

Crimes (Forensic Procedures) Act 2000 No 59

[2000-59]



New South Wales

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Notes—

- **See also**
[Crimes and Courts Legislation Amendment Bill 2013](#)

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Crimes (Forensic Procedures) Act 2000 No 59



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Crimes (Forensic Procedures) Act 2000 No 59



New South Wales

An Act to make provision with respect to the powers to carry out forensic procedures on certain persons and to make provision with respect to a DNA database system; to make a related amendment to the *Justices Act 1902* and consequential amendments to the *Crimes Act 1900*; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Crimes (Forensic Procedures) Act 2000*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Section 121 commences on the date of assent.

3 Interpretation

(1) **Definitions** In this Act:

Aboriginal legal aid organisation means an organisation that provides legal assistance to Aboriginal persons or Torres Strait Islanders, being an organisation prescribed by the regulations for the purposes of this definition.

adult means a person of or above 18 years of age.

appropriately qualified, in relation to carrying out a forensic procedure, means:

- (a) having suitable professional qualifications or experience to carry out the forensic procedure, or
- (b) qualified under the regulations to carry out the forensic procedure.

authorised applicant for an order for the carrying out of a forensic procedure on a suspect means:

- (a) the police officer in charge of a police station, or

- (b) a custody manager within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
- (c) an investigating police officer in relation to an offence, or
- (d) the Director of Public Prosecutions.

authorised officer has the same meaning as it has in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

child means a person who is at least 10 years of age but under 18 years of age.

correctional centre medical officer, in relation to a correctional centre or other place of detention, means any person appointed or acting as medical officer for the correctional centre or other place of detention.

corresponding law is defined in section 95.

crime scene index is defined in section 90.

dental prosthetist means a person registered under the Health Practitioner Regulation National Law:

- (a) to practise in the dental profession as a dental prosthetist (other than as a student), and
- (b) in the dental prosthetists division of that profession.

destroy is explained in subsection (5).

DNA database system is defined in section 90.

excluded volunteer is defined in section 76A.

exercise a function includes perform a duty.

forensic material means:

- (a) samples, or
 - (b) hand prints, finger prints, foot prints or toe prints, or
 - (c) photographs, or
 - (d) casts or impressions,
- taken from or of a person's body.

forensic procedure means:

- (a) an intimate forensic procedure, or

(b) a non-intimate forensic procedure,

(c) (Repealed)

but does not include:

(d) any intrusion into a person's body cavities except the mouth, or

(e) the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

Note—

Paragraph (e) makes it clear that the Act only applies to samples taken for forensic purposes and not to samples taken purely to establish the identity of a person.

function includes a power, authority or duty.

incapable person means an adult who:

(a) is incapable of understanding the general nature and effect of a forensic procedure, or

(b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

inform is explained in subsection (4).

informed consent in relation to:

(a) a suspect—is defined in section 9, and

(b) a serious indictable offender—is defined in section 67, and

(b1) an untested former offender—is defined in section 75F, and

(b2) an untested registrable person—is defined in section 75V, and

(c) a volunteer or parent or guardian of a volunteer—is defined in section 77.

interview friend is explained in section 4.

intimate forensic procedure means any of the following:

(a) an external examination of a person's private parts,

(b) the carrying out on a person of an other-administered buccal swab,

(c) the taking from a person of a sample of the person's blood,

(d) the taking from a person of a sample of the person's pubic hair,

- (e) the taking from a person of a sample of any matter, by swab or washing, from the person's private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from the person's private parts,
- (g) the taking from a person of a dental impression,
- (h) the taking of a photograph of the person's private parts,
- (i) the taking from a person of an impression or cast of a wound from the person's private parts.

investigating police officer means 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.

legal representative of a suspect means an Australian legal practitioner acting for the suspect.

missing persons index is defined in section 90.

non-intimate forensic procedure means any of the following:

- (a) an external examination of a part of a person's body, other than the person's private parts, that requires touching of the body or removal of clothing,
- (b) the carrying out on a person of a self-administered buccal swab,
- (c) the taking from a person of a sample of the person's hair, other than pubic hair,
- (d) the taking from a person of a sample (such as a nail clipping) of the person's nails or of matter from under the person's nails,
- (e) the taking from a person of a sample of any matter, by swab or washing, from any external part of the person's body, other than the person's private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from any external part of the person's body, other than the person's private parts,
- (g) the taking from a person of the person's hand print, finger print, foot print or toe print,
- (h) the taking of a photograph of a part of a person's body, other than the person's private parts,
- (i) the taking from a person of an impression or cast of a wound from a part of the person's body, other than the person's private parts,

- (j) the taking of a person's physical measurements (whether or not involving marking) for biomechanical analysis of an external part of the person's body, other than the person's private parts.

offender means:

- (a) a serious indictable offender, or
- (b) a prescribed offender.

offenders index is defined in section 90.

other-administered buccal swab means a buccal swab carried out by someone other than the person on whom it is carried out.

parent of a child means a person who has parental responsibility for the child.

parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.

participating jurisdiction is defined in section 95.

place of detention, in relation to a person the subject of a home detention order under the *Crimes (Sentencing Procedure) Act 1999*, means the place at which the person resides pursuant to the order.

police station includes:

- (a) a police station of a State or Territory, and
- (b) a building that is occupied by members of the NSW Police Force and that is nominated by the Commissioner of Police for the purposes of this paragraph, and
- (c) a building occupied by the Australian Federal Police.

prescribed offence means:

- (a) an indictable offence, or
- (b) any other offence under a law of the State prescribed by the regulations for the purposes of this paragraph.

prescribed offender means a person who is convicted of a prescribed offence.

private parts means a person's genital area, anal area or buttocks, and, in the case of a female or transgender person who identifies as a female, includes the person's breasts.

recognised transgender person means a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the

corresponding provisions of a law of another Australian jurisdiction.

recording includes audio recording and video recording.

responsible person, in relation to the DNA database system, means the person declared by the regulations to be the person responsible for the care, control and management of the system.

sample has a meaning affected by subsection (3).

self-administered buccal swab means a buccal swab carried out by the person on whom it is carried out.

senior police officer means a police officer of or above the rank of sergeant.

serious indictable offence means:

- (a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or
- (b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.

serious indictable offender means a person who has been convicted of a serious indictable offence.

suspect means the following:

- (a) a person whom a police officer suspects on reasonable grounds has committed an offence,
- (b) a person charged with an offence,
- (c) a person who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person.
- (d) (Repealed)

time out means:

- (a) the time (if any) that is reasonably required to convey a suspect from the place where the suspect presents himself or herself to an investigating police officer to the nearest premises where facilities for carrying out a forensic procedure in accordance with this Act are available to the investigating police officer,

- (b) any time that is reasonably spent waiting for an investigating police officer or appropriately qualified person who is to carry out the forensic procedure to arrive at the place where the procedure is to be carried out,
- (c) any time that is reasonably spent waiting for facilities or equipment that are needed to carry out the procedure to become available,
- (d) any time during which carrying out the procedure is suspended or delayed to allow the suspect, or someone else on the suspect's behalf, to communicate with an Australian legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person as provided by this Act,
- (e) any time during which carrying out the procedure is suspended or delayed to allow such an Australian legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person to arrive at the place where the procedure is to be carried out,
- (f) any time during which carrying out the procedure is suspended or delayed to allow the suspect to consult with an Australian legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person at the place where the procedure is to be carried out as provided by this Act,
- (g) any time during which carrying out the procedure is suspended or delayed to allow the suspect to receive medical attention,
- (h) any time during which carrying out the procedure is suspended or delayed to allow the suspect to recover from the effects of intoxication due to alcohol or another drug (or both),
- (i) any time during which carrying out the procedure is suspended or delayed to allow the suspect to rest or receive refreshments or to give the suspect access to toilet and other facilities,
- (j) any time during which carrying out the procedure is suspended or delayed at the request of the suspect,
- (k) any time that is reasonably spent waiting for a senior police officer or a Magistrate or other authorised officer to make an order as provided by this Act.

transgender person is defined in subsection (6).

under arrest is explained in subsection (2).

untested former offender is defined in section 75A.

untested registrable person is defined in section 75P.

volunteer is defined in section 76.

volunteers (limited purposes) index is defined in section 90.

volunteers (unlimited purposes) index is defined in section 90.

- (2) **Under arrest** For the purposes of this Act, a person is **under arrest** if he or she is a person to whom Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies.
- (3) **Taking samples** For the purposes of this Act, a **sample** taken from a person includes a sample taken from the person that consists of matter from another person's body.
- (4) **Informs** For the purposes of this Act, a person **informs** another person of a matter if the person informs the other person of the matter, through an interpreter if necessary, in a language (including sign language or braille) in which the other person is able to communicate with reasonable fluency.
- (5) **Destroy forensic material** For the purposes of this Act, a person who is required to destroy forensic material is required not only to destroy the material but also to ensure that any information that relates any DNA profile derived from that material to a person whose DNA it describes is removed from the DNA database system.
- (6) **Transgender persons** In this Act, a reference to a person being **transgender** or a **transgender person** is a reference to a person, whether or not the person is a recognised transgender person:
- (a) who identifies as a member of the opposite sex, by living, or seeking to live, as a member of the opposite sex, or
 - (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
 - (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,
- and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.
- (7) In this Act (other than subsection (6)), a reference:
- (a) to a member of the opposite sex of a person means, if the person is a transgender person, a member of the opposite sex to the sex with which the transgender person identifies, and
 - (b) to a member of the same sex as a person means, if the person is a transgender person, a member of the same sex as the sex with which the transgender person identifies.
- (8) Notes included in the text of this Act do not form part of this Act.

4 Interview friends

- (1) This section lists the people who may act as an **interview friend** of a suspect or serious indictable offender for the purposes of a provision of this Act referring to an interview friend. Different people may act as interview friends of a suspect or offender for the purposes of different provisions of this Act.
- (2) If the suspect or serious indictable offender is a child or an incapable person, the following people may act as **interview friends**:
 - (a) a parent or guardian, or other person, chosen by, or acceptable to, the suspect or offender,
 - (b) a legal representative of the suspect or offender,
 - (c) if the suspect or offender identifies as an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available—a representative of an Aboriginal legal aid organisation or a person whose name is on the relevant list maintained under section 116 (1) who is chosen by, or acceptable to, the suspect or offender,
 - (d) if none of the previously mentioned persons is available—a person who is not a police officer or in any way involved in the investigation of an offence in relation to which a forensic procedure is proposed to be carried out, or is carried out, on the suspect or offender.
- (3) Where the suspect or serious indictable offender identifies as an Aboriginal person or Torres Strait Islander, and is not covered by subsection (2), the following people may act as **interview friends**:
 - (a) a relative or other person chosen by the suspect or offender,
 - (b) an Australian legal practitioner acting for the suspect or offender,
 - (c) if none of the previously mentioned persons is available—a representative of an Aboriginal legal aid organisation, or a person whose name is included in the relevant list maintained under section 116 (1).
- (4) A suspect or serious indictable offender who has a legal representative may also have an interview friend who is not the suspect's or offender's legal representative.

Part 2 Authority and time limits for forensic procedures on suspects: summary of rules

5 How forensic procedures may be authorised in different circumstances

The following table shows the circumstances in which a forensic procedure may be carried out on a suspect, and shows the provisions that authorise the carrying out of the

procedure.

Authority for forensic procedures

Suspect's status	Intimate forensic procedure	Non-intimate forensic procedure
1 Adult not under arrest	With informed consent under Part 3 By order of a Magistrate or an authorised officer under Part 5	With informed consent under Part 3 By order of a Magistrate or an authorised officer under Part 5
2 Adult under arrest	With informed consent under Part 3 By order of a Magistrate or an authorised officer under Part 5	With informed consent under Part 3 By order of a senior police officer under Part 4
3 Incapable person (whether or not under arrest)	By order of a Magistrate or an authorised officer under Part 5	By order of a Magistrate or an authorised officer under Part 5
4 Child at least 10 but under 18 (whether or not under arrest)	By order of a Magistrate or an authorised officer under Part 5	By order of a Magistrate or an authorised officer under Part 5

6 Time limits for carrying out forensic procedures

The following table sets out in general terms the time limits that apply to the carrying out of a forensic procedure on a suspect depending on the status of the suspect and the source of the authority to carry out the procedure.

Time limits for forensic procedures

Suspect's status	Procedure with suspect's consent (Part 3)	Procedure by order of a senior police officer (Part 4)	Procedure by order of a Magistrate or an authorised officer (Part 5)
1 Child or an incapable person, not under arrest	Not applicable	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating police officer, disregarding "time out" (see section 40)

2	Suspect, including person identifying as Aboriginal person or Torres Strait Islander (not a child or an incapable person), not under arrest	Procedure must be carried out within 2 hours after suspect presents to investigating police officer, disregarding "time out" (see section 16)	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating police officer, disregarding "time out" (see section 40)
3	Child or an incapable person, under arrest	Not applicable	Not applicable	Procedure must be carried out not later than 2 hours after the end of the investigation period permitted under section 115 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , disregarding "time out" (see Division 4 of Part 5)
4	Suspect, including person identifying as Aboriginal person or Torres Strait Islander (not a child or an incapable person), under arrest	Suspect may be detained in accordance with Part 9 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , for 2 hours after the end of the investigation period permitted under section 115 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , disregarding "time out" (see section 7 (3) and (4))	Suspect may be detained in accordance with Part 9 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , for 2 hours after the end of the investigation period permitted under section 115 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , disregarding "time out" (see section 17 (3) and (4))	Procedure must be carried out not later than 2 hours after the end of the investigation period permitted under section 115 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , disregarding "time out"

Part 3 Forensic procedures on suspect by consent

7 Forensic procedure may be carried out with informed consent of suspect

- (1) A person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.

- (2) This Part does not authorise the carrying out of a forensic procedure on a suspect who is:
 - (a) a child, or
 - (b) an incapable person.
- (3) This Part does not authorise keeping a suspect under arrest, in order to carry out a forensic procedure, for more than 2 hours after the expiration of the investigation period provided for by section 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- (4) In working out any period of time for the purposes of subsection (3), any time out is to be disregarded.
- (5) Nothing in this Act or Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* prevents the carrying out of a forensic procedure, with the informed consent of the suspect, during the investigation period provided for by section 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. However, neither carrying out the forensic procedure, nor any delays associated with carrying out the forensic procedure, operates to extend the investigation period provided for by section 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

8 Police officer to ask whether suspect identifies as Aboriginal person or Torres Strait Islander

Before asking a suspect to consent to a forensic procedure under this Part, a police officer must ask the suspect whether the suspect identifies as an Aboriginal person or Torres Strait Islander.

9 Informed consent to forensic procedures—general

- (1) This section applies where:
 - (a) a police officer intends to ask a suspect to consent to a forensic procedure, and
 - (b) the suspect does not identify as an Aboriginal person or Torres Strait Islander.
- (2) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:
 - (a) asks the suspect to consent to the forensic procedure under section 11, and
 - (b) personally or in writing, gives the suspect:
 - (i) the information that the suspect must be given under section 13 (1) (a), (e), (f), (g), (i), (j) and (k), and
 - (ii) a description of the nature of the information that the suspect must be given

under section 13 (1) (b), (c) and (d) (but not the specific information that the suspect is to be given under these paragraphs in relation to the particular forensic procedure), and

(c) informs the suspect about the forensic procedure in accordance with section 13, and

(d) gives the suspect a reasonable opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the suspect's choice and, subject to subsection (3), to do so in private.

(3) If the suspect is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the Australian legal practitioner in private if the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

10 Informed consent to forensic procedures—Aboriginal persons and Torres Strait Islanders

(1) This section applies where:

(a) a police officer intends to ask a suspect to consent to a forensic procedure, and

(b) the suspect identifies as an Aboriginal person or Torres Strait Islander.

(2) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:

(a) asks the suspect to consent to the forensic procedure under section 11, and

(b) gives the suspect a written statement setting out:

(i) the information that the suspect must be given under section 13 (1) (a), (e), (f), (g), (h), (i), (j) and (k), and

(ii) the nature of the information that the suspect must be given under section 13 (1) (b), (c) and (d) (but not the specific information that the suspect is to be given under these paragraphs in relation to the particular forensic procedure), and

(c) informs the suspect about the forensic procedure in accordance with section 13, and

(d) complies with the rest of this section.

(3) The police officer must not ask the suspect to consent to the forensic procedure unless:

- (a) an interview friend is present, or
- (b) the suspect has expressly and voluntarily waived his or her right to have an interview friend present.

Note—

Section 106 relates to proving a waiver under paragraph (b).

- (4) Before asking the suspect to consent to a forensic procedure, the police officer must:
 - (a) inform the suspect that a representative of an Aboriginal legal aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure, and
 - (b) notify such a representative accordingly.
- (5) The police officer is not required to comply with subsection (4) if he or she is aware that the suspect:
 - (a) has arranged for a legal representative to be present, or
 - (b) has expressly and voluntarily waived his or her right to have a legal representative present,while the suspect is being asked to consent to the forensic procedure.
- (6) After asking a suspect covered by subsection (3) (b) to consent to a forensic procedure, the police officer must give the suspect a reasonable opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the suspect's choice and, subject to subsection (8), to do so in private.
- (7) After asking a suspect not covered by subsection (3) (b) to consent to a forensic procedure, the police officer must allow the suspect to communicate with the interview friend (if any), and with the suspect's legal representative (if any), and, subject to subsection (8), to do so in private.
- (8) If a suspect covered by subsection (6) or (7) is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the Australian legal practitioner, or the suspect's interview friend or legal representative, in private if the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.
- (9) An interview friend (other than a legal representative) of the suspect may be excluded from the presence of the police officer and the suspect if:
 - (a) the interview friend unreasonably interferes with or obstructs the police officer in asking the suspect to consent to the forensic procedure, or in informing the suspect as required by section 13, or

(b) the police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend 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.

(10) If an interview friend is excluded under subsection (9), a suspect may choose another person to act as his or her interview friend. If the suspect does not waive his or her right to have an interview friend present and does not choose another person as an interview friend, the police officer may arrange for any person who may act as an interview friend under section 4 to be present as an interview friend.

11 Conditions under which police officer may request consent to forensic procedure

(1) A police officer may not ask a suspect to undergo a forensic procedure unless satisfied:

- (a) that section 8, and section 9 or 10, as the case requires, have been complied with, and
- (b) that the circumstances referred to in subsection (2) or (3) exist, and
- (c) that the suspect is neither a child nor an incapable person, and
- (d) that the request for consent is justified in all the circumstances.

(2) In the case of an intimate forensic procedure:

- (a) the act or omission in respect of which the suspect is a suspect must constitute a prescribed offence, and
- (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the prescribed offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other prescribed offence.

(3) In the case of a non-intimate forensic procedure:

- (a) the act or omission in respect of which the suspect is a suspect must constitute an offence, and
- (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other offence.

12 (Repealed)

13 Matters that suspect must be informed of before giving consent

- (1) The police officer must (personally or in writing) inform the suspect of the following matters:
 - (a) that the giving of information under this section, and the giving of consent (if any) by the suspect, is being or will be recorded by electronic means, or in writing, and that the suspect has a right to be given an opportunity to hear or view the recording as provided by section 100,
 - (b) the purpose for which the forensic procedure is required,
 - (c) the offence in relation to which the police officer wants the forensic procedure carried out,
 - (d) the way in which the forensic procedure is to be carried out,
 - (e) that the forensic procedure may produce evidence against the suspect that might be used in a court of law,
 - (f) that the forensic procedure will be carried out by an appropriately qualified police officer or person,
 - (g) if relevant, the matters specified in subsection (2),
 - (h) if the suspect identifies as an Aboriginal person or a Torres Strait Islander—that the suspect's interview friend may be present while the forensic procedure is carried out,
 - (i) that the suspect may refuse to consent to the carrying out of the forensic procedure,
 - (j) the consequences of not consenting, as specified in subsection (3), (4) or (5) (whichever is applicable),
 - (k) if the police officer intends forensic material obtained from the carrying out of the forensic procedure to be used for the purpose of deriving a DNA profile on the suspect—that information obtained from analysis of the forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and the rules that will apply under this Act to its disclosure and use, including that the information may be compared with information from the DNA database systems of other participating jurisdictions.
- (2) **Suspect's right to have medical practitioner or dentist present during some forensic procedures** In the case of:
 - (a) an intimate forensic procedure, or

(b) a non-intimate forensic procedure that involves the taking of an impression or cast of a wound from a part of the suspect's body,

the police officer must inform the suspect that the suspect may ask that a medical practitioner or dentist (depending on the kind of procedure) of his or her choice be present while the procedure is being carried out.

- (3) **Failure to consent to non-intimate forensic procedure—suspect under arrest** If the suspect is under arrest and the forensic procedure is a non-intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent, a senior police officer may order the carrying out of the forensic procedure under Part 4 if he or she is satisfied of the matters referred to in section 20.
- (4) **Failure to consent to intimate forensic procedure—suspect under arrest** If the suspect is under arrest in relation to a prescribed offence and the forensic procedure is an intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a Magistrate or other authorised officer for an order authorising the carrying out of the forensic procedure.
- (5) **Failure to consent to intimate or non-intimate forensic procedure—suspect not under arrest** If the suspect is not under arrest, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a Magistrate or other authorised officer for an order authorising the carrying out of the forensic procedure.
- (6), (7) (Repealed)

14 Withdrawal of consent

If a person 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 person'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 senior police officer under Part 4 or a Magistrate or other authorised officer under Part 5.

15 Recording of giving information and suspect's responses

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the suspect's responses (if any) are recorded by electronic means.
- (2) If the recording of the giving of the information and the suspect's responses (if any) by electronic means is not practicable:

- (a) an independent person who is not a police officer must be present while the information is given and while any responses are made, and
- (b) a police officer must make a written record of the information that is given and any responses that are made, and
- (c) the police officer by whom the record is made must ensure that a copy of the record is made available to the suspect.

Note—

Part 13 contains provisions about making copies of material (including copies of tapes) available to the suspect.

- (3) Subsection (2) (a) does not apply if the suspect expressly and voluntarily waives his or her right to have an independent person present, but such a person may nevertheless be present if the investigating police officer so directs.

16 Time for carrying out forensic procedure—suspect not under arrest

- (1) If a suspect who is not under arrest:

- (a) consents to a forensic procedure, and
- (b) presents himself or herself to an investigating police officer to undergo the procedure,

the procedure must be carried out as quickly as reasonably possible but in any case within 2 hours after the suspect so presents himself or herself.

- (2) In working out any period of time for the purposes of subsection (1), any time out is to be disregarded.

Part 4 Non-intimate forensic procedures on suspects by order of senior police officer

17 Non-intimate forensic procedure may be carried out by order of senior police officer

- (1) A person is authorised to carry out a non-intimate forensic procedure on a suspect by order of a senior police officer under section 18. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.
- (2) This Part does not authorise the carrying out of a forensic procedure on a suspect who is:
 - (a) a child, or
 - (b) an incapable person.
- (3) This Part does not authorise keeping a suspect under arrest, in order to carry out a

forensic procedure, for more than 2 hours after the expiration of the investigation period provided for by section 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

- (4) In working out any period of time for the purposes of subsection (3), any time out is to be disregarded.
- (5) Nothing in this Act or Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* prevents the carrying out of a forensic procedure, in accordance with a senior police officer's order under section 18, during the investigation period provided for by section 115 of that Act. However, neither carrying out the forensic procedure, nor any delays associated with carrying out the forensic procedure, operate to extend the investigation period provided for by Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

18 Circumstances in which senior police officer may order non-intimate forensic procedure

- (1) A senior police officer may order the carrying out of a non-intimate forensic procedure on a suspect who is under arrest if:
 - (a) the suspect has been asked under Part 3 to consent to the carrying out of the forensic procedure, and
 - (b) the suspect has not consented, and
 - (c) the senior police officer is satisfied as required by section 20.
- (2) If the senior police officer needs to decide between taking a sample of the suspect's hair or the carrying out of a self-administered buccal swab, an order for the taking of a sample of hair may not be made unless, following inquiry by the police officer:
 - (a) the suspect has indicated that he or she prefers the taking of a sample of hair, or
 - (b) the suspect has failed to indicate that he or she will carry out a self-administered buccal swab.

19 (Repealed)

20 Matters to be considered by senior police officer before ordering non-intimate forensic procedure

A senior police officer may not order the carrying out of a non-intimate forensic procedure under section 18 (1) unless satisfied:

- (a) that the suspect is under arrest, and
- (b) that there are reasonable grounds to believe that the suspect has committed an offence, and

- (c) that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence referred to in paragraph (b), and
- (d) that the suspect is neither a child nor an incapable person, and
- (e) that the carrying out of such a procedure is justified in the circumstances.

21 Making and recording senior police officer's order

- (1) The senior police officer may make an order under section 18 in person or, if that is not practicable, by telephone, radio, telex, facsimile or other means of transmission.
- (2) If an order is made by radio or other form of oral communication, the senior police officer must ensure that:
 - (a) the suspect or the suspect's legal representative, if any, and
 - (b) the suspect's interview friend, if any,are given an opportunity to speak to the police officer.
- (3) If the order is made by telex, facsimile or other form of written communication, the senior police officer must ensure that:
 - (a) the suspect or the suspect's legal representative, if any, and
 - (b) the suspect's interview friend, if any,are given an opportunity to make a written submission to the senior police officer, or to speak to the senior police officer by telephone, radio or other form of oral communication.
- (4) The senior police officer must, at the time of, or as soon as practicable after, making an order under section 18, make a record of:
 - (a) the order made, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and must sign the record.
- (5) The senior police officer must ensure that a copy of the record is sent to or made available to the suspect as soon as practicable after the record is made.

Part 5 Forensic procedures on suspects by order of Magistrate or other authorised officer

Division 1 General

22 Forensic procedure may be carried out by order of Magistrate or other authorised officer

A person is authorised to carry out a forensic procedure on a suspect by order of a Magistrate under section 24 or 27, or by order of an authorised officer under section 32. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.

23 Circumstances in which Magistrate or other authorised officer may order forensic procedure

An order may be made by a Magistrate under section 24, or by an authorised officer under section 32, for the carrying out of a forensic procedure on a suspect if:

- (a) the suspect is not under arrest and has not consented to the forensic procedure, or
- (b) the suspect is under arrest and has not consented to the forensic procedure, or
- (c) the suspect is a child or an incapable person.

Division 2 Final orders

24 Final order for carrying out forensic procedure

(1) A Magistrate may order the carrying out of a forensic procedure if satisfied on the balance of probabilities:

- (a) that the circumstances referred to in subsection (2) or (3) exist, and
- (b) that the carrying out of such a procedure is justified in all the circumstances.

(2) In the case of an intimate forensic procedure:

- (a) there must be reasonable grounds to believe that the suspect has committed a prescribed offence, and
- (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence referred to in paragraph (a).

(3) In the case of a non-intimate forensic procedure:

- (a) there must be reasonable grounds to believe that the suspect has committed an offence, and
- (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence referred to in paragraph (a).

- (4) In determining whether or not the carrying out of the forensic procedure is justified in all the circumstances, the Magistrate must balance the public interest in obtaining evidence as to whether or not the suspect committed the alleged offence against the public interest in upholding the suspect's physical integrity, having regard to the following:
- (a) the gravity of the alleged offence,
 - (b) the seriousness of the circumstances in which the offence is alleged to have been committed,
 - (c) the degree to which the suspect is alleged to have participated in the commission of the offence,
 - (d) the age, cultural background and physical and mental health of the suspect, to the extent to which they are known,
 - (e) in the case of a suspect who is a child or an incapable person, the best interests of the child or person,
 - (f) such other practicable ways of obtaining evidence as to whether or not the suspect committed the alleged offence as are less intrusive,
 - (g) such reasons as the suspect may have given for refusing to consent to the carrying out of the forensic procedure concerned,
 - (h) in the case of a suspect who is in custody, the period for which the suspect has been in custody and the reasons for any delay in the making of an application for an order under this section,
 - (i) such other matters as the Magistrate considers relevant to the balancing of those interests.

25 (Repealed)

26 Application for order

- (1) An authorised applicant (but no other person) may apply to a Magistrate for an order under section 24 authorising him or her to arrange the carrying out of a forensic procedure on a suspect.
- (2) An application for an order must:
 - (a) be made in writing, and
 - (b) be supported by evidence on oath, or by affidavit, in relation to the matters as to which the Magistrate must be satisfied, as referred to in section 24 (1), and
 - (c) specify the type of forensic procedure sought to be carried out, and

(d) be made in the presence of the suspect (subject to any contrary order made by the Magistrate).

- (3) If a Magistrate refuses an application for an order authorising the carrying out of a forensic procedure on a suspect, the authorised applicant (or any other person aware of the application) may not make a further application to carry out the same forensic procedure on the suspect unless he or she provides additional information that justifies the making of the further application.

27 Application and order for repeated forensic procedure

- (1) An authorised applicant (but no other person) may apply to a Magistrate for an order under this section authorising him or her to arrange the carrying out for a second or subsequent time of a forensic procedure on a suspect on whom a forensic procedure has already been carried out by order of a Magistrate under section 24.
- (2) The application for the order must:
- (a) be made in writing, and
 - (b) specify the type of forensic procedure carried out and the grounds for authorising it to be carried out a second or subsequent time, and
 - (c) be supported by evidence on oath or by affidavit.
- (3) A Magistrate may order the carrying out for a second or subsequent time of a forensic procedure on a suspect under this section if the Magistrate is satisfied that:
- (a) the forensic procedure or procedures already carried out on the suspect was authorised by an order under section 24 and was carried out in accordance with Part 6, and
 - (b) the forensic material obtained as a result of the carrying out of that forensic procedure or those forensic procedures is insufficient for analysis, has been contaminated, has been lost or is for any other reason not available for analysis, and
 - (c) the carrying out of the forensic procedure for a second or subsequent time is justified in all the circumstances.

28 Securing the presence of suspect at hearing—suspect under arrest

- (1) If the suspect has been arrested by a police officer (**original arrest**), the Magistrate may, on the application of another police officer, issue a warrant directing the person holding the suspect under original arrest to deliver the suspect into the custody of the other police officer (**temporary custody**) for the hearing of an application for an order under this Part.

- (2) The police officer given temporary custody must return the suspect to the place of original arrest:
 - (a) if the application for the order is refused—without delay, or
 - (b) if the order is made—without delay at the end of the period for which the suspect may be detained under arrest under section 42.

29 Securing the presence of suspect at hearing—suspect not under arrest

- (1) If the suspect is not under arrest, the Magistrate may, on the application of a police officer:
 - (a) issue a summons for the appearance of the suspect at the hearing of the application, or
 - (b) issue a warrant for the arrest of the suspect for the purpose of bringing the suspect before the Magistrate for the hearing of the application.
- (2) An application for a summons under subsection (1) must be:
 - (a) made by information on oath, and
 - (b) accompanied by an affidavit dealing with the matters referred to in subsection (3).
- (3) The Magistrate may issue a summons only if satisfied:
 - (a) that the issue of the summons is necessary to ensure the appearance of the suspect at the hearing of the application, or
 - (b) that the issue of the summons is otherwise justified.
- (4) An application for a warrant under subsection (1) must be:
 - (a) made by information on oath, and
 - (b) accompanied by an affidavit dealing with the matters referred to in subsection (5).
- (5) The Magistrate may issue a warrant only if satisfied:
 - (a) that the arrest is necessary to ensure the appearance of the suspect at the hearing of the application, and that the issue of a summons would not ensure that appearance, or
 - (b) that the suspect might destroy evidence that might be obtained by carrying out the forensic procedure, or
 - (c) that the issue of the warrant is otherwise justified.

30 Procedure at hearing of application for order

- (1) An order may only be made in the presence of the suspect concerned, subject to any contrary order made by the Magistrate.
- (2) A suspect who is a child or an incapable person, or who identifies as an Aboriginal person or Torres Strait Islander:
 - (a) must have an interview friend present, and
 - (b) may be represented by a legal representative.
- (3) Subsection (2) (a) does not apply to a suspect who identifies as an Aboriginal person or Torres Strait Islander if the suspect expressly and voluntarily waives his or her right to have an interview friend present.
- (4) At the beginning of any hearing in relation to proceedings on an application for an order under this Division, the suspect must be asked whether he or she identifies as an Aboriginal person or Torres Strait Islander.
- (5) Any other suspect (including a suspect covered by subsection (2)) may be represented by an Australian legal practitioner.
- (6) The suspect or his or her representative:
 - (a) may cross-examine the applicant for the order, and
 - (b) may, with the leave of the Magistrate, call or cross-examine any other witness, and
 - (c) may address the Magistrate.
- (7) A Magistrate must not give leave under subsection (6) (b) unless the Magistrate is of the opinion that there are substantial reasons why, in the interests of justice, the witness should be called or cross-examined.
- (8) Despite subsection (2), the suspect's interview friend may be excluded from the hearing if the interview friend unreasonably interferes with or obstructs the hearing of the application.

31 Making of order

- (1) If a Magistrate makes an order for the carrying out of a forensic procedure, the Magistrate must:
 - (a) specify the forensic procedure authorised to be carried out, and
 - (b) give reasons for making the order, and
 - (c) ensure that a written record of the order is kept, and

- (d) order the suspect to attend for the carrying out of the forensic procedure, and
 - (e) inform the suspect that reasonable force may be used to ensure that he or she complies with the order for the carrying out of the forensic procedure.
- (2) The Magistrate may give directions as to the time and place at which the procedure is to be carried out.

Division 3 Interim orders

32 Interim order for carrying out of a forensic procedure

- (1) An authorised officer may make an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay if:
- (a) section 23 applies, and
 - (b) the authorised officer is satisfied that the probative value of evidence obtained as a result of the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the procedure, and
 - (c) the authorised officer is satisfied that there is sufficient evidence to indicate that a Magistrate is reasonably likely to be satisfied, as referred to in section 24 (1), when the application is finally determined.
- (2) An interim order may authorise the carrying out of an intimate forensic procedure on a suspect only if the person is a suspect in relation to a prescribed offence.
- (3) An interim order operates as provided by this Division until a Magistrate, at a hearing held under Division 2, confirms the interim order or disallows the interim order, whether or not the suspect consents to the carrying out of the forensic procedure after the interim order is made but before it is confirmed or disallowed.

Note—

Section 35 (2) requires that an interim order specify the intended date, time and place of the later hearing.

- (4) Division 2 applies in relation to an order confirming the interim order in the same way it applies in relation to an order under section 24. Accordingly, a Magistrate may make an order confirming the interim order only if the Magistrate is satisfied as referred to in section 24 (1). An order confirming the interim order is taken to be an order under section 24.

33 Application for interim order

- (1) An authorised applicant (but no other person) may, without bringing a suspect before an authorised officer and without obtaining an order under section 24, make an application seeking an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay.

- (2) An application seeking an interim order authorising the carrying out of an intimate forensic procedure on a suspect may be made only if the person is a suspect in relation to a prescribed offence.
- (3) An application for an interim order must:
 - (a) if it is made in person—be supported by evidence on oath or by affidavit dealing with the matters referred to in section 32 (1), and
 - (b) specify the type of forensic procedure sought to be carried out.
- (4) An application for an interim order must be made:
 - (a) in person, or
 - (b) if it is not practicable to make the application in person and there are facsimile facilities readily available—by facsimile, or
 - (c) if it is not practicable to make the application in person and there are no facsimile facilities readily available—by telephone, radio, telex, email or other means of communication.
- (4A) An authorised officer must not issue an interim order on an application made by facsimile, telephone, radio, telex, email or other means of written communication unless the authorised officer is satisfied that the interim order is required urgently and that it is not practicable for the application to be made in person.
- (5) If the suspect (being a child or an incapable person, or being a person who identifies as an Aboriginal person or Torres Strait Islander) is in the presence of the authorised applicant when an application for an interim order is made:
 - (a) the suspect's interview friend, or
 - (b) the suspect's legal representative,must also be present if reasonably practicable.
- (6) At the beginning of any hearing in relation to proceedings on an application for an order under this Division, the suspect (if present) must be asked whether he or she identifies as an Aboriginal person or Torres Strait Islander.
- (7) If a suspect who is in the presence of the authorised applicant when an application for an interim order is made is not covered by subsection (5), the suspect's legal representative (if any) must also (if reasonably practicable) be in the presence of the authorised applicant.
- (8) Despite subsection (5), the suspect's interview friend may be excluded from the presence of the authorised applicant if the interview friend unreasonably interferes with or obstructs the making of the application.

- (9) If an application is not made in person, the application must be supported by evidence on oath or by affidavit dealing with the matters referred to in section 32 (1) as soon as practicable after the making of the application and before any interim order made as a result of the application is confirmed or disallowed.

34 Procedure at hearing of application for interim order

- (1) If the application is made in person, or by telephone or radio or other form of oral communication, the authorised officer must ensure that:
- (a) the suspect or the suspect's legal representative, if any, and
 - (b) the suspect's interview friend, if any,
- are given an opportunity to speak to the authorised officer.
- (2) If the application is made by telex, facsimile or other form of written communication, the authorised officer must ensure that:
- (a) the suspect or the suspect's legal representative, if any, and
 - (b) the suspect's interview friend, if any,
- are given an opportunity to make a written submission to accompany the application, or to speak to the authorised officer by telephone, radio or other form of oral communication.
- (3) Despite subsections (1) and (2), the suspect's interview friend may be excluded from the presence of the authorised officer if the interview friend unreasonably interferes with or obstructs the hearing of the application.

35 Making of interim order

- (1) An authorised officer who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, facsimile or other means of transmission:
- (a) that the order has been made, and
 - (b) of the terms of the order, including the matters mentioned in subsection (2), and
 - (c) of any orders made or directions given under subsection (3) in relation to the order.
- (2) An interim order must specify the date, time and place at which a further hearing on the application will take place and the application will be finally determined.
- (3) An authorised officer may make such orders and give such directions in relation to an interim order as a Magistrate may make or give in relation to an order under section

24.

36 Records of application and interim order

- (1A) This section applies when an application for an interim order is made in person, by facsimile, by email or by other electronic means of written communication.
- (1) The applicant for an interim order must, at the time of applying for the interim order, make a record (the **applicant's record**) of:
- (a) the application, and
 - (b) the grounds for seeking the order,
 - (c)-(e) (Repealed)
- and sign the record.
- (2) The applicant must send a copy of the applicant's record to the authorised officer as soon as practicable after it is made.
- (3) The authorised officer must, at the time of, or as soon as practicable after, making an interim order, make a record (the **authorised officer's record**) of:
- (a), (b) (Repealed)
 - (c) the order made, and
 - (d) the date and time when the order was made, and
 - (e) the reasons for making it,
- and sign the record.
- (4) The authorised officer must send a copy of the authorised officer's record to the applicant as soon as practicable after the record is made.
- (5) The applicant must ensure that a copy of the authorised officer's record and a copy of the applicant's record are made available to the suspect as soon as practicable after the applicant receives the authorised officer's record.
- (6) If the applicant's record does not, in all material respects, accord with the authorised officer's record, the order is taken to have had no effect.

36A Records of application and interim order (where application not made in person or reduced to writing)

- (1) This section applies when an application for an interim order is not made in person, by facsimile, by email or by other electronic means of written communication.

- (2) The authorised officer must, at the time of, or as soon as practicable after, making an interim order, make a record (***the authorised officer's record***) of:
 - (a) the order made, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and sign the record.
- (3) The applicant for an interim order must, as soon as practicable after an order is made, make a record (***the applicant's record***) of:
 - (a) the order made, and
 - (b) the date and time when the order was made, and
 - (c) the authorised officer's name,and sign the record.
- (4) The authorised officer must send a copy of the authorised officer's record to the applicant as soon as practicable after the record is made.
- (5) The applicant must ensure that a copy of the authorised officer's record and a copy of the applicant's record are made available to the suspect as soon as practicable after the applicant receives the authorised officer's record.
- (6) If the applicant's record does not, in all material respects, accord with the authorised officer's record, the order is taken to have no effect.

37 Suspect may be prevented from destroying or contaminating evidence

- (1) A police officer may, while waiting for the application seeking an interim order to be determined, use reasonable force to prevent the suspect destroying or contaminating any evidence that might be obtained by carrying out the forensic procedure if the order is made.
- (2) Nothing in this section authorises any person to carry out a forensic procedure before an interim order is made.

38 Results of forensic procedure carried out under interim order

- (1) A sample taken under an interim order must not be analysed unless:
 - (a) the sample is likely to perish before a final order is made, or
 - (b) a final order is made.

(2) A person who conducts an analysis in the circumstances set out in subsection (1) (a) must not intentionally or recklessly disclose the results of the analysis to any person other than the suspect:

- (a) during the period before a final order is made, or
- (b) if the interim order is disallowed.

Maximum penalty (subsection (2)): imprisonment for 12 months.

Division 4 Time limits for forensic procedures ordered by Magistrate or other authorised officer

39 Application

This Division applies where a Magistrate or other authorised officer orders the carrying out of a forensic procedure on a suspect under this Act.

40 Time for carrying out forensic procedure—suspect not under arrest

- (1) If a suspect who is not under arrest presents himself or herself to the investigating police officer concerned to undergo the procedure after it is ordered by the Magistrate or other authorised officer, the procedure must be carried out as quickly as reasonably possible but in any case within 2 hours after the suspect so presents himself or herself.
- (2) In working out any period of time for the purposes of subsection (1), any time out is to be disregarded.

41 Arrest of suspect not under arrest

- (1) If the suspect is not under arrest, the Magistrate or other authorised officer may, on the application of a police officer, issue a warrant for the arrest of the suspect for the purpose of carrying out the forensic procedure.
- (2) An application for a warrant must be:
 - (a) made by information on oath, and
 - (b) accompanied by an affidavit dealing with the matters referred to in subsection (3) (a) and (b).
- (3) The Magistrate or other authorised officer may issue a warrant only if satisfied:
 - (a) that the arrest is necessary to ensure that the forensic procedure can be carried out, or
 - (b) that the issue of the warrant is otherwise justified.
- (4) A Magistrate or other authorised officer must not issue a warrant for the arrest of a

suspect for the purpose of carrying out a forensic procedure if a warrant has previously been issued (by any Magistrate or other authorised officer) for the arrest of the suspect for the purpose of carrying out that forensic procedure.

42 Time for carrying out forensic procedure—suspect under arrest

- (1) If the suspect is under arrest (whether or not as the result of the issue of a warrant under section 41), he or she may be detained under arrest for such period as is reasonably necessary to carry out the forensic procedure but in any case for no longer than 2 hours after the end of the investigation period permitted under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* starting when:
 - (a) the Magistrate or other authorised officer orders the carrying out of the procedure, or
 - (b) the suspect is arrested pursuant to a warrant under section 41.
- (2) In working out any period of time for the purposes of subsection (1), any time out is to be disregarded.

Division 5 Reports of proceedings under Act

43 Restrictions on publication

- (1) A person must not intentionally or recklessly, in any report of a proceeding under this Act, publish:
 - (a) the name of the suspect on whom a forensic procedure is carried out or proposed to be carried out in relation to an offence, or
 - (b) any information likely to enable the identification of the suspect,unless the suspect has been charged with the offence or the Magistrate, by order, has authorised such publication.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (2) This section does not make it an offence to publish the name of a suspect or any information likely to enable the identification of a suspect if the publication is solely for the purposes of the internal management of the NSW Police Force.

Division 6 False or misleading information in applications

43A False or misleading information in applications

- (1) A person must not, in or in connection with an application for an order under this Part, give information to a Magistrate or authorised officer that the person knows to be false or misleading in a material particular.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) This section applies to an application made by telephone or other means as well as to one made in person.
- (3) This section applies whether or not the information given is also verified on oath or by affidavit.

Part 6 Carrying out forensic procedures on suspects

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).

Division 1 General

44 General rules for carrying out forensic procedures

A forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect and except as permitted (expressly or impliedly) by any other provision of this Act, must not be carried out in the presence or view of a person who is of the opposite sex to the suspect, and
- (b) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Act, and
- (c) must not involve the removal of more clothing than is necessary for the carrying out of the procedure, and
- (d) must not involve more visual inspection than is necessary for the carrying out of the procedure.

45 No questioning during forensic procedure

- (1) A forensic procedure must not be carried out while the suspect is being questioned. If questioning has not been completed before the forensic procedure is to be carried out, it must be suspended while the forensic procedure is carried out.
- (2) In this section, a reference to **questioning** of a suspect is a reference to questioning the suspect, or carrying out an investigation (in which the suspect participates), to investigate the involvement (if any) of the suspect in any offence (including an offence for which the suspect is not under arrest).

46 Suspect must be cautioned before forensic procedure starts

Before anyone starts to carry out a forensic procedure on a suspect, a police officer must

caution the suspect that he or she does not have to say anything while the procedure is carried out but that anything the person does say may be used in evidence.

47 Use of force in carrying out forensic procedures

- (1) Subject to subsection (2) and section 48, a person authorised to carry out a forensic procedure on a suspect, or a police officer, may use reasonable force:
 - (a) to enable the forensic procedure to be carried out, or
 - (b) to prevent loss, destruction or contamination of any sample.
- (2) All forensic procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards.
- (3) This section applies only to a forensic procedure that is carried out pursuant to an order under Part 4, 5, 7, 7A or 7B.

48 Forensic procedures not to be carried out in cruel, inhuman or degrading manner

Nothing in this Act authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner but the carrying out of a forensic procedure on a suspect in accordance with this Act is not of itself taken to be cruel, inhuman or degrading to the suspect.

49 Taking of samples of hair

A person is authorised to take a sample of hair of a suspect by removing the root of the hair only if:

- (a) the person takes only so much hair as the person believes is necessary for the analysis of the sample or other examination of the hair, and
- (b) strands of hair are taken using the least painful technique known and available to the person.

49A (Repealed)

Division 2 Persons involved in forensic procedures

50 Persons who may carry out forensic procedures

- (1) The table to this section shows, for each forensic procedure specified in the first column of the table, the persons who may carry out the procedure under this Act. A person not specified in the second column of the table is not authorised to carry out a forensic procedure under this Part except as mentioned in section 52.
- (2) The third column of the table to this section shows, for each forensic procedure, whether the suspect is entitled to request that a medical practitioner or dentist of the

suspect's choice is present while the forensic procedure is carried out.

Note—

Section 53 makes detailed provision for the presence of a medical practitioner or dentist of the suspect's choice while a forensic procedure is carried out.

- (3) 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 this section 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.

- (4) (Repealed)

Who may carry out forensic procedures

	Forensic procedure	Persons who may carry out forensic procedure	Is suspect entitled to request presence of medical practitioner or dentist of suspect's choice?
1	external examination of the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female	medical practitioner nurse appropriately qualified police officer or person	yes (medical practitioner)
2	the taking of a sample of blood	medical practitioner nurse appropriately qualified police officer or person	yes (medical practitioner)
3	the taking of a sample of saliva, or a sample by other-administered buccal swab	medical practitioner dentist dental prosthetist nurse appropriately qualified police officer or person	no
4	the taking of a sample of pubic hair	medical practitioner nurse appropriately qualified police officer or person	yes (medical practitioner)

5	the taking of a sample by swab or washing from the external genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female	medical practitioner nurse appropriately qualified police officer or person	yes (medical practitioner)
6	the taking of a sample by vacuum suction, scraping or lifting by tape from the external genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female	medical practitioner nurse appropriately qualified police officer or person	yes (medical practitioner)
7	the making of a dental impression	medical practitioner dentist dental prosthetist	yes (dentist)
8	the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female	appropriately qualified police officer or person	yes (medical practitioner)
9	external examination of a part of the body other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female that requires touching of the body or removal of clothing	medical practitioner nurse appropriately qualified police officer or person	no
10	the taking of a sample of hair other than pubic hair	medical practitioner nurse appropriately qualified police officer or person	no
11	the taking of a sample from a nail or from under a nail	medical practitioner nurse appropriately qualified police officer or person	no

12	<p>the taking of a sample by swab or washing from any external part of the body other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female</p>	<p>medical practitioner nurse appropriately qualified police officer or person</p>	no
13	<p>the taking of a sample by vacuum suction, scraping or lifting by tape from any external part of the body other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female</p>	<p>medical practitioner nurse appropriately qualified police officer or person</p>	no
14	<p>the taking of a hand print, finger print, foot print or toe print</p>	<p>appropriately qualified police officer or person</p>	no
15	<p>the taking of a photograph of an external part of the body other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female</p>	<p>appropriately qualified police officer or person</p>	no
16	<p>the taking of an impression or cast of a wound from an external part of the body other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female</p>	<p>appropriately qualified police officer or person</p>	yes (medical practitioner)

17	the taking of physical measurements (whether or not involving marking) for biomechanical analysis of an external part of the body other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as a female	appropriately qualified police officer or person	no
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Note—

Appropriately qualified (as used in the expression “appropriately qualified police officer or person”) is defined in section 3.

Division 3 Further provisions about who may carry out forensic procedures

51 Certain forensic procedures generally to be carried out by person of same sex as suspect

- (1) If practicable, an intimate forensic procedure (other than the taking of a sample of blood or saliva, or a dental impression) is to be carried out:
 - (a) if the suspect is an adult—by a person of the same sex as the suspect, or
 - (b) if the suspect is a child—by a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, a person of the same sex as the suspect.
- (2) If practicable, a non-intimate forensic procedure for which the suspect is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes, scarf or hat is to be carried out:
 - (a) if the suspect is an adult—by a person of the same sex as the suspect, or
 - (b) if the suspect is a child—by a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, a person of the same sex as the suspect.
- (3) If practicable, a person asked under section 52 to help carry out a forensic procedure covered by subsection (1) or (2):
 - (a) is to be:
 - (i) if the suspect is an adult—a person of the same sex as the suspect, or
 - (ii) if the suspect is a child—a person of the sex chosen by the suspect or, if the

suspect does not wish to make such a choice, a person of the same sex as the suspect, and

(b) is to be a person who is not inappropriate to help carry out the forensic procedure.

51A Self-administered buccal swabs

A self-administered buccal swab may be carried out by the suspect in the presence or view of another person, whether of the same sex as the suspect or of the opposite sex.

52 Person may get help to carry out forensic procedures

- (1) A person who is authorised to carry out a forensic procedure under the table to section 50 is authorised to ask another person to help him or her to carry out the procedure, and the other person is authorised to give that help.
- (2) A person who is asked to help carry out a forensic procedure need not be a person mentioned in the table to section 50.
- (3) A person who is asked to help carry out a forensic procedure may use reasonable force to enable the forensic procedure to be carried out.
- (4) Subsection (3) applies only in relation to a forensic procedure that is carried out pursuant to an order under Part 4, 5, 7, 7A or 7B.

Division 4 Presence of other people while forensic procedure is carried out

53 Medical practitioner or dentist of suspect's choice may be present for some forensic procedures

- (1) A suspect is entitled to request a medical practitioner or dentist (***the expert***) of his or her choice, as shown in the Table to section 50, to be present while:
 - (a) an intimate forensic procedure, or
 - (b) a non-intimate forensic procedure that involves the taking of an impression or cast of a wound from a part of the suspect's body,is being carried out.

Note—

Section 99 provides that the request may be made by the suspect's legal representative or interview friend.

- (2) The expert chosen 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.

54 Presence of interview friend or legal representative—children and incapable persons

- (1) This section applies if the suspect is:
 - (a) a child, or
 - (b) an incapable person.
- (2) Either an interview friend or a legal representative (if he or she is not the interview friend) of the suspect must, if reasonably practicable, be present while the forensic procedure is carried out. Both an interview friend and a legal representative may be present.
- (3) An interview friend (other than a legal representative) of the suspect may be excluded from the place where the forensic procedure is being carried out if:
 - (a) the interview friend unreasonably interferes with or obstructs the carrying out of the procedure, or
 - (b) the investigating police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend 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.
- (4) If an interview friend is excluded under subsection (3), a suspect may choose another person to act as his or her interview friend. If the suspect does not choose another person as an interview friend, the police officer may arrange for any person who may act as an interview friend under section 4 to be present as an interview friend.

55 Presence of interview friend or legal representative—Aboriginal persons and Torres Strait Islanders

- (1) This section applies if the suspect (not being a child or an incapable person) identifies as an Aboriginal person or Torres Strait Islander.
 - (1A) For the purpose of determining whether this section applies to a suspect, the investigating police officer must ask the suspect if the suspect identifies as an Aboriginal person or Torres Strait Islander.
- (2) Either an interview friend or a legal representative (if he or she is not the interview friend) of the suspect must, if reasonably practicable, be present while the forensic procedure is carried out. Both an interview friend and a legal representative may be present.

- (3) Subsection (2) does not apply if the suspect expressly and voluntarily waives his or her right to have an interview friend present. If a suspect so waives his or her right to have an interview friend present, a legal representative of the suspect may still be present.

Note—

Section 106 relates to proving a waiver.

- (4) An interview friend (other than a legal representative) of the suspect may be excluded from the place where the forensic procedure is being carried out if:
- (a) the interview friend unreasonably interferes with or obstructs the carrying out of the procedure, or
 - (b) the investigating police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend 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.
- (5) If an interview friend is excluded under subsection (4), a suspect may choose another person to act as his or her interview friend. If the suspect does not waive his or her right to have an interview friend present and does not choose another person as an interview friend, the police officer may arrange for any person who may act as an interview friend under section 4 to be present as an interview friend.

56 Presence of police officers

- (1) The number of police officers who may be present during the carrying out of a forensic procedure must not exceed that which is reasonably necessary to ensure that the procedure is carried out effectively and in accordance with this Act.
- (2) Where the presence of a police officer (other than a police officer who is carrying out or helping to carry out the procedure) is reasonably necessary to ensure that a forensic procedure is carried out effectively and in accordance with this Act, the police officer is, if reasonably practicable:
- (a) if the suspect is a child—to be a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, a person of the same sex as the suspect, or
 - (b) in any other case—to be of the same sex as the suspect unless it is not practicable for such a police officer to attend within a reasonable time.

Note—

Section 51 provides that, if practicable, most forensic procedures are to be carried out by persons of the same sex as the suspect.

- (3) This section 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 suspect to remove any clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes, scarf or hat.

Division 5 Recording of forensic procedure

57 Recording of forensic procedure

- (1) The carrying out of a forensic procedure must be recorded by electronic means unless:
 - (a) the suspect objects to the recording, or
 - (b) the recording is not practicable.
- (1A) 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, but only if the taking of such a photograph constitutes a non-intimate forensic procedure.
- (2) Before the forensic procedure is carried out, the suspect 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 suspect, and
 - (b) that the suspect may object to the recording.
- (3) Despite section 99, an interview friend of a person who identifies as an Aboriginal person or Torres Strait Islander, and is not a child or an incapable person, has no right to object to the recording of the forensic procedure.

Note—

Section 99 gives interview friends and legal representatives general powers to act on behalf of suspects. Section 54 applies to children and incapable persons, including children or incapable persons who are Aboriginal persons or Torres Strait Islanders, but does not apply to other Aboriginal persons or Torres Strait Islanders.

- (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 who is not a police officer.
- (5) Subsection (4) does not apply if the suspect expressly and voluntarily waives his or her right to have an independent person present, but such a person may nevertheless be present if the investigating police officer so directs.
- (6) Nothing in this section prevents 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.

Division 6 Procedure after forensic procedure is carried out

58 Samples—sufficient material to share

- (1) This section applies to a sample taken from a suspect under this Act if there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect.
- (2) The investigating police officer concerned must ensure that:
 - (a) a part of the material sufficient for analysis is made available to the suspect as soon as practicable after the procedure has been carried out, and
 - (b) reasonable care is taken to ensure that the suspect's part of the material is protected and preserved until the suspect receives it, and
 - (c) reasonable assistance is given to the suspect to ensure that the material is protected and preserved until it can be analysed.

Note—

Part 13 contains provisions about making material available to the suspect.

59 Photographs

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

Note—

Part 13 contains provisions about making copies of material available to the suspect.

60 Material to be made available to suspect

- (1) If material from a sample taken from a suspect is analysed in relation to the investigation of an offence, the investigating police officer must ensure that, if the suspect so requests in writing:
 - (a) a copy of the suspect'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 suspect's DNA profile and any other DNA profile,are made available to the suspect.
- (2) A suspect is to be informed of his or her right to make such a request.
- (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.

- (4) Despite subsection (3), the requirements of subsection (1) must be complied with a reasonable time before evidence of the suspect's DNA profile, or of any match between the suspect's DNA profile and any other DNA profile, is adduced in any prosecution of the suspect for the offence.

Note—

Part 13 contains provisions about making copies of material available to the suspect.

Part 7 Carrying out of certain forensic procedures after conviction of serious indictable offenders

61 Forensic procedures and offenders to which Part applies

- (1) **Intimate forensic procedures to which Part applies** This Part applies to the following intimate forensic procedures:

- (a) the taking of a sample of blood,
- (b) the carrying out of an other-administered buccal swab.

- (2) **Non-intimate procedures to which Part applies** This Part applies to the following non-intimate forensic procedures:

- (a) the taking of a sample of hair other than pubic hair,
- (b) the taking of a hand print, finger print, foot print or toe print,
- (c) the carrying out of a self-administered buccal swab.

- (3) (Repealed)

- (4) A person is authorised to carry out a forensic procedure under this Part on a person who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention whether or not the offender was convicted of the offence before or after the commencement of this section.

62 Non-intimate forensic procedures authorised to be carried out on serious indictable offenders

- (1) A person is authorised to carry out a non-intimate forensic procedure to which this Part applies on a person (other than a child or an incapable person) who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention:

- (a) with the informed consent of the serious indictable offender, or
- (b) by order of a police officer under section 70, or
- (c) by order of a court under section 74.

- (2) A person is authorised to carry out a non-intimate forensic procedure to which this Part applies on a child, or an incapable person, who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention by order of a court under section 74.

63 Intimate forensic procedures authorised to be carried out on serious indictable offenders

- (1) A person is authorised to carry out an intimate forensic procedure to which this Part applies on a person (other than a child or an incapable person) who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention:

- (a) with the informed consent of the serious indictable offender, or
- (b) by order of a court under section 74.

- (2) (Repealed)

64 (Repealed)

64A Person to ask whether serious indictable offender identifies as Aboriginal person or Torres Strait Islander

Before asking a serious indictable offender to consent to a forensic procedure under this Part, a person must ask the offender whether the offender identifies as an Aboriginal person or Torres Strait Islander.

65 Application of Part 6

- (1) Part 6 applies to the carrying out of a forensic procedure on a serious indictable offender under this Part as if the references to the suspect in Part 6 were references to a serious indictable offender.
- (2) A person is authorised by section 62 or 63 to carry out a forensic procedure in accordance with Part 6 as applied by this section and not otherwise.

66 Scope of authorisation

- (1) A person is not authorised to carry out a forensic procedure under this Part on a serious indictable offender if the serious indictable offender is a suspect or a volunteer.
- (2) A forensic procedure may be carried out on a serious indictable offender who is a

suspect only if authorised by and in accordance with Parts 2–5.

- (3) A forensic procedure may be carried out on a serious indictable offender who is a volunteer only if authorised by and in accordance with Part 8.

67 Informed consent to forensic procedures

- (1) A serious indictable offender gives informed consent to the carrying out of a forensic procedure under this Part if the offender consents to the carrying out of the procedure after a police officer:
- (a) requests the offender to consent to the forensic procedure under section 68, and
 - (b) informs the offender about the forensic procedure in accordance with section 69, and
 - (c) gives the offender the opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the offender's choice.
- (2) The police officer must allow the offender to communicate, or attempt to communicate, with the Australian legal practitioner in private unless the police officer suspects on reasonable grounds that the offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Note—

Section 103 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

68 Police officer may request offender to consent to forensic procedure

A police officer may request a serious indictable offender (other than a child or an incapable person) to consent to a forensic procedure to which this Part applies being carried out on the offender.

69 Matters that offender must be informed of before giving consent

- (1) The police officer must (personally or in writing) inform the serious indictable offender of the following:
- (a) the purpose for which the forensic procedure is required,
 - (b) if the police officer wants the forensic procedure carried out in relation to an offence—the offence concerned,
 - (c) the way in which the forensic procedure is to be carried out,
 - (d) that the forensic procedure may produce evidence against the offender that might be used in a court of law,

- (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 65,
- (f) if the forensic procedure is the taking of a sample of blood—that the offender may request that the correctional centre medical officer be present while the blood is taken,
- (g) that the offender may refuse consent to the carrying out of the forensic procedure,
- (h) the consequences of not consenting, as specified in subsection (2) or (3) (whichever is applicable),
- (i) the effect of section 84 (if applicable),
- (j) that information obtained from analysis of forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and used for the purposes of a criminal investigation or for any other purpose for which the DNA database system may be used under Part 11 or 12 and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions.

(2) **Failure to consent to non-intimate forensic procedure** The police officer must (personally or in writing) inform a serious indictable offender requested to undergo a non-intimate forensic procedure to which this Part applies that, if the offender does not consent, a senior police officer may order the carrying out of the forensic procedure under section 70.

(3) **Failure to consent to intimate forensic procedure** The police officer must (personally or in writing) inform a serious indictable offender requested to undergo an intimate forensic procedure to which this Part applies that, if the offender does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

(4) (Repealed)

70 Circumstances in which senior police officer may order non-intimate forensic procedure

- (1) A senior police officer may order the carrying out of a non-intimate forensic procedure on a serious indictable offender if:
 - (a) the offender has been requested under section 68 to consent to the carrying out of the forensic procedure, and
 - (b) the offender has not consented.
 - (c) (Repealed)
- (2) If the senior police officer needs to decide between taking a sample of the offender's

hair or the carrying out of a self-administered buccal swab, an order for the taking of a sample of hair may not be made unless, following inquiry by the police officer:

- (a) the offender has indicated that he or she prefers the taking of a sample of hair, or
- (b) the offender has failed to indicate that he or she will carry out a self-administered buccal swab.

71 (Repealed)

72 Form of consent

The consent of a serious indictable offender to the carrying out of a forensic procedure under this Part 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 offender, and
- (c) the signature is witnessed by a person other than a police officer, and
- (d) the offender is given a copy of the consent as soon as practicable after it is signed and witnessed.

73 Record of order of senior police officer

- (1) The senior police officer must, at the time of, or as soon as practicable after, making an order under section 70, make a record of:
 - (a) the order, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and sign the record.
- (2) The senior police officer must ensure that a copy of the record is made available to the serious indictable offender as soon as practicable after the record is made.

74 Court order for carrying out forensic procedure on serious indictable offender

- (1) A police officer may apply to any court for an order for the carrying out of a forensic procedure to which this Part applies on a serious indictable offender who is serving a sentence of imprisonment in a correctional centre or other place of detention.
- (2), (3) (Repealed)
- (4) A police officer may make such an application to the court that is sentencing a serious indictable offender or to any court at a later time.

- (5) A court may order the carrying out of a forensic procedure under this section if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
- (6) (Repealed)
- (7) An order under this section takes effect immediately. However, any forensic material taken must not (unless the sample is likely to perish if analysis is delayed) be analysed:
 - (a) until the expiration of any appeal period or after the final determination of any appeal in relation to the serious indictable offence committed by the serious indictable offender concerned, whichever is the later, or
 - (b) if the conviction is quashed.

74A Carrying out of forensic procedure following conviction

If a court orders the carrying out of a forensic procedure to which this Part applies on a serious indictable offender, the court may order that a police officer, together with a person who, under Part 6 as applied by section 65, may carry out the forensic procedure, be permitted to attend on the offender to enable the forensic procedure to be carried out.

75 Refusal or failure to permit forensic procedure

A serious indictable offender in respect of whom a forensic procedure is ordered to be carried out under section 74 must not, without reasonable excuse, refuse or fail to permit the forensic procedure to be carried out.

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.

Part 7A Carrying out of certain forensic procedures on untested former offenders

75A Forensic procedures and offenders to which Part applies

- (1) **Intimate forensic procedures to which Part applies** This Part applies to the following intimate forensic procedures:
 - (a) the taking of a sample of blood,
 - (b) the carrying out of an other-administered buccal swab.
- (2) **Non-intimate forensic procedures to which Part applies** This Part applies to the following non-intimate forensic procedures:
 - (a) the taking of a sample of hair other than pubic hair,
 - (b) the carrying out of a self-administered buccal swab.

(3) This Part applies to any person:

- (a) who has served a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention, and
- (b) who is served with a court attendance notice in respect of an indictable offence, if it appears that the person's DNA profile is not contained in the offenders index of the DNA database system (an **untested former offender**).

75B Non-intimate forensic procedures authorised to be carried out on untested former offenders

A person is authorised to carry out a non-intimate forensic procedure to which this Part applies on an untested former offender:

- (a) with the informed consent of the former offender, or
- (b) by order of a senior police officer under section 75I, or
- (c) by order of a court under section 75L.

75C Intimate forensic procedures authorised to be carried out on untested former offenders

A person is authorised to carry out an intimate forensic procedure to which this Part applies on an untested former offender:

- (a) with the informed consent of the former offender, or
- (b) by order of a court under section 75L.

75D Police officer to ask whether untested former offender identifies as Aboriginal person or Torres Strait Islander

Before asking an untested former offender to consent to a forensic procedure under this Part, a police officer must ask the former offender whether the former offender identifies as an Aboriginal person or Torres Strait Islander.

75E Application of Part 6

- (1) Part 6 applies to the carrying out of a forensic procedure on an untested former offender under this Part as if the references to the suspect in Part 6 were references to an untested former offender.
- (2) A person is authorised by section 75B or 75C to carry out a forensic procedure in accordance with Part 6 as applied by this section and not otherwise.

75F Informed consent to forensic procedures

- (1) An untested former offender gives informed consent to the carrying out of a forensic

procedure under this Part if the former offender consents to the carrying out of the procedure after a police officer:

- (a) requests the former offender to consent to the forensic procedure under section 75G, and
 - (b) informs the former offender about the forensic procedure in accordance with section 75H, and
 - (c) gives the former offender the opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the former offender's choice.
- (2) The police officer must allow the former offender to communicate, or attempt to communicate, with the Australian legal practitioner in private unless the police officer suspects on reasonable grounds that the former offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Note—

Section 103 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

75G Police officer may request untested former offender to consent to forensic procedure

A police officer may request an untested former offender (other than a child or an incapable person) to consent to a forensic procedure to which this Part applies being carried out on the former offender.

75H Matters that untested former offender must be informed of before giving consent

- (1) The police officer must (personally or in writing) inform the untested former offender of the following:
 - (a) the purpose for which the forensic procedure is required,
 - (b) if the police officer wants the forensic procedure carried out in relation to an offence—the offence concerned,
 - (c) the way in which the forensic procedure is to be carried out,
 - (d) that the forensic procedure may produce evidence against the former offender that might be used in a court of law,
 - (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 75E,
 - (f) if the forensic procedure is the taking of a sample of blood—that the former offender may request that a medical officer be present while the blood is taken,
 - (g) that the former offender may refuse consent to the carrying out of the forensic

procedure,

- (h) the consequences of not consenting, as specified in subsection (2) or (3) (whichever is applicable),
- (i) the effect of section 84 (if applicable),
- (j) that information obtained from the analysis of forensic material obtained from the carrying out of the forensic procedure may be placed on the DNA database system of this State, or become part of a national DNA matching scheme, or both, and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions.

(2) **Failure to consent to non-intimate forensic procedure** The police officer must (personally or in writing) inform an untested former offender requested to undergo a non-intimate forensic procedure to which this Part applies that, if the former offender does not consent, a senior police officer may order the carrying out of the forensic procedure under section 75I.

(3) **Failure to consent to intimate forensic procedure** The police officer must (personally or in writing) inform an untested former offender requested to undergo an intimate forensic procedure to which this Part applies that, if the former offender does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

75I Circumstances in which senior police officer may order non-intimate forensic procedure

- (1) A senior police officer may order the carrying out of a non-intimate forensic procedure on an untested former offender if:
 - (a) the former offender has been requested under section 75G to consent to the carrying out of the forensic procedure, and
 - (b) the former offender has not consented, and
 - (c) the former offender is under arrest or otherwise in custody.
- (2) If the senior police officer needs to decide between taking a sample of the former offender's hair or the carrying out of a self-administered buccal swab, an order for the taking of a sample of hair may not be made unless, following inquiry by the police officer:
 - (a) the former offender has indicated that he or she prefers the taking of a sample of hair, or
 - (b) the former offender has failed to indicate that he or she will carry out a self-administered buccal swab.

75J Form of consent

The consent of an untested former offender to the carrying out of a forensic procedure under this Part 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 former offender, and
- (c) the signature is witnessed by a person other than a police officer, and
- (d) the former offender is given a copy of the consent as soon as practicable after it is signed and witnessed.

75K Record of order of senior police officer

- (1) At the time of, or as soon as practicable after, making an order under section 75I, a senior police officer must make a record of:
 - (a) the order, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and must sign the record.
- (2) The senior police officer must ensure that a copy of the record is made available to the untested former offender as soon as practicable after the record is made.

75L Court order for carrying out forensic procedure on untested former offender

- (1) A police officer may apply to any court for an order for the carrying out of a forensic procedure to which this Part applies on an untested former offender.
- (2) A court may order the carrying out of a forensic procedure under this section if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.

75M Making of order

- (1) If a court makes an order for the carrying out of a forensic procedure on an untested former offender, the court must:
 - (a) specify the forensic procedure authorised to be carried out, and
 - (b) give reasons for making the order, and
 - (c) ensure that a written record of the order is kept, and

- (d) order the former offender (if present) to attend for the carrying out of the forensic procedure, and
- (e) inform the former offender (if present) that reasonable force may be used to ensure that he or she complies with the order for the carrying out of the forensic procedure.

(2) The court may give directions as to the time and place at which the procedure is to be carried out.

75N Carrying out of forensic procedure on untested former offender in custody

If a court orders the carrying out of a forensic procedure to which this Part applies on an untested former offender, the court may order that a police officer, together with a person who, under Part 6 as applied by section 75E, may carry out the forensic procedure, be permitted to attend on the former offender to enable the forensic procedure to be carried out.

75O Refusal or failure to permit forensic procedure

An untested former offender in respect of whom a forensic procedure is ordered to be carried out under section 75L must not, without reasonable excuse, refuse or fail to permit the forensic procedure to be carried out.

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.

Part 7B Carrying out of certain forensic procedures on registrable persons

75P Forensic procedures and persons to which Part applies

- (1) **Intimate forensic procedures to which Part applies** This Part applies to the carrying out of an other-administered buccal swab.
- (2) **Non-intimate forensic procedures to which Part applies** This Part applies to the following non-intimate forensic procedures:
 - (a) the carrying out of a self-administered buccal swab,
 - (b) the taking of a sample of hair other than pubic hair.
- (3) This Part applies to any person:
 - (a) who is a registrable person under the *Child Protection (Offenders Registration) Act 2000*, and
 - (b) who is required to comply with the reporting obligations under that Act,if it appears that the person's DNA profile is not contained in the offenders index of

the DNA database system (an ***untested registrable person***).

75Q Non-intimate forensic procedures authorised to be carried out on untested registrable persons

A person is authorised to carry out a non-intimate forensic procedure to which this Part applies on an untested registrable person:

- (a) with the informed consent of the registrable person, or
- (b) by order of a senior police officer under section 75Y, or
- (c) by order of a court under section 75ZC.

75R Intimate forensic procedures authorised to be carried out on untested registrable persons

A person is authorised to carry out an intimate forensic procedure to which this Part applies on an untested registrable person:

- (a) with the informed consent of the registrable person, or
- (b) by order of a court under section 75ZC.

75S Police officer to ask whether untested registrable person identifies as Aboriginal person or Torres Strait Islander

Before asking an untested registrable person to consent to a forensic procedure under this Part, a police officer must ask the registrable person whether the registrable person identifies as an Aboriginal person or Torres Strait Islander.

75T Application of Part 6

- (1) Part 6 applies to the carrying out of a forensic procedure on an untested registrable person under this Part as if the references to the suspect in Part 6 were references to an untested registrable person.
- (2) A person is authorised by section 75Q or 75R to carry out a forensic procedure in accordance with Part 6 as applied by this section and not otherwise.

75U Scope of authorisation

- (1) A person is not authorised to carry out a forensic procedure under this Part on an untested registrable person if the untested registrable person is a suspect or a volunteer.
- (2) A forensic procedure may be carried out on an untested registrable person who is a suspect only if authorised by and in accordance with Parts 2-5.
- (3) A forensic procedure may be carried out on an untested registrable person who is a

volunteer only if authorised by and in accordance with Part 8.

75V Informed consent to forensic procedures

- (1) An untested registrable person gives informed consent to the carrying out of a forensic procedure under this Part if the registrable person consents to the carrying out of the procedure after a police officer:
 - (a) requests the registrable person to consent to the forensic procedure under section 75W, and
 - (b) informs the registrable person about the forensic procedure in accordance with section 75X, and
 - (c) gives the registrable person the opportunity to communicate, or attempt to communicate, with an Australian lawyer of the registrable person's choice.
- (2) The police officer must allow the registrable person to communicate, or attempt to communicate, with the Australian lawyer in private unless the police officer suspects on reasonable grounds that the registrable person might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Note—

Section 103 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

75W Carrying out forensic procedure on untested registrable person

- (1) A police officer may request an untested registrable person (other than a child or an incapable person) to consent to a forensic procedure to which this Part applies being carried out on the person.
- (2) If the request is made when the untested registrable person attends a police station or other place in person to make a report under Part 3 of the *Child Protection (Offenders Registration) Act 2000*, the police officer may detain the untested registrable person at the police station or other place for so long as is reasonably necessary:
 - (a) to determine whether the registrable person consents to the carrying out of the forensic procedure under this Part, and
 - (b) if the person consents—to carry out the forensic procedure in accordance with this Part, and
 - (c) if the person does not consent—to order the carrying out of a non-intimate forensic procedure under section 75Y and, if the order is made, to carry out the forensic procedure.

- (3) In detaining the person, the police officer must tell the person:
 - (a) why the person is being detained, and
 - (b) that the detention is authorised under this Act, and
 - (c) that the person will be released immediately:
 - (i) if consent is refused and no order is to be made under section 75Y, or
 - (ii) if the forensic procedure is to be carried out with consent or by order, after it is carried out.
- (4) The detained person:
 - (a) must not be held for a period that is longer than is reasonably necessary to make the determination referred to in subsection (2) (a) and, if a forensic procedure is to be carried out with consent or by order, to carry it out, and
 - (b) must be released immediately if consent is refused and no order is to be made under section 75Y or, if the forensic procedure is to be carried out with consent or by order, after it is carried out.
- (5) The police officer may use reasonable force to ensure the detained person remains at the police station or other place for the period referred to in subsection (4).

75X Matters that untested registrable person must be informed of before giving consent

- (1) Before asking the untested registrable person whether he or she consents to the carrying out of a forensic procedure, the police officer must (personally or in writing) inform the untested registrable person of the following:
 - (a) the purpose for which the forensic procedure is required,
 - (b) the way in which the forensic procedure is to be carried out,
 - (c) that the forensic procedure may produce evidence against the registrable person that might be used in a court of law,
 - (d) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 75T,
 - (e) that the registrable person may refuse consent to the carrying out of the forensic procedure,
 - (f) the consequences of not consenting, as specified in subsection (2) or (3) (whichever is applicable),
 - (g) the effect of section 84 (if applicable),

(h) that information obtained from the analysis of forensic material obtained from the carrying out of the forensic procedure may be placed on the DNA database system of this State, or become part of a national DNA matching scheme, or both, and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions.

(2) **Failure to consent to non-intimate forensic procedure** The police officer must (personally or in writing) inform an untested registrable person requested to undergo a non-intimate forensic procedure to which this Part applies that, if the registrable person does not consent, a senior police officer may order the carrying out of the forensic procedure under section 75Y and that reasonable force may be used to enable the forensic procedure to be carried out.

(3) **Failure to consent to intimate forensic procedure** The police officer must (personally or in writing) inform an untested registrable person requested to undergo an intimate forensic procedure to which this Part applies that, if the registrable person does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

75Y Circumstances in which senior police officer may order non-intimate forensic procedure

(1) A senior police officer may order the carrying out of a non-intimate forensic procedure on an untested registrable person if:

(a) the registrable person has been requested under section 75W to consent to the carrying out of the forensic procedure, and

(b) the registrable person has not consented.

(2) If the senior police officer needs to decide between taking a sample of the registrable person's hair or the carrying out of a self-administered buccal swab, an order for the taking of a sample of hair may not be made unless, following inquiry by the police officer:

(a) the registrable person has indicated that he or she prefers the taking of a sample of hair, or

(b) the registrable person has failed to indicate that he or she will carry out a self-administered buccal swab.

75Z Form of consent

The consent of an untested registrable person to the carrying out of a forensic procedure under this Part 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 registrable person, and
- (c) the signature is witnessed by a person other than a police officer, and
- (d) the registrable person is given a copy of the consent as soon as practicable after it is signed and witnessed.

75ZA Record of order of senior police officer

- (1) At the time of, or as soon as practicable after, making an order under section 75Y, a senior police officer must make a record of:
 - (a) the order, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and must sign the record.
- (2) The senior police officer must ensure that a copy of the record is made available to the untested registrable person as soon as practicable after the record is made.

75ZB Application for court order for carrying out forensic procedure on untested registrable person

- (1) A police officer may apply to any court for an order under section 75ZC for the carrying out of a forensic procedure to which this Part applies on an untested registrable person.
- (2) An application may be made whether or not the untested registrable person has been requested to consent to the carrying out of the forensic procedure under this Part or been ordered to undergo the forensic procedure by a senior police officer.

75ZC Court order for carrying out forensic procedure on untested registrable person

- (1) The court may order the carrying out of a forensic procedure to which this Part applies on the untested registrable person if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
- (2) The court may order the carrying out of a forensic procedure on an untested registrable person whether or not the person is present.
- (3) The court may give directions as to the time and place at which the forensic procedure is to be carried out.
- (4) If the court makes an order, the court must:
 - (a) specify the forensic procedure authorised to be carried out, and

- (b) give reasons for making the order, and
 - (c) ensure that a written record of the order is kept, and
 - (d) order the registrable person (if present) to attend for the carrying out of the forensic procedure, and
 - (e) inform the registrable person (if present) that reasonable force may be used to ensure that he or she complies with the order for the carrying out of the forensic procedure.
- (5) If the registrable person is not present when the order is made, all reasonable steps are to be taken by the police officer who applied for the order to notify the person that:
- (a) the order has been made for the carrying out of the forensic procedure, and
 - (b) if the registrable person fails to attend for the carrying out of the forensic procedure in accordance with the order, the person may be arrested under section 75ZD (2).

75ZD Refusal or failure to permit forensic procedure

- (1) An untested registrable person in respect of whom a forensic procedure is ordered to be carried out under section 75ZC must not, without reasonable excuse, refuse or fail to permit the forensic procedure to be carried out.

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.

- (2) If a police officer suspects on reasonable grounds that a person has committed an offence under this section, the police officer may, without a warrant, arrest the person for the purpose of carrying out the forensic procedure concerned.
- (3) A police officer who arrests a person under subsection (2) must, as soon as is reasonably practicable after the forensic procedure is carried out, release the person.
- (4) Nothing in this section affects any power of a police officer to arrest and deal with the person under Part 8 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Part 8 Carrying out of forensic procedures on volunteers and certain other persons

76 Carrying out of forensic procedures on volunteers

- (1) In this Act, **volunteer** means:
- (a) a person (other than a child or an incapable person) who consents to a request by a police officer for the person to undergo a forensic procedure, or

(b) a child who consents, and whose parent or guardian consents, to a request by a police officer for the child to undergo a forensic procedure, or

(c) an incapable person whose parent or guardian consents to a request by a police officer for the person to undergo a forensic procedure,

but does not include a suspect, a person under 10 years of age or an excluded volunteer.

(2) A person is authorised to carry out a forensic procedure on a volunteer (other than a child or an incapable person) with the informed consent of the volunteer given in accordance with section 77.

(2A) A person is authorised to carry out a forensic procedure on a volunteer who is a child:

(a) with the informed consent of the child's parent or guardian, given in accordance with section 77, or

(b) if the informed consent of the child's parent or guardian cannot be obtained, by order of a Magistrate under section 80,

and, in either case, with the informed consent of the child.

(2B) A person is authorised to carry out a forensic procedure on a volunteer who is an incapable person:

(a) with the informed consent of the person's parent or guardian given in accordance with section 77, or

(b) if the informed consent of the person's parent or guardian cannot be obtained, by order of a Magistrate under section 80.

(3) Subsections (2A) and (2B) do not authorise a person to carry out a forensic procedure on a child or an incapable person who objects to or resists the carrying out of the forensic procedure.

(4) Part 6 applies to the carrying out of a forensic procedure under this Part as if the references to a suspect in that Part were references to a volunteer referred to in this section. A person is authorised by this section to carry out a forensic procedure on a volunteer in accordance with Part 6 as so applied and not otherwise.

76A Excluded volunteers

In this Act:

excluded volunteer means:

(a) a person who volunteers to a police officer to undergo a forensic procedure in relation

to an offence under Part 3, or Division 2 of Part 4, of the *Crimes Act 1900* of which the person is a victim, or

- (b) a child or incapable person whose parent or guardian volunteered to a police officer that the child or incapable person undergo a forensic procedure in relation to an offence under Part 3, or Division 2 of Part 4, of the *Crimes Act 1900* of which the child or incapable person is a victim, or
- (c) a person who volunteers to a police officer to undergo a forensic procedure for the purpose of eliminating the person's finger prints or hand prints from those found in relation to an offence under Parts 4, 4AA, 4AC or 4AD of the *Crimes Act 1900*, being the offence in relation to which the forensic procedure is carried out, or
- (d) a child or incapable person whose parent or guardian volunteered to a police officer that the child or incapable person undergo a forensic procedure for the purpose of eliminating the child or incapable person's finger prints or hand prints from those found in relation to an offence under Parts 4, 4AA, 4AC or 4AD of the *Crimes Act 1900*, being the offence in relation to which the forensic procedure is carried out.

76B Police officer to ask whether volunteer identifies as Aboriginal person or Torres Strait Islander

Before asking a person to consent to a forensic procedure under this Part, a police officer must ask the person whether he or she identifies as an Aboriginal person or Torres Strait Islander.

77 Informed consent of volunteer or parent or guardian of volunteer

- (1) A volunteer, or parent or guardian of a volunteer, gives informed consent in accordance with this section if the volunteer, parent or guardian consents in the presence of an independent person (not being a police officer) after a police officer informs the volunteer, parent or guardian (personally or in writing) of the following matters:
 - (a) the way in which the forensic procedure is to be carried out,
 - (a1) the purpose for which the forensic procedure is required,
 - (a2) the offence in relation to which the police officer wants the forensic procedure to be carried out,
 - (b) that the volunteer is under no obligation to undergo the forensic procedure,
 - (c) that the forensic procedure may produce evidence that might be used in a court of law, including evidence that may be used against the volunteer,
 - (c1) that the forensic procedure will be carried out by an appropriately qualified police officer or person,

- (d) to the extent that they are relevant, the matters specified in subsection (2),
 - (e) that the volunteer, parent or guardian may consult an Australian legal practitioner of the volunteer's, parent's or guardian's choice before deciding whether or not to consent to the forensic procedure,
 - (f) that the volunteer, parent or guardian may at any time withdraw consent to undergoing the forensic procedure or retention of the forensic material taken or of information obtained from the analysis of that material,
 - (g) the effect of section 84 (if applicable).
- (2) The police officer must (personally or in writing) inform the volunteer, or parent or guardian of the volunteer, of the following:
- (a) that information obtained from analysis of forensic material taken from a person under this Part, and as to the identity of the person, may be placed on the DNA database system and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions,
 - (b) if the police officer intends the information to be placed on the volunteers (limited purposes) index of that system—the purpose for which it is to be placed on that index and that the information may be used only for that purpose,
 - (c) if the police officer intends the information to be placed on the volunteers (unlimited purposes) index of that system—that the information may be used for the purposes of a criminal investigation or any other purpose for which the DNA database system may be used under Part 11 or 12,
- (c1) if the police officer intends the information to be placed on the missing persons index of that system:
- (i) that the principal purpose for which the information is to be placed on that index is to assist in the identification of a missing person, and
 - (ii) that the information may be used for the purposes of a criminal investigation or any other purpose for which the DNA database system may be used under Part 11 or 12, including for the purpose of matching the material against any or all of the other indexes on the database, and
 - (iii) if the information obtained from analysis of forensic material taken from the volunteer matches information in the DNA profile of a missing blood relative on the missing persons index, that the volunteer will be informed of the fact, and
 - (iv) if the information obtained from analysis of forensic material taken from the volunteer matches information in the DNA profile of another person on another index of the database, that the volunteer will be informed of the fact, and

- (v) that the information obtained from analysis of forensic material taken from the volunteer, or any match of that information with any information in another DNA profile, cannot be used in proceedings against the volunteer, but may be admissible if adduced by the volunteer,
 - (d) that information placed on the DNA database system will be retained for such period as the Commissioner of Police and the volunteer (or in the case of a volunteer who is a child or an incapable person, a parent or guardian of the volunteer) agree and must then be removed from the system,
 - (e) any other matters prescribed by the regulations.
- (3) Any requirement of this section for a volunteer to be given information is taken, in the case of a volunteer who is a child, to be a requirement for the child to be given information in a way that is comprehensible to the child, having regard to his or her age and level of understanding.

78 Form of consent

The consent of a volunteer, or a parent or guardian of a volunteer, to the carrying out of a forensic procedure under this Part 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 volunteer, parent or guardian, and
- (c) the signature is witnessed by a person other than a police officer or other person involved in the investigation of an offence to which the forensic procedure relates, and
- (d) the volunteer, parent or guardian is given a copy of the consent as soon as practicable after it is signed and witnessed.

79 Withdrawal of consent

- (1) If a volunteer, or parent or guardian of a volunteer, 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 volunteer's, 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 (in the case of a child or incapable person) by order of a Magistrate under section 80.
- (2) If, after the carrying out of a forensic procedure under this Part on a volunteer, the volunteer, or the parent or guardian of the volunteer, expressly withdraws consent to

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 81, to be destroyed as soon as practicable after the consent is withdrawn.

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

80 Circumstances in which Magistrate may order the carrying out of forensic procedure on child or incapable person

- (1) A Magistrate may order the carrying out of a forensic procedure on a child or incapable person if:
- (a) the consent of the parent or guardian of the child or incapable person to the carrying out of the forensic procedure cannot reasonably be obtained from a parent or guardian of the child or incapable person, or
 - (b) the parent or guardian of the child or incapable person refuses consent to the carrying out of the forensic procedure and the Magistrate is satisfied that there are reasonable grounds to believe that:
 - (i) the parent or guardian is a suspect, and
 - (ii) the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence, or
 - (c) the parent or guardian of the child or incapable person consented to the carrying out of the forensic procedure, but subsequently withdrew that consent.
- (2) In determining whether to make an order under this section, the Magistrate is to take into account the following:
- (a) whether this Part would authorise the carrying out of the forensic procedure apart from this section,
 - (b) if the forensic procedure is being carried out for the purposes of the investigation of a particular offence—the seriousness of the circumstances surrounding the commission of the offence,
 - (c) the best interests of the child or incapable person,
 - (d) so far as they can be ascertained, any wishes of the child or incapable person with respect to whether the forensic procedure should be carried out,
 - (e) except in the circumstances referred to in subsection (1) (b), any wishes expressed by the parent or guardian of the child or incapable person with respect

to whether the forensic procedure should be carried out,

(f) whether the carrying out of the forensic procedure is justified in all the circumstances.

(3) An order under this section may:

(a) require the forensic procedure to be carried out at a time or place specified in the order, or

(b) specify the period for which forensic material obtained from carrying out the procedure may be retained,

or both.

81 Retention of forensic material by order of Magistrate after withdrawal of consent

(1) An authorised applicant may apply to a Magistrate for an order under subsection (2).

(2) 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 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 volunteer or anything reasonably believed to have been worn or carried by the volunteer 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 volunteer 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 volunteer is justified in all the circumstances.

(3) The order may specify the period for which the forensic material or information

obtained from the analysis of that material may be retained.

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,
 - (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.

- (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:
 - (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.

Part 9 Admissibility of evidence

Division 1 Forensic evidence

82 Inadmissibility of evidence from improper forensic procedures

(1) This section applies where:

- (a) a forensic procedure has been carried out on a person, and
- (b) there has been any breach of, or failure to comply with:
 - (i) any provision of this Act in relation to a forensic procedure carried out on a person (including, but not limited to, any breach of or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out), or
 - (ii) any provision of Part 11 with respect to recording or use of information on the DNA database system.

(2) This section does not apply if:

- (a) a provision of this Act required forensic material to be destroyed, and
- (b) the forensic material has not been destroyed.

Note—

Section 83 applies where this Act requires forensic material to have been destroyed.

(3) This section applies:

- (a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person by a forensic procedure, and
- (b) to evidence of any results of the analysis of the forensic material, and
- (c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.

(4) If this section applies, evidence described in subsection (3) is not admissible in any proceedings against the person in a court unless:

- (a) the person does not object to the admission of the evidence, or

- (b) in the opinion of the court the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was not obtained in compliance with the provisions of this Act, or
 - (c) in the opinion of the court, the breach of, or failure to comply with, the provisions of this Act arose out of mistaken but reasonable belief as to the age of a child.
- (5) The matters that may be considered by the court for the purposes of subsection (4) (b) are the following:
- (a) the probative value of the evidence,
 - (b) the reasons given for the failure to comply with the provision of this Act,
 - (c) the gravity of the failure to comply with the provisions of this Act, and whether the failure deprived the person of a significant protection under this Act,
 - (d) whether the failure to comply with the provision of this Act was intentional or reckless,
 - (e) the nature of the provision of this Act that was not complied with,
 - (f) the nature of the offence concerned and the subject matter of the proceedings,
 - (g) whether admitting the evidence would seriously undermine the protection given to suspects by this Act,
 - (h) whether the breach of or failure to comply with the provision of this Act was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights,
 - (i) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply,
 - (j) the difficulty (if any) of obtaining the evidence without contravention of an Australian law,
 - (k) any other matters the court considers to be relevant.
- (6) The probative value of the evidence does not by itself justify the admission of the evidence.
- (7) If a judge permits evidence to be given before a jury under subsection (4), the judge must:
- (a) inform the jury of the breach of, or failure to comply with, a provision of this Act, and
 - (b) give the jury such warning about the evidence as the judge thinks appropriate in

the circumstances.

83 Inadmissibility of evidence where forensic material required to be destroyed

- (1) If a provision of this Act requires forensic material taken from a person by a forensic procedure to be destroyed, subsection (2) applies:
 - (a) to evidence of the forensic material, and
 - (b) if the material has not been destroyed—to evidence consisting of the forensic material, and
 - (c) to any results of the analysis of the forensic material, and
 - (d) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (2) The results of the analysis, and the other evidence, are not admissible if adduced by the prosecution in any proceedings against the person, but may be admissible if adduced in such proceedings by the person.

83A Inadmissibility of certain evidence from forensic procedures undertaken for purpose of missing persons index

- (1) This section applies to a person who volunteers to have a forensic procedure carried out for the purposes of placing information obtained from the analysis of the person's forensic material on the missing persons index.
- (2) This section applies:
 - (a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person to whom this section applies by a forensic procedure, and
 - (b) to evidence of any results of the analysis of the forensic material, and
 - (c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (3) If this section applies, evidence described in subsection (2) is not admissible in any proceedings against the person in a court, but may be admissible if adduced in such proceedings by the person.
- (4) This section extends to a person who volunteered to undergo a forensic procedure before the commencement of this section.

Division 2 Other evidence

84 Admissibility of evidence relating to consent to forensic procedure

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic

procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a police officer or another person investigating the commission of the offence concerned acted contrary to law in carrying out that investigation.

85 Admissibility of evidence relating to carrying out of forensic procedure

Despite section 82 (4), evidence of how a forensic procedure was carried out is admissible in proceedings against a person in a court:

- (a) to establish or rebut an allegation that unreasonable force was used to enable the procedure to be carried out, or
- (b) to determine the admissibility of a confession or admission or other evidence adverse to the person where the person alleges that the evidence was induced or obtained by the use of unreasonable force, or
- (c) to establish or rebut an allegation that the forensic procedure was not carried out in accordance with Part 6.

Part 10 Destruction of forensic material

86 Destruction of forensic material where interim order disallowed or specified retention period ended

- (1) If an interim order made under section 32 for the carrying out of a forensic procedure is disallowed after the forensic procedure is carried out, the investigating police officer concerned must ensure that:
 - (a) any forensic material obtained as a result of carrying out the forensic procedure is destroyed as soon as practicable after the disallowance, and
 - (b) a copy of the results of any analysis of the forensic material are made available by the person who conducted the analysis to the suspect.

Note—

Part 13 contains provisions about making copies of material available to the suspect. Section 3 (5) explains the meaning of **destroy**.

- (2) If an order for:
 - (a) the carrying out of a forensic procedure made under section 80, or
 - (b) the retention of forensic material under section 81,specifies a period for which forensic material obtained as a result of the carrying out of the procedure may be retained the forensic material is to be destroyed as soon as practicable after the end of the period.

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.

87A Destruction of forensic material given voluntarily for elimination purposes

If a person has consented, or consent has been given on the person's behalf, to have the person's finger print or hand print taken for the purpose of eliminating the person's finger prints or hand prints from those found in relation to an offence under Parts 4, 4AA, 4AC or 4AD of the *Crimes Act 1900*, the police officer in charge of the investigation of the offence must ensure that the finger prints or hand prints are destroyed or returned to the person as soon as practicable after they have been used to eliminate the person from inquiries in relation to the event.

88 Destruction of forensic material after 12 months

(1) This section applies where forensic material has been taken from a suspect by a forensic procedure carried out under Part 3, 4 or 5.

(2) If:

- (a) forensic material has been taken from a suspect, and
- (b) a period of 12 months has elapsed since the forensic material was taken, and
- (c) proceedings for an offence in respect of the act or omission in relation to which

the forensic material was taken have not been instituted against the suspect, or have been discontinued,

the forensic material must be destroyed as soon as practicable unless a warrant for the apprehension of the suspect has been issued.

Note—

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

- (3) If a warrant for the apprehension of the suspect is issued during the period of 12 months after forensic material is taken, the forensic material must be destroyed as soon as practicable after:
- (a) the warrant lapses, or
 - (b) a period of 12 months elapses after the suspect is apprehended.
- (4) If forensic material has been taken from a person who is a suspect and:
- (a) the person is found to have committed an offence to which the forensic material relates but no conviction is recorded, or
 - (b) the person is acquitted of such an offence and:
 - (i) no appeal is lodged against the acquittal, or
 - (ii) an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn,
- 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.
- (5) A Magistrate may, on application by a police officer or the Director of Public Prosecutions, extend the period of 12 months referred to in subsection (2), or that period as previously extended under this subsection in relation to particular forensic material, if the Magistrate is satisfied that there are special reasons for doing so.
- (6) A Magistrate to whom an application is made under subsection (5) is not to extend the period unless:
- (a) the applicant for the extension has taken reasonable steps to notify the person from whom the forensic material was taken of the making of the application, and
 - (b) the person or his or her legal representative or interview friend (if any) has been given an opportunity to speak to or make a submission to the Magistrate concerning the extension.
- (7) An extension in relation to particular forensic material may be given on more than one occasion.

- (8) The Magistrate is to ensure that the responsible person in relation to the DNA database system is notified of any extension given under this section.

Note—

Part 13 contains provisions restricting the use of information obtained as a result of the carrying out of a forensic procedure.

89 Destruction of forensic material where related evidence is inadmissible

- (1) If a court finds that evidence described in section 82 relating to a forensic procedure is inadmissible under that section, the Commissioner of Police must, as soon as practicable after the end of the proceedings before the court (including any re-trial and any period during which an appeal may be made), ensure that the forensic material taken from the suspect by that forensic procedure is destroyed.
- (2) This section does not require the destruction of a DNA profile derived from forensic material.

Note—

The Commissioner of Police may delegate this function. See section 31 of the *Police Act 1990*. Section 3 (5) explains the meaning of **destroy**.

Part 11 DNA database system

90 Definitions

In this Act:

crime scene index means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where an offence (whether a serious indictable offence or a prescribed offence or an offence under the law of a participating jurisdiction) was, or is reasonably suspected of having been, committed, or
- (b) on or within the body of the victim of such an offence, or
- (c) on anything worn or carried by the victim at the time when such an offence was committed, or
- (d) on or within the body of any person, on any thing, or at any place, associated with the commission of such an offence.

DNA database system means a database (whether in computerised or other form and however described) containing:

- (a) the following indexes of DNA profiles:
- (i) a crime scene index,

- (ii) a missing persons index,
- (iii) an offenders index,
- (iv) a suspects index,
- (v) an unknown deceased persons index,
- (vi) a volunteers (limited purposes) index,
- (vii) a volunteers (unlimited purposes) index,

and information that may be used to identify the person from whose forensic material each DNA profile was derived, and

- (b) a statistical index, and
- (c) any other index prescribed by the regulations.

missing persons index means an index of DNA profiles derived from forensic material of:

- (a) persons who are missing, and
- (b) volunteers and persons under 10 years of age who are relatives by blood of such persons.

offenders index means an index of DNA profiles derived from forensic material taken:

- (a) in accordance with Part 7, 7A or 7B or under a corresponding law of a participating jurisdiction from serious indictable offenders, and
- (b) from suspects who have been convicted of prescribed offences or offences under the laws of participating jurisdictions.

statistical index means an index of information that:

- (a) is obtained from the analysis of forensic material taken from persons in accordance with this Act or under a corresponding law of a participating jurisdiction, and
- (b) has been compiled for statistical purposes, and
- (c) cannot be used to discover the identity of the persons from whom the forensic material was taken.

suspects index means an index of DNA profiles derived from forensic material taken from suspects in accordance with Part 3, 4 or 5 or under a corresponding law of a participating jurisdiction.

unknown deceased persons index means an index of DNA profiles derived from

forensic material of deceased persons whose identities are unknown.

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.

volunteers (unlimited purposes) index means an index of DNA profiles derived from material taken:

- (a) 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 under section 77 (2) (c) that information obtained may be used for the purpose of a criminal investigation or any other purpose for which the DNA database system may be used under this Part or Part 12, and
- (b) from deceased persons whose identity is known.

91 Supply of forensic material for DNA database system purposes

(1) A person:

- (a) whose conduct causes the supply of forensic material taken from any person under this Act (or under a corresponding law of a participating jurisdiction) to any person for prohibited analysis, and
 - (b) who intends or is reckless as to the supply of material of that kind,
- is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

(2) A person:

- (a) whose conduct causes the supply of forensic material (other than permitted forensic material) to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system, and
 - (b) who intends or is reckless as to the supply of material of that kind,
- is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

(3) In this section:

permitted forensic material means forensic material:

- (a) found at a crime scene, or
- (b) taken from a suspect in relation to an offence in accordance with Part 3, 4 or 5 or under a corresponding law of a participating jurisdiction, or
- (c) taken from an offender, untested former offender, untested registrable person, volunteer or a person under 10 years of age in accordance with Part 7, 7A, 7B, 8 or 8A or under a corresponding law of a participating jurisdiction, or
- (d) taken from the body of a deceased person, or
- (e) that is from the body of a missing person, or
- (f) taken from a volunteer who is a relative by blood of a deceased or missing person.

prohibited analysis means analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system when the forensic material is required to be destroyed by this Act or under a corresponding law of a participating jurisdiction.

92 Use of information on DNA database system

- (1) A person must not access information stored on the DNA database system unless the information is accessed in accordance with this section.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) A person authorised for the time being by the responsible person for the DNA database system may access information stored on the DNA database system for one or more of the following purposes:
 - (a) the purpose of forensic matching permitted under section 81M or 93,
 - (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates,
 - (c) the purpose of administering the DNA database system,
 - (d) the purposes of any arrangement entered into between the State and another State or Territory or the Commonwealth for the provision of access to information contained in the DNA database system by law enforcement officers or by any other persons prescribed by the regulations,
 - (e) the purposes of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987*, or the *Extradition Act 1988*, of the Commonwealth,
 - (f) the purpose of a review of, or inquiry into, a conviction or sentence under Part 7 of

the *Crimes (Appeal and Review) Act 2001*,

- (g) the purposes of the investigation of complaints about the conduct of police officers under Part 8A of the *Police Act 1990*,
- (h) the purposes of a coronial inquest or inquiry,
- (i) the purpose of the investigation of a complaint by the Privacy Commissioner,
- (j) any other purposes prescribed by the regulations.

(3) This section does not apply in relation to information that cannot be used to discover the identity of any person.

Note—

Section 109 prevents the disclosure of accessed information except in certain specified circumstances.

93 Permissible matching of DNA profiles

- (1) A matching of a DNA profile on an index of the DNA database system specified at the top of a column of the table to this subsection with a DNA profile on an index of the system specified in column 1 of a row of the table:
 - (a) is not permitted by this Part if “no” is shown at the intersection of the relevant row and column, and
 - (b) is permitted by this Part if “yes” is shown at the intersection of the relevant row and column, and
 - (c) is permitted by this Part in connection with the volunteers (limited purposes) index if “only if within purpose” is shown at the intersection of the relevant row and column, but only if the matching is for a purpose for which the relevant DNA profile was placed on that index.

Index of profile to be matched

Is matching permitted?

column 1	column 2	column 3	column 4	column 5	column 6	column 7	column 8
	crime scene	suspects	volunteers (limited purposes)	volunteers (unlimited purposes)	offenders	missing persons	unknown deceased persons
crime scene	yes	yes	only if within purpose	yes	yes	yes	yes

suspects	yes	yes	no	no	yes	yes	yes
volunteers only if (limited purposes)	within purpose	no	no	no	only if within purpose	only if within purpose	only if within purpose
volunteers (unlimited purposes)	yes	no	no	no	yes	yes	yes
offenders	yes	yes	only if within purpose	yes	yes	yes	yes
missing persons	yes	yes	only if within purpose	yes	yes	yes	yes
unknown deceased persons	yes	yes	only if within purpose	yes	yes	yes	yes

(2) (Repealed)

(3) A person:

(a) whose conduct gives rise to a matching that is not permitted by this Part of a DNA profile on an index of the DNA database system with a DNA profile on the same or another index of the DNA database system, and

(b) who intends or is reckless as to any such matching of profiles,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

(4) This section does not make it an offence for conduct to cause a matching that is not permitted by this Part if the matching is solely for the purpose of administering the DNA database system.

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,

(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.

94 Recording, retention and removal of identifying information on DNA database system

(1) A person:

(a) whose conduct causes any identifying information about a person obtained from forensic material taken from the person under this Act to be recorded or retained in a DNA database system at any time after this Act requires the forensic material to be destroyed, and

Note—

See, for example, section 88 (2) which requires forensic material taken from a suspect to be destroyed if 12 months has elapsed since the forensic material was taken and proceedings have not been instituted against the suspect.

(b) who intends or is reckless as to the recording or retention,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

(2) The responsible person for the DNA database system must ensure that any identifying information relating to a person from whose forensic material a DNA profile on the volunteers (unlimited purposes) index or volunteers (limited purposes) index of the

system was derived is removed from the system as soon as practicable after the end of the identifying period for the profile.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (3) The responsible person for the DNA database system must ensure that any identifying information relating to a DNA profile of an offender on the offenders index is removed from the system as soon as practicable after becoming aware that the offender has been pardoned or acquitted of the offence concerned or if the conviction has been quashed.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (4) In this section:

identifying information means any information that could be used:

- (a) to discover the identity of the person from whose forensic material the DNA profile was derived, or
- (b) to get information about an identifiable person.

identifying period for a DNA profile means:

- (a) if the DNA profile is derived from forensic material taken from a volunteer—such period after the DNA profile is placed on the DNA database system as is agreed by the Commissioner of Police and the volunteer (or, in the case of a volunteer who is a child or an incapable person, a parent or guardian of the volunteer), or
- (b) if the DNA profile is derived from forensic material taken from a deceased person (not being a person who was a volunteer) whose identity is known—such period as the Commissioner of Police orders the responsible person to retain identifying information relating to the profile.

Part 12 Interstate enforcement

95 Definitions

In this Act:

appropriate authority means:

- (a) in relation to a participating jurisdiction other than the Australian Capital Territory—an authority exercising, in relation to the police force of that jurisdiction, functions corresponding to those of the Commissioner of Police and any other authority prescribed by the regulations, or
- (b) in relation to the Australian Capital Territory—the Commissioner of the Australian Federal Police and any other authority prescribed by the regulations.

corresponding law means:

- (a) a law of the Commonwealth, or of a State or Territory, that substantially corresponds to Part 11, or
- (b) such provisions of a law of the Commonwealth, or of a State or Territory, as are declared by the regulations to be a corresponding law for the purposes of this Act.

CrimTrac means the Commonwealth agency of that name.

DNA database means:

- (a) in relation to the State—the DNA database system, and
- (b) in relation to a participating jurisdiction—a database of DNA profiles that is kept in accordance with a corresponding law of the participating jurisdiction.

participating jurisdiction means the Commonwealth, or a State or Territory, in which there is a corresponding law in force.

responsible authority, in relation to a participating jurisdiction, means any one or more of the following:

- (a) the Minister having responsibility for a corresponding law within that jurisdiction,
- (b) a public authority that administers a corresponding law within that jurisdiction,
- (c) a person or body prescribed by the regulations,

and includes, in relation to the Commonwealth, CrimTrac.

96 Registration of orders

- (1) The Minister may enter into arrangements with the responsible authorities of one or more of the participating jurisdictions for the establishment and maintenance of one or more registers of orders for the carrying out of forensic procedures made under this Act or a corresponding law of a participating jurisdiction.
- (2) An order is registered in accordance with such an arrangement when a copy of the order (being a copy certified by the person who made it) is registered:
 - (a) on such a register and the register is maintained in accordance with the arrangement, or
 - (b) in accordance with the law of the State, or of the participating jurisdiction, as the case may be, in which the register is kept.
- (3) A person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with such an arrangement in the State. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.

- (4) An application for registration of an order, or for cancellation of registration of an order, may be made in accordance with the regulations.

97 Database information

- (1) The Minister may enter into arrangements for any of the purposes set out in subsection (1A) with the responsible authority of one or more participating jurisdictions under which:
- (a) information from the DNA database of this State may be transmitted to any jurisdiction that is a party to the arrangements, and
 - (b) information from any such jurisdiction may be transmitted to this State.
- (1A) Information that is transmitted under this section must not be used except for the following purposes:
- (a) the investigation of, or the conduct of proceedings for, an offence against the law of this State or the law of a jurisdiction that is a party to the arrangements,
 - (b) the identification of missing or deceased persons,
 - (c) if arrangements are entered into with CrimTrac—CrimTrac comparing the transmitted information with information transmitted from a participating jurisdiction and then notifying this State and that jurisdiction of any matches that it finds.
- (1B) Arrangements under this section may not authorise the comparison of information so as to match DNA profiles in a manner that would contravene section 93 were the information contained wholly within the DNA database of this State.
- (2) Information that is transmitted under this section must not be recorded or maintained in any database of information that may be used to discover the identity of a person or to obtain information about an identifiable person at any time after this Act or a corresponding law of a participating jurisdiction requires the forensic material to which it relates to be destroyed.

Part 13 General provisions relating to operation of this Act

98 Interpreters

- (1) Where:
- (a) a police officer proposes to take an action listed in subsection (2), and
 - (b) the police officer believes on reasonable grounds that the suspect or serious indictable offender is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in the English language,

the police officer must, before taking the proposed action, arrange for the presence of an interpreter, and defer taking the proposed action until the interpreter is present.

- (1A) If it is not practicable to arrange for the presence of an interpreter, it is sufficient compliance with subsection (1) if the police officer arranges for a telephone linking to an interpreter.
- (2) The actions are as follows:
- (a) asking a suspect, offender, untested former offender or untested registrable person to consent to a forensic procedure (Part 3, 7, 7A or 7B),
 - (b) ordering the carrying out of a non-intimate forensic procedure on, or taking of a sample by buccal swab from, a suspect, offender, untested former offender or untested registrable person (Part 4, 7, 7A or 7B),
 - (c) applying to a Magistrate or other authorised officer for an order for the carrying out of a forensic procedure on a suspect, offender, untested former offender or untested registrable person (Part 5, 7, 7A or 7B),
 - (d) cautioning a suspect, offender, untested former offender or untested registrable person (Part 6, 7, 7A or 7B),
 - (e) carrying out, or arranging for the carrying out of, a forensic procedure on a suspect, offender, untested former offender or untested registrable person (Part 6, 7, 7A or 7B),
 - (f) giving a suspect or offender an opportunity to view a video recording made under this Act (section 100).

99 Powers and entitlements of legal representatives and interview friends

- (1) A request or objection that may be made by a suspect or offender under this Act may be made on the suspect's or offender's behalf by:
- (a) in any case—the suspect's or offender's legal representative, or
 - (b) if the suspect or offender is a child or an incapable person—an interview friend of the suspect or offender, or
 - (c) if the suspect or offender identifies as an Aboriginal person or a Torres Strait Islander—an interview friend of the suspect or offender.
- (2) If:
- (a) a provision of this Act requires a suspect or offender to be informed of a matter, and
 - (b) an interview friend or legal representative of the suspect or offender is present

when the suspect or offender is to be so informed,
the interview friend or legal representative must also be informed of the matter.

100 Obligation of investigating police officers relating to recordings

- (1) If a recording is made as required by a provision of this Act, the investigating police officer concerned must ensure that:
 - (a) if an audio recording only or a video recording only is made—the suspect, offender, volunteer or person under 10 years of age concerned is given the opportunity to listen to or view the recording, and
 - (b) if both an audio recording and a video recording are made:
 - (i) the suspect, offender, volunteer or person under 10 years of age concerned is given an opportunity to listen to the audio recording, and
 - (ii) the suspect, offender, volunteer or person under 10 years of age concerned is given an opportunity to view the video recording, and
 - (c) in any case, if a transcript of the recording is made—a copy of the transcript is made available to the suspect, offender, volunteer or person under 10 years of age concerned.
- (2) Where an investigating police officer is required to ensure that a suspect, offender, volunteer or person under 10 years of age is given an opportunity to view a video recording made under this Act, the investigating police officer must ensure that the same opportunity is given to:
 - (a) in any case—the legal representative of the suspect, offender, volunteer or person under 10 years of age, and
 - (b) if the suspect, offender or volunteer is a child or an incapable person—an interview friend of the suspect, offender or volunteer, and
 - (c) if the suspect, offender or volunteer identifies as an Aboriginal person or a Torres Strait Islander—an interview friend of the suspect, offender or volunteer.

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

- (1) Without limiting the way in which material from samples, copies, or any other material, that must be made available to a suspect, offender, volunteer or person under 10 years of age under this Act may be made available, it:
 - (a) may be sent to the suspect, offender, volunteer or person under 10 years of age at his or her last known address (if any), or to the legal representative (if any) of the suspect, offender, volunteer or person under 10 years of age at his or her last

known address, or

(b) if there is no known address as mentioned in paragraph (a)—may be made available for collection by the suspect, offender, volunteer or person under 10 years of age at the police station where the investigating police officer concerned was based at the time the forensic procedure was carried out.

(2) Material of any kind (other than material from samples and copies of records made under section 36) that is required by this Act to be made available to a suspect, offender, volunteer or person under 10 years of age must be made available in accordance with subsection (1):

(a) within 90 days after the material comes into existence, or

(b) if the material is requested by the suspect, offender, volunteer or person under 10 years of age or the interview friend or legal representative of the suspect, offender, volunteer or person under 10 years of age, within 90 days of the request.

Note—

The timing of making copies of section 36 records available is covered in section 36 (5).

102 No charge to be made for material or viewing video

If a provision of this Act requires material of any kind to be given to a suspect, offender, volunteer or person under 10 years of age, or an opportunity to view a video recording to be given to a suspect, offender, volunteer or person under 10 years of age, the material or the opportunity to view the video recording must be given without charge.

103 Proof of belief or suspicion

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds, or suspected on reasonable grounds, as to a matter referred to in this Act.

104 Proof of impracticability

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that it was not practicable to do something required by this Act to be done if practicable.

105 Proof that time should be disregarded

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that any particular time was covered by a provision of section 16 (2), 40 (2) or 53 (2).

106 Proof of voluntary waiver of certain rights

In any proceedings:

- (a) the burden lies on the prosecution to prove that a person who identifies as an Aboriginal person or Torres Strait Islander has waived a right as mentioned in section 10 (3), 15 (3), 30 (3), 55 (3) or 57 (5), and
- (b) the burden is not discharged unless the court is satisfied on the balance of probabilities that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.

107 Liability for forensic procedures

No civil or criminal liability is incurred by any person (including a police officer) who carries out, or helps to carry out, a forensic procedure under this Act in respect of anything properly and necessarily done or omitted to be done in good faith by the person in carrying out or helping to carry out the forensic procedure if the person believed on reasonable grounds that:

- (a) informed consent had been given to the carrying out of the forensic procedure, or
- (b) the carrying out of the forensic procedure without informed consent had been duly ordered by a police officer or a Magistrate or other authorised officer under this Act.

Note—

This section does not provide any protection in respect of action taken maliciously or recklessly.

108 Experts not obliged to carry out forensic procedures

Nothing in this Act requires a medical practitioner, nurse, dentist, dental prosthetist or appropriately qualified police officer or person to carry out a forensic procedure.

109 Disclosure of information

(1) A person who has access:

- (a) to any information stored on the DNA database system, or
- (b) to any other information revealed by a forensic procedure carried out on a suspect, offender or volunteer,

must not disclose that information except as provided by this section.

(2) A person may only disclose information stored on the DNA database system for one or more of the following purposes:

- (a) the purposes of forensic comparison in the course of a criminal investigation by a police officer or other person prescribed by the regulations,

- (b) the purposes of making the information available, in accordance with the regulations, to the person to whom the information relates,
 - (c) the purposes of administering the DNA database system,
 - (c1) the purposes of any arrangement of the kind referred to in section 97,
 - (d) the purposes of any other arrangement entered into between the State and another State or Territory or the Commonwealth for the provision of access to information contained in the DNA database system by law enforcement officers or by any other persons prescribed by the regulations,
 - (e) the purposes of a review, or inquiry into, a conviction or sentence under Part 7 of the *Crimes (Appeal and Review) Act 2001*,
 - (f) the purposes of an investigation of a complaint by the Privacy Commissioner,
 - (f1) the purposes of informing a person who volunteered to undergo a forensic procedure for the purposes of placing information obtained from the analysis of the person's forensic material on the missing persons index:
 - (i) that the DNA profile of the person matches a DNA profile on an index of the DNA database system, and
 - (ii) that the DNA profile of a missing blood relative of the person matches a DNA profile on an index of the DNA database system,
 - (g) any other purpose prescribed by the regulations.
- (3) A person may only disclose information revealed by the carrying out of a forensic procedure on a suspect, offender or volunteer:
- (a) if the person is the suspect, offender or volunteer to whom the information relates, or
 - (b) if the information is already publicly known, or
 - (c) in accordance with any other provision of this Act, or
 - (d) in accordance with the *Mutual Assistance in Criminal Matters Act 1987*, or the *Extradition Act 1988*, of the Commonwealth, or
 - (e) for the purposes of the investigation of any offence or offences generally, or
 - (f) for the purpose of a decision whether to institute proceedings for an offence, or
 - (g) for the purpose of proceedings for any offence, or
 - (h) for the purpose of a coronial inquest or inquiry, or

- (i) for the purpose of civil proceedings (including proceedings under Part 9 of the *Police Act 1990*) that relate to the way in which the procedure was carried out, or
 - (j) for the purpose of the suspect's, offender's or volunteer's medical treatment, or
 - (k) for the purpose of the medical treatment of a victim of an offence that there are reasonable grounds to believe was committed by the suspect, or
 - (l) if the suspect, offender or volunteer consents in writing to the disclosure, or
 - (m) for the purposes of the investigation of complaints about the conduct of police officers under Part 8A of the *Police Act 1990*, or
 - (n) for the purposes of scrutiny by the Ombudsman under section 121, or
 - (o) for any other purpose prescribed by the regulations.
- (4) This section does not apply in relation to information that cannot be used to discover the identity of any person.
- (5) A person:
- (a) whose conduct gives rise to the disclosure of information in contravention of this section, and
 - (b) who intends or is reckless as to the disclosure,
- is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

110 Retention of electronic recordings

- (1) A recording made by electronic means by a police officer in accordance with this Act that is no longer required for investigative or evidentiary purposes may be retained for such other purposes, and for such period, as the Commissioner of Police directs.
- (2) A recording that is retained under this section is to be stored so as to protect it against unauthorised access or use by any person.

Part 14 Operation of this Act and effect on other laws

111 (Repealed)

112 Application of Act to taking of photographs, hand prints etc

This Act does not apply to the taking of photographs, hand prints, finger prints, foot prints or toe prints:

- (a) from a suspect who is under 14 years of age, if the suspect is in lawful custody as

mentioned in section 136 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or

- (b) from a suspect who is at least 14 years of age, if the suspect is in lawful custody as mentioned in section 133 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
- (c) from an offender as referred to in section 63 of the *Crimes (Sentencing Procedure) Act 1999*, or
- (d) from a person in accordance with section 138A or 138B of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

113 Relationship with Parts 9 and 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

- (1) Nothing in this Act is intended to limit the rights and protections provided by Parts 9 and 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to the extent that the provisions of those Parts can operate in circumstances covered by this Act.
- (2) The rights and protections conferred by this Act are in addition to those conferred by Parts 9 and 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* but, to the extent (if any) that compliance with this Act results in compliance with those Parts, the requirements of those Parts are satisfied.

114 Application of other laws

- (1) This Act is not intended to limit or exclude the operation of another law of the State relating to the following:
 - (a) the carrying out of forensic procedures, including procedures not referred to in this Act,
 - (b) without limiting paragraph (a), the carrying out of breath analysis or a breath test or the production of samples of blood or urine to determine the level of alcohol or drugs, if any, present in a person's body,
 - (b1) without limiting paragraph (a), the taking of finger prints or hand prints of applicants seeking employment under any Act,
 - (c) the taking of forensic samples, including samples not referred to in this Act,
 - (d) the taking of identification evidence,
 - (e) the carrying out of searches of a person,
 - (f) the retention or use of forensic material or information obtained as a result of activities described in paragraph (a), (b), (b1), (c), (d) or (e).

- (2) It is declared that even though another law of the State provides power to do one or more of the things referred to in subsection (1), a similar power conferred by this Act may be used despite the existence of the power under the other law.

115 Taking, retention and use of forensic material

- (1) **Taking, retention and use authorised by laws of other jurisdictions** Nothing in this Act affects the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised by or under another law of the State or a law of the Commonwealth.
- (2) Forensic material, or information obtained from it, that is taken in accordance with the law of another State or a Territory may be retained or used in the State for investigative, statistical or evidentiary purposes even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with, any provision of this Act relating to the carrying out of forensic procedures.
- (3) **Use and retention of forensic material taken before commencement of subsection** Forensic material, or information obtained from it, that was taken in accordance with the law of this or another State or a Territory, as in force immediately before the commencement of this subsection, may be retained or used in the State for investigative, statistical or evidentiary purposes even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with, any provision of this Act relating to the carrying out of forensic procedures.

Part 15 Miscellaneous

115A Appeals from forensic procedure orders made by Magistrate

- (1) An appeal against an order made by a Magistrate under this Act authorising the carrying out of a forensic procedure on a person may be made to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001* as if the order were a sentence arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
- (2) An appeal against a Magistrate's refusal to make an order under this Act authorising the carrying out of a forensic procedure on a person may be made to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001* as if the refusal were an order dismissing a matter under Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
- (3) The *Crimes (Local Courts Appeal and Review) Act 2001* applies to an appeal arising under this section with such modifications as are made by or in accordance with the regulations under that Act.

116 Lists of interview friends

- (1) The Minister must, so far as is reasonably practicable, establish, and update at such intervals as the Minister thinks appropriate, a list, in relation to a part of the State where there are likely to be persons under arrest or serving sentences of imprisonment in a correctional centre or other place of detention, of the names of persons (not being police officers) who:
 - (a) are suitable to help Aboriginal persons or Torres Strait Islanders under arrest or serving a sentence of imprisonment, and
 - (b) are willing to give such help in that part of the State.
- (2) In establishing and maintaining a list in relation to a part of the State, the Minister must from time to time consult with any Aboriginal legal aid organisation providing legal assistance to Aboriginal persons or Torres Strait Islanders in that part of the State.
- (3) The Minister may, in writing, delegate to a person employed in the Attorney General's Department all or any of the functions of the Minister under this section.

117 Proceedings for offences

Proceedings for an offence against this Act or the regulations are to be dealt with summarily before the Local Court.

118 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may make provision for or with respect to:
 - (a) the DNA database system, or
 - (b) the registration of orders under Part 12.
- (3) A regulation may create an offence punishable by a penalty not exceeding 20 penalty units.

119 (Repealed)

120 Savings, transitional and other provisions

Schedule 2 has effect.

121 Monitoring of operation of Act by Ombudsman

- (1) For the period of 18 months after the commencement of Part 8 the Ombudsman is to

keep under scrutiny the exercise of the functions conferred on police officers under this Act.

- (2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.
- (3) The Ombudsman must, as soon as practicable after the expiration of that 18-month period, prepare a report of the Ombudsman's work and activities under this section and furnish a copy of the report to the Minister, the Minister for Police and the Commissioner of Police.
- (4) The Ombudsman may identify, and include recommendations in the report to be considered by the Minister about, amendments that might appropriately be made to this Act with respect to the exercise of functions conferred on police officers under this Act.
- (5) The Ombudsman may at any time make a special report on any matter arising out of the operation of this Act to the Minister.
- (6) The Minister is to lay (or cause to be laid) a copy of any report made or furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.
- (7) If a House of Parliament is not sitting when the Minister seeks to furnish a report to it, the Minister may present copies of the report to the Clerk of the House concerned.
- (8) The report:
 - (a) on presentation and for all purposes is taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and
 - (d) is to be recorded:
 - (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
 - (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,on the first sitting day of the House after receipt of the report by the Clerk.

122 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act

remain valid and whether the terms of the Act remain appropriate for securing those objectives.

- (2) The review is to be undertaken as soon as possible after the period of 18 months from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period referred to in subsection (2).

123 Inquiry by Standing Committee on Law and Justice

- (1) The Committee of the Legislative Council established under the name of the "Standing Committee on Law and Justice" is to enquire into and report on the operation of this Act and the regulations.
- (2) The report is to be tabled in the Legislative Council as soon as possible after the end of the period of 18 months from the date of assent to this Act.
- (3) Without limiting the matters that the Committee may take into account for the purposes of its enquiry and report, it may take into account the following:
 - (a) any relevant provisions of the *Model Forensic Procedures Bill 1999* set out in Appendix 3 of the Discussion paper dated May 1999 prepared by the Model Criminal Code Officers Committee or of any State, Commonwealth or other law,
 - (b) the wider social and legal implications of use of information obtained from matching of DNA profiles derived from forensic material,
 - (c) the effectiveness of matching of DNA profiles as an investigative tool,
 - (d) the reliability of the matching of DNA profiles for the purposes of forensic identification.
- (4) The Committee may make recommendations in its report about amendments that might appropriately be made to the Act to enhance its operation and provide further safeguards for the privacy and civil liberty of persons on whom forensic procedures are carried out, or proposed to be carried out, under the Act.
- (5) The Committee is to furnish a copy of the report to the Ombudsman for consideration.

Schedule 1 (Repealed)

Schedule 2 Savings, transitional and other provisions

(Section 120)

Part 1 Savings and transitional regulations

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

Crimes (Forensic Procedures) Amendment Act 2002

Crimes (Forensic Procedures) Amendment Act 2006

Crimes (Forensic Procedures) Amendment Act 2007

Crimes (Forensic Procedures) Amendment Act 2008

Crimes (Forensic Procedures) Amendment Act 2009

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of Act

2 Forensic procedures

- (1) This Act does not apply in respect of the carrying out of a forensic procedure on a person:
- (a) arrested for an offence, or
 - (b) charged with an offence, or
 - (c) summonsed to appear before a court in relation to an offence,
- before the commencement of this clause.

- (2) Section 353A (3A) and (3B) of the *Crimes Act 1900* continue to apply to and in respect of the taking of samples of the blood, saliva and hair of a person taken into lawful custody before the commencement of this clause.

3 DNA database system

- (1) Nothing in this Act prevents a DNA profile derived from forensic material found, or obtained from the carrying out of a forensic procedure, before the commencement of this clause from being placed on the appropriate index of the DNA database system.
- (2) However, information obtained from analysis of forensic material taken from a volunteer before that commencement is not to be placed on the DNA database system unless the volunteer (or in the case of a child or an incapable person, a parent or guardian of the volunteer) has been informed of the matters set out in section 77 (2).

Part 3 Provisions consequent on enactment of Crimes (Forensic Procedures) Amendment Act 2002

4 Definition

In this Part, **amending Act** means the *Crimes (Forensic Procedures) Amendment Act 2002*.

5 Application and order for repeated forensic procedure

The amendment made by Schedule 1 [9] to the amending Act extends to circumstances where forensic material is lost or became unavailable for analysis before the commencement of the amendment.

6 Application for interim orders

The amendment made by Schedule 1 [15] to the amending Act does not apply to an application made but not dealt with before the commencement of the amendment.

7 Records of applications and interim orders

The amendments made by Schedule 1 [16]-[20] to the amending Act extend to applications and orders made before the commencement of the amendments.

Part 4 Provisions consequent on enactment of Crimes (Forensic Procedures) Amendment Act 2006

8 Definition

In this Part, **the 2006 amending Act** means the *Crimes (Forensic Procedures) Amendment Act 2006*.

9 Application of Part 7A

Part 7A applies to and in respect of any person who, after the commencement of that Part, is served with a court attendance notice referred to in section 75A (3) (b), and so applies regardless of when the person served the sentence of imprisonment referred to in section 75A (3) (a).

10 Ministerial arrangements under section 97

The amendments to section 97 that are made by the 2006 amending Act do not affect any arrangement that was in force under that section immediately before the commencement of those amendments.

11 Existing consents

The amendments to this Act that are made by the 2006 amending Act do not affect any consent that had been given for the purposes of this Act before the commencement of those amendments.

Part 5 Provisions consequent on enactment of **Crimes (Forensic Procedures) Amendment Act 2008**

12 Ministerial arrangements under section 97

Each of the following arrangements is taken to have been validly entered into under section 97 (1), as substituted by the *Crimes (Forensic Procedures) Amendment Act 2008*, on and from the date the arrangement was entered into:

- (a) the arrangement entitled "*Section 97 (1) New South Wales/Commonwealth Arrangement*" signed by the Attorney General and the Minister for Justice and Customs of the Commonwealth and dated 25 November 2003,
- (b) the arrangement entitled "*Crimes (DNA Database) (Reciprocal Access—New South Wales and Queensland) Arrangement*" signed by the Attorney General and the Minister for Police and Corrective Services of Queensland and dated 16 May 2005,
- (c) the arrangement entitled "*Arrangement for the Transmission of DNA Database Information to and from New South Wales and the CrimTrac Agency of the Commonwealth*" signed by the Attorney General and the Chief Executive Officer of CrimTrac and dated 28 February 2007,
- (d) the arrangement entitled "*New South Wales and Western Australia Ministerial Arrangement for the Transmission of DNA Database Information*" signed by the Attorney General and the Minister for Police and Emergency Services of Western Australia and dated 19 July 2007,
- (e) the arrangement entitled "*New South Wales and Australian Capital Territory Ministerial Arrangement for the Transmission of DNA Database Information*" signed by

the Attorney General and the Attorney General of the Australian Capital Territory and dated 20 July 2007,

- (f) the arrangement entitled "*New South Wales and Victoria Ministerial Arrangement for the Transmission of DNA Database Information*" signed by the Attorney General and the Attorney General of Victoria and dated 13 August 2007,
- (g) the arrangement entitled "*New South Wales and Tasmania Ministerial Arrangement for the Transmission of DNA Database Information*" signed by the Attorney General and the Minister for Justice and Workplace Relations of Tasmania and dated 17 September 2007,
- (h) the arrangement entitled "*New South Wales and South Australia Ministerial Arrangement for the Transmission of DNA Database Information*" signed by the Attorney General and the Attorney General of South Australia and dated 19 February 2008.

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.