

Passed by both Houses



New South Wales

Crimes (Forensic Procedures) Amendment Bill 2006

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2006*



New South Wales

Crimes (Forensic Procedures) Amendment Bill 2006

Act No , 2006

An Act to amend the *Crimes (Forensic Procedures) Act 2000* with respect to the carrying out of forensic procedures; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes (Forensic Procedures) Amendment Act 2006*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Crimes (Forensic Procedures) Act 2000 No 59

The *Crimes (Forensic Procedures) Act 2000* is amended as set out in Schedule 1.

4 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 No 103

The *Law Enforcement (Powers and Responsibilities) Act 2002* is amended as set out in Schedule 2.

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Amendment of Crimes (Forensic Procedures) Act 2000

(Section 3)

[1] Section 3 Interpretation

Omit the definitions of *Aboriginal person* and *Torres Strait Islander* from section 3 (1).

[2] Section 3 (1), definition of “authorised applicant”

Omit “section 355 of the *Crimes Act 1900*” from paragraph (b).

Insert instead “the *Law Enforcement (Powers and Responsibilities) Act 2002*”.

[3] Section 3 (1), definition of “forensic procedure”

Omit “or” from paragraph (b) and omit paragraph (c).

[4] Section 3 (1), definition of “informed consent”

Insert after paragraph (b) of the definition:

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

[5] Section 3 (1), definition of “intimate forensic procedure”

Omit the definition. Insert instead:

intimate forensic procedure means any of the following:

- (a) an external examination of a person’s private parts,
- (b) the carrying out on a person of an other-administered buccal swab,
- (c) the taking from a person of a sample of the person’s blood,
- (d) the taking from a person of a sample of the person’s pubic hair,
- (e) the taking from a person of a sample of any matter, by swab or washing, from the person’s private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from the person’s private parts,
- (g) the taking from a person of a dental impression,
- (h) the taking of a photograph of the person’s private parts,
- (i) the taking from a person of an impression or cast of a wound from the person’s private parts.

[6] Section 3 (1), definition of “non-intimate forensic procedure”

Omit the definition. Insert instead:

non-intimate forensic procedure means any of the following:

- (a) an external examination of a part of a person’s body, other than the person’s private parts, that requires touching of the body or removal of clothing,
- (b) the carrying out on a person of a self-administered buccal swab,
- (c) the taking from a person of a sample of the person’s hair, other than pubic hair,
- (d) the taking from a person of a sample (such as a nail clipping) of the person’s nails or of matter from under the person’s nails,
- (e) the taking from a person of a sample of any matter, by swab or washing, from any external part of the person’s body, other than the person’s private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from any external part of the person’s body, other than the person’s private parts,
- (g) the taking from a person of the person’s hand print, finger print, foot print or toe print,
- (h) the taking of a photograph of a part of a person’s body, other than the person’s private parts,
- (i) the taking from a person of an impression or cast of a wound from a part of the person’s body, other than the person’s private parts,
- (j) the taking of a person’s physical measurements (whether or not involving marking) for biomechanical analysis of an external part of the person’s body, other than the person’s private parts.

[7] Section 3 (1)

Insert in alphabetical order:

offenders index is defined in section 90.

[8] Section 3 (1), definition of “order”

Omit “75” from paragraph (d) of the definition. Insert instead “74A”.

[9] Section 3 (1), definition of “order”

Insert after paragraph (d) of the definition:

(d1) order of a court under section 75L, 75M or 75N, or

[10] Section 3 (1)

Insert in alphabetical order:

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

[11] Section 3 (1)

Insert in alphabetical order:

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

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

[12] Section 3 (1), definition of “responsible person”

Insert “declared by the regulations to be the person” after “the person”.

[13] Section 3 (1)

Insert in alphabetical order:

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

untested former offender is defined in section 75A.

[14] Section 3 (5)

Omit the subsection. Insert instead:

(5) Destroy forensic material

For the purposes of this Act, a person who is required to destroy forensic material is required not only to destroy the material but also to ensure that any information that relates any such DNA profile to a person whose DNA it describes is removed from the DNA database system.

[15] Section 4 Interview friends

Omit “if the suspect or offender is” from section 4 (2) (c).

Insert instead “if the suspect or offender identifies as”.

[16] Section 4 (3)

Omit “is an Aboriginal person or a Torres Strait Islander not covered”.

Insert instead “identifies as an Aboriginal person or Torres Strait Islander, and is not covered”.

[17] Section 5 How forensic procedures may be authorised in different circumstances

Omit “or buccal swab” from the heading to the second column of the Table to section 5.

[18] Section 6 Time limits for carrying out forensic procedures

Insert “person identifying as” before “Aboriginal person” wherever occurring in the Table to section 6.

[19] Section 8

Omit the section. Insert instead:

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

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

[20] Section 9 Informed consent to forensic procedures—general

Omit section 9 (1) (b). Insert instead:

- (b) the suspect does not identify as an Aboriginal person or Torres Strait Islander.

[21] Section 10 Informed consent to forensic procedures—Aboriginal persons and Torres Strait Islanders

Omit section 10 (1) (b). Insert instead:

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

[22] Section 10 (5)

Omit the subsection. Insert instead:

- (5) The police officer is not required to comply with subsection (4) if he or she is aware that the suspect:
 - (a) has arranged for a legal representative to be present, or
 - (b) has expressly and voluntarily waived his or her right to have a legal representative present,while the suspect is being asked to consent to the forensic procedure.

[23] Section 11

Omit sections 11 and 12. Insert instead:

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

- (1) A police officer may not ask a suspect to undergo a forensic procedure unless satisfied:
 - (a) that section 8, and section 9 or 10, as the case requires, have been complied with, and
 - (b) that the circumstances referred to in subsection (2) or (3) exist, and
 - (c) that the suspect is neither a child nor an incapable person, and
 - (d) that the request for consent is justified in all the circumstances.
- (2) In the case of an intimate forensic procedure, or a non-intimate forensic procedure involving the taking of a sample of the suspect's hair or the carrying out of a self-administered buccal swab:
 - (a) the act or omission in respect of which the suspect is a suspect must constitute a prescribed offence, and
 - (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the prescribed offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other prescribed offence.

- (3) In the case of a non-intimate forensic procedure (other than a procedure involving the taking of a sample of the suspect's hair or the carrying out of a self-administered buccal swab):
- (a) the act or omission in respect of which the suspect is a suspect must constitute an offence, and
 - (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other offence.

[24] Section 13 Matters that suspect must be informed of before giving consent

Omit "if the police officer believes on reasonable grounds that the suspect is" from section 13 (1) (h).

Insert instead "if the suspect identifies as".

[25] Section 13 (1) (j)

Omit "(4), (5), (6) or (7)". Insert instead "(4) or (5)".

[26] Section 13 (1) (k)

Insert ", including that the information may be compared with information from the DNA database systems of other participating jurisdictions" after "disclosure and use".

[27] Section 13 (2)

Omit the subsection. Insert instead:

(2) Suspect's right to have medical practitioner or dentist present during some forensic procedures

In the case of:

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

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

[28] Section 13 (5)

Omit “and the forensic procedure is a non-intimate forensic procedure or an intimate forensic procedure”.

[29] Section 13 (6) and (7)

Omit the subsections.

[30] Section 15 Recording of giving information and suspect’s responses

Omit section 15 (2) and the note appearing after that subsection. Insert instead:

- (2) If the recording of the giving of the information and the suspect’s responses (if any) by electronic means is not practicable:
 - (a) an independent person who is not a police officer must be present while the information is given and while any responses are made, and
 - (b) a police officer must make a written record of the information that is given and any responses that are made, and
 - (c) the police officer by whom the record is made must ensure that a copy of the record is made available to the suspect.

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

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

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

Omit “or 19” wherever occurring in section 17 (1) and (5).

[32] Section 17 (5)

Omit “section 356D of the *Crimes Act 1900*”.

Insert instead “section 115 of that Act”.

[33] Section 18 Circumstances in which senior police officer may order non-intimate forensic procedure

Insert at the end of the section:

- (2) If the senior police officer needs to decide between taking a sample of the suspect's hair or the carrying out of a self-administered buccal swab, an order for the taking of a sample of hair may not be made unless, following inquiry by the police officer:
 - (a) the suspect has indicated that he or she prefers the taking of a sample of hair, or
 - (b) the suspect has failed to indicate that he or she will carry out a self-administered buccal swab.

[34] Section 19 Sample of hair may be taken by order of senior police officer if consent to take sample by buccal swab refused

Omit the section.

[35] Section 20

Omit the section. Insert instead:

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

- (1) A senior police officer may not order the carrying out of a non-intimate forensic procedure under section 18 (1) unless satisfied:
 - (a) that the suspect is under arrest, and
 - (b) that the circumstances referred to in subsection (2) or (3) exist, and
 - (c) that the suspect is neither a child nor an incapable person, and
 - (d) that the carrying out of such a procedure is justified in all the circumstances.
- (2) In the case of a non-intimate forensic procedure involving the taking of a sample of the suspect's hair or the carrying out of a self-administered buccal swab:
 - (a) the act or omission in respect of which the suspect is a suspect must constitute a prescribed offence, and

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- (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the prescribed offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other prescribed offence.
 - (3) In the case of a non-intimate forensic procedure (other than a procedure involving the taking of a sample of the suspect's hair or the carrying out of a self-administered buccal swab):
 - (a) the act or omission in respect of which the suspect is a suspect must constitute an offence, and
 - (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other offence.

[36] Section 21 Making and recording senior police officer's order

Omit "or 19" wherever occurring in section 21 (1) and (4).

[37] Part 5, heading

Insert "on suspects" after "Forensic procedures".

[38] Section 23 Circumstances in which Magistrate or other authorised officer may order forensic procedure

Omit section 23 (c). Insert instead:

- (c) the suspect is a child or an incapable person.

[39] Section 24

Omit sections 24 and 25. Insert instead:

24 Final order for carrying out forensic procedure

- (1) A Magistrate may order the carrying out of a forensic procedure if satisfied on the balance of probabilities:
 - (a) that the circumstances referred to in subsection (2) or (3) exist, and
 - (b) that the carrying out of such a procedure is justified in all the circumstances.

- (2) In the case of an intimate forensic procedure, or a non-intimate forensic procedure involving the taking of a sample of the suspect's hair or the carrying out of a self-administered buccal swab:
 - (a) the act or omission in respect of which the suspect is a suspect must constitute a prescribed offence, and
 - (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the prescribed offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other prescribed offence.
- (3) In the case of a non-intimate forensic procedure (other than a procedure involving the taking of a sample of the suspect's hair or the carrying out of a self-administered buccal swab):
 - (a) the act or omission in respect of which the suspect is a suspect must constitute an offence, and
 - (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
 - (i) that the suspect has committed the offence referred to in paragraph (a), or
 - (ii) that the suspect has committed some other offence.
- (4) In determining whether or not the carrying out of the forensic procedure is justified in all the circumstances, the Magistrate must balance the public interest in obtaining evidence as to whether or not the suspect committed the alleged offence against the public interest in upholding the suspect's physical integrity, having regard to the following:
 - (a) the gravity of the alleged offence,
 - (b) the seriousness of the circumstances in which the offence is alleged to have been committed,
 - (c) the degree to which the suspect is alleged to have participated in the commission of the offence,
 - (d) the age, cultural background and physical and mental health of the suspect, to the extent to which they are known,
 - (e) in the case of a suspect who is a child or an incapable person, the best interests of the child or person,

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- (f) such other practicable ways of obtaining evidence as to whether or not the suspect committed the alleged offence as are less intrusive,
 - (g) such reasons as the suspect may have given for refusing to consent to the carrying out of the forensic procedure concerned,
 - (h) in the case of a suspect who is in custody, the period for which the suspect has been in custody and the reasons for any delay in the making of an application for an order under this section,
 - (i) such other matters as the Magistrate considers relevant to the balancing of those interests.

[40] Section 26 Application for order

Omit section 26 (2) (b). Insert instead:

- (b) be supported by evidence on oath, or by affidavit, in relation to the matters as to which the Magistrate must be satisfied, as referred to in section 24 (1), and

[41] Section 27 Application and order for repeated forensic procedure

Insert “or subsequent” after “second” wherever occurring.

[42] Section 27 (3) (a)

Insert “or procedures” after “procedure”.

[43] Section 27 (3) (b)

Insert “or those forensic procedures” after “that forensic procedure”.

[44] Section 30 Procedure at hearing of application for order

Omit section 30 (2)–(4). Insert instead:

- (2) A suspect who is a child or an incapable person, or who identifies as an Aboriginal person or Torres Strait Islander:
 - (a) must have an interview friend present, and
 - (b) may be represented by a legal representative.
- (3) Subsection (2) (a) does not apply to a suspect who identifies as an Aboriginal person or Torres Strait Islander if the suspect expressly and voluntarily waives his or her right to have an interview friend present.

- (4) At the beginning of any hearing in relation to proceedings on an application for an order under this Division, the suspect must be asked whether he or she identifies as an Aboriginal person or Torres Strait Islander.

[45] Section 30 (8)

Omit “subsections (2) and (3)”. Insert instead “subsection (2)”.

[46] Section 32 Interim order for carrying out of a forensic procedure

Omit “of the existence of the matters referred to in section 25” from section 32 (1) (c).

Insert instead “, as referred to in section 24 (1),”.

[47] Section 32 (4)

Omit “of the matters set out in section 25”.

Insert instead “as referred to in section 24 (1)”.

[48] Section 33 Application for interim order

Omit section 33 (5) and (6). Insert instead:

- (5) If the suspect (being a child or an incapable person, or being a person who identifies as an Aboriginal person or Torres Strait Islander) is in the presence of the authorised applicant when an application for an interim order is made:
- (a) the suspect’s interview friend, or
 - (b) the suspect’s legal representative,
- must also be present if reasonably practicable.
- (6) At the beginning of any hearing in relation to proceedings on an application for an order under this Division, the suspect (if present) must be asked whether he or she identifies as an Aboriginal person or Torres Strait Islander.

[49] Section 33 (7)

Omit “or (6)”.

[50] Section 33 (8)

Omit “subsections (5) and (6)”. Insert instead “subsection (5)”.

[51] Section 47 Use of force in carrying out forensic procedures

Insert after section 47 (2):

- (3) This section applies only to a forensic procedure that is carried out pursuant to an order under Part 4, 5, 7 or 7A.

[52] Section 49 Taking of samples of hair

Omit section 49 (a). Insert instead:

- (a) the person takes only so much hair as the person believes is necessary for the analysis of the sample or other examination of the hair, and

[53] Section 49A Self-administered buccal swabs

Omit the section.

[54] Section 50 Persons who may carry out forensic procedures

Omit section 50 (4).

[55] Section 50, Table

Insert "other-administered" before "buccal swab" in the first column of item 3.

[56] Section 51A

Insert after section 51:

51A Self-administered buccal swabs

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

[57] Section 52 Person may get help to carry out forensic procedures

Insert after section 52 (3):

- (4) Subsection (3) applies only in relation to a forensic procedure that is carried out pursuant to an order under Part 4, 5, 7 or 7A.

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

Omit section 53 (1). Insert instead:

- (1) A suspect is entitled to request a medical practitioner or dentist (*the expert*) of his or her choice, as shown in the Table to section 50, to be present while:
- (a) an intimate forensic procedure, or

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

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

**[59] Section 55 Presence of interview friend or legal representative—
Aboriginal persons and Torres Strait Islanders**

Omit section 55 (1). Insert instead:

- (1) This section applies if the suspect (not being a child or an incapable person) identifies as an Aboriginal person or Torres Strait Islander.
- (1A) For the purpose of determining whether this section applies to a suspect, the investigating police officer must ask the suspect if the suspect identifies as an Aboriginal person or Torres Strait Islander.

[60] Section 57 Recording of forensic procedure

Omit "(other than the taking of a hand print, finger print, foot print or toe print)" from section 57 (1).

[61] Section 57 (1A)

Insert after section 57 (1):

- (1A) Subsection (1) does not apply to:
- (a) the taking of a hand print, finger print, foot print or toe print, or
- (b) the taking of a photograph, but only if the taking of such a photograph constitutes a non-intimate forensic procedure.

[62] Section 57 (3)

Omit "an Aboriginal person or a Torres Strait Islander not covered by section 54".

Insert instead "a person who identifies as an Aboriginal person or Torres Strait Islander, and is not a child or an incapable person,".

[63] Section 57 (5)

Omit the subsection. Insert instead:

- (5) Subsection (4) does not apply if the suspect expressly and voluntarily waives his or her right to have an independent person present, but such a person may nevertheless be present if the investigating police officer so directs.

[64] Section 60

Omit the section. Insert instead:

60 Material to be made available to suspect

- (1) If material from a sample taken from a suspect is analysed in relation to the investigation of an offence, the investigating police officer must ensure that, if the suspect so requests in writing:
 - (a) a copy of the suspect's DNA profile that has been derived from the sample, and
 - (b) a statement as to whether or not a match has been found, in relation to the investigation, between the suspect's DNA profile and any other DNA profile,are made available to the suspect.
- (2) A suspect is to be informed of his or her right to make such a request.
- (3) The requirements of subsection (1) need not be complied with in a manner that would, or at a time when to do so would:
 - (a) prejudice the investigation of any offence, or
 - (b) be a source of embarrassment to a victim of any offence.
- (4) Despite subsection (3), the requirements of subsection (1) must be complied with a reasonable time before evidence of the suspect's DNA profile, or of any match between the suspect's DNA profile and any other DNA profile, is adduced in any prosecution of the suspect for the offence.

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

[65] Section 61 Forensic procedures and offenders to which Part applies

Omit section 61 (1). Insert instead:

(1) Intimate forensic procedures to which Part applies

This Part applies to the following intimate forensic procedures:

- (a) the taking of a sample of blood,

(b) the carrying out of an other-administered buccal swab.

[66] Section 61 (2) (c)

Insert after section 61 (2) (b):

(c) the carrying out of a self-administered buccal swab.

[67] Section 61 (3)

Omit the subsection.

[68] Section 62 Non-intimate forensic procedures authorised to be carried out on serious indictable offenders

Insert at the end of section 62 (1) (b):

, or

(c) by order of a court under section 74.

[69] Section 63 Intimate forensic procedures authorised to be carried out on serious indictable offenders

Omit section 63 (2).

[70] Section 64 Authority to take buccal swabs from serious indictable offenders

Omit the section.

[71] Section 64A

Insert before section 65:

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

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

[72] Section 65 Application of Part 6

Omit “section 62, 63 or 64” from section 65 (2).

Insert instead “section 62 or 63”.

[73] Section 69 Matters that offender must be informed of before giving consent

Omit “(2), (3) or (4)” from section 69 (1) (h). Insert instead “(2) or (3)”.

[74] Section 69 (1) (j)

Insert “and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions” after “Part 11 or 12”.

[75] Section 69 (2)

Omit “if the senior police officer has taken into account the matters set out in section 71”.

[76] Section 69 (4)

Omit the subsection.

[77] Section 70 Circumstances in which senior police officer may order non-intimate forensic procedure

Omit “has not consented, and” from section 70 (1) (b).

Insert instead “has not consented.”.

[78] Section 70 (1) (c)

Omit the paragraph.

[79] Section 70 (2)

Omit the subsection. Insert instead:

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

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

[80] Section 71 Matters to be taken into account by senior police officer

Omit the section.

[81] Section 74 Court order for carrying out forensic procedure on serious indictable offender

Omit section 74 (1)–(3). Insert instead:

- (1) A police officer may apply to any court for an order for the carrying out of a forensic procedure to which this Part applies on a serious indictable offender who is serving a sentence of imprisonment in a correctional centre or other place of detention.

[82] Section 74 (6)

Omit the subsection.

[83] Sections 74A and 75

Omit section 75. Insert instead:

74A Carrying out of forensic procedure following conviction

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

75 Refusal or failure to permit forensic procedure

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

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

[84] Part 7A

Insert after Part 7:

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

75A Forensic procedures and offenders to which Part applies

- (1) **Intimate forensic procedures to which Part applies**

This Part applies to the following intimate forensic procedures:

- (a) the taking of a sample of blood,

(b) the carrying out of an other-administered buccal swab.

(2) **Non-intimate forensic procedures to which Part applies**

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

- (a) the taking of a sample of hair other than pubic hair,
- (b) the carrying out of a self-administered buccal swab.

(3) This Part applies to any person:

- (a) who has served a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention, and
- (b) who is served with a court attendance notice in respect of an indictable offence,

if it appears that the person's DNA profile is not contained in the offenders index of the DNA database system (an *untested former offender*).

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

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

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

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

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

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

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

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

75E Application of Part 6

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

75F Informed consent to forensic procedures

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

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

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

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

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

- (1) The police officer must (personally or in writing) inform the untested former offender of the following:
 - (a) the purpose for which the forensic procedure is required,

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- (b) if the police officer wants the forensic procedure carried out in relation to an offence—the offence concerned,
 - (c) the way in which the forensic procedure is to be carried out,
 - (d) that the forensic procedure may produce evidence against the former offender that might be used in a court of law,
 - (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 75E,
 - (f) if the forensic procedure is the taking of a sample of blood—that the former offender may request that a medical officer be present while the blood is taken,
 - (g) that the former offender may refuse consent to the carrying out of the forensic procedure,
 - (h) the consequences of not consenting, as specified in subsection (2) or (3) (whichever is applicable),
 - (i) the effect of section 84 (if applicable),
 - (j) that information obtained from the analysis of forensic material obtained from the carrying out of the forensic procedure may be placed on the DNA database system of this State, or become part of a national DNA matching scheme, or both, and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions.

(2) Failure to consent to non-intimate forensic procedure

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

(3) Failure to consent to intimate forensic procedure

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

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

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

75J Form of consent

The consent of an untested former offender to the carrying out of a forensic procedure under this Part is not effective unless:

- (a) the consent is in writing and in a form containing the particulars prescribed by the regulations, and
- (b) the consent is signed by the former offender, and
- (c) the signature is witnessed by a person other than a police officer, and
- (d) the former offender is given a copy of the consent as soon as practicable after it is signed and witnessed.

75K Record of order of senior police officer

- (1) At the time of, or as soon as practicable after, making an order under section 75I, a senior police officer must make a record of:
 - (a) the order, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and must sign the record.

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- (2) The senior police officer must ensure that a copy of the record is made available to the untested former offender as soon as practicable after the record is made.

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

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

75M Making of order

- (1) If a court makes an order for the carrying out of a forensic procedure on an untested former offender, the court must:
- (a) specify the forensic procedure authorised to be carried out, and
 - (b) give reasons for making the order, and
 - (c) ensure that a written record of the order is kept, and
 - (d) order the former offender (if present) to attend for the carrying out of the forensic procedure, and
 - (e) inform the former offender (if present) that reasonable force may be used to ensure that he or she complies with the order for the carrying out of the forensic procedure.
- (2) The court may give directions as to the time and place at which the procedure is to be carried out.

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

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

750 Refusal or failure to permit forensic procedure

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

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

[85] Section 76 Carrying out of forensic procedures on volunteers

Omit section 76 (1) and (2). Insert instead:

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

but does not include a suspect or an excluded volunteer.

- (2) A person is authorised to carry out a forensic procedure on a volunteer (other than a child or an incapable person) with the informed consent of the volunteer given in accordance with section 77.
- (2A) A person is authorised to carry out a forensic procedure on a volunteer who is a child:
- (a) with the informed consent of the child's parent or guardian, given in accordance with section 77, or
 - (b) if the informed consent of the child's parent or guardian cannot be obtained, by order of a Magistrate under section 80,
- and, in either case, with the informed consent of the child.
- (2B) A person is authorised to carry out a forensic procedure on a volunteer who is an incapable person:
- (a) with the informed consent of the person's parent or guardian given in accordance with section 77, or
 - (b) if the informed consent of the person's parent or guardian cannot be obtained, by order of a Magistrate under section 80.

[86] Section 76 (3)

Omit “Subsection (2) (b) (i) does not”.

Insert instead “Subsections (2A) and (2B) do not”.

[87] Section 76B

Insert after section 76A:

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

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

[88] Section 77 Informed consent of volunteer or parent or guardian of volunteer

Insert before section 77 (1) (a):

- (a1) the purpose for which the forensic procedure is required,
- (a2) the offence in relation to which the police officer wants the forensic procedure to be carried out,

[89] Section 77 (1) (c1)

Insert after section 77 (1) (c):

- (c1) that the forensic procedure will be carried out by an appropriately qualified police officer or person,

[90] Section 77 (1) (g)

Insert after section 77 (1) (f):

- (g) the effect of section 84 (if applicable).

[91] Section 77 (2) (a)

Insert “and, in particular, that the information may be compared with information from the DNA database systems of other participating jurisdictions” after “system”.

[92] Section 77 (3)

Insert after section 77 (2):

- (3) Any requirement of this section for a volunteer to be given information is taken, in the case of a volunteer who is a child, to be a requirement for the child to be given information in a way that is comprehensible to the child, having regard to his or her age and level of understanding.

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

Omit section 80 (1) (b) (i). Insert instead:

- (i) the parent or guardian is a suspect, and

[94] Section 87

Omit the section. Insert instead:

87 Destruction of forensic material taken from offender after conviction quashed

- (1) This section applies if, after a forensic procedure is carried out on a person who is:
 - (a) a serious indictable offender under Part 7, or
 - (b) an untested former offender under Part 7A,the conviction by virtue of which he or she is such a person (or, if there is more than one such conviction, each of them) is quashed.
- (2) As soon as practicable after the expiry of the time limited for appealing against the quashing of the conviction or convictions, the police officer in charge of the investigation of the offence must ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.

[95] Section 90 Definitions

Insert “or 7A” after “Part 7” in paragraph (a) of the definition of *offenders index*.

[96] Section 91 Supply of forensic material for DNA database system purposes

Insert “, untested former offender” after “offender”, and “, 7A” after “Part 7”, in paragraph (c) of the definition of *permitted forensic material* in section 91 (3).

[97] Section 92 Use of information on DNA database system

Insert “for the time being” after “authorised” in section 92 (2).

[98] Section 94 Recording, retention and removal of identifying information on DNA database system

Omit “must remove any identifying information relating to a DNA profile of an offender on the offenders index of the system” from section 94 (3).

Insert instead “must ensure that any identifying information relating to a DNA profile of an offender on the offenders index is removed”.

[99] Section 95 Definitions

Omit the definitions of *corresponding law* and *responsible Minister*.

Insert instead:

corresponding law means:

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

responsible authority, in relation to a participating jurisdiction, means the Minister or other public authority of that jurisdiction who or which is responsible for the administration of a corresponding law within that jurisdiction.

[100] Section 95, definition of “DNA database”

Omit “DNA database system that is kept under” from paragraph (b).

Insert instead “database of DNA profiles that is kept in accordance with”.

[101] Section 96 Registration of orders

Omit “responsible Ministers” from section 96 (1).

Insert instead “responsible authorities”.

[102] Section 97 Database information

Omit section 97 (1) and (1A). Insert instead:

- (1) The Minister may enter into arrangements with a responsible authority of a participating jurisdiction under which:
 - (a) information from the DNA database of this State is to be transmitted to that authority for the purposes of:
 - (i) the investigation of, or the conduct of proceedings for, an offence against the law of this State or the law of the participating jurisdiction, or

- (ii) the identification of missing or deceased persons, and
- (b) information from a DNA database of the participating jurisdiction is to be transmitted to the Commissioner of Police for the purposes of:
 - (i) the investigation of, or the conduct of proceedings for, an offence against the law of this State or the law of the participating jurisdiction, or
 - (ii) the identification of missing or deceased persons.
- (1A) Without limiting subsection (1), the Minister may enter into arrangements with a responsible authority of the Commonwealth under which information from the DNA database of this State (*this State's information*) is transmitted to that authority for the purpose of that authority:
 - (a) comparing the information so transmitted with information supplied to it from the DNA database of a participating jurisdiction (*the participating jurisdiction's information*), and
 - (b) identifying to the Commissioner of Police or to the responsible person for the DNA database of this State, and to that authority, any matches that are found as a result of the comparison, and
 - (c) transmitting this State's information with respect to those matches to that authority or to the responsible person (however described) for the DNA database of the participating jurisdiction, and
 - (d) transmitting the participating jurisdiction's information with respect to those matches to the Commissioner of Police or to the responsible person for the DNA database of this State.
- (1B) Such an arrangement may not authorise the comparison of information so as to match DNA profiles in a manner that would contravene section 93 were the information contained wholly within the DNA database of this State.

[103] Section 98 Interpreters

Omit "or offender" wherever occurring in section 98 (2) (a)–(e).

Insert instead " , offender or untested former offender".

[104] Section 98 (2) (a)–(e)

Omit "or 7" wherever occurring. Insert instead " , 7 or 7A".

[105] Section 99 Powers and entitlements of legal representatives and interview friends

Omit “if the investigating police officer concerned believes on reasonable grounds that the suspect or offender is” from section 99 (1) (c).

Insert instead “if the suspect or offender identifies as”.

[106] Section 100 Obligation of investigating police officers relating to recordings

Omit “if the investigating police officer believes on reasonable grounds that the suspect, offender or volunteer is” from section 100 (2) (c).

Insert instead “if the suspect, offender or volunteer identifies as”.

[107] Section 106 Proof of voluntary waiver of certain rights

Insert “a person who identifies as” after “prove that” in section 106 (a).

[108] Section 106 (a)

Omit “30 (4)”. Insert instead “15 (3), 30 (3)”.

[109] Section 112, heading

Omit the heading to the section. Insert instead:

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

[110] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Crimes (Forensic Procedures) Amendment Act 2006

[111] Schedule 2, Part 4

Insert after Part 3 of Schedule 2:

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

8 Definition

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

9 Application of Part 7A

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

10 Ministerial arrangements under section 97

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

11 Existing consents

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

Schedule 2 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002

(Section 4)

[1] Section 117 Certain times to be disregarded in calculating investigation period

Insert after section 117 (1) (m):

- (n) any time that is reasonably required to carry out a forensic procedure on the person under the *Crimes (Forensic Procedures) Act 2000*, or to prepare, make and dispose of an application for an order for the carrying out of such a procedure.

[2] Section 133 Power to take identification particulars

Insert after section 133 (2):

- (3) This section does not authorise a police officer to take from any person, or to require any person to provide, any sample of the person's hair, blood, urine, saliva or other body tissue or body fluid.
- (4) Subsection (3) does not affect a police officer's power to take any such sample, or to require the provision of any such sample, for the purposes of, and in accordance with the requirements of, any other Act or law.

Note. See, for example, the powers conferred by the *Crimes (Forensic Procedures) Act 2000*.