

2015

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES LEGISLATION AMENDMENT BILL 2015

EXPLANATORY STATEMENT

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CRIMES LEGISLATION AMENDMENT BILL 2015

Purpose of the Bill

The Crimes Legislation Amendment Bill 2015 will make amendments to address a number of criminal justice legislation issues that have arisen in the ACT.

In summary, the Bill will:

- a) amend the *Bail Act 1992* to remove section 233B of the *Customs Act 1901* (Cwlth) from item 3 in part 1.5 of schedule 1 and insert part 9.1 of the *Criminal Code Act 1995* (Cwlth) to create a neutral presumption for bail for drug offences where amounts are equal to or greater than the trafficable quantity of a controlled drug;
- b) amend the *Crimes Act 1900* to authorise police officers to take fingerprints, photographs (including video recordings), samples of handwriting and voice recordings of suspects who are children and young people for identification purposes;
- c) amend the *Crimes (Forensic Procedures) Act 2000* to:
 - i) create a requirement that police officers, when intending to ask an Aboriginal or Torres Strait Islander person to consent to a forensic procedure, inform the person that the Aboriginal Legal Service (NSW/ACT) will be notified;
 - ii) provide a mechanism to allow an Aboriginal or Torres Strait Islander person to decline the presence of an interview friend or lawyer during a forensic procedure;
 - iii) expand the definition of ‘incapable person’ to include adults who are temporarily incapacitated; and
 - iv) allow a ‘close associate’ of an incapable person to consent to non intimate forensic procedures on behalf of that incapable person;
- d) amend the *Crimes (Sentencing) Regulation 2006* to allow a victim impact statement to be made for category 2 offences under the *Work Health and Safety Act 2011* where exposure to a risk of death or serious injury or illness has resulted in death or serious injury or illness; and

- e) authorise police officers to issue infringement notices for certain offences under the *Magistrates Court (Security Industry Infringement Notices) Regulation 2008* to enforce obligations on licensees, including that security licensees wear their licence number when carrying out certain security activities.

Human Rights Considerations

The *Crimes Legislation Amendment Bill 2015* engages a number of the rights in the *Human Rights Act 2004* (HR Act).

The Bill engages, and places limitations on, the following HR Act rights:

- the right of every child to the protection needed by the child because of being a child, without distinction or discrimination of any kind (s 11(2));
- the right to privacy and reputation (s 12);
- the right to liberty and security (s18);
- children in the criminal process (s 20); and
- rights in criminal proceedings (s22).

Human rights are subject only to reasonable limits which are demonstrably justifiable. In determining if a limit is reasonable and demonstrably justifiable the following relevant factors are considered:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.¹

In ensuring that limitations on individual human rights are demonstrably justifiable, public authorities must act consistently within these rights. In making decisions, public authorities must give proper consideration to relevant human rights.²

Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*. A party must show:

¹ HR Act, s 28.

² HR Act, s 40B

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”³

This explanatory statement provides an assessment of rights engaged and limited. The Government believes that the limitations in human rights under this Bill are proportionate and justified in the circumstances because it is the least restrictive means available to address criminal justice issues that have arisen in the ACT.

³ *R v Oakes* [1986] 1 S.C.R. 103.

Crimes Legislation Amendment Bill 2015

Detail

Part 1 – *Preliminary*

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Crimes Legislation Amendment Act 2015*.

Clause 2— Commencement

This clause provides that the Act commences the day after it is notified.

Clause 3— Legislation amended

This clause identifies the legislation amended by the Act.

Part 2 – *Bail Act 1992*

The amendments to the Bail Act ensure consistency when applying bail legislation to ACT drug offences and Commonwealth drug offences.

These amendments engage and restrict:

- the right to liberty (HR Act, s 18); and
- rights in criminal proceedings (HR Act, s 22).

Right to liberty

Section 18 of the HR Act sets out the right to liberty and is particularly relevant to the formulation of legislation relating to bail. Reasonable limitations of the right are permitted under section 28 of the HR Act.

Section 18(2) of the HR Act states that “no-one may be deprived of liberty, except on the grounds and accordance with the procedures established by law”. Those laws should be proportionate to the purpose (*Winterwerp v Netherlands* (1979 2 EHRR 387)). The Bail Act

provides both the grounds and procedures for continued detention in custody following charge.

Section 18(5) of the HR Act provides that accused people awaiting trial should not be detained in custody as a general rule.

The International Covenant on Civil and Political Rights (ICCPR) commentary suggests that the right to liberty and security of person relates only to a very specific aspect of human liberty.⁴ This specific aspect of human liberty is an interference that results only from the forceful detention of a person at a certain narrowly bounded location, such as a prison or other detention facility. In *Celepli v Sweden* the United Nations Human Rights Committee considered the assigned residence of a Turkish citizen to a Swedish municipality for nearly seven years and his obligation to report to the police three times a week as an interference with his freedom of movement but not his personal liberty.⁵

The right to security and liberty of person is engaged by amendments in part 2 because a presumption against bail or a neutral presumption for bail arguably amounts to arbitrary detention (HR Act, s 18(1)). The United Nations Human Rights Committee confirmed in the case of *Van Alphen v the Netherlands* that ‘arbitrary’ deprivation of liberty must not be manifestly disproportionate, unjust or unpredictable.⁶ In this regard, the amendments support predictability within the legislation and ensure that clarity and transparency are maintained.

The purpose of the limitations is to ensure that the question of bail in relation to serious drug importation offences properly balances the presumption of innocence on the one hand and the right of the community to be safe and for justice to be done on the other. In this context the limitations in the Bill are justified and proportionate.

⁴ Murdock, J.L (ed.), 2005, *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person*.

⁵ (Communication no. 456/1991 *Ismet Celepli v Sweden*) Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration.

⁶ *Van Alphen v The Netherlands* UN Doc CCPR/C/39/D/305/1988, 15 August 1990, paragraph 5.8)

The nature and extent of the limitations are restricted to only apply a neutral presumption to offences involving the importation of amounts equal to or greater than the trafficable quantity of a controlled drug. The amendments reflect the original intention of Bail Act provisions dealing with neutral presumptions.

The limitations are the least restrictive means available to ensure the purpose is achieved as the onus is placed on the prosecution to show why bail should not be granted.⁷

This limitation on the right to liberty is proportionate and justified in the circumstances.

Rights in criminal proceedings

This clause also engages section 22 (rights in criminal proceedings) in the HR Act. Section 22(1) of the HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires judges, juries and the relevant public authorities to refrain from prejudging any case. The authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.⁸

The amendments engage and limit this presumption by stating that there is no presumption for bail for a person accused of an offence listed in the Bill. This limitation is proportionate as the clause does not interfere with the court's ability to consider the circumstances of the case and the onus is placed on the prosecution to show why bail should not be granted.

Furthermore, the amendments give effect to the original intention of the Bail Act and are consistent with the neutral presumption that applies to serious drug offences in the *Criminal Code 2002*.

Section 28 of the HR Act permits reasonable limitations on human rights and sets out in section 28(2) considerations in deciding whether the limitation is reasonable. While introducing a new reference to part 9.1 of the Commonwealth Code, the clause is restricted to

⁷ *In the matter of an application for bail by Le Clair* [2014] ACTCS 245 referring at 36-44 to *R v Kissner* (Unreported, New South Wales Supreme Court, Hunt J, 17 January 1992).

⁸ UN Human Rights Committee General Comment 13, para. 7; *Alenet de Ribemont v. France*, 1995

offences involving amounts equal to or greater than the trafficable quantity of a controlled drug.

Clause 4 — Offences against Customs Act 1901 (Cwlth), Schedule 1, part 1.5, item 3

This clause repeals the reference to section 233B of the Customs Act in schedule 1, part 1.5, item 3 in the Bail Act. The need to omit this reference has resulted from the court applying a presumption in favour of bail to people charged with serious drug offences. The repeal is in response to the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cwlth), which transferred offences relating to the importation and possession of serious drug offences from section 233B of the Customs Act to part 9.1 of the Criminal Code Act. Part 9.1 of the Criminal Code Act now contains the Commonwealth serious drug offences.

Clause 5 — Schedule 1, new part 1.6

Section 9B of the *Bail Act 1992* provides that there is no presumption for bail for a person accused of an offence set out in schedule 1 (offences to which presumption of bail does not apply).

This clause inserts new part 1.6 to update reference to item 3 of part 1.5 of schedule 1 references to part 9.1 of the Criminal Code Act. This amendment gives effect to the original intention of the Bail Act and is consistent with the neutral presumption that applies to serious drug offences in the Criminal Code Act.

The neutral presumption for bail only applies to offences involving amounts equal to or greater than the trafficable quantity of a controlled drug. The amendment will allow a court to apply a neutral presumption to bail and support bail decisions determined according to the relative seriousness of the alleged offending behaviour.

Part 3 – Crimes Act 1900

Clause 6 – Definitions for pt 10, Section 185, new definitions

This clause inserts a new definition for ‘identification material’ in part 10 of the Crimes Act dealing with criminal investigation. This definition includes the taking of a print of a person’s hands, fingers, feet or toes, a recording of the person’s voice, a sample of the person’s

handwriting or a photograph (including a video recording) of the person. The singular form of the definition does not limit the taking of more than one sample of material where authorised.

Clause 7 – Section 230

Clause 7 inserts section 230 and section 230A to outline the procedures and legislative requirements for the taking of identification material for people at least 18 years of age (s 230) and people under 18 years of age (s 230A). This clause remakes section 230 to restructure and modernise the provision.

Section 230

This section provides authority for a police officer to take identification material from a person who is at least 18 years old, not in police custody for an offence and not in an impaired state, only if the person consents in writing.

If a person is at least 18 years of age, is not in police custody and is in an impaired state, a police officer may only take identification material when a magistrate orders the material to be taken. The material must be taken with a parent, guardian or spouse present, in circumstances where it is practicable to do so and the suspect does not object. If it is not practicable for a parent, guardian or spouse to be present, another person who is capable of representing the interests of the person must be present. This person must be acceptable to the suspect, so far as is practicable in the circumstances.

Section 230(3) authorises a police officer to take identification material from a person who is at least 18 years of age and in police custody for an offence only if the officer is of or above the rank of sergeant, or is the officer in charge of a police station at which the person is in custody. For the taking of material to occur in these circumstances, the suspect must not be in an impaired state and must consent, in writing, to the material being taken.

Where consent is not given, the material must be limited to a print of the person's fingers or a photograph of the suspect, or both. A print or photograph can only be taken in circumstances where a police officer believes on reasonable grounds that the taking of material is necessary to identify the person, generally or in connection with an offence, or where a police officer

suspects on reasonable grounds that the person has committed another offence and that the material is likely to identify a person as having committed the other offence.

A magistrate may make an order allowing identification material to be taken from a person who is not in police custody and in an impaired state as set out in section 230(2), if satisfied that the information is reasonably necessary for the identification of the person. A police officer may apply to the court in accordance with section 230(5).

If a police officer has to use force to take identification material from a person, a police officer must ensure that the forceful taking of identification material is recorded by a video recording and sound recording.

Section 230A

This section provides authority for a police officer to take fingerprint, photograph (including a voice recording), a sample of handwriting and voice recording material from suspects who are under 18 years of age (a child or young person). This clause allows identification to be determined through non-invasive procedures before the child or young person attends court. This process can be undertaken with a magistrate's approval, unless subject to an exception set out in the new section.

The ability of police officers to take material from those under 18 years of age was previously contained in section 84 of the *Children and Young People Act 1999* (repealed). The repeal of this section by the *Children and Young People Act 2008* and the failure to relocate the provision has removed the power of a police officer to take identifying material from a child or young person. This presents an operational constraint for police dealing with certain children and young people.

A police officer may take material from a person who is under 18 years old and not in custody for an offence, or under 16 years old and in custody for an offence, only if a magistrate orders that the material be taken. A magistrate must not make an order allowing material to be taken unless satisfied that the information is reasonably necessary to identify the child or young person.

Under section 230A (2), a police officer may take identification material from a young person who is aged 16 or 17 years of age and in police custody, only if the offence was allegedly committed by the person when they were aged 16 or 17 years old and if the young person is not in an impaired state at the proposed time for taking the material. The material can only be taken by a police officer who is an officer of or above the rank of sergeant, or is the officer in charge of a police station at which the person is in custody.

This material can only be taken in circumstances where the officer believes on reasonable grounds that the taking of the material is necessary to identify the person either generally or in connection with an offence, or the officer suspects on reasonable grounds that the person has committed another offence and that the material is likely to identify the person as having committed the other offence. If the person is in an impaired state, a magistrate order is required for the taking of such material.

Section 230A (3) requires that where material is to be taken, a police officer must inform the person about the purposes for which the material is required, the offence/s which the person is believed to have committed or have been charged with, and that the material may be used as evidence in proceedings in relation to the alleged offence/s. The person's response to such information may also help inform a police officer to determine whether the young person has sufficient mental capacity to understand the proposed procedure.

Section 230A(7) requires that a police officer involved with giving the explanation to the person or involved in the taking of identification material must allow someone with parental responsibility for the person to be present, if it is practicable to do so and the person does not object. If it is not practicable or the person objects to someone with parental responsibility being present, then a police officer must allow an interview friend for the person to be present when the explanation is given or the material is taken. As soon as practicable, a police officer must then take reasonable steps to tell someone with parental responsibility about the action that has been taken. These safeguards provide increased protections to children and address the requirements contained in the HR Act, section 11 (protection of the family and children) and section 20 (children in the criminal process). Section 230A (7) will streamline identification procedures for police officers and support the person's right in criminal proceedings by ensuring that the person is detained for a minimal amount of time while their identity is being determined.

Section 230A (6) provides that a magistrate must not make an order allowing identification material to be taken under section 230 unless satisfied that the material is reasonably necessary to identify the person. A police officer may apply for an order under section 230A (5).

If a police officer needs to use force to take identification material from a person, the police officer must ensure that the forceful taking is recorded by a video and sound recording (s 230A (10)).

This clause is consistent with the current powers available in section 230 of the Act and addresses a gap in the law relating to taking material from people under 18 years of age. A summary of the offence is provided in diagrams 1 – 4 below.

The amendments under new section 230A that give police officers authority to take identification material from children and young people may limit a number of human rights including:

- the rights of children under section 11 (Protection of family and children);
- section 12 (Privacy and reputation);
- section 18 (Liberty and security of the person)
- section 20 (Children in criminal proceedings).

The nature of the rights engaged centres on the encroachment of the child or young person's private life through the taking of fingerprint or other samples including photographs and voice recordings. The possibility that police may use force for the purpose of taking identifying material may limit the security of the person.⁹

The purpose of any limitations is to allow police officers, with appropriate safeguards and controls, to obtain material to establish the identity of the child or young person who is suspected of committing a criminal offence and to identify the child or young person as the person who committed the offence.

⁹ *R v Beare* [1988] 2 SCR 387 at 41-42.

Canadian case law suggests that the right to privacy is not limited by provisions allowing the taking of fingerprints if a person has been taken into custody for a serious crime.¹⁰ This is on the basis that the person has either been taken into custody or suspected of committed a serious criminal offence and the taking of fingerprints does not aggravate the invasion of privacy that occurs on arrest.

While section 230A goes further than the circumstances considered in *Beare* by allowing the taking of identifying material from a person under 18 years old in police custody for an offence without reference to the seriousness of the offence, the circumstances that give rise to a police officer's power to take identifying material are analogous to those considered in *Beare*. This is because of the graduated safeguards included in section 230A that limit when material may be taken and the protections available to the child or young person. The diagrams below provide a useful summary of the circumstances and requirements in section 230A.

In addition, existing section 231 (Destruction of identification material) will apply to new section 230A. In summary, section 231 requires that identification material must be destroyed as soon as practicable once a 12-month period has elapsed and proceedings to which the identification material relates have not been instituted or have been discontinued. Material must also be destroyed if the person is either acquitted of the offence or is found to have committed the offence but no conviction is recorded (under the *Crimes (Sentencing) Act 2005*, s 17). This approach is consistent with the case of *S and Marper v United Kingdom* [2008] ECHR 1581 decided by the European Court of Human Rights (ECHR). The ECHR held that holding DNA samples of individuals arrested but who are later acquitted or have the charges against them dropped is a violation of the right to privacy under the European Convention on Human Rights.

Any limitations on rights are justified and proportionate given the safeguards that have been legislated for and discussed above.

¹⁰ *R v Beare* [1988] 2 SCR 387 at 60-61.

Diagram 1 – Circumstances when a Magistrates Order is required for the taking of identification material – See section 230A (1) and (2)

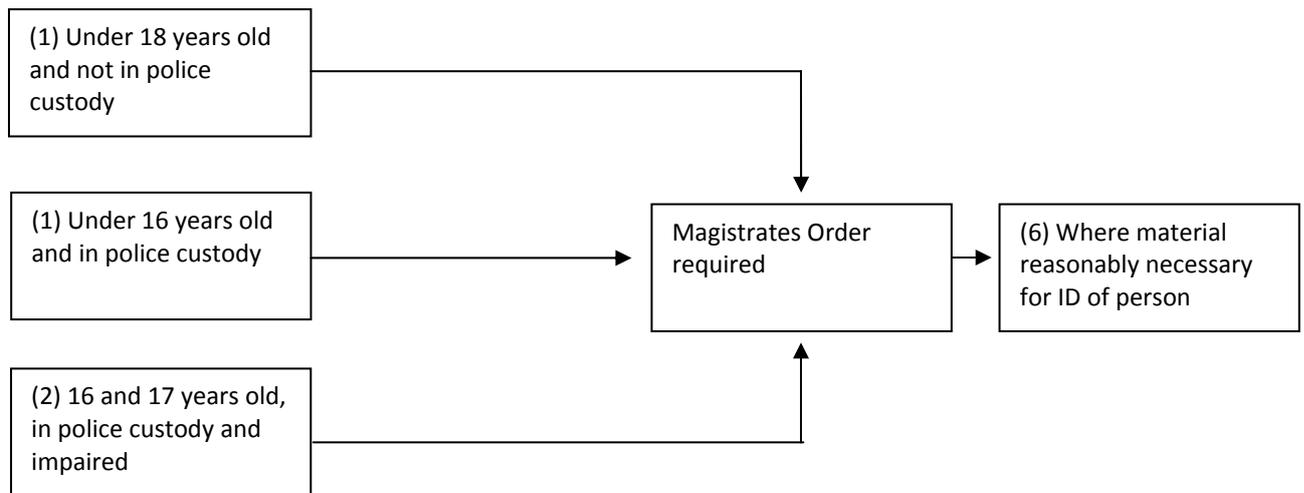


Diagram 2 – Circumstances where a Police Officer may take identification material

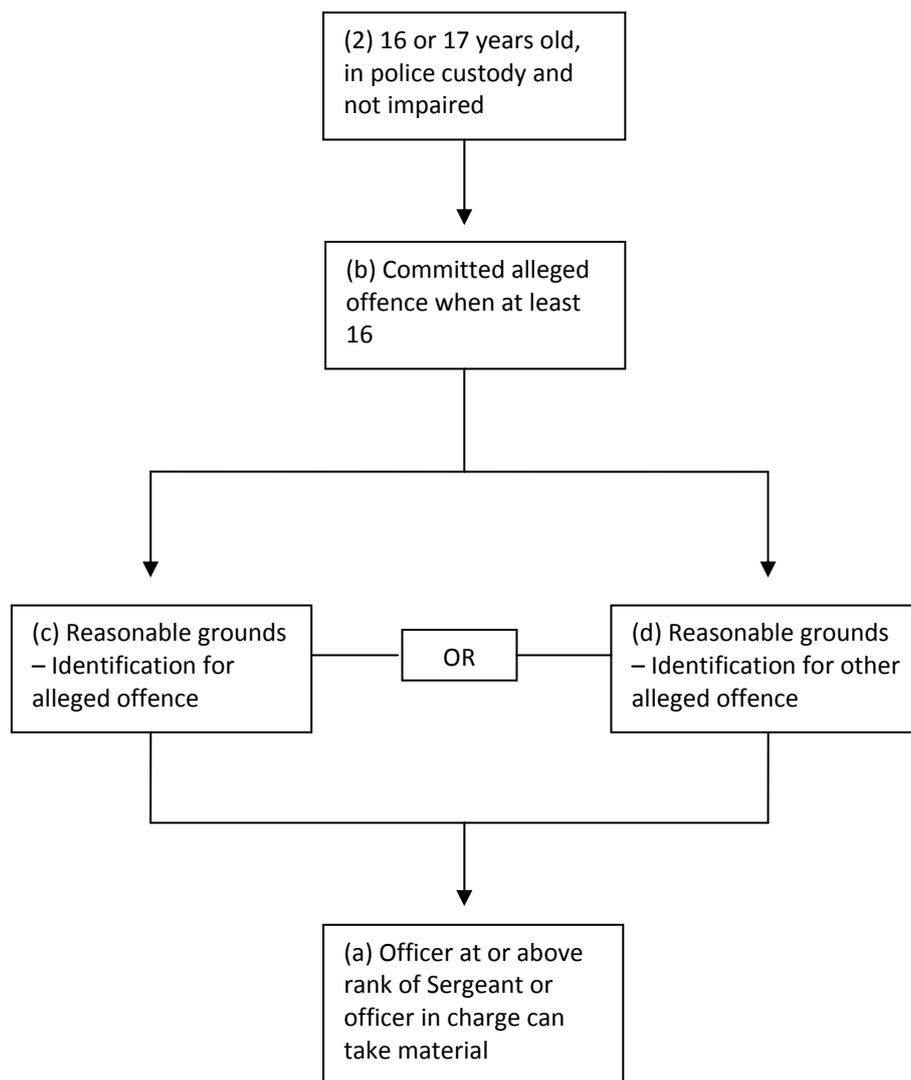


Diagram 3 – Taking of identification material – Explanation

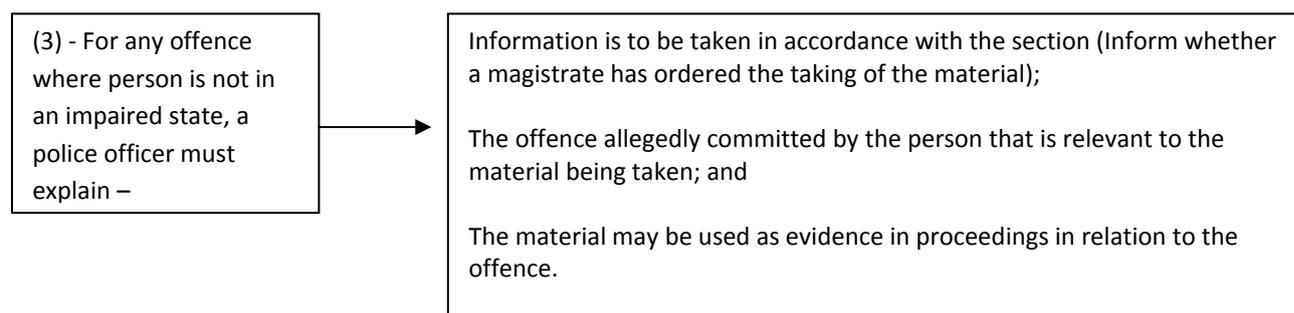
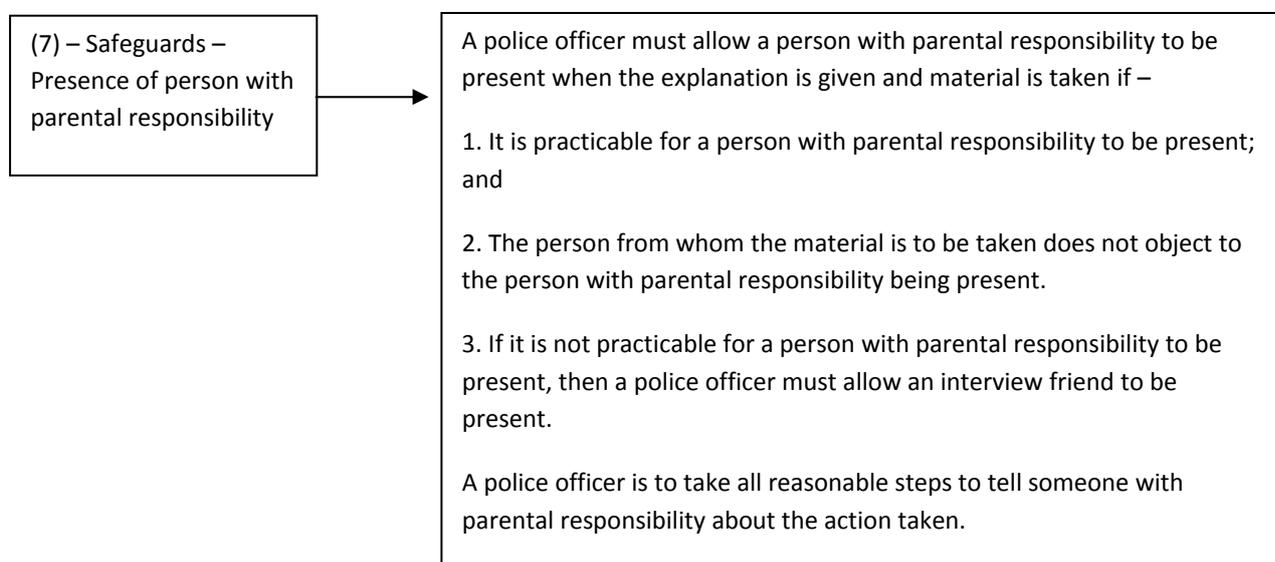


Diagram 4 – Taking of identification material – Other safeguards



Clause 8 – Destruction of identification material, Section 231(1)(a) and (2)

This clause is a consequential amendment to the section dealing with the destruction of identification material to ensure it also addresses section 230A.

Clause 9 – Section 232 heading

This clause amends the title of the offence relating to the refusal to allow a fingerprint or a photograph to be taken to more accurately reflect the physical elements of the offence.

Clause 10 – Laws relating to taking forensic samples not affected, Section 247

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 11 – Dictionary, new definitions

This clause inserts new definitions in the dictionary to ensure consistency in the Act.

Part 4 – *Crimes (Forensic Procedures) Act 2000*

The amendments to the Crimes (Forensic Procedures) Act make three categories of amendments that will:

1. require notification of the Aboriginal Legal Service (NSW/ACT) when a police officer intends to ask an Aboriginal or Torres Strait Islander person to consent to a forensic procedure;
2. expand the definition of ‘incapable’ in section 15 to allow a third party, a close associate, to give consent to non-intimate forensic procedures on behalf of a person who is incapable or temporarily incapable; and
3. provide a mechanism to allow an Aboriginal or Torres Strait Islander person to decline the presence of an interview friend or lawyer during a forensic procedure.

These amendments engage and support the following HR Act rights:

- the right of every child to the protection needed by the child because of being a child, without distinction or discrimination of any kind (s 11(2));
- the right to privacy and reputation (s 12);
- children in the criminal process (s 20); and
- rights in criminal proceedings (s22).

These amendments support the right to freedom of expression and recognition and equality before the law by allowing an Aboriginal or Torres Strait Islander person to decline the presence of an interview friend or lawyer, where not required. The bill also supports the right to privacy by providing a close associate as an additional safeguard and supports rights in criminal proceedings by ensuring that the Aboriginal Legal Service is notified when a police officer intends to ask an Aboriginal or Torres Strait Islander person to consent to a forensic procedure.

Clause 12 – Part 2.1 heading

This clause updates the heading for part 2.1 for consistency in legislation.

Clause 13 – Meaning of *volunteer*, Section 10 (b) and note

Section 10 (b), which defines the term ‘volunteer’ for the Act, is substituted by two separate paragraphs that differentiate between a person who is a child and a person who is an incapable person. This clause states that if a person is an incapable person, a volunteer includes a close associate. A close associate is able to volunteer to a police officer that the incapable person undergoes a forensic procedure.

Clause 14 – New section 14A

This clause inserts a new defined term of close associate to support the giving of consent on behalf of a person who is temporarily incapable or unable to give consent to a non intimate forensic procedure. A person who is deemed to be an incapable person must be aged 18 years or older for a close associate to be able to volunteer for them.

This clause expands the class of people who are authorised to provide consent on behalf of the incapable or unconscious person for non-intimate forensic procedures. This amendment does not interfere with the requirement for a Magistrate to approve the conduct of an intimate forensic procedure where consent of a specified third party, parent or guardian cannot be obtained.

This authority will extend to a person who is the incapable person’s domestic partner, carer, close relative or close friend. However, the power does not extend to a person under the age of 18 years or a person who has impaired decision making capacity.

This will streamline procedures and allow a broad class of people to provide consent where the person is incapable of making decisions and an authorised person cannot be located. This is consistent with section 12 of the HR Act, as the expansion of the definition does not unlawfully or arbitrarily interfere with the person’s privacy and is the least restrictive means available in the circumstances.

Clause 15 – Meaning of *incapable person*, Section 15

This clause expands the definition of incapable person to include a person who is temporarily incapable. This clarifies the intended operation of this provision. This definition applies to people aged 18 years or older.

Clause 16 – Section 15, new examples

This clause provides examples of circumstances where a person may be temporarily incapable. The examples include incapacity caused by a lack of cogent consciousness caused or affected by drugs and/or alcohol or sedation.

Clause 17 – Interview friend, New section 16 (2) (ba)

This clause inserts an additional paragraph for the definition of interview friend. If the person is an incapable person, an interview friend of the person includes a close associate of the person.

Clause 18 – Section 16 (2) (c)

This clause is a consequential amendment to ensure the effective operation of amendment to the definition of ‘interview friend’.

Clause 19 – New section 17

This clause inserts new section 17 which requires a police officer to ask a suspect if he or she identifies as an Aboriginal person or Torres Strait Islander person, before asking a suspect to consent to a forensic procedure under the Act. This procedural requirement is an important measure to support amendments set out in clause 20.

Clause 20 - New section 24A

This clause inserts a new requirement for a police officer, when intending to ask an Aboriginal or Torres Strait Islander suspect to consent to a forensic procedure, to inform the suspect that the Aboriginal Legal Service (NSW/ACT) will be notified. The police officer is to notify the Aboriginal Legal Service as soon as practicable. This clause supports rights in criminal proceedings by assisting an Aboriginal or Torres Strait Islander person to understand the nature and reason of the procedure and seek legal advice and support where appropriate. This clause also provides recognition and equality before the law by allowing vulnerable people to access support and protection of the law without discrimination.

This clause recognises Aboriginal and Torres Strait Islander people as vulnerable groups and the need for a special provision to protect their rights in the context of forensic procedure. It is based on section 23WG of the *Crimes Act 1914* (Cwlth), with minor changes to reflect the approach in section 10 of the *Crimes (Forensic Procedures) Act 2000* (NSW).

This clause is consistent with the requirement that an interview friend is present when a forensic procedure is carried out in respect of an Aboriginal or Torres Strait Islander person. If a suspect waives their right to an interview friend, this waiver does not remove the requirement for the police officer to notify the Aboriginal Legal Service about the proposed forensic procedure application. This means that the amendment requires notification to the Aboriginal Legal Service in addition to, and not as an alternative to, the presence of an interview friend.

The requirement to notify the Aboriginal Legal Service does not apply in circumstances where a suspect arranges for a lawyer to be present or where a suspect expressly waives their right to have a lawyer present. This right of waiver is separate to the right to waive an interview friend.

A suspect can only give informed consent to a forensic procedure or waive their right to an interview friend or a legal representative, if the person is not a child or is not an incapable person. New section 24A does not require police officers to make a determination as to whether the Aboriginal or Torres Strait Islander suspect is at a disadvantage in relation to the request for consent by comparison with members of the Australian community generally. This removes the exercise of a discretion that would require a high level of subjectivity.

After notifying the Aboriginal Legal Service, a police officer must allow the suspect to communicate, or attempt to communicate with the interview friend or lawyer in private. This requirement applies unless the suspect is under arrest and a police officer believes on reasonable grounds that the suspect may attempt to destroy or contaminate any evidence that may be obtained by carrying out the forensic procedure.

The need for these special provisions in relation to Aboriginal and Torres Strait Islander people was raised by an inquiry by the NSW Legislative Council Standing Committee on Law and Justice into the *Crimes (Forensic Procedures) Act 2000* (NSW).¹¹ The Aboriginal and Torres Strait Islander Commission and the NSW Aboriginal Land Council made

¹¹ Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000*, Recommendations 33 and 37.

submissions to the inquiry, stating that bodily samples are used by Aboriginal and Torres Strait Islander people for spiritual purposes and as a result they may be particularly reluctant to give such samples.¹² These amendments attempt to address these issues by providing Aboriginal and Torres Strait Islander people with an opportunity to seek support from interview friends and seek legal advice from legal representatives.

Clause 21 – Presence of interview friend or lawyer while forensic procedure is carried out, New section 57 (1A)

An Aboriginal or Torres Strait Islander person may waive their right to have an interview friend or lawyer present. A waiver of the right to an interview friend does not amount to waiving the right to a lawyer. A waiver of the right to a lawyer does not amount to waiving the right to an interview friend. Neither waiver applies to Aboriginal or Torres Strait Islander people who are children or deemed incapable. A waiver of these rights must be express and voluntary.

This amendment will act as a mechanism to allow an Aboriginal or Torres Strait Islander person to decline the presence of an interview friend or lawyer during a forensic procedure. This will allow police officers to take material without delay in circumstances where it is appropriate to do so. This is consistent with the right to privacy and reputation and the right to humane treatment when deprived of liberty, in sections 12 and 19 of the HR Act.

Clause 22 – Section 79

This clause substitutes section 79 (Carrying out of forensic procedures on volunteers) with amendments to support the expansion of provisions to allow for substitute decisions for the carrying out of forensic procedures on volunteers who are not able to consent. The remade section allows a ‘close associate’ to consent on behalf of an incapable person where the person’s parent or guardian cannot be contacted.

In Australia, provisions regulating the taking of forensic samples from volunteers in their current form were proposed in the Model Criminal Code Officers Committee *Discussion Paper, Model Forensic Procedures Bill and Proposed National DNA Database*

¹² Thomson Reuters, *The Law Handbook*, 13th Edition, Redfern Legal Centre Publishing, 2009.

(May 1999).¹³ The 1999 proposal to legislate for the taking of samples from volunteers was based on the need to establish ‘statutory safeguards concerning informed consent, the ability to withdraw consent, proper procedures and controls over the storage, security, use and disclosure of information’.¹⁴ The 1999 Discussion Paper recognised that while most suspects will normally be victims or people who submit to a forensic procedure to exclude them as a suspect, it is possible that volunteers may also be potential suspects.

A key safeguard relating to volunteers is the requirement for informed consent to be given before a forensic procedure is carried out. The giving of informed consent in relation to volunteers is set out in section 80 (Informed consent of volunteer or parent or guardian of volunteer). Amendments are made to section 80 to include reference to ‘close associates’.

If the volunteer is an incapable person and the parent or guardian of the volunteer cannot be contacted, the informed consent of a close associate may be obtained for a non intimate forensic procedure only. This consent must be obtained in accordance with section 80 or by order of a magistrate under section 83. The incapable person must then be informed that consent has been given by a close associate. If the incapable person objects to or resists the carrying out of the forensic procedure, the procedure cannot be carried out.

Similarly, the section does not authorise a person to carry out a forensic procedure on a child or incapable person who objects to or resists the carrying out of the forensic procedure.

Clause 23 - Section 80 heading

This clause amends the heading of section 80 to reflect the inclusion of close associate or a class of person who may be covered for a forensic procedure on behalf of volunteers and certain other people.

¹³ *Discussion Paper, Model Forensic Procedures Bill and Proposed National DNA Database* (May 1999) Available at URL:

http://www.lccsc.gov.au/agdbasev7wr/scli/documents/pdf/mcloc_projects_forensic_procedures_discussion_paper.pdf

¹⁴ *Ibid*, p. 33.

Clause 24 – Section 80

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency in the Act.

Clause 25 – Consent to retention of forensic material taken etc, Section 80A

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency in the Act.

Clause 26 – Recording of giving of information etc, Section 81

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency in the Act.

Section 27 – Withdrawal of consent or end of agreed retention period, Section 82

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency in the Act.

Clause 28 – Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person, Section 83(1)

This clause substitutes section 83(1) to state the circumstances in which a magistrate may order the carrying out of forensic procedures on a child or incapable person. This clause supports the protection of children and incapable people and provides additional safeguards for those involved in the criminal process.

A magistrate may order the carrying out of a forensic procedure on a child or incapable person if consent to the carrying out of a forensic procedure cannot reasonably be obtained from the parent or guardian of the child, or the parent, guardian or close associate of an incapable person.

If the parent or guardian of the child, or the parent, guardian or close associate of the incapable person refuses to consent to the carrying out of the forensic procedure, a magistrate may order the carrying out of a forensic procedure on a child or incapable person. The magistrate must be satisfied that there are reasonable grounds to believe that the parent, guardian or incapable person is a suspect and the forensic procedure is likely to produce

evidence that confirms or disproves that the parent, guardian or close associate committed an offence.

Clause 29 – Section 83 (2) (d), note

This clause is a technical amendment to ensure consistency in the Act.

Clause 30 – Section 83 (2) (e)

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency of language in the legislation.

Clause 31 – Retention of forensic material etc by order of magistrate – Section 84

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency of language in the legislation.

Clause 32 – Definitions – Act, Section 94, Definition of *volunteers (unlimited purposes) index*

This clause is a technical amendment that includes a reference to ‘close associates’ to ensure consistency of language in the legislation.

Clause 33 – Section 94, Definition of *volunteers (unlimited purposes) index*

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency of language in the legislation.

Clause 34 – Dictionary, note 2

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 35 – Dictionary, new definition of close associate

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency of language in the legislation.

Clause 36 – Dictionary, Definition of *forensic order*, paragraph (d)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 37 – Dictionary – Definition of *informed consent*, paragraph (c)

This clause is a technical amendment that includes a reference to ‘close associate’ to ensure consistency of language in the legislation.

Part 5 – *Crimes (Sentencing) Regulation 2006*

Clause 38 – Section 1A

This clause authorises a person to make a Victim Impact Statement (VIS) where a person is exposed to a risk of death or serious injury or illness and it has actually resulted in death or serious injury or illness. This clause supports the right to freedom of expression in criminal proceedings and supports recognition and equality before the law by providing a voice to those who have been affected by a death or serious injury or illness.

The *Crimes (Sentencing) Act 2005* provides for the making of a VIS for offences punishable by imprisonment for longer than one year or another offence as prescribed by the *Crimes (Sentencing) Regulation 2006* (the Regulation).

Category 1 offences (reckless conduct) under section 31 of the *Work Health and Safety Act 2011* (WHS Act) are the only offences under the WHS Act that meet the VIS imprisonment threshold. In some circumstances where a conviction of a category 2 offence (failure to comply with health and safety duty exposing individual to risk of death or serious injury or illness) occurs, it is appropriate that a VIS should be made by a victim.

This clause amends the Regulation to allow a VIS to be made for category 2 offences under the WHS Act when the exposure to a risk of death or serious injury or illness has resulted in death or serious injury or illness.

Part 6 – Magistrates Court (Security Industry Infringement Notices)

Regulation 2008

Clause 39 – Contents of infringement notices – identifying authorised person, Section 10 (a) and (b)

A person is authorised to issue infringement notices in accordance with the *Security Industry Act 2003* pursuant to the Magistrates Court (Security Industry Infringement Notices) Regulation. An authorised person includes a police officer or a person authorised by the

Commissioner of Fair Trading under section 36 of the *Fair Trading (Australian Consumer Law) Act 1992*.

An authorised person may serve an infringement notice for an infringement notice offence under the Security Industry Act and a reminder notice for an infringement notice offence against the Security Industry Act.

Clause 40 – Contents of reminder notices – identifying authorised person, Section 11 (a) and (b)

This clause is a technical amendment consistent with clause 39 that ensures consistency of language in the Act.

Clause 41 – Section 12

This clause is a technical amendment consistent with clauses 39 and 40 to ensure consistency of language in the Act.