



New South Wales

Crimes (Forensic Procedures) Amendment Act 2002 No 35

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Crimes (Forensic Procedures) Act 2000 No 59	2
4 Amendment of Police Service Act 1990 No 47	2
Schedules	
1 Amendment of Crimes (Forensic Procedures) Act 2000	3
2 Amendment of Police Service Act 1990	16



New South Wales

Crimes (Forensic Procedures) Amendment Act 2002 No 35

Act No 35, 2002

An Act to amend the *Crimes (Forensic Procedures) Act 2000* in relation to the making of orders for forensic procedures, the carrying out of forensic procedures and the recording of information; to amend the *Police Service Act 1990* in relation to the finger printing and hand printing of applicants for appointment as a police officer; and for other purposes. [Assented to 25 June 2002]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes (Forensic Procedures) Amendment Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Crimes (Forensic Procedures) Act 2000 No 59

The *Crimes (Forensic Procedures) Act 2000* is amended as set out in Schedule 1.

4 Amendment of Police Service Act 1990 No 47

The *Police Service Act 1990* is amended as set out in Schedule 2.

Schedule 1 Amendment of Crimes (Forensic Procedures) Act 2000

(Section 3)

[1] Section 3 Interpretation

Omit “the” from paragraph (c) of the definition of *authorised applicant* in section 3 (1).

Insert instead “an”.

[2] Section 3 (1), definition of “investigating police officer”

Omit “the police officer in charge of”.

Insert instead “any police officer involved in”.

[3] Section 3 (1)

Insert in alphabetical order:

excluded volunteer is defined in section 76A.

missing persons index is defined in section 90.

nurse means a registered nurse or an enrolled nurse, within the meaning of the *Nurses Act 1991*.

[4] Section 3 (1), definition of “time out”

Omit “the investigating” where firstly occurring in paragraph (a).

Insert instead “an investigating”.

[5] Section 9 Informed consent to forensic procedures—general

Omit “gives the suspect a written statement setting out” from section 9 (2) (b).

Insert instead “personally or in writing, gives the suspect”.

[6] Section 9 (2) (b) (ii)

Insert “a description of” before “the nature”.

[7] Section 10 Informed consent to forensic procedures—Aboriginal persons and Torres Strait Islanders

Omit section 10 (9). Insert instead:

- (9) An interview friend (other than a legal representative) of the suspect may be excluded from the presence of the police officer and the suspect if:
 - (a) the interview friend unreasonably interferes with or obstructs the police officer in asking the suspect to consent to the forensic procedure, or in informing the suspect as required by section 13, or
 - (b) the police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend may be a co-offender of the suspect or may be involved in some other way, with the suspect, in the commission of the offence.
- (10) If an interview friend is excluded under subsection (9), a suspect may choose another person to act as his or her interview friend. If the suspect does not waive his or her right to have an interview friend present and does not choose another person as an interview friend, the police officer may arrange for any person who may act as an interview friend under section 4 to be present as an interview friend.

[8] Section 16 Time for carrying out forensic procedure—suspect not under arrest

Omit “the investigating police officer” from section 16 (1) (b).

Insert instead “an investigating police officer”.

[9] Section 27 Application and order for repeated forensic procedure

Omit “or has been contaminated” from section 27 (3) (b).

Insert instead “, has been contaminated, has been lost or is for any other reason not available for analysis”.

[10] Section 32 Interim order for carrying out of a forensic procedure

Insert “, 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” after “order” where thirdly occurring in section 32 (3).

[11] Section 32 (4)

Omit the subsection. Insert instead:

- (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 of the matters set out in section 25. An order confirming the interim order is taken to be an order under section 24.

[12] Section 33 Application for interim order

Insert “(but no other person)” after “applicant” in section 33 (1).

[13] Section 33 (3) (a)

Insert “if it is made in person—“ before “be”.

[14] Section 33 (4) and (4A)

Omit section 33 (4). Insert instead:

- (4) An application for an interim order must be made:
 - (a) in person, or
 - (b) if it is not practicable to make the application in person and there are facsimile facilities readily available—by facsimile, or
 - (c) 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.
- (4A) An authorised justice must not issue an interim order on an application made by facsimile, telephone, radio, telex, email or other means of written communication unless the authorised

justice is satisfied that the interim order is required urgently and that it is not practicable for the application to be made in person.

[15] Section 33 (9)

Insert after section 33 (8):

- (9) If an application is not made in person, the application must be supported by evidence on oath or by affidavit dealing with the matters referred to in section 32 (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.

[16] Section 36 Records of application and interim order (where application made in person or reduced to writing)

Insert before section 36 (1):

- (1A) This section applies when an application for an interim order is made in person, by facsimile, by email or by other electronic means of written communication.

[17] Section 36 (1)

Omit “, or as soon as practicable after,”.

[18] Section 36 (1) (b)

Omit “order, and”. Insert instead “order.”.

[19] Section 36 (1) (c)–(e) and (3) (a) and (b)

Omit the paragraphs.

[20] Section 36A

Insert after section 36:

36A Records of application and interim order (where application not made in person or reduced to writing)

- (1) This section applies when an application for an interim order is not made in person, by facsimile, by email or by other electronic means of written communication.

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- (2) The authorised justice must, at the time of, or as soon as practicable after, making an interim order, make a record (*the authorised justice's record*) of:
- (a) the order made, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,
- and sign the record.
- (3) The applicant for an interim order must, as soon as practicable after an order is made, make a record (*the applicant's record*) of:
- (a) the order made, and
 - (b) the date and time when the order was made, and
 - (c) the authorised justice's name,
- and sign the record.
- (4) The authorised justice must send a copy of the authorised justice's record to the applicant as soon as practicable after the record is made.
- (5) The applicant must ensure that a copy of the authorised justice's record and a copy of the applicant's record are made available to the suspect as soon as practicable after the applicant receives the authorised justice's record.
- (6) If the applicant's record does not, in all material respects, accord with the authorised justice's record, the order is taken to have no effect.

[21] Sections 40 (1), 55 (1), 58 (2), 59, 60 (1), 86 (1), 99 (1) (c), 100 (1) and 101 (1) (b)

Insert "concerned" after "officer" wherever occurring.

[22] Part 5 Forensic procedures by order of Magistrate or authorised justice

Insert after section 43:

Division 6 False or misleading information in applications

43A False or misleading information in applications

- (1) A person must not, in or in connection with an application for an order under this Part, give information to a Magistrate or authorised justice that the person knows to be false or misleading in a material particular.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) This section applies to an application made by telephone or other means as well as to one made in person.
- (3) This section applies whether or not the information given is also verified on oath or by affidavit.

[23] Section 49A

Insert after section 49:

49A Self-administered buccal swabs

If a forensic procedure is carried out on a suspect by the suspect himself or herself taking a sample by buccal swab, that forensic procedure may be carried out in the presence or view of a person who is of the opposite sex to the suspect.

[24] Section 55 Presence of interview friend or legal representative—Aboriginal persons and Torres Strait Islanders

Insert at the end of section 55 (3) (before the note):

If a suspect so waives his or her right to have an interview friend present, a legal representative of the suspect may still be present.

[25] Section 57 Recording of forensic procedure

Omit “a video” from section 57 (2) (b). Insert instead “the”.

[26] Section 57 (6)

Insert after section 57 (5):

- (6) Nothing in this section prevents any recording of a forensic procedure being made for the purpose of maintaining good order, discipline and security in a correctional centre or other place of detention.

[27] Section 69 Matters that offender must be informed of before giving consent

Insert “senior” before “police officer” where secondly and thirdly occurring in section 69 (2).

[28] Section 70 Circumstances in which senior police officer may order non-intimate forensic procedure

Insert “senior” before “police officer” wherever occurring in section 70 (1).

[29] Section 71 Matters to be taken into account by senior police officer

Insert “senior” before “police officer”.

[30] Section 73 Record of order of senior police officer

Insert “senior” before “police officer” wherever occurring.

[31] Section 76 Carrying out of forensic procedures on volunteers

Insert “or excluded volunteer” after “suspect” in the definition of *volunteer* in section 76 (1).

[32] Section 76A

Insert after section 76:

76A Excluded volunteers

In this Act:

excluded volunteer means:

- (a) a person who volunteers to a police officer to undergo a forensic procedure in relation to an offence under

- Part 3, or Subdivision 2 of Division 1 of Part 4, of the *Crimes Act 1900* of which the person is a victim, or
- (b) a child or incapable person whose parent or guardian volunteered to a police officer that the child or incapable person undergo a forensic procedure in relation to an offence under Part 3, or Subdivision 2 of Division 1 of Part 4, of the *Crimes Act 1900* of which the child or incapable person is a victim, or
 - (c) a person who volunteers to a police officer to undergo a forensic procedure for the purpose of eliminating the person's finger prints or hand prints from those found in relation to an offence under Part 4 of the *Crimes Act 1900*, being the offence in relation to which the forensic procedure is carried out, or
 - (d) a child or incapable person whose parent or guardian volunteered to a police officer that the child or incapable person undergo a forensic procedure for the purpose of eliminating the child or incapable person's finger prints or hand prints from those found in relation to an offence under Part 4 of the *Crimes Act 1900*, being the offence in relation to which the forensic procedure is carried out.

[33] Section 77 Informed consent of volunteer or parent or guardian of volunteer

Insert after section 77 (2) (c):

- (c1) if the police officer intends the information to be placed on the missing persons index of that system:
 - (i) that the principal purpose for which the information is to be placed on that index is to assist in the identification of a missing person, and
 - (ii) that the information may be used for the purposes of a criminal investigation or any other purpose for which the DNA database system may be used under Part 11 or 12, including for the purpose of matching the material against any or all of the other indexes on the database, and

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- (iii) if the information obtained from analysis of forensic material taken from the volunteer matches information in the DNA profile of a missing blood relative on the missing persons index, that the volunteer will be informed of the fact, and
 - (iv) if the information obtained from analysis of forensic material taken from the volunteer matches information in the DNA profile of another person on another index of the database, that the volunteer will be informed of the fact, and
 - (v) that the information obtained from analysis of forensic material taken from the volunteer, or any match of that information with any information in another DNA profile, cannot be used in proceedings against the volunteer, but may be admissible if adduced by the volunteer,

[34] Section 83A

Insert after section 83:

83A Inadmissibility of certain evidence from forensic procedures undertaken for purpose of missing persons index

- (1) This section applies to a person who volunteers to have a forensic procedure carried out for the purposes of placing information obtained from the analysis of the person's forensic material on the missing persons index.
- (2) This section applies:
 - (a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person to whom this section applies by a forensic procedure, and
 - (b) to evidence of any results of the analysis of the forensic material, and
 - (c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.

- (3) If this section applies, evidence described in subsection (2) is not admissible in any proceedings against the person in a court, but may be admissible if adduced in such proceedings by the person.
- (4) This section extends to a person who volunteered to undergo a forensic procedure before the commencement of this section.

[35] Section 87 Destruction of forensic material taken from offender after conviction quashed

Insert “70 or” after “section”.

[36] Section 87 (2)

Insert at the end of section 87:

- (2) If a forensic procedure was carried out on a serious indictable offender under Part 7 and the offender’s conviction is quashed after the making of the order, the police officer in charge of the investigation of the offence must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.

[37] Section 87A

Insert after section 87:

87A Destruction of forensic material given voluntarily for elimination purposes

If a person has consented, or consent has been given on the person’s behalf, to have the person’s finger print or hand print taken for the purpose of eliminating the person’s finger prints or hand prints from those found in relation to an offence under Part 4 of the *Crimes Act 1900*, the police officer in charge of the investigation of the offence must ensure that the finger prints or hand prints are destroyed or returned to the person as soon as practicable after they have been used to eliminate the person from inquiries in relation to the event.

[38] Section 89 Destruction of forensic material where related evidence is inadmissible

Insert “after the end of the proceedings before the court (including any re-trial and any period during which an appeal may be made)” after “practicable” in section 89 (1).

[39] Section 90 Definitions

Insert “or (c1)” after “section 77 (2) (b)” in the definition of *volunteers (limited purposes) index*.

[40] Section 96 Registration of orders

Omit section 96 (1) and (2). Insert instead:

- (1) The Minister may enter into arrangements with the responsible Ministers of one or more of the participating jurisdictions for the establishment and maintenance of one or more registers of orders for the carrying out of forensic procedures made under this Act or a corresponding law of a participating jurisdiction.
- (2) An order is registered in accordance with such an arrangement when a copy of the order (being a copy certified by the person who made it) is registered:
 - (a) on such a register and the register is maintained in accordance with the arrangement, or
 - (b) in accordance with the law of the State, or of the participating jurisdiction, as the case may be, in which the register is kept.

[41] Section 96 (4)

Omit section 96 (4). Insert instead:

- (4) An application for registration of an order, or for cancellation of registration of an order, may be made in accordance with the regulations.

[42] Section 98 (1A)

Insert after section 98 (1):

- (1A) If it is not practicable to arrange for the presence of an interpreter, it is sufficient compliance with subsection (1) if the police officer arranges for a telephone linking to an interpreter.

[43] Section 109 Disclosure of information

Insert after section 109 (2) (f):

- (f1) the purposes of informing a person who volunteered to undergo a forensic procedure for the purposes of placing information obtained from the analysis of the person's forensic material on the missing persons index:
- (i) that the DNA profile of the person matches a DNA profile on an index of the DNA database system, and
 - (ii) that the DNA profile of a missing blood relative of the person matches a DNA profile on an index of the DNA database system,

[44] Section 114 Application of other laws

Insert after section 114 (1) (b):

- (b1) without limiting paragraph (a), the taking of finger prints or hand prints of applicants seeking employment under any Act,

[45] Section 114 (1) (f)

Insert "(b1)," after "(b)".

[46] Section 121 Monitoring of operation of Act by Ombudsman

Omit "2 years after the commencement of this section" from section 121 (1).

Insert instead "18 months after the commencement of Part 8".

[47] Section 121 (3)

Omit "2-year period". Insert instead "18-month period".

[48] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Crimes (Forensic Procedures) Amendment Act 2002

[49] Schedule 2, Part 3

Insert after clause 3:

**Part 3 Provisions consequent on enactment of
Crimes (Forensic Procedures) Amendment
Act 2002**

4 Definition

In this Part, *amending Act* means the *Crimes (Forensic Procedures) Amendment Act 2002*.

5 Application and order for repeated forensic procedure

The amendment made by Schedule 1 [9] to the amending Act extends to circumstances where forensic material is lost or became unavailable for analysis before the commencement of the amendment.

6 Application for interim orders

The amendment made by Schedule 1 [15] to the amending Act does not apply to an application made but not dealt with before the commencement of the amendment.

7 Records of applications and interim orders

The amendments made by Schedule 1 [16]–[20] to the amending Act extend to applications and orders made before the commencement of the amendments.

Schedule 2 Amendment of Police Service Act 1990

(Section 4)

Section 96A

Insert after section 96:

96A Finger printing and hand printing of applicants—police officers

- (1) The Commissioner may, before accepting an application for appointment as a police officer, require the applicant to consent to the taking of a finger print or hand print for use by the Commissioner in determining the applicant's suitability for employment.
- (2) Before a finger print or hand print is taken from an applicant for appointment as a police officer the applicant must be informed in writing that the print may be retained and used for the purpose of performing a check of the applicant's criminal history.
- (3) The Commissioner must destroy any finger print or hand print taken under this section from any person who is not appointed to a position as a police officer as soon as practicable after the decision is made not to appoint the person to the position.
- (4) A person who was not appointed to a position as a police officer may request that any finger print or hand print taken from the person in connection with an application for appointment as a police officer before the commencement of this section be destroyed. The Commissioner must ensure that such a request is complied with as soon as practicable after the request is made.

- (5) A person who ceases to be a police officer may request that any finger print or hand print taken from the person under this section be destroyed. The Commissioner must ensure that such a request is complied with as soon as practicable after the request is made.

[Second reading speech made in—
Legislative Assembly on 28 May 2002
Legislative Council on 12 June 2002]