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Dear Mr Ahlin

Independent review of Part 1D

I refer to you letter of 22 July 2002 inviting me to make a submission in relation to the independent review of Part 1D of your Crimes Act.

You would be aware that Mr Cowdery QC, Director of Public Prosecutions was a signatory to a letter sent to the Commonwealth Attorney General in relation to forensic science and law reform (letter dated 13 May 2002). Those issues remain relevant to your independent review. You would be aware that the *Crimes (Forensic Procedures Act) 2000 NSW* is also presently under review.

To date, this Office has not completed many trials involving DNA evidence but where that evidence has been cogent and significant it has contributed to the conviction of suspects. Several trials involving DNA evidence are either awaiting trial or are presently underway. If you would be assisted, details of significant cases can be provided to you.

Some issues have arisen involving the use of forensic evidence in court. Those issues are broadly stated in the letter of 13 May 2002 and I will outline them in more detail.

Sing [2002] NSW CCA 20 - The Court of criminal Appeal held that the admission of DNA evidence involved unfair prejudice to the accused. Evidence of Messrs Weigner and Goetz (who conducted the testing) was led by the Crown over the objections of the accused, *without* evidence from every person who carried out the procedures, and in the absence of evidence that there was any difficulty in calling those persons.

The Court held that there is an obligation on the prosecution to call available witnesses of events alleged to constitute the offence and which are central to the prosecution case, unless there is some justification for not doing so. The Court also held that the correct conduct of testing procedures should not be proved merely by giving evidence of the existence of

procedures and the giving of instructions and be otherwise left to inference. A re-trial was ordered.

Should the defence object in every case involving DNA evidence as happened in **Sing,** forensic laboratories will grind to a halt because almost all members of the forensic team would be required at court. Legislation enabling the supervising scientist to present that evidence, in the absence of compelling reasons to call all persons involved in the testing would be sensible. I note however that this issue has not arisen since **Sing,** but this may be because the prosecution is calling everybody or reaching agreement.

Another more common issue has arisen as to the reliability of methodology and the application of that methodology (the Daubert and Kumho Tyres criteria). This issue arose in the trial of **Gallagher (Supreme Court 7 June 2001).** Here, a challenge was mounted to the tender of evidence of DNA results on the basis that the Profiler Plus system had not been shown to be reliable because it had not been subject to an acceptable validation exercise.

The defence submitted that it could therefore not have the reliability required by the Evidence Act and was therefore not admissible. The Court (Barr J) dismissed this challenge (ruling that it was not necessary to know the primer sequences in order to test the reliability of Profiler Plus) and also ruled that the evidence proposed to be given by Mr Goetz was based on his training, study and experience.

To date, no appeal has been mounted on this issue, and objections could still be raised in every trial to the tender of DNA results. Such challenges require a considerable amount of court time to argue. Legislative resolution of this issue would also be desirable (although I note the difficulty with this).

It is certainly desirable that the same procedures apply in relation to the collection, destruction and use of DNA evidence for all participating jurisdictions.

This Office has proposed some amendments to the *Crimes (Forensic Procedures) Act 2000.*

An issue arose in a case where a second order for a forensic procedure was refused by a magistrate on the basis that section 27(3) of our Act did not contemplate the making of a second order in circumstances where the first sample had been lost. The legislation contemplates a second order where the first sample was insufficient for analysis, has been contaminated, or where the forensic procedure carried out was already authorised by an order under s.24. The Office has sought amendment allowing the making of a second order where the original sample is for any reason unavailable for analysis and the other two prerequisites have been satisfied.

S.32 of our Act provides for the making of an interim order for the carrying out of a forensic procedure. That sample must not be analysed until a final order is made unless the sample is likely to perish before the final order is made. The Act, however, contains no reference to what matters a magistrate must have regard to or be satisfied of before confirming or disallowing the interim order. This is an important issue, because the consequences of an order dismissing an application for confirmation of an interim order is the destruction of the sample obtained under an interim order.

The NSW Act does not address the question of what effect the consent of the suspect to the carrying out of a forensic procedure has upon an interim order (for the carrying out of that same forensic procedure) obtained prior to the giving of consent. It is not clear whether or not the consent renders the interim order a nullity, or whether the interim order must still be either confirmed or disallowed at a subsequent hearing before a magistrate.

The definition of an authorised applicant (ss 32,26 and 27) is limited. In a recent murder prosecution, an interim order made by an authorised justice was challenged in the Supreme Court on the basis that the applicant, although a police officer involved in the relevant investigation, was not at the time of the application the officer in charge of the investigation. This apparent requirement that one police officer be in charge, and that only s/he is able to make the application, does not recognise the operational realities associated with the conduct of police investigations. The Act provides no guidance as to how the identity of the officer in charge is to be determined. I note that the equivalent Victorian legislation permits an application for an interim or final order to be made by "a member of the police force."

The *Crimes (Forensic Procedures) Amendment Bill 2002* was introduced into Parliament on 28 May 2002. The main features of the Bill as at 30 May 2002 are as follows.

The definition of "volunteers" has been amended to exclude from the operation of Part 8 (the volunteer provisions), victims of offences against the person and persons who volunteer to provide a sample of their fingerprints for elimination purposes.

A person giving a sample for the purpose of the missing person index must first be told that their DNA profile may be matched against all of the other indexes on the database, but information about a match between that person's profile and any other DNA profile cannot be used in court proceedings against that person. This amendment is designed to protect relatives of missing persons who volunteer samples from being implicated in other crimes.

The Bill will also amend s10, allowing police to exclude an interview friend if on reasonable grounds if they believe, based on reasonable grounds, that the interview friend may be a co-offender or involved in some other way with the suspect in the commission of the offence.

A number of drafting anomalies (ss 9, 57, 70(1), 87 and 96) are also corrected in the Bill.

The suggestions for reform by this Office noted above have also been included in the Bill.

If I can be of any further assistance, please do not hesitate to contact me.

Yours faithfully

R. Ellis
Deputy Director of Public Prosecutions