



Australian Capital Territory

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

**A2000-61**

**Republication No 13**

**Effective: 30 May 2009 – 11 July 2009**

Republication date: 30 May 2009

Last amendment made by A2009-7  
(republication for amendments by A2008-44)

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Crimes (Forensic Procedures) Act 2000* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 30 May 2009. It also includes any amendment, repeal or expiry affecting the republished law to 30 May 2009.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication does not include amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

# Crimes (Forensic Procedures) Act 2000

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Australian Capital Territory

# Crimes (Forensic Procedures) Act 2000

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An Act about forensic procedures and other matters

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## Chapter 1 Preliminary

### 1 Name of Act

This Act is the *Crimes (Forensic Procedures) Act 2000*.

### 3 Dictionary

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act or in other legislation.

For example, the signpost definition '*crime scene index*—see section 94.' means that the term "crime scene index" is defined in that section.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

### 4 Notes

A note included in this Act is explanatory and is not part of this Act.

*Note* See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

## 4A Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

*Note 1 Criminal Code*

The Criminal Code, ch 2 applies to the following offences against this Act (see Code, pt 2.1):

- s 96 (1) (Use of information on ACT DNA database)
- s 97 (3) (Permissible matching of DNA profiles)
- s 98 (Recording, retention and removal of identifying information on ACT DNA database).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

*Note 2 Penalty units*

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

## Chapter 2 Forensic procedures

### Part 2.1 General concepts

#### 5 Forensic material and forensic procedures

- (1) *Forensic material* is any of the following taken of or from a person's body:
- (a) a sample;
  - (b) a handprint, fingerprint, footprint or toeprint;
  - (c) a photograph or video recording;
  - (d) a cast or impression.

*Note* *Sample* is defined in the dictionary to include a sample that consists of matter from someone else's body.

- (2) A *forensic procedure* is an intimate forensic procedure or non-intimate forensic procedure.

*Note* *Intimate forensic procedure* and *non-intimate forensic procedure* are defined in s 6 and s 7.

- (3) A *forensic procedure* does not include—
- (a) any intrusion into a person's body cavities (other than the mouth); or
  - (b) the taking of anything of or from a person's body for the sole purpose of establishing the identity of the person.

**6 What is an *intimate forensic procedure*?**

An *intimate forensic procedure* is any of the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, for a female or a transgender or intersex person who identifies as a female, the breasts;
- (b) the taking of a sample of blood;
- (c) the taking of a sample of pubic hair;
- (d) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, for a female or a transgender or intersex person who identifies as a female, the breasts;
- (e) 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, for a female or a transgender or intersex person who identifies as a female, the breasts;
- (f) the taking of a dental impression;
- (g) the taking of a photograph or video recording of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, for a female or a transgender or intersex person who identifies as a female, the breasts.

**7 What is a *non-intimate forensic procedure*?**

A *non-intimate forensic procedure* is any of the following forensic procedures:

- (a) an examination of a part of the body (other than the genital or anal area, buttocks, or, for a female or a transgender or intersex person who identifies as 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 of saliva or a sample by buccal swab;
- (e) 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, for of a female or a transgender or intersex person who identifies as a female, the breasts);
- (f) 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, for a female or a transgender or intersex person who identifies as a female, the breasts);
- (g) the taking of a handprint, fingerprint, footprint or toeprint;
- (h) the taking of a photograph or video recording 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, for a female or a transgender or intersex person who identifies as a female, the breasts).

## 8 Meaning of *suspect*

A *suspect* is any of the following:

- (a) a person suspected by a police officer, on reasonable grounds, to have committed an offence;
- (b) a person charged with an offence;
- (c) a person who has been summonsed to appear before a court for an offence;
- (d) a person who has entered into a voluntary agreement to attend court (VATAC) for an offence.

*Note* Section 107 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.



## 9 Meaning of *serious offence* and *serious offender*

- (1) A *serious offence* is—
- (a) an offence against a territory law punishable by imprisonment for longer than 12 months; or
  - (b) an offence against the law of another participating jurisdiction punishable by imprisonment for life or by a maximum penalty of 2 or more years of imprisonment.

*Note* Another *participating jurisdiction* is defined in s 100.

- (2) A *serious offender* is a person who is convicted of a serious offence.

## 10 Meaning of *volunteer*

A *volunteer*, in relation to a forensic procedure, is a person—

- (a) who volunteers to a police officer to undergo the forensic procedure; or
- (b) if the person is a child or incapable person—whose parent or guardian volunteers on the child's or incapable person's behalf to a police officer that the child or incapable person undergo the forensic procedure.

*Note* *Child* and *parent* are defined in s 14, and *incapable person* is defined in s 15.

## 11 Meaning of *investigating police officer*

An *investigating police officer*, for an offence in relation to which a forensic procedure is carried out or proposed to be carried out, is—

- (a) the police officer in charge of the investigation of the offence; or
- (b) any other police officer directed by the police officer in charge to do something in relation to the investigation.

**12 Meaning of *authorised applicant***

An *authorised applicant*, for an offence in relation to which a forensic procedure is carried out or proposed to be carried out, is—

- (a) the police officer in charge of a police station; or
- (b) an investigating police officer; or
- (c) the director of public prosecutions.

**13 Meaning of *appropriately qualified person***

A person is an *appropriately qualified person* to carry out a forensic procedure if the person is a person (such as a police officer) who is qualified as prescribed by regulation to carry out the forensic procedure.

**14 Meaning of *child* and *parent* of a child**

- (1) *Child* means a person under 18 years old.
- (2) A *parent* of a child is a person who has parental responsibility for the child.
- (3) *Parental responsibilities* for a child are all the duties, powers, responsibilities and authority parents have by law in relation to their children.

**15 Meaning of *incapable person***

An *incapable person* means an adult who is incapable of—

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

**16 Interview friend**

- (1) This section applies to a suspect, serious offender or volunteer who is a child or incapable person.
- (2) An *interview friend* of the person is—
  - (a) a parent or guardian or other person chosen by, or acceptable to, the person; or
  - (b) a lawyer of the person; or
  - (c) if no-one mentioned in paragraphs (a) and (b) is available—a person chosen by an authorised applicant for a forensic order in relation to the person who is not—
    - (i) a police officer; or
    - (ii) in any way involved in the investigation of the offence concerned.
- (3) If the person has a lawyer, the person may also have an interview friend who is not the lawyer.

## Part 2.2                      Circumstances in which forensic procedures on suspects may be authorised

### 18                      How forensic procedures may be authorised in different circumstances

Table 18 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.

**Table 18                      Authorisations for forensic procedures**

column 1 item	column 2 sections	column 3 suspect	column 4 intimate forensic procedure	column 5 non-intimate forensic procedure
1	<ul style="list-style-type: none"><li>• 19</li><li>• 31</li></ul>	adult not in custody	<ul style="list-style-type: none"><li>• with informed consent under part 2.3</li><li>• by forensic order of a magistrate under part 2.5</li></ul>	<ul style="list-style-type: none"><li>• with informed consent under part 2.3</li><li>• by forensic order of a magistrate under part 2.5</li></ul>
2	<ul style="list-style-type: none"><li>• 19</li></ul>	adult in custody	<ul style="list-style-type: none"><li>• with informed consent under part 2.3</li></ul>	<ul style="list-style-type: none"><li>• with informed consent under part 2.3</li></ul>
	<ul style="list-style-type: none"><li>• 27</li></ul>			<ul style="list-style-type: none"><li>• by forensic order of a police officer under part 2.4</li></ul>

column 1 item	column 2 sections	column 3 suspect	column 4 intimate forensic procedure	column 5 non-intimate forensic procedure
	• 31		by forensic order of a magistrate under part 2.5	• by forensic order of a magistrate under part 2.5
3	31	incapable person (whether or not in custody)	by forensic order of a magistrate under part 2.5	by forensic order of a magistrate under part 2.5
4	31	child (whether or not in custody)	by forensic order of a magistrate under part 2.5	by forensic order of a magistrate under part 2.5

*Note* Pt 2.3 deals with forensic procedures carried out with the consent of the suspect. Pt 2.4 deals with non-intimate forensic procedures carried out on a suspect by order of a police officer. Pt 2.5 deals with forensic procedures carried out on a suspect by order of a magistrate.

## Part 2.3 Forensic procedures by consent of suspect

### 19 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.
- (2) The person is authorised to carry out the procedure in accordance with part 2.6 (Carrying out forensic procedures) and not otherwise.
- (3) This part does not authorise the carrying out of a forensic procedure on a suspect who is a child or incapable person.

### 20 People who cannot consent to forensic procedures

A child or incapable person cannot consent to the carrying out of a forensic procedure.

### 21 Informed consent of suspect to forensic procedure

- (1) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer—
  - (a) requests the suspect to consent to the forensic procedure under section 22; and
  - (b) informs the suspect about the forensic procedure in accordance with section 24 (Matters that suspect must be informed of before giving consent); and
  - (c) gives the suspect the opportunity to communicate, or attempt to communicate, with a lawyer of the suspect's choice.

*Note* **Inform** is defined in the dictionary.

- (2) The police officer must allow the suspect to communicate, or attempt to communicate, with the lawyer in private unless the police officer 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.

*Note* Section 107 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

**22 Police officer may request suspect to consent to forensic procedure**

A police officer may request a suspect to undergo a forensic procedure if the police officer is satisfied as required by section 23.

**23 Matters to be considered by police officer before requesting consent to forensic procedure**

- (1) The police officer must be satisfied on the balance of probabilities that—
- (a) the person on whom the forensic procedure is proposed to be carried out is a suspect; and
  - (b) if the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is a serious offence and there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed—
    - (i) that offence; or
    - (ii) another serious offence arising out of the same circumstances as that offence; or
    - (iii) another serious offence for which the evidence likely to be obtained because of carrying out the proposed forensic

procedure on the suspect is likely to have probative value;  
and

- (c) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toeprint—the offence in relation to which the person is a suspect is an offence other than an offence that may be dealt with by way of infringement notice and there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed—
  - (i) that offence; or
  - (ii) another offence (other than an offence that may be dealt with by way of infringement notice) arising out of the same circumstances as that offence; or
  - (iii) another offence (other than an offence that may be dealt with by way of infringement notice) for which the handprints, fingerprints, footprints or toeprints are likely to have probative value; and
- (d) the person on whom the forensic procedure is proposed to be carried out is not a child or incapable person; and
- (e) the request for consent to carry out the forensic procedure is justified in all the circumstances.

*Note* Section 107 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

- (2) In deciding whether a request is justified in all the circumstances, the police officer 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 police officer must have regard to the following matters:
- (a) the seriousness of the circumstances surrounding the commission of the offence and the gravity of the offence;
  - (b) the degree of the suspect's alleged participation in the commission of the offence;
  - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer;
  - (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the offence;
  - (e) if the suspect gives any reasons for refusing to consent—the reasons;
  - (f) any other matter considered relevant to balancing those interests.

**24 Matters that suspect must be informed of before giving consent**

- (1) The police officer 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, will be recorded by electronic means or in writing, and that the suspect has a right to a copy of that record;
- Note* See s 26 (Recording of giving of information and consent) and s 104 (Obligation of investigating police officers relating to electronic recordings).
- (b) the purpose for which the forensic procedure is required;

- (c) the fact that the person is a suspect in the offence in relation to which the police officer 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 mentioned in subsection (2) or (3);
- (h) that the suspect may refuse to consent to the carrying out of the forensic procedure;
- (i) the consequences of not consenting, as mentioned in subsection (4), (5) or (6) (whichever is applicable);
- (j) the effect of section 87 (Admissibility of evidence relating to consent to forensic procedures);
- (k) that information obtained from analysis of forensic material obtained may be placed on the ACT DNA database and the rules that will apply to its disclosure and use under this Act, including that the information may be compared with information from the DNA databases of other participating jurisdictions;
- (l) that the suspect may apply to a court for an order that the forensic material obtained be destroyed, and the circumstances when the court may order destruction.

*Note* Section 92 (Application for destruction of forensic material after 1 year) sets out when the court may order destruction.

- (2) The police officer must inform the suspect that the suspect may request that a doctor of the suspect's choice be present while an intimate forensic procedure (other than the taking of a dental

impression) is carried out or a sample of saliva or sample by buccal swab is taken.

- (3) If the forensic procedure is the taking of a dental impression, sample of saliva or sample by buccal swab, the police officer must inform the suspect that the suspect may request that a dentist of the suspect's choice be present while the procedure is carried out.
- (4) If the suspect is in custody and the forensic procedure is a non-intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent—
  - (a) a police officer may order the carrying out of the forensic procedure under part 2.4 (Non-intimate forensic procedures on suspect by order of police officer) if the police officer is satisfied about the matters mentioned in section 23 (Matters to be considered by police officer before requesting consent to forensic procedure); and
  - (b) reasonable force may be used to enable the forensic procedure to be carried out.
- (5) If the suspect is in custody and the forensic procedure is an intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent—
  - (a) an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure; and
  - (b) reasonable force may be used to enable the forensic procedure to be carried out if the order is made.
- (6) If the suspect is not in custody, the police officer must inform the suspect that, if the suspect does not consent—
  - (a) an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure; and
  - (b) reasonable force may be used to enable the forensic procedure to be carried out if the order is made.

## **25 Withdrawal of suspect's consent**

If a suspect expressly withdraws consent to the carrying out of a forensic procedure under this Act (or if the withdrawal of such consent can reasonably be inferred from the suspect's conduct) before or during the carrying out of the forensic procedure—

- (a) the forensic procedure must be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and
- (b) the forensic procedure may be carried out in accordance with an order under part 2.4 (Non-intimate forensic procedures on suspect by order of police officer) or part 2.5 (Forensic procedures on suspect by order of magistrate) and not otherwise.

## **26 Recording of giving of information and consent**

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the suspect's responses (if any) are recorded by audiotape, videotape or other electronic means.
- (2) If electronic recording of the giving of the information and the suspect's responses (if any) is not practicable, the police officer 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* Pt 2.14 contains provisions about making copies of material (including tapes) available to the suspect.

## **Part 2.4**

### **Non-intimate forensic procedures on suspect by order of police officer**

#### **27 Non-intimate forensic procedure may be carried out by order of police officer**

- (1) A person is authorised to carry out a non-intimate forensic procedure on a suspect in custody by order of a police officer under this part.
- (2) The person is authorised to carry out the procedure in accordance with part 2.6 (Carrying out forensic procedures) and not otherwise.
- (3) This part does not authorise the carrying out of a forensic procedure on a suspect who is a child or incapable person.

#### **28 Circumstances in which police officer may order non-intimate forensic procedure**

A police officer 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 part 2.3 (Forensic procedures by consent of suspect) to consent to the carrying out of the forensic procedure; and
- (b) the suspect has not consented; and
- (c) the police officer is satisfied as required by section 29.

**29 Matters to be considered by police officer before ordering forensic procedure**

- (1) The police officer must be satisfied on the balance of probabilities that—
- (a) the suspect is in custody that is lawful custody; and
  - (b) if the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint—the offence for which the person is a suspect is a serious offence and there are reasonable grounds to believe that the suspect committed—
    - (i) that offence; or
    - (ii) another serious offence arising out of the same circumstances as that offence; or
    - (iii) another serious offence for which the evidence likely to be obtained because of carrying out the procedure on the suspect is likely to have probative value; and
  - (c) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toeprint—the offence for which the person is a suspect is an offence other than an offence that may be dealt with by way of infringement notice and there are reasonable grounds to believe that the suspect committed—
    - (i) that offence; or
    - (ii) another offence (other than an offence that may be dealt with by way of infringement notice) arising out of the same circumstances as that offence; or
    - (iii) another offence (other than an offence that may be dealt with by way of infringement notice) for which the handprints, fingerprints, footprints or toeprints are likely to have probative value; and

- (d) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed the relevant offence; and
- (e) the carrying out of the forensic procedure without consent is justified in all the circumstances.

*Note* Section 107 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

- (2) In deciding whether the carrying out of the forensic procedure without consent is justified in all the circumstances, the police officer 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 police officer must have regard to the following matters:
  - (a) the seriousness of the circumstances surrounding the commission of the offence and the gravity of the offence;
  - (b) the degree of the suspect's alleged participation in the commission of the offence;
  - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer;
  - (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the offence;
  - (e) if the suspect gives any reasons for refusing to consent—the reasons;
  - (f) any other matter considered relevant to balancing those interests.

**30 Record of police officer's order**

- (1) If a police officer orders the carrying out of a forensic procedure on a suspect who is in custody, the police officer must—
  - (a) make a record of—
    - (i) the order; and
    - (ii) the date and time the order was made; and
    - (iii) the reasons for making it; and
  - (b) sign the record.
- (2) The police officer must make and sign the record when the order is made or as soon as practicable afterwards.
- (3) The police officer must ensure that a copy of the record is made available to the suspect as soon as practicable after the record is made.



## **Part 2.5                      Forensic procedures on suspect by order of magistrate**

### **Division 2.5.1              General**

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

- (1) A person is authorised to carry out a forensic procedure on a suspect by order of a magistrate under this part.
- (2) The person is authorised to carry out the procedure in accordance with part 2.6 (Carrying out forensic procedures) and not otherwise.

#### **32                      Circumstances in which magistrate may order forensic procedure**

A magistrate may, under section 33 or section 41 (Interim order for immediate carrying out of forensic procedure), 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, has been requested to consent and has not consented to the forensic procedure; or
- (c) the suspect is in custody and the investigation period when the suspect may lawfully be held has not yet expired; or
- (d) the suspect is a child or incapable person.

## **Division 2.5.2 Final orders**

### **33 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 32 applies; and
- (b) the magistrate is satisfied as required by section 34.

### **34 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 forensic procedure is proposed to be carried out is a suspect; and
  - (b) if the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint—the offence for which the person is a suspect is a serious offence and, on the evidence before the magistrate, there are reasonable grounds to believe that the suspect committed—
    - (i) that offence; or
    - (ii) another serious offence arising out of the same circumstances as that offence; or
    - (iii) another serious offence for which the evidence likely to be obtained because of carrying out the procedure on the suspect is likely to have probative value; and
  - (c) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toeprint—the offence for which the person is a suspect is an offence other than an offence that may be dealt with by way of infringement notice and, on the

evidence before the magistrate, there are reasonable grounds to believe that the suspect committed—

- (i) that offence; or
  - (ii) another offence (other than an offence that may be dealt with by way of infringement notice) arising out of the same circumstances as that offence; or
  - (iii) another offence (other than an offence that may be dealt with by way of infringement notice) for which the handprints, fingerprints, footprints or toeprints are likely to have probative value; and
- (d) the carrying out of the forensic procedure is justified in all the circumstances.
- (2) In deciding 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 offence and the gravity of the offence;
  - (b) the degree of the suspect's alleged participation in the commission of the offence;
  - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the magistrate;
  - (d) if the suspect is a child or incapable person—the best interests of the suspect;
  - (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the offence;

- (f) if the suspect gives any reasons for refusing to consent—the reasons;
- (g) if the suspect is in custody and the investigation period when the suspect may lawfully be held has not expired—
  - (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;
- (h) any other matter considered relevant to balancing those interests.

### **35 Application for order**

- (1) An authorised applicant (and no-one else) may apply to a magistrate for an order under section 32 (Circumstances in which magistrate may order forensic procedure) authorising 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 mentioned in section 34 (1) (Matters to be considered by magistrate before ordering forensic procedure); and
  - (c) state the type of forensic procedure sought to be carried out.

### **36 Securing the presence of suspects at hearings—suspect in custody**

- (1) If the suspect is in the custody of a police officer or is otherwise detained under territory law (the *original custody*), the magistrate may, on the application of a police officer, issue a warrant directing the person holding the suspect in the original custody to deliver the

suspect into the custody of the police officer (*temporary custody*) for the hearing of an application for an order under this part.

- (2) The police officer given temporary custody must return the suspect to the place of the original custody—
  - (a) if the application for the order is refused—without delay; or
  - (b) if the order is made—without delay after the period after the order is made that is reasonably necessary to carry out the forensic procedure.

**37 Securing the presence of suspects at hearings—suspect not in custody**

- (1) If the suspect is not in custody—
  - (a) the Magistrates Court may, on the application of a police officer, issue a summons for the appearance of the suspect at the hearing of the application; or
  - (b) a magistrate may, on the application of a police officer, issue a warrant for the arrest of the suspect to bring the suspect before the magistrate for the hearing of the application.
- (2) 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; 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.

**38 Procedure at hearing of application for order**

- (1) This section applies if an authorised applicant has applied under section 35 for an order authorising the carrying out of a forensic procedure on a suspect.

- (2) The suspect must be present at the hearing of the application unless—
- (a) the suspect is remanded or otherwise detained in lawful custody in a State and it is not practicable for the suspect to be present by audio link or audiovisual link; or
- Note 1* **State** includes the Northern Territory (see Legislation Act, dict, pt 1).
- Note 2* The *Evidence (Miscellaneous Provisions) Act 1991*, s 20 (Territory courts may take evidence and submissions from outside ACT) applies in relation to the taking of evidence and making of submissions by audiovisual link or audio link from a participating State. See also the *Magistrates Court Act 1930*, s 311 (Appearance by audiovisual or audio links etc).
- (b) the application (and any summons issued under section 37 (1) (a)) has been served on the suspect and the suspect is not present.
- (3) If the suspect is a child or incapable person, the suspect must be represented by an interview friend and may also be represented by a lawyer.
- (4) Any other suspect may be represented by a lawyer.
- (5) The suspect or his or her representative—
- (a) may cross-examine the applicant for the order; and
- (b) may, with the leave of the magistrate, call or cross-examine any other witnesses; and
- (c) may address the magistrate.
- (6) A magistrate may give leave under subsection (5) (b) only if the magistrate is of the opinion that there are substantial reasons why, in the interests of justice, the witness should be called or cross-examined.

(7) In this section:

*audio link* means a system of 2-way communication linking different places so that a person speaking at any of them can be heard at the other places.

*audiovisual link* means a system of 2-way communication linking different places so that a person at any of them can be seen and heard at the other places.

### **39 Action to be taken on making of orders**

- (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) if the suspect is present or represented by a lawyer—inform the suspect or lawyer that reasonable force may be used to enable the forensic procedure to be carried out; and
  - (d) if the suspect is a child or incapable person—inform the suspect’s interview friend or lawyer that reasonable force may be used to enable the forensic procedure to be carried out.
- (2) The magistrate may give directions about the date, time, place where, or how a forensic procedure is to be carried out.

### **40 Suspect in custody may be kept in custody for carrying out forensic procedure**

- (1) This section applies if a magistrate orders the carrying out of a forensic procedure on a suspect mentioned in section 32 (Circumstances in which magistrate may order forensic procedure).
- (2) If the suspect is in custody, the suspect may be detained in custody for as long as reasonably necessary to carry out the forensic procedure.

- (3) An order made in the circumstances set out in section 32 (c) operates despite any other law.

*Note* Section 32 (c) is about a suspect who is in custody and the investigation period when the suspect may lawfully be held has not expired.

**40A Magistrate may order arrest etc of suspect not in custody for carrying out forensic procedure**

- (1) This section applies if a magistrate orders the carrying out of a forensic procedure on a suspect mentioned in section 32 (a *forensic procedure order*).
- (2) If the suspect is not in custody, the magistrate may, on the application of an authorised applicant, also make an order (an *arrest and removal order*) for—
- (a) the arrest of the suspect for the purpose of carrying out the forensic procedure; and
  - (b) the removal of the suspect to the place where the forensic procedure is to be carried out.
- (3) The magistrate may make an arrest and removal order only if satisfied on reasonable grounds that—
- (a) the order is necessary to ensure that the forensic procedure will be carried out; or
  - (b) the suspect might destroy evidence that might be obtained by carrying out the forensic procedure; or
  - (c) the order is otherwise justified.
- (4) An authorised applicant may apply for an arrest and removal order in relation to a suspect—
- (a) when the authorised applicant applies for a forensic procedure order in relation to the suspect; or
  - (b) at any time after a magistrate has made a forensic procedure order in relation to the suspect.



#### **40B Arrest, removal and detention of suspect**

- (1) This section applies if a police officer has power to arrest a suspect under an arrest and removal order.
- (2) The police officer must—
  - (a) use the minimum amount of force necessary to arrest or remove the suspect; and
  - (b) before removing the suspect, explain to the suspect the reason for the arrest.

*Note* The *Crimes Act 1900*, s 252I requires that a responsible person for a child be told if the child is arrested.

- (3) The suspect may be detained in custody for as long as reasonably necessary to carry out the forensic procedure.

#### **40C Arrest and removal order—warrant to enter premises**

- (1) This section applies if a magistrate makes an arrest and removal order in relation to a suspect.
- (2) An authorised applicant may apply to a magistrate for a warrant to enter premises to arrest the suspect.
- (3) The application must be sworn and state the grounds on which the warrant is sought.

*Note* Swear an oath includes make an affirmation (see Legislation Act, dict, pt 1, def *swear*).

- (4) The magistrate may refuse to consider the application until the authorised applicant gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.
- (5) The magistrate may issue a warrant only if satisfied on reasonable grounds that the warrant is necessary to enable the arrest of the suspect.

- (6) The warrant must state—
  - (a) that a police officer may, with any necessary assistance and force, enter the premises to arrest the suspect; and
  - (b) the hours when the premises may be entered; and
  - (c) the date (within 7 days after the day the warrant is issued) that the warrant ends.
- (7) An authorised applicant may apply for a warrant in relation to a suspect—
  - (a) when the authorised applicant applies for an arrest and removal order in relation to the suspect; or
  - (b) at any time after a magistrate has made an arrest and removal order in relation to the suspect.

**40D Warrant to enter premises—announcement before entry and copy of warrant**

- (1) A police officer must, before anyone enters premises under a warrant mentioned in section 40C—
  - (a) announce that the officer is authorised to enter the premises; and
  - (b) give anyone at the premises an opportunity to allow entry to the premises; and
  - (c) if the occupier of the premises, or someone else who apparently represents the occupier, is present at the premises—identify himself or herself to the person.
- (2) A police officer is not required to comply with subsection (1) if the officer believes on reasonable grounds that immediate entry to the premises is required to ensure—
  - (a) the safety of the officer or anyone assisting the officer; or
  - (b) the safety of anyone at the premises; or

- (c) that the effective execution of the warrant is not frustrated.
- (3) If an occupier of premises, or someone else who apparently represents the occupier, is present at the premises while a warrant is being executed, the police officer or anyone assisting must make available to the person a copy of the warrant.
- (4) In this section:
- occupier*, of premises, includes—
- (a) a person believed on reasonable grounds to be an occupier of the premises; and
- (b) a person apparently in charge of the premises.

### **Division 2.5.3 Interim orders**

#### **41 Interim order for immediate carrying out of forensic procedure**

- (1) A magistrate may make an interim order authorising the immediate carrying out of a forensic procedure on a suspect if—
- (a) section 32 (Circumstances in which magistrate may order forensic procedure) applies; and
- (b) the magistrate is satisfied that the probative value of evidence obtained because 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 mentioned in section 34 (1) (Matters to be considered by magistrate before ordering forensic procedure) when the application is finally decided.
- (2) An interim order operates as provided by this division until a magistrate, at a hearing held as mentioned in section 44 (2) (Action

to be taken on making of interim orders), confirms the interim order or disallows it.

- (3) Division 2.5.2 applies to the making of an order confirming the interim order in the same way as it applies to the making of an order under section 33 (Final order for carrying out of forensic procedure), and an order confirming the interim order is taken to be an order under section 33.

## 42 Applications for interim orders

- (1) An authorised applicant may, without bringing a suspect before a magistrate and without obtaining an order under section 33 (Final order for carrying out of forensic procedure), make an application seeking an order (an *interim order*) authorising the immediate carrying out of a forensic procedure on the suspect.
- (2) An application for an interim order must—
  - (a) be supported by evidence on oath or by affidavit dealing with the matters mentioned in section 41 (1); and
  - (b) state 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, fax or other means of communication.
- (4) The suspect must be in the presence of the authorised applicant when the application is made unless the suspect is remanded or otherwise detained in lawful custody in a State and it is not practicable for the suspect to be present by audio link or audiovisual link.

*Note 1* **State** includes the Northern Territory (see Legislation Act, dict, pt 1).

*Note 2* The *Evidence (Miscellaneous Provisions) Act 1991*, s 20 (Territory courts may take evidence and submissions from outside ACT) applies in relation to the taking of evidence and making of submissions by audiovisual link or audio link from a participating State. See also the

*Magistrates Court Act 1930*, s 311 (Appearance by audiovisual or audio links etc).

- (5) If the suspect is a child or incapable person, the suspect's interview friend or lawyer must also be in the presence of the authorised applicant.
- (6) However, the suspect's interview friend (other than a lawyer) may be excluded from the presence of the authorised applicant if the interview friend unreasonably interferes with or obstructs the making of the application.
- (7) In this section:  
*audio link*—see section 38 (6).  
*audiovisual link*—see section 38 (6).

#### **43 Procedure at hearing of application for interim order**

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

#### 44 Action to be taken on making of interim orders

- (1) A magistrate who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, fax or other means of communication—
  - (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 or directions given under subsection (3) in relation to the order.
- (2) An interim order must state the date and time when, and place where, a further hearing on the application will take place and the application will be finally decided by the making of an order confirming or disallowing the interim order.
- (3) A magistrate may make the orders and give the directions in relation to an interim order that a magistrate may make or give in relation to an order under section 33 (Final order for carrying out of forensic procedure).

#### 45 Records of applications and interim orders

- (1) The applicant for an interim order, at the time of, or as soon as practicable after, applying for the interim order, must make a record (the *applicant's record*) of—
  - (a) the application; and
  - (b) the grounds for seeking the order; and
  - (c) the date and time when the order was made; and
  - (d) the order made; and
  - (e) the magistrate's name.
- (2) The magistrate must—

- (a) at the time of, or as soon as practicable after, making an interim order, make a record (the *magistrate's record*) of—
  - (i) the date and time when the order was made; and
  - (ii) the order made; and
  - (iii) the reasons for making it; and
- (b) sign the magistrate's record and send it to the applicant.
- (3) 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.

**46 Suspect may be prevented from destroying or contaminating evidence**

- (1) Any police officer may, while waiting for the application seeking an interim order to be decided, use reasonable force to prevent the suspect destroying any evidence that might be obtained by carrying out the forensic procedure if the order is made.
- (2) This section does not authorise anyone to carry out a forensic procedure before an interim order is made.

**47 Results of forensic procedures carried out under interim order**

- (1) A sample taken under an interim order may be analysed only if—
  - (a) the sample is likely to perish before a final order is made; or
  - (b) a final order is made confirming the interim order.
- (2) A person who conducts an analysis in the circumstances mentioned in subsection (1) (a) must not intentionally or recklessly disclose the results of the analysis to anyone—
  - (a) during the period before a final order is made; or

(b) if the interim order is disallowed.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

## **Division 2.5.4 Reports of proceedings under pt 2.5**

### **48 Restrictions on publication**

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

- (a) the name of the suspect on whom a forensic procedure is carried out or proposed to be carried out in relation to an offence; or
- (b) any information likely to enable the identification of the suspect;

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

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.



## **Part 2.6**                      **Carrying out forensic procedures**

### **Division 2.6.1**                **General provisions**

#### **48A**            **Meaning of *relevant person*—pt 2.6**

In this part:

*relevant person* means the suspect, serious offender or volunteer on whom a forensic procedure is, or is to be, carried out.

#### **49**                **General rules for carrying out forensic procedures**

A forensic procedure—

- (a) must be carried out in circumstances providing reasonable privacy to the relevant person; and
- (b) except as permitted under another provision of this Act, must not be carried out in the presence or view of anyone who is of the opposite sex to the relevant person; and
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the forensic procedure or required or permitted under another provision of this Act; and
- (d) must not involve the removal of more clothing than is necessary for carrying out the procedure; and
- (e) must not involve more visual inspection than is necessary for carrying out the procedure.

#### **49A**            **Rules for carrying out forensic procedures—giving and recording information**

- (1) Before a forensic procedure is carried out on a person in relation to the investigation of a matter by a police officer, a police officer must

ensure that the person is informed about the person's right to request—

- (a) if a sample is to be taken from the person, and there is sufficient material for an analysis to be carried out by or for the person and the officer—that a part of the material sufficient for analysis be made available to the person; and
  - (b) if a photograph or a video recording of a part of the person's body is to be taken—that a copy of the photograph or video recording be made available to the person; and
  - (c) if a sample is to be taken from the person, and material from the sample is analysed in the investigation of the matter—that a copy of the results of the analysis be made available to the person.
- (2) The police officer must, if practicable, ensure that the giving of the information mentioned in subsection (1), and the person's responses (if any) are recorded by audiotape, videotape or other electronic means.
  - (3) If electronic recording of the giving of the information and the person's responses (if any) is not practicable, the police officer must ensure that a written record of the giving of the information and the person's responses (if any) is made, and that a copy of the record is made available to the person.

*Note* Pt 2.14 contains provisions about making copies of material (including tapes) available to the person.

#### **49B Rules for carrying out forensic procedures—transgender and intersex people**

- (1) This section applies if—
  - (a) a forensic procedure is to be carried out on a transgender or intersex person; and

- (b) the provision under which it is carried out refers to a person of the opposite sex, or the same sex.
- (2) The transgender or intersex person may elect to be identified as a male or female.
- (3) If the transgender or intersex person is a child or incapable person, the transgender or intersex person's interview friend or lawyer may elect that the person be identified as a male or female.
- (4) If the election is to be identified as a male, the transgender or intersex person is taken, for this Act, to be male.
- (5) If the election is to be identified as a female, the transgender or intersex person is taken, for this Act, to be female.
- (6) If the transgender or intersex person does not make an election under subsection (2), but requires that the forensic procedure be carried out by a male, the person is taken, for this Act, to be male.
- (7) If the transgender or intersex person's interview friend or lawyer does not make an election under subsection (3), but requires that the forensic procedure be carried out by a male, the transgender or intersex person is taken, for this Act, to be male.
- (8) If the transgender or intersex person does not make an election under subsection (2), but requires that the forensic procedure be carried out by a female, the person is taken, for this Act, to be female.
- (9) If the transgender or intersex person's interview friend or lawyer does not make an election under subsection (3), but requires that the forensic procedure be carried out by a female, the transgender or intersex person is taken, for this Act, to be female.

**50 Use of force in carrying out forensic procedures**

- (1) A person authorised to carry out a forensic procedure on a person, or a police officer, 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) A forensic procedure must be carried out in a way consistent with appropriate medical or other relevant professional standards.

**51 Forensic procedures not to be carried out in cruel, inhuman or degrading way**

- (1) This Act does not authorise the carrying out of a forensic procedure in a cruel, inhuman or degrading way.
- (2) For this section, the carrying out of a forensic procedure in accordance with this Act is not in itself regarded as degrading to the relevant person.

**52 Taking samples of hair**

A person is authorised to take a sample of hair of a relevant person by removing the root of the hair only if—

- (a) the person takes only so much hair as the person believes is necessary for analysis of the sample, or other examination of the hair, to be carried out for the purpose of investigating the relevant offence; and
- (b) the sample is taken using the least painful technique known and available to the person.

## **Division 2.6.2      People involved in forensic procedures**

### **53      People who may carry out forensic procedures**

- (1) Table 53 shows, for each forensic procedure, the people who may carry out the procedure under this Act.
- (2) A person not mentioned in table 53, column 3 is not authorised to carry out a forensic procedure under this Act except as mentioned in section 55 (Person may get help to carry out forensic procedure).
- (3) Table 53, column 4 shows, for each forensic procedure, whether a doctor or dentist of the relevant person's choice may be present while the forensic procedure is carried out.

*Note*      Section 56 makes detailed provisions for the presence of a doctor or dentist of the relevant person's choice while a forensic procedure is carried out.

- (4) This section does not prevent a relevant person from carrying out a forensic procedure mentioned in table 53, item 3, column 2 on himself or herself under the supervision of an appropriately qualified person.

**Table 53 People involved in forensic procedures**

column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 is relevant person entitled to ask for doctor or dentist of person's choice to be present?
1	external examination of— <ul style="list-style-type: none"> <li>• genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female</li> </ul>	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	yes, doctor
2	taking sample of blood	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> </ul>	yes, doctor
3	taking sample of saliva or sample by buccal swab	<ul style="list-style-type: none"> <li>• doctor</li> <li>• dentist</li> <li>• dental technician</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	yes, doctor or dentist
4	taking sample of pubic hair	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> </ul>	yes, doctor

column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 is relevant person entitled to ask for doctor or dentist of person's choice to be present?
5	taking sample by swab or washing from— <ul style="list-style-type: none"> <li>• external genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female</li> </ul>	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> </ul>	yes, doctor
6	taking sample by vacuum suction, scraping or lifting by tape from— <ul style="list-style-type: none"> <li>• external genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female</li> </ul>	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> </ul>	yes, doctor
7	taking dental impression	<ul style="list-style-type: none"> <li>• doctor</li> <li>• dentist</li> <li>• dental technician</li> </ul>	yes, dentist

column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 is relevant person entitled to ask for doctor or dentist of person's choice to be present?
8	taking photograph or video recording of, or impression or cast of, wound from— <ul style="list-style-type: none"> <li>• genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female</li> </ul>	<ul style="list-style-type: none"> <li>• appropriately qualified person</li> </ul>	yes, doctor
9	external examination of part of body (other than— <ul style="list-style-type: none"> <li>• genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female)</li> </ul> that requires touching of body or removal of clothing	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	no
10	taking sample of hair (other than pubic hair)	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	no



<b>column 1 item</b>	<b>column 2 forensic procedure</b>	<b>column 3 people who may carry out forensic procedure</b>	<b>column 4 is relevant person entitled to ask for doctor or dentist of person's choice to be present?</b>
11	taking sample from nail or from under nail	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	no
12	taking sample by swab or washing from any external part of body (other than— <ul style="list-style-type: none"> <li>• genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female)</li> </ul>	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	no
13	taking sample by vacuum suction, scraping or lifting by tape from any external part of body (other than— <ul style="list-style-type: none"> <li>• genital or anal area</li> <li>• buttocks</li> <li>• breasts of female or transgender or intersex person who identifies as female)</li> </ul>	<ul style="list-style-type: none"> <li>• doctor</li> <li>• nurse</li> <li>• appropriately qualified person</li> </ul>	no

column 1 item	column 2 forensic procedure	column 3 people who may carry out forensic procedure	column 4 is relevant person entitled to ask for doctor or dentist of person's choice to be present?
14	taking handprint, fingerprint, footprint or toeprint	<ul style="list-style-type: none"> <li>appropriately qualified person</li> </ul>	no
15	taking photograph or video recording of, or impression or cast of wound from, external part of body (other than— <ul style="list-style-type: none"> <li>genital or anal area</li> <li>buttocks</li> <li>breasts of female or transgender or intersex person who identifies as female)</li> </ul>	<ul style="list-style-type: none"> <li>appropriately qualified person</li> </ul>	no

*Note* *Appropriately qualified person* is defined in s 13.

#### **54 Sex of person carrying out or helping carry out forensic procedures**

- (1) If an intimate forensic procedure (other than the taking of a sample of blood or a dental impression) is to be carried out on a relevant person, the person carrying it out, and anyone asked under section 55 to help carry it out, must be of the same sex as the relevant person.
- (2) If an intimate forensic procedure that is the taking of a sample of blood or a dental impression is to be carried out on a relevant person—
  - (a) the person carrying it out must, if practicable, be of the same sex as the relevant person; and

- (b) anyone asked under section 55 to help carry it out must be of the same sex as the relevant person.
- (3) If a non-intimate forensic procedure (other than a forensic procedure mentioned in subsection (4)) is to be carried out on a relevant person, the person carrying it out, and anyone asked under section 55 to help carry it out, must be of the same sex as the relevant person.
- (4) Subsection (3) does not apply to—
  - (a) the taking of a handprint, fingerprint, footprint or toeprint; or
  - (b) any other non-intimate forensic procedure that may be carried out without—
    - (i) touching the relevant person; or
    - (ii) requiring the relevant person to remove any clothing (other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat).
- (5) If the person on whom a forensic procedure is to be carried out is a volunteer—
  - (a) the person may request that a person of the opposite sex carry out or help carry out the procedure; and
  - (b) any such request must be complied with, despite subsections (1) to (3).

## **55 Person may get help to carry out forensic procedure**

- (1) An order by a police officer or magistrate authorising the carrying out of a forensic procedure authorises the person who is to carry out the procedure in accordance with section 53 (People who may carry out forensic procedures) to ask someone else to help him or her to carry out the procedure, and authorises the other person to give that help.

- (2) A person who is asked to help carry out a forensic procedure need not be a person mentioned in section 53.
- (3) A person who is asked to help carry out a forensic procedure may use reasonable force to enable the forensic procedure to be carried out.

### **Division 2.6.3 Presence of other people while forensic procedure is carried out**

#### **56 Doctor or dentist of person's choice may be present for most forensic procedures**

- (1) A suspect or volunteer is entitled to request a doctor of the person's choice to be present while an intimate forensic procedure (other than the taking of a dental impression) is carried out or a sample of saliva or sample by buccal swab is taken.
- (2) A suspect or volunteer is entitled to request a dentist of the person's choice to be present while a dental impression, sample of saliva or sample by buccal swab is taken.
- (3) If a sample of blood is to be taken from a serious offender, the offender is entitled to request that—
  - (a) if the serious offender is serving a sentence of imprisonment at a correctional centre or other place—a corrections health professional for the centre, or health professional (however described) for the place, be present while the sample is taken; or
  - (b) if the serious offender is not serving a sentence of imprisonment—a doctor of the serious offender's choice be present while the sample is taken.

- (4) If a sample by buccal swab is to be taken from a serious offender, the offender is entitled to request that—
- (a) if the serious offender is serving a sentence of imprisonment at a correctional centre or other place—a corrections health professional for the centre, or health professional (however described) for the place, be present while the sample is taken; or
  - (b) if the serious offender is not serving a sentence of imprisonment—a doctor or dentist of the serious offender's choice be present while the sample is taken.

*Note* Section 103 provides that the request may be made by the relevant person's lawyer or interview friend.

- (5) The doctor or dentist chosen must be present at the carrying out of the forensic procedure unless he or she—
- (a) cannot, 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 carrying out of the forensic procedure considers the forensic procedure should be carried out if it is to be effective in providing evidence of the offence concerned.

## **57 Presence of interview friend or lawyer while forensic procedure is carried out**

- (1) If the relevant person on whom a forensic procedure is to be carried out is a child or incapable person, either the relevant person's interview friend or the relevant person's lawyer (if the lawyer is not the interview friend) must be present while the forensic procedure is carried out.
- (2) Both the interview friend and the lawyer may be present.
- (3) An interview friend (other than a lawyer) of a relevant person who is a child or incapable person 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.

**58 Presence of police officers while forensic procedure is carried out**

- (1) The number of police officers that may be present during the carrying out of a forensic procedure must not exceed the number reasonably necessary to ensure that the procedure is carried out effectively and in accordance with this Act.
- (2) A police officer who is of the opposite sex to that of the relevant person may only be present during the carrying out of a forensic procedure if—
  - (a) it would not be reasonably practicable to carry out the forensic procedure without the presence of the police officer; and
  - (b) there is no police officer of the same sex as the relevant person who, at the time the forensic procedure must be carried out, is available to be present instead of the police officer of the opposite sex.
- (3) This section does not apply to the following forensic procedures:
  - (a) the taking of handprints, fingerprints, footprints or toeprints;
  - (b) any other non-intimate forensic procedure that may be carried out without—
    - (i) touching the relevant person; or
    - (ii) requiring the relevant person to remove any clothing (other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat).

## **Division 2.6.4      Recording of carrying out of forensic procedure**

### **59      Recording of forensic procedure**

- (1) The carrying out of a forensic procedure must be videorecorded unless—
  - (a) the relevant person objects to video recording; or
  - (b) video recording is not reasonably practicable.
- (2) However, the carrying out of the following forensic procedures need not be videorecorded:
  - (a) the taking of a handprint, fingerprint, footprint or toeprint;
  - (b) the taking of a photograph or video recording of a part of the body (other than the genital or anal area, the buttocks, or, for a female or a transgender or intersex person who identifies as a female, the breasts).
- (3) Before the forensic procedure is carried out, the relevant person must—
  - (a) be given an explanation of the value of making a video recording of the carrying out of the forensic procedure to avoid disputes about how it was carried out that might otherwise arise between the relevant person and the person carrying out the procedure after it is carried out; and
  - (b) be informed that the relevant person may object to the video recording.
- (4) If the carrying out of a forensic procedure (other than a forensic procedure to which subsection (2) applies) is not to be videorecorded, the forensic procedure must be carried out in the presence of an independent person who is not a police officer.

- (5) However, an independent person need not be present as mentioned in subsection (4) if the relevant person expressly and voluntarily waives the person's right to have an independent person present.
- (6) Despite a waiver mentioned in subsection (5), a police officer may direct that an independent person be present.

## **Division 2.6.5 Procedure after forensic procedure is carried out**

### **60 Samples**

- (1) This section applies to a sample taken from a relevant person under this Act in relation to the investigation of a matter by a police officer if there is sufficient material for an analysis to be carried out by or for the relevant person and the officer.
- (2) A police officer must ensure that reasonable care is taken to ensure that a part of the material sufficient for analysis to be carried out by or for the relevant person is protected and preserved until—
  - (a) if the relevant person makes a request under subsection (3)—the person receives it; or
  - (b) in any other case—the material is required to be destroyed under this Act or by a court order.
- (3) The relevant person may request that a part of the material sufficient for analysis be made available to the relevant person as soon as practicable.

*Note* Section 103 provides that the request may be made by the lawyer or interview friend of a suspect, serious offender or volunteer.

- (4) If the relevant person makes a request under subsection (3)—
  - (a) a police officer must ensure that a part of the material sufficient for analysis is made available to the relevant person as soon as practicable; and



- (b) reasonable assistance is given to the relevant person to ensure that the material is protected and preserved until it is analysed.

*Note* Pt 2.14 contains provisions about making material available to suspects, serious offenders and volunteers.

## **61 Photographs or video recordings**

- (1) This section applies if a forensic procedure involves the taking of a photograph or video recording of a part of a relevant person's body.
- (2) The relevant person may request that a copy of the photograph or video recording be made available to the relevant person.

*Note 1* Section 103 provides that the request may be made by the lawyer or interview friend of a suspect, serious offender or volunteer.

*Note 2* Section 105 provides that the copy must be made available as soon as practicable after the request is made.

- (3) If the relevant person makes a request under subsection (2), a police officer must ensure that a copy of the photograph or video recording is made available to the relevant person.

*Note* Pt 2.14 contains provisions about making material available to suspects, serious offenders and volunteers.

## **62 Results of analysis**

- (1) This section applies if material from a sample taken from a relevant person is analysed in the investigation of a matter by a police officer.
- (2) The relevant person may request that a copy of the results of the analysis be made available to the relevant person.

*Note 1* Section 103 provides that the request may be made by the lawyer or interview friend of a suspect, serious offender or volunteer.

*Note 2* Section 105 provides that the copy must be made available as soon as practicable after the request is made.

- (3) If the relevant person makes a request under subsection (2), a police officer must ensure that a copy of the results of the analysis is made available to the relevant person.

*Note* Pt 2.14 contains provisions about making material available to suspects, serious offenders and volunteers.

### **63 Preventing the carrying out of forensic procedure**

A person must not intentionally obstruct, hinder or resist a police officer or any other person authorised under this Act to exercise functions relating to the carrying out of a forensic procedure.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

## **Part 2.7**                      **Carrying out of certain forensic procedures after conviction of serious offenders**

### **64**                      **Forensic procedures to which pt 2.7 applies**

- (1) This part applies to an intimate forensic procedure that consists of the taking of a sample of blood.
- (2) This part applies to the following non-intimate forensic procedures:
  - (a) the taking of samples of hair other than pubic hair;
  - (b) the taking of a buccal swab;
  - (c) the taking of fingerprints.

### **65**                      **Non-intimate forensic procedures authorised to be carried out**

- (1) A person is authorised to carry out a non-intimate forensic procedure to which this part applies on a serious offender (other than a child or incapable person)—
  - (a) with the informed consent of the serious offender; or
  - (b) by order of a police officer under section 73 (Circumstances in which police officer may order non-intimate forensic procedure).

- (2) A person is authorised to carry out a non-intimate forensic procedure to which this part applies on a serious offender who is a child or incapable person by order of a court under section 77 (Court order for carrying out forensic procedure on serious offender).

**66 Intimate forensic procedures authorised to be carried out**

A person is authorised to carry out an intimate forensic procedure to which this part applies on a serious offender (other than a child or incapable person)—

- (a) with the informed consent of the serious offender; or
- (b) by order of a court under section 77 (Court order for carrying out forensic procedure on serious offender).

**67 Forensic procedures to be in accordance with pt 2.6**

A person is authorised under section 65 or section 66 to carry out a forensic procedure under this part only in accordance with part 2.6.

**68 Scope of authorisation**

A person is authorised to carry out a forensic procedure under this part on a serious offender even if the serious offender is also a suspect or volunteer.

**69 Informed consent of serious offender to forensic procedure**

- (1) A serious offender gives informed consent to a forensic procedure if the serious offender consents after a police officer—
- (a) requests the serious offender to consent to the forensic procedure under section 70; and
  - (b) informs the serious offender about the forensic procedure in accordance with section 72 (Matters that serious offender must be informed of before giving consent); and

- (c) gives the serious offender the opportunity to communicate, or attempt to communicate, with a lawyer of the serious offender's choice.

*Note* **Inform** is defined in the dictionary.

- (2) The police officer must allow the serious offender to communicate, or attempt to communicate, with the lawyer in private unless the police officer suspects on reasonable grounds that the serious offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

*Note* Section 107 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

**70 Police officer may request serious offender to consent to forensic procedure**

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

**71 Matters to be considered by police officer before requesting consent to forensic procedure**

Before a request is made under section 70, the police officer must be satisfied on the balance of probabilities that—

- (a) for a person on whom the procedure is proposed to be carried out who is not serving a sentence of imprisonment at a correctional centre or other place of detention—the person is a serious offender; and

*Note* **Correctional centre** includes a NSW correction centre, see the dictionary.

- (b) the request for consent to carry out the forensic procedure is justified in all the circumstances.

**72 Matters that serious offender must be informed of before giving consent**

- (1) The police officer must inform the serious offender of the following:
- (a) the purpose for which the forensic procedure is required;
  - (b) if the police officer wants the forensic procedure carried out in relation to a serious offence—the serious offence;
  - (c) how the forensic procedure is to be carried out;
  - (d) that the forensic procedure may produce evidence against the serious offender that might be used in a court of law;
  - (e) that the forensic procedure will be carried out by a person who may carry out the procedure under part 2.6 (Carrying out forensic procedures);

*Note* See s 53 (People who may carry out forensic procedures).

- (f) if the forensic procedure is the taking of a sample of blood—that the serious offender may request that—
  - (i) if the serious offender is serving a sentence of imprisonment at a correctional centre or other place—a corrections health professional for the centre, or health professional (however described) for the place, be present while the blood is taken; or
  - (ii) if the serious offender is not serving a sentence of imprisonment—a doctor of the serious offender's choice be present while the blood is taken;
- (g) if the forensic procedure is the taking of a sample by buccal swab—that the serious offender may request that—
  - (i) if the serious offender is serving a sentence of imprisonment at a correctional centre or other place—a corrections health professional for the centre, or health

professional (however described) for the place, be present while the sample is taken; or

- (ii) if the serious offender is not serving a sentence of imprisonment—a doctor or dentist of the serious offender’s choice be present while the sample is taken;
- (h) that the serious offender may refuse consent to the carrying out of the forensic procedure;
- (i) the consequences of not consenting, as mentioned in subsection (2) or (3) (whichever applies);
- (j) the effect of section 87 (Admissibility of evidence relating to consent to forensic procedures) (if applicable);
- (k) that information obtained from analysis of forensic material obtained may be placed on the ACT DNA database and used for a criminal investigation or any other purpose for which the DNA database may be used, including that the information may be compared with information from the DNA databases of other participating jurisdictions.

*Note* Pt 2.11 and pt 2.13 set out the purposes for which the database may be used.

- (2) The police officer must inform a serious offender requested to undergo a non-intimate forensic procedure to which this part applies that, if the serious offender does not consent, a police officer may order the carrying out of the forensic procedure under section 73 if the police officer has taken into account the matters set out in section 74 (Matters to be considered by police officer).
- (3) The police officer must inform a serious offender requested to undergo an intimate forensic procedure to which this part applies that, if the serious offender does not consent, an application may be made to a court for an order authorising the carrying out of the forensic procedure.

**73 Circumstances in which police officer may order non-intimate forensic procedure**

A police officer may order the carrying out of a non-intimate forensic procedure on a serious offender if—

- (a) the serious offender has been asked under section 70 (Police officer may request serious offender to consent to forensic procedure) to consent to the carrying out of the forensic procedure; and
- (b) the serious offender has not consented; and
- (c) the police officer has taken into account the matters set out in section 74.

**74 Matters to be considered by police officer**

In deciding whether to make an order under section 73, the police officer must take into account—

- (a) whether this Act would authorise the forensic procedure to be carried out in the absence of the order; and
- (b) the seriousness of the circumstances surrounding the serious offence committed by the serious offender; and
- (c) whether the carrying out of the forensic procedure without consent is justified in all the circumstances.

**75 Recording of giving of information and consent**

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the serious offender's responses (if any) are recorded by audiotape, videotape or other electronic means.
- (2) If recording the giving of the information and the serious offender's responses (if any) by audiotape, videotape or other electronic means is not practicable, the police officer must ensure that a written



record of the giving of the information and the serious offender's responses (if any) is made, and that a copy of the record is made available to the serious offender.

*Note* Pt 2.14 contains provisions about making copies of material (including tapes) available to the serious offender.

## **76 Record of police officer's order**

- (1) If a police officer orders the carrying out of a non-intimate forensic procedure on a serious offender, the police officer must—
  - (a) make a record of—
    - (i) the order; and
    - (ii) the date and time the order was made; and
    - (iii) the reasons for making it; and
  - (b) sign the record.
- (2) The police officer must make and sign the record when the order is made or as soon as practicable afterwards.
- (3) The police officer must ensure that a copy of the record is made available to the serious offender as soon as practicable after the record is made.

## **77 Court order for carrying out of forensic procedure on serious offender**

- (1) A police officer may apply to any court for an order directing a serious offender to consent to an intimate forensic procedure to which this part applies being carried out on the serious offender.
- (2) A police officer may apply to any court for an order for the carrying out of a non-intimate forensic procedure to which this part applies on a serious offender who is a child or incapable person.

- (3) A police officer may make an application under this section to the court that is sentencing the serious offender or to any other court at a later time.
- (4) A court may order the carrying out of a forensic procedure under this part if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
- (5) In deciding whether to make an order under this section, the court must take into account—
  - (a) whether this Act would authorise the forensic procedure to be carried out in the absence of the order; and
  - (b) the seriousness of the circumstances surrounding the commission of the serious offence by the serious offender; and
  - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.
- (6) An order under this section takes effect immediately.
- (7) However, the person who conducts an analysis of forensic material obtained because of carrying out the forensic procedure on a serious offender must not disclose the results of the analysis—
  - (a) until the expiry of any appeal period or after the final determination of any appeal in relation to the serious offence concerned, whichever is the later; or
  - (b) if the conviction is quashed.

## **78 Carrying out of forensic procedure following conviction**

- (1) If a court orders a serious offender who is in custody at a correctional centre or another place of detention to permit a forensic procedure to be carried out under this part, the court may order that a police officer, together with a person who, under part 2.6 (Carrying out forensic procedures), may carry out the forensic procedure, be permitted to attend on the serious offender in the

correctional centre or place of detention to allow the forensic procedure to be carried out.

*Note* **Correctional centre** includes a NSW correction centre, see the dictionary.

- (2) If a court orders a serious offender who is not in custody at a correctional centre or another place of detention to permit a forensic procedure to be carried out, the court may order the serious offender to attend at a police station (or other place ordered by the court) within a period ordered by the court to allow the forensic procedure to be carried out.
- (3) A serious offender ordered to permit the carrying out of a forensic procedure must not intentionally fail to permit the forensic procedure to be carried out.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

## Part 2.8

# Carrying out of forensic procedures on volunteers and certain other people

### 79 Carrying out of forensic procedures on volunteers

- (1) A person is authorised to carry out a forensic procedure on a volunteer—
  - (a) if the volunteer is not a child or incapable person—with the informed consent of the volunteer given in accordance with section 80; or
  - (b) if the volunteer is a child or incapable person—
    - (i) with the informed consent of the parent or guardian of the volunteer given in accordance with section 80 or by order of a magistrate under section 83 (Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person); and
    - (ii) after the person has informed the child or incapable person that, even though consent has been given or an order made, if he or she objects to or resists the carrying out of the forensic procedure it will not be carried out.

*Note* **Volunteer** is defined in s 10.

- (2) This section does not authorise a person to carry out a forensic procedure on a child or incapable person who objects to or resists the carrying out of the forensic procedure.
- (3) A person is authorised under this section to carry out a forensic procedure under this part only in accordance with part 2.6.

- (4) However, the following provisions in part 2.6 do not apply to the carrying out of a forensic procedure under this part on a volunteer:
- (a) section 50 (Use of force in carrying out forensic procedures);
  - (b) section 55 (3) (Person may get help to carry out forensic procedure);
  - (c) section 63 (Preventing the carrying out of forensic procedure).

**80 Informed consent of volunteer or parent or guardian of volunteer**

- (1) A volunteer, or a parent or guardian of a volunteer, gives informed consent in accordance with this section if the volunteer, parent or guardian consents in the presence of an independent person who is not a police officer after a police officer informs the volunteer, parent or guardian (orally or in writing) about the following:
- (a) how the forensic procedure is to be carried out;
  - (b) that the volunteer, parent or guardian may request that a doctor of the person's choice be present while an intimate forensic procedure (other than the taking of a dental impression) is carried out or a sample of saliva or sample by buccal swab is taken;
  - (c) if the forensic procedure is the taking of a dental impression, sample of saliva or sample by buccal swab—that the volunteer, parent or guardian may request that a dentist of the person's choice be present while the procedure is carried out;
  - (d) that the volunteer is under no obligation to undergo the forensic procedure;
  - (e) that the forensic procedure may produce evidence that might be used in a court of law;

- (f) that the volunteer, parent or guardian may consult a lawyer of his or her choice before deciding whether or not to consent to the forensic procedure;
- (g) that if the volunteer, parent or guardian consents to the forensic procedure—
  - (A) the consent is also consent to the retention of forensic material taken and information obtained from analysis of the material; and
  - (B) the chief police officer and the volunteer, parent or guardian may set a period for which the material or information may be retained, but it must then be destroyed unless a magistrate orders retention under section 84;

*Note* See s 80A (Consent to retention of forensic material taken etc).

- (h) that the volunteer, parent or guardian may at any time withdraw consent to the volunteer's undergoing the forensic procedure or to retention of the forensic material taken or of information obtained from the analysis of the material;
  - (i) to the extent that they are relevant, the matters mentioned in subsection (3).
- (2) However, an independent person must not be present as mentioned in subsection (1) if the volunteer, parent or guardian requests that an independent person not be present.
  - (3) The police officer must inform the volunteer, or parent or guardian of the volunteer, about the following:
    - (a) that information obtained from analysis of forensic material taken from a person under this part, and about the identity of the person, may be placed on the ACT DNA database, and that the information may be compared with information from the DNA databases of other participating jurisdictions;

- (b) if the police officer intends the information to be placed on the volunteers (limited purposes) index—the purpose for which it is to be placed on the index, and that the information may be used only for that purpose;
- (c) if the police officer intends the information to be placed on the volunteers (unlimited purposes) index—that the information may be used for a criminal investigation or any other purpose for which the ACT DNA database may be used;

*Note* Pt 2.11 and pt 2.13 set out the purposes for which the database may be used.

- (d) anything else prescribed by regulation.

#### **80A Consent to retention of forensic material taken etc**

- (1) This section applies if—
  - (a) a volunteer, or parent or guardian of a volunteer, consents in accordance with section 80 for a forensic procedure to be carried out on the volunteer; and
  - (b) forensic material is taken from the volunteer.
- (2) The volunteer, parent or guardian is taken to consent to the retention of the forensic material and information obtained from analysis of the material.

*Note* Section 82 (2) provides that, if the volunteer, parent or guardian expressly withdraws consent to the retention, the forensic material or information must be destroyed as soon as practicable after the consent is withdrawn unless a magistrate orders retention under s 84.

- (3) The chief police officer and the volunteer, parent or guardian may set the period for which the forensic material or information obtained from analysis of the material may be retained (the ***agreed retention period***).

*Note* Section 82 (4) provides that, if the agreed retention period ends, the forensic material or information must be destroyed as soon as practicable unless a magistrate orders retention under s 84.

## 81 Recording of giving of information etc

- (1) This section applies if a police officer gives information to a volunteer, or parent or guardian of a volunteer, in accordance with section 80 in relation to a forensic procedure to be carried out on the volunteer.
- (2) The police officer must, if practicable, ensure that the following are recorded by audiotape, videotape or other electronic means (*electronic recording*):
  - (a) the giving of the information about the proposed forensic procedure;
  - (b) the volunteer's, parent's or guardian's responses (if any);
  - (c) if the volunteer, parent or guardian makes a request mentioned in section 80 (2)—the making of the request.
- (3) However, a written record of the things mentioned in subsection (2) (a) to (c) must be made, and a copy made available to the volunteer, parent or guardian if—
  - (a) the volunteer, parent or guardian requests that a written record is made instead of an electronic recording; or
  - (b) electronic recording is not practicable.
- (4) Before the forensic procedure is carried out, the volunteer, parent or guardian must be informed that the volunteer, parent or guardian may request that a written record is made instead of an electronic recording.



## **82 Withdrawal of consent or end of agreed retention period**

- (1) If a volunteer, or a parent or guardian of the volunteer, 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 his or her conduct) before or during the carrying out of the forensic procedure—
  - (a) the forensic procedure must be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and
  - (b) if the volunteer is a child or incapable person—the forensic procedure is not to proceed except by an order of a magistrate under section 83.
- (2) If, after the carrying out of a forensic procedure under this part on a volunteer, the volunteer, or a parent or guardian of the volunteer, expressly withdraws consent to retention of the forensic material taken or information obtained from analysis of the material, the material or information must be destroyed as soon as practicable after the consent is withdrawn.
- (3) A police officer may request, but cannot require, a parent or guardian who withdraws consent to the carrying out of a forensic procedure under this part to confirm the withdrawal of consent in writing.
- (4) Forensic material taken from the volunteer or information obtained from analysis of the material must be destroyed as soon as practicable after the end of the agreed retention period.
- (5) However, material or information is not required to be destroyed under subsection (2) or (4) if an application for retention of the material or information has been made under section 84 (Retention of forensic material etc by order of magistrate) and the application has not been finally decided or a magistrate has ordered retention.
- (6) In this section:

*agreed retention period*—see section 80A (3).

**83 Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person**

- (1) A magistrate may order the carrying out of a forensic procedure on a child or incapable person if—
  - (a) the consent of the parent or guardian of the child or incapable person to the carrying out of the forensic procedure cannot reasonably be obtained from a parent or guardian of the child or incapable person; or
  - (b) the parent or guardian of the child or incapable person refuses consent to the carrying out of the forensic procedure and the magistrate is satisfied that there are reasonable grounds to believe—
    - (i) that the parent or guardian is a suspect; and
    - (ii) that the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence; or
  - (c) the parent or guardian of the child or incapable person consented to the carrying out of the forensic procedure, but subsequently withdraws that consent.
- (2) In deciding whether to make an order under this section, the magistrate must take into account—
  - (a) whether this Act would authorise the carrying out of the forensic procedure apart from this section; and
  - (b) if the forensic procedure is being carried out for the purposes of the investigation of a particular offence—the seriousness of the circumstances surrounding the commission of the offence; and
  - (c) the best interests of the child or incapable person; and

- (d) so far as they can be found out, any wishes of the child or incapable person about whether the forensic procedure should be carried out; and

*Note* A forensic procedure cannot be carried out on a child or incapable person who objects to or resists the carrying out of the procedure even if the magistrate makes an order (see s 79 (1) (b) (ii) and (2)).

- (e) except in the circumstances mentioned in subsection (1) (b), any wishes expressed by the parent or guardian of the child or incapable person about whether the forensic procedure should be carried out; and

- (f) whether the carrying out of the forensic procedure is justified in all the circumstances.

- (3) An order under this section—

- (a) may require the forensic procedure to be carried out at a date, time or place, or in a way, stated in the order; and
- (b) must state the period for which forensic material obtained from carrying out the procedure or information obtained from analysis of the material may be retained.

## **84 Retention of forensic material etc by order of magistrate**

- (1) This section applies if—
  - (a) a volunteer, or parent or guardian of a volunteer, gave consent in accordance with section 80 for a forensic procedure to be carried out on the volunteer; and
  - (b) forensic material was taken from the volunteer; and
  - (c) either—
    - (i) the volunteer, parent or guardian withdraws consent to the retention of the forensic material or information obtained from analysis of the material; or

- (ii) the agreed retention period for the forensic material or information ends.
- (2) An authorised applicant may apply to a magistrate for an order under subsection (3).

*Note* Section 82 (5) provides that the forensic material or information is not required to be destroyed under s 82 (2) or (4) if an application for retention of the material or information has been made under this section and the application has not been finally decided or a magistrate has ordered retention.

- (3) A magistrate may order that the forensic material or information be retained if satisfied that—
- (a) during an investigation into the commission of a serious offence material reasonably believed to be from the body of a person who committed the serious offence had been found—
    - (i) at the scene of the serious offence; or
    - (ii) on the victim of the serious offence or anything reasonably believed to have been worn or carried by the victim when the serious offence was committed; or
    - (iii) on the volunteer or anything reasonably believed to have been worn or carried by the volunteer at the scene of the serious offence or when the serious offence was committed; or
    - (iv) on a thing or person reasonably believed to have been associated with the commission of the serious offence; and
  - (b) there are reasonable grounds to believe that information obtained from analysis of the forensic material taken from the volunteer is likely to produce evidence of probative value in relation to the serious offence; and
  - (c) the retention of the forensic material taken from the volunteer is justified in all the circumstances.

- (4) The order must state the period for which the forensic material or information may be retained.
- (5) In this section:  
*agreed retention period*—see section 80A (3).

**84A Certain volunteers—information about matching of DNA profile**

- (1) This section applies if a volunteer volunteers to undergo a forensic procedure for the purpose of—
  - (a) placing the volunteer’s DNA profile on the ACT DNA database; and
  - (b) comparing the volunteer’s DNA profile with a DNA profile on the missing person’s index or unknown deceased person’s index of a DNA database.
- (2) If the volunteer’s DNA profile matches a DNA profile on the missing person’s index or unknown deceased person’s index, a police officer must inform the volunteer about the match as soon as practicable after the day the match is made.

## **Part 2.8A Analysis of forensic material**

### **84B Who may analyse forensic material?**

- (1) The Minister may enter into an agreement with 1 or more of the following to analyse forensic material for the Territory:
  - (a) a forensic laboratory accredited with the National Association of Testing Authorities Australia;
  - (b) another forensic laboratory that the Minister considers on reasonable grounds is competent to analyse forensic material.
- (2) An agreement with a forensic laboratory may allow the outsourcing of the analysis of forensic material to another forensic laboratory.

## **Part 2.9 Admissibility of evidence**

### **Division 2.9.1 Forensic evidence**

#### **85 Inadmissibility of evidence from improper forensic procedures etc**

- (1) This section applies if—
  - (a) a forensic procedure has been carried out on a person; and
  - (b) there has been a breach of, or failure to comply with—
    - (i) any provision of this Act in relation to a forensic procedure carried out on the person (including, but not limited to, any breach of, or failure to comply with, a provision requiring things to be done at any time before or after the forensic procedure is carried out); or
    - (ii) any provision of part 2.11 (ACT DNA database) in relation to recording or use of information on the DNA database system.
- (2) This section does not apply if—
  - (a) this Act or a court order requires forensic material to be destroyed; and
  - (b) the forensic material has not been destroyed.

*Note* Section 86 applies if this Act or a court order requires forensic material to be destroyed.
- (3) This section applies to the following evidence:
  - (a) evidence of forensic material, or evidence consisting of forensic material, taken from the person by the forensic procedure;
  - (b) evidence of any results of the analysis of the forensic material;

- (c) any evidence obtained because of or in connection with the carrying out of the forensic procedure.
- (4) If this section applies, evidence mentioned in subsection (3) is admissible in any proceeding against the person in a court only if—
  - (a) the person does not object to the admission of the evidence; or
  - (b) the court is satisfied on the balance of probabilities that the evidence should be admitted in the proceeding despite the breach of, or failure to comply with, the provisions of this Act.
- (5) The matters that the court may take into consideration in deciding whether evidence should be admitted 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 breach of, or failure to comply with, the provisions of this Act;
  - (c) the gravity of the breach of, or failure to comply with, the provisions of this Act;
  - (d) whether the breach or failure to comply was intentional or reckless;
  - (e) the nature of the provision of this Act that was breached or not complied with;
  - (f) the nature of the offence concerned and the subject matter of the proceeding;
  - (g) any other matters the court considers relevant.
- (6) The probative value of the evidence does not by itself justify the admission of the evidence.



**86 Inadmissibility of evidence if forensic material required to be destroyed**

- (1) If this Act or a court order requires forensic material taken from a person 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 because of or in connection with the carrying out of the forensic procedure.
- (2) Evidence of the results of the analysis, and the other evidence, is not admissible in any proceedings against the person.

**Division 2.9.2 Other evidence**

**87 Admissibility of evidence relating to consent to forensic procedures**

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is admissible in a proceeding against the person in a court only to establish or rebut an allegation that a police officer investigating the commission of the offence concerned acted contrary to law in carrying out the investigation.

**88 Admissibility of evidence relating to carrying out of forensic procedures**

Despite section 85 (4) (Inadmissibility of evidence from improper forensic procedures etc), evidence of how a forensic procedure was carried out is admissible in a proceeding against a person 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 decide the admissibility of a confession or admission or other evidence adverse to the person if the person 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 part 2.6 (Carrying out forensic procedures).

## 89 Obstructing etc the carrying out of forensic procedure

- (1) This section applies if a police officer or magistrate has ordered the carrying out of a forensic procedure on a suspect under this Act.
- (2) 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 a proceeding against the suspect in a court in relation to the offence in relation to which the forensic procedure was carried out.

- (3) Evidence mentioned in subsection (2) is admissible only if it is established that the suspect had been informed by a police officer, or 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.

*Note* **Inform** is defined in the dictionary.

- (4) The court or jury may draw the inferences from the evidence mentioned in subsection (2) that 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.

## Part 2.10 Destruction of forensic material

### 90 Destruction of certain forensic material obtained by court order

- (1) If an interim order for the carrying out of a forensic procedure made under section 41 (Interim order for immediate carrying out of forensic procedure) is disallowed after the forensic procedure is carried out, an investigating police officer must ensure that—
  - (a) any forensic material obtained because of the carrying out of the procedure is destroyed as soon as practicable after the disallowance; and
  - (b) a copy of the results of any analysis of the forensic material is made available to the suspect.

*Note* Pt 2.14 contains provisions about making copies of material available to the suspect.

- (2) If an order for the carrying out of a forensic procedure made under section 83 (Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person) or for the retention of forensic material under section 84 (Retention of forensic material etc by order of magistrate) states a period for which forensic material obtained because of the carrying out of the procedure may be retained, the forensic material must be destroyed as soon as practicable after the end of the period.

**91      Destruction of forensic material taken from serious offender after conviction quashed**

The police officer who obtained an order under section 77 (Court order for carrying out forensic procedure on serious offender) for the carrying out of a forensic procedure on a serious offender whose conviction is quashed after the making of the order must ensure that any forensic material obtained because of the carrying out of the procedure is destroyed as soon as practicable after the conviction is quashed.

**92      Application for destruction of forensic material after 1 year**

- (1) If forensic material has been taken from a suspect by a forensic procedure carried out under part 2.3 (Forensic procedures by consent of suspect), part 2.4 (Non-intimate forensic procedures on suspect by order of police officer) or part 2.5 (Forensic procedures on suspect by order of magistrate), the suspect may apply to a court for an order that the forensic material be destroyed.
- (2) However, the suspect may not make an application under this section—
  - (a) if a proceeding against the suspect for an offence to which the forensic material relates has begun and not been finally decided (including any appeal); or
  - (b) if—
    - (i) the suspect is convicted of an offence to which the forensic material relates; and
    - (ii) the suspect—
      - (A) does not appeal against the conviction in the appeal period; or
      - (B) appeals against the conviction and the appeal is unsuccessful.

- (3) An application under this section may only be made 1 year or later after—
  - (a) the day the forensic material was taken; or
  - (b) if an application for destruction of the forensic material has previously been refused under this section—the day an application was last refused.
- (4) On application, the court must order that the forensic material be destroyed unless satisfied that—
  - (a) there are reasonable grounds to believe that the forensic material is likely to be of probative value in relation to the investigation of, or a proceeding for, an offence (including the offence in relation to which the forensic material was taken from the suspect but, for that offence, not in relation to the suspect); and
  - (b) the destruction of the forensic material is not justified in all the circumstances.
- (5) The court may order when the forensic material must be destroyed.
- (6) If the court orders that forensic material be destroyed, the court must ensure that the responsible person for the ACT DNA database is told about the order.

**93      Destruction of forensic material if related evidence is inadmissible**

If a court finds that evidence mentioned in section 85 (3) (Inadmissibility of evidence from improper forensic procedures etc) relating to a forensic procedure is inadmissible under section 85, the chief police officer must, as soon as practicable, ensure that any forensic material taken from the suspect by that forensic procedure is destroyed.

## Part 2.11 ACT DNA database

### 94 Definitions—Act

In this Act:

*ACT DNA database*—see section 94A.

*corresponding DNA index* means an index of DNA profiles established, kept or maintained under a law, or a provision of a law, of the Commonwealth or a State, whether or not the law or provision is a corresponding law.

*Note* *State* includes the Northern Territory (see Legislation Act, dict, pt 1).

*corresponding statistical index* means an index of information obtained from the analysis of forensic material that is established, kept or maintained under a law, or a provision of a law, of the Commonwealth or a State, whether or not the law or provision is a corresponding law.

*crime scene index* means—

- (a) an index of DNA profiles derived from forensic material found—
  - (i) at any place (whether in or outside Australia) where a serious offence was, or is reasonably suspected of having been, committed; or
  - (ii) on or within the body of the victim, or a person reasonably suspected of being a victim, of a serious offence; or
  - (iii) on anything worn or carried by the victim when a serious offence was, or is reasonably suspected of having been, committed; or



- (iv) on or within the body of anyone, on anything, or at any place, associated with the commission of a serious offence; or
- (b) a corresponding DNA index prescribed by regulation for this definition.

***DNA database system*** means a database (whether in computerised or other form and however described) containing—

- (a) the following indexes of DNA profiles:
  - (i) a crime scene index;
  - (ii) a missing persons index;
  - (iii) an unknown deceased persons index;
  - (iv) a serious offenders index;
  - (v) a volunteers (unlimited purposes) index;
  - (vi) a volunteers (limited purposes) index;
  - (vii) a suspects index;

and information that may be used to identify the person from whose forensic material each DNA profile was derived; and

- (b) a statistical index; and
- (c) any other index prescribed by regulation.

***missing persons index*** means—

- (a) an index of DNA profiles derived from forensic material of—
  - (i) people who are missing; and
  - (ii) volunteers who are relatives by blood of missing people;  
or
- (b) a corresponding DNA index prescribed by regulation for this definition.

*serious offenders index* means—

- (a) an index of DNA profiles derived from forensic material taken—
  - (i) under part 2.7 (Carrying out of certain forensic procedures after conviction of serious offenders) from serious offenders; or
  - (ii) under part 2.3 (Forensic procedures by consent of suspect), part 2.4 (Non-intimate forensic procedures on suspect by order of police officer) or part 2.5 (Forensic procedures on suspect by order of magistrate) from suspects who have been convicted of a serious offence; or
- (b) a corresponding DNA index prescribed by regulation for this definition.

*statistical index* means—

- (a) an index of information that—
  - (i) is obtained from the analysis of forensic material taken from people under this Act; and
  - (ii) has been compiled for statistical purposes; and
  - (iii) cannot be used to discover the identity of people from whom the forensic material was taken; or
- (b) a corresponding statistical index prescribed by regulation for this definition.

*suspects index* means—

- (a) an index of DNA profiles derived from forensic material taken from suspects under part 2.3 (Forensic procedures by consent of suspect), part 2.4 (Non-intimate forensic procedures on suspect by order of police officer) or part 2.5 (Forensic procedures on suspect by order of magistrate); or

- (b) a corresponding DNA index prescribed by regulation for this definition.

***unknown deceased persons index*** means—

- (a) an index of DNA profiles derived from forensic material of dead people whose identities are unknown; or
- (b) a corresponding DNA index prescribed by regulation for this definition.

***volunteers (limited purposes) index*** means—

- (a) an index of DNA profiles derived from forensic material taken under part 2.8 (Carrying out of forensic procedures on volunteers and certain other people) from volunteers who (or whose parents or guardians) have been informed that information obtained will be used only for the purpose of a criminal investigation or any other purpose for which the ACT DNA database may be used under this part; or
- (b) a corresponding DNA index prescribed by regulation for this definition.

***volunteers (unlimited purposes) index*** means—

- (a) an index of DNA profiles derived from material taken—
  - (i) under part 2.8 (Carrying out of forensic procedures on volunteers and certain other people) from volunteers who (or whose parents or guardians) have been informed under section 80 (3) (c) (Informed consent of volunteer or parent or guardian of volunteer) that information obtained may be used for a criminal investigation or any other purpose for which the ACT DNA database may be used; or
  - (ii) from dead people whose identity is known; or
- (b) a corresponding DNA index prescribed by regulation for this definition.

## 94A ACT DNA database

- (1) The Minister must ensure a DNA database system (the *ACT DNA database*) is kept.
- (2) The Minister may enter into an agreement (a *database agreement*) with 1 or more entities to keep the ACT DNA database, or part of the database, on behalf of the Territory.
- (3) To remove any doubt, if the Minister enters into a database agreement, it does not affect the Territory's powers in relation to the ACT DNA database.
- (4) If the Minister enters into a database agreement, the Minister may access the ACT DNA database to review and audit it.

*Note* The Legislation Act, s 254A provides that the Minister may delegate the Minister's functions under an Act to 'anyone else'. A reference to 'anyone else' is a reference to a person generally (see Legislation Act, s 160).

## 95 Supply of forensic material for prohibited analysis etc

- (1) A person commits an offence if—
  - (a) the person's conduct causes the supply of forensic material taken from anyone under this Act (or under a law of another jurisdiction prescribed by regulation for this subsection) to anyone for prohibited analysis; and
  - (b) the person intends, or is reckless about, the supply of material of that kind.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (2) A person commits an offence if—
  - (a) the person's conduct causes the supply of forensic material (other than excluded forensic material) to anyone for analysis

for the purpose of deriving a DNA profile for inclusion on an index of the ACT DNA database; and

- (b) the person intends, or is reckless about, the supply of material of that kind.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (3) In this section:

***excluded forensic material*** means forensic material—

- (a) found at a crime scene; or
- (b) taken from a suspect in relation to a serious offence under part 2.3 (Forensic procedures by consent of suspect), part 2.4 (Non-intimate forensic procedures on suspect by order of police officer) or part 2.5 (Forensic procedures on suspect by order of magistrate); or
- (c) taken from a serious offender or volunteer under part 2.7 (Carrying out of certain forensic procedures after conviction of serious offenders) or part 2.8 (Carrying out of forensic procedures on volunteers and certain other people); or
- (d) taken from the body of a dead person; or
- (e) that is from the body of a missing person; or
- (f) taken from a volunteer who is a relative by blood of a dead or missing person; or
- (g) taken under a law of another jurisdiction prescribed by regulation for this definition.

***law***, of another jurisdiction, means a law, or a provision of a law, of the Commonwealth or a State, whether or not the law is a corresponding law.

*prohibited analysis*, of forensic material, means analysis for the purpose of deriving a DNA profile for inclusion on an index of the ACT DNA database if—

- (a) this Act or a law of another jurisdiction prescribed by regulation requires the material to be destroyed; or
- (b) a court orders that the material be destroyed.

## **96 Use of information on ACT DNA database**

- (1) A person commits an offence if—
  - (a) the person accesses information on the ACT DNA database; and
  - (b) the access is not authorised under this section.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (2) A person may access information stored on the ACT DNA database for 1 or more of the following purposes:
  - (a) the purpose of forensic comparison permitted under section 97;
  - (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates;
  - (c) the purpose of administering the ACT DNA database;
  - (d) the purpose of, and in accordance with, an arrangement entered into under section 102 (Database information) for the provision of access to information on the ACT DNA database by law enforcement officers or anyone else prescribed by regulation;
  - (e) the purpose of the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth) or the *Extradition Act 1988* (Cwlth);
  - (f) the purpose of a coronial inquest or inquiry;

- (g) the purpose of investigation of a complaint by the privacy commissioner (or someone who has corresponding functions under the law of another participating jurisdiction).
- (3) The following entities may access information on the ACT DNA database for the purpose of reviewing or auditing the database:
  - (a) the auditor-general;
  - (b) the human rights commissioner;
  - (c) the ombudsman;
  - (d) the privacy commissioner;
  - (e) an entity of another participating jurisdiction prescribed by regulation;
  - (f) any other entity prescribed by regulation.
- (4) This section does not apply to information that cannot be used to discover the identity of anyone.

## **97 Permissible matching of DNA profiles**

- (1) A matching of a DNA profile on an index of the ACT DNA database mentioned in table 97, column 1 with a DNA profile on another index of the database mentioned in column 2, 3, 4, 5, 6, 7 or 8 is not permitted by this Act if—
  - (a) ‘only if within purpose’ is shown in relation to the index mentioned in column 2, 3, 4, 5, 6, 7 or 8 opposite the volunteers (limited purposes) index mentioned in column 1; and
  - (b) the matching is carried out for a purpose other than a purpose for which the DNA profile placed on the volunteers (limited purposes) index mentioned in column 1 was so placed.

- (2) A matching of a DNA profile on an index of the ACT DNA database mentioned in table 97, column 1 with a DNA profile on another index of the database mentioned in column 2, 3, 4, 5, 6, 7 or 8 is permitted by this Act if—
- (a) ‘yes’ is shown in relation to the index mentioned in column 2, 3, 4, 5, 6, 7 or 8 opposite the index mentioned in column 1; or
  - (b) ‘only if within purpose’ is shown in relation to the index mentioned in column 2, 3, 4, 5, 6, 7 or 8 opposite the volunteers (limited purposes) index mentioned in column 1 and the matching is carried out for a purpose for which the DNA profile placed on the volunteers (limited purposes) index mentioned in column 1 was so placed.
- (3) A person commits an offence if—
- (a) the person’s conduct causes the matching that is not permitted by this Act of a DNA profile on an index of the ACT DNA database with a DNA profile on the same or another index of the ACT DNA database; and
  - (b) the person intends, or is reckless about, the matching.
- Maximum penalty: 200 penalty units, imprisonment for 2 years or both.
- (4) This section does not make it an offence for conduct to cause a matching that is not permitted by this Act if the matching is solely for the purpose of administering the ACT DNA database.



**Table 97 Table of permissible matching of DNA profiles**

<b>profile to be matched</b>	<b>is matching permitted?</b>						
<b>column 1</b>	<b>column 2 crime scene</b>	<b>column 3 suspects</b>	<b>column 4 volunteers (limited purposes)</b>	<b>column 5 volunteers (unlimited purposes)</b>	<b>column 6 serious offenders</b>	<b>column 7 missing persons</b>	<b>column 8 unknown deceased persons</b>
<b>crime scene</b>	yes	yes	only if within purpose	yes	yes	yes	yes
<b>suspects</b>	yes	yes	only if within purpose	yes	yes	yes	yes

<b>profile to be matched</b>	<b>is matching permitted?</b>						
<b>column 1</b>	<b>column 2 crime scene</b>	<b>column 3 suspects</b>	<b>column 4 volunteers (limited purposes)</b>	<b>column 5 volunteers (unlimited purposes)</b>	<b>column 6 serious offenders</b>	<b>column 7 missing persons</b>	<b>column 8 unknown deceased persons</b>
<b>volunteers (limited purposes)</b>	only if within purpose	only if within purpose	only if within purpose	only if within purpose	only if within purpose	only if within purpose	only if within purpose
<b>volunteers (unlimited purposes)</b>	yes	yes	only if within purpose	yes	yes	yes	yes
<b>serious offenders</b>	yes	yes	only if within purpose	yes	yes	yes	yes

<b>profile to be matched</b>	<b>is matching permitted?</b>						
<b>column 1</b>	<b>column 2 crime scene</b>	<b>column 3 suspects</b>	<b>column 4 volunteers (limited purposes)</b>	<b>column 5 volunteers (unlimited purposes)</b>	<b>column 6 serious offenders</b>	<b>column 7 missing persons</b>	<b>column 8 unknown deceased persons</b>
<b>missing persons</b>	yes	yes	only if within purpose	yes	yes	yes	yes
<b>unknown deceased persons</b>	yes	yes	only if within purpose	yes	yes	yes	yes

**98 Recording, retention and removal of identifying information on ACT DNA database**

- (1) A person commits an offence if—
- (a) this Act requires that forensic material taken from someone else (the *relevant person*) under this Act be destroyed; and
  - (b) the person's conduct causes any identifying information about the relevant person obtained from the forensic material to be recorded or retained on the ACT DNA database at any time after the material is required to be destroyed under this Act; and
  - (c) the person intends, or is reckless about, the recording or retention.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (2) A person commits an offence if—
- (a) a court orders that forensic material taken from someone else (the *relevant person*) under this Act be destroyed; and
  - (b) the person's conduct causes any identifying information about the relevant person obtained from the forensic material to be recorded or retained on the ACT DNA database—
    - (i) if no appeal against the order is made during the appeal period—at any time after the appeal period; or
    - (ii) if an appeal against the order is made during the appeal period—at any time after the appeal is finally decided, if the result is that the order is confirmed (however described); and

- (c) the person intends, or is reckless about, the recording or retention.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (3) The responsible person for the ACT DNA database must ensure that any identifying information relating to a person from whose forensic material a DNA profile on the volunteers (unlimited purposes) index or volunteers (limited purposes) index of the ACT DNA database was derived is removed from the database as soon as practicable after—
  - (a) the end of the identifying period for the profile; or
  - (b) if an application is made under section 84 (Retention of forensic material etc by order of magistrate) for retention of the information—a magistrate does not order the retention; or
  - (c) if a magistrate orders retention under section 84—the end of the period stated in the order for which the information may be retained.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (4) The responsible person for the ACT DNA database must ensure that any identifying information relating to a DNA profile of a serious offender on the serious offenders index of the ACT DNA database is removed from the database as soon as practicable after becoming aware that the serious offender has been pardoned or acquitted of the serious offence concerned or that the serious offender's conviction for the serious offence concerned has been quashed.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- (5) The responsible person for the ACT DNA database must ensure that any identifying information relating to a DNA profile of a suspect on the suspects index of the ACT DNA database is removed from

the database as soon as practicable after the information is required to be removed under section 98A.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

(6) In this section:

*agreed retention period*—see section 80A (3).

*identifying information* means any information in electronic form that could be used—

(a) to discover the identity of the person from whose forensic material the DNA profile was derived; or

(b) to get information about an identifiable person.

*identifying period*, for a DNA profile, means—

(a) the period of 1 year after the DNA profile is placed on the ACT DNA database; or

(b) if the DNA profile is derived from forensic material taken from a volunteer—the agreed retention period; or

(c) if the DNA profile is derived from forensic material taken from a dead person (other than a person who was a volunteer) whose identity is known—the period the chief police officer orders the responsible person for the ACT DNA database to retain identifying information relating to the profile.

## **98A Removal of identifying information about suspects after 1 year**

(1) This section applies if—

(a) forensic material has been taken from a suspect by a forensic procedure carried out under part 2.3 (Forensic procedures by consent of suspect), part 2.4 (Non-intimate forensic procedures

on suspect by order of police officer) or part 2.5 (Forensic procedures on suspect by order of magistrate); and

- (b) identifying information about the suspect obtained from the material is included on the ACT DNA database.

(2) If—

- (a) 1 year has elapsed since the forensic material was taken; and
- (b) a proceeding for an offence to which the forensic material relates has not been begun or has been discontinued;

the identifying information must be removed from the ACT DNA database unless a warrant for the apprehension of the suspect has been issued.

(3) If a warrant for the apprehension of the suspect is issued within 1 year after the forensic material is taken, the identifying information must be removed from the ACT DNA database after—

- (a) the warrant lapses; or
- (b) 1 year elapses after the suspect is apprehended.

(4) If—

- (a) the suspect is found guilty of an offence to which the forensic material relates but no conviction is recorded; or
- (b) the suspect is acquitted of an offence to which the forensic material relates and—
  - (i) no appeal against the acquittal is made during the appeal period; or
  - (ii) an appeal is made against the acquittal and the acquittal is confirmed or the appeal is withdrawn;

the identifying information must be removed from the ACT DNA database unless an investigation into, or a proceeding against the

suspect for, another offence to which the forensic material relates is pending.

- (5) A magistrate may, on application by the director of public prosecutions, extend for not longer than 1 year the period for which identifying information may be retained under this section, if the magistrate is satisfied there are special reasons for doing so.
- (6) A magistrate to whom an application is made under subsection (5) may extend the period only if—
  - (a) the person from whom the forensic material was taken has been notified by the director of public prosecutions that the application has been made; and
  - (b) the person or his or her lawyer or interview friend (if any) has been given an opportunity to speak to or make a submission to the magistrate about the extension.
- (7) An extension in relation to particular identifying information may be given more than once.
- (8) The magistrate must ensure that the responsible person for the ACT DNA database is told about any extension given under this section.
- (9) In this section:  
*identifying information*—see section 98 (6).





## Part 2.13 Interstate enforcement

### 100 Definitions relating to interstate enforcement

In this Act:

*another participating jurisdiction* means a participating jurisdiction other than the Territory.

*appropriate authority* means—

- (a) for the Territory—the chief police officer and any other authority prescribed by regulation; or
- (b) for another participating jurisdiction—an authority exercising, in relation to the police service or force of that jurisdiction, functions corresponding to those of the chief police officer and any other authority prescribed by regulation.

*corresponding law* means a law, or a provision of a law, of the Commonwealth or a State that is prescribed by regulation for this definition, whether or not the law corresponds, or substantially corresponds, to this Act.

*DNA database* means—

- (a) the ACT DNA database; or
- (b) NCIDD; or
- (c) for a participating jurisdiction—a database (whether in computerised or other form and however described) held by, or on behalf of, the participating jurisdiction for the purposes of a corresponding law of the participating jurisdiction.

*jurisdiction* means the Territory, the Commonwealth or a State.

*Note* *State* includes the Northern Territory (see Legislation Act, dict, pt 1).

**NCIDD** means the database known as the National Criminal Investigation DNA Database and managed by the Commonwealth.

**participating jurisdiction** means the Territory and another jurisdiction in which a corresponding law is in force.

**responsible Minister**, of another participating jurisdiction, means a Minister of that jurisdiction who is responsible for administration of a corresponding law.

## 101 Registration of orders

- (1) The Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions for the establishment and maintenance, in a participating jurisdiction, of a register of orders for the carrying out of forensic procedures made under this Act and corresponding laws of participating jurisdictions.
- (2) A forensic order is registered when a copy of the order, certified by the person who made it, is registered in accordance with the law of the participating jurisdiction where the register is kept.
- (3) A person is authorised to carry out in the ACT the forensic procedure authorised by an order that is registered in accordance with such an arrangement.
- (4) The person is authorised to carry out the procedure in accordance with part 2.6 (Carrying out forensic procedures) and not otherwise.
- (5) An application for registration of a forensic order, or for cancellation of registration of a forensic order, may be made by an appropriate authority.

## 102 Database information

- (1) The Minister may enter into arrangements with the responsible Minister of another participating jurisdiction under which—
  - (a) information from the ACT DNA database is to be provided to the appropriate authority for the jurisdiction for either or both of the following purposes:
    - (i) the investigation of, or the conduct of a proceeding for, an offence against a law of the Territory or the participating jurisdiction;
    - (ii) the identification of missing or dead people; and
  - (b) information from a DNA database of the participating jurisdiction is to be provided to the appropriate authority for the Territory for either or both of the following purposes:
    - (i) the investigation of, or the conduct of a proceeding for, an offence against a law of the Territory or the participating jurisdiction;
    - (ii) the identification of missing or dead people.
- (2) Without limiting subsection (1), the Minister may enter into arrangements with the responsible Minister of the Commonwealth under which information from the ACT DNA database (the *Territory's information*) is to be provided to the appropriate authority for the Commonwealth for the purpose of the authority—
  - (a) comparing the information with information provided to the authority from a DNA database of another participating jurisdiction (the *participating jurisdiction's information*); and
  - (b) identifying to the appropriate authority for the Territory any matches that are found as a result of the comparison; and
  - (c) providing the Territory's information in relation to those matches to the appropriate authority for the Commonwealth or the appropriate authority of the participating jurisdiction; and

- (d) providing the participating jurisdiction's information in relation to those matches to the appropriate authority for the Territory.
- (3) An arrangement mentioned in this section may not authorise the comparison of information to match DNA profiles in a way that would contravene section 97 (Permissible matching of DNA profiles) were the information contained wholly on the ACT DNA database.
- (4) Information that is provided under this section must not be recorded or maintained on any database of information that may be used to discover the identity of a person or to obtain information about an identifiable person—
  - (a) at any time after this Act or a corresponding law of another participating jurisdiction requires the forensic material to which it relates to be destroyed; or
  - (b) if a court orders that the forensic material to which it relates be destroyed—
    - (i) if no appeal against the order is made during the appeal period—at any time after the appeal period; or
    - (ii) if an appeal against the order is made during the appeal period—at any time after the appeal is finally decided, if the result is that the order is confirmed (however described).

## Part 2.14 General provisions about operation of Act

### 103 Powers of lawyers and interview friends

- (1) A request that may be made by a suspect, serious offender or volunteer under this Act may be made, for the person, by—
- (a) the person's lawyer; or
  - (b) if the person is a child or incapable person—the person's interview friend.

*Note* The interview friend may be a lawyer (see s 16).

- (2) Subsection (3) applies if—
- (a) this Act requires a suspect, serious offender or volunteer to be informed about a matter; and
  - (b) the person's interview friend or lawyer is present when the person is informed about the matter; and
  - (c) the person is informed in a language (including sign language or braille) in which the person's interview friend or lawyer cannot communicate with reasonable fluency.
- (3) The person's interview friend or lawyer must also be informed about the matter in a language in which the interview friend or lawyer can communicate with reasonable fluency.

**104 Obligation of investigating police officers relating to electronic recordings**

- (1) If a recording by audiotape, videotape or other electronic means is made as required by this Act, an investigating police officer must ensure that—
  - (a) if an audio recording only or video recording only is made—the recording, or a copy of it, is made available to the suspect, serious offender or volunteer; 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, serious offender or volunteer; and
    - (ii) the suspect, serious offender or volunteer is given an opportunity to view the video recording; and
  - (c) in any case, if a transcript of the recording is made—a copy of the transcript is made available to the suspect, serious offender or volunteer.
- (2) If an investigating police officer is required to ensure that a suspect, serious offender or volunteer is given an opportunity to view a video recording made under this Act, the investigating police officer must ensure that the same opportunity is given to—
  - (a) the suspect's, serious offender's or volunteer's lawyer; and
  - (b) if the suspect, serious offender or volunteer is a child or incapable person—the suspect's, serious offender's or volunteer's interview friend.

*Note* The interview friend may be a lawyer (see s 16).

**105 Material required to be made available to suspect, serious offender or volunteer**

- (1) Material from samples or copies or any other material, that must be made available to a suspect, serious offender or volunteer under this Act—
- (a) may be sent to the suspect, serious offender or volunteer at his or her last-known address (if any), or to the suspect's, serious offender's or volunteer's lawyer (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, serious offender or volunteer at the police station where an investigating police officer was based when the forensic procedure was carried out.
- (2) Material of any kind (other than material from samples and copies of records made under section 45 (Records of applications and interim orders)) that is required by this Act to be made available to a suspect, serious offender or volunteer must be made available in accordance with subsection (1)—
- (a) as soon as practicable after the material comes into existence; or
  - (b) if the material is requested by the suspect, serious offender or volunteer or the suspect's, serious offender's or volunteer's interview friend or lawyer—as soon as practicable after the making of the request.

*Note* Section 60 (4) (a) deals with the timing of making sample material available, s 45 (3) deals with the timing of making copies available of records mentioned in s 45.



**106 Suspect, serious offender or volunteer not to be charged for material or viewing video**

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

**107 Proof of belief**

In any proceeding, the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds about a matter mentioned in this Act.

**108 Proof of impracticability**

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

**109 Liability for forensic procedures**

No civil or criminal liability is incurred by anyone (including a police officer) who carries out, or helps to carry out, a forensic procedure under this Act in relation to anything done by the person in carrying out, or helping to carry out, the forensic procedure if—

- (a) the person believed on reasonable grounds that—
  - (i) informed consent had been given to the carrying out of the forensic procedure; or
  - (ii) the carrying out of the forensic procedure without informed consent had been duly ordered by a police officer, court or magistrate under this Act; and
- (b) the thing was done in good faith; and

(c) the doing of it was reasonable in all the circumstances.

*Note* Section 107 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

### **110 Experts not obliged to carry out forensic procedures**

This Act does not require a doctor, nurse, dentist, dental technician or appropriately qualified person to carry out a forensic procedure.

### **111 Disclosure of information**

- (1) A person who has access—
- (a) to any information stored on the ACT DNA database; or
  - (b) to any other information revealed by a forensic procedure carried out on the suspect, serious offender or volunteer;
- must not disclose that information except as provided by this section.
- (2) A person may only disclose information stored on the ACT DNA database for 1 or more of the following purposes:
- (a) the purpose of forensic comparison, by a police officer or anyone else prescribed by regulation, in the course of a criminal investigation or an investigation by a police officer relating to a missing or dead person;
  - (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates;
  - (c) the purpose of administering the ACT DNA database;
  - (d) the purpose of reviewing or auditing the ACT DNA database;
  - (e) for the purpose of, and in accordance with, an arrangement entered into under section 102 (Database information) for the provision of access to information on the ACT DNA database

- by law enforcement officers or anyone else prescribed by regulation;
- (f) for the purpose of the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth) or the *Extradition Act 1988* (Cwlth);
  - (g) the purpose of a coronial inquest or inquiry;
  - (h) the purpose of the investigation of a complaint by the privacy commissioner (or someone who has corresponding functions under the law of another participating jurisdiction).
- (3) A person may only disclose information revealed by the carrying out of a forensic procedure as follows:
- (a) if the person is the suspect, serious offender or volunteer to whom the information relates;
  - (b) if the information is already publicly known;
  - (c) in accordance with any other provision of this Act;
  - (d) in accordance with the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth) or the *Extradition Act 1988* (Cwlth);
  - (e) for the purposes of the investigation of any offence or offences generally;
  - (f) for the purpose of a decision whether to institute a proceeding for any offence;
  - (g) for the purpose of a proceeding for any offence;
  - (h) for the purpose of a coronial inquest or inquiry;
  - (i) for the purpose of a civil proceeding (including a disciplinary proceeding) that relates to how the procedure was carried out;
  - (j) for the purpose of the suspect's, serious offender's or volunteer's medical treatment;
  - (k) for the purpose of the medical treatment of a victim of an offence if there are reasonable grounds to believe the offence

was committed by the person on whom the forensic procedure was carried out;

- (1) if the suspect, serious offender or volunteer consents in writing to the disclosure.
- (4) This section does not apply to information that cannot be used to discover the identity of any person.
- (5) A person commits an offence if—
  - (a) the person's conduct causes the disclosure of information in contravention of this section; and
  - (b) the person intends, or is reckless about, the disclosure.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

## **112 Taking, retention and use of forensic material in accordance with another law**

- (1) This Act does not affect the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised under another territory law or a law of the Commonwealth or a State.
- (2) Without limiting subsection (1), this Act does not limit or exclude the *Crimes Act 1900*, part 10 (Criminal investigation) or part 11 (Investigation of extraterritorial offences) or the *Children and Young People Act 1999*, section 84 (Identifying material).
- (3) Forensic material, or information obtained from it, that was taken in accordance with a law of the Commonwealth or a State may be retained or used in the ACT for investigative, evidentiary or statistical purposes even if its retention or use would, apart from this subsection, constitute a breach of, or failure to comply with, any provision of this Act relating to the carrying out of forensic procedures.

**113 Retention of electronic recordings**

- (1) A recording made by audiotape, videotape or other electronic means by a police officer in accordance with this Act that is no longer required for investigative or evidentiary purposes may be retained for the purposes, and for the period, the chief police officer directs.
- (2) A recording that is retained under this section must be stored so as to protect it against unauthorised access or use by anyone.

## Chapter 3      Miscellaneous

### 114      Delegation by chief police officer

The chief police officer may delegate the chief police officer's functions under this Act to a police officer of the rank of sergeant or above.

*Note*      For the making of delegations and the exercise of delegated functions, see the Legislation Act, pt 19.4.

### 115      Regulation-making power

The Executive may make regulations for this Act.

*Note*      A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

## Chapter 4 Transitional

### 116 Forensic procedures under pt 2.7

- (1) A person is authorised by section 65 (Non-intimate forensic procedures authorised to be carried out) to carry out a forensic procedure under part 2.7 (Carrying out of certain forensic procedures after conviction of serious offenders) on a serious offender whether the serious offender was convicted of the serious offence concerned before, or is convicted of the serious offence concerned after, the commencement of that section.
- (2) A person is authorised to carry out a forensic procedure under part 2.7 on a serious offender whether the serious offender was convicted of the serious offence concerned before, or is convicted of the serious offence concerned after, the commencement of this subsection.

### 117 Forensic material taken before commencement

Forensic material taken before the commencement of this section in accordance with the law of the Territory or the Commonwealth or a State, and information obtained from it, may be retained or used in the ACT for investigative, evidentiary or statistical purposes even if its retention or use would be, apart from this section, a breach of, or failure to comply with, any provision of this Act relating to the carrying out of forensic procedures.

### 118 Existing arrangements—s 102

- (1) This section applies if the Minister entered into an arrangement with a responsible Minister of a participating jurisdiction mentioned in section 102 (Database information) before the commencement of this section.

- (2) To remove any doubt, the arrangement is not ended only because of the enactment of the *Crimes (Forensic Procedures) Amendment Act 2008*.
- (3) This section expires 1 year after the day it commences.



## Dictionary

(see s 3)

*Note 1* The Legislation Act contains definitions and provisions that are relevant to this Act.

*Note 2* For example, the Legislation Act, dict, pt 1 defines the following terms:

- adult
- auditor-general
- chief police officer
- contravene
- correctional centre
- dental technician
- dentist
- director of public prosecutions
- doctor
- entity (see s 184A)
- function
- human rights commissioner
- intersex person (see s 169B)
- law, of the Territory
- lawyer
- magistrate
- nurse
- ombudsman
- police officer
- privacy commissioner
- State
- summary offence
- transgender person (see s 169A)
- under.

*ACT DNA database*—see section 94A.

***another participating jurisdiction***—see section 100.

***another Territory*** means a Territory other than this Territory or the Northern Territory.

*Note* ***State*** includes the Northern Territory (see Legislation Act, dict, pt 1).

***appeal period***, for an appeal to a court against an order, means the period stated by a territory law during which an appeal against the order may be made without the court's leave.

***appropriate authority***—see section 100.

***appropriately qualified person***—see section 13.

***arrest and removal order***—see section 40A.

***authorised applicant***—see section 12.

***child***—see section 14.

***correctional centre*** includes a NSW correctional centre.

*Note* ***Correctional centre*** and ***NSW correctional centre*** are defined in the Legislation Act, dict, pt 1.

***corrections health professional***, for a correctional centre, means a health professional appointed under the *Corrections Management Act 2007*, section 22 (Health professionals—non-therapeutic functions) for the centre.

***corresponding law***—see section 100.

***crime scene index***—see section 94.

***destroy***—a person ***destroys*** forensic material taken from someone else by a forensic procedure, the results of the analysis of the material, or other information obtained from it, if the person destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.

***DNA database***—see section 100.

**DNA database system**, for part 2.11 (ACT DNA database)—see section 94.

**forensic material**—see section 5.

**forensic order** means—

- (a) an order of a magistrate under section 33 (Final order for carrying out of forensic procedure); or
- (b) an interim order of a magistrate under section 41 (Interim order for immediate carrying out of forensic procedure); or
- (c) an order of a court under section 77 (Court order for carrying out of forensic procedure on serious offender) or section 78 (Carrying out of forensic procedure following conviction); or
- (d) an order of a magistrate under section 83 (Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person) or section 84 (Retention of forensic material by order of magistrate after parent or guardian of child or incapable person withdraws consent).

**forensic procedure**—see section 5.

**health professional** means a health professional registered under the *Health Professionals Act 2004* or someone who is a health professional registered under a corresponding law of a local jurisdiction within the meaning of that Act.

**incapable person**—see section 15.

**in custody**—a person is **in custody** if the person is in the lawful custody of a police officer.

**inform** a person of a matter means inform the person of the matter, through an interpreter if necessary, in language (including sign language or braille) in which the person can communicate with reasonable fluency.

***informed consent***—

- (a) for a suspect—see section 21 (Informed consent of suspect to forensic procedure); and
- (b) for a serious offender—see section 69 (Informed consent of serious offender to forensic procedure); and
- (c) for a volunteer or parent or guardian of a volunteer—see section 80 (Informed consent of volunteer or parent or guardian of volunteer).

***infringement notice*** means—

- (a) an infringement notice under the *Road Transport (General) Act 1999*; or
- (b) any other notice (however described) served on a person under a territory law that states to the effect that, if the person pays an amount in relation to an offence, no further action will be taken in relation to the offence.

***interview friend***—see section 16.

***intimate forensic procedure***—see section 6.

***investigating police officer***—see section 11.

***jurisdiction***—see section 100.

***missing persons index***—see section 94.

***non-intimate forensic procedure***—see section 7.

***offence*** means an offence against a law in force in the ACT.

***parent***—see section 14.

***participating jurisdiction***—see section 100.

***police station*** includes—

- (a) an ACT police station; and

(b) any other building (or part of a building) occupied by the Australian Federal Police.

**relevant person**, for part 2.6 (Carrying out forensic procedures)—see section 48A.

**responsible Minister**—see section 100.

**responsible person**, for the ACT DNA database, means the person responsible for the care, control and management of the database.

**sample**, taken from a person, includes a sample taken from the person that consists of matter from someone else's body.

**serious offence**—see section 9.

**serious offender**—see section 9.

**serious offenders index**—see section 94.

**statistical index**—see section 94.

**suspect**—see section 8.

**suspects index**—see section 94.

**telephone** includes any telecommunications device.

**unknown deceased persons index**—see section 94.

**volunteer**—see section 10.

**volunteers (limited purposes) index**—see section 94.

**volunteers (unlimited purposes) index**—see section 94.

**warrant**, for the apprehension of a person, includes a warrant issued under the *Magistrates Court Act 1930*, division 3.3.4 (Warrants) for the arrest or apprehension of the person.

## Endnotes

1 About the endnotes

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## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	pt = part
exp = expires/expired	r = rule/subrule
Gaz = gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

### 3 Legislation history

**Crimes (Forensic Procedures) Act 2000 No 61**

notified 5 October 2000 (Gaz 2000 No 40)

s 1, s 2 commenced 5 October 2000

remainder commenced 16 October 2000 (Gaz 2000 No S59)

as amended by

**Justice and Community Safety Amendment Act 2001 No 9 sch 1**

notified 8 March 2001 (Gaz 2001 No 10)

amnds commenced 8 March 2001 (s 2 (2))

**Statute Law Amendment Act 2001 (No 2) 2001 No 56 pt 3.13**

notified 5 September 2001 (Gaz 2001 No S65)

amdt 3.242 commenced 12 September 2001 (s 2 (2))

pt 3.13 remainder commenced 5 September 2001 (s 2 (1))

**Crimes Legislation Amendment Act 2001 No 63 pt 5**

notified 10 September 2001 (Gaz 2001 No S66)

s 1, s 2 commenced 10 September 2001 (IA s 10B)

pt 5 commenced 27 September 2001 (s 2 (2) and CN2001-3)

**Justice and Community Safety Legislation Amendment Act 2001 No 70 sch 1**

notified LR 14 September 2001

amdt commenced 14 September 2001 (s 2 (5))

**Legislation Amendment Act 2002 No 11 pt 2.13**

notified LR 27 May 2002

s 1, s 2 commenced 27 May 2002 (LA s 75)

pt 2.13 commenced 28 May 2002 (s 2 (1))

**Statute Law Amendment Act 2002 No 30 pt 3.12**

notified LR 16 September 2002

s 1, s 2 taken to have commenced 19 May 1997 (LA s 75 (2))

pt 3.12 commenced 17 September 2002 (s 2 (1))

## Endnotes

3 Legislation history

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**Legislation (Gay, Lesbian and Transgender) Amendment Act 2003  
A2003-14 sch 1 pt 1.10**

notified LR 27 March 2003  
s 1, s 2 commenced 27 March 2003 (LA s 75 (1))  
sch 1 pt 1.10 commenced 28 March 2003 (s 2)

**Statute Law Amendment Act 2003 A2003-41 sch 3 pt 3.6**

notified LR 11 September 2003  
s 1, s 2 commenced 11 September 2003 (LA s 75 (1))  
sch 3 pt 3.6 commenced 9 October 2003 (s 2 (1))

**Justice and Community Safety Legislation Amendment Act 2004  
(No 2) A2004-32 pt 9**

notified LR 29 June 2004  
s 1, s 2 commenced 29 June 2004 (LA s 75 (1))  
pt 9 commenced 13 July 2004 (s 2 (3))

**Court Procedures (Consequential Amendments) Act 2004 A2004-60  
sch 1 pt 1.18**

notified LR 2 September 2004  
s 1, s 2 commenced 2 September 2004 (LA s 75 (1))  
sch 1 pt 1.18 commenced 10 January 2005 (s 2 and see Court  
Procedures Act 2004 A2004-59, s 2 and CN2004-29)

**Statute Law Amendment Act 2005 A2005-20 sch 3 pt 3.13**

notified LR 12 May 2005  
s 1, s 2 taken to have commenced 8 March 2005 (LA s 75 (2))  
sch 3 pt 3.13 commenced 2 June 2005 (s 2 (1))

**Sentencing Legislation Amendment Act 2006 A2006-23 sch 1 pt 1.9**

notified LR 18 May 2006  
s 1, s 2 commenced 18 May 2006 (LA s 75 (1))  
sch 1 pt 1.9 commenced 2 June 2006 (s 2 (1) and see Crimes  
(Sentence Administration) Act 2005 A2005-59 s 2, Crimes  
(Sentencing) Act 2005 A2005-58, s 2 and LA s 79)

**Crimes (Forensic Procedures) Amendment Act 2008 A2008-23 pt 2**

notified LR 10 July 2008  
s 1, s 2 commenced 10 July 2008 (LA s 75 (1))  
pt 2 commenced 11 July 2008 (s 2)



**Crimes Legislation Amendment Act 2008 A2008-44 sch 1 pt 1.4**

notified LR 9 September 2008

s 1, s 2 commenced 9 September 2008 (LA s 75 (1))

sch 1 pt 1.4 commenced 30 May 2009 (s 2 and CN2009-4)

**Justice and Community Safety Legislation Amendment Act 2009  
A2009-7 sch 1 pt 1.2**

notified LR 5 March 2009

s 1, s 2 commenced 5 March 2009 (LA s 75 (1))

sch 1 pt 1.2 commenced 6 March 2009 (s 2 (1))

**4 Amendment history****Commencement**

s 2 om R1 LRA

**Offences against Act—application of Criminal Code etc**

s 4A ins A2008-23 s 4

**What is an *intimate forensic procedure*?**

s 6 am A2003-14 amdt 1.40; A2008-23 s 5, s 6

**What is a *non-intimate forensic procedure*?**

s 7 am A2008-23 s 7, s 8

**Meaning of *serious offence* and *serious offender***

s 9 am A2008-44 amdt 1.44

**Meaning of *investigating police officer***

s 11 sub A2008-23 s 9

**Meaning of *authorised applicant***

s 12 am A2008-23 s 10

**Transgender persons**

s 17 am 2002 No 30 amdt 3.134

om A2003-14 amdt 1.41

**How forensic procedures may be authorised in different circumstances**

s 18 am A2003-41 amdt 3.21; table renum R7 LA; A2008-23 s 11

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

s 24 am A2008-23 ss 12-16

**Matters to be considered by police officer before ordering forensic procedure**

s 29 am 2001 No 9 amdt 1.6

**Circumstances in which magistrate may order forensic procedure**

s 32 am A2008-23 s 17

## Endnotes

4 Amendment history

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### **Application for order**

s 35 am A2008-23 s 18

### **Securing the presence of suspects at hearings—suspect not in custody**

s 37 am A2008-23 s 19

### **Procedure at hearing of application for order**

s 38 am A2008-23 s 20, s 21; ss renum R11 LA

### **Action to be taken on making of orders**

s 39 am A2008-23 s 22

### **Suspect in custody may be kept in custody for carrying out forensic procedure**

s 40 hdg sub A2009-7 amdt 1.2

s 40 am A2009-7 amdt 1.2

### **Magistrate may order arrest etc of suspect not in custody for carrying out forensic procedure**

s 40A ins A2009-7 amdt 1.3

### **Arrest, removal and detention of suspect**

s 40B ins A2009-7 amdt 1.3

### **Arrest and removal order—warrant to enter premises**

s 40C ins A2009-7 amdt 1.3

### **Warrant to enter premises—announcement before entry and copy of warrant**

s 40D ins A2009-7 amdt 1.3

### **Applications for interim orders**

s 42 am A2008-23 s 23, s 24

### **Procedure at hearing of application for interim order**

s 43 am A2008-23 s 25

### **Meaning of *relevant person*—pt 2.6**

s 48A ins A2008-23 s 26

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

s 49 am A2008-23 s 27

### **Rules for carrying out forensic procedures—giving and recording information**

s 49A ins A2003-14 amdt 1.42

sub A2008-23 s 28

### **Rules for carrying out forensic procedures—transgender and intersex people**

s 49B ins A2008-23 s 28

### **Forensic procedures not to be carried out in cruel, inhuman or degrading way**

s 51 am A2008-23 s 29

**Taking samples of hair**

s 52 sub A2008-23 s 30

**People who may carry out forensic procedures**

s 53 table renum R7 LA  
am A2008-23 ss 31-33

**Sex of person carrying out or helping carry out forensic procedures**

s 54 sub A2008-23 s 34

**Doctor or dentist of person's choice may be present for most forensic procedures**

s 56 hdg sub A2008-23 s 35  
s 56 am A2008-23 s 35; ss renum R11 LA

**Presence of interview friend or lawyer while forensic procedure is carried out**

s 57 am A2008-23 ss 36-38

**Presence of police officers while forensic procedure is carried out**

s 58 am A2008-23 s 39, s 40

**Recording of carrying out of forensic procedure**

div 2.6.4 hdg sub A2008-23 s 41

**Recording of forensic procedure**

s 59 sub A2008-23 s 41

**Samples**

s 60 sub A2008-23 s 42

**Photographs or video recordings**

s 61 sub A2008-23 s 42

**Results of analysis**

s 62 sub A2008-23 s 42

**Non-intimate forensic procedures authorised to be carried out**

s 65 am A2008-23 s 43

**Forensic procedures to be in accordance with pt 2.6**

s 67 sub A2008-23 s 44

**Scope of authorisation**

s 68 sub A2008-23 s 44

**Matters to be considered by police officer before requesting consent to forensic procedure**

s 71 am A2006-23 amdt 1.92

**Matters that serious offender must be informed of before giving consent**

s 72 am A2006-23 amdt 1.93; A2008-23 ss 45-48; pars renum R11 LA

## Endnotes

4 Amendment history

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**Carrying out of forensic procedure following conviction**

s 78 am A2006-23 amdts 1.94-1.97; A2008-23 s 49

**Carrying out of forensic procedures on volunteers**

s 79 am A2008-23 s 50

**Informed consent of volunteer or parent or guardian of volunteer**

s 80 sub A2008-23 s 51

**Consent to retention of forensic material taken etc**

s 80A ins A2008-23 s 51

**Recording of giving of information etc**

s 81 sub A2008-23 s 51

**Withdrawal of consent or end of agreed retention period**

s 82 hdg sub A2008-23 s 52

s 82 am A2008-23 s 53, s 54

**Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person**

s 83 am A2008-23 s 55

**Retention of forensic material etc by order of magistrate**

s 84 hdg sub A2008-23 s 56

s 84 am A2008-23 s 56, 57; ss renum R11 LA

**Certain volunteers—information about matching of DNA profile**

s 84A ins A2008-23 s 58

**Analysis of forensic material**

pt 2.8A hdg ins A2008-23 s 59

**Who may analyse forensic material?**

s 84B ins A2008-23 s 59

**Inadmissibility of evidence from improper forensic procedures etc**

s 85 am A2008-23 s 60, s 61

**Inadmissibility of evidence if forensic material required to be destroyed**

s 86 am A2008-23 s 62

**Destruction of certain forensic material obtained by court order**

s 90 am A2008-23 s 63, s 64

**Application for destruction of forensic material after 1 year**

s 92 sub A2008-23 s 65

**ACT DNA database**

pt 2.11 hdg sub A2008-23 s 66

**Definitions—Act**

- s 94 hdg sub A2008-23 s 67  
s 94 sub 2001 No 63 s 45  
def **ACT DNA database** ins A2008-23 s 68  
def **arrest and removal order** ins A2009-7 amdt 1.4  
def **corresponding DNA index** sub 2001 No 63 s 45  
def **corresponding statistical index** sub 2001 No 63 s 45  
def **crime scene index** sub 2001 No 63 s 45  
def **DNA database system** sub 2001 No 63 s 45  
def **missing persons index** sub 2001 No 63 s 45  
def **serious offenders index** sub 2001 No 63 s 45  
def **statistical index** sub 2001 No 63 s 45  
def **suspects index** sub 2001 No 63 s 45  
def **unknown deceased persons index** sub 2001 No 63 s 45  
def **volunteers (limited purposes) index** sub 2001 No 63 s 45  
am A2008-23 s 69  
def **volunteers (unlimited purposes) index** sub 2001 No 63 s 45  
am A2008-23 s 70

**ACT DNA database**

- s 94A ins A2008-23 s 71

**Supply of forensic material for prohibited analysis etc**

- s 95 hdg sub A2008-23 s 72  
s 95 am 2001 No 9 amdt 1.7 (see also 2001 No 70 amdt 1.7); 2001 No 63 s 46, s 47; A2008-23 s 73, s 74

**Use of information on ACT DNA database**

- s 96 hdg sub A2008-23 s 75  
s 96 am A2008-23 ss 76-79; ss renum R11 LA

**Permissible matching of DNA profiles**

- s 97 am A2004-32 s 74; ss renum R7 (see A2004-32 s 75)  
sub A2008-23 s 80

**Recording, retention and removal of identifying information on ACT DNA database**

- s 98 sub A2008-23 s 81

**Removal of identifying information about suspects after 1 year**

- s 98A ins A2008-23 s 81

**Definitions relating to interstate enforcement**

- s 100 def **corresponding law** sub 2001 No 63 s 48  
def **DNA database** sub 2001 No 63 s 48; A2008-23 s 82  
def **NCIDD** ins A2008-23 s 83

**Database information**

- s 102 sub A2008-23 s 84

## Endnotes

4 Amendment history

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### **Powers of lawyers and interview friends**

s 103 sub A2008-23 s 85

### **Obligation of investigating police officers relating to electronic recordings**

s 104 am A2008-23 s 86

### **Material required to be made available to suspect, serious offender or volunteer**

s 105 am A2008-23 s 87, s 88

### **Disclosure of information**

s 111 am A2008-23 ss 89-93; pars renum R11 LA

### **Taking, retention and use of forensic material in accordance with another law**

s 112 am 2001 No 56 amdt 3.241

### **Delegation by chief police officer**

s 114 sub 2002 No 30 amdt 3.135

### **Forensic procedures under pt 2.7**

s 116 am A2008-23 s 94

### **Existing arrangements—s 102**

s 118 ins A2008-23 s 95  
exp 11 July 2009 (s 118 (3))

### **Dictionary**

dict am 2002 No 11 amdt 2.27; 2002 No 30 amdt 3.136; A2003-14 amdt 1.43; A2008-23 s 96  
def **ACT DNA database** ins A2008-23 s 97  
def **appeal period** ins A2008-23 s 97  
def **arrest and removal order** ins A2009-7 amdt 1.4  
def **correctional centre** ins A2006-23 amdt 1.98  
def **corrections health professional** ins A2008-23 s 97  
def **DNA database system** sub A2008-23 s 98  
def **function** om 2002 No 30 amdt 3.137  
def **health professional** ins A2008-23 s 99  
def **medical officer** ins A2006-23 amdt 1.98  
om A2008-23 s 100  
def **member of the opposite sex** om 2002 No 30 amdt 3.138  
def **member of the same sex** om 2002 No 30 amdt 3.138  
def **opposite sex** ins 2002 No 30 amdt 3.139  
om A2003-14 amdt 1.44  
def **prison** om A2006-23 amdt 1.99  
def **prison medical officer** om A2006-23 amdt 1.99  
def **recognised transgender person** om A2003-14 amdt 1.45  
def **relevant person** ins A2008-23 s 101  
def **remand centre** om A2006-23 amdt 1.99

def **responsible person** sub A2008-23 s 102  
 def **same sex** ins 2002 No 30 amdt 3.139  
 om A2003-14 amdt 1.46  
 def **summary offence** am 2001 No 56 amdt 3.242  
 om 2002 No 11 amdt 2.28  
 def **transgender person** om A2003-14 amdt 1.47  
 def **warrant** am A2004-60 amdt 1.112; A2005-20 amdt 3.106

## 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (\*) in column 1. Electronic and printed versions of an authorised republication are identical.

Republication No and date	Effective	Last amendment made by	Republication for
R1 (RI) 16 Oct 2003	16 Oct 2000– 7 Mar 2001	not amended	new Act reissue of printed version
R1A 16 Oct 2003	8 Mar 2001– 4 Sept 2001	A2001-9	amendments by A2001-9
R2 23 Nov 2001	27 Sept 2001– 27 May 2002	A2001-70	amendments by A2001-56, A2001-63 and A2001-70
R3 28 May 2002	28 May 2002– 16 Sept 2002	A2002-11	amendments by A2002-11
R4 17 Sept 2002	17 Sept 2002– 27 Mar 2003	A2002-30	amendments by A2002-30
R5 28 Mar 2003	28 Mar 2003– 8 Oct 2003	A2003-14	amendments by A2003-14
R6* 9 Oct 2003	9 Oct 2003– 12 July 2004	A2003-41	amendments by A2003-41

## Endnotes

5 Earlier republications

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<b>Republication No and date</b>	<b>Effective</b>	<b>Last amendment made by</b>	<b>Republication for</b>
R7 13 July 2004	13 July 2004– 9 Jan 2005	A2004-32	amendments by A2004-32
R8 10 Jan 2005	10 Jan 2005– 1 June 2005	A2004-60	amendments by A2004-60
R9 2 June 2005	2 June 2005– 1 June 2006	A2005-20	amendments by A2005-20
R10 2 June 2006	2 June 2006– 10 July 2008	A2006-23	amendments by A2006-23
R11 11 July 2008	11 July 2008– 5 Mar 2009	A2008-23	amendments by A2008-23
R12 6 Mar 2009	6 Mar 2009– 29 May 2009	A2009-7	amendments by A2009-7

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