

Bills Digest
No. 81 2000-01

Crimes Amendment (Forensic Procedures) Bill
2000

ISSN 1328-8091

© Copyright Commonwealth of Australia 2001

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database. On the Internet the Department of the Parliamentary Library can be found at:
<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2001

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 81 2000–01

Crimes Amendment (Forensic Procedures) Bill 2000

Jennifer Norberry
Law and Bills Digest Group
30 January 2001

Contents

Purpose.....	1
Background.....	1
DNA material and DNA profiling.....	1
Work of the Model Criminal Code Officers Committee.....	2
<i>Crimes Amendment (Forensic Procedures) Act 1998</i>	2
Categories of forensic procedure.....	3
Forensic procedures and suspects.....	3
Forensic procedures and convicted serious offenders.....	3
Retention and destruction of forensic material and use of information obtained from analysing forensic material.....	3
DNA statistical database.....	3
Further work by MCCOC on forensic procedures.....	4
State and Territory forensic procedures laws.....	4
Law enforcement and civil liberties.....	5
Main Provisions.....	6
Schedule 1—Amendment of the <i>Crimes Act 1914</i>	6
Conferral of non-judicial Commonwealth powers or functions on State or Territory judicial officers.....	6
Definitions relating to forensic procedures.....	6
Amendment of the expression ‘authorised applicant’.....	6
Amendments relating to transgender persons.....	7
The meaning of destroying forensic material.....	7
Forensic procedures and suspects.....	7
Obtaining a suspect’s consent to a forensic procedure.....	7
Amendments relating to a suspect’s rights.....	8
Amendments relating to hair sampling.....	9
Other amendments relating to suspects.....	9
Forensic procedures and offenders.....	9

General.....	9
Definitions.....	10
Carrying out forensic procedures on offenders.....	10
Obtaining consent from an offender	11
Obtaining an order if an offender refuses to consent to a forensic procedure	11
Offences	12
Destruction of forensic material taken from an offender.....	12
Legal representatives, interview friends and providing samples and recordings to offenders	12
Forensic procedures and volunteers.....	12
General.....	12
Obtaining consent from a volunteer.....	13
Withdrawal of consent by a volunteer and its consequences.....	13
Orders for forensic procedures on children and incapable persons	14
Orders for the retention of forensic material when a volunteer withdraws consent after a forensic procedure has been completed.....	14
Providing samples and recordings to volunteers	14
DNA database system.....	15
DNA Indexes	15
Offences relating to the DNA database system	15
Taking, use and retention of forensic material authorised by State and Territory laws.....	16
Interjurisdictional enforcement.....	17
Concluding Comments.....	17
The taking, retention and use of forensic material	17
Forensic procedures and offenders	18
Forensic procedures and volunteers	20
Independent oversight of the DNA database.....	20
Endnotes.....	21

Crimes Amendment (Forensic Procedures) Bill 2000

Date Introduced: 30 August 2000

House: Senate

Portfolio: Justice and Customs

Commencement: In general, 6 months after Royal Assent unless commenced earlier by Proclamation. Where an earlier commencement is specified in the Bill, details are provided in the Main Provisions section of this Digest.

Purpose

To amend the *Crimes Act 1914* (Cwlth) to provide a legislative regime governing:

- the conduct of forensic procedures on certain convicted offenders
- the conduct of forensic procedures on volunteers (non-suspects), and
- a national DNA database.

Background

DNA material and DNA profiling

DNA has been described as:

... the genetic material contained in the nuclei of cells in the human body. It provides a genetic blueprint unique to each individual. In some senses, DNA provides a genetic 'future diary' about a person's life, because it contains information about significant future events, such as susceptibility to disease and, possibly, about behavioural traits.¹

However, DNA profiles do not necessarily contain all of a person's DNA:

DNA profiling techniques used in forensic work tend to use 'non-coding' loci as the basis for identification, that is, parts of the genome that do not contain genes. ... non-coding loci are not subject to selection pressures, [and] tend to mutate more rapidly. For this reason, these loci show greater variation between individuals and are therefore a better basis for identification.²

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Work of the Model Criminal Code Officers Committee

The police have no power at common law to compel a suspect to provide samples of their blood, hair, saliva or other bodily matter. Absent the suspect's consent, taking such a sample is an assault. A number of Australian and overseas inquiries examined the issue of police powers and forensic sampling before the Model Criminal Code Officers Committee (MCCOC)³ commenced work on model legislation for Australia.

In 1994, MCCOC produced a draft Model Forensic Procedures Bill for public consultation. Following receipt of comments, the Standing Committee of Attorneys-General endorsed the Model Bill and referred the question of a national DNA database to the Australasian Police Ministers Council. In 1995, the Keating Government introduced a Crimes Amendment (Forensic Procedures) Bill (the 1995 Bill) based on the Model Bill into the Commonwealth Parliament. The 1995 Bill lapsed when the 1996 General Election was called. The Howard Government introduced a new Crimes Amendment (Forensic Procedures) Bill 1997 which reflected recommendations made by the Senate Legal and Constitutional Legislation Committee during its examination of the 1995 Bill. This Bill became the *Crimes Amendment (Forensic Procedures) Act 1998* (Cwlth). Other jurisdictions have also passed legislation based, to varying degrees, on the Model Bill.⁴

Crimes Amendment (Forensic Procedures) Act 1998

Federal forensic procedures are governed at present by the *Crimes Amendment (Forensic Procedures Act) 1998*. That Act inserted Part 1D into the *Crimes Act 1914* (the Principal Act).

Part 1D of the Principal Act:

- defines two categories of forensic procedure (non-intimate and intimate forensic procedures)
- prescribes how forensic procedures can be carried out on persons suspected of committing indictable offences
- prescribes how blood samples can be taken from a person convicted of a serious offence
- contains special provisions for forensic procedures in the case of suspects who are minors, incapable persons or Indigenous Australians
- prescribes how forensic samples can be used, retained and destroyed and how information obtained from forensic sampling can be used, and
- enables information obtained as a result of forensic sampling to be stored in a non-identifying statistical database.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Part 1D does not prevent a person who is not a suspect being asked by a constable to undergo a forensic procedure and consenting to the request.⁵ However, there is no statutory regime presently governing forensic procedures on volunteers.

Categories of forensic procedure

Part 1D provides for two categories of forensic procedure. ‘Non-intimate forensic procedures’ include examinations of a person’s body (other than their genital areas) and the taking of fingerprints, hair samples (other than pubic hair), nail samples, swabs or vacuum suctioning (of external body parts other than a person’s genitals). ‘Intimate forensic procedures’ include external examinations of a person’s genitals and the sampling of blood, saliva, pubic hair or dental impressions.

Forensic procedures and suspects

Under Part 1D, forensic procedures can be carried out on a suspect with that person’s informed consent. In the absence of consent, a non-intimate forensic procedure can be ordered by a senior constable. A magistrate’s order is necessary if the suspect is a child, an incapable person or if the suspect has refused to consent to an intimate forensic procedure. Special procedures apply to Indigenous people. For example, a constable cannot ask an Indigenous person to consent to a forensic procedure unless an interview friend is present.⁶

A suspect is defined in subsection 23WA(1) as a person charged with an indictable offence, a person suspected by a constable on reasonable grounds of having committed an indictable offence or a person summonsed to appear in relation to an indictable offence.

Forensic procedures and convicted serious offenders

Under section 23YQ of the Principal Act, a blood sample can be obtained from a person convicted of a serious offence if there are reasonable grounds for believing that the person has committed another serious offence or may do so in the future. A ‘serious offence’ is defined as an offence punishable by a maximum of 5 or more years imprisonment.

Retention and destruction of forensic material and use of information obtained from analysing forensic material

Under the current provisions, a regime exists for the destruction of forensic material after 12 months if proceedings against the suspect are not commenced or are discontinued.⁷ Forensic material may be kept if a conviction is obtained.

DNA statistical database

Section 23YO enables information obtained from forensic analysis to be placed in a non-identifying statistical database for DNA profiling purposes.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Further work by MCCOC on forensic procedures

In May 1999, MCCOC produced a Discussion Paper entitled 'Model Forensic Procedures Bill and the Proposed National DNA database'. A revised Model Bill was released in February 2000. It is on this Model Bill that the Crimes Amendment (Forensic Procedures) Bill 2000 is based.

State and Territory forensic procedures laws

Most States and Territories have enacted legislation based, to varying degrees, on the 1995 Model Bill which enables forensic procedures to be carried out on suspects and some convicted offenders. Additionally, some legislatures have recently passed amendments which provide for more comprehensive testing regimes and for DNA law enforcement databases. Others are considering such legislation or plan to introduce it in the near future. A very brief summary of State and Territory laws is as follows:

The *Crimes (Forensic Procedures) Act 2000* is the relevant New South Wales statute which contains a regime for carrying out forensic procedures on suspects, convicted serious indictable offenders and volunteers. The NSW statute also provides for the placing and matching of profiles derived from forensic material on a DNA database and the exchange of information between jurisdictions.

Amendments to the Victorian *Crimes Act 1958* enable forensic procedures to be carried out on suspects with their consent or by order of a magistrate. Testing can also be carried out on serving prisoners convicted of a 'forensic sample offence'. Provision exists for a computerised DNA database.

In South Australia, the *Criminal Law (Forensic Procedures) Act 1998* enables forensic samples to be taken from suspects with their consent or on a magistrate's order. Post-conviction testing can occur where an indictable major offence⁸ is involved. There is also provision for a DNA database and the exchange of information between jurisdictions.

In Queensland, the *Police Powers and Responsibilities Act 2000* enables forensic procedures to be carried out on suspects, serving prisoners and volunteers. It establishes a DNA database and enables information obtained as a result of DNA analysis to be recorded in a national DNA database.

In the Northern Territory, the *Police Administration Amendment Act (No.2) 1998* covers forensic testing of suspects, those in lawful custody who have been charged with an offence punishable by 1 years imprisonment and volunteers. The *Juvenile Justice Amendment Act (No.3) 1998* (NT) enables intimate and non-intimate forensic samples to be taken from inmates of juvenile detention centres who have been convicted of a crime. The *Prisons (Correctional Services) Act 1998* (NT) enables intimate and non-intimate forensic procedures to be carried out on offenders serving a prison sentence for a crime. Provision is also made under NT law for DNA databases.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The *Crimes (Forensic Procedures) Act 2000* operates in the Australian Capital Territory. It enables forensic samples to be taken from suspects with their consent or by order of a magistrate, from persons convicted of serious offences and from volunteers, children and incapable persons. Provision is also made for a DNA database and for the exchange of DNA information between jurisdictions.

In Tasmania, the *Forensic Procedures Act 2000* governs the carrying out of forensic procedures on suspects, charged persons, prescribed offenders and volunteers. It also provides for a DNA database system and the interjurisdictional sharing of information.

On 15 November 2000, the Criminal Investigation (Identifying People) Bill 2000 was introduced into the Western Australian Parliament. The Bill provided for forensic procedures to be carried out on uncharged and charged suspects, prescribed prisoners, serious offenders who are imprisoned, paroled or on supervised release. Provisions enabling forensic procedures to be carried out on volunteers were also included as were provisions for a DNA database. The Bill lapsed when the Western Australian Parliament was dissolved for the General Election scheduled for 10 February 2001.

Law enforcement and civil liberties

DNA profiling can be an important, though certainly not infallible, investigative and evidentiary technique which involves ‘using genetic information to match crime scene evidence with suspects [and others] in criminal investigations’.⁹ The Queensland Director of Public Prosecutions said recently:

Whilst a conviction can never rest solely on a matching of biological material found at a crime scene with a body sample of the person accused, its use brings certainty to a verdict where there is other incriminating circumstantial evidence.¹⁰

DNA profiling may be useful in establishing innocence, eliminating suspects and identifying criminals¹¹ who have committed certain types of offence.¹² It may also assist clear-up rates for unsolved crimes, given that a small number of offenders are said to commit large numbers of crimes.¹³ Nevertheless, DNA testing has the potential to invade privacy and undermine some basic precepts of the criminal justice system—including the privilege against self-incrimination and presumption of innocence.¹⁴

Some privacy concerns about DNA testing may be allayed by the nature of the DNA profiling system. In a recent article, the Director of the National Institute of Forensic Sciences remarked that the DNA profiling system chosen for Australia reveals ‘no information about a person in relation to physical or mental attributes or status’ apart from gender.¹⁵ However, the potential for such information to be obtained remains so long as the DNA sample is conserved and might be obtainable from current DNA profiles using future analytical techniques.¹⁶

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

A further concern for some is the need to maintain the integrity of DNA samples against both official tampering and the planting of false crime scene evidence by offenders in order to implicate others.¹⁷

There is a considerable literature about DNA profiling from law enforcement, civil libertarian and other perspectives. Some of this material is cited at endnote 18.¹⁸

Main Provisions

Schedule 1—Amendment of the *Crimes Act 1914*

Conferral of non-judicial Commonwealth powers or functions on State or Territory judicial officers

Item 2 inserts **proposed section 4AAA** into the Principal Act. **Proposed section 4AAA** provides that any Commonwealth criminal laws conferring non-judicial functions or powers on State or Territory judges or magistrates confer those powers or functions in a personal capacity. Further, acceptance by the judicial officer of those powers or functions is voluntary. **Proposed subsection 4AAA(6)** applies the section both retrospectively and prospectively.

These amendments affect Part 1A of the Principal Act. They are said to flow from the constitutional doctrine which requires federal judicial power to be separated from legislative and executive power. Under this doctrine, holders of Commonwealth judicial power can only exercise non-judicial power in limited circumstances. For example, non-judicial power which is incidental to the exercise of judicial power may be conferred and exercised. Further, non-judicial power may be exercised by the holder of judicial office if it is conferred in a personal capacity and with the consent of the federal judge.¹⁹ Nor can functions be conferred which are incompatible with the exercise of federal judicial power.²⁰

Item 2 also inserts **proposed section 4AAB**. **Proposed section 4AAB** enables the Commonwealth to make arrangements with the States and Territories so that State and Territory judges, magistrates and justices of the peace can perform non-judicial powers and functions under Commonwealth criminal law. The purpose of limiting the exercise of powers and functions to these officers is to ensure that ‘... appropriately trained people exercise these powers.’²¹

Item 2 commences when the legislation receives Royal Assent.

Definitions relating to forensic procedures

Amendment of the expression ‘authorised applicant’

Item 6 does not contain the word ‘Insert:’ but is designed to amend subsection 23WA(1) of the Principal Act by specifying who is an ‘authorised applicant’ for the purposes of applying for an order to carry out a forensic procedure on an offender. In such a case, an

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

‘authorised applicant’ is a constable in charge of a police station, the officer investigating an offence or the Director of Public Prosecutions. At present, Division 11 of Part 1D of the Principal Act enables ‘a constable’ to apply for a court order directing an offender to give a blood sample.

Amendments relating to transgender persons

Item 16 amends the definition of ‘intimate forensic procedure’ contained in the Principal Act. At present, the Principal Act specifies that an intimate forensic procedure includes an examination of a female’s breasts. The amendments ensure that the definition of ‘intimate forensic procedure’ will extend to examination of the breasts of a transgender person who identifies as female. Similar amendments are effected by **item 22** which alters the definition of ‘non-intimate forensic procedure’.

Item 29 adds a definition of ‘recognised transgender person’ to subsection 23WA(1) of the Principal Act. Such a person is defined as a person who has had their birth sex altered in the record of births, deaths and marriages under State or Territory law.

Item 36 also inserts **proposed subsection 23WA(6)** which defines a transgender person. In addition to a person who is a ‘recognised transgender person’, a transgender person is defined as one who lives as a member of the opposite sex, or a person of indeterminate sex who lives as a member of a particular sex. Also included is a person who is thought of as a transgender person irrespective of whether they are a transgender person.

The meaning of destroying forensic material

Item 36 inserts **proposed subsection 23WA(5)** which provides that forensic material or information is regarded as being destroyed when the means of matching the material or information with the person from whom it was taken is destroyed. Division 8 of Part 1D deals with the destruction of forensic material, however, ‘destroy’ is not presently defined.

Forensic procedures and suspects

The Bill makes some changes to the current regime relating to the carrying out of forensic procedures on suspects with their consent or by order of a senior constable or magistrate. However, this regime basically retains its present content.

Obtaining a suspect’s consent to a forensic procedure

Item 39 amends subsection 23WI(1) of the Principal Act by adding to the matters about which a constable must be satisfied before asking a person to consent to a forensic procedure. At present, the constable must be satisfied that the person is a suspect, it is likely that the forensic procedure will produce probative material and that the procedure is justified in all the circumstances. As a result of the amendment, a constable will also need to be satisfied that a person is not a child or incapable person before asking them to consent to a forensic procedure. Special procedures apply in these cases.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 41 amends subsection 23WJ(1) of the Principal Act by adding to the matters about which a constable must inform a suspect before they can consent to a forensic procedure. As a result of the amendment, a suspect must be told that information obtained as a result of the procedure may be included in the DNA database system and about the rules applying to its disclosure and use.

Amendments relating to a suspect's rights

Item 45 replaces subsection 23WX(6) of the Principal Act with **proposed subsections 23WX(6) & (6A)**. This subsection defines the role that a suspect or their representative can play at a hearing before a magistrate who has been asked to order the carrying out of a forensic procedure. At present, a suspect can call or cross-examine any witness or address the magistrate. The amendments enable the suspect to call or cross-examine the person applying for the order. The provision enabling a suspect to address the magistrate is retained. However, the amendments limit the circumstances in which a suspect may call or cross-examine witnesses other than the applicant for the order. The suspect will only be able to call or cross-examine such witnesses with the magistrate's permission. Further, the magistrate will be unable to grant permission unless he or she believes there are substantial reasons in the interests of justice for permission to be granted.

Item 50 amends the table in subsection 23XM(3) of the Principal Act. The table lists forensic procedures, specifies who may carry out each procedure and states whether the suspect is entitled to ask that a medical practitioner or dentist of their choice is present during the procedure. Procedures currently attracting this entitlement which will no longer do so as a result of item 50 are:

- external examination requiring touching of the suspect's body or removal of clothing (other than the suspect's genital or anal areas, buttocks or breasts)
- taking hair samples (other than pubic hair)
- taking nail samples
- taking a swab from an external part of the body (other than the suspect's genital or anal areas, buttocks or breasts)
- taking a sample by vacuum suction, or scraping an external part of the body (other than the suspect's genital or anal areas, buttocks or breasts)
- taking a photograph, or impression of an external part of the body (other than the suspect's genital or anal areas, buttocks or breasts).

The Bill does not affect a suspect's ability to make such a request in the case of other forensic procedures eg external examinations of genital or anal areas or breasts, taking pubic hair samples or swabbing external genital or anal areas or breasts. As a result of **proposed subsection 23XWE(1)** and **proposed subsection 23XWQ(5)**, the table in its

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

amended form also applies to serious and prescribed offenders, and volunteers, respectively

Item 51 amends the table in section 23XM. At present, hand, foot, finger or toe prints can be taken under Part 1D by a constable. The amendment provides that only an ‘appropriately qualified’ person can conduct such a procedure. An ‘appropriately qualified person’ is defined in section 23WA as a person who has suitable professional qualifications or experience or who is qualified under the regulations.

Amendments relating to hair sampling

Item 47 repeals section 23XL of the Principal Act and replaces it with **proposed section 23XL**. Existing section 23XL prevents a suspect’s hair samples being taken by the root ie samples are taken by cutting the hair.²² **Proposed section 23XL** provides that hair samples can be taken by removing the hair root if:

- only the amount of hair necessary for analysis is removed; and
- each strand of hair is taken individually using the least painful method known and available.

Other amendments relating to suspects

Item 54 amends section 23XO to authorise a person asked to help carry out a forensic procedure to use reasonable force to do so.

Item 55 creates an offence of obstructing, hindering or resisting the carrying out of a forensic procedure (**proposed section 23XWA**). The maximum penalty is two years’ imprisonment.

At present, no time limit is placed on the requirement to destroy forensic material obtained as a result of an interim order regarding a suspect if that order is subsequently disallowed [paragraph 23YC(a)]. **Item 59** inserts a requirement that the forensic material must be destroyed ‘as soon as practicable’.

Forensic procedures and offenders

General

Item 56 inserts **proposed Division 6A** into the Principal Act. **Proposed Division 6A** contains procedures for carrying out intimate and non-intimate forensic sampling on serious and prescribed offenders. While the full range of forensic procedures, including procedures clearly impinging on personal dignity and privacy that apply to suspects do not apply to offenders, procedures which produce DNA samples²³ that can be stored in the DNA database system can be carried out on serious and prescribed offenders. And the statutory protections available to offenders are more limited than those available to suspects.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed Division 6A applies to serious and prescribed offenders under sentence irrespective of whether they were convicted of the serious or prescribed offence before or after the commencement of the proposed legislation.²⁴

The provisions for carrying out forensic procedures on suspects found in Division 6 of Part 1D of the Principal Act also apply to serious and prescribed offenders (**proposed section 23XWE**). Division 6 contains privacy protections²⁵, sets out who can carry out the different sorts of forensic procedures, how forensic procedures are to be recorded and enables the suspect to analyse or monitor the analysis of material taken during a forensic procedure.

Proposed section 23XWF contemplates that a person can be both a serious/prescribed offender and a suspect or volunteer. In such cases, forensic procedures can only be carried out on the person in accordance with the procedures covering suspects or volunteers (whichever is relevant).

Definitions

A ‘serious offender’ is a person ‘under sentence’ for a Commonwealth offence carrying a maximum penalty of life imprisonment or imprisonment for 5 years or more (**items 31 & 32**). A ‘prescribed offender’ is a person ‘under sentence’ for a Commonwealth offence carrying a maximum penalty of life imprisonment or imprisonment for 2 years or more (**items 26 & 27**).

In either case, the expression ‘under sentence’ is defined to encompass that offender being in prison, on parole, released on licence, subject to a hospital order, or subject to conditional release (**item 36**).

The expressions ‘intimate forensic procedures’ and ‘non-intimate forensic procedures’ have restricted definitions in their application to offenders (**proposed section 23XWB**). An ‘intimate forensic procedure’ is a blood sample or buccal swab²⁶. A ‘non-intimate forensic procedure’ means hair sampling (other than pubic hair) or fingerprinting.

Carrying out forensic procedures on offenders

If a ‘serious offender’ is a child or incapable person, a non-intimate forensic procedure (hair sampling²⁷ or fingerprinting) can only be carried out under a magistrate’s order [**proposed subsection 23XWC(3)**]. In the case of other serious offenders, a non-intimate forensic procedure can be carried out with the person’s informed consent or by order of a constable [**proposed subsection 23XWC(1)**].

If a ‘prescribed offender’ is a child or incapable person, only fingerprinting can be carried out and only under a magistrate’s order [**proposed subsection 23XWC(3)**]. In the case of other prescribed offenders, a non-intimate forensic procedure can be carried out with the person’s informed consent or by order of a constable [**proposed subsection 23XWC(2)**].

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

An authorised person can carry out an intimate forensic procedure (blood sampling or buccal swabs) on a serious offender (other than a child or incapable person) with the offender's informed consent or by order of a magistrate (**proposed section 23XWD**).

Obtaining consent from an offender

Proposed subsection 23XWG(1) defines when 'informed consent' will occur. An offender will give informed consent to a forensic procedure if he or she consents after a constable makes a request for consent²⁸, provides information about the forensic procedure²⁹ and gives the offender the opportunity to contact a lawyer. **Proposed section 23XWI** specifies what the constable must consider before asking an offender to consent to a forensic procedure. These matters include whether the request is justified in all the circumstances.

The information that must be provided to an offender is stipulated in **proposed section 23XWJ**. It includes the purpose of the procedure, the relevant offence (if any), the way in which the procedure will be carried out, the fact that the offender may refuse to consent to the procedure, the consequences of refusing to consent, and the use to which information obtained may be put. It may be used as evidence in legal proceedings or placed on the DNA database system [**proposed paragraphs 23XWJ(1)(d) & (j)**].

The constable must tape-record or make a written record when giving information to the offender and of the offender's responses. If tape recording is impracticable, a copy of the written record must be given to the offender (**proposed section 23XWM**).

Obtaining an order if an offender refuses to consent to a forensic procedure

If a serious offender (other than a child or incapable person) refuses to consent to a non-intimate procedure or a prescribed offender refuses to consent to fingerprinting, a constable can order the procedure to be carried out (**proposed section 23XWK**). Before doing so, the constable must take account of the seriousness of the circumstances of the offender's crime, whether carrying out the procedure could assist law enforcement and whether carrying out the procedure is justified in all the circumstances (**proposed sections 23XWK & 23XWL**). If a constable orders a non-intimate forensic procedure to be carried out, he or she must also make a record of the order and why the order was made and provide a copy to the offender (**proposed section 23XWN**).

A constable can apply to a judicial officer (judge or magistrate) for an order directing a serious offender to consent to an intimate forensic procedure or directing a non-intimate forensic procedure to be carried out on a child or incapable person who is a serious offender. An application may also be made to a judicial officer for an order for fingerprinting a child or incapable person who is a prescribed offender (**proposed section 23XWO**).

Judicial officers must take account of certain matters when deciding whether to make an order. These matters include the seriousness of the circumstances surrounding the offence, whether the procedure would assist law enforcement and whether carrying out the

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

procedure is justified in all the circumstances [**proposed subsections 23XWO(6) &(7)**]. The results of a forensic procedure carried out following a judicial order cannot be disclosed until the appeal period for the offence has expired. Nor can they be disclosed if the conviction is quashed [**proposed subsection 23XWO(8)**].

Offences

Absent a reasonable excuse, it is an offence for an offender to refuse to comply with a judicial order permitting a forensic procedure to be carried out on that offender. The maximum penalty is 12 months imprisonment [**proposed subsection 23XWP(4)**].

Destruction of forensic material taken from an offender

Forensic material obtained from an offender must be destroyed as soon as practicable if the offender's conviction is quashed (**item 64**, inserting **proposed section 23YDAA**).

Legal representatives, interview friends and providing samples and recordings to offenders

Part 1D of the Principal Act entitles a suspect's interview friend or legal representative to make requests or objections that could be made by the suspect and to be informed of matters that the suspect must be informed of (section 23YE). Part 1D also requires a constable to provide copies of any tape recordings to a suspect (section 23YF) and stipulates where samples or copies of material must be sent (section 23YG). Amendments effected by **items 66-75** extend these provisions to offenders. Section 23YH of the Principal Act provides that material that must be provided to a suspect under Part 1D must be provided free of charge. **Item 76** amends section 23YH to extend this provision to offenders.

Forensic procedures and volunteers

General

Proposed Division 6B deals with the carrying out of forensic procedures on volunteers. A 'volunteer' is defined in **proposed subsection 23XWQ(1)** and includes a child or incapable person whose parent or guardian gives informed consent to the procedure on their behalf.

The provisions for carrying out forensic procedures on suspects found in Division 6 of Part 1D of the Principal Act also apply to volunteers [**proposed subsection 23XWQ(5)**]. Division 6 contains privacy protections³⁰, sets out who can carry out the different sorts of forensic procedures, how forensic procedures are to be recorded and enables the suspect to analyse or monitor the analysis of material taken during a forensic procedure.

A forensic procedure can only be carried out on a volunteer if it is necessary for or incidental to an Australian Federal Police (AFP) function [**proposed subsection 23XWQ(3)**]. In the case of a volunteer who is a child or incapable person, a forensic procedure cannot be carried out if the person objects or resists [**proposed subsection**

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

23XWQ(4)]. The term ‘AFP function’ is defined as a function contained in section 8 of the *Australian Federal Police Act 1979* (**item 5**).

Obtaining consent from a volunteer

Before a person or the parent or guardian of a child or incapable person can effectively volunteer they must give informed consent as set out in **proposed section 23XWR**. Consent must be given in the presence of an independent person (not a constable) after a constable provides prescribed information. This information includes how the procedure will be carried out, the fact that the volunteer is not obliged to undergo the procedure, that the procedure may produce evidence used in court, and that the person can consult a lawyer before making a decision. Further, a volunteer must be informed that his or her consent to the procedure, the retention of forensic material obtained or the retention of information obtained from forensic analysis can be withdrawn at any time [**proposed subsection 23XWR(1)**].

Additional information, specified in **proposed subsection 23WXR(2)**, must be provided by the constable to the extent that it is relevant. Thus, to the extent that it is relevant, the potential volunteer must be told that information obtained from the forensic analysis may be placed on the DNA database. If the constable intends that the information is placed on particular indexes of that system, then this information must also be conveyed to the extent that it is relevant.

If practicable, the provision of information and the giving of consent must be tape recorded [**proposed subsection 23XWS(1)**]. If tape recording is not practicable, a written record must be made and a copy given to the volunteer, parent or guardian [**proposed subsection 23XWS(2)**].

Withdrawal of consent by a volunteer and its consequences

If a volunteer, parent or guardian withdraws their consent either expressly or inferentially before or during the forensic procedure then consent is treated as being refused from this time and the procedure cannot proceed [**proposed subsection 23XWT(1)**]. While the withdrawal of consent by an adult volunteer before or during a forensic procedure is conclusive, it is possible to obtain a magistrate’s order for a forensic procedure to be carried out on a child or incapable person whose parent or guardian has withdrawn consent on their behalf (see **proposed section 23XWU**—below).

If a volunteer, parent or guardian expressly withdraws consent after a forensic procedure is carried out then forensic material and information derived from its analysis must be destroyed as soon as practicable [**proposed subsection 23XWT(2)**]—unless an order is made under **proposed section 23XWV** (see below).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Orders for forensic procedures on children and incapable persons

The Explanatory Memorandum comments:

The purpose of permitting a procedure in relation to a child or incapable person to proceed by order of a magistrate is to protect that child or person where there are reasons to believe that the withdrawal may not be in the child or incapable person's best interests – for example, if the child or incapable person is believed to be a victim of an offence committed by the relevant parent or guardian.³¹

In certain circumstances a magistrate may order a forensic procedure to be carried out on a child or incapable person without the consent of their parent or guardian. These circumstances are set out in **proposed section 23XWU**. **Proposed section 23XWU** deals not only with the case where a parent or guardian initially consents and subsequently withdraws that consent [**proposed paragraph 23XWU(1)(c)**]. It also enables a magistrate to make an order if consent cannot reasonably be obtained or if the magistrate is satisfied that the parent or guardian is a suspect and the procedure is likely to produce relevant evidence [**proposed paragraphs 23XWU(1)(a) & (b)**]. In deciding whether to make an order, the magistrate must take account of prescribed matters. These include the seriousness of the circumstances of an offence, the best interests and any wishes of the child or incapable person, and whether the forensic procedure is justified in all the circumstances [**proposed subsection 23XWU(2)**].

However, a magistrate's order relating to a child or incapable person is not effective if the child or incapable person objects or resists [**proposed subsection 23XWQ(4)**].

Orders for the retention of forensic material when a volunteer withdraws consent after a forensic procedure has been completed

Proposed section 23XWV enables a magistrate to make an order for the retention of forensic material obtained from a volunteer, child or incapable person if satisfied that a serious offence is being investigated in which matching forensic material from the crime scene with forensic material from the volunteer is likely to produce probative evidence.

Providing samples and recordings to volunteers

Part 1D of the Principal Act requires a constable to provide copies of tape recordings to a suspect (section 23YF) and stipulates where samples or copies of material must be sent (section 23YG). Amendments effected by **items 71-74** extend these provisions to volunteers. Section 23YH of the Principal Act provides that material that must be provided to a suspect under Part 1D must be provided free of charge. **Item 76** amends section 23YH—extending this provision to volunteers.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

DNA database system

DNA Indexes

Proposed section 23YDAC is a definitions provision. In it, the expression ‘DNA database system’, is defined as a database (in computerised or other form) containing specified indexes. These indexes are:

- crime scene index—an index of DNA profiles from forensic material found at places, on or in victims, on victims’ clothing or belongings, or on persons or things or at places associated with prescribed offences
- missing persons index—an index of DNA profiles from forensic material of missing persons or their volunteer blood relatives
- unknown deceased persons index—an index of DNA profiles from forensic material of deceased persons whose identities are unknown
- serious offenders index—an index of DNA profiles from forensic material taken from:
 - serious offenders under Division 6A or a corresponding State or Territory law, or
 - suspects convicted of a prescribed offence
- volunteers (unlimited purposes) index—an index of DNA profiles from forensic material taken from volunteers under Commonwealth law or under a corresponding State/Territory law for any purpose for which the DNA database system can be used. It may include DNA profiles derived from material taken from deceased persons whose identity is known.
- volunteers (limited purposes) index—an index of DNA profiles from forensic material taken under Commonwealth law or under a corresponding State/Territory law for a specified purpose under paragraph 23XWR(2)(b).
- suspects index—an index of DNA profiles from forensic material taken under Commonwealth law or a corresponding State/Territory law, and
- statistical index—an information index compiled for statistical purposes from the analysis of forensic material taken under Commonwealth law or under a corresponding State/Territory law.

Offences relating to the DNA database system

It is an offence to include forensic material in the DNA database system if the law requires its destruction [**proposed subsection 23YDAD(1)**]. It is also an offence to supply forensic material which is not ‘excluded forensic material’ for inclusion in a DNA database system [**proposed subsection 23YDAD(2)**]. The maximum penalty in either case is 2 years imprisonment. ‘Excluded forensic material’ is forensic material taken in accordance with Part 1D³² or a corresponding law or from a crime scene, a deceased person, a missing

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

person or the volunteer blood relative of a missing person [**proposed subsection 23YDAD(3)**]. It also includes

It is an offence to access information stored on a DNA database system except for the purposes set out in **proposed subsection 23YDAE(2)**. The maximum penalty is 2 years imprisonment [**proposed subsection 23YDAE(1)**]. Lawful purposes include permissible matching under proposed section 23YDAF, providing the information to the person to whom the information relates, administering the DNA database system, or pursuant to arrangements between the Commonwealth and a State or Territory or a coronial inquest; or investigating a complaint about a breach of privacy. It is not an offence to access information on the DNA database system if the information does not contain identifying information [**proposed subsection 23YDAE(3)**].

Proposed section 23YDAF provides a table of what is ‘permissible matching’ of DNA profiles within and between indexes. For example, it is permissible to match a DNA profile from the crime scene index with other profiles in the crime scene index and with profiles from the suspects index, the volunteers (unlimited purposes) index, the serious offenders index, the missing persons index and the unknown deceased persons index. It is not permissible to match a DNA profile with a profile from the volunteers (limited purposes) index. It is an offence punishable by a maximum of 2 years imprisonment to recklessly cause an impermissible match to occur—unless the matching is solely for the purposes of administering the DNA database system.

Offences are created, punishable by a maximum penalty of 2 years imprisonment, for recording or retaining identifying information in the DNA database system after it should have been removed or destroyed [**proposed subsections 23YDAG(1)-(3)**].

Under **proposed section 23YO** it is an offence to disclose information on a DNA database system except for the purposes set out in **proposed subsection 23YO(2)**. These purposes include disclosure during a criminal investigation or to the person to whom the information relates. Other lawful purposes are administering the DNA database system, pursuant to arrangements between the Commonwealth and a State or Territory, for a coronial inquest or in order to investigate a complaint by the Privacy Commissioner. The maximum penalty is 2 years imprisonment.

It is also an offence to disclose information revealed by a forensic procedure except as set out in **proposed subsection 23YO(3)**. For example, information can be disclosed to the person to whom the information relates or if the information is already publicly available. It can also be disclosed in order to investigate an offence or offences generally, for the purpose of criminal or civil proceedings or a coronial inquest or for the purposes of medical treatment of the victim, suspect, offender or volunteer.

Taking, use and retention of forensic material authorised by State and Territory laws

Proposed section 23YP provides that forensic material or information taken under State or Territory law can be retained and used for Commonwealth investigative, evidentiary or statistical purposes even if its retention or use would not be supported Commonwealth

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

legislation. This provision extends to the use and retention of forensic material and information lawfully taken under State or Territory law before the commencement of the Bill.

Interjurisdictional enforcement

Proposed section 23YUB deals with the interjurisdictional registration of forensic procedures orders. **Proposed subsection 23YUB(1)** enables the Commonwealth Minister to enter into arrangements with his or her State/Territory counterparts in ‘participating jurisdictions’ for the registration of forensic procedures orders made under Part 1D or the ‘corresponding laws’ of ‘participating jurisdictions’. **Proposed subsection 23YUC** enables orders so registered to be carried out. However, perhaps with the recent High Court case of *R v. Hughes*³³ in mind, it provides that a constable is not compelled to execute such an order.

The expressions ‘corresponding law’ and ‘participating jurisdiction’ are defined in **proposed section 23YUA**. A ‘corresponding law’ is one ‘substantially corresponding with Part 1D or one prescribed by regulation’. A ‘participating jurisdiction’ is one where a ‘corresponding law’ is in force. **Proposed section 23YUD** provides that the Commonwealth Minister can make arrangements with State and Territory Ministers in participating jurisdictions for the sharing of information on their respective DNA database systems.

Concluding Comments

The taking, retention and use of forensic material

The Model Forensic Procedures Bill developed by MCCOC was designed as a template for the Commonwealth, the States and the Territories. However, consistency between jurisdictions has not been achieved. Nor have all jurisdictions passed new forensic procedures statutes. Thus the likely content of new Western Australian legislation is unknown at the time of writing.

The existence of legislative inconsistencies on the one hand and provisions for Commonwealth use of forensic information held by the States and Territories on the other is potentially problematic. In 1999, MCOCC remarked that a consequence of inconsistency could be that:

... a jurisdiction which has loose controls and allows the collection of samples in a wider range of circumstances could undermine appropriate restrictions on the use of the DNA database in another jurisdiction.³⁴

On the assumption that there would be consistency between jurisdictions, MCCOC recommended that DNA material obtained in accordance with the laws of one jurisdiction should be able to be used in another jurisdiction.³⁵ However, in the case of significant legislative disparity between jurisdictions it suggested that the legislation be worded to

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

exclude the use or retention of forensic material or information obtained by one jurisdiction from another if its use or retention would amount to such a serious breach or failure to comply with the laws of the first jurisdiction that it would be inadmissible.³⁶

The Bill enables interjurisdictional use and retention of forensic material even if the use or retention would not be supported by Commonwealth law. The Explanatory Memorandum comments that these provisions recognise that ‘... criminals operate without regard to State and Territory borders and law enforcement benefits from co-operation regardless of the jurisdiction.’³⁷

Whether there is significant disparity between jurisdictions is a matter for judgment. There are certainly differences of both process and substance between jurisdictions. For example, under the Bill the only forensic procedure that can be carried out on a juvenile who is a prescribed offender³⁸ is fingerprinting. Fingerprinting does not produce DNA material. Fingerprinting is only authorised under the Bill on a prescribed juvenile offender if a magistrate’s order is obtained. In contrast, in the Northern Territory, buccal swabs are regarded as non-intimate forensic procedures.³⁹ DNA samples are obtained from buccal swabs. Buccal swabs can be ordered by the superintendent of a juvenile detention centre on juvenile offenders who have been convicted of a crime.⁴⁰ Under Northern Territory law crimes include some offences which carrying maximum periods of imprisonment of 2 years and less⁴¹—in other words, buccal swabs authorised by Northern Territory law would not be obtainable under Commonwealth law nor, in some cases, would fingerprinting be allowed.

Under the Bill, intimate forensic procedures (blood sampling or buccal swabs) can only be carried out on offenders who are under sentence for an offence carrying a maximum penalty of at least five years imprisonment. Under the *Forensic Procedures Act 2000* (Tas), blood or saliva sampling or buccal swabs are defined as non-intimate forensic procedures.⁴² They can be carried out on ‘prescribed offenders’ by order of a police officer. Prescribed offenders include offenders who are serving sentences for offences which carry short prison sentences eg a maximum of 1 year.⁴³ Under Tasmanian law, a volunteer who is aged 15 years or above can consent to a forensic procedure. Under the Bill, a child⁴⁴ cannot volunteer to undergo a forensic procedure. Their parent or guardian must do so on their behalf.

Forensic procedures and offenders

Section 23YQ of the Principal Act adopts the scheme of the 1995 Model Bill by providing that an order directing a serious offender to provide a blood sample can only be obtained from a court if there are reasonable grounds to believe the person had committed another serious offence or might do so in the future. The 1999 MCCOC Discussion Paper took a different approach on the basis that:

If a person is convicted of a serious offence, then it is reasonable for society to expect that person to not only surrender their freedom to mix with society for some future time or to live in accordance with conditional freedom ... but to also be required to

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

give samples to assist with the detection of a repeat offence. Indeed, providing the sample may even deter the offender from committing further crime.

This rationale has more to do with the fact the person belongs to a class of people who are likely to reoffend rather than the specific circumstances of the person.⁴⁵

This view is reflected in the Bill which repeals section 23YQ (see **item 78**) and enables serving serious offenders to be required to provide blood samples or buccal swabs without consideration being given to whether reasonable grounds exist for believing that they have committed another serious offence or are likely to do so. An alternative approach would be to retain the current provision which is based on the idea that people should be considered innocent until there are ‘demonstrable grounds to suggest otherwise’.⁴⁶ It also takes account of research that seems to suggest that not all serious offenders are recidivists—recidivism rates appear to vary depending on the particular offence.⁴⁷

The Bill also differentiates between forensic procedures on suspects and offenders who are not suspects. Some of these differences relate to the making of requests by constables and orders by judicial officers. Others relate to the rights of suspects and offenders.

Under the Principal Act, before asking a suspect to undergo a forensic procedure a constable must consider whether the request is justified against a number of criteria⁴⁸ including the person’s age, physical, mental, cultural and religious background. Similar considerations apply when a judicial officer is asked to make an order for a forensic procedure on a suspect.⁴⁹ However, under the Bill constables and judicial officers need not consider these matters in the case of an offender who is not a suspect.

Further, differences exist in relation to what information must be given to suspects and offenders before they can give informed consent to a forensic procedure. Under the Principal Act, a suspect must be told by a constable that giving information and consent will be recorded and that the suspect has a right to a copy.⁵⁰ While the Bill provides that tape recordings must also be made available to offenders, there does not appear to be a requirement that offenders are told of this entitlement. Further, while the Principal Act provides that a constable must tell an Indigenous suspect that he or she can have an interview friend present while the forensic procedure is carried out⁵¹, there does not appear to be an equivalent requirement for Indigenous offenders. And, while the Principal Act attempts to ensure that suspects who are not fluent in English have access to an interpreter⁵², there does not appear to be an equivalent provision for offenders who are not suspects.

Additionally, given the relative ease with which DNA material can be taken from serious and even prescribed offenders, and despite the presence of **proposed subsection 23XWF(1)** it may be that little use will be made of the statutory regimes applying to offenders who might otherwise be either volunteers or suspects. Instead, there may be blanket testing of serious and prescribed offenders under Division 6A.⁵³ Finally, while **proposed subsection 23XWF(1)** provides that a person cannot carry out a forensic procedure on a serious or prescribed offender under Division 6A if that person is a suspect

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

or volunteer, there appears to be no requirement to inform such an offender that the option of volunteering is open to them.

Forensic procedures and volunteers

In its report on the Bill, the Senate Legal and Constitutional Legislation Committee remarked on the special protections needed for and provided to volunteers.⁵⁴ It recommended two amendments. While the Bill requires a constable to inform a volunteer about the index on which it is intended to store the volunteer's sample, there is no requirement for the constable to inform a volunteer that there are, in fact, two volunteer indexes—a limited purposes index and an unlimited purposes index—and that they can choose which index their sample can be placed on. The Senate Committee recommended that the Bill should be appropriately amended.⁵⁵

The Committee also recommended that **proposed subsection 23XWV(3)** be amended to make it consistent with **proposed subsection 23XWV(2)**. Subsection (2) provides that a magistrate can order the retention of 'forensic material taken or information obtained from' a forensic procedure on a volunteer who has withdrawn their consent to the retention. Subsection (3) enables a magistrate's order to specify a retention period for the 'forensic material' but does not mention that a retention period can also be specified for the 'information obtained' from that forensic procedure.⁵⁶

A more general concern about the volunteers indexes was expressed by the Australian Privacy Charter Council and the New South Wales Privacy Commissioner. Both took the view that samples taken from volunteers should only be retained for the purposes of the particular investigation. The Bill enables samples in the volunteers (unlimited purposes) index to be retained for as long as the volunteer agrees. The Australian Privacy Charter Council remarked:

Whatever the justification for the use of DNA samples for targeted law enforcement investigations, it should not be permitted to build up a permanent database of DNA information about people who are in no way suspected of any wrongdoing.⁵⁷

Further, while the Principal Act enables suspects who need an interpreter to have access to one⁵⁸, the Bill does not appear to give a similar entitlement to volunteers. Lastly, while the Bill ensures that copies of tapes are provided to volunteers (as they currently are to suspects) it does not seem that the Bill requires volunteers to be informed of this entitlement.

Independent oversight of the DNA database

In her Second Reading Speech the Justice Minister stated that the Federal Privacy Commissioner would monitor the administration of the national DNA database system. The Senate Legal and Constitutional Legislation Committee which inquired into the Bill supported this idea but recommended:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

... an expansion of the role of the Federal Privacy Commissioner to include: oversight of the processes governing the retention of the material on the DNA database; provisions for its destruction; oversight of the functioning of the new DNA database within the laboratory; and the operation of the database under the Bill.⁵⁹

Endnotes

- 1 M Redmayne, 'The DNA database: civil liberty and evidentiary issues', *Criminal Law Review*, July 1998, pp. 437–54 at p. 438.
- 2 *ibid.*
- 3 MCCOC was established by the Standing Committee of Attorneys-General and consists of criminal law officers from most Australian jurisdictions. Its primary purpose has been to develop a Model Criminal Code and but has also worked on associated tasks such as model forensic procedures legislation.
- 4 For example, *Criminal Law (Forensic Procedures) Act 1998* (SA) and Part 4 of the *Crimes Act 1957* (Vic).
- 5 Section 23YT.
- 6 Unless the Indigenous person has waived the right to have an interview friend present or it appears to the constable that the Indigenous person is not disadvantaged in relation to the request to consent [subsection 23WG(3)].
- 7 Subsection 23YD(2).
- 8 Generally, offences punishable by five or more years imprisonment.
- 9 For a general discussion of DNA profiling see PW Eastel & S Eastel, 'The forensic use of DNA profiling', *Trends & Issues in Crime and Criminal Justice*, No.26, November 1990. The quotation is from page 1 of that document.
- 10 Quoted in Queensland Parliamentary Library Bulletin, *The Police Powers and Responsibilities and Other Acts Amendment Bill 2000*.
- 11 Justice Michael Kirby, 'DNA evidence: proceed with care', *Australasian Science*, vol. 21, no.6, July 2000, pp. 20–21.
- 12 Types of offence where DNA testing of samples such as saliva and blood samples at the crime scene may assist in criminal investigation include sexual assaults, armed robbery (eg via an offender's use of balaclavas) and extortion (eg through an offender's use of envelopes and stamps), other violent crimes, break and enter, and burglary. It has been estimated that about 25% of offenders who commit break & enters or burglary cut themselves on broken glass. These examples are taken from a Legislation Bulletin produced by the Queensland Parliamentary Library, *op.cit* which quotes an article by Freney & Ansford, 'DNA in forensic science—infallible crime buster?' *Proctor*, January/February 1999.
- 13 Explanatory Memorandum, p. 24.
- 14 Kirby, *op.cit.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 15 A Ross, 'Safeguards to the DNA database', *Australasian Science*, vol.21, no.6, July 2000, pp. 18–19 at p. 18.
- 16 See Redmayne, op.cit.
- 17 See Kirby, op.cit.
- 18 *CQ Researcher*, 28 May 1999, vol.9, no.20, pp.449-72, Eastel & Eastel, op.cit, F Hampel, 'Individual protection or public good?', *Australasian Science*, vol.21, no.6, July 2000, p.19, Kirby, op.cit, Redmayne, op.cit, Ross, op.cit.
- 19 See *Hilton v. Wells* (1985) 157 CLR 57, *Grollo v. Palmer* (1995) 131 ALR 225, *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- 20 See *Kable v. Director of Public Prosecutions* (1996) 189 CLR 51.
- 21 Explanatory Memorandum, p. 12.
- 22 *ibid*, p. 20.
- 23 *ibid*, p. 4.
- 24 **Proposed subsection 23XWB(3).**
- 25 Thus, the general rules for carrying out forensic procedures provide that they must afford reasonable privacy to the suspect, in general cannot be carried out in the presence of a member of the opposite sex, cannot be carried out in a cruel, inhuman or degrading way, and cannot be carried out while the suspect is being questioned. See Subdivision A of Division 6.
- 26 A buccal swab is taken from the inside of the mouth.
- 27 Other than sampling of pubic hair.
- 28 Under **proposed section 23XWH**.
- 29 Under **proposed section 23XWJ**.
- 30 Thus, the general rules for carrying out forensic procedures provide that they must afford reasonable privacy to the suspect. In general they cannot be carried out in the presence of a member of the opposite sex, cannot be carried out in a cruel, inhuman or degrading way, and cannot be carried out while the suspect is being questioned. See Subdivision A of Division 6.
- 31 Explanatory Memorandum, p. 36.
- 32 That is, taken from a person suspected of committing a serious or prescribed offence, serious offenders or volunteers.
- 33 (2000) 171 ALR 155.
- 34 MCCOC, *Discussion Paper, Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, p. 87.
- 35 *ibid*, p. 89.
- 36 *ibid*, p. 86–9.
- 37 Explanatory Memorandum, p. 7.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 38 A 'prescribed offender' is a person who has committed an offence punishable by at least 2 years imprisonment.
- 39 Whereas the Bill defines a buccal swab as an intimate forensic procedure.
- 40 Section 70B, *Juvenile Justice Act* (NT).
- 41 For example, under the Northern Territory Criminal Code, resisting public officers is a crime carrying a penalty of 2 years imprisonment (section 121); conspiracy to commit a simple offence is a crime carrying a penalty of 1 years imprisonment, being an accessory after the fact carries, in some situations, a penalty of 2 years imprisonment [subsection 294(2)].
- 42 Section 3.
- 43 Section 3. Examples are offences against section 34B of the *Police Offences Act 1935* (Tas). Subsection 35B(1) provides that it is an offence to assault, obstruct or resist a police officer and carries a maximum penalty of 12 months imprisonment or 10 penalty units. Subsection 35B(2) provides that it is an offence to assault, resist or obstruct a public officer. The offence carries a maximum penalty of 5 penalty units or 6 months imprisonment.
- 44 For the purposes of Part 1D of the *Crimes Act 1914*, a child is defined as a person who is at least 10 years of age but under 18 years of age [subsection 23WA(1)].
- 45 MCCOC, op.cit, p. 51.
- 46 ibid, p. 33.
- 47 Research cited in the 1999 Discussion Paper released by MCCOC suggests that while there is a recidivism link between sexual offences and other violent offences, recidivism may be low in relation to offences such as homicide and serious drug trafficking offences. There may be other offences where recidivism rates are high—such as theft and fraud—where DNA evidence is unlikely to be useful.
- 48 Section 23WI.
- 49 Section 23WT.
- 50 Paragraph 23WJ(1)(a).
- 51 Paragraph 23WJ(1)(h).
- 52 Section 23YDA.
- 53 Unless, for some reason, forensic material which cannot be taken under Part 6A (which applies to serious and prescribed offenders) is needed.
- 54 The Committee commented that the safeguards had been introduced '... to reflect the widely held view that the legislation should recognise the special position of volunteers and should afford them greater protection than is offered to suspects and offenders. Such safeguards are also important in building public support and cooperation for the database.' Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Crimes Amendment (Forensic Procedures) Bill 2000*, December 2000, p. 6.
- 55 ibid, pp. 6–7 & p. 17.
- 56 ibid, p. 7 & p. 17.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

57 *ibid*, p. 7.

58 Section 23YDA.

59 Senate Committee, *op.cit*, p. 18.

Warning:

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*