UNDER AGE AND UNDER INVESTIGATION: FORENSIC PROCEDURES ON CHILDREN

A paper presented at the Children's Legal Service Conference
11 October 2014

By Felicity Graham – Trial Advocate
Aboriginal Legal Service (NSW/ACT) – Western Region

> *[Soon…] There will be no jury, no horde of detectives and witnesses, no charges and countercharges, and no attorney for the defense. These impedimenta of our courts will be unnecessary. The State will merely submit all suspects in a case to the tests of scientific instruments, and as these instruments cannot be made to make mistakes nor tell lies, their evidence would be conclusive of guilt or innocence, and the court will deliver sentence accordingly.*[1]

[1] "Electric Machine to Tell Guilt of Criminals", *The New York Times* (10 September 1911).

CONTENTS

CONTENTS

CHILDREN CANNOT CONSENT

1. Children have a special status in the forensic procedures legislation.

2. The *Crimes (Forensic Procedures) Act 2000* (NSW) ("the Act") does not permit a child to consent to a forensic procedure autonomously. The Act does not permit a police officer to independently order a child to undergo a procedure.

3. Except for some limited situations in which a parent or guardian may consent on behalf of a child, it is necessary for the police to apply to a court to obtain any order for a forensic procedure to be performed on a child.

When can a child be required to undergo a forensic procedure?

4. The police may perform a forensic procedure on a child in the following situations:

    (1) Following a final order of a Magistrate of the Children's against a **suspect** child (Part 5, s 24)

    (2) Following an interim order of an authorised officer (Magistrate, Registrar of the Local Court or employee authorised by the Attorney-General) against a **suspect** child (Part 5, s 32)

    (3) Following an order of any court against a **serious indictable offender** who is serving a sentence of imprisonment in a correctional centre or other place of detention that the procedure is justified in all the circumstances (Part 7, s 74)

    (4) Following an order of any court against an **untested former offender** that the procedure is justified in all the circumstances (Part 7A, s 75L)

    (5) Following an order of any court against an **untested registrable person** under the *Child Protection (Offenders Registration) Act 2000* who is required to comply with reporting obligations that the procedure is justified in all the circumstances (Part 7B, s 75ZC)

    (6) Following the consent of a **volunteer child** (not including a suspect, person under 10 years or age or excluded volunteer), whose parent or guardian consents, to a request by a police officer for the child to undergo a forensic procedure (Part 8, s 77)

    (7) Following an order of a Magistrate against a **volunteer child** (Part 8, s 80)

    (8) In relation to a **child under 10** years of age – if a parent or guardian of the child gives informed consent to the carrying out of the forensic procedure (Part 8A, s 81C)

    (9) In relation to a **child under 10** years of age – if the forensic procedure is carried out on the child pursuant to a Magistrate's order (Part 8A, s 81F)

5. The focus of this paper will be on orders made against child suspects.

‘NEW AND UNPRECEDENTED POWERS’

The traditional right against self-incrimination

6. In responding to a forensic procedure application, it is important to consider the legislation in the context of the traditional right against self-incrimination.

7. In the seventeenth century a rule developed that an accused person could not be examined on oath – the rule was encapsulated in the maxim *nemo debet prodere se ipsum* (no one may be compelled to betray himself) or as above *nemo tenebatur prodere seipsum* (his fault was not to be wrung out of himself). Later, it became accepted that a person has a right to refuse to answer questions about an offence he or she may have committed.

8. In *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 (“*Sorby v The Commonwealth*”), the High Court considered the privilege against self-incrimination in the context of the plaintiffs being required to answer questions as witnesses at a Royal Commission. Documents and other things were seized from the homes of the witnesses under search warrants. Neither of the plaintiffs had been charged with any criminal offence. They were not under arrest. Gibbs CJ said at 288-289:

> It has been a firmly established rule of the common law, since the seventeenth century, that no person can be compelled to incriminate himself. A person may refuse to answer any question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal": *Lamb v. Munster* (1882) 10 QBD 110, at p 111.
>
> …
>
> Although the legislature may abrogate the privilege, there is a presumption that it does not intend to alter so important a principle of the common law.

9. Gibbs CJ continued in *Sorby v The Commonwealth* and said at 294-295:

> In the absence of binding authority the matter must be approached from the standpoint of principle. If a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged, his answers may place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence [by virtue of an express statutory prohibition to that effect in s 6DD *Royal Commissions Act 1902*]. The traditional objection that exists to allowing the executive to compel a man to convict himself out of his own mouth applies even when the words of the witness may not be used as an admission. It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover the existence of such a power tends to lead to abuse and to "the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice": *Validity of Section 92(4) of The Vehicles Act 1957 (Saskatchewan)* [1958] SCR 608, at p 619. It is true that in some cases the legislature may consider that it can only achieve the intended purpose of the statute by limiting or abrogating the privilege against self-incrimination, but, as I have said, if the legislature intends to render the privilege unavailable it must manifest clearly its intention to do so.

10. In the same case, Mason, Wilson and Dawson JJ said at 309 in relation to the scope of the privilege:

> We reject the submission that the privilege is merely a rule of evidence applicable in judicial proceedings and that it cannot be claimed in an executive inquiry. We adhere to the conclusion we expressed in *Pyneboard* that the privilege against self-incrimination is inherently capable of applying in non-judicial proceedings. See *Kempley* [1944] ALR 249, esp. at pp. 253 (per Starke J); 254 (per Williams J); *Ex parte Grinham; Re Sneddon* (1959) 61 SR (NSW) 862; *Commissioner of Customs and Excise v Harz* [1967] 1 AC 760 at p. 816.

11. Mason, Wilson and Dawson JJ further held that "[t]he privilege against self-incrimination is deeply ingrained in the common law.": at 309.

12. Further, Murphy J said at 311:

> The privilege against self-incrimination is part of the common law of human rights. Unless excluded, it attaches to every statutory power (judicial or otherwise) to require persons to supply information (*Pyneboard Pty. Ltd. v. Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328). Subject to any constitutional constraint, the privilege may be excluded or qualified by statute. Because the privilege is such an important human right, an intent to exclude or qualify the privilege will not be imputed to a legislature unless the intent is conveyed in unmistakable language.

13. In *Petty and Maiden v The Queen* (1991) 173 CLR 95; [1991] HCA 34 ("*Petty and Maiden*") at [2] by Mason CJ, Deane, Toohey and McHugh JJ described the right as follows:

> A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country.

14. See also *Police Service Board and Another v Morris; Police Service Board and Another v Martin* [1985] HCA 9; (1985) 156 CLR 397 in relation to the privilege against self-incrimination in the context of police officers refusing to provide answers in disciplinary proceedings.

15. It is suggested that the firmly established rule that no person can be compelled to incriminate himself or herself ought to be applied in light of the changing technological landscape since the seventeenth century. Whereas, earlier cases have focussed on a person refusing to answer questions or to produce documentary material, in the context of a witness giving evidence in a court or tribunal, it is suggested that the rule is not constrained to those circumstances. Rather, those circumstances were the commonplace examples of the application of the rule given the resources available to the investigating authorities at the time. Now, approaching the matter from the standpoint of principle, it is suggested that the phrases "to produce any document or thing" or "supply information to any person in authority" should be interpreted to include producing any thing from the person's body or providing or cooperating with the collection of information from their body in accordance with a forensic procedure. Accordingly, it is suggested that the traditional right against self-incrimination or right to silence ordinarily extends to circumstances that involve the carrying out of a forensic procedure on a person.

16. As recognised by Simpson J in *Orban v Bayliss* [2004] NSWSC 428 ("*Orban v Bayliss*") at [30]:

> The *Forensic Procedures Act* conferred **new and unprecedented powers** upon, *inter alia,* magistrates that would have the result of compelling persons suspected of criminal offences (including those against whom charges have not been laid) to cooperate in the investigation of the crime(s) of which they are suspected, and to provide, from their own bodies, evidence which may be used against them (and which, of course, may also be used to exonerate them). The Parliament was, in my view, seeking to maintain a delicate balance between preserving the traditional rights of citizens and individuals, including those suspected of crime, to decline to participate in investigations or to cooperate with investigating authorities, and the overall interests of the community and of justice in facilitating the investigation of crime, and the administration of justice, in securing the conviction of the guilty and the non-prosecution or acquittal of the not guilty. The Act was a specific response to scientific and technological developments, but in the context of valued traditional civil liberties. (Emphasis added)

17. In *KC v Sanger* [2012] NSWSC 98 ("*KC v Sanger*"), RA Hulme J held that whilst the Act has undergone various amendments since it was first enacted in 2000, the overview of its provisions by Simpson J in *Orban v Bayliss* (above) remains apposite: at [4].

18. In *Fawcett v Nimmo & Anor* [2005] NSWSC 1047 ("*Fawcett v Nimmo*"), Grove J characterised the new legislation in these terms:

> 14 The Forensic Procedures Act recognizes that mandatory procedures have a potential to represent the antithesis of historic rights of citizens against self incrimination and the statute legislates requirements and limitations in order to strike a necessary balance between the appropriate use of available scientific means for investigating suspected crime and those rights.

19. A contrary view has however been expressed by the NSW Court of Appeal in *Charara v Commissioner of Police* by Campbell JA (Giles JA and McColl JA agreeing) at [74]-[75].

20. The case dealt with an order made by a police officer under s 70 of the Act for the taking of a hair sample, following the refusal of a serious indictable offender to consent to providing a buccal swab. Campbell JA said the following:

> 74 I do not accept that this is a field where the privilege against self-incrimination has any role to play. The scope of that privilege is stated in *Cross on Evidence*, 7th Australian ed, (2004), par [25065]:
>
> > "No one is bound to answer any question or produce any document if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or to conviction for a crime."
>
> 75 Cross goes on to say, at [25095]:
>
> > "The rule prevents oral and documentary disclosures only. One may, therefore, be required to provide a finger-print or show one's face for identification or furnish a sample of breath for analysis notwithstanding that compliance with the requirement may mean exposure to civil penalty or conviction. This is subject to the judge's power to exclude the evidence at trial where such requirement is unlawful or unfair."
>
> Taking of the hair sample is precisely analogous to taking a finger print, or taking a sample of breath for analysis.

21. However, it is suggested that this is not in line with principle as expounded by the High Court in *Sorby v The Commonwealth*, *Petty and Maiden* and elsewhere.

22. It should be noted that the above may derive from what was said by Gibbs CJ in *Sorby v The Commonwealth* in the context of witnesses being required to answer questions at a Royal Commission (as opposed to suspects in the presence of a police officer) and in circumstances where the Victorian legislation mentioned contained an express statutory power for breath-testing at 292:

> When the learned author of *Wigmore on Evidence* spoke of "testimonial disclosures", he was drawing a distinction between statements or other communications made by the witness on the one hand and real or physical evidence provided by the witness on the other. The privilege prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of the witness, as to the condition of his body. **For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he may be identified, or to speak or to write so that the jury or another witness may hear the voice or compare his handwriting.** That this was the significance of the distinction between "testimonial" and other disclosures was recognised in *King v McLellan*, where it was held that the protection afforded by the rule against self-incrimination did not extend to entitle a person who had been arrested to refuse to furnish a sample of his breath for analysis when required to do so under s. 80F(6) of the *Motor Car Act 1958* (Vict.). (Emphasis added)

23. Part of the above extract (in bold) from *Sorby v The Commonwealth* is also referred to in *Ross on Crime* at [6.725] under the heading "Right of police to obtain fingerprints from a suspect". Extracted as it is, without reference to the specific legislative provision, for example, authorising breath-testing, or the facts of the case relating to witnesses at a Royal Commission, is apt to mislead.

The principle of legality

24. The principle of legality demands that Parliament's intention to remove, curtail or wholly abrogate a fundamental right, freedom or immunity be demonstrated by unmistakable and unambiguous language: *Coco v The Queen* (1994) 179 CLR 427 at 437.

25. The privilege against self-incrimination has been intruded upon, qualified or wholly abrogated by various pieces of legislation including provisions requiring a person to provide their fingerprints or a driver of a car to provide a sample of their breath or to respond to a form of demand in relation to the name of the driver.

26. The starting point therefore for the analysis of the Act is that in line with the common law, but for the provisions of the Act, suspects would be entitled to refuse to participate in or cooperate with forensic procedures. However, the powerful advancements in technology and forensic science have permitted and encouraged a significant curtailment of the otherwise long-standing right of suspects against self-incrimination. The Act forces a person to provide evidence which will possibly incriminate them and it takes away their right to refuse to provide that evidence. In doing so, Parliament has clearly expressed its intention to interfere with the right against self-incrimination.

27. The Act, however, creates rigorous pre-conditions that must be met before a citizen may be subjected to a forensic procedure. In defending an application, a stringent adherence to the requirements of the Act should be insisted upon. As held by Hall J in *Walker v Budgen* [2005] NSWSC 898; (2005) 155 A Crim R 416 at [53]:

> Authorisation under the Act can only be granted strictly in accordance with its provisions.

28. To the extent that there is any doubt about the interpretation of the Act, it should be resolved in favour of the 'suspect'. In *Stephanopoulos v Police* (2000) 79 SASR 91; 115 A Crim R 450, the Supreme Court of South Australia considered the *Criminal Law (Forensic Procedures) Act 1998* (SA). Martin J said:

> The Act authorises the performance of forensic procedures upon person against their consent. Those procedures include invasive procedures. In these circumstances, it is often said that a strict construction should be adopted. … I proceed on the basis, therefore, that while it is important for the Court to adopt a construction which will give effect to the provisions in the legislation, if there is any doubt or ambiguity as to whether section 49(2)(a) extends to the situation of the Appellant, that doubt or ambiguity should be resolved in favour of the Appellant.

29. The correct approach to statutory construction of a law concerning the abrogation of a privilege against self-incrimination was recently considered in *Baff v New South Wales Commissioner of Police* [2013] NSWSC 1205 by Adamson J at [65-68]. Her Honour referred to the principles in *Al-Kateb v Godwin* [2004] HCA 37 and *Electrolux Home Products Pty Limited v Australian Workers' Union* [2004] HCA 40, and concluded by referring to *R v Secretary of State for the Home Department; Ex parte Simm* [1999] UKHL 33 per Lord Hoffman on the principle of legality:

> Parliament can, if it chooses, legislate contrary to fundamental principles of human rights… The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Authorising what would otherwise be a tortious act

30. In many respects, the Act authorises what would otherwise be a tortious act, for example, an assault on a person (although this is not the case in relation to all forensic procedures: eg. the taking of a photograph) or an unlawful confinement. This is another basis upon which the legislation ought to be construed and applied strictly. In other situations involving the invasion of the state upon the rights and interests of the individual, courts have emphasised the importance of this strict approach.

31. In *George v Rockett & Anor* [1990] HCA 26; (1990) 170 CLR 104 ("*George v Rockett*"), the High Court considered Queensland search warrant legislation. The Court in their joint judgment held at 110:

> State and Commonwealth statutes have made many exceptions to the common law position and s. 679 is a far reaching one. Nevertheless, in construing and applying such statutes, it needs to be kept in mind that they authorise the invasion of interest which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

32. In *Ousley* [1997] 97 A Crim R 195, the High Court considered the *Listening Devices Act 1969* (Vic). Kirby J (in dissent) said at 244-245:

> In a sense, therefore, the attack on the warrants presents a legal technicality. However, our criminal law and procedure are replete with technicalities raised in the vindication of legal requirements, including those defensive of basic rights. At the heart of the appellant's arguments lies an appeal to an attitude of strictness which courts in common law jurisdictions have taken in challenges to warrants, including those permitting undisclosed listening to, and recording of, private conversations. Except for a valid warrant, such eavesdropping would involve both criminal offences and civil wrongs. This court has consistently required a strict approach. It should do so again on this occasion.

33. Kirby J continued at 252:

> It is well established that legislation authorising intrusion onto an individual's property and privacy is strictly construed. In part, this rule is but an illustration of the general principle that laws diminishing, or authorising the diminution of, the rights of the individual must be clear.

34. It is notable (and potentially persuasive in submissions) that the search warrant and listening device examples referred to above authorise interferences with privacy in the home or during otherwise private conversations, whereas the forensic procedure legislation authorises much more intrusive conduct by police vis-à-vis individuals.

Consequences of orders being made

35. It is important to note that the consequences of a successful application are potentially far-reaching.

36. Any forensic material obtained from a forensic procedure may be kept and used in future matters beyond the matter for which the forensic procedure was sought and carried out.

37. The consequences are particularly sweeping in relation to DNA and fingerprints which almost certainly remain the same throughout a person's lifetime.

38. In relation to DNA, see the provisions relating to the DNA Database System in sections 90-94 and in particular, s 93 which provides for permissible matching of DNA profiles between the various indexes on the DNA Database System.

WHAT IS A FORENSIC PROCEDURE?

39. The Act contains a number of definitions including in s3(1) the following:

> ***forensic material*** means:
> (a) samples, or
> (b) hand prints, finger prints, foot prints or toe prints, or
> (c) photographs, or
> (d) casts or impressions,
> taken from or of a person's body.
>
> ***forensic procedure*** means:
> (a) an intimate forensic procedure, or
> (b) a non-intimate forensic procedure,
> (c) (Repealed)
> but does not include:
> (d) any intrusion into a person's body cavities except the mouth, or
> (e) the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

Not for the sole purpose of establishing identity

40. Whilst paragraph (e) makes it clear, in accordance with the Note to that section, "that the Act only applies to samples taken for forensic purposes and not to samples taken purely to establish the identity of a person", it appears that the operation of s 112 of the Act has the effect that the Act does not apply to the taking of certain samples for the dual purpose of establishing the identity of the person in custody and the forensic purpose of establishing the identity of the person as the offender. Section 112 provides:

> **112 Application of Act to taking of photographs, hand prints etc**
> This Act does not apply to the taking of photographs, hand prints, finger prints, foot prints or toe prints:
> (a) from a suspect who is under 14 years of age, if the suspect is in lawful custody as mentioned in section 136 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
> (b) from a suspect who is at least 14 years of age, if the suspect is in lawful custody as mentioned in section 133 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
> (c) from an offender as referred to in section 63 of the *Crimes (Sentencing Procedure) Act 1999*, or
> (d) from a person in accordance with section 138A or 138B of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

41. The issue was considered by the NSW Court of Criminal Appeal in the matter of *R v SA, DD and ES* [2011] NSWCCA 60. SA, DD and ES were among seven accused to stand trial in the District Court charged with an offence of causing grievous bodily harm with intent to inflict grievous bodily harm pursuant to s33 *Crimes Act 1900*: at [4]. At the time of arrest, ES and SA were 15 and DD was 14: at [5]. Whilst in police custody, the police took photographs of each of them and used them in photo-board arrays shown to other witnesses for identification purposes. The police also took fingerprints from ES and DD which were subsequently matched to a chair used as a weapon in the attack and a chewing gum wrapper in the victim's apartment: at [6], [8] and [10].

42. The photographs and fingerprints were taken, not pursuant to the provisions of the *Crimes (Forensic Procedure) Act 2000* but pursuant to s 133 of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("*LEPRA*"), set out here:

133 Power to take identification particulars

(1) A police officer may take or cause to be taken all particulars that are necessary to identify a person who is in lawful custody for any offence.

(2) If the person is over the age of 14 years, the particulars may include the person's photograph, finger-prints and palm-prints.

(3) This section does not authorise a police officer to take from any person, or to require any person to provide, any sample of the person's hair, blood, urine, saliva or other body tissue or body fluid.

(4) Subsection (3) does not affect a police officer's power to take any such sample, or to require the provision of any such sample, for the purposes of, and in accordance with the requirements of, any other Act or law.

Note. See, for example, the powers conferred by the *Crimes (Forensic Procedures) Act 2000*.

43. The trial judge held that the photographs and fingerprints were inadmissible and the Crown challenged that ruling on an appeal pursuant to s5F *Criminal Appeal Act 1912*.

44. In the District Court and in the proceedings before the NSWCCA, SA, DD and ES argued that the provisions of the Act had the effect of modifying the *LEPRA* provisions and requiring the consent of a magistrate to be obtained before taking photographs or fingerprints for the purpose of identification.

45. This was rejected. Blanch J (with whom McClellan CJ at CL and Hoeben J agreed) allowed the Crown appeal and set aside the order rejecting the evidence in the District Court. His Honour referred to the earlier legislative provision in s 353A(3) of the *Crimes Act 1900* which was replaced with s 133 *LEPRA* and stated as follows:

> 26 The settled law in this State relating to s353A(3) of the *Crimes Act* 1900 was restated in *R v McPhail* (1988) 36 A Crim R 390 where Lee CJ at CL (Hunt and Campbell JJ agreeing) said at 398 and 399:
>
> > "The section [ie s353A(3)] in defining the power of the officer to take finger prints etc, uses the expression 'all such particulars as may be deemed necessary for the identification of such person' and it is plain that this gives an officer a very wide discretion as to when particulars of identification can be required. The power of the police officer under the section is not limited to cases where he might suspect that identification will be in dispute at the trial but is available in every case where it is considered by him to be necessary for the identification of the accused in court in whatever circumstances that may arise."
>
> 27 In *Carr v The Queen* (1973) 172 CLR 662 the High Court said in refusing an application for special leave at page 663:
>
> > "The second limitation that is sought depends upon the same notion, namely, that the identification is for the purpose of identifying the person fingerprinted as a person who has been convicted and not for the purpose of identifying him with the offence. The Court of Criminal Appeal correctly rejected these contentions."
>
> …
>
> 33 It is quite clear from these authorities that a broad interpretation was accepted in New South Wales of police powers under s353A(3) of the *Crimes Act* 1900. It allowed the police to take fingerprints and photographs not only to establish the identity of a suspect but to use that evidence to prove the suspect had committed the crime.
>
> …
>
> 37 It is clear then that the *CFPA* when enacted contemplated the same broad interpretation of police powers given by the courts to the police under s353A(3) of the Crimes Act 1900 and it was intended that those powers not be restricted by the CFPA. When the *LEPRA* was enacted, the section referred to in s112 of the *CFPA* was simply changed to refer to s133 of *LEPRA* instead of s353A(3) of the

Crimes Act 1900. There is no suggestion at all of any change to the police powers and none should be read into the Act from the terms of s133 or any other section of either Act.

46. His Honour ultimately concluded at [42] that "s112 of the *CFPA* excludes in terms from the operation of the Act the taking of photographs and fingerprints from a suspect in lawful custody as mentioned in s133 of the *LEPRA*."

Intimate and non-intimate forensic procedures

47. The current act distinguishes between intimate and non-intimate forensic procedures, with consequences for the test to be applied on an application for an order. The definitions are set out in s 3(1) of the Act:

> ***intimate forensic procedure*** means any of the following:
> (a) an external examination of a person's private parts,
> (b) the carrying out on a person of an other-administered buccal swab,
> (c) the taking from a person of a sample of the person's blood,
> (d) the taking from a person of a sample of the person's pubic hair,
> (e) the taking from a person of a sample of any matter, by swab or washing, from the person's private parts,
> (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from the person's private parts,
> (g) the taking from a person of a dental impression,
> (h) the taking of a photograph of the person's private parts,
> (i) the taking from a person of an impression or cast of a wound from the person's private parts.
>
> ***non-intimate forensic procedure*** means any of the following:
> (a) an external examination of a part of a person's body, other than the person's private parts, that requires touching of the body or removal of clothing,
> (b) the carrying out on a person of a self-administered buccal swab,
> (c) the taking from a person of a sample of the person's hair, other than pubic hair,
> (d) the taking from a person of a sample (such as a nail clipping) of the person's nails or of matter from under the person's nails,
> (e) the taking from a person of a sample of any matter, by swab or washing, from any external part of the person's body, other than the person's private parts,
> (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from any external part of the person's body, other than the person's private parts,
> (g) the taking from a person of the person's hand print, finger print, foot print or toe print,
> (h) the taking of a photograph of a part of a person's body, other than the person's private parts,
> (i) the taking from a person of an impression or cast of a wound from a part of the person's body, other than the person's private parts,
> (j) the taking of measurement of a person's body or any part of a person's body (other than the person's private parts) whether or not involving the marking of the person's body.
> ***other-administered buccal swab*** means a buccal swab carried out by someone other than the person on whom it is carried out.
> ***private parts*** means a person's genital area, anal area or buttocks, and, in the case of a female or transgender person who identifies as a female, includes the person's breasts.
> ***self-administered buccal swab*** means a buccal swab carried out by the person on whom it is carried out.

48. In subs (3) the definition of 'sample' is expanded to beyond material personal to the suspect.

> For the purposes of this Act, a ***sample*** taken from a person includes a sample taken from the person that consists of matter from another person's body.

49. In *Orban v Bayliss* Simpson J discussed the distinction between intimate and non-intimate forensic procedures and the consequences for orders made by a Magistrate under the Act (as at 2004).[2]

> 29 What emerges from an analysis of these provisions is that the legislature perceived a distinction between the kinds of offences that would warrant the authorisation by a magistrate of forensic procedures against the will of a suspect. The extent to which an intrusive procedure may be so authorised is dependent upon the seriousness of the crime suspected, balanced against the intrusiveness of the procedure for which an order is sought.
>
> …
>
> 32 A forensic procedure (as defined in s3) necessarily involves, to a greater or lesser extent, some invasion of the personal privacy and personal bodily integrity of the person concerned. The degree to which that balance to which I have referred will warrant the making of an order that will have the consequence of causing some degree of invasion of personal privacy and personal bodily integrity is made to depend upon the interaction of two things – firstly, the seriousness of the crime of which the person is suspected, and secondly, the degree of invasion of personal privacy or integrity.
>
> 33 Reference to the definition of non-intimate forensic procedures in s3 shows that, in the main, those procedures involve limited invasion, and limited touching of the body, and no invasion or touching of genital, anal or female or trans gender breast areas. The degree of intrusion into personal privacy or bodily integrity is apparently perceived to be small in relation to those procedures. It is, presumably, for that reason that a magistrate is empowered to make an order for a forensic procedure even where the offence of which the person is suspected is a summary one.
>
> 34 By definition, the taking of a hair sample (other than pubic hair) is a non-intimate forensic procedure, but is specifically excluded from s25(c). This, presumably, is because of the nature of the procedure involved, which is deemed to be sufficiently invasive to warrant its being authorised only in relation to more serious offences: see the particular provisions relating to the taking of hair samples contained in s49.
>
> 35 Intimate forensic procedures, and the taking of hair samples other than pubic hair, and buccal swabs, may only be authorised where the offence of which the person is suspected is a prescribed offence (or a related offence.)[3]

50. These comments were made at a time when the Act distinguished between intimate forensic procedures, non-intimate forensic procedures, and a third category, namely the category of the taking of a sample by buccal swab.

A mere passive participant

51. In *Mullins v Lillyman* [2007] NSWSC 407 ("*Mullins v Lillyman*"), the plaintiff appealed against an order made by the Magistrate requiring the plaintiff to "attend at the 7-11 Store at 234 George Street, Sydney, by mutual agreement with Constable Lillyman

[2] This case referred to the provisions of the Act before they were substantially amended on 1 July 2007. In particular, s 25 was repealed and substantially replaced by an amended s 24. The old s 25 deemed the taking of a hair sample (other than pubic hair) and buccal swabs to be sufficiently invasive to warrant only being authorised in relation to more serious 'prescribed' offences. The old sections 24 and 25 are set out in full in Appendix A.

[3] Section 25 was repealed in July 2007 and replaced substantially by s 24. The classification of various forensic procedures has also changed, affecting whether it is required that the person is suspected of a prescribed offence or merely any other offence.

within twenty-eight (28) days for the purpose of taking groups of forensic photographs of his left arm": at [1]. The Magistrate had also made an order requiring the plaintiff to attend the police station for the purpose of taking forensic photographs of his left arm. That second order was not challenged on appeal: at [3].

52. The applicant had given evidence before the Magistrate, recorded at [11]-[14] including that:

> … What we're looking to do is actually attend the scene with [the plaintiff] and have him pose in a similar pose to what's depicted in the footage without his shirt, sot that we can clearly see the tattoo on his arm and placed in a similar situation as to what's depicted in the video footage in the hopes of a comparison between the two.

53. Buddin J concluded at [15] that:

> What seems tolerably clear from the evidence is that the plaintiff will be required to attend the scene of the crime and then take up various positions which correspond to those in which the offender was depicted in the video footage during the course of the incident. He will be photographed whilst doing so. The purpose of this requirement is to enable a comparison to be made between the plaintiff and the offender because … the material derived from the CCTV footage is not sufficiently clear to enable the comparison to be made. The comparison, it may be noted, will not be limited to the tattoos which the offender and the plaintiff display but will also include their facial features and their physiques.

54. After setting out the relevant definition of a non-intimate procedure and other provisions and referring to the common law position which would not have permitted the procedure and the requirements generally of the principle of legality, Buddin J said at [24]-[27]:

> 24 The language used by the legislature, namely that the NIPF involves "the taking of" a sample from, or in the present case "the taking of a photograph of a part of the body" of a suspect, suggests that the suspect is a mere passive participant in the conducting of the forensic procedure. A literal reading of the legislation provides no support for the proposition that the suspect is required to perform an active role. The legislation does not, for example, require a suspect to provide a sample of his or her voice by speaking. Such a requirement would mean that the suspect would be obliged to take an active role in the process.
>
> 25 Some support for the view which I have expressed can be found in **R v Kane** (2004) 144 A Crim R 296 in which Sully J, with whom Studdert and Dunford JJ agreed, made the following observations about the scope and operation of the Act:
>
> > The long title to the Act explains relevantly that the Act is intended "to make provision with respect to the powers to carry out forensic procedures *on certain persons …"*
> >
> > A careful examination of the s 3 definitions earlier herein quoted shows, in my opinion, that what is contemplated by the notion of a forensic procedure, whether intimate or non-intimate, is that it is a procedure actually carried out on the person of some specific individual. (pars 12-13).
>
> 26 The remarks made by the Minister for Police in his Second Reading Speech when introducing the legislation are to similar effect. The Minister said:
>
> > The bill provides a comprehensive regime regulating the taking and use of forensic material for the purposes of criminal investigation. It involves striking a balance between the need to enable police to effectively investigate crime and the civil liberties of suspects. The bill confirms the Government's commitment to addressing crime and improving the operation of the criminal justice system in New South Wales. <u>It will enable law enforcement agencies to identify or exclude suspects by comparing forensic material taken from them with material</u>

found at crime scenes. (Hansard, Legislative Assembly, 31 May 2000 at 6293) (emphasis added)

27 … the vice contained in the Magistrate's order … is that it requires the plaintiff to become an active participant in the investigation of the crime. Moreover it obliges the plaintiff to attend the scene of the crime and participate in the partial recreation of the crime. The only semblance of any connection between that kind of procedure and the legislation is that the procedure itself will be photographed.

55. At [29] Buddin J also referred to s 45 of the Act and noted that "[t]hat section makes it clear that the carrying out of the forensic procedure is to be kept quite separate from the interrogation process and/or conduct of the investigation itself." Buddin J concluded at [30] that "what is contemplated goes well beyond the statutory requirement that there be 'the taking of a photograph of a part of the body' of a person."

56. His Honour also referred to the appropriate place for the carrying out of a forensic procedure and the use of force for carrying out a procedure and said at [31]-[33]:

31 … In the normal course of events, forensic procedures, and for that matter interrogation of suspects, take place at a police station. That is where the necessary resources upon which police rely are maintained. Furthermore, safeguards to protect the integrity of any such procedure and the interrogation process itself can be provided in such an environment. Concerns about issues of privacy can also be addressed at police stations. Indeed s 44 of the Act is designed to afford reasonable privacy for a suspect who is the subject of the forensic procedure.

32 Against that background the conducting of a forensic procedure at the scene of the crime would represent a radical departure from time-honoured practice. There is nothing apparent in the legislation itself which raises the possibility that such procedures could be conducted at the scene of the crime. Of course a suspect may voluntarily engage in such a procedure at the scene of the crime, or otherwise assist police by, for example, participating in a "run-around". However such a scenario is somewhat removed from the present situation in which the suspect is required to participate in the forensic procedure.

33 Section 47 of the Act provides that a person authorised to carry out a forensic procedure on a suspect, or a police officer, may use reasonable force to enable the forensic procedure to be carried out. That may have come practical significance in the present context when it is borne in mind that the order appears to require the plaintiff to move from one position to another at the scene of the crime. The existence of such a power also serves to highlight the need to ensure that the intrusion upon the rights of a citizen which the legislation envisages must only be permitted in circumstances that are clearly authorised by the legislation.

An external examination and measurements

57. In *Coffen v Goodhart* [2013] NSWSC 1018 ("*Coffen v Goodhart")*, Fullerton J examined the term "an external examination of a part of the person's body" in the context of a final order having been made authorising the taking of a measurement of the suspect's height. Her Honour held at [9] that:

… it was necessary for her Honour to be satisfied that measuring the plaintiff's height involved an external examination of *a part* of his body. For my part, I am unable to see how the measurement of a person's height (from the heel of the foot to the crown of the head) can be sensibly understood as involving "an ... examination of *a part* of a person's body". Both logic and common sense dictate that measuring a person's height necessarily involves a measurement that incorporates the whole of the person's body. I also consider that it impermissibly strains the language of the section for the measurement of a person's height to be characterised as an "external examination". The Macquarie

> dictionary defines "examination" to include an inquiry, inspection or investigation. The taking of a measurement is not an examination of the body in either of these senses but an assessment or a calculation against a metric standard. I am fortified in that view by the inclusion of an express provision in subsection (j) of the definition of a non-intimate forensic procedure, namely the "taking of a person's physical measurements (whether or not involving marking) for biomechanical analysis of an external part of the person's body, other than the person's private parts". Since that definition is purposive, being required for biomechanical analysis, it was not open to the defendant to rely upon it at the time of the application and it was not relied upon by counsel on the appeal.

58. Her Honour continued, in obiter, to make comments broadening the scope of the category of external examination "that requires touching of the body or removal of clothing" as follows:

> … in my view it would do no damage to the definition of a non-intimate forensic procedure in subsection (a) of section 3(1) to read into the requirement that the examination under consideration involves touching of the body or removal of clothing, the words "if necessary". Self evidently, if a person presented for a compulsory height measurement barefoot (and without a hat or perhaps a hooded sweater) there would be no need for clothing to be removed for a height measurement to be taken. Simply because a person may present barefoot and bare headed at a police station under compulsion of an order under the Act that their height be measured would not deprive a magistrate of reliance on subsection (a) of section 3(1) assuming it was otherwise open, which in my view it is not.

59. A similar issue arose in *ACP v Munro* [2012] NSWSC 1510 ("*ACP v Munro*"), in which the Magistrate made orders for the taking of measurements of the suspect's height and the length of various parts of his body in addition to photographs of the measuring process: at [16]-[19]. There was no evidence that the measurements were to be undertaken "for biomechanical analysis": at [41]. Button J, agreeing with Fullerton J's approach in *Coffen v Goodhart*, stated at [57] that "it is impossible to construe a measurement of the overall height of the defendant, whether with or without shoes, as *"an external examination of a part of a person's body".* The height of a person is an attribute of the person, not a part of his or her body." Button J also agreed with Fullerton J's comments in relation to reading the words "if necessary" into the examination definition: at [65].

60. However, by virtue of an amendment to the Act by the *Crimes and Courts Legislation Amendment Act 2013*, Schedule 3, which came into force on 29 October 2013, the measuring of the whole or any part of a person's body no longer needed to be for the purposes of biomechanical analysis: see also *ACP v Munro* at [66]. The amended definition now allows for the taking of measurement of a person's whole body or any part of their body (other than the person's private parts) whether or not involving the marking of the person's body.

Urine sample is not a forensic procedure

61. In *Alessi v SE and Anor* [2008] NSWSC 909 ("*Alessi v SE*"), the police sought and the Magistrate granted, *inter alia*, an order for a urine sample from the suspect. Barr J at [3] stated: "[t]aking a urine sample is not a forensic procedure and the *Act* makes no reference to it."

Collection of a sample without interference to the person is not a forensic procedure

62. In *R v Jason Michael Kane* [2004] NSWCCA 78, it was argued that the retrieval by the investigating police of a cigarette butt dropped by a suspect on to the footpath, and the subsequent examination and analysis of the DNA contents of that butt amounted to a forensic procedure in the sense contemplated by the Act: at [10]. Sully J (with whom Studdert and Dunford JJ agreed) did not accept that submission.

> 11 It seems to me that the short answer to those submissions is that they misconceive the purpose and the scope and operation of the **Crimes (Forensic Procedures) Act**.
>
> 12 The long title to the Act explains relevantly that the Act is intended:
>
> > "to make provision with respect to the powers to carry out forensic procedures *on certain persons* ..."
>
> 13 A careful examination of the s 3 definitions earlier herein quoted shows, in my opinion, that what is contemplated by the notion of a forensic procedure, whether intimate or non-intimate, is that it is a procedure actually carried out on the person of some specific individual. The chance circumstance that a person throws away, relevantly, a cigarette butt which is retrieved without any reference to, or interference with the person, and which turns out to have significant probative value in terms of what it says about the relevant DNA profile, does not seem to me to satisfy, either in principle or in practice, either in law or in fact, what is contemplated by the **Crimes (Forensic Procedures) Act 2000**.

63. Where a forensic procedure application is refused, or in any event, the police may attempt to obtain forensic samples from suspected persons by covert means. The admissibility of such evidence will fall to be considered under the *Evidence Act 1995*, particularly with respect to the various discretionary exclusions.

APPLICATIONS UNDER PART 5

Who may make an application for an order?

64. An 'authorised applicant' (but no other person) may apply to a Magistrate for a final order: s 26(1); for a repeated forensic procedure: s 27(1); or for an interim order: s 33(1).

65. The following relevant definitions feature in s 3(1):

> ***authorised applicant*** for an order for the carrying out of a forensic procedure on a suspect means:
> (a) the police officer in charge of a police station, or
> (b) a custody manager within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
> (c) an investigating police officer in relation to an offence, or
> (d) the Director of Public Prosecutions.
> …
> ***investigating police officer*** means any police officer involved in the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

66. Applications are most commonly brought by a police officer and usually the officer in charge of the particular investigation, however the Act specifically provides for applications brought by the Director of Public Prosecutions.

67. Note that the definition of 'investigating police officer' has been significantly broadened since first enacted. The original definition of 'investigating police officer' was *the police officer in charge of* the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

68. It is also noteworthy that the Act permits a custody manager – ordinarily not involved in the investigative aspect of a person's custody – to make an application. This provision may have in mind small police stations where there are fewer police available to make such applications, especially urgent interim applications.

69. In *Kerr v Police*, Studdert J dealt with an issue relating to whether an investigating police officer was an authorised applicant under the old provision requiring the officer in charge to apply for the order. His Honour said:

> 49 In presenting his affidavit supporting the application for the interim order, Const. Sly asserted he was an *"authorised applicant under the Crimes (Forensic Procedures) Act"*. He was not. Does this invalidate the interim order which was made? What was done constituted an irregularity in the making of the application. The assertion by the deponent in his affidavit that he was an authorised applicant was incorrect. The justice considering the application was entitled to assume the accuracy of the asserted status but, regrettably, the affidavit was misleading.
>
> 50 However, when the provisions of the Act are considered it does not seem to me that the irregularity in the application for the interim order affected the order that was made.
>
> …
>
> 54 I read nothing in Pt 5 of the Statute which leads me to the conclusion that the irregularity in the making of the application has affected the validity of the interim order in this case. I do observe that

> in Div 2, concerning final orders, there is a provision that relates to an application for a second forensic procedure. Section 27(1) provides for this. Such a procedure is to be applied for by *"an authorised applicant (but no other person)"*: s 27(1). In this respect s 27 is to be contrasted with s 33 where the bracketed words are not to be found. This difference in the language in these two sections is by no means conclusive but consideration of all of the provisions of Pt 5 has led me to the conclusion I have reached.

70. Since this decision, s 33(1) has been amended to include the bracketed words "but no other person" that feature in s 27(1).

Who may make an order for a forensic procedure?

71. The Act authorises the carrying out of forensic procedures by order of a Magistrate or authorised officer in certain circumstances.

> **22 Forensic procedure may be carried out by order of Magistrate or other authorised officer**
>
> A person is authorised to carry out a forensic procedure on a suspect by order of a Magistrate under section 24 or 27, or by order of an authorised officer under section 32. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.

72. The effect of this provision is that only a Magistrate has the power to order a final forensic procedure (s 24) or a repeated forensic procedure (s 27).

73. However, an interim order under s 32 may be made by a Local Court Magistrate, Children's Court Magistrate, Registrar of the Local Court, or an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer either personally or as the holder of a specified office for the purposes of *LEPRA* all of whom fall within the definition of an 'authorised officer'.

74. This is a result of the operation of s 3(1) of the Act and the definition of 'authorised officer' in s 3 of *LEPRA*.

Circumstances in which an application or order may be made

75. By virtue of a suspect being a child, the jurisdiction of a Magistrate or authorised officer is conferred by s 23(c) of the Act.

76. In addition, an application seeking an interim order authorising the carrying out of an intimate forensic procedure on a suspect may be made only if the person is a suspect in relation to a 'prescribed offence': s 33(2).

Circumstances relating to a second or subsequent application

77. In relation to a second or subsequent application for a final order following the refusal or an earlier application, there is a further bar to the application in s 26(3), removed only if there is additional information provided justifying the making of the further application.

26 Application for order

…

(3) If a Magistrate refuses an application for an order authorising the carrying out of a forensic procedure on a suspect, the authorised applicant (or any other person aware of the application) may not make a further application to carry out the same forensic procedure on the suspect unless he or she provides additional information that justifies the making of the further application.

78. The first aspect in s 26(3) "[i]f a Magistrate refuses an application…" is satisfied where an order from a Magistrate has been successfully appealed, and an order made substituting a refusal to grant the forensic procedure application instead: see *Munro v ACP* [2012] NSWSC 100 ("*Munro v ACP*") at [25].

79. RA Hulme J considered the requirement to provide "additional information that justifies the making of the further application" in *Munro v ACP* and said as follows:

> 28 There are two components to this: whether there is "additional information" and, if so, whether it "justifies the making of the further application". The first is a matter requiring objective assessment of the material put forward in support of the application and comparing it with that put forward in support of application(s) made in the past. The second is a matter for discretionary judgment. The present case was only concerned with the first component, but the second component should not be ignored.

80. His Honour rejected the submission that the term "additional information" was constrained to new information, not previously in the possession of the police at the time of the earlier application. His Honour stated:

> 50 The construction of the words "additional information" is, in my view, straightforward. They should be given their ordinary meaning. They require that in a subsequent application for the same forensic procedure the applicant must provide more information than was provided in support of the earlier application(s). An applicant is not entitled to make an application based solely upon information that was the subject of an earlier unsuccessful application.
>
> 51 There is nothing in such a construction which in any way detracts from the purpose or object underlying the Act and there is nothing that is inconsistent with the language and purpose of the Act as a whole. If a magistrate is satisfied that there is such additional information, then it will be necessary for the magistrate to then assess whether it is of such a nature, degree and quality that it justifies the making of the further application.

81. Following an appeal from a third application, Button J addressed submissions made on the principle of double jeopardy. His Honour stated:

> 73 Furthermore, I am not persuaded that considerations of double jeopardy fall for separate consideration under the subsection. The structure of the subsection is that a further application may not be made (let alone granted) unless a particular precondition is made out. That precondition is a satisfaction on the part of the Magistrate that the additional information provided by a prosecutor justifies the making of the application. The word *"justifies"* connotes a concept of the balancing of competing considerations, in light of the fact that the primary definition given in the Macquarie Dictionary of the word *"justify"* is *"to show (an act, claim, statement, etc.) to be just, right, or warranted"*. It is true that that process should include a consideration of the number of previous applications and their surrounding circumstances, in determining whether the test has been made out. To that extent, I agree that the subsection calls for reflection on the degree to which a defendant has been *"vexed"*. But nothing in the subsection, nor in the judgment of R A Hulme J, calls for an explicit, detailed discussion of the principle compendiously known as double jeopardy.

82. In *Police v Prilja* [2006] NSWLC 18, Dare SC LCM rejected a submission on behalf of the respondent that there was an *issue estoppel* preventing the Court from making an order for a forensic procedure. His Honour stated at [22] and following:

> 22. I now turn to the question raised by Mr Groch, namely, that there is an *issue estoppel* such that the Court cannot make an order for a forensic procedure. He submitted that, first, the hearing of an Application under the Act is not criminal proceeding but, rather, a civil one. He said that in dealing with the "first application" I had dismissed it (in fact, I had *refused* it, to use the correct parlance) and, as a consequence, what the prosecution should have done if aggrieved was to appeal to the Supreme Court under Part 5 of the ***Crimes (Local Courts Appeal and Review) Act, 2001.*** He pointed out that they had not done so. As a further consequence, he submitted, the prosecution was estopped from making another application for the same procedure upon the same person. To hold otherwise, he submitted, would amount to an abuse of process and he cited the authorities of ***Reichel*** *(1889) 14 App Cases at 668;* ***Walton v Gardner*** *(1993) 177 CLR 378 @ 395 per Mason CJ, Deane and Dawson JJ agreeing;* and ***Rogers v The Queen*** *(1994) 181 CLR 251 @ 256.* By way of further assistance, Mr Groch referred me to a decision of the Victorian Supreme Court of ***Kingston City Council v Monash City Council & Others*** *[2004] VSC 41, in particular from [59] to [118].*
>
> 23. The principle of *issue estoppel* was authoritatively stated by Dixon J in ***Blair v Curran*** *(1939) 62 CLR 464 @ 531-32 as follows:-*
>
> > *"A judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot be afterwards be raised between the same parties or their privies."*
>
> He went on to say:
>
> > "*The distinction between res judicata and issue estoppel is that in the first, the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, while in the second (i.e., issue estoppel), for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by prior judgment, decree of order."*
>
> 24. His Honour emphasised that what was closed or precluded was only that which is "legally indispensable to the conclusion". Thus, where a claim depended on a number of ingredients or ultimate facts, so that if any one were absent then the claim would fail, "the estoppel covers only the actual ground upon which the existence of the right was negatived."
>
> 25. Nonetheless, his Honour said, the estoppel was not confined "to the final legal conclusion expressed in the judgment, decree or order". The determination concludes not only the point actually decided but any matter which it was necessary to decide and which was actually decided as the basis of the decision. What his Honour called "matters cardinal" to the point at issue could not be re-litigated if to do so would necessarily assert that the former decision was erroneous.
>
> 26. As was pointed out by McDougall J., in ***Cockatoo Dockyard v Commonwealth of Australia*** *[2004] NSWSC 841 (@ par 49):*
>
> > *"Underlying all the decisions is the difficulty of application of the principle. That depends, as Dixon J said in Blair at 533, on distinguishing fundamental or cardinal matters from those that are not essential to the decision. His Honour said that there were two questions. The first is whether the ultimate decision necessarily involves the issue that was determined. As it is put in Spencer Bower, Turner and Handley,* **The Doctrine of Res Judicata** (Butterworths, 3rd ed. 1966 at 105), *is "the determination ... so fundamental to the decision that the latter cannot stand without it? The second question is whether the determination of the issue is the immediate foundation of the decision, or collateral or subsidiary only? In other words, is it no more than part of the reasoning that supports the ultimate decision?*
>
> 27. The application of *issue estoppel* to the criminal law was recognised in ***Mraz v The Queen (No. 2)*** *(1956) 96 CLR 62.* It later became, first, debatable in ***Storey v The Queen*** *(1978) 140 CLR 364,*

then impermissible in ***Rogers v The Queen*** *(1994) 181 CLR 251.* It is submitted before me, and I accept, that applications under the Act are civil in nature. Indeed, Sully J in ***L v Lyons and Another (supra)*** acknowledges this to be the case.

28. I think it needs to be made perfectly clear what I actually did in fact in refusing the first application so that the law can be properly applied. The first application was dealt with somewhat peremptorily in a busy and lengthy list. It contained only the Affidavit in Support of Detective Sergeant Handley, the content of which was largely based upon hearsay. Mr Groch submitted, and I agreed, that the application supported by material in that form did not permit me to be satisfied of the matters required in *Section 25* of the Act. It was the form and not the substance of the application which led to the refusal.

29. My decision to refuse the application for the reasons I did does not, in my view, permit the application of *issue estoppel* in the present case. Even if it could somehow be contrived that it was applicable, I need look no further than *Section 26 (3)* to see that the Act makes specific provision for a further application *provided* the authorised applicant provides "additional information that justifies the making of the further application" to carry out the same forensic procedure on the suspect. I have expressed my satisfaction as to this point earlier in this judgment. And that, I think, sufficiently disposes of *issue estoppel* in this case. In so doing, it also disposes of any alleged abuse of process about which I need say no more.

Application for repeated forensic procedure

83. The Act specifically contemplates that a forensic procedure might be carried out on a second or subsequent occasion. A different set of circumstances apply to an application and order for a repeated forensic procedure authorising a police officer to arrange the carrying out for a second or subsequent time of a forensic procedure on a suspect on whom a forensic procedure has already been carried out by order of a Magistrate under section 24: s 27(1). They are contained in s 27(3) of the Act.

27 Application and order for repeated forensic procedure

…

(3) A Magistrate may order the carrying out for a second or subsequent time of a forensic procedure on a suspect under this section if the Magistrate is satisfied that:

(a) the forensic procedure or procedures already carried out on the suspect was authorised by an order under section 24 and was carried out in accordance with Part 6, and

(b) the forensic material obtained as a result of the carrying out of that forensic procedure or those forensic procedures is insufficient for analysis, has been contaminated, has been lost or is for any other reason not available for analysis, and

(c) the carrying out of the forensic procedure for a second or subsequent time is justified in all the circumstances.

84. If the initial procedure was not carried out in strict accordance with Part 6 of the Act, then an important pre-condition for the further application will not be met.

85. Further, the Magistrate must be satisfied that the carrying out of the forensic procedure is justified in the all the circumstances.

THE APPLICATION PROCESS

Final order

86. An application for a final order or an order for a repeated forensic procedure must:

(1) Be made in writing: s 26(2)(a) and s 27(2)(a);

(2) Be supported by evidence on oath or by affidavit (in relation to the matters as to which the Magistrate must be satisfied as referred to in s 24(1) for a final order; or otherwise as relevant): s 26(2)(b) and s 27(c);

(3) Specify the type of forensic procedure sought to be carried out: s 26(2)(c) and s 27(2)(b); and

(4) In the case of an order for a repeated forensic procedure, specify the grounds for authorising it to be carried out a second or subsequent time: s27(2)(b).

Interim order

87. An application for an interim order must:

(1) Be made in person: s33(4)(a); and

(2) If it is made in person – be supported by evidence on oath or by affidavit dealing with the matters referred to in s 32(1): s 33(3)(a); or

(3) If it is not practicable to make the application in person and there are facsimile facilities readily available – by facsimile: s33(4)(b); or

(4) If it is not practicable to make the application in person and there are no facsimile facilities readily available – by telephone, radio, telex, email or other means of communication: s 33(4)(c); but

(5) An authorised officer must not issue an interim order on an application made by fax, telephone, radio, telex, email or other means of written communication unless satisfied that the interim order is required urgently and that it is not practicable to be made in person: s 33(4A); and

(6) If it is not made in person – be supported by evidence on oath or by affidavit dealing with the matters referred to in s32(1) as soon as practicable after the making of the application and before any interim order made as a result of the application is confirmed or disallowed: s 33(9); and

(7) Specify the type of forensic procedure sought to be carried out: s33(3)(b).

Evidence by affidavit

88. Most applications are supported by evidence on affidavit, which may or may not be supplemented by further evidence on oath.

89. It has been remarked in *Walker v Budgen* (at [8]) and elsewhere that the police appear to regularly use a *pro forma* document for their affidavit in support of the application. This has been criticised. For example, in *Orban v Bayliss*, Simpson J said the following:

> 14 The application was supported by an affidavit sworn by Detective Bayliss, who deposed that he was "an authorised person" (within the meaning of s26). The affidavit appears to have been completed on a pro-forma. Paragraph 3 commences:
>
> > "The grounds for believing that the person on whom the procedure is proposed to be carried out is a suspect are: ..."
>
> The opening words of paragraph 3 are followed by a narrative of a police investigation; included in the narrative is the assertion:
>
> > "From evidence gathered throughout this investigation ... it became apparent that the Accused Steven ORBAN, was dealing heroin from his hair dressing business address ..."
>
> In a later paragraph, Detective Bayliss deposed:
>
> > "It is alleged that the Accused supplied a drug runner with the deal of heroin, and in turn the drug runner would supply the undercover police operative with the deal of heroin in turn (sic) for money. The drug runner would then return to Orban's Hair Salon and give the Accused the money. Police used numerous evidence gathering techniques in which to colate (sic) relevant evidence ... which included different forms of electronic surveillance and field surveillance."
>
> 15 Subsequent paragraphs reinforce the impression that the document was completed on a pro-forma. For example, paragraphs 7 to 12 inclusive contain opening words and sentences that relate to presently irrelevant parts of the *Forensic Procedures Act.* Those opening words are followed by spaces which have been left blank.
>
> 16 For reasons I will give below, **the format of the affidavit was, in my view, apt to mislead both the deponent and the magistrate**. (Emphasis added)

90. Further to the discussion above in relation to the principle of legality, the requirement for an application to be supported by evidence on oath or by affidavit should be stringently enforced.

91. The case of *Munro v ACP* is a good example of the importance of an application being, and the extent to which an application should be, supported by appropriate evidence. The first application made by police for photographs (sought for use in identification procedures with complainants and eye witnesses to alleged indecent assaults of school girls at a train station) was supported by a four page affidavit. The affidavit did not include anything about the account by a local business manager who identified the suspect from the CCTV footage. The application was granted by the Magistrate and appealed to the Supreme Court. It was conceded on that appeal that there was a deficiency in the material before the Magistrate, namely that it was incapable of satisfying the statutory requirement that "there must be reasonable grounds to believe that the suspect has committed an offence." It was conceded that the appeal should be

allowed and consent orders were made including quashing the decision of the Magistrate and substituting an order that the application was refused: at [5]-[8].

92. A second application was brought. It was supported by a far more extensive affidavit – the six-page affidavit had 29 annexures totalling about 170 pages and comprised of witness statements (including that of the local business manager), statements from the complainants, transcripts of witness interviews, police notebook entries, still images from CCTV footage, and the like: *Munro v ACP* at [9]; and *ACP v Munro* [2012] NSWSC 1510 at [13]. A third application was brought, seeking further orders and accompanied by further affidavit evidence and a further statement from an expert: *ACP v Munro* at [15].

93. It is suggested that in the ordinary course, the applicant's affidavit ought to annex the 'first-hand' material relevant to the determination of the forensic procedure application, including for example, witness statements, expert certificates, police notebook entries, photographs or CCTV footage or other recordings.

THE PRESENCE OF THE SUSPECT AT COURT

94. A suspect's presence at the hearing can be secured by summons or warrant depending on the circumstances. Either process must be issued by a Magistrate (as opposed to an authorised officer or Registrar) and on an application of a police officer.

95. Section 3(2) of the Act establishes for the purposes of the Act, that a person is *under arrest* if he or she is a person to whom Part 9 of *LEPRA* applies. In those circumstances, the Magistrate has a power to issue a warrant for the temporary custody of the person for the hearing of the application.

> **28 Securing the presence of suspect at hearing—suspect under arrest**
>
> (1) If the suspect has been arrested by a police officer (original arrest), the Magistrate may, on the application of another police officer, issue a warrant directing the person holding the suspect under original arrest to deliver the suspect into the custody of the other police officer (temporary custody) for the hearing of an application for an order under this Part.
>
> (2) The police officer given temporary custody must return the suspect to the place of original arrest:
> (a) if the application for the order is refused—without delay, or
> (b) if the order is made—without delay at the end of the period for which the suspect may be detained under arrest under section 42.

96. Where the suspect is not under arrest, the application of the police officer for a summons or warrant must be by information on oath and accompanied by an affidavit dealing with the relevant issues: why the process is necessary to ensure the appearance of the suspect at the hearing, or why it is otherwise justified, or in the case of a warrant, that the suspect might destroy evidence that might be obtained from the procedure.

29 Securing the presence of suspect at hearing—suspect not under arrest

(1) If the suspect is not under arrest, the Magistrate may, on the application of a police officer:
(a) issue a summons for the appearance of the suspect at the hearing of the application, or
(b) issue a warrant for the arrest of the suspect for the purpose of bringing the suspect before the Magistrate for the hearing of the application.

(2) An application for a summons under subsection (1) must be:
(a) made by information on oath, and
(b) accompanied by an affidavit dealing with the matters referred to in subsection (3).

(3) The Magistrate may issue a summons only if satisfied:
(a) that the issue of the summons is necessary to ensure the appearance of the suspect at the hearing of the application, or
(b) that the issue of the summons is otherwise justified.

(4) An application for a warrant under subsection (1) must be:
(a) made by information on oath, and
(b) accompanied by an affidavit dealing with the matters referred to in subsection (5).

(5) The Magistrate may issue a warrant only if satisfied:
(a) that the arrest is necessary to ensure the appearance of the suspect at the hearing of the application, and that the issue of a summons would not ensure that appearance, or
(b) that the suspect might destroy evidence that might be obtained by carrying out the forensic procedure, or
(c) that the issue of the warrant is otherwise justified.

97. Note that in relation to an application for an interim order under s 32, the authorised applicant may make the application without bringing the suspect before the authorised officer: s 33(1).

98. A final order may be made in the presence of the suspect concerned or, at the discretion of the Magistrate, *ex parte*: s30(1).

NATURE OF THE PROCEEDINGS

Civil or criminal proceedings?

99. The hearing of an application for a forensic procedure order ("a forensic procedure proceeding") is not a 'criminal proceeding'. In *L v Lyons & Anor; B and S v Lyons & Anor* [2002] NSWSC 1199; (2002) 56 NSWLR 600; 137 A Crim R 93, ("*Lyons and Lyons*") Sully J at [27]:

> 27 It seems to me that the policy objectives of the **Forensic Procedures Act** are not compatible with such an understanding of what is meant by the expression *"criminal proceedings"* as used in the [*Children (Criminal Proceedings) Act 1987* (NSW), referred to as the] **Criminal Proceedings Act**. The present plaintiffs have not been charged, as yet, with having committed any offence. They are, certainly, suspected of having committed a number of serious criminal offences. It seems to me, however, that it could not be contended reasonably that the **Forensic Procedures Act** proceedings in the Local Court were intended to culminate, or were capable whether in fact or in law of culminating, in either convictions or acquittals in respect of substantive crimes charged, heard and determined in those Local Court proceedings. The distinct requirements, earlier herein referred to, of section 25 of the **Forensic Procedures Act** contemplate clearly, in my opinion, an ultimate

> outcome which does not correspond at all to what would be contemplated ordinarily as the outcome of *"criminal proceedings"* in the sense in which that expression is conventionally employed by the law.
>
> 28 I am, therefore, of the opinion that the Local Court proceedings brought pursuant to the **Forensic Procedures Act** were not governed by the **Criminal Proceedings Act**.

100. This view is also supported by the definition provisions in s 3(1) of the *Civil Procedure Act 2005*:

> ***civil proceedings*** means any proceedings other than criminal proceedings.
> …
> ***criminal proceedings*** means proceedings against a person for an offence (whether summary or indictable), and includes the following:
> (a) committal proceedings,
> (b) proceedings relating to bail,
> (c) proceedings relating to sentence,
> (d) proceedings on an appeal against conviction or sentence.

101. This position has been confirmed in the matter of *TS v Constable Courtney James* [2014] NSWSC 984 per Adamson J at [21].

Certain provisions do not apply

102. Accordingly, the provisions of s 13 of the *Children (Criminal Proceedings) Act 1987* (NSW) governing the admissibility of any statement, confession, admission or information, made or given to a member of the police force by a child who is a party to criminal proceedings do not apply to a proceeding for a forensic procedure against a child suspect.

103. In addition, Sully J said at [42]-[43] in relation to the application of the rule of admissibility of admissions under s 85 *Evidence Act 1995* (NSW) ("the *Evidence Act*") to a forensic procedure proceeding:

> 42 Relevant to the construction and application of section 85 of the **Evidence Act** is the following definition, which is to be found in the Dictionary forming part of that Act:
>
> > "**Criminal proceeding** means a prosecution for an offence and includes:
> >
> > (a) a proceeding for the committal of a person for trial or sentence for an offence, and
> >
> > (b) a proceeding relating to bail, but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the Taxation Administration Act 1953 of the Commonwealth."
>
> 43 The proceedings with which the Local Court was dealing, howsoever they might be characterised in law, cannot be fitted within that statutory definition of a criminal proceeding. It seems to me to follow that section 85 of the **Evidence Act** was not applicable to those particular Local Court proceedings.

104. In line with this authority, the discretion in s 90 of the *Evidence Act* to exclude an admission made by an accused in a criminal proceeding is also inapplicable to a forensic procedure proceeding.

105. In addition, s 281 *Criminal Procedure Act 1986* (NSW) applies pursuant to s 274 of that Act "to the extent that it is capable of being applied, to all offences, however arising (whether under an Act or at common law), whenever committed and in whatever court dealt with" rather than "to criminal proceedings" as in the legislation above. Assuming the other pre-conditions in s 281(1) are met, it is unclear whether the scope of its application would extend to a forensic procedure proceeding in relation to a suspect for an offence.

Standard of proof

106. Given that the hearing of a forensic procedure application appears to be a civil proceeding, the requisite standard of proof is on the balance of probabilities.

107. In any event, the Act now specifically addresses the standard of proof in relation to the determination of a Magistrate making a final order under s 24(1) (not a feature of the earlier ss 24 and 25 provisions). The Act also prescribes the standard of proof in relation to some additional matters in ss 103 and 104.

> **24 Final order for carrying out forensic procedure**
>
> (1) A Magistrate may order the carrying out of a forensic procedure if satisfied **on the balance of probabilities**:
> (a) that the circumstances referred to in subsection (2) or (3) exist, and
> (b) that the carrying out of such a procedure is justified in all the circumstances.
>
> **103 Proof of belief or suspicion**
>
> In any proceedings, the burden lies on the prosecution to prove **on the balance of probabilities** that a police officer had a belief on reasonable grounds, or suspected on reasonable grounds, as to a matter referred to in this Act.
>
> **104 Proof of impracticability**
>
> In any proceedings, the burden lies on the prosecution to prove **on the balance of probabilities** that it was not practicable to do something required by this Act to be done if practicable.

RULES OF EVIDENCE

Does the *Evidence Act 1995* apply?

108. The applicability of the *Evidence Act* to a forensic procedure has been recently settled by the decision of *TS v Constable Courtney James* [2014] NSWSC 984 ("*TS v James*"). Adamson J dealt with the issue at [19]-[21]:

> **Whether the Evidence Act applies in terms to applications for a forensic procedure**
>
> 19 Section 4(1) of the *Evidence Act* provides:
> "(1) This Act applies to all proceedings in a NSW court, including proceedings that:
> (a) relate to bail, subject to Division 4 of Part 3 of the Bail Act 2013, or

(b) are interlocutory proceedings or proceedings of a similar kind, or
(c) are heard in chambers, or
(d) subject to subsection (2), relate to sentencing."

20 The expression "NSW court" is defined to mean this Court or "any other court created by Parliament": Dictionary to the *Evidence Act*. The Children's Court is a court created by Parliament: see s 4 of the *Children's Court Act 1987*. Accordingly the *Evidence Act* applies to these proceedings as does the common law of evidence to the extent to which it has not been overridden by the Act: s 9(1) of the *Evidence Act*. To the extent to which the Court below read either *L v Lyons* (2002) 56 NSWLR 600 (Lyons) or *LK v Commissioner of Police* [2011] NSWSC 458 (LK) as indicating that it does not apply, her Honour was in error, as appears from *Lyons* at [27]-[28] per Sully J and *LK* at [26] per Fullerton J.

21 The conclusion that the *Evidence Act* applies requires a further determination of the identification and construction of applicable provisions. For example, the proceedings, although related to the suspected commission of an offence, are civil, not criminal, since they do not amount to the prosecution of a person for an offence or for committal, sentence or bail (see the definition of "criminal proceedings" in the Dictionary) to the *Evidence Act*. Not being criminal proceedings, they are necessarily "civil proceedings" since the *Evidence Act* defines "civil proceeding" as a proceeding other than a criminal proceeding.

109. In representing a suspect, objections ought to be taken, and rulings made by the Magistrate, in accordance with the rules of evidence contained within the *Evidence Act* as they apply to civil proceedings.

The hearsay rules

110. The applicability of the hearsay rule to forensic procedure applications has been somewhat contested.

111. Section 59 of the *Evidence Act* relevantly provides:

59 The hearsay rule—exclusion of hearsay evidence
(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
(2) Such a fact is in this Part referred to as an asserted fact.
(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.
Note. Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000) 158 FLR 359.
(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Notes. Specific exceptions to the hearsay rule are as follows:
- evidence relevant for a non-hearsay purpose (section 60),
- first-hand hearsay:

— civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64)
— criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)
- contemporaneous statements about a person's health etc (section 66A)
- business records (section 69)
- tags and labels (section 70)
- electronic communications (section 71)

- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
- marriage, family history or family relationships (section 73)
- public or general rights (section 74)
- use of evidence in interlocutory proceedings (section 75)
- admissions (section 81)
- representations about employment or authority (section 87 (2))
- exceptions to the rule excluding evidence of judgments and convictions (section 92 (3))
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

112. There are a number of exceptions which may apply.

113. Where a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact, that is, the representation is relevant for a non-hearsay purpose, section 60 *Evidence Act* provides as follows:

> **60 Exception: evidence relevant for a non-hearsay purpose**
>
> (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
> (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).
> **Note.** Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.
> (3) However, this section does not apply in a criminal proceeding to evidence of an admission.
> **Note.** The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

114. This exception may arise by virtue of the determination of *the suspect question*. For example, where the previous representation is relevant to establishing that a police officer suspected on reasonable grounds that the person has committed an offence – a non-hearsay purpose – the representation may also be admitted for a hearsay purpose. In these circumstances, the same material might be admitted for the purpose of determining the other matters under s 24(2) and (3) – requiring satisfaction that there are "reasonable grounds to believe" certain things. In this regard, it is suggested that these questions, when considered together, may enliven s 60 *Evidence Act* such that representations (that would otherwise fall foul of the hearsay rule) might be admissible pursuant to that exception to the hearsay rule. In this way, the determination of *the suspect question* may affect the form of evidence which may be admitted in relation to the application generally.

115. As her Honour Adamson J stated in *TS v James*, "[h]ow the laws of evidence apply to applications for forensic procedures is affected by the matters of which the Magistrate is required to be satisfied": at [23]. Her Honour directly addressed the issue in relation to the question of an officer forming a reasonable belief or suspicion in relation to a person. Her Honour stated at [25]:

> What constitutes reasonable grounds for forming a suspicion or belief must be judged against "what was known or reasonably capable of being known at the relevant time": *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612 at [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ; see also *Bain v Police* [2011] SASC 228 per White J at [26]. Accordingly, reasonable grounds for suspicion or belief may include information that the officer concerned has been told by another officer. It can include material of a hearsay nature: see, for example, *Azar v DPP* [2014] NSWSC 132.

116. It is suggested that this may have been the process of reasoning that is demonstrated in Sully J's approach in *Lyons and Lyons* to the admissibility of "a composite body of evidence to establish the matters required to be established": at [33]. The relevant part of his Honour's decision is set out here:

> 29 During the course of her evidence in the Local Court, Constable Lyons produced:
>
> > [1] a number of statements which she identified as written statements made by eye witnesses to, and in some cases victims of, some of the relevant robberies;
> >
> > [2] evidence of entries in the Police Service Computer Data Base, which entries had been made by various police officers. Transcripts of these entries were received in evidence;
> >
> > [3] evidence of oral statements made to her and to other police officers; and in particular, evidence of such oral statements made at the time of the arrests of the present plaintiffs J and B;
> >
> > [4] evidence of statements made by the present plaintiff B to her;
> >
> > [5] evidence of statements made by the present plaintiff J to other police officers, and recorded by those police officers in transcripts which Constable Lyons herself produced to the Court.
>
> 30 The documents variously identified by Constable Lyons in the course of her giving of her evidence respecting each of the foregoing five categories of evidence, were admitted into evidence over objection.
>
> 31 It was submitted for the plaintiff J that all of this material was hearsay material in the sense of that description as used in, particularly, Part 3.2 of the **Evidence Act 1995 (NSW)** ("the Evidence Act"). It was submitted that the Magistrate virtually ignored the provisions of Part 3.2 of the **Evidence Act,** with the result that evidence which was hearsay evidence, and governed as such by the provisions of Part 3.2, was admitted without any proper consideration of the effect upon the admissibility of the evidence of the relevant provisions of Part 3.2.
>
> 32 The initial ruling of the Magistrate, upon objection being taken to the admission of this body of evidence, was expressed as follows:
>
> > "I am not dealing with a criminal proceeding, I have made that finding, and hearsay evidence I find is admissible in these proceedings. It may not be admissible in any later criminal proceedings, if charges are laid, but that is not my view here." [T 4.3.02: at 11,12]
>
> 33 As the evidence of Constable Lyons proceeded; and as various particular items were tendered through her, and as continuing objection was taken to those successive tenders as being tenders of inadmissible hearsay evidence, it became apparent from brief successive rulings of the learned Magistrate that her Worship's real view was that **the challenged material was admissible in the particular proceedings with which her Worship was dealing, not as hearsay evidence to prove the truth of what was asserted in the statements, but as a composite body of evidence to establish the matters required to be established** by the relevant provisions, as herein previously quoted, of section 25 of the **Forensic Procedures Act**.
>
> 34 In my respectful opinion, this approach of the learned Magistrate was correct in law. Section 26(2)(b) of the **Forensic Procedures Act** required that the application made by Constable Lyons for orders pursuant to the **Forensic Procedures Act** be supported by evidence on oath dealing with the matters referred to in the relevant parts of section 25 of that Act. That did not entail, however, that Constable Lyons had to prove, by reference to whatever standard of proof might be thought appropriate to such an application, that the plaintiffs, or any of them, were guilty in fact of the crimes which they were respectively suspected by her of having committed. Constable Lyons was entitled to put before the Magistrate the composite body of material which she had collected and collated in connection with her application for orders under the **Forensic Procedures Act**; and **she**

was entitled to argue, upon the basis of that composite body of material, that the Magistrate ought to be satisfied of, relevantly, the matters to which reference is made in paragraphs (a), (c), (f) and (g), all quoted previously herein, of section 25 of the **Forensic Procedures Act**. That seems to me to be the way in which the learned Magistrate approached the matter. In my opinion that approach of the learned Magistrate was correct in law. (Emphasis added)

117. It should be further noted that the evidence before the Local Court in the *Lyons and Lyons* matter included the witness statements and various brief items. The hearsay material was not merely contained in summary form in the affidavit provided by the applicant. If the material is merely contained in summary form in the affidavit provided by the applicant, it may be argued that the probative value of the evidence is extremely limited. Accordingly, the further away from the source of the previous representation, the less weight that ought to be attributed to the material.

118. In some circumstances, it may be appropriate to seek to limit the use for which hearsay material may be used pursuant to s 136 *Evidence Act*, for example, only for the purpose of *the suspect question* and not otherwise for the remaining matters required to be determined by the Magistrate in s 24.

119. However, where *the suspect question* is determined, not by reference to a police officer's suspicion, but by virtue of the person having been charged or summoned, the s 60 avenue – permitting otherwise hearsay material to be admitted – does not arise.

120. In addition to this issue, the applicable "first-hand" hearsay exceptions for civil proceedings are significantly more flexible than those applicable in criminal proceedings:

63 Exception: civil proceedings if maker not available

(1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
(2) The hearsay rule does not apply to:
(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or
(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes.
[1] Section 67 imposes notice requirements relating to this subsection.
[2] Clause 4 of Part 2 of the Dictionary is about the availability of persons.

64 Exception: civil proceedings if maker available

(1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
(2) The hearsay rule does not apply to:
(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or
(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation,
if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.
Note. Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.
(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
(a) that person, or
(b) a person who saw, heard or otherwise perceived the representation being made.

> (4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.
> **Note.** Clause 4 of Part 2 of the Dictionary is about the availability of persons.

121. In many situations, the exception in s 64(2)(b) *Evidence Act* may render any witness statements admissible on a forensic procedure application.

122. A further exception to the hearsay rule exists in s 81 in relation to admissions. In *LK v Commissioner of Police* [2011] NSWSC 458 ("*LK v Police*"), over objection, the evidence admitted before the Magistrate included an alleged admission by a co-accused JB, "It's our gun… It's mine and [the plaintiff's] gun, CC doesn't own it.": at [13] and [24]. The objection was on the basis that what JB said was inadmissible against LK, it being an admission by a third party which was not adopted by him nor otherwise admissible as a third party admission under s 83 *Evidence Act 1995*: at [24]. The Magistrate had considered the proceedings to be analogous to bail or interlocutory proceedings and that therefore the rules of evidence did not govern the proceedings: at [25]. Fullerton J considered it inappropriate to deal with the issue at length or express a final view about the matter. However, her Honour observed at [26] that:

> … the *Bail Act* 1978 specifically provides that a court is not bound by the rules of evidence, which under s 8 of the *Evidence Act* displace s 4(1)(b) of the *Evidence Act* which provides that the Act does apply to proceedings relating to bail. In addition, although the *Crimes (Forensic Procedure) Act* makes no express provision that the rules of evidence apply to proceedings under the Act (or for the rules of evidence to be dispensed with), s 33 of the Act, which deals with applications for interim orders, refers expressly to the need for an application made in person to be supported by *evidence* on oath or affirmation, and s 26 provides that an application for a final order must also be supported *by evidence* in relation to the matters in s 24 to which the Magistrate needs to be satisfied before a final order is made. I also note that s 4 of the *Evidence Act* provides that the Act applies to all proceedings in a New South Wales court including interlocutory proceedings or proceedings of a similar kind. Assuming that the proceedings are civil proceedings (as defined in the *Evidence Act*) the applicant did not apply for waiver of the rules of evidence under s 190(3) of the *Evidence Act*. On this analysis it would appear that proceedings under the Act (or at least the proceedings the subject of the appeal) are governed by the rules of evidence and that the challenged evidence ought to have been disregarded by the Magistrate.

123. But note that in the event that s 60 operates, the provision in s 60(3) of the *Evidence Act* constraining the use of admissions in criminal proceedings, does not to apply in civil proceedings.

124. A further exception to the hearsay rule that may be applicable to forensic procedure applications is contained in s 69 of the *Evidence Act* and relates to business records. However, even assuming the other pre-conditions of the section are met, it is likely that in the context of forensic procedure applications, subs 69(3) will be engaged. It provides that the exception does not apply if the representation "(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, *an Australian or overseas proceeding*, or (b) was made in connection with an investigation relating or leading to a criminal proceeding." Note also the procedural requirements in ss 170-173 of the *Evidence Act.*

THE HEARING PROCESS

The respondent's options

125. A respondent child to a forensic procedure application has two basic options:

(1) Make no formal opposition to the making of the order, but give no consent to it.

(2) Oppose the making of the order – by objections, cross-examination of the applicant and/or other witnesses and/or the making of submissions.

126. The suspect or any legal representative for them has a right to address the Magistrate in relation to the application for a final order: s30(6)(c).

Representation

127. Throughout the hearing process for a final order, the suspect may be represented by an Australian legal practitioner: s30(5)

128. In relation to an application for an interim order, the authorised officer must ensure that the suspect, or any legal representative for the suspect and any interview friend, are given the opportunity to speak to the authorised officer or make a written submission to accompany the application as the case may be: s 34(1) and (2).

Interview friends

129. At the beginning of any hearing for a final or interim order, the suspect, if present, must be asked whether he or she identifies as an Aboriginal person or Torres Strait Islander: s 30(4) and s 33(6).

130. In relation to an application for a final order, if the suspect does identify, or if the suspect is a child or an incapable person, they must have an interview friend present with them: s 30(2). However, this requirement does not apply if an Aboriginal or Torres Strait Islander suspect expressly and voluntarily waives their right to have an interview friend present: s 30(3). There is no corresponding provision for a child or an incapable person to waive the right to an interview friend.

131. In relation to an application for an interim order, if the suspect does identify, or if the suspect is a child or an incapable person, they must have an interview friend or legal representative present with them if reasonably practicable: s 33(5).

132. In *JW v Blackley*, the police sought fingernail scrapings, swabs of hands and fingers, a buccal swab, DNA hair removal and photographs: at [15]. The suspect was in a psychiatric unit at the time of the application for the interim order: at [7]. The police officer obtained details of the suspect's family from the hospital but attempts to contact them were unsuccessful. The police officer also made enquiries on the Police Service

information system but was unable to obtain any information identifying the plaintiff's family: at [12]. On appeal the question of impracticality relating to the presence of an interview friend and a legal representative was raised. Simpson J observed at [26] that:

> … it is necessary to bear in mind the urgency of the circumstances. The police officers were concerned that any DNA evidence that might have been located upon the plaintiff could be lost. It was, as they said, fragile and transitory. In my opinion Detective Blackely has demonstrated that she did all that was reasonably necessary and possible in the circumstances.

133. Different people may act as an interview friend of a suspect, including a parent or guardian, or other person, chosen by, or acceptable to, the suspect; a legal representative of the suspect; or a representative of an Aboriginal legal aid organisation or a person whose name is on the list of interview friends required to be maintained by the Minister under s 116 of the Act; or another person who is not a police officer or in any way involved in the investigation: s 4.

134. If the suspect's interview friend unreasonably interferes with or obstructs the hearing of an application for a final order or an interim order, they may be excluded from the hearing: s 30(8) and s 34(3).

Powers and entitlements of legal representatives and interview friends

135. A request or objection that may be made by a suspect may be made on their behalf by their legal representative or if the suspect is a child or incapable person or identifies as an Aboriginal person or a Torres Strait Islander – by an interview friend: s 99(1).

136. If a provision of the Act requires a suspect to be informed of a matter, any interview friend of legal representative present with the suspect at the time must also be informed of the matter: s 99(2).

137. If the suspect in relation to an application for an interim order (being a child, incapable person or an Aboriginal person or Torres Strait Islander) is in the presence of the authorised applicant when the application is made, the interview friend or legal representative must also be present if reasonably practicable: s 33(5).

Cross-examination of witnesses and calling evidence

138. There is a right to cross-examine the applicant for the order in s 30(6) of the Act.

139. However, in order to cross-examine any other witness, leave of the Magistrate is required: s 30(6)(b). However, a Magistrate must not give leave under subs (6)(b) unless of the opinion that there are substantial reasons why, in the interests of justice, the witness should be called or cross-examined: s 30(7).

140. Similarly, in relation to the calling of any evidence by the respondent, leave of the Magistrate is required and the same test in s 30(7) is applied.

141. Button J emphasised in *ACP v Munro* at [78] that it is "incumbent upon the Magistrate not to grant leave to the defendant to undertake such cross-examination

unless" the Magistrate is "affirmatively satisfied by the defendant that there were *"substantial reasons why in the interests of justice"* that should be done."

142. In that case, the police sought photographs of the suspect, measurements of his body and parts of his body and photographs of the measuring process: at [16]-[19]. Professor Fryer expressed an opinion in a report relied upon by the police that measurements and photographs of the suspect could usefully be compared with stills of the offender derived from the CCTV footage: at [27]. The respondent made an application to cross-examine Professor Fryer in the hearing of the application, however it was refused by the Magistrate. Button J set out the Magistrate's judgment on point at [79]:

> "HER HONOUR: ... I have looked very carefully at what is purported to be said in the claims by Emeritus Professor Fryer and what is indicated he would undertake. It is a fairly narrowly defined process using photogrammetry and using that for the purpose of analysing in a mathematical methodology the information which might be derived from the available CCTV and then subsequently compared with the information which might be provided then by virtue of this application. It does seem to me that on the face of it, what he is suggesting he would be doing is somewhat mechanical activity and I do not think that it is something which would be illuminated a lot more by cross examination in any event.
>
> It is obviously something which if the outcome of his measurements were to be established in the way that he says could be of some usefulness in the process, I would not however think that it would assist the Court greatly were he to be cross examined. The matters which have been raised and I refer to the evidence of Dr Kemp which is not the subject of these proceedings but which I was obliged to read in any event, clearly indicates what might be issues which the defence might have wished to challenge him on if he eventually ever does the report he is proposing and it would be well for him and the prosecution to bear in mind those potential criticisms when he purports to either give the analysis or to draw any conclusions from it. But I think that that is something which is fairly obvious and which is not necessarily deficiency [sic] in the material which is put before the Court now, and I DO NOT PROPOSE TO ALLOW FURTHER TIME FOR THIS MATTER TO BE EXPANDED BY HIM BEING CROSS EXAMINED."

143. His Honour was not persuaded that the Magistrate applied a wrong test: at [86]. After setting out the parties' submissions, his Honour stated as follows:

> 82 … First, the test to be applied by the Magistrate was a simple one, calling for consideration as it did of only two separate concepts. Secondly, the test has been a commonplace and well-known part of the criminal justice system since 1997, when it was adopted as a test that determined whether the bulk of prosecution witnesses should be required for cross-examination in committal proceedings. Thirdly, it is undeniable that the correct test was repeatedly brought to the attention of her Honour by both parties before her Honour delivered the judgment.
>
> 83 The proposition that I am permitted to consider the whole of the transcript of the matter, including the interchanges between the Bench and the Bar table and the written submissions received from both parties, is of significance in my determination.
>
> 84 It is true that the judgment does not explicitly reflect the statutory test. But in light of the simplicity of the test; its important and longstanding role in the criminal justice system; and the repeated references to it by the parties, I consider it inconceivable that the Magistrate was not aware of the test that her Honour was required to apply to the question. My remarks with regard to the challenge to the first procedure founded upon s 26(3) are apposite here as well.

> 85 Nor do I consider that the discussions by her Honour in the judgment as to perceived limitations in the evidence of Professor Fryer, and the approaches that may need to be taken to it at some future stage of the proceedings, demonstrate that the Magistrate has applied a wrong test.

144. As referred to by Button J, the authorities on the calling and cross-examination of witnesses at committal proceedings are apposite here.

THE TEST FOR A FINAL ORDER

A rigid, demanding and very specific checklist

145. It has been held repeatedly that "the provisions relevant to the making of a final order are rigid and demanding and very specific": see *JW v Blackley* at [31] per Simpson J.

146. A Magistrate must satisfy themselves on the balance of probabilities of four matters pursuant to s 24 in order to make a final order for the carrying out of a forensic procedure:

(1) That the respondent to the application is a suspect (*"the suspect question"*).

(2) There must be reasonable grounds to believe that the suspect committed a certain type of offence, depending on which type of procedure is sought ("*the offence question*"): s 24(2)(a) or (3)(a).

(3) There must be reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence ("*the evidence question*"): s24(2)(b) or (3)(b).

(4) The carrying out of the forensic procedure is justified in all the circumstances ("*the justification question*"): s 24(1)(b).

147. The first requirement was originally expressed in the old s 25(a): that the Magistrate had to be satisfied that "the person on whom the procedure is proposed to be carried out is a suspect". It no longer features in the new s 24, however it is still a necessary threshold issue.

148. See also the checklist set out by RA Hulme J in *KC v Sanger* at [10].

149. Section 24 of the Act is as follows:

> **24 Final order for carrying out forensic procedure**
>
> (1) A Magistrate may order the carrying out of a forensic procedure if satisfied on the balance of probabilities:
> (a) that the circumstances referred to in subsection (2) or (3) exist, and
> (b) that the carrying out of such a procedure is justified in all the circumstances.
> (2) In the case of an intimate forensic procedure:

(a) there must be reasonable grounds to believe that the suspect has committed a prescribed offence, and
(b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence referred to in paragraph (a).
(3) In the case of a non-intimate forensic procedure:
(a) there must be reasonable grounds to believe that the suspect has committed an offence, and
(b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence referred to in paragraph (a).
(4) In determining whether or not the carrying out of the forensic procedure is justified in all the circumstances, the Magistrate must balance the public interest in obtaining evidence as to whether or not the suspect committed the alleged offence against the public interest in upholding the suspect's physical integrity, having regard to the following:
(a) the gravity of the alleged offence,
(b) the seriousness of the circumstances in which the offence is alleged to have been committed,
(c) the degree to which the suspect is alleged to have participated in the commission of the offence,
(d) the age, cultural background and physical and mental health of the suspect, to the extent to which they are known,
(e) in the case of a suspect who is a child or an incapable person, the best interests of the child or person,
(f) such other practicable ways of obtaining evidence as to whether or not the suspect committed the alleged offence as are less intrusive,
(g) such reasons as the suspect may have given for refusing to consent to the carrying out of the forensic procedure concerned,
(h) in the case of a suspect who is in custody, the period for which the suspect has been in custody and the reasons for any delay in the making of an application for an order under this section,
(i) such other matters as the Magistrate considers relevant to the balancing of those interests.

1. *THE SUSPECT QUESTION*

Who is a suspect?

150. As set out in s 3(1) of the Act:

> ***suspect*** means the following:
>
> (a) a person whom a police officer suspects on reasonable grounds has committed an offence,
> (b) a person charged with an offence,
> (c) a person who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person.
> (d) (Repealed)

151. It was emphasised in *Orban v Bayliss* that the provisions of the Act relating to suspects are not designed to permit police to use the process to determine who might be a suspect in relation to an offence. Simpson J at [31] said:

> The conditions that must be met before an order can be made demonstrate that the purpose of the legislation is not to enable investigating police (or other authorised persons) to identify a person as a suspect; it is to facilitate the procurement of evidence against a person who already is a suspect.

Types of suspect

152. The Act distinguishes between suspects according to their status as an adult, a child or an incapable person.

153. It is incumbent upon a police officer to satisfy themselves that a suspect is neither a child nor an incapable person before asking them to consent to a forensic procedure: s 11(1)(c) of the Act.

154. The consequence of a suspect being a child or an incapable person is that any forensic procedure must be authorised by an order of a Magistrate or authorised officer under Part 5. The avenues for informed consent under Part 3 or an order of a senior police officer under Part 4 are not available vis-à-vis a child or incapable suspect.

155. In s 3(1):

> ***adult*** means a person of or above 18 years of age.
>
> ***child*** means a person who is at least 10 years of age but under 18 years of age.

156. In line with the age of criminal responsibility, a child must be at least 10 years of age before they can be treated as a suspect for the purpose of the Act. When an order for a forensic procedure is sought, the Court ought to be scrupulous when making decisions which derogate from the rights of a child.

Determination whether a person is a suspect

157. Whether a person is a suspect or not will not be controversial in many cases, by virtue of the person having been charged with an offence or summoned to appear before a court in relation to an offence. In *Police v AH* [2008] NSWLC 6, Lerve LCM (as his Honour then was) took the expression "summoned" to mean that the person has had served on them a Court Attendance Notice requiring attendance at Court: at [7].

158. However, absent those circumstances, it falls to the Magistrate to determine whether the person is a suspect by virtue of a police officer suspecting on reasonable grounds that they have committed an offence.

159. The requirement under the old s 25(a) that the Magistrate be satisfied that the person on whom the procedure is proposed to be carried out is a suspect is not replicated in the current s 24 requirements. Notwithstanding this omission, whether a person is a suspect is a threshold issue for the application of Part 5. As RA Hulme J held in *KC v Sanger*, applying the current ss 23 and 24 provisions, the application before the Magistrate required consideration of whether the plaintiffs were "suspects" as defined in s 3: at [10], [17]. In those circumstances, the authorities dealing with the earlier s 25(a) determination are still apposite.

The Magistrate is satisfied that a police officer suspects on reasonable grounds

160. In *Helen Maguire v Jason Beaton* [2005] NSWSC 1241; (2005) 162 A Crim R 21 ("*Maguire v Beaton*"), Latham J set out the following:

> 18 The remarks of Simpson J in **Regina v. Rondo** [2001] NSW CCA 540 at par 53 are apposite to the present matter. At that paragraph her Honour summarised the propositions applying to a reasonable suspicion as follows:

> "(a) A reasonable suspicion involved less than a reasonable belief but more than a possibility. There must be some thing which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs cover by s 357E. A reason to suspect that a factor exists is more than a reason to consider or look into the possibility of its existence.
>
> (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
>
> (c) What is important is the information in the mind of the police officer (undertaking the relevant course of action). Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of these surrounding circumstances."

161. The remarks in *Rondo* are on point in relation to determining the threshold suspect question, namely, whether a police officer suspects on reasonable grounds that the person committed an offence: *the suspect question*.

162. In *Maguire v Beaton,* the respondent to the forensic procedure application had exercised her right to remain silent when questioned by police about her possible involvement in drug and firearm-related offences. The Magistrate said in his reasons for ordering the forensic procedure:

> She has exercised her right to remain silent. Therefore she has not, I suppose, afforded an opportunity where a more full assessment may be made of the situation. She is entitled to say nothing of course to the police, but in so doing of course there is insufficient, sort of, material, I suppose, to make a complete assessment of the situation. **And the police would like the opportunity to see whether in fact she may be implicated any more**, in these very, very serious matters that they allude to. Hence the present application before the court. (Emphasis added)

163. On appeal to the Supreme Court, it was held at [20] that the Magistrate 'fell foul of Simpson J's admonition at [30] and [31] in *Orban v Bayliss*. Latham J held at [16] that:

> … at no stage did the Magistrate articulate the basis on which he was satisfied that the plaintiff was a suspect; that is whether the Magistrate was satisfied that the police officer had reasonable grounds for a suspicion that the plaintiff had committed an offence. The Magistrate appeared to accept that the requirement in s 25(a) was met by the fact of the police officer's assertion in the affidavit grounding the application.

164. Latham J placed particular significance on the paragraph set out above and concluded at [21] that "it appears to me that the police had formed a view that a forensic procedure would allow them to identify the plaintiff as a suspect and that reasonable grounds did not exist to establish that the plaintiff was already a suspect." Her Honour held at [16] that the Magistrate proceeded on an erroneous basis in accepting that the requirement in s 25(a) was met by the fact of the police officer's assertion in the affidavit ground the application that the person was a suspect.

165. In *Orban v Bayliss*, Simpson J stated at [40]:

> 40 The magistrate did not explicitly make any finding, in terms of s25(a), that the plaintiff was a suspect. Since the definition of "suspect" in s3 includes a person who has been charged with an offence, and there was uncontroversial evidence that the plaintiff was such a person, that also could hardly have been in issue, and it was not. Nevertheless, the section requires a positive finding to that effect. The definition also includes:

"a person whom a police officer suspects on reasonable grounds has committed an offence"

and thus is applicable to a person who is not, at the time of the application, the subject of any charge. Where an order is sought in relation to such a person, then the evidence put before the magistrate must be evidence which will enable the magistrate to satisfy himself or herself not only that the police officer does suspect that that person had committed an offence *but also* that the police officer has reasonable grounds for that suspicion. Evaluation of whether the grounds for suspicion are reasonable or not, for this purpose, must be the independent evaluation of the magistrate. The mere assertion by a police officer that he or she suspects, or even that he or she suspects on reasonable grounds, that the person the subject of the order sought has committed an offence, would not satisfy the sub-paragraph.

166. However, Simpson J continued that had the Magistrate turned her attention to the question, she could not reasonably have formed any view to the contrary and so Simpson J was not inclined to interfere on that basis: at [41].

167. Similarly in *KC v Sanger*, RA Hulme J accepted at [71] that the Magistrate had failed "to articulate a finding that there were reasonable grounds for the suspicion held by the applicant officer." His Honour continued:

72 However, a failure in this respect could not warrant the interference of this Court. It is clear enough in my view that the magistrate was satisfied that there were reasonable grounds to believe that the plaintiffs had committed an offence (s24(3)(a)). Such a finding subsumes a finding that there were reasonable grounds for the suspicion of the applicant officer.

168. In *F V v Zeitler* [2007] NSWSC 333, Simpson J stated at [32], [35] and [38] as follows:

32 In order to prove the first – that the plaintiff was a suspect – it was necessary that the police officer establish to the satisfaction of the magistrate that she did in fact suspect that the plaintiff had committed an offence. This she was able to do by her own assertion. It was also necessary to establish that her suspicion was based upon reasonable grounds. This could not be done by her own assertion. As I have previously observed (**Orban v Bayliss** [2004] NSWSC 428), it is not a sufficient discharge of the magistrate's function merely to accept a police officer's assertion that he or she has reasonable grounds for the stated belief. The magistrate must bring an independent assessment to bear upon the grounds said reasonably to give rise to that suspicion. There is, obviously, considerable overlap between that and the second matter necessary to be proved.

…

35 Analysis of the material put before the magistrate shows that, at this stage, the case for suspecting the plaintiff to be the perpetrator is circumstantial. However, there is, when the material is properly examined, a great deal of circumstantial material that would justify such a suspicion – that is, constitute reasonable grounds for the suspicion.

…

38 Plainly, establishing reasonable grounds for a suspicion is a less demanding test than establishing reasonable grounds to charge a person with an offence. The whole purpose of the authorisation of forensic procedures is to provide evidence either to strengthen an existing suspicion, or to explode that suspicion.

An example

169. The matter of *Police v AH* [2008] NSWLC 6 provides a useful example of the required analysis. In that case, DR was walking along a cycle path in Albury when he was approached and struck with a beer bottle on his face, causing severe lacerations along the jaw line and ultimately requiring surgery. A crime scene examination revealed 2 blood trails leading away from the scene in two different directions – one being the victim's, the other believed to belong to the offender (who it was believed had become injured in the attack): at [3]. The underlying offences were recklessly inflicting grievous bodily harm with intent contrary to s 33 *Crimes Act 1900* or recklessly wounding another person contrary to s 35 *Crimes Act 1900*: at [4]. AH was not charged nor served with a CAN. The Magistrate was accordingly required to determine whether a "police officer suspects on reasonable grounds that the respondent has committed an offence": at [7].

170. A DNA profile was obtained from the second blood trail. It was entered onto the DNA database and was unknown. The young person AH's profile was not on the database: at [3].

171. The only evidence linking AH to the offence was that a short time after the incident, a male person who wished to remain anonymous contacted the police and said that he had overheard AH at the Northside Hotel claiming that he was responsible for the attack on the person pictured in the newspaper that day: at [3].

172. Lerve LCM (as his Honour then was) concluded that he was not satisfied on the balance of probabilities that the respondent was a suspect. His Honour referred to a number of authorities including *Orban v Bayliss*, *Maguire v Beaton*, *R v Rondo* and *Fawcett v Nimmo* and stated as follows:

> 15. Applying the authorities it is my opinion that the real question I need to determine is whether the applicant police officer has reasonable grounds for suspecting that the respondent was involved in the commission of the offences contrary to either sections 33 or 35 of the Crimes Act.
>
> 16. The only information available to the officer is information from an anonymous source who is alleged to have overheard the respondent admitting to his involvement. The information is apparently that the respondent was "overheard". It is not even to the extent of the anonymous source speaking directly with the respondent, nor the respondent making any direct admission to the anonymous source". It was conceded in the course of argument before me on 24 April 2008 that the anonymous source is going to remain precisely that and no further information will be forthcoming. There is no name of the anonymous source, nor is there likely to be one. There are no observations of the respondent at or about the time of the commission of the alleged offences. For example, if the respondent was observed to have lacerations on either of his hands shortly after the alleged incident involving the victim R that would have been a very significant matter. Likewise, the position would be entirely different if the information obtained by police was an account from a named person. The anonymous source maintains that it was at licensed premises that he overheard the respondent admit to his involvement. As Smart AJ pointed out in *Rondo* "regard must be had to the source of the information and its content".
>
> 17. The anonymous source is said to have overheard the respondent in the Northside Tavern, i.e. licences premises. The respondent is a juvenile, and is therefore not permitted in licensed premises. I am not so naïve that I do not accept that underage persons enter licensed premises and consume liquor therein, however, this is yet another albeit minor matter to be taken into account. In the matter presently under consideration it is perfectly conceivable that the "anonymous" information could well have been given by someone with a grudge against the respondent.

18. Given the paucity of information held by the applicant, it is my opinion, considering the various authorities set out above that it is a mere possibility that the respondent was involved in the offences involving DR. The information entitled the police to begin an investigation. There is no evidence before me of any investigation or part thereof that has been conducted into the allegation that the respondent was involved in the incident in the early hours of 1 January 2008. Information used to ground a reasonable suspicion does not have to amount to admissible evidence (see Smart AJ in *Rondo* at [53(b)]), however, it has to have some probative value. It is my opinion that the information held by the applicant lacks that probative value.

Conclusion

19. For these reasons, I am not satisfied on the balance of probabilities that the respondent is a "suspect" within the meaning of the relevant legislation. As Simpson J. held in *Orban –v- Bayliss* (at [31]) the purpose of the legislation is "not to enable investigating police to identify a person as a suspect; it is to facilitate the procurement of evidence against a person who is already a suspect". It is my opinion that in reality in the matter presently under consideration the application is directed towards confirming that the respondent is a suspect.

20. For the sake of completeness, I observe that the incident that gave rise to this application is very serious. Further, if there had been some further information or material, e.g. lacerations on the hand of the respondent, or that the source had given a name and more detailed account of what the respondent had allegedly said, it is very likely that my decision would be different.

Suspected in relation to an underlying offence

173. In *Fawcett v Nimmo*, his Honour Grove J emphasised that:

15 Before exercising power to oblige a person to undergo any forensic procedure, a magistrate must be satisfied that the person on whom the procedure is proposed is "a suspect". **In order for a person to be categorized as a "suspect" there must rationally be conceived by the person holding the suspicion an underlying offence of which the person is suspected.** In the context of this case, although it is apparent that such an initial suspicion would first exist in the mind of the investigator, the statute explicitly requires the magistrate be satisfied, on the evidence before the Court, before an order can be made for the taking of a sample by buccal swab, that there are reasonable grounds for suspecting that the person committed a prescribed offence. All indictable offences are prescribed offences. (Emphasis in bold added)

174. Grove J continued at [16] that "the learned magistrate found that there were reasonable grounds to believe that the respondent had committed a prescribed offence, although in her formal finding did not specify what particular offence." This case emphasises the importance of identifying a particular offence for which the person is a suspect or for which there might be reasonable grounds to believe they committed; the need to consider each "elemental ingredient of an offence"; and to address whether the evidence before the court is sufficient to determine the threshold *suspect question* and the further *offence question* below.

2. *THE OFFENCE QUESTION*

The Magistrate is satisfied there are reasonable grounds to believe

175. It is important to distinguish the test in *Rondo* (above) which was formulated in circumstances involving the need for action by police and the test applying in court justifying the making of an order. The test in *Rondo* is on point in relation to determining the threshold suspect question, namely, whether a police officer suspects on reasonable grounds that the person committed an offence: *the suspect question*.

176. There is an important distinction, however, to be made between the type and quality of material used to demonstrate that a police officer had a reasonable suspicion and that which is used to persuade a court that there are reasonable grounds to believe a certain matter: *the offence question* and *the evidence question*. It is suggested that whilst a reasonable suspicion by a police officer may be founded on hearsay material or otherwise inadmissible material; that the material on which a court might found a reasonable belief ought to be admissible in those proceedings in accordance with the rules of evidence that apply in those proceedings.

177. Two of the requirements call for the Magistrate to be satisfied on the balance of probabilities that there are reasonable grounds to believe certain matters to be the case: *the offence question* and *the evidence question*. This part of the paper is therefore relevant also to the next.

178. The High Court in a joint judgment in *George v Rockett* considered at 112 the circumstance of when "a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief" and held that "it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person." The Court referred at 112-113 to earlier UK authority and extracted from the judgment of Fox J in *Reg v Tillett; Ex Parte Newton* (1969) 14 FLR 101, at p. 106 which in turn referred to Edwards J in *Bowden v Box* [1916] GLR (NZ) 443 at p. 444 in which it was said:

> It is impossible to construe this enactment as authority to a justice to issue a search warrant upon the oath alone of a constable or of any other person that "there is reasonable ground to believe that liquor is sold", etc. So to hold would be to hold that the justice may discharge the judicial duty cast upon him by acting, parrot-like, upon the bald assertion of the informant.

179. The High Court continued at 113: "It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind."

180. Hall J in *Walker v Budgen*, held at [26] that the "statutory formula which is central to a consideration by a magistrate before ordering a forensic procedure under [s 24] is encapsulated in the phrase "*there are reasonable grounds to believe that …*". That expression plays a central role in the application of the provisions in [s 24] in the same way that similar expressions have been employed in search warrant legislation." His Honour then extracted the quote from *George v Rockett* at 112 above and continued:

> 27 Accordingly, in the application of [s 24], there must be information establishing the existence of specific facts, namely those that are sufficient to induce the requisite state of mind, being the asserted belief as to the suspect having committed a prescribed offence within [s 24(2)(a)] and

sufficient to induce a belief that a forensic procedure might produce evidence which tends to either confirm or disprove that the suspect committed the relevant offence.

28 It follows that the process of consideration required by the provisions of [s 24] is not merely a ritualistic one to be addressed in a peremptory fashion without due regard to the import of those provisions. The nature of the obligation of an authorising magistrate in this respect is not dissimilar to that described by Burchett, J. in **Parker v. Churchill** (1985) 9 FCR 316 at 322 in a passage which was cited by the High Court in **George v. Rockett** (supra) at 111:-

> *"The duty, which the Justice of the Peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the Justice of the Peace* ***should stand between the police and the citizen****, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs."*

29 The position under the Forensic Procedures Act, then, is not unlike that of a justice or other authorised officer who is required to consider whether the requisite grounds exist for the specified belief in the issue of a search warrant. In that context, as with provisions such as those contained in [s 24], it is for the magistrate or authorising officer to consider and come to his or her own conclusions on the basis of the material presented on an application under the Act. (Emphasis added)

181. In *Ryan Kapral v Federal Agent Joshua Bunting* [2009] NSWSC 749 ("*Kapral v Bunting*"), the applicant relied on an affidavit with a detailed statement of facts annexed to it: at [7]-[26]. The applicant was also cross-examined: at [27]. It does not appear that any objection was taken pursuant to the hearsay rule when the matter was before the Local Court.

182. The Magistrate in deciding to grant the application referred to *International Finance Trust Company Limited v NSW Crimes Commission* [2008] NSWCA 291 and in particular the judgment of Allsop P at 110-111: (at [33] in *Kapral v Bunting*):

> 110 In *George v Rockett* (1990) 170 CLR 104 the High Court considered s 679 of the *Criminal Code* (Qld) which provided that if it appeared to a justice that "there are reasonable grounds for suspecting or believing" (relevant matters) the justice may issue a warrant directing a police officer to take steps to enforce the law. The High Court made plain that when legislation took this form the court's task was to be satisfied that there were reasonable grounds for the suspicion but it was not necessary for the court itself to entertain the relevant suspicion. Sufficient facts must exist to induce the relevant suspicion in the mind of a reasonable person (p 112). "It must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist."
>
> 111 The High Court also considered the nature of the facts required to be established to demonstrate reasonable grounds for a suspicion or belief. "Suspicion" and "belief" are different states of mind. "Suspicion" is "a state of conjecture or surmise where proof is lacking" (*Hussein v Chong Fook Kam* [1970] AC 942 at p 948). The facts sufficient to found a suspicion may be quite insufficient to ground a belief.

183. Howie J continued examining the Magistrate's reasons, and said:

> 39 There is a continuum on which a consideration of certain facts may result in differing states of mind as to a conclusion to be drawn from those facts about the existence of another fact. The court here was concerned with inferential reasoning, that is drawing from some ascertained facts an inference of the existence of another fact. The inferred fact was the plaintiff's involvement in the supply of a commercial quantity of the drug.

40 As the magistrate himself understood, certain facts may not support a conclusion that there are reasonable grounds for a suspicion that the inferred fact exists. But the addition of further facts might provide such grounds, yet not support a finding of reasonable grounds for a belief in the existence of the inferred fact. The addition of other facts may however provide a support for a finding of reasonable grounds for belief that the inferred fact exists, yet not support a finding that there is no other reasonable conclusion to be drawn from the ascertained facts other than that the inferred fact exists. This last state of mind is proof, or conviction, of the existence of the inferred fact.

41 There is no bright line between the differing conclusions that may be drawn from the facts considered and minds might differ as to what conclusion should be drawn. The requirement that there be reasonable grounds for whatever state of mind is being considered is to remove the extravagant or eccentric findings that might be made by a particular individual.

42 Further there is a subtle distinction that is drawn between the various states of mind as to the existence of the concluded fact. In *George v Rockett*, in the passage part of which was referred to by the Court of Appeal in the decision referred to by the Magistrate, the judgment goes on to consider "belief" as distinct from "suspicion". It was stated at 116:

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

43 In inferential reasoning, it is not appropriate to consider one particular established fact and ask whether the inference can be drawn from that fact of the existence of the concluded fact. It never will. This is the difference between a circumstantial case and a direct evidence case. In the latter case, provided that the established fact is reliable, it will itself establish the existence of the concluded fact. So a reliable admission of the commission of a crime will prove that the person making the admission committed the crime, the concluded fact.

44 Much of the argument before the Magistrate and before this Court on behalf of the plaintiff falls into the error of considering the established facts individually and arguing that there are explanations for that fact that are inconsistent with a belief that the plaintiff had committed the particular offence under consideration. So it was argued that the conversation in which Ryan (the plaintiff) is asked to "sweep it up there" may be a reference to something unconnected with the packages containing the pseudoephedrine substitute in light of the fact that the warehouse was used for storing foodstuffs.

45 But as the Magistrate appreciated, that fact has to be considered in light of all the established facts taken as a whole.

That the suspect committed an offence

184. *The offence question* requires the Magistrate to consider whether there are reasonable grounds to believe that the suspect committed a certain type of offence, depending on which type of procedure is sought:

- A prescribed offence (an indictable offence) in relation to intimate procedures: s 24(2)(a); or
- Any offence in relation to non-intimate procedures: s 24(3)(a).

185. In *Orban v Bayliss*, Simpson J outlined the test as follows:

> 43 The next question the magistrate should have asked herself, in relation to each of the forensic procedures for which an order was sought, was whether there were reasonable grounds to believe that the plaintiff had committed a prescribed (or related) offence. This required her own individual assessment of two things: the grounds upon which the plaintiff was suspected, and reasonableness of those grounds. At no stage did she direct her mind to the questions. Nor was she given evidence that would have enabled her to make relevant findings or reach the required satisfaction. The opening words of paragraph 3 of Detective Bayliss' affidavit are, in my view, intended to achieve that purpose, but they reflect a degree of confusion about what is required by s25. It is for this reason that I earlier characterised the format of the affidavit as apt to mislead.
>
> …
>
> 45 What required addressing were the grounds for believing that the plaintiff had committed a prescribed offence, or a related offence. Those grounds were required to be set out in order to enable the magistrate to form her own independent opinion as to their reasonableness. The magistrate had to be given evidence to satisfy herself that grounds existed for believing that the plaintiff was guilty of a prescribed (or related) offence; *and* that those grounds were reasonable.
>
> 46 Even in Detective Bayliss' narrative no concrete facts to establish the grounds of belief or their reasonableness, were stated. It is insufficient to say, as he did, that:
>
> > " ... it became apparent that [the plaintiff] was dealing heroin ..."
>
> or that
>
> > "It is alleged that [the plaintiff] supplied a drug runner with a deal of heroin [and] [t]he drug runner would then return to [the plaintiff's] Hair Salon, and give [the plaintiff] the money."
>
> 47 That gave the magistrate no basis at all for a finding that grounds existed for believing that the plaintiff had committed a prescribed (or related) offence, or, if she so held, that those grounds were reasonable.
>
> 48 When attention is directed to the nature of the orders sought, and having regard to the delicate balance struck by Parliament, it will be recognised that what I have said is no mere pedantry. Parliament intended that orders for involuntary forensic procedures be made only where its stated preconditions are met. Those preconditions include a magistrate's independent satisfaction that reasonable grounds exist for the police officer's suspicion.
>
> …
>
> 56 None of the evidence, in my opinion, was capable of satisfying the magistrate that there were reasonable grounds for believing that the plaintiff committed a prescribed or related offence… In order to reach the necessary state of satisfaction, it is necessary that the magistrate bring his or her own independent evaluation to the evidence which the prosecution contends amounts to reasonable grounds to believe that the suspect committed the relevant offence. It is insufficient, in my view, merely to recount that "it is alleged" that a suspected person engaged in certain acts. In order to enable the magistrate to reach the required level of satisfaction on that question it is necessary to put before the magistrate sufficient evidence to enable him or her to be satisfied that reasonable grounds for believing that the person suspected committed the offence exist. This was not done. The same may be said of evidence to enable answers to be given to the other questions.

3. *THE EVIDENCE QUESTION*

The Magistrate is satisfied that there are reasonable grounds to believe the procedure might produce evidence

186. This part of the test requires the Magistrate to be satisfied that there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence.

187. In *Orban v Bayliss*, Simpson J referred to what appeared to be a pro-forma affidavit and its concomitant inadequacies and held at [51]:

> The question at issue is not whether or not an applicant for an order believes that there are reasonable grounds for believing that the forensic procedure sought might produce evidence of the required kind: it requires evidence to enable a magistrate to reach that conclusion.

188. Further, at [53] her Honour emphasised that where an application seeks more than one order, they each require a separate assessment of this question.

> … the requirement demanded attention individually to each of the procedures in relation to which an order was sought. It is entirely possible that available evidence might have established reasonable grounds for believing that one or the other, but not both, procedures for which orders were made might produce the relevant evidence.

189. Simpson J ultimately held that none of the evidence was capable of establishing *the evidence question*: at [56].

190. In *Walker v Budgen*:

> 34 … Mr. Stratton, SC. submitted that there was an absence of any evidence of DNA having in fact been found at the victim's premises. Accordingly, it was submitted it was not open to the learned magistrate to find that the forensic procedure might produce evidence tending to confirm or disprove that the plaintiff committed the offence. More precisely, it was contended that there were no reasonable grounds for any belief to that effect. The submission continued:-
>
> > *"... Whatever was the result of the DNA analysis of any buccal swab taken from the plaintiff, such a result could not tend to confirm or disprove the plaintiff's guilt unless there was DNA material at the scene of the crime to compare it with."*
>
> …
>
> 37 The expression in s.25(f) *"might produce"* cannot be divorced from the preceding expression *"reasonable grounds to believe"* in that provision. It does not, with respect, assist in saying simply that s.25(f) provides a relatively low threshold of probability. Firstly, the notion of *belief* is a different concept from *suspicion*. Facts that can reasonably ground a *suspicion* may be substantially less than would be reasonably required to ground a *belief*: **George v. Rockett** (supra) at 115. Secondly, although a reasonable suspicion involves less than a reasonable belief, nonetheless, it still requires more than a possibility: **Regina v. Rondo** (2001) 126 A. Crim. R. 552. In **Rondo,** it was stated that a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. A fortiori, with a provision requiring reasonable grounds for a belief as to a specified matter.
>
> …

40 The provisions of s.25, which an applicant for a final order authorising the carrying out of a forensic procedure must satisfy, can only be met by information or material being placed before a magistrate that establishes the matters specified in the sub-paragraphs of that section.

191. Hall J clarified the "prospective" nature of the test and emphasised that it was for the Magistrate to be satisfied, not for the applicant to assert his or her belief.

42 The expression in s.25(f) *"reasonable grounds to believe"* is used in s.25(b), (c), (d) and (e), although the belief in each of those sub-paragraphs is related to past facts. In s.25(f), the grounds of the requisite belief must relate to a matter in prospect but one based on an assessment of existing facts, namely, the prospective outcome of a forensic procedure if undertaken.

43 It is clear that an applicant for a final order under the *Forensic Procedures Act* must place before the magistrate information which enables the latter to be able to assess whether or not there are reasonable grounds for the asserted belief. The mere assertion or contention in an affidavit that there are reasonable grounds to believe that a forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence is clearly insufficient: see **Orban** (supra) at [40]. The factual foundation constituting reasonable grounds for the specified belief must be given with sufficient particularity to permit an authorising magistrate to be in a position to determine whether there are reasonable grounds to believe that the forensic procedure might produce the outcome or result referred to in the sub-paragraph.

192. In relation to DNA evidence, his Honour commented as follows:

45 … The technique of DNA identification is, of course, one employed on the basis that there, in fact, exists forensic material upon which identification can be made or disproved. In an article, *DNA Identification in the Criminal Justice System,* by Jeremy Gans and Gregor Urbas (May 2002), Australian Institute of Criminology *Trends and Issues and Crime and Criminal Justice*, the learned authors discuss the technique of DNA identification involving, as it does, the essential comparison of DNA from two bodily samples, crime scene DNA and samples taken of other human bodily material:-

> *"... contemporary profiling techniques can generally be used on such tiny samples as the root of a pulled hair, saliva on a cigarette butt, a square-centimetre blood stain, skin cells from clothing or three micrograms of semen from a vaginal swab; standard or alternative techniques will sometimes succeed on other, less optimal, samples such as shed hair or skin cells from a handled object ..."*

46 The evidence before the magistrate in the application before him failed to identify the basis for the claimed belief that DNA matching could be undertaken. Specifically, there is no information as to the taking or availability of crime scene DNA material from the victim's premises. There are references to the possibility that a meal or meals had or may have been half eaten by someone and there is reference to the fact that a telephone call may have been made by the plaintiff. However, what is left to speculation is the existence of any relevant DNA crime scene sample(s) or material that could provide the reasonable grounds for the belief stated in and made necessary by the provisions of s.25(f). The existence and nature of any such samples or material, if they existed, would, no doubt, be readily ascertainable by or known to those who have been involved in the investigation.

47 I do not consider, as was argued on behalf of the first defendant, that the pre-condition specified in s.25(f) sets such a low threshold that the reference to *"might produce evidence"* meant that the magistrate need only be satisfied that there existed a potential outcome envisaged by s.25(f) without more. The inclusion of the expression *"reasonable grounds to believe"* means, there must be more than mere speculation or more than a mere theoretical possibility that evidence referred to in the provision might be produced. A factual foundation sufficient to constitute reasonable grounds for such belief must be demonstrated. …

48 In determining the correct interpretation and application of the provisions of s.25, it is, of course, necessary to bear in mind practical issues surrounding the availability of forensic procedures to

authorised persons. In other words, an interpretation which would in any way frustrate the purpose of the legislature is, of course, one that must be avoided.

49 The first defendant submitted, as earlier mentioned, that the Act does not require material found at the crime scene to already have been analysed at the time of the making of an order for a forensic procedure. It was emphasised that an application is made whilst an investigation is still in progress and that *"the spirit of intendment of the Act, particularly based on the working of s.25(f), is such to investigate that orders of this nature might be made where the factual framework is relatively thin on the ground"*.

50 An interpretation of a statutory provision that requires factual material to be placed before a magistrate on a forensic procedure application is not one that works against a practical application of the Act itself.

….

52 What will often need to be established in relation to s.25(f) is a chain of facts which, in some way and to some extent, link the suspect to crime scene material

193. Fullerton J considered this aspect of the test in some detail in *LK v Police*:

28 Mr Winch submitted that properly construed, the test in the second limb necessitates that at the time of the application for a final order there must be something either in the form of crime scene DNA, or an opinion from a suitably qualified person that DNA will in all probability be retrievable from a crime scene, otherwise there is nothing against which a meaningful assessment of what the forensic procedure might produce for comparative DNA testing can be made. For a Magistrate to simply assume that there will be, or might be, crime scene DNA to enable a comparison to be made with a forensic sample from a suspect, either because the police think or hope that will be the result, is not enough to induce the reasonable belief to which the section refers. That is plainly correct.

29 The defendants accepted that there was no evidence before the Magistrate that DNA material was on or likely to be retrieved from the parts of the rifle seized at the crime scene. At the hearing of the application the rifle parts had merely been lodged in the crime scene laboratory for the purposes of determining whether DNA could be recovered. There was no evidence that a laboratory technician had considered the viability of DNA being recovered or even asked that question. In those circumstances, Mr Winch submitted that the prospect that the procedure might produce evidence of the kind with which s 24(3)(b) is concerned was at best a theoretical possibility and at worst simply speculative, neither of which are capable of grounding a reasonable belief. That is also plainly correct.

30 Mr Winch relied upon *Walker v Bugden* as authority for the proposition that without evidence of a DNA deposit obtained from a crime scene, the test under s 24(3)(b) could not be made out as a matter of law…

31 I am not persuaded that *Walker v Bugden* is authority for the blanket proposition for which the plaintiff contends. A careful reading of his Honour's reasons for judgment suggest otherwise. That is not to say that in some cases the absence of a crime scene might not be fatal to an application under s 24. In *Walker v Bugden* Hall J concluded that the absence of a DNA sample was fatal to the success of the application because without it there was an insufficient factual basis to induce a reasonable belief that a DNA comparison could be undertaken which might provide evidence of the kind to which the section refers. Although at [45] his Honour correctly identified that the technique of DNA identification is employed on the basis that there *in fact* exists forensic material upon which identification of a suspect can be made or disproved, I do not understand his Honour to have held that a crime scene DNA sample is a necessary precondition to a successful application for an order that a forensic procedure be undertaken.

32 His Honour's insightful analysis of the operation of the section in *Walker v Bugden* at [45]-[52] does however serve to emphasise that each application must be considered by reference to an assessment of *existing* facts and whether, in the particular case, they are sufficient to induce a reasonable belief in the mind of a Magistrate that the prospective outcome or result of the forensic

> procedure, if undertaken, might produce evidence of the relevant kind. As I see it, it is not impossible to conceive of a case where, despite the fact that the results of a crime scene analysis are not available at the time of the application, other evidence collected during the course of the investigation might be sufficient to support a submission by an applicant police officer that there are reasonable grounds for a belief that a DNA comparison might be productive of evidence tending to prove or disprove that the suspect had committed the offence. Photographic or electronic evidence establishing a suspect's presence at the scene of a crime at a relevant time and/or a suspect's physical contact with an item or items in some way involved with the commission of an offence, or perhaps admissions by a suspect to similar effect, are examples of evidence that may carry sufficient weight on an application for final orders under s 24 of the Act despite the fact that crime scene DNA evidence is unavailable.

194. By way of further example, it was held in *F V v Zeitler* that there was sufficient evidence that DNA material might be available from the crime scene by virtue of the hairs found on the deceased victim's shirt, and that ultimately there was sufficient material to establish reasonable grounds in relation to the *evidence question* for a buccal swab, a hair sample and photograph: at [39].

195. In *Alessi v SE*, the police sought orders for a buccal swab, blood and urine sample, photographs of the young person's body and swabs of the hands of the young person: at [2]. On an appeal by the prosecution, the plaintiff made a submission that:

> … since the several procedures were different and apt to produce different results, it was necessary for his Honour to consider separately the potential of each proposed procedure so as to ascertain whether there were reasonable grounds to believe that that procedure might produce evidence tending to confirm or disprove the commission of the offences by the first defendant. It was submitted that in failing to consider each procedure separately his Honour fell into error.

196. Barr J, setting aside the order of the Magistrate and remitting the proceedings to be dealt with according to law, concluded that:

> 26 I accept the submissions made on behalf of the plaintiff that, the procedures contended for being different in nature and possibly apt to produce different results, different considerations might arise in answering the [question whether there were reasonable grounds to believe that the desired procedure might produce evidence tending to confirm or disprove that the suspect had committed the offences]. I accept the submission that it was necessary for his Honour to consider each proposed procedure on its own merits and decide whether it had the necessary quality. I accept that in failing to do so his Honour erred in law.

197. It is suggested that this is also the correct approach in relation to an application for an interim order.

198. In *Munro v ACP*, RA Hulme J rejected arguments relating to the definition of a non-intimate forensic procedure being "a single, indivisible class", and whether there could be "severability in relation to a magistrate's determination of identified component sub-classes of a single forensic procedure application": at [57].

> 58 Simply because an application requests a number of different types of non-intimate forensic procedures (or intimate forensic procedures or a combination of the two), that cannot possibly mean they cannot each be dealt with on their merits. It is impracticable, inconceivable and would be inconsistent with any sensible construction of the provisions of the Act to hold that a magistrate only has power to grant all types of non-intimate forensic procedures sought in an application, or to refuse them all, and has no power to grant some and not others.

4. *THE JUSTIFICATION QUESTION*

Justified in all the circumstances

199. This aspect of the test requires the Magistrate to be satisfied that the carrying out of the forensic procedure is justified in all the circumstances by reference to the matters set out in s 24(4) (set out in [149] at pages 35-36 above).

200. In *Daley v Brown; Pittman v Brown* [2014] NSWSC 144 ("*Daley and Pittman*"), Bellew J considered the term "justified in all the circumstances" (albeit in the context of s 75L of the Act), and held that the section conferred a discretion upon the Magistrate to order that a forensic procedure be carried out.[4] His Honour continued at [90]-[92], saying:

> … That discretion was not unfettered. It required the Magistrate to be satisfied that the carrying out of that procedure was justified in all the circumstances.
>
> 91 In my view, it is evidence from the Magistrate's reasons that he did not ask himself, and did not address, that question. Rather, the question he posed was whether or not he was satisfied that sufficient grounds had been advanced by the plaintiffs in order to satisfy the court that the order sought in each case should not be made. Not only was that not the question raised by s. 75L(2), it was one which incorrectly imposed an onus on the plaintiffs. It appears that the Magistrate took the view that once the defendant (as the applicant) satisfied the court that the requirements in s. 75A(3) had been met, the onus shifted to the plaintiffs (as the respondents to the applications) to advance reasons why the making of the order was not justified. That approach reflected error. The onus was on the defendant, as the applicant for the orders, to satisfy the Magistrate firstly, that the requirements of s. 75A(3) were met, and secondly, that all the circumstances justified the making of the orders sought.
>
> 92 In approaching the matter in the way in which he did, the Magistrate asked himself the wrong question, identified the wrong issue and incorrectly reversed the onus. In each case, an error of law is made out (see *Craig v The State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82]; 351).

201. In the context of an application for a final order, Simpson J held in *Orban v Bayliss* at [58] that even if the magistrate is otherwise satisfied, "a discretion to decline to make the order remains, and delay and the interests of justice are factors which may be taken into account on that question."

202. Unlike s 75L, s 24(4) sets out a number of matters to be taken into account in determining *the justification question*. In *ACP v Munro*, Button J at [96]:

> In determining the last question, the Magistrate was required to balance the public interest in obtaining evidence as to whether or not the defendant committed the alleged offence, as against the public interest in upholding his physical integrity. That was required pursuant to the chapeau of s

---

[4] Section 75L of the Act is as follows:

75L Court order for carrying out forensic procedure on untested former offender

(1) A police officer may apply to any court for an order for the carrying out of a forensic procedure to which this Part applies on an untested former offender.

(2) A court may order the carrying out of a forensic procedure under this section if satisfied that the carrying out of the forensic procedure is justified in all the circumstances.

> 24(4). In undertaking that balancing exercise, **the Magistrate was required to have regard to all of the factors enumerated in ss 24(4)(a)-(i)**. (Emphasis added)

203. Simpson J also emphasised in *Orban v Bayliss* that "[i]n respect of this question it is also necessary to pay particular and individual attention to each of the three different procedures proposed" in "a balancing of, *inter alia*, the invasiveness of a compulsory forensic procedure, against the anticipated evidence to be obtained from it, and the requirements of the administration of justice in the most accurate solution of a particular crime.": at [54]. This is especially the case in circumstances where different procedures authorise varying levels of interference with a person's bodily integrity and have different consequences in relation to retention and use in other proceedings. See also the comments by Barr J in *Alessi v SE* at [26] of the judgment (set out above at [205]). Simpson J ultimately held that none of the evidence before the Magistrate was capable of establishing *the justification question*: at [56].

204. In *LK v Police*, Fullerton J upheld the plaintiff's grounds of appeal on this point given that "the failure to undertake any analysis at all as to whether the forensic procedure 'was justified in all the circumstances' was a clear error of law." Her Honour said at [37] that the "Magistrate was obliged to balance the invasiveness of a compulsory forensic procedure against the anticipated evidence to be obtained by employing it and this he failed to do." As a result, the final order was set aside and any evidence resulting from the application or the undertaking of the buccal swab and hair sample was ordered to be destroyed: at [39].

205. After an unsuccessful appeal to the Supreme Court against interim orders made for various forensic procedures, the matter of *Police v JW* [2007] NSWLC 30 returned to the Parramatta Local Court for determination of the whether the interim order should be confirmed in accordance with the provisions relating to a final order. Magistrate Favretto made orders for the taking of fingernail scrapings, swabs of the hands and fingers and photographs of the hands and fingers of JW. His Honour considered the balancing exercise required by s 24(4) and stated the following:

> 17. The balancing exercise is between the *"public interest in obtaining evidence as to whether or not the suspect committed the alleged offence against the public interest in upholding the suspect's physical integrity, having regard to the following".*
>
> By use of the words in s24 (4) of *"having regard to the following"* and the words *"such other matters…to the balancing of those interests"* in the last listed criterion (i) of s24 (4) the Parliament has made it clear that it is a balancing exercise of evidence against upholding a suspects physical integrity and no more.
>
> 18. The concept of obtaining evidence that either inculpates or exculpates a suspect is readily understood and requires no further elucidation.
>
> 19. The words "physical integrity" are not defined in the Act. The words have been used in a number of different contexts. In the LexisNexis Encyclopaedic Australian Legal Dictionary Intentional Tort is defined as:
>
> *"Interference with a person's chattels, land, or **physical integrity** or security".*
>
> 20. In the context of a claim for a veterans affairs disability pension Statement of Principles No 15 of 1994 defines 'stressor' as meaning that a *"person experienced, witnessed, or was confronted with event that involved actual or threatened death or serious injury, or threat to person's, or other people's, **physical integrity**."*: see **Hayes and Repatriation Commission** (2001) 68 ALD 255; [2001] AATA 412.

21. In **Re W** (1997) 136 FLR the synonomous (sic) term "bodily integrity" was referred to by Hannon J in the context of an application before the court for an order to authorise the taking of a bone marrow harvest upon a child to be used for the benefit of his aunt.

22. In **Secretary, Department of Health and Community Services v JWB and SMB** the parents of Marion, a fourteen-year-old mentally retarded girl who resided in the Northern Territory, applied to the Family Court for an order authorizing performance of a hysterectomy and an ovariectomy on her. In considering s.188 of the Criminal Code Act 1983 (NT) which made an unlawful assault an offence Mason CJ, Dawson, Toohey and Gaudron JJ said, at 233: *"The corollary of these provisions, which embody the notion that, prima facie, any physical contact or threat of it is unlawful, is a right in each person to bodily integrity. That is to say, the right in an individual to choose what occurs with respect to his or her own person. In his Commentaries 55 , Blackstone wrote:*

"[T]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner."

23. Similarly, what this application entails is judicial approval of what would otherwise amount to the offence of assault as well as an intentional tort in the balancing exercise under s24 (4). In the circumstances of this application the degree to which JW's physical integrity will be violated has to be considered in the context of, amongst the other s24 (4) criterion, *"(d) the age, cultural background and physical and mental health of the suspect, to the extent to which they are known"* and *"(e) in the case of a suspect who is a child or an incapable person, the best interests of the child or person,".*

24. The words *"upholding the suspect's physical integrity"* are to be construed as being referable to the nature of the physical acts upon JW that the carrying out of the procedure will entail. In doing so the court needs to be cognisant of the type of procedure involved and its physical effect on JW taking into account the s24 (4) criteria, particularly (d) and (e) in the circumstances of this case as JW suffered from mental illness and was an incapable person. Further, s24 (4) (f) requires the court to consider whether there are other practicable ways of obtaining evidence that is *"less intrusive"* which confirms that it is the effect of the physical acts in carrying out the procedure that the court has to consider. Regarding s24 (4) (g) there is no evidence before this court that JW had given any reason for refusing to consent but in any event as he was an incapable person he could not consent. Regarding s24 (4) (h) there was no delay in making the application. Regarding s24 (4) (i) there are no other matters before the court that is relevant to the balancing of the interests in s24 (4).

…

26. In this case the procedures involved are non-intimate, there being minimal intrusion to JW's physical integrity by taking fingernail scrapings, swabs of fingers and hands and photographs of the hands and fingers. The court also needs to take into account that the alleged offence of Aggravated Sexual Assault is a very grave offence and the facts allege a particularly serious offence and on the evidence before the court JW is the only suspect. Given the allegations by EB obtaining evidence by way of the fingernail scrapings and hand/finger swabs and their analysis will have significant probative value in either inculpating or exculpating JW in the public interest.

206. In *Police v RH* [2013] NSWChC 7, Magistrate Blewitt heard an application for a final order for buccal swab or the taking of a hair sample from a child, said to be a suspect in relation to a number of break, enter and steal offences. In relation to the consideration of the best interests of the child in s 24(4)(e), his Honour said: "This Court takes the view that it is in the Young Person's best interests to take responsibility for his actions, in the hope that his prospects for rehabilitation can be improved": at [37].

THE TEST FOR AN INTERIM ORDER

207. In addition to being satisfied that s 23 applies, an authorised officer may make an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay if satisfied of two matters:

(1) The probative value of evidence obtained as a result of the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the procedure: s 32(1)(b); and

(2) There is sufficient evidence to indicate that a Magistrate is reasonably likely to be satisfied, as referred to in s 24(1), when the application is finally heard: s 32(1)(c).

208. In addition, an interim order is only permitted in relation to a suspect for a prescribed offence: s 32(2).

209. Section 32 is as follows:

> **32 Interim order for carrying out of a forensic procedure**
>
> (1) An authorised officer may make an interim order authorising the carrying out of a forensic procedure on a suspect that must be carried out without delay if:
> (a) section 23 applies, and
> (b) the authorised officer is satisfied that the probative value of evidence obtained as a result of the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the procedure, and
> (c) the authorised officer is satisfied that there is sufficient evidence to indicate that a Magistrate is reasonably likely to be satisfied, as referred to in section 24 (1), when the application is finally determined.
> (2) An interim order may authorise the carrying out of an intimate forensic procedure on a suspect only if the person is a suspect in relation to a prescribed offence.
> (3) An interim order operates as provided by this Division until a Magistrate, at a hearing held under Division 2, confirms the interim order or disallows the interim order, whether or not the suspect consents to the carrying out of the forensic procedure after the interim order is made but before it is confirmed or disallowed.
> **Note.** Section 35 (2) requires that an interim order specify the intended date, time and place of the later hearing.
> (4) Division 2 applies in relation to an order confirming the interim order in the same way it applies in relation to an order under section 24. Accordingly, a Magistrate may make an order confirming the interim order only if the Magistrate is satisfied as referred to in section 24 (1). An order confirming the interim order is taken to be an order under section 24.

Likely to be lost or destroyed if there is delay

210. The first part of the test for an interim order requires the authorised officer to be satisfied that the probative value of evidence obtained as a result of the planned forensic procedure is likely to be lost or destroyed if there is delay in carrying it out.

211. Commonly this will arise where the order sought is a fingernail scraping, or a photograph of a fresh injury or a swab from part of the suspect's body.

212. In *Dogan v Quayle* [2011] NSWSC 143 ("*Dogan v Quayle*"), although not in the context of an interim order and where some months had passed since the alleged incident, it was argued that there was some urgency in relation to obtaining a photograph of the suspect on the basis that "[i]f his photograph could not be obtained soon it was said that there was a risk, with the passage of time, that the recollections of witnesses to the assault may fade and that the chance that Mr Dogan's role, if any, in the criminal activity concerned might be ascertained would be lost or diminished": at [12].

213. Note also that a police officer may, while waiting for the application seeking an interim order to be determined, use reasonable force to prevent the suspect destroying or contaminating any evidence that might be obtained by the forensic procedure: s 37(1). However, the section does not authorise any person to carry out a forensic procedure before an interim order is made: s 37(2).

Sufficient evidence to indicate that a final order is reasonably likely

214. It is a further requirement that the authorised officer be satisfied that there is sufficient evidence to indicate that a Magistrate is reasonably likely to be satisfied, as referred to in s 24(1), when the application is finally determined. It is therefore necessary for the authorised officer to have regard to the questions required to be determined in the test for a final order in s 24.

Confirms or disallows the interim order

215. Once an interim order falls for determination at a final hearing before a Magistrate, the Magistrate may either confirm or disallow the interim order: s 32(3).

216. In *Kerr v Police*, when the matter came before the Magistrate for a hearing under Division 2, the application was ultimately withdrawn and the Magistrate made no formal ruling. It was common ground on the appeal that the Magistrate neither confirmed nor disallowed the interim order as required by s 32(3): at [11]. Studdert J made the following findings in relation to that issue:

> 57 By s 32(3) of the Statute the interim order which was made operates *"until a magistrate, at a hearing held under Division 2, confirms [it] or disallows [it]."* In fairness to the learned magistrate, it is understandable that in the events that happened on 8 February last the interim order was neither confirmed nor disallowed. What the court below did on that occasion was to accede to the application for withdrawal. However, the legislative scheme does not contemplate that an interim order should stand indefinitely. Its status is to be determined; it is to be confirmed or disallowed after a magistrate has had the opportunity for due consideration of the matters to be considered under [the then relevant] s 25, [now s 24].

217. There is a prohibition on analysing any sample taken under an interim order unless the sample is likely to perish before a final order is made or until a final order is made: s 38.

> **38 Results of forensic procedure carried out under interim order**
> (1) A sample taken under an interim order must not be analysed unless:

(a) the sample is likely to perish before a final order is made, or
(b) a final order is made.
(2) A person who conducts an analysis in the circumstances set out in subsection (1) (a) must not intentionally or recklessly disclose the results of the analysis to any person other than the suspect:
(a) during the period before a final order is made, or
(b) if the interim order is disallowed.
Maximum penalty (subsection (2)): imprisonment for 12 months.

MAKING OF AN ORDER

218. Section 31 governs the making of a final order by a Magistrate and provides as follows:

31 Making of order
(1) If a Magistrate makes an order for the carrying out of a forensic procedure, the Magistrate must:
(a) specify the forensic procedure authorised to be carried out, and
(b) give reasons for making the order, and
(c) ensure that a written record of the order is kept, and
(d) order the suspect to attend for the carrying out of the forensic procedure, and
(e) inform the suspect that reasonable force may be used to ensure that he or she complies with the order for the carrying out of the forensic procedure.
(2) The Magistrate may give directions as to the time and place at which the procedure is to be carried out.

219. In corresponding terms, section 35 governs the making of an interim order by an authorised officer and provides as follows:

35 Making of interim order
(1) An authorised officer who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, facsimile or other means of transmission:
(a) that the order has been made, and
(b) of the terms of the order, including the matters mentioned in subsection (2), and
(c) of any orders made or directions given under subsection (3) in relation to the order.
(2) An interim order must specify the date, time and place at which a further hearing on the application will take place and the application will be finally determined.
(3) An authorised officer may make such orders and give such directions in relation to an interim order as a Magistrate may make or give in relation to an order under section 24.

220. There are additional requirements in relation to record-keeping by the authorised applicant and the authorised officer for an interim order in ss 36 and 36A. If the applicant's record does not, in all material respects, accord with the authorised officer's record, the order is taken to have had or have no effect: ss 36(6) and 36A(6).

Requirement for reasons

221. A Magistrate who makes a final order must give reasons for the making of the order: s 31(1)(b).

222. The requirement for an authorised officer to provide reasons when making an interim order are captured within the record-keeping provisions in ss 36(3)(e) and 36A(2)(c).

223. A number of the appellate decisions involve an issue in relation to the absence of or inadequacy of reasons by Magistrates or authorised officers in making a forensic procedure order.

224. In *Alessi v SE*, Barr J held that:

> 21 It is an error of law if the court appealed from does no more than set out the evidence and announce the decision. The criteria for adequate reasons for judgment include that the judge should refer to relevant evidence, should set out material findings of fact and any conclusions or ultimate findings of fact reached, and that the judge should provide reasons for making the relevant findings of fact and the conclusion: *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187; *Beale v Government Insurance Officer of New South Wales* (1997) 48 NSWLR 430.

225. After competing submissions from the parties about the process of reasoning that the Magistrate must have followed, Barr J concluded that ultimately the parties can only speculate what the reasons were for the ultimate decision reached by the Magistrate: at [18]-[24].

> 25 I accept that it was appropriate for his Honour to give an *ex tempore* judgment in such an application and I accept what has been said about the business of the Children's Court. I accept that one ought not to be critical of imperfections in expressions used in the delivery of reasons *ex tempore*. However, the reasons must be understandable, and I cannot without reading something into what his Honour said, come to any conclusion about the ultimate meaning of the passages I have extracted.
>
> …
>
> 27 In my opinion, after making proper allowance for the imperfections one might expect to find in any judgment delivered *ex tempore*, no reasonable reading of his Honour's judgment can reveal why his Honour reached his conclusions.

226. In *Walker v Budgen*, Hall J held that the issues posed by *the justification question* were not addressed by the Magistrate, and that, of itself is sufficient to constitute an error of law: at [56].

227. Similarly in *Orban v Bayliss*, the Magistrate did not focus upon either of the important questions posed by *the suspect question* nor *the offence question*. That constituted error of law: at [49].

228. However, appellate courts are generally reluctant to criticise the reasons of Magistrates in recognition of the reality of the Local Court. Button J captured the essence of the situation in *ACP v Munro* at [109] where he said "I am also acutely aware of the fact that one should not, at leisure, criticise things done by other persons in imposed haste."

229. Most recently, in *Daley and Pittman*, Bellew J stated as follows at [94]-[97]:

> … there is a long line of authority which recognises that care must be taken in approaching the task of reviewing *ex tempore* reasons for judgment of a Magistrate or Judge sitting in a busy court (see *Munro v ACP* [2012] NSWSC 100 at [21] per RA Hulme J and the authorities cited therein). At the same time, there are a number of minimum requirements which apply to the giving of reasons. In *Stoker v Adecco Gemvale Constructions Pty Limited* [2004] NSWCA 449, Santow JA observed (at [41]):
>
> > "It is clear that the duty to give reasons is a necessary incident of the judicial process. Without adequate reasons, justice has not been seen to be done, so that failure to give

> adequate reasons may be an error of law: *Pettit v Dunkley* [1971] 1 NSWLR 376, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 278-9 per McHugh JA, *Mifsud v Campbell* (1991) 21 NSWLR 725, *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430. But the duty does not require the trial judge to spell out in minute detail every step in the reasoning process or refer to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings."
>
> 95 In *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 Meagher JA said (at 442):
>
> > "A failure to provide sufficient reasons can, and often does, lead to a real sense of grievance that a party does not know or understand why the decision was made: *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478. This court has previously accepted the proposition that a judge is bound to expose his reasoning in sufficient detail to enable a losing party to understand why it lost."
>
> 96 His Honour went on to observe (at 442 - 443) that whilst a statement of reasons need not necessarily be lengthy or elaborate, an adequate statement of reasons will:
>
> > (i)refer to all relevant evidence;
> >
> > (ii)set out any material findings of fact and any conclusions reached; and
> >
> > (iii)provide reasons for making the relevant findings of fact, and reaching the relevant conclusions, as well as provide reasons in applying the law to the facts found.
>
> 97 Similar observations were made in *Pollard v RRR Corporation Pty Limited* [2009] NSWCA 110 at [56] and following (per McColl JA, Ipp JA and Bryson AJA agreeing) and were summarised by Sackville AJA (Campbell JA and Bergin CJ in Eq agreeing) in *Qushair v Raffoul* [2009] NSWCA 329 at [52] and following.

230. See also *KC v Sanger* at [64]-[68].

231. Appellate courts commonly make allowances for the realities of a busy Local Court when considering *ex tempore* reasons given by Magistrates.

232. For example, Simpson J held in *Orban v Bayliss* that had the Magistrate turned her attention to the relevant question, she could not reasonably have formed any view to the contrary and so was not inclined to interfere on that basis: at [41]. Similarly in *KC v Sanger*, RA Hulme J accepted at [71] that a failure to articulate consideration of a matter did not warrant interference.

Time and place at which the procedure is to be carried out

233. In *JW v Blackley*, the plaintiff complained that the Magistrate failed to specify a time or place, or a time limit for the carrying out of the forensic procedure. Simpson J held at [23] that a requirement to specify a time or place for the carrying out of forensic procedures or to impose any time limit thereon "would be quite impracticable and would, in many cases, defeat the objects of the Forensic Procedures Act. Quite plainly, there may well be occasions when forensic procedures are required and ordered when it cannot be known whether or when the suspect, or the persons who will carry out the procedures, will be available for that purpose. It will not be in every case that the suspect is in custody, or is subject to orders under the Mental Health Act 1990 and is

therefore readily available." Her Honour concluded at [24] that there "is nothing to support the contention that an order is 'void and a nullity' for those reasons."

234. A forensic procedure must be carried out as quickly as reasonably possible but in any case within two hours after the suspect presents to the investigating police officer: s 40. There is provision for a warrant if necessary in s 41. Where the person is under arrest, not later than 2 hours after the end of the investigation period permitted under section 115 *LEPRA*: s 42. See also the table set out in s 6 of the Act. The required time frames are disregarding any "time out" as defined in s 3(1).

Informing the suspect

235. For the purposes of the Act, the requirement to "inform" the suspect pursuant to s 31(1)(e) will be satisfied where the Magistrate informs the suspect (through an interpreter if necessary) in a language in which the other person is able to communicate with reasonable fluency: s 3(4).

RESTRICTIONS ON PUBLICATION

236. The Act creates a criminal offence in relation to publication of the name of the suspect or information likely to enable the identification of the suspect in certain circumstances.

> **43 Restrictions on publication**
>
> (1) A person must not intentionally or recklessly, in any report of a proceeding under this Act, publish:
> (a) the name of the suspect on whom a forensic procedure is carried out or proposed to be carried out in relation to an offence, or
> (b) any information likely to enable the identification of the suspect,
> unless the suspect has been charged with the offence or the Magistrate, by order, has authorised such publication.
>
> Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.
>
> (2) This section does not make it an offence to publish the name of a suspect or any information likely to enable the identification of a suspect if the publication is solely for the purposes of the internal management of the NSW Police Force.

237. As a result, in first instance judgments and on appeal, 'the suspect' and others mentioned in references to evidence are routinely referred to by initials.

FALSE OR MISLEADING INFORMATION IN APPLICATIONS

238. It is an offence to give information to a Magistrate or an authorised officer, in or in connection with an application for a forensic procedure order, that the person knows to be false or misleading in a material particular. The maximum penalty is 100 penalty units and/or imprisonment for 2 years: s43A.

239. There is an important public policy reason for this offence provision particularly bearing in mind the issues set out at the beginning of this paper in relation to the privilege against self-incrimination and the Act otherwise authorising an assault on the person.

APPEALS

240. There are two avenues for appeal from a forensic procedure order:

(1) An appeal against an order by a Magistrate pursuant to s 115A of the Act; and/or

(2) An appeal against an order by a Magistrate or an authorised officer pursuant to ss 69 and/or 75 *Supreme Court Act 1970*.

Appeals from orders made by a Magistrate: s 115A of the Act

241. The appeal provisions in s 115A engage the *Crimes (Appeal and Review) Act 2001* ("the *Appeal Act*") as if an appeal by a suspect were an appeal against a sentence and as if an appeal by the police were an appeal against an acquittal. Section 115A is in the following terms:

> **115A Appeals from forensic procedure orders made by Magistrate**
>
> (1) An appeal against an order made by a Magistrate under this Act authorising the carrying out of a forensic procedure on a person may be made to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001* as if the order were a sentence arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
>
> (2) An appeal against a Magistrate's refusal to make an order under this Act authorising the carrying out of a forensic procedure on a person may be made to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001* as if the refusal were an order dismissing a matter under Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
>
> (3) The *Crimes (Local Courts Appeal and Review) Act 2001* applies to an appeal arising under this section with such modifications as are made by or in accordance with the regulations under that Act.

242. The section immediately engages the provisions of the *Appeal Act* in ss 52-55 in relation to suspect appeals and in ss 56 and 59 in relation to police appeals.

243. Sections 52 and 53 of the *Appeal Act* relevantly provide:

> **52 Appeals as of right**
> (1) Any person who has been … sentenced by the Local Court … may appeal to the Supreme Court against the … sentence, but only on a ground that involves a question of law alone.
> (2) An appeal must be made within such period after the date of the conviction or sentence as may be prescribed by rules of court.
>
> **53 Appeals requiring leave**
> (1) Any person who has been … sentenced by the Local Court … may appeal to the Supreme Court against the … sentence on a ground that involves:
> (a) a question of fact, or
> (b) a question of mixed law and fact,
> but only by leave of the Supreme Court.
> …
> (4) An application for leave to appeal must be made within such period after the date of the … sentence … as may be prescribed by rules of court.

244. A suspect accordingly has an appeal as of right on a question of law and an appeal on a question of mixed law and fact or fact alone only by leave of the Supreme Court.

245. Section 56 of the *Appeal Act* relevantly provides:

> **56 Appeals as of right**
> (1) The prosecutor may appeal to the Supreme Court against:
> …
> (c) an order made by the Local Court dismissing a matter the subject of any summary proceedings, or
> …
> … but only on a ground that involves a question of law alone.
> (2) An appeal must be made within such period after the date of the sentence or order as may be prescribed by rules of court.

246. The police have an appeal as of right but only on a question of law alone.

Appeals pursuant to ss 69 and 75 *Supreme Court Act 1970*

247. A number of appeals from the making of a final order were prosecuted pursuant to both the *Appeal Act* and the *Supreme Court Act 1970.*

248. In relation to interim orders made other than by a Magistrate, it appears that the *Supreme Court Act* route is the only one available, given that s 115A requires an order to have been made by a Magistrate.

249. Sections 69 and 75 of the *Supreme Court Act 1970* are as follows:

> **69 Proceedings in lieu of writs**
> (1) Where formerly:
> (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
> (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation

to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

then, after the commencement of this Act:

(c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but

(d) shall not issue any such writ, and

(e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and

(f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:

(a) the writ of habeas corpus ad subjiciendum,

(b) any writ of execution for the enforcement of a judgment or order of the Court, or

(c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

75 Declaratory relief

No proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Appeals from interim orders

250. JW appealed pursuant to the *Supreme Court Act 1970* in relation to an interim order made by an authorised officer. The orders sought included restraining the police from testing or subjecting forensic samples to any form of scientific examination; restraining the police from further entertaining an application for an order under s 32(4); declaring that the interim order is contrary to law and void; and ordering the destruction of any forensic samples: see *JW v Blackley* at [1]-[2].

251. Simpson J considered that there was "considerable substance" in the response by the defendant in *JW v Blackley* that the appeal by the plaintiff was premature: at [29]. Her Honour referred to s 38 which precludes the analysis of any samples taken under an interim order until a final order is made, or unless the sample is likely to perish before a final order is made: at [30]. Her Honour also referred to the "rigid and demanding and very specific" requirements for a final order and concluded that "the samples taken under the interim order will not be analysed, and therefore will not be used, unless and until a magistrate determines that it is appropriate that an order be made.": at [31]-[32].

252. In *Kerr v Police*, the plaintiff sought orders restraining the police from testing or subjecting forensic samples to any form of scientific examination; a declaration that the interim order is contrary to law and invalid; an order for destruction of the forensic samples; and an order remitting the proceedings seeking confirmation of the interim order to a Magistrate to be dealt with according to law: at [1]. The forensic samples included swabbing of the plaintiff's hands and body, fingernail scrapings, hair from his head and an external examination of his body: at [5]. Studdert J remitted the matter for

determination by a Magistrate but did not make the orders restraining testing or requiring destruction of the samples; nor declare that the interim order was contrary to law and invalid: at [66]. In referring to the orders restraining testing and for destruction, his Honour stated:

> 29 If I were to make the orders sought this would have the practical consequence of interfering with the course of the criminal process following the charging of the plaintiff with the most serious crime of murder. I am asked to make an order that would prevent testing and scientific examination of available evidence. I am asked to order the destruction of evidence. Testing and/or scientific examination of the samples may produce evidence of significant probative value for the purposes of any trial that may take place. For this Court, in its civil jurisdiction, to make orders, the practical consequence of which would be to eliminate the possibility of significant evidence being made available for the consideration of this court in its criminal jurisdiction, is a course which should only be taken in exceptional circumstances.

253. His Honour also considered it important that the submissions on behalf of the suspect in relation to aspects of the process would have to be considered by the trial judge before any evidence concerning the samples or tests and/or scientific examination could be introduced at trial: at [30]. In particular, his Honour continued, "[s]hould it be determined at any trial, or for the purposes of any trial, that there was any failure to comply with the statute in relation to the taking of the samples and/or their testing and examination, the operation of s 82 would be enlivened". Having set out the legislation, his Honour held at [33] that it "is implicit from s 82 that the legislature contemplates that the evidence with which the section is concerned remains in existence at the time of trial." Ultimately, his Honour considered that the issues would be more appropriately determined by the trial judge, who would have the advantage of a *voir dire* hearing, at which the judge could expect to hear from the relevant police officers and the plaintiff and any other witness whose evidence may bear upon the question of the plaintiff's consent and whether he was an incapable person for the purposes of the Act: at [34].

254. His Honour also relied on the principle that "a civil court will be and should be reluctant to make declarations or orders that have the effect of interfering with the course of criminal proceedings.": at [35]. His Honour outlined several authorities:

> 36 In Sankey v Whitlam (1978) 142 CLR 1 at 26 Gibbs CJ said:
>
> > *"For these reasons I would respectfully endorse the observations of Jacobs P (as he then was) in Shapowloff v Dunn ((1973) 2 NSWLR 468 at 470) that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."*
>
> 37 In Anderson v Attorney General for New South Wales (1987) 10 NSWLR 198 Kirby P said at 200:
>
> > *"The jurisdiction of the Court to make a declaration of the law applicable to the indictment against the claimant was not disputed by the Attorney General. However, the courts' disinclination to do so in criminal cases, particularly in circumstances where proceedings are in the charge of a judge who at this very moment is beginning the trial, has been frequently stated. Courts such as this will limit their intervention to special cases. They will intervene only in the 'most exceptional' circumstances: see Gibbs ACJ in Sankey v Whitlam (1978) 142 CLR 1 at 25, or for 'some special reason' (ibid, Mason J at 82); see also Bacon v Rose [1972] 2 NSWLR 793 at 797; Bourke v Hamilton [1977] 1 NSWLR 470 at 479; Barton v The Queen (1980) 147 CLR 75 at 104 and Lamb v Moss (1983) 49 ALR 533 at 545."*

38 See also Yates v Wilson (1989) 168 CLR 339 where, in refusing special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial, Mason CJ said:

> *"The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us."*

39 See also Sergi v DPP (unreported, NSWCA, 10 September 1991, per Kirby P at 7) and Tye v The Commissioner of Police (1995) 84 ACrimR 147 at 155.

Appeal grounds

255. In *Kapral v Bunting*, Howie J considered a question as to whether the plaintiff required to leave to appeal as a result of the nature of the question raised before the Court. His Honour cited a decision of the High Court in *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; 186 CLR 389 in which the High Court stated (footnotes omitted):

> The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated. In Hayes v FCT, Fullagar J emphasised the distinction between the factum probandum (the ultimate fact in issue) and the facta probantia (the facts adduced to prove or disprove that ultimate fact). His Honour said:
>
> > Where the factum probandum involves a term used in a statute, the question whether the accepted facta probantia establish that factum probandum will generally — so far as I can see, always — be a question of law.
>
> In *Collector of Customs v Pozzolanic Enterprises Ltd*, the Full Federal Court spoke of the distinction between law and fact in a statutory context as resting upon "value judgement[s] about the range of [an] Act" which, the court said, necessarily raised questions of law.
>
> Some recent Federal Court decisions have attempted to distil the numerous authorities on the problem into a number of general propositions. Thus in *Pozzolanic*, after referring to many cases, the court identified five general propositions:
>
> 1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
> 2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
> 3. The meaning of a technical legal term is a question of law.
> 4. The effect or construction of a term whose meaning or interpretation is established is a question of law.
> 5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.
>
> In Pozzolanic, the Full Court qualified the fifth proposition. The court said that, when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is one of fact.

256. His Honour then continued:

> 38 In the present matter it was not clear at the hearing of the appeal whether there was an assertion that the error occurred because there was no evidence that would support a finding that there were reasonable grounds to hold the relevant belief, an issue that involves a question of law, or whether, although there was such evidence, the Magistrate erred in reaching that conclusion, an issue that raises a question of fact. Ultimately, however, in further submissions filed with leave after the Court

> had reserved, the submission made by the plaintiff was that the facts relied upon by the defendant, taken at their highest, could only support a finding that there were reasonable grounds for a suspicion that the plaintiff had committed the alleged offence. Although it was submitted that this was a question of mixed fact and law it seems to me to be a question of law alone.

257. Examples of grounds of appeal that involve a question of law alone:

- The Magistrate erred in law by failing to consider and apply the matters set out in s 24(4) of the Act: *LK v Police* at [2] and [6];
- The Magistrate erred in law by failing to decide whether or not the forensic procedure was justified in accordance with the criteria set out in s 24(4) of the Act: *LK v Police* at [2] and [6];
- The Magistrate erred in law in not giving separate and individual consideration, in relation to each forensic procedure sought, to the question of whether there were reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offences: *Alessi v SE* at [17] and [26];
- The Magistrate erred in law in concluding that the type of procedure was authorised by the Act: *Mullins v Lillyman* at [2] and [34];
- The Magistrate failed to provide proper reasons: *Daley and Pittman* at [98];
- The Magistrate erred in law when determining the construction of the term "additional information" as contained in s 26(3) of the Act: *Munro v ACP* at [2] and [29];
- The Magistrate erred in law in determining that the plaintiff did not provide additional information in support of an application for an order authorising the carrying out of a forensic procedure pursuant to s 26(3): *Munro v ACP* at [2], [29] and [34];
- The Magistrate erred in law in determining that s 26(3) prevented the plaintiff from making an application for a final order: *Munro v ACP* at [2] and [29];

258. Examples of grounds of appeal that involved at least a mixed question of fact and law:

- The Magistrate erred in law in finding that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence pursuant to s 24(3)(b) of the Act: *LK v Police* at [2] and [5]

259. Howie J favoured caution by appeal courts in cases involving a question of fact alone in *Kapral v Bunting* at [48]:

> I have some difficulty in conceiving of a case where leave might be granted on a question of fact. But it should be noted that the particular provision, s 53(1) of the Appeal Act, is actually concerned with appeals against conviction or sentence. It is perhaps possible to imagine that there may in such an appeal be an error of fact of such significance that it might, if not reviewed, result in a positive injustice. It is difficult to see such a situation arising from an appeal against an order of the kind made by the Magistrate in the present case. The Supreme Court should in my opinion be cautious

before interfering with a factual decision made by a magistrate who correctly understood and applied the law in an otherwise unimpeachable hearing in the Local Court and where minds might reasonably differ about the finding of fact involved.

Orders on appeal

260. In relation to the determination of a suspect's appeal and the orders that might be made, s 55 *Appeal Act* relevantly provides:

> **55 Determination of appeals**
> …
> (2) The Supreme Court may determine an appeal against sentence:
> (a) by setting aside the sentence, or
> (b) by varying the sentence, or
> (c) by setting aside the sentence and remitting the matter to the Local Court sitting at the place at which the original Local Court proceedings were held for redetermination, in relation to sentence, in accordance with the Supreme Court's directions, or
> (d) by dismissing the appeal.
> …

261. In relation to the determination of a police appeal and the orders that might be made, s 59 *Appeal Act* relevantly provides:

> **59 Determination of appeals**
> …
> (2) The Supreme Court may determine an appeal against an order referred to in section 56 (1) …
> (c) … :
> (a) by setting aside the order and making such other order as it thinks just, or
> (b) by dismissing the appeal.

262. Pursuant to the *Supreme Court Act 1970*, the Court may make orders in the nature of prohibition, mandamus (commanding an inferior court), certiorari (reviewing a decision of an inferior court) or of any other description, or it may make a declaration.

263. For example, in *LK v Police*, Fullerton J set aside the final order made in the Children's Court and ordered than any evidence resulting from the application or the forensic procedure be destroyed: at [39].

264. Further, in *Maguire v Beaton*, in addition to setting aside the order by the Magistrate, Latham J made declarations that the Magistrate erred in law in making an order for a non-intimate forensic procedure, namely the taking of the plaintiff's fingerprints and palm prints; and a further declaration that insufficient evidence exists to allow for the making of an order pursuant to s 24 of the Act: at [21].

Binding nature of single judge decisions

265. Most of the appellate decisions in relation to the operation of Part 5 of the Act are single judge decisions of the NSW Supreme Court. In *ACP v Munro*, Button J considered the issue of the degree to which the decision of another Supreme Court single judge decision was binding upon him. His Honour summarised the submissions as follows:

45 He submitted that single judges of this Court constitute an intermediate appellate court from decisions of magistrates with regard to orders for forensic procedures. He submitted that not only was I bound by the usual principles of comity, but also by the principles that would attach to the consideration by an intermediate appellate court of its previous decisions. He relied upon the discussion by Heydon J in *Green v The Queen; Quinn v The Queen* [2011] HCA 49; (2011) 244 CLR 462.

46 In short, the defendant submitted that I should follow the decision of Fullerton J unless convinced that it is clearly wrong…

266. His Honour accepted at [56] the submission about the binding nature of the earlier decision upon him, stating:

Quite apart from considerations of comity between single judges of the same Court, I agree that it would be very undesirable for the determination of appeals from orders of magistrates authorising forensic procedures to depend upon the capricious question of which judge of this Court happens to have the matter listed before him or her. I consider that I should follow the two determinative remarks that Fullerton J made in *Coffen v Goodhart*, unless I am affirmatively satisfied that either of them is clearly wrong. As for the *obiter dicta* of her Honour, I consider that I should give those great weight as well, in the circumstances.

Time for appeals

267. Part 51B of the *Supreme Court Rules 1970* apply to appeals pursuant to s115A of the *Appeal Act*. The time for appeal is 28 days after the material date, which is defined in rule 3:

material date in relation to an appeal means:
(a) where the appeal is from the decision of a court, the date on which the decision is pronounced or given, and
(b) where the appeal is from any other person, the date on which notice of the decision was given to the person who wishes to appeal by or on behalf of the person who made the decision.

268. Rule 6 provides for time to appeal to be extended by the Supreme Court or the Magistrate.

6 Time for appeal

(1) Subject to subrules (1A) and (2) and any provisions made by or under any Act, an appeal must be instituted within 28 days after the material date.
(1A) If an application is made to a Local Court under Part 2 of the subject Act, the time for instituting an appeal does not start to run until the application under Part 2 is finally disposed of.
(2) Time fixed by subrule (1) may be extended:
(a) by the Court at any time, or
(b) where the decision appealed from is that of a magistrate—by the tribunal below, but only within the time fixed by subrule (1) for instituting an appeal (as extended by subrule (1A)) or on application filed within that time.
(3) A party applying to the Court for an extension of time under subrule (2) (a) shall:
(a) include that application in the summons instituting the appeal, or
(b) lodge with his or her notice of motion or summons a draft, completed as far as possible, of the summons under rule 7 and the statement under rule 8, to be filed if an extended time is fixed.

Costs

269. The question of whether costs may be awarded as a form of relief in appeals pursuant to s115A of the Act was considered by Button J in *ACP v Munro*. Powers to order costs are provided with regard to other appeals in the *Appeal Act*, however there is no such power created by statute with regard to an appeal pursuant to s115A of the Act: at [105]. His Honour referred to his decision in *Cunningham v Cunningham (No 2)* [2012] NSWSC 954 and held that there is a power to order costs in these circumstances, despite the absence of an explicit statutory power to do so: at [106].

270. This was followed by Fullerton J in *Coffen v Goodhart* at [12].

Stay of order and criminal proceedings pending appeal outcome

271. In *Dogan v Quayle*, Harrison J considered an appeal from a final order requiring Mr Dogan to attend the police station to be photographed in relation to a suspected assault by him. On the day required by the order, Mr Dogan did not attend to be photographed. Instead, he commenced proceedings by summons in the Supreme Court seeking an order setting aside the order of the Magistrate: at [2]-[3]. Mr Dogan's appeal operated as a stay of the Magistrate's order that he attend to be photographed by virtue of s 63 *Appeal Act*: at [6]. Section 63 is relevantly as follows:

> **63 Stay of execution of sentence pending determination of appeal**
>
> (1) This section applies to:
> (a) any sentence, and
> (b) any penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege that arises under an Act as a consequence of a conviction,
> in respect of which an appeal or application for leave to appeal is made under this Act.
> (2) The execution of any such sentence, and the operation of any such penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege, is stayed:
> (a) except as provided by paragraphs (b) and (c), when notice of appeal is duly lodged, or
> (b) in the case of an appellant whose appeal is the subject of an application for leave, when leave to appeal is granted, or
> …
> (3) Subject to any order of the appeal court, a stay of execution continues in force until the appeal is finally determined.
> (4) Such an order is to be made only if the appeal court is satisfied, in proceedings on an application by the prosecutor, that the appellant has unduly delayed the appeal proceedings.
> …

272. The summons was not supported by any affidavit evidence; nor did the summons contain any grounds of appeal; nor whether it was made as of right although no leave was sought in the summons: at [7]. Mr Dogan did not prosecute his appeal "with any enthusiasm"; he failed to comply with orders to file and serve an amended summons and went overseas for a number of months including during the time the matter was referred to the Supreme Court Duty Judge by the defendant: at [8]-[9].

273. The defendant sought an order pursuant to s 55(2)(b) of the *Appeal Act* varying the Magistrate's order so as to require Mr Dogan to be photographed within a few days of his expected return to Australia: at [9].

274. Harrison J referred to s 30(1) of the Act and that Mr Dogan had not been given any notice of the defendant's proposal to seek a variation of the Magistrate's order. His Honour ultimately decided not to vary the order, nor dismiss the appeal and made no order at all. His Honour commented as follows in relation to the effect of the stay:

> 14 The defendant's complaint is essentially in two parts. First, for as long as the appeal operates as a stay of Magistrate McIntyre's order, Mr Dogan is not in breach and presumably no other similar order can be obtained before these proceedings are dealt with one way or another. Secondly, even if the present proceedings were somehow finally to be disposed of, the defendant is concerned that Mr Dogan might nevertheless have available to him an argument that as the time for compliance with the original order has passed, dismissal of the current proceedings could not revive the original order made against him. In those circumstances the defendant would have no alternative but to proceed to apply for another order pursuant to s 24.
>
> 15 Unfortunately, that is as may be.

275. It may also be necessary to consider an application for a temporary stay of any criminal proceedings which have already been instituted against the suspect pending the outcome of appeal proceedings in relation to any forensic procedure. See *DPP v Shirvanian* (1998) 102 A Crim R 180 in which it was stated that the power of the Local Court to stay proceedings is "an essential attribute of the exercise of the jurisdiction with which it is invested": at 186.

INADMISSIBILITY OF EVIDENCE FROM IMPROPER FORENSIC PROCEDURES

276. In addition to the Supreme Court appeal avenues, s 82(3) of the Act provides that any forensic material obtained in violation of the Act is inadmissible, as the default position.

277. The section applies where "there has been any breach of, or failure to comply with … any provision of this Act in relation to a forensic procedure carried out on a person": s 82(1)(b)(i).

278. To the extent that any application before a court relies on evidence obtained from a previous forensic procedure, if that material was obtained as a result of any breach or failure to comply with the Act, then an objection might be raised under s 82 that that material not be admitted in the application proceedings.

279. Furthermore, it is suggested that, notwithstanding a forensic procedure might be ostensibly authorised by an order of a Magistrate or authorised officer, to the extent of any breach or failure to comply with the Act during that process (or in the carrying out of the forensic procedure following the order), s 82 may operate to render the resulting evidence inadmissible.

DESTRUCTION OF FORENSIC MATERIAL OBTAINED FROM A CHILD

280. Part 10 of the Act governs the destruction of forensic material.

281. The Act sets out a number of mandatory destruction provisions:

(1) Where an interim order was disallowed (s 86(1)).

(2) Where a specified retention period for a sample taken from a volunteer has ended (s 86(2)).

(3) Where the conviction of a suspect, serious indictable offender, untested former offender or untested registrable person has been set aside or quashed – unless an investigation into, or a proceeding against the person for another offence, is pending (s 87).

(4) Where the material was given voluntarily for elimination purposes (s 87A).

(5) Where 12 months (or on application an extended period) has passed since the taking of forensic material from a suspect, without charge or where the proceedings have been discontinued (s 88(2)); unless a warrant for the apprehension of the suspect has been issued in that time, then after the warrant lapses or 12 months elapses after the suspect is apprehended (s 88(3)).

(6) Where a sample taken from a suspect who is found to have committed an offence but no conviction is recorded, or the person is acquitted – unless an investigation into, or a proceeding against the person for another offence, is pending (s 88(4)).

(7) Where a court has found that the related evidence is inadmissible under s 82 of the Act (evidence from improper forensic procedures) (s 89).

282. In addition to these provisions, the *Children (Criminal Proceedings) Act 1987* (NSW) provides for the destruction of any photographs, finger-prints, palm-prints and any other prescribed records relating to the offence:

(1) If a child is found not guilty of the offence – then the Children's Court must make the order for destruction (s 38(1)).

(2) If a child is found guilty of the offence – then the Children's Court may make an order for destruction if it is of the opinion that the circumstances of the case justify its doing so (s 38(2)).

APPENDIX A: OLD LEGISLATIVE PROVISIONS IN SECTIONS 24 AND 25

(Version as at 15 March 2007 to 30 June 2007)

24 Final order for carrying out of forensic procedure

A Magistrate may order the carrying out of a forensic procedure on a suspect if:
(a) section 23 applies, and
(b) the Magistrate is satisfied as required by section 25.

25 Matters to be considered by Magistrate before ordering forensic procedure

The Magistrate must be satisfied that:
(a) the person on whom the procedure is proposed to be carried out is a suspect, and
(b) if the forensic procedure concerned is an intimate forensic procedure, on the evidence before the Magistrate there are reasonable grounds to believe that the suspect committed:
(i) a prescribed offence, or
(ii) another prescribed offence arising out of the same circumstances as that offence, or
(iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
Note. A *prescribed offence* is defined in section 3 as an indictable offence or any other offence prescribed by the regulations.
(c) if the forensic procedure concerned is a non-intimate forensic procedure other than the taking of a sample of hair other than pubic hair, on the evidence before the Magistrate, there are reasonable grounds to believe that the suspect committed:
(i) an indictable or a summary offence, or
(ii) another indictable or summary offence arising out of the same circumstances as that offence, or
(iii) another indictable or summary offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
(d) if the forensic procedure concerned is the taking of a sample of hair other than pubic hair, on the evidence before the Magistrate, there are reasonable grounds to believe that the suspect committed:
(i) a prescribed offence, or
(ii) another prescribed offence arising out of the same circumstances as that offence, or
(iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
(e) if the forensic procedure concerned is the taking of a sample by buccal swab, on the evidence before the Magistrate, there are reasonable grounds to believe that the suspect committed:
(i) a prescribed offence, or
(ii) another prescribed offence arising out of the same circumstances as that offence, or
(iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
(f) there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence, and
(g) the carrying out of the forensic procedure is justified in all the circumstances.

APPENDIX B: HISTORICAL NOTES

Crimes (Forensic Procedures) Act 2000 No 59

Current version for 24 June 2014 to date (accessed 8 October 2014)

Table of amending instruments

Crimes (Forensic Procedures) Act 2000 No 59. Assented to 5.7.2000. Date of commencement, Part 8 and sec 121 excepted, 1.1.2001, sec 2 (1) and GG No 168 of 22.12.2000, p 13459; date of commencement of Part 8, 1.6.2003, sec 2 (1) and GG No 53 of 27.2.2003, p 3497; date of commencement of sec 121, assent, sec 2 (2). This Act has been amended as follows:

2000	No 93	Statute Law (Miscellaneous Provisions) Act (No 2) 2000. Assented to 8.12.2000. Date of commencement of Sch 2.11, assent, sec 2 (2).
	No 107	Crimes Legislation Further Amendment Act 2000. Assented to 14.12.2000. Date of commencement of Sch 4, 1.1.2001, sec 2 and GG No 168 of 22.12.2000, p 13460.
2001	No 121	Justices Legislation Repeal and Amendment Act 2001. Assented to 19.12.2001. Date of commencement of Sch 2, 7.7.2003, sec 2 and GG No 104 of 27.6.2003, p 5978.
2002	No 35	Crimes (Forensic Procedures) Amendment Act 2002. Assented to 25.6.2002. Date of commencement, 1.6.2003, sec 2 and GG No 53 of 27.2.2003, p 3498.
	No 46	Crimes Legislation Amendment (Penalty Notice Offences) Act 2002. Assented to 4.7.2002. Date of commencement of Sch 3, 1.9.2002, sec 2 (1) and GG No 135 of 30.8.2002, p 6537.
	No 103	Law Enforcement (Powers and Responsibilities) Act 2002. Assented to 29.11.2002. Date of commencement of Sch 4, 1.12.2005, sec 2 and GG No 45 of 15.4.2005, p 1356.
2003	No 27	Crimes Legislation Amendment Act 2003. Assented to 8.7.2003. Date of commencement of Sch 4, assent, sec 2 (1).
	No 82	Statute Law (Miscellaneous Provisions) Act (No 2) 2003. Assented to 27.11.2003. Date of commencement of Sch 3, assent, sec 2 (1).
2005	No 98	Statute Law (Miscellaneous Provisions) Act (No 2) 2005. Assented to 24.11.2005. Date of commencement of Sch 3, assent, sec 2 (2).
2006	No 58	Statute Law (Miscellaneous Provisions) Act 2006. Assented to 20.6.2006. Date of commencement of Sch 2.10, assent, sec 2 (2).
	No 70	Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006. Assented to 19.10.2006. Date of commencement, 23.2.2007, sec 2 and GG No 33 of 23.2.2007, p 945.
	No 74	Crimes (Forensic Procedures) Amendment Act 2006. Assented to 27.10.2006. Date of commencement of Sch 1 [1] [2] [7] [8] [12] [14]–[16] [18]–[24] [26] [30] [32] [35] [37]–[52] [54] [57] [59] [62]–[64] [71] [74] [81]–[83] [85]–[94] [97] [98] and [105]–[109], 1.7.2007, sec 2 and GG No 33 of 23.2.2007, p 946; date of commencement of Sch 1 [3]–[6] [9]–[11] [13] [17] [25] [27]–[29] [31] [33] [34] [36] [53] [55] [56] [58] [60] [61] [65]–[70] [72] [73] [75]–[80] [84] [95] [96] [103] and [104], 15.3.2007, sec 2 and GG No 33 of 23.2.2007, p 946; date of commencement of Sch 1 [99]–[102] [110] and [111], 23.2.2007, sec 2 and GG No 33 of 23.2.2007, p 946.
	No 128	Police Powers Legislation Amendment Act 2006. Assented to 12.12.2006. Date of commencement of Sch 4, assent, sec 2 (1).
2007	No 71	Crimes (Forensic Procedures) Amendment Act 2007. Assented to 7.12.2007. Date of commencement, 25.3.2008, sec 2 and GG No 16 of 15.2.2008, p 706.

	No 87	Child Protection (Offenders Registration) Amendment Act 2007. Assented to 13.12.2007. Date of commencement of Sch 2, 20.10.2008, sec 2 (1) and GG No 132 of 17.10.2008, p 9976.
	No 94	Miscellaneous Acts (Local Court) Amendment Act 2007. Assented to 13.12.2007. Date of commencement of Sch 2, 6.7.2009, sec 2 and 2009 (314) LW 3.7.2009.
2008	No 56	Crimes (Forensic Procedures) Amendment Act 2008. Assented to 1.7.2008. Date of commencement, assent, sec 2.
2009	No 63	Crimes (Forensic Procedures) Amendment (Untested Registrable Persons) Act 2009. Assented to 16.9.2009. Date of commencement, assent, sec 2.
	No 99	Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009. Assented to 14.12.2009. Date of commencement, 22.2.2010, sec 2 and 2010 (41) LW 19.2.2010.
	No 111	Crimes (Forensic Procedures) Amendment Act 2009. Assented to 14.12.2009. Date of commencement, 17.5.2010, sec 2 and 2010 (183) LW 14.5.2010.
2010	No 34	Health Practitioner Regulation Amendment Act 2010. Assented to 15.6.2010. Date of commencement of Sch 2, 1.7.2010, sec 2 (2).
2011	No 62	Statute Law (Miscellaneous Provisions) Act (No 2) 2011. Assented to 16.11.2011. Date of commencement of Sch 3, 6.1.2012, sec 2 (1).
2013	No 80	Crimes and Courts Legislation Amendment Act 2013. Assented to 29.10.2013. Date of commencement, assent, sec 2.
	No 90	Crimes Legislation Amendment Act 2013. Assented to 20.11.2013. Date of commencement, assent, sec 2.
2014	No 33	Statute Law (Miscellaneous Provisions) Act 2014. Assented to 24.6.2014. Date of commencement of Sch 1.6, 29.10.2013, Sch 1.6.

Table of amendments

Sec 3	Am 2000 No 107, Sch 4 [1]–[3]; 2001 No 121, Sch 2.74 [1] [2]; 2002 No 35, Sch 1 [1]–[4]; 2002 No 103, Sch 4.18 [1]–[3]; 2005 No 98, Sch 3.17 [1]; 2006 No 74, Sch 1 [1]–[14]; 2007 No 87, Sch 2 [1]–[3]; 2009 No 63, Sch 1 [1]; 2009 No 111, Sch 1 [1]–[3]; 2010 No 34, Sch 2.9 [1]; 2011 No 62, Sch 3.5 [1]; 2013 No 80, Sch 3.
Sec 4	Am 2005 No 98, Sch 3.17 [1]; 2006 No 74, Sch 1 [15] [16].
Sec 5, table	Am 2000 No 107, Sch 4 [4]; 2006 No 58, Sch 2.10 [1]; 2006 No 74, Sch 1 [17].
Sec 6, table	Am 2000 No 107, Sch 4 [4]; 2002 No 103, Sch 4.18 [2]–[4]; 2006 No 74, Sch 1 [18].
Sec 7	Am 2002 No 103, Sch 4.18 [3] [4].
Sec 8	Subst 2006 No 74, Sch 1 [19].
Sec 9	Am 2002 No 35, Sch 1 [5] [6]; 2005 No 98, Sch 3.17 [1] [2]; 2006 No 74, Sch 1 [20].
Sec 10	Am 2002 No 35, Sch 1 [7]; 2005 No 98, Sch 3.17 [1] [2]; 2006 No 74, Sch 1 [21] [22].
Sec 11	Subst 2006 No 74, Sch 1 [23]. Am 2007 No 71, Sch 1 [1] [2].
Sec 12	Rep 2006 No 74, Sch 1 [23].
Sec 13	Am 2000 No 107, Sch 4 [5]; 2002 No 103, Sch 4.18 [2]; 2006 No 74, Sch 1 [24]–[29].
Sec 14	Am 2000 No 107, Sch 4 [5]; 2002 No 103, Sch 4.18 [2].
Sec 15	Am 2006 No 74, Sch 1 [30].
Sec 16	Am 2002 No 35, Sch 1 [8].
Sec 17	Am 2002 No 103, Sch 4.18 [3] [4]; 2006 No 74, Sch 1 [31] [32].
Sec 18	Am 2006 No 74, Sch 1 [33].

Sec 19	Rep 2006 No 74, Sch 1 [34].
Sec 20	Subst 2006 No 74, Sch 1 [35]; 2007 No 71, Sch 1 [3].
Sec 21	Am 2006 No 74, Sch 1 [36]; 2013 No 90, Sch 1.3 [1].
Part 5, heading	Am 2000 No 107, Sch 4 [6]; 2002 No 103, Sch 4.18 [5]; 2006 No 74, Sch 1 [37].
Sec 22	Am 2000 No 107, Sch 4 [7]; 2002 No 103, Sch 4.18 [2].
Sec 23	Am 2000 No 107, Sch 4 [8]; 2002 No 103, Sch 4.18 [2]; 2006 No 74, Sch 1 [38].
Sec 24	Subst 2006 No 74, Sch 1 [39]. Am 2007 No 71, Sch 1 [4].
Sec 25	Rep 2006 No 74, Sch 1 [39].
Sec 26	Am 2006 No 74, Sch 1 [40]; 2013 No 90, Sch 1.3 [2] [3].
Sec 27	Am 2002 No 35, Sch 1 [9]; 2006 No 74, Sch 1 [41]–[43].
Sec 30	Am 2005 No 98, Sch 3.17 [1]; 2006 No 74, Sch 1 [44] [45]; 2013 No 90, Sch 1.3 [4]–[6].
Sec 32	Am 2000 No 107, Sch 4 [9] [10]; 2002 No 35, Sch 1 [10] [11]; 2002 No 103, Sch 4.18 [2]; 2006 No 74, Sch 1 [46] [47].
Sec 33	Am 2000 No 107, Sch 4 [11]; 2002 No 35, Sch 1 [12]–[15]; 2002 No 103, Sch 4.18 [2]; 2006 No 74, Sch 1 [48]–[50].
Sec 34	Am 2000 No 107, Sch 4 [10]; 2002 No 103, Sch 4.18 [2].
Sec 35	Am 2000 No 107, Sch 4 [9] [12]; 2002 No 103, Sch 4.18 [2].
Sec 36	Am 2000 No 107, Sch 4 [10] [13] [14]; 2002 No 35, Sch 1 [16]–[19]; 2002 No 103, Sch 4.18 [2] [6]–[8].
Sec 36A	Ins 2002 No 35, Sch 1 [20]. Am 2002 No 103, Sch 4.18 [2] [7] [8]; 2006 No 58, Sch 2.10 [2].
Part 5, Div 4, heading	Am 2000 No 107, Sch 4 [15]; 2002 No 103, Sch 4.18 [5].
Sec 39	Am 2000 No 107, Sch 4 [5]; 2002 No 103, Sch 4.18 [2].
Sec 40	Am 2000 No 107, Sch 4 [5]; 2002 No 35, Sch 1 [21]; 2002 No 103, Sch 4.18 [2].
Sec 41	Am 2000 No 107, Sch 4 [5]; 2002 No 103, Sch 4.18 [2].
Sec 42	Am 2000 No 107, Sch 4 [5]; 2002 No 103, Sch 4.18 [2] [3].
Sec 43	Am 2011 No 62, Sch 3.5 [1].
Sec 43A	Ins 2002 No 35, Sch 1 [22]. Am 2002 No 103, Sch 4.18 [2].
Part 6, note	Subst 2009 No 111, Sch 1 [4].
Sec 47	Am 2006 No 74, Sch 1 [51]; 2007 No 87, Sch 2 [4].
Sec 49	Am 2006 No 74, Sch 1 [52].
Sec 49A	Ins 2002 No 35, Sch 1 [23]. Rep 2006 No 74, Sch 1 [53].
Sec 50, table	Am 2006 No 74, Sch 1 [54] [55]; 2010 No 34, Sch 2.9 [2]; 2014 No 33, Sch 1.6.
Sec 51A	Ins 2006 No 74, Sch 1 [56].
Sec 52	Am 2006 No 74, Sch 1 [57]; 2007 No 87, Sch 2 [4].
Sec 53	Am 2006 No 74, Sch 1 [58].
Sec 54	Am 2003 No 27, Sch 4 [1].
Sec 55	Am 2002 No 35, Sch 1 [21] [24]; 2003 No 27, Sch 4 [2]; 2006 No 74, Sch 1 [59].
Sec 57	Am 2002 No 35, Sch 1 [25] [26]; 2006 No 74, Sch 1 [60]–[63].
Secs 58, 59	Am 2002 No 35, Sch 1 [21].
Sec 60	Am 2002 No 35, Sch 1 [21]. Subst 2006 No 74, Sch 1 [64].
Sec 61	Am 2006 No 74, Sch 1 [65]–[67].
Sec 62	Am 2006 No 74, Sch 1 [68].
Sec 63	Am 2006 No 74, Sch 1 [69].

Sec 64	Rep 2006 No 74, Sch 1 [70].
Sec 64A	Ins 2006 No 74, Sch 1 [71].
Sec 65	Am 2006 No 74, Sch 1 [72].
Sec 67	Am 2005 No 98, Sch 3.17 [1] [2].
Sec 69	Am 2002 No 35, Sch 1 [27]; 2006 No 74, Sch 1 [73] [74]–[76].
Sec 70	Am 2002 No 35, Sch 1 [28]; 2006 No 74, Sch 1 [77]–[79].
Sec 71	Am 2002 No 35, Sch 1 [29]. Rep 2006 No 74, Sch 1 [80].
Sec 73	Am 2002 No 35, Sch 1 [30].
Sec 74	Am 2006 No 74, Sch 1 [81] [82].
Sec 74A	Ins 2006 No 74, Sch 1 [83].
Sec 75	Subst 2006 No 74, Sch 1 [83].
Part 7A (secs 75A–75O)	Ins 2006 No 74, Sch 1 [84].
Part 7B	Ins 2007 No 87, Sch 2 [5].
Sec 75P	Ins 2007 No 87, Sch 2 [5].
Secs 75Q, 75R	Ins 2007 No 87, Sch 2 [5]. Am 2009 No 63, Sch 1 [1].
Secs 75S–75V	Ins 2007 No 87, Sch 2 [5].
Sec 75W	Ins 2007 No 87, Sch 2 [5]. Subst 2009 No 63, Sch 1 [2].
Sec 75X	Ins 2007 No 87, Sch 2 [5]. Am 2009 No 63, Sch 1 [3] [4].
Secs 75Y–75ZA	Ins 2007 No 87, Sch 2 [5].
Secs 75ZB, 75ZC	Ins 2007 No 87, Sch 2 [5]. Subst 2009 No 63, Sch 1 [5].
Sec 75ZD	Ins 2007 No 87, Sch 2 [5]. Am 2009 No 63, Sch 1 [1] [6].
Sec 76	Am 2002 No 35, Sch 1 [31]; 2006 No 74, Sch 1 [85] [86]; 2009 No 111, Sch 1 [5].
Sec 76A	Ins 2002 No 35, Sch 1 [32]. Am 2009 No 99, Sch 4.2 [1] [2].
Sec 76B	Ins 2006 No 74, Sch 1 [87].
Sec 77	Am 2002 No 35, Sch 1 [33]; 2005 No 98, Sch 3.17 [1]; 2006 No 74, Sch 1 [88]–[92]; 2009 No 111, Sch 1 [6].
Sec 80	Am 2006 No 74, Sch 1 [93].
Sec 81	Am 2009 No 111, Sch 1 [7] [8].
Part 8A (secs 81A–81N)	Ins 2009 No 111, Sch 1 [9].
Sec 83A	Ins 2002 No 35, Sch 1 [34].
Sec 86	Am 2002 No 35, Sch 1 [21].
Sec 87	Am 2000 No 93, Sch 2.11 [1]; 2002 No 35, Sch 1 [35] [36]. Subst 2006 No 74, Sch 1 [94]. Am 2007 No 87, Sch 2 [6]. Subst 2009 No 111, Sch 1 [10].
Sec 87A	Ins 2002 No 35, Sch 1 [37]. Am 2009 No 99, Sch 4.2 [2].
Sec 88	Am 2007 No 71, Sch 1 [5].
Sec 89	Am 2000 No 93, Sch 2.11 [2]; 2002 No 35, Sch 1 [38]; 2011 No 62, Sch 3.5 [2].
Sec 90	Am 2002 No 35, Sch 1 [39]; 2006 No 74, Sch 1 [95]; 2007 No 87, Sch 2 [4]; 2009 No 111, Sch 1 [11] [12].
Sec 91	Am 2000 No 107, Sch 4 [16]; 2006 No 74, Sch 1 [96]; 2007 No 87, Sch 2 [7]; 2009 No 111, Sch 1 [13].
Sec 92	Am 2006 No 70, Sch 2.2 [1]; 2006 No 74, Sch 1 [97]; 2009 No 111, Sch 1 [14]; 2011 No 62, Sch 3.5 [2].
Sec 93	Am 2008 No 56, Sch 1 [1].
Sec 93A	Ins 2009 No 111, Sch 1 [15].

Sec 94	Am 2006 No 74, Sch 1 [98].
Sec 95	Am 2003 No 27, Sch 4 [3]; 2006 No 74, Sch 1 [99] [100]; 2008 No 56, Sch 1 [2].
Sec 96	Am 2002 No 35, Sch 1 [40] [41]; 2006 No 74, Sch 1 [101].
Sec 97	Am 2003 No 27, Sch 4 [4]; 2006 No 74, Sch 1 [102]; 2008 No 56, Sch 1 [3] [4].
Sec 98	Am 2000 No 107, Sch 4 [5]; 2002 No 35, Sch 1 [42]; 2002 No 103, Sch 4.18 [2]; 2006 No 74, Sch 1 [103] [104]; 2007 No 87, Sch 2 [8].
Sec 99	Am 2002 No 35, Sch 1 [21]; 2006 No 74, Sch 1 [105].
Sec 100	Am 2002 No 35, Sch 1 [21]; 2006 No 74, Sch 1 [106]; 2009 No 111, Sch 1 [16]–[18].
Sec 101	Am 2002 No 35, Sch 1 [21]; 2009 No 111, Sch 1 [16] [19] [20].
Sec 102	Am 2009 No 111, Sch 1 [16].
Sec 106	Am 2006 No 74, Sch 1 [107] [108].
Sec 107	Am 2000 No 107, Sch 4 [17]; 2002 No 103, Sch 4.18 [2].
Sec 108	Am 2010 No 34, Sch 2.9 [2].
Sec 109	Am 2002 No 35, Sch 1 [43]; 2003 No 27, Sch 4 [5] [6]; 2006 No 70, Sch 2.2 [2]; 2008 No 56, Sch 1 [5]; 2011 No 62, Sch 3.5 [2].
Sec 111	Rep 2009 No 111, Sch 1 [21].
Sec 112	Am 2002 No 46, Sch 3.1; 2002 No 103, Sch 4.18 [9] [10]; 2006 No 74, Sch 1 [109]; 2006 No 128, Sch 4.2.
Sec 113	Am 2002 No 103, Sch 4.18 [11] [12].
Sec 114	Am 2002 No 35, Sch 1 [44] [45].
Sec 115A	Ins 2001 No 121, Sch 2.74 [3].
Sec 117	Am 2001 No 121, Sch 2.74 [4]; 2007 No 94, Sch 2.
Sec 119	Rep 2003 No 82, Sch 3.
Sec 121	Am 2002 No 35, Sch 1 [46] [47].
Sch 1	Am 2000 No 107, Sch 4 [18]. Rep 2003 No 82, Sch 3.
Sch 2	Am 2002 No 35, Sch 1 [48] [49]; 2006 No 74, Sch 1 [110] [111]; 2007 No 71, Sch 1 [6]; 2008 No 56, Sch 1 [6] [7]; 2009 No 111, Sch 1 [22] [23].