

Crimes Amendment Regulations 2001 (No. 3) 2001 No. 138

EXPLANATORY STATEMENT

Statutory Rules 2001 No. 138

Issued by the authority of the Minister for Justice and Customs

Crimes Act 1914

Crimes Amendment Regulations 2001 (No. 3)

Section 91 of the *Crimes Act 1914* ('the Crimes Act') provides that the Governor-General may make regulations for the purposes of the Crimes Act.

The *Crimes Regulations 1990* ('the Principal Regulations') made under the Crimes Act set out various matters necessary to give effect to that Act.

The purpose of the Regulations is to prescribe New South Wales, Australian Capital Territory and Tasmanian forensic procedure laws as 'corresponding laws' in relation to Part 1D of the Crimes Act and to prescribe forensic experts as person who can lawfully access and disclose information on the national DNA database for law enforcement purposes.

Part 1D was amended by the *Crimes Amendment (Forensic Procedures) Act 2001* ('the Forensic Procedures Act'). Part 1D permits the carrying out of forensic procedures on suspects, offenders and volunteers for the purposes of the investigation of Commonwealth offences. Part 1D also regulates the storage and use of DNA information derived from forensic material obtained from suspects, offenders and volunteers on the national DNA database, including the matching of DNA profiles within the Commonwealth jurisdiction and across the State and Territory jurisdictions.

The Forensic Procedures Act received Royal Assent on 6 April 2001 and will be proclaimed to commence on 20 June 2001.

New section 23YUA of the Crimes Act (which is located in Division 11 of Part 1D) provides that 'corresponding law' means a law relating to the carrying out of forensic procedures and DNA databases that substantially corresponds to Part 1D or is prescribed in regulations. The national DNA database is, predicated on the sharing of DNA information between the Commonwealth, States and Territories. However, the sharing of DNA information can only occur between jurisdictions with corresponding laws.

The Regulations amend the Principal Regulations:

- (i) to prescribe, for the purposes of sections 23YDAE and 23YO of the Crimes Act, Commonwealth, State and Territory forensic experts as persons who can lawfully access and disclose information on the national DNA database for law enforcement purposes;
- (ii) to prescribe, as 'corresponding laws' for the purposes of section 23YUA of the Crimes Act, the *Crimes (Forensic Procedures) Act 2000* of New South Wales, the *Forensic Procedures Act 2000* of Tasmania and the *Crimes (Forensic Procedures) Act 2000* of the Australian Capital Territory (together 'the relevant State and Territory laws');
- (iii) to include a new Schedule 3C indicating the particular provisions of the relevant State and Territory laws that substantially correspond to particular provisions of Part 14D of the Crimes Act.

Details of the Regulations follow.

The Amendments

Regulation 1 is a formal clause providing for the citation of these Regulations.

Regulation 2 provides that these Regulations commence upon the commencement of Schedule 1 (other than items 2 and 3) of the *Crimes Amendment (Forensic Procedures) Act 2001* ('the Forensic Procedures Act').

Regulation 3 contains Schedule 1, which inserts proposed regulations 6D, 6E and a proposed Schedule 3C into the *Crimes Regulations 1990*.

Subregulation 6D refers to paragraphs 23YDAE(2)(d) and 23YO(2)(a) and (d) of the Crimes Act, and prescribes Commonwealth, State and Territory forensic experts as persons who can lawfully access and disclose information on the national DNA database for law enforcement purposes. It is important that forensic experts are able to access and disclose information stored on the national DNA database, and have information disclosed to them, lawfully. The forensic experts will be providing DNA information to the national DNA database and will be notified by the CrimTrac Agency, which administers the database, if a match between DNA profiles has occurred. The subregulation ensures that the prescription does not apply to forensic experts 'at large'. Only those forensic experts that provide forensic services to the Commonwealth, State and Territory police services in forensic laboratories that are accredited by the National Association of Testing Authorities, Australia (NATA) are covered. NATA provides strict and detailed accreditation procedures for forensic science laboratories in Australia to ensure they meet all necessary international and domestic standards.

Subregulation 6E(1) provides that for the purposes of the definition of 'corresponding law' in section 23YUA of the Crimes Act, the *Crimes (Forensic Procedures) Act 2000* of New South Wales, the *Forensic Procedures Act 2000* of Tasmania and the *Crimes (Forensic Procedures) Act 2000* of the Australian Capital Territory (together 'the relevant State and Territory laws') are prescribed as corresponding laws.

Subregulation 6E(2) refers to proposed Schedule 3 C, which describes the particular provisions of the relevant State and Territory laws that substantially correspond to particular provisions of Part 1D of the Crimes Act.

The language of the definition of 'corresponding law' in section 23YUA gives a clear indication that substantial correspondence with Part 1D, as a self-evident fact, provides a sufficient legislative basis for identifying a corresponding law. It is considered that the relevant State and Territory laws do substantially correspond to the provisions of Part 1D of the Crimes Act. However, in order to avoid uncertainty with this issue the Regulations prescribe the relevant State and Territory laws as 'corresponding laws' for the purposes of Part 1D. This will ensure that the Commonwealth can share DNA information with New South Wales, the Australian Capital Territory and Tasmania, thereby ensuring the proper participation of these jurisdictions on the national DNA database system.

At this stage, the laws of the other jurisdictions, including Victoria, Queensland, Western Australia, South Australia and the Northern Territory, are not considered substantially similar. Accordingly, prescription of these laws in the proposed Regulations is not justified. It is anticipated that once suitable changes are made to the legislative regimes of these jurisdictions prescription in future Commonwealth regulations may be appropriate.

Schedule 3C identifies specific Parts and Divisions of the relevant State and Territory laws that correspond with specified Divisions of Part 1D.

Item 1 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 3 of Part 1D, which stipulates the requirements for a suspect to consent to a

forensic procedure. For example, the Commonwealth provisions and the relevant State and Territory laws require informed consent.

Item 2 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 4 of Part 1D, which regulates how, and in what circumstances, a police constable may authorise the carrying out of a non-intimate forensic procedure on a suspect who does not consent. For example, the Commonwealth provisions and the relevant State and Territory laws outline the threshold grounds on which a police officer may order a non-intimate forensic procedure. While there are slight differences in these grounds they are unlikely to make a practical difference. The main difference between this aspect of the relevant State and Territory laws is that mouth swabs are treated as non-intimate forensic procedures in Tasmania and the Australian Capital Territory. This is not considered to be a sufficient difference that should preclude the recognition of the Tasmanian and Australian Capital Territory laws as 'corresponding laws' for the purposes of the Crimes Act.

Item 3 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 5 of Part 1D, which regulates how, and in what circumstances, a magistrate may authorise the carrying out of a forensic procedure on a suspect. For example, the Commonwealth provisions and the relevant State and Territory laws outline that a magistrate must consider that a forensic procedure would produce evidence of probative value before authorising a procedure. While the Crimes Act and the Australian Capital Territory laws have virtually identical considerations, the New South Wales and Tasmanian laws give the magistrate sufficient scope to reject an application where it is not justified.

Item 4 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 6 of Part 1D, which regulates the carrying out of forensic procedures. For example, the Commonwealth provisions and the relevant State and Territory laws stipulate who may carry out particular forensic procedures. For all intents and purposes, these are identical.

Item 5 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 6A of Part 1D, which regulates the carrying out of forensic procedures on convicted offenders. For example, the Commonwealth provisions and the relevant State and Territory laws stipulate how, and in what circumstances, a police officer can authorise the carrying out of a forensic procedure on a convicted offender. The main difference with this aspect of the relevant State and Territory laws relates to the scope of offenders covered in each jurisdiction. The Tasmanian and Australian Capital Territory laws apply to offenders convicted of indictable offences whereas the Commonwealth and New South Wales laws apply to offenders convicted of offences punishable by 5 or more years imprisonment. However, in practice this is unlikely to make a significant difference.

Item 6 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 6B of Part 1D, which regulates the carrying out of forensic procedures on volunteers. For example, the Commonwealth provisions and the relevant State and Territory laws stipulate that a forensic procedure can only occur with the informed consent of a volunteer. For all intents and purposes, these are identical.

Item 7 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 7 of Part 1D, which regulates the admissibility of DNA evidence derived from forensic material obtained by carrying out forensic procedures. For example, the Commonwealth provisions and the relevant State and Territory laws apply admissibility rules to the obtaining of DNA evidence illegally, improperly or unfairly. Evidence may be inadmissible on the basis that a contravention of the Commonwealth provisions or the relevant State and Territory laws had occurred. The Commonwealth, New South Wales and Australian Capital Territory laws contain specific inadmissibility provisions whereas Tasmania relies on the general admissibility laws regarding illegally and improperly obtained evidence. In practice, the general laws in Tasmania are likely to be interpreted by the courts in the strict manner represented in the Commonwealth, New South Wales and Australian Capital Territory laws.

Item 8 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 8 of Part 1D, which regulates the destruction of forensic material obtained by carrying out forensic procedures. For example, the Commonwealth provisions and the relevant State and Territory laws require the destruction of a suspect's forensic material if, after 12 months, proceedings have not been instituted, or have been discontinued, against that suspect. For all intents and purposes, these are identical.

Item 9 of Schedule 3C lists the relevant State and Territory laws that substantially correspond with Division 8A of Part 1D, which regulates the use of forensic material on the national DNA database system. For example, the Commonwealth provisions and the relevant State and Territory laws contain detailed matching rules that are underpinned by misuse and unauthorised access and disclosure offences, which prescribe maximum penalties of imprisonment for 2 years. For all intents and purposes, these are identical.

Item 10 of Schedule 3 C lists the relevant State and Territory laws that substantially correspond with Division 11 of Part 1D, which regulates the inter-jurisdictional aspects of the national DNA database. For example, the Commonwealth provisions and the relevant State and Territory laws foreshadow Ministerial arrangements between these jurisdictions for the exchange of information stored on the national DNA database system. For all intents and purposes, these are identical.