

# FORENSIC PROCEDURES MODEL PROVISIONS

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## Introductory note

The draft extends previously drafted core provisions for the carrying out of forensic procedures on people who are suspects in relation to offences. The provisions are extended to cover forensic procedures on people who have been convicted of offences punishable by 5 or more years of imprisonment or who volunteer to undergo forensic procedures and include provisions relating to DNA databases containing information derived from forensic material obtained by such procedures. The new provisions have added to the previously drafted provisions with only minor amendment to the previous provisions so as to highlight the amendments made. Any jurisdiction which has not yet enacted the previous provisions will have the opportunity to re-arrange the previously drafted and the new provisions rather than merely adding the new provisions to their enacted provisions. The provisions will also need to be adjusted in each jurisdiction (and appropriate consequential amendments made) to take into account local circumstances (in particular, local legislation relating to police interviews and search procedures) and those matters that are not to be uniformly adopted. It is assumed each jurisdiction will have supplementary procedural provisions that are appropriate to local circumstances.

## Part \*\* Forensic procedures

### Division 1      General

#### 1 Interpretation (former cl 1)

##### (1) Definitions

In this Part:

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

**appropriately qualified person** to carry out a forensic procedure means a person (such as a police officer) who is qualified as prescribed by the regulations to carry out the forensic procedure.

**authorised applicant** for an order means:

- (a) the police officer in charge of a police station, or
- (b) the investigating police officer, or
- (c) the Director of Prosecutions [*an appropriate reference should be inserted in each jurisdiction to ensure that this covers any person prosecuting a relevant offence*].

**child** means a person who is under 18 years of age.

**Commissioner of Police** includes a police officer to whom the Commissioner has delegated the functions conferred or imposed on the Commissioner under this Act.

**corresponding law** is defined in section 85.

**destroy** is defined in subsection (5).

**exercise** a function includes perform a duty.

**DNA database system** is defined in section 79.

**forensic material** means:

- (a) samples, or
- (b) handprints, fingerprints, footprints or toeprints, or
- (c) photographs or video recordings, 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,

but does not include any intrusion into a person's body cavities except the mouth or the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

**function** includes a power, authority or duty.

**incapable person** means an adult who:

- (a) is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure, or
- (b) is incapable of indicating whether or not he or she consents or does not consent to a forensic procedure being carried out.

**in custody** is defined in subsection (2).

**informed consent:**

- (a) in relation to a suspect—is defined in section 6, and
- (b) in relation to an offender—is defined in section 54, and
- (c) in relation to a volunteer or parent or guardian of a volunteer—is defined in section 65.

**interview friend** is defined in section 2.

**intimate forensic procedure** means the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts,
- (b) the taking of a sample of blood,
- (c) the taking of a sample of saliva, or a sample by buccal swab,

- (d) the taking of a sample of pubic hair,
- (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts,
- (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts,
- (g) the taking of a dental impression,
- (h) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts.

***investigating police officer*** means the police officer in charge of the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

***magistrate*** means [an appropriate definition should (if necessary) be inserted by each jurisdiction to ensure that the provisions relating to magistrates do not apply to lay justices].

***non-intimate forensic procedure*** means the following forensic procedures:

- (a) an examination of a part of the body other than the genital or anal area, buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts, that requires touching of the body or removal of clothing, or
- (b) the taking of a sample of hair other than pubic hair, or
- (c) the taking of a sample from a nail or under a nail, or
- (d) the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts, or
- (e) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts, or
- (f) the taking of a handprint, fingerprint, footprint or toeprint, or
- (g) the taking of a photograph of, or an impression or cast of a wound from, a part of the body other than the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts.

**offender** means:

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

**order** means:

- (a) order of a magistrate under section 18, or
- (b) interim order of a magistrate under section 26, or
- (c) order of a court under section 62 or 63, or
- (d) order of a magistrate under section 68 or 69.

**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 85.

**prescribed offence** means an offence under a law of this State or of a participating jurisdiction that is punishable by a maximum penalty of 2 or more years of imprisonment.

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

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

[*Note: an appropriate definition should be inserted by each jurisdiction*]

**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.

[*Note: the appropriate equivalent of the above NSW provision should be inserted in each jurisdiction*]

**responsible person**, in relation to the DNA database system, means the person responsible for the care, control and management of the system.

**serious offence** means the following:

- (a) an offence under a law of this State or of a participating jurisdiction that is punishable by imprisonment for life or by a maximum penalty of 5 or more years of imprisonment,

- (b) an offence under section 61 of the *Crimes Act 1900*,  
*[Note: the appropriate equivalent of the above NSW provision (offence of common assault) should be inserted in each jurisdiction]*
- (c) an offence under section 562I of the *Crimes Act 1900* of contravening a prohibition or restriction specified in an order,  
*[Note: the appropriate equivalent of the above NSW provision (which relates to contravention of apprehended violence orders (domestic violence orders)) should be inserted in each jurisdiction].*

**serious offender** means a person who is convicted of a serious offence.

**suspect** means:

- (a) a person whom a police officer suspects on reasonable grounds has committed an offence, or
- (b) a person charged with an offence, or
- (c) a person who has been summonsed to appear before a court in relation to an offence.

**Note.** Section 92 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.

**transgender person** is defined in subsection (6).

**volunteer** is defined in section 64.

- (2) **In custody**  
In this Part, a reference to a person in custody is a reference to a person who is in the lawful custody of a police officer.
- (3) **Taking samples**  
In this Part, a reference to a sample taken from a person includes a reference to a sample taken from the person that consists of matter from another person's body.
- (4) **Inform**  
In this Part, a reference to informing a person of a matter is a reference to informing the person of the matter, through an interpreter if necessary, in language (including sign language or braille) in which the person is able to communicate with reasonable fluency.
- (5) **Destroy forensic material or information**  
For the purposes of this Part, a person destroys forensic material taken from another person by a forensic procedure, the results of the analysis of the material or other information gained from it if the person destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.

(6) **Transgender persons**

In this Part, 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 Part (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.

**2 Interview friend** (former cl 2)

(1) In this Part, an *interview friend* of a suspect, an offender or volunteer who is a child or an incapable person is:

- (a) a parent or guardian or other person chosen by, or acceptable to, the suspect, offender or volunteer, or
- (b) a legal representative of the suspect, offender or volunteer, or
- (c) if there is no available person who is covered by either paragraph (a) or (b)—a person who is not a police officer or person who is in any way involved in the investigation of the offence in relation to which the person is a suspect, offender or volunteer chosen by an authorised applicant for an order in relation to the carrying out of a forensic procedure on the suspect, offender or volunteer.

(2) A suspect, offender or volunteer who has a legal representative may also have an interview friend who is not the suspect's, offender's or volunteer's legal representative.

**Division 2            Circumstances in which forensic procedures on suspects may be authorised**

**3    How forensic procedures may be authorised in different circumstances**  
(former cl 3)

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.

**Table**

Sections	Suspect	Intimate forensic procedure	Non-intimate forensic procedure
[to be inserted]	adult not in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a magistrate under Division 5
	adult in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a police officer under Division 4
	incapable adult (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5
	child (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5

**Division 3            Forensic procedures by consent of suspect**

**4    Forensic procedure may be carried out with informed consent of suspect** (former cl 4)

- (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 Division 6 and not otherwise.
- (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who:
  - (a) is a child, or

- (b) is an incapable person.

**5 Persons who cannot consent to forensic procedures** (former cl 5)

- (1) A child cannot consent to the carrying out of a forensic procedure.
- (2) An incapable person cannot consent to the carrying out of a forensic procedure.

**6 Informed consent to forensic procedures** (former cl 6)

- (1) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:
  - (a) requests the suspect to consent to the forensic procedure under section 7, and
  - (b) informs the suspect about the forensic procedure in accordance with section 9, and
  - (c) gives the suspect the opportunity to communicate, or attempt to communicate, with a legal practitioner of the suspect's choice.
- (2) The police officer must allow the suspect to communicate, or attempt to communicate, with the legal practitioner in private unless 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.

**Note.** Section 92 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.

**7 Police officer may request suspect to consent to forensic procedure** (former cl 7)

A police officer may request a suspect to undergo a forensic procedure if the police officer is satisfied as required by section 8.

**8 Matters to be considered by police officer before requesting consent to forensic procedure** (former cl 8)

- (1) The police officer must be satisfied on the balance of probabilities that:
  - (a) the person on whom the forensic procedure is proposed to be carried out is a suspect, and
  - (b) if the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is a prescribed offence and there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed:
    - (i) that offence, or

- (ii) another prescribed offence arising out of the same circumstances as that offence, or
  - (iii) another prescribed offence in respect of which the evidence likely to be obtained as a result of carrying out the proposed forensic procedure on the suspect is likely to have probative value, and
- (c) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is an offence other than an offence that may be dealt with by way of penalty notice and there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed:
- (i) that offence, or
  - (ii) another offence (other than an offence that may be dealt with by way of penalty notice) arising out of the same circumstances as that offence, or
  - (iii) another offence (other than an offence that may be dealt with by way of penalty notice) in respect of which the handprints, fingerprints, footprints or toeprints are likely to have probative value:
- (d) the person on whom the forensic procedure is proposed to be carried out is not a child or incapable person, and
- (e) the request for consent to carry out the forensic procedure is justified in all the circumstances.

**Note.** Section 92 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.

- (2) In determining whether a request is justified in all the circumstances, the police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the police officer must have regard to the following matters:
- (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence,
  - (b) the degree of the suspect's alleged participation in the commission of the relevant offence,
  - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer,

- (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence,
- (e) if the suspect gives any reasons for refusing to consent—the reasons,
- (f) any other matter considered relevant to balancing those interests.

**9 Matters that the suspect must be informed of before giving consent**  
(former cl 9)

- (1) The police officer must 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 audio tape, video tape or other electronic means, or in writing, and that the suspect has a right to a copy of that record in a form provided by section 90,

*[Note: adjustments will be required in each jurisdiction to ensure that this paragraph complies with local requirements for provision of transcripts]*

- (b) the purpose for which the forensic procedure is required,
  - (c) the fact that the person is a suspect in 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 person,
  - (g) if relevant, the matters specified in subsection (2) or (3),
  - (h) that the suspect may refuse to consent to the carrying out of the forensic procedure,
  - (i) the consequences of not consenting, as specified in subsection (4), (5) or (6) (whichever is applicable),
  - (j) the effect of section 72,
  - (k) that information obtained from analysis of forensic material obtained may be placed on the DNA database system and the rules that will apply to its disclosure and use under this Part.
- (2) **Suspect's right to have medical practitioner present during certain forensic procedures**  
The police officer must inform the suspect that the suspect may request that a medical practitioner of the suspect's choice be present while an intimate forensic procedure is carried out.

(3) **Suspect's right to have dentist present during taking of dental impression and other material from mouth**

If the forensic procedure is the taking of a dental impression, sample of saliva or buccal swab, the police officer must inform the suspect that the suspect may request that a dentist of the suspect's choice be present while the procedure is carried out.

(4) **Effect of failure to consent to non-intimate forensic procedure by suspect in custody**

If the suspect is in custody 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 police officer may order the carrying out of the forensic procedure under Division 4 if the police officer is satisfied of the matters referred to in section 14.

(5) **Effect of failure to consent to intimate forensic procedure by suspect in custody**

If the suspect is in custody 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 for an order authorising the carrying out of the forensic procedure.

(6) **Effect of failure to consent to forensic procedure by suspect not in custody**

If the suspect is not in custody, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

**10 Withdrawal of suspect's consent** (former cl 10)

If a suspect 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 suspect's conduct) before or during the carrying out of the forensic procedure, then:

- (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 police officer under Division 4 or a magistrate under Division 5.

**11 Recording of giving of information and consent** (former cl 11)

- (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 audio tape, video tape or other electronic means.

- (2) If electronic recording of the giving of the information and the suspect's responses (if any) is not practicable, the police officer must ensure that a written record of the giving of the information and the suspect's responses (if any) is made, and that a copy of the record is made available to the suspect.

**Note.** Division 14 contains provisions about making copies of material (including tapes) available to the suspect.

*[Note: adjustments will be required in each jurisdiction to ensure that subclause (2) complies with local requirements for provision of transcripts]*

#### **Division 4      Non-intimate forensic procedures on suspect by order of police officer**

##### **12 Non-intimate forensic procedure may be carried out by order of police officer** (former cl 12)

- (1) A person is authorised to carry out a non-intimate forensic procedure on a suspect in custody by order of a police officer under section 13. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who:
- (a) is a child, or
  - (b) is an incapable person.

##### **13 Circumstances in which police officer may order non-intimate forensic procedure** (former cl 13)

A police officer may order the carrying out of a non-intimate forensic procedure on a suspect who is in custody if:

- (a) the suspect has been asked under Division 3 to consent to the carrying out of the forensic procedure, and
- (b) the suspect has not consented, and
- (c) the police officer is satisfied as required by section 14.

##### **14 Matters to be considered by police officer before ordering forensic procedure** (former cl 14)

- (1) The police officer must be satisfied on the balance of probabilities that:
- (a) the suspect is in custody that is lawful custody, and

- (b) if the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is a prescribed offence and there are reasonable grounds to believe that the suspect committed:
  - (i) that offence, or
  - (ii) another prescribed offence arising out of the same circumstances as that offence, or
  - (iii) another prescribed offence in respect of which the evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
- (c) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is an offence other than an offence that may be dealt with by way of penalty notice and there are reasonable grounds to believe that the suspect committed:
  - (i) that offence, or
  - (ii) another offence (other than an offence that may be dealt with by way of penalty notice) arising out of the same circumstances as that offence, or
  - (iii) another offence (other than an offence that may be dealt with by way of penalty notice) in respect of which the handprints, fingerprints, footprints or toeprints are likely to have probative value, and
- (d) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed the relevant offence, and
- (e) the carrying out of the forensic procedure without consent is justified in all the circumstances.

**Note.** Section 92 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.

- (2) In determining whether the carrying out of the forensic procedure without consent is justified in all the circumstances, the police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the police officer must have regard to the following matters:
  - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence,
  - (b) the degree of the suspect's alleged participation in the commission of the relevant offence,

- (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer,
- (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence,
- (e) if the suspect gives any reasons for refusing to consent—the reasons,
- (f) any other matter considered relevant to balancing those interests.

**15 Record of police officer's order** (former cl 15)

- (1) The police officer must, at the time of, or as soon as practicable after, making an order under section 13, 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 police officer must ensure that a copy of the record is made available to the suspect as soon as practicable after the record is made.

**Division 5 Forensic procedures on suspect by order of a magistrate**

**Subdivision 1 General**

**16 Forensic procedure may be carried out by order of a magistrate** (former cl 16)

A person is authorised to carry out a forensic procedure on a suspect by order of a magistrate under section 17. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.

**17 Circumstances in which magistrate may order forensic procedure** (former cl 17)

A magistrate may, under section 18 or 26, order the carrying out of a forensic procedure on a suspect if:

- (a) the suspect is not in custody and has not consented to the forensic procedure, or

- (b) the suspect is in custody, has been requested to consent and has not consented to the forensic procedure, and the procedure is an intimate forensic procedure, or
- (c) the suspect is in custody and the investigation period during which the suspect may lawfully be held has not yet expired, or
- (d) the suspect is a child or an incapable person.

## **Subdivision 2 Final orders**

### **18 Final order for carrying out of forensic procedure** (former cl 18)

A magistrate may order the carrying out of a forensic procedure on a suspect if:

- (a) section 17 applies, and
- (b) the magistrate is satisfied as required by section 19.

### **19 Matters to be considered by magistrate before ordering forensic procedure** (former cl 19)

- (1) The magistrate must be satisfied on the balance of probabilities that:
  - (a) the person on whom the forensic procedure is proposed to be carried out is a suspect, and
  - (b) if the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is a prescribed offence and on the evidence before the magistrate there are reasonable grounds to believe that the suspect committed:
    - (i) that offence, or
    - (ii) another prescribed offence arising out of the same circumstances as that offence, or
    - (iii) another prescribed offence in respect of which the evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
  - (c) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is an offence other than an offence that may be dealt with by way of penalty notice and on the evidence before the magistrate there are reasonable grounds to believe that the suspect committed:
    - (i) that offence, or
    - (ii) another offence (other than an offence that may be dealt with by way of penalty notice) arising out of the same circumstances as that offence, or

- (iii) another offence (other than an offence that may be dealt with by way of penalty notice) in respect of which the handprints, fingerprints, footprints or toeprints are likely to have probative value, and
    - (d) the carrying out of the forensic procedure is justified in all the circumstances.
  - (2) In determining whether the carrying out of the forensic procedure is justified in all the circumstances, the magistrate must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
  - (3) In balancing those interests, the magistrate must have regard to the following matters:
    - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the offence,
    - (b) the degree of the suspect's alleged participation in the commission of the relevant offence,
    - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the magistrate,
    - (d) if the suspect is a child or an incapable person—the best interests of the suspect,
    - (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence,
    - (f) if the suspect gives any reasons for refusing to consent—the reasons,
    - (g) if the suspect is covered by section 17 (c):
      - (i) the period for which the suspect has already been detained, and
      - (ii) the reasons for any delay in proposing the carrying out of the forensic procedure,
    - (h) any other matter considered relevant to balancing those interests.

**20 Application for order** (former cl 20)

- (1) An authorised applicant (but no other person) may apply to a magistrate for an order under section 17 authorising 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 dealing with the matters referred to in section 19 (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 order to the contrary made by the magistrate).

**21 Securing the presence of suspects at hearings—suspect in custody**  
(former cl 21)

- (1) If the suspect is in the custody of a police officer or is otherwise detained under the law of the State [or Territory] (*original custody*), the magistrate may, on the application of a police officer, issue a warrant directing the person holding the suspect in original custody to deliver the suspect into the custody of the police officer (*temporary custody*) for the hearing of an application for an order under this Division.
- (2) The police officer given temporary custody must return the suspect to the place of original custody:
  - (a) if the application for the order is refused—without delay, or
  - (b) if the order is made—without delay after such period after the order is made as is reasonably necessary to carry out the forensic procedure.

**22 Securing the presence of suspects at hearings—suspect not in custody**  
(former cl 22)

- (1) If the suspect is not in custody, 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) 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, 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.

*[Note: procedures concerning application for summons and warrant are covered by separate provisions in each jurisdiction.]*

**23 Procedure at hearing of application for order** (former cl 23)

- (1) An order may only be made in the presence of the suspect concerned.
- (2) A suspect who:
  - (a) is a child, or
  - (b) is an incapable person,must be represented by an interview friend and may also be represented by a legal practitioner.
- (3) Any other suspect may be represented by a legal practitioner.
- (4) 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 witnesses, and
  - (c) may address the magistrate.
- (5) A magistrate must not give leave under subsection (4) (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.

**24 Action to be taken on making of orders** (former cl 24)

- (1) If a magistrate makes an order for the carrying out of a forensic procedure the magistrate must:
  - (a) give reasons for making the order, and
  - (b) ensure that a written record of the order is kept, and
  - (c) inform the suspect that reasonable force may be used to ensure that he or she complies with the order.
- (2) The magistrate may give directions as to the time, place and manner in which a forensic procedure is to be carried out.

**25 Suspect may be kept in custody for carrying out of forensic procedure** (former cl 25)

- (1) If a magistrate orders the carrying out of a forensic procedure on a suspect, the suspect may be detained in custody for so long as is reasonably necessary to carry out the forensic procedure.
- (2) If a magistrate makes an order in the circumstances set out in section 17 (c) the order operates despite any other law.

### **Subdivision 3 Interim orders**

#### **26 Interim orders for the immediate carrying out of a forensic procedure** (former cl 26)

- (1) A magistrate may make an interim order authorising the immediate carrying out of a forensic procedure on a suspect if:
  - (a) section 17 applies, and
  - (b) the magistrate 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 magistrate is satisfied that there is sufficient evidence to indicate that a magistrate is reasonably likely to be satisfied of the existence of the matters referred to in section 19 (1) when the application is finally determined.
- (2) An interim order operates as provided by this Subdivision until a magistrate, at a hearing held as referred to in section 29 (2), confirms the interim order or disallows the interim order.
- (3) Subdivision 2 applies to the making of an order confirming the interim order in the same way as it applies to the making of an order under section 18, and an order confirming the interim order is taken to be an order under section 18.

#### **27 Applications for interim orders** (former cl 27)

- (1) An authorised applicant may, without bringing a suspect before a magistrate and without obtaining an order under section 18, make an application seeking an order (an *interim order*) authorising the immediate carrying out of a forensic procedure on a suspect.
- (2) An application for an interim order must:
  - (a) be supported by evidence on oath or by affidavit dealing with the matters referred to in section 26 (1), and
  - (b) specify the type of forensic procedure sought to be carried out.
- (3) An application for an interim order may be made in person or, if that is not practicable, by telephone, radio, facsimile or other means of communication.
- (4) The suspect must be in the presence of the authorised applicant when the application is made.
- (5) If the suspect is:
  - (a) a child, or
  - (b) an incapable person,

the suspect's interview friend or legal representative must also be in the presence of the authorised applicant.

- (6) 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.

**28 Procedure at hearing of application for interim order** (former cl 28)

- (1) If the application is made in person, or by telephone, radio or other form of oral communication, the magistrate must ensure that:
  - (a) the suspect, and
  - (b) the suspect's legal representative, if any, and
  - (c) the suspect's interview friend, if any,are given an opportunity to speak to the magistrate.
- (2) If the application is made by telex, facsimile or other form of written communication, the magistrate must ensure that:
  - (a) the suspect, and
  - (b) the suspect's legal representative, if any, and
  - (c) 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 magistrate by telephone, radio or other form of oral communication.

**29 Action to be taken on making of interim orders** (former cl 29)

- (1) A magistrate who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, facsimile or other means of communication:
  - (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 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 by the making of an order confirming or disallowing the interim order.
- (3) A magistrate may make 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 18.

**30 Records of applications and interim orders** (former cl 30)

- (1) The applicant for an interim order must, at the time of, or as soon as practicable after, applying for the interim order, make a record (the *applicant's record*) of:
  - (a) the application, and
  - (b) the grounds for seeking the order, and
  - (c) the date and time when the order was made, and
  - (d) the order made, and
  - (e) the magistrate's name.
- (2) The magistrate must, at the time of, or as soon as practicable after, making an interim order, make a record (the *magistrate's record*) of:
  - (a) the date and time when the order was made, and
  - (b) the order made, and
  - (c) the reasons for making it,and sign the magistrate's record and send it to the applicant.
- (3) The applicant must ensure that a copy of the magistrate'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 magistrate's record.

**31 Suspect may be prevented from destroying or contaminating evidence** (former cl 31)

- (1) Any police officer may, while waiting for the application seeking an interim order to be determined, use reasonable force to prevent the suspect destroying 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.

**32 Results of forensic procedures carried out under interim order** (former cl 32)

- (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 confirming the interim order.
- (2) A person who conducts an analysis in the circumstances set out in subsection (1) must not intentionally or recklessly disclose the results of the analysis to any person:
  - (a) during the period before a final order is made, or
  - (b) if the interim order is disallowed.

Maximum penalty: 12 months' imprisonment.

## **Subdivision 4 Reports of proceedings under this Division**

### **33 Restrictions on publication** (former cl 33)

A person must not intentionally or recklessly, in any report of a proceeding under this Division, 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 relevant offence or the magistrate, by order, has authorised such publication.

Maximum penalty: 12 months' imprisonment.

## **Division 6 Carrying out forensic procedures**

### **Subdivision 1 General provisions**

#### **34 General rules for carrying out forensic procedures** (former cl 34)

A forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect, and
- (b) except as permitted by other provisions of this Part, must not be carried out in the presence or view of a person who is of the opposite sex to the suspect, and
- (c) 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 Part, and
- (d) must not involve the removal of more clothing than is necessary for carrying out the procedure, and
- (e) must not involve more visual inspection than is necessary for carrying out the procedure.

#### **35 Use of force in carrying out forensic procedures** (former cl 35)

- (1) A person authorised to carry out a forensic procedure on a person, or a police officer, may use reasonable force:
  - (a) to enable a 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.

**36 Forensic procedures not to be carried out in cruel, inhuman or degrading manner** (former cl 36)

- (1) Nothing in this Part authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner.
- (2) For the purposes of this section, the carrying out of a forensic procedure in accordance with this Part is not in itself regarded as degrading to the suspect.

**37 Taking samples of hair** (former cl 37)

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 analysis of the sample, or other examination of the hair, to be carried out for the purpose of investigating the offence, and
- (b) each strand of hair is taken individually using the least painful technique known and available to the person.

**Subdivision 2 Persons involved in forensic procedures**

**38 Persons who may carry out forensic procedures** (former cl 38)

- (1) The Table to this clause shows, for each forensic procedure, the persons who may carry out the procedure under this Part. 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 40.
- (2) The third column of the Table to this clause shows, for each forensic procedure, whether a medical practitioner or dentist of the suspect's choice may be present while the forensic procedure is carried out.  
**Note.** Section 41 makes detailed provisions for the presence of a medical practitioner or dentist of the suspect's choice while a forensic procedure is carried out.
- (3) This section does not prevent a suspect from carrying out a forensic procedure specified in item 3 of the first column of the Table to this clause on himself or herself under the supervision of an appropriately qualified person.

**Table**

	<b>Forensic procedure</b>	<b>Persons who carry out forensic procedure</b>	<b>May medical practitioner or dentist of suspect's choice be present?</b>
1	external examination of the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	medical practitioner nurse appropriately qualified person	medical practitioner
2	the taking of a sample of blood	medical practitioner nurse	medical practitioner
3	the taking of a sample of saliva, or a sample by buccal swab	medical practitioner dentist dental technician nurse appropriately qualified person	dentist medical practitioner
4	the taking of a sample of pubic hair	medical practitioner nurse	medical practitioner
5	the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	medical practitioner nurse	medical practitioner
6	the taking of a sample by vacuum suction, scraping or lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	medical practitioner nurse	medical practitioner
7	the taking of a dental impression	medical practitioner dentist dental technician	dentist

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8	the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	appropriately qualified person	medical practitioner
9	external examination of a part of the body other than the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts, that requires touching of the body or removal of clothing	medical practitioner nurse appropriately qualified person	no
10	the taking of a sample of hair other than pubic hair	medical practitioner nurse appropriately qualified person	no
11	the taking of a sample from a nail or from under a nail	medical practitioner nurse appropriately qualified person	no
12	the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	medical practitioner nurse appropriately qualified person	no

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13	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, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	medical practitioner nurse appropriately qualified person	no
14	the taking of a handprint, fingerprint, footprint or toeprint	appropriately qualified person	no
15	the taking of a photograph of, or an impression or cast of a wound from, an external part of the body other than the genital or anal area, the buttocks, or, in the case of a female or a transgender person who identifies as a female, the breasts	appropriately qualified person	no

**Note.** *Appropriately qualified person* is defined in section 1.

**39 Certain forensic procedures generally to be carried out by person of same sex as suspect** (former cl 39)

- (1) If practicable, an intimate forensic procedure (other than the taking of a sample of blood, a sample of saliva, a buccal swab or a dental impression) is to be carried out by 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 and hat is to be carried out by a person of the same sex as the suspect.
- (3) If practicable, a person asked under section 40 to help carry out a forensic procedure covered by subsection (1) or (2) is to be a person of the same sex as the suspect.

**40 Person may get help to carry out forensic procedure** (former cl 40)

- (1) An order by a police officer or magistrate authorising the carrying out of a forensic procedure authorises the person who is to carry out the procedure in accordance with section 38 to ask another person to help him or her to carry out the procedure, and authorises the other person to give that help.
- (2) A person who is asked to help carry out a forensic procedure need not be a person mentioned in section 38.
- (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.

**Subdivision 3 Presence of other people while forensic procedure is carried out**

**41 Medical practitioner or dentist of suspect's choice may be present for most forensic procedures** (former cl 41)

- (1) A suspect is entitled to request a medical practitioner of his or her choice to be present while an intimate forensic procedure (other than the taking of a dental impression) is carried out in relation to an offence.
- (2) A suspect is entitled to request a dentist of his or her choice to be present while a dental impression, sample of saliva or buccal swab is taken.  
**Note.** Section 88 provides that the request may be made by the suspect's legal representative or interview friend.
- (3) The medical practitioner or dentist chosen is to be present at the carrying out of 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.

**42 Presence of interview friend or legal representative while forensic procedure is carried out** (former cl 42)

- (1) If the suspect on whom a forensic procedure is to be carried out:
  - (a) is a child, or
  - (b) is an incapable person,

then either the suspect's interview friend or the suspect's legal representative (if he or she is not the interview friend) must be present while the forensic procedure is carried out. Both the interview friend and the legal representative may be present.

- (2) An interview friend (other than a legal representative) of a suspect covered by subsection (1) may be excluded from the place where the forensic procedure is being carried out if the interview friend unreasonably interferes with or obstructs the carrying out of the procedure.

**43 Presence of police officers while forensic procedure is carried out**  
(former cl 43)

- (1) The number of police officers that 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 Part.
- (2) A police officer who is of the opposite sex to that of the suspect may only be present during the carrying out of a forensic procedure if:
  - (a) it would not be reasonably practicable to carry out the forensic procedure without the presence of the police officer, and
  - (b) there is no police officer of the same sex as the suspect who, at the time the forensic procedure must be carried out, is available to be present instead of the police officer of the opposite sex.
- (3) This section does not apply to the following forensic procedures:
  - (a) the taking of handprints, fingerprints, footprints or toeprints, or
  - (b) any non-intimate forensic procedure that may be carried out without requiring the suspect to remove any clothing except his or her overcoat, coat, jacket, gloves, socks, shoes and hat.

**Subdivision 4 Carrying out of forensic procedure to be recorded**

**44 Recording of forensic procedure** (former cl 44)

- (1) The carrying out of a forensic procedure (other than the taking of a handprint, fingerprint, footprint or toeprint) must be video recorded unless:
  - (a) the suspect objects to the video recording, or
  - (b) the video recording is not reasonably practicable.

- (2) Before the forensic procedure is carried out, the suspect must:
  - (a) be given an explanation of the value of making a video recording of the carrying out of the forensic procedure so as to avoid disputes about how it was carried out that might otherwise arise between the suspect and the person carrying out the procedure after it is carried out, and
  - (b) be informed that the suspect may object to the video recording.

*[Note: adjustments will be required in each jurisdiction to ensure that this provision complies with local requirements concerning video recording of suspects.]*
- (3) If the carrying out of a forensic procedure (other than the taking of handprints, fingerprints, footprints or toeprints) is not to be video recorded, the forensic procedure must be carried out in the presence of an independent person (not being a police officer).

## **Subdivision 5 Procedure after forensic procedure is carried out**

### **45 Samples** (former cl 45)

- (1) This section applies to a sample taken from a suspect under this Part if there is sufficient material for an analysis to be carried out by not only the police investigating the offence but also by or on behalf of the suspect.
- (2) The investigating police officer must ensure that:
  - (a) a part of the material sufficient for analysis is made available to the suspect as soon as practicable, 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 is analysed.

**Note.** Division 14 contains provisions about making material available to the suspect.

### **46 Photographs or video recordings** (former cl 46)

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

**Note.** Division 14 contains provisions about making material available to the suspect.

**47 Results of analysis** (former cl 47)

If material from a sample taken from a suspect is analysed in the investigation of the offence, the investigating police officer must ensure that a copy of the results of the analysis is made available to the suspect.

**Note.** Division 14 contains provisions about making material available to the suspect.

**48 Preventing the carrying out of forensic procedure** (former cl 48)

A person must not intentionally obstruct, hinder or resist a police officer or other person authorised by or under this Act to exercise functions relating to the carrying out of a forensic procedure.

Maximum penalty: 2 years' imprisonment.

**Division 7 Carrying out of certain forensic procedures after conviction of serious and prescribed offenders**

**49 Forensic procedures to which Division applies** (former cl 49)

(1) **Intimate forensic procedures to which Division applies**

This Division applies to the following intimate forensic procedures:

- (a) the taking of a sample of blood,
- (b) the taking of a buccal swab.

(2) **Non-intimate procedures to which Division applies**

This Division applies to the following non-intimate forensic procedures:

- (a) the taking of samples of hair other than pubic hair,
- (b) the taking of fingerprints.

**50 Non-intimate forensic procedures authorised to be carried out on offenders** (former cl 51)

(1) A person is authorised to carry out a non-intimate forensic procedure to which this Division applies on a person (other than a child or an incapable person) who is a serious offender:

- (a) with the informed consent of the serious offender, or
- (b) by order of a police officer under section 58.

(2) A person is authorised to take the fingerprints of a prescribed offender (other than a child or an incapable person):

- (a) with the informed consent of the prescribed offender, or
- (b) by order of a police officer under section 58.

- (3) A person is authorised to carry out a non-intimate forensic procedure to which this Division applies on a child or an incapable person who is a serious offender, or to take the fingerprints of a child or incapable person who is a prescribed offender, by order of a court under section 62.
- (4) A person is authorised by this section to carry out a forensic procedure under this Division on a serious offender or a prescribed offender whether convicted of the serious or prescribed offence concerned before or after the commencement of this section.

**51 Intimate forensic procedures authorised to be carried out on serious offenders** (former cl 52)

- (1) A person is authorised to carry out an intimate forensic procedure to which this Division applies on a person (other than a child or incapable person) who is a serious offender:
  - (a) with the informed consent of the serious offender, or
  - (b) by order of a court under section 62.
- (2) A person is authorised by this section to carry out an intimate forensic procedure under this Division in accordance with Division 6 as applied by section 52 and not otherwise.

**52 Application of Division 6** (former cl 50)

- (1) Division 6 applies to the carrying out under this Division of a forensic procedure on an offender as if the references to the suspect in Division 6 were references to the offender.
- (2) A person is authorised by section 50 or 51 to carry out a forensic procedure under this Division in accordance with Division 6 as applied by this section and not otherwise.

**53 Scope of authorisation** (former cl 61)

- (1) A person is not authorised to carry out a forensic procedure under this Division on a serious offender or a prescribed offender if the serious offender or prescribed offender is a suspect or a volunteer.
- (2) A forensic procedure may be carried out on a serious offender or prescribed offender who is a suspect only if authorised by and in accordance with Divisions 2–5.
- (3) A forensic procedure may be carried out on a serious offender or prescribed offender who is a volunteer only if authorised by and in accordance with Division 8.

**54 Informed consent to forensic procedures** (former cl 53)

- (1) An offender gives informed consent to a forensic procedure if the offender consents after a police officer:
  - (a) requests the offender to consent to the forensic procedure under section 55, and
  - (b) informs the offender about the forensic procedure in accordance with section 57, and
  - (c) gives the offender the opportunity to communicate, or attempt to communicate, with a legal practitioner of the offender's choice.
- (2) The police officer must allow the offender to communicate, or attempt to communicate, with the 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 92 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.

**55 Police officer may request offender to consent to forensic procedure** (former cl 54)

A police officer may request:

- (a) a serious offender (other than a child or an incapable person) to consent to an intimate or non-intimate forensic procedure to which this Division applies being carried out on the serious offender, or
- (b) a prescribed offender (other than a child or an incapable person) to consent to the taking of the offender's fingerprints.

**56 Matters to be considered by police officer before requesting consent to forensic procedure** (former cl 55)

Before a request is made under section 55, the police officer must be satisfied on the balance of probabilities that:

- (a) in the case of a person on whom the procedure is proposed to be carried out who is not serving a sentence of imprisonment in a prison or other place of detention—that the person is an offender, and
- (b) the request for consent to carry out the forensic procedure is justified in all the circumstances.

**57 Matters that offender must be informed of before giving consent** (former cl 56)

- (1) The police officer must inform the 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 Division 6 as applied by section 52,

**Note.** See section 38.

- (f) if the forensic procedure is the taking of a sample of blood, that the offender may request that:
  - (i) if the offender is serving a sentence of imprisonment in a prison or other place of detention—the prison medical officer be present while the blood is taken, or
  - (ii) if the offender is not serving a sentence of imprisonment—a medical practitioner of the offender's choice 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 72 (if applicable)
- (j) that information obtained from analysis of forensic material obtained 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 Division 11.

(2) **Effect of failure to consent to non-intimate forensic procedure**

The police officer must inform a serious offender requested to undergo a non-intimate forensic procedure to which this Division applies or a prescribed offender requested to consent to the taking of his or her fingerprints that, if the offender does not consent, a police officer may order the carrying out of the forensic procedure under section 58 if the police officer has taken into account the matters set out in section 59.

(3) **Effect of failure to consent to intimate forensic procedure**

The police officer must inform a serious offender requested to undergo an intimate forensic procedure to which this Division applies that, if the serious offender does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

**58 Circumstances in which police officer may order non-intimate forensic procedure** (former cl 57)

A police officer may order the carrying out of a non-intimate forensic procedure on a serious offender or the taking of the fingerprints of a prescribed offender if:

- (a) the offender has been asked under section 55 to consent to the carrying out of the forensic procedure, and
- (b) the offender has not consented, and
- (c) the police officer has taken into account the matters set out in section 59.

**59 Matters to be considered by police officer** (former cl 58)

In determining whether to make an order under section 58, the police officer is to take into account:

- (a) whether this Part would authorise the forensic procedure to be carried out in the absence of the order, and
- (b) the seriousness of the circumstances surrounding the offence committed by the offender, and
- (c) whether the carrying out of the forensic procedure without consent is justified in all the circumstances.

**60 Recording of giving of information and consent** (former cl 59)

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the offender's responses (if any) are recorded by audio tape, video tape or other electronic means.
- (2) If recording the giving of the information and the offender's responses (if any) by audio or video tape or other electronic means is not practicable, the police officer must ensure that a written record of the giving of the information and the offender's responses (if any) is made, and that a copy of the record is made available to the serious offender.

**Note.** Division 14 contains provisions about making copies of material (including tapes) available to the serious offender.

*[Note: adjustments will be required in each jurisdiction to ensure that subclause (2) complies with local requirements for provision of transcripts]*

**61 Record of police officer's order** (former cl 60)

- (1) The police officer must, at the time of, or as soon as practicable after, making an order under section 58, 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 police officer must ensure that a copy of the record is made available to the offender as soon as practicable after the record is made.

**62 Court order for carrying out forensic procedure on offender** (former cl 62)

- (1) A police officer may apply to any court for an order directing a serious offender to consent to an intimate forensic procedure to which this Division applies being carried out on the serious offender.
- (2) A police officer may apply to any court for an order for the carrying out of a non-intimate forensic procedure to which this Division applies on a child or an incapable person who is a serious offender.
- (3) A police officer may apply to any court for an order for the taking of the fingerprints under this Division of a child or an incapable person who is a prescribed offender.
- (4) A police officer may make an application under this section to the court that is sentencing an offender or to any other court at a later time.
- (5) A court may order the carrying out of a forensic procedure under this Division if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
- (6) In determining whether to make an order under this section, a court is to take into account:
  - (a) whether this Part would authorise the forensic procedure to be carried out in the absence of the order, and
  - (b) the seriousness of the circumstances surrounding the commission of the offence by the offender, and
  - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.
- (7) An order under this section takes effect immediately. However, the person who conducts any analysis of forensic material obtained as a result of carrying out the forensic procedure on an offender must not disclose the results of the analysis:
  - (a) until the expiration of any appeal period or after the final determination of any appeal in relation to the offence concerned, whichever is the later, or
  - (b) if the conviction is quashed.

**63 Carrying out forensic procedure following conviction** (former cl 63)

- (1) If a court orders an offender who is in prison or another place of detention to permit a forensic procedure to be carried out under this Division, the court may order that a police officer, together with a person who, under Division 6 as applied by section 52, may carry out the forensic procedure, be permitted to attend on the offender in the prison or place of detention to allow the forensic procedure to be carried out.
- (2) If a court orders an offender who is not in a prison or another place of detention to permit a forensic procedure to be carried out, the court may order the offender to attend at a police station (or other place specified by the court) within a period specified by the court to allow the forensic procedure to be carried out.
- (3) An offender ordered to permit the carrying out of a forensic procedure must not intentionally refuse or fail to permit the forensic procedure to be carried out.

Maximum penalty: 12 months' imprisonment.

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

**64 Carrying out of forensic procedures on volunteers** (former cl 64)

- (1) In this Part:  
*volunteer* means a person:
  - (a) who volunteers to a police officer to undergo a forensic procedure, or
  - (b) in the case of a child or incapable person—whose parent or guardian volunteers on the child or incapable person's behalf to a police officer that the child or incapable person undergo a forensic procedure.
- (2) A person is authorised to carry out a forensic procedure:
  - (a) on a volunteer other than a child or an incapable person—with the informed consent of the volunteer given in accordance with section 65, or
  - (b) on a volunteer who is a child or an incapable person:
    - (i) with the informed consent of the parent or guardian of the volunteer given in accordance with section 65 or by order of a magistrate under section 68, and

- (ii) after the person has informed the child or incapable person that, even though consent has been given or an order made, if he or she objects to or resists the carrying out of the forensic procedure it will not be carried out.
- (3) This section does 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) Division 6 applies to the carrying out of a forensic procedure under this Division as if the references to a suspect in that Division 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 Division 6 as so applied and not otherwise.

**65 Informed consent of volunteer or parent or guardian of volunteer** (former cl 65)

- (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 of the following matters:
  - (a) the way in which the forensic procedure is 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,
  - (d) to the extent that they are relevant, the matters specified in subsection (2),
  - (e) that the volunteer, parent or guardian may consult a 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 the volunteer's undergoing the forensic procedure or to retention of the forensic material taken or of information obtained from the analysis of that material.
- (2) The police officer must 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 Division, and as to the identity of the person, may be placed on the DNA database system,

- (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 Division 11,
- (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.

**66 Recording of giving of information and consent** (former cl 66)

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the volunteer's or volunteer's parent's or guardian's responses (if any) are recorded by audio tape, video tape or other electronic means.
- (2) If recording the giving of information and the volunteer's, parent's or guardian's responses (if any) by audio or video tape or other electronic means is not practicable, the police officer must ensure that a written record of the giving of the information and the volunteer's, parent's or guardian's responses (if any) is made, and that a copy of the record is made available to the volunteer, parent or guardian.

**67 Withdrawal of consent** (former cl 67)

- (1) If a volunteer, or parent or guardian of the volunteer, expressly withdraws consent to the carrying out of a forensic procedure under this Division (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 68.

- (2) If, after the carrying out of a forensic procedure under this Division 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 69, to be destroyed as soon as practicable after the consent is withdrawn.
- (3) A police officer may request, but cannot require, a parent or guardian who withdraws consent to the carrying out of a forensic procedure under this Division to confirm the withdrawal of consent in writing.

**68 Circumstances in which magistrate may order the carrying out of forensic procedure on a child or incapable person** (former cl 68)

- (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:
    - (i) that the parent or guardian is a suspect, and
    - (ii) that 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 withdraws 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,

**Note.** A forensic procedure cannot be carried out on a child or an incapable person who objects to or resists the carrying out of the procedure even if the magistrate makes an order. See section 64(2)(b)(ii) and (3).

- (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 or in a manner specified in the order, or
  - (b) specify the period for which forensic material obtained from carrying out the procedure may be retained.

**69 Retention of forensic material by order of a magistrate after parent or guardian of child or incapable person withdraws consent** (former cl 69)

- (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 volunteer who 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 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 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 obtained from carrying out the procedure may be retained.

## **Division 9      Admissibility of evidence**

### **Subdivision 1   Forensic evidence**

#### **70   Inadmissibility of evidence from improper forensic procedures etc** (former cl 70)

- (1) This section applies if:
  - (a) a forensic procedure has been carried out on a person, and
  - (b) there has been a breach of, or failure to comply with:
    - (i) any provision of this Part in relation to a forensic procedure carried out on the person (including, but not limited to, any breach 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 Division 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 Part requires forensic material to be destroyed, and
  - (b) the forensic material has not been destroyed.

**Note.** Section 71 applies where this Part requires forensic material to have been destroyed.
- (3) This section applies to the following evidence:
  - (a) evidence of forensic material, or evidence consisting of forensic material, taken from the person by the forensic procedure,
  - (b) evidence of any results of the analysis of the forensic material,
  - (c) any evidence 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) the court is satisfied on the balance of probabilities that the evidence should be admitted in the proceedings despite the failure to comply with the provisions of this Part.
- (5) The matters that the court may take into consideration in determining whether evidence should be admitted are the following:
  - (a) the probative value of the evidence, including whether equivalent evidence or evidence of equivalent probative value could have been obtained by other means,

- (b) the reasons given for the failure to comply with the provisions of this Part,
  - (c) the gravity of the failure to comply with the provisions of this Part,
  - (d) whether the failure to comply with the provisions of this Part was intentional or reckless,
  - (e) the nature of the provision of this Part that was not complied with,
  - (f) the nature of the offence concerned and the subject matter of the proceedings,
  - (g) any other matters the court considers relevant.
- (6) The probative value of the evidence does not by itself justify the admission of the evidence.

**71 Inadmissibility of evidence where forensic material required to be destroyed** (former cl 71)

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

**Subdivision 2 Other evidence**

**72 Admissibility of evidence relating to consent to forensic procedures** (former cl 72)

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 investigating the commission of the offence concerned acted contrary to law in carrying out the investigation.

**73 Admissibility of evidence relating to carrying out of forensic procedures** (former cl 73)

Despite section 70 (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 if 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 Division 6.

**74 Obstructing etc the carrying out of forensic procedure** (former cl 74)

(1) This section applies if a police officer or magistrate has ordered the carrying out of a forensic procedure on a suspect under this Part.

(2) Evidence that the suspect:

- (a) refused to comply with any reasonable direction in connection with the carrying out of the forensic procedure, or
- (b) obstructed, resisted, hindered, used violence against, threatened or intimidated a person in connection with the carrying out of the forensic procedure,

is admissible in any proceedings against the suspect in respect of the offence in relation to which the forensic procedure was carried out.

(3) Evidence described in subsection (2) is not admissible unless it is established that the suspect:

- (a) had been informed by a police officer through an interpreter if necessary, in language (including sign language or braille) in which the person is able to communicate with reasonable fluency, or
- (b) otherwise knew,

that the fact of refusing to comply with the direction, or obstructing, resisting, hindering, using violence against, threatening or intimidating the person, in connection with the carrying out of the forensic procedure might be used in evidence against the suspect.

(4) The court or jury may draw such inferences from the evidence described in subsection (2) as appear to the court or jury to be proper in the circumstances, having regard to any evidence given by or on behalf of the suspect.

## **Division 10      Destruction of forensic material**

### **75      Destruction of certain forensic material obtained by court order** (former cl 75)

- (1) If an interim order for the carrying out of a forensic procedure made under section 26 is disallowed after the forensic procedure is carried out, the investigating police officer must ensure that:
  - (a) any forensic material obtained as a result of the carrying out of the procedure is destroyed as soon as practicable after the disallowance, and
  - (b) a copy of the results of any analysis of the forensic material is made available to the suspect.

**Note.** Division 14 contains provisions about making copies of material available to the suspect.

- (2) If an order for the carrying out of a forensic procedure made under section 68 or for the retention of forensic material under section 69 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.

### **76      Destruction of forensic material taken from offender after conviction quashed**

The police officer who obtained an order under section 62 for the carrying out of a forensic procedure on an offender whose conviction is quashed after the making of the order must ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed as soon as practicable after the conviction is quashed.

### **77      Destruction of forensic material after 12 months** (former cl 76)

- (1) This section applies where forensic material has been taken from a suspect by a forensic procedure carried out under Division 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 in respect of an offence to which the forensic material relates have not been instituted or have been discontinued,

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

- (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 to which the forensic material relates is pending.
- (5) A magistrate may, on application by a police officer or the Director of Prosecutions [*an appropriate reference should be inserted in each jurisdiction to ensure that this covers any person prosecuting a relevant offence*], extend for a period not exceeding 12 months the period for which forensic material may be retained under this section, if the magistrate is satisfied 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 person from whom the forensic material was taken has been notified by the applicant for the extension that the application has been made, 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.

**78 Destruction of forensic material where related evidence is inadmissible**  
(former cl 77)

If a court finds that evidence described in section 70 (4) relating to a forensic procedure is inadmissible under section 70, the Commissioner of Police must, as soon as practicable, ensure that any forensic material taken from the suspect by that forensic procedure is destroyed.

## Division 11 DNA database system

### 79 Definitions (former cl 89)

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 a prescribed offence was, or is reasonably suspected of having been, committed, or
- (b) on or within the body of the victim, or a person reasonably suspected of being a victim, of a prescribed offence, or
- (c) on anything worn or carried by the victim at the time when a prescribed offence was, or is reasonably suspected of having been, committed, or
- (d) on or within the body of any person, on any thing, or at any place, associated with the commission of a prescribed 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 unknown deceased persons index,
  - (iv) a serious offenders index,
  - (v) a volunteers (unlimited purposes) index,
  - (vi) a volunteers (limited purposes) index,
  - (vii) a suspects 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 who are relatives by blood of missing persons.

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

- (a) in accordance with Division 7 or under a corresponding law of a participating jurisdiction—from serious offenders, and
- (b) suspects who have been convicted of a prescribed offence.

**statistical index** means an index of information that:

- (a) is obtained from the analysis of forensic material taken from persons in accordance with this Part 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 persons from whom the forensic material was taken.

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

**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 forensic material taken in accordance with Division 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 65 (2) (b).

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

- (a) in accordance with Division 8 or under a corresponding law of a participating jurisdiction—from volunteers who (or whose parents or guardians) have been informed under section 65 (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 Division, and
- (b) from deceased persons whose identity is known.

**80 Supply of forensic material for purposes of DNA database** (former cl 90)

- (1) A person:
  - (a) whose conduct causes the supply of forensic material taken from any person under this Part (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: 2 years' imprisonment.

- (2) A person:
- (a) whose conduct causes the supply of forensic material (other than excluded 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: 2 years' imprisonment.

- (3) In this section:

***excluded forensic material*** means forensic material:

- (a) found at a crime scene, or
- (b) taken from a suspect in relation to a serious offence or prescribed offence) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction who is subsequently convicted of the offence, or
- (c) taken from a serious offender or a volunteer in accordance with Division 7 or 8 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 Part or under a corresponding law of a participating jurisdiction

## **81 Use of information on DNA database system** (former cl 91)

- (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: 2 years' imprisonment

- (2) A person may access information stored on the DNA database system for one or more of the following purposes:
- (a) the purpose of forensic comparison permitted under section 82 (permissible matching),
  - (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 purpose of any arrangement entered into between the State [*or Territory*] 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 purpose 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 coronial inquest or inquiry, or
  - (g) the purpose of investigation of a complaint by the Privacy Commissioner (however described in each jurisdiction).
- (3) This section does not apply to information that cannot be used to discover the identity of any person.

**82 Permissible matching of DNA profiles** (former cl 92)

- (1) A matching of a DNA profile on an index of the DNA database system specified in Column 1 of the following Table with a DNA profile on another index of the system specified in Column 2, 3, 4, 5, 6, 7 or 8 of the Table is not permitted by this Part if:
- (a) “no” is shown in relation to the index specified in Column 2, 3, 4, 5, 6, 7 or 8 opposite the index specified in Column 1, or
  - (b) “only if within purpose” is shown in relation to the index specified in Column 2, 3, 4, 5, 6, 7 or 8 opposite the volunteers (limited purposes) index specified in Column 1 and the matching is carried out for a purpose other than a purpose for which the DNA profile placed on the volunteers (limited purposes) index specified in Column 1 was so placed.

**Table**

Profile to be matched	Is matching permitted?						
	column 2	column 3	column 4	column 5	column 6	column 7	column 8
column 1	crime scene	suspects	volunteers (limited purposes )	volunteers (unlimited purposes)	serious offenders	missing persons	unknown deceased persons
crime scene	yes	yes	no	yes	yes	yes	yes
suspects	yes	no	no	no	yes	no	yes
volunteers (limited purposes)	only if 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
serious offenders	yes	yes	no	no	yes	yes	yes
missing persons	yes	yes	yes	yes	yes	yes	yes
unknown deceased persons	yes	yes	yes	yes	yes	yes	no

- (2) A person:
  - (a) whose conduct causes the 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: 2 years' imprisonment
- (3) 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 purposes of administering the DNA database system.

**83 Recording, retention and removal of identifying information on DNA database system** (former cl 93)

- (1) A person:
  - (a) whose conduct causes any identifying information about a person obtained from forensic material taken from the person under this Part being recorded or retained in a DNA database system at any time after this Part requires the forensic material to be destroyed, and
  - (b) who intends or is reckless as to the recording or retention, is guilty of an offence.  
Maximum penalty: 2 years' imprisonment.
- (2) The responsible person 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 DNA database system was derived is removed from the system as soon as practicable after the end of the identifying period for the profile.  
Maximum penalty: 2 years' imprisonment.
- (3) The responsible person must ensure that any identifying information relating to a DNA profile of an offender on the serious offenders index of the DNA database system 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: 2 years' imprisonment.
- (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 the following:

- (a) except as provided by paragraphs (b) and (c), the period of 12 months after the DNA profile is placed on the DNA database system,
- (b) 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),
- (c) 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.

## **Division 12      Operation of this Part and effect on other laws**

### **84      Application of other Acts** (former cl 94)

- (1) This Part is not intended to limit or exclude the operation of another law of the State [*or Territory*] relating to:
  - (a) the carrying out of forensic procedures, including procedures not referred to in this Part, or
  - (b) without limiting paragraph (a), the carrying out of breath analysis or a breath test or the production of samples of blood and urine to determine the level of alcohol or drugs, if any, present in a person's body, or
  - (c) the taking of forensic samples, including samples not referred to in this Part, or
  - (d) the carrying out of searches of the person.
- (2) To avoid any doubt, it is declared that even if another law of the State [*or Territory*] provides a power to do one or more of the things referred to in subsection (1), a similar power conferred by this Part may be exercised despite the existence of the power under the other law.

## **Division 13      Interstate enforcement**

**85 Definitions** (former cl 95)

In this Part:

**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 law relating to the carrying out of forensic procedures and DNA databases that substantially corresponds to this Part or is prescribed by the regulations for the purposes of this definition.

**DNA database** means:

- (a) in relation to this State [*or Territory*]—the DNA database system, and
- (b) in relation to a participating jurisdiction—a DNA database system that is kept under a corresponding law of the participating jurisdiction,

**participating jurisdiction** means a State or Territory in which there is a corresponding law in force.

**responsible Minister** of a participating jurisdiction means a Minister of that jurisdiction who is responsible for administration of a corresponding law.

**86 Registration of orders** (former cl 96)

- (1) The Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions for the establishment and maintenance, in one of those jurisdictions, of a register of orders for the carrying out of forensic procedures made under corresponding laws of participating jurisdictions.
- (2) An order is registered when a copy of the order (being a copy certified by the person who made it) is registered in accordance with the law of the participating jurisdiction 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 this State [*or Territory*]. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (4) An application for registration of an order, or for cancellation of registration of an order, may be made by an appropriate authority.

**87 Database information** (former cl 97)

- (1) The Minister may enter into arrangements with a responsible Minister of a participating jurisdiction under which:
  - (a) information from the DNA database system of this State *[or Territory]* that may be relevant to the investigation of an offence against the law of the participating jurisdiction is to be transmitted to the appropriate authority in that jurisdiction for the purposes of the investigation of, or proceedings in respect of, that offence, and
  - (b) information from a DNA database system of the participating jurisdiction that may be relevant to the investigation of an offence against the law of this State *[or Territory]* is to be transmitted to the Commissioner of Police for the purposes of the investigation of, or proceedings in respect of, that offence.
- (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 Part or a corresponding law of a participating jurisdiction requires the forensic material to which it relates to be destroyed.

*[This provision could be modified to enable information on the databases of every participating jurisdiction to be centralised in one State *[or Territory]*]*

**Division 14 General provisions relating to operation of Part**

**88 Powers of legal representatives and interview friends** (former cl 78)

- (1) A request that may be made by a suspect or offender under this Part may be made on the suspect's or offender's behalf by:
  - (a) the suspect's or offender's legal representative, or
  - (b) if the suspect or offender is a child or an incapable person—the suspect's or offender's interview friend.
- (2) If:
  - (a) this Part requires a suspect or offender to be informed of a matter, and
  - (b) the suspect's or offender's interview friend or legal representative is present when the suspect or offender is so informed, and

- (c) the suspect or offender is so informed in a language (including sign language or braille) in which the suspect's or offender's interview friend or legal representative is not able to communicate with reasonable fluency,

the interview friend or legal representative must also be informed of the matter in a language in which the interview friend or legal representative is able to communicate with reasonable fluency.

**89 Obligation of investigating police officers relating to tape recordings**  
(former cl 79)

- (1) If a recording by audio tape, video tape or other electronic means is made as required by this Part, the investigating police officer must ensure that:
  - (a) if an audio recording only or video recording only is made—the recording, or a copy of it, is made available to the suspect, offender or volunteer, and
  - (b) if both an audio recording and a video recording are made:
    - (i) the audio recording, or a copy of it, is made available to the suspect, offender or volunteer, and
    - (ii) the suspect, offender or volunteer 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 or volunteer.
- (2) If an investigating police officer is required to ensure that a suspect, offender or volunteer is given an opportunity to view a video recording made under this Part, the investigating police officer must ensure that the same opportunity is given to:
  - (a) the suspect's, offender's or volunteer's legal representative, and
  - (b) if the suspect, offender or volunteer is a child or an incapable person—the suspect's, offender's or volunteer's interview friend.

*[Note: adjustments will be required in each jurisdiction to ensure that this paragraph complies with local requirements for provision of transcripts]*

**90 Material required to be made available to suspect, offender or volunteer**  
(former cl 80)

- (1) Material from samples or copies or any other material, that must be made available to a suspect, offender or volunteer under this Part:
  - (a) may be sent to the suspect, offender or volunteer at his or her last known address (if any), or to the suspect's, offender's or volunteer's legal representative (if any) 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 or volunteer at the police station where the investigating police officer 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 30) that is required by this Part to be made available to a suspect, offender or volunteer must be made available in accordance with subsection (1):
- (a) within 4 weeks after the material comes into existence, or
  - (b) if the material is requested by the suspect, offender or volunteer or the suspect's, offender's or volunteer's interview friend or legal representative, within 4 weeks of the request.

**Note.** Section 45 deals with the timing of making sample material available, Section 30 (3) deals with the timing of making copies available of records referred to in section 30.

*[Note: adjustments will be required in each jurisdiction to ensure that this paragraph complies with local requirements for provision of transcripts and copies of video tapes.]*

**91 Suspect, offender or volunteer not to be charged for material or viewing video** (former cl 81)

If this Part requires material of any kind to be given to a suspect, offender or volunteer, or an opportunity to view a video recording to be given to a suspect, offender or volunteer, the material or the opportunity to view the video must be given without charge.

**92 Proof of belief** (former cl 82)

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 as to a matter referred to in this Part.

**93 Proof of impracticability** (former cl 83)

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 Part to be done if practicable.

**94 Liability for forensic procedures** (former cl 84)

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 Part in respect of anything done 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, court or magistrate under this Part,

and the thing was done in good faith and the doing of it was reasonable in all the circumstances.

**Note.** Section 92 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.

**95 Experts not obliged to carry out forensic procedures** (former cl 85)

Nothing in this Part requires a medical practitioner, nurse, dentist, dental technician or appropriately qualified person to carry out a forensic procedure.

**96 Disclosure of information** (former cl 86)

- (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 the 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,
  - (d) the purposes of any arrangement entered into between the State *[or Territory]* 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) for the purposes of, and in accordance with, the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988* of the Commonwealth,
  - (f) for the purpose of a coronial inquest or inquiry,
  - (g) the purposes of investigation of a complaint by the Privacy Commissioner (however described in each jurisdiction).

- (3) A person may only disclose information revealed by the carrying out of a forensic procedure as follows:
- (a) if the person is the suspect, serious offender or volunteer to whom the information relates,
  - (b) if the information is already publicly known,
  - (c) in accordance with any other provision of this Part,
  - (d) in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988* of the Commonwealth,
  - (e) for the purposes of the investigation of any offence or offences generally,
  - (f) for the purpose of a decision whether to institute proceedings for any offence,
  - (g) if the procedure is a forensic procedure other than the taking of a handprint, fingerprint, footprint or toeprint—for the purpose of proceedings for any offence,
  - (h) if the procedure is the taking of a handprint, fingerprint, footprint or toeprint—for the purpose of proceedings for any offence,
  - (i) for the purpose of a coronial inquest or inquiry,
  - (j) for the purpose of civil proceedings (including disciplinary proceedings) that relate to the way in which the procedure was carried out,
  - (k) for the purpose of the suspect's, offender's or volunteer's medical treatment, or
  - (l) for the purpose of the medical treatment of a victim of an offence there are reasonable grounds to believe was committed by the suspect on whom the forensic procedure in relation to the offence was carried out, or
  - (m) if the suspect, serious offender or volunteer consents in writing to the disclosure.
- (4) This section does not apply to information that cannot be used to discover the identity of any person.
- (5) A person:
- (a) whose conduct causes 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: 2 years' imprisonment.

**97 Taking, retention and use of forensic material** (former cl 87)

- (1) **Taking, retention and use authorised by laws of other jurisdictions**  
Nothing in this Part 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 Territory]* or a law of the Commonwealth.
- (2) Forensic material, or information obtained from it, that was taken in accordance with the law of another State or a Territory may be retained or used in this State *[or Territory]* for investigative, evidentiary or statistical 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 Part 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 is 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 this State *[or Territory]* for investigative, evidentiary or statistical 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 Part relating to the carrying out of forensic procedures.

**98 Retention of electronic recordings** (former cl 88)

- (1) A recording made by audio tape, video tape or other electronic means by a police officer in accordance with this Part 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.