



# **Crimes Amendment (Forensic Procedures) Act 1998**

**No. 96, 1998**





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**An Act to amend the *Crimes Act 1914*, and for related purposes**



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# Crimes Amendment (Forensic Procedures) Act 1998

No. 96, 1998

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## An Act to amend the *Crimes Act 1914*, and for related purposes

[Assented to 23 July 1998]

The Parliament of Australia enacts:

### 1 Short title

This Act may be cited as the *Crimes Amendment (Forensic Procedures) Act 1998*.

### 2 Commencement

- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

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- (2) Item 12 of Schedule 2 is taken to have commenced immediately after the commencement of the *Crimes Amendment Act 1995*.
  - (3) Subject to subsection (4), Schedules 1 and 3, and the remaining items of Schedule 2, commence on a day to be fixed by Proclamation.
  - (4) If the provisions specified in subsection (3) have not commenced under that subsection within the period of 6 months beginning on the day on which this Act receives the Royal Assent, those provisions commence on the first day after the end of that period.

### **3 Schedule(s)**

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.



## **Schedule 1—Amendment of the Crimes Act 1914 relating to forensic procedures**

### **1 After Part 1C**

Insert:

### **Part 1D—Forensic procedures**

#### **Simplified outline of operation of Part**

This Part provides for forensic procedures to be carried out on people who are suspects in relation to indictable offences.

In different circumstances, forensic procedures may be carried out on suspects:

- with the informed consent of the suspect; or
- by order of a senior constable; or
- by order of a magistrate.

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

If a forensic procedure covered by this Part is carried out without proper authority under this Part, evidence obtained through the procedure may be inadmissible in proceedings against the suspect (Division 7).

If a forensic procedure authorised by this Part is not carried out as required by this Part (in particular Division 6), evidence obtained through the procedure may be inadmissible in proceedings against the suspect (Division 7).

Division 11 provides for the taking of blood samples from people convicted of serious offences.

## Division 1—Explanation of expressions used

### 23WA Definitions

(1) In this Part:

*Aboriginal legal aid organisation* has the same meaning as the expression has in Part 1C.

*adult* means a person of or above 18 years of age.

*appropriately qualified*, in relation to carrying out a forensic procedure, means:

- (a) having suitable professional qualifications or experience to carry out the forensic procedure; or
- (b) qualified under the regulations to carry out the forensic procedure.

*authorised applicant* for an order for the carrying out of a forensic procedure on a suspect means:

- (a) the constable in charge of a police station; or
- (b) the investigating constable in relation to a relevant offence.

*child* means a person who is at least 10 years of age but under 18 years of age.

*forensic material* means:

- (a) samples; or
- (b) hand prints, finger prints, foot prints or toe prints; or
- (c) photographs; or
- (d) casts or impressions;

taken from or of a person's body by a forensic procedure.

*forensic procedure* means:

- (a) an intimate forensic procedure; or
- (b) a non-intimate forensic procedure;

but does not include any intrusion into a person's body cavities except the mouth.

*incapable person* means an adult who:

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

*in custody* is explained in subsection (2).

*indictable offence* means an indictable offence against a law of the Commonwealth.

*inform* is explained in subsection (4).

*informed consent* is explained in section 23WF.

*interview friend* is explained in section 23WB.

*intimate forensic procedure* means the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks or, in the case of a female, the breasts;
- (b) the taking of a sample of blood;
- (c) the taking of a sample of saliva, or a sample by buccal swab;
- (d) the taking of a sample of pubic hair;
- (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks or, in the case of a female, the breasts;
- (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks or, in the case of a female, the breasts;
- (g) the taking of a dental impression;
- (h) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks or, in the case of a female, the breasts.

*investigating constable* means the constable in charge of the investigation of the commission of a relevant offence.

*legal representative* of a suspect means a legal practitioner acting for the suspect.

*non-intimate forensic procedure* means the following forensic procedures:

- (a) an examination of a part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts, that requires touching of the body or removal of clothing;
- (b) the taking of a sample of hair other than pubic hair;
- (c) the taking of a sample from a nail or under a nail;
- (d) the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts;
- (e) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts;
- (f) the taking of a hand print, finger print, foot print or toe print;
- (g) the taking of a photograph of, or an impression or cast of a wound from, a part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts.

**offence** does not include an offence against a law of the Australian Capital Territory or any other Territory.

**order** means order of a magistrate under section 23WS or interim order of a magistrate under section 23XA.

**parent** of a child includes a person who:

- (a) is legally entitled to, and who has, custody of the child; or
- (b) is legally responsible for the day-to-day care, welfare and development of the child and has the child in his or her care.

**police station** includes:

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

**relevant offence**, in relation to a person who is a suspect, means:

- (a) the indictable offence in relation to which the person is a suspect; or
- (b) any other indictable offence arising out of the same circumstances; or
- (c) any other indictable offence in respect of which the evidence likely to be obtained as a result of a proposed forensic procedure carried out on the suspect is likely to have probative value.

**sample** has a meaning affected by subsection (3).

**senior constable** means a constable of the rank of sergeant or higher.

**suspect**, in relation to an indictable offence, means:

- (a) a person whom a constable suspects on reasonable grounds has committed the indictable offence; or
- (b) a person charged with the indictable offence; or
- (c) a person who has been summonsed to appear before a court in relation to the indictable offence.

**tape recording** includes audio recording and video recording.

- (2) In this Part, a person is **in custody** if he or she is in the lawful custody of a constable.
- (3) In this Part, a **sample** taken from a person includes a sample taken from the person that consists of matter from another person's body.
- (4) In this Part, a person **informs** another person of a matter if the person informs the other person of the matter, 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.

### **23WB Interview friends**

- (1) This section lists the people who may act as an **interview friend** of a suspect for the purposes of a provision of this Part referring to an interview friend. Different people may act as interview friends of a suspect for the purposes of different provisions of this Part.
- (2) Where the suspect is a child or an incapable person, the following people may act as **interview friends**:
  - (a) a parent, guardian or other person chosen by, or acceptable to, the suspect;
  - (b) a legal practitioner acting for the suspect;
  - (c) if the suspect is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available—a representative of an Aboriginal legal aid

organisation or a person whose name is on the relevant list maintained under subsection 23J(1) who is chosen by, or acceptable to, the suspect;

- (d) if there is no available person who is covered by paragraph (a), (b) or (c)—an independent person who is not a constable.
- (3) Where the suspect is an Aboriginal person or a Torres Strait Islander not covered by subsection (2), the following people may act as *interview friends*:
- (a) a relative or other person chosen by the suspect;
  - (b) a legal practitioner acting for the suspect;
  - (c) if there is no available person who is covered by paragraph (a) or (b)—a representative of an Aboriginal legal aid organisation, or a person whose name is included in the relevant list maintained under subsection 23J(1).
- (4) A suspect who has a legal representative may also have an interview friend who is not the suspect's legal representative.

## **Division 2—Authority and time limits for forensic procedures: summary of rules**

### **23WC How forensic procedures may be authorised in different circumstances**

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

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**Authority for forensic procedures**

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<b>Suspect</b>	<b>Intimate forensic procedure</b>	<b>Non-intimate forensic procedure</b>
<b>1</b> adult not in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a magistrate under Division 5
<b>2</b> adult in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a senior constable under Division 4 by order of a magistrate under Division 5
<b>3</b> incapable person (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5
<b>4</b> child at least 10 but under 18 (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5

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**23WCA Time limits for carrying out forensic procedures**

The following table sets out in general terms the time limits that apply to the carrying out of a forensic procedure depending on the status of the suspect and the source of the authority to carry out the procedure.

**Schedule 1** Amendment of the Crimes Act 1914 relating to forensic procedures

<b>Time limits for forensic procedures</b>			
<b>Suspect's status</b>	<b>Procedure with suspect's consent (Division 3)</b>	<b>Procedure by order of a constable (Division 4)</b>	<b>Procedure by order of a magistrate (Division 5)</b>
<b>1</b> Child or incapable person not in custody	Not applicable	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23XGB(2) (see section 23XGB).
<b>2</b> Aboriginal person or Torres Strait Islander (not a child or incapable person) not in custody	Procedure must be carried out within 2 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23WLA(2) (see section 23WLA).	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23XGB(2) (see section 23XGB).
<b>3</b> Suspect (not covered by item 1 or 2) not in custody	Procedure must be carried out within 4 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23WLA(2) (see section 23WLA).	Not applicable	Procedure must be carried out within 4 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23XGB(2) (see section 23XGB).



<b>Time limits for forensic procedures</b>			
<b>Suspect's status</b>	<b>Procedure with suspect's consent (Division 3)</b>	<b>Procedure by order of a constable (Division 4)</b>	<b>Procedure by order of a magistrate (Division 5)</b>
<b>4</b> Child or incapable person in custody	Not applicable	Not applicable	In addition to the detention period permitted under Part 1C, suspect may be detained for up to 2 hours after magistrate's order or suspect's arrest, disregarding "dead time" described in subsection 23XGD(2) (see Subdivision D of Division 5).
<b>5</b> Aboriginal person or Torres Strait Islander (not a child or incapable person) in custody	Suspect may be detained in accordance with Part 1C, but the detention period permitted by Part 1C is not extended in connection with carrying out the procedure (see subsections 23WD(3) and (4)).	Suspect may be detained in accordance with Part 1C, but the detention period permitted by Part 1C is not extended in connection with carrying out the procedure (see subsections 23WM(3) and (4)).	In addition to the detention period permitted under Part 1C, suspect may be detained for up to 2 hours after magistrate's order or suspect's arrest, disregarding "dead time" described in subsection 23XGD(2) (see Subdivision D of Division 5).

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**Time limits for forensic procedures**

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<b>Suspect's status</b>	<b>Procedure with suspect's consent (Division 3)</b>	<b>Procedure by order of a constable (Division 4)</b>	<b>Procedure by order of a magistrate (Division 5)</b>
<b>6</b> Suspect (not covered by item 4 or 5) in custody	Suspect may be detained in accordance with Part 1C, but the detention period permitted by Part 1C is not extended in connection with carrying out the procedure (see subsections 23WD(3) and (4)).	Suspect may be detained in accordance with Part 1C, but the detention period permitted by Part 1C is not extended in connection with carrying out the procedure (see subsections 23WM(3) and (4)).	In addition to the detention period permitted under Part 1C, suspect may be detained for up to 4 hours after magistrate's order or suspect's arrest, disregarding "dead time" described in subsection 23XGD(2) (see Subdivision D of Division 5).

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**Division 3—Forensic procedures by consent**

**23WD Forensic procedure may be carried out with informed consent of suspect**

- (1) A person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who is:
  - (a) a child; or
  - (b) an incapable person.
- (3) This Division does not authorise keeping a suspect in custody, in order to carry out a forensic procedure, after the expiration of the investigation period provided for by Part 1C.

Note: If it is necessary to keep a suspect in custody after the expiration of the Part 1C investigation period in order to carry out a forensic procedure, an order of a magistrate under Division 5 will have to be obtained to authorise this.

- (4) Nothing in this Part or Part 1C prevents the carrying out of a forensic procedure, with the informed consent of the suspect, during the investigation period provided for by Part 1C. However, neither carrying out the forensic procedure, nor any delay associated with carrying out the forensic procedure, operates to extend the investigation period provided for by Part 1C.

Note: By contrast, the carrying out of a forensic procedure in accordance with a magistrate's order under Division 5, and associated delays, may delay the expiration of the investigation period provided for by Part 1C (see subsection 23C(7)).

### **23WE People who cannot consent to forensic procedures**

- (1) A child cannot consent to a forensic procedure.
- (2) An incapable person cannot consent to a forensic procedure.

### **23WF Informed consent to forensic procedures—general**

- (1) This section applies where:
- (a) a constable intends to ask a suspect to consent to a forensic procedure; and
  - (b) the constable does not believe on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander.
- (2) A suspect not covered by section 23WE gives informed consent to a forensic procedure if the suspect consents after a constable:
- (a) asks the suspect to consent to the forensic procedure under section 23WH; and
  - (b) gives the suspect a written statement setting out:
    - (i) the information that the suspect must be given under paragraphs 23WJ(1)(a), (e), (f), (g), (h), (i) and (j); and
    - (ii) the nature of the information that the suspect must be given under paragraphs 23WJ(1)(b), (c) and (d) (but not the specific information that the suspect is to be given under these paragraphs in relation to the particular forensic procedure); and
  - (c) informs the suspect about the forensic procedure in accordance with section 23WJ; and
  - (d) gives the suspect a reasonable opportunity to communicate, or attempt to communicate, with a legal practitioner of the

suspect's choice and, subject to subsection (3), to do so in private.

- (3) If the suspect is in custody, the constable need not allow the suspect to communicate, or attempt to communicate, with the legal practitioner in private if the constable suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

**23WG Informed consent to forensic procedures—Aboriginal persons and Torres Strait Islanders**

- (1) This section applies where:
- (a) a constable intends to ask a suspect to consent to a forensic procedure; and
  - (b) the constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander.
- (2) A suspect not covered by section 23WE gives informed consent to a forensic procedure if the suspect consents after a constable:
- (a) asks the suspect to consent to the forensic procedure under section 23WH; and
  - (b) informs the suspect about the forensic procedure in accordance with section 23WJ; and
  - (c) complies with the rest of this section.
- (3) The constable must not ask the suspect to consent to the forensic procedure unless:
- (a) an interview friend is present; or
  - (b) the suspect has expressly and voluntarily waived his or her right to have an interview friend present; or
  - (c) the constable is a senior constable and he or she believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in relation to the request to consent by comparison with members of the Australian community generally.

Note: Section 23YK relates to proving a waiver under paragraph (3)(b) of this section.

- (4) Before asking the suspect to consent to a forensic procedure, the constable must:
  - (a) inform the suspect that a representative of an Aboriginal legal aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure; and
  - (b) notify such a representative accordingly.
- (5) The constable is not required to comply with subsection (4) if:
  - (a) he or she is aware that the suspect has arranged for a legal practitioner to be present while the suspect is asked to consent to the forensic procedure; or
  - (b) paragraph (3)(b) or (c) applies.
- (6) After asking a suspect covered by paragraph (3)(b) or (c) to consent to a forensic procedure, the constable must give the suspect a reasonable opportunity to communicate, or attempt to communicate, with a legal practitioner of the suspect's choice and, subject to subsection (8), to do so in private.
- (7) After asking a suspect not covered by paragraph (3)(b) or (c) to consent to a forensic procedure, the constable must allow the suspect to communicate with the interview friend (if any), and with the suspect's legal representative (if any), and, subject to subsection (8), to do so in private.
- (8) If a suspect covered by subsection (6) or (7) is in custody, the constable need not allow the suspect to communicate, or attempt to communicate, with a legal practitioner, or the suspect's interview friend or legal representative, in private if the constable suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.
- (9) An interview friend (other than a legal representative) of the suspect may be excluded from the presence of the constable and the suspect if the interview friend unreasonably interferes with or obstructs the constable in asking the suspect to consent to the forensic procedure, or in informing the suspect as required by section 23WJ.

**23WH Constable may request suspect to consent to forensic procedure**

A constable may ask a suspect to undergo a forensic procedure if the constable is satisfied as required by section 23WI.

**23WI Matters to be considered by constable before requesting consent to forensic procedure**

- (1) The constable must be satisfied on the balance of probabilities that:
  - (a) the person on whom the procedure is proposed to be carried out is a suspect; and
  - (b) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence; and
  - (c) the request for consent to the forensic procedure is justified in all the circumstances.
- (2) In determining whether a request is justified in all the circumstances, the constable must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the constable must have regard to the following matters:
  - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence;
  - (b) the degree of the suspect's alleged participation in the commission of the relevant offence;
  - (c) the age, physical and mental health, cultural background and (where appropriate) religious beliefs of the suspect, to the extent that they are known to the constable or can reasonably be discovered by the constable (by asking the suspect or otherwise);
  - (d) if the constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—the suspect's customary beliefs (if any), to the extent that they are known to the constable or can reasonably be

discovered by the constable (by asking the suspect or otherwise);

- (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence;
- (f) any other matter considered relevant to balancing those interests.

**23WJ Matters that suspect must be informed of before giving consent**

- (1) The constable must inform the suspect of the following matters:
  - (a) that the giving of information under this section, and the giving of consent (if any) by the suspect, is being or will be recorded by audio tape, videotape or other electronic means, or in writing, and that the suspect has a right to a copy of that record in a form provided by section 23YF;
  - (b) the purpose for which the forensic procedure is required;
  - (c) the offence in relation to which the constable wants the forensic procedure carried out;
  - (d) the way in which the forensic procedure is to be carried out;
  - (e) that the forensic procedure may produce evidence against the suspect that might be used in a court of law;
  - (f) that the forensic procedure will be carried out by an appropriately qualified person;
  - (g) if relevant, the matters specified in subsection (2);
  - (h) if the constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—that the suspect’s interview friend may be present while the forensic procedure is carried out;
  - (i) that the suspect may refuse to consent to the carrying out of the forensic procedure;
  - (j) the consequences of not consenting, as specified in subsection (3), (4) or (5) (whichever is applicable).

*Suspect’s right to have medical practitioner or dentist present during most forensic procedures*

- (2) The constable must inform the suspect that the suspect may ask that a medical practitioner or dentist (depending on the kind of
-

forensic procedure) of his or her choice be present while the forensic procedure is carried out (unless the forensic procedure is the taking of a hand print, finger print, foot print or toe print).

*Failure to consent to non-intimate forensic procedure—suspect in custody*

- (3) If the suspect is in custody and the forensic procedure is a non-intimate forensic procedure, the constable must inform the suspect that, if the suspect does not consent:
- (a) a constable may order the carrying out of the forensic procedure under Division 4 if he or she is satisfied of the matters referred to in subsection 23WO(1); or
  - (b) an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

*Failure to consent to intimate forensic procedure—suspect in custody*

- (4) If the suspect is in custody and the forensic procedure is an intimate forensic procedure, the constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

*Failure to consent to forensic procedure—suspect not in custody*

- (5) If the suspect is not in custody, the constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

### **23WK Withdrawal of consent**

If a person expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from the person's conduct) before or during the carrying out of the forensic procedure, then:

- (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and



- (b) the forensic procedure is not to proceed except by order of a constable under Division 4 or a magistrate under Division 5.

### **23WL Recording of giving of information and suspect's responses**

- (1) The constable must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the suspect's responses (if any) are tape recorded.
- (2) If tape recording the giving of the information and the suspect's responses (if any) is not practicable, the constable must ensure that a written record of the giving of the information and the suspect's responses (if any) is made, and that a copy of the record is made available to the suspect.

Note: Division 9 contains provisions about making copies of material (including copies of tapes) available to the suspect.

### **23WLA Time for carrying out forensic procedure—suspect not in custody**

- (1) If a suspect who is not in custody:
  - (a) consents to a forensic procedure; and
  - (b) presents himself or herself to the investigating constable to undergo the procedure;the procedure must be carried out as quickly as reasonably possible but in any case within the following period:
  - (c) if the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—2 hours after the suspect so presents himself or herself;
  - (d) in any other case—4 hours after the suspect so presents himself or herself.
- (2) In working out any period of time for the purposes of subsection (1), the following times are to be disregarded:
  - (a) the time (if any) that is reasonably required to convey the suspect from the place where the suspect presents himself or herself to the investigating constable to the nearest premises where facilities for carrying out the procedure in accordance with this Part are available to the investigating constable;

- (b) any time during which carrying out the procedure is suspended or delayed to allow the suspect, or someone else on the suspect's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person as provided by this Part;
- (c) any time during which carrying out the procedure is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person to arrive at the place where the procedure is to be carried out;
- (d) any time during which carrying out the procedure is suspended or delayed to allow the suspect to receive medical attention;
- (e) any time during which carrying out the procedure is suspended or delayed because of the suspect's intoxication;
- (f) any reasonable time during which carrying out the procedure is suspended or delayed to allow the suspect to rest or recuperate;
- (g) any time during which carrying out the procedure is suspended or delayed at the request of the suspect.

#### **Division 4—Non-intimate forensic procedures by order of senior constable**

##### **23WM Non-intimate forensic procedure may be carried out by order of senior constable**

- (1) A person is authorised to carry out a non-intimate forensic procedure on a suspect by order of a senior constable under section 23WN. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who is:
  - (a) a child; or
  - (b) an incapable person.

- (3) This Division does not authorise keeping a suspect in custody, in order to carry out a forensic procedure, after the expiration of the investigation period provided for by Part 1C.

Note: If it is necessary to keep a suspect in custody after the expiration of the Part 1C investigation period in order to carry out a forensic procedure, an order of a magistrate under Division 5 will have to be obtained to authorise this.

- (4) Nothing in this Part or Part 1C prevents the carrying out of a forensic procedure, in accordance with a constable's order under section 23WN, during the investigation period provided for by Part 1C. However, neither carrying out the forensic procedure, nor any delays associated with carrying out the forensic procedure, operate to extend the investigation period provided for by Part 1C.

Note: By contrast, the carrying out of a forensic procedure in accordance with a magistrate's order under Division 5, and associated delays, may delay the expiration of the investigation period provided for by Part 1C (see subsection 23C(7)).

### **23WN Circumstances in which senior constable may order non-intimate forensic procedures**

A senior constable may order the carrying out of a non-intimate forensic procedure on a suspect who is in custody if:

- (a) the suspect has been asked under Division 3 to consent to the carrying out of the forensic procedure; and
- (b) the suspect has not consented; and
- (c) the senior constable is satisfied as required by section 23WO.

### **23WO Matters to be considered by senior constable before ordering forensic procedure**

- (1) The senior constable must be satisfied on the balance of probabilities that:
  - (a) the suspect is in the lawful custody of a constable; and
  - (b) there are reasonable grounds to believe that the suspect committed a relevant offence; and
  - (c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence; and

- (d) the carrying out of the forensic procedure without consent is justified in all the circumstances.
- (2) In determining whether the carrying out of the forensic procedure without consent is justified in all the circumstances, the senior constable must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the senior constable must have regard to the following matters:
  - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence;
  - (b) the degree of the suspect's alleged participation in the commission of the relevant offence;
  - (c) the age, physical and mental health, cultural background and (where appropriate) religious beliefs of the suspect, to the extent that they are known to the senior constable or can reasonably be discovered by the senior constable (by asking the suspect or otherwise);
  - (d) if the senior constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—the suspect's customary beliefs (if any), to the extent that they are known to the senior constable or can reasonably be discovered by the senior constable (by asking the suspect or otherwise);
  - (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence;
  - (f) if the suspect gives any reasons for refusing to consent—the reasons;
  - (g) any other matter considered relevant to balancing those interests.

**23WP Record of senior constable's order**

- (1) The senior constable must, at the time of, or as soon as practicable after, make an order under section 23WN, make a record of:

- (a) the order made; and
  - (b) the date and time when the order was made; and
  - (c) the reasons for making it;
- and must sign the record.
- (2) The senior constable must ensure that a copy of the record is made available to the suspect as soon as practicable after the record is made.

## **Division 5—Forensic procedures by order of a magistrate**

### **Subdivision A—General**

#### **23WQ Forensic procedure may be carried out by order of magistrate**

A person is authorised to carry out a forensic procedure on a suspect by order of a magistrate under section 23WS or 23XA. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.

#### **23WR Circumstances in which magistrate may order forensic procedure**

A magistrate may, under section 23WS or 23XA, order the carrying out of a forensic procedure on a suspect if:

- (a) the suspect is not in custody and has not consented to the forensic procedure; or
- (b) the suspect is in custody and has not consented to the forensic procedure; or
- (c) under section 23WE, the suspect cannot consent to the forensic procedure.

### **Subdivision B—Final orders**

#### **23WS Final order for carrying out of forensic procedure**

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

- (a) section 23WR applies; and

(b) the magistrate is satisfied as required by section 23WT.

**23WT Matters to be considered by magistrate before ordering forensic procedure**

- (1) The magistrate must be satisfied on the balance of probabilities that:
  - (a) the person on whom the procedure is proposed to be carried out is a suspect; and
  - (b) on the evidence before him or her, there are reasonable grounds to believe that the suspect committed a relevant offence; and
  - (c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence; and
  - (d) the carrying out of the forensic procedure is justified in all the circumstances.
- (2) In determining whether the carrying out of the forensic procedure is justified in all the circumstances, the magistrate must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the magistrate must have regard to the following matters:
  - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence;
  - (b) the degree of the suspect's alleged participation in the commission of the relevant offence;
  - (c) the age, physical and mental health, cultural background and (where appropriate) religious beliefs of the suspect, to the extent that they are known to the magistrate or can reasonably be discovered by the magistrate (by asking the suspect or otherwise);
  - (d) if the magistrate believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—the suspect's customary beliefs (if any), to the extent that

they are known to the magistrate or can reasonably be discovered by the magistrate (by asking the suspect or otherwise);

- (e) if the suspect is a child or an incapable person—the welfare of the suspect;
- (f) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence;
- (g) if the suspect gives any reasons for refusing to consent—the reason;
- (h) if the suspect is in custody:
  - (i) the period for which the suspect has already been detained; and
  - (ii) the reasons for any delay in proposing the carrying out of the forensic procedure;
- (i) any other matter considered relevant to balancing those interests.

### **23WU Application for order**

- (1) An authorised applicant (but no other person) may apply to a magistrate for an order under section 23WS authorising him or her to arrange the carrying out of a forensic procedure on a suspect.
- (2) An application for an order must:
  - (a) be made in writing; and
  - (b) be supported by evidence on oath or by affidavit dealing with the matters referred to in paragraphs 23WT(1)(a), (b), (c) and (d); and
  - (c) specify the type of forensic procedure sought to be carried out; and
  - (d) be made in the presence of the suspect (subject to any contrary order made by the magistrate).

### **23WV Securing the presence of suspect at hearing—suspect in custody**

- (1) If the suspect is in the custody of another constable or is otherwise detained under a law of the Commonwealth, a State or a Territory (*original custody*), the magistrate may, on the application of a

constable, issue a warrant directing the person holding the suspect in original custody to deliver the suspect into the custody of the constable (*temporary custody*) for the hearing of an application for an order under this Division.

- (2) The constable given temporary custody must return the suspect to the place of original custody:
  - (a) if the application for the order is refused—without delay; or
  - (b) if the order is made—without delay at the end of the period for which the suspect may be detained in custody under section 23XGD.

**23WW Securing the presence of suspect at hearing—suspect not in custody**

- (1) If the suspect is not in custody, the magistrate may, on the application of a constable:
  - (a) issue a summons for the appearance of the suspect at the hearing of the application; or
  - (b) issue a warrant for the arrest of the suspect for the purpose of bringing the suspect before the magistrate for the hearing of the application.
- (2) An application for a summons under subsection (1) must be:
  - (a) made by information on oath; and
  - (b) accompanied by an affidavit dealing with matters referred to in paragraphs (3)(a) and (b).
- (3) The magistrate may issue a summons only if satisfied:
  - (a) that the issue of the summons is necessary to ensure the appearance of the suspect at the hearing of the application; or
  - (b) that the issue of the summons is otherwise justified.
- (4) An application for a warrant under subsection (1) must be:
  - (a) made by information on oath; and
  - (b) accompanied by an affidavit dealing with matters referred to in paragraphs (5)(a), (b) and (c).
- (5) The magistrate may issue a warrant only if satisfied:



- (a) that the arrest is necessary to ensure the appearance of the suspect at the hearing of the application, and that the issue of a summons would not ensure that appearance; or
- (b) that the suspect might destroy evidence that might be obtained by carrying out the forensic procedure; or
- (c) that the issue of the warrant is otherwise justified.

**23WX Procedure at hearing of application for order**

- (1) An order may only be made in the presence of the suspect concerned, subject to any contrary order made by the magistrate.
- (2) A suspect who is:
  - (a) a child; or
  - (b) an incapable person;must be represented by an interview friend and may also be represented by a legal practitioner.
- (3) If the applicant believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander not covered by subsection (2), the suspect must be represented by an interview friend and may also be represented by a legal practitioner.
- (4) Subsection (3) does not apply if the applicant believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in relation to the hearing by comparison with members of the Australian community generally.
- (5) Any other suspect (including a suspect covered by subsection (4)) may be represented by a legal practitioner.
- (6) The suspect or his or her representative:
  - (a) may call or cross-examine any witnesses; and
  - (b) may address the magistrate.
- (7) In spite of subsection (2) or (3), the suspect's interview friend may be excluded from the hearing if the interview friend unreasonably interferes with or obstructs the hearing of the application.

## **23WY Making of order**

- (1) If a magistrate makes an order for the carrying out of a forensic procedure, the magistrate must:
  - (a) give reasons for making the order; and
  - (b) ensure that a written record of the order is kept; and
  - (c) order the suspect to attend for the carrying out of the forensic procedure; and
  - (d) inform the suspect 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 magistrate may give directions as to the time, place and manner in which the procedure is to be carried out.

## **Subdivision C—Interim orders**

### **23XA Interim order for carrying out of a forensic procedure**

- (1) A magistrate may make an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay if:
  - (a) section 23WR applies; and
  - (b) the magistrate is satisfied that the probative value of evidence obtained as a result of the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the procedure; and
  - (c) the magistrate is satisfied that there is sufficient evidence to indicate that a magistrate is reasonably likely to be satisfied of the existence of the matters referred to in subsection 23WT(1) when the application is finally determined.
- (2) An interim order operates as provided by this Subdivision until a magistrate, at a hearing held under Subdivision B, confirms the interim order or disallows the interim order.

Note: Subsection 23XD(2) requires that an interim order specify the intended date, time and place of the later hearing.
- (3) Subdivision B applies in relation to an order confirming the interim order in the same way it applies in relation to an order under

section 23WS, and an order confirming the interim order is taken to be an order under section 23WS.

**23XB Application for interim order**

- (1) An authorised applicant may, without bringing a suspect before a magistrate and without obtaining an order under section 23WS, make an application seeking an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay.
- (2) An application for an interim order must:
  - (a) be supported by evidence on oath or by affidavit dealing with the matters referred to in paragraphs 23XA(1)(a), (b) and (c); and
  - (b) specify the type of forensic procedure sought to be carried out.
- (3) An application for an interim order may be made in person or, if that is not practicable, by telephone, radio, telex, facsimile or other means of transmission.
- (4) The suspect must be in the presence of the authorised applicant when the application is made.
- (5) If the suspect is:
  - (a) a child; or
  - (b) an incapable person;an interview friend or legal representative of the suspect must also be in the presence of the authorised applicant.
- (6) If the applicant believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander not covered by subsection (5), an interview friend or legal representative of the suspect must also be in the presence of the authorised applicant.
- (7) Subsection (6) does not apply if the applicant believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in relation to the application by comparison with members of the Australian community generally.

- (8) If the suspect is not covered by subsection (5) or (6), the suspect's legal representative (if any) must also be in the presence of the authorised applicant.
- (9) In spite of subsection (5) or (6), the suspect's interview friend may be excluded from the presence of the authorised applicant if the interview friend unreasonably interferes with or obstructs the making of the application.

**23XC Procedure at hearing of application for interim order**

- (1) If the application is made in person, or by telephone or radio or other form of oral communication, the magistrate must ensure that:
  - (a) the suspect; and
  - (b) the suspect's legal representative, if any; and
  - (c) the suspect's interview friend, if any;are given an opportunity to speak to the magistrate.
- (2) If the application is made by telex, facsimile or other form of written communication, the magistrate must ensure that:
  - (a) the suspect; and
  - (b) the suspect's legal representative, if any; and
  - (c) the suspect's interview friend, if any;are given an opportunity to make a written submission to accompany the application, or to speak to the magistrate by telephone, radio or other form of oral communication.

**23XD Making of interim order**

- (1) A magistrate who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, facsimile or other means of transmission:
    - (a) that the order has been made; and
    - (b) of the terms of the order, including the matters mentioned in subsection (2); and
    - (c) of any orders made or directions given under subsection (3) in relation to the order.
  - (2) An interim order must specify the date, time and place at which a further hearing on the application will take place and the application will be finally determined.
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- (3) A magistrate may make such orders and give such directions in relation to an interim order as the magistrate may make or give in relation to an order under section 23WS.

### **23XE Records of application and interim order**

- (1) The applicant for an interim order must, at the time of, or as soon as practicable after, applying for the interim order, make a record (the *applicant's record*) of:
- (a) the application; and
  - (b) the grounds for seeking the order; and
  - (c) the order made; and
  - (d) the date and time when the order was made; and
  - (e) the magistrate's name;
- and sign the record.
- (2) The applicant must send a copy of the applicant's record to the magistrate as soon as practicable after it is made.
- (3) The magistrate must, at the time of, or as soon as practicable after, making an interim order, make a record (the *magistrate's record*) of:
- (a) the application; and
  - (b) the grounds for seeking the order; and
  - (c) the order made; and
  - (d) the date and time when the order was made; and
  - (e) the reasons for making it;
- and sign the record.
- (4) The magistrate must send a copy of the magistrate's record to the applicant as soon as practicable after the record is made.
- (5) The applicant must ensure that a copy of the magistrate's record and a copy of the applicant's record are made available to the suspect as soon as practicable after the applicant receives the magistrate's record.
- (6) If the applicant's record does not, in all material respects, accord with the magistrate's record, the order is taken to have had no effect.

**23XF Suspect may be prevented from destroying or contaminating evidence**

- (1) A constable may, while waiting for the application seeking an interim order to be determined, use reasonable force to prevent the suspect destroying or contaminating any evidence that might be obtained by carrying out the forensic procedure if the order is made.
- (2) Nothing in this section authorises any person to carry out a forensic procedure before an interim order is made.

**23XG Results of forensic procedure carried out under interim order**

- (1) A sample taken under an interim order must not be analysed unless:
  - (a) the sample is likely to perish before a final order is made; or
  - (b) a final order is made.
- (2) A person who conducts an analysis in the circumstances set out in paragraph (1)(a) must not intentionally or recklessly disclose the results of the analysis to any person:
  - (a) during the period before a final order is made; or
  - (b) if the interim order is disallowed.

Penalty for a contravention of subsection (2): Imprisonment for 12 months.

**Subdivision D—Time limits for forensic procedures ordered by magistrates**

**23XGA Application**

This Subdivision applies where a magistrate orders the carrying out of a forensic procedure on a suspect under this Part.

**23XGB Time for carrying out forensic procedure—suspect not in custody**

- (1) If a suspect who is not in custody presents himself or herself to the investigating constable to undergo the procedure ordered by the

magistrate, the procedure must be carried out as quickly as reasonably possible but in any case within the following period:

- (a) if the suspect is a child or an incapable person, or the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—2 hours after the suspect so presents himself or herself;
  - (b) in any other case—4 hours after the suspect so presents himself or herself.
- (2) In working out any period of time for the purposes of subsection (1), the following times are to be disregarded:
- (a) the time (if any) that is reasonably required to convey the suspect from the place where the suspect presents himself or herself to the investigating constable to the nearest premises where facilities for carrying out the procedure in accordance with this Part are available to the investigating constable;
  - (b) any time during which carrying out the procedure is suspended or delayed to allow the suspect, or someone else on the suspect's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person as provided by this Part;
  - (c) any time during which carrying out the procedure is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person to arrive at the place where the procedure is to be carried out;
  - (d) any time during which carrying out the procedure is suspended or delayed to allow the suspect to receive medical attention;
  - (e) any time during which carrying out the procedure is suspended or delayed because of the suspect's intoxication;
  - (f) any reasonable time during which carrying out the procedure is suspended or delayed to allow the suspect to rest or recuperate;
  - (g) any time during which carrying out the procedure is suspended or delayed at the request of the suspect.

**23XGC Arrest of suspect not in custody**

- (1) If the suspect is not in custody, the magistrate may, on the application of a constable, issue a warrant for the arrest of the suspect for the purpose of carrying out the forensic procedure.
- (2) An application for a warrant must be:
  - (a) made by information on oath; and
  - (b) accompanied by an affidavit dealing with matters referred to in paragraphs (3)(a) and (b).
- (3) The magistrate may issue a warrant only if satisfied:
  - (a) that the arrest is necessary to ensure that the forensic procedure can be carried out; or
  - (b) that the issue of the warrant is otherwise justified.
- (4) A magistrate must not issue a warrant for the arrest of a suspect for the purpose of carrying out a forensic procedure if a warrant has previously been issued (by any magistrate) for the arrest of the suspect for the purpose of carrying out that forensic procedure.

**23XGD Time for carrying out forensic procedure—suspect in custody**

- (1) If the suspect is in custody (whether or not as the result of the issue of a warrant under section 23XGC), he or she may be detained in custody for such period (the *detention period*) as is reasonably necessary to carry out the forensic procedure but in any case for no longer than a period starting when:
  - (a) the magistrate orders the carrying out of the procedure; or
  - (b) the suspect is arrested pursuant to a warrant under section 23XGC;whichever is later, and ending:
  - (c) if the suspect is a child or an incapable person, or the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—2 hours later; or
  - (d) in any other case—4 hours later.
- (2) In working out any period of time for the purposes of subsection (1), the following times are to be disregarded:



- (a) the time (if any) that is reasonably required to convey the suspect from the place where the suspect is when the detention period starts to the nearest premises where facilities for carrying out the procedure in accordance with this Part are available to the investigating constable;
- (b) any time during which carrying out the procedure is suspended or delayed to allow the suspect, or someone else on the suspect's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person as provided by this Part;
- (c) any time during which carrying out the procedure is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person to arrive at the place where the procedure is to be carried out;
- (d) any time during which carrying out the procedure is suspended or delayed to allow the suspect to receive medical attention;
- (e) any time during which carrying out the procedure is suspended or delayed because of the suspect's intoxication;
- (f) any reasonable time during which carrying out the procedure is suspended or delayed to allow the suspect to rest or recuperate;
- (g) any time during which the suspect is being questioned under Part 1C;
- (h) any time that is to be disregarded under subsection 23C(7) for the purposes of subsection 23C(4) or (6).

### **Subdivision E—Reports of proceedings under Division**

#### **23XH Restrictions on publication**

A person must not intentionally or recklessly, in any report of a proceeding under this Division, publish:

- (a) the name of the suspect; or
- (b) any information likely to enable the identification of the suspect;

unless the suspect has been charged with a relevant offence or the magistrate, by order, has authorised such publication.

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Penalty: Imprisonment for 12 months.

## **Division 6—Carrying out forensic procedures**

### **Subdivision A—General provisions**

#### **23XI General rules for carrying out forensic procedures**

A forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect; and
- (b) except as permitted (expressly or impliedly) by other provisions of this Part, must not be carried out in the presence or view of a person who is of the opposite sex to the suspect; and
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Part; and
- (d) must not involve the removal of more clothing than is necessary for the carrying out of the procedure; and
- (e) must not involve more visual inspection than is necessary for the carrying out of the procedure.

#### **23XIA No questioning during forensic procedure**

A forensic procedure must not be carried out while the suspect is being questioned as defined in subsection 23B(6). If questioning has not been completed before the forensic procedure is to be carried out, it must be suspended while the forensic procedure is carried out.

#### **23XIB Suspect must be cautioned before forensic procedure starts**

Before anyone starts to carry out a forensic procedure on a suspect, a constable must caution the suspect that he or she does not have to say anything while the procedure is carried out but that anything the person does say may be used in evidence.

**23XJ Use of force in carrying out forensic procedures**

- (1) Subject to subsection (2) and section 23XK, a person authorised to carry out a forensic procedure on a person, or a constable, may use reasonable force:
  - (a) to enable a forensic procedure to be carried out; or
  - (b) to prevent loss, destruction or contamination of any sample.
- (2) All forensic procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards.

**23XK Forensic procedures not to be carried out in cruel, inhuman or degrading manner**

For the purpose of this Part, the carrying out of a forensic procedure is not of itself taken to be cruel, inhuman or degrading. However, nothing in this Part authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner.

**23XL Taking of samples of hair**

Nothing in this Part authorises the taking of a sample of hair by removing the root of the hair.

**Subdivision B—Persons involved in forensic procedures**

**23XM Persons who may carry out forensic procedures**

- (1) The table following subsection (3) shows, for each forensic procedure, the persons who may carry out the procedure under this Part. A person not specified in the second column of the table is not authorised to carry out a forensic procedure under this Part except as mentioned in section 23XO.
- (2) The third column of the table following subsection (3) shows, for each forensic procedure, whether the suspect is entitled to request that a medical practitioner or dentist of the suspect's choice is present while the forensic procedure is carried out.

Note: Section 23XP makes detailed provision for the presence of a medical practitioner or dentist of the suspect's choice while a forensic procedure is carried out.

**Schedule 1** Amendment of the Crimes Act 1914 relating to forensic procedures

- (3) A person is authorised to carry out a particular forensic procedure if he or she is an appropriately qualified person in relation to the procedure even if the person also satisfies another description specified in the following table that is not specified in relation to the particular forensic procedure.

Example: A constable who is an appropriately qualified person to take samples of blood may take such samples even though the table does not expressly list constables as persons who may take samples of blood.

**Who may carry out forensic procedures**

<b>Forensic procedure</b>	<b>Persons who may carry out forensic procedure</b>	<b>Is suspect entitled to request presence of medical practitioner or dentist of suspect's choice?</b>
<b>1</b> external examination of the genital or anal area, the buttocks or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>2</b> the taking of a sample of blood	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>3</b> the taking of a sample of saliva, or a sample by buccal swab	medical practitioner dentist dental technician nurse appropriately qualified person	yes (dentist or medical practitioner)
<b>4</b> the taking of a sample of pubic hair	medical practitioner nurse appropriately qualified person	yes (medical practitioner)

<b>Who may carry out forensic procedures</b>		
<b>Forensic procedure</b>	<b>Persons who may carry out forensic procedure</b>	<b>Is suspect entitled to request presence of medical practitioner or dentist of suspect's choice?</b>
<b>5</b> the taking of a sample by swab or washing from the external genital or anal area, the buttocks or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>6</b> the taking of a sample by vacuum suction, scraping or lifting by tape from the external genital or anal area, the buttocks or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>7</b> the taking of a dental impression	medical practitioner dentist dental technician	yes (dentist or medical practitioner)
<b>8</b> the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks or, in the case of a female, the breasts	appropriately qualified person	yes (medical practitioner)
<b>9</b> external examination of a part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts, that requires touching of the body or removal of clothing	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>10</b> the taking of a sample of hair other than pubic hair	medical practitioner nurse constable appropriately qualified person	yes (medical practitioner)

**Schedule 1** Amendment of the Crimes Act 1914 relating to forensic procedures

<b>Who may carry out forensic procedures</b>		
<b>Forensic procedure</b>	<b>Persons who may carry out forensic procedure</b>	<b>Is suspect entitled to request presence of medical practitioner or dentist of suspect's choice?</b>
<b>11</b> the taking of a sample from a nail or from under a nail	medical practitioner nurse constable appropriately qualified person	yes (medical practitioner)
<b>12</b> the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>13</b> the taking of a sample by vacuum suction, scraping or lifting by tape from any external part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	yes (medical practitioner)
<b>14</b> the taking of a hand print, finger print, foot print or toe print	constable	no
<b>15</b> the taking of a photograph of, or an impression or cast of a wound from, an external part of the body other than the genital or anal area, the buttocks or, in the case of a female, the breasts	appropriately qualified person	yes (medical practitioner)

Note: *Appropriately qualified* (as used in the expression "appropriately qualified person") is defined in section 23WA.

**Subdivision C—Further provisions about who may carry out forensic procedures**

**23XN Certain forensic procedures generally to be carried out by person of same sex as suspect**

- (1) If practicable, an intimate forensic procedure (other than the taking of a sample of blood, a sample of saliva, a buccal swab or a dental impression) is to be carried out:
  - (a) if the suspect is an adult—by a person of the same sex as the suspect; or
  - (b) if the suspect is a child—by a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, by a person of the same sex as the suspect.
- (2) If practicable, a non-intimate forensic procedure for which the suspect is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat is to be carried out:
  - (a) if the suspect is an adult—by a person of the same sex as the suspect; or
  - (b) if the suspect is a child—by a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, by a person of the same sex as the suspect.
- (3) If practicable, a person asked under section 23XO to help carry out a forensic procedure covered by subsection (1) or (2):
  - (a) is to be:
    - (i) if the suspect is an adult—a person of the same sex as the suspect; or
    - (ii) if the suspect is a child—a person of the sex chosen by the suspect or, if the suspect does not wish to make such a choice, by a person of the same sex as the suspect; and
  - (b) is to be a person who is not inappropriate to help carry out the forensic procedure.

**23XO Person may get help to carry out forensic procedures**

- (1) A person who is authorised to carry out a forensic procedure under the table in section 23XM is authorised to ask another person to help him or her to carry out the procedure, and the other person is authorised to give that help.
- (2) A person who is asked to help carry out a forensic procedure need not be a person mentioned in the table in section 23XM.

**Subdivision D—Presence of other people while forensic procedure is carried out**

**23XP Medical practitioner or dentist of suspect's choice may be present for most forensic procedures**

- (1) A suspect is entitled to request a medical practitioner or dentist (the *expert*) of his or her choice as shown in the table in section 23XM to be present while a forensic procedure (other than the taking of a hand print, finger print, foot print or toe print) is carried out.

Note: Section 23YE provides that the request may be made by the suspect's legal representative or interview friend.

- (2) The expert chosen is to be present at the forensic procedure unless he or she:
  - (a) is unable, or does not wish, to attend; or
  - (b) cannot be contacted;within a reasonable time or, if relevant, within the time in which the person responsible for the effective carrying out of the forensic procedure considers the forensic procedure should be carried out if it is to be effective in affording evidence of the relevant offence.

**23XQ Presence of interview friend or legal representative—children and incapable persons**

- (1) This section applies if the suspect is:
  - (a) a child; or
  - (b) an incapable person.



- (2) Either an interview friend or a legal representative (if he or she is not the interview friend) of the suspect must be present while the forensic procedure is carried out. Both an interview friend and a legal representative may be present.
- (3) An interview friend (other than a legal representative) of the suspect may be excluded from the place where the forensic procedure is being carried out if the interview friend unreasonably interferes with or obstructs the carrying out of the procedure.

**23XR Presence of interview friend or legal representative—  
Aboriginal persons and Torres Strait Islanders**

- (1) This section applies if the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander not covered by section 23XQ.
- (2) Either an interview friend or a legal representative (if he or she is not the interview friend) of the suspect must be present while the forensic procedure is carried out. Both an interview friend and a legal representative may be present.
- (3) Subsection (2) does not apply if:
  - (a) the investigating constable believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in respect of the carrying out of the forensic procedure by comparison with members of the Australian community generally; or
  - (b) the suspect expressly and voluntarily waives his or her right to have an interview friend present.

Note: Section 23YK relates to proving a waiver under subsection (3).

- (4) An interview friend (other than a legal representative) of the suspect may be excluded from the place where the forensic procedure is being carried out if the interview friend unreasonably interferes with or obstructs the carrying out of the procedure.

**23XS Presence of constables**

- (1) The number of constables that may be present during the carrying out of a forensic procedure must not exceed that which is

reasonably necessary to ensure that the procedure is carried out effectively and in accordance with this Part.

- (2) Where the presence of a constable (other than a constable who is carrying out or helping to carry out the procedure) is reasonably necessary to ensure that a forensic procedure is carried out effectively and in accordance with this Part, the constable is:
- (a) if the suspect is a child—to be of the same sex as the suspect; or
  - (b) in any other case—to be of the same sex as the suspect unless it is not practicable for such a constable to attend within a reasonable time.

Note: Section 23XN provides that, if practicable, most forensic procedures are to be carried out by persons of the same sex as the suspect.

- (3) This section does not apply to the following forensic procedures:
- (a) the taking of hand prints, finger prints, foot prints or toe prints;
  - (b) any non-intimate forensic procedure that may be carried out without requiring the suspect to remove any clothing except his or her overcoat, coat, jacket, gloves, socks, shoes and hat.

## **Subdivision E—Recording of forensic procedure**

### **23XT Recording of forensic procedure**

- (1) The carrying out of a forensic procedure (other than the taking of a hand print, finger print, foot print or toe print) must be video recorded unless:
- (a) the suspect objects to the video recording; or
  - (b) the video recording is not practicable.
- (2) Before the forensic procedure is carried out, the suspect must be informed:
- (a) of the reasons for video recording the carrying out of the forensic procedure, including the protection that the video recording provides for the suspect; and
  - (b) that the suspect may object to the video recording.

- (3) In spite of section 23YE, an interview friend of an Aboriginal person or a Torres Strait Islander not covered by section 23XQ has no right to object to the video recording of the forensic procedure.

Note: Section 23YE gives interview friends and legal representatives general powers to act on behalf of suspects. Section 23XQ applies to children and incapable persons, including children or incapable persons who are Aboriginal persons or Torres Strait Islanders, but does not apply to other Aboriginal persons or Torres Strait Islanders.

- (4) If the carrying out of the forensic procedure is not to be video recorded, the forensic procedure must be carried out in the presence of an independent person (not a constable).

### **Subdivision F—Procedure after forensic procedure is carried out**

#### **23XU Samples—sufficient material to share**

- (1) This section applies to a sample taken from a suspect under this Part if there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect.
- (2) The investigating constable must ensure that:
- (a) a part of the material sufficient for analysis is made available to the suspect as soon as practicable after the procedure has been carried out; and
  - (b) that reasonable care is taken to ensure that the suspect's part of the material is protected and preserved until the suspect receives it; and
  - (c) that reasonable assistance is given to the suspect to ensure that the material is protected and preserved until it can be analysed.

Note: Division 9 contains provisions about making material available to the suspect.

#### **23XUA Samples—insufficient material to share**

- (1) This section applies to a sample taken from a suspect under this Part if:
- (a) there is not sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect; and

- (b) the material does not need to be analysed immediately after the sample is taken.
- (2) The suspect is entitled to request that a person of his or her choice be present while the material is analysed in the investigation of the offence.
- Note: Section 23YE provides that the request may be made by the suspect's legal representative or interview friend.
- (3) The person chosen is to be present at the analysis of the material unless he or she:
- (a) is unable, or does not wish, to attend; or
  - (b) cannot be contacted;
- within a reasonable time or, if relevant, within the time in which the person responsible for analysing the material considers the analysis should be carried out if it is to provide valid results.

### **23XV Photographs**

Where a forensic procedure involves the taking of a photograph of a part of a suspect's body, the investigating constable must ensure that a copy of the photograph is made available to the suspect.

Note: Division 9 contains provisions about making copies of material available to the suspect.

### **23XW Results of analysis**

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

Note: Division 9 contains provisions about making copies of material available to the suspect.

## **Division 7—Admissibility of evidence**

### **Subdivision A—Forensic evidence**

#### **23XX Inadmissibility of evidence from improper forensic procedures etc.**

- (1) This section applies where:
- (a) a forensic procedure has been carried out on a suspect; and
  - (b) there has been any breach of, or failure to comply with, any provision of this Part in relation to the forensic procedure (including, but not limited to, any breach or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out).

- (2) This section does not apply where:
- (a) a provision of this Part required forensic material to be destroyed; and
  - (b) the forensic material has not been destroyed.

Note: Section 23XY applies where this Part requires forensic material to have been destroyed.

- (3) This section applies to:
- (a) evidence of forensic material, or evidence consisting of forensic material, taken from the suspect by the forensic procedure; and
  - (b) evidence of any results of the analysis of the forensic material; and
  - (c) any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (4) Where this section applies, evidence described in subsection (3) is not admissible in any proceedings against the suspect in a court unless:
- (a) the suspect does not object to the admission of the evidence; or
  - (b) the court is satisfied on the balance of probabilities of matters that, in the court's opinion, justify the admission of the evidence in the proceedings in spite of the failure to comply with the provisions of this Part.

- (5) The matters that may be considered by the court for the purposes of paragraph (4)(b) are the following:
  - (a) the probative value of the evidence, including whether equivalent evidence or evidence of equivalent probative value could have been obtained by other means;
  - (b) the reasons given for the failure to comply with the provisions of this Part;
  - (c) the gravity of the failure to comply with the provisions of this Part, and whether the failure deprived the suspect of a significant protection under this Part;
  - (d) whether the failure to comply with the provisions of this Part was intentional or reckless;
  - (e) the nature of the provision of this Part that was not complied with;
  - (f) the nature of the offence concerned and the subject matter of the proceedings;
  - (g) whether admitting the evidence would seriously undermine the protection given to suspects by this Part;
  - (h) any other matters the court considers to be relevant.
- (6) The probative value of the evidence does not by itself justify the admission of the evidence.
- (7) If a judge permits evidence to be given before a jury under subsection (4), the judge must:
  - (a) inform the jury of the breach of, or failure to comply with, a provision of this Part; and
  - (b) give the jury such warning about the evidence as the judge thinks appropriate in the circumstances.

**23XY Inadmissibility of evidence where forensic material required to be destroyed**

- (1) If a provision of this Part requires forensic material taken from a suspect by a forensic procedure to be destroyed, subsection (2) applies to:
    - (a) evidence of the forensic material; and
    - (b) if the material has not been destroyed—evidence consisting of the forensic material; and
    - (c) any results of the analysis of the forensic material; and
-

- (d) any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (2) The results of the analysis, and the other evidence, are not admissible if adduced by the prosecution in any proceedings against the suspect, but may be admissible if adduced in such proceedings by the suspect.

### **Subdivision B—Other evidence**

#### **23XZ Admissibility of evidence relating to consent to forensic procedure**

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a constable or another person investigating the commission of the offence concerned acted contrary to law in carrying out that investigation.

#### **23YA Admissibility of evidence relating to carrying out of forensic procedure**

In spite of subsection 23XX(4), evidence of how a forensic procedure was carried out is admissible in proceedings against the suspect in a court:

- (a) to establish or rebut an allegation that unreasonable force was used to enable the procedure to be carried out; or
- (b) to determine the admissibility of a confession or admission or other evidence adverse to the suspect where the suspect alleges that the evidence was induced or obtained by the use of unreasonable force; or
- (c) to establish or rebut an allegation that the forensic procedure was not carried out in accordance with Division 6.

#### **23YB Obstructing the carrying out of forensic procedure**

- (1) This section applies where a constable or magistrate has ordered the carrying out of a forensic procedure on a suspect under this Part.

- (2) Subject to subsections (3) and (4), evidence that the suspect:
- (a) refused to comply with any reasonable direction in connection with the carrying out of the forensic procedure; or
  - (b) obstructed, resisted, hindered, used violence against, threatened or intimidated a person in connection with the carrying out of the forensic procedure;
- is admissible in any proceedings against the suspect in respect of a relevant offence.
- (3) Evidence described in subsection (2) is not admissible if the forensic procedure was in fact carried out satisfactorily.
- (4) Evidence described in subsection (2) is not admissible unless it is established that the suspect:
- (a) had been informed by a constable as described in subsection 23WA(4); or
  - (b) otherwise knew;
- that the fact of refusing to comply with the direction, or obstructing, resisting, hindering, using violence against, threatening or intimidating the person, in connection with the carrying out of the forensic procedure might be used in evidence against the suspect.
- (5) The court or jury may draw such inferences from the evidence described in subsection (2) as appear to the court or jury to be proper in the circumstances, having regard to any evidence given by or on behalf of the suspect.

## **Division 8—Destruction of forensic material**

### **23YC Destruction of forensic material where interim order disallowed**

If an interim order for the carrying out of a forensic procedure made under section 23XA is disallowed after the forensic procedure is carried out, the investigating constable must ensure that:

- (a) all forensic material is destroyed; and
  - (b) a copy of the results of any analysis of the forensic material are made available to the suspect.
-



Note: Division 9 contains provisions about making copies of material available to the suspect.

### **23YD Destruction of forensic material after 12 months**

- (1) This section applies where forensic material has been taken from a suspect by a forensic procedure carried out under this Part (except section 23YQ).
- (2) If:
  - (a) a period of 12 months has elapsed since the forensic material was taken; and
  - (b) proceedings in respect of a relevant offence have not been instituted against the suspect, or have been discontinued;the forensic material must be destroyed as soon as practicable.
- (3) If:
  - (a) the suspect is found to have committed a relevant offence but no conviction is recorded; or
  - (b) the suspect is acquitted of such an offence and:
    - (i) no appeal is lodged against the acquittal; or
    - (ii) an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn;the forensic material must be destroyed as soon as practicable unless an investigation into, or a proceeding against the suspect for, another relevant offence is pending.
- (4) A magistrate may, on application by a constable or the Director of Public Prosecutions, extend the period of 12 months referred to in subsection (2), or that period as previously extended under this subsection in relation to particular forensic material, if the magistrate is satisfied that there are special reasons for doing so.

Note: Division 10 contains provisions restricting the use of information obtained as a result of the carrying out of a forensic procedure.

## **Division 9—General provisions relating to operation of this Part**

### **23YDA Interpreters**

- (1) Where:
-

- (a) a constable proposes to take an action listed in subsection (2); and
  - (b) the constable believes on reasonable grounds that the suspect is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in the English language;
- the constable must, before taking the proposed action, arrange for the presence of an interpreter, and defer taking the proposed action until the interpreter is present.
- (2) The actions are as follows:
    - (a) asking a suspect to consent to a forensic procedure (Division 3);
    - (b) ordering the carrying out of a non-intimate forensic procedure on a suspect who is in custody (Division 4);
    - (c) applying to a magistrate for a final order or an interim order for the carrying out of a forensic procedure on a suspect (Division 5);
    - (d) cautioning a suspect (Division 6);
    - (e) carrying out, or arranging for the carrying out of, a forensic procedure on a suspect (Division 6);
    - (f) giving a suspect an opportunity to view a video recording made under this Part (section 23YF).

**23YE Powers etc. of legal representatives and interview friends**

- (1) A request or objection that may be made by a suspect under this Part may be made on the suspect's behalf by:
    - (a) in any case—the suspect's legal representative; or
    - (b) if the suspect is a child or an incapable person—an interview friend of the suspect; or
    - (c) if the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—an interview friend of the suspect.
  - (2) If:
    - (a) a provision of this Part requires a suspect to be informed of a matter; and
    - (b) an interview friend or legal representative of the suspect is present when the suspect is to be so informed;
-

the interview friend or legal representative must also be informed of the matter.

**23YF Obligation of investigating constables relating to tape recordings**

- (1) If a tape recording is made as required by a provision of this Part, the investigating constable must ensure that:
  - (a) if an audio recording only or a video recording only is made—the recording, or a copy of it, is made available to the suspect; and
  - (b) if both an audio recording and a video recording are made:
    - (i) the audio recording, or a copy of it, is made available to the suspect; and
    - (ii) the suspect is given an opportunity to view the video recording; and
  - (c) in any case, if a transcript of the tape recording is made—a copy of the transcript is made available to the suspect.
- (2) Where an investigating constable is required to ensure that a suspect is given an opportunity to view a video recording made under this Part, the investigating constable must ensure that the same opportunity is given to:
  - (a) in any case—the suspect’s legal representative; and
  - (b) if the suspect is a child or an incapable person—an interview friend of the suspect; and
  - (c) if the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—an interview friend of the suspect.
- (3) If section 23YD requires forensic material taken from a suspect by a forensic procedure to be destroyed, the investigating constable must ensure that any video recording of the carrying out of the forensic procedure is also destroyed.

**23YG Material required to be made available to suspect**

- (1) Material from samples, copies, or any other material, that must be made available to a suspect under this Part:

- (a) may be sent to the suspect at his or her last known address (if any), or to the suspect's legal representative (if any) at his or her last known address; or
  - (b) if there is no known address as mentioned in paragraph (a)—may be made available for collection by the suspect at the police station where the investigating constable was based at the time the forensic procedure was carried out.
- (2) Material of any kind (other than material from samples and copies of records made under section 23XE) that is required by this Part to be made available to a suspect must be made available in accordance with subsection (1) within 7 days after the material comes into existence.

Note: The timing of making sample material available is covered in section 23XV. The timing of making copies of section 23XE records available is covered in subsection 23XE(5)

### **23YH No charge to be made for giving material etc. to suspects**

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

### **23YI Proof of belief or suspicion**

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that a constable had a belief on reasonable grounds, or suspected on reasonable grounds, as to a matter referred to in this Part.

### **23YJ Proof of impracticability**

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

### **23YJA Proof that time should be disregarded**

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that any particular time was covered by a provision of subsection 23WLA(2), 23XGB(2) or 23XGD(2).

### **23YK Proof of voluntary waiver of certain rights**

In any proceedings:

- (a) the burden lies on the prosecution to prove that an Aboriginal person or Torres Strait Islander has waived a right as mentioned in subsection 23WG(3) or subsection 23XR(3); and
- (b) the burden is not discharged unless the court is satisfied on the balance of probabilities that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.

### **23YL Liability for forensic procedures**

No civil or criminal liability is incurred by any person (including a constable) who carries out, or helps to carry out, a forensic procedure under this Part in respect of anything properly and necessarily done in good faith by the person in carrying out or helping to carry out the forensic procedure if the person believed on reasonable grounds that:

- (a) informed consent had been given to the carrying out of the forensic procedure; or
- (b) the carrying out of the forensic procedure without informed consent had been duly ordered by a constable or magistrate under this Part.

Note: This section does not provide any protection in respect of action taken maliciously or recklessly.

### **23YM Experts not obliged to carry out forensic procedures**

Nothing in this Part requires a medical practitioner, nurse, dentist, dental technician or appropriately qualified person to carry out a forensic procedure.

## **Division 10—Dealing with information obtained under this Part**

### **23YN Database for identification purposes**

- (1) Information about a person obtained from forensic material taken under this Part must not be recorded, or retained, in a personal records system at any time after this Part requires the forensic material to be destroyed.
- (2) In this section, *personal records system* means a database of information that may be used to discover the identity of a person or to get information about an identifiable person.

### **23YO Databases for statistical purposes**

Information obtained from analysis of forensic material taken in accordance with this Part may be used for compiling a database for statistical purposes, but only if the information cannot be used to identify the person on whom a forensic procedure was carried out.

### **23YP Disclosure of information**

- (1) In this section:  
*offence* means an offence against a law of the Commonwealth, a State or a Territory punishable by a maximum penalty of 12 or more months of imprisonment.
- (2) A person (other than a suspect) who has access to information revealed by the carrying out of a forensic procedure on the suspect must not intentionally or recklessly disclose that information except as provided by this section.

Penalty: Imprisonment for 2 years.

- (3) A person may only disclose information revealed by the carrying out of a forensic procedure:
  - (a) if the information is already publicly known; or
  - (b) in accordance with any other provision of this Part; or
  - (c) in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988*; or

- (d) for the purposes of the investigation of any offence or offences generally; or
- (e) for the purpose of a decision whether to institute proceedings for an offence; or
- (f) for the purpose of proceedings for an offence; or
- (g) for the purpose of a coronial inquest or inquiry; or
- (h) for the purpose of civil proceedings (including disciplinary proceedings) that relate to the way in which the procedure was carried out; or
- (i) for the purpose of the suspect's medical treatment; or
- (j) for the purpose of the medical treatment of a victim of a relevant offence in relation to the suspect; or
- (k) if the suspect consents in writing to the disclosure.

## **Division 11—Taking of blood samples after conviction**

### **23YQ Taking of blood samples after conviction**

- (1) In this section:

*serious offence* means an offence punishable by a maximum penalty of 5 or more years of imprisonment.

- (2) If a court finds a person guilty of a serious offence, a constable may apply to the court for an order directing the person to give a sample of blood.
- (3) An application under subsection (2):
- (a) may only be made after the expiration of any appeal period or after the final determination of any appeal, whichever is later; and
  - (b) may only be made if, at that time, the conviction stands.
- (4) An application under subsection (2) must be accompanied by an affidavit by the constable dealing with the matters referred to in paragraphs (5)(a) and (b).
- (5) In determining whether to make such an order, the court is to take into account:

- (a) the seriousness of the circumstances surrounding the commission of the offence for which the person was convicted and the gravity of that offence; and
  - (b) whether there are reasonable grounds to believe that the person may have committed some other serious offence or may commit some other serious offence in the future.
- (6) If a court orders the person to give a blood sample, the court may order:
- (a) the person to attend a police station; or
  - (b) that a constable, together with a person who, under section 23XM, may carry out the taking of a blood sample, be permitted to attend on the person in a place of detention; to allow the blood sample to be taken.
- (7) The person ordered to give the blood sample must not intentionally, without reasonable excuse, refuse or fail to allow the blood sample to be taken.
- Penalty: Imprisonment for 12 months.
- (8) Division 6 applies to the taking of a blood sample under this section as if the references to the suspect in that Division were references to a person ordered to give the blood sample under this section.

## **Division 12—Operation of this Part and effect on other laws**

### **23YQA Part does not apply to persons under 10**

This Part does not authorise the carrying out of a forensic procedure on a person who is under 10 years of age.

### **23YR Relationship with Part 1AA**

This Part does not apply to the taking of hand prints, finger prints, foot prints or toe prints:

- (a) from a suspect who is under 18 years of age or is incapable of managing his or her affairs, if the suspect has been arrested and charged as mentioned in section 3ZJ; or



- (b) from a suspect who is at least 18 years of age and is capable of managing his or her affairs, if the suspect is in lawful custody in respect of an offence as mentioned in section 3ZJ.

Note: Part 1AA deals with the taking of identification material as defined in subsection 3ZJ(1) (which includes prints) from suspects described in paragraphs 23YR(a) and (b).

### **23YS Relationship with Part 1C**

- (1) Nothing in this Part is intended to limit the rights and protections provided by Part 1C to the extent that the provisions of that Part can operate in circumstances covered by this Part.
- (2) The rights and protections conferred by this Part are in addition to those conferred by Part 1C but, to the extent (if any) that compliance with this Part results in compliance with Part 1C, the requirements of Part 1C are satisfied.

### **23YT Part does not apply to forensic procedures on non-suspects**

Nothing in this Part affects any right of a constable apart from this Part:

- (a) to ask a person who is not a suspect in relation to an indictable offence to undergo a forensic procedure; or
- (b) to carry out a forensic procedure on a person who is not a suspect in relation to an indictable offence but who has consented to the forensic procedure.

### **23YU Application of other laws**

- (1) This Part is not intended to limit or exclude the operation of another law of the Commonwealth or of a law of a State or Territory relating to:
  - (a) the carrying out of forensic procedures, including procedures not referred to in this Part; or
  - (b) the taking of forensic samples, including samples not referred to in this Part; or
  - (c) the taking of identification evidence; or
  - (d) the carrying out of searches of the person; or

- (e) the retention or use of forensic material or information obtained as a result of activities described in paragraphs (a), (b), (c) and (d).
- (2) To avoid any doubt, it is declared that even though another law of the Commonwealth provides power to do one or more of the things referred to in subsection (1), a similar power conferred by this Part may be used despite the existence of the power under the other law.

## **Division 13—Review of operation of Part**

### **23YV Review of operation of Part**

- (1) The Minister must cause an independent review of:
- (a) the operation of this Part; and
  - (b) the extent to which the forensic procedures permitted by this Part have contributed to the conviction of suspects; and
  - (c) any other matter in relation to this Part which, in the Minister's view, should be considered;
- to be undertaken as soon as possible after the second anniversary of the commencement of this Act.
- (2) A person who undertakes the review must give the Minister a written report of the review.
- (3) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.
- (4) In this section:
- independent review*** means a review undertaken by persons who:
- (a) in the Minister's opinion, possess appropriate qualifications to undertake the review; and
  - (b) include a nominee of the Attorney-General, a nominee of the Commissioner of the Australian Federal Police, a nominee of the Director of Public Prosecutions and a nominee of the Ombudsman.

## **Schedule 2—Further amendment of the Crimes Act 1914**

### **1 Subsection 3(1)**

Insert:

*Aboriginal person* means a person of the Aboriginal race of Australia.

### **2 Subsection 3(1):**

Insert:

*dentist* means a dental practitioner within the meaning of the *Health Insurance Act 1973*.

### **3 Subsection 3(1)**

Insert:

*medical practitioner* has the same meaning as in the *Health Insurance Act 1973*.

### **4 Subsection 3(1)**

Insert:

*nurse* means a registered nurse within the meaning of the *Health Insurance Act 1973*.

### **5 Subsection 3(1)**

Insert:

*Torres Strait Islander* means a descendent of an indigenous inhabitant of the Torres Strait Islands.

### **6 Subsection 3ZH(2)**

Repeal the subsection, substitute:

- (2) A strip search may be conducted if:
- (a) a constable suspects on reasonable grounds that the person has in his or her possession:
    - (i) a seizable item; or

- (ii) evidential material (other than forensic material as defined in Part 1D) in relation to that or another offence; and
  - (b) the constable suspects on reasonable grounds that it is necessary to conduct a strip search of the person in order to recover that item or evidential material; and
  - (c) a constable of the rank of superintendent or higher has approved the conduct of the search.
- (2A) If:
- (a) in the course of carrying out a strip search, the constable comes to believe on reasonable grounds that the carrying out of a forensic procedure would be likely to produce evidence relating to the offence for which the person has been arrested; and
  - (b) Part 1D provides for the carrying out of such a forensic procedure;
- the forensic procedure must not be carried out except in accordance with Part 1D.

**7 After subsection 3ZH(3)**

Insert:

- (3A) Subsection (3) does not authorise the conduct of a strip search for the purpose of obtaining forensic material as defined in Part 1D. Such a search must not be conducted except in accordance with Part 1D.

**8 Subsection 3ZH(6)**

Omit “(d)”, substitute “(c)”.

**9 Subsection 3ZJ(6)**

Insert “(other than hand prints, finger prints, foot prints or toe prints)” after “identification material”.

**10 After subsection 3ZJ(6)**

Insert:

- (6A) A constable must not take hand prints, finger prints, foot prints or toe prints from a suspect who:

- (a) is at least 10 but under 18, or is incapable of managing his or her affairs; and
  - (b) has not been arrested and charged;
- except in accordance with Part 1D.

**11 Section 3ZY**

Repeal the section.

**12 Subsection 7(6)**

Omit “7B”, substitute “86”.

**13 After section 15F**

Insert in Part 1A:

**15FA Nature of functions conferred on magistrate**

- (1) Where a function that is not a judicial function or incidental to a judicial function is expressed to be conferred on a magistrate by this Act, the function is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (2) Without limiting the generality of subsection (1), an order made by a magistrate in the performance of a function covered by that subsection has effect only by virtue of this Act and is not to be taken by implication to be made by a court.
- (3) A magistrate performing a function covered by subsection (1) has the same protection and immunity as if he or she were performing that function as, or as a member of, a court (being the court of which the magistrate is a member).
- (4) The Governor-General may make arrangements with the Governor of a State, the Chief Minister of the Australian Capital Territory, the Administrator of the Northern Territory or the Administrator of Norfolk Island for the performance, by all or any of the persons who from time to time hold office as magistrates in that State or Territory, of functions covered by subsection (1).

**14 Subsection 23B(1) (definition of *Aboriginal person*)**

Repeal the definition.

**15 Subsection 23B(1) (definition of *Torres Strait Islander*)**

Repeal the definition.

**16 Subsection 23B(6)**

Repeal the subsection, substitute:

- (6) In this Part, a reference to questioning a person:
- (a) is a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest); and
  - (b) does not include a reference to carrying out a forensic procedure on the person under Part 1D.

**17 Paragraph 23C(7)(g)**

Insert “, 23WU or 23XB” after “23D”.

**18 After paragraph 23C(7)(g)**

Insert:

- (ga) any time during which the constable is informing the person of matters specified in section 23WJ;

**19 Subsection 23C(7)**

Add at the end:

- ; (i) any time during which a forensic procedure is being carried out on the person by order of a magistrate under Division 5 of Part 1D;
- (j) any time during which the questioning of the person is suspended or delayed, if section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section.

## **Schedule 3—Amendment of other Acts**

### ***Commonwealth Places (Application of Laws) Act 1970***

#### **1 Schedule**

Omit “and sections 20C, 21B and 21E”, substitute “sections 20C, 21B and 21E and Part 1D”.

### ***Crimes at Sea Act 1979***

#### **2 Paragraph 5(4)(a)**

Omit “and sections 20C, 21B and 21E”, substitute “sections 20C, 21B and 21E and Part 1D”.

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*[Minister's second reading speech made in—  
House of Representatives on 26 March 1997  
Senate on 26 May 1997]*

(51/97)