

[Act 2002 No 35]



New South Wales

Crimes (Forensic Procedures) Amendment Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Crimes (Forensic Procedures) Act 2000*:

- (a) to extend the class of investigating police officers who may make applications for orders for the carrying out of forensic procedures, and
 - (b) to make provision with respect to the presence of interview friends and legal representatives of suspects and serious indictable offenders, and
 - (c) to extend the circumstances in which a Magistrate may make a second order for the carrying out of a forensic procedure, and
 - (d) to clarify the effect of a person's consent on an interim order for the carrying out of a forensic procedure on that person, and
 - (e) to clarify that the conditions to be met before an interim order can be confirmed are the same as the conditions to be met before a final order can be made, and
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- (f) to clarify who may apply for an interim order, and
- (g) to remove the requirement to support an application for an interim order by evidence on oath or by affidavit in the case where an application is made by telephone or facsimile or any other way other than in person, and
- (h) to require that an application for an interim order be made in person unless it is not practicable to do so, and
- (i) to simplify the recording requirements for the making of interim orders, and
- (j) to make it an offence for a person to give information that the person knows to be false or misleading in an application for an interim or final order, and
- (k) to clarify the procedure when a suspect self-administers a buccal swab, and
- (l) to clarify that a suspect may object to any form of electronic recording of the carrying out of a forensic procedure, and
- (m) to clarify that powers to authorise the carrying out of a non-intimate forensic procedure on a serious indictable offender apply only if the relevant police officer is a senior police officer, and
- (n) to exclude from the operation of the provisions of the Act dealing with volunteers the carrying out of forensic procedures on victims of offences against the person and certain property offences, being victims who volunteer to undergo those procedures, and
- (o) to exclude from the operation of the provisions of the Act dealing with volunteers the finger printing or hand printing of people who volunteer to provide a finger print or hand print for elimination purposes in relation to property offences and to provide for destruction of those prints, and
- (p) to make provision regarding the missing persons index and, in particular, to provide that evidence arising from forensic material volunteered for the purposes of the missing persons index is inadmissible in proceedings against the person who volunteered it, and
- (q) to provide that forensic material taken from a serious indictable offender is to be destroyed following the quashing of the person's conviction, and
- (r) to provide that material is not to be destroyed until after the end of proceedings, including any appeal period or any re-trial following a hung jury or appeal, and
- (s) to provide that a telephone interpreter service may be used where an interpreter is required, and
- (t) to change the period in which the Ombudsman must monitor the operation of the Act.

This Bill also amends the *Police Service Act 1990* to authorise the Commissioner of Police to require an applicant for appointment as a police officer to provide a finger print or hand print before his or her application is accepted.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Crimes (Forensic Procedures) Act 2000* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendment to the *Police Service Act 1990* set out in Schedule 2.

Schedule 1 Amendment of Crimes (Forensic Procedures) Act 2000

Applications for orders

The *Crimes (Forensic Procedures) Act 2000* provides for authorised applicants to make applications for interim, final or second orders for the carrying out of forensic procedures (see sections 33, 26 and 27, respectively). The class of people who are authorised applicants for an order for the carrying out of a forensic procedure on a suspect include the investigating police officer in relation to an offence. At present, *investigating police officer* is defined to mean the police officer in charge of the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

Schedule 1 [2] extends the definition of *investigating police officer* to include any police officer involved in the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

Schedule 1 [1], [4], [8] and [21] make consequential amendments.

Informed consent to forensic procedures

Section 13 of the Act requires police to give certain information to a suspect personally or in writing. Section 9 (2) (b) provides that a suspect gives informed consent to a forensic procedure if he or she consents after a police officer has given a written statement of the matters referred to in section 13.

Schedule 1 [5] provides that a suspect gives informed consent to a forensic procedure if the suspect consents after a police officer informs the suspect about the forensic procedure in accordance with section 13 (1), that is, either personally or in writing.

Schedule 1 [6] makes a consequential amendment.

Interview friends

The Act provides for a person to act as an interview friend of a suspect or serious indictable offender for the purposes of various provisions of the Act, including when a police officer is asking a suspect who is an Aboriginal person or a Torres Strait Islander to consent to a forensic procedure.

Schedule 1 [7] provides that an interview friend may be excluded if he or she unreasonably interferes with or obstructs the police officer or the police officer reasonably believes that the interview friend may prejudice the investigation of an offence because he or she may be a co-offender of the suspect or may be involved in some other way, with the suspect, in the commission of the offence. If an interview friend is excluded, the suspect may nominate another person to act as his or her interview friend.

Schedule 1 [24] provides that if a suspect waives his or her right to have an interview friend present, a legal representative of the suspect may still be present.

Application and order for repeated forensic procedure

Section 27 of the Act provides for the making of an application to a Magistrate for an order authorising the carrying out for a second time of a forensic procedure on a suspect on whom the same type of forensic procedure has already been carried out by order of a Magistrate. An order can be made only if the forensic material obtained as a result of the carrying out of the first forensic procedure is insufficient for analysis or has been contaminated and if the carrying out of the forensic procedure for a second time is justified in all the circumstances.

Schedule 1 [9] extends the circumstances in which a Magistrate may make a second order for the carrying out of a forensic procedure to include any situation where the forensic material has been lost or is for any other reason not available for analysis and the carrying out of the forensic procedure for a second time is justified in all the circumstances.

Interim orders

Section 32 of the Act provides for the making of an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay. An interim order operates until a Magistrate, at a hearing, confirms the interim order or disallows the interim order.

Schedule 1 [10] makes it clear that the interim order will operate until either confirmed or disallowed even if the suspect consents to the carrying out of the forensic procedure after the interim order is obtained but before it is confirmed.

Schedule 1 [11] makes it clear that the matters to be considered by a Magistrate for the purpose of confirming an interim order are the same as the matters to be considered by a Magistrate before ordering forensic procedures by way of a final order.

Schedule 1 [12] puts it beyond doubt that only an authorised applicant, and no other person, may make an application for an interim order.

Schedule 1 [13] removes the requirement to support an application for an interim order by evidence on oath or by affidavit in the case where an application is made by telephone, facsimile or any other way other than in person. **Schedule 1 [15]** provides that if an application for an interim order is not made in person, the application must be supported by evidence on oath or by affidavit as soon as practicable after the making of the application and before the making of any final order.

Schedule 1 [14] provides that an application for an interim order must be made in person unless it is not practicable to make the application in person, in which case it must be made by facsimile transmission if facsimile transmission facilities are readily available or may be made by telephone, radio, telex, email or other means of communication if facsimile transmission facilities are not readily available.

Schedule 1 [16]–[20] remove some of the requirements for the keeping of records of applications for interim orders and records of interim orders in cases where the application is made in person or is reduced to writing. The amendments make special provision for the recording of applications and interim orders where the application is not made in person or reduced to writing.

False or misleading information in applications for orders

Schedule 1 [22] makes it an offence for a person to give information that the person knows to be false or misleading in a material particular in an application for an interim or final order to carry out a forensic procedure.

Self-administered buccal swabs

Section 44 (a) of the Act provides that a forensic procedure must not be carried out in the presence or view of a person who is of the opposite sex to the suspect, except as permitted by any other provision of the Act.

Schedule 1 [23] provides that a self-administered buccal swab is not subject to that requirement.

Electronic recording of forensic procedure

Section 57 (1) (a) of the Act provides that a suspect may object to the recording by electronic means of a forensic procedure being carried out. Recording is defined to include audio and video recording. However, under section 57 (2) (b), the suspect is only to be informed that he or she may object to a video recording.

Schedule 1 [25] clarifies that a suspect must be informed that he or she may object to any form of recording of the carrying out of a forensic procedure.

Schedule 1 [26] makes it clear that section 57 does not prevent any recording of a forensic procedure being made for the purpose of maintaining good order, discipline and security in a correctional centre or other place of detention.

Carrying out of non-intimate forensic procedures on serious indictable offenders

Part 7 of the Act provides for the carrying out of forensic procedures on serious indictable offenders. Section 70 (1) of the Act provides that a police officer may order the carrying out of a non-intimate forensic procedure on such an offender. Section 70 (2) of the Act provides that a senior police officer (that is, a police officer of or above the rank of sergeant) may authorise the taking of a sample of hair.

Schedule 1 [28] provides that only a senior police officer may order the carrying out of a non-intimate forensic procedure on a serious indictable offender. (Section 74 continues to provide for a court order for the carrying out of forensic procedures on serious indictable offenders.)

Schedule 1 [27], [29] and [30] make consequential amendments.

Carrying out of forensic procedures on certain volunteers

Part 8 of the Act includes provisions regarding the carrying out of a forensic procedure on a volunteer (or a child or incapable person who has been put forward as a volunteer).

Schedule 1 [31] and **[32]** exclude from the operation of Part 8 the carrying out of forensic procedures on victims of offences against the person, or victims of certain property offences, who volunteer to undergo forensic procedures or on people who volunteer to provide a finger print or hand print sample for elimination purposes in relation to property offences. **Schedule 1 [37]** provides for the destruction of the finger prints or hand prints as soon as practicable after they have been used to eliminate the person from inquiries in relation to the event.

Missing persons index

The DNA database system established under the Act includes the missing persons index, which is an index of DNA profiles derived from forensic material of persons who are missing and of volunteers who are relatives by blood of such persons. Section 93 of the Act provides that it is permissible to match a DNA profile on the missing persons index with a DNA profile on another index of the system. If, for example, a woman whose son is missing provides forensic material for the purposes of the missing persons index, her DNA profile may be matched with a DNA profile on the crime scene index, for instance from forensic material found on the body of an unrelated victim of an unsolved murder. Accordingly, the woman may be implicated in the murder because she voluntarily provided forensic material for the purpose of finding her missing son.

Schedule 1 [33] provides that a volunteer who provides a sample of forensic material for the missing persons index must be informed that material provided for the missing persons index is provided for the principal purpose of assisting in the identification of a missing person and that to achieve this the material may be matched against all indexes on the database.

Schedule 1 [34] provides that if there is a match to a DNA profile on another index on the database with a DNA profile provided for the purpose of being placed on the missing person index that information cannot be used in proceedings against the volunteer. A fresh forensic procedure would have to be carried out under the provisions of the Act dealing with suspects.

Schedule 1 [43] provides for disclosure to a volunteer who is a relative and whose DNA profile is placed on the missing persons index that the DNA profile of some other person on another index matched their own DNA profile or that of a missing blood relative on the missing persons index.

Schedule 1 [39] makes a consequential amendment.

Destruction of forensic material

Section 87 of the Act provides for the destruction of forensic material taken from a serious indictable offender in the event that the offender's conviction is quashed. However, the section applies only to offenders who were tested as a result of a court order.

Schedule 1 [35]–[37] provide for forensic material taken from a serious indictable offender to be destroyed following the quashing of the relevant conviction if the forensic procedure was ordered by a senior police officer or if the offender consented to undergo the forensic procedure for elimination purposes.

Section 89 of the Act provides that certain evidence relating to a forensic procedure found by a court to be inadmissible is to be destroyed as soon as practicable.

Schedule 1 [38] provides that material is not to be destroyed until after the end of proceedings (including any appeal period or any re-trial following a hung jury or appeal).

Telephone interpreters

Schedule 1 [43] provides for a telephone interpreter service to be used in certain circumstances where an interpreter is required.

Consequential and other amendments

Schedule 1 [3] inserts a definition of *nurse*.

Schedule 1 [40] and **[41]** provide for orders to be kept on more than one register and provide for the regulations to make provision regarding registration and cancellation of registration.

Schedule 1 [44] and **[45]** are consequential on the proposed amendment made by Schedule 2.

Schedule 1 [46] and **[47]** extend the period in which the Ombudsman must monitor the operation of the Act.

Schedule 1 [48] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [49] makes savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Police Service Act 1990

Schedule 2 authorises the Commissioner of Police to require an applicant for appointment as a police officer to provide a finger print or hand print before an application is accepted. Before a finger print or hand print is taken from an applicant, the applicant must be informed in writing that the print may be retained and may be used for the purpose of checking the applicant's criminal history. The Commissioner must destroy the prints of any person provided under the proposed section if the person is not appointed as a police officer. A person who stops being a police officer may request that his or her prints be destroyed.

Schedule 1 [44] and [45] exclude such finger printing and hand printing from the operation of the *Crimes (Forensic Procedures) Act 2000*.