

## **Crimes (Forensic Procedures) Bill 2000**

### **Explanatory note**

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

#### Overview of Bill

The objects of this Bill are:

- (a) to lay down a regime for carrying out forensic procedures on persons suspected of having committed certain offences, persons convicted of serious indictable offences and persons who volunteer to undergo forensic procedures, and
- (b) to provide for the storage, use and destruction of material derived from those procedures, and
- (c) to make provision with respect to a national DNA database system containing information derived from the carrying out of such forensic procedures.

Parts 2–5 of the proposed Act provide for forensic procedures to be carried out on people who are suspects in relation to offences.

In different circumstances, forensic procedures (categorised as intimate forensic procedures, non-intimate forensic procedures and the taking of samples by buccal swab) may be carried out on suspects:

- (a) with the informed consent of the suspects, or
- (b) by order of a senior police officer, or
- (c) by order of a Magistrate.

While intimate samples and buccal swabs will be able to be taken only from persons suspected of indictable and summary offences prescribed by the regulations, non-intimate procedures will in general be able to be carried out on persons suspected of either indictable or summary offences.

If the carrying out of a forensic procedure is authorised under the proposed Act, it must be carried out in accordance with the rules and procedures set out in Part 6.

If a forensic procedure covered by the proposed Act is carried out without proper authority under the Act, evidence obtained through the procedure may be inadmissible in proceedings against the suspect (Part 9).

If a forensic procedure authorised by the proposed Act is not carried out as required by the Act (in particular Part 6), evidence obtained through the procedure may be inadmissible in proceedings against the suspect (Part 9).

The proposed Act also provides for the taking of blood and hair (other than pubic hair) samples, samples by buccal swabs and finger prints from people convicted of serious indictable offences who are serving sentences of imprisonment in correctional centres and other places of detention (Part 7) and for carrying out forensic procedures on volunteers and certain other persons (Part 8).

The proposed Act contains detailed provision in relation to a DNA database system containing information derived from the carrying out of forensic procedures (Part 11). It also provides for the reciprocal enforcement of orders for the carrying out of forensic procedures made in other jurisdictions and for exchange of information on the databases of other jurisdictions (Part 12).

The proposed Act contains a number of provisions that balance the rights of the suspect against the public interest in gathering evidence of offences. It includes safeguards to protect the rights and interests of suspects and other persons on whom forensic procedures are carried out, including safeguards to protect children, persons who are incapable and Aboriginal persons and Torres Strait Islanders.

#### Outline of provisions

### **Part 1 Preliminary**

Proposed Part 1 defines or explains key terms used in the proposed Act and provides for the citation and commencement of the Act.

**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** defines words and expressions used in the proposed Act. **Forensic procedure** is defined to mean an intimate forensic procedure, a non-intimate forensic procedure or the taking of a sample by buccal swab. The definition makes it clear that the proposed Act will not authorise intrusions into any body cavity except the mouth or the taking of a sample solely to establish the identity of the person from whom it is taken. The definition of **intimate forensic procedure** lists those procedures which are considered to be more intrusive than non-intimate forensic procedures and that, under the proposed Act, can only be carried out with informed consent or by order of a Magistrate or court. The definition of **non-intimate forensic procedure** lists those procedures which are considered to be less intrusive. The taking of a **sample by buccal swab** (that is, a swab taken from the cheek) is treated as a separate category as specific provision is made for this forensic procedure. Under the proposed Act, these procedures may only be carried out on an adult who is a suspect and who is not under arrest with informed consent or by order of a Magistrate and may only be carried out on a child or an incapable person by order of a Magistrate. However, a senior police officer may order a non-intimate forensic procedure to be carried out on an adult under arrest if satisfied of certain matters specified in clause 20. The taking of prints from arrested persons for identification purposes will continue to be governed by sections 353A and 353AA of the *Crimes Act 1900* and from convicted persons for identification purposes by section 63 of the *Crimes (Sentencing Procedure) Act 1999*.

Clause 3 (4) provides that a person only **informs** another of a matter required by the proposed Act if they inform the person, through an interpreter if necessary, in a language (including sign language or braille) in which the other person is able to communicate with reasonable fluency.

**Clause 4** sets out a list of persons who can act as **interview friends** of suspects and serious indictable offenders who are children, incapable persons or Aboriginal persons or Torres Strait Islanders. Various provisions of the proposed Act give suspects, offenders and volunteers from these groups a right to have an interview friend present.

## **Part 2 Authority and time limits for forensic procedures on suspects: summary of rules**

Proposed Part 2 sets out in general terms the circumstances in which forensic procedures may be carried out on different classes of suspect and the time limits which apply to the conduct of a forensic procedure in different circumstances.

**Clause 5** contains a table that gives a guide to the various circumstances in which forensic procedures may be carried out on a suspect under the proposed Act.

**Clause 6** contains a table that gives a general guide to the time limits which apply to the conduct of forensic procedures in different circumstances. All forensic procedures conducted under the proposed Act must be completed within a reasonable period but within the following upper limits:

- (a) consensual procedure on a suspect not under arrest—2 hours (excluding “time out” as defined in clause 3), and
- (b) procedure by consent or ordered by a senior police officer on a suspect under arrest—not later than 2 hours after the end of the existing “investigation period” time limit (a reasonable period of up to 4 hours (with provision for the extension of the period for up to an additional 8 hours in certain circumstances)) under section 356D of the *Crimes Act 1900* (excluding “time out”), and
- (c) procedure ordered by a Magistrate—4 hours (excluding “time out”) or 2 hours in the case of a child, an incapable person, an Aboriginal person or a Torres Strait Islander (excluding “time out”).

### **Part 3 Forensic procedures on suspect by consent**

Proposed Part 3 gives authority to carry out forensic procedures with consent and sets out the requirements that must be met before a suspect is viewed as having given consent to a forensic procedure. It also prescribes the time limit that applies to the conduct of a procedure by consent on a suspect not under arrest.

**Clause 7** authorises a person to carry out a forensic procedure on a suspect with the informed consent of the suspect provided the procedure is carried out in accordance with proposed Part 6 (which sets out the rules that must be followed in conducting a forensic procedure and for providing material arising from a procedure to a suspect). Clause 7 also makes it clear that any such forensic procedure must be carried out not later than 2 hours after the expiration of the investigation period provided for by section 356D of the *Crimes Act 1900* (excluding “time out”).

**Clause 8** makes it clear that a child or incapable person (whether or not under arrest) cannot consent to a forensic procedure.

**Clause 9** sets out the requirements for informed consent to be given by a suspect a police officer does not have reasonable grounds to believe is an Aboriginal person or a Torres Strait Islander. The suspect can only give consent after a police officer informs the suspect about the forensic procedure in accordance with clause 13 and gives the suspect a written statement setting out the information or nature of the information that the suspect must be given under that clause. It provides that a suspect must have an opportunity to consult with a legal practitioner of the suspect’s choice before consenting to undergo the procedure.

**Clause 10** sets out the requirements for informed consent to be given by a suspect a police officer has reasonable grounds to believe is an Aboriginal person or a Torres Strait Islander. Like clause 9, such a suspect gives informed consent if a police officer asks the suspect to consent and informs the suspect about the procedure in accordance with clause 13. Clause 10 lists a number of additional procedures which must be followed to provide safeguards for such persons.

**Clause 11** authorises a police officer to request a suspect to undergo a forensic procedure if the police officer has complied with clauses 9 and 10 and is satisfied of the matters specified in clause 12.

**Clause 12** requires a police officer to be satisfied as to specified things before requesting a suspect’s consent to undergo a forensic procedure. This is intended to prevent a police officer from requesting consent to unnecessary forensic procedures, procedures which may only marginally be related to the offence in question or to procedures designed as “fishing expeditions”. The police officer must be satisfied (among other things) that the request is justified in all the circumstances.

**Clause 13** sets out the matters that a police officer must inform a suspect about before consent is given. These include the purpose for which the forensic procedure is required, the offence in question and the way in which the procedure is to be carried out. The suspect must also be told that the procedure may produce evidence that might be used in a court of law, that the forensic procedure will be carried out only by an appropriately qualified police officer or person, that the suspect has a right to have a medical practitioner or dentist present for some procedures, that the suspect may refuse consent, and the consequences of refusal.

For example, the police officer must inform a suspect who is under arrest or charged with an indictable or summary offence prescribed by the regulations who refuses consent to the taking of a sample by buccal swab that the consequences of that refusal are that a senior police officer may order a sample of hair other than pubic hair to be taken or a court order may be sought for the taking of such a sample or for some other forensic procedure to be carried out on the suspect.

**Clause 14** describes the effect of a withdrawal of consent, whether express or implied.

**Clause 15** requires the giving of information to a suspect and the giving of consent to be recorded in writing or electronically. Clauses 100 and 101 require provision of copies of such information or opportunities to view or hear such recordings to be provided to the suspect, his

or her lawyer and, if applicable, his or her interview friend.

**Clause 16** imposes a time limit on the conduct of a forensic procedure on a suspect who is not under arrest. The procedure must be carried out as quickly as reasonably possible but in any case within 2 hours after the suspect presents himself or herself to the investigating police officer concerned. In working out this period of time, time outs can be disregarded (for example, the time during which the carrying out of the procedure is delayed to allow the suspect to communicate with a lawyer, friend, relative or medical practitioner and the time to convey the suspect to premises where the procedure can be carried out).

#### **Part 4 Non-intimate forensic procedures on suspects by order of senior police officer**

Proposed Part 4 gives authority to carry out a non-intimate forensic procedure without the consent of a suspect who has been requested to consent to the procedure if the carrying out of the procedure is ordered by a senior police officer.

**Clause 17** authorises a person to carry out a non-intimate forensic procedure on a suspect who has not consented to the carrying out of the procedure by order of a senior police officer provided the procedure is carried out in accordance with proposed Part 6. Clause 17 also makes it clear that any such forensic procedure must be carried out not later than 2 hours after the expiration of the investigation period provided for by section 356D of the *Crimes Act 1900* (excluding "time out").

**Clause 18** sets out the circumstances in which a senior police officer may order the carrying out of a non-intimate forensic procedure on a suspect under the proposed Part.

**Clause 19** sets out the circumstances in which a senior police officer may order the taking of a sample of hair other than pubic hair from a suspect who has refused consent to the taking of a sample by buccal swab.

**Clause 20** requires a senior police officer to be satisfied as to various matters before ordering the carrying out of a non-intimate forensic procedure under proposed Part 4. The police officer must be satisfied (among other things) that there are reasonable grounds for believing that the person on whom it is proposed to carry out the procedure is a suspect who has committed an offence and that the carrying out of the procedure without consent is justified in all the circumstances.

**Clause 21** requires a senior police officer who makes an order under the proposed Part to make a signed record of the order and the reasons for making it. A copy of the record is to be made available to the suspect as soon as practicable after it is made. It makes it clear that an order may be made in person or by telephone, radio, telex, facsimile or other means of transmission.

#### **Part 5 Forensic procedures by order of Magistrate**

Proposed Part 5 gives authority to carry out a forensic procedure on a suspect who has not consented to the carrying out of the procedure or cannot consent to it if the carrying out of the procedure is ordered by a Magistrate. It also provides for the making of orders in certain circumstances to repeat the carrying out of a forensic procedure.

##### **Division 1 General**

**Clause 22** authorises a person to carry out a forensic procedure on a suspect by order of a Magistrate where a suspect (whether or not under arrest) has not consented to the forensic procedure or cannot consent to the forensic procedure provided the procedure is carried out in accordance with proposed Part 6.

**Clause 23** sets out the circumstances in which a Magistrate may order the carrying out of a forensic procedure on a suspect under the proposed Part.

##### **Division 2 Final orders**

**Clause 24** provides for a Magistrate to order that a forensic procedure be carried out under the

proposed Part if the circumstances set out in clause 23 exist and the Magistrate is satisfied as required by clause 25.

**Clause 25** requires a Magistrate to be satisfied of various matters before ordering the carrying out of a forensic procedure on a suspect. The Magistrate must be satisfied (among other things) that the person on whom it is proposed to carry out the procedure is a suspect, that there are reasonable grounds to believe that the suspect has committed a relevant offence and that the carrying out of the procedure is justified in all the circumstances.

**Clause 26** provides that only a police officer in charge of a police station, a custody manager within the meaning of section 355 of the *Crimes Act 1900*, the investigating police officer in relation to an offence or the Director of Public Prosecutions may apply for an order under the proposed Part. It also sets out the requirements for the making of an application, including the requirement that (subject to any order of the Magistrate to the contrary) the application be made in the presence of the suspect concerned.

**Clause 27** provides for the making of orders in limited circumstances to authorise forensic procedures to be carried out for a second time (for example, if a sample obtained by the first procedure carried out is contaminated).

**Clause 28** provides for the issue of warrants to secure the attendance of a suspect who is under arrest at the hearing of an application for an order under the proposed Part.

**Clause 29** provides for the issue of summonses and warrants to secure the attendance of a suspect who is not under arrest at the hearing of an application for an order under the proposed Part. A summons may be issued only if a Magistrate is satisfied that the issue is necessary to ensure the attendance of the suspect or is otherwise justified. A warrant may be issued only if the Magistrate is satisfied that the issue is necessary to ensure the attendance of the suspect and that a summons would not ensure the appearance, that the suspect might destroy evidence that might be obtained from the carrying out of the procedure or that the issue is otherwise justified (for example, where it is feared the suspect may abscond).

**Clause 30** sets out the procedure to be followed in hearing an application for an order under the proposed Part. It ensures that (subject to any contrary order of a Magistrate) an application may be heard only in the presence of the suspect concerned. It provides for any suspect to be represented by a lawyer at the hearing and requires children and incapable persons to be represented by an interview friends. It also requires Aboriginal persons and Torres Strait Islanders to be represented by an interview friend unless this requirement is waived by the suspect concerned.

**Clause 31** sets out various actions a Magistrate who makes an order under the proposed Part must take, including giving reasons for an order and keeping a written record of the order.

### **Division 3      Interim orders**

**Clause 32** sets out the circumstances in which a Magistrate may make an urgent interim order authorising a forensic procedure which must be carried out without delay. An interim order operates as provided by the proposed Division until a final hearing is held under proposed Division 2 at which time the interim order is confirmed or disallowed.

**Clause 33** sets out the procedure for making an application for an interim order. An application may be made in person or, if that is not practicable, by telephone, radio, telex, facsimile or other means of transmission.

**Clause 34** sets out the procedure to be followed at the hearing of an application for an interim order. Provision is made to ensure that the suspect and the suspect's lawyer or interview friend (if any) are given the opportunity to oppose the application, either orally or by written communication.

**Clause 35** sets out various actions a Magistrate who makes an interim order must take, including informing the applicant of the terms of the order and the time at which a further hearing on the application will take place and the application finally determined and the interim order confirmed or disallowed.

**Clause 36** requires the applicant for an interim order, and the Magistrate to whom an application is made, to keep certain records relating to the grounds on which the order was

sought and the terms of any order made. The applicant must ensure that copies of those records are made available to the suspect concerned.

**Clause 37** permits a police officer, while an application for an interim order is being determined, to use reasonable force to prevent a suspect from destroying or contaminating any evidence that might be obtained by carrying out a forensic procedure if the order is made.

**Clause 38** prohibits analysis of a sample taken under an interim order unless a final order is made or the sample is likely to perish before a final order is made. It also makes it an offence for a person who conducts an analysis to disclose the results to any person other than the suspect before a final order is made or if the interim order is disallowed.

#### **Division 4 Time limits for forensic procedures ordered by Magistrate**

The proposed Division imposes time limits on the carrying out of forensic procedures that have been ordered by a Magistrate.

**Clause 39** provides for the proposed Division to apply to forensic procedures on suspects ordered by Magistrates.

**Clause 40** applies the same time limits for carrying out a forensic procedure on a suspect who is not under arrest by order of a Magistrate as apply to a procedure carried out on a suspect not in custody with informed consent under clause 16.

**Clause 41** provides for the issue of warrants for the arrest of suspects who are not under arrest for the purpose of carrying out a forensic procedure. A warrant may be issued only if a Magistrate is satisfied that the arrest is necessary to ensure the procedure can be carried out or is otherwise justified.

**Clause 42** sets out the time limits within which a forensic procedure is to be carried out on a suspect who is under arrest by order of a Magistrate. The suspect may be detained for as long as is reasonably necessary to allow the forensic procedure to be carried out but the forensic procedure must be carried out not later than 2 hours after the end of the investigation period permitted by section 356D of the *Crimes Act 1900* (excluding "time out").

#### **Division 5 Reports of proceedings under Act**

**Clause 43** creates an offence of intentionally or recklessly publishing the name of a suspect or any information likely to enable the identification of the suspect in a report of a proceeding under the proposed Act unless the suspect has been charged or a Magistrate has by order authorised the publication.

### **Part 6 Carrying out forensic procedures on suspects**

Proposed Part 6 sets out the rules that must be followed in conducting a forensic procedure on a suspect and in providing material arising from a procedure to a suspect. The rules are applied to the conduct of forensic procedures on serious indictable offenders and volunteers by clauses 65 and 76 (4).

#### **Division 1 General**

**Clause 44** lays down a series of general principles in relation to the way a forensic procedure is to be carried out. It provides for the procedure to be carried out in circumstances affording reasonable privacy to the suspect, out of the presence or view of unnecessary persons (including persons of the opposite sex who could be replaced by persons of the suspect's sex) and with minimal removal of clothing and visual inspection of the suspect.

**Clause 45** requires questioning of a suspect to be suspended while a forensic procedure is being carried out.

**Clause 46** requires a police officer to caution a suspect before a forensic procedure is carried out. Failure to comply with this provision may render any admissions made by the suspect inadmissible as evidence.

**Clause 47** authorises police officers and other persons authorised to carry out forensic procedures to use reasonable force to enable a forensic procedure to be carried out or to

prevent the loss, destruction or contamination of any sample. However, the procedure must be carried out in a manner consistent with appropriate medical or other relevant professional standards.

**Clause 48** makes it clear that nothing in the proposed Act authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner.

**Clause 49** regulates the taking of a sample of hair.

#### **Division 2      Persons involved in forensic procedures**

**Clause 50** contains a table which lists the persons who are authorised under the proposed Act to carry out each forensic procedure. The table also indicates whether a suspect is entitled to request that a medical practitioner or dentist of his or her choice be present while the forensic procedure is carried out.

#### **Division 3      Further provisions about who may carry out forensic procedures**

**Clause 51** requires certain forensic procedures to be carried out, if practicable, by a person of the same sex as the suspect and for any person assisting in the carrying out of the procedure to also, if practicable, be of the same sex as the suspect.

**Clause 52** provides authority for persons to assist persons authorised to carry out forensic procedures under the proposed Part to carry out the procedures.

#### **Division 4      Presence of other people while forensic procedure is carried out**

**Clause 53** entitles a suspect to request the presence of a medical practitioner or dentist of his or her choice while certain forensic procedures are carried out. The chosen person is to be present unless he or she is unable or does not wish to attend or cannot be contacted within the time specified in the clause.

**Clause 54** requires either the suspect's interview friend or lawyer to be present when a forensic procedure is carried out on a suspect who is a child or incapable person. The interview friend may be excluded if he or she unreasonably interferes with or obstructs the carrying out of the procedure.

**Clause 55** requires either the suspect's interview friend or lawyer to be present when a forensic procedure is carried out on a suspect who the investigating police officer has reason to suspect is an Aboriginal person or Torres Strait Islander except in the circumstances specified in the clause. The interview friend may be excluded if he or she unreasonably interferes with or obstructs the carrying out of the procedure.

**Clause 56** limits the number of police officers who may be present while a forensic procedure is carried out on a suspect to those reasonably necessary to ensure that the procedure is carried out effectively and in accordance with the proposed Act. It also requires any such police officer to be of the same sex as the suspect, if this is practicable.

#### **Division 5      Recording of forensic procedure**

**Clause 57** requires the carrying out of a forensic procedure (other than the taking of a hand print, finger print, foot print or toe print) on a suspect to be electronically recorded where practicable and unless the suspect objects. The suspect may choose to have the procedure instead conducted in the presence of an independent person (other than a police officer).

#### **Division 6      Procedure after forensic procedure is carried out**

**Clause 58** requires a suspect to be given a part of a sample taken from the suspect that is sufficient for analysis if there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect. The provision is limited in this way because in many cases insufficient material may be available, for example, where a flake of paint has been removed from under a suspect's fingernail or where a small blood stain is all that is found and these samples are entirely used in the process of analysis.

**Clause 59** requires a copy of any photograph taken of a part of a suspect's body during a forensic procedure to be made available to the suspect.

**Clause 60** requires a copy of the results of any analysis of material taken from a sample from a suspect to be given to the suspect.

#### **Part 7 Carrying out of certain forensic procedures after conviction of serious indictable offenders**

Proposed Part 7 provides for the taking of samples of blood, samples of hair other than pubic hair, samples by buccal swabs and finger prints from persons who are serving sentences of imprisonment for serious indictable offences in correctional centres or other places of detention.

**Clause 61** sets out the forensic procedures to which the proposed Part applies.

**Clause 62** authorises the taking of samples of hair (other than pubic hair) and finger prints from serious indictable offenders with the informed consent of the offenders or by order of a police officer.

**Clause 63** authorises the taking of a sample of blood from a serious indictable offender with the informed consent of the offender or by court order.

**Clause 64** authorises the taking of samples by buccal swab from serious indictable offenders. If an offender refuses consent to the taking of a sample by buccal swab, a senior police officer may order a sample of hair other than pubic hair to be taken instead (see clause 70) or a court order may be sought for the taking of the sample by buccal swab or the carrying out of some other forensic procedure.

**Clause 65** applies the rules set out in proposed Part 6 that must be followed in conducting a forensic procedure and in providing material arising from a procedure on a suspect to the conduct of forensic procedures on serious indictable offenders and provision of material under proposed Part 7.

**Clause 66** describes the scope of the proposed Part. It makes it clear, for example, that the proposed Part does not authorise the carrying out of a forensic procedure on a serious indictable offender who is a suspect otherwise than in accordance with proposed Parts 2–5.

**Clause 67** sets out the requirements for informed consent to be given by an offender.

**Clause 68** authorises a police officer to request a serious indictable offender (other than a child or an incapable person) to undergo a forensic procedure.

**Clause 69** sets out the matters that a police officer must inform a serious indictable offender about before consent is given.

**Clause 70** sets out the circumstances in which a police officer may order the taking of a sample of hair other than pubic hair or the taking of finger prints of a serious indictable offender without the consent of the offender.

**Clause 71** requires the police officer to take into account whether the proposed Act would authorise the forensic procedure to be carried out in the absence of the order.

**Clause 72** provides for the signing and witnessing of forms of consent.

**Clause 73** requires a police officer who makes an order under the proposed Part to make a signed record of the order and the reasons for making it. A copy of the order is to be made available to the offender as soon as practicable after it is made.

**Clause 74** authorises a police officer to apply to a court for an order for the taking of a blood sample or a buccal swab from a serious indictable offender.

**Clause 75** provides for the carrying out of forensic procedures by court order at a correctional centre or other place of detention.

#### **Part 8 Carrying out of forensic procedures on volunteers and certain other persons**

Proposed Part 8 gives authority to carry out forensic procedures on persons who have volunteered to undergo a forensic procedure.

**Clause 76** authorises a person to carry out a forensic procedure on a volunteer (other than a child or an incapable person) with the informed consent of the volunteer and on a child or an incapable person with the informed consent of the parent or guardian of the volunteer or by order of a Magistrate.



**Clause 77** sets out the requirements for informed consent to be given by a volunteer or the parent or guardian of a volunteer.

**Clause 78** provides for the signing and witnessing of forms of consent under the proposed Part.

**Clause 79** describes the effect of a withdrawal of consent, whether express or implied.

**Clause 80** sets out the circumstance in which a Magistrate may order the carrying out of a forensic procedure on a child or an incapable person under the proposed Part.

**Clause 81** sets out the circumstance in which a Magistrate may order that forensic material obtained from carrying out a forensic procedure on a volunteer who withdraws consent to the carrying out of the procedure may be retained.

## **Part 9 Admissibility of evidence**

Proposed Part 9 makes evidence obtained from carrying out forensic procedures inadmissible in certain circumstances.

### **Division 1 Forensic evidence**

**Clause 82** provides for evidence to be inadmissible if it is obtained in breach of, or if there has been a failure to comply with, the provisions of the proposed Act unless the person does not object to its admission or the court, after considering a number of listed matters (including a mistaken but reasonable belief about the age of a child), rules that admission is justified despite the breach or failure. If a court admits such evidence, the judge is required to inform the jury of the breach or failure to comply and to give appropriate warnings about the evidence.

**Clause 83** provides for evidence related to forensic material taken from a person that should have been destroyed under the proposed Act to be inadmissible unless adduced by the person.

### **Division 2 Other evidence**

**Clause 84** makes evidence of a person's refusal to consent to the carrying out of a forensic procedure, or withdrawal of consent, inadmissible in proceedings against the person except to establish or rebut an allegation that a police officer or other person investigating the commission of the offence concerned acted contrary to law in carrying out the investigation.

**Clause 85** allows evidence of how a forensic procedure was carried out to be admitted against a suspect in a court of law for certain purposes (for example, to establish or rebut an allegation of unreasonable force used during the procedure) even if it was obtained in breach of, or where there was a failure to comply with, proposed Part 6.

## **Part 10 Destruction of forensic material**

Proposed Part 10 requires forensic material to be destroyed in certain circumstances.

**Clause 86** requires any forensic material obtained from a forensic procedure carried out under an interim order that is disallowed to be destroyed and for a copy of the results of any analysis of the material to be made available to the suspect.

**Clause 87** provides for the destruction of forensic material obtained from an offender whose conviction is quashed.

**Clause 88** provides for the destruction of forensic material taken from a suspect by a forensic procedure carried out under the proposed Act in specified circumstances. It ensures that in general material is not retained where a suspect is not found guilty of an offence or where proceedings are not instituted against the suspect within 12 months.

**Clause 89** requires the Commissioner of Police to ensure certain forensic material is destroyed.

## **Part 11 DNA database system**

Proposed Part 11 regulates the recording, retention and use of information obtained from the carrying out of forensic procedures on a DNA database system.

**Clause 90** defines words and expressions used in the proposed Act, including a definition of

the **DNA database system** and definitions of the various indexes of DNA profiles that may be contained in the system.

**Clause 91** creates offences relating to the intentional or reckless supply of forensic material for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system when the forensic material is required by law to be destroyed and the supply of certain forensic material for analysis.

**Clause 92** creates an offence of accessing information stored on the DNA database system otherwise than in accordance with the clause.

**Clause 93** creates an offence of matching certain profiles on the DNA database system for impermissible purposes. For example, if a volunteer has agreed to the placing of a DNA profile of the volunteer on the system only for certain purposes, it will be an offence to match the profile with another DNA profile on the system for some other purpose.

**Clause 94** creates offences relating to the recording or retention of identifying information about a person on the DNA database system.

## **Part 12 Interstate enforcement**

Proposed Part 12 provides for the reciprocal enforcement of orders for the carrying out of forensic procedures made in other jurisdictions and for the exchange of information on the DNA databases of other jurisdictions.

**Clause 95** defines words and expressions for the purposes of the proposed Part.

**Clause 96** enables the Minister to enter into arrangements within other jurisdictions for the establishment and maintenance of a register of orders for the carrying out of forensic procedures and for the reciprocal enforcement of the orders.

**Clause 97** enables the Minister to enter into arrangements within other jurisdictions for the exchange of information on the DNA database system for the purposes of the investigation of, and proceedings in respect of, offences.

## **Part 13 General provisions relating to operation of this Act**

Proposed Part 13 contains various provisions relating to the manner of complying with requirements of the proposed Act, the burden of proof of various matters, the duties and liabilities of persons carrying out, or assisting in the carrying out of, forensic procedures authorised by the proposed Act and the use and disclosure of information obtained from forensic material taken under the proposed Act.

**Clause 98** requires a police officer to arrange for the presence of an interpreter before taking specified action in respect of a suspect or offender if he or she has reasonable grounds to believe the suspect or offender is unable to communicate with reasonable fluency in the English language.

**Clause 99** enables a lawyer or interview friend of a suspect or offender to make any request or objection that may be made by the suspect or offender under the proposed Act on behalf of the suspect or offender. It also requires a suspect's or offender's lawyer or interview friend who is present when information that is required to be given to a suspect or offender is given to the suspect or offender to also be given the information.

**Clause 100** ensures that a suspect, offender or volunteer is given copies or transcripts of, or the opportunity to view, any audio or video recordings concerning the suspect, offender or volunteer that are made as required by the proposed Act. It ensures that the opportunity to view is also given to the suspect's, offender's or volunteer's lawyer and interview friend (if any).

**Clause 101** sets out the ways of making material available to a suspect, offender or volunteer.

**Clause 102** ensures that a suspect is not charged for materials received or for being given an opportunity to view a video in accordance with the requirements of the proposed Act.

**Clause 103** places the burden of proof on the prosecution of proving, on the balance of probabilities, that a police officer had a belief on reasonable grounds, or suspected on reasonable grounds, as to a matter referred to in the proposed Act.

**Clause 104** places the burden of proof on the prosecution of proving, on the balance of probabilities, that it was not practicable to do something required by the proposed Act to be done if practicable.

**Clause 105** places the burden of proof on the prosecution, on the balance of probabilities, of showing that any time said to be disregarded under clause 16 (2), 40 (2) or 53 (2) was properly disregarded. For example, if a suspect argued that results of a forensic procedure should be excluded from evidence because he or she was detained for longer than allowed under the proposed Act, the prosecution would need to prove that any time disregarded by police officers was properly disregarded.

**Clause 106** places the burden of proof on the prosecution, on the balance of probabilities, of voluntary waiver of certain rights by an Aboriginal person or a Torres Strait Islander.

**Clause 107** protects a person who carries out a forensic procedure, or assists in carrying it out, from civil or criminal liability for actions properly or necessarily done in good faith so long as the person believed informed consent had been given or that the procedure had been duly ordered.

**Clause 108** makes it clear that the proposed Act does not require any medical practitioner, nurse, dentist, dental technician or other appropriately qualified police officer or person to carry out a forensic procedure.

**Clause 109** makes it an offence for a person who has access to information stored on the DNA database system or revealed by a forensic procedure carried out on a suspect, offender or volunteer to disclose that information except in certain circumstances specified in the clause.

**Clause 110** provides for the retention of electronic recordings required for investigative or evidentiary purposes.

#### **Part 14 Operation of this Act and effect on other laws**

Proposed Part 14 contains provisions relating to the operation of the proposed Act and its relationship to other laws.

**Clause 111** makes it clear that the proposed Act does not authorise the carrying out of a forensic procedure on a person who is under 10 years of age.

**Clause 112** confirms that the proposed Act does not apply to the taking of photographs, hand prints, finger prints, foot prints or toe prints under sections 353A and 353AA of the *Crimes Act 1900* and section 63 of the *Crimes (Sentencing Procedure) Act 1999*.

**Clause 113** ensures that the provisions and protections of Part 10A of the *Crimes Act 1900* concerning the detention of persons after arrest (such as limits on the length of time a suspect can be held under arrest) continue to apply as far as possible. As many of the rights and protections provided under the proposed Act overlap with those provided by Part 10A, the clause also confirms that the rights and protections conferred by the proposed Act are in addition to those conferred by Part 10A.

**Clause 114** makes it clear that the proposed Act does not limit or exclude the operation of various other laws of the State relating to matters described in the clause.

**Clause 115** ensures that the proposed Act does not affect the taking, retention or use of forensic material or information obtained from forensic material in accordance with certain other laws.

#### **Part 15 Miscellaneous**

Proposed Part 15 contains miscellaneous provisions.

**Clause 116** provides for the establishment and maintenance of a list of persons who are suitable, and willing, to be interview friends of Aboriginal persons or Torres Strait Islanders.

**Clause 117** provides for proceedings for an offence against the proposed Act and regulations.

**Clause 118** enables the Governor to make regulations for the purposes of the proposed Act.

**Clause 119** is a formal provision giving effect to the amendments to the *Crimes Act 1900* and *Justices Act 1902* set out in proposed Schedule 1.

**Clause 120** is a formal provision giving effect to the savings, transitional and other provisions

set out in proposed Schedule 2.

**Clause 121** provides for the Ombudsman to monitor for a period of 18 months the exercise of police powers conferred by the proposed Act.

**Clause 122** provides for the review of the proposed Act at the end of 18 months after its date of assent, and for a tabling in Parliament of a report on the results of the review. The report will contain a report from the Ombudsman under clause 121 on the work and activities of the Ombudsman under that clause.

**Schedule 1** amends the *Justices Act 1902* to provide for the making of appeals on questions of law from certain decisions of Magistrates under the proposed Act. It also makes consequential amendments to the *Crimes Act 1900* to omit section 353A (3A) and (3B) (which relate to the taking of samples of blood, saliva and hair from persons in lawful custody).

**Schedule 2** contains a provision enabling the regulations under the proposed Act to contain provisions of a savings or transitional nature (clause 1) and makes it clear that the Act does not apply to the carrying out of forensic procedures on persons arrested for an offence, charged with an offence or summonsed to appear before a court before the commencement of proposed clause 2 of the Schedule.