



Crimes Amendment (Forensic Procedures) Act 2001

No. 22, 2001

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

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No. 22, 2001

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

[Assented to 6 April 2001]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Crimes Amendment (Forensic Procedures) Act 2001*.

2 Commencement

- (1) Sections 1, 2 and 3, items 2 and 3 of Schedule 1, and Schedule 2 commence on the day on which this Act receives the Royal Assent.

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- (2) Subject to subsection (3), Schedule 1 (other than items 2 and 3) commences on a day to be fixed by Proclamation.
 - (3) If Schedule 1 (other than items 2 and 3) does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.
 - (4) Item 78 of Schedule 1 is taken to have commenced immediately before item 77 of that Schedule. Item 79 of Schedule 1 is taken to have commenced immediately before item 81 of that Schedule.

3 Schedule(s)

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendment of the Crimes Act 1914

1 At the end of section 3ZL

Add:

- (4) Nothing in this section derogates from the right to use the provisions of Part 1D as authority for the taking of fingerprints from a prescribed offender or a serious offender.
- (5) In subsection (4), *prescribed offender* and *serious offender* have the meanings given in subsection 23WA(1).

2 After section 4

Insert:

4AAA Commonwealth laws conferring non-judicial functions and powers on officers

Application

- (1) This section sets out the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on one or more of the following persons:
 - (a) a State or Territory judge;
 - (b) a magistrate;
 - (c) a Justice of the Peace or other person:
 - (i) employed in a State or Territory court; and
 - (ii) authorised to issue search warrants, or warrants of arrest.

Note 1: *Magistrate* is defined in section 16C of the *Acts Interpretation Act 1901*.

Note 2: *Justice of the Peace* is defined in paragraph 26(e) of the *Acts Interpretation Act 1901*.

Functions and powers conferred personally

- (2) The function or power is conferred on the person only in a personal capacity and not, in the case of a State or Territory judge or magistrate, as a court or a member of a court.

Function or power need not be accepted

- (3) The person need not accept the function or power conferred.

Protection and immunity provided

- (4) A State or Territory judge or magistrate performing a conferred function, or exercising a conferred power, has the same protection and immunity as if he or she were performing that function, or exercising that power, as, or as a member of, a court (being the court of which the judge or magistrate is a member).
- (5) A person referred to in paragraph (1)(c) performing a conferred function, or exercising a conferred power, has the same protection and immunity as he or she would have in performing functions and powers as part of the person's employment with a State or Territory court, as the case may be.

This section applies regardless of when Commonwealth law made

- (6) This section applies whether the law conferring a function or power was made before, on or after, the commencement of this section.

A law of the Commonwealth relating to criminal matters

- (7) In this section, a reference to ***a law of the Commonwealth relating to criminal matters*** includes a reference to this Act.

4AAB Arrangements for conferral of non-judicial functions and powers

Governor-General may make arrangements

- (1) The Governor-General may make arrangements with:
- (a) the Governor of a State (excluding the Northern Territory);
 - and
 - (b) the Chief Minister for the Australian Capital Territory; and

- (c) the Administrator of the Northern Territory; and
- (d) the Administrator of Norfolk Island;

for the performance of functions, and the exercise of powers, that are neither judicial nor incidental to a judicial function or power, conferred by a law of the Commonwealth relating to criminal matters on:

- (e) a State or Territory judge; or
- (f) a magistrate; or
- (g) a Justice of the Peace or other person:
 - (i) employed in a State or Territory court; and
 - (ii) authorised to issue search warrants, or warrants of arrest.

Note 1: **Magistrate** is defined in section 16C of the *Acts Interpretation Act 1901*.

Note 2: **Justice of the Peace** is defined in paragraph 26(e) of the *Acts Interpretation Act 1901*.

Lack of arrangement does not affect validity of exercise of power or performance of function

- (2) The validity of the performance of a function, or the exercise of a power, is not affected by the absence of an arrangement under this section covering the performance of the function or exercise of the power.

This section applies regardless of when Commonwealth law made

- (3) This section applies to functions or powers conferred by laws made before, on or after the commencement of this section.

A law of the Commonwealth relating to criminal matters

- (4) In this section, a reference to **a law of the Commonwealth relating to criminal matters** includes a reference to this Act.

3 Section 15FA

Repeal the section.

4 Part 1D (simplified outline)

Repeal the simplified outline, substitute:

Simplified outline of operation of Part

This Part provides for forensic procedures to be carried out on:

- suspects in relation to indictable offences (Divisions 3, 4 and 5); and
- offenders in relation to prescribed and serious offences (Division 6A); and
- volunteers (Division 6B).

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

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

This Part also provides for:

- the establishing of a DNA database system (Division 8A); and
- offences in relation to the DNA database system (Division 8A); and
- the protection of information stored in the DNA database system (Division 11); and
- the destruction of forensic material (Division 8A).

5 Subsection 23WA(1)

Insert:

AFP function means a function of the Australian Federal Police set out in section 8 of the *Australian Federal Police Act 1979*.

6 Subsection 23WA(1) (definition of *authorised applicant*)

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

- (a) if the procedure will be carried out on a suspect—the constable in charge of a police station or the investigating constable in relation to a relevant offence; or
- (b) if the procedure will be carried out on an offender—the constable in charge of a police station, the investigating constable in relation to a relevant offence or the Director of Public Prosecutions.

7 Subsection 23WA(1)

Insert:

Commissioner means the Commissioner of the Australian Federal Police and includes a constable or staff member to whom the Commissioner has delegated the functions and powers conferred or imposed on the Commissioner under this Act.

Note: See section 23YQ for the Commissioner's power to delegate.

8 Subsection 23WA(1)

Insert:

corresponding law is defined in section 23YUA.

9 Subsection 23WA(1)

Insert:

destroy is defined in subsection (5).

10 Subsection 23WA(1)

Insert:

DNA database system is defined in section 23YDAC.

11 Subsection 23WA(1)

Insert:

exercise a function includes perform a duty.

12 Subsection 23WA(1) (at the end of paragraph (c) of the definition of *forensic material*)

Add "or video recordings".

13 Subsection 23WA(1) (at the end of the definition of *forensic procedure*)

Add “or the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken”.

14 Subsection 23WA(1)

Insert:

function includes a power, authority or duty.

15 Subsection 23WA(1) (paragraph (a) of the definition of *incapable person*)

After “effect of”, insert “, and purposes of carrying out,”.

16 Subsection 23WA(1) (paragraphs (a), (e), (f) and (h) of the definition of *intimate forensic procedure*)

After “female”, insert “or a transgender person who identifies as a female”.

17 Subsection 23WA(1) (paragraph (h) of the definition of *intimate forensic procedure*)

After “photograph”, insert “or video recording”.

18 Subsection 23WA(1) (definition of *investigating constable*)

Omit “a relevant offence”, substitute “an offence in relation to which a forensic procedure is carried out or proposed to be carried out”.

19 Subsection 23WA(1)

Insert:

judge means a State or Territory judge.

20 Subsection 23WA(1)

Insert:

member of the opposite sex of a person is defined in subsection (7).

21 Subsection 23WA(1)

Insert:

member of the same sex as a person is defined in subsection (7).

22 Subsection 23WA(1) (paragraphs (a), (d), (e) and (g) of the definition of *non-intimate forensic procedure*)

After “female”, insert “or a transgender person who identifies as a female”.

23 Subsection 23WA(1) (paragraph (g) of the definition of *non-intimate forensic procedure*)

After “photograph”, insert “or video recording”.

24 Subsection 23WA(1)

Insert:

offender means:

- (a) a serious offender; or
- (b) a prescribed offender.

24A Subsection 23WA(1) (definition of *order*)

Repeal the definition, substitute:

order means:

- (a) in relation to a suspect—an order of a magistrate under section 23WS or interim order of a magistrate under section 23XA; or
- (b) in relation to an offender—an order of a judge or magistrate under section 23XWO; or
- (c) in relation to a volunteer—an order of a magistrate under section 23XWU.

25 Subsection 23WA(1)

Insert:

participating jurisdiction is defined in section 23YUA.

26 Subsection 23WA(1)

Insert:

prescribed offence means an offence under a law of the Commonwealth punishable by a maximum penalty of imprisonment for life or 2 or more years.

27 Subsection 23WA(1)

Insert:

prescribed offender means a person who is under sentence for a prescribed offence.

Note: For the meaning of ***under sentence***, see subsection (8).

28 Subsection 23WA(1)

Insert:

prison medical officer means, in relation to a prison or other place of detention, a person appointed or acting as medical officer for the prison or other place of detention.

29 Subsection 23WA(1)

Insert:

recognised transgender person means a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* of New South Wales, or under the corresponding provisions of a law of another Australian jurisdiction.

29A Subsection 23WA(1) (definition of *relevant offence*)

Repeal the definition, substitute:

relevant offence means:

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

- (b) in relation to an offender—the offence for which the offender was convicted and to which an application for an order authorising a forensic procedure relates.

30 Subsection 23WA(1)

Insert:

responsible person, in relation to the DNA database system, means the person responsible for the care, control and management of the system.

31 Subsection 23WA(1)

Insert:

serious offence means an offence under a law of the Commonwealth punishable by a maximum penalty of imprisonment for life or 5 or more years.

32 Subsection 23WA(1)

Insert:

serious offender means a person who is under sentence for a serious offence.

Note: For the meaning of *under sentence*, see subsection (8).

33 Subsection 23WA(1) (definition of *tape recording*)

Repeal the definition, substitute:

tape recording means audio recording, video recording or recording by other electronic means.

34 Subsection 23WA(1)

Insert:

transgender person is defined in subsection (6).

35 Subsection 23WA(1)

Insert:

volunteer is defined in section 23XWQ.

36 At the end of section 23WA

Add:

Destroy forensic material or information

- (5) For the purposes of this Part, a person ***destroys*** forensic material taken from another person by a forensic procedure, the results of the analysis of the material or other information gained from it if the person destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.

Transgender persons

- (6) In this Part, a reference to a person being ***transgender*** or a ***transgender person*** is a reference to a person, whether or not the person is a recognised transgender person:
- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or
 - (b) who has identified as a member of the opposite sex by living as a member of the opposite sex; or
 - (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex;
- and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.
- (7) In this Part (other than subsection (6)), a reference:
- (a) to a ***member of the opposite sex of a person*** means, if the person is a transgender person, a member of the opposite sex to the sex with which the transgender person identifies; and
 - (b) to a ***member of the same sex as a person*** means, if the person is a transgender person, a member of the same sex as the sex with which the transgender person identifies.
- (8) For the purposes of the definitions of ***prescribed offender*** and ***serious offender***, a person is ***under sentence*** in relation to a prescribed offence or a serious offence if the person:
- (a) is serving a sentence in a prison (including a gaol, lock-up or other place of detention); or

-
- (b) is serving a sentence of a kind, or subject to an order of a kind, provided for in subsection 20AB(1) as a sentence or order that may be passed or made by a court, under that section, in respect of a person convicted of a federal offence; or
 - (c) is released under a parole order made under subsection 19AL(1) or (2); or
 - (d) is released on a licence granted under section 19AP; or
 - (e) being a child or young person, is serving a sentence of a kind, or subject to an order of a kind, provided for in subsection 20C(1) as a sentence or order that, under that section, may be imposed on the child or young person who in a State or Territory is convicted of an offence against the law of the Commonwealth; or
 - (f) is subject to an order made under Division 9 of Part 1B; or
 - (g) is convicted and conditionally released as provided for in subsection 20(1), either:
 - (i) in the case of paragraph 20(1)(a)—without sentence being passed; or
 - (ii) in the case of paragraph 20(1)(b)—after sentence has been passed.

36A Section 23WB

After “suspect” (wherever occurring), insert “, offender or volunteer”.

36B Subsection 23WB(4)

After “suspect’s”, insert “, offender’s or volunteer’s”.

37 Division 2 of Part 1D (heading)

Repeal the heading, substitute:

Division 2—Authority and time limits for forensic procedures on suspects: summary of rules

38 Division 3 of Part 1D (heading)

Repeal the heading, substitute:

Division 3—Forensic procedures on suspect by consent

39 At the end of subsection 23WI(1)

Add:

; and (d) the person on whom the forensic procedure is proposed to be carried out is not a child or an incapable person.

40 After paragraph 23WJ(1)(i)

Insert:

(ia) the effect of section 23XZ;

41 At the end of subsection 23WJ(1)

Add:

; (k) that information obtained from analysis of forensic material obtained may be placed on the DNA database system and the rules that will apply to its disclosure and use under this Part.

41A Subsection 23WJ(2)

Omit “the taking of a hand print, finger print, foot print or toe print”, substitute “a non-intimate forensic procedure”.

Note: The heading to subsection 23WJ(2) is altered by omitting “*most*” and substituting “*intimate*”.

42 Division 4 of Part 1D (heading)

Repeal the heading, substitute:

Division 4—Non-intimate forensic procedures on suspect by order of senior constable

43 Division 5 of Part 1D (heading)

Repeal the heading, substitute:

Division 5—Forensic procedures on suspect by order of a magistrate

44 Paragraph 23WT(3)(g)

Omit “reason”, substitute “reasons”.

45 Subsection 23WX(6)

Repeal the subsection, substitute:

- (6) The suspect or his or her representative:
 - (a) may call or cross-examine the applicant for the order; and
 - (b) may, with the leave of the magistrate, call or cross-examine any other witnesses; and
 - (c) may address the magistrate.
- (6A) A magistrate must not give leave under paragraph (6)(b) unless the magistrate is of the opinion that there are substantial reasons why, in the interests of justice, the witness should be called or cross-examined.

46 Division 6 of Part 1D (heading)

Repeal the heading, substitute:

Division 6—Carrying out forensic procedures on suspects

47 Section 23XL

Repeal the section, substitute:

23XL Taking of hair samples

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

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

48 Subsections 23XM(1) and (2)

Omit “(3)”, substitute “(4)”.

49 Subsection 23XM(3) (table item 8, column 2)

After “photograph”, insert “or a video recording”.

50 Subsection 23XM(3) (table items 9, 10, 11, 12, 13 and 15, column 4)

Omit “yes (medical practitioner)”, substitute “no”.

51 Subsection 23XM(3) (table item 14, column 3)

Omit “constable”, substitute “appropriately qualified person”.

52 Subsection 23XM(3) (table item 15, column 2)

After “photograph”, insert “or a video recording”.

53 After subsection 23XM(3) (before the table)

Insert:

- (4) This section does not prevent a suspect from taking a sample of saliva, or a sample by buccal swab, from himself or herself under the supervision of an appropriately qualified person.

54 At the end of section 23XO

Add:

- (3) A person who is asked to help carry out a forensic procedure may use reasonable force to enable the forensic procedure to be carried out.

54A Subsection 23XP(1)

Omit “the taking of a hand print, finger print, foot print or toe print”, substitute “a non-intimate forensic procedure”.

Note: The heading to section 23XP is altered by omitting “**most**” and substituting “**intimate**”.

55 After section 23XW in Division 6 of Part 1D

Insert:

23XWA Preventing the carrying out of forensic procedure

A person is guilty of an offence if the person obstructs, hinders or resists a person carrying out a forensic procedure in accordance with this Part.

Penalty: Imprisonment for 2 years.

56 After Division 6 of Part 1D

Insert:

**Division 6A—Carrying out of certain forensic procedures
after conviction of serious and prescribed
offenders**

23XWB Forensic procedures to which Division applies

Intimate forensic procedures to which Division applies

- (1) This Division applies to the following intimate forensic procedures:
 - (a) the taking of a sample of blood;
 - (b) the taking of a buccal swab.

Non-intimate forensic procedures to which Division applies

- (2) This Division applies to the following non-intimate forensic procedures:
 - (a) the taking of samples of hair other than pubic hair;
 - (b) the taking of fingerprints.

Application of Division

- (3) A person is authorised by this section to carry out a forensic procedure under this Division on a serious offender or a prescribed offender whether convicted of the serious or prescribed offence concerned before or after the commencement of this section.

**23XWC Non-intimate forensic procedures authorised to be carried
out on offenders**

- (1) A person is authorised to carry out a non-intimate forensic procedure to which this Division applies on a person (other than a child or an incapable person) who is a serious offender:
 - (a) with the informed consent of the serious offender; or
 - (b) by order of a constable under section 23XWK.
- (2) A person is authorised to take the fingerprints of a prescribed offender (other than a child or an incapable person):

- (a) with the informed consent of the prescribed offender; or
 - (b) by order of a constable under section 23XWK.
- (3) A person is authorised to carry out a non-intimate forensic procedure to which this Division applies on a child or an incapable person who is a serious offender, or to take the fingerprints of a child or incapable person who is a prescribed offender, by order of a magistrate under section 23XWO.

23XWD Intimate forensic procedures authorised to be carried out on serious offenders

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

- (a) with the informed consent of the serious offender; or
- (b) by order of a magistrate under section 23XWO.

23XWE Application of Division 6

- (1) Division 6 applies to the carrying out under this Division of a forensic procedure on an offender as if the references to the suspect in Division 6 were references to the offender.
- (2) A person is authorised by section 23XWC or 23XWD to carry out a forensic procedure under this Division in accordance with Division 6 as applied by this section and not otherwise.

23XWF Scope of authorisation

- (1) A person is not authorised to carry out a forensic procedure under this Division on a serious offender or a prescribed offender if the serious offender or prescribed offender is a suspect or a volunteer.
- (2) A forensic procedure may be carried out on a serious offender or prescribed offender who is a suspect only if authorised by and in accordance with Divisions 2 to 5.
- (3) A forensic procedure may be carried out on a serious offender or prescribed offender who is a volunteer only if authorised by and in accordance with Division 6B.

23XWG Informed consent to forensic procedures

- (1) An offender gives informed consent to a forensic procedure if the offender consents after a constable:
 - (a) requests the offender to consent to the forensic procedure under section 23XWH; and
 - (b) informs the offender about the forensic procedure in accordance with section 23XWJ; and
 - (c) gives the offender the opportunity to communicate, or attempt to communicate, with a legal practitioner of the offender's choice.
- (2) The constable must allow the offender to communicate, or attempt to communicate, with the legal practitioner in private unless the constable suspects on reasonable grounds that the offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Note: Section 23YI states that the burden lies on the prosecution to prove on the balance of probabilities that a constable had a suspicion on reasonable grounds.

23XWH Constable may request offender to consent to forensic procedure

A constable may request:

- (a) a serious offender (other than a child or an incapable person) to consent to an intimate or non-intimate forensic procedure to which this Division applies being carried out on the serious offender; or
- (b) a prescribed offender (other than a child or an incapable person) to consent to the taking of the offender's fingerprints.

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

Before a request is made under section 23XWH, the constable must be satisfied on the balance of probabilities that:

- (a) in the case of a person on whom the procedure is proposed to be carried out who is not serving a sentence of imprisonment in a prison or other place of detention—that the person is an offender; and

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

23XWJ Matters that offender must be informed of before giving consent

- (1) The constable must inform the offender of the following:
 - (a) the purpose for which the forensic procedure is required;
 - (b) if the constable wants the forensic procedure carried out in relation to an offence—the offence concerned;
 - (c) the way in which the forensic procedure is to be carried out;
 - (d) that the forensic procedure may produce evidence against the offender that might be used in a court of law;
 - (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Division 6 as applied by section 23XWE;
- Note: See section 23XM.
- (f) if the forensic procedure is the taking of a sample of blood, that the offender may request that:
 - (i) if the offender is serving a sentence of imprisonment in a prison or other place of detention—the prison medical officer be present while the blood is taken; or
 - (ii) if the offender is not serving a sentence of imprisonment—a medical practitioner of the offender's choice be present while the blood is taken;
 - (g) that the offender may refuse consent to the carrying out of the forensic procedure;
 - (h) the consequences of not consenting, as specified in subsection (2) or (3) (whichever is applicable);
 - (i) the effect of section 23XZ (if applicable);
 - (j) that information obtained from analysis of forensic material obtained may be placed on the DNA database system and used for the purposes of a criminal investigation or for any other purpose for which the DNA database system may be used under Division 8A.

Effect of failure to consent to non-intimate forensic procedure

- (2) The constable must inform a serious offender requested to undergo a non-intimate forensic procedure to which this Division applies or

a prescribed offender requested to consent to the taking of his or her fingerprints that, if the offender does not consent, a constable may order the carrying out of the forensic procedure under section 23XWK if the constable has taken into account the matters set out in section 23XWL.

Effect of failure to consent to intimate forensic procedure

- (3) The constable must inform a serious offender requested to undergo an intimate forensic procedure to which this Division applies that, if the serious offender does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

23XWK Circumstances in which constable may order non-intimate forensic procedure

A constable may order the carrying out of a non-intimate forensic procedure to which this Division applies on a serious offender or the taking of the fingerprints of a prescribed offender other than a child or an incapable person if:

- (a) the offender has been asked under section 23XWH to consent to the carrying out of the forensic procedure; and
- (b) the offender has not consented; and
- (c) the constable has taken into account the matters set out in section 23XWL.

23XWL Matters to be considered by constable

In determining whether to make an order under section 23XWK, the constable is to take into account:

- (a) whether this Part would authorise the forensic procedure to be carried out in the absence of the order; and
- (b) the seriousness of the circumstances surrounding the offence committed by the offender; and
- (c) whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or otherwise; and
- (d) whether the carrying out of the forensic procedure without consent is justified in all the circumstances.

23XWM Recording of giving of information and consent

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

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

23XWN Record of constable's order

- (1) The constable must, at the time of, or as soon as practicable after, making an order under section 23XWK, make a record of:
 - (a) the order; and
 - (b) the date and time when the order was made; and
 - (c) the reasons for making it, and sign the record.
- (2) The constable must ensure that a copy of the record is made available to the offender as soon as practicable after the record is made.

23XWO Judge or magistrate order for carrying out forensic procedure on offender

- (1) An authorised applicant may apply to any judge or magistrate for an order directing a serious offender to consent to an intimate forensic procedure to which this Division applies being carried out on the serious offender.
- (2) An authorised applicant may apply to any judge or magistrate for an order for the carrying out of a non-intimate forensic procedure to which this Division applies on a child or an incapable person who is a serious offender.
- (3) An application under subsection (1) or (2) must be accompanied by an affidavit by the authorised applicant dealing with the matters referred to in subsection (7).

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- (4) An authorised applicant may apply to any judge or magistrate for an order for the taking of the fingerprints under this Division of a child or an incapable person who is a prescribed offender.
 - (5) An authorised applicant may make an application under this section to the judge or magistrate that is sentencing an offender or to any other judge or magistrate at a later time.
 - (6) A judge or magistrate may order the carrying out of a forensic procedure under this Division if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.
 - (7) In determining whether to make an order under this section, a judge or magistrate is to take into account:
 - (a) whether this Part would authorise the forensic procedure to be carried out in the absence of the order; and
 - (b) the seriousness of the circumstances surrounding the commission of the offence by the offender; and
 - (c) whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or otherwise; and
 - (d) whether the carrying out of the forensic procedure is justified in all the circumstances.
 - (8) An order under this section takes effect immediately. However, the person who conducts any analysis of forensic material obtained as a result of carrying out the forensic procedure on an offender must not disclose the results of the analysis:
 - (a) until the expiration of any appeal period or after the final determination of any appeal in relation to the offence concerned, whichever is the later; or
 - (b) if the conviction is quashed.

23XWP Carrying out forensic procedure following conviction

- (1) If:
 - (a) an offender is in prison or another place of detention; and
 - (b) a judge or magistrate orders the offender to permit a forensic procedure to be carried out under this Division;the judge or magistrate may order that a constable and a Division 6 person be permitted to attend on the offender in the prison or place of detention to allow the forensic procedure to be carried out.

- (2) In subsection (1), **Division 6 person** means a person who, under Division 6 as applied by section 23XWE, may carry out the forensic procedure.
- (3) If a judge or magistrate orders an offender who is not in a prison or another place of detention to permit a forensic procedure to be carried out, the judge or magistrate may order the offender to attend at a police station (or other place specified by the judge or magistrate) within a period specified by the judge or magistrate to allow the forensic procedure to be carried out.
- (4) An offender ordered to permit the carrying out of a forensic procedure is guilty of an offence if the offender, without reasonable excuse, refuses or fails to permit the forensic procedure to be carried out.

Penalty: Imprisonment for 12 months.

Note: A defendant bears the evidential burden in relation to the exception of reasonable excuse—see subsection 13.3(3) of the *Criminal Code*.

Division 6B—Carrying out of forensic procedures on volunteers and certain other persons

23XWQ Carrying out of forensic procedures on volunteers

- (1) In this Part:

volunteer means a person:

- (a) who volunteers to a constable to undergo a forensic procedure; or
 - (b) in the case of a child or incapable person—whose parent or guardian volunteers on the child or incapable person's behalf to a constable that the child or incapable person undergo a forensic procedure.
- (2) A person is authorised to carry out a forensic procedure:
 - (a) on a volunteer other than a child or an incapable person—with the informed consent of the volunteer given in accordance with section 23XWR; or
 - (b) on a volunteer who is a child or an incapable person:

-
- (i) with the informed consent of the parent or guardian of the volunteer given in accordance with section 23XWR or by order of a magistrate under section 23XWU; and
 - (ii) after the person has informed the child or incapable person that, even though consent has been given or an order made, if he or she objects to or resists the carrying out of the forensic procedure it will not be carried out.
 - (3) This section only authorises a person to carry out a forensic procedure if the procedure is necessary, or incidental to, the carrying out of an AFP function.
 - (4) This section does not authorise a person to carry out a forensic procedure on a child or an incapable person who objects to or resists the carrying out of the forensic procedure.
 - (5) Division 6 applies to the carrying out of a forensic procedure under this Division as if the references to a suspect in that Division were references to a volunteer referred to in this section. A person is authorised by this section to carry out a forensic procedure on a volunteer in accordance with Division 6 as so applied and not otherwise.

23XWR Informed consent of volunteer or parent or guardian of volunteer

- (1) A volunteer, or parent or guardian of a volunteer, gives informed consent in accordance with this section if the volunteer, parent or guardian consents in the presence of an independent person (not being a constable) after a constable informs the volunteer, parent or guardian of the following matters:
 - (a) the way in which the forensic procedure is to be carried out;
 - (b) that the volunteer is under no obligation to undergo the forensic procedure;
 - (c) that the forensic procedure may produce evidence that might be used in a court of law;
 - (d) to the extent that they are relevant, the matters specified in subsection (2);
 - (e) that the volunteer, parent or guardian may consult a legal practitioner of the volunteer's, parent's or guardian's choice before deciding whether or not to consent to the forensic procedure;

- (f) that the volunteer, parent or guardian may at any time withdraw consent to:
 - (i) the volunteer undergoing the forensic procedure; or
 - (ii) retention of the forensic material taken; or
 - (iii) retention of information obtained from the analysis of that material.
- (2) The constable must inform the volunteer, or parent or guardian of the volunteer, of the following:
 - (a) that information obtained from analysis of forensic material taken from a person under this Division, and as to the identity of the person, may be placed on the DNA database system;
 - (b) that the volunteer has a choice as to whether the information is stored on the volunteers (limited purposes) index or the volunteers (unlimited purposes) index of that system;
 - (ba) if the information is placed on the volunteers (limited purposes) index—the purpose for which the information is placed on the index and that the information may only be used for that purpose;
 - (c) if the information is placed on the volunteers (unlimited purposes) index—that the information may be used for the purposes of a criminal investigation or any other purpose for which the DNA database system may be used under Division 8A;
 - (d) that information placed on the DNA database system will be retained for such period as the Commissioner and the volunteer (or, in the case of a volunteer who is a child or an incapable person, a parent or guardian of the volunteer) agree and must then be removed from the system;
 - (e) any other matters prescribed by the regulations.

23XWS Recording of giving of information and consent

- (1) The constable must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the volunteer's or volunteer's parent's or guardian's responses (if any) are tape recorded.
- (2) If tape recording the giving of information and the volunteer's, parent's or guardian's responses (if any) is not practicable, the constable must ensure that:

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- (a) a written record of the giving of the information and the volunteer's, parent's or guardian's responses (if any) is made; and
 - (b) a copy of the record is made available to the volunteer, parent or guardian.

23XWT Withdrawal of consent

- (1) If a volunteer, or parent or guardian of the volunteer, expressly withdraws consent to the carrying out of a forensic procedure under this Division (or if the withdrawal of such consent can reasonably be inferred from the volunteer's, parent's or guardian's conduct) before or during the carrying out of the forensic procedure:
 - (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and
 - (b) the forensic procedure is not to proceed except (in the case of a child or incapable person) by order of a magistrate under section 23XWU.
- (2) If:
 - (a) a forensic procedure is carried out on a volunteer under this Division; and
 - (b) after the procedure is carried out, the volunteer, or the parent or guardian of the volunteer, expressly withdraws consent to retention of the forensic material taken or of information obtained from the analysis of that material;

then, subject to any order made under section 23XWV, the forensic material and any information obtained from analysis of the material is to be destroyed as soon as practicable after the consent is withdrawn.
- (3) A constable may request, but cannot require, a parent or guardian who withdraws consent to the carrying out of a forensic procedure under this Division to confirm the withdrawal of consent in writing.

23XWU Circumstances in which magistrate may order the carrying out of forensic procedure on a child or incapable person

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

Note: A forensic procedure cannot be carried out on a child or an incapable person who objects to or resists the carrying out of the procedure even if the magistrate makes an order. See subparagraph 23XWQ(2)(b)(ii) and subsection 23XWQ(3).

- (e) except in the circumstances referred to in paragraph (1)(b), any wishes expressed by the parent or guardian of the child or incapable person with respect to whether the forensic procedure should be carried out;

- (f) whether the carrying out of the forensic procedure is justified in all the circumstances.
- (3) An order under this section may:
 - (a) require the forensic procedure to be carried out at a time, or place, or in a manner, specified in the order; or
 - (b) specify the period for which forensic material obtained from carrying out the procedure may be retained.

23XWV Retention of forensic material by order of a magistrate after volunteer, parent or guardian of child or incapable person withdraws consent

- (1) An authorised applicant may apply to a magistrate for an order under subsection (2).
- (2) A magistrate may order that forensic material taken or information obtained from carrying out a forensic procedure on a volunteer who withdraws consent, or parent or guardian of a volunteer who withdraws consent, as the case may be, to the retention of the material be retained if the magistrate is satisfied that:
 - (a) during an investigation into the commission of a serious offence, material reasonably believed to be from the body of a person who committed the offence had been found:
 - (i) at the scene of the offence; or
 - (ii) on the victim of the offence or anything reasonably believed to have been worn or carried by the victim when the offence was committed; or
 - (iii) on the volunteer or anything reasonably believed to have been worn or carried by the volunteer at the scene of the offence or when the offence was committed; or
 - (iv) on an object or person reasonably believed to have been associated with the commission of the offence; and
 - (b) there are reasonable grounds to believe that information obtained from analysis of the forensic material taken from the volunteer is likely to produce evidence of probative value in relation to the serious offence being investigated; and
 - (c) the retention of the forensic material taken from the volunteer is justified in all the circumstances.

- (3) The order may specify the period for which the forensic material taken or information obtained from carrying out the procedure may be retained.

57 Paragraph 23XX(1)(a)

Omit “suspect”, substitute “person”.

58 Paragraph 23XX(1)(b)

Repeal the paragraph, substitute:

- (b) there has been a breach of, or failure to comply with:
- (i) any provision of this Part in relation to a forensic procedure carried out on the person (including, but not limited to, any breach or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out); or
 - (ii) any provision of Division 8A with respect to recording or use of information on the DNA database system.

58A Paragraph 23XX(3)(a)

Omit “suspect”, substitute “person”.

58B Subsection 23XX(4)

Omit “suspect” (wherever occurring), substitute “person”.

58C Paragraph 23XX(5)(c)

Omit “suspect”, substitute “person”.

58D Paragraph 23XX(5)(g)

Omit “suspects”, substitute “persons”.

58E Sections 23XY and 23YA

Omit “suspect” (wherever occurring), substitute “person”.

59 At the end of paragraph 23YC(a)

Omit “is destroyed”, substitute “obtained as a result of the carrying out of the procedure is destroyed as soon as practicable after the disallowance”.

60 At the end of section 23YC

Add:

- (2) If an order for the carrying out of a forensic procedure made under section 23XWU or for the retention of forensic material under section 23XWV specifies a period for which forensic material obtained as a result of the carrying out of the procedure may be retained, the forensic material is to be destroyed as soon as practicable after the end of the period.

61 Subsection 23YD(1)

Omit “section 23YQ”, substitute “Divisions 6A and 6B”.

62 At the end of subsection 23YD(2)

Add “unless a warrant for apprehension of the suspect has been issued”.

63 Subsection 23YD(4)

Repeal the subsection, substitute:

- (4) If a warrant for the apprehension of the suspect is issued during the period of 12 months after forensic material is taken, the forensic material must be destroyed as soon as practicable after:
 - (a) the warrant lapses; or
 - (b) a period of 12 months elapses after the suspect is apprehended.
- (5) A magistrate may, on application by a constable or the Director of Public Prosecutions, extend for a period not exceeding 12 months the period for which forensic material may be retained under this section, if the magistrate is satisfied there are special reasons for doing so.
- (6) A magistrate to whom an application is made under subsection (5) is not to extend the period unless:
 - (a) the person from whom the forensic material was taken has been notified by the applicant for the extension that the application has been made; and
 - (b) the person or his or her legal representative or interview friend (if any) has been given the opportunity to speak to or make a submission to the magistrate concerning the extension.

- (7) An extension in relation to particular forensic material may be given on more than one occasion.
- (8) The magistrate is to ensure that the responsible person in relation to the DNA database system is notified of any extension given under this section.

64 At the end of Division 8 of Part 1D

Add:

23YDAA Destruction of forensic material taken from offender after conviction quashed

The constable who obtained an authority under section 23XWG, 23XWK or 23XWO for the carrying out of a forensic procedure on an offender whose conviction is quashed after the making of the order must ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed as soon as practicable after the conviction is quashed.

23YDAB Destruction of forensic material where related evidence is inadmissible

If a magistrate finds that evidence described in subsection 23XX(3) relating to a forensic procedure is inadmissible under section 23XX, the Commissioner must, as soon as practicable, ensure that any forensic material taken from the person by that forensic procedure is destroyed.

65 After Division 8 of Part 1D

Insert:

Division 8A—DNA database system

23YDAC Definitions

In this Part:

crime scene index means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where an offence (whether a prescribed offence or an offence under the

law of a participating jurisdiction) was, or is reasonably suspected of having been, committed; or

- (b) on or within the body of the victim, or a person reasonably suspected of being a victim, of a prescribed offence; or
- (c) on anything worn or carried by the victim at the time when a prescribed offence was, or is reasonably suspected of having been, committed; or
- (d) on or within the body of any person, on any thing, or at any place, associated with the commission of a prescribed offence.

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

- (a) the following indexes of DNA profiles:
 - (i) a crime scene index;
 - (ii) a missing persons index;
 - (iii) an unknown deceased persons index;
 - (iv) a serious offenders index;
 - (v) a volunteers (unlimited purposes) index;
 - (vi) a volunteers (limited purposes) index;
 - (vii) a suspects index;
 and information that may be used to identify the person from whose forensic material each DNA profile was derived; and
- (b) a statistical index; and
- (c) any other index prescribed by the regulations.

missing persons index means an index of DNA profiles derived from forensic material of:

- (a) persons who are missing; and
- (b) volunteers who are relatives by blood of missing persons.

serious offenders index means an index of DNA profiles derived from forensic material taken from:

- (a) serious offenders in accordance with Division 6A, or under a corresponding law of a participating jurisdiction; and
- (b) suspects who have been convicted of a prescribed offence or an offence under a corresponding law of a participating jurisdiction.

statistical index means an index of information that:

- (a) is obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction; and
- (b) has been compiled for statistical purposes; and
- (c) cannot be used to discover the identity of persons from whom the forensic material was taken.

suspects index means an index of DNA profiles derived from forensic material taken from suspects in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction.

unknown deceased persons index means an index of DNA profiles derived from forensic material of deceased persons whose identities are unknown.

volunteers (limited purposes) index means an index of DNA profiles derived from forensic material taken in accordance with Division 6B or under a corresponding law of a participating jurisdiction from volunteers who (or whose parents or guardians) have been informed that information obtained will be used only for a purpose specified to them under paragraph 23XWR(2)(b).

volunteers (unlimited purposes) index means an index of DNA profiles derived from forensic material taken:

- (a) from volunteers who (or whose parents or guardians) have been informed under paragraph 23XWR(2)(c) that information obtained may be used for the purpose of a criminal investigation or any other purpose for which the DNA database system may be used under this Division, in accordance with Division 6B, or under a corresponding law of a participating jurisdiction; and
- (b) from deceased persons whose identity is known.

23YDAD Supply of forensic material for purposes of DNA database

- (1) A person is guilty of an offence if:
 - (a) the person engages in conduct; and
 - (b) the person's conduct results in the forensic material taken from any person, and which is required to be destroyed, under this Part or under a corresponding law of a

participating jurisdiction, to be supplied to another person;
and

- (c) the person is reckless as to whether the forensic material is required to be destroyed and the supply of the material to the other person; and
- (d) the person intends that the forensic material be analysed for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system.

Penalty: Imprisonment for 2 years.

- (2) A person is guilty of an offence if:
 - (a) the person engages in conduct; and
 - (b) that conduct results in the supply of forensic material to any person and the person is reckless as to that result; and
 - (c) the person is reckless as to whether the forensic material is not excluded forensic material; and
 - (d) the person intends that the forensic material be analysed for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system.

Penalty: Imprisonment for 2 years.

- (3) In this section:

excluded forensic material means forensic material:

- (a) found at a crime scene; or
- (b) taken from a suspect in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction; or
- (c) taken from a serious offender or a volunteer in accordance with Division 6A or 6B or under a corresponding law of a participating jurisdiction; or
- (d) taken from the body of a deceased person; or
- (e) that is from the body of a missing person; or
- (f) taken from a volunteer who is a relative by blood of a deceased or missing person.

23YDAE Use of information on DNA database system

- (1) A person is guilty of an offence if the person accesses information stored on the DNA database system otherwise than in accordance with this section.

Penalty: Imprisonment for 2 years.

- (2) A person may access information stored on the DNA database system for one or more of the following purposes:
- (a) the purpose of forensic comparison permitted under section 23YDAF (permissible matching);
 - (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates;
 - (c) the purpose of administering the DNA database system;
 - (d) the purpose of any arrangement entered into between the Commonwealth and a State or Territory for the provision of access to information contained in the DNA database system by law enforcement officers or by any other persons prescribed by the regulations;
 - (e) the purpose of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988*;
 - (f) the purpose of a coronial inquest or inquiry;
 - (g) the purpose of an investigation of a complaint by the Privacy Commissioner of the Commonwealth or of a participating jurisdiction.
- (3) This section does not apply to information that cannot be used to discover the identity of any person.

23YDAF Permissible matching of DNA profiles

- (1) A matching of a DNA profile on an index of the DNA database system specified in column 1 of the following table with a DNA profile on another index of the system specified in column 2, 3, 4, 5, 6, 7 or 8 of the table is not permitted by this Part if:
- (a) “no” is shown in relation to the index specified in column 2, 3, 4, 5, 6, 7 or 8 opposite the index specified in column 1; or
 - (b) “only if within purpose” is shown in relation to the index specified in column 2, 3, 4, 5, 6, 7 or 8 opposite the volunteers (limited purposes) index specified in column 1

and the matching is carried out for a purpose other than a purpose for which the DNA profile placed on the volunteers (limited purposes) index specified in column 1 was so placed.

Profile to be matched		Is matching permitted?					
Column 1	Column 2 Crime scene	Column 3 Suspects	Column 4 Volunteers (limited purposes)	Column 5 Volunteers (unlimited purposes)	Column 6 Serious offenders	Column 7 Missing persons	Column 8 Unknown deceased persons
1. crime scene	yes	yes	no	yes	yes	yes	yes
2. suspects	yes	no	no	no	yes	no	yes
3. volunteers (limited purposes)	only if within purpose	no	no	no	only if within purpose	only if within purpose	only if within purpose
4. volunteers (unlimited purposes)	yes	no	no	no	yes	yes	yes
5. serious offenders	yes	yes	no	no	yes	yes	yes
6. missing persons	yes	yes	yes	yes	yes	yes	yes
7. unknown deceased persons	yes	yes	yes	yes	yes	yes	no

(2) A person is guilty of an offence if:

- (a) the person's conduct causes the matching that is not permitted by this Part of a DNA profile on an index of the DNA database system with a DNA profile on the same or another index of the DNA database system; and
- (b) the person is reckless as to any such matching of profiles.

Penalty: Imprisonment for 2 years.

(3) This section does not make it an offence for conduct to cause a matching that is not permitted by this Part if the matching is solely for the purposes of administering the DNA database system.

Note: A defendant bears the evidential burden in relation to the matter in subsection (3)—see subsection 13.3(3) of the *Criminal Code*.

23YDAG Recording, retention and removal of identifying information on DNA database system

- (1) A person is guilty of an offence if:
- (a) the person's conduct causes any identifying information about a person obtained from forensic material taken from the person under this Part to be recorded or retained in a DNA database system at any time after this Part requires the forensic material to be destroyed; and
 - (b) the person is reckless as to the recording or retention or whether the forensic material is required to be destroyed.

Penalty: Imprisonment for 2 years.

- (2) The responsible person is guilty of an offence if he or she does not ensure that any identifying information, relating to a person from whose forensic material a DNA profile on the volunteers (unlimited purposes) index or volunteers (limited purposes) index of the DNA database system was derived, is removed from the system as soon as practicable after the end of the identifying period for the profile.

Penalty: Imprisonment for 2 years.

Note: See subsection 23WA(1) for *responsible person*.

- (3) The responsible person is guilty of an offence if he or she does not ensure that any identifying information relating to a DNA profile of an offender on the serious offenders index of the DNA database system is removed from the system as soon as practicable after becoming aware that the offender has been pardoned or acquitted of the offence concerned or if the conviction has been quashed.

Penalty: Imprisonment for 2 years.

Note: See subsection 23WA(1) for *responsible person*.

- (4) In this section:

identifying information means any information that could be used:

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

- (b) to get information about an identifiable person.

identifying period for a DNA profile means the following:

- (a) except as provided by paragraphs (b) and (c), the period of 12 months after the DNA profile is placed on the DNA database system;
- (b) if the DNA profile is derived from forensic material taken from a volunteer—such period after the DNA profile is placed on the DNA database system as is agreed by the Commissioner and the volunteer (or, in the case of a volunteer who is a child or an incapable person, a parent or guardian of the volunteer);
- (c) if the DNA profile is derived from forensic material taken from a deceased person (not being a person who was a volunteer) whose identity is known—such period as the Commissioner orders the responsible person to retain identifying information relating to the profile.

66 Subsection 23YE(1)

After “suspect” (wherever occurring), insert “or offender”.

67 Subsection 23YE(1)

After “suspect’s” (twice occurring), insert “or offender’s”.

68 Paragraphs 23YE(2)(a) and (b)

After “suspect”, insert “or offender”.

69 After paragraph 23YE(2)(b)

Insert:

- ; and (c) the suspect or offender is so informed in a language (including in sign language or braille) in which the suspect’s or offender’s interview friend or legal representative is not able to communicate with reasonable fluency;

70 Subsection 23YE(2)

Omit all the words from “the interview” up to and including “matter”, substitute “the interview friend or legal representative must also be informed of the matter in a language in which the interview friend or legal representative is able to communicate with reasonable fluency”.

71 Section 23YF

After “suspect” (wherever occurring), insert “, offender or volunteer”.

72 Paragraph 23YF(2)(a)

After “suspect’s”, insert “, offender’s or volunteer’s”.

73 Section 23YG

After “suspect” (wherever occurring), insert “, offender or volunteer”.

74 Paragraph 23YG(1)(a)

After “suspect’s”, insert “, offender’s or volunteer’s”.

75 Subsection 23YG(2)

Omit “ subsection (1) within 7 days after the material comes into existence”, substitute:

subsection (1):

- (a) within 7 days after the material comes into existence; or
- (b) if the material is requested by the suspect, offender or volunteer or the suspect’s, offender’s or volunteer’s interview friend or legal representative, within 7 days of the request.

75A Subsection 23YG(2) (note)

Omit “section 23XV”, substitute “section 23XU”.

76 Section 23YH

After “suspect” (twice occurring), insert “, offender or volunteer”.

Note: The heading to section 23YH is altered by adding at the end “, **offenders and volunteers**”.

77 At the end of Division 9 of Part 1D

Add:

23YN Retention of electronic recordings

- (1) A tape recording made by a constable in accordance with this Part that is no longer required for investigative or evidentiary purposes may be retained for such other purposes, and for such period, as the Commissioner directs.

- (2) A recording that is retained under this section is to be stored so as to protect it against unauthorised access or use by any person.

23YO Disclosure of information

- (1) A person is guilty of an offence if:
- (a) the person has access to any information stored on the DNA database system or to any other information revealed by a forensic procedure carried out on a suspect, offender or volunteer; and
 - (b) the person's conduct causes the disclosure of information other than as provided by this section; and
 - (c) the person is reckless as to any such disclosure.

Penalty: Imprisonment for 2 years.

- (2) A person may only disclose information stored on the DNA database system for one or more of the following purposes:
- (a) the purposes of forensic comparison in the course of a criminal investigation by a constable or other person prescribed by the regulations;
 - (b) the purposes of making the information available, in accordance with the regulations, to the person to whom the information relates;
 - (c) the purposes of administering the DNA database system;
 - (d) the purposes of any arrangement entered into between the Commonwealth and a State or Territory for the provision of access to information contained in the DNA database system by law enforcement officers or by any other persons prescribed by the regulations;
 - (e) the purposes of, and in accordance with, the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988*;
 - (f) the purpose of a coronial inquest or inquiry;
 - (g) the purposes of an investigation by the Privacy Commissioner or the Ombudsman of the Commonwealth or of a participating jurisdiction.
- (3) A person may only disclose information revealed by the carrying out of a forensic procedure as follows:

-
- (a) if the person is the suspect, offender or volunteer to whom the information relates;
 - (b) if the information is already publicly available;
 - (c) in accordance with any other provision of this Part;
 - (d) in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988*;
 - (e) for the purposes of the investigation of any offence or offences generally;
 - (f) for the purpose of a decision whether to institute proceedings for any offence;
 - (g) for the purpose of proceedings for any offence;
 - (h) for the purpose of a coronial inquest or inquiry;
 - (i) for the purpose of civil proceedings (including disciplinary proceedings) that relate to the way in which the procedure is carried out;
 - (j) for the purposes of the suspect's, offender's or volunteer's medical treatment;
 - (k) for the purpose of the medical treatment of the victim of an offence that there are reasonable grounds to believe was committed by the suspect;
 - (l) if the suspect, offender or volunteer consents in writing to the disclosure.
- (4) This section does not apply to information that cannot be used to discover the identity of any person.

23YP Taking, retention and use of forensic material

Taking, retention and use authorised by laws of other jurisdictions

- (1) Nothing in this Part affects the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised by or under a law of a State or a Territory.
- (2) Forensic material, or information obtained from it, that was taken in accordance with a law of a State or a Territory may be retained or used for investigative, evidentiary or statistical purposes of the Commonwealth. The material or information may be retained or used even if its retention or use would, but for this subsection,

constitute a breach of, or failure to comply with, any provision of this Part relating to the carrying out of forensic procedures.

Use and retention of forensic material taken before commencement of subsection

- (3) Forensic material, or information obtained from it, that is taken in accordance with a law of a State or a Territory, as in force immediately before the commencement of this subsection, may be retained or used for investigative, evidentiary or statistical purposes of the Commonwealth. The material or information may be retained or used even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with, any provision of this Part relating to the carrying out of forensic procedures.

23YQ Commissioner may delegate functions and powers

- (1) The Commissioner of the Australian Federal Police may delegate all or any of his or her functions and powers under this Part to a constable or staff member.
- (2) In subsection (1), *staff member* has the meaning it has in the *Australian Federal Police Act 1979*.

78 Divisions 10 and 11 of Part 1D

Repeal the Divisions.

79 Division 12 of Part 1D

Renumber as Division 10 of Part 1D.

80 After paragraph 23YU(1)(a)

Insert:

- (aa) without limiting paragraph (a), the carrying out of breath analysis or a breath test or the production of samples of blood and urine to determine the level of alcohol or drugs, if any, present in a person's body; or

81 After Division 10 of Part 1D

Insert:

Division 11—Interjurisdictional enforcement

23YUA Definitions

In this Part:

appropriate authority means:

- (a) in relation to a participating jurisdiction other than the Australian Capital Territory—an authority exercising, in relation to the police force of that jurisdiction, functions corresponding to those of the Commissioner and any other authority prescribed by the regulations; or
- (b) in relation to the Australian Capital Territory—the Commissioner and any other authority prescribed by the regulations.

corresponding law means a law relating to the carrying out of forensic procedures and DNA databases that substantially corresponds to this Part or is prescribed by the regulations for the purposes of this definition.

DNA database means:

- (a) in relation to the Commonwealth—the DNA database system; and
- (b) in relation to a participating jurisdiction—a DNA database system that is kept under a corresponding law of the participating jurisdiction.

participating jurisdiction means a State or Territory in which there is a corresponding law in force.

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

23YUB Registration of orders

- (1) The Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions for the establishment and maintenance, in one or more of those jurisdictions, of a register of orders for the carrying out of forensic procedures made under this Part or corresponding laws of participating jurisdictions.

- (2) An order is registered when a copy of the order (being a copy certified by the person who made it) is registered in accordance with the law of the participating jurisdiction in which the register is kept.
- (3) An application for registration of an order, or for cancellation of registration of an order, may be made by an appropriate authority.

23YUC Carrying out of registered orders

- (1) A person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with an arrangement referred to in subsection 23YUB(1) anywhere in the Commonwealth. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (2) A constable, or other person assisting a constable in accordance with this Part or a corresponding law of a participating jurisdiction, is not compelled by this Part, or an arrangement referred to in subsection 23YUB(1), to execute an order registered under such an arrangement.

23YUD Database information

- (1) The Minister may enter into arrangements with a responsible Minister of a participating jurisdiction under which:
 - (a) information from the DNA database system of the Commonwealth that may be relevant to the investigation of an offence against the law of the participating jurisdiction is to be transmitted to the appropriate authority in that jurisdiction for the purpose of the investigation of, or proceedings in respect of, that offence; and
 - (b) information from a DNA database system of the participating jurisdiction that may be relevant to the investigation of an offence against the law of the Commonwealth is to be transmitted to the Commissioner for the purposes of the investigation of, or proceedings in respect of, that offence.
- (2) Information that is transmitted under this section must not be recorded, or maintained in any database of information that may be used to discover the identity of a person or to obtain information about an identifiable person at any time after this Part or a

corresponding law of a participating jurisdiction requires the forensic material to which it relates to be destroyed.

81A Section 23YT

Repeal the section.

82 Division 13 of Part 1D

Renumber as Division 12 of Part 1D.

83 After paragraph 23YV(1)(b)

Insert:

- (ba) the effectiveness of independent oversight and accountability mechanisms for the DNA database system; and
- (bb) any disparities between the legislative and regulatory regimes of the Commonwealth and participating jurisdictions for the collection and use of DNA evidence; and
- (bc) any issues relating to privacy or civil liberties arising from forensic procedures permitted by this part; and

84 Subsection 23YV(1)

Omit “second anniversary of the commencement of this Act,”, substitute “first anniversary of the commencement of Schedule 1 to the *Crimes Amendment (Forensic Procedures) Act 2001* referred to in subsection 2(2) of that Act”.

85 Subsection 23YV(4) (paragraph (b) of the definition of *independent review*)

Omit “and a nominee of the Ombudsman”, substitute “, a nominee of the Ombudsman and a nominee of the Privacy Commissioner”.

86 At the end of section 23YV

Add:

- (5) If a written report tabled under subsection (3) identifies inadequacies in respect of the matters referred to in subsection (1):
 - (a) the Minister must cause a further independent review to be undertaken within 2 years of the tabling of that report to ascertain whether the inadequacies have been effectively dealt with; and

- (b) subsections (2), (3) and (4) apply in relation to the report of that further review in the same manner as they apply in respect of the report of the original review.

Schedule 2—Amendment of the Mutual Assistance in Criminal Matters Act 1987

1 Subsection 3(1) (definition of *foreign restraining order*)

Repeal the definition, substitute:

foreign restraining order means an order:

- (a) made under the law of a foreign country in respect of an offence against the law of that country; and
- (b) which is, or purports to be, made for the purpose of preserving property (whether or not the order also purports to do other things) including an order:
 - (i) restraining a particular person or persons from dealing with the property; or
 - (ii) freezing the property; or
 - (iii) directing the seizure of the property; or
 - (iv) directing that the property be taken into official custody or control.

2 Subsection 34(7)

Omit “a restraining order”, substitute “an order”.

3 At the end of subsection 34(7)

Add “that directed that the property specified in the order is not to be disposed of, or otherwise dealt with, by any person”.

*[Minister’s second reading speech made in—
Senate on 30 August 2000
House of Representatives on 26 March 2001]*

(145/00)

