



AUSTRALIAN CAPITAL TERRITORY

Crimes (Forensic Procedures) Act 2000

No 61 of 2000

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DICTIONARY



AUSTRALIAN CAPITAL TERRITORY

Crimes (Forensic Procedures) Act 2000

No 61 of 2000

An Act about forensic procedures and other matters

[Notified in ACT Gazette No. 40: 5 October 2000]

The Legislative Assembly for the Australian Capital Territory enacts as follows:

CHAPTER 1—PRELIMINARY

1 Name of Act

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

2 Commencement

This Act commences on a day fixed by the Minister by notice in the Gazette.

Note 1 The provisions of an Act providing for its name and commencement automatically commence on the date of notification of the Act (see *Interpretation Act 1967*, s 10B).

Note 2 A single day or time may be fixed, or different days or times may be fixed for different provisions (see *Interpretation Act 1967*, s 10C (1)).

Note 3 If a provision has not commenced within 6 months beginning on the date of notification of the Act, it automatically commences on the first day after that period (see *Interpretation Act 1967*, s 10E (2)).

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain words and expressions used in this Act, and includes references (*signpost definitions*) to other words and expressions defined elsewhere in this Act or in other legislation.

For example, the signpost definition ‘*crime scene index*—see section 94.’ means that the expression “crime scene index” is defined in that section of the Act and applies for the Act.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see *Interpretation Act 1967*, s 11F and s 11G).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See *Interpretation Act 1967*, s 12 (1), (4)-(5) for the legal status of notes.

CHAPTER 2—FORENSIC PROCEDURES

PART 2.1—GENERAL CONCEPTS

5 Forensic material and forensic procedures

(1) *Forensic material* is any of the following taken of or from a person's body:

- (a) a sample;
- (b) a handprint, fingerprint, footprint or toeprint;
- (c) a photograph or video recording;
- (d) a cast or impression.

Note *Sample* is defined in the dictionary to include a sample that consists of matter from someone else's body.

(2) A *forensic procedure* is an intimate forensic procedure or non-intimate forensic procedure.

Note *Intimate forensic procedure* and *non-intimate forensic procedure* are defined in sections 6 and 7.

(3) A *forensic procedure* does not include—

- (a) any intrusion into a person's body cavities (other than the mouth);
or
- (b) the taking of anything of or from a person's body for the sole purpose of establishing the identity of the person.

6 What is an intimate forensic procedure?

An *intimate forensic procedure* is any of the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, for 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 pubic hair;
- (d) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, for a female or a transgender person who identifies as a female, the breasts;

- (e) 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, for a female or a transgender person who identifies as a female, the breasts;
- (f) the taking of a dental impression;
- (g) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, for a female or a transgender person who identifies as a female, the breasts.

Note **Transgender person** is defined in section 17.

7 What is a non-intimate forensic procedure?

A **non-intimate forensic procedure** is any of the following forensic procedures:

- (a) an examination of a part of the body (other than the genital or anal area, buttocks, or, for a female or a transgender person who identifies as a female, the breasts) that requires touching of the body or removal of clothing;
- (b) the taking of a sample of hair (other than pubic hair);
- (c) the taking of a sample from a nail or under a nail;
- (d) the taking of a sample of saliva or a sample by buccal swab;
- (e) 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, for 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 any external part of the body (other than the genital or anal area, the buttocks, or, for a female or a transgender person who identifies as a female, the breasts);
- (g) the taking of a handprint, fingerprint, footprint or toeprint;
- (h) 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, for a female or a transgender person who identifies as a female, the breasts).

8 Meaning of suspect

A **suspect** is any of the following:

- (a) a person suspected by a police officer, on reasonable grounds, to have committed an offence;

- (b) a person charged with an offence;
- (c) a person who has been summonsed to appear before a court for an offence;
- (d) a person who has entered into a voluntary agreement to attend court (**VATAC**) for an offence.

Note Section 107 (Proof of belief) 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.

9 Meaning of *serious offence* and *serious offender*

- (1) A *serious offence* is—
- (a) an indictable offence against Territory law; or
 - (b) an offence against the law of another participating jurisdiction punishable by imprisonment for life or by a maximum penalty of 2 or more years of imprisonment.

Note *Another participating jurisdiction* is defined in section 100.

- (2) A *serious offender* is a person who is convicted of a serious offence.

10 Meaning of *volunteer*

A *volunteer*, in relation to a forensic procedure, is a person—

- (a) who volunteers to a police officer to undergo the forensic procedure; or
- (b) if the person is 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 the forensic procedure.

Note *Child* and *parent* are defined in section 14, and *incapable person* is defined in section 15.

11 Meaning of *investigating police officer*

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

12 Meaning of *authorised applicant*

An *authorised applicant*, for an offence in relation to which a forensic procedure is carried out or proposed to be carried out, is—

- (a) the police officer in charge of a police station; or
- (b) the investigating police officer; or
- (c) the director of public prosecutions.

13 Meaning of *appropriately qualified person*

A person is an *appropriately qualified person* to carry out a forensic procedure if the person is a person (such as a police officer) who is qualified as prescribed under the regulations to carry out the forensic procedure.

14 Meaning of *child and parent of a child*

- (1) *Child* means a person under 18 years old.
- (2) A *parent* of a child is a person who has parental responsibility for the child.
- (3) *Parental responsibilities* for a child are all the duties, powers, responsibilities and authority parents have by law in relation to their children.

15 Meaning of *incapable person*

An incapable person means an adult who is incapable of—

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

16 Interview friend

- (1) This section applies to a suspect, serious offender or volunteer who is a child or incapable person.
- (2) An *interview friend* of the person is—
 - (a) a parent or guardian or other person chosen by, or acceptable to, the person; or
 - (b) a lawyer of the person; or

- (c) if no-one mentioned in paragraphs (a) and (b) is available—a person chosen by an authorised applicant for a forensic order in relation to the person who is not—
 - (i) a police officer; or
 - (ii) in any way involved in the investigation of the offence concerned.

(1) If the person has a lawyer, the person may also have an interview friend who is not the lawyer.

17 Transgender persons

- (1) A *transgender* person is a person who—
- (a) identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or
 - (b) has identified as a member of the opposite sex by living as a member of the opposite sex; or
 - (c) is of indeterminate sex and identifies as a member of a particular sex by living as a member of that sex;

whether or not the person is a recognised transgender person.

(1) A *transgender* person includes a person who is thought of as a transgender person, whether or not the person is a recognised transgender person.

(3) A *recognised transgender person* is a person the record of whose sex is altered under Part 4 of the *Births, Deaths and Marriages Registration Act 1997* or the corresponding provisions of a law of a State or another Territory.

- (4) In this Part (other than subsection (1)), 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.

PART 2.2—CIRCUMSTANCES IN WHICH FORENSIC PROCEDURES ON SUSPECTS MAY BE AUTHORISED

18 How forensic procedures may be authorised in different circumstances

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

Table of authorisations for forensic procedures

column 1 item	column 2 sections	column 3 suspect	column 4 intimate forensic procedure	column 5 non-intimate forensic procedure
1	<ul style="list-style-type: none"> • 17 • 31 	adult not in custody	<ul style="list-style-type: none"> • with informed consent under Part 2.3 • by forensic order of a magistrate under Part 2.5 	<ul style="list-style-type: none"> • with informed consent under Part 2.3 • by forensic order of a magistrate under Part 2.5
2	<ul style="list-style-type: none"> • 19 • 27 • 31 	adult in custody	<ul style="list-style-type: none"> • with informed consent under Part 2.3 • by forensic order of a magistrate under Part 2.5 	<ul style="list-style-type: none"> • with informed consent under Part 2.3 • by forensic order of a police officer under Part 2.4

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column 1 item	column 2 sections	column 3 suspect	column 4 intimate forensic procedure	column 5 non-intimate forensic procedure
3	31	incapable person (whether or not in custody)	by forensic order of a magistrate under Part 2.5	by forensic order of a magistrate under Part 2.5
4	31	child (whether or not in custody)	by forensic order of a magistrate under Part 2.5	by forensic order of a magistrate under Part 2.5

Note Part 2.3 deals with forensic procedures carried out with the consent of the suspect. Part 2.4 deals with non-intimate forensic procedures carried out on a suspect by order of a police officer. Part 2.5 deals with forensic procedures carried out on a suspect by order of a magistrate.

PART 2.3—FORENSIC PROCEDURES BY CONSENT OF SUSPECT

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

- (1) A person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect.
- (2) The person is authorised to carry out the procedure in accordance with Part 2.6 (Carrying out forensic procedures) and not otherwise.
- (3) This Part does not authorise the carrying out of a forensic procedure on a suspect who is a child or incapable person.

20 People who cannot consent to forensic procedures

A child or incapable person cannot consent to the carrying out of a forensic procedure.

21 Informed consent of suspect to forensic procedure

- (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 22; and
 - (b) informs the suspect about the forensic procedure in accordance with section 24 (Matters that suspect must be informed of before giving consent); and
 - (c) gives the suspect the opportunity to communicate, or attempt to communicate, with a lawyer of the suspect's choice.

Note **Inform** is defined in the dictionary.

- (2) The police officer must allow the suspect to communicate, or attempt to communicate, with the lawyer 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 107 (Proof of belief) 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.

22 Police officer may request suspect to consent to forensic procedure

A police officer may request a suspect to undergo a forensic procedure if the police officer is satisfied as required by section 23.

23 Matters to be considered by police officer before requesting consent to forensic procedure

(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 serious 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 serious offence arising out of the same circumstances as that offence; or
 - (iii) another serious offence for which the evidence likely to be obtained because 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 infringement 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 infringement 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 infringement notice) for which the handprints, fingerprints, footprints or toeprints are likely to have probative value; and
- (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 107 (Proof of belief) 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 deciding 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 offence and the gravity of the offence;
- (b) the degree of the suspect's alleged participation in the commission of the 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 offence;
- (e) if the suspect gives any reasons for refusing to consent—the reasons;
- (f) any other matter considered relevant to balancing those interests.

24 Matters that suspect must be informed of before giving consent

- (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, will be recorded in writing, and that the suspect has a right to a copy of that record;
 - (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 mentioned 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 mentioned in subsection (4), (5) or (6) (whichever is applicable);
 - (j) the effect of section 87 (Admissibility of evidence relating to consent to forensic procedures);
 - (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 Act.
- (2) The police officer must inform the suspect that the suspect may request that a doctor of the suspect's choice be present while an intimate forensic procedure is carried out.
- (3) 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) 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 Part 2.4 (Non-intimate forensic procedures on suspect by order of a police officer) if the police officer is satisfied of the matters mentioned in section 23 (Matters to be considered by police officer before requesting consent to forensic procedure).
- (5) 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) 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.

25 Withdrawal of suspect's consent

If a suspect expressly withdraws consent to the carrying out of a forensic procedure under this Act (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—

- (a) the forensic procedure must be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and
- (b) the forensic procedure may be carried out in accordance with an order under Part 2.4 (Non-intimate forensic procedures on suspect by order of a police officer) or Part 2.5 (Forensic procedures on suspect by order of a magistrate) and not otherwise.

26 Recording of giving of information and consent

(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 audiotape, videotape 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 Part 2.14 (General provisions about operation of Act) contains provisions about making copies of material (including tapes) available to the suspect.

**PART 2.4—NON-INTIMATE FORENSIC PROCEDURES ON
SUSPECT BY ORDER OF A POLICE OFFICER**

**27 Non-intimate forensic procedure may be carried out by order of
police officer**

- (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 this Part.
- (2) The person is authorised to carry out the procedure in accordance with Part 2.6 (Carrying out forensic procedures) and not otherwise.
- (3) This Part does not authorise the carrying out of a forensic procedure on a suspect who is a child or incapable person.

**28 Circumstances in which police officer may order non-intimate
forensic procedure**

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 Part 2.3 (Forensic procedures by consent of suspect) 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 29.

**29 Matters to be considered by police officer before ordering
forensic procedure**

- (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 for which the person is a suspect is a serious offence and there are reasonable grounds to believe that the suspect committed—
 - (i) that offence; or
 - (ii) another offence arising out of the same circumstances as that offence; or

- (iii) another offence for which the evidence likely to be obtained because 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 for which the person is a suspect is an offence other than an offence that may be dealt with by way of infringement 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 infringement 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 infringement notice) for 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 107 (Proof of belief) 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 deciding 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 offence and the gravity of the offence;
- (b) the degree of the suspect's alleged participation in the commission of the 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 offence;
- (e) if the suspect gives any reasons for refusing to consent—the reasons;
- (f) any other matter considered relevant to balancing those interests.

30 Record of police officer's order

(1) If a police officer orders the carrying out of a forensic procedure on a suspect who is in custody, the police officer must—

- (a) make a record of—
 - (i) the order; and
 - (ii) the date and time the order was made; and
 - (iii) the reasons for making it; and
- (b) sign the record.

(1) The police officer must make and sign the record when the order is made or as soon as practicable afterwards.

(3) 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.

PART 2.5—FORENSIC PROCEDURES ON SUSPECT BY ORDER OF A MAGISTRATE

Division 2.5.1—General

31 Forensic procedure may be carried out by order of a magistrate

- (1) A person is authorised to carry out a forensic procedure on a suspect by order of a magistrate under this Part.
- (2) The person is authorised to carry out the procedure in accordance with Part 2.6 (Carrying out forensic procedures) and not otherwise.

32 Circumstances in which magistrate may order forensic procedure

A magistrate may, under section 33 or section 41 (Interim order for immediate carrying out of forensic procedure), 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 when the suspect may lawfully be held has not yet expired; or
- (d) the suspect is a child or incapable person.

Division 2.5.2—Final orders

33 Final order for carrying out of forensic procedure

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

- (a) section 32 applies; and
- (b) the magistrate is satisfied as required by section 34.

34 Matters to be considered by magistrate before ordering forensic procedure

- (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 for which the person is a suspect is a serious offence and, on the evidence before the magistrate, there are reasonable grounds to believe that the suspect committed—
 - (i) that offence; or
 - (ii) another serious offence arising out of the same circumstances as that offence; or
 - (iii) another serious offence for which the evidence likely to be obtained because 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 for which the person is a suspect is an offence other than an offence that may be dealt with by way of infringement 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 infringement 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 infringement notice) for 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 deciding 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 offence and the gravity of the offence;
- (b) the degree of the suspect's alleged participation in the commission of the 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 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 offence;
- (f) if the suspect gives any reasons for refusing to consent—the reasons;
- (g) if the suspect is in custody and the investigation period when the suspect may lawfully be held has not expired—
 - (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.

35 Application for order

(1) An authorised applicant (and no-one else) may apply to a magistrate for an order under section 32 (Circumstances in which magistrate may order forensic procedure) 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 mentioned in subsection 34 (1) (Matters to be considered by magistrate before ordering forensic procedure); and
 - (c) state 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).

36 Securing the presence of suspects at hearings—suspect in custody

- (1) If the suspect is in the custody of a police officer or is otherwise detained under Territory law (the *original custody*), the magistrate may, on the application of a police officer, issue a warrant directing the person holding the suspect in the 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 Part.
- (2) The police officer given temporary custody must return the suspect to the place of the 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.

37 Securing the presence of suspects at hearings—suspect not in custody

- (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 to bring 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.

38 Procedure at hearing of application for order

- (1) A forensic order may only be made in the presence of the suspect concerned.
- (2) If the suspect is a child or incapable person, the suspect must be represented by an interview friend and may also be represented by a lawyer.
- (3) Any other suspect may be represented by a lawyer.

- (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 may give leave under paragraph (4) (b) only if 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.

39 Action to be taken on making of orders

- (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 about the date, time, place where, or how a forensic procedure is to be carried out.

40 Suspect may be kept in custody for carrying out of forensic procedure

- (1) If a magistrate orders the carrying out of a forensic procedure on a suspect, the suspect may be detained in custody for as long as reasonably necessary to carry out the forensic procedure.
- (2) If a magistrate makes an order in the circumstances set out in paragraph 32 (c), the order operates despite any other law.

Note Paragraph 32 (c) is about a suspect who is in custody and the investigation period when the suspect may lawfully be held has not expired.

Division 2.5.3—Interim orders

41 Interim order for immediate carrying out of forensic procedure

- (1) A magistrate may make an interim order authorising the immediate carrying out of a forensic procedure on a suspect if—
- (a) section 32 (Circumstances in which magistrate may order forensic procedure) applies; and

- (b) the magistrate is satisfied that the probative value of evidence obtained because 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 mentioned in subsection 34 (1) (Matters to be considered by magistrate before ordering forensic procedure) when the application is finally decided.
- (2) An interim order operates as provided by this Division until a magistrate, at a hearing held as mentioned in subsection 44 (2) (Action to be taken on making of interim orders), confirms the interim order or disallows it.
- (3) Division 2.5.2 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 33 (Final order for carrying out of forensic procedure), and an order confirming the interim order is taken to be an order under section 33.

42 Applications for interim orders

- (1) An authorised applicant may, without bringing a suspect before a magistrate and without obtaining an order under section 33 (Final order for carrying out of forensic procedure), make an application seeking an order (an *interim order*) authorising the immediate carrying out of a forensic procedure on the suspect.
- (2) An application for an interim order must—
- (a) be supported by evidence on oath or by affidavit dealing with the matters mentioned in subsection 41 (1); and
 - (b) state 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, telex, fax 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 child or incapable person, the suspect's interview friend or lawyer must also be in the presence of the authorised applicant.

(6) However, the suspect's interview friend (other than a lawyer) may be excluded from the presence of the authorised applicant if the interview friend unreasonably interferes with or obstructs the making of the application.

43 Procedure at hearing of application for interim order

(1) If the application is made in person, or by telephone, radio or other form of oral communication, the magistrate must ensure that the following are given an opportunity to speak to the magistrate:

- (a) the suspect;
- (b) the suspect's lawyer (if any);
- (c) the suspect's interview friend (if any).

(2) If the application is made by telex, fax or other form of written communication, the magistrate must ensure that the following 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:

- (a) the suspect;
- (b) the suspect's lawyer (if any);
- (c) the suspect's interview friend (if any).

44 Action to be taken on making of interim orders

(1) A magistrate who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, fax 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 state the date and time when, and place where, a further hearing on the application will take place and the application will be finally decided 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 33 (Final order for carrying out of forensic procedure).

45 Records of applications and interim orders

(1) The applicant for an interim order, at the time of, or as soon as practicable after, applying for the interim order, must 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—

- (a) at the time of, or as soon as practicable after, making an interim order, make a record (the *magistrate's record*) of—
 - (i) the date and time when the order was made; and
 - (ii) the order made; and
 - (iii) the reasons for making it; and
- (b) 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.

46 Suspect may be prevented from destroying or contaminating evidence

(1) Any police officer may, while waiting for the application seeking an interim order to be decided, 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) This section does not authorise anyone to carry out a forensic procedure before an interim order is made.

47 Results of forensic procedures carried out under interim order

(1) A sample taken under an interim order may be analysed only if—

- (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 mentioned in paragraph (1) (a) must not intentionally or recklessly disclose the results of the analysis to anyone—

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

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

Division 2.5.4—Reports of proceedings under this Part

48 Restrictions on publication

A person must not intentionally or recklessly, in any report of a proceeding under this Part, 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 publication.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

PART 2.6—CARRYING OUT FORENSIC PROCEDURES

Division 2.6.1—General provisions

49 General rules for carrying out forensic procedures

A forensic procedure—

- (a) must be carried out in circumstances providing reasonable privacy to the suspect; and
- (b) except as permitted under another provision of this Act, must not be carried out in the presence or view of anyone 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 forensic procedure or required or permitted under another provision of this Act; 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.

50 Use of force in carrying out forensic procedures

(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) A forensic procedure must be carried out in a way consistent with appropriate medical or other relevant professional standards.

51 Forensic procedures not to be carried out in cruel, inhuman or degrading way

(1) This Act does not authorise the carrying out of a forensic procedure in a cruel, inhuman or degrading way.

(2) For this section, the carrying out of a forensic procedure in accordance with this Act is not in itself regarded as degrading to the suspect.

52 Taking samples of hair

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

- (a) the person takes only so much hair as the person believes is necessary for analysis of the sample, or other examination of the hair, to be carried out for the purpose of investigating the relevant offence; and
- (b) each strand of hair is taken individually using the least painful technique known and available to the person.

Division 2.6.2—People involved in forensic procedures

53 People who may carry out forensic procedures

(1) The table in this section shows, for each forensic procedure, the people who may carry out the procedure under this Act.

(2) A person not mentioned in column 3 of the table is not authorised to carry out a forensic procedure under this Act except as mentioned in section 55 (Person may get help to carry out forensic procedure).

(3) Column 4 of the table shows, for each forensic procedure, whether a doctor or dentist of the suspect's choice may be present while the forensic procedure is carried out.

Note Section 56 (Doctor or dentist of suspect's choice may be present for most forensic procedures) makes detailed provisions for the presence of a doctor or dentist of the suspect's choice while a forensic procedure is carried out.

(4) This section does not prevent a suspect from carrying out a forensic procedure mentioned in item 3 of column 1 of the table on himself or herself under the supervision of an appropriately qualified person.

Table of people involved in forensic procedures

column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 doctor/dentist of suspect's choice present?
1	external examination of— <ul style="list-style-type: none"> • genital or anal area • buttocks • breasts of female or transgender person who identifies as female 	<ul style="list-style-type: none"> • doctor • nurse • appropriately qualified person 	<ul style="list-style-type: none"> • doctor
2	taking sample of blood	<ul style="list-style-type: none"> • doctor • nurse 	<ul style="list-style-type: none"> • doctor
3	taking sample of saliva or sample by buccal swab	<ul style="list-style-type: none"> • doctor • dentist • dental technician • nurse • appropriately qualified person 	<ul style="list-style-type: none"> • dentist • doctor
4	taking sample of pubic hair	<ul style="list-style-type: none"> • doctor • nurse 	<ul style="list-style-type: none"> • doctor
5	taking sample by swab or washing from— <ul style="list-style-type: none"> • external genital or anal area • buttocks • breasts of female or transgender person who identifies as female 	<ul style="list-style-type: none"> • doctor • nurse 	<ul style="list-style-type: none"> • doctor
6	taking sample by vacuum suction, scraping or lifting by tape from— <ul style="list-style-type: none"> • external genital or anal area • buttocks • breasts of female or transgender person who identifies as female 	<ul style="list-style-type: none"> • doctor • nurse 	<ul style="list-style-type: none"> • doctor

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column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 doctor/dentist of suspect's choice present?
7	taking dental impression	<ul style="list-style-type: none"> • doctor • dentist • dental technician 	<ul style="list-style-type: none"> • dentist
8	taking photograph of, or impression or cast of, wound from— <ul style="list-style-type: none"> • genital or anal area • buttocks • breasts of female or transgender person who identifies as female 	<ul style="list-style-type: none"> • appropriately qualified person 	<ul style="list-style-type: none"> • doctor
9	external examination of part of body (other than— <ul style="list-style-type: none"> • genital or anal area • buttocks • breasts of female or transgender person who identifies as female) that requires touching of body or removal of clothing	<ul style="list-style-type: none"> • doctor • nurse • appropriately qualified person 	no
10	taking sample of hair (other than pubic hair)	<ul style="list-style-type: none"> • doctor • nurse • appropriately qualified person 	no
11	taking sample from nail or from under nail	<ul style="list-style-type: none"> • doctor • nurse • appropriately qualified person 	no
12	taking sample by swab or washing from any external part of body (other than— <ul style="list-style-type: none"> • genital or anal area • buttocks • breasts of female or transgender person who identifies as a female) 	<ul style="list-style-type: none"> • doctor • nurse • appropriately qualified person 	no

column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 doctor/dentist of suspect's choice present?
13	taking sample by vacuum suction, scraping or lifting by tape from any external part of body (other than— <ul style="list-style-type: none"> • genital or anal area • buttocks • breasts of female or transgender person who identifies as female) 	<ul style="list-style-type: none"> • doctor • nurse • appropriately qualified person 	no
14	taking handprint, fingerprint, footprint or toeprint	<ul style="list-style-type: none"> • appropriately qualified person 	no
15	taking photograph of, or impression or cast of wound from, external part of body (other than— <ul style="list-style-type: none"> • genital or anal area • buttocks • breasts of female or transgender person who identifies as female) 	<ul style="list-style-type: none"> • appropriately qualified person 	no

Note **Appropriately qualified person** is defined in section 13, and **dentist**, **dental technician**, **doctor** and **nurse** are defined in the *Interpretation Act 1967*, dictionary.

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

(1) If practicable, an intimate forensic procedure (other than the taking of a sample of blood or a dental impression) must 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) must be carried out by a person of the same sex as the suspect.

(3) If practicable, a person asked under section 55 to help carry out a forensic procedure covered by subsection (1) or (2) must be a person of the same sex as the suspect.

55 Person may get help to carry out forensic procedure

(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 53 (People who may carry out forensic procedures) to ask someone else 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 53.

(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.

Division 2.6.3—Presence of other people while forensic procedure is carried out

56 Doctor or dentist of suspect's choice may be present for most forensic procedures

(1) A suspect is entitled to request a doctor of his or her choice to be present while an intimate forensic procedure (other than the taking of a dental impression) is carried out.

(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 103 (Powers of lawyers and interview friends) provides that the request may be made by the suspect's lawyer or interview friend.

(3) The doctor or dentist chosen must be present at the carrying out of the forensic procedure unless he or she—

- (a) cannot, 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 carrying out of the forensic procedure considers the forensic procedure should be carried out if it is to be effective in providing evidence of the offence concerned.

57 Presence of interview friend or lawyer while forensic procedure is carried out

(1) If the suspect on whom a forensic procedure is to be carried out is a child or incapable person, either the suspect's interview friend or the suspect's lawyer (if he or she is not the interview friend) must be present while the forensic procedure is carried out.

(2) Both the interview friend and the lawyer may be present.

(3) An interview friend (other than a lawyer) of a suspect who is a child or incapable person 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.

58 Presence of police officers while forensic procedure is carried out

(1) The number of police officers that may be present during the carrying out of a forensic procedure must not exceed the number reasonably necessary to ensure that the procedure is carried out effectively and in accordance with this Act.

(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;
- (b) any non-intimate forensic procedure that may be carried out without requiring the suspect to remove any clothing (other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat).

Division 2.6.4—Carrying out of forensic procedure to be recorded

59 Recording of forensic procedure

(1) The carrying out of a forensic procedure (other than the taking of a handprint, fingerprint, footprint or toeprint) must be videorecorded unless—

- (a) the suspect objects to videorecording; or
- (b) videorecording 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 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.

(3) If the carrying out of a forensic procedure (other than the taking of handprints, fingerprints, footprints or toeprints) is not to be videorecorded, the forensic procedure must be carried out in the presence of an independent person who is not a police officer.

Division 2.6.5—Procedure after forensic procedure is carried out

60 Samples

(1) This section applies to a sample taken from a suspect under this Act if there is sufficient material for an analysis to be carried out by not only the police officers investigating the offence concerned 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 Part 2.14 (General provisions about operation of Act) contains provisions about making material available to the suspect.

61 Photographs or video recordings

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 Part 2.14 (General provisions about operation of Act) contains provisions about making material available to the suspect.

62 Results of analysis

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

Note Part 2.14 (General provisions about operation of Act) contains provisions about making material available to the suspect.

63 Preventing the carrying out of forensic procedure

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

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

PART 2.7—CARRYING OUT OF CERTAIN FORENSIC PROCEDURES AFTER CONVICTION OF SERIOUS OFFENDERS

64 Forensic procedures to which pt 2.7 applies

- (1) This Part applies to an intimate forensic procedure that consists of the taking of a sample of blood.
- (2) This Part applies to the following non-intimate forensic procedures:
 - (a) the taking of samples of hair other than pubic hair;
 - (b) the taking of a buccal swab;
 - (c) the taking of fingerprints.

65 Non-intimate forensic procedures authorised to be carried out

- (1) A person is authorised to carry out a non-intimate forensic procedure to which this Part applies on a serious offender (other than a child or incapable person)—
 - (a) with the informed consent of the serious offender; or
 - (b) by order of a police officer under section 73 (Circumstances in which police officer may order non-intimate forensic procedure).
- (2) A person is authorised to carry out a non-intimate forensic procedure to which this Part applies on a serious offender who is a child or incapable person by order of a court under section 77 (Court order for carrying out forensic procedure on serious offender).

Note Section 116 permits the carrying out of a forensic procedure on a serious offender convicted of the serious offence concerned before the commencement of this section.

66 Intimate forensic procedures authorised to be carried out

A person is authorised to carry out an intimate forensic procedure to which this Part applies on a serious offender (other than a child or incapable person)—

- (a) with the informed consent of the serious offender; or
- (b) by order of a court under section 77 (Court order for carrying out forensic procedure on serious offender).

67 Application of pt 2.6 to carrying out of forensic procedures to which pt 2.7 applies

- (1) Part 2.6 (Carrying out forensic procedures) applies to the carrying out of a forensic procedure on a serious offender under this Part as if a reference to the suspect in Part 2.6 were a reference to the serious offender.

(2) A person is authorised under section 65 (Non-intimate forensic procedures authorised to be carried out) or section 66 to carry out a forensic procedure under this Part in accordance with Part 2.6 as applied by this section and not otherwise.

68 Scope of authorisation

(1) A person is not authorised to carry out a forensic procedure under this Part on a serious offender if the serious offender is a suspect or volunteer.

(2) A forensic procedure may be carried out on a serious offender who is a suspect only if it is authorised under, and carried out in accordance with, the following Parts:

- 2.2 (Circumstances in which forensic procedures on suspects may be authorised)
- 2.3 (Forensic procedures by consent of suspect)
- 2.4 (Non-intimate forensic procedures on suspect by order of a police officer)
- 2.5 (Forensic procedures on suspect by order of a magistrate).

(3) A forensic procedure may be carried out on a serious offender who is a volunteer only if it is authorised under, and carried out in accordance with, Part 2.8 (Carrying out of forensic procedures on volunteers and certain other people).

69 Informed consent of serious offender to forensic procedure

(1) A serious offender gives informed consent to a forensic procedure if the serious offender consents after a police officer—

- (a) requests the serious offender to consent to the forensic procedure under section 70; and
- (b) informs the serious offender about the forensic procedure in accordance with section 72 (Matters that serious offender must be informed of before giving consent); and
- (c) gives the serious offender the opportunity to communicate, or attempt to communicate, with a lawyer of the serious offender's choice.

Note **Inform** is defined in the dictionary.

(2) The police officer must allow the serious offender to communicate, or attempt to communicate, with the lawyer in private unless the police officer suspects on reasonable grounds that the serious offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Note Section 107 (Proof of belief) 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.

70 Police officer may request serious offender to consent to forensic procedure

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

71 Matters to be considered by police officer before requesting consent to forensic procedure

Before a request is made under section 70, the police officer must be satisfied on the balance of probabilities that—

- (a) for 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 a serious offender; and
- (b) the request for consent to carry out the forensic procedure is justified in all the circumstances.

72 Matters that serious offender must be informed of before giving consent

- (1)** The police officer must inform the serious 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 a serious offence—the serious offence;
 - (c) how the forensic procedure is to be carried out;
 - (d) that the forensic procedure may produce evidence against the serious offender that might be used in a court of law;
 - (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 2.6 (Carrying out forensic procedures) as applied by section 67 (Application of pt 2.6 to carrying out of forensic procedures to which pt 2.7 applies);

Note See section 53 (People who may carry out forensic procedures).

- (f) if the forensic procedure is the taking of a sample of blood—that the serious offender may request that—
 - (i) if the serious 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 serious offender is not serving a sentence of imprisonment—a doctor of the serious offender’s choice be present while the blood is taken;
- (g) that the serious offender may refuse consent to the carrying out of the forensic procedure;
- (h) the consequences of not consenting, as mentioned in subsection (2) or (3) (whichever applies);
- (i) the effect of section 87 (Admissibility of evidence relating to consent to forensic procedures) (if applicable);
- (j) that information obtained from analysis of forensic material obtained may be placed on the DNA database system and used for a criminal investigation or any other purpose for which the DNA database system may be used.

Note Part 2.11 (DNA database system) sets out the purposes for which the system may be used.

(2) The police officer must inform a serious offender requested to undergo a non-intimate forensic procedure to which this Part applies that, if the serious offender does not consent, a police officer may order the carrying out of the forensic procedure under section 73 if the police officer has taken into account the matters set out in section 74 (Matters to be considered by police officer).

(3) The police officer must inform a serious offender requested to undergo an intimate forensic procedure to which this Part 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.

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

A police officer may order the carrying out of a non-intimate forensic procedure on a serious offender if—

- (a) the serious offender has been asked under section 70 (Police officer may request serious offender to consent to forensic procedure) to consent to the carrying out of the forensic procedure; and
- (b) the serious offender has not consented; and
- (c) the police officer has taken into account the matters set out in section 74.

74 Matters to be considered by police officer

In deciding whether to make an order under section 73, the police officer must take into account—

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

75 Recording of giving of information and consent

(1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the serious offender's responses (if any) are recorded by audiotape, videotape or other electronic means.

(2) If recording the giving of the information and the serious offender's responses (if any) by audiotape, videotape or other electronic means is not practicable, the police officer must ensure that a written record of the giving of the information and the serious offender's responses (if any) is made, and that a copy of the record is made available to the serious offender.

Note Part 2.14 (General provisions about operation of Act) contains provisions about making copies of material (including tapes) available to the serious offender.

76 Record of police officer's order

- (1) If a police officer orders the carrying out of a non-intimate forensic procedure on a serious offender, the police officer must—
 - (a) make a record of—
 - (i) the order; and
 - (ii) the date and time the order was made; and
 - (iii) the reasons for making it; and
 - (b) sign the record.
- (2) The police officer must make and sign the record when the order is made or as soon as practicable afterwards.
- (3) The police officer must ensure that a copy of the record is made available to the serious offender as soon as practicable after the record is made.

77 Court order for carrying out of forensic procedure on serious offender

- (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 Part 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 Part applies on a serious offender who is a child or incapable person.
- (3) A police officer may make an application under this section to the court that is sentencing the serious offender or to any other court at a later time.
- (4) A court may order the carrying out of a forensic procedure under this Part if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
- (5) In deciding whether to make an order under this section, the court must take into account—
 - (a) whether this Act 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 serious offence by the serious offender; and
 - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.
- (6) An order under this section takes effect immediately.

(7) However, the person who conducts an analysis of forensic material obtained because of carrying out the forensic procedure on a serious offender must not disclose the results of the analysis—

- (a) until the expiry of any appeal period or after the final determination of any appeal in relation to the serious offence concerned, whichever is the later; or
- (b) if the conviction is quashed.

78 Carrying out of forensic procedure following conviction

(1) If a court orders a serious offender who is in prison or another place of detention to permit a forensic procedure to be carried out under this Part, the court may order that a police officer, together with a person who, under Part 2.6 (Carrying out forensic procedures) as applied by section 67 (Application of pt 2.6 to carrying out of forensic procedures to which pt 2.7 applies), may carry out the forensic procedure, be permitted to attend on the serious offender in the prison or place of detention to allow the forensic procedure to be carried out.

(2) If a court orders a serious 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 serious offender to attend at a police station (or other place ordered by the court) within a period ordered by the court to allow the forensic procedure to be carried out.

(3) A serious offender ordered to permit the carrying out of a forensic procedure must not intentionally fail to permit the forensic procedure to be carried out.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

PART 2.8—CARRYING OUT OF FORENSIC PROCEDURES ON VOLUNTEERS AND CERTAIN OTHER PEOPLE

79 Carrying out of forensic procedures on volunteers

(1) A person is authorised to carry out a forensic procedure on a volunteer—

- (a) if the volunteer is not a child or incapable person—with the informed consent of the volunteer given in accordance with section 80; or
- (b) if the volunteer is a child or incapable person—
 - (i) with the informed consent of the parent or guardian of the volunteer given in accordance with section 80 or by order of a magistrate under section 83 (Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person); 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.

Note Volunteer is defined in section 10 (Meaning of *volunteer*).

(2) This 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.

(3) Part 2.6 (Carrying out forensic procedures) applies to the carrying out of a forensic procedure under this Part on a volunteer mentioned in this section as if a reference to a suspect in Part 2.6 were a reference to the volunteer.

(1) A person is authorised under this section to carry out a forensic procedure under this Part in accordance with Part 2.6 as applied by subsection (3) and not otherwise.

80 Informed consent of volunteer or parent or guardian of volunteer

(1) A volunteer, or a 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 who is not a police officer after a police officer informs the volunteer, parent or guardian of the following matters:

- (a) how 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 mentioned in subsection (2);
- (e) that the volunteer, parent or guardian may consult a lawyer of his or her 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 Part, and about 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 a criminal investigation or any other purpose for which the DNA database system may be used;

Note Part 2.11 (DNA **database** system) sets out the purposes for which the system may be used.

- (d) that information placed on the DNA database system will be retained for such period as the chief police officer and the volunteer (or, for a volunteer who is a child or incapable person, a parent or guardian of the volunteer) agree and must then be removed from the system;
- (e) any other matters prescribed under the regulations.

81 Recording of giving of information and consent

- (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 audiotape, videotape or other electronic means.
- (2) If recording the giving of information and the volunteer's, parent's or guardian's responses (if any) by audiotape, videotape 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.

82 Withdrawal of consent

- (1) If a volunteer, or a parent or guardian of the volunteer, expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from his or her conduct) before or during the carrying out of the forensic procedure—
 - (a) the forensic procedure must be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and
 - (b) if the volunteer is a child or incapable person—the forensic procedure is not to proceed except by an order of a magistrate under section 83.

(2) If, after the carrying out of a forensic procedure under this Part on a volunteer, the volunteer, or the parent or guardian of the volunteer, expressly withdraws consent to retention of the forensic material taken or of information obtained from the analysis of that material, the forensic material and any information obtained from analysis of the material is, subject to any order made under section 84 (Retention of forensic material by order of magistrate after parent or guardian of child or incapable person withdraws consent), 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 Part to confirm the withdrawal of consent in writing.

83 Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person

(1) A magistrate may order the carrying out of a forensic procedure on a child or incapable person if—

- (a) the consent of the parent or guardian of the child or incapable person to the carrying out of the forensic procedure cannot reasonably be obtained from a parent or guardian of the child or incapable person; or
- (b) the parent or guardian of the child or incapable person refuses consent to the carrying out of the forensic procedure and the magistrate is satisfied that there are reasonable grounds to believe—
 - (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 deciding whether to make an order under this section, the magistrate must take into account—

- (a) whether this Act would authorise the carrying out of the forensic procedure apart from this section; and
- (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; and

- (c) the best interests of the child or incapable person; and
- (d) so far as they can be found out, any wishes of the child or incapable person about whether the forensic procedure should be carried out; and

Note A forensic procedure cannot be carried out on a child or incapable person who objects to or resists the carrying out of the procedure even if the magistrate makes an order (see s 79 (1) (b) (ii) and (2)).

- (e) except in the circumstances mentioned in subsection (1) (b), any wishes expressed by the parent or guardian of the child or incapable person about whether the forensic procedure should be carried out; and
 - (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 date, time or place, or in a way, stated in the order; or
 - (b) state the period for which forensic material obtained from carrying out the procedure may be retained.

84 Retention of forensic material by order of magistrate after parent or guardian of child or incapable person withdraws consent

- (1) An authorised applicant may apply to a magistrate for an order under subsection (2).
- (2) A magistrate may order that forensic material taken or information obtained from carrying out a forensic procedure on a 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 serious offence had been found—
 - (i) at the scene of the serious offence; or
 - (ii) on the victim of the serious offence or anything reasonably believed to have been worn or carried by the victim when the serious 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 serious offence or when the serious offence was committed;
or
 - (iv) on a thing or person reasonably believed to have been associated with the commission of the serious 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; 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.

PART 2.9—ADMISSIBILITY OF EVIDENCE

Division 2.9.1—Forensic evidence

85 Inadmissibility of evidence from improper forensic procedures etc

- (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 Act in relation to a forensic procedure carried out on the person (including, but not limited to, any breach of, or failure to comply with, a provision requiring things to be done at any time before or after the forensic procedure is carried out); or
 - (ii) any provision of Part 2.11 (DNA database system) in relation to recording or use of information on the DNA database system.
- (2) This section does not apply if—
- (a) a provision of this Act requires forensic material to be destroyed; and
 - (b) the forensic material has not been destroyed.

Note Section 86 applies if this Act 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 because of or in connection with the carrying out of the forensic procedure.
- (4) If this section applies, evidence mentioned in subsection (3) is admissible in any proceeding against the person in a court only if—
- (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 proceeding despite the breach of, or failure to comply with, the provisions of this Act.

- (5) The matters that the court may take into consideration in deciding 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 breach of, or failure to comply with, the provisions of this Act;
 - (c) the gravity of the breach of, or failure to comply with, the provisions of this Act;
 - (d) whether the breach or failure to comply was intentional or reckless;
 - (e) the nature of the provision of this Act that was breached or not complied with;
 - (f) the nature of the offence concerned and the subject matter of the proceeding;
 - (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.

86 Inadmissibility of evidence if forensic material required to be destroyed

- (1) If this Act 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 because 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.

Division 2.9.2—Other evidence

87 Admissibility of evidence relating to consent to forensic procedures

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is admissible in a proceeding against the person in a court only 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.

88 Admissibility of evidence relating to carrying out of forensic procedures

Despite subsection 85 (4) (Inadmissibility of evidence from improper forensic procedures etc), evidence of how a forensic procedure was carried out is admissible in a proceeding 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 decide 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 Part 2.6 (Carrying out forensic procedures).

89 Obstructing etc the carrying out of forensic procedure

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

(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 a proceeding against the suspect in a court in relation to the offence in relation to which the forensic procedure was carried out.

(3) Evidence mentioned in subsection (2) is admissible only if it is established that the suspect had been informed by a police officer, or 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.

Note **Inform** is defined in the dictionary.

(4) The court or jury may draw such inferences from the evidence mentioned 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.

PART 2.10—DESTRUCTION OF FORENSIC MATERIAL

90 Destruction of certain forensic material obtained by court order

(1) If an interim order for the carrying out of a forensic procedure made under section 41 (Interim order for immediate carrying out of forensic procedure) is disallowed after the forensic procedure is carried out, the investigating police officer must ensure that—

- (a) any forensic material obtained because 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 Part 2.14 (General provisions about operation of Act) 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 83 (Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person) or for the retention of forensic material under section 84 (Retention of forensic material by order of magistrate after parent or guardian of child or incapable person withdraws consent) states a period for which forensic material obtained because of the carrying out of the procedure may be retained, the forensic material must be destroyed as soon as practicable after the end of the period.

91 Destruction of forensic material taken from serious offender after conviction quashed

The police officer who obtained an order under section 77 (Court order for carrying out forensic procedure on serious offender) for the carrying out of a forensic procedure on a serious offender whose conviction is quashed after the making of the order must ensure that any forensic material obtained because of the carrying out of the procedure is destroyed as soon as practicable after the conviction is quashed.

92 Destruction of forensic material after 1 year

(1) This section applies if forensic material has been taken from a suspect by a forensic procedure carried out under Part 2.3 (Forensic procedures by consent of suspect), Part 2.4 (Non-intimate forensic procedures on suspect by order of a police officer) or Part 2.5 (Forensic procedures on suspect by order of a magistrate).

- (2) If—
- (a) 1 year has elapsed since the forensic material was taken; and
 - (b) a proceeding for an offence to which the forensic material relates has not been instituted or has been discontinued;

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

- (3) If a warrant for the apprehension of the suspect is issued within 1 year after forensic material is taken, the forensic material must be destroyed as soon as practicable after—

- (a) the warrant lapses; or
- (b) 1 year 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 the director of public prosecutions, extend for not longer than 1 year 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) may extend the period only if—

- (a) the person from whom the forensic material was taken has been notified by the director of public prosecutions that the application has been made; and
- (b) the person or his or her lawyer or interview friend (if any) has been given an opportunity to speak to or make a submission to the magistrate about the extension.

- (7) An extension in relation to particular forensic material may be given more than once.

(8) The magistrate must ensure that the responsible person for the DNA database system is notified of any extension given under this section.

93 Destruction of forensic material if related evidence is inadmissible

If a court finds that evidence mentioned in subsection 85 (3) (Inadmissibility of evidence from improper forensic procedures etc) relating to a forensic procedure is inadmissible under section 85, the chief police officer must, as soon as practicable, ensure that any forensic material taken from the suspect by that forensic procedure is destroyed.

PART 2.11—DNA DATABASE SYSTEM

94 Definitions relating to DNA database system

In this Act:

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

- (a) at any place (whether in or outside Australia) where a serious 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 serious offence; or
- (c) on anything worn or carried by the victim when a serious offence was, or is reasonably suspected of having been, committed; or
- (d) on or within the body of anyone, on anything, or at any place, associated with the commission of a serious 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 under 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) under Part 2.7 (Carrying out of certain forensic procedures after conviction of serious offenders), or under a corresponding law of a participating jurisdiction, from serious offenders; and
- (b) under Part 2.3 (Forensic procedures by consent of suspect), 2.4 (Non-intimate forensic procedures on suspect by order of a police officer) or 2.5 (Forensic procedures on suspect by order of a magistrate), or under a corresponding law of a participating jurisdiction, from suspects who have been convicted of a serious offence.

statistical index means an index of information that—

- (a) is obtained from the analysis of forensic material taken from persons under this Act or 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 from suspects—

- (a) under Part 2.3 (Forensic procedures by consent of suspect), Part 2.4 (Non-intimate forensic procedures on suspect by order of a police officer) or Part 2.5 (Forensic procedures on suspect by order of a magistrate); or
- (b) 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, under Part 2.8 (Carrying out of forensic procedures on volunteers and certain other people) 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 the purpose of a criminal investigation or any other purpose for which the DNA system may be used under this Part (or the corresponding law of the other jurisdiction).

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

- (a) under Part 2.8 (Carrying out of forensic procedures on volunteers and certain other people) or under a corresponding law of a participating jurisdiction, from volunteers who (or whose parents or guardians) have been informed under paragraph 80 (2) (c) (Informed consent of volunteer or parent or guardian of volunteer), or a corresponding law of a participating jurisdiction, 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; and
- (b) from deceased persons whose identity is known.

95 Supply of forensic material for purposes of DNA database

- (1) A person commits an offence if—
 - (a) the person's conduct causes the supply of forensic material taken from any person under this Act (or under a corresponding law of a participating jurisdiction) to anyone for prohibited analysis; and
 - (b) the person intends, or is reckless about, the supply of material of that kind.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (2) A person commits an offence if—
 - (a) the person's conduct causes the supply of forensic material (other than excluded forensic material) to anyone for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system; and

- (b) the person intends, or is reckless about, the supply of material of that kind.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (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 under Part 2.3 (Forensic procedures by consent of suspect), Part 2.4 (Non-intimate forensic procedures on suspect by order of a police officer) or Part 2.5 (Forensic procedures on suspect by order of a magistrate), or under a corresponding law of a participating jurisdiction, if the suspect is subsequently convicted of the serious offence; or
- (c) taken from a serious offender or volunteer under Part 2.7 (Carrying out of certain forensic procedures after conviction of serious offenders) or 2.8 (Carrying out of forensic procedures on volunteers and certain other people) or under a corresponding law of a participating jurisdiction; or
- (d) taken from the body of a deceased person; or
- (e) that is from the body of a missing person; or
- (f) taken from a volunteer who is a relative by blood of a deceased or missing person.

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

96 Use of information on DNA database system

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

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (2) A person may access information stored on the DNA database system for 1 or more of the following purposes:

- (a) the purpose of forensic comparison permitted under section 97;

- (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 Territory and the Commonwealth or a State for the provision of access to information contained in the DNA database system by law enforcement officers or by anyone else prescribed under the regulations;
 - (e) the purpose of the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth) or the *Extradition Act 1988* (Cwlth);
 - (f) the purpose of a coronial inquest or inquiry;
 - (g) the purpose of investigation of a complaint by the privacy commissioner (or someone who has corresponding functions under the law of another participating jurisdiction).
- (3) This section does not apply to information that cannot be used to discover the identity of anyone.

97 Permissible matching of DNA profiles

- (1) A matching of a DNA profile on an index of the DNA database system mentioned in column 1 of the following table with a DNA profile on another index of the system mentioned in column 2, 3, 4, 5, 6, 7 or 8 is not permitted by this Act if—
- (a) ‘no’ is shown in relation to the index mentioned in column 2, 3, 4, 5, 6, 7 or 8 opposite to the index mentioned in column 1; or
 - (b) ‘only if within purpose’ is shown in relation to the index mentioned in column 2, 3, 4, 5, 6, 7 or 8 opposite the volunteers (limited purposes) index mentioned 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 mentioned in column 1 was so placed.

Table of permissible matching of DNA profiles

profile to be matched	Is matching permitted?						
column 1	column 2	column 3	column 4	column 5	column 6	column 7	column 8
	crime scene	suspects	volunteers (limited purposes)	volunteers (unlimited purposes)	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	yes

- (2) A person commits an offence if—
- (a) the person's conduct causes the matching that is not permitted by this Act 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) the person intends, or is reckless about, any such matching of profiles.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

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

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

- (1) A person commits an offence if—
- (a) the person's conduct causes any identifying information about a person obtained from forensic material taken from the person under this Act being recorded or retained in a DNA database system at any time after this Act requires the forensic material to be destroyed; and
 - (b) the person intends, or is reckless about, the recording or retention.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (2) The responsible person for the DNA database system must ensure that any identifying information relating to a person from whose forensic material a DNA profile on the volunteers (unlimited purposes) index or volunteers (limited purposes) index of the 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: 200 penalty units, imprisonment for 2 years or both.

- (3) The responsible person for the DNA database system must ensure that any identifying information relating to a DNA profile of a serious 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 serious offender has been pardoned or acquitted of the serious offence concerned or that the serious offender's conviction for the serious offence concerned has been quashed.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

(4) In this section:

identifying information means any information that could be used—

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

identifying period, for a DNA profile, means—

- (a) except as provided by paragraphs (b) and (c), the period of 1 year after the DNA profile is placed on the DNA database system; or
- (b) if the DNA profile is derived from forensic material taken from a volunteer—the period after the DNA profile is placed on the DNA database system agreed by the chief police officer and the volunteer (or, for a volunteer who is a child or incapable person, a parent or guardian of the volunteer); or
- (c) if the DNA profile is derived from forensic material taken from a deceased person (other than a person who was a volunteer) whose identity is known—the period the chief police officer orders the responsible person for the DNA database system to retain identifying information relating to the profile.

PART 2.12—OPERATION OF ACT AND EFFECT ON OTHER LAWS

99 Application of other Acts

(1) This Act is not intended to limit or exclude the operation of another Territory law relating to—

- (a) the carrying out of forensic procedures, including procedures not mentioned in this Act; 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 decide the level of alcohol or drugs (if any) present in a person's body; or
- (c) the taking of forensic samples, including samples not mentioned in this Act; or
- (d) the carrying out of searches of the person.

(2) To remove any doubt, it is declared that even if another Territory law provides a power to do 1 or more of the things mentioned in subsection (1), a similar power given by this Act may be exercised despite the existence of the power under the other law.

PART 2.13—INTERSTATE ENFORCEMENT

100 Definitions relating to interstate enforcement

In this Act:

another participating jurisdiction means a participating jurisdiction other than the Territory.

appropriate authority means—

- (a) for the Territory—the chief police officer and any other authority prescribed under the regulations; or
- (b) for another participating jurisdiction—an authority exercising, in relation to the police service or force of that jurisdiction, functions corresponding to those of the chief police officer and any other authority prescribed under the regulations.

corresponding law means a law relating to the carrying out of forensic procedures and DNA databases that substantially corresponds to this Act or is prescribed under the regulations for this definition.

DNA database means—

- (a) for the Territory—the DNA database system; or
- (b) for another participating jurisdiction—a DNA database system that is kept under a corresponding law of the participating jurisdiction.

jurisdiction means the Territory, the Commonwealth or a State.

Note ***State*** includes the Northern Territory (see *Interpretation Act 1967*, dictionary).

participating jurisdiction means the Territory and another jurisdiction in which a corresponding law is in force.

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

101 Registration of orders

(1) The Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions for the establishment and maintenance, in a participating jurisdiction, of a register of orders for the carrying out of forensic procedures made under this Act and corresponding laws of participating jurisdictions.

- (2) A forensic order is registered when a copy of the order, certified by the person who made it, is registered in accordance with the law of the participating jurisdiction where the register is kept.
- (3) A person is authorised to carry out in the ACT the forensic procedure authorised by an order that is registered in accordance with such an arrangement.
- (4) The person is authorised to carry out the procedure in accordance with Part 2.6 (Carrying out forensic procedures) and not otherwise.
- (5) An application for registration of a forensic order, or for cancellation of registration of a forensic order, may be made by an appropriate authority.

102 Database information

- (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 the Territory that may be relevant to the investigation of an offence against the law of the participating jurisdiction is provided to the appropriate authority in that jurisdiction for the investigation of, or proceedings for, 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 Territory law is provided to the chief police officer for the investigation of, or proceedings for, that offence.
- (2) Information that is provided under this section must not be recorded, or maintained in any database of information that may be used to discover the identity of a person or to obtain information about an identifiable person at any time after this Act or a corresponding law of a participating jurisdiction requires the forensic material to which it relates to be destroyed.

PART 2.14—GENERAL PROVISIONS ABOUT OPERATION OF ACT

103 Powers of lawyers and interview friends

(1) A request that may be made by a suspect or serious offender under this Act may be made on the suspect's or serious offender's behalf by—

- (a) the suspect's or serious offender's lawyer; or
- (b) if the suspect or serious offender is a child or incapable person—the suspect's or serious offender's interview friend.

Note The interview friend may be a lawyer (see section 16 (Interview friend)).

(2) If—

- (a) this Act requires a suspect or serious offender to be informed of a matter; and
- (b) the suspect's or serious offender's interview friend or lawyer is present when the suspect or serious offender is so informed; and
- (c) the suspect or serious offender is so informed in a language (including sign language or braille) in which the suspect's or serious offender's interview friend or lawyer cannot communicate with reasonable fluency;

the interview friend or lawyer must also be informed of the matter in a language in which the interview friend or lawyer can communicate with reasonable fluency.

104 Obligation of investigating police officers relating to electronic recordings

(1) If a recording by audiotape, videotape or other electronic means is made as required by this Act, 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, serious 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, serious offender or volunteer; and
 - (ii) the suspect, serious 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, serious offender or volunteer.
- (2) If an investigating police officer is required to ensure that a suspect, serious offender or volunteer is given an opportunity to view a video recording made under this Act, the investigating police officer must ensure that the same opportunity is given to—
- (a) the suspect's, serious offender's or volunteer's lawyer; and
 - (b) if the suspect, serious offender or volunteer is a child or incapable person—the suspect's, serious offender's or volunteer's interview friend.

Note The interview friend may be a lawyer (see section 16 (Interview friend)).

105 Material required to be made available to suspect, serious offender or volunteer

- (1) Material from samples or copies or any other material, that must be made available to a suspect, serious offender or volunteer under this Act—
- (a) may be sent to the suspect, serious offender or volunteer at his or her last-known address (if any), or to the suspect's, serious offender's or volunteer's lawyer (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, serious offender or volunteer at the police station where the investigating police officer was based when the forensic procedure was carried out.
- (2) Material of any kind (other than material from samples and copies of records made under section 45 (Records of applications and interim orders)) that is required by this Act to be made available to a suspect, serious offender or volunteer must be made available in accordance with subsection (1)—
- (a) as soon as practicable after the material comes into existence; or
 - (b) if the material is requested by the suspect, serious offender or volunteer or the suspect's, serious offender's or volunteer's interview friend or lawyer—as soon as practicable after the making of the request.

Note Paragraph 60 (2) (a) (Samples) deals with the timing of making sample material available, subsection 45 (3) (Records of applications and interim orders)) deals with the timing of making copies available of records mentioned in section 45.

106 Suspect, serious offender or volunteer not to be charged for material or viewing video

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

107 Proof of belief

In any proceeding, 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 mentioned in this Act.

108 Proof of impracticability

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

109 Liability for forensic procedures

No civil or criminal liability is incurred by anyone (including a police officer) who carries out, or helps to carry out, a forensic procedure under this Act in relation to anything done by the person in carrying out, or helping to carry out, the forensic procedure if—

- (a) the person believed on reasonable grounds that—
 - (i) informed consent had been given to the carrying out of the forensic procedure; or
 - (ii) the carrying out of the forensic procedure without informed consent had been duly ordered by a police officer, court or magistrate under this Act; and
- (b) the thing was done in good faith; and
- (c) the doing of it was reasonable in all the circumstances.

Note Section 107 (Proof of belief) 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.

110 Experts not obliged to carry out forensic procedures

This Act does not require a doctor, nurse, dentist, dental technician or appropriately qualified person to carry out a forensic procedure.

111 Disclosure of information

- (1) A person who has access—
- (a) to any information stored on the DNA database system; or
 - (b) to any other information revealed by a forensic procedure carried out on the suspect, serious 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 1 or more of the following purposes:

- (a) the purpose of forensic comparison in the course of a criminal investigation by a police officer or by anyone else prescribed under the regulations;
- (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 Territory and the Commonwealth or a State for the provision of access to information contained in the DNA database system by law enforcement officers or by anyone else prescribed under the regulations;
- (e) for the purpose of the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth) or the *Extradition Act 1988* (Cwlth);
- (f) the purpose of a coronial inquest or inquiry;
- (g) the purpose of the investigation of a complaint by the privacy commissioner (or someone who has corresponding functions under the law of another participating 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 Act;
- (d) in accordance with the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth) or the *Extradition Act 1988* (Cwlth);
- (e) for the purposes of the investigation of any offence or offences generally;

- (f) for the purpose of a decision whether to institute a proceeding for any offence;
 - (g) for the purpose of a proceeding for any offence;
 - (h) for the purpose of a coronial inquest or inquiry;
 - (i) for the purpose of a civil proceeding (including a disciplinary proceeding) that relates to how the procedure was carried out;
 - (j) for the purpose of the suspect's, serious offender's or volunteer's medical treatment;
 - (k) for the purpose of the medical treatment of a victim of an offence if there are reasonable grounds to believe the offence was committed by the person on whom the forensic procedure was carried out;
 - (l) 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 commits an offence if—
- (a) the person's conduct causes the disclosure of information in contravention of this section; and
 - (b) the person intends, or is reckless about, the disclosure.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

112 Taking, retention and use of forensic material in accordance with another law

- (1) This Act does not affect 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 under another Territory law or a Commonwealth or State law.
- (2) Without limiting subsection (1), this Act does not limit or exclude Part 10 (Criminal investigation) or Part 10A (Investigation of extraterritorial offences) of the *Crimes Act 1900* or section 82 (Identifying material) of the *Children and Young People Act 1999*.
- (3) Forensic material, or information obtained from it, that was taken in accordance with a Commonwealth or State law may be retained or used in the Territory for investigative, evidentiary or statistical purposes even if its retention or use would, apart from this subsection, constitute a breach of, or failure to comply with, any provision of this Act relating to the carrying out of forensic procedures.

113 Retention of electronic recordings

(1) A recording made by audiotape, videotape or other electronic means by a police officer in accordance with this Act that is no longer required for investigative or evidentiary purposes may be retained for the purposes, and for the period, the chief police officer directs.

(2) A recording that is retained under this section must be stored so as to protect it against unauthorised access or use by anyone.

CHAPTER 3—MISCELLANEOUS

114 Delegation by chief police officer

The chief police officer may, in writing, delegate the chief police officer's functions under this Act to a police officer of the rank of sergeant or above.

115 Regulation-making power

The Executive may make regulations for this Act.

CHAPTER 4—TRANSITIONAL

116 Forensic procedures under pt 2.7

A person is authorised by section 65 (Non-intimate forensic procedures authorised to be carried out) to carry out a forensic procedure under Part 2.7 (Carrying out of certain forensic procedures after conviction of serious offenders) on a serious offender whether the serious offender was convicted of the serious offence concerned before, or is convicted of the serious offence concerned after, the commencement of that section.

117 Forensic material taken before commencement

Forensic material taken before the commencement of this section in accordance with the law of the Territory or the Commonwealth or a State, and information obtained from it, may be retained or used in the Territory for investigative, evidentiary or statistical purposes even if its retention or use would be, apart from this section, a breach of, or failure to comply with, any provision of this Act relating to the carrying out of forensic procedures.

DICTIONARY

(See s 3)

Note 1 The following terms that are relevant to this Act are defined in the dictionary to the *Interpretation Act 1967*:

- adult
- chief police officer
- contravene
- dental technician
- dentist
- director of public prosecutions
- doctor
- law, of the Territory
- lawyer
- magistrate
- police officer
- State
- under

Note 2 The *Interpretation Act 1967* contains other definitions and provisions that are relevant to the interpretation of this Act.

another participating jurisdiction—see section 100.

another Territory means a Territory other than this Territory or the Northern Territory.

Note ***State*** includes the Northern Territory (see *Interpretation Act 1967*, dictionary).

appropriate authority—see section 100.

appropriately qualified person—see section 13 (Meaning of ***appropriately qualified person***).

authorised applicant—see section 12 (Meaning of ***authorised applicant***).

child—see section 14 (Meaning of ***child*** and ***parent*** of child).

corresponding law—see section 100.

crime scene index—see section 94.

destroy—a person ***destroys*** forensic material taken from someone else by a forensic procedure, the results of the analysis of the material, or other information obtained 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.

DNA database—see section 100.

DNA database system—see section 94.

DICTIONARY—continued

forensic material—see section 5 (Forensic material and forensic procedures).

forensic order means—

- (a) an order of a magistrate under section 33 (Final order for carrying out of forensic procedure); or
- (b) an interim order of a magistrate under section 41 (Interim order for immediate carrying out of forensic procedure); or
- (c) an order of a court under section 77 (Court order for carrying out of forensic procedure on serious offender) or section 78 (Carrying out of forensic procedure following conviction); or
- (d) an order of a magistrate under section 83 (Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person) or section 84 (Retention of forensic material by order of magistrate after parent or guardian of child or incapable person withdraws consent).

forensic procedure—see section 5 (Forensic material and forensic procedures).

function includes power.

incapable person—see section 15 (Meaning of *incapable person*).

in custody—a person is *in custody* if the person is in the lawful custody of a police officer.

inform a person of a matter means inform the person of the matter, through an interpreter if necessary, in language (including sign language or braille) in which the person can communicate with reasonable fluency.

informed consent—

- (a) for a suspect—see section 21 (Informed consent of suspect to forensic procedure); and
- (b) for a serious offender—see section 69 (Informed consent of serious offender to forensic procedure); and
- (c) for a volunteer or parent or guardian of a volunteer—see section 80 (Informed consent of volunteer or parent or guardian of volunteer).

DICTIONARY—continued

infringement notice means—

- (a) an infringement notice under the *Road Transport (General) Act 1999*; or
- (b) any other notice (however described) served on a person under a Territory law that states to the effect that, if the person pays an amount in relation to an offence, no further action will be taken in relation to the offence.

interview friend—see section 16.

intimate forensic procedure—see section 6 (What is an *intimate forensic procedure*?)

investigating police officer—see section 11 (Meaning of *investigating police officer*).

jurisdiction—see section 100.

member of the opposite sex, for a transgender person—see paragraph 17 (4) (a).

member of the same sex, for a transgender person—see paragraph 17 (4) (b).

missing persons index—see section 94.

non-intimate forensic procedure—see section 7 (What is a *non-intimate forensic procedure*?).

offence means an offence against a law in force in the Territory.

parent—see section 14 (Meaning of *child* and *parent* of a child).

participating jurisdiction—see section 100.

police station includes—

- (a) a Territory police station; and
- (b) any other building (or part of a building) occupied by the Australian Federal Police.

prison includes a place where a person may be detained under the *Removal of Prisoners Act 1968*.

prison medical officer means—

- (a) for a prison or another place of detention (other than a remand centre)—a medical officer for the prison or other place of detention; or

DICTIONARY—continued

(b) for a remand centre— the medical officer for remand centre under the *Remand Centres Act 1976*.

recognised transgender person—see section 17.

remand centre means a remand centre under the *Remand Centres Act 1976*.

responsible Minister—see section 100.

responsible person, for the DNA database system, means the person responsible for the care, control and management of the system

sample, taken from a person, includes a sample taken from the person that consists of matter from someone else's body.

serious offence—see section 9 (Meaning of *serious offence* and *serious offender*).

serious offender—see section 9 (Meaning of *serious offence* and *serious offender*).

serious offenders index—see section 94.

statistical index—see section 94.

summary offence means an offence that is punishable on summary conviction under section 33E of the *Interpretation Act 1967*.

suspect—see section 8 (Meaning of *suspect*).

suspects index—see section 94.

telephone includes any telecommunications device.

transgender person—see section 17.

unknown deceased persons index—see section 94.

volunteer—see section 10 (Meaning of *volunteer*).

volunteers (limited purposes) index—see section 94.

volunteers (unlimited purposes) index—see section 94.

warrant, for the apprehension of a person, includes a warrant issued under Division 5 of Part 4 of the *Magistrates Court Act 1930* for the arrest or apprehension of the person.

DICTIONARY—continued

Endnote

Penalty units

Section 33AA of the *Interpretation Act 1967* deals with the meaning of offence penalties that are expressed in penalty units.

[Presentation speech made in Assembly on 29 June 2000]