

# Summary

## From verdict to DNA profile

### A process evaluation of the DNA Sampling of Convicted persons Act

The DNA Sampling of Convicted persons Act [*Wet DNA-onderzoek bij veroordeelden, Wet DNA-V*] entered into force on 1 February 2005. Since that date, samples of cellular material have been taken from the vast majority of individuals convicted of a violent or sexual offence. This cellular material is then used to establish a DNA profile, which is saved in the database and compared with DNA profiles already present in the system, as well as those that are subsequently added. The aim of this legislation is to contribute to *'the prevention, detection, prosecution and trial of offences in which the perpetrator has left behind traces of cellular material'*.

The Act has important consequences for various organisations within the criminal law chain, such as the Public Prosecution Service [*Openbaar Ministerie, OM*], the police, the National Agency of Correctional Institutions [*Dienst Justitiële Inrichtingen, DJI*] and the Netherlands Forensic Institute [*Nederlands Forensisch Instituut, NFI*]. As the implementation of legislation places great demands on these *chain partners* and in view of the fact that it is necessary for each part of the chain to function effectively in order to ultimately achieve the intended goals, it is important to identify the ways in which the relevant organisations implement the Act and what results they have achieved to date in this regard. The Research and Documentation Centre [*Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC*] has therefore carried out a *process evaluation* in order to gain an insight into this issue. The *main issue* that the study attempted to address was as follows:

*how is the DNA-V Act being implemented and what results have been achieved to date by the organisations involved in its implementation?*

The main issue has been broken down into research questions focusing on: the way in which the various organisations have prepared for the new legislation; the actual implementation of the Act; as well as the results that the organisations have achieved. The results or *output* are taken to mean the direct services that the various implementing organisations are required to provide, such as the DNA samples taken from convicted persons or the inclusion of DNA profiles in the database and the resulting *matches*. The desired effects or *outcome* of the Act, namely a reduction in recidivism and an increase in the number of arrests, summonses and convictions, have not been addressed in this study. These issues will be dealt with in an *effect evaluation* to be carried out at a later date.

Four types of data were used in order to answer the research questions. Firstly, interviews were conducted, both *face-to-face* and over the telephone, with key individuals at the various chain partners. Secondly, legislation, regulations and

policy documents were studied. A third data source consisted of figures obtained from the various organisations. In the fourth case, legal databases were used in order to gain an overview of lodged objections tot DNA-profiling.

### **Legislation, regulations and implementation structure**

As almost the entire criminal law chain is involved in implementing the Act and due to the many cases of mutual dependency and the many communication flows that play an important role in this implementation, the implementation structure is fairly complex. Before proceeding to discuss the conclusions and recommendations, a description of the main features of this implementation structure is therefore provided below. The key elements of the legislation and regulations are also addressed.

At the moment, the DNA-V Act only applies to violent and sexual offences. The restriction to these offences is not a component of the Act itself, but is stipulated in an implementation decree. The original legislation relates to a much broader category of convicted persons, namely all offenders convicted of an offence that falls within the scope of Article 67, paragraph 1 of the Code of Criminal Procedure [*Wetboek van Strafvordering*, Sv]. This includes violent and sexual offences, however also other crimes such as offences against property (for example theft and breaking and entering). Due to the major procedural consequences associated with the Act, the decision was however taken to phase in the Act. The first stage is currently underway, which means that the Act is only implemented in respect of persons convicted of a violent or sexual offence. During the second stage, which is still to be introduced, the Act will also apply to (some) individuals convicted of other offences.

Where a person is convicted in the first instance (i.e. by a court) of a violent or sexual offence, the Public Prosecutor [*officier van justitie*, OvJ] who dealt with the case will issue an order for the collection of cell material. An order will only not be issued if a DNA sample from the convicted person has already been saved in the DNA database or if one of the two substantive grounds for exemption applies. These two substantive grounds for exemption relate respectively to the type of serious offence and characteristics or circumstances of the convicted person, on the basis of which it is *reasonably plausible that the determining and processing of the convicted person's DNA profile will not be of any importance in the prevention, detection, prosecution and trial of offences committed by the convicted person.*

On the one hand, the Act applies to all persons convicted of a pertinent offence after 1 February 2005 and upon whom a sentence (imprisonment) or measure (placement under a hospital order) for the restriction of liberty has been imposed, or who are required to serve a community service order, a suspended custodial sentence or undergo a placement in a correctional institution for juvenile offenders, psychiatric hospital or an institution for repeat offenders. The implementation of the Act in respect of convictions after 1 February 2005 is called the *regular procedure*. In the regular procedure, a DNA sample is taken in all instances with the exception of those cases in which the sanction is purely financial in nature (a pecuniary sanction).

On the other hand, the Act also applies to convicted persons who had already been handed down a non-suspendable custodial sentence or measure prior to 1 February 2005 and who were still in the process of serving or had yet to serve this sentence or measure on that date. This part of the implementation of the Act is referred to as the *catching up procedure*. Convicted persons who were handed down a sentence other than a custodial sentence prior to 1 February 2005, such as a community service order or one of the other above-mentioned sanctions, do not fall within the scope of the catching up procedure and are therefore not required to provide a DNA sample within the context of this Act. With regard to the organisation of the implementation process, the main difference between the regular procedure and the catching up procedure lies in the fact that implementation within the regular procedure takes place at the individual public prosecutor's offices, whereas the implementation of the catching up procedure is coordinated centrally by the Public Prosecution Service, namely by the National Officer for Forensic Research [*Landelijk Officier Forensische Research*, LOFR].

The order issued by the Public Prosecutor must state the location at which the sample must be taken. In the case of all convicted persons (therefore those from both the regular procedure and the catching up procedure) who were already detained at the time that the sentence was handed down and in the case of those convicted persons who fall within the scope of the catching up procedure who were yet to serve their custodial sentence at the time that the sentence was handed down, the sample is taken in the correctional institution in which they are or will be staying. Convicted persons under the regular procedure who are not in custody at the time that the order is issued, in other words those who have been handed down a community service order and convicted persons who have been handed down a suspended or postponed custodial sentence ('convicted persons awaiting imprisonment'), must report to a police station to undergo DNA sampling. The plan was originally to call up convicted persons awaiting imprisonment under the catching up procedure for the purpose of undergoing DNA sampling at a police station. As there is no overview available of this category of convicted persons who are classed under the catching up procedure, in practice, samples are not taken from these individuals until they report to a correctional institution to serve their sentence. Within the catching up procedure, all samples are therefore taken in correctional institutions, whereas in the regular procedure, samples are taken in both correctional institutions and at police stations.

The police organise so-called DNA surgeries, in principle two times per month, for the purpose of taking cellular material samples at police stations. In the order, the Public Prosecutor summons the individual in question to attend a DNA surgery at a specific time. For this reason, the surgeries are scheduled by the public prosecutor's office, naturally in consultation with the police. If the convicted person fails to comply with a summons to attend the DNA surgery, the police report this non-attendance to the Public Prosecution Service. The Public Prosecution Service subsequently ensures that the convicted person is *listed* in the index of wanted persons [*opsporingsregister*, OPS], which means that he or she is registered as a person who must be detained. If a person is merely listed in the OPS, which can be interpreted as a *passive* warrant of arrest, the individual will not be *actively* tracked down and thus it will only be possible

to arrest the convicted person if he or she comes into contact with the police or the Royal Military Constabulary [*Koninklijke Marechaussee*] in another way, such as during a spot check or via passport control at Schiphol. The Public Prosecution Service may however also decide that a convicted person should be actively tracked down. In this case, the Public Prosecutor will issue a warrant for his or her arrest.

In the case of both DNA sampling at a DNA surgery and in a correctional institution, the samples are taken by a doctor or nurse or, if the convicted person does not object, by a 'regular' employee of the police or the institution who has undergone the necessary training. In practice, this means that during DNA surgeries, samples are in principle taken by a police man/woman, unless the convicted person insists that this be carried out by a doctor or nurse. Samples in correctional institutions were, certainly during the first few months of the implementation of the Act, relatively frequently taken by medical personnel. However since then they have been taken by the so-called *prison intake staff*, the members of staff responsible within the institution for admitting new inmates. DNA samples are specifically taken by scraping a cotton bud across the inside of the cheek.

The buccal swab samples are then used by the NFI to compile a DNA profile, which is saved in the database. However, this 'profiling' only takes place once the Public Prosecutor has issued an explicit instruction for this to be carried out. The Public Prosecutor issues this instruction once the two week period within which the convicted party is able to lodge a notice of objection against inclusion in the database has expired. The convicted person is not entitled to raise an objection against the sampling of cellular material itself (incidentally, the lodging of an appeal against the verdict of the court doesn't have a suspensive effect on the sampling either). When a DNA profile is entered in the database, it is compared with all the DNA profiles already present in the system, as well as those that are subsequently added. The results of the comparison are submitted to the Public Prosecutor by the NFI. This report is only sent to the Public Prosecutor who issued the order for profiling to be carried out, thus the same Public Prosecutor who issued the order for a sample of cellular material to be taken.

## **Conclusions and recommendations**

The implementation of the Act constitutes a huge operation for the chain partners. Up to and including 30 June 2007 (the most recent available reference point), 47,297 orders had been issued with regard to the collection of samples of cellular material from convicted persons, samples had been taken from at least 40,325 convicted persons and 24,458 new DNA profiles of convicted persons had been added to the database (the NFI has a processing backlog). This means that the majority of DNA profiles within the NFI database relating to known individuals currently comprise those DNA profiles obtained as a result of the implementation of this Act.

If we take into account the scope of the operation, the Act is being implemented without any major problems in many areas. One aspect of the implementation

that has not gone particularly well is the reporting and following up of matches. This is an important, yet not the only, area in which improvements are both required and possible. In drawing conclusions from the present process evaluation we will focus on these aspects of implementation. In some cases, the conclusions are accompanied by recommendations.

### ***Preparations for the implementation of the Act***

#### *Preparations for the implementation of the Act: division of responsibilities*

An important observation with regard to the division of responsibilities is that the number of convicted persons to which the Act applies is much higher than was assumed during the preparations (and in the budget). The offences common assault (Article 300, paragraph 1 of the Penal Code [*Wetboek van Strafrecht*, Sr]) and arson (Article 157 of the Sr) were not originally included in the offences to which the DNA-V Act would apply (from the first stage). As the result of an amendment to the Code of Criminal Procedure and on the insistence of the Public Prosecution Service respectively, common assault and arson were finally brought under the scope of application of (the first stage of) the Act.

These offences were added at fairly short notice before the Act entered into force. In the 12 November 2004 version of the *Master Plan*, the plan drawn up by the *Project Group* for the purpose of introducing the Act, common assault and arson were not yet included under those offences that fall within the scope of the first stage (*Master Plan*, 2004, pp. 26 and 27). In the case of common assault, the fact that this offence became one to which the DNA-V Act applies was also *noted* at a late stage. The fact is, common assault became an offence in respect of which DNA sampling is required as a result of other legislation in the field of justice, namely legislation with regard to the placing of repeat offenders in specific institutions (Bulletin of Acts and Decrees, no. 351, 2004). This legislation brought common assault under the regime of Article 67, paragraph 1 of the Sv and therefore also within the scope of application of the DNA-V Act. The Act in relation to repeat offenders entered into force on 1 October 2004, however had been published in the Bulletin of Acts and Decrees as far back as 9 July 2004.

As common assault in particular occurs very frequently, the addition of this offence has resulted in a significant increase in the number of convicted persons that fall within the scope of the Act, namely, at a (rough) estimate, by about one third. As a result of the late stage at which the scope of application of the Act was extended and/or recognised and chiefly as a result of the fact that this extension was not factored into the budget in respect of implementation costs however, the chain organisations were not able to prepare for the larger number of convicted persons. We will return to this subject in the section entitled 'budget'.

In so far as the division of responsibilities was carried out by the chain partners themselves, in a number of areas this took place at a late stage. For instance, a final decision was not taken with regard to the following aspects until the last month(s) prior to the introduction of the Act: the extent to which convicted persons who failed to turn up to a DNA surgery should be actively tracked down (decision: in principle, no active tracing, instead of tracking down all of these convicted persons); the point in the criminal justice chain at which samples of cellular material should be taken (decision: in the correctional institutions and

at DNA surgeries, instead of immediately after the trial); and the role of the probation and after-care service (decision: solely to encourage those who have been handed down a community service order to attend a surgery, instead of also identifying these individuals to the Public Prosecution Service/the police). In addition, a final decision with regard to who would be responsible for taking the samples within correctional institutions was not taken by the National Agency of Correctional Institutions [*Dienst Justitiële Inrichtingen*, DJI] until the end of December 2004. In the first instance, the DJI operated on the basic assumption that this would be carried out by doctors and nurses. The doctors and nurses themselves were however not informed of this until a few months before the Act entered into force. At that time, they raised objections against this role, as it was asserted that DNA sampling would have a detrimental effect with regard to the bond of trust that exists between doctors/nurses and inmates. As a result of this opposition, the decision was taken at the time to arrange for the prison intake staff to take the samples. These employees, whose responsibilities within the correctional institutions include the admission of newly convicted persons, were, however, first required to undergo training, which did not take place in a timely manner. We will return to this issue later. The overdue decision of the DJI to arrange for the prison intake staff to collect the samples also resulted in a delay to the regulations that were being drawn up on the basis of the DNA-V Act. The DNA Sampling in Criminal Cases Decree [*Besluit DNA-onderzoek in strafzaken*] stipulates that DNA sampling shall be carried out by a doctor or nurse or, if the convicted person does not object, by another person who meets the requirements established by ministerial regulation (Government Gazette, no. 203, 2001). This ministerial regulation takes the form of the DNA Sampling in Criminal Cases Regulation [*Regeling DNA-onderzoek in strafzaken*], which covers such aspects as the training that must be followed by individuals other than doctors and nurses in order to carry out DNA sampling (Order in Council, 2001). Until 2006, however, this training requirement was only stipulated with regard to investigating officers who take samples of cellular material and no reference was made to sampling carried out by non-medical personnel in correctional institutions, as it was assumed in the first instance that doctors and nurses would be responsible for this. A training requirement in relation to employees of institutions was not specified in the DNA Sampling in Criminal Cases Regulation until January 2006.

#### *Preparations for the implementation of the Act: budget*

The budget in respect of implementation costs was established on the basis of estimates of the number of convicted persons. These estimates were drawn up in 2001, and were based on the number of convicted persons in 1999 and 2000. No adjustments were subsequently made to this budget. Partly as a result of the addition of arson and, in particular, common assault to the list of offences to which the Act applies, the number of convicted persons that fall within the scope of the Act turned out to be greater than previously anticipated. Despite expectations that, during the first two years of its implementation, the Act would affect 16,500 and 8,000 convicted persons respectively, in reality these numbers rose to almost 19,600 and 20,300. As the funding with regard to implementation was also based on these estimates, the NFI has experienced a major capacity shortage and a backlog in relation to the processing of samples taken. On 30 June 2007, the backlog within this institution amounted to (at most) of more

than 15,000 samples. It is likely that the expansion in the capacity of the NFI that took place in 2007 and will continue to take place during 2008 will help to clear this backlog. The extent to which the backlog is cleared in full partly depends on the number of 'additional' convicted persons who will be brought within the scope of the Act as a result of the possible introduction of the second phase. It is important that, to a greater extent than was the case during preparations for the first stage of implementation, all factors that may affect the scope of the category of convicted persons affected by the Act, including, for example, legislation in other (judicial) areas (e.g. amendments to the Code of Criminal Procedure), are taken into account and, where necessary, adjustments to estimates and budgets are timely made.

#### *Preparations for the implementation of the Act: automation*

The fact that the introduction of a number of automation and information systems did not take place or suffered a delay caused a major bottleneck in the implementation of the DNA-V Act. Firstly, for example, the *digital DNA office*, which it was assumed in the Explanatory Memorandum would become operational in 2003, was still not in operation at the end of 2007. This system is to be used by the Public Prosecution Service, the police, the DJI and the NFI for the purpose of streamlining all data traffic in relation to DNA sampling. Secondly, there was also a significant delay to the introduction of a new system within the Public Prosecution Service, the Integrated Process System [*Geïntegreerd Proces Systeem*, GPS]. In the Explanatory Memorandum, it was envisaged that the GPS would be introduced by the end of 2002, however as yet (end of 2007) it is still not operational. As a result of the anticipated introduction of the GPS, the Public Prosecution Service took the decision at that time not to adapt the existing system, the Public Prosecution Service Communication System – Public Prosecutor's Office Administration System [*Communicatiesysteem Openbaar Ministerie – Parket Administratie Systeem*, Compas], so that it would become useable for the purpose of supporting the Public Prosecution Service's tasks in relation to DNA sampling. An 'emergency system' was introduced at that time in order to carry out these tasks, namely the DNA Research Assignment Register [*Registratie OnderzoeksOpdrachten DNA*, ROOD]. The disadvantage of this is that, as a result of the existence of two systems (Compas and ROOD), data must now be entered twice, as well as the fact that ROOD does not support various elements of the working process involved in DNA sampling, such as the process of informing the NFI with regard to changes in the status of stored DNA profiles taken from traces and individuals and, until recently, the reporting of matches.

A third finding with regard to automation and information systems relates to the index of wanted persons [*Opsporingsregister*, OPS]. The OPS is a list of individuals who must be detained. Convicted persons who have failed to turn up to a DNA surgery are also included in the OPS. The registration of these convicted persons did not commence, however, until January 2006. Before then, it was not possible to passively track down the convicted persons in question, i.e. to trace these individuals by means of consulting the OPS, for example during a spot check or at passport control at Schiphol.

The lack of a multi-organisation, automated information system (the *digital DNA office*) for the purpose of controlling the flow of information between the

chain partners from orders up to and including matches and the lack of a system within the Public Prosecution Service that can be used for all tasks in relation to DNA sampling, leads to inefficiency within the implementation process and also has a negative effect on the quality of implementation. In the first instance, the inefficiency is brought about by the fact that the implementation of the coordinating role of the Public Prosecution Service becomes more labour intensive. In the case of the DNA sampling of convicted persons, this directing, coordinating role of the Public Prosecution Service means, amongst other things, that the Public Prosecutor [*Officier van Justitie, OvJ*] is responsible for: issuing the orders; scheduling the surgeries; including in the OPS, and issuing arrest warrants in respect of convicted persons who fail to attend a DNA surgery; ensuring that matches are reported to the appropriate Public Prosecutor's Office, following which the Public Prosecutor presiding over the case must reach a decision with regard to follow-up actions; as well as informing the NFI with regard to the outcome of criminal investigations, criminal proceedings and objections raised. These actions are currently largely being carried out by means of written forms, which is time-consuming. A second cause of this inefficiency relates to the delivery of samples to, and the processing of such samples by, the NFI. The systems for the delivery and processing of samples are currently also chiefly based on 'paper'.

In addition to the fact that the implementation process is less efficient as a result of the absence of an automated information system, this has also placed pressure on the quality of (some of) the aforementioned activities. Firstly, this has made it more difficult to adequately pick up on and follow up matches, which means that there is a risk that matches will not be reported to the appropriate body and will fall off the radar (this has indeed occurred in some instances). Secondly, there is a greater risk that the Public Prosecution Service will fail to observe its obligation to provide information to the NFI at various times. As a result of this, the database contains DNA profiles that do not belong there. Thirdly, there is a greater risk of errors being made in relation to the delivery of samples, which occurs on a fairly regular basis as a result of the form that must be used on delivery of samples; in a random check performed by the NFI in 2006, in the case of 24% of the samples received the form had been used incorrectly or not at all. A fourth negative consequence in terms of the quality of the implementation process is more indirect and consists of the fact that it is more difficult to generate information *on* the implementation, which means that there are fewer opportunities to manage the implementation process.

At this time (end of 2007), it is unclear whether and when a multi-organisation, automated system will be realised. However, the aforementioned disturbances to the implementation process and also the potential entry into force of a second stage of the DNA-V Act emphasise the importance of the speedy introduction of this type of system. After all, particular in the case of a greater number of convicted persons, however naturally also aside from this, it is important that implementation takes place in an efficient and appropriate manner.

*(other) Preparations by individual chain partners and start of the implementation*  
In December 2004, the Public Prosecution Service published the DNA Sampling of Convicted Persons Briefing [*Instructie DNA-onderzoek bij veroordeelden*] (Board of the Procurators General, 2004). This document outlines the steps that

must be taken with regard to the implementation of the Act, from the issuing of the order up to and including the follow-up action subsequent to the reporting of a match by the NFI. The procedure to be followed in the event that a match is reported in the case of the DNA sampling of *convicted persons* differs to the working method used in the case of *suspects*. We will provide an example in order to demonstrate this. Imagine that a Public Prosecutor sends a sample of cellular material taken from an individual involved in case A to the NFI with a request that a DNA profile be established for this person and included in and compared against the DNA database. Now imagine that this person's DNA profile appears to match the DNA profile taken from an unsolved crime, case B, which falls under the jurisdiction of another Public Prosecutor. In this case, if the person in question is a *suspect*, the Public Prosecutor dealing with case A, the Public Prosecutor dealing with case B and also the investigation teams handling cases A and B will be notified by the NFI, whereas if the person in question is a *convicted person*, only the Public Prosecutor dealing with case A will receive notification of the match, whereupon Public Prosecutor A must inform Public Prosecutor B (or the Chief Public Prosecutor [*hoofdofficier*, HovJ] from his or her Public Prosecutor's Office) with regard to the match in his or her case. As, in the aforementioned example, only Public Prosecutor B is able to commence any investigational activities as a result of the match and, if the person in question is a *convicted person*, is dependent upon Public Prosecutor A to inform him or her of the match, it is very important for the latter to report the match. As mentioned previously, this does not apply in the case of the DNA sampling of *suspects* as the NFI sends a report of a match to all relevant parties when the match refers to a suspect. Whether or not matches are actually forwarded therefore depends to a large degree on the extent to which the employees of the Public Prosecution Service involved in the implementation of the Act are aware of this item in the DNA Sampling of Convicted Persons Briefing, and are aware that the procedure to be followed in the event of matches differs, if the person in question is a *convicted person*, from the procedure that they are accustomed to following in the case of *suspects*. A proportion of the employees were not, however, sufficiently familiar with the briefing, and were not aware of the difference in the procedures and, partly as a result of this, a proportion of the matches were not being reported to the correct Public Prosecutor, the correct Public Prosecutor's Office, or to the investigation team. In this regard, we also wish to note that although the procedure that the Public Prosecutor's Offices are required to follow once a match has been reported is described in the DNA Sampling of Convicted Persons Briefing, the briefing does not explicitly state that this procedure differs from the one that the Public Prosecutor's Offices are accustomed to in relation to *suspects*. The procedure to be followed in the event of matches has also been, prior to the introduction of the DNA-V Act, a subject of attention within the *Project Group*, which includes representatives from all the chain partners. However, it remains to be seen whether, at policy level, all those involved were aware of (the consequences of) the fact that this procedure differs from the standard practice when reporting matches in relation to *suspects*. As the efficient picking up of matches is vital to the proper implementation of the Act, a greater focus should have been placed on the decision-making process in this area and the dissemination of knowledge to the Public Prosecutor's Offices. We will come back to this topic later.

A further observation in relation to the preparations is that the lists of convicted persons who fall within the scope of the Act were not ready at a number of Public Prosecutor's Offices until after 1 February 2005. This meant that the issuing of orders did not commence at these Public Prosecutor's Offices until after 1 February 2005. However, this delayed start included all convicted persons, therefore also those who were convicted between 1 February 2005 and the time at which the first orders were issued.

The commencement of the implementation by the police of the Act was also subject to a delay in various regions. The reasons behind this were the above-mentioned delayed issuing of orders by the Public Prosecution Service, but also the fact that the police were occasionally late in releasing the required labour capacity and/or that the necessary agreements with the Public Prosecution Service were not established on time.

In addition, as stated above, the DJI did not reach the decision that the prison intake staff would be responsible for carrying out sampling in the correctional institutions until a very late stage. As these prison intake staff first needed to undergo training, doctors and nurses were, after all, asked to assist in the taking of samples during the first few months after 1 February 2005. Due to the resulting limited sampling capacity (a proportion of the medical personnel did not wish to lend their cooperation in the implementation of the Act), it was not possible to carry out sampling in a number of cases, particularly in the case of the catching up procedure, and a number of convicted persons therefore left the correctional institution without providing a sample of cellular material.

### ***Implementation of the Act***

#### *The issuing of orders*

Up to and including the first four/six months of 2007, a total of 47,297 orders had been issued with regard to the collection of samples of cellular material from convicted persons.<sup>1</sup> The grounds for exemption, on the basis of which an order need not be issued, are only used in a very limited number of cases, in so far as revealed by the study, which is in line with the intentions of the legislation with regard to these grounds for exemption. What is expressly not in line with the intentions of the legislation is that, in a proportion of cases, the Public Prosecution Service failed to consider whether or not a ground for exemption applied. A major cause of this is the fact that the DNA-V Act is often not implemented by the Public Prosecutors presiding over the case, but rather by a specialised member of staff who, in principle, is not familiar with the case file, such as the LOFR in the case of the catching up procedure and the forensic Public Prosecutor or an administrative member of staff in the case of the regular procedure. The fact that responsibility for implementation is passed on to specialists is understandable and, in some respects, probably also desirable. It is possible that this may improve efficiency, and as far as the picking up of matches is concerned there are, in principle, fewer risks with regard to implementation if this responsibility is placed in one central, specialised location, than if the task were to be left to the various Public Prosecutors presiding over individual cases.

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<sup>1</sup> With regard to the catching up procedure, figures are available on the first six months of 2007. The figures in respect of the regular procedure related to the first four months of that year.

However, if this means that the grounds for exemption are no longer subject to any kind of assessment, this would not be desirable. As it was the intention of the legislation that individual assessments would indeed take place, it is recommended that a working method be sought whereby this assessment is in fact carried out, but in which the advantages of central and specialised implementation also remain intact in so far as possible.

### *Samples*

In the case of the catching up procedure, it was not possible to implement a proportion of the orders. This was true of 565, or 9%, of the 6,213 orders issued up to and including 30 June 2007 within the context of the catching up procedure. The convicted persons in question had already been released before it was possible to serve or implement the order. One of the reasons for this was that, as previously stated, sampling capacity within the correctional institutions was insufficient during the first few months.

One specific focus for attention is the sampling of cellular material in respect of convicted persons in institutions run by private bodies. This sampling allegedly did not take place in a number of cases. This information was not obtained until this report was reaching the stage of completion, and it was therefore not possible to produce a detailed account of this information. Within this category, failure to collect samples occurred in the context of both the catching up procedure and the regular procedure.

Furthermore, it would appear that physical coercion was employed in no or hardly any cases of sampling in correctional institutions. On occasion however, convicted persons who have been detained are reluctant at first and do not cooperate until after (being threatened with) solitary confinement.

In the case of convicted persons who have been released, sampling is carried out at the DNA surgeries organised by the police. Attendance at these surgeries is approximately 60%. This is significantly higher than was assumed during preparations for the implementation of the Act (15%). The Public Prosecution Service and the police do not have a centralised policy in respect of the active tracing, in other words the active 'picking up', of convicted persons who have failed to turn up at a surgery. The active tracing of these convicted persons therefore depends on the priority granted to this, particularly by the regional police.

### *Delivery to and processing by the NFI*

As the *digital DNA office* was not operational, the Public Prosecution Service and the police developed the 3-in-1 form in order to support the data traffic associated with sampling. A considerable number of these forms are being used incorrectly, which has led to inefficiency, particularly within the context of the vigorously standardised working process of the NFI front desk. This report has already referred to the importance of the introduction of an automated system that can be used by the chain organisations for the purpose of data traffic.

As cell material samples are being taken from a greater number of convicted persons than originally assumed in the budget and in assessing the capacity of the NFI, the NFI now has a major backlog of samples to be processed. As stated,

this backlog amounted to (at most) 15,564 samples on 30 June 2007. The NFI appears to be the only organisation that is experiencing problems with regard to capacity as a result of the excess in the number of convicted persons who fall within the scope of the Act. As far as we know, the Public Prosecution Service, the police and the DJI have not experienced any problems in relation to capacity. The explanation of this lies in the fact that, comparatively speaking, in other words when compared to the full range of duties, the implementation of the DNA-V Act forms a much larger task for the NFI than for the other chain partners. A large proportion of all tasks carried out by the NFI in the field of DNA analysis is performed within the context of this Act.

### *Objections raised*

Around 2% of the convicted persons in respect of whom an order for the collection of cellular material is issued submit a notice of objection, which is a much lower percentage than anticipated (25% for the catching up procedure and 10% for the regular procedure). Of the notices of objection lodged, 21% have been declared founded to date. In so far as revealed by the existing databases, the (alleged) incompatibility of the storage of the DNA profiles of convicted minors with Articles from the International Convention on the Rights of the Child (CRC) appears to be one of the main reasons for submitting an objection and/or for declaring such objections founded. In the case of one of the objections raised by convicted minors, the Procurator General will demand cassation in the interest of the law.

In addition, it may be noted that in a number of apparently similar cases, courts have issued different judgments in respect of notices of objection submitted. For instance, judgments handed down by courts with regard to notices of objection submitted have been found to contain contradictory reasoning in relation to: the compatibility with the CRC of the storage of the DNA profiles of convicted minors in the database, the consequences that may be linked to information material compiled by the Ministry of Justice, and the application of the grounds for exemption.

### *The reporting and following up of matches*

Up to and including 30 June 2007, 1,109 of the 24,458 newly convicted persons whose DNA profiles were added to the database produced a match, relating, in total, to 1,623 cases. A percentage of these 1,623 matches, however, related to cases that had already been settled, and must therefore be regarded in that respect as an unusable match. The total percentage of unusable matches is not known, however, it is possible to give a percentage in relation to a shorter period of implementation. Research shows that 108 of the 710 matches (with DNA profiles of convicted persons) produced in total between 1 May 2005 and 1 May 2006 related to cases that had already been settled, which amounts to 15% (Ondracek, 2007).

As stated above, the DNA Sampling of Convicted Persons Briefing stipulates that, in contrast to the normal procedure with regard to suspects, matches are only sent to the Public Prosecutor who issued the order for the DNA profile of the convicted person to be added to the database. In the case of convicted persons, the NFI does not inform the Public Prosecutor presiding over the case

with which the match was produced or the police. The Public Prosecutor issuing the order must, according to the DNA Sampling of Convicted Persons Briefing, ensure that the match is forwarded to the Public Prosecutor under whose jurisdiction the case falls, who must subsequently reach a decision with regard to any investigational activities to be carried out, and must inform the police as well. A study into the 710 matches shows that these were not forwarded to the correct Public Prosecutor and/or the police in a significant number of cases, as a result of which the relevant Public Prosecutors and investigation teams are still unaware of the match in their case and these matches have not been subject to any follow-up action (Ondracek, 2007). The above-mentioned study lists the causes of this as the lack of sufficient knowledge of the DNA Sampling of Convicted Persons Briefing, as well as the absence of a system for the purpose of recording matches within the Public Prosecutor's Offices.

The aim of the Act, namely prevention, detection, prosecution and trial of offences, and therefore also the justification of the implementation costs and the invasion of privacy associated with the Act, rests on the assumption that matches are dealt with effectively. It is therefore extremely important that policy and implementation practices in relation to the following up of matches are adequate. Furthermore, the potential introduction of a second stage of the implementation of the Act means that this is even more important. After all, during the second stage more DNA profiles will (at first in any event) be added to the database, and it is therefore likely that a greater number of matches will be produced. The likelihood of this is even greater, due to the fact that the convicted persons who will be brought under the scope of application of the Act during the second stage have committed the type of offence that makes up the database for the most part, in so far as traces left behind are concerned: namely offences against property.

A number of changes have recently been implemented within the Public Prosecution Service which should improve the process with regard to the passing on of matches. From now on, for example, the NFI will send all matches to one central Public Prosecutor within a Public Prosecutor's Office, and the Public Prosecutor's Offices are now required to regularly provide information on the number of matches received and any new judgments handed down on the basis of matches. This will provide the National Office of the Public Prosecution Service [*Parket-Generaal*] with an overview of matches as well as enabling this authority to take appropriate action, and above all will also force the Public Prosecutor's Offices themselves to register the matches and to become more aware of the procedure to be followed when a match is produced. As stated above, there is currently (end of 2007) no automated system within the Public Prosecution Service that can be used for all activities associated with DNA analysis. With regard to the registration and following up of matches, the ROOD system was adapted as of mid October 2007 so that it can also be used for these activities.

In addition to the (continuing) implementation of the measures introduced by the National Office of the Public Prosecution Service, we recommend that, in their preparations for the second stage of implementation of the Act, the chain partners/the *Project group* pay ample attention to the subject of matches. By this we mean the effective following up of matches, as well as all policy-related and organisational factors that are important in this regard, but also the capacity that may be required as a result of a greater number of matches within the

context of the police and the Public Prosecution Service. Not enough attention was paid to these factors during the implementation of the first stage, and the matches, certainly with hindsight, are too often regarded, literally and figuratively, as the final element of the Act, whilst the effective processing of matches forms the basis for the legitimacy and the potential achievement of the aims of the Act.

With regard to the achievement of aims, we also wish to note that even if all matches were to reach the correct destination, a number of these matches would probably not lead to any investigation activities. For example, in the case of isolated break-ins or where an individual has recently been convicted of an offence that is (much) more serious than the offence in the case with which the match was produced, it may be considered inadvisable to take any action.

#### *Management of the DNA database: data traffic between the Public Prosecution Service and the NFI*

Part of the directing, coordinating role of the Public Prosecution Service in DNA sampling consists of notifying the NFI with regard to facts that are important for the purpose of managing the database, such as changes in the status of a case or individual whose DNA profile is stored in the database. It appears that this obligation to provide information is (still) not being observed in all cases, which has led to problems such as the inclusion in the database of DNA profiles that do not belong there. This problem is not specific to the DNA sampling of convicted persons, but rather applies to DNA sampling in general, therefore also, and in particular, to the DNA testing of traces as well as in respect of suspects. From the point of view of legality and the social acceptability of forensic DNA analysis, this obligation to provide information must be adhered to more closely. It has already been noted that the absence of an automated system within the Public Prosecution Service that indicates, for example, when a DNA profile must be destroyed, constitutes an obstructive factor to the due observance of the obligation to provide information. Furthermore, it is possible that sufficient attention is not being paid to the obligation to provide information at all of the Public Prosecutor's Offices. An indication of this is the fact that, even when having received notification of a match in a case that has already been settled, from which it is possible to deduce that a trace has mistakenly not yet been removed from the database, the Public Prosecutor's Offices often neglect to instruct the NFI to remove the trace in question.

#### *An overview with regard to implementation*

Overviews in figures with regard to implementation are limited. This is true at a central level outside of the chain partners, however it is also true of the Public Prosecution Service, the police and the DJI at a central level within the individual organisations. Although the provision of information on, and supervision of, the implementation of policy do not represent an end in themselves, sufficient information must be available with regard to the principle points so that it is possible to verify whether implementation is being carried out in line with expectations or whether unexpected developments are perhaps taking place. In order to guarantee this type of insight without forcing the implementing departments within the organisations to collect unnecessary data, a limited number of indicators must be drawn up, preferably in advance. This has already been carried out to a large extent by a number of the chain organisations. However,

it is necessary for information to be provided on a more regular basis than is currently the case.

Aside from numerical data, there is not, in all cases, a great deal of insight into the decentralised implementation of policy that has been developed centrally. For instance, it was to a large extent not known whether the DNA Sampling of Convicted Persons Briefing was being implemented correctly within the Public Prosecution Service. Certainly, in instances where central guidelines prescribe activities or actions that involve a new, different way of working in terms of implementation practices, and particularly when these actions are somewhat crucial, such as the procedure to be followed in the event of a match, it cannot be assumed that the mere existence of a guideline constitutes a guarantee that such guidelines will be implemented correctly. Incidentally, the study into the forwarding and picking up of matches, which revealed that the briefing was not being duly observed, was partly carried out on the initiative of the Public Prosecution Service: evidence that the Public Prosecution Service has at some stage made arrangements for the provision of feedback on implementation. In order to create a structure for this feedback, the Public Prosecution Service has also asked the Public Prosecutor's Offices to provide information with regard to matches on a regular basis. Furthermore, a specific department has recently been designated within the Public Prosecution Service that will focus on the implementation of policy. It is important that attention is not only paid in this regard to *describing* procedures, but also to the actual *implementation* of these.

### **Final remarks**

This report gives an account of a process evaluation of the DNA-V Act. As is usually the case in process evaluations, the study did not focus on the effects of the Act. An insight has however been gained into practical implementation. This has clearly revealed that the implementation of the Act is an extensive and complex operation. Moreover, even though a process evaluation does not address the issue as to whether the aims of a law have been achieved, by analysing the practical implementation of this Act, it has been possible to identify factors that influence the extent to which, or circumstances under which, these aims can or cannot be achieved. The main findings of the study in relation to the practical implementation are summarised in the points below.

The lack of an adequate, automated information system, tailored to DNA analysis, both at a multi-organisational level and within the Public Prosecution Service, has a negative effect on the efficiency and quality of the implementation process.

The grounds for exemption provided for in the Act are only used in a very limited number of cases. This is in line with expectations formulated in this regard in the legislative history. Contrary to the intentions of the legislation, an individual assessment as to whether or not a ground for exemption exists does not take place in a number of cases. The background to this lies in the fact that, in many Public Prosecutor's Offices, responsibility for the issuing of orders with regard to the collection of samples of cellular material does not rest with the Public Prosecutor presiding over the case, but with specialist members of staff who are not (always) familiar with the individual cases.

In the case of the catching up procedure, a proportion of the orders were not implemented, as the convicted persons in question had already been released before it was possible to collect a DNA sample.

It appears that physical coercion is only employed in the collection of DNA samples in extremely rare cases.

Attendance at the DNA surgeries is approximately 60%.

Of those convicted persons in respect of whom an order is issued, 2% submit a notice of objection against the processing of their cellular material. Of these objections, 21% are declared founded.

Courts occasionally issue different judgments in respect of notices of objection submitted in apparently similar cases.

The NFI is experiencing a major backlog with regard to the processing of samples collected. One of the reasons for this is that, on the introduction of the first stage of the Act, a greater number of offences were brought under the scope of application of the Act than was assumed at the time of establishing the budget in respect of implementation costs.

Up to and including the first six months of 2007, the addition of the DNA profiles of 24,458 convicted persons to the database produced 1,623 matches. A proportion of these, however, related to cases that had already been settled.

A number of matches were not reported to the correct Public Prosecutor, the correct Public Prosecutor's Office or the investigation team. One of the reasons for this is that some of the employees of the Public Prosecution Service were not aware of the procedure followed by the NFI in the event that the DNA profile of a convicted person produces a match.

The Public Prosecution Service does not always observe its obligation to provide information to the NFI, which has led to problems such as the inclusion in the database of DNA profiles that do not belong there.