



New South Wales

Crimes (Forensic Procedures) Amendment Act 2009 No 111

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Crimes (Forensic Procedures) Amendment Act 2009 No 111

Act No 111, 2009

An Act to amend the *Crimes (Forensic Procedures) Act 2000* to make further provision with respect to the carrying out of forensic procedures and the use of forensic material and DNA profiles; and for other purposes. [Assented to 14 December 2009]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes (Forensic Procedures) Amendment Act 2009*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of State Records Regulation 2005

Schedule 2 Provisions excepted from operation of section 21

Insert “sections 81D (2) (Withdrawal of consent) and 81M (3) (Use and retention of forensic material taken from child under 10 years of age),” after “*Crimes (Forensic Procedures) Act 2000*,” under the heading “**Provisions requiring destruction of records**”.

Schedule 1 Amendment of Crimes (Forensic Procedures) Act 2000 No 59

[1] Section 3 Interpretation

Omit the note from the definition of *child* in section 3 (1).

[2] Section 3 (1), definition of “order”

Omit the definition.

[3] Section 3 (5)

Omit “any such DNA profile”.

Insert instead “any DNA profile derived from that material”.

[4] Part 6 Carrying out forensic procedures on suspects

Omit the note at the beginning of the Part. Insert instead:

Note. Some provisions contained in this Part also apply to the carrying out of forensic procedures on serious indictable offenders, volunteers and persons under 10 years of age. See sections 65, 76 (4) and 81A (4).

[5] Section 76 Carrying out of forensic procedures on volunteers

Insert “, a person under 10 years of age” after “a suspect” in section 76 (1).

[6] Section 77 Informed consent of volunteer or parent or guardian of volunteer

Insert “, including evidence that may be used against the volunteer” after “court of law” in section 77 (1) (c).

[7] Section 81 Retention of forensic material by order of Magistrate after withdrawal of consent

Omit “A Magistrate may order that forensic material taken or information obtained from carrying out a forensic procedure on a volunteer who withdraws consent to the retention of the material” from section 81 (2).

Insert instead “If a volunteer, or the parent or guardian of a volunteer, expressly withdraws consent to the retention of forensic material taken from the volunteer or of information obtained from the analysis of that material, a Magistrate may order that such forensic material or information”.

[8] Section 81 (3)

Omit “carrying out the procedure”.

Insert instead “the analysis of that material”.

[9] Part 8A

Insert after section 81:

Part 8A Carrying out of forensic procedures on children under 10 years of age

81A Carrying out of forensic procedure on child under 10 years of age prohibited except in limited circumstances

- (1) In this Part, *child* means a person under 10 years of age.
- (2) A person is authorised to carry out a forensic procedure on a child in accordance with this Part and not otherwise.
- (3) This Part authorises the carrying out of a forensic procedure on a child only in the following circumstances:
 - (a) if a parent or guardian of the child gives informed consent to the carrying out of the forensic procedure under section 81C,
 - (b) if the forensic procedure is carried out on the child pursuant to a Magistrate's order under section 81F.
- (4) Sections 44, 48, 49, 52 and 56 (1) apply to the carrying out of a forensic procedure authorised by this Part as if the references to a suspect in those sections were references to a child.

81B References to parent or guardian of child under 10 years of age

- (1) Despite any provision of this Part, if a parent or guardian of a child is a suspect in relation to the offence under investigation in relation to which a forensic procedure is proposed to be carried out on the child, a reference to the parent or guardian of the child is to be read as a reference to:
 - (a) a parent or guardian of the child who is not a suspect in relation to the offence under investigation, or
 - (b) if such a parent or guardian is not available—the closest available relative of the child who is not a suspect in relation to the offence under investigation.
- (2) In this Part:

closest available relative of a child means one of the following persons who is at least 18 years of age and is available at the relevant time:

 - (a) a brother or sister of the child,
 - (b) a grandparent of the child,

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- (c) an uncle or aunt of the child.

81C Carrying out of forensic procedures on child under 10 years of age with informed consent of parent or guardian

- (1) This section applies to the carrying out of a forensic procedure on a child for the following purposes:
- (a) in relation to the investigation of an offence under Part 3 or Subdivision 2 of Division 1 of Part 4 of the *Crimes Act 1900* of which the child is a victim,
 - (b) to eliminate the child's forensic material from other forensic material found at a crime scene in relation to an offence.
- (2) A person is authorised to carry out a forensic procedure to which this section applies:
- (a) with the informed consent of the child's parent or guardian given in accordance with this section, or
 - (b) if the informed consent of the parent or guardian of the child cannot be obtained or is withdrawn as referred to in section 81D—by order of a Magistrate under section 81F (1) (a).
- (3) A parent or guardian of a child gives informed consent in accordance with this section if the parent or guardian consents in the presence of an independent person after a police officer informs the parent or guardian (personally or in writing) of the following matters:
- (a) the way in which the forensic procedure is to be carried out,
 - (b) the purpose for which the forensic procedure is required,
 - (c) the offence in relation to which the police officer wants the forensic procedure to be carried out,
 - (d) that the child is under no obligation to undergo the forensic procedure,
 - (e) that the forensic procedure will be carried out by an appropriately qualified police officer or person,
 - (f) that the parent or guardian may consult an Australian legal practitioner of the parent's or guardian's choice before deciding whether or not to consent to the forensic procedure,
 - (g) that the parent or guardian may at any time withdraw consent to the child undergoing the forensic procedure or

- to the retention of the forensic material taken or of information obtained from the analysis of that material,
- (h) if the police officer intends the information to be placed on the volunteers (limited purposes) index of the DNA database system:
- (i) the purpose for which the information is to be placed on that index and that the information may be used and matched with other indexes, but only for that purpose, and
 - (ii) that the information placed on the DNA database system will be removed as soon as is reasonably practicable after a period of 12 months, unless any proceedings for the prosecution of an offence to which the investigation relates have not yet concluded.
- (4) The consent of a parent or guardian to the carrying out of a forensic procedure under this section is not effective unless:
- (a) the consent is in writing and in a form containing the particulars prescribed by the regulations, and
 - (b) the consent is signed by the parent or guardian, and
 - (c) the signature is witnessed by an independent person, and
 - (d) the parent or guardian is given a copy of the consent as soon as practicable after it is signed and witnessed.
- (5) In this section, *independent person* means a person other than a police officer or other person involved in the investigation of an offence to which the forensic procedure relates.

81D Withdrawal of consent

- (1) If a parent or guardian of a child expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from the parent's or guardian's conduct) before or during the carrying out of the forensic procedure:
- (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused, and
 - (b) the forensic procedure is not to proceed except by order of a Magistrate under section 81F.
- (2) If, after the carrying out of a forensic procedure under this Part on a child, the parent or guardian of the child expressly withdraws consent to the retention of the forensic material taken or of

information obtained from the analysis of that material, the forensic material and any information obtained from analysis of the material is, subject to any order made under section 81N, to be destroyed as soon as practicable after the consent is withdrawn.

Note. Section 3 (5) explains the meaning of *destroy*.

- (3) A police officer may request, but cannot require, a parent or guardian of a child who withdraws consent to the carrying out of a forensic procedure under this Part to confirm the withdrawal of consent in writing.

81E Application for order

- (1) An authorised applicant may apply to a Magistrate for an order under section 81F.
- (2) An application must:
- (a) be made in writing, and
 - (b) specify the type of forensic procedure to be carried out, and
 - (c) specify the purpose for which the forensic procedure is to be carried out, and
 - (d) be supported by evidence on oath or by affidavit in relation to the matters which the Magistrate is to take into account, as referred to in section 81F (2), and
 - (e) specify whether or not the consent of the parent or guardian of the child has been sought and, if it has, whether that consent was withdrawn or could not be obtained.

81F Circumstances in which Magistrate may order carrying out of forensic procedure on child under 10 years of age

- (1) A Magistrate may order the carrying out of a forensic procedure on a child, but only for the following purposes:
- (a) to investigate an offence,
 - (b) to assist in locating or identifying a missing person,
 - (c) to assist in identifying a deceased person.
- (2) In determining whether to make an order under this section, the Magistrate is to take into account the following:
- (a) the age of the child,
 - (b) the best interests of the child,

- (c) so far as can be ascertained, whether the child understands what will be involved in carrying out the forensic procedure and any wishes of the child with respect to whether the forensic procedure should be carried out,
 - (d) any wishes expressed by the parent or guardian of the child with respect to whether the forensic procedure should be carried out,
 - (e) any submissions or evidence presented to the Magistrate by an Australian legal practitioner on behalf of the child,
 - (f) the type of forensic procedure that is proposed to be carried out,
 - (g) the purpose for which the forensic procedure is required,
 - (h) if the forensic procedure is proposed to be carried out for the purposes of the investigation of a particular offence—the seriousness of the circumstances surrounding the commission of the offence,
 - (i) any other matter that the Magistrate considers relevant.
- (3) An order under this section may require the forensic procedure to be carried out at a time or place specified in the order.

81G Persons who may carry out forensic procedures on children under 10 years of age

- (1) The table to section 50 applies to the carrying out of a forensic procedure under this Part as follows:
- (a) for each forensic procedure specified in the first column of the table, the persons who are authorised to carry out that procedure under this Part are specified in the second column of the table,
 - (b) for each forensic procedure, the third column of the table shows whether a parent or guardian of a child is entitled to request that a medical practitioner or dentist of the parent's or guardian's choice is present while the forensic procedure is carried out, as if a reference to a suspect in the heading to that column were a reference to the parent or guardian of the child.

Note. Section 81I makes detailed provision for the presence of a medical practitioner or dentist of the parent's or guardian's choice while a forensic procedure is carried out.

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- (2) A person is authorised to carry out a particular forensic procedure if he or she is an appropriately qualified police officer or person in relation to the procedure even if the person also satisfies another description specified in the table to section 50 that is not specified in relation to the particular forensic procedure.

Note. For example, a police officer who is an appropriately qualified police officer or person to take samples of blood may take such samples even though the table does not expressly list police officers as persons who may take samples of blood.

81H Presence of other people while forensic procedure is carried out on children under 10 years of age

- (1) A parent or guardian of a child, or an Australian legal practitioner representing a child, must, if reasonably practicable, be present while a forensic procedure is carried out on the child.
- (2) Where the presence of a police officer is reasonably necessary to ensure that a forensic procedure is carried out effectively and in accordance with this Part, the police officer is (if reasonably practicable) to be a person of the sex chosen by the child or, if the child is unable or does not wish to make such a choice, a person of the same sex as the child.
- (3) Subsection (2) does not apply to the following forensic procedures:
- (a) the taking of hand prints, finger prints, foot prints or toe prints,
 - (b) any non-intimate forensic procedure that may be carried out without requiring the child to remove any clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes, scarf or hat.

81I Medical practitioner or dentist of parent's or guardian's choice may be present for some forensic procedures

A medical practitioner or dentist chosen by a parent or guardian of a child pursuant to section 81G (1) (b) is to be present at the forensic procedure unless he or she:

- (a) is unable, or does not wish, to attend, or
- (b) cannot be contacted,

within a reasonable time or, if relevant, within the time in which the person responsible for the effective carrying out of the forensic procedure considers the forensic procedure should be carried out if it is to be effective in affording evidence of the relevant offence.

81J Recording of forensic procedure

- (1) The carrying out of a forensic procedure under this Part must be recorded by electronic means unless:
 - (a) a parent or guardian of the child objects to the recording, or
 - (b) the recording is not practicable.
- (2) Subsection (1) does not apply to:
 - (a) the taking of a hand print, finger print, foot print or toe print, or
 - (b) the taking of a photograph, other than of the child's private parts.
- (3) Before the forensic procedure is carried out, the parent or guardian of the child must be informed:
 - (a) of the reasons for recording the carrying out of the forensic procedure, including the protection that the recording provides for the child, and
 - (b) that the parent or guardian of the child may object to the recording.
- (4) If the carrying out of the forensic procedure is not to be recorded by electronic means, the forensic procedure must be carried out in the presence of an independent person.
- (5) Subsection (4) does not apply if the parent or guardian of the child expressly and voluntarily waives the child's right to have an independent person present, but such a person may nevertheless be present if the investigating police officer so directs.
- (6) In this section, *independent person* means a person other than a police officer or other person involved in the investigation of an offence to which the forensic procedure relates.

81K Photographs

Where a forensic procedure involves the taking of a photograph of a part of a child's body, the investigating police officer concerned must ensure that a copy of the photograph is made available to a parent or guardian of the child.

81L Material to be made available to parent or guardian of child under 10 years of age

- (1) If material from a sample taken from a child is analysed in relation to the investigation of an offence, the investigating police officer must ensure that, if a parent or guardian of the child so requests in writing:

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- (a) a copy of the child's DNA profile that has been derived from the sample, and
 - (b) a statement as to whether or not a match has been found, in relation to the investigation, between the child's DNA profile and any other DNA profile,
- are made available to the parent or guardian of the child.
- (2) The parent or guardian of a child is to be informed of his or her right to make such a request by the investigating police officer.
 - (3) The requirements of subsection (1) need not be complied with in a manner that would, or at a time when to do so would:
 - (a) prejudice the investigation of any offence, or
 - (b) be a source of embarrassment to a victim of any offence.

81M Use and retention of forensic material taken from child under 10 years of age

- (1) Any forensic material taken from a child pursuant to this Part must only be used for the purposes for which the carrying out of the forensic procedure was authorised.
- (2) Any DNA profile derived from forensic material taken from a child:
 - (a) may be placed on:
 - (i) the volunteers (limited purposes) index, or
 - (ii) the missing persons index, or
 - (iii) the unknown deceased persons index,but must not be placed on any other index, and
 - (b) if placed on an index of the DNA database system, may only be matched with a DNA profile on the same or another index of the DNA database system if the matching is for a purpose for which the DNA profile of the child was placed on the index of the DNA database system (despite section 93).
- (3) Any forensic material obtained from the carrying out of a forensic procedure must:
 - (a) in the case of forensic material obtained pursuant to section 81C or an order under section 81F (1) (a) or 81N (2)—be destroyed as soon as is reasonably practicable after a period of 12 months has elapsed since the forensic material was taken, unless any proceedings for the prosecution of an offence to which the investigation relates have not yet concluded, and

- (b) in the case of forensic material obtained pursuant to an order under section 81F (1) (b) or (c)—be destroyed within 12 months of being obtained.

Note. Section 3 (5) explains the meaning of *destroy*.

81N Retention of forensic material by order of a Magistrate after parent or guardian of child under 10 years of age withdraws consent

- (1) An authorised applicant may apply to a Magistrate for an order under subsection (2).
- (2) A Magistrate may order that forensic material taken or information obtained from carrying out a forensic procedure on a child whose parent or guardian withdraws consent to the retention of the material be retained if the Magistrate is satisfied that:
 - (a) during an investigation into the commission of a serious indictable offence material reasonably believed to be from the body of a person who committed the offence had been found:
 - (i) at the scene of the offence, or
 - (ii) on the victim of the offence or anything reasonably believed to have been worn or carried by the victim when the offence was committed, or
 - (iii) on the child or anything reasonably believed to have been worn or carried by the child at the scene of the offence or when the offence was committed, or
 - (iv) on an object or person reasonably believed to have been associated with the commission of the offence, and
 - (b) there are reasonable grounds to believe that information obtained from analysis of the forensic material taken from the child is likely to produce evidence of probative value in relation to the serious indictable offence being investigated, and
 - (c) the retention of the forensic material taken from the child is justified in all the circumstances.

[10] Section 87

Omit the section. Insert instead:

87 Destruction of forensic material taken from offender after conviction set aside or quashed

- (1) This section applies if, after a forensic procedure is carried out on a person who is:
- (a) a suspect who is subsequently convicted of an offence, or
 - (b) a serious indictable offender under Part 7, or
 - (c) an untested former offender under Part 7A, or
 - (d) an untested registrable person under Part 7B,

the conviction by virtue of which he or she is such a person (or, if there is more than one such conviction, each of them) is set aside or quashed.

- (2) If forensic material has been taken from a person to whom this section applies and:
- (a) no appeal is lodged against the setting aside or quashing of the conviction, or
 - (b) an appeal is lodged and the setting aside or quashing of the conviction is confirmed or the appeal is withdrawn, or
 - (c) there is no reasonable prospect of a retrial or rehearing in connection with the setting aside or quashing of the conviction,

the forensic material must be destroyed as soon as practicable unless an investigation into, or a proceeding against the person for, another offence is pending.

[11] Section 90 Definitions

Insert “and persons under 10 years of age” after “volunteers” in paragraph (b) of the definition of *missing persons index*.

[12] Section 90, definition of “volunteers (limited purposes) index”

Omit the definition. Insert instead:

volunteers (limited purposes) index means an index of DNA profiles derived from:

- (a) forensic material taken in accordance with Part 8 or under a corresponding law of a participating jurisdiction from volunteers who (or whose parents or guardians) have been

informed that information obtained will be used only for a purpose specified to them under section 77 (2) (b) or (c1), or

- (b) forensic material taken from a person under 10 years of age in accordance with Part 8A.

[13] Section 91 Supply of forensic material for DNA database system purposes

Omit “or a volunteer in accordance with Part 7, 7A, 7B or 8” from paragraph (c) of the definition of *permitted forensic material* in section 91 (3).

Insert instead “, volunteer or a person under 10 years of age in accordance with Part 7, 7A, 7B, 8 or 8A”.

[14] Section 92 Use of information on DNA database system

Insert “81M or” after “section” in section 92 (2) (a).

[15] Section 93A

Insert after section 93:

93A Use of DNA profile of child or incapable person

- (1) Despite any other provision of this Act, if a forensic procedure is carried out on a volunteer who is a child or incapable person and a DNA profile is obtained as a result of that forensic procedure, that DNA profile:
- (a) must not be placed on the volunteers (unlimited purposes) index of the DNA database system, and
 - (b) must, if placed on an index of the DNA database system, only be used for the purpose for which the DNA profile is placed on that index, and
 - (c) must not be matched with any DNA profile on the same or another index of the DNA database system for any other purpose, unless otherwise ordered by a Magistrate.
- (2) In determining whether to make an order under subsection (1) (c), the Magistrate is to take into account the following:
- (a) the age of the volunteer,
 - (b) the best interests of the volunteer,
 - (c) so far as can be ascertained, whether the volunteer understands what will be involved in the matching of his or her DNA profile on the DNA database system and any wishes of the volunteer with respect to whether that should be ordered,

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- (d) any wishes expressed by the parent or guardian of the volunteer with respect to the matching of the volunteer's DNA profile on the DNA database system,
 - (e) any submissions or evidence presented to the Magistrate by an Australian legal practitioner on behalf of the volunteer,
 - (f) the purpose for which the matching is required,
 - (g) any other matter that the Magistrate considers relevant.

[16] Sections 100 (1), 101 and 102

Omit "or volunteer" wherever occurring.

Insert instead ", volunteer or person under 10 years of age".

[17] Section 100 Obligation of investigating police officers relating to recordings

Omit "or volunteer" where firstly occurring in section 100 (2).

Insert instead ", volunteer or person under 10 years of age".

[18] Section 100 (2) (a)

Omit "suspect's, offender's or volunteer's legal representative".

Insert instead "legal representative of the suspect, offender, volunteer or person under 10 years of age".

[19] Section 101 Material required to be made available to suspect, offender, volunteer or person under 10 years of age

Omit "suspect's, offender's or volunteer's legal representative (if any)" from section 101 (1) (a).

Insert instead "legal representative (if any) of the suspect, offender, volunteer or person under 10 years of age".

[20] Section 101 (2) (b)

Omit "suspect's, offender's or volunteer's interview friend or legal representative".

Insert instead "interview friend or legal representative of the suspect, offender, volunteer or person under 10 years of age".

[21] Section 111 Act does not apply to persons under 10

Omit the section.

[22] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Crimes (Forensic Procedures) Amendment Act 2009

[23] Schedule 2, Part 6

Insert after Part 5:

**Part 6 Provisions consequent on enactment of
Crimes (Forensic Procedures) Amendment
Act 2009**

13 Application of Part 8A

Part 8A applies to a forensic procedure carried out after the commencement of that Part and so applies regardless of when the offence to which the forensic procedure relates was committed.

14 Existing convictions set aside or quashed

Section 87, as substituted by the *Crimes (Forensic Procedures) Amendment Act 2009*, extends to a conviction set aside or quashed before the commencement of that substitution.

[Agreement in principle speech made in Legislative Assembly on 15 May 2009
Second reading speech made in Legislative Council on 2 September 2009]

BY AUTHORITY