



 OmbudsmanSA

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

September 2022

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Hon Kyam Maher MLC
Attorney-General
By email: AttorneyGeneral@sa.gov.au

I present this report on the 2021-2022 audit to monitor compliance with the *Criminal Law (Forensic Procedures) Act 2007*, as required by section 57 of that Act.

I note your obligation under section 57 to cause copies of this report to be laid before each House of Parliament within 12 sitting days of receiving it.

A handwritten signature in black ink, appearing to read 'Steven Strelan', enclosed in a thin black rectangular border.

Steven Strelan
Deputy Ombudsman
Ombudsman SA

26 September 2022

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Executive summary

This is a report on 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 2021 to 30 June 2022 (**the audit/this audit**).

As was the case for the 2020-2021 audit period, the audit results showed that compliance continues to be the norm. Most statutory requirements appear to have been fully complied with and where this was not the case, compliance against the relevant provisions was more common than not.

I acknowledge SA Police's co-operation with the audit. I am also pleased to note that SA Police has continued to take steps to implement my previous recommendations.

The audit identified that there is scope for improvement to ensure compliance with the legislation (in terms of actual compliance or recording compliance) in the following areas:

- clarifying the distinction between a 'relevant person' for the purposes of consenting to a volunteers and victims procedure carried out on a protected person and an 'appropriate representative' to witness that procedure
- ensuring that the legislative hierarchy for selecting an appropriate representative is applied
- amending references to gender to ensure consistency with current usage and the legislation
- ensuring that copies of applications for suspect procedure orders are provided to the suspect and that orders are appropriately recorded and provided to the suspect
- ensuring that introductions on audio-visual recordings are properly conducted and captured
- providing guidance to hospitals on humane treatment in conducting forensic procedures
- exploring options to ensure that as far as reasonably practicable, forensic procedures are carried out by a person of the same sex, and that the preference of the person subject to the procedure is recorded (this includes all section 21(3) forensic procedures, including those not related to sexual assault)¹
- ensuring that access to forensic procedures is restricted to those persons reasonably necessary or required by statute.

Almost half of the recommendations simply require reminding officers of their obligations. I have included those recommendations only where I consider that the issue raised is particularly significant or there is a relatively high level of non-compliance.

I refer to the table at Appendix 1 for a breakdown of the audit results.

While the CL(FP) Act does not provide the Ombudsman with specific power to make recommendations, I have made suggestions as to improvements to practice as follows:

¹ Section 21(3) provides: If reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or the breast region of a female person or a transgender or intersex person who identifies as female, must not be carried out by a person of a different sex (other than at the request of the person on whom the forensic procedure is to be carried out).

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Recommendation 1

That the Commissioner of Police consider amending the form PD425 to clarify that a relevant person for the purpose of authorising a forensic procedure on a volunteer or victim who is a protected person, and an appropriate representative for witnessing a forensic procedure carried out on a volunteer or victim who is a protected person, have different definitions. The forms should clearly indicate that an appropriate representative must be chosen in accordance with the hierarchy of section 25(3), and evidence of consideration is to be recorded where a relative or friend is not available.

Recommendation 2

That the Commissioner of Police consider amending the PD425 form to include:

- a question, or question similar to, 'In the case of an intrusive procedure (where section 21(3) applies), is it reasonably practicable to have [a] person conducting the procedure of the same gender as client?' with a Yes or No tick box
- a question, or question similar to, 'If no, does client consent to FME with a person conducting the procedure NOT of the same gender?' with a Yes or No tick box.

Recommendation 3

That the Commissioner of Police consider amending the form PD184A, used for recording volunteers and victims procedures, to remove the term 'Transsexual' under the criteria of Sex, and replace it with the term 'Intersex'.

Recommendation 4

That the Commissioner of Police consider amending the relevant forms to include a prompt to ask the suspect the following question:

'Do you have a relative or friend that you wish to have present?'

The form should have a checkbox to record 'Yes' or 'No', and space to record reasons if the suspect requests a relative or friend, and a relative or friend is unavailable.

Recommendation 5

That the Commissioner of Police remind relevant police officers that a copy of the PD430 must be given to the suspect and that fact recorded on the form at the time of completing the application.

Recommendation 6

That the Commissioner of Police remind relevant police officers of the importance of completing the entirety of the PD431, including that a copy of the record must be given to the suspect at the time when the order is made.

Recommendation 7

That the Commissioner of Police remind relevant police officers of the requirements of the General Order 'Forensic procedures', namely, that once the audio-visual recording has commenced, they should:

- 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.

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- Recommendation 8** That the Commissioner of Police consider making SA Police training material for contracted nurses available to SA Health to distribute as appropriate.
- Recommendation 9** That the Commissioner of Police:
- remind relevant police officers that alternative provider options must be explored to ensure compliance with section 21(3) of the CL(FP) Act, and
 - the suspect's preference as to the sex of the person carrying out the procedure should be recorded on the PD431.
- Recommendation 10** That the Commissioner of Police consider amending the aide memoire to include a prompt for senior police officers to advise that the suspect may, at their own expense, organise for a medical practitioner of their choice to witness the procedure and provide space to record the suspect's response.
- Recommendation 11** That the Commissioner of Police remind relevant police officers of the importance of restricting access to forensic procedures to those persons who are necessary for the carrying out of the procedure and/or to satisfy any relevant statutory requirements

I provided a draft of this report to the Commissioner of Police for comment. The audit team met with SA Police officers to clarify issues regarding my draft recommendations. The Acting Commissioner of Police subsequently provided a response to my draft recommendations on the basis of those clarifications.

The Acting Commissioner of Police advised that she:

- accepted my draft Recommendations 1, 2, 3, and 4
- accepted my draft Recommendations 5, 6 and 7, and the first parts of Recommendations 9 and 11 in slightly amended form (in light of SA Police's comments, I have amended the references to 'Senior Police Officers' in those recommendations to 'relevant police officers')
- supported an amended version of draft Recommendation 8, noting that it is for SA Health to determine how best to use the training information to address the issues identified (I have amended Recommendation 8 accordingly)
- noted in relation to the second part of draft Recommendation 9 that 'consent' is not central to suspects procedures authorised by an order under the CL(FP) Act and that she would be willing to consider that issue further (I have amended Recommendation 9 to use the language of 'preference' instead of 'consent')
- accepted draft Recommendation 10, noting that the aide memoire was updated after last year's audit, but acknowledging that it could be further enhanced
- noted in relation to the second part of draft Recommendation 11 that as a result of the audit team's discussions with SA Police, part 2 of Recommendation 11 would not be included if part one were to be accepted (I have amended recommendation 11 accordingly to remove part 2).

I also provided a draft of this report to Forensic Science SA, but did not seek comment from Forensic Science SA on the basis that the report did not make any comments or recommendations relevant to it. The Director of Forensic Science SA confirmed that they did not have any comments or observations to add.

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As noted in last year's report, compliance with the Act has greatly improved since the first audit conducted by Ombudsman SA in 2018. I commend SA Police for this and for implementing recommendations made in previous audits.

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. While the CL(FP) Act provides police officers and others with significant statutory powers to facilitate the collection and management of forensic evidence, it also imposes safeguards or limits to those powers. Those limits ensure, for example, that procedures are only conducted where necessary 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. Non-compliance may also give rise to the exclusion of evidence in certain circumstances. 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 CL(FP) Regulations**) during the period 1 July 2021 to 30 June 2022 (**the audit period**). It is the fifth 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 me as Deputy Ombudsman to conduct the audit. The Ombudsman did so having declared a potential conflict of interest and out of an abundance of caution.²

² Mr Wayne Lines declared a potential conflict of interest on the grounds that his son-in-law is a Senior Constable with SA Police, whose duties involve conducting procedures that could be subject to the audit.

Audit scope and methodology

6. The majority of forensic procedures carried out in South Australia are conducted by police officers. Records relating to those procedures are vetted and held by the DNA Management Unit of the SA Police Forensic Services Branch.
7. The audit team reviewed written records for the following procedures undertaken during the audit period:
 - victims and volunteers' procedures
 - suspects simple identity procedures
 - suspects procedures authorised by a senior police officer
 - forensic procedures on deceased persons
 - blood testing for communicable diseases
 - requests for destruction of victims and volunteers material from the DNA database.
8. This year's audit reviewed a greater proportion of suspect procedures than previous audits.³ During the course of the audit, Ombudsman SA officers viewed 46 audio-visual records of intrusive procedures carried out on suspects.
9. In light of their relatively few numbers and complete compliance recorded over the past three years, I have chosen not to carry out an audit of offenders procedures. As there were no retention or assimilation orders made during the audit period, the audit did not inspect any records in relation to those procedures.
10. 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.

³ In 2019-20, Ombudsman SA inspected records relating to 5.9% of simple identity procedures, and 42% of authorised procedures; in 2020-21, no simple identity procedures were reviewed and 26% of authorised procedures were inspected.

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	761	75	9.9%
Simple identity procedures	6216	625	10.1%
Authorised Procedures	189	102	54%
Forensic procedures on deceased persons	1 ⁴	1	100%
Blood testing for communicable diseases	6	6	100%
Requests for destruction of DNA material	9	9	100%

11. Division 1 of Part 3 of the CL(FP) Act contains provisions that apply to all forensic procedures:
- forensic procedures must be carried out humanely and with care
 - to avoid, as far as reasonably practicable, offending genuinely held cultural values or religious beliefs; and
 - to avoid inflicting unnecessary physical harm, humiliation or embarrassment⁵
 - forensic procedures must not be carried out in the presence or view of more persons than are necessary⁶
 - any subject of a forensic procedure who is not reasonably fluent in English is entitled to be assisted by an interpreter⁷
 - forensic procedures must be carried out in a way that is consistent with appropriate medical and professional standards⁸
 - an authorised representative must be present to witness a forensic procedure carried out on a protected person.⁹

⁴ Fifteen applications for information obtained during post-mortem procedures were also made, but only one order concerned the collection of forensic material.

⁵ Section 21(1).

⁶ Section 21(2).

⁷ Section 22.

⁸ Section 23.

⁹ Section 25(2).

12. This audit has assessed a sample of written and audio-visual material against these overarching requirements of the CL(FP) Act, as well as the specific provisions particular to each audited forensic procedure. In doing so, the audit also had regard to the SA Police General Order ‘Forensic procedures,’ and the Forensic Services Branch DNA Management Unit Standard Operating Procedures relevant to each forensic procedure.
13. This report sets out my views in relation to compliance with the CL(FP) Act, including where it was unclear whether compliance had been achieved or not.¹⁰ Appendix 1 provides a summary in table format of findings against relevant provisions of the Act.
14. As with previous audits, I have taken the liberty of making informal recommendations¹¹ where I consider changes to procedures may improve practice. I emphasise that the audit continues to demonstrate improved compliance with the CL(FP) Act, and accordingly my 11 recommendations are simply suggestions for improvements to practice.

2020-2021 Audit Report recommendations

15. The 2020-2021 audit report included 7 recommendations. Six of those recommendations have been implemented by the Commissioner of Police; in the case of Recommendation 5, alternative action was undertaken to address the recommendation. The table below sets out the 2021 recommendations and the implementation action taken by SA Police.

Recommendation 1	That the Commissioner of Police consider amending the form PD184A, used for recording volunteers and victims procedures, to include a prompt to record whether the person has been notified that they may, at their own expense, be allowed a reasonable opportunity to arrange for the attendance of a medical practitioner of their choice to witness the forensic procedure.	PD 184A amended. Recommendation implemented on 28 February 2022
Recommendation 2	That the Commissioner of Police consider amending the form PD184A, used for recording volunteers and victims procedures, to include a prompt to record whether the person wishes to request the making of an audio-visual record.	PD 184A amended. Recommendation implemented on 28 February 2022

¹⁰ I have redacted any references to specific procedures in this report to avoid disclosing information contrary to section 50 of the CL(FP) Act.

¹¹ The CL(FP) Act does not require the Ombudsman to make recommendations.

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<p>Recommendation 3</p>	<p>That the Commissioner of Police give further consideration to how electronic recordings of forensic procedures are made and stored in order to potentially mitigate the loss or corruption of such recordings (including consideration of whether further quality assurance processes are required).</p>	<p>Amendments to General Order currently being drafted to reinforce instructions for staff to confirm electronic recording has been stored successfully. Business case prepared for new digital records management system.</p>
<p>Recommendation 4</p>	<p>That the Commissioner of Police reiterate to senior police officers the requirement to properly consider and record reasons for concluding the public interest was in favour of carrying out an authorised procedure.</p>	<p>Changes made to relevant forms to include prompts to consider/ record matters of public interest. Enhanced training for Senior Police Officers includes.</p>
<p>Recommendation 5</p>	<p>That the Commissioner of Police investigate ways police officers might make appropriate electronic recordings of their notes (such as, for example, by making these notes initially in an electronic form or transcription of notes afterwards).</p>	<p>PD 436 amended to provide instructions to make handwritten notes legible. Where notes not legible, request made by DNAMU for electronic transcript.</p>
<p>Recommendation 6</p>	<p>That the Commissioner of Police consider amending the form PD431 and the senior police officer's aide memoire to include a prompt for the senior police officer to ask after an order has been made whether the suspect requests that a medical practitioner of their choice and at their own expense witness the procedure.</p>	<p>PD431 updated.</p>
<p>Recommendation 7</p>	<p>That the Commissioner of Police consider what procedural or other steps might be implemented to improve compliance with section 21(3) of the CL(FP) Act</p>	<p>SA Police has noted the difficulties in compliance with section 21(3) and is considering options to address these challenges.</p>

Staff undertaking forensic procedures

16. Section 24(2) of the CL(FP) Act prescribes who may conduct a forensic procedure:¹²
17. Regulation 5(1)(a) of the CL(FP) Regulations provides that 'a person who is a registered nurse is qualified to carry out a forensic procedure of any type except the taking of a dental impression'.
18. As noted in the 2020-21 audit report, SA Police contracts with an external provider for the provision of medical services at certain SA Police locations. As a part of that contractual arrangement, the registered nurses employed by the external provider undertake forensic procedures under the CL(FP) Act.
19. Registered nurses employed by the external provider are therefore authorised to undertake most forensic procedures. Based upon the procedures audited, it is apparent that the majority of intrusive forensic procedures are carried out by registered nurses, who are trained in how to undertake forensic procedures by staff from the SA Police Medical Section.
20. Having reviewed the training materials provided during the 2020-21 audit, including the course learning outcomes, and training video, I consider that those materials appropriately address the requirements of the CL(FP) Act and emphasise the rights of the individual subject to the procedure.
21. Having viewed a number of audio-visual recordings of intrusive forensic procedures carried out by the external provider, the audit has not identified any issues with registered nurses' ability to carry out intrusive forensic procedures in accordance with the requirements of the CL(FP) Act. I have noted one issue in relation to a medical practitioner, who does not appear to have undertaken the same training. I discuss that further below.¹³

¹² Section 55(5) of the CL(FP) Act similarly prescribes who may carry out forensic procedures on deceased persons.

¹³ At page 21.

Volunteers and victims procedures

22. Volunteers and victims procedures may be carried out on persons who are not under suspicion of a serious offence¹⁴ and either:
 - the relevant person consents to the carrying out of the procedure expressly (orally or in writing or by giving some other unequivocal indication of consent);¹⁵ or
 - a senior police officer authorises the carrying out of the procedure.¹⁶
23. 761 volunteers and victims procedures were carried out by or on behalf of SA Police during the audit period. 76 records of those forensic procedures were inspected by the audit.
24. One of the records provided is comprised of documents created by the Women and Children's Health Network, which are not documents created by SA Police. I have not considered that record and have instead reviewed only the remaining 75 records. This represents a sample of 9.9% of the total procedures carried out.
25. The audit observed that:
 - all of the inspected records detailed that the relevant person had consented to the procedure; and
 - in the majority of cases, the procedures that were carried out showed a high level of compliance with the relevant legislative requirements concerning victims and volunteers procedures.

¹⁴ Section 7(2)(a) of the CL(FP) Act.

¹⁵ Section 8(a) and (b) of the CL(FP) Act.

¹⁶ Section 9 of the CL(FP) Act.

Protected persons

26. The CL(FP) Act contains specific provisions for the authorisation of volunteers and victims procedures carried out on 'protected persons'.¹⁷
27. Before a volunteers or victims procedure is carried out on a protected person:
- consent must be obtained from a **relevant person** as defined in section 6 of the CL(FP) Act unless a senior police officer authorises the procedure pursuant to section 9 of the CL(FP Act)¹⁸
 - a police officer or the person who is to carry out the procedure must explain to the protected person that the procedure will not be carried out if the person objects to the procedure¹⁹
 - the procedure must not be carried out or, if commenced, is not to be continued on a protected person if the person objects or resists the procedure.²⁰
28. Nine records inspected by the audit concerned procedures carried out on protected persons. I am satisfied that the requisite explanation was provided in relation to 8 of those 9 procedures.
29. In the remaining instance,²¹ there was no requirement to obtain consent because the procedure appears to have been properly authorised pursuant to section 9 of the CL(FP) Act.
30. Section 25(2) of the CL(FP) Act states that where a forensic procedure is carried out following an authorisation under a Division of Part 2, and that procedure is carried out on a protected person within the meaning of that same Division, **an appropriate representative** must be present to witness the procedure.
31. Section 25(3) of the CL(FP) Act provides a hierarchy which applies to the selection of an appropriate representative:
- 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.
32. I observe that the process for authorising a forensic procedure on a volunteer or victim is set out in Part 2, Division 1 of the CL(FP) Act. Under that Division, where a volunteer or victim is a protected person, the **relevant person** for providing consent in the case of a child is the closest available next of kin, or in any other case, a person's guardian or closest available next of kin.²²

¹⁷ A child under the age of 16 years; or a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure.

¹⁸ Section 7(2)(b) of the CL(FP) Act.

¹⁹ Section 11(1) of the CL(FP) Act.

²⁰ Section 11(2) of the CL(FP) Act.

²¹

²² Section 6 of the CL(FP) Act.

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33. However, a *relevant person* within the meaning of Part 2, Division 1 of the CL(FP) Act is not necessarily always going to be the same as an appropriate representative as defined by the hierarchy under section 25(3).
34. Six of the records indicated that the protected person's parent provided consent to authorise the volunteer or victims' procedure, and the same parent was present to witness the procedure. In these instances, the parent was recorded as both the relevant person and the appropriate representative according to the hierarchy.
35. The 3 other records indicated that a 'DCP Case Worker', 'Social Worker' and 'Guardian' were present as a witness for the protected person. Without further evidence, it is not apparent that an appropriate representative was selected in accordance with the hierarchy.
36. While it may be the case that a person who is in the care of the Department for Child Protection will be unlikely to be able to have the closest available next of kin present to witness a procedure, it does not automatically preclude a relative or friend of the protected person's choice from being present.
37. To fulfil the requirements of an appropriate representative under section 25(3), consideration must be given to whether a relative or friend can be present, before a representative can be selected from the subsequent categories.
38. The PD425 form, which was used for two of the above records, does not provide a definition of an appropriate representative to witness a forensic procedure, and does not make clear that an appropriate representative may be a different person to a 'relevant person' for providing consent to the procedure.
39. Therefore, I RECOMMEND:

Recommendation 1

That the Commissioner of Police consider amending the form PD425 to clarify that a relevant person for the purpose of authorising a forensic procedure on a volunteer or victim who is a protected person, and an appropriate representative for witnessing a forensic procedure carried out on a volunteer or victim who is a protected person, have different definitions. The forms should clearly indicate that an appropriate representative must be chosen in accordance with the hierarchy of section 25(3), and evidence of consideration is to be recorded where a relative or friend is not available.

Intrusive procedures

Conduct of section 21(3) procedures

40. If reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or the breast region of a female person or a transgender or intersex person who identifies as female (**a section 21(3) procedure**), must not be carried out by a person of a different sex to the victim or volunteer.²³
41. I consider that there has been a continued high level of compliance with the legislative requirements concerning section 21(3) procedures carried out on volunteers and victims.
42. The audit considered 17 section 21(3) procedures that fell within the audit period. Of the procedures audited, 15 procedures occurred in the context of a sexual assault examination, and accordingly a PD184A form was used.
43. In accordance with section 21(3) of the CL(FP) Act, records of 14 procedures indicated that those procedures were carried out on a volunteer or victim by a person of the same sex.
44. Two PD184A forms recorded that it was not reasonably practicable for the procedure to be carried out by a person of the same sex, and it was recorded that the victim or volunteer consented to the procedure.
45. One section 21(3) procedure was carried out on a person where the procedure was carried out by a person of a different sex, however as that procedure did not relate to a sexual assault, a PD425 was completed.²⁴ The PD425 form does not contain a prompt for officers to consider section 21(3) of the CL(FP) Act.
46. However, I consider that the PD425 form should be amended to prompt officers to consider that where reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or the breast region of a female person or 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.
47. The PD184A form contains the question 'Is it reasonably practicable to have [a] clinician of the same gender as client?' with a Yes or No tick box. It is followed by another question 'If no, does client consent to FME with clinician NOT of the same gender?' with a Yes or No tick box.
48. I consider it would be prudent to include a prompt similar to the prompt in the PD184A form on the PD425 form.

²³ Section 21(3) of the CL(FP) Act.

²⁴ [REDACTED]

49. Therefore, I RECOMMEND:

Recommendation 2

That the Commissioner of Police consider amending the PD425 form to include:

- a question, or question similar to, 'In the case of an intrusive procedure (where section 21(3) applies), is it reasonably practicable to have [a] person conducting the procedure of the same gender as client?' with a Yes or No tick box
- a question, or question similar to, 'If no, does client consent to FME with a person conducting the procedure NOT of the same gender?' with a Yes or No tick box.

Medical practitioners and audio-visual records

50. If any intrusive forensic procedure is to be carried out on a volunteer or victim,
- that 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 forensic procedure²⁵
 - that person may also request the making of an audio-visual record of the same and pursuant to that request, such a record must be made.²⁶
51. Despite my recommendations in last year's audit, records of intrusive volunteers and victims procedures in this year's audit period provide limited information which would assist auditing of compliance with the above requirements. The reason for this is that the PD184A form used for documenting sexual assault examinations fails to include any particular reference to the person's right to request a medical practitioner of their choice to witness the procedure or request that an audio-visual record of the procedure be made.
52. That said, I understand that in circumstances where a sexual assault examination is to be carried out, the volunteer or victim is generally provided with an information brochure prepared by the Commissioner for Victims' Rights, which includes an explanation of these rights.
53. The Commissioner of Police has recently advised that the PD184A form was amended on 28 February 2022. I accept that there may have been some delay in ensuring uniform use of those updated forms during the audit period. In light of that, I do not intend make any recommendation about this issue but will monitor it further in the next audit.

²⁵ Section 25(1) of the CL(FP) Act.

²⁶ Section 26(1)(b) of the CL(FP) Act.

Number of people present

54. In my view, 13 of the 15 records comprising sexual assault examinations are likely to have been conducted in the presence of no more persons that are necessary, and therefore likely to satisfy the requirements of section 21(2) of the CL(FP) Act. I draw this conclusion given the 'behind the screen/curtain' check box has been marked on 13 records.²⁷ I note that 2 records left the 'behind the screen/curtain' check box unmarked and it is therefore unclear if the requirements of section 21(2) of the CL(FP) Act were met.

Use of the term 'transsexual'

55. The PD184A has the following options for the criteria of Sex: Male, Female, Transgender and Transsexual. 'Transsexual' was the term previously used to identify a person who would now be commonly referred to as 'transgender', with the term 'transsexual' having fallen out of common usage. I observe that the CL(FP) Act specifically uses the term 'transgender' and does not use the term 'transsexual'.²⁸ As such, there appears to be no reason for the form to include both transgender and transsexual, and given the space available on the form, it may be prudent to replace 'transsexual' with the option with 'intersex', given that 'intersex' is also a term used in the CL(FP) Act.
56. Therefore, I RECOMMEND:

Recommendation 3

That the Commissioner of Police consider amending the form PD184A, used for recording volunteers and victims procedures, to remove the term 'Transsexual' under the criteria of Sex, and replace it with the term 'Intersex'.

Right to interpreter

57. Of the 75 volunteers and victims procedures audited, all procedures were carried out on a person fluent in English. However in one instance,²⁹ the procedure was carried out on a protected person and as such, the relevant person to consent to authorising the procedure was the protected person's parent, who was not fluent in English. An interpreter was arranged to provide an explanation to the protected person's parent over the telephone. In my view, this demonstrates good practice and that consideration was clearly given to the right of a person to be assisted by an interpreter.
58. Considering the above, the audit did not find any issues of non-compliance in this area.

²⁷ A forensic procedure must not be carried out in the presence or view of more persons than are necessary.

²⁸ Section 3 and 21(3) of the CL(FP) Act.

²⁹ [REDACTED]

Suspects procedures

59. Suspects procedures can be carried out on persons who are suspected of a serious offence.³⁰ Apart from 3 instances, records of suspects procedures clearly indicated that the person was suspected of a serious offence.³¹
60. Suspects procedures can only be conducted if they consist of a 'simple forensic procedure' or the procedure is authorised by a senior police officer.³²

Simple forensic procedures

61. Simple forensic procedures are forensic procedures consisting of one or more of:
- a simple identity procedure
 - a gunshot residue procedure
 - a forensic procedure prescribed by regulation.

Simple identity procedures comprise forensic procedures consisting of one or more of:

- taking of prints of hands or fingers
 - taking of forensic material from a person by buccal swab or finger-prick for the purpose of obtaining a DNA profile of that person.³³
62. A total of 6,216 simple forensic procedures were carried out on suspects and offenders during the audit period. The audit inspected 625 records relating to simple forensic procedures carried out on suspects. This equates to 10.05% of the total number of procedures carried out.
63. The majority of records demonstrated full compliance with the terms of the CL(FP) Act, continuing the trend from previous years.
64. Section 30 of the CL(FP) Act requires that before a suspect or offender forensic procedure is carried out on a person, a police officer must inform 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.
65. All of the records inspected indicated that a warning was given, and in all but 3 instances a record was made that indicated that the suspect clearly acknowledged the warning.
66. One record did not include any response from the suspect,³⁴ one recorded that the suspect responded 'No' to the question 'Do you understand this warning?',³⁵ and the other recorded the suspect's response to the warning as 'I'm cold'.³⁶ In these instances it is not clear whether the suspect comprehended the warning.

³⁰ Section 14(2)(a) of the CL(FP) Act.

³¹ [REDACTED]

³² Section 14(2)(b) of the CL(FP) Act.

³³ Section 3(1) of the CL(FP) Act.

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ [REDACTED]

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67. While some further clarification in these 3 instances may have been ideal, and other records showed further attempts to ensure that a suspect comprehended the warning, I am mindful that 100% of the records inspected clearly indicated that the warning was given, and only 0.5% did not clearly indicate if the suspect understood the warning. In those circumstances, I do not consider it necessary to make a recommendation.
68. Section 24 of the CL(FP) Act provides that the person who carries out a forensic procedure 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 forensic procedures indicated compliance with that provision.

Protected persons

69. 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.

70. Section 25(3) of the CL(FP) Act provides a hierarchy for the selection of an appropriate representative:

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.

71. In the 2019-20 report, the previous Deputy Ombudsman made the following recommendation.

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.

72. It is evident from inspection of the records within this audit period that the above recommendation was implemented, as a new form has been created that sets out the hierarchy under section 25(3), and provides ample space for officers to record any consideration given towards selecting an appropriate consideration.
73. Of the 625 simple forensic procedures inspected, 111 of the procedures were carried out on protected persons. Of those records, over 90 indicated that a relative or a close friend was present for the procedure as the appropriate representative, and as such, in the majority of cases it was appropriate for no further details to be recorded on the form.
74. In instances where a relative or friend was not selected as an appropriate representative, the details recorded were mixed.

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75. One record was, in my view, exemplary in demonstrating the officer's consideration of the hierarchy.³⁷ The record clearly indicated that the suspect was a protected person due to an intellectual impairment, it was stated that no person was available from category 25(3)(a), and that the appropriate representative was a support worker who was known to, and selected by, the protected person.
76. In contrast, another record simply stated that the representative was a 'Carer'.³⁸ Attached to the record was an email indicating that further clarification was sought from the officer who initially made the record. The response from the officer indicated that the officer was unclear of what further information ought to have been included on the report, stating that the protected person had no family. This was relevant information that should have been included on the form, and also does not demonstrate that consideration was given to whether a friend of the protected person may have been available. That said, I am pleased to note that upon SA Police's review of the form, further clarification was sought from the officer involved.
77. In addition to the above record, 6 further records indicated that the representative was a 'carer'. Five of those records stated that the protected person was under Guardianship of the Chief Executive of the Department for Child Protection, and the remaining record provided no further details.
78. Evidence demonstrating consideration of whether a representative from category 25(3)(a) was available was not recorded in any of the above 7 instances where 'carer' was recorded.
79. Similar to my observations in relation to the victims and volunteers procedures, in circumstances where a child is under a Guardianship order, it is not guaranteed that a 'carer' is a relative or 'friend' of the child. As such, even with the information that a protected person is under a Guardianship order, simply recording that a carer was present does not indicate full consideration of whether an appropriate person under section 25(3)(a) was available.
80. In comparison, 6 records indicated that a Red Cross Volunteer was the protected person's representative, and in 5 instances reasons were recorded that demonstrated that consideration was given whether an appropriate person under section 25(3)(a) was available before the Red Cross Volunteer was selected.
81. While I recognise and appreciate that consideration was given to Recommendation 3 from the Deputy Ombudsman's 2019-20 Audit and I acknowledge that a change was implemented, I consider that an additional prompt would be beneficial to ensure that best record keeping practices are maintained.
82. To this end, I consider that adding a question to the relevant form, such as 'Do you have a relative or friend that you wish to have present?', would ensure that a record is made demonstrating consideration was given to section 25(3)(a) and to prompt an officer to ensure that a protected person is aware that they may have a relative or friend of their choosing present, if available.
83. In my view, such a question would assist in demonstrating that an appropriate representative from section 25(3)(a) was considered before choosing a representative from the other sections of the hierarchy.

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84. Therefore, I RECOMMEND:

Recommendation 4

That the Commissioner of Police consider amending the relevant forms to include a prompt to ask the suspect the following question:

‘Do you have a relative or friend that you wish to have present?’

The form should have a checkbox to record ‘Yes’ or ‘No’, and space to record reasons if the suspect requests a relative or friend, and a relative or friend is unavailable.

Procedures carried out pursuant to orders of senior police officers

85. During the audit period, 189 suspects were the subject of forensic procedures that were carried out pursuant to orders made by senior police officers. I refer to these as ‘authorised procedures’.
86. The audit team examined 102 records relating to authorised procedures. This equates to 54% of the total number of authorised procedures carried out.
87. Documentation inspected included copies of applications for orders authorising forensic procedures (PD430), orders authorising suspects forensic procedures (PD431) and senior police officers’ records of applications for orders or authorisations (PD436). The senior police officer is also assisted by an aide memoire. Copies of the aides memoire were also provided to the audit.
88. In addition, the audit team also viewed 48 of the audio-visual records associated with authorised procedures.
89. In last year’s audit I noted that two of the sample audio-visual records were unable to be viewed as they were corrupted. In this year’s audit, two records were technically inaccessible as in one record the audio-visual recording ceased after 7 seconds, and in the other record the audio can be heard but the visual had not been recorded.³⁹
90. That said, I note that SA Police is taking steps to address this issue. I will continue to monitor this issue in next year’s audit.

Applications regarding suspects procedures

91. For suspects procedures that are not simple forensic procedures, an application must be made to a senior police officer.⁴⁰ The application must:
- be made in writing by a police officer
 - state the nature of the suspected offence and the grounds for suspecting the suspect committed the offence
 - state the nature of the procedure or procedures for which the order is sought and the grounds for suspecting the procedure or procedures could produce evidence of value to the investigation of the suspected offence.⁴¹
92. All records inspected for the audit period indicated compliance with those requirements.
93. I note that it was initially unclear in 8 instances whether a copy of the application was given to the suspect as the confirmation box on the PD430 was not completed.⁴² Following provision of the draft audit report to the Commissioner of Police, further records have been provided indicating that the PD430 had been provided to suspects in 5 of the 8 instances,⁴³ while 3 remain incomplete.⁴⁴
94. Accordingly, I RECOMMEND:

Recommendation 5

That the Commissioner of Police remind relevant police officers that a copy of the PD430 must be given to the suspect and that fact recorded on the form at the time of completing the application.⁴⁵

95. A copy of the application must be given to the suspect unless the application is of 'special urgency'. None of the procedures audited this year were recorded as being of special urgency.
96. 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 and Order

Reasonable grounds to suspect respondent had committed a serious offence

97. In all of the audited procedures, it was recorded that the senior police officer was satisfied that there were reasonable grounds to suspect that the procedure could produce material of value to the investigation.⁴⁶

⁴⁰ Section 15(1) of the CL(FP) Act.

⁴¹ Section 15(2) of the CL(FP) Act.

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⁴⁵ Section 15(3) of the CL(FP) Act.

⁴⁶ Section 19(1)(a) of the CL(FP) Act.

Reasonable grounds to suspect procedure could produce evidence of value

98. I note that for the purposes of auditing this section, the PD430 and PD436 need to be read together.⁴⁷
99. While generally, it was recorded that the senior police officer was satisfied that the procedure or procedures could produce evidence of value, in two instances, not all of the procedures applied for were authorised.
100. In the first instance, the senior police officer formed the view that the applicant had failed to provide enough information or evidence to form a sufficient nexus between the suspect's involvement in the alleged offending, and as such did not authorise 3 out of 4 of the requested forensic procedures.⁴⁸
101. In the second instance, the senior police officer did not authorise 2 of the 3 requested forensic procedures after representations from the suspect's lawyer. The representations stated that the passage of time from the alleged offence meant that the collection of forensic material would be very limited and that it was unlikely to produce material of value in relation to the offence for which the suspect was being detained. The senior police officer was persuaded by the submission and only authorised one forensic procedure which was not invasive.⁴⁹
102. I consider that the above instances demonstrate that the process used by SA Police is being appropriately implemented and that it provides for relevant and sensible checks upon the exercise of powers under the CL(FP) Act.

The public interest

103. 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.
104. In weighing the above public interest factors against one another, 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 suspect'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 suspect committed the offence
 - any other relevant factors.

⁴⁷ Section 19(1)(b) of the CL(FP) Act.

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105. Given the procedures inspected during last year's audit raised concerns that officers were not properly weighing the impact that the proposed procedure would have on the public interest and private rights, I made the following recommendation:

Recommendation 4

That the Commissioner of Police reiterate to senior police officers the requirement to properly consider and record reasons for concluding the public interest was in favour of carrying out an authorised procedure.

106. The Commissioner accepted that recommendation. There has been a marked improvement in the recording of the public interest factors, though I note that the analysis of weighting of relevant public interest factors is sometimes perfunctory and appears rote. Notwithstanding, given the high compliance of officers demonstrating that they are turning their minds to the public interest factors, I do not propose to re-agitate this issue, and I commend SA Police on the improvement.

Opportunity for suspect to make representations at hearing

107. Audited records indicated full compliance with the requirements associated with conducting the hearing, specifically the requirement that the suspect or their representative must be given a reasonable opportunity to make representations at the hearing.⁵⁰

Record of order

108. The senior police officer must make a written record of their order and their reasons for making it.⁵¹ In 7 circumstances, it initially appeared that pages 2 and 3 of the PD431 order were not completed in their entirety.⁵² The PD431 is arguably the most important document that the senior police officer is required to complete for authorised procedures as it is the formal record of the procedures authorised. When filled out properly, the PD431 documents and confirms that a copy of the order has been given to the suspect, that the suspect has been offered the opportunity to have a medical practitioner of their choosing present at the procedure, whether or not the person is a protected person, whether or not the section 30 warning has been delivered, and the identity of the person who carried out the forensic procedure. A failure to complete the PD431 risks any or all of the preceding information not being recorded and in those circumstances it becomes difficult to know whether the proper procedure was followed.
109. Following provision of the draft audit report to the Commissioner of Police, I was provided with the completed pages for 7 of the incomplete PD431 orders. I am satisfied that pages 2 and 3 of the PD431 have been completed in 6 instances. However, in one instance it is unclear whether the relevant warning and copy of the order has been provided to the suspect.⁵³

⁵⁰ Section 17(4) of the CL(FP) Act.

⁵¹ Section 19(3) of the CL(FP) Act.

⁵² See [REDACTED]

⁵³ [REDACTED]

110. Accordingly, I RECOMMEND:

Recommendation 6

That the Commissioner of Police remind relevant police officers of the importance of completing the entirety of the PD431, including that a copy of the record must be given to the suspect at the time when the order is made.⁵⁴

Protected Persons

111. Section 17(2) of the CL(FP) Act requires that protected persons must be represented at an informal hearing by an appropriate representative and may be represented by a legal practitioner.

112. An appropriate representative is defined under section 25(3) 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.⁵⁵

113. Seventeen instances were audited where the suspect was a protected person. Of those 17 suspects, it was recorded that 15 suspects had an appropriate representative as defined above. While it appears that an appropriate representative was present in 2 instances,⁵⁶ the records did not demonstrate that consideration was first given to a relative or friend under section 25(3)(a). Notwithstanding this, given that the protected person was provided with an appropriate representative in each instance, compliance with this section appears to be high.

Conduct of the procedures

114. Of the 102 authorised procedures audited this year, the audit team viewed 46 audio-visual recordings of the procedures.

Introductions

115. In the previous two audit years, the former Deputy Ombudsman and I reported that the audit team encountered some difficulty assessing sections 25(2) and 21(2) of the CL(FP) Act, as persons present in procedures are often out of view of the camera and were not identified by the investigating officer.

116. In light of this, the former Deputy Ombudsman recommended that the General Order 'Forensic procedures' be amended to include a direction that police officers making audio-visual records of intrusive procedures introduce themselves, invite all other

⁵⁴ Section 19(4) of the CL(FP) Act.

⁵⁵ Section 25(3).

⁵⁶ [REDACTED]

persons present to introduce themselves, and seek an acknowledgment from the suspect that no other persons than those identified are present in the room.

117. The Commissioner of Police amended the General Order 'Forensic procedures' accordingly.
118. It was observed in the current audit that some audio-visual records of procedures were compliant with this General Order, however many other records did not comply.
119. In 2 cases, the procedures were undertaken without anyone in the room introducing themselves.⁵⁷ In 5 cases, at least one person in the room was not introduced, including either an Officer or a Nurse or both. In 13 instances, the suspect is not recorded as confirming that there are no other persons in the room other than those introduced. I consider this to be statistically significant and as such, I RECOMMEND:

Recommendation 7

That the Commissioner of Police remind relevant police officers of the requirements of the General Order 'Forensic procedures', namely, that once the audio-visual recording has commenced, they should:

- 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.

120. I note that in one instance introductions were particularly well done; each of the two officers present introduced themselves, followed by the attending nurse. The suspect was then asked to identify themselves and to confirm that no other persons in the room were present other than those who introduced themselves. The suspect was then handed a copy of the PD431.⁵⁸

Section 30 Warning

121. A police officer must issue a section 30 warning to the suspect prior to carrying out the forensic procedure. Compliance with this obligation was generally high. As the warning is sometimes administered in the audio-visual record, the audit chose to audit compliance against this aspect in relation to the matters where audio-visual of the procedure was recorded, namely, in 48 instances. In 3 instances, inspection of both the PD431 and audio-visual record did not demonstrate that the warning was given. It could be that the warning was given and not recorded, but that is not clear from the records available to me.⁵⁹
122. It is essential that a suspect understands that reasonable force may be used and that evidence of obstruction or resistance may be used against them. Further, failure to give the warning may result in the suspect challenging the admissibility of the evidence in court.

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123. In many of the audio-visual records audited, the warning was provided on camera. In my view, this is best practice. Where the warning is given on camera, it mitigates against the risk that if the PD431 is not filled out, SA Police can provide documented evidence of the warning being administered.

Humane treatment

124. 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 procedures were largely carried out respectfully and humanely.
125. One of the recordings inspected demonstrated exemplary practice in carrying out a procedure humanely and within care.⁶⁰ The suspect in the recording became distressed when advised that blood would need to be taken from their arm by a needle. The attending officers and nurse responded compassionately by providing the suspect with relevant information and time to process the procedure, and successfully talked the suspect through the procedure.
126. There was one case that did not appear to demonstrate good practice. The doctor attending to conduct a penile swab appears to insert the cotton bud into the urethra of the suspect, which caused the suspect to make an exclamation indicative of some degree of pain.⁶¹ The suspect asks the doctor whether the cotton bud is supposed to be inserted into this urethra, and the doctor confirmed that is correct. This procedure seems at odds with the SA Police training provided to the external registered nurses, which repeatedly instructs nurses not to insert the swab into the urethra.
127. It appears to be rare for doctors to conduct forensic procedures for the purposes of the CL(FP) Act, and based on the information provided during the audit, this seems to occur largely in regional areas. It is unclear whether doctors also participate in training for the purpose of conducting forensic procedures under the CL(FP) Act. However, it may be beneficial for SAPOL to provide SA Health with the training materials developed for external registered nurses to address this issue. As such I RECOMMEND:

Recommendation 8

That the Commissioner of Police consider making SA Police training material for contracted nurses available to SA Health to distribute as appropriate.

Forensic procedure carried out by person of same sex

128. Under section 21(3) of the CL(FP) Act, 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. Of the audio-visual authorised procedures inspected by Ombudsman SA Officers, 26 procedures involved the exposure of, or contact with, a suspect’s genitals.

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129. One instance demonstrated very good compliance,⁶² where the suspect has requested that someone of the same sex perform the procedure and attempts were made to contact other watch houses and hospitals to locate a suitable person to undertake the procedure. While someone of the same sex could not be located, I consider the attempts made to find an alternative practitioner demonstrate that it was not reasonably practicable to have a practitioner of the same sex carry out the procedure.
130. In 11 instances, the procedures that were performed appeared to be non-compliant with section 21(3) of the CL(FP) Act.⁶³ The records do not indicate the reason as to why it was not reasonably practicable to have a practitioner of the same sex perform the procedure. The 11 records also do not indicate if the suspect requested a practitioner of a different sex, or whether the suspect had indicated a preference as to the sex of the practitioner.
131. In 3 instances, intrusive forensic procedures involving contact with the genital area were carried out on protected persons (children) by practitioners of a different sex. In one instance, the protected person was a young female subject to a procedure involving vaginal swabbing.⁶⁴ In that instance, while the suspect did consent, it does not appear that attempts were made to locate a practitioner of the same sex before proceeding. In another instance, the suspect was a very young male,⁶⁵ and was subject to penile swabbing. In that instance, the PD 421 stated that only a female nurse was available and it was not practicable to take the suspect to the hospital, but it is unclear as to why this was the case. In another instance, the young male suspect had said that it was against his culture to expose his penis.⁶⁶ However, no explanation as to why a practitioner of the same sex was not available was provided. In instances where a suspect is a protected person, particularly a child, I consider it would be best practice for further efforts to be made to have someone of the same sex carry out the procedure.
132. In light of the above, I RECOMMEND:

Recommendation 9

That the Commissioner of Police:

- remind relevant police officers that alternative provider options must be explored to ensure compliance with section 21(3) of the CL(FP) Act, and
- The suspect's preference as to the sex of the person carrying out the procedure should be recorded on the PD431.

Medical practitioner of choice

133. 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.

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⁶³ I note that the General Order Forensic Procedures states that '[n]otes should be made on the relevant forms as to the reasons why a person of the same sex could not be used to conduct the procedure (where relevant)'. These records were:

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134. In last year's audit, I observed that in some cases the offer was being made when the procedure was about to commence. I recommended that the Commissioner of Police consider amending the form PD431 and the senior police officer's aide memoire to include a prompt for the senior police officer to ask, when an order has been made, whether the suspect requests that a medical practitioner of their choice and at their own expense witness the procedure. I understand this recommendation was accepted; While PD431 has been amended to include the prompt, it is missing from the aide memoire. The aide memoire is a useful tool, it is akin to a checklist. If the aide memoire included a prompt to ensure that a response is recorded in relation to medical practitioners, it would then provide the suspect with a 'reasonable opportunity' or organise for a medical practitioner of their choosing to attend the procedure.
135. Unfortunately, it was unclear in 13 instances whether the offer had been extended to the suspect by virtue of inspection of both the PD431 and the audio-visual record.
136. Accordingly, I RECOMMEND:

Recommendation 10

That the Commissioner of Police consider amending the aide memoire to include a prompt for senior police officers to advise that the suspect may, at their own expense, organise for a medical practitioner of their choice to witness the procedure and provide space to record the suspect's response.

Forensic procedure not carried out in presence of more persons than necessary

137. Section 21(2) provides that a 'forensic procedure must not be carried out in the presence or view of more persons than are necessary for properly carrying out the procedure and satisfying any relevant statutory requirements'.
138. Most forensic procedures occur in the presence of two police officers and a person qualified to perform the forensic procedure. In the case of protected persons, it is also common for the authorised representative to be present.
139. In 9 of the audio-visual records audited there appears to be more people in the room than are necessary to carry out the procedure. In one instance, multiple people come and go from the room throughout the procedure and those people are not introduced.⁶⁷
140. I am unable to draw inferences as to why there are extra individuals present in the 9 audio-visual records. Accordingly I RECOMMEND:

Recommendation 11

That the Commissioner of Police remind relevant police officers of the importance of restricting access to forensic procedures to those persons who are necessary for the carrying out of the procedure and/or to satisfy any relevant statutory requirements

⁶⁷ [REDACTED]

Provision of an interpreter

141. Section 22(a) provides that if a person on whom a forensic procedure is to be carried out is not reasonably fluent in English, the person is entitled to be assisted by an interpreter. Section 22(b) also states that the person may request to have an interpreter present during the procedure. 93 records indicated that the requirement for an interpreter was not relevant. In the remaining 9 instances, interpreters assisted a person at the hearing for the procedure.
142. I note that the requirement of section 22(b) is that, if requested, the interpreter be *present* at the carrying out of the procedure. I consider that, for purposes of section 22(b), telephone attendance by the interpreter complies with this requirement.
143. In one instance the interpreter was present at the hearing, but it is clear that the interpreter was not present for the procedure. The Officer present at the procedure can be overheard saying 'we explained that before, with the interpreter'.⁶⁸ Having viewed the audio-visual of that record, I am satisfied that the suspect appeared to understand the information and directions given to them by the authorised and qualified officer.

⁶⁸ [REDACTED]

Retention orders

144. 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'.
145. Section 36 of the CL(FP) Act sets out the grounds on which a senior police officer makes 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.
146. I am advised that no applications for retention orders were made during the audit period.

Assimilation orders

147. 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.⁶⁹ 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 be subject to applications for and orders of destruction.⁷⁰
148. A senior police officer can make an assimilation order if satisfied that there are reasonable grounds to suspect that the volunteer or victim in question has committed a serious offence and:
- 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; or
 - the forensic material consists of material taken from the volunteer or victim for the purpose of obtaining a DNA profile from them.⁷¹
149. I am advised that no assimilation orders were made by SA Police in the relevant period.

⁶⁹ CL(FP) Act, section 37.

⁷⁰ CL(FP) Act, section 37 and 39.

⁷¹ CL(FP) Act, section 37.

Forensic procedures on deceased persons

150. 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 either in the investigation of a serious offence, or in the identification of the deceased.
151. Written authorisations were given under this provision on 16 occasions during the audit period and the audit team inspected all 16 records. Only 3 of those constituted forensic procedures.
152. A forensic procedure for purposes of the CL(FP) Act is limited to ‘a procedure carried out by or on behalf of South Australia Police or a law enforcement authority’ which consists of:
- taking prints of hands, fingers, feet or toes
 - examination of a person’s body requiring the removal of clothing of, or physical contact with, the person
 - taking biological or other material from a person’s body
 - taking an impression or cast from a person.
153. In 15 cases, the required forensic material had already been collected in the course of the post-mortem examination of the body.⁷² I understand that in those cases the authorisation form was completed for the purpose of recording that the relevant material was provided to the Commissioner of Police to enable the material to be further scrutinised by Forensic Science SA (FFSA), such as by comparing the material with other DNA samples. The authorisation was not for the purpose of carrying out further forensic procedures for the purposes of the CL(FP) Act.
154. In those 15 cases, I do not consider an authorisation under section 55(1) (which allows the ‘carrying out of a forensic procedure’) was required. For this reason, I consider the sample size audited for compliance against section 55 of the CL(FP) Act was in fact a sample size of one.
155. While the procedure appears to have been compliant, the record inspected was incomplete. While the record specified the nature of the forensic procedure to be authorised,⁷³ it did not identify the medical practitioner or person qualified to carry out the forensic procedure. In supplementary material supplied by SA Police, it provided the names of all the pathologists who carried out the procedures.⁷⁴
156. Given the isolated occurrence of this issue, I do not consider it necessary to make a recommendation.

⁷² [REDACTED]

⁷³ As required by section 55(1) of the CL(FP) Act.

⁷⁴ Section 55(5) of the CL(FP) Act.

Blood testing for communicable diseases

157. Five forensic procedures that consisted of the taking of a sample of blood to test for communicable diseases were carried out during the audit period. The records for each of those procedures were inspected by Ombudsman SA Officers.
158. The taking of a sample of blood is an intrusive procedure and as the 5 procedures were carried out on suspects, audio-visual records must be made.⁷⁵ Given the high degree of compliance with this aspect of audit last year, I chose not to inspect the audio-visual records this year, and instead audited the paper records.
159. Pursuant to section 20B of the CL(FP) Act, a senior police officer (**authorising officer**) may authorise the taking of a sample of blood from a person to test for communicable diseases, if satisfied that:
- the person is suspected of a prescribed serious offence; and
 - it is likely that a person engaged in prescribed employment came into contact with, or was otherwise exposed to, biological material of the person as a result of the suspected offence.⁷⁶
160. The relevant document for inspection, PD430A, sufficiently demonstrated that in all instances, the authorising officer was satisfied that the above requirements had been met. I consider it pertinent to also note that the PD430A appears to contain a Risk Matrix to assist authorising officers in forming such a view.
161. To comply with section 20B(2) of the CL(FP) Act, the authorising officer must:
- make a written record of the grounds on which they determined that the forensic procedures should be carried out; and
 - provide a copy of the record to the person from whom a sample of blood was sought.⁷⁷
162. I am pleased that all of the PD430As audited contained a detailed written record of the grounds on which the procedure was authorised.
163. Regulation 4A(1)(a)(i) and (ii) of the CL(FP) Regulations requires the authorising officer, before the procedure is carried out, to give the person written notice that:
- a sample of the person's blood is taken pursuant to section 20B of the Act; and
 - the blood will be tested for communicable diseases.⁷⁸
164. The PD430A contains a section titled 'notice to suspect', the contents of which set out the above requirements. In one matter the authorising officer signed and dated that a copy of the application and order had been given to the suspect prior to the procedure, however had a failed to tick the box advising same. Given the section is signed and dated by the authorising officer, it appears to be an administrative oversight.⁷⁹

⁷⁵ Section 26(1)(a) of the CL(FP) Act.

⁷⁶ Section 20B(1)(a) and (b) of the CL(FP) Act.

⁷⁷ Section 20B(2) of the CL(FP) Act.

⁷⁸ Regulation 4A(1)(a)(i) and (ii) of the CL(FP) Regulations.

⁷⁹ [REDACTED]

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165. In accordance with regulation 4A(b), the authorising officer must invite the person to nominate a medical practitioner to receive a copy of the results of the testing. I am pleased to report full compliance with this requirement.
166. The Commissioner of Police must take reasonable steps to notify the person from whom the sample of blood was taken of the results of the test (or their nominated medical practitioner).⁸⁰ SA Police provided us with copies of letters enclosing results of the tests for five instances. In one instance, the sample was not tested due to clinical error. However, in light of the affected person's results, SA Police did not consider it necessary to obtain a further sample and on that basis there was no results to notify. Accordingly I am satisfied that SA Police is making reasonable attempts to notify persons from whom a sample of blood was taken.
167. Reasonable steps must also be taken to notify each affected employee of the results of the testing.⁸¹ I am satisfied that this was complied with in relation to the 5 samples tested.
168. Further to the above considerations, given that the taking of a sample of blood is an intrusive procedure for the purposes of the CL(FP) Act, the audit also considered whether in each instance, persons were allowed a reasonable opportunity to arrange for the attendance of a medical practitioner of their choice to witness the procedure⁸² and whether a police officer:
- informed those persons that reasonable force may be used to carry out the procedure; and
 - if those persons obstruct or resist the carrying out of the procedure, evidence of that fact may be admissible in proceedings against them.⁸³
169. The PD430A form in relation to each procedure evidenced that these requirements were complied with.
170. While the audit does not specifically consider compliance with sections 34A and 39A of the CL(FP) Act, I note that in relation to blood testing of persons with communicable diseases, SA Police's General Order Forensic Procedures expressly states that:
- forensic material obtained as a result of this procedure must be destroyed as soon as is reasonably practicable after the material has been tested for communicable diseases
 - forensic material obtained under this provision must not be used for any other purpose than testing for communicable diseases.

⁸⁰ Regulation 4B(1) and (2).

⁸¹ Regulation 4C.

⁸² Section 25(1)(a) of the CL(FP) Act.

⁸³ Section 30(a) and (b) of the CL(FP) Act.

The DNA database system

171. Part 5 of the CL(FP) Act sets out the requirements for the storage of information about forensic procedures on the DNA database system.
172. 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*. The current Memorandum of Administrative Agreement was executed on 2 November 2020.
173. By virtue of section 42(2)(a) of the current Act, the Attorney-General is permitted to enter into arrangements with their counterparts in other Australian jurisdictions for the exchange of information recorded in the South Australian DNA database system and databases kept under corresponding laws.
174. 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,⁸⁴ 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.
175. It is an offence under the CL(FP) Act to access information stored on the South Australian database without the authorisation of the Commissioner and for any purpose other than those provided by section 45(2). Similarly it is an offence to disclose information stored on the DNA database for any purpose not authorised under section 50.

⁸⁴ Now known as the Australian Criminal Intelligence Commission (**the ACIC**).

176. The DNA Management Unit has advised of the following procedures in place to prevent unauthorised disclosure of information stored on the DNA database:
- the SAPOL General Order, Forensic Procedures addresses the confidentiality requirements of section 50 of the CL(FP) Act
 - the requirements of section 50 of the CL(FP) Act forms part of the Buccal Swab Training Course which is completed by all SAPOL members
 - instances of suspected unauthorised disclosure of information under the CL(FP) Act by SAPOL employees are reported to SAPOL's Ethical and Professional Services Branch and may result in training, managerial advice and/or sanction
 - the DNA Management Unit is subject to a quarterly audit conducted by SAPOL employees not attached to Unit. The purpose of this audit is to evaluate awareness of DNA Management Unit employees with regard to maintaining confidentiality of DNA information
 - access to the Forensic Science South Australia Laboratory Information Management System (**LIMS**) is limited to SAPOL employees that require access to conduct their core duties.
177. The DNA Management Unit has confirmed that for the audit period there were no instances of unauthorised access.
178. Section 42 of the CL(FP) Act also creates a number of offences in relation to the storage of information, noting that it is an offence to store a DNA profile derived from forensic material obtained by carrying out a forensic procedure on a database other than the DNA database system, unless certain exceptions apply, such as on a backup database. The DNA Management Unit has confirmed that SAPOL did not keep a further backup database during the audit period.
179. 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.⁸⁵ Further, such DNA profiles cannot be compared to other profiles stored on the database if the person has imposed a condition to that effect.⁸⁶
180. During the audit period, there were two instances of volunteers' material being retained on the DNA database for unlimited purposes.⁸⁷ In both instances the relevant consent form, PD248, had been completed and signed by the relevant persons and were fully compliant with the requirements of section 43(1).

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

181. If forensic material is obtained from a volunteer or victim, the person who carries out the procedure must give the person a written statement explaining that person's right to request destruction of the material.⁸⁸

⁸⁵ CL(FP) Act, section 43(1).

⁸⁶ CL(FP) Act, section 45(3)(a).

⁸⁷

⁸⁸ Section 12(1) of the CL(FP) Act.

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182. Part G of PD425 contains a written statement which is provided to the volunteer or victim clearly explaining that requests for destruction are to be made in writing to the attention of the Officer in Charge, DNA Management Unit, with the inclusion of an email address. In 97% of records inspected, the PD425 indicated that the statement had been provided. In two instances,⁸⁹ it was not clear whether the written statement had been provided, as the section acknowledging service of a copy of Part G was signed by a SAPOL police officer. This may have been a clerical oversight, and, noting the high level of compliance, I do not consider it necessary to make a recommendation.
183. The Commissioner of Police must ensure that forensic material obtained from a person by carrying out a volunteers and victims procedure is destroyed within 21 days after receiving a request for destruction from the person who consented to the procedure.⁹⁰
184. I have been advised that the DNA Management Unit is subject to a monthly audit conducted by a SAPOL member not attached to the Unit, the purpose of which is to evaluate legislative compliance with the timeframes for destruction requests.
185. During the audit period, a total of 9 requests for destruction of forensic material were received. In 7 instances, the forensic material was destroyed within the required 21-day period.
186. In respect of the 2 other requests,⁹¹ the material was not destroyed for approximately six weeks and two months respectively, following the request. However, I note that both requests sought destruction after forensic examination had been completed. In both instances, it appears that the DNA Management Unit was awaiting confirmation from Forensic Science SA that comparison to other exhibits in the relevant cases had been completed before proceeding with destruction, and when that confirmation had been received the material was destroyed within one week. As such, I consider that while in two instances destruction was not strictly within the prescribed timeframes, there was a reasonable explanation. All other instances were actioned within the required timeframes.

⁸⁹ [REDACTED]

⁹⁰ Section 39(1) of the CL(FP) Act.

⁹¹ [REDACTED]

Appendix 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	Comment
Person was not suspected of having committed the offence that was being investigated (s7(2))	75	100%	0%	0%	
Relevant person consented to procedure (s7(2)) by providing express consent or some other unequivocal indication of consent (s 8)	74	100%	0%	0%	One instance by a senior police officer and on that basis no consent was required
Relevant person withdrew consent and procedure discontinued (s10(1))	0	N/A	N/A	N/A	No relevant person withdrew consent in the procedures audited
Relevant person withdrew consent but senior police officer authorised continuation of procedure (s10(3))	0	N/A	N/A	N/A	No relevant person withdrew consent in the procedures audited
Senior police officer authorised carrying out of procedure (s7(2))	1	100%	0%	0%	

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	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)	1	100%	0%	0%	Relevant person, or a person related to associated with him or her, was under suspicion in relation to a criminal offence
Senior police officer's authorisation was in writing and specified procedure authorised (s9)	1	100%	0%	0%	
Explained to protected person that procedure would not be carried out if protected person objected to it (s11(1))	9	100%	0%	0%	One record related to a protected person under 10 years of age (11(3)(c)(i))
Procedure discontinued where protected person objected to or resisted it (s11(2))	0	N/A	N/A	N/A	No protected person objected or resisted
Forensics procedure carried out humanely? (s21(1))	0	N/A	N/A	N/A	Not audited as paper records only.

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
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 reasonably practicable (s21(3))	17	94%	6%	0%	It was not reasonably practicable to obtain a person of the same sex in two procedures and the victim or volunteers consented
Not carried out in the presence or view of more people than necessary (s21(2))	15	86.7%	0%	13.3%	This requirement was only audited where a PD184 sexual assault examination form was used
Duty to observe relevant medical or other professional standards (s23)	0	N/A	N/A	N/A	Not audited given the absence of audio-visual records.
Person qualified to carry out the procedure (s24(1))	75	100%	0%	0%	
Person not reasonably fluent in English is to be assisted by an interpreter (s22)	0	NA	N/A	NA	All persons on whom a procedure was carried out were fluent in English

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
Where the procedure on protected person, an appropriate person present to witness procedure (s25(2))	9	66.6%	0%	33.3%	Consideration of the hierarchy under section 25(3) was not recorded
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))	17	11.8%	0%	88.2%	<p>Only one record indicated that a person arranged for attendance of a medical practitioner of their choice. One procedure was carried out on 4-year-old and a reasonable opportunity to make a request does not appear to be required.</p> <p>It is unclear whether, in the circumstances of 15 cases that utilised a PD184A form, that the provision of the brochure meant the person was allowed a reasonable opportunity for the attendance of the medical practitioner.</p>
Audio-visual record must be made of an intrusive procedure where requested by victim or volunteer (s26(1)(b))	17	11.8%	0%	88.2%	<p>Only one record indicated that a request was made by the victim or volunteer.</p> <p>One procedure was carried out on 4-year-old and a reasonable opportunity to make a request does not appear to be required.</p> <p>It is unclear whether, in the circumstances of 15 cases that utilised a PD184A form, that the provision of the brochure meant the person was prompted to request an audio-visual record to be made.</p>

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
Relevant person given a written statement explaining their right to request destruction of forensic material (s12(1))	75	97.3%	0%	2.7%	Part G signed by SA Police Officer
Forensic material destroyed within 21 days of receipt of request (s39(5))	9	78%	0%	22%	There were two instances where the victim or volunteer asked for forensic material to be destroyed only after analysis was completed.

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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	Comment
The person was suspected of a serious offence	625	100%	0%	0%	
The procedure consisted of a simple identity procedure	625	100%	0%	0%	
Suspected of a serious offence (s 14(2))	625	622	0%	3	In one instance the PD429 did not list the suspected offence. In 2 other instances, the nature of the offence was not specified such that it could definitively be confirmed as a 'serious offence.'
Suspect reasonably fluent in English or assisted by interpreter (s22)	619	99%	0%	1%	In 4 instances, the PD429 was incomplete. In two instances, the PD429 suggested that the suspect was not fluent in English, but interpreter details were not provided.
Appropriate representative present to witness authorised procedure on protected person (s25(2))	111	93%	0%	7%	In 8 instances, where the appropriate representative was listed as either a carer or volunteer, it was unclear whether the relevant hierarchy had been considered.
Written record provided of any directions given where person not in lawful custody (s29)	1	100%	0%	0%	

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
Warning provided to the suspect that (a) reasonable force could be used to carry out the procedure and (b) that if the suspect obstructed or resisted the procedure, evidence of that fact might be admissible in proceedings against the suspect (s30)	624	99.9%	0%	0.1%	In one instance, the PD429 did not record whether the warning had been provided. In two other instances, where the warning was provided, it was not clear that the suspect understood that warning.

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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	Comment
Written application for senior police officer's order made (s15(2))	102	100%	0%	0%	
Did the application state the nature of the suspected offence and the grounds for suspecting the respondent had committed the offence (s15(2)(b))	102	100%	0%	0%	
The suspected offence was a serious offence	102	100%	0%	0%	
The application stated the nature of the forensic procedure for which the order was sought and the grounds for suspecting that the procedure could produce evidence of value to the investigation	102	100%	0%	0%	
Copy of application given to respondent (s15(3))	102	97%	0%	3%	In 3 cases, it was unclear whether this had occurred.

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A copy of the application given to the senior police officer in writing by email, fax, by hand or, if not reasonably practicable read over the telephone? (s15(4))	102	99%	0%	1%	In one instance it was unclear if this requirement had been met.
Senior police officer conducted informal hearing (s16)	102	100%	0%	0%	
The respondent a protected person and, if so, were they represented by an appropriate representative at the hearing (s17(2))	17	100%	0%	0%	12 persons were protected persons for the purposes of the hearing;
The appropriate representative a relative or friend chosen by the protected person and, if not, was an appropriate explanation provided? (s 17(2))	17	82.3%	0%	17.7%	In three cases not enough information was provided to demonstrate that the person chosen was suitable
Senior police officer satisfied that there were reasonable grounds to suspect respondent had committed serious offence (s19(1)(a))	102	100%	0%	0%	

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Senior police officer satisfied that there were reasonable grounds to suspect that procedure could produce evidence of value to investigation (s19(1)(b))	102	100%	0%	0%	While the senior police officer was not satisfied in 2 instances that the procedure could produce evidence of value to the investigation, it would be unfair to characterise those instances as demonstrating 'non-compliance'; rather the senior police officer was simply 'not-satisfied' that the procedure could produce evidence of value.
Senior police officer satisfied that public interest in obtaining evidence outweighed public interest in ensuring individuals are protected from unwanted interference (s19(1)(c))	102	95%	3%	2%	
Respondent or representative given reasonable opportunity to make representations at hearing (s17(4))	102	98%	0%	2%	
Senior police officer made written record of order and reasons for making it (s19(3))	102	99%	0%	1%	
Copy of order given to respondent (s19(4))	102	99%	0%	1%	

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NOTE: The following data relates only to the 48 audio-visual recordings reviewed.					
Suspect provided warning (s30)	48	94%	0%	6%	Warning not recorded, or audio-visual unable to be viewed
Forensic procedures to be carried out humanely (s21(1))	48	96%	0%	4%	Audio-visual record unable to be viewed
Duty to observe relevant medical or other professional standards (s23)	46	96%	0%	4%	Audio visual recording unable to be viewed
If not reasonably fluent in English, was an interpreter afforded to the suspect (s22)	9	100%	0%	0%	In 9 cases an interpreter was provided to assist the suspect during the hearing
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	57.7%	42.3%	0%	In 11 instances, no reasons were provided as to why a person of the same sex could not carry out the procedure.
Intrusive forensic procedure and suspect allowed reasonable opportunity to arrange for attendance of medical practitioner to witness same (s25(1))	48	68.5%	0%	31.5%	In 15 instances it was unclear from the recordings as to whether the suspect had been offered an opportunity to have a medical practitioner of choice attend.

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If the procedure an intrusive procedure, an audio-visual record made of the same	48	96%	0%	4%	One audio visual record cut out after 7 seconds, and one record had no visual recording.
Appropriate representative present to witness authorised procedure on protected person (s25(2))	11	82%	9%	9%	
Not more people present than necessary (s21(2))	48	87%	0%	13%	Unclear due to lack of introductions or confirmation from suspect as to how many people present
The person who carried out the procedure qualified to carry out that procedure(s 24(1))	48	100%	0%	0%	

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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	Comment
Did a senior police officer authorise the carrying out of the forensic procedure?	1	100%	0%	0%	
Senior police officer satisfied that evidence obtained from procedure likely to assist with investigation of serious offence or identification of deceased (s55(1))	1	0%	0%	100%	
Authorisation in writing and specified procedure to be carried out (s55(1))	1	100%	0%	0%	
Procedure carried out by medical practitioner or person qualified as required by the regulations to carry out the procedure (s55(5))	1	100%	0%	0%	Not detailed on PD435, but subsequently advised that procedure carried out by forensic pathologist.
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))	1	N/A	N/A	N/A	The authorized procedure did not require police officers to exercise the power to enter premises to carry out the procedure.

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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	Comment
Senior police officer satisfied that person suspected of a prescribed serious offence (s20B(1)(a))	6	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))	6	100%	0%	0%	
Senior police officer made written record of grounds on which they determined that sample of blood should be taken (s20B(2))	6	100%	0%	0%	
Copy of written record given to suspected person (s20B(2))	6	100%	0%	25%	
Person not reasonably fluent in English is to be assisted by an interpreter (s22)	1	100%	0%	0%	One person not fluent in English. Interpreter assisted.

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
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)	6	83.3%	0%	16.7%	In one case, it was unclear whether this occurred as the form was not completed.
Before procedure carried out, senior police officer invited suspected person to nominate a medical practitioner to receive copy of test results (reg. 4A)	6	100%	0%	0%	
Police officer provided warning that reasonable force could be used to carry out procedure and if person obstructed/resisted procedure, evidence of that fact may be admissible in proceedings against them (s 30)	6	100%	0%	0%	
Forensics procedure carried out humanely (s 21 (1))	0	N/A	N/A	N/A	Unable to consider requirement as audio-visual record not reviewed.
Not carried out in the presence or view of more people than necessary (s 21 (2))	0	N/A	N/A	N/A	Unable to consider requirement as audio-visual record not reviewed.
Person qualified to carry out the procedure (s 24 (1))	6	100%	0%	0%	

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
Suspect allowed reasonable opportunity to arrange for attendance of medical practitioner to witness procedure (s 25 (1))	6	100%	0%	0%	
Where the procedure on protected person, an appropriate person present to witness procedure (s25(2))	1	100%	0%	0%	One procedure carried out on protected person. Records indicate appropriate person (parent) present for procedure.
Reasonable steps taken by SAPOL to notify suspected person/nominated medical practitioner of results of testing (reg.4B)	5	100%	0%	0%	One sample not tested due to clinical error. No results to notify.
Reasonable steps taken by SAPOL to notify affected person/nominated medical practitioner of results of testing (reg.4C)	6	100%	0%	0%	

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Provision	Sample size	Proportion of sample size that complied	Non-compliant procedures	Proportion of sample size where it was unclear whether procedure was compliant	Comment
Blood samples taken under section 20B must not be used for any purpose other than testing for communicable diseases (s 34A)	0	N/A	N/A	N/A	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.
Forensic material destroyed as soon as reasonably practicable after the material has been tested for communicable diseases (s 39A)	0	N/A	N/A	N/A	This requirement not audited this year. Refer to SAPOL's General Order that material obtained as a result of this procedure must be destroyed as soon as reasonably practicable.

Appendix 2

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.⁹²

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.⁹³

Investigating police officer means a police officer in charge of the investigation of a suspected offence.⁹⁴

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.⁹⁵

Qualified person means -

- (a) a medical practitioner⁹⁶; or
- (b) a registered nurse (for any procedure other than a dental impression)⁹⁷; or
- (c) a police officer authorised by the Commissioner of Police to take prints of the hands, fingers, feet or toes⁹⁸; or
- (d) a police officer authorised by the Commissioner of Police to non-intrusively examine a part of a person's body⁹⁹; 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 body¹⁰⁰
 - (ii) taking samples of fingernails toenails, or material from under a fingernail or toenail¹⁰¹

⁹² Section 25(3).

⁹³ Section 3(1).

⁹⁴ Section 3(1).

⁹⁵ Section 6.

⁹⁶ Section 24(1)(a).

⁹⁷ Regulation 5(1)(a).

⁹⁸ Regulation 5(1)(b)(i).

⁹⁹ Regulation 5(1)(b)(ii).

¹⁰⁰ Regulation 5(1)(c)(i).

¹⁰¹ Regulation 5(1)(c)(ii).

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- (iii) taking samples of biological or other material from an external part of the body¹⁰²
- (iv) buccal swabs¹⁰³
- (v) taking samples of blood by finger prick¹⁰⁴
- (vi) taking impressions of casts or wounds.¹⁰⁵

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 kin¹⁰⁶
- (c) if the person is not a child but is a protected person by reason of their incapacity - their guardian¹⁰⁷, or if they don't have a guardian, the closest available next of kin.^{108 109}

Respondent means the person on whom it is proposed to carry out a forensic procedure (other than a simple forensic procedure).¹¹⁰

Senior police officer means a police officer of or above the rank of inspector.¹¹¹

Serious offence means an indictable offence or a summary offence that is punishable by imprisonment¹¹²

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

- (a) a simple identity procedure;
- (b) a gunshot residue procedure.¹¹³

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.¹¹⁴

¹⁰² Regulation 5(1)(c)(iii).

¹⁰³ Regulation 5(1)(c)(iv).

¹⁰⁴ Regulation 5(1)(c)(v).

¹⁰⁵ Regulation 5(1)(c)(vi).

¹⁰⁶ 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.

¹⁰⁷ Section 3(1) defines 'guardian' to mean a person acting or appointed under any Act or law as the guardian of another.

¹⁰⁸ 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.

¹⁰⁹ Section 6.

¹¹⁰ Section 13.

¹¹¹ Section 3(1) of the CL(FP) Act.

¹¹² Section 3(1).

¹¹³ Section 3(1).

¹¹⁴ Section 3(1).

Glossary of Relevant Forms

Victims and volunteers procedures use the following forms:

- PD425 Volunteers and Victims Consent Form
This is the most common form, containing the recording of consent, the forensic procedure, usually a buccal swab, and other relevant details. This form is usually filled out where the procedure is performed by the Police.
- PD184A Medical Record for Sexual Assault Examination
This form is typically filled out by a medical practitioner at a hospital, most commonly the Royal Adelaide Hospital or Yarrow Place.
- Child Protection Services - Forensic Medical Assessment
This form is used where a child is undergoing an intrusive examination. These are commonly carried out in response to sexual assault allegations.
- Forensic Evidence Collection Kit - Victim Examination
This is a brief form recording a buccal swab, where a PD425 should have been completed. This form is meant for internal Police processes rather than to record a procedure for purposes of the CL(FP) Act.
- Authority to Release Medical Reports and Associated Material from a Forensic Medical Examination to Police
Where consent is obtained to provide forensic material from a victim after a forensic procedure has been undertaken by a hospital or specialised unit such as Yarrow Place, this form is completed to record that consent.

Procedures authorised on suspects, other than simple identity procedures, require all of the following forms to be completed:

- PD430 - Application for Order Authorising Suspects Forensic Procedure
The form is filled out by the applicant, usually the investigating police officer, and provided to the senior police officer and suspect in advance of the hearing. It sets out the application for the forensic procedure, the basis for the application, and other relevant details.
- PD431 - Order Authorising Suspects Forensic Procedure
This form records the particulars of the order by the senior police officer and the final page records the procedure performed on the suspect.
- PD436 - Senior Police Officer Record of Application for Order or Authorisation
This form provides a record of the reasons for the decision. It contains little formal structure, allowing more substantive records to be made by the senior police officer.
- Aide Memoire - Senior Police Officer's Hearing
This form contains prompts to ensure that the senior police officer turns their mind to the relevant requirements and considerations in conducting the hearing for an order or authorisation. In some cases, this can contain information for understanding reasons for the senior police officer's order, when read with PD436.

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Simple identity procedures performed on suspects and offenders require the use of a single form:

- PD429 - Record of Simple Forensic Procedure Suspect or Offender
- This form is filled out to record a simple identity procedure, usually a buccal swab for obtaining the DNA of a suspect or offender.

SA Police records an authorisation for a forensic procedure on a deceased person on:

- PD435 - Authorisation for a Forensic Procedure on a Deceased Person
- This form contains both the senior police order for the forensic procedure and the record of the order carried out. This form is also used by Police to analyse material already collected and therefore exceeds the purposes of the CL(FP) Act.

SA Police records blood testing on persons for identifying whether that person has a communicable disease on:

- PD430A - Application and Order for Authorising Blood Testing of Certain Persons for Communicable Diseases
- This form contains the application, the senior police officer's order, and a record of the procedure.

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