

South Australia

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

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

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*This Act is published under the Legislation Revision and Publication Act 2002 and incorporates all amendments in force as at **4 April 2003**.*

*Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.*

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

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Criminal Law (Forensic Procedures) Act 1998 No. 8 of 1998  
[Assented to 2 April 1998]<sup>1</sup>

as amended by

Summary Offences (Searches) Amendment Act 2000 No. 54 of 2000 [Assented to 20 July 2000]<sup>2</sup>

Statutes Amendment and Repeal (Attorney-General's Portfolio) Act 2000 No. 57 of 2000 [Assented to 20 July 2000]<sup>3</sup>

**Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Act 2002 No. 49 of 2002 [Assented to 19 December 2002]<sup>4</sup>**

<sup>1</sup> Came into operation 25 July 1999: *Gaz.* 15 July 1999, p. 234.

<sup>2</sup> Section 4 came into operation 22 February 2002: *Gaz.* 10 January 2002, p. 4.

<sup>3</sup> Part 7 (ss. 15-17) came into operation 14 August 2000: *Gaz.* 10 August 2000, p. 444.

<sup>4</sup> **Came into operation 4 April 2003: *Gaz.* 3 April 2003, p. 1305.**

*NOTE:*

- *Asterisks indicate repeal or deletion of text.*
- *Entries appearing in bold type indicate the amendments incorporated since the last reprint.*
- *For the legislative history of the Act see Appendix.*

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**Criminal Law (Forensic Procedures) Act 1998**

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**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. (1) In this Act—

"**assimilation order**" means an order under section 44;

"**category 1 (consent) procedure**"—*see* section 13A;

"**category 2 (volunteers) procedure**"—*see* section 13E;

"**category 3 (suspects) procedure**"—*see* section 14;

"**category 4 (offenders) procedure**"—*see* section 30;

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

"**closest available next of kin**" means—

- (a) in relation to a child, the first in order of priority of the following persons who is not a protected person and is available at the time:
  - (i) a parent of the child;
  - (ii) a brother or sister of the child;
  - (iii) a guardian of the child; and
- (b) in relation to any other person, the first in order of priority of the following persons who is not a protected person and is available at the time:
  - (i) the spouse of the person;
  - (ii) a son or daughter of the person;
  - (iii) a parent of the person;
  - (iv) a brother or sister of the person;

"**corresponding law**" means a law of the Commonwealth, another State, or a Territory that provides for carrying out forensic procedures and is prescribed by regulation for the purposes of this definition;

"**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;

**"DNA database system"**—*see* section 46A;

**"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 procedure carried out by or on behalf of South Australia Police or a law enforcement authority and consisting of—

- (a) the taking of prints of the hands, fingers, feet or toes; or
- (b) an examination of a part 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 biological or other material from a person's body<sup>1</sup> (but not the taking of a detached hair from the person's clothing); or
- (d) the taking of an impression or cast of a part of a person's body<sup>2</sup>;

**"guardian"** means a person acting or appointed under any Act or law as the guardian of another;

**"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 (other than a procedure consisting of the taking of a sample by buccal swab); or
- (c) the taking of a sample of blood (other than the taking of a sample by finger-prick for the purpose of obtaining a DNA profile);

**"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;

**"offenders index"**—*see* section 46A;

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

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**"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;

**"retention order"** means an order under section 43;

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

**"serious offence"** means—

- (a) an indictable offence or a summary offence listed in the Schedule; or
- (b) an offence of attempting to commit such an offence; or
- (c) an offence of aiding, abetting, counselling or procuring the commission of such an offence; or
- (d) an offence of conspiring to commit such an offence; or
- (e) an offence of being an accessory after the fact to such an offence;

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

**"under suspicion"**—*see section 4*;

**"volunteers (limited purposes) index"**—*see section 46A*;

**"volunteers (unlimited purposes) index"**—*see section 46A*.

(2) A reference in this Act to the closest available next of kin of a person means, where there are two or more persons having a description referred to in a subparagraph of paragraph (a) or (b) of the definition of "**closest available next of kin**" in subsection (1), any one of those people<sup>3</sup>.

(3) If a provision of this Act or an order made under this Act requires the destruction of any forensic material, the forensic material will be taken to have been destroyed, for the purposes of that provision or order, if it is not possible to identify the person from whom the material was obtained or to whom the material relates.

<sup>1</sup> This would include, for example, taking a sample of the person's hair, a sample of the person's fingernails or toenails or material under the person's fingernails or toenails, a blood sample, a sample by buccal swab or a sample of saliva.

<sup>2</sup> This would include, for example, the taking of a dental impression or the taking of an impression or cast of a wound.

<sup>3</sup> This means, for example, that where this Act requires the consent of the closest available next of kin of a person to the carrying out of a forensic procedure, the procedure may be authorised by the consent of any one of the closest available next of kin, even if the other closest available next of kin do not consent.

## 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 (whether or not the person has been charged with the 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 where another law authorises the taking of the sample for the purpose of determining the concentration of alcohol, or of any drug, present in the person's blood; 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 forensic procedure authorised under another law<sup>1</sup>.

<sup>1</sup> See, for example, section 81(4)(a) of the *Summary Offences Act 1953*. 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.

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### **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 out 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 sample of hair taken from a person in the course of a forensic procedure must not be used for the purpose of obtaining a DNA profile of that person unless the person has specifically requested that the DNA profile be obtained in this way.

## Part 2A—Category 1 (consent) procedures

### Division 1—Preliminary

#### Category 1 (consent) procedures

**13A.** (1) A forensic procedure authorised under this Part is a **category 1 (consent) procedure**.

(2) A forensic procedure may only be authorised under this Part if it is carried out in the following circumstances:

- (a) the person on whom the procedure is carried out is not under suspicion; and
- (b) if a DNA profile of the person is to be derived from forensic material obtained by carrying out the procedure—the DNA profile is not to be stored on the DNA database system.

#### Application of this Act to category 1 (consent) procedures

**13B.** This Act, apart from Parts 1 and 2, this Part and Part 6, does not apply in relation to category 1 (consent) procedures.

### Division 2—Authorisation of category 1 (consent) procedures

#### Authority required for carrying out category 1 (consent) procedure

**13C.** (1) A forensic procedure is authorised under this Part if—

- (a) the person on whom the procedure is to be carried out is competent to consent to the procedure and does so; or
- (b) the person on whom the procedure is to be carried out is not competent to consent to the procedure but—
  - (i) if the person is a child—the closest available next of kin of the child consents; or
  - (ii) in any other case—the person’s guardian consents or, if the person does not have a guardian, the closest available next of kin of the person consents; or
- (c) a magistrate authorises the procedure under subsection (3).

(2) A person’s consent to a forensic procedure under this Part is not to be presumed from absence of objection; hence a person is taken not to have consented to the procedure unless the person—

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

(3) A magistrate may authorise the carrying out of a forensic procedure on a person who is not competent to consent if the magistrate is satisfied that—

- (a) it is impracticable or inappropriate to obtain consent to the procedure from a person who might consent on the person’s behalf—
  - (i) because of the difficulty of locating or contacting that person; or
  - (ii) because that person, or a person related to or associated with him or her, is under

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suspicion in relation to a criminal offence; and

- (b) the carrying out of the procedure is justified in the circumstances of the case.
- (4) On an application for an authorisation under subsection (3), the magistrate—
  - (a) is not bound by rules of evidence but may act on the basis of information the magistrate considers reasonably reliable in the circumstances; and
  - (b) may deal with the application in a way that appears appropriate in the circumstances and is not bound by procedural rules; and
  - (c) may, in a case of urgency, hear the application by telephone and give the authorisation by telephone or fax.
- (5) A person is **competent to consent** to a forensic procedure under this Part if the person—
  - (a) is of or above the age of 16 years; and
  - (b) is not physically or mentally incapable of consenting to the procedure.

**Category 1 (consent) procedure not to be carried out on person who is not competent to consent but objects to procedure**

**13D.** (1) A category 1 (consent) procedure is not to be carried out and, if commenced, is not to be continued on a person who is not competent to consent to the procedure if the person objects to or resists the procedure.

(2) Before a category 1 (consent) procedure is carried out on a person who is not competent to consent to the procedure but appears capable of responding rationally to information, a police officer must explain to the person that the procedure will not be carried out if the person objects to or resists the procedure.

- (3) However—
  - (a) if a category 1 (consent) procedure is commenced but not completed because of objection or resistance to the procedure, the admissibility of evidence obtained before the procedure was, or should have been, discontinued is not affected; and
  - (b) failure to give an explanation under subsection (2) does not affect the admissibility of evidence obtained as a result of the procedure; and
  - (c) this section does not apply if the person on whom the forensic procedure is (or is to be) carried out is under 10 years of age.

## Part 2B—Category 2 (volunteers) procedures

### Division 1—Preliminary

#### Category 2 (volunteers) procedures

**13E.** (1) A forensic procedure authorised under this Part is a **category 2 (volunteers) procedure**.

(2) A forensic procedure may only be authorised under this Part if it is carried out in the following circumstances:

- (a) the person on whom the procedure is carried out is not under suspicion; and
- (b) a DNA profile of the person is to be derived from forensic material obtained by carrying out the procedure and is to be stored on the volunteers (limited purposes) index or the volunteers (unlimited purposes) index of the DNA database system.

#### Authority required for carrying out category 2 (volunteers) procedure

**13F.** A forensic procedure is authorised under this Part if—

- (a) the person on whom the procedure is to be carried out—
  - (i) is not a protected person; and
  - (ii) gives informed consent to the procedure; or
- (b) the person on whom the procedure is to be carried out is a protected person but—
  - (i) if the person is a child—the closest available next of kin of the child gives informed consent to the procedure; or
  - (ii) in any other case—the person’s guardian gives informed consent to the procedure or, if the person does not have a guardian, the closest available next of kin of the person gives informed consent to the procedure.

### Division 2—Informed consent

#### Requirements for informed consent

**13G.** (1) Before a person gives informed consent to a forensic procedure under this Part, a police officer must—

- (a) complete a written statement, in a form approved by the Attorney-General, explaining—
  - (i) the nature of the proposed forensic procedure and the person’s right to refuse consent to the proposed procedure; and
  - (ii) the options, under this Act, relating to storage of a DNA profile of the person on the DNA database system and the person’s right to refuse consent to such storage or to impose conditions; and
  - (iii) any other matters required by the Attorney-General; and
- (b) read that statement to the person; and
- (c) give the person a copy of the written statement.

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(2) If a person whose informed consent to a forensic procedure is sought is not reasonably fluent in English, the statement required to be read to the person under subsection (1) must be read with the assistance of an interpreter.

(3) A person gives informed consent to a forensic procedure under this Part by—

(a) expressly consenting to the procedure orally or in writing; or

(b) giving some other unequivocal indication of consent.

(4) An audio or audiovisual record of—

(a) the statement read to the person in relation to the proposed forensic procedure; and

(b) the giving of informed consent by the person,

must be made at the request of the person and, subject to subsection (5), a copy of that record must be given to the person.

(5) A copy of an audiovisual record will not be provided unless the fee fixed by regulation is paid.

(6) Arrangements must be made, at the request of the person, for the playing of an audiovisual record at a reasonable time and place to be nominated by the Commissioner of Police.

**Division 3—Protected persons**

**Requirements for informed consent of guardian or next of kin**

**13H.** (1) Before the guardian or closest available next of kin of a protected person gives informed consent to the carrying out of a forensic procedure on the protected person under this Part, a police officer must—

(a) complete a written statement, in a form approved by the Attorney-General, explaining—

(i) the nature of the proposed forensic procedure and the guardian or closest available next of kin's right to refuse consent to the proposed procedure; and

(ii) the options, under this Act, relating to storage of a DNA profile of the protected person on the DNA database system and the guardian or closest available next of kin's right to refuse consent to such storage or to impose conditions; and

(iii) any other matters required by the Attorney-General; and

(b) read that statement to the guardian or closest available next of kin; and

(c) give the guardian or closest available next of kin a copy of the written statement.

(2) If a guardian or closest available next of kin whose informed consent to a forensic procedure is sought is not reasonably fluent in English, the statement required to be read to the guardian or closest available next of kin under subsection (1) must be read with the assistance of an interpreter.

(3) A guardian or closest available next of kin of a protected person gives informed consent to the carrying out of a forensic procedure on the protected person under this Part by—

- (a) expressly consenting to the procedure orally or in writing; or
  - (b) giving some other unequivocal indication of consent.
- (4) An audio or audiovisual record of—
- (a) the statement read to the guardian or closest available next of kin in relation to the proposed forensic procedure; and
  - (b) the giving of informed consent by the guardian or closest available next of kin,

must be made at the request of the guardian or closest available next of kin and, subject to subsection (5), a copy of that record must be given to the guardian or closest available next of kin.

(5) A copy of an audiovisual record will not be provided unless the fee fixed by regulation is paid.

(6) Arrangements must be made, at the request of the guardian or closest available next of kin, for the playing of an audiovisual record at a reasonable time and place to be nominated by the Commissioner of Police.

**Category 2 (volunteers) procedure not to be carried out on protected person who objects to procedure**

**13I.** (1) A category 2 (volunteers) procedure is not to be carried out and, if commenced, is not to be continued on a protected person if the person objects to or resists the procedure.

(2) Before a category 2 (volunteers) procedure is carried out on a protected person who appears capable of responding rationally to information, a police officer must explain to the person that the procedure will not be carried out if the person objects to or resists the procedure.

- (3) However—
- (a) if a category 2 (volunteers) procedure is commenced but not completed because of objection or resistance to the procedure, the admissibility of evidence obtained before the procedure was, or should have been, discontinued is not affected; and
  - (b) failure to give an explanation under subsection (2) does not affect the admissibility of evidence obtained as a result of the procedure; and
  - (c) this section does not apply if the person on whom the forensic procedure is (or is to be) carried out is under 10 years of age.

## **Part 3—Category 3 (suspects) procedures**

### **Division 1—Preliminary**

#### **Category 3 (suspects) procedures**

**14.** (1) A forensic procedure authorised under this Part is a **category 3 (suspects) procedure**.

(2) A forensic procedure may only be authorised under this Part if the person on whom the procedure is to be carried out is under suspicion and—

- (a) there are reasonable grounds to suspect that the forensic procedure may produce evidence of value to the investigation of the suspected offence; or
- (b) the suspected offence is a serious offence and the procedure consists only of the taking of a sample from the person's body by buccal swab or finger-prick for the purpose of obtaining a DNA profile of the person.

#### **Authority required for carrying out category 3 (suspects) procedure**

**15.** (1) A forensic procedure is authorised under this Part if—

- (a) the person on whom the procedure is to be carried out—
  - (i) is not a protected person; and
  - (ii) gives informed consent to the procedure; or
- (b) an order authorising the procedure is made under Division 3; or
- (c) the person on whom the procedure is to be carried out is under suspicion of having committed a serious offence and the procedure consists only of the taking of a sample from the person's body by buccal swab or finger-prick for the purpose of obtaining a DNA profile of the person.

(2) Before a forensic procedure authorised under subsection (1)(c) is carried out on a person, a police officer must inform the person that—

- (a) reasonable force may be used to carry out the forensic procedure; and
- (b) if the person obstructs or resists a person in connection with the carrying out of the procedure, evidence of that fact may be admissible in proceedings against the person.

(3) If a forensic procedure authorised under subsection (1)(c) is to be carried out on a person who is not in lawful custody, a senior police officer may issue directions about—

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

(4) A written record of any directions issued under subsection (3) in relation to a forensic procedure must be given to the person on whom the procedure is to be carried out and the person must be informed—

- (a) of the nature of the suspected offence; and

- (b) that if the person fails to comply with the directions, a warrant may be issued by the Magistrates Court for the arrest of the person for the purpose of carrying out the forensic procedure.

(5) If a person fails to comply with directions issued under subsection (3) in relation to a forensic procedure, a police officer may apply to the Magistrates Court for the issue of a warrant to have the person arrested and brought to a police station specified in the application for the purpose of carrying out the forensic procedure.

(6) The Magistrates Court must issue a warrant for the arrest of the person under subsection (5) if satisfied that the person has failed to comply with directions issued under subsection (3).

## **Division 2—Informed consent**

### **Requirements for informed consent**

**16.** (1) Before a person gives informed consent to a forensic procedure under this Part, a police officer must—

- (a) complete a written statement, in a form approved by the Attorney-General, explaining—
- (i) the nature of the suspected offence; and
  - (ii) the nature of the proposed forensic procedure; and
  - (iii) the person's right to refuse consent to the proposed procedure and the possible consequences if consent is refused; and
  - (iv) if a DNA profile of the person is to be derived from forensic material obtained by carrying out the procedure and is to be stored on the DNA database system—that, if the person consents to the forensic procedure, the DNA profile will be so stored and the purposes for which that DNA profile may be used; and
  - (v) that the forensic procedure may produce evidence that might be used against the person; and
  - (vi) any other matters required by the Attorney-General; and
- (b) read that statement to the person; and
- (c) give the person a copy of the written statement.

(2) If a person whose informed consent to a forensic procedure is sought is not reasonably fluent in English, the statement required to be read to the person under subsection (1) must be read with the assistance of an interpreter.

(3) If a person whose informed 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 deciding whether to give informed 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.

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(5) A person gives informed consent to a forensic procedure under this Part by—

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

(6) An audiovisual record (or, if that is not reasonably practicable, an audio record) of—

- (a) the statement read to the person in relation to the proposed forensic procedure; and
- (b) the giving of informed consent by the person,

must be made and, subject to subsection (7), a copy of that record must be provided to the person.

(7) A copy of an audiovisual record will not be provided unless the fee fixed by regulation is paid.

(8) If an audiovisual record is made of a person giving informed consent, arrangements must be made, at the request of the person, for the playing of the audiovisual record at a reasonable time and place to be nominated by the investigating police officer.

**Division 3—Orders authorising forensic procedures under this Part****Classes of orders**

17. Orders authorising forensic procedures under this Part 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 Part.

(3) For the purpose of proceedings for a final order under this Part—

- (a) the Magistrates Court (in its Criminal Division) is an **appropriate authority**; and
- (b) if the respondent is a child—the Youth Court is an **appropriate authority**.

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

**19.** An application for an interim or final order authorising a forensic procedure under this Part 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
- (ba) a police prosecutor; 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) if there is no available person in the above category—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**

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**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 under this Part 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) the appropriate authority must not make an interim order for carrying out—
  - (i) an intrusive forensic procedure; or
  - (ii) a forensic procedure that is to be carried out on a person for the purpose of obtaining a DNA profile of the person,

if the suspected offence is not a serious 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 is made, or is taken to be 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 a 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 authorising the carrying out of a forensic procedure under this Part 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.

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(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 to give informed 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) the appropriate authority must not make a final order for carrying out—
  - (i) an intrusive forensic procedure; or
  - (ii) a forensic procedure that is to be carried out on a person for the purpose of obtaining a DNA profile of the person,

if the suspected offence is not a serious 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 authorising 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 as soon as practicable and, in the case of a final order other than a final order confirming an interim order, the copy must be given to the respondent before the forensic procedure authorised by the order is carried out.

(3) An interim or final order authorising a forensic procedure under this Part may include directions about—

- (a) the time, place and manner in which the 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—Miscellaneous**

### **Interim order becomes final on conviction etc**

**29.** If—

- (a) a forensic procedure is carried out on a person under an interim order; and
- (b) before proceedings for a final order are determined, the person becomes a person to whom Part 3A applies,

a final order confirming the interim order will be taken to have been made.

## **Part 3A—Category 4 (offenders) procedures**

### **Category 4 (offenders) procedures**

**30.** (1) A forensic procedure authorised under this Part is a **category 4 (offenders) procedure**.

(2) A forensic procedure may only be authorised under this Part if it is carried out in the following circumstances:

- (a) the person on whom the procedure is carried out is not under suspicion; and
- (b) the person on whom the procedure is carried out is a person to whom this Part applies; and
- (c) if a DNA profile of the person is to be derived from forensic material obtained by carrying out the procedure—the DNA profile is to be stored on the offenders index of the DNA database system.

(3) A person is a **person to whom this Part applies** if, after the commencement of this section, the person—

- (a) is serving a term of imprisonment, detention or home detention in relation to an offence; or
- (b) is being detained as a result of being declared liable to supervision by a court dealing with a charge of an offence; or
- (c) is convicted of a serious offence by a court; or
- (d) is declared liable to supervision by a court dealing with a charge of a serious offence.

(4) This section applies whether the relevant offence was committed before or after the commencement of this section.

### **Authority required for carrying out category 4 (offenders) procedure**

**31.** (1) A forensic procedure is authorised under this Part if the procedure consists only of one or both of the following:

- (a) the taking of fingerprints from a person to whom this Part applies;
- (b) the taking of a sample from the body of a person to whom this Part applies by buccal swab or finger-prick for the purpose of obtaining a DNA profile of the person.

(2) Before a forensic procedure authorised under subsection (1) is carried out on a person, a police officer must inform the person that—

- (a) reasonable force may be used to carry out the forensic procedure; and
- (b) if the person obstructs or resists a person in connection with the carrying out of the procedure, evidence of that fact may be admissible in proceedings against the person.

(3) If a forensic procedure authorised under subsection (1) is to be carried out on a person who is not in lawful custody, a senior police officer may issue directions about—

- (a) the time, place and manner in which the forensic procedure is to be carried out; and

- (b) custody of the person while the forensic procedure is being carried out; and
- (c) any other incidental matter.

(4) A written record of any directions issued under subsection (3) in relation to a forensic procedure must be given to the person on whom the procedure is to be carried out and the person must be informed that if the person fails to comply with those directions, a warrant may be issued by the Magistrates Court for the arrest of the person for the purpose of carrying out the forensic procedure.

(5) If a person fails to comply with directions issued under subsection (3) in relation to a forensic procedure, a police officer may apply to the Magistrates Court for the issue of a warrant to have the person arrested and brought to a police station specified in the application for the purpose of carrying out the forensic procedure.

(6) The Magistrates Court must issue a warrant for the arrest of the person under subsection (5) if satisfied that the person has failed to comply with directions issued under subsection (3).

## **Part 4—Carrying out forensic procedures**

### **Division 1—Preliminary**

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#### **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 1A—Obstruction**

#### **Obstruction**

**34A.** A person must not intentionally obstruct or resist the carrying out of a category 3 (suspects) procedure or a category 4 (offenders) procedure if that procedure has been authorised otherwise than by consent under this Act<sup>1</sup>.

Maximum penalty: Imprisonment for two years.

<sup>1</sup> That is, if the procedure has been authorised by order under Part 3 or is authorised under section 15(1)(c) or section 31(1).

### **Division 2—Use of force**

#### **Use of force**

**35.** (1) A person authorised under this Act to carry out a forensic procedure, or a person assisting such a person, may, if the procedure has been authorised otherwise than by consent<sup>1</sup>, use reasonable force—

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

(2) If an application for an interim order authorising the carrying out of a forensic procedure on a person under Part 3 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 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.

(4) Where this section authorises the use of force to detain a person, that action does not, by itself, constitute an arrest of the person.

<sup>1</sup> That is, if the procedure has been authorised by order under this Act or is authorised under section 15(1)(c) or section 31(1).

\* \* \* \* \*

### **Division 3—Right to have witness present**

#### **Right to have witness 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.

(2a) An appropriate representative may be—

- (a) a relative or friend chosen by, or acceptable to, the protected person; or
- (b) if there is no available person within the above category—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 either of the above categories—a person, who is not a police officer or person involved in the investigation of the suspected offence (if any), chosen by a police officer in charge of a police station or, where relevant, the investigating police officer.

(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**

#### **Audiovisual record to be made**

**38.** (1) An audiovisual 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 an audiovisual recording of a forensic procedure, the person who is to carry out the procedure, or a police officer, must—

- (a) give the person on whom the forensic procedure is to be carried out a written statement in a form approved by the Minister outlining—
  - (i) the value of making an audiovisual recording of the procedure; and
  - (ii) that the person may object to the procedure being so recorded; and
- (b) read the statement to the person (with the assistance of an interpreter if one is to be present during the carrying out of the procedure).

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

(4) A copy of an audiovisual 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 an audiovisual 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 4A—Miscellaneous**

**Exemption from liability**

**38A.** 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 4A—How forensic material is to be dealt with**

### **Division 1—Access to forensic material**

#### **Application of Division**

**38B.** This Division only applies to category 3 (suspects) procedures and category 4 (offenders) procedures.

#### **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, a 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, subsection (1) need not be complied with 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 an impression or cast of a part of a person's body.

#### **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 Commissioner of Police) 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 Commissioner of Police) of the photograph; and
- (b) a copy of the photograph will be provided to the person on payment of the fee fixed by regulation.

## **Division 2—Analysis of certain material**

### **Analysis of certain material**

**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, or is taken to be 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.

(3) If—

- (a) a category 4 (offenders) procedure is carried out on a person in accordance with this Act; but
- (b) the judgment of the court in the proceedings that brought the person within the application of Part 3A is liable to appeal,

forensic material obtained as a result of the procedure must not be analysed until the time for appeal has expired and, if an appeal is commenced, the forensic material must not be analysed 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 Part 3A.

## **Division 3—Retention and assimilation orders**

### **Court order for retention of forensic material obtained by carrying out category 2 (volunteers) procedure on protected person**

**43.** (1) If—

- (a) forensic material was obtained by carrying out a category 2 (volunteers) procedure on a protected person; and
- (b) the person who gave informed consent to the procedure has requested destruction of the forensic material,

a magistrate may make an order authorising the retention of the forensic material for a period specified in the order.

(2) A magistrate may make an order under this section if satisfied that—

- (a) the person who gave consent, or a person related to or associated with him or her, is under suspicion in relation to an indictable offence; and

(b) there are reasonable grounds to believe that the forensic material to which the application relates is of probative value in relation to the investigation of the offence; and

(c) the order is justified in all the circumstances.

(3) An application for an order under this section may be made by—

(a) a police officer in charge of a police station; or

(b) the investigating police officer; or

(c) a police prosecutor; or

(d) the DPP.

(4) An application for an order under this section—

(a) must be made in writing; and

(b) must state the nature of the suspected offence and the grounds for suspecting that the person who gave the consent, or a person related to or associated with him or her, has committed the offence; and

(c) must state the grounds for suspecting that the forensic material to which the application relates is of probative value in relation to the investigation of the offence.

(5) An application for an order under this section may be faxed to the magistrate who is to hear the application or, if it is not reasonably practicable to fax the application, the application may be read to the magistrate over the telephone (however, in such a case, a copy of the application must be provided to the magistrate as soon as practicable after the application is made).

(6) If the person who requested destruction of the forensic material to which the application relates (the **respondent**) can be located, a copy of the application must be served on the respondent.

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

(8) If the respondent is present at the hearing, the respondent must be given a reasonable opportunity to make representations to the magistrate.

(9) If the magistrate hearing an application is satisfied that the respondent—

(a) could not be located to be served with a copy of the application; or

(b) has been served with a copy of the application but has failed to attend the hearing,

the magistrate may proceed to hear and determine the application in the absence of the respondent.

(10) An order under this section may include directions about any incidental matter.

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(11) If an order is made under this section authorising the retention of forensic material for a specified period, a magistrate may, on application by a person referred to in subsection (3), extend or further extend the specified period.

**Court order for forensic material obtained by category 2 (volunteers) procedure to be treated as if obtained by category 3 (suspects) procedure**

**44.** (1) A magistrate may order that forensic material obtained from a person as a result of a category 2 (volunteers) procedure be treated, for the purpose of determining when the material is required to be destroyed and for the purposes of the DNA database system, as if it were material obtained as a result of a category 3 (suspects) procedure if satisfied that there are reasonable grounds to suspect that the person has committed a criminal offence and—

- (a) there are reasonable grounds to suspect that the forensic material to which the application relates may be of value to the investigation of the suspected offence; or
- (b) the suspected offence is a serious offence and the forensic material to which the application relates consists of—
  - (i) a sample from the person's body taken for the purpose of obtaining a DNA profile of the person; or
  - (ii) a DNA profile of the person.

(2) An application for an order under this section may be made by—

- (a) a police officer in charge of a police station; or
- (b) the investigating police officer; or
- (c) a police prosecutor; or
- (d) the DPP.

(3) An application for an order under this section—

- (a) must be made in writing; and
- (b) must state the reasons for seeking the order.

(4) An application for an order under this section may be faxed to the magistrate who is to hear the application or, if it is not reasonably practicable to fax the application, the application may be read to the magistrate over the telephone (however, in such a case, a copy of the application must be provided to the magistrate as soon as practicable after the application is made).

(5) If the respondent can be located, a copy of the application must be served on the respondent.

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

(7) If the respondent is present at the hearing, the respondent must be given a reasonable opportunity to make representations to the magistrate.

(8) If the magistrate hearing an application is satisfied that the respondent—

- (a) could not be located to be served with a copy of the application; or
- (b) has been served with a copy of the application but has failed to attend the hearing,

the magistrate may proceed to hear and determine the application in the absence of the respondent.

(9) For the purposes of this section, the **respondent** to an application relating to forensic material is—

- (a) if the person from whom the forensic material was obtained is a protected person—
  - (i) if the person is a child—the closest available next of kin of the child; or
  - (ii) if the person is not a child—the person’s guardian or, if the person does not have a guardian, the closest available next of kin of the person; or
- (b) in any other case—the person from whom the forensic material was obtained.

#### **Division 4—Destruction of forensic material**

##### **No destruction required if decision may be appealed**

**44A.** Material need not be destroyed under this Division on the basis of a judicial decision until all rights of appeal from the decision are exhausted.

##### **Destruction of forensic material obtained by carrying out category 2 (volunteers) procedures**

**44B.** (1) The Commissioner of Police must ensure that relevant forensic material obtained from a person by carrying out a category 2 (volunteers) procedure is destroyed—

- (a) within 14 days after receiving a request for destruction of the material from the person who gave informed consent to the procedure; or
- (b) at the time (if any) specified by the person in giving informed consent to the procedure; or
- (c) if a retention order has been made in relation to the forensic material—at the time directed in the order.

(2) A request for destruction of relevant forensic material must be in writing.

(3) A person who, at the time at which a category 2 (volunteers) procedure was authorised, was a protected person because he or she was a child, may, at any time after reaching the age of 18 years, request the destruction of relevant forensic material under this section as if he or she had given informed consent to the procedure.

(4) If, within 14 days of receiving a request for destruction of relevant forensic material, an application is made for a retention order or an assimilation order that relates to the material, the Commissioner of Police may postpone destruction of the material until that application is determined (but, if the application is refused by the Court, the Commissioner of Police must ensure that the material is destroyed as soon as practicable after that refusal).

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(5) If relevant forensic material obtained by carrying out a forensic procedure is destroyed in accordance with this section, the Commissioner of Police must ensure that reasonable steps are taken, within 14 days of the destruction of the material, to give written notice of that fact to the person who gave informed consent to the procedure.

(6) In this section—

"**relevant forensic material**", in relation to a person, means forensic material that was obtained as a result of a forensic procedure carried out on that person but does not include forensic material that consists only of biological material from a different person, or the results of analysis of such material.

**Destruction of forensic material obtained by carrying out category 3 (suspects) procedures**

**44C.** (1) The Commissioner of Police must ensure that forensic material obtained from a person by carrying out a category 3 (suspects) 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—
  - (i) are not commenced against the person within two years after the material is obtained; or
  - (ii) are commenced against the person within two years after the material is obtained, but—
    - (A) the proceedings are discontinued; or
    - (B) the person is not, as a result of the proceedings, a person to whom Part 3A applies.

(2) However—

- (a) the Magistrates Court may, if satisfied that special reasons exist for doing so, extend (or further extend) the period of two years referred to in subsection (1)(b)(i) on application by a police officer or the DPP; and
- (b) material need not be destroyed under subsection (1)(b)(ii) if there are other proceedings pending against the person.

(3) If this section applies to forensic material as a result of an assimilation order being made, the forensic material will, for the purposes of subsection (1)(b), be taken to have been obtained on the day on which the order was made.

(4) If relevant forensic material is destroyed in accordance with this section, the Commissioner of Police must ensure that reasonable steps are taken, within 14 days of the destruction of the material, to give written notice of that fact to the person from whom the material was obtained.

**Destruction of forensic material obtained by carrying out category 4 (offenders) procedures**

**44D.** (1) The Commissioner of Police must ensure that forensic material obtained from a person by carrying out a category 4 (offenders) procedure is destroyed (as soon as practicable) if—

- (a) Part 3A applied to the person because he or she had been dealt with by a court on a charge of an offence; and

(b) the person is subsequently pardoned or acquitted of the offence or a conviction recorded against the person in relation to the offence is subsequently quashed.

(2) If relevant forensic material is destroyed in accordance with this section, the Commissioner of Police must ensure that reasonable steps are taken, within 14 days of the destruction of the material, to give written notice of that fact to the person from whom the material was obtained.

**Part 5—Evidence****Effect of non-compliance on admissibility of evidence**

**45.** (1) If a police officer or other person with responsibilities under this Act (other than a person acting as an appropriate representative of a protected person under this Act) contravenes a requirement of this Act in relation to—

- (a) a forensic procedure; or
- (b) forensic material obtained from a forensic procedure; or
- (c) a DNA profile derived from such forensic material,

evidence obtained as a result of the forensic procedure is not admissible in evidence against the person on whom the procedure was carried out unless—

- (d) the person does not object to the admission of the evidence; or
- (e) 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 give informed 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 category 3 (suspects) procedure or a category 4 (offenders) procedure authorised otherwise than by consent under this Act<sup>1</sup> is admissible in any criminal proceedings against the person subject to the ordinary rules governing the admissibility of evidence.

<sup>1</sup> That is, if the procedure has been authorised by order under Part 3 or is authorised under section 15(1)(c) or section 31(1).

## Part 5A—The DNA database system

### Interpretation

46A. In this Part—

"**crime scene index**" means an index of DNA profiles derived from biological material found—

- (a) at any place (whether within or outside Australia) where a prescribed offence 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 and information that may be used to identify the person from whose biological material each DNA profile was derived:
  - (i) a crime scene index;
  - (ii) a missing persons index;
  - (iii) an unknown deceased persons index;
  - (iv) an offenders index;
  - (v) a volunteers (unlimited purposes) index;
  - (vi) a volunteers (limited purposes) index;
  - (vii) a suspects index; 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 biological material of persons who are missing;

"**offenders index**" means an index of DNA profiles derived from forensic material obtained from persons—

- (a) by carrying out forensic procedures authorised under Part 3, or a corresponding law, if the persons have become persons to whom Part 3A applies; and
- (b) by carrying out forensic procedures authorised under Part 3A or a corresponding law;

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**"prescribed offence"** means—

- (a) an indictable offence; or
- (b) an offence under the law of a jurisdiction in which a corresponding law is in force for which the maximum penalty is, or includes, imprisonment for two years or more or for an indefinite term;

**"statistical index"** means an index of information that—

- (a) has been derived from the analysis of biological material obtained from persons by carrying out forensic procedures authorised under this Act, or a corresponding law, or otherwise; and
- (b) has been compiled for statistical purposes; and
- (c) cannot be used to discover the identity of persons from whom the biological material was obtained;

**"suspects index"** means an index of DNA profiles derived from forensic material obtained from persons—

- (a) by carrying out forensic procedures authorised under Part 3, or a corresponding law; and
- (b) by carrying out forensic procedures authorised under Part 2B if an assimilation order has been made in relation to the material or a court has ordered, in accordance with a corresponding law, that the forensic material be treated as if it were forensic material obtained from a person under suspicion;

**"unknown deceased persons index"** means an index of DNA profiles derived from biological material obtained from deceased persons whose identities are unknown;

**"volunteers (limited purposes) index"** means an index of DNA profiles derived from forensic material obtained from persons by carrying out forensic procedures authorised under Part 2B, or a corresponding law, where the person giving informed consent to the forensic procedure has specifically consented to the information being stored on this index and being used for specified purposes;

**"volunteers (unlimited purposes) index"** means an index of DNA profiles derived from forensic material obtained—

- (a) from persons by carrying out forensic procedures authorised under Part 2B, or a corresponding law, where the person giving informed consent to the forensic procedure has specifically consented to the information being stored on this index and being used for the purposes of a criminal investigation or any other purposes for which the DNA database system may be used under this Part; and
- (b) from deceased persons whose identity is known.

**DNA database system**

**46B.** (1) The Commissioner of Police may maintain a DNA database system.

(2) The Minister may—

- (a) enter into an arrangement with the Minister responsible for the administration of a corresponding law, providing for the exchange of information recorded in the DNA database system kept under this section and a database kept under the corresponding law; and
- (b) enter into an arrangement with the Minister responsible for the administration of a corresponding law of the Commonwealth, providing for the exchange of information recorded in the DNA database system kept under this section and a database kept by the Commonwealth that is to be, or has been, compiled from information recorded in the DNA database system kept under this section and databases kept under corresponding laws.

(3) A person who stores a DNA profile derived from forensic material obtained by carrying out a forensic procedure under this Act on a database other than the DNA database system is guilty of an offence, unless—

- (a) the DNA profile is stored in such a way that it is not possible to identify the person from whom the material was obtained or to whom the material relates; or
- (b) the DNA profile is stored on a database kept under a corresponding law or kept by the Commonwealth in accordance with an arrangement entered into under subsection (2); or
- (c) the DNA profile is temporarily stored on a database maintained in accordance with the regulations for purposes connected with the administration of this Act.

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

(4) A person who intentionally or recklessly—

- (a) causes the supply of biological material for the purpose of storing a DNA profile on the DNA database system; or
- (b) stores a DNA profile on the DNA database system,

in circumstances in which that storage is not authorised by this Act (or a corresponding law) is guilty of an offence.

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

**Removal of information from DNA database system**

**46C.** (1) The Commissioner of Police must ensure that a DNA profile derived from forensic material obtained under this Act or a corresponding law is not retained on the DNA database system beyond the time the destruction of the material is required under this Act or the corresponding law<sup>1</sup>.

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(2) A DNA profile derived from biological material obtained from a missing person and stored on the missing persons index of the DNA database system must, if the missing person is found and requests, in writing, removal of the DNA profile, be removed from that index as soon as practicable after the request.

(3) A person who intentionally or recklessly causes information to be retained on the database system in contravention of this section is guilty of an offence.

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

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

<sup>1</sup> This means, for example, that where an order is made authorising the retention of forensic material for a specified period, a DNA profile derived from the material can remain on the database for that specified period (but will have to be removed when the material is required to be destroyed).

**Access to and use of DNA database system**

**46D.** (1) No person may have access to information stored on the DNA database system that identifies a person except for the following purposes:

- (a) for the purposes of a criminal investigation; or
- (b) for the purposes of proceedings for a criminal offence; or
- (c) for the purposes of determining whether it is necessary to carry out a forensic procedure under this Act; or
- (d) for the purposes of making the information available to the person to whom the information relates; or
- (e) for the purposes of administering the DNA database system; or
- (f) for the purposes of an arrangement with the Commonwealth, or another State or a Territory under this Part; or
- (g) for the purposes of an investigation by the Ombudsman or the Police Complaints Authority.

(2) Subject to subsection (3), a person who has access to information stored on the DNA database system must not compare a DNA profile stored on an index of the DNA database system specified in column 1 of the following table with a DNA profile stored on an index of the DNA database system specified in another column of the table if—

- (a) "no" is shown in that other column in relation to the index; or
- (b) "if within purpose" is shown in that other column in relation to the index and the comparison is carried out for a purpose other than a purpose for which the DNA profile was placed on the index.

	<b>crime scene</b>	<b>suspects</b>	<b>volunteers (limited purposes)</b>	<b>volunteers (unlimited purposes)</b>	<b>offenders</b>	<b>missing persons</b>	<b>unknown deceased persons</b>
<b>crime scene</b>	yes	yes	if within purpose	yes	yes	yes	yes
<b>suspects</b>	yes	no	no	no	yes	no	yes
<b>volunteers (limited purposes)</b>	if within purpose	no	no	no	if within purpose	if within purpose	if within purpose
<b>volunteers (unlimited purposes)</b>	yes	no	no	no	yes	yes	yes
<b>offenders</b>	yes	yes	no	no	yes	yes	yes
<b>missing persons</b>	yes	yes	yes	yes	yes	yes	yes
<b>unknown deceased persons</b>	yes	yes	yes	yes	yes	yes	no ( <i>see</i> subsection (3)(b))

(3) However—

- (a) a person who has access to information stored on the DNA database system may compare DNA profiles stored on the DNA database system in contravention of subsection (2) if the comparison is made solely for the purposes of administering the DNA database system; and
- (b) a person who has access to information stored on the DNA database system may compare a DNA profile stored on the unknown deceased persons index with other DNA profiles stored on that index if the DNA profile was derived from material obtained from an incomplete body or a body part.

(4) If the regulations prescribe any other index of the DNA database system, the regulations may specify whether or not DNA profiles stored on that index may be compared with DNA profiles stored on other indexes of the DNA database system.

(5) A person—

- (a) who gains access to information stored on the DNA database system in contravention of subsection (1); or
- (b) who compares DNA profiles stored on the DNA database system otherwise than as authorised by subsections (2) and (3) or by regulation under subsection (4),

is guilty of an offence.

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

#### **Transfer of information to suspects index following assimilation order**

**46E.** If an assimilation order is made in relation to forensic material, a DNA profile derived from the material and stored on the volunteers (limited purposes) index or the volunteers (unlimited purposes) index must be transferred to the suspects index.

**Part 6—Miscellaneous****Withdrawal of authority to carry out forensic procedure where that authority is based on consent**

**46F.** (1) If a person has consented to a forensic procedure under this Act, and there is no authority to carry out the procedure independently of that consent, the person may, by withdrawing the consent, withdraw the authority to carry out the procedure at any time before 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 authority to carry out a forensic procedure is withdrawn under subsection (1), the procedure may only be continued or resumed if—

(a) an order is made under this Act authorising the forensic procedure; or

(b) the procedure is authorised under some other law.

(4) The withdrawal of authority to carry out a forensic procedure under this section—

(a) in the case of a category 3 (suspects) procedure or a category 4 (offenders) procedure—does not invalidate the taking of evidence before the authority was withdrawn; but

(b) in any other case—invalidates the taking of evidence.

**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 a serious 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

(ea) the disclosure is necessary for the purpose of determining whether it is necessary to carry out a forensic procedure under this Act; 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 Act; or
- (j) the person to whom the information relates consents to the disclosure.

(1a) A person who has, or has had, access to information stored on the DNA database system must not disclose the information except—

- (a) for the purposes of a criminal investigation; or
- (b) for the purposes of proceedings for a criminal offence; or
- (c) for the purposes of determining whether it is necessary to carry out a forensic procedure under this Act; or
- (d) for the purposes of making the information available to the person to whom the information relates; or
- (e) for the purposes of administering the DNA database system; or
- (f) for the purposes of an arrangement with the Commonwealth, or another State or a Territory under this Act; or
- (g) for the purposes of an investigation by the Ombudsman or the Police Complaints Authority.

(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, in proceedings for an order under Part 3, authorises the publication.

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

**Forensic material lawfully obtained in another jurisdiction**

**49.** Forensic material lawfully obtained under a law of another jurisdiction (before or after the commencement of this section) may be retained and used in this State for investigative, evidentiary or statistical purposes despite the fact that the material was obtained in circumstances in which this Act would not authorise the material to be obtained, or in accordance with requirements that are less stringent than (or are otherwise substantively different to) the requirements that would apply under this Act.

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**State Records Act 1997 not to apply**

**50.** The *State Records Act 1997* does not apply to forensic material or the DNA database system.

**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—Serious offences**

The description of the offence is given for ease of reference only.

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Offence	Description
<i>Criminal Law Consolidation Act 1935</i>	
Section 86A	Using a motor vehicle without consent—first offence
<i>Firearms Act 1977</i>	
Section 11	Possession and use of firearms
Section 23	Duty to register firearms
Section 29A	Possession of silencer and other parts of firearms
<i>Summary Offences Act 1953</i>	
Section 6(1)	Assaulting police
Section 15	Carrying an offensive weapon etc
Section 15A	Possession of body armour
Section 17	Being on premises for an unlawful purpose
Section 17A	Trespassing on premises
Section 23	Indecent behaviour and gross indecency
Section 33	Indecent or offensive material
Section 41	Unlawful possession of personal property
Section 62	Making a false report to police
Section 62A	Creating a false belief as to events calling for police action

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**APPENDIX**

**LEGISLATIVE HISTORY**

**Amendments**

The *Criminal Law (Forensic Procedures) Act 1998* amended the following:

*Summary Offences Act 1953*

**Transitional provisions**

*(Transitional provision from Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Act 2002, s. 44)*

44. (1) The provisions of the principal Act governing forensic procedures apply, as amended by this Act, to forensic procedures conducted after the commencement of the amendments even though an offence or a suspected offence to which the procedures relate was or may have been committed before the commencement of the amendments.

(2) A DNA profile stored on a database maintained under the principal Act as in force immediately before the commencement of Part 5A (inserted by this Act) may be stored on the DNA database system established under Part 5A as if it were a DNA profile obtained after the commencement of Part 5A.

**Legislative History**

*(entries in bold type indicate amendments incorporated since the last reprint)*

Section 3:	definitions of "appropriate authority" and "appropriate representative" repealed by 49, 2002, s. 3(a) definitions of "assimilation order", "category 1 (consent) procedure", "category 2 (volunteers) procedure", "category 3 (suspects) procedure" and "category 4 (offenders) procedure" inserted by 49, 2002, s. 3(a) definition of "closest available next of kin" inserted by 49, 2002, s. 3(b) definition of "corresponding law" substituted by 49, 2002, s. 3(b) definition of "DNA database system" inserted by 49, 2002, s. 3(c) definition of "forensic procedure" substituted by 49, 2002, s. 3(d) definition of "guardian" inserted by 49, 2002, s. 3(d) definition of "intrusive forensic procedure" amended by 49, 2002, s. 3(e), (f) definition of "offenders index" inserted by 49, 2002, s. 3(g) definition of "retention order" inserted by 49, 2002, s. 3(h) definition of "senior police officer" amended by 49, 2002, s. 3(i) definition of "serious offence" inserted by 49, 2002, s. 3(j) definitions of "volunteers (limited purposes) index" and "volunteers (unlimited purposes) index" inserted by 49, 2002, s. 3(k) redesignated as s. 3(1) by 49, 2002, s. 3(l) inserted by 49, 2002, s. 3(l)
Section 3(2) and (3):	inserted by 49, 2002, s. 3(l)
Section 4:	amended by 49, 2002, s. 4
Section 5:	amended by 49, 2002, s. 5
Section 6(2):	substituted by 49, 2002, s. 6
Section 7:	repealed by 49, 2002, s. 7
	Division 2 of Part 2 comprising ss. 8, 9 and heading repealed by 49, 2002, s. 8
Section 13:	substituted by 49, 2002, s. 9
	Part 2A comprising ss. 13A - 13D and headings inserted by 49, 2002, s. 10
	Part 2B comprising ss. 13E - 13I and headings inserted by 49, 2002, s. 10
Part 3 heading:	substituted by 49, 2002, s. 11

**Division 1 of Part 3** comprising s. 14 and heading **repealed** and ss. 14, 15 and heading **inserted in its place** by 49, 2002, s. 12

**Division 2 of Part 3** comprising ss. 15, 16 and heading **repealed** and s. 16 and heading **inserted in its place** by 49, 2002, s. 12

**Part 3 Division 3 heading:**

**Section 17:**

**Section 18(2):**

**Section 18(3):**

**Section 18(4):**

**Section 19:**

**Section 21(3):**

**Section 23(1):**

**Section 23(2):**

**Section 23(3):**

**Section 24(2):**

**Section 26(1):**

**Section 26(2):**

**Section 26(3):**

**Section 28(1):**

**Section 28(2):**

**Section 28(3):**

amended by 49, 2002, s. 13

amended by 49, 2002, s. 14

amended by 49, 2002, s. 15(a)

substituted by 49, 2002, s. 15(b)

amended by 49, 2002, s. 15(c)

amended by 49, 2002, s. 16

amended by 49, 2002, s. 17

amended by 49, 2002, s. 18(a)

amended by 49, 2002, s. 18(b)

amended by 49, 2002, s. 18(c)

amended by 49, 2002, s. 19

amended by 49, 2002, s. 20(a)

amended by 49, 2002, s. 20(b)

amended by 49, 2002, s. 20(c)

amended by 49, 2002, s. 21(a)

substituted by 49, 2002, s. 21(b)

amended by 49, 2002, s. 21(c), (d)

**Division 8 of Part 3** comprising ss. 29, 30 and heading amended by 57, 2000, ss. 15, 16; **repealed** and s. 29 and heading **inserted in its place** by 49, 2002, s. 22

**Division 9 of Part 3** comprising s. 31 and heading **repealed** by 49, 2002, s. 22

**Part 3A** comprising ss. 30, 31 and heading **inserted** by 49, 2002, s. 22

**Section 32:**

**repealed** by 49, 2002, s. 23

**Division 1A of Part 4** comprising s. 34A and heading **inserted** by 49, 2002, s. 24

**Section 35:**

**Section 36:**

**Section 37(2a):**

**Section 38(1):**

**Section 38(2):**

**Section 38(3):**

**Section 38(4):**

**Section 38(5):**

substituted by 49, 2002, s. 25

**repealed** by 49, 2002, s. 25

**inserted** by 49, 2002, s. 26

amended by 49, 2002, s. 27(a)

substituted by 54, 2000, s. 4; amended by 49, 2002, s. 27(b)

amended by 49, 2002, s. 27(c), (d)

amended by 49, 2002, s. 27(e)

amended by 49, 2002, s. 27(f)

**Division 4A of Part 4** comprising s. 38A and heading **inserted** by 49, 2002, s. 28

**Part 4 Division 5 heading:**

**Part 4A heading:**

**Part 4A Division 1 heading:**

**Section 38B:**

**Section 39(1):**

**Section 39(2):**

**Section 39(3):**

**Section 40(2):**

**Section 41:**

**Part 4A Division 2 heading:**

**Section 42(1):**

**Section 42(3):**

**Part 4 Division 6 heading:**

**Section 43:**

**Part 4 Division 7 heading:**

**repealed** by 49, 2002, s. 29

**inserted** by 49, 2002, s. 29

**inserted** by 49, 2002, s. 29

**inserted** by 49, 2002, s. 29

amended by 49, 2002, s. 30(a)

amended by 49, 2002, s. 30(b)

amended by 49, 2002, s. 30(c)

amended by 49, 2002, s. 31

amended by 49, 2002, s. 32

**inserted** by 49, 2002, s. 33

amended by 49, 2002, s. 34(a)

**inserted** by 49, 2002, s. 34(b)

**repealed** by 49, 2002, s. 35

**repealed** by 49, 2002, s. 35

**repealed** by 49, 2002, s. 35

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<b>Section 44:</b>	repealed by 49, 2002, s. 35
	<b>Division 3 of Part 4A comprising ss. 43, 44 and heading inserted by 49, 2002, s. 35</b>
	<b>Division 4 of Part 4A comprising ss. 44A - 44D and heading inserted by 49, 2002, s. 35</b>
<b>Section 45(1):</b>	substituted by 49, 2002, s. 36
<b>Section 46(1):</b>	amended by 49, 2002, s. 37(a)
<b>Section 46(2):</b>	substituted by 49, 2002, s. 37(b)
	<b>Part 5A comprising ss. 46A - 46E and heading inserted by 49, 2002, s. 38</b>
<b>Section 46F:</b>	inserted by 49, 2002, s. 39
<b>Section 47(1):</b>	amended by 49, 2002, s. 40(a)-(c)
<b>Section 47(1a):</b>	inserted by 49, 2002, s. 40(d)
<b>Section 48:</b>	amended by 49, 2002, s. 41
<b>Section 49:</b>	amended by 57, 2000, s. 17; substituted by 49, 2002, s. 42
<b>Section 50:</b>	substituted by 49, 2002, s. 42
<b>Schedules 1 and 2:</b>	repealed by 49, 2002, s. 43
<b>Schedule:</b>	inserted by 49, 2002, s. 43 (Sched.)