

Forensic Procedures and DNA Sampling¹

For the purpose of this chapter, the [Crimes \(Forensic Procedures\) Act 2000](#) (NSW) has been abbreviated to “CFPA”. The CFPA establishes the legislative framework for the taking, testing, destruction and storage of forensic samples.

Any reference to a section of legislation in this chapter is a reference to a section of the CFPA unless otherwise specified. A person who is the subject of an application for an order for forensic procedure is referred to as the suspect.

It is important that a criminal law practitioner have a working knowledge of the CFPA in at least three ways:-

- When appearing for a client in an application for an order for forensic procedure;
- When considering the admissibility, relevance and use of forensic material in a hearing or trial;
- When advising a client both pre and post sentence who has been convicted of a “serious indictable offence”.

This chapter aims to provide a detailed discussion on each of the above points.

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Application for an Order for Forensic Procedure

A criminal law practitioner may be required to appear for a client who is before the Local or Children’s Court for an application for an order for forensic procedure. This is an order that is sought by a specified police officer (“the authorised applicant”), authorising the taking of a forensic sample from a person who is referred to as the “suspect”. Unfortunately, in many instances where the client can “consent” to the taking of the order, a legal practitioner will not be involved in either the provision of legal advice or representation. Legal advice and representation however, is more commonly utilised where the client cannot consent to the order.

This section discusses the detail of the various orders for forensic procedures that can be sought and granted.

1. Who is an authorised applicant?

Section 3 defines an “authorised applicant as:

- The police officer in charge of a police station; or
- A custody manager within the meaning of section 355 of the *Crimes Act 1900* (NSW); or
- An investigating police officer in relation to an offence; or
- Any police officer involved in the investigation; or
- The Director of Public Prosecutions.

2. Types of forensic procedures

Section 3 of the CFPA defines a forensic procedure as:

¹ A chapter taken from [A Practitioner’s Guide to Criminal Law](#) (2nd Edition) NSW Young Lawyers, 2003, ISBN 0957838271)

- An intimate forensic procedure (as further defined in section 3); or
- A non-intimate forensic procedure (as further defined in section 3); or
- A buccal swab, that is, a swab of saliva taken from a person's mouth.

A forensic procedure does not include any intrusion into a person's body cavities (except the mouth) or the taking of a sample for the sole purpose of establishing the identity of the person from whom the sample is taken [section 3].

3. Consenting to a forensic procedure

The CFPA does **not** authorise the carrying out of a forensic procedure on a person under 10 years of age [section 111].

A "child", being a person above the age of 10 and under 18 [section 3], **cannot** consent to a forensic procedure [section 8].

An "incapable person", being an adult who is incapable of understanding the general nature and effect of a forensic procedure, or is incapable of indicating whether he or she consents or does not consent to the forensic procedure being carried out [section 3], **cannot** consent to a forensic procedure [section 8].

With the exclusion of a child or incapable person, a forensic procedure may be carried out on a suspect with the **informed consent** of the suspect [section 7].

There are provisions in the Act regarding:

- The obtaining of informed consent from an Aboriginal person or Torres Strait Islander [section 10] and generally [section 9].
- The matters to be considered by a police officer before requesting consent to a forensic procedure [section 12];
- The matters that the suspect must be informed of before giving consent [section 13].

If a suspect cannot consent or does not consent to the taking of a forensic procedure, an order may be made by [section 23]:

- A senior police officer - in the case of a non-intimate forensic procedure on a person under arrest who is not a child or incapable person.
- An authorised justice - in the case of an interim order.
- A magistrate - in the case of a final order.

4. The application for an order for forensic procedure

(i) Interim Order

Section 33 states that an authorised applicant may:

- Without bringing a suspect before an authorised justice; and
- Without obtaining an order from a magistrate under section 24;
- Make an application seeking an **interim** order authorising the carrying out of a forensic procedure that;
- Must be carried out without delay.

The provisions that relate to the hearing, making and recording of an interim order [sections 34-38] are not canvassed in detail in this chapter as (unfortunately) a lawyer is rarely involved at this early stage of the matter. However, it is important to note that:

- An interim order should not stand indefinitely and the status of the order should be determined by an appropriate hearing on the section 25 criteria (which are outlined later in this chapter): [*Kerr v Commissioner of Police \(2001\) NSWSC 637*](#).

- A sample taken under an interim order must not be analysed unless the sample is likely to perish before a final order is made, or a final order is made [section 38].

(ii) Final Order

An authorised applicant may apply to a magistrate for an order authorising the carrying out of a forensic procedure [section 26(1)].

Section 26(2) provides that the application must:

- Be made in writing; and
- Be supported by evidence on oath or affidavit dealing with the matters referred to in section 25; and
- Specify the type of forensic procedure to be carried out; and
- Be made in the presence of a suspect (subject to any contrary order of a magistrate).

If a magistrate refuses an application, the authorised applicant may not make a further application unless there is additional information that justifies the making of a further application [section 26(3)].

An authorised applicant may apply to a magistrate for an order authorising him/her to arrange the carrying out of a second forensic procedure on a suspect on whom a forensic procedure has already been carried out by order of a magistrate if the material obtained as a result of that forensic procedure is insufficient for analysis, has been contaminated, has been lost or is for any other reason not available for analysis if satisfied that carrying out a forensic procedure for the second time is justified in all the circumstances.

5. Who can order the taking of a forensic procedure?

(i) Powers of a senior police officer

A senior police officer has power to order the taking of a non-intimate forensic procedure on a suspect (except for a child or incapable person) who is under arrest and does not consent [section 18] if satisfied that [section 20]:

- There are reasonable grounds to believe that the suspect committed an offence; **and**
- There are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove the suspect committed such an offence; **and**
- The carrying out of the forensic procedure without consent is justified in all the circumstances.

If a suspect (other than a child or incapable person) has been asked and does not consent to a buccal swab, a senior police officer may order the taking of a sample of hair (other than a pubic hair) from a suspect who is under arrest [section 19] if satisfied of the criteria in section 20 that has been outlined above.

(ii) Interim Order – Authorised Justice

If a person does not consent, or cannot consent to a forensic procedure, an authorised justice (as defined in section 3) may make an interim order authorising the carrying out of a forensic procedure [section 32]. However, before doing so, the authorised justice must be satisfied:

- That the probative value of the 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**
- There is sufficient evidence to indicate that an authorised justice is likely to be satisfied of the existence of the matters referred to in section 25 (discussed below) when the application is finally determined; **and**
- In the case of an intimate forensic procedure, the suspect is a suspect of a prescribed offence.

If an interim order is granted by an authorised justice the forensic procedure must be carried out without delay [section 32]. An interim order operates only until a magistrate confirms or disallows the interim order [section 32(3)] by way of the granting of a final order.

(iii) Final Order – Magistrate

If a person cannot, or does not, consent to a forensic procedure, a magistrate may order the carrying out of a forensic procedure [section 24]. However, before doing so, the magistrate must be satisfied that **all** of the criteria in section 25 have been established, that is:

- That the person is a suspect [section 25(a)]; **and**
- There are reasonable grounds to believe that the suspect committed a particular type of offence, which is dependant upon which type of forensic procedure sought [sections 25(b), 25(c) and 25(d)]; **and**
- 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 [section 25(f)]; **and**
- The carrying out of the forensic procedure is justified in all of the circumstances [section 25(g)].

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 [section 103].

At the time of writing (April 2003) there is no New South Wales case law directly on point regarding the of interpretation and application of the section 25 criteria. Additionally, there is no legislative specification of the factors to be taken into account by a magistrate when considering each of the criteria.

As such, assistance can be given to the interpretation of “reasonable grounds” to “suspect” and “believe” by the case law examining section 357E [Crimes Act 1900](#) (NSW), in particular, the decision of Smart AJ in [R v Rondo \(2001\) NSW CCA 540](#) where it was held:

“These propositions emerge:

- (a) *A reasonable suspicion involves less than a reasonable belief but more than a mere possibility A reason to suspect that a fact 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 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) *.....”.*

Given the lack of case law regarding the interpretation and application of the Act, a suspect’s legal representative should argue that the legislation be strictly construed and applied as the Act authorises an intrusion into an individual’s privacy and essentially forfeits the right against self incrimination: see [Kerr v Commissioner of Police and Ors \(2001\) NSWSC 637](#) at paragraph 28. Additionally, it should be argued that any doubt about the construction of the Act should be resolved in favour of the suspect:

“The Act authorises the performance of forensic procedures upon persons 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": [Stefanopoulos v Police \(2000\) 115 A Crim R 450](#), Martin J.

6. The hearing of an application for a Final Order

(i) The nature of the proceedings

It has been held that a hearing of an application for an order for forensic procedure is not a "criminal proceeding":

"The distinct requirements, earlier herein referred to, of section 25 of the Forensic Procedures Act [the abbreviation used in the decision for the CFPA] contemplates 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". ([L v Lyons & Anor; B and S v Lyons & Anor \(2002\) NSWSC 1199, Sully J](#)).

The unfortunate consequence of this finding is that various provisions that relate to the conduct of criminal proceedings, such as sections 12 and 13 of the [Children \(Criminal Proceedings\) Act 1987](#) (NSW) or section 85 of the *Evidence Act 1990* (NSW), are not applicable.

Hearsay evidence is admissible in a forensic procedure hearing, not as hearsay evidence to prove the truth of what was asserted, but as a composite body of evidence to assist in establishing the section 25 criteria:

"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 for 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 herein, of section 25 of the Forensic Procedures Act" (L V Lyons & Anor; B and S v Lyons & Anor (2002) NSWSC 1199, Sully J).

Accordingly, a COPS event entry, an alleged admission of a co-"suspect" (during ERISP or otherwise) etc can be admissible in a forensic procedure hearing.

(ii) Interview friend and legal representation

A child, or a suspect who is an incapable person, Aboriginal person or Torres Strait Islander must have an interview friend (as defined in section 3) present during the hearing and may also be represented by a legal practitioner [section 30(2)]. An Aboriginal person or Torres Strait Islander may expressly and voluntarily waive the right to have an interview friend present [section 30(4)].

Any other suspect may be represented by a legal practitioner [section 30(5)].

(iii) Conduct of the proceedings

The suspect or legal representative is entitled to cross-examine the applicant for the order and may address the court [section 30(6)(a) and (c)]. Additionally, with the leave of the Magistrate, the suspect or legal representative may call or cross-examine any other witness [section 30(6)(2)] if the Magistrate is of the opinion that there are "substantial reasons why, in the interests of justice", the witness should be called or cross-examined [section 30(7)].

At the time of writing (April 2003) there is no case law outlining or indicating what would satisfy the section 30(7) test of “substantial reasons” and “interests of justice”. However, the case law on “substantial reasons” in regard to [s48E Justices Act 1902](#) (NSW) committal hearings *may* be of some assistance: [DPP v Losurdo & Another \(1998\) 44 NSWLR 618](#); [Hanna v Kearney \(Unreported Supreme Court, 28 May 1998\)](#).

(iv) The making of a final order

If a Magistrate makes an order for a forensic procedure, section 31 states that the Magistrate must:

- Specify the forensic procedure authorised to be carried out;
- Give reasons;
- Ensure that a written record of the order is kept;
- Order the suspect attend for the carrying out of the forensic procedure;
- Inform the suspect that reasonable force may be used to ensure that he/ she complies with the order.

The Magistrate may give directions for the carrying out of the forensic procedure [section 31(2)].

7. General provisions for the taking of a forensic procedure

(i) Time Limits

Section 6 provides the following table that outlines the time limits for carrying out forensic procedures:

Circumstance	Time limits
Suspect not under arrest	Quickly as reasonably possible within 2 hours of suspect presenting to the police officer (excluding time out) [section 40].
Suspect under arrest	Not later than 2 hours after the end of the investigation period (excluding time out) [section 42].

(ii) Procedure for taking the forensic sample

Section 44 outlines general rules for carrying out forensic procedures such as, for example, the suspect must be afforded reasonable privacy and must not involve more visual inspection than is required.

There must be no questioning of the suspect whilst the forensic procedure is being carried out [section 45].

The suspect must be cautioned by a police officer before anyone starts to conduct the forensic procedure [section 46].

Reasonable force may be used to enable a forensic procedure to be carried out and to prevent the loss, destruction or contamination of any sample [section 47]. However, it is noted that the Act does not authorise the carrying out of a forensic procedure in a cruel, inhuman or degrading way [section 48].

A table in section 50 outlines who may take a forensic procedure.

A child, incapable person, Aboriginal person or Torres Strait Islander must, if reasonably practicable, have an interview friend and/or legal representative present while the forensic procedure is being carried out [section 54]. However, an Aboriginal or Torres Strait Islander may expressly and voluntarily waive the right [section 55].

(iii) The sample – sufficient material to share

If, after taking a forensic procedure from a suspect, there is sufficient material to be analysed in the investigation of the offence and on behalf of the suspect, the investigating police officer must ensure:

- That a part of the material sufficient for analysis is given to the suspect;
- That reasonable care is taken to protect and preserve the sample until it is given to the suspect; and
- To reasonably assist the suspect to protect and preserve it until it is analysed [section 58].

(iv) Results of analysis

The result of the analysis of any forensic sample must be made available to the suspect unless to do so would prejudice the investigation of any offence. However, the results must be made available to the suspect in reasonable time before the evidence is adduced in any prosecution of the offence [section 60].

8. Practical application and considerations

Prior to appearing for a client in a hearing for an application for an order for forensic procedure, a practitioner should closely examine and be able to answer the following questions:

- Is the application in the correct form?
- Is the applicant an authorised applicant?
- Does there need to be an interview friend present?
- Do I need to cross-examine the applicant?
- Do I need to seek leave to cross-examine any relevant witness?
- Do I need to seek leave to call any evidence?
- Is there a power to consent and, if so, should I exercise it?
- Has “suspect” been made out?
- Have “reasonable grounds” been made out?
- If there is to be forensic material obtained will it confirm or disprove? That is, is there something to compare the forensic material with?
- Do the circumstances require such a procedure?
- Should I invite the magistrate to give reasons?

Admissibility of Forensic Material

When appearing for a client, at hearing or trial, it is important to consider whether any evidence in the police brief of evidence that is to be used or relied upon (by the prosecution) at the hearing or trial has been (or ought to have been) obtained pursuant to an order under the CFPA.

If forensic material obtained pursuant to an order under the CFPA is to be relied upon at hearing or trial, the admissibility of such evidence should be closely considered.

Part 9 of the Act deals with the inadmissibility of evidence from improper forensic procedures and applies where a forensic procedure has been carried out on a person and there has been any breach of or failure to comply with any provision in relation to a forensic procedure carried out on a person or any provision of Part 11 in respect of recording or use of information on the DNA database system [section 82(1)].

The section applies to [section 82(3)]:

- Evidence of forensic material, or evidence consisting of forensic material, taken from a person by a forensic procedure;
- Evidence of any results of the analysis of the forensic material;
- Any other evidence made or obtained as a result of, or in connection with, the carrying out of the forensic procedure.

If the section applies, evidence is **not** to be admitted in *any* proceedings against the person in a court unless [section 82(4)]:

- The person does not object to the admission of the evidence; or
- In the opinion of the court the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that was not obtained in compliance with the provisions of the Act; or
- In the opinion of the court, the breach of, or failure to comply with, the provisions of the Act arose out of mistaken but reasonable belief as to the age of a child.

In considering whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, section 82(5) says that the court *may* consider the following matters:-

- The probative value of the evidence;
- The reasons given for failure to comply with the Act;
- The gravity of the failure to comply with the Act, and whether the failure deprived the person of a significant protection under the Act;
- Whether the failure to comply was intentional or reckless;
- The nature of the provision of the Act that was not complied with;
- The nature of the offence concerned and the subject matter of the proceedings;
- Whether admitting the evidence would seriously undermine the protection given to suspects by the Act;
- Whether the breach of or failure to comply with the provisions of the Act was contrary to or inconsistent with a right of a person recognised by the International Convention on Civil and Political Rights;
- Whether any other proceedings (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply;
- The difficulty of obtaining evidence without contravention of an Australian Law;
- Any other matters the court considers relevant.

The Act specifically states that the probative value of the evidence does **not** by itself justify the admission of the evidence [section 82(6)].

The terms of section 82 are similar to, but arguably go beyond, the provisions of section 138 [Evidence Act 1995](#) (NSW) and consequently the case law considering section 138 [Evidence Act 1995](#) (NSW) may be useful.

When considering forensic material that has been supplied in a police brief of evidence, a practitioner should carefully examine whether:

- There is evidence which was obtained consequent upon a forensic procedure;
- There has been a failure to comply with a provision of the Act;
- To support the argument for admission or rejection of that evidence by reasoned argument as to the section 82 criteria.

Following is a brief checklist of matters a practitioner should examine when considering a failure to comply with the Act:

- Have any time limits been breached?
- Was the person able to consent?
- Has there been informed consent?
- Has the procedure been carried out appropriately?

- Has the forensic procedure been recorded?
- Has there been compliance with the provisions for the taking of samples from serious indictable offenders?
- Does the Act require certain forensic material to be destroyed?
- Has the appropriate person carried out the procedure?
- Has there been an interpreter been present where appropriate?
- Has there been proof by the prosecution/ applicant why certain rights have been waived?

DNA Sampling of a Serious Indictable Offender

The CFPA authorises the taking of a forensic procedure (a DNA sample) from some persons who are convicted of a serious indictable offence. A criminal law practitioner may be asked to advise of the circumstances when this is applicable and the consequence of the taking, testing and storing of the sample.

Part 7 of the Act deals with the carrying out of certain forensic procedures after conviction of a serious indictable offence. This Part only applies to a person who is serving a sentence of imprisonment (in a correctional centre or other place of detention) for a serious indictable offence whether or not the offender was convicted before or after commencement of the section [section 61].

1. Who is a serious indictable offender

A serious indictable offender is a person **convicted** of a serious indictable offence.

A serious indictable offence is defined in section 3 as:

- An indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years of imprisonment; or
- An indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.

2. Non-intimate forensic procedure on a serious indictable offender

A person is authorised to carry out a non-intimate forensic procedure on a person:

- Other than a child or incapable person, to which Part 7 applies with the informed consent (the provisions of which are outlined in section 67 and 69) of the serious indictable offender or by order of a police officer [section 62(1)];
- On a child or incapable person, by order of a court under section 74 [section 62(2)].

A non-intimate forensic procedure for the purpose of Part 7 of the Act is the taking of a sample of hair (other than pubic hair), or the taking of a hand print, finger print, or toe print [section 61(2)].

3. Intimate forensic procedure on a serious indictable offender

A person is authorised to carry out an intimate forensic procedure to which Part 7 applies with the informed consent of the serious indictable offender or by order of a court [section 63].

An intimate forensic procedure for the purpose of Part 7 is the taking of a sample of blood [section 61(1)].

4. Buccal Swab on a serious indictable offender

A person is authorised to take a sample by buccal swab from a person to which Part 7 applies with the informed consent of the serious indictable offender or by order of the court under section 74 [section 64].

5. Court order authorising a forensic procedure on a serious indictable offender

A police officer may apply to any court for an order regarding a serious indictable offender to which Part 7 applies:

- To permit an intimate forensic procedure to which this Part applies to be carried out [section 74(1)];
- In the case of a child or incapable person, for an order for the carrying out of a non-intimate procedure [section 74(2)];
- For an order for the taking of a buccal swab or any other forensic procedure on a serious indictable offender [section 74(3)].

A police officer can make the application to the sentencing court, or to any court at a later time [section 74(4)]. The court must be satisfied the carrying out of the forensic procedure is justified in all of the circumstances [section 74(5)] and must take into account whether the Act would authorise the forensic procedure to be carried out in the absence of an order [section 74(6)].

DNA Database System

Part 11 of the Act establishes the regime for the DNA database system. A person is only permitted access to information stored on the DNA database system if accessed in accordance with the Act [section 92(1)].

Section 92(2) outlines the purposes for which a person (who is authorised by the responsible person for the DNA database system) may access information stored on the database as follows:-

- The purpose of forensic matching as permitted under section 93;
- The purpose of making the information available to the person whom the information relates (in accordance with the regulation);
- The purpose of administering the DNA database system;
- The purpose of any arrangements entered into between the State and another State or Territory or the Commonwealth for the provision of access to information contained in the DNA database system by law enforcement officers or by any other person prescribed by regulations;
- The purposes of and in accordance with the [Mutual Assistance in Criminal Matters Act 1987](#), or the [Extradition Act 1988](#), of the Commonwealth;
- The purpose of a review of, or inquiry into, a conviction or sentence under Part 13A of the *Crimes Act 1900*.
- The investigation of complaints about the conduct of police officers under Part 8A of the [Police Act 1990](#);
- The purpose of a coronial inquest or inquiry;
- The purpose of the investigation of a complaint by the Privacy Commissioner; and
- Any other purpose prescribed by the regulations.

Section 93 of the Act contains a detailed table outlining when it is permissible to match DNA profiles.

Destruction of Forensic Material

Part 10 of the Act outlines the provisions regarding the destruction of forensic material. Basically, the Part provides for the destruction of forensic samples if:

- Taken pursuant to an interim order if the order is disallowed by the magistrate;
- A conviction is quashed;
- 12 months has elapsed and proceedings against the suspect have not been instituted or have been discontinued (the 12 month period may be extended by a magistrate if satisfied that there are special reasons to do so);
- No conviction has been recorded;
- The person is acquitted (and there is no appeal lodged regarding the acquittal or the appeal was unsuccessful or withdrawn).

Practical Tips in Forensic Procedure Matters

- Read the Act.
- The subject of an application for an order for forensic procedure is referred to as the “suspect”, not the defendant, prisoner etc.
- Appeal is to the Supreme Court by way of section 115A of the *Crimes (Forensic Procedures) Act 2000*. An appeal can be brought on a question of law only.
- Be conscious that any forensic material obtained from a forensic procedure may not be used just for that particular matter in which you appear but is kept on the database for future use subject to a requirement for destruction in certain cases: sections 91-94.
- Do not hesitate to seek a short adjournment (or stand the matter in the court list) if you need research or consider the legislation.