

2000

**THE LEGISLATIVE ASSEMBLY OF THE AUSTRALIAN CAPITAL
TERRITORY**

CRIMES (FORENSIC PROCEDURES) BILL 2000

EXPLANATORY MEMORANDUM

**Circulated by the authority of the Minister for Justice and
Community Safety
Mr Gary Humphries MLA**

CRIMES (FORENSIC PROCEDURES) BILL 2000

Outline

This Bill establishes a new legislative scheme for taking and using forensic material, including DNA material, for criminal investigations. The Bill is based very substantially on the Model Forensic Procedures Bill that was developed by the Model Criminal Code Officers Committee for the Standing Committee of Attorneys General.

The provisions relating to forensic material which are drawn from the Model Bill established a detailed code governing the taking of forensic material in relation to offences committed in the ACT.

Forensic material covered by the Bill

The Bill covers the taking of a very wide range of forensic material, not just DNA samples – the range of material covered by the Bill includes fingerprints and other prints, dental casts, photographs and body samples.

Carrying out forensic procedures

The Bill details the types of forensic procedures which can be carried out, on whom the procedures can be carried out, the circumstances in which forensic procedures may be authorised, the way in which the procedures are to be carried out and how evidence obtained from samples may be used.

The Bill contains a range of safeguards to ensure that powers to take samples are used appropriately. The power to take a sample cannot be exercised automatically. First, the person to be sampled must be asked whether he or she consents. For suspects and offenders the circumstances in which consent may be requested are limited, and include a requirement that the request be justified. There is no power to "solicit" consent from volunteers – people cannot be asked by police to consent to a procedure if they are not suspects or serious offenders, but they may come forward at their own initiative.

In all cases, in order to be effective the consent must be properly informed and must be recorded. Special provisions apply to consent arrangements for children and incapable persons, who are not able to consent on their own behalf.

Where consent is not forthcoming or is withdrawn, it may be possible to obtain an order authorising the procedure. Any police officers and magistrates who order a forensic procedure to be carried out must balance a range of matters set out in the Bill before deciding whether to make the order. These factors to be

considered include a weighing of the public interest in obtaining relevant evidence against the public interest in upholding a person's physical integrity.

DNA database provisions

The Bill contains provisions to enable forensic material consisting of DNA material to be included on a DNA database. These provisions are also drawn from the Model Bill and will allow the Territory to participate in the proposed national DNA database to be established as part of the national CrimTrac initiative. The provisions explain what material may be stored on the database, how material is to be stored on the database, how the databases can be interrogated, who may have access to the databases and how information from the databases may be disclosed.

There are safeguards to prevent the misuse of the database, including severe penalties for breaches of the Act.

Data will be sorted and stored in particular indexes which reflect the source of the data. The Bill contains rules setting out which indexes can be compared with each other to find matches. It should be noted that not all indexes can be compared with each other – for example, any data contained on the volunteers (limited purpose) index can only be used for the purposes for which it was taken. The rules about comparing indexes are contained in tabular form to make it easier to see which matches will and will not be permitted. Breaking the rules about matching will attract severe penalties.

From time to time it will be necessary to remove data from an index – for example, if a suspect is cleared, or the conviction of a serious offender is set aside, the data relating to that suspect or serious offender must be destroyed. Data is destroyed by removing the means of identifying the source of the data, which makes it impossible to link the data to a particular person. It is an offence to record or retain identifying material for data which is required to be destroyed under the Bill.

Interstate arrangements

The Bill enables the Territory to enter into arrangements with other participating jurisdictions to facilitate the establishment of the DNA database as a national initiative so that law enforcement agencies are able, subject always to the matching rules, to share and exchange intelligence. These provisions recognise that crime and criminals increasingly cross borders within Australia.

Financial Implications

There will be costs for the police associated with taking and analysing samples. There will be an annual cost for using the CrimTrac system - this amount will be

payable by the Territory regardless of the number of occasions it accesses the CrimTrac databases. If more offenders are located and convicted, there may also be increased costs from the prosecution and detention of these offenders. To offset these costs, however, there may be significant savings resulting from shorter investigation periods, an increase in guilty pleas and, potentially, a reduction in crime rates. It is thus very difficult to estimate at this stage whether the Bill will ultimately result in a net cost or a net saving to the Territory.

CRIMES (FORENSIC PROCEDURES) BILL 2000

Notes on Clauses

CHAPTER 1 PRELIMINARY

This Chapter contains formal provisions dealing with the name of the proposed Act, its commencement and the interpretation of terms used in it.

CHAPTER 2 FORENSIC PROCEDURES

This Chapter contains the substantive provisions of the Bill within its fourteen parts.

PART 2.1 GENERAL CONCEPTS

This Part explains key concepts in the Bill.

Clause 5 Forensic material and forensic procedures

The purpose of this clause is to explain the concepts of "forensic material" and "forensic procedure" which are used extensively in the Bill. A wide range of material coming from, or about, a person can be "forensic material". The clause explains that there are two general types of forensic procedure for the Bill, which are respectively intimate forensic procedures and non-intimate forensic procedures. This distinction is important because the circumstances in which an intimate forensic procedure is authorised by the Bill are more limited than the circumstances for authorising non-intimate forensic procedure. The clause makes it clear that the Bill does not authorise any forensic procedures which intrude into a person's body cavities, other than a person's mouth.

Clause 6 What is an intimate forensic procedure?

This clause lists the procedures which are regarded as intimate forensic procedures under the Bill. The term covers a range of procedures which involve the external anal and genital regions, buttocks and the breasts of women and transgender persons identifying as women. It also covers taking blood samples, dental impressions and samples of pubic hair.

Clause 7 What is a non-intimate forensic procedure?

This clause lists the procedures which are regarded as non-intimate forensic procedures. The term covers a wide range of procedures involving body parts other than the external anal and genital regions, buttocks or breasts of women and transgender persons identifying as women. It includes taking fingerprints and other prints, photographs, samples of saliva and buccal swabs and taking samples of non-pubic hair.

Clause 8 Meaning of suspect

This clause explains who is a suspect for the purposes of the Bill. The Bill contains provisions for taking forensic material from suspects so it is necessary to explain who may be subject to these provisions. The definition includes persons who have been charged with, or summonsed for, an offence as well as persons who have entered into a voluntary agreement to attend court and persons suspected by the police on reasonable grounds.

Clause 9 Meaning of serious offence and serious offender

A serious offence is an indictable offence against Territory law. The concept also includes offences against laws in other jurisdictions for which the maximum penalty is 2 or more years imprisonment. A serious offender is someone convicted of a serious offence.

Clause 10 Meaning of volunteer

The purpose of this definition is to clarify who is a volunteer under the Bill. A volunteer is a person who volunteers to the police to undergo a forensic procedure. Since children and incapable persons cannot volunteer themselves, this clause explains that a volunteer can be a child or incapable person whose parent or guardian makes the decision to volunteer that the child or incapable person undergo the procedure.

Clause 11 Meaning of investigating police officer

This clause explains that the police officer in charge of investigating an offence is the investigating police officer for that offence. This concept is defined because under the Bill, an investigating police officer has certain powers in relation to requesting or ordering a forensic procedure.

Clause 12 Meaning of authorised applicant

An authorised applicant under the Bill may be the police officer in charge of a police station, the investigating police officer or the DPP. The concept is defined because the Bill provides that only an authorised applicant is able to ask a magistrate for an order requiring a person to undergo a forensic procedure.

Clause 13 Meaning of appropriately qualified person

An appropriately qualified person is someone who can carry out a forensic procedure. This clause explains that the regulations will prescribe who is an appropriately qualified person for a forensic procedure. The Bill only authorises appropriately qualified persons to carry out forensic procedures, in order to ensure that procedures are properly carried out.

Clause 14 Meaning of child and parent of a child

In the Bill, a child is someone under 18. A child's parent is the person who has parental responsibilities for that child. The clause explains that parental responsibilities are all the duties, powers, responsibilities and authority that under the law a parent would have for a child. The concept is explained in the Bill because a child cannot consent to a forensic procedure, the consent of the child's parent is required and therefore it is necessary to establish who is a parent for a child so that consent can be requested or obtained.

Clause 15 Meaning of incapable person

An incapable person is someone who is incapable of understanding what a forensic procedure is or why it is carried out, or a person who cannot indicate whether or not he or she consents to the procedure.

Clause 16 Interview friend

Under the Bill, a child or incapable person has a right to have an interview friend present in various circumstances. This clause explains who can be an interview friend, and that a child or incapable person can have an interview friend who is that person's lawyer. The clause also explains that a child or incapable person can have both an interview friend and a lawyer.

Clause 17 Transgender persons

This clause explains the concept of a transgender person. Certain forensic procedures involving the breasts are classified according to whether the person on whom the procedure is carried out is a woman or a transgender person who identifies as a woman. In brief, a transgender person is someone who identifies as a member of the opposite sex to the sex that person was born. A recognised

transgender person is someone whose birth record is altered under law to change the sex specified in the record.

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

This Part consists of clause 18, which is explained below.

Clause 18 How forensic procedures may be authorised in different circumstances

This clause contains a table which sets out in summary form the various circumstances in which a forensic procedure is authorised to be carried out on a suspect. The purpose of the table is to enable persons using the Bill to understand more clearly when a suspect can undergo a forensic procedure.

PART 2.3 FORENSIC PROCEDURES BY CONSENT OF SUSPECT

This Part deals with forensic procedures which are authorised by the consent of the suspect.

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

This clause authorises forensic procedures which are carried out with the informed consent of a suspect, provided the suspect is not a child or incapable person. Other provisions in the Bill apply to forensic procedures on children and incapable people. The authority only extends to procedures which are carried out in accordance with Part 2.6 of the Bill, which explains how procedures must be carried out.

Clause 21 Informed consent of suspect to forensic procedure

This clause explains what is meant by "informed consent" and includes a requirement that the suspect be given an opportunity to consult a lawyer.

Clause 22 Police officer may request suspect to consent to forensic procedure

The purpose of this clause is to ensure that suspects are given an opportunity to consent to the forensic procedure before it is carried out. Consent may only be requested after the police officer making the request has considered certain matters. The Bill does not permit the police to request consent from a suspect as a matter of routine.

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

Clause 23 lists the matters a police officer must consider before requesting consent and requires the police officer to weigh competing public interests before deciding whether or not to make the request. The purpose of this clause is to ensure that police have due regard to the fact that forensic procedures affect a person's physical integrity and should be requested only where appropriate. The intention is that unless there is a reasonable chance that a procedure will produce relevant probative evidence of the commission of an offence, it should not be authorised.

Clause 24 Matters that suspect must be informed of before giving consent

The purpose of this clause is to ensure that a suspect's consent is properly informed, by requiring the police officer requesting the consent to provide the suspect with detailed information about the procedure and its potential consequences for the criminal investigation and any ensuing proceedings. The police officer must also explain the consequences of non-consent.

Clause 25 Withdrawal of suspect's consent

This clause explains what happens if a suspect withdraws consent after initially consenting. In brief, the suspect is regarded as having refused consent. The result is that the forensic procedure will only be able to be carried out if it is subsequently authorised by Part 2.4 or Part 2.5, which deal with forensic procedures carried out by order of a police officer or magistrate, respectively.

Clause 26 Recording of giving of information and consent

The purpose of this clause is to avoid future disputes about whether consent was given and if so whether it was properly informed, by requiring a record of the giving of information and the consent to be made and a copy given to the suspect.

PART 2.4 NON-INTIMATE FORENSIC PROCEDURE ON SUSPECT BY ORDER OF A POLICE OFFICER

This Part deals with non-intimate forensic procedures which are authorised by an order made by a police officer.

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

This clause authorises the carrying out of a non-intimate forensic procedure on a suspect who does not consent, by order of a police officer. The clause does not authorise carrying out an intimate forensic procedure, or carrying out any procedure on a child or incapable person who is a suspect.

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

This clause explains when a police officer may order the procedure. In brief, an order can only be made where the suspect is in lawful custody, has refused consent under Part 2.3 and the police officer has considered under clause 29 whether or not to order the procedure.

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

Clause 29 lists the matters a police officer must consider before making the order and requires the police officer to weigh competing public interests before deciding whether or not to make the request. The purpose of this clause is to ensure that police have due regard to the fact that forensic procedures affect a person's physical integrity and should be ordered only where appropriate. The intention is that unless there is a reasonable chance that a procedure will produce relevant probative evidence of the commission of an offence, it should not be authorised.

Clause 30 Record of police officer's order

This clause requires the police officer to make a signed record of the order and provide a copy of the order to the suspect as soon as practicable. The purpose of the clause is to avoid disputes about whether or when the order was made.

PART 2.5 FORENSIC PROCEDURE ON SUSPECT BY ORDER OF A MAGISTRATE

This Part consist of 4 Divisions which deal with the way in which forensic procedures on suspects can be authorised by order of a magistrate. It provides for final orders and interim orders by magistrates.

Division 2.5.1 General

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

This clause authorises forensic procedures which have been ordered by a magistrate to be carried out on suspect.

Clause 32 Circumstances in which magistrate may order forensic procedure

This clause explains when a magistrate may order forensic procedures. In brief, this clause applies when the suspect has not consented and either:

- the suspect is in custody and the forensic procedure is an intimate forensic procedure; or
- the suspect is not in custody.

A magistrate can also make an order when the suspect is a child or an incapable person, or is a suspect who is in custody and the investigation period for that suspect has not expired (that period is the time during which a suspect can be held for investigations under Part 1C of the Commonwealth *Crimes Act 1914*).

Division 2.5.2 Final orders

Clause 33 Final order for carrying out forensic procedure

This clause explains when a final order can be made by a magistrate. In brief, clause 32 must apply and the magistrate must have considered the matters in clause 34 - this will require a hearing before the magistrate, under the *Magistrates Court Act 1930*. An interim order can be made under clause 41 if the magistrate has not been able to consider the matters in clause 34 and it is important that the procedure be carried out immediately.

Clause 34 Matters to be considered by magistrate before ordering forensic procedure

This clause lists the matters which the magistrate must consider. As with clauses 23 and 29, above, the magistrate is required to balance competing public interests before making a decision. Again, the intention is that unless there is a reasonable chance that a procedure will produce relevant probative evidence of the commission of an offence, it should not be authorised.

Clause 35 Application for order

The purpose of this clause is to ensure that applications for orders are made only by authorised applicants - that concept is explained above - so that orders are not sought frivolously or by persons not involved in the investigation or prosecution of an offence. The application must make clear what sort of forensic procedure is proposed - the magistrate needs to know the type of procedure so that he or she can properly consider under clause 34 whether a less invasive procedure could achieve the same result.

Clause 36 Securing the presence of suspects at hearings - suspect in custody

This clause enable suspects in custody to be brought before the court for the hearing of the application. This clause and clause 37 are linked to the requirement in clause 38 that suspects must be present at the hearing for a final order.

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

This clause enables a warrant to be issued to bring a suspect before the court for a hearing if the magistrate is satisfied that a warrant is necessary, for example, to ensure the suspect is present or to prevent destruction of evidence.

Clause 38 Procedure at application for order

This clause requires the suspect to be present and permits a child or incapable person to have an interview friend with them. All suspects may be represented by a lawyer. To ensure fairness to the suspect, the suspect or representative has rights to cross-examine the applicant and, with leave, can cross-examine or call other witnesses. He or she can also address the magistrate, which means that he or she can put forward arguments to the magistrate about whether the order should be made.

Clause 39 Action to be taken on making of order

The magistrate is required to give reasons for making an order and must record the order in writing. The magistrate must tell the suspect that reasonable force can be used to implement the order, and must also state when, where and how the order is to be implemented.

Clause 40 Suspect may be kept in custody for carrying out forensic procedures

This clause allows the suspect to be detained so the forensic procedure covered by the order can be carried out.

Division 2.5.3 Interim orders

Clause 41 Interim order for immediate carrying out of forensic procedure

This clause enables a magistrate to make an interim order so that a forensic procedure can be carried out immediately, without a full hearing in the court, in limited circumstances. The clause lists the matters a magistrate must be satisfied about before making an interim order; these matters include that the magistrate is satisfied that the probative value of the evidence generated by the forensic procedure is likely to be lost or destroyed if there is delay. An example could be where it is reasonably believed that a suspect has a victim's blood or other body tissues on his or her person which would be lost if the suspect were to wash before a final order could be made.

Interim orders operate only until they are confirmed or disallowed. The process for confirming an interim order is the same as the process for obtaining a final order - that is, there is a hearing as provide by clause 38 and the magistrate considers the matters in clause 34.

Clause 42 Applications for interim orders

This clause explains the process whereby authorised applicants may apply for interim orders and what matters the application must address. Applications can be made in a variety of ways, such as in person, by fax or telephone or other means of communication. The suspect must be present and can have an interview friend present as well if he or she is a child or incapable person. The suspect can also have legal representation. Interview friends may be excluded if they are disruptive.

Clause 43 Procedure at hearing of application for interim order

This clause explains how the hearing for the application is conducted. The procedure will depend partly on the form of communication being used - for example, if the application was made using a form of oral communication, the suspect or his or her representative must be given an opportunity to speak to the magistrate. If the communication is by written means, such as a fax or email, the suspect or his or her representative must be given an opportunity to communicate with the magistrate either in writing or by a form of oral communication.

Clause 44 Action to be taken on making of interim order

This clause explains what must happen once an interim order is made. The magistrate must let the applicant know the order is made and its terms, and the order must indicate when the hearing for a final order will take place. The magistrate can also give directions about the implementation of the interim order.

Clause 45 Records of applications and interim orders

This clause requires records to be made of any applications for interim orders and any interim orders that are made. The record of an interim order prepared and signed by the magistrate must be sent to the applicant who must provide a copy to the suspect. The applicant must also give the suspect a copy of the record of the application for the order.

Clause 46 Suspect may be prevented from destroying or contaminating evidence

The purpose of this clause is to ensure that police can take steps to prevent suspects from destroying evidence pending the grant of an interim order. It does not authorise carrying out a forensic procedure before an interim order is made.

Clause 47 Results of forensic procedures carried out under interim order

As it is possible that an interim order may not be confirmed by a magistrate, this provision is included to ensure that the carrying out of a procedure under an interim order does not prejudice the interests of a suspect. The clause prevents analysis of samples (unless analysis must be carried out immediately before the sample perishes) or disclosure of results until the interim order is confirmed.

Division 2.5.4 Reports of proceedings under this Part

Clause 48 Restrictions on publication

It is a general principal of our legal system that court proceedings are open and can be reported, in order that the decisions of the judiciary be transparent. The law makes exceptions to this principal to protect the privacy of individuals in certain circumstances. This clause is such an exception - it prevents reports about applications for orders to carry out forensic procedures on suspects unless the suspect has been charged with the relevant offence or the magistrate permits publication.

PART 2.6 CARRYING OUT FORENSIC PROCEDURES

This Part deals with the way in which forensic procedures authorised by the Bill are to be carried out. It is undeniable that some forensic procedures, particularly intimate forensic procedures, are intrinsically personal and that some suspects may find them humiliating. The purpose of this Part is to establish clear rules about what can and cannot be done to a person who is subjected to a forensic procedure, to ensure that as far as possible that person's dignity and human rights are respected during the procedure.

Division 2.6.1 General provisions

Clause 49 General rules for carrying out forensic procedures

This clause sets the standard for forensic procedures authorised by the Bill. It covers personal privacy issues, including limiting the presence of persons of the opposite sex to that of the person undergoing the procedure.

Clause 50 Use of force in carrying out forensic procedure

This clause authorises the use of reasonable force only, and requires that a procedure must be carried out consistently with appropriate medical or professional standards.

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

The purpose of this clause is to ensure that forensic procedures are carried out with due regard for a person's human rights and dignity. It should be noted that under Part 2.9, a failure to comply with this (or any another) provision relating to carrying out a forensic procedure may make the evidence obtained inadmissible in court.

Clause 52 Taking samples of hair

The purpose of this clause is to minimise the pain caused by removing a hair sample.

Division 2.6.2 People involved in forensic procedures

Clause 53 People who may carry out forensic procedures

The purpose of this clause is to preserve the scientific integrity of forensic procedures by ensuring that people who carry them out are appropriately qualified. The rules about which procedures can be carried out by which

persons are set out in a table. For some procedures, a suspect may be able to carry out the procedure under supervision.

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

This clause requires that, wherever possible, certain forensic procedures are carried out by or in the presence of person of the same sex as the suspect. It should be noted that for transgender suspects, their sex is taken to be that with which they identify.

Clause 55 Person may get help to carry out forensic procedure

The purpose of this clause is to enable a person carrying out a forensic procedure to be assisted by another person.

Division 2.6.3 Presence of other persons while forensic procedure is carried out

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

This clause allows a suspect to ask his or her doctor or dentist to be present to observe the forensic procedure and the procedure can be delayed for a reasonable time to allow the doctor or dentist to attend, if this would not adversely affect the outcome of the procedure. A doctor or dentist cannot be compelled to attend.

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

The interview friend of a child or incapable person who is a suspect, or a suspect's lawyer (or both) can be present for the procedure. An interview friend will be removed, however, if he or she is disruptive.

Clause 58 Presence of police officers while forensic procedure is carried out

Only those police officers who need to be present to ensure the procedure is effective can be present during a forensic procedure. A police officer of the opposite sex to the suspect may be present only if it is not practicable to carry out the procedure without that officer and no other police officer of the same sex as the suspect is available instead. However, this latter requirement does not apply for taking fingerprints, handprints, footprints and toeprints, or for procedures which only require removal of clothes such as coats, hats, gloves socks or shoes.

Division 2.6.4 Carrying out of forensic procedure to be recorded

Clause 59 Recording of forensic procedure

The purpose of this provision is to avoid disputes about the way a procedure was carried out by videorecording the procedure. The requirement to videorecord the procedure does not apply if a suspect objects to the recording or it is not practicable to make a videorecording. Where no video recording can be made, an independent witness must be present.

Division 2.6.5 Procedure after forensic procedure is carried out

Clause 60 Samples

The purpose of this clause is to enable a suspect to have access to material resulting from a forensic procedure. A suspect is to be given part of the sample taken during the procedure, where there is enough material to do so. This provision will facilitate independent analysis of the sample should the suspect so wish.

Clause 61 Photographs or videorecordings

This clause has a similar purpose to clause 60 and requires that where a forensic procedure involves photographing or videorecording the suspect, the police must give the suspect a copy of the photograph or videorecording.

Clause 62 Results of analysis

This clause has a similar purpose to clauses 60 and 61 and requires the suspect to be given a copy of the results of any analysis of material taken by a forensic procedure.

Clause 63 Preventing the carrying out of forensic procedure

This clause makes it an offence to interfere with or prevent the carrying out of a forensic procedure.

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

The purpose of this Part is to obtain forensic material from serious offenders which may be relevant to solving other offences. Experience both in Australia and in other jurisdictions indicates that a small percentage of community is responsible for committing most of the offences within that community, and that

recidivism rates for certain offences, particularly property offences and sex offences, are very high. This Part will enable forensic material to be taken from persons convicted of serious offences for inclusion on databases which can be used to investigate other offences. The concept of "serious offender" is explained in clause 9, described above.

Clause 64 Forensic procedures to which Part 2.7 applies

Only a limited range of forensic procedures may be carried out on serious offenders. The permitted procedures are taking blood samples, hair samples (non-pubic only), buccal swabs and fingerprints. All these procedures except the taking of a blood sample are non-intimate forensic procedures. No other forensic procedure is authorised by this Part.

Clause 65 Non-intimate forensic procedures authorised to be carried out

This clause explains that a non-intimate forensic procedure can be carried out on a serious offender with the consent of the offender or by order of a police officer, if the offender is not a child or an incapable person. A magistrate's order is required to authorise a forensic procedure on a serious offender who is a child or incapable person.

Clause 66 Intimate forensic procedures authorised to be carried out

The offender's consent or a magistrate's order are necessary to authorise a forensic procedure on a serious offender who is not a child or incapable person. It should be noted that Part 2.7 does not authorise the carrying out of an intimate forensic procedure on a serious offender who is a child or incapable person.

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

The effect of this clause is to ensure that forensic procedures carried out on serious offenders are performed in the same way, and subject to the same limitations, as forensic procedures carried out on suspects.

Clause 68 Scope of authorisation

The purpose of this clause is to make it clear that Part 2.7 is not to be used to obtain forensic material from a serious offender who is also a suspect or a volunteer. In other words, it cannot be used to by-pass the provisions which deal with carrying out forensic procedures on suspects or volunteers.

Clause 69 Informed consent of serious offender to forensic procedure

This clause explains how a serious offender may give informed consent to forensic procedures. The serious offender must be advised of certain matters and given an opportunity to consult a lawyer before deciding whether or not to consent.

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

This clause allows a police officer to seek the serious offender's consent to a forensic procedure. The purpose of the provision is to give serious offenders an opportunity to agree to the procedure without the need to obtain a police order or court order.

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

The purpose of this provision is to require a police officer to consider the justification for the request before making it. Where the serious offender is not in prison or otherwise in detention when the request is made, the police officer must be satisfied that the person whose consent is requested is in fact a serious offender (this requirement is not considered necessary for persons who are in detention because there are already procedures in prisons and remand centres to establish a person's identity and convictions for offences).

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

The purpose of this clause is to ensure that a serious offender's consent is properly informed, by requiring the police officer requesting the consent to provide the offender with detailed information about the procedure and its potential consequences, including possible use in proceedings against the offender and (where relevant to the forensic procedure involved) inclusion on the DNA database system. The police officer must also explain the consequences of non-consent.

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

An order by a police officer cannot be made unless the serious offender has refused consent to the procedure and the officer has considered the matters listed in clause 74.

Clause 74 Matters to be considered by police officer

This clause lists the matters to be considered before an order is made by a police officer. They include a consideration of whether the order would be justified in all the circumstances.

Clause 75 Recording of giving of information and consent

This clause is intend to prevent disputes about whether the information or consent was given, by requiring the process to be recorded electronically. If electronic recording is not possible, a written record must be made and a copy of that record given to the serious offender.

Clause 76 Record of police officer's order

This clause requires the order made by the police to be recorded and a copy provided to the offender.

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

As noted above, a court order is required before a forensic procedure can be carried out on a serious offender who is a child or incapable person. A court order is also required if the serious offender has refused consent and the procedure is an intimate forensic procedure. The application for the order can be made by the police officer either at the time of sentencing or later.

The court may make the order after considering the matters listed in subclause 77(5), and must be satisfied that the making of the order is justified in all the circumstances.

Subclause (7) explains what is to happen to the results of the procedure, to take account of the potential for the conviction to be overturned on appeal. In brief, results cannot be disclosed pending the expiry of an appeal period or if a conviction is quashed.

Clause 78 Carrying out forensic procedure following conviction

The purpose of this clause is to ensure that orders for carrying out forensic procedures on serious offenders can be implemented, by enabling the court to make ancillary orders so police officers have access to serious offenders to carry out the procedure. A serious offender must comply with a court order authorising a forensic procedure to be carried out on him or her.

As some ACT offenders are serving their sentences in New South Wales, arrangements will be made in consultation with that State for enforcing orders to carry out forensic procedures on those offenders.

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

The purpose of this Part is to provide a secure legislative basis for carrying out forensic procedures on volunteers, and on children or incapable persons whose parents or guardians have given informed consent to the procedure. It is particularly important that persons who volunteer to undergo a procedure (or who volunteers that a child or incapable person undergo the procedure), as well as the law enforcement authorities, can be certain of how forensic material can be taken, how it can be used and what safeguards are in place to ensure that it is used only as intended. It is important to note that the Bill does not authorise the police or law enforcement authorities to solicit volunteers. A police officer can only request a person's consent to a forensic procedure under the provisions dealing with suspects and serious offenders.

Clause 79 Carrying out of forensic procedures on volunteers

This clause authorises forensic procedures on volunteers who have given informed consent. It also authorises forensic procedures on a child or incapable person, providing that a parent or guardian has given informed consent and the child or incapable person does not object or resist.

This clause also ensures that forensic procedures carried out under this Part are performed in the same way, and subject to the same limitations, as forensic procedures carried out on suspects under Part 2.6.

Clause 80 Informed consent of volunteer or parent or guardian of a volunteer

The purpose of this provision is to ensure that consent for the forensic procedure is properly informed and freely given. The clause lists the matters which must be explained by the police officer, and there must be an independent person present while this occurs.

Clause 81 Recording of giving of information and consent

The giving of information by the police officer, and the giving of consent, must be recorded electronically. If this is not possible, a written record is required and copy of the written record must be given to the person who gave consent.

Clause 82 Withdrawal of consent

This clause explains what happens if consent is withdrawn to either the carrying out of the procedure or retention of material from the procedure. Withdrawal of consent need not be in writing to be effective.

Where consent is withdrawn before the procedure is carried out and the volunteer is a child or incapable person, it cannot proceed except by order of a magistrate under clause 83. For other volunteers, the procedure cannot proceed. The purpose of permitting a procedure in relation to a child or incapable person to proceed by order of a magistrate is to protect that child or person where there are reasons to believe that the withdrawal may not be in the child or incapable person's best interests - this is reflected in the terms of clause 83.

If the withdrawn consent concerns the retention of material generated by forensic procedure, the material must be destroyed unless an order is made by a magistrate under clause 84 to retain the material.

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

This clause explains when a magistrate may order that a child or incapable person undergo a forensic procedure for which there is no consent by the parent or guardian. An order can be made where the consent cannot be obtained or is withdrawn. An order can also be made under this section if the consent is refused and the parent or guardian who refused consent is a suspect for the offence and is likely to be implicated by the results of the forensic procedure.

The factors to be considered by the magistrate include the best interests of the child or incapable person and his or her wishes. As noted above, the procedure cannot be carried out if the child or incapable person objects or resists.

Clause 84 Retention of forensic material by order of a magistrate after withdrawal of consent

This clause explains what is to happen if consent is withdrawn after a forensic procedure under this Part has been carried out. It permits an authorised applicant to seek a magistrate's order to retain the material. The magistrate may make the order only if he or she is satisfied of the matters in subclause (2), which only arise if the police are investigating a serious offence.

In summary, these matters relate to whether the material taken from the volunteer is likely to have probative value in the context of a serious offence for which there is forensic material available (such as material from the crime scene)

which could identify the perpetrator, and the retention is justified in all the circumstances. The purpose is to authorise retention only where the material from the volunteer is likely to be useful in proceedings involving the serious offence.

PART 2.9 ADMISSIBILITY OF EVIDENCE

The purpose of this Part is to set out rules about using evidence relating to forensic procedures and forensic material and data from the DNA database in court proceedings.

Clause 85 Inadmissibility of evidence from improper forensic procedures etc

This clause restricts the use of evidence relating to forensic procedures carried out under the Bill (including material or other information generated from such procedures) where there was a breach of, or failure to comply with, the Bill. It also restricts the use of information generated as a result of a breach of, or failure to comply with, the provisions relating to the DNA data system. The evidence can only be used in proceedings against the person who underwent the forensic procedure if he or she does not object, or if the court permits the evidence to be admitted. The matters which the court may consider before deciding whether to admit the evidence are listed in subclause (5) and, among other matters, include the probative value of the evidence, the seriousness of the offence, the gravity of the non-compliance and the reasons for the non-compliance. In summary, the court will weigh the circumstances of the non-compliance against the value of the evidence in proving matters in dispute before the court.

Clause 86 Inadmissibility of evidence if forensic material required to be destroyed

This clause prohibits the use of evidence relating to forensic material which the Bill requires to be destroyed, including any results from analysing that material. The probative value of the material is irrelevant - the evidence cannot be used against the person from whom it was taken in any proceeding.

Clause 87 Admissibility of evidence relating to consent to forensic procedures

The purpose of this clause is to protect persons who refuse or withdraw consent from having adverse inferences drawn from their refusal or withdrawal of consent. Evidence of the refusal or withdrawal can only be introduced if it is relevant to an allegation that a police officer acted contrary to law in carrying out the investigation of the offence concerned.

Clause 88 Admissibility of evidence relating to carrying out of forensic procedures

The purpose of this clause is to permit evidence about forensic procedures which did not comply with the Bill, in certain limited circumstances. These circumstances are:

- where it is alleged that unreasonable force was used to carry out the procedure;
- where it is alleged that a confession, admission or other adverse evidence was obtained because unreasonable force was used; or
- where it is alleged that there Part 2.6 was not followed in carrying out the procedure.

Clause 89 Obstructing etc the carrying out of forensic procedures

The purpose of this clause is to enable evidence about a person's resistance or obstruction in carrying out a forensic procedure to be used against that person in proceedings about the offence to which the procedure related. However, the evidence can only be used where the forensic procedure was ordered by a police officer or a court and the person had been told, or otherwise knew, that the non-cooperation could be used against the person. The court or jury is expressly permitted to draw whatever inferences it regards as proper from the person's behaviour in light of all the evidence.

PART 2.10 DESTRUCTION OF FORENSIC MATERIAL

This Part deals with the destruction of forensic material generated under this Bill. Destruction has a special meaning which is set out in the Dictionary at the end of the Bill. Forensic material and any information generated from it are destroyed if the means of linking the material or information to the person from whom it was taken is destroyed.

Clause 90 Destruction of certain forensic material obtained by court order

The purpose of this clause is to ensure that material which is the subject of certain court orders is held only as long as permitted by law.

Subclause 90(1) requires the police to destroy forensic material obtained from a suspect under an interim order if the order is disallowed. If the material was analysed, a copy of the results of the analysis must be given to the suspect.

Subclause (2) deals with orders made by courts under clauses 83 and 84. The Court can set time limits for holding material when it makes those orders; subclause (2) requires the material to be destroyed when the time for holding the material expires.

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

The purpose of this clause is to ensure that if a person's conviction for a serious offence is quashed, forensic material taken from that person by order of a court under clause 77 is destroyed.

Clause 92 Destruction of forensic material after 1 year

This clause applies to forensic material taken from suspects and requires the material to be destroyed after 1 year if no proceeding against the suspect has been instituted and no warrant to apprehend the suspect has been issued. If a warrant has been issued, the material can only be retained until the warrant lapses or 1 year lapses after the suspect is apprehended under the warrant. Material from a suspect who is not convicted of the offence must also be destroyed unless an investigation or proceeding against the person is pending for an offence and the forensic material also relates to that offence.

The period for holding material from suspects can be extended on application by the DPP to a magistrate. Subclauses (6) to (8) contain the procedures to be followed for such applications. Only 1 extension can be given.

Clause 93 Destruction of forensic material if related evidence is inadmissible

This clause requires the destruction of forensic material where a court has found that evidence relating to that material is inadmissible because of clause 85. The purpose is to ensure that improperly obtained forensic material can never be used once it has been found inadmissible.

PART 2.11 DNA DATABASE SYSTEM

This Part deals with the establishment and operation of the proposed DNA database system. It is intended that substantially similar legislation be enacted by other Australian jurisdictions so that a national DNA database, similar to the national fingerprint database, can be established to assist with national law enforcement activities. The Commonwealth Government has contributed over \$50 million towards the establishment of the technological infrastructure for a

national criminal intelligence database system known as CrimTrac, of which the national DNA database is to form part.

Clause 94 Definitions relating to DNA database system

This clause defines key concepts and terms relating to the DNA database, including definitions of the indexes which are to comprise the database. The information derived from a sample of DNA from forensic material by laboratory analysis is known as a DNA profile. DNA profiles will be stored in particular indexes depending on the source of the forensic material from which the DNA profile was derived.

The serious offenders index is to contain DNA profiles derived from forensic material taken from serious offenders taken under Part 2.7 and equivalent provisions in other jurisdictions, and can also contain DNA profiles from suspects who are subsequently convicted of serious offences - this will avoid the need to carry out another forensic procedure after the suspect is convicted of a serious offence.

As well as DNA profiles derived from forensic procedures carried out under the Bill, the DNA system will include a crime scene index, an unknown deceased persons index, a missing persons index and a statistical index. It should also be noted that DNA profiles from known deceased persons may be included on the volunteers (unlimited purposes) index.

The statistical index cannot include any information which can be used to identify and individual.

Clause 95 Supply of forensic material for purposes of DNA database

The purpose of this clause is to protect the integrity of the database system by preventing the inclusion of certain forensic material on the DNA database system. The only material which can be included on the DNA database system is forensic material taken from:

- a crime scene
- a person as permitted by the Bill (but not if is material which must be destroyed under the Bill)
- a deceased person
- a missing person
- a volunteer who is a blood relative of a missing or deceased person.

Supplying any other forensic material to another person so it can be analysed and included on the database system is an offence.

Clause 96 Use of information on DNA database system

The purpose of the clause is to protect the privacy of information stored on the system. It is an offence to use information stored on the DNA database system except for specific purposes, which are listed in subclause (2). The penalty for unauthorised access to information is a fine of 200 penalty units (which is equivalent to \$20,000) or 2 years imprisonment or both. The offence is not committed if the information which is accessed cannot be used to identify anyone.

Clause 97 Permissible matching of DNA profiles

The process of comparing two DNA profiles on different indexes is known as matching those DNA profiles. The Bill does not permit general matching between all profiles in all indexes - only certain profiles on the indexes can be compared with each other.

In particular, the matching rules for the volunteers (limited purpose) index are very restrictive to ensure that DNA profiles from volunteers are used only for the purpose for which the forensic procedure was carried out. Given the important role that volunteers can play in eliminating potential suspects from investigations, thereby reducing the time and resources used by investigations, it is important that volunteers can be confident that their forensic material will not be misused.

This clause contains a table setting out the rules for permissible matching of the DNA profiles on the various indexes of the DNA database system. It is an offence to cause an impermissible matching unless the matching is done only for the purpose of administering the DNA database system.

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

This clause has the same purpose as clauses 90 to 93, which require the destruction of forensic material in certain circumstances. This provision will ensure that the database is kept up-to-date and will reduce the potential for impermissible matches of DNA profiles. It applies to information on the DNA database system, derived from forensic material, which can be used to identify the person from whom the forensic material was taken.

This clause makes it an offence to record or retain any identifying information if the forensic material to which it relates is required to be destroyed under the Bill. Further, where the identifying information concerns forensic material which can

only be retained for a limited time under the Bill or is otherwise required to be destroyed under the Bill, the person who is responsible for administering the DNA database system must remove the identifying material as soon as practicable once the retention time expires.

Subclause 98(4) also contains a mechanism for calculating when identifying material relating either to volunteers or to deceased persons whose material is included in the volunteers (unlimited purposes) index must be removed.

PART 2.12 OPERATION OF ACT AND EFFECT ON OTHER LAWS

This Part consists of clause 99.

Clause 99 Application of other Acts

The purpose of this clause is to preserve the operation of other laws applying in the ACT which may involve forensic material and forensic procedures or searches of a person.

The clause also ensures that a power under the Bill to do something can be used even if another law contains a similar power - the Bill's operation is not to be limited by other laws.

PART 2.13 INTERSTATE ENFORCEMENT

The purpose of this Part is to enable orders for carrying out forensic procedures that were made in one jurisdiction to be enforced in another jurisdiction, to deal with persons subject to those orders who move between jurisdictions. For example, it may be necessary for an order made in relation to an offence that was committed in Civic to be enforced against a person who resides across the ACT/NSW border in Queanbeyan. It is envisaged that other Australian jurisdictions will include equivalent provisions in their legislation. Victoria has already enacted such legislation - it formed the basis for many provisions in the MCCOC Model Forensic Procedures Bill, on which this Bill is substantially based.

Clause 100 Definitions relating to interstate enforcement

This clause explains key terms and concepts used in this Part of the Bill. A term of particular importance is "corresponding law", which means another jurisdiction's law that is in substantially similar terms to this Bill.

Clause 101 Registration of orders

This clause enables the Minister to make agreements with other jurisdictions which have corresponding laws (these jurisdictions are referred to in the Bill as participating jurisdictions) about registering orders for carrying out forensic procedures under this Bill and the corresponding laws. Orders from participating jurisdictions which are registered by such arrangements can be enforced in the ACT.

The forensic procedures covered by an interstate order can only be carried out in the way set out in Part 2.6 - in other words, they must be carried out in the same way as orders made under this Bill.

Clause 102 Database information

This is the clause in the Bill which enables the ACT to participate in the proposed national DNA database system. It enables the Minister to enter into agreements with participating jurisdictions for sharing information on each jurisdiction's DNA database for the purposes of criminal investigations.

Information provided to or by the ACT cannot be retained or recorded in any database which can be used to determine a person's identity if the Bill or a corresponding law requires the destruction of the forensic material from which the information was derived.

PART 2.14 GENERAL PROVISIONS ABOUT OPERATION OF ACT

This Part contains various provisions clarify the way the Act is to operate. These provisions are included to avoid doubt about the way things which are required to be done under the Bill are to be done, the powers and obligations of certain types of people who can do things under the Bill and other technical matters, including who must prove what in court if there is a dispute about certain matters.

Clause 103 Powers of lawyers and interview friends

This clause clarifies the powers of interview friends and lawyers to make requests on the behalf of suspects and serious offenders and ensures that they are given the same information as the persons they represent.

Clause 104 Obligation of investigation police officers relating to electronic recordings

This clause covers all electronic recordings required to be made under the Bill. It ensures that suspects, serious offenders and volunteers, and their lawyers and

interview friends, have access to the recording or a copy of it, and to any transcripts of electronic recordings.

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

This clause details how, where and when material which is required by the Bill to be made available to a person is to be made available to that person. This clause applies unless another process or timeframe is specified in the Bill.

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

This clause ensures that the purpose of requiring material to be made available to persons is not undermined by making those persons pay for the material or access to it. It prohibits the person from being charged any fee or other payment for the material or the access.

Clause 107 Proof of belief

The prosecution bears the onus of proving, on the balance of probabilities, that a police officer had a belief on reasonable grounds about a matter. The purpose of placing this onus on the prosecution is to ensure that police take seriously their obligation to have reasonable grounds about something before deciding to act.

Clause 108 Proof of impracticability

Again, the prosecution must prove on the balance of probabilities that it was not practicable for the police to do something which should have been done if practicable. The purpose of this clause is to make it clear that the requirement to do the thing cannot be taken lightly.

Clause 109 Liability for forensic procedures

The purpose of this clause is to provide immunity from liability for people who carry out forensic procedures under the Bill reasonably, appropriately and in good faith.

Clause 110 Experts not obliged to carry out forensic procedures

This clause makes it clear that certain persons, such as doctors, nurses or dentists, do not have to carry out a particular forensic procedure. The clause does not affect any requirements under Part 2.6 that particular types of procedures must be carried out by particular types of experts - it merely means that a person cannot be made to carry out a forensic procedure which the person does not wish to carry out.

Clause 111 Disclosure of information

The purpose of this clause is to protect the privacy of persons whose DNA profiles are included on the DNA database system or who have undergone a forensic procedure under the Bill. The clause lists the purposes for which disclose information stored on the database, or revealed by forensic procedures can be lawfully disclosed by a person who has access to that information to another person. The permitted purposes include a range of legal proceedings and certain kinds of criminal investigations. The permitted purposes also include the medical treatment of the person to whom the information relates, and the medical treatment of victims of serious offences which are reasonably to have been committed by a suspect to whom the information relates.

It is an offence to disclose the information except for the listed purposes. The offence is not committed if the information cannot be used to identify anyone.

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

This clause ensures that the Bill does not interfere with the taking, retention or use of information or forensic material generated under other laws, including other Commonwealth or State laws. It also makes it clear that information or material that was lawfully taken under a Commonwealth or State law of can be retained or used in the Territory even if that retention or use would (if this clause did not exist) not comply with the Bill.

Clause 113 Retention of electronic recordings

This clause explains how and for what period of time electronic recordings made under the Bill are to retained.

CHAPTER 3 MISCELLANEOUS**Clause 114 Delegation**

The Bill confers certain functions on the chief police officer. This clause permit the chief police officer to delegate those functions. In order to ensure that any delegated functions are exercised by persons of significant policing experience, the power of delegation is limited to police officers of the rank of sergeant or higher.

Clause 115 Regulation-making power

This clause enables regulations to be made under the Act.

CHAPTER 4 TRANSITIONAL**Clause 116 Forensic procedures under Part 2.7**

The effect of this clause is to permit forensic material to be taken under Part 2.7 from persons who were convicted of a serious offence before the Bill comes into effect as a law. The purpose is to enable the DNA profiles and fingerprints of people already convicted of serious offences to be included on the national DNA database system and the national fingerprint database system, respectively.

Clause 117 Forensic material taken before commencement

The effect of this clause is to permit forensic material that was lawfully collected before the Bill commences to be used, and where relevant, included on the DNA database, after commencement. This provision will, for example, enable DNA profiles from current unsolved crime scenes (including homicides and sexual assaults) to be included in the crime scene index. It is possible that the DNA database system will help to solve these crimes as the volume of data contained on the system increases.

DICTIONARY

The dictionary contains definitions of some terms used in the Bill and explains where definitions of certain other terms are located in the body of the Bill.
