

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the Crimes (Forensic Procedures) Act 2000 (the Principal Act):

(a) to prohibit the carrying out of forensic procedures on a child who is under the age of 10 years, unless ordered by a Magistrate (or otherwise authorised under the Principal Act) and carried out in accordance with the Principal Act, and

(b) to require police to inform a volunteer (and, if relevant, the parent or guardian of a volunteer who is a child aged 10 years or more or an incapable person) that a forensic procedure may produce evidence that may be used in court, including evidence that may be used against the volunteer, as part of obtaining the informed consent of the volunteer or parent or guardian of the volunteer, and

(c) to make it clear that a Magistrate may, in certain circumstances, order that forensic material or information obtained from a volunteer may be retained if either the volunteer, or the parent or guardian of the volunteer, withdraws consent to the retention of that material or information, and

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(d) to provide that forensic material taken, by consent or by order of a Magistrate, from a suspect who is subsequently convicted of an offence must be destroyed if the suspect's conviction is set aside or quashed, unless there is a reasonable prospect of a retrial or rehearing, and

(e) to limit the use of the DNA profile of a volunteer who is a child aged 10 years or more or incapable person to the purpose for which the DNA profile was placed on the DNA database system and to provide that such a DNA profile must not be matched against any index on the DNA database system, unless otherwise ordered by a Magistrate, and

(f) to make other minor and consequential amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 amends the State Records Regulation 2005 to except proposed sections 81D (2) and 81M (3) from the operation of section 21 of the State Records Act 1998 so that the requirements to destroy the information specified in those proposed sections prevail over the requirements of that Act.

Schedule 1 Amendment of Crimes (Forensic Procedures) Act 2000 No 59

Destruction of forensic material

Schedule 1 [3] amends section 3 (5) of the Principal Act to make it clear that a person who is required to destroy forensic material must remove any information that relates any DNA profile derived from that material to a person whose DNA it describes from the DNA database system, as well as destroying the material itself.

Currently, section 87 of the Principal Act provides that if a forensic procedure is carried out on a person convicted of an offence and that conviction is quashed, the forensic material taken from that person should be destroyed as soon as practicable after the time limit for an appeal has elapsed. Schedule 1 [10] extends the application of that section to suspects who are subsequently convicted of an offence and provides that forensic material obtained from persons to whom that section applies should not be destroyed if there is a reasonable prospect of a retrial or rehearing. The proposed amendment also extends that section to both the quashing and setting aside of

convictions.

Carrying out of forensic procedures on volunteers

Section 77 of the Principal Act specifies those matters about which a police officer must inform a volunteer, or parent or guardian of a volunteer, in order for that volunteer, or parent or guardian, to give informed consent to the carrying out of a

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forensic procedure on a child or an incapable person. Schedule 1 [6] makes it clear that a police officer must inform a volunteer, or parent or guardian of a volunteer, that a forensic procedure carried out on the volunteer may produce evidence that may be used in a court of law, including evidence that may be used against the volunteer.

Section 81 of the Principal Act provides that a Magistrate may, in certain circumstances, order that forensic material or information obtained from carrying out a forensic procedure be retained if a volunteer withdraws consent to the retention of that material. Schedule 1 [7] makes it clear that section 81 of the Principal Act applies whether the withdrawal of consent is made by the volunteer or by a parent or guardian of a child or incapable person who is a volunteer. Schedule 1 [8] makes a consequential amendment.

Carrying out of forensic procedures on persons under 10 years of age

Currently, the Principal Act does not apply to persons under 10 years of age.

Schedule 1 [9] inserts proposed Part 8A into the Principal Act to prohibit the carrying out of forensic procedures within the meaning of the Act on persons under 10 years of age except in limited circumstances. Proposed section 81A inserts a definition of child for the purposes of proposed Part 8A, which means a person under 10 years of age.

Proposed section 81B provides that if the parent or guardian of a child is a suspect in the investigation of an offence in relation to which a forensic procedure is proposed to be carried out, a reference to the parent or guardian of a child in proposed Part 8A is to be read as a reference to firstly a parent or guardian of the child who is not a suspect in relation to the offence or, secondly, the closest available relative of the child. That relative must not be a suspect in relation to the offence under investigation, must be available at the relevant time and be at least 18 years of age.

Proposed section 81C authorises the carrying out of a forensic procedure for certain purposes on a child with the informed consent of the parent or guardian of the child or, if that consent cannot be obtained or is withdrawn, by order of a Magistrate under proposed section 81F. The purposes for which a forensic procedure may be carried out are those in relation to certain offences (for example, assault, kidnapping or robbery) of which the child is a victim and to eliminate the child's forensic material from other forensic material found at a crime scene.

Proposed section 81D makes it clear that if the parent or guardian of a child withdraws consent to the carrying out of a forensic procedure, the forensic procedure is to be treated as a forensic procedure for which consent has been refused and the forensic procedure is not to proceed except by order of a Magistrate under proposed section 81F.

Proposed section 81F provides that a Magistrate may order the carrying out of a forensic procedure on a child to investigate an offence, to assist in locating or identifying a missing person or to assist in identifying a deceased person. The Magistrate must take certain matters into consideration in determining whether to make the order. An authorised applicant may apply for such an order in accordance with proposed section 81E.

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Proposed sections 81A (4) and 81G–81L apply existing provisions in the Principal Act to a child on whom a forensic procedure is being carried out, including restrictions on who may carry out the forensic procedure, who may be present during the forensic procedure, the recording of the forensic procedure and the making of certain material and information available to the parent or guardian of the child. Proposed sections 81M and 81N restrict the use and retention of forensic material taken from a child under proposed Part 8A and any information obtained from the analysis of that material. A Magistrate’s order is required to retain such material or information if the parent or guardian of the child withdraws consent to the retention of that material or information. Schedule 1 [1], [2], [4], [5], [11]–[14] and [16]–[21] make amendments consequential on the insertion of proposed Part 8A. Schedule 1 [22] and [23] insert savings and transitional provisions consequent on the enactment of the proposed Act.

Use of DNA profiles of certain volunteers

Schedule 1 [15] inserts proposed section 93A into the Principal Act to limit the use of the DNA profile of a volunteer who is a child or incapable person to the purpose for which the DNA profile was placed on the DNA database system and to provide that such a DNA profile must not be matched against any index of the DNA database system, unless otherwise ordered by a Magistrate.