

2008

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (FORENSIC PROCEDURES) AMENDMENT BILL 2008

EXPLANATORY STATEMENT

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EXPLANATORY STATEMENT

Overview

Outline

The *Crimes (Forensic Procedures) Act 2000* (Act) was enacted as part of a national model Bill endorsing national protocols for the collection and storage of forensic materials as well as the exchange of DNA information between participating jurisdictions.

The *Crimes (Forensic Procedures) Amendment Bill 2008* (Bill) advances this national scheme by advancing and facilitating the creation of a viable cross-jurisdictional DNA matching system throughout Australia, consistent with the national scheme, by enabling the ACT to use CrimTrac as its agent in handling the ACT's DNA data. The Bill also reduces practical inefficiencies and impediments surrounding the enforcement and implementation of the Act; and reduces operational disconnection between the Forensic Act, the enforcers of the Act and the technology involved.

The Bill amends the Act enabling the ACT to use the National Criminal Investigation DNA Database, as established by the Commonwealth Agency CrimTrac, as an agent for the ACT's DNA database.

When the Act was first enacted in 2000, the ACT stored and conducted matches on an internal database system. Following the creation of the National Criminal Investigation DNA Database (NCIDD), ACT's DNA data was uploaded onto the NCIDD because ACT Policing recognised its superior storage and matching capabilities and superior security infrastructure. However, the act of uploading ACT DNA data onto the NCIDD raised the issue of who then had ownership over the DNA data because the NCIDD was a Commonwealth entity. The Bill solves this problem by allowing the ACT to enter into agreements with an entity for the storage and use of the ACT's DNA data. This will enable CrimTrac, who currently run the NCIDD to hold and run matches on behalf of the ACT as a service provider.

The Act has always been intended to allow intra-jurisdictional (matches within the ACT) and inter-jurisdictional matching (matches between different jurisdictions). The scope of matching relies on a matching table (matching table 97) that outlines permissible matching combinations between particular indexes. For example, a serious offender DNA profile can only be matched with a crime scene index containing DNA material at a crime scene if it is a permissible match under the table.

In order to enable effective intra-jurisdictional and inter-jurisdictional matching the table needs to be consistent and allow matching across the board, except when a person volunteers their DNA information for the specific purposes. When a person volunteers their DNA information for a specific purpose, matching can only occur in accordance with that specific purpose. This Bill creates the requisite consistency.

In 2006, the Commonwealth passed amending legislation to allow state and territory 'inspection entities' to audit or inspect state and territory data held on the NCIDD. Any inspection would be limited to the data sourced from the originating jurisdiction. The Bill empowers the Auditor General, the Privacy Commissioner, the Human Rights Commission, the Ombudsman, the Chief Police Officer for the ACT and the Chief Executive Officer of the Department of Justice and Community Safety with oversight and accountability powers. The oversight and accountability powers authorises the ACT inspection entities to inspect and audit the manner in which DNA information is retained, used and destroyed by other jurisdictions that receive such information from the ACT to ensure compliance with ACT legislation.

As a national agreement for reciprocal oversight and accountability comes into line, there will be arrangements made for interstate authorities to check the way in which the ACT handles extra-jurisdictional information.

An unintended legislative gap has prevented ACT Policing from obtaining forensic samples from convicted serious offenders where they are suspects for another crime that does not warrant the taking of a forensic procedure. The Bill ensures that forensic samples are taken from all convicted serious offenders so that they cannot evade detection for other offences they may commit.

The Bill also addresses the rules surrounding the destruction of forensic samples. The existing Act requires that all forensic material belonging to a suspect, including materials obtained through non-intimate processes such as photographs, casts and fingerprints, be destroyed after one year unless the Director of Public Prosecutions makes a successful application to the court for the material to be retained for a longer period. While this provision may have provided some protection for suspects it has proved to be a risky investigative tool for police, with important evidence being lost in some cases when an investigation has spanned over a long period of time, or has involved a number of suspects.

In looking at how best to address this issue, the benefits of preserving forensic material as evidence needs to be balanced against the rights of an individual to have their privacy and DNA profile protected. As a result the Bill now distinguishes between the identifying information that is obtained from a person's forensic sample, that is, their DNA analysis that can be placed on a DNA database and compared against all other DNA profiles on the database, and the forensic material itself - the actual swabs or blood samples or fingerprints. The existing provisions are retained with respect to the identifying material so that it must be removed from DNA databases after 12 months, or if the person is acquitted of a charge relating to the information, in less than 12 months. The police still have the ability to apply to keep those samples on the database if there is a proper forensic purpose.

To round out the new approach to preserving forensic evidence a new provision is introduced in the Bill that allows police to retain forensic material

for the life of the investigation. A provision enabling the suspect to apply for the destruction of the material after a year if no proceedings have been commenced affords the suspect protection against long term retention of their material in a case where they have no involvement. If an application is made for the destruction of the material the police will be required to establish why the material should be retained. This new provision provides police with greater certainty that they can retain evidence in ongoing investigations and prosecutions without fear that it will be destroyed part way through the process.

The existing Act does not provide for the common situation where a suspect avoids coming to court for the hearing of an application for a forensic sample to be taken, or where the suspect is apprehended in another jurisdiction and is in the custody of that State or Territory. The Bill establishes that a Magistrate may make an order for a forensic procedure, in the absence of the suspect, where the suspect is in the custody of another jurisdiction and cannot appear by audio link or video link for the hearing, or a suspect has been served with a summons to appear before a magistrate and chooses not to appear.

Victims of crime often provide forensic samples to police to aid in the investigation of the crime. The Bill introduces new provisions to ensure that those volunteers are treated with sensitivity and are empowered to have control over the processes that they are subject to. These include the ability of a volunteer to elect not to have an independent person present when they are undergoing their forensic procedure and also elect not to have the procedure video recorded. Although it is important to have an independent person present to verify that a procedure has been conducted appropriately and that is why it still remains as the default position, this requirement should still be sensitive to the wishes of the victim. For certain victims, such as victims of sexual assault, it would be insensitive to deny the person an ability to choose whether a stranger is allowed to be present during the procedure, or to choose whether the invasiveness of the procedure is increased by having it video taped.

A number of areas in the Bill contain amendments that address the human rights of people who may provide forensic samples under the Act. These include improving the manner in which victims of crime are empowered to make choices about how they participate in forensic procedures. There is also assurance that people of the same sex are present for the taking of intimate forensic samples.

The Bill refers to a suspect being informed in section 24(4)(b) that a police officer may use reasonable force to take a forensic sample. It should be noted that the concept of reasonable force in this context is limited by Commissioner's Order 3 that governs how police exercise their use of force, and the role of the Chief Medical Officer who is on record as saying that he would not take a blood based sample, whether a venous sample or finger prick sample, by force. It is not envisaged that the concept of reasonable force in this Bill overrides either of those two considerations in any way.

Detail**Part 1 Preliminary****Clause 1 Name of Act**

This clause is a technical clause and sets out the name of the proposed Act as the *Crimes (Forensic Procedures) Amendment Act 2008*.

Clause 2 Commencement

The Act commences on the day fixed by the Minister by written notice.

Part 2 Crimes (Forensic Procedures) Act 2000**Clause 3 Legislation amended—part 2**

This clause identifies the Act to be amended, namely the *Crimes (Forensic Procedures) Act 2000*.

Clause 4 New section 4A

This clause notes the application of the Criminal Code.

**Clause 5 What is an intimate forensic procedure?
Section 6(a), (d) and (e)**

This clause inserts the words ‘or intersex’ to paragraphs 6(a) to (e), to be consistent with the Act’s recognition of intersex persons under section 49A.

Clause 6 Section 6(g)

This clause amends paragraph 6(g) to include video recordings of intimate areas of the body in the definition of an intimate forensic procedure. It also includes intersex people who identify as female in the group of people covered by the subsection.

**Clause 7 What is non-intimate forensic procedure?
Section 7 (a), (e) and (f)**

This clause inserts the words ‘or intersex’ to be consistent with the Act’s recognition of intersex persons under section 49A to paragraphs 7(a) to (f).

Clause 8 Section 7(h)

This clause amends paragraph 7(h) to include video recordings of non-intimate parts of the body in the definition of non-intimate procedures. It also includes intersex people who identify as female in the group of people covered by the subsection.

Clause 9 Section 11

This clause amends section 11 to redefine the meaning of investigating police officer. An investigating officer is defined to be the police officer in charge of the investigation as well as any police officer who has been directed by the police officer in charge to undertake a task relevant to the investigation.

The amendment is a practical amendment to allow flexibility, so that the regulation of who may perform common investigative tasks does not unnecessarily restrict the enforcement of the Act.

However, the provision still requires the police officer in charge to remain the directing officer so that the integrity of the investigation is maintained. It provides for protection to individuals who undergo forensic procedures by maintaining that the responsibility for ensuring that directions to take forensic samples are only given to police officers who are capable (both by virtue of rank and by virtue of skill) of performing the relevant task, rests with the officer in charge of the investigation.

Clause 10 Meaning of *authorised applicant* Section 12 (b)

This clause broadens the scope of who may be considered an authorised applicant. The amendment allows any investigating police officer, appropriately involved in the investigation of the commission of an offence, to be considered as an authorised applicant.

Clause 11 How forensic procedures may be authorised in different circumstances Section 18, table 18, item 2

This clause amends table 18 to clarify that a magistrate, under section 31 of the Act, can order a non-intimate forensic procedure under section 32 of the Act.

This clarification enables non-intimate forensic procedure orders to be registered under section 101 of the Act, and allows law enforcement officials from other jurisdictions, who have custody of a suspect, who is suspected of an ACT offence, to carry out a non-intimate forensic procedure, by registered order under section 101 of this Act.

For example, Benny is suspected of assault in the ACT and escapes to NSW to avoid capture by ACT Policing. Benny enters into a fight at a pub in NSW and is apprehended and remanded by NSW police. Finding out that Benny is in the custody of NSW police, ACT Policing apply for an order in the ACT Magistrates Court for the carrying out of a non-intimate forensic procedure, including obtaining a buccal swab from Benny for DNA analysis. When ACT Policing have sufficient evidence to satisfy the ACT Magistrate that Benny is

reasonably suspected of the assault in the ACT, an order is made for the carrying out of a non-intimate forensic procedure. This order is then registered by ACT Policing onto a register of orders. NSW police use the registered order to get a buccal swab from Benny for the purposes of the ACT assault case.

Clause 12 Matters that suspect must be informed of before giving consent
Section 24 (1) (a)

This clause has been amended to remain consistent with section 26 of the Act. Under section 26 the recording of giving of information and consent can be done by audiotape, video tape or other electronic means or by writing if it is not practicable to make an electronic recording. The amendment to paragraph 24(1)(a) recognises that that the recording of giving of information and consent can be done by electronic means, as provided under section 26 of the Act.

Clause 13 Section 24 (1) (k)

Section 24 provides a list of the facts that a suspect must be informed of before giving consent to provide a forensic sample.

This clause amends to paragraph 24(1)(k) to remain consistent with the insertion of new section 94A. New section 94A allows the Minister to enter into agreements with other entities, such as CrimTrac who currently administer the NCIDD, to keep and store ACT DNA data as a service provider. A new definition of ACT DNA database has been inserted under section 94.

This clause requires police to inform a suspect, before the suspect gives consent, that the forensic material obtained from them may be placed on the ACT DNA database as described under new section 94A.

The insertion of paragraph 24(1)(l) works in conjunction with the amendments to sections 92 relating to destruction of forensic materials belonging to suspects. The amendment to section 92 empowers suspects with a right to apply for the destruction of forensic materials belonging to them after one year. Suspects must therefore be informed of this before the suspect gives consent to the carrying out of the forensic procedure to, satisfy privacy requirements.

Clause 14 Section 24 (2)

This clause requires police to inform a suspect that they can request a doctor of the suspect's choice to be present when they are undergoing certain forensic procedures, as provided under table 53.

Clause 15 Section 24(3)

This clause states that a buccal swab is a process and not an actual sample, although the material obtained from the process of swabbing is a sample.

Clause 16 Section 24(4) to (6)

This clause requires police to inform a suspect that reasonable force may be used to enable the forensic procedure to be carried out, as provided under section 50 of the Act. This provision ensures that a suspect is fully informed when involved in the process of having a forensic sample taken.

The concept of reasonable force is tempered by the Commissioner's Order 3 under which ACT Policing operate, and the role of the Chief Medical Officer who will not take a fingerpick sample or venous blood sample from a suspect being held forcibly.

**Clause 17 Circumstances in which magistrate may order forensic procedure
Section 32 (b)**

This clause clarifies that a magistrate may make an order for the carrying out of a non-intimate forensic procedure.

This clarification enables non-intimate forensic procedure orders to be registered under section 101 of the Act. It allows law enforcement officials from other jurisdictions, who have custody of a suspect, who is suspected of an ACT offence, to carry out a non-intimate forensic procedure, such as a buccal swab, by registered order under section 101 of this Act.

**Clause 18 Application for order
Section 35 (2) (d)**

This clause removes paragraph 35(2)(d) from section 35 of the Act. The omission enables a magistrate to make an order without requiring the suspect to be present as contemplated by amended sections 38 and 42.

**Clause 19 Securing the presence of suspects at hearings—suspect not in custody
Section 37 (1)**

This clause amends subsection 37 (1) enabling police to make an application to a Magistrates court, which includes the registrar of the Magistrates court, for a summons to issue for the appearance of a suspect at the hearing of the application to the summons.

This enables police to apply for a summons without requiring a magistrate to hear the application for a summons and introduces consistency with other legislation that allows for a summons to issue.

The amendment preserves that the decision to order a warrant is still made by a magistrate.

**Clause 20 Procedure at hearing of application for order
Section 38 (1)**

This clause amends subsection 38(1) so that section 38 can be read in conjunction with section 35.

While the overarching principle is still that the suspect should be present at the hearing of and the making of any forensic order, the provision contemplates the situation where a suspect is in another jurisdiction and allows the court to order that the suspect may be present through audio link or audiovisual link. Section 20 of the *Evidence (Miscellaneous Provisions) Act 1991* gives the court the power to direct that evidence may be taken or a submission made by audio or audiovisual link from a participating jurisdiction. Section 311 of the *Magistrates Court Act 1930* allows that a person who is appearing by audio or audiovisual link is taken to be before the court.

As has been articulated earlier, an order that is made in the absence of the suspect because the suspect is in the lawful custody of another jurisdiction can be placed on a register of orders as provided under section 101 of the Act.

This section does not provide for evidence to be given by those means from within the ACT as if the suspect is in custody, as the geography of the ACT is such that it should always be possible for a suspect to be before the court if they are in custody.

The provision contemplates that it will be a matter for the magistrate to determine whether the application can be heard in the absence of the suspect, and the question of whether it is practicable for them to be present via audio or audiovisual link.

Clause 21 New section 38 (6)

New subsection 38(6) provides a definition of audio link and audiovisual link, which encompasses communication via emerging technologies.

**Clause 22 Action to be taken on making orders
Section 39 (1) (c)**

This clause amends paragraph 39(1)(c) to remain consistent with the amendments to sections 35, 37 and 38. The amendment recognises the possibility that a suspect may not be present at the hearing of the order, after the amendments to section 35, 37 and 38.

**Clause 23 Applications for interim orders
Section 42 (4)**

This clause amends subsection 42(4) so that a magistrate may make an interim order for the urgent carrying out of a forensic procedure on a suspect if the suspect is in the lawful custody of another jurisdiction. This remains the only exception to the requirement that the suspect must be in the presence of the applicant for an interim order.

Clause 24 New section 42 (7)

The insertion of new subsection 42(7) keeps section 42 consistent with provisions allowing a person to be present at a hearing for an interim order through audio or audiovisual link.

**Clause 25 Procedure at hearing of application for interim order
Section 43 (1) (a) and (c)**

This clause amends paragraphs 43(1)(a) and (c) to remain consistent with the amendments to section 42 which allows that the suspect may not be present when the order is made if they are in the custody of another jurisdiction and the suspect cannot be present through audio or audio visual link.

Clause 26 New section 48A

This clause inserts new section 48A, which provides a meaning for *relevant person* under part 2.6 of the Act. The amendment clarifies that part 2.6 which sets out provisions for the carrying out of forensic procedures can be applied to suspects, serious offenders or volunteers.

**Clause 27 General rules for carrying out forensic procedures
Section 49 (a) and (b)**

Clause 22 amends paragraphs 49 (a) and (b) to remain consistent with new section 48A. The amendment clarifies that part 2.6 which sets out provisions for the carrying out of forensic procedures can be applied to suspects, serious offenders or volunteers.

Clause 28 Section 49A and 49B

This clause amends section 49A to provide rules relating to the giving and recording of information for the carrying out of forensic procedures. The amendments require police to ensure that a person is informed of all relevant issues before the forensic procedure is carried out. Amended section 49A requires police to inform a person of the person's rights under subsections 60(2), 61(2) and 62(2).

Police must also ensure, under amended section 49A, that the giving of information is appropriately recorded by electronic means, or if it is impractical to have an electronic recording, then police must ensure that a written record

of the giving of the information is made, and that a copy of the written record is made available to the person. The onus is on police to provide the person with the written record, even if there is no request for it to be provided.

New section 49B is a redrafting of old section 49A. New section 49B enables a transgender or intersex person to elect their identifying gender if they wish to. A person who elects to be identified as a particular gender shall be taken to be that particular gender under new section 49B.

If there is no election of their identifying gender, a transgender or intersex person can nominate the gender of the individual who will carry out the forensic procedure on them. If a nomination is made instead of an election, then the transgender or intersex person is deemed under new section 49B to be of the same gender as the person carrying out the forensic procedure on them, in order to satisfy the requirement of new section 54.

**Clause 29 Forensic procedures not to be carried out in cruel, inhuman or degrading way
Section 51 (2)**

This clause amends subsection 51(2) to remain consistent with new section 48A. The amendment clarifies that part 2.6 which sets out provisions for the carrying out of forensic procedures can be applied to suspects, serious offenders or volunteers.

Clause 30 Section 52

This clause amends paragraph 52(b) to permit the taking of more than one strand of hair at a time, using the least painful technique. This allows for the practical difficulty encountered when people are trying to remove one individual hair at a time. The amendment does not allow the taking of a handful of hair as an attempt to obtain hair.

**Clause 31 People who may carry out forensic procedures
Section 53 (3)**

This clause amends subsection 53(3) to remain consistent with new section 48A. The amendment clarifies that part 2.6 which sets out provisions for the carrying out of forensic procedures can be applied to suspects, serious offenders or volunteers.

Clause 32 Section 53 (4)

This clause amends subsection 53(4) to remain consistent with new section 48A.

Clause 33 Table 53

This clause amends column 4 of Table 53 to clarify the circumstances in which a relevant person can ask for a doctor or dentist of the person's choice

to be present during the carrying out of the forensic procedure. Table 53 is a table outlining the provisions under Division 2.6.3 of the Act.

Clause 34 Section 54

This clause amends section 54 to clarify when a suspect or serious offender, is undergoing an intimate forensic procedure, the person who is carrying out the procedure, or any person helping to carry out the procedure, must be the same sex as the suspect or the serious offender. The amendment also clarifies that when a volunteer is undergoing an intimate forensic procedure, the procedure must be carried out by a person of the same unless the volunteer requests that a person of the opposite sex carry out the intimate forensic procedure. The amendment to subsections 54(1) and (2) enables victims of crime to elect the sex of the person who is to carry out or help carry out an intimate forensic procedure on them.

This clause also amends section 54 to clarify that the person who is carrying out a forensic procedure on a relevant person (the person who is having the forensic procedure carried out on them) is not required to be of the of the same sex to the relevant person, if the forensic procedure is a non-intimate forensic procedure. This also applies to a person who is asked under section 55 to help carry out a non-intimate forensic procedure. However the circumstances in which this applies relates to non-intimate forensic procedure that do not require touching or the removal of any item of clothing.

It is intended that the references to “overcoat, coat, jacket, gloves, socks, shoes and hat” do not include any garment of cultural or religious significance. If items of cultural or religious significance are required to be removed, then the procedure would be performed or assisted by a person of the same sex as the person undergoing the forensic procedure.

Clause 35 Section 56

This clause amends section 56 so that a suspect or volunteer has the right to elect to have a doctor or dentist of their choice present during their forensic procedure. This creates consistency with table 53 and creates parity for suspects, volunteers and serious offenders where practical.

**Clause 36 Presence of interview friend or lawyer while forensic procedure is carried out
Section 57 (1)**

This clause amends subsection 57(1) to remain consistent with new section 48A.

Clause 37 Section 57 (1)

This clause amends subsection 57(1) to remain consistent with new section 48A.

Clause 38 Section 57 (3)

This clause amends subsection 57(3) to remain consistent with new section 48A.

**Clause 39 Presence of police officers while forensic procedure is carried out
Section 58 (2)**

This clause amends subsection 58(2) to remain consistent with new section 48A.

Clause 40 Section 58 (3) (b)

This clause amends paragraph 58(3)(b) to remain consistent with amendments to section 54 of the Act. A police officer of the same sex must be present for non-intimate forensic procedures that require touching the relevant person who is having the non-intimate forensic procedure carried out on them. If the relevant person can carry out the non-intimate forensic procedure by themselves, such as making a fingerprint impression or performing a buccal swab, then a person of the same sex as the person undergoing the procedure does not need to be present.

It is intended that the references to “overcoat, coat, jacket, gloves, socks, shoes and hat” do not include any garment of cultural or religious significance. If items of cultural or religious significance are required to be removed, then the procedure would be performed or assisted by a person of the same sex as the person undergoing the forensic procedure.

Clause 41 Division 2.6.4

This clause amends section 59 to remove the requirement for a record to be made of a forensic procedure if the forensic procedure is a video recording or photograph of a part of the body of a person, other than intimate areas of the person’s body including the genital or anal areas, buttocks, or for a person who identifies as a female, the breasts. A video recording or photograph has the same effect as a toeprint, fingerprint, handprint or footprint. The results from these forensic procedures are evidence in and of themselves that the forensic procedure was carried out and are confined to forensic procedures that are non-intimate forensic procedures.

The amendment also enables a relevant person who is having a forensic procedure performed on them to waive their right to have an independent person present during the carrying out of the forensic procedure if the forensic procedure is not being video recorded. This amendment enables victims of crime, for example victims of sexual assault, to elect not to have an independent person be present when the forensic procedure is being carried out. However, if there is a perceived need to have an independent person present, police can still direct that an independent person to be present.

The perceived need might include circumstances where police are concerned about the mental health of the relevant person, or a need to ensure that police officers are not placed in a position where unjustified complaints can be made about their conduct toward the relevant person.

Clause 42 Sections 60 to 62

This clause amends sections 60, 61 and 62 to enable a relevant person (a suspect, serious offender or volunteer) to request that:

- a sample of forensic material be provide to the relevant person;
- a copy of a photograph or video recording of a part of the relevant person's body be provided to the relevant person;
- a copy of the results of the analysis obtained from the forensic material be provided to the relevant person.

These amendments change the previous requirement that police provide a sample to every person from whom one was taken and moves to a position where samples are only provided to those who request them. It does not override the requirements of prosecution disclosure so that all copies of material such as photographs will still be provided in a brief of evidence, whether requested or not.

Section 105 provides the rules for making materials or copies available to a person following a request under amended sections 60 to 62.

Clause 43 Non-intimate forensic procedures authorised to be carried out Section 65 note

This clause is a technical clause and removes the note in section 65.

Clause 44 Sections 67 and 68

This clause amends section 67 to remain consistent with new section 48A. The amendment enables a person to carry out a forensic procedure on a serious offender only in accordance with section 65, which provides the circumstances in which a non-intimate forensic procedure is to be carried out on serious offender, section 66, which provides the circumstances in which an intimate forensic procedure is to be carried out on serious offender, and part 2.6, which provides the rules for carrying forensic procedures on a relevant person, contemplated to be a serious offender.

Section 68 is amended to clarify that a forensic procedure may be carried out on a serious offender even if the serious offender is also a volunteer and/or a suspect. It is intended to close a gap in the previous section, which prevented a sample being taken from a serious offender who had then become a suspect in a case that had no basis for a forensic sample, thus avoiding providing a forensic sample at all.

**Clause 45 Matters that serious offender must be informed of before giving consent
Section 72 (1) (e)**

This clause amends paragraph 72(1)(e) to remain consistent with the amendments to sections 67 and 68.

Clause 46 Section 72 (1) (f) (i)

This clause amends paragraph 72(1)(f)(i) to require that a serious offender must be informed that the serious offender can request that a health correctional health professional (including but not limited to nurses, doctors, dentist etc) be present during the taking of a blood sample. This provides consistency with the *Corrections Management Act 2007*.

Clause 47 New section 72 (1) (fa)

This clause adds the requirement that a serious offender must be informed of their rights to have certain people present when a buccal swab is taken.

Clause 48 Section 72 (1) (j)

This clause amends paragraph 72(1)(j) to remain consistent with the insertion of new section 94A. New section 94A allows the Minister to enter into agreements with other entities, such as CrimTrac who currently administer NCIDD, to keep and store ACT DNA data as a service provider. A new definition of ACT DNA database has been inserted under section 94.

The amendment requires police to inform the serious offender before the serious offender provides informed consent that information obtained from the analysis of the serious offender's forensic material may be placed on the ACT DNA database, which may be the NCIDD.

**Clause 49 Carrying out of forensic procedure following conviction
Section 78 (1)**

This clause amends subsection 78(1) to remain consistent with the amendments to sections 67 and 68.

**Clause 50 Carrying out of forensic procedure following conviction
Section 79 (3) and (4)**

This clause amends subsection 79(3) to remain consistent with new section 48A.

This clause also amends subsection 79(4) to remove unnecessary rules under part 2.6 relating to the carrying out of forensic procedures on relevant persons who are volunteers and who may be victims of crime. It is not necessary to use force to enable the carrying out of a forensic procedure on a volunteer. It is also not necessary to enable any rules that raise a suggestion of struggle or

conflict, as this would indicate that the volunteer has withdrawn consent, in which the forensic procedure should not be permitted to continue.

Clause 51 Sections 80 and 81

This clause amends section 80 to clarify the rules for obtaining informed consent from a volunteer, or the parent or guardian of the volunteer. The amendment to subsection 80(1) enables police to inform the volunteer, parent or guardian in writing or orally. The amendment requires police to inform the volunteer, parent or guardian that the consent provided by the volunteer, parent or guardian is also consent for:

- the retention of forensic material taken and information obtained from analysis of the forensic material under paragraph 80(1)(f)(A); and
- that the volunteer, parent or guardian can set a period for which the material or the information may be retained under paragraph 80(1)(f)(B).

The amendment separates forensic material from the information obtained from analysis of the material. The issue of consent is broken up into consent of retention of material or information obtained. The volunteer may elect that they do not wish to have an independent person present. This allows for victims of crime who may not wish to have any extra people present during their discussions with police.

The amendment adds new subsection 80(3) requiring police to inform the volunteer, parent or guardian of the volunteer that:

- the information obtained from the analysis of the forensic material may be placed on the ACT DNA database and may be compared with data from other jurisdictions;
- that information placed on the volunteers (limited purposes) index may only be used for that purpose;
- that information placed on the volunteers (unlimited purposes) index may be used for a criminal investigation or any other purpose for which the ACT DNA database may be used for under parts 2.11 and 2.13 of the Act; or
- anything else that is prescribed by regulation.

The insertion of section 80A clarifies that the consent of the volunteer, or the volunteer's parent or guardian is consent to the retention of the forensic material and information obtained from analysis of the material, not just the retention of the forensic material.

New section 80A also clarifies that the volunteer, parent or guardian in consultation with a delegated police officer of appropriate rank, can set the period for which the forensic material or information obtained from analysis of the material may be retained.

The amendment to section 81 enables a volunteer, parent or guardian to request that a written record of the giving of information under amended section 80 is made, rather than an electronic recording such as a video recording. This amendment enables victims of crime, for example victims of sexual assault, to elect not to have a video recording featuring them whilst

police are informing them or their parent or guardian of issues under amended section 80.

In circumstances where a volunteer withdraws consent before the agreed retention period ends, the withdrawal of consent will over-ride the agreed retention period.

Clause 52 Section 82 heading

This clause changes the heading of section 82 to include a reference to the ending of an agreed retention period, which has been added to various volunteer's provisions.

**Clause 53 Withdrawal of consent
Section 82 (2)**

This clause amends subsection 82(2) to clarify that consent is broken up into consent of retention of material 'or' information obtained, not forensic material 'and' information obtained. Therefore, withdrawal of consent can be in relation to forensic material or information obtained; or forensic material and information obtained.

Clause 54 New section 82 (4) to (6)

This clause inserts new subsections 82(4) to (6) to remain consistent with the amendments to sections 80 to 82 relating to the conceptual separation of forensic material from information obtained from analysis of the forensic material.

The new subsections refer to the agreed set period of retention of forensic material or information obtained from the analysis under s80A. When the agreed set period expires for retention of material, withdrawal of consent is deemed to have taken place and this clause deals with how the material or information is to be dealt with. Under new subsection 80(4) the forensic material or information obtained from the analysis of the material may be retained for a further period if a successful application is made to a magistrate under section 84 of the Act, before the agreed retention period expires.

**Clause 55 Circumstances in which magistrate may order carrying out of forensic procedure on child or incapable person
Section 83 (3)**

This clause amends subsection 83(3) to clarify that an order made under section 84 may include the circumstances in which the forensic procedure is to be carried out, for example the time and place; but must state the period for which forensic material or the information obtained from the analysis of the material is to be retained.

The amendment requires that a court in ordering the carrying out of a forensic procedure must also set the time frame in which the forensic material (which

is separate from the information derived from analysis of that material) can be retained. The court must also set the time frame in which the information derived from the analysis of the material (which is separate from the actual forensic material itself) can be retained. This permits the court to set different time frames for the forensic material itself and the information derived from the forensic material.

**Clause 56 Retention of forensic material by order of magistrate after parent or guardian of child or incapable person withdraws consent
Section 84**

This clause amends section 84 to enable an authorised applicant to apply for the retention of forensic material or information obtained from the analysis of the material when consent has been withdrawn or when the agreed retention period ends. The application can be any time before the expiration of the agreed retention.

While it is envisaged that such an application would be made before the end of the agreed period, there is nothing to prevent an authorised applicant making an application after the period has expired. The risk will be that the material may have been destroyed if the application is not made in time, but the lateness of the application does not bar it being made.

Clause 57 Section 84 (3)

This clause amends subsection 84(3) to remain consistent with amended subsection 83(3). The retention order under section 84, if made, must set the period in which the material or information is to be retained.

There is nothing in this section that limits the rights of a volunteer or authorised applicant to appeal a decision of a magistrate order under subsection 84(2).

Clause 58 New section 84A

This clause inserts new section 84A to require police to inform a volunteer, who undergoes a forensic procedure for the purposes of placing the volunteer's DNA profile on the ACT DNA database to be matched with the missing person's index or unknown deceased person's index, either with ACT DNA database or another jurisdiction's DNA database, of any matches that are made.

Clause 59 New part 2.8A

This clause inserts new part 2.8A, which creates a new part for dealing with the analysis of forensic material. The inserted part 2.8A enables the Minister to enter into an agreement with 1 or more forensic laboratories accredited with the National Association of Testing Authorities Australia to analyse forensic material for the Territory. New part 2.8A enables the outsourcing of forensic

analysis tasks to accredited forensic laboratories. New part 2.8A provides a mechanism for the effective distribution of workload regarding forensic analysis.

**Clause 60 Inadmissibility of evidence from improper forensic procedures etc
Section 85 (1) (b) (ii)**

This clause amends paragraph 85(1)(b)(ii) to remain consistent with the insertion of new section 94A.

Clause 61 Section 85 (2)

This clause amends paragraph 85(2)(a) to clarify that section 85 also applies to court orders as well as provisions of the Act.

**Clause 62 Inadmissibility of evidence if forensic material required to be destroyed
Section 86 (1)**

This clause amends subsection 86(1) to clarify that section 86 also applies to court orders as well as provisions of the Act. The amendment recognises the amendments to section 92 where a court can order the destruction of forensic material on the application of a suspect

**Clause 63 Destruction of certain forensic material obtained by court order
Section 90 (1)**

This clause amends subsection 90(1) to remain consistent with the amendment to section 11.

**Clause 64 Destruction of certain forensic material obtained by court order
Section 90 (2)**

This clause amends subsection 90(2) to remain consistent with the change of the heading name at section 84.

Clause 65 Section 92

This clause inserts new section 92 enabling a suspect to apply for the destruction of forensic material one year after the samples are taken. It changes the position under the previous section 92 where all forensic material and identifying information was to be destroyed after 12 months unless an application to retain the information was successful.

Now identifying information must be removed from DNA databases after one year under new section 98A, but all forensic material can be retained by police unless the suspect makes a successful application for the material to be

destroyed. While the onus is on the suspect to make the application, the onus of proving the probative value of the material shifts to the police.

The amendment will have prospective effect. Amended section 92 will apply to all forensic materials obtained from a suspect, on the day of, or after the day of commencement of this Act.

Clause 66 Part 2.11

This clause amends the heading name of part 2.11 to ACT DNA database.

Clause 67 Section 94 heading

This clause amends the heading of section 94 to refer to Definitions of the Act.

Clause 68 Section 94, new definition of *ACT DNA database*

This clause inserts a new definition of ACT DNA database, which signposts the definition provided at new section 94A.

Clause 69 Section 94, definition of *volunteers (limited purposes) index, paragraph (a)*

This clause amends the definition of *volunteers (limited purposes) index* to remain consistent with the insertion of new section 94A.

Clause 70 Section 94, definition of *volunteers (unlimited purposes) index, paragraph (a) (i)*

This clause amends the definition of *volunteers (unlimited purposes) index* to remain consistent with the insertion of new section 94A and the amendment to subsection 80(4).

Clause 71 New section 94A

This clause inserts new section 94A to provide a contextual definition of ACT DNA database. The ACT DNA database is the database on which DNA collected in the ACT is stored. However this database may be kept by an external entity, such as CrimTrac who administer the NCIDD, by agreement between the Minister and the entity. The agreement between the entity and the Minister will be an agreement of service, where the entity is a service provider for the ACT in storing and matching DNA data.

The database referred to is the one kept on an electronic or computer system that facilitates the matching of DNA profiles. It does not extend to the working files used during the analysis of the DNA, nor the files on which investigating police may store the results of analysis.

Clause 72 Section 95 heading

This clause amends the heading to section 95 in consideration to new section 94A.

Clause 73 Section 95 (2) (a)

This clause amends paragraph 95(2)(a) to remain consistent with the insertion of new section 94A.

Clause 74 Section 95 (3), definition of *prohibited analysis*

This clause amends the definition of prohibited analysis to remain consistent with the insertion of new section 94A and amended section 92, which enables a court to make a destruction order.

Clause 75 Section 96 heading

This clause amends the heading to section 96 to remain consistent with the insertion of new section 94A.

Clause 76 Section 96 (1)

This clause amends subsection 96(1) to better frame the offence that occurs if an unauthorized access of the DNA database occurs, and to ensure consistency in the use of the definition in section 94A.

Clause 77 Section 96 (2) and (2) (c)

The clause amends subsection 96(2) and paragraph 96(2)(c) to remain consistent with the insertion of new section 94A.

Clause 78 Section 96 (2) (d)

This clause amends paragraph 96(2)(d) to clarify that a person may access information stored on the ACT's DNA database in accordance with the terms of an arrangement entered into by the Minister with the appropriate authority of another jurisdiction for the sharing of DNA information as permitted under section 102 of the Act. This enables other jurisdictions to compare their DNA information with that of the ACT as part of their criminal investigations.

Clause 79 New section 96 (2A)

This clause inserts new subsection 96(2A) to enable the auditor-general, the human rights commissioner, the ombudsman, the privacy commissioner, or anyone else prescribed by regulation with accountability powers to audit or review information that is stored on the ACT DNA database. The Minister may delegate to the Chief Police Officer or the Chief Executive under section 94A(4) an accountability power under new subsection 96(2A) to audit or

review information stored on the ACT's DNA database. This ensures transparency and accountability for the storage of the information.

Clause 80 Section 97 and table 97

This clause amends section 97 to:

- to permit matching between all indexes of DNA profiles except with volunteers (limited purposes), where matching is permitted only within the purpose;
- permit matching universally between columns 1 and columns 2 through to column 8, where a 'yes' is indicated, except with volunteers (limited purposes), where matching is permitted only within the purpose which is defined in section 94; and
- permit matching between samples derived from crime scenes, suspects, volunteers (unlimited purpose), serious offenders, missing persons and deceased persons interchangeably.

Amended table 97:

- enables a suspect's profile to be matched against the suspect index. In the event of a number of suspects being profiled, enabling a cross match will reduce instances of identity fraud;
- clarifies that the volunteers for limited purposes index should remain as an index that can only be matched for the purpose of the matching. For example, volunteers who give a sample for a particular investigation, or to assist identifying a deceased person, should only have their DNA matched for that purpose; and
- clarifies that the volunteers' (unlimited purposes) profiles index is able to be matched against serious offenders' profiles, suspects' profiles and the volunteers' (unlimited purposes) profile itself. Volunteers (unlimited purposes) are contemplated to be people who offer a profile for unrestricted matching because, for example, they are a repeat offender wishing to be eliminated from an investigation, or a police officer not wishing to be re-sampled for every investigation they are involved with.

Clause 81 Section 98

The clause amends section 98 to reflect the distinction between the destruction of forensic material and the removal of identifying information from the DNA database. It should be noted that it is not contemplated that the need to remove information from a DNA database extends to removing the information from the working files of those who performed the analysis, or the investigation files maintained by police.

The section is also amended to ensure consistency in the approach taken to their information relating to volunteers, suspects and serious offenders.

New section 98A provides that the identifying information obtained from a forensic sample must be removed from the electronic DNA databases after 1 year, unless an application is made to keep the information on the database. The purpose of this section is to protect the privacy rights of suspects and

prevent their DNA profiles being kept on databases that enable their matching for extended periods of time.

The amendment will have prospective effect. New section 98A will apply to forensic DNA materials obtained from a suspect for purpose of matching or storing on a DNA database, on the day of, or after the day of commencement of this Act.

**Clause 82 Definitions relating to interstate enforcement
Section 100, definition of DNA database**

This clause amends the definition of DNA database under section 100. The amendment re-defines the meaning of DNA database to include the new definition of ACT DNA database as provided under section 94A of the Act; the NCIDD which is administered by CrimTrac; and DNA databases held by another State or Territory, or the Commonwealth's DNA database. This covers jurisdictions that similar to the ACT require the services of a service provider, such as CrimTrac to keep that jurisdiction's DNA database.

Clause 83 Section 100, new definition of *NCIDD*

This clause inserts a definition of NCIDD to section 100 of the Act. The NCIDD is the National Criminal Investigation DNA Database, which is managed by CrimTrac, a Commonwealth entity. This is the database which it is contemplated will store the DNA information from the ACT to be used in inter and intra-jurisdictional matches.

Clause 84 Section 102

The clause amends section 102 so that the Minister may enter into an arrangement with a responsible Minister of another jurisdiction for the provision and exchange of information relevant to an investigation or a proceeding of an offence against the law of the ACT or the law of the participating jurisdiction; and the identification of missing or unknown deceased persons.

The amendment establishes that the Ministerial arrangement may cover issues relating to the matching of DNA data between ACT DNA data and the DNA data of other jurisdictions.

Clause 85 Section 103

This clause amends section 103 to remain consistent with the insertion of new section 48A to include volunteers as well as suspects and serious offenders. The amendment also requires police to ensure that when a person is represented by a lawyer or friend, then any information conveyed to a person under the Act must be communicated in a form that can be understood by the person, or the person's lawyer or friend, including through the use of a lawyer.

**Clause 86 Obligation of investigating police officers relating to
electronic recordings
Section 104 (1)**

This clause amends subsection 104(1) to remain consistent with amendment to section 11.

**Clause 87 Material required to be made available to suspect, serious
offender or volunteer
Section 105 (1) (b)**

This clause amends paragraph 105(1)(b) to remain consistent with amendment to section 11.

Clause 88 Section 105, note

This clause amends the note under section 105 to remain consistent with the amendments to section 60. The amendments to section 60 relocate the issue of when a sample must be made available to amended paragraph 60(3)(a).

**Clause 89 Disclosure information
Section 111 (1) (a) and (2)**

This clause amends paragraph 111(1)(a) and subsection 96(2) to remain consistent with the insertion of new section 94A.

Clause 90 Section 111 (2) (a)

This clause amends paragraph 111(2)(a) to include missing or unknown deceased persons. The amendment remains consistent with the amendment to section 102.

Clause 91 Section 111 (2) (c)

This clause amends paragraph 111(2)(c) to remain consistent with the insertion of new section 94A.

Clause 92 Section 111 (2) (ca)

This clause amends paragraph 111(2)(ca) to remain consistent with the insertion of new sections 94A and 96(2A).

Clause 93 section 111 (2) (d)

This clause amends paragraph 111(2)(d) to recognize the addition of provisions in amended section 102.

**Clause 94 Forensic procedures under pt 2.7
Section 116 (2)**

This clause inserts new subsection 116(2) as a transitional provision. New subsection 116(2) clarifies that if a person convicted of a serious offence before the commencement of new subsection 116(2), for the purposes of this Act the conviction carries on after the commencement of new 116.

Clause 95 New section 118

This clause inserts new section 118 as a transitional provision. New section 118 clarifies that any arrangement entered into by the Minister under the *Crimes (Forensic Procedures) Act 2000* before the commencement of new section 118, still has effect after the commencement of the new section 118.

Clause 96 Dictionary, note 2, new notes

This clause inserts new notes to note 2 of the Dictionary. The new notes to provide assistance in locating the definitions of auditor-general, human rights commissioner, ombudsman and privacy commissioner as referred to in new subsection 96(2A); and entity as referred to in new section 94A.

Clause 97 Dictionary, new definitions

This clause inserts new definitions for ACT DNA database, appeal period and DNA database. The new definition for ACT DNA database and DNA database signpost sections 94 and 100. The new definition for appeal period has been added as a result of the insertion of new subsection 102(4).

Clause 98 Dictionary, definition of DNA database system

This clause omits the definition for DNA database system. The omission reflects the adoption of the new terms 'ACT DNA database' and 'DNA database' to replace 'DNA database system'.

Clause 99 Dictionary, definition of *medical officer*

This clause removes the definition for medical officer as the term has been substituted by corrections health professional.

Clause 100 Dictionary, new definition of *relevant person*

This clause inserts a new definition for relevant person. Relevant person replaces the references to suspect in part 2.6 and is provided as conceptual definition under new section 48A.

Clause 101 Dictionary, definition of *responsible person*

This clause inserts a new definition for responsible person. A new definition for responsible person has been inserted as a result to amendments to

section 92 of the Act. Section 92 requires the court to notify a responsible person for the ACT DNA database about a destruction order that is made by the court under amended section 92.

Part 3 Crimes (Forensic Procedures) Regulation 2000

Clause 102 Legislation amended—pt 3

This clause identifies the regulation to be amended, namely the *Crimes (Forensic Procedures) Regulation 2000*.

Clause 103 Section 5

This clause amends regulation 5 to include investigations relating to missing persons or unknown deceased persons. The amendment also recognises the amendments to section 102.

Clause 104 Corresponding law—Act, s 100, def *corresponding law* Section 6 (1) (f)

This clause amends regulation 6(1)(f) to recognise that *Criminal Law (Forensic Procedures) Act 2007* (SA) is corresponding law for the purposes of section 100 of the original Act.

Clause 105 Schedule 1, item 1, column 2

This clause amends item 1, column 2 of schedule 1 to include intersex persons as well as transgender persons.

Clause 106 Schedule 1, item 3, column 2

This clause amends item 3, column 2 of the schedule 1 to remain consistent with the addition of video recordings to sections 6 and 7 of the primary Act.

Clause 107 Schedule 1, items 4, 7 and 8, column 2

This clause amends items 4, 7 and 8, column 2 of schedule 1 to include intersex persons as well as transgender persons.

Clause 108 Schedule 1, item 10, column 2

This clause amends item 10, column 2 of schedule 1 to remain consistent with the addition of video recordings to sections 6 and 7 of the primary Act.

Clause 109 Schedule 1, notes

This clause amends the notes of schedule 1 relocate the references to police officer and doctor to note 2 of the Dictionary.

Clause 110 Schedule 2, item 9, column 2

This clause amends item 9, column 2 of schedule 1 to remain consistent with new section 94A of the primary Act.

Clause 111 Schedule 2, item 11, column 2

This clause amends item 11, column 2 of schedule 2 to remain consistent with the change to section 80 of the primary Act.

Clause 112 Dictionary, notes 2 and 3

This clause amends note 2 of the Dictionary to include doctor, police officer, intersex person, and transgender person. This clause also amends note 3 of the Dictionary to replace the reference to DNA database system to ACT DNA database, given that term DNA database system has been removed from the original Act. Forensic procedure is also added to the list in note 3.