

OUR REFERENCE

DIRECTOR'S CHAMBERS



YOUR REFERENCE

DATE

21 December 2009

Mr Peter Ford
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Part 1D Review Committee Secretariat
c/- Criminal Justice Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Mr Ford

DNA Questionnaire

I refer to your letter dated 24 November 2009 seeking my response to your questionnaire. I advise that this Office does not collate statistics in relation to prosecutions where DNA is an issue. It is therefore difficult to answer the questionnaire in any detail. However, I have considered the individual questions and I make the following comments, which I hope will be of some assistance to you.

Without doubt DNA evidence is powerful evidence in any prosecution. It can be compelling evidence of guilt. (In the investigation phase it can also be strongly indicative of innocence). However it can be misleading and there is a heavy onus on the prosecution to ensure the jury comprehends the relevance of the evidence. It is essentially corroborative evidence and should be balanced against other evidence. It will never be sufficient alone to prove guilt.

Therefore it would be a rare and exceptional case where DNA is the sole evidence against an accused and I cannot point to any such case. A DNA link between an accused and a crime scene item shows only that the accused could be the offender because of a physical link with the item at some time. This correct line of reasoning can be found in *R v Pantoja* (1996) 88 A Crim R 554. Total reliance cannot be placed on the evidence because of a lack of other probative evidence, faulty process, contamination or simply that we do not yet know enough about the science.

Most recent Court of Criminal Appeal cases involving DNA are:

Dodds v R [2009] NSWCCA 78

Fleming v R [2009] NSWCCA 233 – involving a 1984 offence and a DNA match found in 2004.

O'Keefe v R [2009] NSWCCA 121

Samadi v R [2008] NSWCCA 330 and

Razzak v R [2008] NSWCCA 304

It is difficult to analyse whether the presence of DNA evidence will increase pleas of guilty. Guilty pleas are the product of a wide range of circumstances. It must also be remembered that DNA evidence is often successfully challenged, so the reasons an accused will or will not enter a plea of guilty cannot be easily defined.

There are some useful and often dramatic statistics in relation to DNA evidence. The article *DNA testing of convicted offenders* by Wayne Tosh published in the Judicial Officers' Bulletin December 2005, Vol 17 No 11 states that the DNA testing of adult convicted offenders in NSW correctional centres has linked more than 3,900 convicted offender profiles to previously unresolved crimes. He also stated the enactment of the *Crimes (Forensic Procedures) Act 2000*, which facilitated the taking of DNA swabs, was the most significant advancement in policing since the introduction of fingerprint technology in 1903. The value of DNA evidence therefore cannot be overstated – provided all procedures are followed and the jury understands the context and use of the evidence.

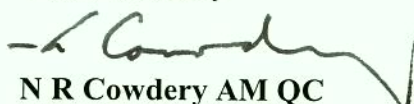
The NSW Judicial Commission Bench Book provides the following extracts to assist Judges in providing directions on DNA Evidence:

1. **Misleading or confusing:** A commonly arising example of evidence likely to mislead or confuse is that of the raw percentage results of DNA tests, which necessarily require complicated explanations from expert witnesses: see, for example: *R v GK* (2001) 53 NSWLR 317 (CCA) at [60], [100]; *R v Galli* [2001] NSWCCA 504 at [72]. Expert DNA evidence itself, however, if properly formulated and explained by reference to the available evidence, is no more essentially complex or difficult than questions of fact that are routinely, and correctly, left to juries in criminal cases: *R v Lisoff* [1999] NSWCCA 364 at [55].
2. Certain strands of evidence are capable of amounting to corroboration, including:
 - (a) ...
 - (b) DNA or similar evidence which would establish a consistency between the relevant profile of the accused and that recovered from exhibits at the scene of the alleged events or from intimate samples recovered from the complainant, subject to an appropriate direction that, inter alia, does not involve the prosecutors' fallacy.

Integrity of the material is paramount and the evaluation of the material should be left to the jury. I refer you to **Freckleton and Selby Expert Evidence** LBC Loose Leaf Service, ch 14 "DNA Profiling Evidence; Legal Issues." This reference service provides cases and articles – in particular therein is the list of proposed set of procedures that is suggested by the English case of *R v Doheny and Adams* (1997) 1 Cr App R 369. These procedures could well be used in Australian jurisdictions.

Question 3(a) of your questionnaire raises consideration of the DNA Review Panel in NSW. Information about it may be obtained from the Department of Attorney General and Justice.

Yours faithfully


N R Cowdery AM QC
Director of Public Prosecutions