

South Australia



**CRIMINAL LAW (FORENSIC PROCEDURES) ACT 1998**

**No. 8 of 1998**

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# ELIZABETHAE II REGINAE

A.D. 1998

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No. 8 of 1998

**An Act to provide for carrying out forensic procedures to obtain evidence relevant to the investigation of criminal offences; and for other purposes.**

[Assented to 2 April 1998]

The Parliament of South Australia enacts as follows:

## PART 1 PRELIMINARY

### Short title

1. This Act may be cited as the *Criminal Law (Forensic Procedures) Act 1998*.

### Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

### Interpretation

3. In this Act—

"appropriate authority"—*See section 18;*

"appropriate representative" of a protected person—*See section 21(3);*

"child" means a person under the age of 18 years;

"corresponding law" means a law of the Commonwealth, another State, or a Territory providing for carrying out forensic procedures;

"criminal offence" means any offence except—

- (a) a summary offence that is not punishable by imprisonment; or
- (b) a summary offence that is capable of being expiated;

"DPP" means the Director of Public Prosecutions;

**"forensic material"** means material obtained by carrying out a forensic procedure and includes the results of the analysis of any such material;

**"forensic procedure"** means—

- (a) the taking of prints of the hands, fingers, feet or toes; or
- (b) an examination of an external part or an orifice of a person's body (but not an examination that can be conducted without disturbing the person's clothing and without physical contact with the person); or
- (c) the taking of a sample of hair from a person's body (but not the taking of a detached hair from the person's clothing); or
- (d) the taking of a sample of blood; or
- (e) the taking of a sample by buccal swab, or a sample of saliva; or
- (f) the taking of a sample of fingernail or toenail, or material from under a fingernail or toenail; or
- (g) the taking of a sample of biological or other material from an external part of the body; or
- (h) the taking of a dental impression; or
- (i) the taking of an impression or cast of a wound;

**"intimate forensic procedure"** means a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or, in the case of a female, the breasts;

**"intrusive forensic procedure"** means—

- (a) an intimate forensic procedure; or
- (b) a forensic procedure involving intrusion into a person's mouth; or
- (c) the taking of a sample of blood;

**"investigating police officer"** means a police officer in charge of the investigation of a suspected offence;

**"medical practitioner"** means a registered medical practitioner and includes, in relation to a forensic procedure involving the mouth or teeth or an impression left by the mouth or teeth, a registered dentist;

**"non-intrusive forensic procedure"** means a forensic procedure other than an intrusive forensic procedure;

**"person liable to supervision"** means a person who has been declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935*;

**"police officer" means—**

- (a) any member of the police force; or
- (b) a law enforcement officer to whom the powers of a police officer under this Act are extended by regulation;

**"protected person" means—**

- (a) a child; or
- (b) a person physically or mentally incapable of giving informed consent to a forensic procedure;

**"senior police officer" means a police officer of or above the rank of inspector;**

**"telephone" includes any device for voice telecommunication;**

**"under suspicion"—See section 4.**

#### **Suspicion of criminal offence**

4. For the purposes of this Act, a person is **under suspicion** if the police officer by or on whose instructions a forensic procedure is to be carried out on the person suspects the person, on reasonable grounds, of having committed a criminal offence.

#### **Non-application of Act to certain procedures**

5. This Act does not apply to—

- (a) the taking of a sample of breath or blood from a person required under any other law to submit to a breath analysis or an alcotest; or
- (b) a search of the person.

**PART 2**  
**FORENSIC PROCEDURES GENERALLY**

**DIVISION 1—PRELIMINARY**

**Application of this Act**

6. (1) This Part applies in relation to a forensic procedure whether authorised under this Act or not.

(2) Except for this Part, this Act does not apply in relation to—

- (a) a forensic procedure authorised under another Act<sup>1</sup>; or
- (b) a forensic procedure carried out by consent on a person who is not under suspicion.

**Authority required for carrying out forensic procedure**

7. (1) A forensic procedure may be carried out on a person who is not under suspicion—

- (a) if that person consents to the procedure; or
- (b) if the procedure is authorised by order under Division 8 of Part 3<sup>2</sup>; or
- (c) if the procedure is authorised under another law.

(2) A forensic procedure may be carried out on a person who is under suspicion—

- (a) if that person consents to the procedure under this Act; or
- (b) if the procedure is authorised by order under this Act; or
- (c) if the procedure is authorised under another law.

**DIVISION 2—GENERAL PROVISIONS ABOUT CONSENT**

**How consent to be expressed**

8. A person's consent to a forensic procedure is not to be presumed from absence of objection; hence a person is taken not to have consented to a forensic procedure unless the person—

- (a) expressly consents to the procedure orally or in writing; or
- (b) gives some other unequivocal indication of consent.

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<sup>1</sup> See, for example, section 81(4)(a) of the *Summary Offences Act 1953* which in certain circumstances provides for the taking of prints of the hands, fingers, feet or toes of a person in custody on a charge of committing an offence. Where a forensic procedure is authorised under that provision, Division 3 of this Part will be applicable to the procedure but this Act will not be otherwise relevant.

<sup>2</sup> Under Division 8 of Part 3, a criminal court may, in certain circumstances, order a forensic procedure on a person *after* the person has been dealt with on a charge of a criminal offence.

**Withdrawal of consent**

9. (1) A person who consents to a forensic procedure may withdraw the consent at any time before the completion of the procedure.

(2) If, at any time before completion of a forensic procedure, a person who has consented to the procedure behaves in a way that would indicate withdrawal of consent to a reasonable observer, the person is taken to have withdrawn consent.

(3) If consent is withdrawn after a forensic procedure is commenced but before it is completed, the procedure may only be continued or resumed if—

- (a) an order is made under this Act authorising the forensic procedure; or
- (b) the continuance or resumption of the procedure is authorised under another law.

(4) However, the withdrawal of consent before a forensic procedure is completed does not invalidate the taking of evidence before the withdrawal of consent.

**DIVISION 3—GENERAL PRINCIPLES FOR CARRYING OUT FORENSIC PROCEDURES****Forensic procedures to be carried out humanely**

10. (1) A forensic procedure must be carried out humanely and with care—

- (a) to avoid, as far as reasonably practicable, offending genuinely held cultural values or religious beliefs; and
- (b) to avoid inflicting unnecessary physical harm, humiliation or embarrassment.

(2) A forensic procedure must not be carried out in the presence or view of more persons than are necessary for properly carrying out the procedure and satisfying any relevant statutory requirements.

(3) If reasonably practicable, an intimate forensic procedure must not be carried by a person of the opposite sex (other than at the request of the person on whom the forensic procedure is to be carried out).

**Right to be assisted by interpreter**

11. If a person in relation to whom a forensic procedure is to be carried out is not reasonably fluent in English, the person is entitled—

- (a) to be assisted by an interpreter; and
- (b) if the person so requests—to have an interpreter present during carrying out of the forensic procedure.

**Duty to observe relevant medical or other professional standards**

12. A forensic procedure must be carried out in a way that is consistent with appropriate medical standards or other relevant professional standards.

**Taking samples of hair**

13. A person carrying out a forensic procedure that involves taking a sample of hair must not remove the root of the hair unless specifically authorised to do so by the person from whom the sample is taken.



**PART 3**  
**AUTHORITY FOR CARRYING OUT FORENSIC PROCEDURES**

**DIVISION 1—APPLICATION OF THIS PART**

**Application of this Part**

**14.** (1) This Part deals with the authorisation of a forensic procedure on a person who is under suspicion.

(2) This Part also deals with the authorisation of forensic procedures, in certain circumstances, on a person who has been dealt with by a court on a charge of a criminal offence.

**DIVISION 2—CONSENT**

**Preconditions of request for consent**

**15.** A police officer may only ask a person who is under suspicion to consent to a forensic procedure if—

- (a) there are reasonable grounds to suspect that the forensic procedure may produce evidence of value to the investigation of the suspected offence; and
- (b) the person whose consent is sought is not a protected person; and

**Requirements for informed consent**

**16.** (1) Before a person who is under suspicion consents to a forensic procedure, a police officer must explain to the person—

- (a) the nature of the suspected offence; and
- (b) the nature and purpose of the proposed forensic procedure and how, and by whom, it will be carried out; and
- (c) if the proposed forensic procedure is an intrusive forensic procedure—that the person is entitled to have a medical practitioner of his or her choice present when the procedure is carried out; and
- (d) that the forensic procedure may produce evidence that might be used against the person; and
- (e) that the person may refuse consent to the forensic procedure and evidence of the refusal is not admissible in criminal proceedings against the person without the person's consent; and
- (f) that, if the person does not consent to the proposed procedure—
  - (i) if the proposed procedure is an intrusive forensic procedure and the suspected offence is a summary offence—the person cannot be compelled to undergo the procedure; or
  - (ii) in any other case—an application may be made to an appropriate authority for an order authorising the procedure and the use of force reasonably necessary for the purpose of carrying it out; and

- (g) that, if information is obtained from carrying out a forensic procedure and the person is subsequently convicted of the suspected offence (or another offence by way of an alternative verdict) or is declared liable to supervision, the information may be stored on a database and will in that event be available for access by authorities of this State, the Commonwealth and other States and Territories of the Commonwealth; and
- (h) if the person has not already been given a reasonable opportunity to communicate with a legal practitioner of the person's choice—that the person is entitled to a reasonable opportunity to communicate with a legal practitioner before responding to the request.

(2) If a person whose consent to a forensic procedure is sought is not reasonably fluent in English, the explanations required under subsection (1) must be provided through an interpreter.

(3) If a person whose consent to a forensic procedure is sought expresses a desire to communicate with a legal practitioner, and a legal practitioner of the person's choice is available to give advice to the person, the person must be allowed a reasonable opportunity to communicate with the legal practitioner before responding to the request for consent.

(4) The person must be allowed to speak with the legal practitioner in private unless the police officer has reasonable grounds to suspect that the person may attempt to destroy or contaminate evidence.

(5) A record of the explanation, the request for consent to the proposed forensic procedure and the person's response to the request must be made.

(6) The record must, if reasonably practicable, be made by videotape; if it is not reasonably practicable to make a videotape record, an audiotape record must be made; and if it is not reasonably practicable to make either a videotape or an audiotape record, a written record must be made.

(7) Subject to subsection (9), a copy of the record must be given to the person whose consent is sought.

(8) Arrangements must be made, at the request of the person whose consent is sought, for the playing of a videotape record at a reasonable time and place to be nominated by the investigating police officer.

(9) However, a copy of a videotape record will not be provided unless the fee fixed by regulation is paid.

### **DIVISION 3—ORDERS AUTHORISING FORENSIC PROCEDURES**

#### **Classes of order**

17. Orders authorising forensic procedures are of two classes—

- (a) interim orders; and
- (b) final orders.

#### **Order may be made by appropriate authority**

18. (1) An order authorising a forensic procedure on a person who is under suspicion (the respondent) may be made under this Part by an appropriate authority.

(2) A magistrate is an **appropriate authority** for the purpose of proceedings for an interim order under this Act.

(3) The Magistrates Court (in its Criminal Division) is an **appropriate authority** for the purpose of proceedings for a final order under this Act.

(4) A senior police officer is an **appropriate authority** for the purpose of proceedings for an interim or a final order under this Act if—

- (a) the officer is not involved in the investigation for which the authorisation is sought; and
- (b) the respondent is in lawful custody; and
- (c) the respondent is not a protected person; and
- (d) the forensic procedure for which an authorisation is sought is non-intrusive.

#### **DIVISION 4—APPLICATION FOR ORDER**

##### **Application for order authorising forensic procedure**

**19.** An application for an interim or final order authorising a forensic procedure may be made to an appropriate authority by—

- (a) a police officer in charge of a police station; or
- (b) the investigating police officer who has the respondent under suspicion; or
- (c) the DPP.

##### **General formal and procedural requirements**

**20.** (1) An application for an interim or final order—

- (a) must be made in writing; and
- (b) must state the nature of the suspected offence and the grounds for suspecting that the person has committed the offence; and
- (c) must state the nature of the forensic procedure for which the order is sought and the grounds for suspecting the forensic procedure could produce evidence of value to the investigation of the suspected offence; and
- (d) if the application is for an interim order—must state the reasons for urgency.

(2) A copy of the application must be given to the respondent.

(3) If the application is for an interim order, the application may be faxed to the appropriate authority that is to hear the application or, if it is not reasonably practicable to fax the application, the application may be read to the appropriate authority over the telephone (however, in such a case, a copy of the application must be provided to the appropriate authority as soon as practicable after the application is made).

**Representation**

21. (1) A respondent may be represented by a legal practitioner at the hearing of an application for an order under this Part.

(2) A respondent who is a protected person must be represented by an appropriate representative at the hearing (and may also be represented by a legal practitioner).

(3) An appropriate representative may be—

(a) a parent, relative or friend chosen by, or acceptable to, the protected person; or

(b) an advocate for the protected person nominated by a government or private agency with responsibilities for the care of protected persons of the relevant class; or

(c) if there is no available person within the above categories—a person, who is not a police officer or person involved in the investigation of the suspected offence, chosen by a police officer in charge of a police station or the investigating police officer.

**DIVISION 5—DETERMINATION OF APPLICATION FOR INTERIM ORDER****Hearing of application for interim order**

22. (1) An interim order may be made on the basis of an informal hearing at which the applicant and the respondent may, but need not be, present.

(2) If the applicant is not present at the hearing, the applicant may communicate with the appropriate authority by telephone.

(3) The respondent and the respondent's representatives (if any) must be in the presence of the applicant when the application is heard.

(4) The respondent or the respondent's representatives (if any) must be given a reasonable opportunity to make representations to the appropriate authority at the hearing (personally or by telephone).

**Making of interim order**

23. (1) After hearing the applicant's representations (and obtaining from the applicant any undertakings the appropriate authority considers necessary about the nature of the evidence to be given at the hearing of the application for a final order), and hearing any representations put on behalf of the respondent, the appropriate authority may make an interim order authorising a forensic procedure if the authority is satisfied that—

(a) evidence (or the probative value of evidence) may be lost or destroyed unless the forensic procedure is carried out urgently; and

(b) there are reasonable grounds to believe that the grounds for making a final order will ultimately be established.

(2) However—

(a) an interim order may only be made for carrying out a forensic procedure on a person who is not a protected person if the person has been given an opportunity to give informed consent to the procedure and has refused, failed to give, or withdrawn, consent; and

- (b) an interim order for carrying out an intrusive forensic procedure may only be made if the suspected offence is an indictable offence.

(3) Although a forensic procedure may be carried out on a person under an interim order, the evidence obtained by carrying out the procedure is inadmissible against the person unless a final order has been made confirming the interim order.

#### **DIVISION 6—DETERMINATION OF APPLICATION FOR FINAL ORDER**

##### **Respondent to be present at hearing of application**

24. (1) The respondent must be present at the hearing of an application for a final order unless the appropriate authority is satisfied that reasonable grounds exist for dispensing with this requirement.

(2) If the application is made to the Magistrates Court, the Court may—

- (a) issue a summons for the appearance of the respondent at the hearing of the application; or
- (b) issue a warrant to have the respondent arrested and brought before the Court for the hearing of the application; or
- (c) if the respondent is already in lawful custody—issue a warrant requiring the custodian to produce the respondent at the hearing of the application.

(3) However, a warrant for the arrest of the respondent may only be issued if—

- (a) the arrest is necessary to ensure the attendance of the respondent at the hearing; or
- (b) the arrest is necessary to prevent the destruction of evidence (or the probative value of evidence) that might be obtained by carrying out the forensic procedure; or
- (c) there are other substantial reasons justifying the issue of a warrant.

(4) A respondent arrested on a warrant issued under this section is eligible to apply for release on bail pending the hearing of the application as if the respondent were a person who is appearing or is to appear before a court as a witness in proceedings.

##### **Procedure at hearing**

25. (1) The applicant for a final order may submit evidence orally or in writing.

(2) Evidence must be verified on oath or by affidavit.

(3) The respondent or a person representing the respondent—

- (a) may give or call evidence; and
- (b) may cross-examine the applicant and other witnesses called by the applicant and, by leave of the appropriate authority, witnesses whose evidence has been submitted in writing; and
- (c) may make submissions to the appropriate authority.

**Making of final order for carrying out forensic procedure**

26. (1) An appropriate authority may make a final order for carrying out a forensic procedure on a respondent if satisfied that—

- (a) there are reasonable grounds to suspect that the respondent has committed a criminal offence; and
- (b) there are reasonable grounds to suspect that the forensic procedure could produce material of value to the investigation of the suspected offence; and
- (c) the public interest in obtaining evidence tending to prove or disprove the respondent's guilt outweighs the public interest in ensuring that private individuals are protected from unwanted interference.

(2) In weighing the public interest in obtaining evidence tending to prove or disprove guilt against the public interest in ensuring that private individuals are protected from unwanted interference, the appropriate authority must have regard to—

- (a) the seriousness of the suspected offence; and
- (b) the extent to which the procedure is necessary for the proper investigation of the suspected offence; and
- (c) any likely effects of the procedure on the welfare of the respondent (so far as they can be reasonably anticipated) given the respondent's age, physical and mental health, and cultural and ethnic background; and
- (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence of the same or similar probative value to confirm or disprove that the respondent committed the suspected offence; and
- (e) if the respondent gives any reasons for refusing consent—those reasons; and
- (f) other relevant factors,

(3) However—

- (a) a final order may only be made for carrying out a forensic procedure on a respondent who is not a protected person if the respondent has been given an opportunity to give informed consent to the procedure and has refused, failed to give, or withdrawn, consent; and
- (b) a final order for carrying out an intrusive forensic procedure may only be made if the suspected offence is an indictable offence.

**Making of final order confirming interim order**

27. (1) An appropriate authority may make a final order confirming an interim order if satisfied, after conducting the hearing required under this Division, that proper grounds exist for making a final order.

(2) If the appropriate authority is not satisfied that proper grounds exist for making the final order, the authority must order the destruction of forensic material obtained by carrying out the procedure.

(3) However, the forensic material is not to be destroyed until the time for appealing against the order has expired or, if there is an appeal, unless the order is confirmed on appeal or the appeal is discontinued.

#### **DIVISION 7—DUTIES OF APPROPRIATE AUTHORITY ON MAKING ORDER**

##### **Action to be taken on making order**

**28.** (1) If an appropriate authority makes an interim or final order for the carrying out of a forensic procedure, the authority must—

- (a) make a written record of the order and the reasons for the order; and
- (b) inform the respondent that—
  - (i) reasonable force may be used to carry out the order; and
  - (ii) if the respondent obstructs or resists a person in connection with the carrying out of the order, evidence of that fact may be admissible in proceedings against the respondent.

(2) A copy of the record of the order must be given to the respondent.

(3) An interim or final order for carrying out a forensic procedure may include directions about—

- (a) the time, place and manner in which a forensic procedure is to be carried out; and
- (b) custody of the respondent while the order is being carried out; and
- (c) any other incidental matter.

#### **DIVISION 8—FORENSIC PROCEDURES AFTER COURT HAS DEALT WITH CHARGE**

##### **Application of this Division**

**29.** (1) If a person is charged with an indictable offence and dealt with by a court (the **relevant criminal court**) on the charge in one of the following ways:

- (a) the court records a conviction or finding of guilt on the charge; or
- (b) the court declares that the person is liable to supervision,

this Division applies to the person.

(2) However, if the court's judgment is liable to appeal, this Division does not apply to the person until the time for appeal has expired and, if an appeal is commenced, this Division does not apply to the person unless the judgment is confirmed on appeal or the judgment, as varied or substituted by the appellate court, would bring the person within the application of this Division.

(3) This Division does not derogate from the application of other provisions of this Part to a person to whom this Division applies.

**Order authorising taking of blood samples and fingerprints**

**30.** (1) The relevant criminal court may, on application by a police officer or the DPP, make an order authorising—

- (a) the taking of fingerprints from a person to whom this Division applies; and
- (b) if the relevant charge was a charge of a major offence—the taking of material for the purpose of obtaining a DNA profile from a person to whom this Division applies.

(2) In deciding whether to make such an order, the court must take into account the nature and seriousness of the charge and any established propensity to engage in serious criminal conduct (or conduct that would be seriously criminal if it were not for a defect of capacity to be responsible for such conduct).

(3) An order made under this section may include directions about—

- (a) the time, place and manner in which the order is to be carried out; and
- (b) custody of the person while the order is being carried out; and
- (c) any other incidental matter.

(4) In this section—

"**major offence**" means an indictable offence for which the maximum penalty is, or includes, imprisonment for five years or more, or for an indefinite term

**DIVISION 9—MISCELLANEOUS****Obstruction**

**31.** A person must not intentionally obstruct or resist the carrying out of a forensic procedure that has been authorised by order under this Part.

Maximum penalty: Imprisonment for 2 years.



**PART 4**  
**CARRYING OUT FORENSIC PROCEDURES**

**DIVISION 1—PRELIMINARY**

**Application of Part**

32. (1) This Part applies to forensic procedures to be carried out on a person who is under suspicion of having committed a criminal offence where—

- (a) the procedure is authorised by a consent obtained under Part 3; or
- (b) the procedure is authorised by an order of an appropriate authority under this Act.

(2) This Part (except Divisions 5 and 6) also applies to forensic procedures to be carried out on a person by order under Division 8 of Part 3<sup>3</sup>.

**Who may carry out forensic procedure**

33. A person who carries out a forensic procedure must be—

- (a) a medical practitioner; or
- (b) a person who is qualified as required by the regulations to carry out forensic procedures of the relevant type.

**Assistants**

34. A person carrying out a forensic procedure may be assisted by a police officer or other person.

**DIVISION 2—USE OF FORCE**

**Use of force**

35. (1) A person authorised by an order under this Act to carry out a forensic procedure, or a person assisting such a person, may use reasonable force—

- (a) to carry out the authorised forensic procedure and any incidental directions included in the order; and
- (b) to protect evidence obtained from a forensic procedure.

(2) If an application for an interim order authorising the carrying out of a forensic procedure on a person has been or is about to be made, a police officer may use reasonable force to prevent the person from destroying or contaminating evidence until the result of the application is known and, if an interim order is made, until the forensic procedure is actually carried out.

(3) If force is used to prevent a person from destroying or contaminating evidence before an application for an interim order is made, the investigating police officer must ensure that an application for an interim order is made as soon as reasonably practicable.

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<sup>3</sup> Ie. the provisions under which a criminal court may, in certain circumstances, make an order for carrying out a forensic procedure after it has dealt with a charge against the person in relation to whom the procedure is to be carried out.

**Use of force does not constitute arrest**

36. The use of force to detain a person for the purposes of—

- (a) preventing destruction or contamination of evidence until a forensic procedure is carried out in accordance with this Act; or
- (b) carrying out a forensic procedure in accordance with this Act; or
- (c) protecting evidence obtained from a forensic procedure carried out in accordance with this Act,

does not, by itself, constitute an arrest of the person.

**DIVISION 3—RIGHT TO HAVE WITNESS PRESENT****Right to have witnesses present**

37. (1) If an intrusive forensic procedure is to be carried out on a person, the person must be allowed a reasonable opportunity to arrange for the attendance, at the person's expense, of a medical practitioner of the person's choice to witness the forensic procedure.

(2) If a forensic procedure is to be carried out on a protected person, an appropriate representative must be present to witness the forensic procedure.

(3) However, a witness who attempts, without reasonable justification, to obstruct the forensic procedure may be excluded from the place in which the procedure is being or is to be carried out.

**DIVISION 4—RECORDING OF FORENSIC PROCEDURE****Videotape recording to be made**

38. (1) A video recording of a forensic procedure must be made if—

- (a) it is reasonably practicable to make the recording; and
- (b) the person on whom the forensic procedure is to be carried out does not object.

(2) If it is reasonably practicable to make a video recording of a forensic procedure, the person who is to carry out the procedure, or a police officer, must explain to the person on whom the forensic procedure is to be carried out—

- (a) the value of making a video recording of the procedure; and
- (b) that he or she may object to the recording of the procedure.

(3) Arrangements must be made, at the request of a person on whom a forensic procedure was carried out, for the playing of the video recording of the procedure at a reasonable time and place to be nominated by the investigating police officer.

(4) A copy of a video recording made under this section must, on payment of the fee fixed by regulation, be made available to the person on whom the forensic procedure was carried out.

(5) If a video recording is not made, the forensic procedure must be carried out in the presence of an independent witness (who is not a police officer or legal or other representative of the person on whom the forensic procedure is being carried out).

(6) This section does not apply to a forensic procedure that involves only the taking of prints of the hands, fingers, feet or toes of a person.

#### **DIVISION 5—HOW FORENSIC MATERIAL IS TO BE DEALT WITH**

##### **Person to be given sample of material for analysis**

**39.** (1) If forensic material is removed from a person's body by a forensic procedure, the investigating police officer must ensure that—

- (a) a part of the material, sufficient for analysis, is set aside for the person as soon as practicable after the material has been analysed; and
- (b) reasonable care is taken to ensure that the material set aside is protected from degradation until the person receives it; and
- (c) if the person expresses a desire to have the material analysed—reasonable assistance is given to the person to ensure that the material is protected from degradation until it is analysed.

(2) However, the investigating police officer need not comply with subsection (1) if it is not practicable to divide the material obtained into separate parts for analysis.

(3) This section does not apply to the taking of prints of the hands, fingers, feet or toes of a person or the taking of a dental impression or an impression or cast of a wound.

##### **Access to results of analysis**

**40.** (1) Subject to subsection (2), a copy of the results of the analysis of material taken from a person's body by a forensic procedure must be given to the person.

(2) However, if the results of analysis are in a form that cannot be accurately reproduced by photocopying—

- (a) arrangements must be made, on request by the person on whom the forensic procedure was carried out, for the viewing (at a reasonable time and place to be nominated by the investigating police officer) of those results; and
- (b) a copy of those results will be provided to the person on payment of the fee fixed by regulation.

##### **Access to photographs**

**41.** If, in the course of a forensic procedure, a photograph is taken of part of a person's body—

- (a) arrangements must be made, on request by the person, for the viewing (at a reasonable time and place to be nominated by the investigating police officer) of the photograph; and
- (b) a copy of the photograph will be provided to the person on payment of the fee fixed by regulation.

##### **Analysis of material obtained under interim order**

**42.** (1) Forensic material obtained under an interim order must not be analysed unless—

- (a) the material is likely to perish or lose its evidentiary value before a hearing for a final order is held; or

(b) a final order is made confirming the interim order.

(2) A person who intentionally or recklessly discloses the results of analysis of forensic material obtained under an interim order—

(a) during the period before a hearing for a final order is held; or

(b) following a hearing for a final order at which the appropriate authority decides not to confirm the interim order,

is guilty of an offence.

Maximum penalty: Imprisonment for two years.

### DIVISION 6—DESTRUCTION OF FORENSIC MATERIAL

#### Destruction of forensic material

43. (1) The investigating police officer must ensure that forensic material obtained as a result of a forensic procedure is destroyed (as soon as practicable) if—

(a) the material is obtained under an interim order and the appropriate authority decides not to confirm the order; or

(b) proceedings for an offence to which the material is relevant are not commenced within 2 years after the material is obtained, or proceedings for an offence to which the material is relevant are commenced within 2 years after the material is obtained, but the proceedings are discontinued; or

(c) a court decides that the material is inadmissible in proceedings for the offence to which the material relates; or

(d) the person from whom the material is obtained is acquitted of the offence to which the material relates (unless the person is declared to be liable to supervision).

(2) However—

(a) material need not be destroyed on the basis of a judicial decision until all rights of appeal from the decision are exhausted; and

(b) the Magistrates Court may, if satisfied that special reasons exist for doing so, extend (or further extend) the period of 2 years referred to in subsection (1)(b) on application by a police officer or the DPP.

### DIVISION 7—MISCELLANEOUS

#### Exemption from liability

44. No civil or criminal liability is incurred by a person who carries out, or assists in carrying out, a forensic procedure for an act or omission if—

(a) the person genuinely believes that the forensic procedure is authorised under this Act; and

(b) the act or omission is reasonable in the circumstances.

**PART 5**  
**EVIDENCE**

**Effect of non-compliance on admissibility of evidence**

45. (1) If a police officer or other person with responsibilities related to a forensic procedure carried out, or to be carried out, under this Act contravenes a requirement of this Act, evidence obtained as a result of carrying out the forensic procedure is not admissible in evidence against the person on whom the procedure was carried out unless—

- (a) the person does not object to the admission of the evidence; or
- (b) the court is satisfied that the evidence should be admitted in the interests of the proper administration of justice despite the contravention.

(2) In deciding whether evidence should be admitted in the interests of the proper administration of justice, the court must have regard to the following matters:

- (a) the probative value of the evidence (which however cannot, by itself, justify admission of the evidence); and
- (b) the seriousness of the contravention and, in particular, whether it was intentional or reckless; and
- (c) the extent to which the defendant has been prejudiced by the contravention; and
- (d) any other relevant factors.

(3) Evidence obtained by a forensic procedure is inadmissible if, by the time the question of its admissibility arises, the forensic material obtained from the procedure should have been destroyed.

**Admissibility of evidence of denial of consent, obstruction etc.**

46. (1) Evidence that a person refused or failed to consent, or withdrew consent, to a forensic procedure is inadmissible, without the consent of the person, in any criminal proceedings against the person.

(2) However, evidence that a person obstructed or resisted the carrying out of a forensic procedure properly authorised by an appropriate authority is admissible in any criminal proceedings against the person subject to the ordinary rules governing admissibility of evidence.

**PART 6**  
**MISCELLANEOUS**

**Confidentiality**

**47.** (1) A person who has, or has had, access to information obtained through the conduct of forensic procedures under this Act must not disclose the information unless—

- (a) the information is publicly known; or
- (b) the disclosure is necessary for the investigation of a criminal offence or criminal offences generally; or
- (c) the disclosure is necessary for the purpose of deciding whether to begin proceedings for an indictable offence; or
- (d) if the procedure was an intrusive forensic procedure—the disclosure is necessary for the purpose of proceedings for an indictable offence; or
- (e) if the procedure was a non-intrusive forensic procedure—the disclosure is necessary for the purpose of proceedings for any criminal offence; or
- (f) the disclosure is necessary for the purpose of a coronial inquest or inquiry; or
- (g) the disclosure is necessary for the purpose of civil proceedings (including disciplinary proceedings) that relate to the way in which the procedure was carried out; or
- (h) the disclosure is necessary for the medical treatment of the person to whom the information relates or any other person; or
- (i) the disclosure is necessary for the purposes of an arrangement with the Commonwealth, or another State or a Territory under this Part; or
- (j) the person to whom the information relates consents to the disclosure.

(2) A person who intentionally or recklessly discloses information in contravention of this section is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for two years.

**Restriction on publication**

**48.** A person must not intentionally or recklessly publish by newspaper, radio, television or in any other way, a report of proceedings under this Act containing the name of a person under suspicion, or other information tending to identify the person, unless—

- (a) the person consents to the publication; or
- (b) the person has been charged with the suspected offence or a related criminal offence; or
- (c) the appropriate authority authorises the publication.

Maximum penalty: \$5 000 or imprisonment for one year.

**Databases**

49. (1) The Commissioner of Police may maintain a database of information obtained from carrying out forensic procedures under this Act.

(2) A DNA profile derived from material obtained from carrying out a forensic procedure under this Act may only be stored on a database if the person from whom the material was obtained—

- (a) was found guilty of the offence in relation to which the forensic procedure was carried out; or
- (b) was declared to be liable to supervision.

(3) If a DNA profile derived from material obtained from a person who has been found guilty of an offence is stored on a database in accordance with this section and the person is subsequently acquitted of the offence, the information must be removed from the database as soon as practicable.

(4) The Minister may enter into an arrangement with the Minister responsible for the administration of a corresponding law, providing for the exchange of information recorded in the database kept under this section and a database kept under a corresponding law.

**Access to information stored in database**

50. (1) No person may have access to information about DNA profiles stored in a database maintained under this Part except for the following purposes:

- (a) for the purposes of a criminal investigation; or
- (b) for the purpose of making the information available to the person to whom the information relates; or
- (c) for the purpose of administering the database; or
- (d) for the purposes of an arrangement with the Commonwealth, or another State or a Territory; or
- (e) for the purposes of an investigation by the Ombudsman or the Police Complaints Authority.

(2) Information about a DNA profile derived from forensic material obtained under this Act or a corresponding law must not be retained on the database beyond the time the destruction of the forensic material is required under this Act or the corresponding law.

(3) This section only applies to information that identifies a person.

**Reciprocal registration of orders**

51. (1) The Minister may enter into an arrangement with the Minister responsible for the administration of a corresponding law, providing for—

- (a) the registration, in accordance with the regulations, of orders made under the corresponding law; and
- (b) the registration under the corresponding law of orders made under this Act.

(2) The Minister may register, in accordance with the regulations, an order for obtaining forensic material that is—

- (a) made under the law of the Commonwealth or of another State or a Territory of the Commonwealth; and
- (b) registrable under criteria prescribed by the regulations.

(3) An order that is registered under this section, may be enforced in the same way as if it were an order made under this Act.

#### **Regulations**

52. (1) The Governor may make regulations for the purposes of this Act.

(2) A regulation may impose a fine of not more than \$500 for contravention of the regulation.



**SCHEDULE 1**

*Transitional*

**Act not to apply to forensic procedures before commencement**

1. This Act applies in relation to forensic procedures carried out, or to be carried out, after its commencement (whether the suspected offence was committed before or after the commencement of this Act).

**SCHEDULE 2***Amendment of Summary Offences Act 1953***Amendment of Summary Offences Act 1953**

2. Section 81 of the *Summary Offences Act 1953* is amended—

- (a) by inserting in subsection (1) ", or a medical practitioner acting at the request of a member of the police force," after "member of the police force";
- (b) by striking out subsections (2) and (3) and substituting the following subsections:
  - (2) A person carrying out a search under subsection (1) may be assisted by a member of the police force or other person.
  - (3) If a member of the police force intends to request that a medical practitioner search a person in custody, the person must be allowed a reasonable opportunity to arrange for the attendance, at the person's expense, of a medical practitioner of his or her choice to witness the search.
- (c) by striking out paragraph (b) of subsection (4);
- (d) by striking out from subsection (4e) "an impression of his or her teeth or";
- (e) by striking out from subsection (4f) ", impressions" (twice occurring).

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

E. J. NEAL Governor