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 to 31 December 2022

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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Chapter 1

Overview

Background

1. Definitions

Act	*Crimes Act 1958* (Vic)
Chief Commissioner	Chief Commissioner of Victoria Police
DEC	Digital Evidence Collection
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 Offence	An indictable offence or an offence specified in schedule 8 of the Act or any offence of conspiracy to commit, incitement to commit or attempting to commit an indictable offence or an offence specified in Schedule 8.
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 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. A forensic procedure is expressly defined to exclude the taking of DNA profile samples and fingerprints.
IBAC	the Independent Broad-based Anti-corruption Commission
IBAC Act	*Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*
Inspection period	1 July 2019 – 31 December 2022
Senior police officer	Victoria Police officer of or above the rank of senior sergeant
the Act	Crimes Act 1958 (Vic)
VPFSD	Victoria Police Forensic Services Department
VPM	Victoria Police Manual – DNA profile sample

2. Introduction

The IBAC's functions are set out under section 464ZM of the Act pertaining to the taking of DNA profile samples by consent or under an authorisation given by a senior police officer. IBAC's power under s464ZO of the Act is to inspect the records of Victoria Police in relation to the carrying out of their functions and powers for the taking of DNA profile samples, to determine the extent of compliance by police with these powers.

IBAC also reviews the statistical information in the reports provided to IBAC by the Chief Commissioner of Police under s464ZN of the Act to determine if the report contains the information required as relevant to DNA profile sample taking powers.

IBAC is required to provide a written report to the Attorney-General on:

the Chief Commissioner of Police's requirement under section 464ZN of the Act to provide to IBAC a report setting out statistical information in relation to DNA profile samples[1]

the results of IBAC's inspection of Victoria Police records under section 464ZO(3) of the Act, to determine the extent of compliance by Victoria Police in the taking of DNA profile samples[2]

any recommendations about actions that should be taken in relation to a matter arising out of the report.[3]

This report sets out:

- IBAC's review of the Chief Commissioner's 464ZN reports for the period 1 January 2021 to 31 December 2022[4]
- the results of IBAC's inspection under section 464ZO(3) conducted in February and June 2023 for the period 1 July 2019 to 31 December 2022
- recommended action in relation to the inspections.

IBAC does not have the power to inspect Victoria Police records and make comments regarding their compliance pertaining to the collection, retention and destruction of non-DNA profiles samples, being forensic procedures, compulsory procedures and voluntary samples. Where reports provided to IBAC by the Chief Commissioner under the Act include data in relation to other sample types, IBAC confined its review to determining if the information required by the Act is included in the report.

3. Timing of the report

Following the commencement of legislative amendments in July 2019 with respect to DNA profile sampling, IBAC officers undertook considerable engagement with Victoria Police in late 2019, familiarised themselves with processes and procedures and obtained supporting documentation and information to understand and develop the DNA profile reporting framework. At the time the oversight functions were provided to IBAC, no new or additional funding was provided. Accordingly, these oversight functions were absorbed into current resourcing.

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 significant resourcing constraints at IBAC throughout 2020 - 2022. This caused significant delays in progressing IBAC's engagement with Victoria Police, the oversight work and, regrettably, the delay in providing this report.

Therefore, in the interests of efficiency, IBAC has given the Attorney-General a single report on the results of both IBAC inspections in the reporting period, and the two reports provided to IBAC by the Chief Commissioner under section 464N of the Act for 2021 and 2022. IBAC's report summarises the data received from Victoria Police.

4. Legislative framework

DNA profile samples 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.[5] The Act now creates a distinction between DNA profile samples and DNA samples obtained by way of forensic procedures. IBAC's inspection of Victoria Police record pertains to the exercise of powers in relation to the taking of DNA profile samples.

[1] *Crimes Act 1958* (Vic) s 464ZP(1)(a).
[2] *Crimes Act 1958* (Vic) s 464ZP(1)(b).
[3] *Crimes Act 1958* (Vic) s 464ZP(1)(c).
[4] IBAC gave a report to the Attorney-General dated 23 May 2023 under section 464ZP(1)(a) for the period 1 July 2019 to 31 December 2020.
[5] Amendments were made under the *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic).

From 1 July 2019, Victoria Police cannot request DNA from an adult or child over 15 years to be provided by way of a forensic procedure. If 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, an application for an order to perform a compulsory procedure must be made.[6]

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 a 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, or where a senior police officer gives an authorisation under s464SE.
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, or where a senior police officer gives an authorisation under s464SE.
Section 464SE	A senior police officer may authorise the taking of a DNA profile sample from a DNA person if the officer is satisfied that the DNA person is under lawful arrest or in lawful custody and the person is not capable of giving consent by reason of mental impairment and the DNA person (and their parent/guardian if the DNA person is a child) has refused to give consent under section 464SC.
Section 464ZFAB	A police officer can direct that a DNA profile sample be taken from a person who is a registrable offender, as defined in the *Sex Offenders Registration Act 2004* (Vic), if the Chief Commissioner of Police does not have a (previously obtained) sample 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 final 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 indefinitely.
Section 464ZFAE	A senior police officer may authorise the taking of a DNA profile sample from a person who has previously provided a sample, and a forensic scientist has not derived a DNA profile from the sample taken.

[6] *Crimes Act 1958* (Vic) ss 464R, 464U, 4646T, 464V.

5. Inspection scope and methodology

Desktop review

IBAC conducted a desktop review of the information contained in two reports provided by the Chief Commissioner to IBAC pursuant to 464ZN of the Act, for the period 1 January 2021 to 31 December 2021 and 1 January 2022 to 31 December 2022, respectively. The results of the review are set out in Chapter 2 of this report.

Inspection of Victoria Police records

IBAC inspected the records of Victoria Police associated with their actions and decisions in exercising powers pertaining to the taking of DNA profile samples.

The scope of IBAC's inspection powers under the Act do not extend to assessing the merits of decisions and actions taken by Victoria Police.

Further, IBAC's powers to inspect Victoria Police records are confined to those in relation to the taking of DNA profile samples whether by consent or authorisation. [7]

Therefore, IBAC's review of the parts of the Chief Commissioner's report to IBAC under section 464ZN that pertain to retention and destruction of samples from forensic procedures, compulsory procedures or voluntary samples[8] (being information that must also be included in the Chief Commissioner's report to the Attorney-General under section 464ZFE) is confined to verifying that the information was present in the report. See part 5 in Chapter 2.

IBAC's inspection for the reporting period focused on Victoria Police's compliance with taking DNA profile samples by:

- gaining informed consent under section 464SC
- an authorisation under section 464SE
- a senior police officer authorisation[9]
- an authorisation made under section 464ZFAE

The following table sets out the number of records reviewed by IBAC.

Sample obtained by	Adult	Child	Total
Informed Consent	2,893	159	3,052
Senior Police Authorisation under s 464SE	75	33	108
Senior Police Officer Authorisation under s 464ZFAC	290	N/A	290
Senior Police Authorisation under s 464ZFAE	1	0	1
Total	**3,259**	**199**	**3458**

6. Victoria Police governance framework

Subdivision 30A of Part III, Division 1 of the Act governs the circumstances in which Victoria Police may collect and retain DNA profile samples and sets out a number of legislative requirements police must comply with when exercising these powers.

The Victoria Police Manual - DNA profile sample (VPM) sets out Victoria Police policy and procedures pertaining to DNA profile sample powers and functions. Victoria Police has also developed a number of flow charts and prescriptive forms to assist members when seeking a DNA profile sample from an individual.

In summary, a police officer can request a DNA person to give a DNA profile sample by way of informed consent or a senior police officer can authorise a DNA profile sample to be taken, in accordance with the Act.[10]

Only a police officer who has undertaken the required training can take a non-intimate sample[11] or supervise a DNA person to undertake the procedure themself.[12]

[7] Section 464ZO(3) read with the definition of 'records' in s464ZO(1).
[8] For example, section 464ZFE(e) relates to forensic material and procedures that are not DNA profile sample powers.
[9] A senior police officer authorisation is defined in the Act as being an authorisation made under section 464ZFAC.
[10] See Chapter 2 'Inspection of Records pursuant to section 464ZO'.
[11] Chief Commissioner's authorisation under s464Z dated 1 July 2019 authorises a person who has completed the Forensic Procedures training course.
[12] Chief Commissioner's authorisation under s464Z dated 1 July 2019 authorises a police officer who has completed *DNA - Supervised Mouth Scraping* training.

The VPM also sets out the training required to be undertaken by police in relation to obtaining a DNA profile sample.

The Biological Sciences Group within VPFSD receives, processes and analyses the DNA samples and the relevant accompanying paperwork.

PaLM system

All DNA profile samples taken, whether by informed consent or by authorisation, are registered and tracked within the Victoria Police Property and Laboratory Management system known as PaLM.

Governance audits

When VPFSD receives a DNA profile sample, the DNA Analysis Unit review the accompanying form to ensure the correct one has been used and completed. If an issue is identified, VPFSD sends an email to the police officer who took the sample, to request that further information is provided. If a sample is taken in a way that may not comply with the legislative requirements, the sample is either quarantined to await legal advice or marked for destruction.

Chapter 2

Inspection Results

Summary

1. Level of compliance

The following ratings are used to describe the level of statutory compliance achieved by the Chief Commissioner.

Compliant – full compliance with statutory requirements, or any degree of non-compliance was relatively minor and 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.

Unable to determine – The necessary evidence was not available to IBAC to enable an assessment of compliance with the Act to be made in the course of the inspection.

In relation to the rating of Unable to determine, IBAC acknowledge that there may be various reasons why the information required for the inspection was not available, including:

- there was insufficient relevant information to enable an assessment of compliance to be made
- the required records were not centrally available for inspection and too difficult to gather.

The following table summarises IBAC's assessment of the Chief Commissioner's compliance with the categories listed above.

Compliance Category	Compliance rating
Report provided pursuant to section 464ZN	Compliant
Inspection of records pursuant to 464ZO(3)	
• Informed consent	Unable to determine
• Senior Police Officer Authorisations - s 464SE	Unable to determine
• Senior Police Officer Authorisation – s 464ZFAC	Unable to determine
• Senior Police Officer Authorisation - s 464ZFAE	Compliant

2. Recommendations

Based on the findings set out in this report and in particular the compliance rating of Unable to be determined, IBAC makes the following recommendations to ensure future inspections are able to be undertaken with all requisite information:

Recommendation 1 of 2023:

That Victoria Police update the relevant parts of the VPM to make it clear that when police officers complete or review the Forms F22/F23, they ensure that all sections of the form have been filled in and contain the relevant information as required.

Recommendation 2 of 2023

That Victoria Police, in cases where information is found to be in error or missing from the form, ensure the issue is followed up with the relevant police officer to determine what action is to be taken to ensure the consent requirements under the Act have been complied with.

Recommendation 3 of 2023

That Victoria Police update the VPM in relation to requesting the taking of a DNA profile sample from a DNA person to include information and guidance on applying the different standards of suspicion and belief as well as establishing that there exists reasonable grounds for having reached these standards.

Recommendation 4 of 2023

That Victoria Police implement a process:

(a) to prevent the use of Form F1 to obtain consent for taking a DNA profile sample; and

(b) for dealing with cases where the incorrect form has been used, including assessing and mitigating identified risks associated with this practice.

Recommendation 5 of 2023

That Victoria Police take steps to:

(a) ensure that superseded versions of forms are not available for use by police;
(b) update the VPM to emphasise that when taking a DNA profile sample by informed consent, a police officer must ensure they use the most recent version of the relevant form.

Recommendation 6 of 2023

That Victoria Police:

(a) update the VPM and related procedures to prohibit the practice of entering information retrospectively into DNA profile sample forms, making it clear that once a form has been signed by a DNA person or senior police officer, no further information should be entered.

(b) implement a process for dealing with cases where forms F22/F23 have been altered post-signature of the DNA person or others, including assessing and mitigating identified risks associated with this practice.

Recommendation 7 of 2023

That Victoria Police take steps to ensure that police no longer (solely) use DEC recordings and that they comply with the VPM by ensuring that Forms F22/F23 are used to seek and record informed consent given by a DNA person.

Recommendation 8 of 2023

That Victoria Police develop a process for ensuring that compliance checks are completed before being provided to VPFSD.

Recommendation 9 of 2023

That Victoria Police revise Forms F24/F25 to include a declaration that the senior police officer making the authorisation has not been involved in the investigation of the offence.

Recommendation 10 of 2023

Victoria Police revise Forms F24/F25 to provide for the police officer completing the form to tick or circle the relevant details regarding the DNA person's lawful arrest or custody arrangements to enable a senior police officer to determine if they are satisfied that the requirements of section 464SE(1)(a) of the Act are met.

Recommendation 11 of 2023

That Victoria Police amend its process to ensure that when a police officer applies for an authorisation from a senior police officer, evidence of the DNA person's refusal to give informed consent is also provided and retained for IBAC inspections.

Recommendation 12 of 2023

That Victoria Police update its guidance documentation to provide instructions on what is required when recording on Form F24/F25 as required, the response from the DNA person, their parent or guardian or their legal practitioner.

Recommendation 13 of 2023

That Victoria Police update its guidance documentation to provide instruction on what is required when detailing the grounds for granting or refusing an authorisation to take a DNA profile sample.

Recommendation 14 of 2023

That Victoria Police update its processes to ensure that the provision of an authorisation to a DNA person prior to the sample being taken, is captured and available to IBAC for inspection.

Recommendation 15 of 2023

That Victoria Police ensure that all records, or copies of records, relating to the taking of a DNA profile sample by an authorisation given by a senior police officer are kept in a central location that will allow for access and inspection by IBAC officers.

Recommendation 16 of 2023

That Victoria Police update the VPM, and include guidance notes on relevant forms or written procedures, requiring police to:

(a) record whether a person who is the subject of a senior police officer authorisation is a relevant person.

(b) ensure that a copy of the notice to attend is provided to VPFSD along with the senior police officer authorisation to ensure it is available to IBAC during an inspection.

Recommendation 17 of 2023

That Victoria Police ensure that when an authorisation requires an affidavit of service, a copy of the affidavit is provided to VPFSD together with the authorisation and a copy of the notice to attend so that these are available to IBAC for inspection.

Recommendation 18 of 2023

That Victoria Police put in place a process to ensure that when a sample is registered, the sample and relevant paperwork is provided to VPFSD.

Chief Commissioner's response to recommendations

Recommendations 9, 10, 11 and 12 have been accepted by Victoria Police.

Recommendations 1 to 8 and 13 to 18 - have been accepted in principle in relation to their intent and IBAC will continue to engage with Victoria Police in addressing these.

3. Recommendations from IBAC report for period 1 July 2019 to 31 December 2020

On 23 May 2023, IBAC made a report to the Attorney-General pursuant to section 464ZP(1)(a) of the Act in relation to the Chief Commissioner's obligation under section 464ZN to provide a written report to IBAC pertaining to the taking and destruction of DNA samples between 1 July 2019 and 31 December 2020.

The following recommendations were accepted by Victoria Police in February 2023 for implementation, the progress of which will be reviewed by IBAC at its next inspection.

Recommendation	Status
Recommendation 1 of 2022 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.	**Complete** Victoria Police has implemented alternative solutions to reduce the likelihood of inaccurate reporting.
Recommendation 2 of 2022 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.	**Incomplete ***
Recommendation 3 of 2022 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 - ensure that this information is included in reports provided to IBAC under section 464ZN of the Act.	**Complete** Victoria Police implemented this recommendation which took effect in relation to the 2022 report provided to IBAC under s464ZN.

* There had not been sufficient opportunity to implement this recommendation at the time the section 464ZN reports included in this report were provided to IBAC.

IBAC review of the report provided by the Chief Commission to IBAC pursuant to section 464ZN

The Chief Commissioner of Police must provide a written report to IBAC as soon as practicable after 1 January but no later than 1 March in each year, setting out information in relation to the taking and destruction of DNA profile samples for the previous 12 months.[13] That report is to also include matters on which the Chief Commissioner is to report on to the Attorney-General under section 464ZFE of the Act, being a broad range of data on the taking, retention and destruction of all sample types. Some of the information required by the s464ZFE report is repeated in the requirements set out in section 464ZN(2) pertaining to DNA profile samples.

The results of IBAC's review of the s464ZN reports for 2021 and 2022 pertaining to the taking of DNA profile samples is set out below. The implementation by Victoria Police of IBAC's recommendation 3 (above) took effect in relation to the 2022 report as set out in Part 2 below and reflected in Table 4.

IBAC's review of information otherwise required in the report under section 464ZFE pertaining to all sample types and destructions are set out in Part 5 of Chapter 2.

The following reports were provided to IBAC within the legislative timeframe. The statistical detail within each report is set out below. Overall, IBAC determined that the reports provided under s464ZN contained the required information.

1. 2021 Report to IBAC

The 2021 Report consisted of a letter attaching the following reports:

- **Received report 2021**: forensic samples received by VPFSD in the period 1 January to 31 December 2021. 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.
- **Destroyed report 2021:** forensic samples destroyed during the period 1 January to 31 December 2021. Each record in the attachment included a unique identifying number for the sample, the date the sample 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.
- **Retained report 2021:** forensic samples retained by VPFSD for a period of more than 12 months, as at 31 December 2021. 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 1-3 below provide a breakdown of the data from the 2021 Report.

Table 1: Samples received by VPFSD between 1 January and 31 December 2021

Sample obtained by	Total	Adult	Children
Compulsory (Court) order	939	914	25
Consent	4,356	4,236	120
Interim (Court) order	11	7	4
No order (by consent, pre-July 2019)	74	74	0
Senior police authority where consent not given (pre- or post- conviction)	1,705	1,695	10
Total	**7,085**	**6,926**	**159**

[13] *Crimes Act 1958* (Vic) s 464ZN.

Table 2: Samples destroyed by VPFSD between 1 January and 31 December 2021

Reasons for destruction	Total
Administrative Issue	348
Destruction period reached	228
Extension or retention order rejected	20
Matter not proceeded with / Person not Charged	4,040
Person not found guilty	458
Total	**5,094**

Table 3: Samples retained by VPFSD for 12 months or more

Status of investigation	Total	Adult	Children
Matter before the court or warrant issued	5,440	5,385	55
Held conditionally pending judicial proceeding	1,972	1,951	21
Ongoing investigation: extension sought	29	29	0
Total	**7,441**	**7,365**	**76**

2. 2022 Report to IBAC

The 2022 Report consisted of a letter attaching the following reports:

- **Received report 2022**: forensic samples received by VPFSD in the period 1 January to 31 December 2022. 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, whether the donor was an adult or child when the sample was taken, and the specific legislative provision relied upon as authority to obtain the sample.
- **Destroyed report 2022:** forensic samples destroyed during the period 1 January to 31 December 2022. Each record in the attachment included a unique identifying number for the sample, the date the sample 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.
- **Retained report 2022:** forensic samples retained by VPFSD for a period of more than 12 months, as at 31 December 2022. 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 4-6 below provide a breakdown of the data provided in the 2022 Report.

Revised 2022 report

On 11 September 2023, Victoria Police provided a revised 2022 report to IBAC due to a routine audit which identified that 247 samples had been destroyed outside of VPFSD and as a result were not included in the original 2022 Report to IBAC.

Victoria Police advise that they have commenced revising their guidance documents to ensure that all future destructions are undertaken centrally by VPFSD.

On a review of the revised report IBAC raised the following with Victoria Police:

- the reasons given for the destruction of 13 samples was unclear
- four instances were noted where the age of the person providing the sample could not be determined.

Victoria Police informed IBAC that it would require considerable time to provide this clarification. Therefore, to avoid further delays in finalising this report, IBAC has excluded the 13 samples from this report, and will review these in the 2024 inspection.

Table 4: Samples taken between 1 January and 31 December 2022

Sample obtained by	Total	Adult	Children
Informed Consent – (Adult s 464SC(1), Child s 464SC(2))	4,059	3,901	158
Authorisation made pursuant to s 464SE	158	133	25
Senior Police Authorisation made pursuant to s 464ZFAC	741	741	-
Authorisation made pursuant to s 464ZFAE	-	-	-
Registrable offender sample s 464ZFAB	349	349	-
Children's Court orders	5	-	5
Court orders	223	223	-
Total[14]	**5,535**	**5,347**	**188**

Table 5: Samples destroyed by VPFSD in 2022

Reasons for destruction	Total
Administrative issue	117
Destruction period reached	189
Extension or retention order rejected	9
Matter not proceeded with / Person not charged	1306
Person not found guilty	313
Total	**1,934**

Table 6: Samples retained by VPFSD for 12 months or more

Status of investigation	Total	Adult	Children
Matter before the court or warrant issued	4,621	4,567	54
Held conditionally pending judicial proceeding	1,782	1,756	26
Ongoing investigation: extension sought	53	48	5
Total	**6,456**	**6,371**	**85**

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

Inspection of records pursuant to 464ZO

Set out below are the findings of IBAC's inspection under section 464ZO(3) in relation to DNA profile samples taken in the period 1 July 2019 to 31 December 2022 (inspection period).

1. DNA profile samples taken with informed consent

Request to provide a DNA profile sample

A police officer may request a DNA person aged 18 years or older to provide a DNA profile sample if the officer is satisfied that:

- the taking of the sample is justified in all circumstances, and
- the DNA person:
  - is suspected on reasonable grounds of having committed an indictable offence; or
  - has been charged with an indictable offence; or
  - has been summonsed to answer a charge for an indictable offence. [15]

A DNA profile sample may then be taken if the adult DNA person gives informed consent.[16]

A police officer may request a DNA person aged 15 - 17 years to provide a DNA profile sample if the officer is satisfied that the taking of the sample is justified in all circumstances, and the DNA person:

- is believed on reasonable grounds of having committed a DNA sample offence; or
- has been charged with a DNA sample offence; or
- has been summonsed to answer a charge for a DNA sample offence. [17]

A DNA profile sample may then be taken if the child DNA person and a parent or guardian of the child give informed consent.[18]

Note: A reference in this report to 'parent/guardian' means a parent or guardian of a DNA person who is a child.

Informed consent to request to take a DNA profile sample

A DNA person or parent/guardian will be taken to have given informed consent to a request for a DNA profile sample, if they give their consent after being informed by a police officer, in a language likely to be understood by them, of the following:

- the nature of the procedure to be conducted to take the sample;
- the purpose for which the sample is required;
- 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;
- they 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.[19]

[15] *Crimes Act 1958* (Vic) s 464SC(1).
[16] *Crimes Act 1958* (Vic) s 464SC(3)(a)(i). Alternatively, a DNA profile sample may be taken from an adult DNA person if a senior police officer gives an authorisation (s 464SC(3)(a)(ii)) - see Part 2 below.
[17] *Crimes Act 1958* (Vic) s 464SC(2).
[18] *Crimes Act 1958* (Vic) s 464SC(3)(b)(i). Alternatively, a DNA profile sample may be taken from a child DNA person if a senior police officer gives an authorisation (s 464SC(3)(b)(ii)) - see Part 2 below.
[19] *Crimes Act 1958* (Vic) s 464SD(2).

An adult 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. A DNA person who is a child and their parent/guardian 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.[20]

The police officer must record the giving of the above information by audio recording, audio-visual recording or in writing signed by the DNA person and must give or send by registered post to the DNA person or their legal practitioner or the parent/guardian of the child.[21]

Informed consent - procedure

The VPM sets out the procedure for seeking to obtain from, and record informed consent given by, a DNA person in relation to taking a DNA profile sample. The VPM instructs police to use VPM Form F22 for an adult and VPM Form F23 for a child aged between 15 – 17 years, to:

- inform the person of the information required by section 464SD(2); and
- record on the form and/or the DEC recording (as applicable) that the DNA person (and, if a child, the parent or guardian) consents.

The VPM forms set out the information required to be given to a DNA person prior to them giving informed consent and contain fields in which to record the grounds / relevant offence, personal details specific to the DNA person, as well as a field to record the basis on which the officer is satisfied that the taking of the DNA sample is 'justified in all of the circumstances'.

Incomplete forms

IBAC officers inspected around 2,100 completed F22/F23 forms and found a number of instances, set out in the table below, where fields requiring confirmation of certain information given to a DNA person by checking a box or otherwise filling in the relevant information, were incomplete or incorrectly completed.

Incomplete or incorrect information	Adult	Child
Grounds for taking the sample	101	4
Offence	107	8
Nature of the procedure to be conducted	18	1
Justification*	289*	45*
Total	515	58

* In April 2020, Forms F22/F23 were revised to add a 'justification' field - these figures show the number of updated forms where this field was left blank or otherwise had the offence listed as the justification.

IBAC officers were unable to determine from the records whether there had been any follow up with the responsible police officers to query and rectify incomplete fields or other errors.

IBAC also queried cases where the signature of the DNA person or other part of a form had not been given to VPFSD. In these instances, IBAC officers were provided with evidence of follow up which indicated that the informed consent was alternatively captured on DEC recordings (see section below on the use of DEC recordings for informed consent).

Where completed F22/F23 forms are missing information, IBAC is unable to determine whether that information was in fact provided to the DNA person *prior* to them giving informed consent, as required by the Act.

IBAC makes the following recommendations:

Recommendation 1 of 2023

That Victoria Police update the relevant parts of the VPM to make it clear that when police officers complete or review the Forms F22/F23, they ensure that all sections of the form have been filled in and contain the relevant information as required.

Recommendation 2 of 2023

That Victoria Police, in cases where information is found to be in error or missing from the form, ensure that the issue is followed up with the relevant police officer to determine what action is to be taken to ensure the consent requirements under the Act have been complied with.

[20] *Crimes Act 1958* (Vic) s 464SD(2).
[21] *Crimes Act 1958* (Vic) s 464SD(3).

Suspected or believed on reasonable grounds

A request by police for a DNA profile sample under section 464SC of the Act, can only be made of a DNA person, which is defined as (inter alia) a person who is suspected of having committed or attempted to commit an indictable offence (adult) or a DNA offence (child)[22].

The police officer also has to be satisfied that the request is justified in all the circumstances, and that the DNA person is suspected on reasonable grounds of having committed the indictable offence (adult) or believed on reasonable grounds of having committed the DNA sample offence (child). [23]

The Act does not define 'suspicion', 'belief' or 'reasonable grounds'.

IBAC notes that the VPM - DNA profile sample does not provide information or guidance on the common law as it applies to distinguishing between suspicion and belief, or what is required in order to form a belief on reasonable grounds. [24]

Recommendation 3 of 2023

That Victoria Police update the VPM in relation to requesting the taking of a DNA profile sample from a DNA person to include information and guidance on applying the different standards of suspicion and belief as well as establishing that there exists reasonable grounds for having reached these standards.

Incorrect form used

From 1 July 2019, Victoria Police cannot request DNA to be provided by way of a forensic procedure.[25]

However, of the 2,670 forms used to gain informed consent, IBAC officers found 83 instances where consent for a DNA profile sample was gained using the forensic procedure Form F1. Although Form F1 contains the majority of information as required by Form F22, there are also differences between the two forms, in particular:

- Form F1 does not contain details surrounding the destruction of the DNA profile sample.
- Form F1 refers to the procedure as an intimate sample, whereas in Form F22 the nature of the procedure is correctly specified as either a mouth scraping or a blood sample.
- Form F1 refers to the term 'forensic procedure' as well as sections of the Act that do not relate to DNA profile samples.
- Form F1 does not include the fields added to the April 2020 version of the F22.

IBAC officers did not find any records to show that the police officer who had used the incorrect form had been notified of the error and asked to rectify this.

It is important that police comply with the instructions in the VPM that direct them to use Forms F22/F23 when requesting and taking a DNA profile sample by way of informed consent, as these forms, when correctly completed, ensure compliance with the relevant provisions in the Act. IBAC therefore makes the following recommendation:

Recommendation 4 of 2023

That Victoria Police implement a process:

(c) to prevent the use of Form F1 to obtain consent for taking a DNA profile sample; and

(d) for dealing with cases where the incorrect form has been used, including assessing and mitigating identified risks associated with this practice.

Superseded forms used

Since the introduction of the DNA profile sample scheme, there have been several revisions by Victoria Police to Forms F22/F23, the most recent being the April 2020 revision. The revision to forms, since their introduction, include the addition of the following two sections:

- a compliance check box which requires a Sergeant or above to ensure that the information within the form is complete and confirm that they agreed that the taking of the sample was justified in all the circumstances.
- a section to specify how the taking of the DNA is relevant and/or likely to contribute to or assist the investigation.

[22] See *Crimes Act 1958* (Vic) s 464(2) Definitions.
[23] See *Crimes Act 1958* (Vic) s 464SC(1)-(2).
[24] See for example *George v Rockett* (1990) 170 CLR 104.
[25] *Crimes Act 1958* (Vic) ss 464R, 464U, 4646T, 464V.

IBAC considers these additions to the forms are important as they provide some assurance that police involved in taking DNA profile samples have turned their mind to whether the taking of the sample is justified in all of the circumstances.

IBAC officers found instances where a superseded version of F22/F23 had been used to gain informed consent. During the 2021/22 calendar years, of the 705 F22/23 forms reviewed by IBAC officers, 34 forms were found to be superseded versions. IBAC makes the following recommendation:

Recommendation 5 of 2023

That Victoria Police take steps to:

(c) ensure that superseded versions of forms are not available for use by police.

(d) update the VPM to emphasise that when taking a DNA profile sample by informed consent, a police officer must ensure they use the most recent version of the relevant form.

Information entered retrospectively

IBAC officers identified 58 instances where information had either been corrected or entered into Form F22 retrospectively, as follows:

- 23 instances of general information being corrected or entered regarding the DNA person (i.e., name, gender, date of birth or age);
- 19 instances where the information corrected or entered should been given to the DNA person prior to giving informed consent; and
- 16 instances where the consent box had been ticked after the DNA person had signed the form.

The Act clearly states that a DNA person is only able to provide informed consent *after* a police officer informs them of certain information. IBAC officers rely on the completed Form F22 to verify whether the required information was provided to the DNA person prior to them giving informed consent. Where retrospective changes or additions are made to the form IBAC is not able to determine whether the requirements under the Act have been met.

IBAC therefore makes the following recommendation:

Recommendation 6 of 2023

That Victoria Police:

(a) update the VPM and related procedures to prohibit the practice of entering information retrospectively into DNA profile sample forms, making it clear that once a form has been signed by a DNA person or senior police officer, no further information should be entered;

(b) implement a process for dealing with cases where forms F22/F23 have been altered post-signature of the DNA person or others, including assessing and mitigating identified risks associated with this practice.

Recording informed consent on DEC recording only

The VPM for DNA profile samples, when first introduced in July 2019, allowed for the recording of informed consent in writing, using Forms F22/F23, or by DEC recording. On 28 October 2019, Victoria Police updated the VPM requiring the recording of informed consent in writing.

Of the 3,052 informed consent records inspected, IBAC officers found 260 instances where informed consent was recorded by DEC recording, with 149 occurring after 28 October 2019. Whilst the Act allows informed consent to be recorded through audio, audio-visual or writing, the VPM clearly states that the investigating member must use F22/F23 forms to gain and record the DNA persons informed consent in writing.

Capturing informed consent by DEC recording also negates the two controls in place to ensure that informed consent has been captured appropriately, being (i) the compliance check within forms F22/F23 to be completed by a Senior Sergeant and (ii) the review completed by VPFSD on receipt of the DNA sample.

IBAC officers were advised that when the informed consent is recorded on DEC the recordings are held within the police station where they were recorded. On 26 June 2023 IBAC officers requested copies of the DEC recordings and, at the time of writing the report, had not received them. IBAC makes the following recommendation:

Recommendation 7 of 2023

That Victoria Police take steps to ensure that police no longer (solely) use DEC recordings and that they comply with the VPM by ensuring that Forms F22/F23 are used to seek and record informed consent given by a DNA person.

Compliance checks not completed

Forms F22/F23 contain a compliance section to be completed by a Sergeant (or above) to confirm that the responsible police officer has undertaken the required training, that the DNA consent form has been completed correctly and that the Sergeant (or above) is satisfied that the taking of the sample is justified in all circumstances.

IBAC officers found 140 out of 1702 instances where the compliance section of the form had not been completed. Although not required by the Act, the check is an important part of Victoria Police's internal governance as it acts to identify issues prior to the sample being submitted to VPFSD and provides assurance that the taking of the sample is by a trained officer and is justified in all of the circumstances. IBAC makes the following recommendation:

Recommendation 8 of 2023

That Victoria Police develop a process for ensuring that compliance checks are completed before being provided to VPFSD.

2. Senior Police Officer Authorisation to take DNA profile sample - under section 464SE

Where a request for informed consent to take a DNA profile sample from a DNA person is refused, a senior police officer may authorise the taking of the DNA profile sample. The senior police officer must not be involved in investigating the offence for which the taking of the sample is required.[26] A 'senior police officer' means a police officer of, or above the rank of senior sergeant.[27]

Requirements to authorise the taking of a DNA profile sample

A senior police officer may make an authorisation if, at the time the authorisation is made, they are satisfied that:

- 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
- for a DNA person who is a child, both the child and the child's parent or guardian have 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.[28]

An authorisation 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.[29] Where the person continues to refuse to provide a sample, reasonable force may be used to assist a police officer to obtain the sample.[30]

The VPM states that once a DNA person has refused to provide a DNA profile sample by informed consent the investigating member may apply for a senior police officer authorisation to obtain a DNA profile sample. The application process involves the use of templated forms – Form F24 for an DNA person who is an adult and Form F25 for a DNA person who is a child – which sets out the requirements a senior police officer needs to be satisfied of in order to authorise a request.

Forms F24/F25 contain Parts A, B and C, and general statements regarding the DNA person as well as fields to be filled in by both the investigating member and the senior police officer reviewing the application.

IBAC officers identified a number of matters pertaining to these authorisations.

[26] *Crimes Act 1958* (Vic) s 464SE(1).
[27] *Crimes Act 1958* (Vic) s 464(2).
[28] *Crimes Act 1958* (Vic) s 464SE(1).
[29] *Crimes Act 1958* (Vic) s 464SE(2).
[30] *Crimes Act 1958* (Vic) s 464ZA(1).

Senior police officer giving the authorisation must not be involved in the investigation of the offence

The Act requires that the senior police officer giving an authorisation for a DNA profile sample to be taken must not be involved in the investigation of the offence[31] and the VPM reflects this requirement. However, Forms F24/F25 do not provide for the senior police officer making the authorisation to state that they were not involved in the investigation of the offence.

On reviewing a sample of Forms F24/F25, IBAC officers were unable to verify if the senior police officers giving the authorisations met this requirement of the Act.

IBAC makes the following recommendation.

Recommendation 9 of 2023

That Victoria Police revise Forms F24/F25 to include a declaration that the senior police officer making the authorisation has not been involved in the investigation of the offence.

DNA person being under lawful arrest or in custody of an investigating official

The Act requires the DNA person to be under lawful arrest by warrant, or otherwise under sections 458 or 459 of the Act, a provision of any other Act, or in the custody of an investigating official in accordance with Magistrates' Court or Children's Court order under section 464B(5) of the Act. Also, that they were in custody at the time the application for any such order was made.[32] This requirement is expressed on the forms via the following statement:

"This application is made because the person is a DNA person; and

- *is under lawful arrest by warrant / under lawful arrest under Statute / or in custody of an investigating official pursuant to an order made under section 464B(5) of the Crimes Act 1958".*

No further information is provided within the form to show which of the above requirements applies to the DNA person. Without specifying the relevant detail, a senior police officer is not be able to satisfy themselves of the specific requirements, and IBAC is unable to determine compliance with this requirement.

IBAC therefore makes the following recommendation:

Recommendation 10 of 2023

Victoria Police revise Forms F24/F25 to provide for the police officer completing the form to tick or circle the relevant details regarding the DNA person's lawful arrest or custody arrangements to enable a senior police officer to determine if they are satisfied that the requirements of section 464SE(1)(a) of the Act are met.

Recording of refusal of informed consent

For an authorisation to be given where consent is refused, the Act requires the senior police officer to be satisfied that the DNA person and (if applicable) their parent or guardian refused a request to give a DNA profile sample by informed consent.

The VPM instructs a police officer to record a DNA person's refusal to consent on Form F22/F23, including if refusal has been recorded on a DEC recording.

In 43 of the 117 cases reviewed, IBAC officers were not provided with evidence of the DNA persons' refusal of informed consent and were therefore unable to verify whether the DNA person had refused consent prior to the application being made to a senior police officer for authorisation to take a DNA profile sample.

As the VPM does not require the F22/F23 form evidencing the refusal of consent to accompany the F24/F25 application for authorisation, where evidence is not attached, the senior police officer relies on the following templated statement in Forms F24/F25 to form their satisfaction:

"This application is made because the person is a DNA person; and

- *Form F24 - has refused to give consent to a request under section 464SC(1) of the Crimes Act 1958;*
- *Form F25 - the DNA person is a child and both the child and the child's parent or guardian have refused to give consent to a request under section 464SC(2) of the Crimes Act 1958".*

[31] *Crimes Act 1958* (Vic) s 464SE(1).
[32] *Crimes Act 1958* (Vic) s 464SE(1)(a).

IBAC considers that evidence of the DNA person refusing consent to provide a DNA profile sample should be given to the senior police officer considering an application. This is also important to enable IBAC to verify if consent was refused prior to an application being made for a senior police officer authorisation.

IBAC makes the following recommendation:

Recommendation 11 of 2023

That Victoria Police amend its process to ensure that when a police officer applies for an authorisation from a senior police officer, evidence of the DNA person's refusal to give informed consent is also provided, and is retained for IBAC inspections.

Making or Refusing an authorisation

Allowing reasonable opportunity to provide reasoning why the authorisation should not be made

A senior police officer hearing the application for an authorisation to take a DNA profile sample must allow the DNA person, their parent or guardian (if applicable) and their legal practitioner a reasonable opportunity to provide reasons as to why the DNA profile sample should not be taken.[33]

The VPM instructs the senior police officer, when reviewing an application for an authorisation, to give a reasonable opportunity to the DNA person, their parent/guardian or legal practitioner to explain why the sample should not be taken and to record the response in the relevant section of Form F24/F25.

IBAC officers found the methods for recording a response, or lack of response, by a DNA person, their parent/guardian or legal practitioner, to be inconsistent. Of the 108 records reviewed, IBAC offices found 20 instances where the section of the form was blank, and two instances where the senior police officer entered 'N/A'.

While the section not being completed could be interpreted as no reason having been given, it could also mean that no reasonable opportunity to provide a reason was given, meaning that IBAC was unable to determine compliance with this requirement of the Act. To ensure that IBAC is able to verify compliance with this requirement of the Act in the future, IBAC makes the following recommendation.

Recommendation 12 of 2023

That Victoria Police update its guidance documentation to provide instructions on what is required when recording on Form F24/F25 the response from the DNA person, their parent or guardian or their legal practitioner, including where no response was given.

Making an authorisation

An authorisation must be given in writing, signed by the senior police officer and include the date and time the authorisation is given, as well as the grounds on which the authorisation is given.[34]

Part B on Forms F24/F25 is where the senior police officer is to record the date and time the authorisation was given, along with their signature. IBAC noted that the authorisations reviewed contained the date and time of the authorisation and the signature of the senior police officer.

However, the VPM and Forms F24/25 do not provide any guidance for the recording of the grounds for giving or refusing an authorisation.

IBAC officers found the detail recorded pertaining to the grounds of giving an authorisation varied greatly between forms. For example, some forms included the authoriser simply listing the indictable offence the DNA person was reasonably believed to have committed, and others contained a detailed analysis of the requirements of the Act, and how taking a DNA profile sample was justified.

IBAC makes the following recommendation:

Recommendation 13 of 2023

That Victoria Police update its guidance documentation to provide instruction on what is required when detailing the grounds for granting or refusing an authorisation to take a DNA profile sample.

[33] *Crimes Act 1958* (Vic) s 464SF(1).
[34] *Crimes Act 1958* (Vic) s 464SF(2).

Providing a copy of the authorisation prior to taking the sample

If a senior police officer gives an authorisation they must give or cause another police officer to give the DNA person a copy of the authorisation as soon as possible and prior to the taking of a DNA profile sample.[35]

Both the VPM and Forms F24/F25 set out the instructions to provide the authorisation to the DNA person prior to taking the sample. However, Victoria Police do not record if a copy has been provided to the DNA person. IBAC were therefore unable to determine compliance with this part of the Act.

IBAC makes the following recommendation:

Recommendation 14 of 2023

That Victoria police update its processes to ensure that the provision of an authorisation to a DNA person prior to the sample being taken is captured and available to IBAC for inspection.

Information required prior to carrying out an authorisation

Prior to taking a DNA profile sample under an authorisation given by a senior police officer, a police officer must inform the DNA person orally of the following:

- that an authorisation under section 464SE has been given;
- the date and time the authorisation was made;
- the grounds the authorisation was made on; and
- that a police officer may use reasonable force to enable the DNA profile sample to be taken.[36]

The police officer must also record the giving of the above information by audio or audio-visual recording and give or send by registered post a copy of the recording no more than seven days after taking the DNA profile sample.[37]

The VPM and the Forms F24/F25 instruct police to record the giving of the information by DEC recording and to provide this to the DNA person within seven days of taking the DNA profile sample.

IBAC Officers queried the location of these recordings and were informed that VPFSD do not undertake this part of the process.

The VPM does not provide instructions on where the DEC recordings are to be held, or that a copy is to be given to VPFSD for retention. As IBAC did not have access to the DEC recordings, IBAC officers were unable to determine compliance with the relevant section of the Act.

Recommendation 15 of 2023

That Victoria Police ensure that all records, or copies of records, relating to the taking of a DNA profile sample by an authorisation given by a senior police officer are kept in a central location that will allow for access and inspection by IBAC officers.

Refusal by a senior police officer to make an authorisation

If a senior police officer refuses to give an authorisation under section 464SE in respect of a DNA person, the DNA person must be informed orally of the decision as soon as practical and given written notice of the decision within 7 days.[38]

IBAC officers determined that there were seven instances where a senior police officer refused an application for an authorisation in the period 1 January 2019 to 31 December 2020, which may include refusals prior to the introduction of the DNA profile sample scheme. IBAC officers noted that there were no refusals given from 1 January 2021 to 31 December 2022.

[35] *Crimes Act 1958* (Vic) s 464SF(3).
[36] *Crimes Act 1958* (Vic) s 464SF(4).
[37] *Crimes Act 1958* (Vic) s 464SF(5).
[38] *Crimes Act 1958* (Vic) s 464SF(6).

3. Senior Police Officer Authorisation to take DNA profile - under section 464ZFAC

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 is found not guilty of a DNA offence, other than an offence heard and determined summarily, because of mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.[39]

A senior police officer may only make this authorisation if:

- it is not more than six months after the final determination of an appeal against the conviction or the verdict of not guilty because of mental impairment (as the case requires), or the expiration of any appeal period;
- the person is not under the age of 18 years at the time the finding of guilt, or the finding of not guilty because of mental impairment, was made; and
- the Chief Commissioner of Police does not have a sample from the person that may be retained indefinitely.[40]

An authorisation must be made in writing and signed by the senior police officer giving it.[41]

Application for a senior police authorisation

The VPM directs a police officer, who identifies that the above grounds for a senior police authorisation exist, to complete the 'DNA Profile Sample Senior Police Officer's Authorisation – Post-conviction' [Form F26, Part A] and submit the application to a Senior Sergeant or above. The senior police officer will consider the form, sign the 'Authorisation' page [Form F26, Part B] and return the form to the applicant police officer for service.

Part A on Form F26 sets out the information that is required by the Act to be provided to the authorising senior police officer along with details of the DNA person and the police officer making the application. Part B sets out what the senior police officer is required to complete when considering the application, including the grounds for giving or refusing the authorisation.

Form 30 is a 'Notice to Attend DNA Profile Sample Caution', which is given to the DNA person to sign when they comply with a Notice to Attend by attending a specified police station before a nominated date (see 'Notice to Attend' below).

IBAC officers reviewed 321 authorisations made by a senior police officer post-conviction and found that a significant number of the files reviewed were missing the required forms, including 56 instances where Form 30 was not provided.

Incomplete forms

IBAC officers identified 14 instances where forms were missing information or where other errors had been made. The details are set out below.

Information missing or incorrect	F26 (Part A)	F26 (Part B)	F30
Sample retained indefinitely by Chief Commissioner	4	-	-
Details of applicant or senior police officer	1	-	-
Details of the DNA person	1	-	-
DNA offence	1	-	-
How sample taken*	-	-	6
Date authorisation made	-	1	-

*Does not include cases where F30 forms were not provided to VPFSD.

Missing and incorrect forms used

IBAC officers identified four cases where the applicant police officer had not indicated if the Chief Commissioner of Police had retained a sample indefinitely, and six instances where the forms did not indicate how the sample was taken from the DNA person.

IBAC officers identified further instances where incorrect forms had been used and provided to VPFSD by police members. The incorrect forms primarily consisted of 'Forensic Procedure' or 'Informed Consent' forms used in the place of Form 30. IBAC officers were informed that some of those samples had been quarantined by VPFSD awaiting legal advice.

[39] *Crimes Act 1958* (Vic) s 464ZFAC.
[40] *Crimes Act 1958* (Vic) s 464ZFAC(2).
[41] *Crimes Act 1958* (Vic) s 464ZFAC (9).

Conditions regarding taking a sample

Senior police officer authorisations can be made before the appeal period in relation to a conviction or relevant verdict has expired, or before the appeal has been finally determined.

A sample authorised to be taken by a senior police officer from a person post-conviction must not be taken until the expiry of an appeal period or the final determination of an appeal upholds the conviction.[42]

If, on appeal, a conviction for the DNA offence or verdict of not guilty for the DNA because of mental impairment is set aside, an authorisation for the sample to be taken from the person will cease to have effect.[43]

If an authorisation for a sample to be taken has been carried out after expiry of the appeal period and leave to appeal against the conviction or verdict is granted after the expiry period, any sample and related material and information taken may be retained by a police officer but must not be used for any purpose pending the final determination of the appeal. If on appeal, the conviction or verdict is set aside, any sample taken and any related material and information must be destroyed without delay.[44]

IBAC officers queried what mechanisms Victoria Police has in place to ensure that the above legislative requirements are met.

Victoria Police advised that the DNA Management Unit (DNAMU) run regular reports to filter out senior police authorisations with approximately two months until expiry. A number of checks are completed to ensure there are no outstanding appeal dates and the DNAMU will then notify the relevant police officer or work unit requesting the execution of the authorisation. DNAMU will actively monitor senior police authorisations until the appeal period is finalised.

IBAC is satisfied that this procedure captures the relevant information in the time required.

Notice to attend

If a senior police officer authorisation is given, a notice to attend must be attached to the authorisation and served on what the Act describes as a 'relevant person,'[45] being a person who is not a detained or protected person.[46] A Notice to Attend therefore does not need to be provided to a person who is detained or protected.

The notice must contain the following information:

- the date on which the senior police officer authorisation was given; and
- the kind of DNA profile sample that is to be taken from the person; and
- the name, rank and telephone number of the senior police officer who gave the senior police officer authorisation; and
- that the Chief Commissioner of Police does not have a sample from the person that may be retained indefinitely; and
- that if the person fails to comply with the notice, an application for a warrant to arrest the person may be made without further notice to the person; and
- that the person may wish to seek legal advice as to the effect of the notice; and
- the name, rank and telephone number of the police officer serving the notice or causing the notice to be served; and
- that a police officer may use reasonable force to enable the sample to be taken.[47]

The VPM directs the applicant, having received the signed authorisation forms from a senior police officer, to prepare a 'Notice to Attend – DNA Profile Sample Post-conviction' (Form F27), attach a copy of the signed Form 26 (Part B) and arrange service before scanning and emailing the Form F26 (Part B) to the VPFSC.

IBAC officers were unable to determine whether a notice to attend was required as Form F27 does not indicate whether or not the subject of the authorisation was a relevant person. During the inspection, 73 percent of the records inspected did not include a copy of the notice to attend. Victoria Police advised IBAC that a notice to attend is not required to be provided to VPFSD when analysing the sample and they are only provided with the authorisations in some instances. If a notice to attend existed, IBAC was informed that it would be located at the police station where the authorisation originated. IBAC was therefore unable to determine Victoria Police's compliance with this legislative obligation, and makes the following recommendation.

[42] *Crimes Act 1958* (Vic) s 464ZFAC(3)-(6).
[43] *Crimes Act 1958* (Vic) s 464ZFAC(8).
[44] *Crimes Act 1958* (Vic) s 464ZFAC(7).
[45] *Crimes Act 1958* (Vic) s 464ZFAD(2).
[46] *Crimes Act 1958* (Vic) s 464ZFAD(1).
[47] *Crimes Act 1958* (Vic) s 464ZFAD(3).

Recommendation 16 of 2023

That Victoria Police update the VPM, and include guidance notes on relevant forms or written procedures, requiring police to:

(a) record whether a person who is the subject of a senior police officer authorisation is a relevant person.

(b) ensure that a copy of the notice to attend is provided to VPFSD along with the senior police officer authorisation to ensure it is available to IBAC during an inspection.

Serving the notice

A notice may be served on the person by:

- delivering a true copy of the notice to the person personally; or
- leaving a true copy of the notice for the person at their last or most usual place of residence or business with a person who apparently resides or works there and who is apparently not less than 16 years of age; or
- posting the notice to the person at their last known place of residence or business.[48]

If a notice is served by post, evidence of service must state the manner in which the police officer ascertained the address to which the notice was posted and the time and place of posting.[49] The VPM directs the police officer to retain the affidavit of service.

IBAC officers were unable to determine compliance with these service provisions as there is no indication on VPSFD files as to whether a notice to attend is required in each instance and therefore no way to determine whether an affidavit of service was required.

Recommendation 17 of 2023

That Victoria Police ensure that when an authorisation requires an affidavit of service, a copy of the affidavit is provided to VPFSD together with the authorisation and a copy of the notice to attend so that these are available to IBAC for inspection.

Quarantined DNA profile samples

At the time of the inspection there were 35 DNA profile samples from IBAC's selected sample which had been quarantined and not analysed by VPFSD due to incomplete or missing forms. IBAC officers were informed that Victoria Police are currently seeking legal advice on the matters identified to determine whether the samples could undergo testing or otherwise be destroyed.

IBAC will seek an update on Victoria Polices processes concerning the quarantined DNA profile samples at the next inspection.

4. Senior Police Officer Authorisation to take a DNA profile sample from person who has previously provided a sample - under section 464ZFAE

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.[50]

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:[51]

- 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 sample for the purpose of deriving a DNA profile was taken in accordance with 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.

If such an authorisation is given by a senior police officer, the senior police officer may serve, or cause to be served, a notice on a person directing them to attend a police station to provide a DNA profile sample within 28 days of service.[52]

[48] *Crimes Act 1958* (Vic) s 464ZFAD(4).
[49] *Crimes Act 1958* (Vic) s 464ZFAD(5).
[50] *Crimes Act 1958* (Vic) s 464ZFAE(1).
[51] *Crimes Act 1958* (Vic) s 464ZFAE(1).
[52] *Crimes Act 1958* (Vic) s 464ZFAE(2).

Application process

The VPM states that if a DNA profile sample is unable to be derived from the sample previously provided, VPFSD will notify the informant and direct them to submit a Form F28 to a Senior Sergeant for authorisation. Form F28 consists of Part A (the application for authorisation) and Part B (the authorisation). The form includes a section to indicate how the previous DNA profile sample was gained and that a DNA profile had not been derived.

IBAC noted one instance of an authorisation from a senior police officer to take a DNA profile sample from an adult who previously provided a sample being given.

Notice to attend

A notice to attend must be served on a person who is the subject of an authorisation under s 464ZFAE. This notice must include:

- the date on which the senior police officer authorisation was given; and
- the kind of DNA profile sample that is to be taken from the person; and
- the name, rank and telephone number of the senior police officer who gave the authorisation; and
- that the Chief Commissioner of Police does not have a DNA profile of the person; and
- that a DNA profile was not able to be derived by a forensic scientist from the sample given by the person—
  - in accordance with an order made by a court under section 464T, 464U, 464V, 464ZF or 464ZFAAA; or
  - in accordance with section 464SC, an authorisation given under section 464SE, a direction given under section 464ZFAB or a senior police officer authorisation; and
- that if the person fails to comply with the notice, application for a warrant to arrest the person may be made without further notice to the person; and
- that the person may wish to seek legal advice as to the effect of the notice; and
- the name, rank and telephone number of the police officer serving the notice or causing the notice to be served; and
- that a police officer may use reasonable force to enable the DNA profile sample to be taken.

A notice may be served directing a person to attend a specified police station within 28 days after service of the notice.[53] If the person does not comply with the notice, a warrant to arrest may be issued without further notice to the person.[54]

IBAC officers noted there was only one instance of a notice being served and that notice contained the requirements set out by the Act.

Affidavit of service

The VPM directs the police officer to create and retain an affidavit of service in relation to a notice to attend issued in accordance with s 464ZFAE.

IBAC officers were not provided with a copy of the affidavit of service pertaining to the one matter in which a notice was required. IBAC was therefore unable to determine compliance with the VPM, however IBAC considers that recommendation 17 above will address this issue for future compliance inspections.

[53] *Crimes Act 1958* (Vic) s 464ZFAE(2).
[54] *Crimes Act 1958* (Vic) s 464ZFAE(3)(f).

5. Any matter on which the Chief Commissioner is required to report on under section 464ZFE

IBAC reviewed the Chief Commissioner's requirement to include in the report to IBAC under s464ZN those matters to be included in reports to the Attorney-General under section 464ZFE,[55] to determine whether these reports complied with the requirements of section 464ZFE. IBAC's review of the matters set out in section 464ZFE that are covered by the report provided under section 464ZN(2) in relation to the taking of DNA profile samples, are not repeated in this this part.

IBAC reviewed 10 reports provided for the period 1 July 2019 to 31 December 2022. All 10 reports contained the details set out within section 464ZFE of the Act, and were therefore deemed to be compliant.

6. Other matters

Samples taken and not provided to VPFSD

The VPM process for taking a DNA profile sample instructs a police officer to register a DNA sample in PaLM once the DNA sample has been taken. During the inspection, of the 3,151 records inspected across informed consent and authorisations granted by a senior police officer, IBAC found 28 instances where a DNA profile sample had been registered within PaLM where no sample had been received by VPFSD.

Recommendation 18 of 2023

That Victoria Police put in place a process to ensure that when a sample is registered, the sample and relevant paperwork is provided to VPFSD.

[55] *Crimes Act 1958* (Vic) s 464ZFE.

Conclusions

Whilst IBAC was ultimately unable to determine Victoria Police's compliance with a number of aspects of the record keeping requirements of the Act, discussions between IBAC and Victoria Police demonstrate a commitment by Victoria Police to meeting its statutory obligations.

IBAC considers that if Victoria Police implement the recommendations in this report, it will enable IBAC to better assess compliance with the Act.

VPFSD staff were courteous to and cooperative with IBAC officers undertaking the inspection under the Act. The engagement between VPFSD and IBAC was positive and constructive throughout and I take this opportunity to thank VPFSD staff for their assistance.

IBAC has made 18 recommendations within this report, the progress of which will be monitored by IBAC at the next inspection to be scheduled in 2024.



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Acting Commissioner
Independent Broad-based Anti-corruption Commission

Date: 5 December 2023

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