ibac independent broad-based anti-corruption commission
Victoria

Report to the Attorney-General

Pursuant to section 464ZP of the Crimes Act 1958 (Vic)

1 July 2019 - 31 December 2020

Acknowledgement

IBAC acknowledges the Traditional Owners of Country throughout Victoria and pays respect to and recognises the contribution from their Elders past and present

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ISBN XXXX (print)
ISBN XXXX (online)

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Chapter 1

Overview

Definitions

The following definitions are used in this report:

Term	Definition
2019 report	The report provided by the Chief Commissioner to IBAC under section 464ZN of the Act for the period 1 July to 31 December 2019.
2019 reporting period	1 July to 31 December 2019.
2020 report	The report provided by the Chief Commissioner to IBAC under section 464ZN of the Act for the period 1 January to 31 December 2020.
2020 reporting period	1 January to 31 December 2020.
Act	*Crimes Act 1958* (Vic).
Chief Commissioner	Chief Commissioner of Victoria Police.
DNA person	(a) A person of or above the age of 18 years who is suspected of having committed or attempted to commit an indictable offence; or has been charged with an indictable offence; or has been summonsed to answer to a charge for an indictable offence; or (b) A child of or above the age of 15 years but under the age of 18 years suspected of having committed or attempted to commit a DNA sample offence; or who has been charged with a DNA sample offence; or has been summonsed to answer to a charge for a DNA sample offence.
DNA profile sample	A sample taken for the purpose of deriving a DNA profile that is either a blood sample, a sample of hair (other than pubic hair) including the root if required, a sample of saliva or a scraping taken from the mouth.
DNA sample offence	Any indictable offence specified in Schedule 9 of the Act.
Forensic material	Any material: (a) from which a DNA profile may be derived; and (b) which is obtained from samples taken or procedures conducted in accordance with Subdivision 30A of the Act, but not including samples taken for the sole purpose of establishing the identity of the person from whom the sample is taken. Note: The taking of DNA profile samples or performance of a forensic procedure will both result in the collection of forensic material.
Forensic procedure	The taking of a sample from any part of the body, whether an intimate or non-intimate sample or any other type of sample, or the conduct of any procedure on or physical examination of the body, but not including the taking of a fingerprint or a DNA profile sample.
PaLM	Victoria Police's Property and Laboratory Management system.
Senior police officer	A police officer of or above the rank of senior sergeant.
Senior police officer authorisation	An authorisation under section 464ZFAC of the Act.
VPFSD	Victoria Police Forensic Services Department.

Overview

1. Introduction

Pursuant to section 464ZM of the *Crimes Act 1958* (Vic) (the Act), the Independent Broad-based Anti-corruption Commission (**IBAC**) is responsible for monitoring compliance by Victoria Police with its obligations in respect of, the taking of DNA samples by consent, or as a result of a senior police officer authorisation or an authorisation under section 464ZFAE of the Act.

This report is given under section 464ZP of the Act in relation to the Chief Commissioner of Victoria Police's obligation under section 464ZN to provide a written report to IBAC pertaining to the taking and destruction of DNA samples, for the period 1 July 2019 to 31 December 2020.

2. Timing of report

Following the commencement of legislative amendments in July 2019 with respect to DNA sampling (set out under 3. below), IBAC officers engaged with the Victoria Police Forensic Services Department (VPFSD) in late 2019 and familiarised themselves with Victoria Police's processes and procedures which support the DNA profile sampling regime. IBAC officers, together with VPFSD, also engaged with Victoria Police's Investment Management and Reporting Department and the Organisational Performance and Risk Department and obtained further supporting documentation and information relevant to the DNA sampling process.

On 23 June 2020, the Chief Commissioner provided IBAC with the first written report[1] under section 464ZN of the Act, being for the period 1 July to 31 December 2019 (**2019 Report**).[2]

Following receipt of the 2019 Report, IBAC undertook considerable engagement with Victoria Police to develop the reporting framework for the new legislative scheme. The complex nature of the work and time required to complete it, was compounded by the COVID-19 pandemic, public health restrictions limiting movement and resourcing constraints at IBAC throughout 2020 and 2021. This caused significant delays in progressing IBAC's engagement with Victoria Police and the required oversight work and, regrettably, the delay in provision of this report.

During IBAC's analysis and finalisation of the 2019 report, on 11 March 2021 the Chief Commissioner's report under s464N of the Act, in respect of the period 1 January to 31 December 2020 (**2020 Report**) was received by IBAC.

Therefore, in the interests of efficiency, IBAC has given the Attorney-General a single report under sections 464ZP(1)(a) and (c), covering both the 2019 and 2020 reports to IBAC by the Chief Commissioner under s 464N of the Act. IBAC's report summarises the data received from Victoria Police in the relevant periods and makes recommendations to improve the reporting framework.

IBAC has since commenced an inspection of Victoria Police's records under section 464ZO of the Act to determine Victoria Police's compliance with its obligations in respect of DNA samples for the relevant reporting periods. Upon completion of the inspection a report will be given to the Attorney-General pursuant to sections 464ZP(1)(b) and (c).

[1] Following the introduction of the relevant amendments to the Act.

[2] *Crimes Act 1958* (Vic) s 464ZN - the Chief Commissioner's report is to be provided to IBAC as soon as practicable after 1 January, but not later than 1 March, in each year.

3. Legislative framework

DNA profile sample and forensic procedures

On 1 July 2019, a new scheme for the taking of DNA profile samples commenced in Victoria, following amendments to the Act.[3]

- The scheme creates a distinction between DNA profile samples and DNA samples obtained by way of forensic procedures. A DNA profile sample is a sample that is either a blood sample, a sample of hair (other than pubic hair) including the root if required, a sample of saliva or a scraping taken from the mouth, which is taken for the purpose of deriving a DNA profile.[4]
- A forensic procedure means the taking of a sample from any part of the body, whether an intimate or non-intimate sample or any other type of sample, or the conduct of any procedure on, or physical examination of, the body.[5] A forensic procedure is expressly defined to exclude the taking of DNA profile samples and fingerprints.[6]

Accordingly, from 1 July 2019, Victoria Police can no longer request DNA to be provided by way of a forensic procedure, unless the person from whom DNA is being sought is a child aged 10 to 14 years, or is incapable of giving informed consent by reason of mental impairment, in which case an application for an order to perform a compulsory procedure can be made.[7]

Overview of legislative authority for the taking of DNA profile samples

Table 1: Legislative authority

Authority for taking a DNA profile sample	Circumstances under which DNA profile sample can be taken
Section 464SC(1)	DNA profile sample taken from a DNA person, aged 18 years or over, suspected on reasonable grounds of committing an indictable offence; or has been charged with an indictable offence; or has been summonsed to answer a charge for an indictable offence. A DNA profile sample can only be taken where informed consent has been given and the taking of the sample is justified in all the circumstances.
Section 464SC(2)	DNA profile sample taken from a DNA person, aged between 15-17 years, believed on reasonable grounds to have committed a DNA sample offence; or has been charged with a DNA sample offence; or summonsed to answer a charge for a DNA sample offence. A DNA profile sample can only be taken where informed consent has been given by both the child and their parent or guardian, and the taking of the sample is justified in all the circumstances.
Section 464SE	A senior police officer may authorise the taking of a DNA profile sample from a DNA person following refusal to give informed consent under section 464SC.
Section 464ZFAB	A police officer can direct a DNA profile sample to be taken from a person who is a registrable offender, as defined in the Sex Offenders Registration Act 2004 (Vic), and no DNA profile sample has been obtained previously that may be retained indefinitely.
Section 464ZFAC	A senior police officer may authorise the taking of a DNA profile sample from a person aged 18 years or over if the person is found guilty of a DNA offence, or not guilty of a DNA offence (other than an offence heard and determined summarily) because of mental impairment; and it is within six months of the determination of an appeal or the expiration of any appeal period for the DNA offence and no DNA profile sample has been obtained previously that can be retained.
Section 464ZFAE	A senior police officer may authorise the taking of a DNA profile sample from a person who has previously provided a sample, but no profile was able to be obtained.

The provisions set out in Table 1 are detailed below.

[3] Amendments were made under the *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic).
[4] *Crimes Act 1958* (Vic) s 464 - Definitions.
[5] Ibid.
[6] Ibid.
[7] *Crimes Act 1958* (Vic) ss 464R, 464U, 4646T, 464V.

DNA profile samples obtained from adults with informed consent

Police officers have a discretionary power to request a person who is aged 18 years or older to give a DNA profile sample provided they are satisfied that the taking of the sample is justified in all of the circumstances,[8] and the person:[9]

- is suspected on reasonable grounds of having committed an indictable offence;
- has been charged with an indictable offence; or
- has been summonsed to answer to a charge for the indictable offence.

The person from whom a DNA profile sample is requested is referred to as a DNA person.

The DNA profile sample may only be taken if the DNA person gives informed consent. If informed consent is not given, a request may be made to a senior police officer not involved in the investigation to authorise the taking of a DNA profile sample. Where a DNA person is incapable of giving informed consent by reason of mental impairment, a senior police authorisation cannot be given. However, application for a compulsory procedure may be available.

DNA profile samples obtained from children with informed consent

Police officers have a discretionary power to request that a child, aged 15-17 years, give a DNA profile sample provided they are satisfied that the taking of the sample is justified in all of the circumstances,[10] and:[11]

- the child is believed on reasonable grounds of having committed a DNA sample offence;
- the child has been charged with a DNA sample offence; or
- the child has been summonsed to answer to a charge for the DNA sample offence.

The child from whom a DNA profile sample is requested is referred to as a DNA person.

The DNA profile sample may only be taken if the child who is the DNA person, and their parent or guardian, give informed consent. If informed consent is not given, or cannot be given or if consent is refused, a request may be made to a senior police officer not involved in the investigation to authorise the taking of a DNA profile sample.

Informed consent

A DNA person can only give informed consent to a request to take a DNA profile sample, after a police officer has informed them, in language likely to be understood by them:[12]

- of the purpose for which the sample is required;
- of the nature of the procedure to be conducted to take the sample;
- that the taking of the sample could produce evidence to be used in a court;
- that information obtained from analysis of forensic material obtained by the taking of the sample will be placed on a DNA database and may be used for the purpose of a criminal investigation, or any other purpose for which the DNA database can be used under subdivision 30A of the Act or the corresponding law of a participating jurisdiction;
- that the sample taken will be destroyed if they are not charged with an indictable offence or a DNA profile sample offence at the end of 12 months after the sample was taken; or where the person has been charged, but the charges are not proceeded with, or the person is found not guilty;
- that the DNA person or the parent or guardian in the case of a child, may refuse to consent to the taking of the sample; and
- if they refuse to give consent, a senior police officer may authorise the taking of the sample.

If the person is an adult, they must also be informed of the indictable offence they are suspected of committing, have been charged with, or summonsed to answer to a charge for.[13] If the DNA person is a child, they must be informed of the DNA sample offence they are believed on reasonable grounds of having committed, have been charged with, or summonsed to a charge for.[14]

[8] *Crimes Act 1958* (Vic) s 464SC(1).

[9] *Crimes Act 1958* (Vic) ss 464SC(1)(a)-(c).

[10] *Crimes Act 1958* (Vic) ss 464SC(2).

[11] *Crimes Act 1958* (Vic) ss 464SC(2)(a)-(c).

[12] *Crimes Act 1958* (Vic) s 464SD(2).

[13] *Crimes Act 1958* (Vic) s 464SD(2)(c).

[14] *Crimes Act 1958* (Vic) s 464SD(2)(d).

A DNA person who is in custody is deemed to have refused consent if they fail to consent within 24 hours of being given the information referred to above.[15]

With respect to obtaining consent from a child, informed consent must also be obtained from the parent or guardian of the child from whom the DNA profile sample is being sought, who must be informed of the above.[16] A parent or guardian who is not capable of giving informed consent by reason of mental impairment is deemed to have refused consent.[17] In the case where a child has refused consent and the parent or guardian is not capable of giving informed consent due to mental impairment, an application can be made for a senior police authorisation under section 464SE. If the child is not capable of giving consent by reason of mental impairment, regardless of informed consent given by the parent or guardian, then a senior police authorisation under s464SE is not available.[18] However, an application for a compulsory procedure under section 464U can be made, which would result in the obtaining of forensic material, but not a DNA profile sample.

Authorisations to take DNA profile samples following refusal to give informed consent

Where a request to provide a DNA profile sample under section 464SC is refused, section 464SE provides a senior police officer the power to authorise the taking of a DNA profile sample. A 'senior police officer' means a police officer of, or above the rank of senior sergeant.[19] The senior police officer must not be involved in investigating the offence for which the taking of the sample is required.

A senior police officer may only make an authorisation under section 464SE if, at the time the authorisation is made, they are satisfied that:[20]

- the person is under lawful arrest by warrant, or under lawful arrest under section 458 or 459 of the Act or a provision of any other Act, or in the custody of an investigating official in accordance with an order of the Magistrates' Court or Children's Court under section 464B(5) of the Act and was in custody at the time the application for any such order was made; and
- the person is not incapable of giving informed consent by reason of mental impairment; and
- the DNA person who is an adult has refused to give consent; and
- the DNA person who is a child has refused to give consent and the child's parent or guardian have also refused to give consent; and
- if the person is an adult, there are reasonable grounds to believe the person has committed the indictable offence in respect of which the authorisation is sought; or
- if the person is a child, the child is believed on reasonable grounds of having committed the DNA sample office in respect of which the authorisation is sought; and
- taking the sample without consent of the person is justified in all of the circumstances.

Authorisations under section 464SE must not be given if an application for a court order for a compulsory procedure in respect of the person for the same matter on the same grounds has been refused. Authorisations must not be given if a previous application for an authorisation in respect of the person for the same matter on the same grounds has been considered but an authorisation was not given.[21]

Where the person continues to refuse to provide a sample, reasonable force may be used to assist a person to obtain the sample.[22]

[15] *Crimes Act 1958* (Vic) s 464SD(4).

[16] *Crimes Act 1958* (Vic) s 464SD(2).

[17] *Crimes Act 1958* (Vic) s 464SD(5).

[18] *Crimes Act 1958* (Vic) s 464SE(1)(b).

[19] *Crimes Act 1958* (Vic) s 464(2).

[20] *Crimes Act 1958* (Vic) s 464SE(1).

[21] *Crimes Act 1958* (Vic) s 464SE(2).

[22] *Crimes Act 1958* (Vic) s 464ZA(1).

Senior police officer authorisations to take post-conviction DNA profile samples from adults

A senior police officer may authorise the taking of a DNA profile sample from a person who is found guilty of a DNA offence or not guilty of a DNA offence[23] because of mental impairment.[24]

The authorisation may only be made if:

- it is not more than six months after the final determination of an appeal against the conviction or verdict of not guilty due to mental impairment, or the expiration of any appeal period for the DNA offence;
- the person was not under the age of 18 years at the time the finding of guilt or not guilty because of mental impairment for a DNA offence was made; and
- the Chief Commissioner of Police does not have a DNA profile sample from the person that may be retained indefinitely.[25]

If an authorisation is made under section 464ZFAC, a notice to attend must be attached to the authorisation and served on the person.[26] If the person does not comply with the notice an application for a warrant to arrest may be made to the Magistrates' Court without further notice to the person.[27]

Authorisations to take DNA profile samples from persons who have previously provided a sample

A senior police officer, on request from a police officer, may authorise a DNA profile sample to be taken from a person if they have previously provided a sample.[28]

While the authorisations granted are not limited by the age of a person who has previously provided a sample, a senior police officer may only make this authorisation if they are satisfied that:[29]

- a sample for the purpose of deriving a DNA profile was previously taken in accordance with court order made under sections 464T, 464U, 464V, 464ZF or 464ZFAAA; or
- a DNA profile sample given with consent under section 464SC, an authorisation under section 464SE, a direction given under section 464ZFAB or a senior police authorisation under section 464ZFAC; and
- a forensic scientist has not derived a DNA profile from the sample taken from the person.

A notice may be served directing a person to attend a specified police station within 28 days after service of the notice.[30] If the person does not comply with the notice, a warrant to arrest may be issued without further notice to the person.[31]

DNA profile samples from registrable sex offenders

A police officer may direct that a DNA profile sample be taken from a person who is a registrable offender.[32] A person becomes a registrable offender in Victoria where they have been convicted of a registrable offence.[33] Directions may only be given if the Chief Commissioner does not have a sample from the registrable offender that may be retained indefinitely.[34]

The taking of DNA profile samples under section 464ZFAB is not within the scope of IBAC's inspection. However, data related to the taking of samples under this provision was included in reports provided to IBAC under section 464ZFE of the Act.

[23] Other than an offence heard and determined summarily – see *Crimes Act 1958* (Vic) ss 464ZFAC(2)(a)(ii).

[24] *Crimes Act 1958* (Vic) ss 464ZFAC(1)-(2)(a).

[25] *Crimes Act 1958* (Vic) ss 464ZFAC(1)-(2)(b)-(d).

[26] *Crimes Act 1958* (Vic) s 464ZFAD(2).

[27] *Crimes Act 1958* (Vic) s 464ZFAD(6).

[28] *Crimes Act 1958* (Vic) s 464ZFAE.

[29] *Crimes Act 1958* (Vic) s 464ZFAE(1).

[30] *Crimes Act 1958* (Vic) s 464ZFAE(2).

[31] *Crimes Act 1958* (Vic) s 464ZFAE(3)(f).

[32] *Crimes Act 1958* (Vic) s 464ZFAB.

[33] Being a class 1 or class 2 offence or where a person has been convicted of a class 3 or 4 offence or has been convicted of a specified offence in another jurisdiction; see *Sex Offenders Registration Act 2004* (Vic).

[34] *Crimes Act 1958* (Vic) s 464ZFAB(2).

Retention and destruction of DNA profile samples

DNA profile samples obtained under sections 464SC or 464SE prior to final determination

DNA profile samples obtained from DNA persons under sections 464SC or 464SE must be destroyed if the DNA person:[35]

- has not been charged with a relevant offence at the end of 12 months after the taking of the sample;
- has been charged, but the charge is not proceeded with; or
- is found not guilty (except because of mental impairment) of the offence, or any other relevant offence, whether on appeal or otherwise before the end of that period.

If a DNA person is not charged within 12 months after the taking of the sample, the sample and any related material and information must be destroyed immediately after the period of 12 months.[36]

If charges are not proceeded with, or the DNA person is found not guilty (except because of mental impairment), the sample must be destroyed either: within one month after the conclusion of the proceedings and the end of any appeal period; or if a proceeding is adjourned under section 75 of the *Sentencing Act 1991* (Vic), within one month of dismissal of the charge under that section.[37]

Before the requirement to destroy a DNA profile sample is reached, a police officer may apply without notice to any other person, to either the Magistrates' Court of Victoria or the Children's Court as appropriate, for an order extending the retention period.[38] A person who knowingly fails to destroy, or uses, causes or permits a DNA profile sample or related material and information required to be destroyed may be liable for criminal punishment.[39]

DNA samples obtained from adults under sections 464SC or 464SE following finding of guilt

If a DNA profile sample is taken from an adult in accordance with sections 464SC or 464SE then the DNA profile sample and any related material and information may be retained indefinitely where the person is found guilty, or not guilty because of mental impairment, of:[40]

- the indictable offence for which the DNA profile sample was taken;
- any other indictable offence arising out of the same circumstances;
- or any other indictable offence in which evidence obtained as a result of the DNA profile sample had probative value.

If on appeal against conviction, the finding of guilt or conviction is set aside, or on appeal against the verdict of not guilty because of mental impairment is set aside, the DNA profile sample and any related material and information must be destroyed without delay.[41] A person who knowingly fails to destroy, or uses, causes or permits a DNA sample or related material and information required to be destroyed may be liable for criminal punishment for a summary offence.[42]

DNA samples obtained from children under sections 464SC or 464SE upon finding of guilt

If a DNA profile sample is taken from a DNA person who is a child, in accordance with sections 464SC or 464SE, and a court finds the child guilty of:

- the offence for which the DNA profile sample was taken;
- any other offence arising out of the same circumstances; or
- any other offence in which evidence obtained as a result of the DNA profile sample had probative value,

then a police officer may apply to the court which made the finding, or to the Children's Court, for an order permitting retention of any sample and any related material and information.[43]

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[35] *Crimes Act 1958* (Vic) s 464ZG(3).

[36] *Crimes Act 1958* (Vic) ss 464ZG(3)(a) and (4)(a).

[37] *Crimes Act 1958* (Vic) ss 464ZG(3)(b) and (4)(b).

[38] *Crimes Act 1958* (Vic) s 464ZG(5).

[39] *Crimes Act 1958* (Vic) s 464ZG(7)-(8).

[40] *Crimes Act 1958* (Vic) s 464ZFB(1AA).

[41] *Crimes Act 1958* (Vic) s 464ZFC.

[42] *Crimes Act 1958* (Vic) s 464ZFC(3)-(4).

[43] *Crimes Act 1958* (Vic) s 464ZFB(1).

In the case of a child being found not guilty because of mental impairment, a police officer may apply to the court which made the finding for an order permitting retention of the sample and any related material information, unless the offence was heard and determined summarily.[44]

In either case, a police officer may make application to the court at any time, but no later than six months after the final determination of an appeal against conviction or sentence, or the expiry of an appeal period in respect of the offence.

If the court refuses to make an order, or a police officer does not make an application within the specified time, the DNA profile sample, and any related material and information, must be destroyed without delay.[45] A person who knowingly fails to destroy, or uses, causes or permits a DNA sample or related material and information required to be destroyed to be used, may be liable for criminal punishment for a summary offence.[46]

Section 464ZFAC authorisations

If a post-conviction sample is taken and leave to appeal against conviction or verdict related to a DNA offence is subsequently granted out of time, Victoria Police may retain the sample and any related material but must not use it for any purpose until a determination of the appeal against conviction or verdict is finalised.[47] If a conviction or verdict is set aside the sample and related material must be destroyed without delay.[48]

Section 464ZFAE authorisations

While the Act does not provide express requirements for the retention or destruction of DNA profile samples authorised under section 464ZFAE, the applicable retention and destruction requirements will be informed by the statutory provisions under which the initial DNA profile sample was taken.

Additional destruction requirement relating to forensic information obtained from juveniles

Where a DNA profile sample has been taken from a child, or the child undergoes a forensic procedure, and the authority for the taking of that sample or for that procedure allows for the retaining of the forensic material obtained, if the child is not found guilty of any further offences before attaining the age of 26 years, the Chief Commissioner of Police must without delay destroy any sample taken and any related material and information.[49]

Section 464ZGA does not apply under limited exceptions in relation to specified offences as set out in the Act.

4. Victoria Police reporting obligations

The Chief Commissioner of Police must provide IBAC with a written report as soon as practicable after 1 January, but no later than 1 March, for the previous 12 months in relation to:[50]

- any DNA profile sample taken, or senior police authorisation, or authorisation given and applied for;
- the destruction of any DNA profile sample taken or given in accordance with a senior police officer authorisation, or authorisation; and
- any matter on which the Chief Commissioner is required to report under section 464ZFE.

The report to IBAC must include:

- a list that identifies by a unique identifying number every DNA profile sample taken or given in accordance with a senior police officer authorisation (i.e. authorisations under section 464ZFAC) or authorisation given under Subdivision 30A of the Act within the period to which the report relates;
- information indicating if any of the DNA profile samples were taken from a child;
- the date on which the DNA profile samples were taken;
- information indicating if any of the DNA profile samples listed in the report, or any previous report submitted, have been destroyed during the reporting period and if destroyed, the reason for the destruction, the date of the requirement to destroy the sample arose under section 464ZFC, the date of destruction and the person who destroyed it;

[44] *Crimes Act 1958* (Vic) ss464ZFB(1A)-(1B).

[45] *Crimes Act 1958* (Vic) ss 464ZFC(1)(a)-(b).

[46] *Crimes Act 1958* (Vic) ss 464ZFC(3)-(4).

[47] *Crimes Act 1958* (Vic) s 464ZFAC (7)(a).

[48] *Crimes Act 1958* (Vic) s 464ZFAC(7)(b).

[49] *Crimes Act 1958* (Vic) s 464GA.

[50] *Crimes Act 1958* (Vic) ss 464ZN(1)(a)-(c).

- the number of DNA profile samples taken by consent in accordance with section 464SC within the period to which the report relates;
- the number of senior police officer authorisations (i.e. authorisation under section 464ZFAC) given and refused within the reporting period;
- the number of authorisations given and refused under sections 464SE and 464ZFAE; and
- information on any DNA profile sample that has been retained for 12 months or more, including the status of any investigation of the DNA person from whom the sample has taken (for the reporting) period.

Chapter 2

Inspection Results

Summary

1. 2019 report

The 2019 Report consisted of a summary and the following attachments:

- **(i) - PALM DNA profile samples of suspect, accused, guilty, received**: forensic samples received by VPFSD in the period 1 July to 31 December 2019. Each record in the attachment included a unique identifying number for each sample, the date the sample was taken and whether the donor was an adult or child when the sample was taken.
- **(ii) - PALM DNA profile samples destroyed:** forensic samples destroyed that were processed by VPFSD in the period 1 July to 31 December 2019. Each record in the attachment included a unique identifying number for the sample, the reason the sample was destroyed, the date the requirement to destroy the sample arose, the date of sample destruction and by whom the sample was destroyed.
- **(iii) - PALM DNA Profile samples of suspect, accused, guilty, retained:** forensic samples retained by VPFSD for a period of more than 12 months as at 31 December 2019. Records in the attachment included a unique identifying number for each sample and the reason the sample was retained relevant to the status of the investigation linked to the sample.

Tables 2-4 below provide a breakdown of the data from the 2019 Report.

Table 2: Samples received by VPFSD between 1 July and 31 December 2019

Sample obtained by	Total	Adult	Children
Compulsory (Court) order	2,402	2,355	47
Consent	7,810	7,662	148
Interim (Court) order	48	46	2
No order (by consent, pre-July 2019)	450	449	1
Senior police authority where consent not given (pre- or post- conviction)	248	242	6
Total	10,958	10,754	204[51]

Table 3: Samples destroyed by VPFSD between 1 July and 31 December 2019

Reasons for destruction	Total
Destruction period reached	182
Extension or retention order rejected	1
Matter not proceeded with / Person not charged	330
Person not found guilty	58
Total[52]	571

[51] This number includes eight samples taken from children aged 10-14 years.

[52] IBAC identified a record confirmed by Victoria Police to have been duplicated by PaLM. The duplicate was removed for the purpose of reporting how many DNA profile samples were destroyed.

Table 4: Samples retained by VPFSD for 12 months or more, as at 31 December 2019

Samples retained	
Adults	750
Children	13
Total	763

Investigation status	Total	Adult	Children
Matter before the court or warrant issued	685	682	3
Held conditionally pending judicial proceeding	67	57	10
Ongoing investigation: extension sought	10	10	0
Guilty profile: retain indefinitely	1	1	0

2. 2020 Report

The 2020 Report consisted of a letter enclosing the following excel files titled:

- **(i) – IBAC Received report 2020**: forensic samples received by VPFSD in the period 1 January to 31 December 2020. Each record in the attachment included a unique identifying number for the sample, the date the sample was taken, the method by which the sample was obtained, and whether the donor was an adult or child when the sample was taken.
- **ii) - IBAC Destroyed report 2020:** forensic samples destroyed during the period 1 January to 31 December 2020. Each record in the attachment included a unique identifying number for the sample, the date the same was taken, the date the requirement to destroy the sample arose, the reason for the destruction of the sample, the date the sample was destroyed and the person responsible for destroying the sample.
- **(iii) – IBAC Retained report 2020:** forensic samples retained by VPFSD for a period of more than 12 months, as at 31 December 2020. Records in the attachment included a unique identifying number for each sample and the reason the sample was retained relevant to the status of the investigation linked to the sample.

Tables 5-7 below provide a breakdown of the data provided in the 2020 Report.

Table 5: Samples received by VPFSD in 2020

Sample obtained by	Total	Adult	Children
Compulsory (Court order)	1,558	1,504	54
Consent	14,660	14,342	318
Interim (Court) order	28	27	1
No order (by consent, pre-July 2019)	112	112	0
Senior police authority where consent not given (pre- or post- conviction)	1,202	1,188	14
Total[53]	17,560	17,173	387

[53] This number includes 15 samples taken from children aged 10-14 years.

Table 6: Samples destroyed by VPFSD in 2020

Reasons for destruction	Total
Destruction period reached	651
Extension or retention order rejected	4
Matter not proceeded with / Person not charged	2,562
Person not found guilty	232
Administrative issue	35
Total	3,484

Table 7: Samples retained by VPFSD for 12 months or more, as at 31 December 2020

Samples retained	
Adults	4,031
Children	54
Total	4,085

Investigation status	Total	Adult	Children
Matter before the court or warrant issued	2,922	2,891	31
Held conditionally pending judicial proceeding	1,126	1,104	22
Ongoing investigation: extension sought	34	34	0
Guilty profile: retain indefinitely	2	2	0

3. Level of Compliance

The following three ratings are used to describe the level of statutory compliance achieved by the Chief Commissioner during the inspection period in respect of the categories of compliance referred to further below:

- **Compliant** – fully compliant with statutory requirements, or any degree of non-compliance was relatively minor in the nature of an occasional mistake or oversight.
- **Substantially Compliant** – generally compliant with statutory requirements, but there were material compliance problems or issues identified.
- **Not Compliant** – a failure to meet statutory requirements entirely, or a pattern of fundamental compliance problems or issues identified.

Overall IBAC finds the Chief Commissioner substantially compliant with section 464ZN of the Act. Matters of non-compliance are detailed in the relevant sections of this report.

4. Recommendations

Pursuant to section 464ZQ of the Act, IBAC makes the following recommendations:

Recommendation 1: That Victoria Police rectifies any identified system anomalies or implements alternative solutions to ensure accurate reporting in relation to samples taken under section 464ZFAB of the Act.

Recommendation 2: That Victoria Police include the timeframes applying to statutory destruction requirements, as applicable to the authority under which the DNA profile sample was taken, in all relevant policies, procedures and templates relating to the destruction of DNA profile samples.

Recommendation 3: That Victoria Police:

- makes enhancements to systems to enable the recording of the specific legislative provision relied upon as authority to obtain a DNA profile sample and/or collect forensic material; and
- ensures that this information is included in reports provided to IBAC under section 464ZN of the Act.

5. Analysis of data provided by Victoria Police

Requirement to report on DNA profile samples 'taken'

IBAC's review of over 10,900 records in Attachment (i) revealed that 748 records related to samples taken on or before 30 June 2019 (i.e., prior to the relevant legislative regime coming into effect). VPFSD confirmed that this is because the 2019 Report records all DNA profile samples *received by VPFSD* during the reporting period, which included the noted 748 samples which, although *taken* on or before 30 June 2019, were transmitted to the VPFSD after 1 July 2019.

VPFSD advised that the reason for preparing the report on this basis (i.e., reporting only those samples received by VPFSD rather than all samples taken during the relevant period) was due to VPFSD's validation process upon receiving a physical sample after extraction from PaLM. VPFSD indicated that if the data is not limited in this way it may result in items being incorrectly entered into PaLM. Despite this, VPFSD acknowledged there may be circumstances in which DNA profile samples had been taken and entered into PaLM during the reporting period, but which had not yet been provided to VPFSD (as they would not be provided until such time as the need for the DNA profile arose). Such samples would therefore not be captured in the 2019 Report, despite having been "taken" during the relevant reporting period.

IBAC considers that limiting the report to only those DNA profile samples received by VPFSD in the relevant period, rather than all those samples taken by Victoria Police in the reporting period (even if they have not yet been forwarded to VPFSD), does not sufficiently report on the extent of the DNA profile sample scheme's usage.

Discussions with VPFSD indicated that the reporting process adopted by Victoria Police could be updated to include all DNA profile samples taken in the reporting period (not only those which had been sent to VPFSD) but noting that VPFSD cannot validate samples which are not yet received, and this creates a potential for errors when compiling data for reports to IBAC.

Despite this, changes appear to have been made in respect of the 2020 data, as indicated by the 2020 Report to IBAC which states: "*The following report lists information directly extracted from the Victoria Police [PaLM] in relation to [s464ZN](2) (a) - (e), (g) & (i) with (f) & (h) compiled based on notifications received from police members that related to period: 1 January - 31 December 2020. Force-wide data entered into PALM is not administered or verified by VPFSD.*"

IBAC endorses Victoria Police's updated practice, as reflected in the 2020 report, and is satisfied that reporting samples taken during the reporting period rather than only those samples received by VPFSD, is in-line with the legislative requirement.

DNA profile samples taken under section 464ZFAB

The 2019 Report and the 2020 Report included information about the number of DNA profile samples taken from registrable offenders as defined by the *Sex Offenders Registration Act 2004* (Vic) (SOR Act), obtained pursuant to section 464ZFAB of the Act. The records included a breakdown of the samples taken under the categories of 'accused', 'guilty' or 'suspect' under section 464ZFAB of the Act.

It is noted that a person can only be classed as a 'registrable offender' in circumstances where they have been convicted of a registrable offence, being a class 1 or class 2 offence as defined in the SOR Act. In addition, in circumstances where a person has been convicted of a class 3 or 4 offence or has been convicted of a specified offence in another jurisdiction, they may also become a registrable offender in Victoria.

Accordingly, there would not arise a situation in which a person was either 'accused' or 'suspected' of an offence, and could be defined as a registrable offender, if they had not already been convicted of a registrable offence. In discussion with Victoria Police, this matter appears to be a system anomaly that requires re-configuration for future reporting.

Accordingly, IBAC makes the following recommendation:

Recommendation 1: That Victoria Police rectifies any identified system anomalies or implements alternative solutions to ensure accurate reporting in relation to samples taken under section 464ZFAB of the Act.

Destruction of DNA profile samples

IBAC's review of Attachment (ii) to the 2019 Report indicated that some of the DNA profile samples destroyed during the 2019 reporting period had been collected as early as 1998 (namely, 21 years prior to the date they were destroyed). Likewise, IBAC's review of Enclosure (ii) to the 2020 Report indicated that some of the samples destroyed during the reporting period had been collected as early as 1992 (namely, 28 years prior to the date they were destroyed).

Neither of the reports indicated the statutory authority relied upon to obtain these samples. It was therefore not possible for IBAC to determine how many DNA profile samples – a definition only applicable from 1 July 2019 – were destroyed during the reporting period. As the report included destruction information relating to samples taken prior to 1 July 2019, the report is not limited only to the destruction of DNA profile samples.

Sixty-eight per cent (391 samples) of samples destroyed in the 2019 reporting period were destroyed within 12 months of the requirement to destroy under section 464ZFC. However, there were over 160 samples where more than 1,000 days had elapsed between the required time to destroy and destruction occurring. Ninety-eight per cent of samples destroyed in the 2020 reporting period (3,440 samples) were destroyed within 12 months of the requirement to destroy under section 464ZFC. There were 44 samples which were not destroyed within 12 months of the requirement to destroy, 17 of which were destroyed more than 1,000 days after the deadline for destruction.

Where a DNA profile sample has been taken and subsequently the finding of guilt, a conviction, or a verdict of not guilty because of mental impairment is set aside on appeal, the DNA profile sample, and any related material and information must be destroyed 'without delay', a term not defined in the Act. VPFSD indicated that several measures are used to identify when samples are due for destruction. These include automated reminders generated by PaLM at specific times after the sample has been taken as well as manual review processes.

VPFSD advise that a review is undertaken of all matches from the DNA database prior to the results being provided, to ensure the sample can be lawfully used. Despite this, IBAC considers Victoria Police's practice of retaining samples for considerable periods of time after the requirement to destroy has arisen, is not in keeping with the statutory requirement to destroy samples within specified timeframes where certain conditions have been met, and noting the criminal sanctions applicable for failing to destroy samples.

IBAC's review of Victoria Police documentation and other materials supporting the statutory destruction regime for DNA profile samples found them to be detailed and comprehensive, and, in general terms, adequately cover the requirements for destroying DNA profile samples. The review revealed, however, an absence of references to the relevant statutory timeframes within which samples must be destroyed, and suggest this be included to make clear to staff the strict statutory timeframes applicable to the destruction of DNA profile samples.

Accordingly, IBAC makes the following recommendations:

> **Recommendation 2:** That Victoria Police include the timeframes applying to statutory destruction requirements, as applicable to the authority under which the DNA profile sample was taken, in all relevant policies, procedures and templates relating to the destruction of DNA profile samples.

It is also noted that the reason for destruction of some of the samples included in the 2020 Report was listed as being "Administrative issue". No further information was provided by Victoria Police as to the reasons for the destruction of these samples. IBAC intends to inspect the records relating to the destruction of these samples, when the inspection pursuant to section 464ZO is conducted, in order to assess whether these samples were destroyed in compliance with the Act.

Information required under section 464ZFE

In addition to the requirement for Victoria Police to provide a report to IBAC in relation to DNA profile samples taken and destroyed in the reporting period, [54] the report is also in relation to any matter the Chief Commissioner is required to report on to the Attorney-General under section 464ZFE.[55] The report to the Attorney-General is to include information relating to *every* sample taken under Subdivision 30A of the Act, this being forensic procedures, compulsory procedures and voluntary samples, as well as DNA profile samples.[56]

[54] Crimes Act 1958 (Vic) subsection 464ZN(1)(a)-(b).
[55] *Crimes Act 1958* (Vic) s 464ZN(1)(c).
[56] *Crimes Act 1958* (Vic) ss 464ZFE(a)-(d) and (db).

The records included in the 2019 Report and the 2020 Report did not reference the provisions relied upon for taking the samples. While not a statutory reporting requirement, the absence of this information means that IBAC is unable to determine whether the reporting obligation under section 464ZFE has been met.

In addition, VPFSD confirmed that samples obtained by way of forensic procedures had not been included in the 2019 Report. It is presumed that the same approach was taken in respect of the 2020 Report. However, IBAC notes the inclusion in the 2019 Report of samples taken prior to 1 July 2019 suggests that the report may have included samples that had been obtained by way of forensic procedures, compulsory procedures or voluntary samples.

The scope of IBAC's oversight is presently limited to monitoring compliance with the exercise of police authority to obtain DNA profile samples, whether by consent or authorisation, and the statutory retention and destruction requirements. Whilst information relating to forensic procedures, compulsory procedures and voluntary samples appears to have been included in the report provided by Victoria Police under section 464ZN(1), IBAC does not have the power to inspect such records and make comments regarding Victoria Police's compliance with respect to such procedures.

IBAC makes the following recommendation:

Recommendation 3: That Victoria Police:

- makes enhancements to systems to enable the recording of the specific legislative provision relied upon as authority to obtain a DNA profile sample and/or collect forensic material; and
- ensures that this information is included in reports provided to IBAC under section 464ZN of the Act.

Details prescribed by section 464ZN(2)

The Chief Commissioner's report is to include the number of DNA samples obtained by consent in accordance with section 464SC, senior police officer authorisations given and refused within the reporting period; and authorisations given and refused under sections 464SE and 464ZFAE.[57]

The records provided in the 2019 Report and the 2020 Report contained unique identifiers and the date on which each sample was taken. Where required by the Act, the records also indicated whether the sample was taken from a child or an adult, the reasons for retention and destruction of samples, and the details of the individual who destroyed each of the samples.

As set out in Tables 2-7 in Chapter 2 of this report, the 2019 Report and 2020 Report also included the number of samples obtained by consent in accordance with section 464SC, senior police officer authorisations given and refused within the reporting period; and authorisations given and refused under sections 464SE and 464ZFAE.

DNA profile samples taken pursuant to a senior police authorisation

The 2019 Report revealed that 33 of 248 samples reported to have been obtained by senior police authorisations were taken before 1 July 2019 (i.e., before the relevant legislative regime came into effect). Likewise, the 2020 Report revealed that 10 of 1202 samples reported to have been obtained by senior police authorisations were taken before 1 July 2019.

Any DNA samples taken prior to 1 July 2019 are beyond the scope of IBAC's oversight role and this report.

In respect of the DNA profile samples taken after 1 July 2019, in the absence of references to the applicable legislative provision relied upon in taking each DNA profile sample, it is not clear whether they were taken pursuant to section 464ZFAC under the definition of a 'senior police officer authorisation', or provisions in existence prior to 1 July 2019. In this respect, the samples could have been taken after 1 July 2019, pursuant to a senior police office authorisation given prior to 1 July 2019 (under previous legislative provisions).

[57] *Crimes Act 1958* (Vic) ss 464ZN(2)(f)-(h).

DNA profile samples taken from children

The summary provided with the 2019 Report indicated that 196 samples had been obtained from children aged between 15 and 17 years. In addition, the summary indicated that eight samples had been taken from children aged between 10 and 14 years.

Likewise, the 2020 Report indicated that 372 samples had been obtained from children aged between 15 and 17 years, whilst 15 samples had been taken from children aged between 10 and 14 years.

From 1 July 2019, DNA profile samples may only be taken from children aged between 15 and 17 years, in which case the reported samples from children aged 10-14 years were not "DNA profile samples", within the meaning of the Act. As noted earlier in this report, the absence of information as to the statutory provisions under which the sample had been taken, while not a statutory reporting obligation, makes it difficult for IBAC to assess Victoria Police compliance with its obligations.

Recommendations

Accordingly, IBAC refers to and repeats Recommendation 3 above.

VPFSD indicated the inclusion of the statutory provision under which each sample had been taken would require a system change to PaLM to include the relevant data field, and accordingly would be applied in relation to future reports to IBAC, after the time the system change had been made.

6. Other comments

The discussions between IBAC and Victoria Police staff at the Forensic Services Department were positive and constructive. Victoria Police staff were courteous and cooperative with IBAC in setting up and undertaking the initial reporting aspects of IBAC's oversight function under the Act.

The provisions in the Act relating to the taking of DNA profile samples are complex and at times challenging to navigate. I take this opportunity to thank Victoria Police for their engagement and assistance to date.

IBAC looks forward to Victoria Police's continuing cooperation in the context of IBAC's upcoming inspection of Victoria Police records under section 464ZO of the Act, and future reporting.



Stephen Farrow

Acting Commissioner

Dated: 23 May 2023

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