person not reasonably fluent in English unless they are assisted by an interpreter. In my 2018 and 2019 audit reports, I made recommendations regarding the use of interpreters during forensic procedures and hearings associated with them. These recommendations were that SA Police General Order 'Forensic procedures' be amended so as to direct that neither police officers nor suspected co-offenders should act as interpreters and that, where reasonably practicable, interpreters should be professionally qualified interpreters.
40. Each of these recommendations has been implemented by SA Police and I am pleased to report that the 2019/20 audit demonstrated that SA Police now engage professionally qualified interpreters to assist when carrying out simple identity procedures. In each of the cases where simple identity procedures were carried out on suspects who were not reasonably fluent in English, I was satisfied that a professional interpreter had been engaged.
41. Section 30 of the CL(FP) Act requires that before a forensic procedure is carried out on a person, a police officer must warn the person that:
  - reasonable force may be used to carry out the procedure
  - if the person obstructs or resists the procedure, evidence of that fact may be admissible in proceedings against them.
42. Each of the records inspected that related to simple identity procedures carried out on suspects showed that the required warning was given prior to the procedure being conducted.

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<sup>34</sup> Section 14(2)(a) of the CL(FP) Act.

<sup>35</sup> Section 14(2)(b) of the CL(FP) Act.

<sup>36</sup> Section 3(1).

<sup>37</sup> Section 3(1).

43. Section 24 of the CL(FP) Act provides that the person who carries out a forensic procedures must be a medical practitioner or a person who is qualified as required by the regulations to do so. All records inspected relating to simple identity procedures indicated compliance with this provision.
44. Only one of the simple identity procedures carried out on a suspect was carried out when the suspect was not in custody and pursuant to a direction given under section 29 of the CL(FP) Act.<sup>38</sup> The records associated with that procedure showed that section 29 was fully complied with (that is, an appropriate written record of the direction was given to the suspect).
45. Section 25(2) of the CL(FP) Act provides:
- If, in accordance with an authorisation under a Division of Part 2, a forensic procedure is to be carried out on a person who is a protected person within the meaning of that Division, an appropriate representative must be present to witness the forensic procedure.
46. SAPOL advised in its response to my draft report that this provision is interpreted to apply to all suspects procedures carried on protected persons (whether simple identity procedures or those requiring an authorisation by a senior police officer). I consider this is a reasonable interpretation of the legislation and note that the relevant form police use to record simple identity procedures carried out on suspects or offenders (PD429) prompts the officer to record the appropriate representative's details.
47. Section 25(3) of the CL(FP) Act provides a hierarchy to apply for the selection of an appropriate representatives:
- An 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 the above category - 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; or
  - (c) If there is no available person within either of the above categories - a person, who is not a police officer or person involved in the investigation of the suspected offence (if any), chosen by a police officer in charge of a police station or, where relevant, the investigating police officer.
48. In two of the sets of records inspected where the suspect was a child who was subject to a simple identity procedure, the appropriate representative was described as the child's 'carer'.<sup>39</sup> A carer is not obviously a relative of a child and is unlikely to be considered the child's friend; such a person does not fall within paragraph (a) of section 25(3). Neither does a carer necessarily satisfy the description of an advocate for the protected person nominated by a government or private agency. It might be inferred therefore that, in these two cases, the carer was identified as an appropriate representative by the investigating police officer. If this is the case, the records inspected did not reveal what efforts had been made to ascertain the availability of a relative, friend or nominated advocate.

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<sup>38</sup> [REDACTED]

<sup>39</sup> [REDACTED]





57. In all of the audited procedures a senior police officer conducted an informal hearing before making the order as required by section 16 of the CL(FP) Act.

### *Authorisation of the procedure*

58. Section 19(1) of the CL(FP) Act provides that 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; and
  - (b) there are reasonable grounds to suspect that the procedure could produce material 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.
59. In weighing where the public interest lies, section 19(2) requires the senior police officer to have regard to:
- the seriousness of the suspected offence
  - the extent to which the procedure is necessary for the proper investigation of the offence
  - any likely effects of the procedure on the respondent's welfare given their age, physical and mental health and cultural and ethnic background
  - whether there is a less intrusive but reasonably practicable way of obtaining evidence of the same or similar probative value to confirm or disprove that the respondent committed the offence
  - any other relevant factors.
60. Records relating to nine authorised suspects procedures were unclear as to whether the senior police officer had had regard to the factors set out in the preceding paragraph and had properly weighed the public interest factors as required by section 19(1)(c) of the CL(FP) Act.<sup>46</sup> Often in these cases the senior police officer had only listed the public interest factors set out in section 19(2) and included limited additional information other than a notation of the suspected offence and the maximum penalty such an offence attracted. In his response to my draft report the Commissioner of Police advised this had been noted and that he would ensure that appropriate advice is provided to senior police officers.
61. Records audited indicated full compliance with the other requirements associated with conducting the hearing (specifically, that the respondent or their representative must be given a reasonable opportunity to make representations at the hearing<sup>47</sup>; that the senior police officer must make a written record of their order and their reasons for making it<sup>48</sup>; and that a copy of the record must be given to the respondent<sup>49</sup>).

### *Appropriate representative for protected person*

62. Section 17(2) of the CL(FP) Act states that if a respondent at an informal hearing is a protected person, they must be represented by an 'appropriate representative' who

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<sup>46</sup> [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

<sup>47</sup> Section 17(4) of the CLFP Act.

<sup>48</sup> Section 19(3) of the CLFP Act.

<sup>49</sup> Section 19(4) of the CLFP Act.

may make submissions at the hearing. Section 25(2) provides that if, in accordance with an authorisation, a forensic procedure is to be carried out on a protected person, an appropriate representative must be present to witness the procedure. Appropriate representative is defined as:

- (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.<sup>50</sup>

63. I consider that all records inspected in the audit period indicated compliance with these requirements. However, one matter raised the issue of whether the appropriate representative was engaged in and understood their role. I discuss this further below.

### *Conduct of the procedure*

64. In the course of viewing audio-visual records of intrusive procedures carried out on suspects, the audit team noted that persons present during such procedures were not always identified or introduced by the investigating officer. This impacted on the team's ability to form a view as to whether sections 25(2) and 21(2) of the CL(FP) Act had been complied with (that is whether the appropriate person witnessed the procedure and whether the procedure was carried out in the presence or view of no more persons than are reasonably necessary for carrying out the procedure). In one case, the investigating officer indicated that he was in company with other police officers but did not provide their names or indicate how many other officers were present.<sup>51</sup> In three cases, it was not clear from the recording whether the appropriate representative was present to witness the forensic procedure.<sup>52</sup>

65. In this regard, I note that SA Police General Order 'Interviewing suspects and vulnerable witnesses' provides:

When commencing an electronically recorded interview the investigating officer must include a preamble in which they state the time, date and place of the interview, introduce themselves and invite all other persons present to introduce themselves.

The interviewing officer should seek an acknowledgement from the interviewee that no persons other than those identified are present in the room.

66. It seems to me that the practice identified in this General Order should be included in the General Order 'Forensic procedures'. It represents best practice in terms of evidence gathering techniques and would also facilitate the auditing process. I therefore RECOMMEND:

That the Commissioner of Police consider amending General Order 'Forensic procedures' so as to require police officers making audio-visual records of intrusive procedures on suspects to:

- introduce themselves
- invite all other persons present to introduce themselves

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<sup>50</sup> Section 25(3).

<sup>51</sup>

<sup>52</sup> [REDACTED]; [REDACTED]; [REDACTED].

- seek an acknowledgement from the suspect that no persons other than those identified are present in the room. (Recommendation 4)
67. Section 25(1) of the CL(FP) Act requires that, if an intrusive forensic procedure is to be carried out on a person, the person 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 procedure.
  68. In two sets of records inspected by the audit team, while the written records indicated that the suspects were provided with an opportunity to request a medical practitioner of their choice to witness the procedure, having viewed the audio-visual records, I query whether this amounted to a 'reasonable opportunity'.<sup>53</sup> In one procedure, the footage showed the suspect sitting on a hospital bed with a medical practitioner preparing the suspect's arm for a blood sample. While this was taking place, a police officer asked the suspect whether they wanted a medical practitioner of their choice to attend as a witness. The police officer appeared to be completing a form when asking this question.
  69. In the second case, the footage shows a nurse ready to conduct a procedure and wearing a gown, gloves, hair net and mask when the suspect is asked by a police officer whether they wanted a medical practitioner of their choice to witness the procedure.
  70. In both cases, the suspects indicated that they did not require a medical practitioner of their choice present to witness the procedure. However, I query whether a suspect about to undergo a forensic procedure in the presence of police officers would feel able to answer this question in the affirmative and exercise this right.
  71. Section 21(1) of the CL(FP) Act provides that 'a forensic procedure must be carried out humanely and with care' and 'to avoid inflicting unnecessary physical harm, humiliation or embarrassment'. The audio-visual records inspected indicated that those procedures were carried out respectfully and humanely.
  72. That said, I consider one case<sup>54</sup> could have been conducted more sensitively, particularly given that the suspect was a protected person and a particularly vulnerable child (a child under the guardianship of the Chief Executive of the Department for Child Protection (DCP)). The appropriate representative was described as a DCP carer.<sup>55</sup> The senior police officer recorded their recognition that the procedure might cause some embarrassment to the suspect, the officer also recorded that the procedure 'will be conducted by a qualified medical practitioner and it is not anticipated that this will cause long term effects on the welfare of the respondent'. It was also noted that, due to the respondent's age, a support person would be present during the procedure.
  73. In this case the intrusive procedures were carried out by a female doctor. These included a penile swab and an examination of the suspect's body. The footage showed that the suspect was required to remove all his clothes, including his underwear, for this examination to occur. In other audio-visual records of examinations of a suspect's unclothed body, the suspect is permitted to wear clothing on the upper part of their

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<sup>53</sup> [REDACTED]

<sup>54</sup> [REDACTED]

<sup>55</sup> [REDACTED]

body while the lower part of their body is examined, and vice versa. I suggest this would have been the preferable way to proceed in this case.

74. The audio-visual record of this procedure in addition to other interactions between SA Police, the suspect and the carer beforehand, indicated that the carer appeared not to be engaged in the events taking place. At various times throughout the footage, the appropriate representative is seen sitting next to the suspect and yawning while police officers speak to the suspect.
75. Whilst section 25(2) of the CLFP Act simply provides that the appropriate representative 'must be present to witness the forensic procedure', I assume its purpose is to assist in safeguarding against potential breaches of provisions like section 21(1) and that it is expected that an appropriate representative would speak up if, for example, the procedure was being conducted in a manner that was causing unnecessary embarrassment to the suspect. If that is the case, I consider it would be useful if appropriate representatives were provided information about the requirements of the Act in relation to carrying out procedures and guidance as to action to take if these were not being adhered to. Accordingly, I RECOMMEND:

That the Commissioner of Police consider the development of an information sheet to be provided to appropriate representatives so that they are informed of the nature and importance of their role. (Recommendation 5)

76. The Commissioner of Police has advised that this recommendation is noted and that 'consideration will be given to creation of an appropriate means of providing advice to appropriate representatives in line with the intentions of the Act.'
77. 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.<sup>56</sup> A number of the procedures inspected by the audit team involved the exposure of and contact with a male suspect's genitals and were carried out by a female practitioner. In these cases it was not clear from the records whether or not it was 'reasonably practicable' for a practitioner of the same sex as the suspect to undertake the procedure.<sup>57</sup>
78. During their attendance at DNAMU, the audit team raised the issue of such intimate procedures being carried out by a person of a different sex than the suspect. In response, auditors were advised that registered nurses employed by SA Police are able to facilitate all intrusive procedures apart from the taking of dental impressions. In the event that an SA Police registered nurse is unavailable, police officers are able to utilise the Wakefield Hospital emergency centre for undertaking authorised procedures on suspects. As far as I am aware, both the registered nurses currently employed by SA Police are female.
79. I consider this situation would rarely make it 'reasonably practicable' for an intrusive procedure to be carried out on a male suspect by a male person. I suggest SA Police should consider arranging for the procedure to occur at Wakefield Hospital where a male suspect requests a male practitioner.

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<sup>56</sup> Section 21(3) of the CLFP Act.

<sup>57</sup> This was the case in 50% of the 26 procedures inspected to determine compliance with this requirement. Four of these records comprised audio-visual records : [REDACTED], [REDACTED].

### ***Setting forensic material aside for analysis by suspect***

80. 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.
81. The Commissioner has delegated to the Director of FSSA the responsibility for complying with section 33 of the CL(FP) 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.
82. 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.
83. Samples that are not consumed during analysis are retained as extracts in freezers.
84. 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.

## Retention orders

85. 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'.
86. Section 36 of the CL(FP) Act sets out the grounds on which a senior police officer make an order. Section 38 of the CL(FP) Act sets out the requirements for making an application for a retention order and the process and the requirements for the hearing of an application. I note that section 38 also applies to applications made for assimilation orders.
87. I am advised that no applications for retention orders were made during the audit period.

## Assimilation orders

88. 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.<sup>58</sup> The effect of this is that the material will be stored on the suspects/offenders index of the DNA database and that it can no longer subject to applications for and orders of destruction.<sup>59</sup>
89. 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.<sup>60</sup>
90. Section 38 of the CL(FP)(Act) requires that:
- 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
  - if the respondent can be located, a copy of the application must be given to them
  - an assimilation order can only be made on the basis of an informal hearing conducted in such manner as the senior officer thinks fit
  - the hearing can be conducted in the absence of the respondent if the senior police 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
  - if the respondent attends the hearing, they are entitled to be represented by a legal practitioner
  - the respondent or their representative must be given a reasonable opportunity to make representations at the hearing
  - the senior police officer must make a written record of the order
  - if the respondent can be located, a copy of that order must be given to them<sup>61</sup>.
91. In the relevant period, only one<sup>62</sup> assimilation order was made. In this instance, the crime allegedly occurred at a residence at which the respondent resided. At first instance, hand and fingernail swabs were taken from the respondent voluntarily. Information subsequently received led SA Police to suspecting the respondent of having committed the offence and the investigating officer sought an order from a senior police officer to assimilate the forensic material obtained in the course of the victim and volunteer procedure so that it would be treated as if it were the result of a suspect's procedure. At the same time, an additional suspects procedure was carried out on the respondent.
92. The records indicate that all of the relevant requirements in the CL(FP) Act were complied with.

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<sup>58</sup> CL(FP) Act, section 37.

<sup>59</sup> CL(FP) Act, section 37 and 39.

<sup>60</sup> CL(FP) Act, section 37.

<sup>61</sup> CL(FP) Act, section 38(10)

<sup>62</sup> [REDACTED].



93. That said, I note a discrepancy in the written record of the order. The Aide Memoir for the hearing records that the senior police officer said '*Having heard the submissions of all persons I am... satisfied that it is appropriate* to approve the assimilation order.' (Italicised text denotes the pre-existing text of the form). In contrast the terms recorded on the PD434 form (which is the proforma for recording details of applications for and orders of assimilation) are as follows: '*forensic material*. Hand and fingernail swabs including photographs taken of the hands and any injuries *obtained from* [respondent's name] *on* [date] *at* [police station] *shall be retained until* 20 September 2020'. Despite this discrepancy, I am satisfied that the senior police officer intended to make an assimilation order and that by uttering the words set above at the hearing he did make one.
94. I also note that the making of assimilation orders is specifically envisaged for the situation SA Police found itself in; that is, where a person who volunteered collection of forensic material subsequently becomes the suspect. Retention orders, on the other hand, are designed to deal with situations where the person who gave consent to a victims or volunteers procedure (including an appropriate representative) or a person related to or associated with them, is suspected of a serious offence. Retention orders may only be made once a request for destruction has been received by the person who gave consent to the volunteers and victims procedure.
95. I consider that the discrepancy in written record of the order arose due to the proforma used to make the order (PD434) which prompts the senior police officer to record a retention rather than assimilation order. I set out that part of PD434 which allows a senior police officer to record their order at Appendix 3.
96. Accordingly, I RECOMMEND:
- That Commissioner of Police consider amending the form used to make assimilation orders (PD434) to ensure that it includes the terms of an assimilation order. (Recommendation 6)

## Offenders procedures

97. Section 20 of the CL(FP) 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*.
98. These are known as ‘offenders procedures’. 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 CL(FP) Act. The latter process was not conducted during the audit period.
99. The records of the four offender procedures<sup>63</sup> conducted during the audit period indicated that the conditions of section 20 were met; that is, the procedures were simple identity procedures, and three were conducted on persons who had been convicted of serious criminal offences and one was conducted on a person who was a registrable offender under the *Child Sex Offenders Registration Act*.
100. Further, the records inspected indicated compliance with the requirements of the CL(FP) Act in that:
- the procedures were conducted by a person qualified as required by the regulations<sup>64</sup>
  - in each case the person was warned that reasonable force could be used to carry out the procedure and that, if the offender obstructed or resisted the procedure, evidence of that fact might be admissible in proceedings against them<sup>65</sup>.
101. Other legislative requirements relating to offenders procedures did not arise in the procedures audited this year; in particular:
- the persons on whom the procedures were carried out were reasonably fluent in English and therefore did not require an interpreter<sup>66</sup>
  - I am advised that none of the procedures required a written direction to be issued under section 29 of the CL(FP) Act.<sup>67</sup>

<sup>63</sup> [REDACTED]

<sup>64</sup> Section 24 of the CL(FP) Act.

<sup>65</sup> Section 30 of the CL(FP) Act.

<sup>66</sup> Section 22 of the CL(FP) Act.

<sup>67</sup> Section 29 provides that 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. A written record of those directions must be given to the offender and the offender must be informed that, if they fail to comply with the directions, a warrant may be issued for their arrest.

## Forensic procedures on deceased persons

102. Section 55(1) of the CL(FP) Act provides that 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.
103. Written authorisations were given under this provision on 21 occasions during the audit period and the audit team inspected all of these records.
104. In 9 cases the required forensic material had already been collected in the course of the post-mortem examination of the body.<sup>68</sup> I understand in these cases the authorisation form was completed for the purpose of recording that the relevant material was provided to the Commissioner of Police under section 55(4)(b) of the CL(FP) Act; that is, to enable the material to be further scrutinised by FSSA (eg by comparing with other DNA samples) but that further forensic procedures were not required. In these cases, I do not consider an authorisation under section 55(1) (which allows the 'carrying out of a forensic procedure') was strictly required. For this reason, I consider the sample size audited for compliance against section 55 of the CL(FP) Act was in fact 12.
105. The records inspected did not reveal any instances of non-compliance with the Act. In particular:
- all 12 of the written authorisations audited specified the nature of the forensic procedure to be authorised<sup>69</sup>
  - 8 of the records indicated that the forensic procedure was carried out by a medical practitioner or a person qualified to carry out forensic procedures of the relevant type.<sup>70</sup> In 4 cases such details were not recorded and accordingly I could not determine whether section 55(5) had been complied with.
  - I am advised by SAPOL that none of the procedures required the exercise of the power in section 55(2) of the CL(FP) Act to enter and search premises in which a police officer 'reasonably believes the body of the deceased is located'. Accordingly the requirement that reasonable attempts to contact the occupier of the premises and advise them of their intention to exercise the powers<sup>71</sup> did not arise in the context of this audit.

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<sup>68</sup> [REDACTED]

<sup>69</sup> As required by section 55(1) of the CL(FP) Act.

<sup>70</sup> Section 55(5) of the CL(FP) Act.

<sup>71</sup> Section 55(3) of the CL(FP) Act.

## Blood testing for communicable diseases

106. During the audit period, blood samples were sought from 15 suspects for the purpose of testing those samples for communicable diseases. Ombudsman SA Officers inspected records relating to each of those procedures. I note in two cases a sample was not able to be taken.
107. 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.<sup>72</sup> All of the records inspected indicated compliance with these requirements, with the exception of one. In that case<sup>73</sup> it was not clear from the record on what basis the senior police officer formed a view that there was a likelihood that a person in prescribed employment had been exposed to the suspect's biological material; specifically, the record did not mention the suspect having, for example, bled or spat.
108. In all 15 procedures, the authorising officer had made a written record of their reasons for authorising the procedure in accordance with section 20B(2) of the CL(FP) Act. In 12 instances, however, it was unclear from the records whether the requirement that a copy of the written record of the grounds for the authorisation had been provided to the suspect had been satisfied.<sup>74</sup> Records in relation to 13 procedures were also unclear as to whether the requirement that the authorising officer give the person written notice that (a) a sample of their blood is to be taken and (b) that the blood will be tested for communicable diseases had been met.<sup>75</sup> That said, I understand that the relevant form (PD430A) was amended during the audit period and now includes a check box to record provision of the relevant form to the suspect.
109. In each of the matters considered, the records indicated that the suspect had been invited to nominate a medical practitioner to receive the results of the testing. Routinely this invitation is issued by the arresting officer, who is present with the suspect, rather than the authorising officer, who is usually not. In all seven instances where the audit team specifically considered this issue, this was the case. In my view this practice does not appear to be compliant with regulation 4A(1)(b), which requires *the authorising officer* to invite the suspect to nominate a medical practitioner. I consider future non-compliance could be avoided if the written notice provided to the suspect under regulation 4A(1)(a) included the relevant invitation to the suspect. Accordingly, I RECOMMEND:

That the Commissioner of Police consider amending the form authorising the taking of a blood sample to test for communicable diseases under Regulation 4A to include an invitation for the suspect to nominate a medical practitioner to receive the results of the testing. (Recommendation 7)

110. The Commissioner of Police must take reasonable steps to notify the tested person (or their nominated medical practitioner) of the results of the test.<sup>76</sup> I am informed that the suspect, or their nominated medical practitioner, is informed of the outcome by letter or

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<sup>72</sup> Section 20B(1) of the CL(FP) Act.

<sup>73</sup> [REDACTED]

<sup>74</sup> [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

<sup>75</sup> Regulation 4A.

<sup>76</sup> Regulation 4B.

text message once the results are received. In cases where a suspect's blood tests positive for a communicable disease, they cannot be contacted and have not nominated a medical practitioner, SA Police notify SA Health's Viral Hepatitis Nurses, who follow up in accordance with their local processes. I consider this practice is a significant improvement to the practice I identified in my previous audit, during which I was advised that SA Police did not provide suspects with test results when those results were negative.

111. Reasonable steps must also be taken to notify each affected employee of the results of the testing.<sup>77</sup> I am satisfied that this was complied with in relation to the 13 procedures that were conducted.

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<sup>77</sup> Regulation 4C.

## The DNA database system

112. Part 5 of the CLFP Act sets out the requirements for the storage of information about forensic procedures on the DNA database system.
113. 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 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*.
114. 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.
115. 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<sup>78</sup>, providing for transmission of information recorded in 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.
116. Section 42 of the CL(FP) 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 database<sup>79</sup>, or for the purpose of an arrangement entered into by the Attorney-General with another Australian jurisdiction<sup>80</sup>.
117. 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.
118. Since September 2017, FSSA has used 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

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<sup>78</sup> Now known as the Australian Criminal Intelligence Commission (**the ACIC**).

<sup>79</sup> 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).

<sup>80</sup> Section 45(2)(g) of the CL(FP) Act.

obtained in South Australia onto the national database, known as the National Criminal Intelligence DNA Database (NCIDD)<sup>81</sup>.

119. The NCIDD has been operated by the ACIC (or its predecessor, Crimtrac) 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. Searches can then be conducted against indices in the NCIDD in accordance with the CL(FP) Act and other state legislation to detect matches to that profile.
120. The CLFP Act creates a number of offences in relation to the storage of information including:
- it is an offence to store DNA profiles derived from forensic procedures carried out under the CL(FP) Act on any database other than the DNA database system.<sup>82</sup>
  - it is 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 CL(FP) Act or a corresponding law.<sup>83</sup>
  - it is an offence to access information stored on the DNA database system<sup>84</sup> unless the person so doing has been authorised by the Commissioner of Police and only for one or more of the following purposes<sup>85</sup>:
    - to compare a DNA profile stored on the database with other DNA profiles so stored
    - for the purpose of proceedings for a serious offence or proceedings under the *Criminal Assets Confiscation Act 2005*
    - to determine whether it is necessary to carry out a forensic procedure under the CL(FP) Act or a corresponding law
    - for the purpose of a coronial inquest or inquiry
    - to make the information available to the person to whom it relates
    - to administer the database
    - for the purpose of an arrangement entered into by the South Australian Attorney-General and Ministers responsible for the administration of corresponding laws
    - for the purpose of the *Mutual Assistance in Criminal Matters Act 1987 (Cth)* or the *Extradition Act 1988 (Cth)*
    - for an Ombudsman's investigation
    - for an investigation under the *Police Complaints and Discipline Act 2016*
    - for this audit.
  - It is an offence to retain information on the database where a former missing person has requested their DNA profiles to be removed.<sup>86</sup>
121. In the course of the 2019 audit, FSSA provided details of systems in place to prevent the unauthorised storage of DNA profiles on LIMS. In 2020, the Assistant Director,

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<sup>81</sup> Provision for the NCIDD is found in Division 8A of Volume 2 of the *Crimes Act 1914* (Cth).

<sup>82</sup> CL(FP) Act, section 42(1). There are four exceptions to this general provision (including where information is 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).

<sup>83</sup> CL(FP) Act, section 42(2).

<sup>84</sup> CL(FP) Act, section 45(1).

<sup>85</sup> CL(FP) Act, section 45(2).

<sup>86</sup> CL(FP) Act, section 46.

Operations, updated this advice to reflect changes made since the 2019 audit. It is 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 39 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.

122. 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
- six Database Scientists have access to LIMS for the purpose of assessing profiles in LIMS and to upload to and remove profiles from the NCIDD
- 17 Reporting Scientists and 19 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 33 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.

123. 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, FSSA advised that FSSA's Laboratory Operations Manager undertakes six monthly audits of access to LIMS and access to



the system requires staff to log in to their individual computers. A log-in is also required to access the NCIDD.

124. 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 Sector<sup>87</sup>.
125. 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.<sup>88</sup> Further, such DNA profiles cannot be compared to other profiles stored on the database if the person has imposed a condition to that effect.<sup>89</sup>

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<sup>87</sup> 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).

<sup>88</sup> CL(FP) Act, section 43(1).

<sup>89</sup> CL(FP) Act, section 45(3)(a).

## Annexure 1: Summary of audit results

### Volunteers and victims procedures

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Person was not suspected of having committed the offence that was being investigated (s7(2))	65	N/A	N/A	N/A	65	Not audited
Relevant person consented to procedure (s7(2))	65	100%	0%	0%	N/A	
Relevant person withdrew consent and procedure discontinued (s10(1))	65	N/A	N/A	N/A	100%	This requirement did not apply to any of the procedures audited.
Relevant person withdrew consent but senior police officer authorised continuation of procedure (s10(3))	65	N/A	N/A	N/A	100%	This requirement did not apply to any of the procedures audited.
Senior police officer authorised carrying out of procedure (s7(2))	65	N/A	N/A	N/A	100%	This requirement did not apply to any of the procedures audited as none of the procedures audited resulted from a senior police officer authorisation.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Senior police officer satisfied that it was impracticable/inappropriate to obtain consent from relevant person and that carrying out of procedure is justified (s9)	65	N/A	N/A	N/A	100%	This requirement did not apply to any of the procedures audited.
Senior police officer's authorisation was in writing and specified procedure authorised (s9)	65	N/A	N/A	N/A	100%	This requirement did not apply to any of the procedures audited.
Explained to protected person that procedure would not be carried out if protected person objected to it (s11(1))	5	100%	0%	20%		
Procedure discontinued where protected person objected to or resisted it (s11(2))	5	N/A	N/A	N/A	100%	No record of objections made by protected persons.
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 if reasonable practicable (s21(3))	12	100%	0%	0%		In two cases the victim was female and the medical practitioner was male; however not otherwise reasonably practicable.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Person not reasonably fluent in English is to be assisted by an interpreter (s22)	3	N/A	N/A	N/A	100%	All records appeared to be in relation to people that were reasonably fluent in English. Nevertheless recommendation made to prompt recording of this on relevant form.
Where the procedure on protected person, an appropriate person present to witness procedure (s25(2))	5	100%	0%	0%	60	
Where an intrusive procedure, the victim or volunteer must be allowed reasonable opportunity to arrange for attendance of medical practitioner of their choice to witness procedure (s25(1))	12	0%	0%	100%		It is unclear whether, in the circumstances of each case the provision of the brochure meant the person was allowed a reasonable opportunity for the attendance of the medical practitioner.
Audio-visual record must be made of an intrusive procedure where so requested by victim or volunteer (s26(1)(b))	12	N/A	N/A		100%	Records did not indicate anyone requested an audio-visual record.
Relevant person given a written statement explaining their right to	65	95%	0%	5%		In 3 cases it was unclear from the records whether the person was given a written statement.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
request destruction of forensic material (s12(1))						
Forensic material destroyed within 21 days of receipt of request (s39(5))	9	78%	11%	11%		<p>In three cases the 21 days was not complied with.</p> <p>In one case it is unclear if destruction of the record was carried out within 21 days as the date the request was received was not recorded.</p>

## Retention Orders

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Forensic material was obtained by carrying out a volunteers and victims procedures (s36(1))	0	N/A	N/A	N/A	N/A	
The relevant person who gave consent has requested destruction of the forensic material (s36(1))	0	N/A	N/A	N/A	N/A	
Does the order specify the period for the forensic material to be retained (s36(1))	0	N/A	N/A	N/A	N/A	
The officer was satisfied that the person who gave consent, or a person associated with him or her, is suspected of a serious offence (s36(2))	0	N/A	N/A	N/A	N/A	
The officer was satisfied that there are reasonable grounds to suspect that the forensic material to which the application relates could be of probative value in relation to the investigation of the	0	N/A	N/A	N/A	N/A	

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
suspected offence (s36(2))						
The senior police officer was satisfied that the order was justified in all the circumstances (s36(2))	0	N/A	N/A	N/A	N/A	
Application made in writing by a police officer stating the grounds on which the order is sought (s38(1))	0	N/A	N/A	N/A	N/A	
A copy of the application given to the respondent, if able to be located s38(2)	0	N/A	N/A	N/A	N/A	
Was a hearing carried conducted by the senior police officer (s38(4))	0	N/A	N/A	N/A	N/A	
If the hearing has occurred and the determination made in the absence of the respondent, the senior police officer was satisfied that the respondent could not be located to be served or had been served but has failed to attend the hearing (s38(6))	0	N/A	N/A	N/A	N/A	

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
If an order was made, the senior police officer made a written record of the order and reasons (s38(9))	0	N/A	N/A	N/A	N/A	



## Assimilation Orders

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
The senior police officer was satisfied that there were reasonable grounds to suspect that the person on whom the procedure was carried out has committed a serious offence (s37)	1	100%				
The senior police officer was satisfied that there were reasonable grounds to suspect that the forensic material may be of value to the investigation of the suspected offence or that the forensic material consists of forensic material taken from the person's body for the purpose of obtaining a DNA profile of the person (s37)	1	100%				
Application made in writing by a police officer stating the grounds on which the order is sought (s38(1))	1	100%				

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
A copy of the application given to the respondent, if able to be located s38(2)	1	100%				
Was a hearing carried conducted by the senior police officer (s38(4))	1	100%				
If the hearing has occurred and the determination made in the absence of the respondent, the senior police officer was satisfied that the respondent could not be located to be served or had been served but has failed to attend the hearing (s38(6))	0	N/A				The respondent attended the hearing by telephone.
If the respondent attends the hearing, they are entitled to be represented by a legal practitioner (section 38(5))	1	100%				Legal representative offered but declined.
The respondent or their representative must be given a reasonable opportunity to make representations at the hearing (section 38(7))	1	100%				

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
If an order was made, the senior police officer made a written record of the order and reasons (s38(9))	1			100%		Terms of order on the PD434 are expressed in terms of a retention order rather than an assimilation order.
If the respondent can be located, a copy of that order must be given to them (section 38(10))	1	100%				There is a prompt on the form to provide a copy of the order to the respondent.

## Suspects procedures

### *Simple forensic procedures*

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
The person was suspected of a serious offence	414	100%	0%	0%		
The procedure consisted of a simple identity procedure	414	100%	0%	0%		
Suspect reasonably fluent in English or assisted by interpreter (s22)	414	100%	0%	0%		
The person who carried out the procedure was a medical practitioner or qualified as required under the regulations to do so (s24)	414	100%	0%	0%		
Written record provided of any directions given where person not in lawful custody (s29))	1	100%	0%	0%		
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	414	100%	0%	0%		

resisted the procedure, evidence of that fact might be admissible in proceedings against the suspect (s30)						
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*Procedures authorised by senior police officers*

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Written application for senior police officer's order made (s15(2))	63	100%	0%	0%		
Copy of application given to respondent (s15(3))	63	84%	0%	16%		In 10 cases, it was unclear whether this had occurred.
Senior police officer conducted informal hearing (s16)	63	100%	0%	0%		
Senior police officer satisfied that there were reasonable grounds to suspect respondent had committed serious offence (s19(1)(a))	63	100%	0%	0%		
Senior police officer satisfied that there were reasonable grounds to suspect that procedure	63	100%	0%	0%		

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
could produce evidence of value to investigation (s19(1)(b))						
Senior police officer satisfied that public interest in obtaining evidence outweighed public interest in ensuring individuals are protected from unwanted interference (s19(1)(c))	63	86%	0%	14%		In 9 cases it was unclear from the record whether the public interest factors had been weighed as required
Protected person respondent represented by appropriate representative at hearing (s17(2))	11	100%	0%	0%		
Respondent or representative given reasonable opportunity to make representations at hearing (s17(4))	63	100%	0%	0%		

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Senior police officer made written record of order and reasons for making it (s19(4))	63	100%	0%	0%		
Copy of order given to respondent (s19(4))	63	97%	0%	3%		
Suspect informed by a police officer that reasonable force might be used to carry out the procedure (s30)	63	N/A	N/A	N/A	100%	Not audited
Suspect informed by a police officer that if suspect obstructs/resists procedure, evidence of that fact may be admissible in proceedings against them (s30))	63	N/A	N/A	N/A	100%	Not audited
Forensic procedures to be carried out humanely (s21(1))	30	100%	0%	0%		30 audio-visual records were viewed to monitor compliance with this provision.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Duty to observe relevant medical or other professional standards (s23)	63	N/A	N/A	N/A	100%	Not audited.
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 (s21(3))	26	50%	0%	50%	35	
Intrusive forensic procedure and suspect allowed reasonable opportunity to arrange for attendance of medical practitioner to witness same (s25(1))	49	96%	0%	4%	11	
Appropriate representative present to witness authorised procedure on protected person and appropriate (s25(2))	11	73%	0%	27%		
Not more people present than necessary (s21(2))	11	90%	0%	10%		



Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Suspect not in custody and police officer issued directions to undergo procedure (s14(3))	63	N/A	N/A	N/A	100%	Not audited.
Written record of directions given to suspect (s29(2))	63	N/A	N/A	N/A	100%	Not audited.
Suspect informed that, if they fail to comply with directions, warrant for arrest may be issued (s29(2))	63	N/A	N/A	N/A	100%	Not audited.

## Offenders procedures

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Simple identity procedure carried out (s20(1))	4	100%				
The person met one of the criteria of being an offender set out in s20(2) (eg person is convicted of a serious offence)	4	100%				
Police officer informed offender that reasonable force could be used to carry out procedure and if offender obstructed/resisted procedure, evidence of that fact may be admissible in proceedings against them (s30)	4	100%				
The person who carried out the procedure was a medical practitioner or a person who was qualified as required by the regulations to carry out the procedure (s24)	4	100%				
Offender assisted by interpreter because not reasonably fluent in English (s22)	4				100%	All offenders were fluent in English.

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Where offender not in custody and police officer issued directions about undergoing forensic procedure: Written record of directions given to offender and offender informed that if they fail to comply with directions warrant for arrest might be issued (s29(2))	4				100%	No such directions were issued during audit period.

## Procedures on deceased persons

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Senior police officer satisfied that evidence obtained from procedure likely to assist with investigation of serious offence or identification of deceased (s55(1))	12	100%	0%	0%	N/A	
Authorisation in writing and specified procedure to be carried out (s55(1))	12	100%	0%	0%	N/A	
Procedure carried out by medical practitioner or person qualified as required by the regulations to carry out the procedure (s55(5))	12	67%	0%	33%	N/A	In four cases, it was unclear from the records whether the procedure had been carried out by a medical practitioner or a qualified person because those details had not been recorded.
Where required to enter premises to conduct forensic procedure, police officer must make a reasonable attempt to contact the occupier of the premises (s55(3))	12	N/A	N/A	N/A	100%	None of the authorised procedures required police officers to exercise the power to enter premises to carry out the procedure.

### Blood testing for communicable diseases

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Senior police officer satisfied that person suspected of a prescribed serious offence (s20B(1)(a))	15	100%	0%	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 (s20B(1)(b))	15	93%	0%	7%		In one case, it was unclear on the records how that there was a likelihood that the suspected offence would have resulted in a person in prescribed employment having been exposed to the suspect's biological material.
Senior police officer made written record of grounds on which they determined that sample of blood should be taken (s20B(2))	15	100%	0%	0%		
Copy of written record given to suspected person (s20B(2))	15	20%	0%	80%		In 12 cases it was unclear whether this has occurred as the form did not require this to be recorded; the form has since been updated to

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
						prompt making a record of this.
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)	15	13%	0%	87%		In 13 cases it was unclear whether this has occurred as the form did not require this to be recorded; the form has since been updated to prompt making a record of this.
Before procedure carried out, senior police officer invited suspected person to nominate a medical practitioner to receive copy of test results (reg.4A)	15	53%	47%	0%		In 7 instances the officer on the ground rather than the authorising officer issued the invitation; accordingly recommended an amendment to the relevant form.
Reasonable steps taken by SAPOL to notify suspected person/nominated medical practitioner of results of testing (reg.4B)	13	100%	0%	0%		
Reasonable steps taken by SAPOL to notify affected person/nominated medical practitioner of results of testing (reg.4C)	13	100%	0%	0%		

Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Proportion of sample size where requirement not relevant or where requirement not audited	Comment
Blood samples taken under section 20B must not be used for any purpose other than testing for communicable diseases (34A)	0				100%	This requirement was not audited this year; non-compliance not likely given the requirement under s39A that this material is destroyed as soon as is reasonably practicable after it is tested for communicable diseases.

## Appendix 2: Assimilation Order form - PD434

### SENIOR POLICE OFFICER'S ORDER

I, ..... Rank ..... ID.....  
of..... Signature: .....

Having received an application made at ..... am/pm on .../.../..... by .....  
and delivered to me: ☐ Personally ☐ By Email ☐ By facsimile ☐ By telephone (read)

**AND** having conducted a hearing: ☐ In person ☐ By telephone ☐ By other electronic means

Was respondent represented by a legal practitioner? ☐ Yes ☐ No

Details of legal practitioner: .....

**OR** having determined the application in the absence of the respondent, as I was satisfied that:

- ☐ the respondent could not be located to be served with a copy of the application, OR
- ☐ that the respondent was served with a copy of the application but failed to attend the hearing

AND BEING SATISFIED that there are reasonable grounds to suspect that the person on whom the procedure was carried out has committed a serious offence

AND:

- (a) there are reasonable grounds to suspect that the forensic material may be of value to the investigation of the suspected offence; or
- (b) the forensic material consists of forensic material from the person's body taken for the purpose of obtaining a DNA profile of that person

ORDER that the forensic material: .....

obtained from: ..... on .../.../.....

at ..... shall be retained until .../.../.....

I further direct the following incidental matters:

.....  
.....  
.....

Order made at: ..... am/pm on .../.../.....

SPO Signature: .....



## Appendix 3: Relevant definitions

**Appropriate representative** may be -

- (d) a relative or friend, chosen by, or acceptable to the protected person; or
- (e) 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
- (f) 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.<sup>90</sup>

**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.<sup>91</sup>

**Investigating police officer** means a police officer in charge of the investigation of a suspected offence.<sup>92</sup>

**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.<sup>93</sup>

**Qualified person** means -

- (a) a medical practitioner<sup>94</sup>; or
- (b) a registered nurse (for any procedure other than a dental impression)<sup>95</sup>; or
- (c) a police officer authorised by the Commissioner of Police to take prints of the hands, fingers, feet or toes<sup>96</sup>; or
- (d) a police officer authorised by the Commissioner of Police to non-intrusively examine a part of a person's body<sup>97</sup>; 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 body<sup>98</sup>

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<sup>90</sup> Section 25(3).

<sup>91</sup> Section 3(1).

<sup>92</sup> Section 3(1).

<sup>93</sup> Section 6.

<sup>94</sup> Section 24(1)(a).

<sup>95</sup> Regulation 5(1)(a).

<sup>96</sup> Regulation 5(1)(b)(i).

<sup>97</sup> Regulation 5(1)(b)(ii).

<sup>98</sup> Regulation 5(1)(c)(i).

- (ii) taking samples of fingernails toenails, or material from under a fingernail or toenail<sup>99</sup>
- (iii) taking samples of biological or other material from an external part of the body<sup>100</sup>
- (iv) buccal swabs<sup>101</sup>
- (v) taking samples of blood by finger prick<sup>102</sup>
- (vi) taking impressions of casts or wounds.<sup>103</sup>

**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 kin<sup>104</sup>
- (c) if the person is not a child but is a protected person by reason of their incapacity - their guardian<sup>105</sup>, or if they don't have a guardian, the closest available next of kin.<sup>106 107</sup>

**Respondent** means the person on whom it is proposed to carry out a forensic procedure (other than a simple forensic procedure).<sup>108</sup>

**Senior police officer** means a police officer of or above the rank of inspector.<sup>109</sup>

**Serious offence** means an indictable offence or a summary offence that is punishable by imprisonment<sup>110</sup>

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

- (a) a simple identity procedure;
- (b) a gunshot residue procedure.<sup>111</sup>

**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.<sup>112</sup>

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<sup>99</sup> Regulation 5(1)(c)(ii).

<sup>100</sup> Regulation 5(1)(c)(iii).

<sup>101</sup> Regulation 5(1)(c)(iv).

<sup>102</sup> Regulation 5(1)(c)(v).

<sup>103</sup> Regulation 5(1)(c)(vi).

<sup>104</sup> 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.

<sup>105</sup> Section 3(1) defines 'guardian' to mean a person acting or appointed under any Act or law as the guardian of another.

<sup>106</sup> 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.

<sup>107</sup> Section 6.

<sup>108</sup> Section 13.

<sup>109</sup> Section 3(1) of the CL(FP) Act.

<sup>110</sup> Section 3(1).

<sup>111</sup> Section 3(1).

<sup>112</sup> Section 3(1).

