

# **The Admissibility of DNA Evidence Obtained Pursuant to Part 3 of the *Crimes (Forensic Procedures) Act 2000 (NSW)***

*This paper was presented by Stephen Lawrence<sup>1</sup> at the Aboriginal Legal Service NSW/ACT Ltd (Western Zone) Annual Conference, at Rydal, March 2012*

## **Introduction**

This paper attempts to explore a selection of admissibility issues that can arise when the prosecution seeks to lead evidence of the comparison of DNA material found at a crime scene, or other relevant place, with DNA taken from a suspect with their consent by a police officer pursuant to Part 3 of the *Crimes (Forensic Procedures) Act 2002 (NSW)* ('the Act').

This paper focuses primarily on Part 3 of the Act, but will be best understood after the reader has familiarised themselves with the general structure of Parts 1 to 6 of the Act and the specific content of both Parts 3 and 4 of the Act (there being some important interaction between those two parts).

The admissibility of DNA given to police by consent is, in the limited experience of the author, somewhat under-litigated, perhaps because some criminal lawyers have a tendency to assume that because DNA has been given "by consent" it is probably admissible.

The reality however is that the legislative scheme in relation to forensic procedures undertaken with consent by police officers is almost as complex

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and mandatory in its terms as that governing the making of coercive orders by senior police officers or Magistrates.

Importantly, the 'consent' given under Part 3 should not be confused with the consent known to the law in general. The consent given under Part 3 is rather a creature of statute, deemed to exist only when a range of statutory pre-conditions and tests are met.

In circumstances where the legislative requirements are not met, either the consent never existed in the first place, or the police action in seeking or acting on the consent was without power.

This paper explores some fairly common breaches of section 7-16 of the Act which can lead to the exclusion from criminal proceedings of DNA evidence.

A sample taken in violation of the Act is inadmissible under section 82 of the Act unless the Court exercises its discretion to admit the evidence. The results of any analysis of the sample and its comparison are also inadmissible.

The paper does not explore a range of other important questions pertaining to the admissibility and probative value of DNA evidence (whether taken by consent or otherwise).

Issues not explored include:

- DNA taken under orders made by a Police Officer or Magistrate
- Issues relating to crime scene collection of the DNA profile
- Proof of continuity of custody of DNA related exhibits
- Contamination of DNA
- Secondary Transfer
- Partial profiles, weak readings and mixtures
- Common statistical problems

- DNA and racial minorities
- The science of DNA

The New South Wales Public Defender's website (<http://www.lawlink.nsw.gov.au/pd>) contains a number of excellent papers which explore many of these issues.

### **Common Admissibility Issues Arising under Part 3 of the Act**

#### **The LEPRA Investigation Period**

Though not strictly speaking an issue arising under Part 3 of the Act, it is always worth firstly considering whether a suspect was lawfully detained at the time 'consent' was given to a procedure. If a suspect was unlawfully detained there will be an obvious issue as to whether the DNA evidence is admissible under section 138 of the *Evidence Act 1995* (NSW).

The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("LEPRA") allows police to extend the detention of a suspect for a defined period, known as the 'investigation period', for the purpose of investigating an offence. Pursuant to sections 114 and 115 this investigation period is effectively a maximum of 4 hours, unless extended by a warrant issued under section 118.<sup>2</sup>

It is important however to be aware of section 7(3) of the *Crimes (Forensic Procedures) Act* which appears in effect to extend the applicable investigation period by 2 hours.

In summary, DNA given by consent may be inadmissible if the procedure was undertaken in violation of Part 9 of LEPRA.

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<sup>2</sup> Under section 117 the investigation period is calculated disregarding certain periods of time.

*R v Dwayne Peckham* unrep. [2011] NSWDC 15 December 2011 (ADCJ Lerve) was a case where the DNA evidence was, in part, held to be inadmissible on account of the accused having been unlawfully detained, purportedly pursuant to LEPR, at the time the consent was given.

His Honour ADCJ Lerve held at 28:

*“..Returning to the matter presently under consideration the accused was not formally charged with the matters relating to the events at the BP Service Station on 3 September 2009 until some considerable time after 14 November 2009. The difficulty for the Crown is created by the answer to the initial questions in cross-examination on the voir dire of Detective Ensor. The officer gave evidence to the effect that he had decided he would give the accused an opportunity to give account before he decided to commence proceedings.*

*29. In these circumstances I am left with the impression that the accused was in fact being detained not for the purpose prescribed by the relevant legislation but rather to ensure that the police from Dubbo had an opportunity to question the accused. The initial arrest of the accused on the warrant was lawful, but his detention thereafter was not. This is reason enough to exclude the record of interview and the evidence of the DNA.”*

For a determination of whether the person's custody under LEPR was lawful another paper presented at this conference by the author may be a helpful start. See 'Admissibility Issues Arising From the Detention of Suspects for Investigation under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*'.

### **Section 7 of the Act – Persons who Cannot Consent**

Section 7 of the Act creates the general power to carry out a forensic procedure on a person with their informed consent.

Sub-section (2) however states that the Part:

*“does not authorise the carrying out of a forensic procedure on a suspect who is: (a) a child, or (b) an incapable person”.*

The term ‘incapable person’ is defined in section 3 as follows:

*“incapable person means an adult who:*

- (a) is incapable of understanding the general nature and effect of a forensic procedure, or*
- (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.*

A threshold issue in determining admissibility will therefore be whether the suspect was at the time of the carrying out of the procedure a child (this should be easily established) or an incapable person (obviously a more subjective issue). Issues of intellectual disability, mental illness and intoxication may be important.<sup>3</sup>

## **Section 8 – Identification of Aboriginal and Torres Strait Islander People**

This section obligates a police officer to ask a suspect before they are asked to consent to a forensic procedure if they identify as an Aboriginal person or a Torres Strait Islander.

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<sup>3</sup> *JW v Detective Sergeant Karol Blackley and Anor* [2007] NSWSC 799 was a case where a suspect was an incapable person on account of a psychiatric condition. *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637 was a case where it was argued a suspect was an incapable person on account of psychiatric disability.

## **Section 9 – Informed Consent (Non-Aboriginal and Torres Strait Islander People)**

This section applies to persons who do not identify as Aboriginal or Torres Strait Islander who a police officer intends to ask to consent to a forensic procedure.

A suspect gives informed consent under sub-section (2) if:

- A police officer asks them to consent; and
- A police officer gives the suspect (personally or in writing) the information that must be given under section 13 of the Act; and
- Informs the suspect about the proposed procedure in accordance with section 13; and
- Gives the suspect the opportunity to communicate with a lawyer (subject to the exception in sub-section (3))

Unless the section is scrupulously complied with it appears the suspect will not have given informed consent (see sub-section (2) (d)).

Section 13 details a range of matters about which suspects must be informed. The NSW police have a standard form which contains a list of the things they must inform suspects of pursuant to the section and this is generally read directly to suspects.

In two recent matters I have been involved in however the standard police form contained a reference to the now repealed section 19 of the Act. This, in the context of those cases, was a somewhat important issue as it led to the suspect being misled about the consequences of not providing consent (one of the matters the suspect must be informed of under section 13). The former

section 19 allowed police to take a hair sample if the suspect did not consent to a self-administered buccal swab.

Under subsections 13(3), (4) and (5) (which applies will depend on the nature of the proposed procedure and the custody status of the suspect) a suspect must be informed of the consequences of not consenting, which generally are that police may make an application to a Magistrate or senior police officer who then has the discretion to make an order.

In one of those matters the paraphrasing of the information required to be provided pursuant to section 13(3) was, “*so if you do not consent we will pull your hair out*”. This was potentially misleading and incorrect. Section 19 had been repealed (therefore it was perhaps more likely a self administered buccal swab would have been ordered) and the police officer should not have pre-empted the outcome of an application to a senior police officer pursuant to section 20 of the Act.

It is fairly common however for police to paraphrase this information and to, in effect, inform suspects that if they do not consent police will undertake the procedure regardless. This is a misstatement of the true position and could leave the DNA evidence liable to be excluded. It is a misstatement because the true position is that, in the absence of consent, police will make an application which will, presumably, be decided upon in due course according to the applicable statutory criteria.<sup>4</sup>

In the matter of *R v Dwayne Peckham* discussed above the following occurred (as detailed in the Court’s reasons for excluding the DNA) at 42:

*“..There are however, further bases to exclude the evidence relating to the DNA sample. Exhibit 10 on the voir dire is a transcript of the*

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<sup>4</sup> *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637. This was a case where it was argued that a police officer had misled a suspect by informing them in that the absence of consent the procedure “would be carried out anyway”.

*procedure by Constable Williams in taking the sample, and exhibit 13 on the voir dire is an audio recording of that same procedure. Counsel for the accused submits, correctly in my opinion, that the accused gave consent while under a mistaken belief that the police could order the sample. In this regard Counsel for the accused relies on questions and answers 37-40 inclusive of exhibit 10 (voir dire). In particular in answer to question 38 the accused says, "it's only going to fuckin' happen anyway", to which the officer replies at question 39, "pretty much".*

*43. Relevantly, section 20 of the Crimes (Forensic Procedures) Act 2002 provides:*

*A senior police officer may not order the carrying out of a non-intimate forensic procedure under section 18 (1) unless satisfied:*

- (a) that the suspect is under arrest, and*
- (b) that there are reasonable grounds to believe that the suspect has committed an offence, and*
- (c) that there are 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 (b), and*
- (d) that the suspect is neither a child nor an incapable person, and*
- (e) that the carrying out of such a procedure is justified in the circumstances.*

*44. A number of issues arise. The accused was not lawfully under arrest at the time of the taking of the sample at about 11.10pm on 14 November 2009. There is the same issue with section 20(1)(c) as there is with the provisions of s. 11(3) of the same legislation. The submission made by counsel for the accused in this regard is made good".*

## **Section 10 – Aboriginal and Torres Strait Islander People**

Section 10 to a significant extent replicates section 9 but contains special protections for Aboriginal and Torres Strait Islander people.

### Interview Friends

One special protection is the provision in sub-section 10(3) for the presence of an interview friend who must be present when a suspect is asked to consent unless the right to have them present has been expressly and voluntarily waived.

Under section 106 of the Act the burden rests on the prosecution to prove that the person voluntarily waived the right on the balance of probabilities, “*and did so with full knowledge and understanding of what he or she was doing*”.

No superior court case law seems to exist on the operation of the interview friend provision in the Act. The provisions are worded somewhat differently to the support person provisions in the LEPR Regulations but the case law that exists in relation to those provisions (or their predecessor legislation) suggests that compliance will not be met by recital by rote of information.

In *R v Phung* [2001] NSWSC 115 Wood CJ stated:

*“63 Additionally, I observe that police should not automatically assume that their obligations under the legislation, can be met by a rote reading of the requisite cautions and advice, or by the handing over of printed forms for an accused to read for himself or herself. Nor should they assume that compliance can be proved by the securing of a simple signature or initial on the custody management report. There is a positive obligation, under the legislation, to ensure that a child or*

*vulnerable person can understand what is being said - for example see [regulation 29](#). That may extend to satisfying themselves that he or she can speak English or can read. Moreover, the regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights - see [regulation 20](#).*

*64 The final observation that needs to be made, in this context, is that the onus of proving compliance with the legislative regime rests upon the Crown. That means that it will need to have the necessary evidence available, if an issue is taken up in relation to the interview of a child as well as in relation to all other accused who are interviewed or subjected to forensic tests in circumstances attracting the legislation. Unless police secure that evidence, then it may well be necessary, as in this case it was, for the evidence to be excluded”.*

#### Legal Advice

A further special protection is the obligation on police under subsection (4) to notify the Aboriginal Legal Service that consent is to be requested of the suspect. Police are only relieved of the obligation to do so if they have complied with sub-section (5).

The suspect is then entitled to the opportunity to obtain legal advice under sub-section (6) in relation to the request for consent. (This provision is a replica provision to the one found in Regulation 33 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*, upon which the Custody Notification Scheme, provided by the Aboriginal Legal Service, is based).

What fairly commonly occurs however is that police arrest a suspect, provide them with legal advice pursuant to regulation 33 of the LEPRA Regulations in relation to a proposed interview, but then fail to provide the suspect with a further opportunity to obtain advice in relation to a proposed forensic procedure. That is a breach of the Act.

The practice of some ALS solicitors of indicating to the police, when first contacted at the time of arrest, that the suspect does not consent to a forensic procedure, even though the police had not raised the subject at that time, does not, on a strict reading of the legislation, remove the obligation to provide the second opportunity when the subject is raised.

The legislative scheme is designed to ensure that ATSI persons can get advice about the forensic procedure specifically before they consent unless they waive the right to have a lawyer present under sub-section (5).

In *R v Ryan & Fitzhenry* [2011] NSWDC 19 October 2011, a District Court trial matter heard before Judge English sitting in Wagga Wagga, Her Honour stated as follows when ruling upon an application to exclude DNA evidence following a breach of section 10 of the Act:

*"..Pursuant to s 10(4), before asking a suspect who is of Aboriginal heritage and therefore a vulnerable person to consent to a forensic procedure, the police officer must inform the suspect that a representative of an Aboriginal Legal Aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure and to notify such a representative accordingly. It is in mandatory terms. There is absolutely no evidence whatsoever in the Crown case that the officer who undertook the forensic procedure complied with that requirement. The video of the buccal swab procedure has been played and when the officer reaches a point in the document from which he is reading regarding the rights of the accused to have legal representation present, he makes an inquiry of the accused as to whether or not he had spoken to a legal representative or not. The words used appear to be, "You have already spoken to the ALS haven't you?" The accused did in fact speak to a legal representative but that was at a time well before he had been informed of the intention to take a buccal swab. As I have said, there is simply no evidence that there was compliance with s 10(4)(a) of the Act. Of course, s 5 provides that a police officer does not have to comply with the provisions of s 4(b) if the accused has*

*expressly waived his or her right to have a legal representative present. The procedure generally I find was carried out with undue haste and certainly not in circumstances where the accused was made aware of the requirement of the police to notify the ALS that a forensic procedure was about to take place. That must necessarily affect whether or not his consent was expressly and voluntarily given in the full understanding of his rights. He was, as I have said, a vulnerable person who had been in custody for at least seven hours".*

In *R v Dwayne Peckham* discussed above ADCJ Lerve also dealt with a similar situation, holding:

*"..This situation with the taking of the DNA sample and subsequent testing that I am considering is similar indeed to the situation met by her Honour Judge English of this Court in the Wagga Wagga District Court in R –v- Ryan and Fitzhenry unrep. [2011] NSWDC 19.10.11. As with the matter before her honour Judge English there is simply no evidence that the officer complied with s.10(4) of the Act. Further, as with that matter before her Honour Judge English, the accused had spoken to a solicitor from the Aboriginal Legal Service but that was many hours before the buccal swab was taken by Constable Williams. The failure by Constable Williams to observe what is a well known and clearly stated provision of the Act causes me considerable disquiet, particularly in circumstances where he has been authorised by an Assistant Commissioner to take DNA samples. That authority is part of exhibit 9 on the voir dire. I would also exclude the evidence relating to the DNA sample on the basis of a breach of s.10(4) of the Crimes (Forensic) Procedures) Act 2002".*

In *R v Helmout* (2000) 112 A Crim R 10 the Court was concerned with a circumstance where police had not called the Aboriginal Legal Service, as they were required to do in accordance with Regulation 28 of the *Crimes*

*(Detention after Arrest) Regulation 1998* (part of the LEPRA predecessor legislation).

Justice Bell held that the:

*“..Custody Manger’s obligation is to notify the Aboriginal legal aid organisation of the fact of the detained person’s custody. This is so whether the detained person wishes an Aboriginal legal aid organisation notified or not”.*

This statement should be equally applicable to the obligation created by section 10(4) of the Act, unless compliance is rendered unnecessary by compliance with sub-section (5).

## **Section 11**

Section 11 details the circumstances in which a police officer is empowered to seek a suspect’s consent to a forensic procedure.

The circumstances that must exist are:

- That sections 8, 9 and 10 have (so far as they apply) been complied with
- That the suspect is not a child or incapable person
- That the request for consent is justified in all the circumstances

In the case of an intimate procedure the following circumstances must also exist:

- The act or omission of which the suspect is suspected must constitute a prescribed offence (defined in section 3)

- There must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the prescribed offence or some other prescribed offence

In the case of a non-intimate procedure the following circumstances must also exist:

- The act or omission of which the suspect is suspected must constitute an offence (not necessarily a prescribed offence)
- 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 or some other offence

Importantly, if the informed consent provisions in section 10 are not complied with then there is no power available under s.11 See s.11(1)(a)) to request a suspect's consent.

The question that arises in many cases where DNA has been taken from a suspect by consent pursuant to Part 3 is whether there were 'reasonable grounds to believe' that the particular forensic procedure to be carried out might produce evidence to prove or disprove involvement in the offence.

This requirement creates a relatively high threshold of evidence and is basically the same requirement that applies to a Magistrate when considering an application for a coercive order under section 24 of the Act. This requirement has been examined in *Walker v Budgen* [2005] NSWSC 898 and *LK v Commissioner of Police* [2011] NSWSC 458.

In *R v Dwayne Peckham* ADCJ Lerve stated (in relation to the similarity of the tests applicable to a magistrate and a police officer) at 38:

*“..Sub-section 3 is the relevant part of the section for the issue that I need to determine. The act in respect of which the accused was a suspect was an offence contrary to the Crimes Act 1900, and accordingly sub-paragraph (a) is satisfied. However, the test in sub-paragraph (b) is in precisely the same terms of section 24(3) of the same legislation which deals with a court making an order. Accordingly, the body of authority that has developed on section 24 (and the now repealed section 25) must be applicable”.*

Generally speaking, unless police have solid grounds to believe they actually have something to compare the sample to (i.e. they have already been told by the lab that the sample contains a DNA profile or there is a bodily fluid left behind linked to the suspect, or other cogent evidence suggesting strong grounds to believe there will be DNA at the scene) there will be an argument to exclude the fruits of the comparison. The reality of police practice is that officers often seek a DNA sample, whether by consent or by order, regardless of whether there is anything to really suggest a solid basis to believe there will be something to compare it to.

Justice Hall stated in *Walker v Budgen*:

*“..In George v Rockett (1990) 170 CLR 104 at 112, (a case involving the issue of a search warrant under s 679(b) of the Criminal Code (Q)), Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ stated —*

*When a statute prescribes that there must be ‘reasonable grounds’ for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person ...”*

Justice Hall went on to find that the Magistrate was not possessed of evidence sufficient to meet the test:

*“[45] Section 25(f) focuses attention upon the existence of reasonable grounds for a belief that a forensic procedure can, in a given situation, produce evidence that either tends to confirm or disprove that the suspect committed the relevant offence. In order to satisfy that pre-condition, there is a need in an application of the kind in question for an applicant to identify the basis upon for the belief that such a forensic outcome might be produced. 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. The factual material in para 2 of the affidavit, as I have earlier stated, was insufficient and was not directed to satisfying the pre-condition to s25(f). It was directed and limited to satisfying the pre-condition stated in s 25(c)”.*

The issue was more recently considered in *LK v Commissioner of Police*:

*“..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”.*

Fullerton J stated further of *Walker v Budgen*:

*[32] His Honour’s insightful analysis of the operation of the section in Walker v Bugden [misspelt] 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” (my emphasis)*

It appears that some are of the view that *LK v Commissioner of Police* retreats from *Walker v Budgen* in terms of the stringency of the interpretation of the reasonable grounds requirement.

My view however is that in the underlined part of the judgment above Fullerton J is positing a class of evidence which is objectively reliable and probative, such that the test propounded in *Walker v Budgen* can be met, notwithstanding the absence of a lab confirmed DNA sample. This should not be seen as retreating from the *Walker v Budgen* test, rather Fullerton J is making the point that the “reasonable grounds to believe” test can be satisfied by the presence of a certain type and quality of evidence, just as it can be met by the proved presence of DNA in a crime scene sample.

Whether the evidence available to police is sufficient will necessarily depend on the facts of the case, not whether there is a lab-confirmed DNA profile detected at the crime scene or not.

## **Section 82 – Admissibility of Evidence from Improper Forensic Procedures**

Section 82 states:

### **82 Inadmissibility of evidence from improper forensic procedures**

*(1) This section applies where:*

*(a) a forensic procedure has been carried out on a person, and*

*(b) there has been any breach of, or failure to comply with:*

*(i) any provision of this Act in relation to a forensic procedure carried out on a person (including, but not limited to, any breach of or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out), or*

*(ii) any provision of Part 11 with respect to recording or use of information on the DNA database system.*

*(2) This section does not apply if:*

*(a) a provision of this Act required forensic material to be destroyed, and*

*(b) the forensic material has not been destroyed.*

**Note.** *Section 83 applies where this Act requires forensic material to have been destroyed.*

*(3) This section applies:*

*(a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person 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.*
- (4) *If this section applies, evidence described in subsection (3) is not admissible in any proceedings against the person in a court unless:*

  - (a) *the person does not object to the admission of the evidence, or*
  - (b) *in the opinion of the court the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was not obtained in compliance with the provisions of this Act, or*
  - (c) *in the opinion of the court, the breach of, or failure to comply with, the provisions of this Act arose out of mistaken but reasonable belief as to the age of a child.*
- (5) *The matters that may be considered by the court for the purposes of subsection (4) (b) are the following:*

  - (a) *the probative value of the evidence,*
  - (b) *the reasons given for the failure to comply with the provision of this Act,*
  - (c) *the gravity of the failure to comply with the provisions of this Act, and whether the failure deprived the person of a significant protection under this Act,*
  - (d) *whether the failure to comply with the provision of this Act was intentional or reckless,*
  - (e) *the nature of the provision of this Act that was not complied with,*
  - (f) *the nature of the offence concerned and the subject matter of the proceedings,*
  - (g) *whether admitting the evidence would seriously undermine the protection given to suspects by this Act,*
  - (h) *whether the breach of or failure to comply with the provision of this Act was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights,*

- (i) *whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply,*
- (j) *the difficulty (if any) of obtaining the evidence without contravention of an Australian law,*
- (k) *any other matters the court considers to be relevant.*
- (6) *The probative value of the evidence does not by itself justify the admission of the evidence.*
- (7) *If a judge permits evidence to be given before a jury under subsection (4), the judge must:*
  - (a) *inform the jury of the breach of, or failure to comply with, a provision of this Act, and*
  - (b) *give the jury such warning about the evidence as the judge thinks appropriate in the circumstances.*

The presumption is that the evidence obtained following a breach of the Act is inadmissible unless, "*in the opinion of the court the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was not obtained in compliance with the provisions of this Act*".

This means that the burden is on the prosecution to satisfy the Court that the evidence should be admitted.<sup>5</sup>

The section to an extent mirrors section 138 of the *Evidence Act 1995* (NSW) but there are significant differences. It will generally be useful to bring the Court's attention to the differences between section 82 and section 138 as they highlight the different considerations applicable when dealing with this category of evidence.

Section 82 omits the following matters contained with section 138(3):

- The importance of the evidence in the proceedings

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<sup>5</sup> *R v Coombe* (unreported NSWCCA, Hunt CJ at CL, Smart, McInerney JJ) 24 April 1997) pg 25 per Hunt CJ at CL

Section 82 contains the following matters not contained with section 138(3):

- The reasons given for the failure to comply with the provision of the Act
- Whether the failure deprived the person of a significant protection under the Act
- The nature of the provision of the Act that was not complied with
- Whether admitting the evidence would seriously undermine the protection given to suspects by the Act
- Any other matters the court considers to be relevant.

Section 82 also contains sub-section (6) which has no equivalent in section 138. It states that "*the probative value of the evidence does not by itself justify the admission of the evidence*". This will be of particular importance in DNA cases where often the evidence will be of very high probative value.

## **Conclusion**

The admissibility of DNA given by consent should not be assumed and nor should compliance by the police with the provisions of Part 3.

Exploring these issues in your hearing or trial may well be the most promising avenue for excluding DNA evidence, given the generally high regard in which the science itself is held and the extent to which Courts have gone to facilitate the admissibility of this form of evidence.

The author welcomes any feedback or comments on this paper.

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### **Part 3 Forensic procedures on suspect by consent**

#### **7 Forensic procedure may be carried out with informed consent of suspect**

(1) A person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.

(2) This Part does not authorise the carrying out of a forensic procedure on a suspect who is:

- (a) a child, or
- (b) an incapable person.

(3) This Part does not authorise keeping a suspect under arrest, in order to carry out a forensic procedure, for more than 2 hours after the expiration of the investigation period provided for by section 115 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

(4) In working out any period of time for the purposes of subsection (3), any time out is to be disregarded.

(5) Nothing in this Act or Part 9 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) prevents the carrying out of a forensic procedure, with the informed consent of the suspect, during the investigation period provided for by section 115 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#). However, neither carrying out the forensic procedure, nor any delays associated with carrying out the forensic procedure, operates to extend the investigation period provided for by section 115 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

#### **8 Police officer to ask whether suspect identifies as Aboriginal person or Torres Strait Islander**

Before asking a suspect to consent to a forensic procedure under this Part, a police officer must ask the suspect whether the suspect identifies as an Aboriginal person or Torres Strait Islander.

#### **9 Informed consent to forensic procedures—general**

(1) This section applies where:

- (a) a police officer intends to ask a suspect to consent to a forensic procedure, and
- (b) the suspect does not identify as an Aboriginal person or Torres Strait Islander.

(2) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:

(a) asks the suspect to consent to the forensic procedure under section 11,  
and

(b) personally or in writing, gives the suspect:

(i) the information that the suspect must be given under section 13  
(1) (a), (e), (f), (g), (i), (j) and (k), and

(ii) a description of the nature of the information that the suspect must  
be given under section 13 (1) (b), (c) and (d) (but not the specific  
information that the suspect is to be given under these paragraphs in  
relation to the particular forensic procedure), and

(c) informs the suspect about the forensic procedure in accordance with  
section 13, and

(d) gives the suspect a reasonable opportunity to communicate, or attempt to  
communicate, with an Australian legal practitioner of the suspect's choice  
and, subject to subsection (3), to do so in private.

(3) If the suspect is under arrest, the police officer need not allow the suspect to  
communicate, or attempt to communicate, with the Australian legal practitioner in  
private if the police officer suspects on reasonable grounds that the suspect might  
attempt to destroy or contaminate any evidence that might be obtained by carrying  
out the forensic procedure.

#### **10 Informed consent to forensic procedures—Aboriginal persons and Torres Strait Islanders**

(1) This section applies where:

(a) a police officer intends to ask a suspect to consent to a forensic  
procedure, and

(b) the suspect identifies as an Aboriginal person or Torres Strait Islander.

(2) A suspect gives informed consent to a forensic procedure if the suspect consents  
after a police officer:

(a) asks the suspect to consent to the forensic procedure under section 11,  
and

(b) gives the suspect a written statement setting out:

(i) the information that the suspect must be given under section 13  
(1) (a), (e), (f), (g), (h), (i), (j) and (k), and

(ii) the nature of the information that the suspect must be given under  
section 13 (1) (b), (c) and (d) (but not the specific information that the  
suspect is to be given under these paragraphs in relation to the  
particular forensic procedure), and

(c) informs the suspect about the forensic procedure in accordance with section 13, and

(d) complies with the rest of this section.

(3) The police officer must not ask the suspect to consent to the forensic procedure unless:

(a) an interview friend is present, or

(b) the suspect has expressly and voluntarily waived his or her right to have an interview friend present.

**Note.** Section 106 relates to proving a waiver under paragraph (b).

(4) Before asking the suspect to consent to a forensic procedure, the police officer must:

(a) inform the suspect that a representative of an Aboriginal legal aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure, and

(b) notify such a representative accordingly.

(5) The police officer is not required to comply with subsection (4) if he or she is aware that the suspect:

(a) has arranged for a legal representative to be present, or

(b) has expressly and voluntarily waived his or her right to have a legal representative present,

while the suspect is being asked to consent to the forensic procedure.

(6) After asking a suspect covered by subsection (3) (b) to consent to a forensic procedure, the police officer must give the suspect a reasonable opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the suspect's choice and, subject to subsection (8), to do so in private.

(7) After asking a suspect not covered by subsection (3) (b) to consent to a forensic procedure, the police officer must allow the suspect to communicate with the interview friend (if any), and with the suspect's legal representative (if any), and, subject to subsection (8), to do so in private.

(8) If a suspect covered by subsection (6) or (7) is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the Australian legal practitioner, or the suspect's interview friend or legal representative, in private if the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

(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.

#### **11 Conditions under which police officer may request consent to forensic procedure**

(1) A police officer may not ask a suspect to undergo a forensic procedure unless satisfied:

- (a) that section 8, and section 9 or 10, as the case requires, have been complied with, and
- (b) that the circumstances referred to in subsection (2) or (3) exist, and
- (c) that the suspect is neither a child nor an incapable person, and
- (d) that the request for consent is justified in all the circumstances.

(2) In the case of an intimate forensic procedure:

- (a) the act or omission in respect of which the suspect is a suspect must constitute a prescribed offence, and
- (b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:
  - (i) that the suspect has committed the prescribed offence referred to in paragraph (a), or
  - (ii) that the suspect has committed some other prescribed offence.

(3) In the case of a non-intimate forensic procedure:

- (a) the act or omission in respect of which the suspect is a suspect must constitute an offence, and

(b) there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove:

- (i) that the suspect has committed the offence referred to in paragraph (a), or
- (ii) that the suspect has committed some other offence.

## 12 (Repealed)

### 13 Matters that suspect must be informed of before giving consent

(1) The police officer must (personally or in writing) inform the suspect of the following matters:

- (a) that the giving of information under this section, and the giving of consent (if any) by the suspect, is being or will be recorded by electronic means, or in writing, and that the suspect has a right to be given an opportunity to hear or view the recording as provided by section 100,
- (b) the purpose for which the forensic procedure is required,
- (c) the offence in relation to which the police officer wants the forensic procedure carried out,
- (d) the way in which the forensic procedure is to be carried out,
- (e) that the forensic procedure may produce evidence against the suspect that might be used in a court of law,
- (f) that the forensic procedure will be carried out by an appropriately qualified police officer or person,
- (g) if relevant, the matters specified in subsection (2),
- (h) if the suspect identifies as an Aboriginal person or a Torres Strait Islander—that the suspect's interview friend may be present while the forensic procedure is carried out,
- (i) that the suspect may refuse to consent to the carrying out of the forensic procedure,
- (j) the consequences of not consenting, as specified in subsection (3), (4) or (5) (whichever is applicable),
- (k) if the police officer intends forensic material obtained from the carrying out of the forensic procedure to be used for the purpose of deriving a DNA profile on the suspect—that information obtained from analysis of the forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and the rules that will apply under this Act to its disclosure and use, including that the information may be compared with

information from the DNA database systems of other participating jurisdictions.

**(2) Suspect's right to have medical practitioner or dentist present during some forensic procedures**

In the case of:

- (a) an intimate forensic procedure, or
- (b) a non-intimate forensic procedure that involves the taking of an impression or cast of a wound from a part of the suspect's body,

the police officer must inform the suspect that the suspect may ask that a medical practitioner or dentist (depending on the kind of procedure) of his or her choice be present while the procedure is being carried out.

**(3) Failure to consent to non-intimate forensic procedure—suspect under arrest**

If the suspect is under arrest and the forensic procedure is a non-intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent, a senior police officer may order the carrying out of the forensic procedure under Part 4 if he or she is satisfied of the matters referred to in section 20.

**(4) Failure to consent to intimate forensic procedure—suspect under arrest**

If the suspect is under arrest in relation to a prescribed offence and the forensic procedure is an intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a Magistrate or other authorised officer for an order authorising the carrying out of the forensic procedure.

**(5) Failure to consent to intimate or non-intimate forensic procedure—suspect not under arrest**

If the suspect is not under arrest, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a Magistrate or other authorised officer for an order authorising the carrying out of the forensic procedure.

(6), (7) (Repealed)

**14 Withdrawal of consent**

If a person expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from the person's conduct) before or during the carrying out of the forensic procedure:

- (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused, and
- (b) the forensic procedure is not to proceed except by order of a senior police officer under Part 4 or a Magistrate or other authorised officer under Part 5.

**15 Recording of giving information and suspect's responses**

(1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the suspect's responses (if any) are recorded by electronic means.

(2) If the recording of the giving of the information and the suspect's responses (if any) by electronic means is not practicable:

(a) an independent person who is not a police officer must be present while the information is given and while any responses are made, and

(b) a police officer must make a written record of the information that is given and any responses that are made, and

(c) the police officer by whom the record is made must ensure that a copy of the record is made available to the suspect.

**Note.** Part 13 contains provisions about making copies of material (including copies of tapes) available to the suspect.

(3) Subsection (2) (a) does not apply if the suspect expressly and voluntarily waives his or her right to have an independent person present, but such a person may nevertheless be present if the investigating police officer so directs.

#### **16 Time for carrying out forensic procedure—suspect not under arrest**

(1) If a suspect who is not under arrest:

(a) consents to a forensic procedure, and

(b) presents himself or herself to an investigating police officer to undergo the procedure,

the procedure must be carried out as quickly as reasonably possible but in any case within 2 hours after the suspect so presents himself or herself.

(2) In working out any period of time for the purposes of subsection (1), any time out is to be disregarded.

#### **Part 4 Non-intimate forensic procedures on suspects by order of senior police officer**

##### **17 Non-intimate forensic procedure may be carried out by order of senior police officer**

(1) A person is authorised to carry out a non-intimate forensic procedure on a suspect by order of a senior police officer under section 18. The person is authorised to carry out the procedure in accordance with Part 6 and not otherwise.

(2) This Part does not authorise the carrying out of a forensic procedure on a suspect who is:

(a) a child, or

(b) an incapable person.

(3) This Part does not authorise keeping a suspect under arrest, in order to carry out a forensic procedure, for more than 2 hours after the expiration of the investigation period provided for by section 115 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

(4) In working out any period of time for the purposes of subsection (3), any time out is to be disregarded.

(5) Nothing in this Act or Part 9 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) prevents the carrying out of a forensic procedure, in accordance with a senior police officer's order under section 18, during the investigation period provided for by section 115 of that Act. However, neither carrying out the forensic procedure, nor any delays associated with carrying out the forensic procedure, operate to extend the investigation period provided for by Part 9 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

### **18 Circumstances in which senior police officer may order non-intimate forensic procedure**

(1) A senior police officer may order the carrying out of a non-intimate forensic procedure on a suspect who is under arrest if:

- (a) the suspect has been asked under Part 3 to consent to the carrying out of the forensic procedure, and
- (b) the suspect has not consented, and
- (c) the senior police officer is satisfied as required by section 20.

(2) If the senior police officer needs to decide between taking a sample of the suspect's hair or the carrying out of a self-administered buccal swab, an order for the taking of a sample of hair may not be made unless, following inquiry by the police officer:

- (a) the suspect has indicated that he or she prefers the taking of a sample of hair, or
- (b) the suspect has failed to indicate that he or she will carry out a self-administered buccal swab.

### **19 (Repealed)**

### **20 Matters to be considered by senior police officer before ordering non-intimate forensic procedure**

A senior police officer may not order the carrying out of a non-intimate forensic procedure under section 18 (1) unless satisfied:

- (a) that the suspect is under arrest, and

(b) that there are reasonable grounds to believe that the suspect has committed an offence, and

(c) that there are 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 (b), and

(d) that the suspect is neither a child nor an incapable person, and

(e) that the carrying out of such a procedure is justified in the circumstances.

## **21 Making and recording senior police officer's order**

(1) The senior police officer may make an order under section 18 in person or, if that is not practicable, by telephone, radio, telex, facsimile or other means of transmission.

(2) If an order is made by radio or other form of oral communication, the senior police officer must ensure that:

(a) the suspect or the suspect's legal representative, if any, and

(b) the suspect's interview friend, if any,

are given an opportunity to speak to the police officer.

(3) If the order is made by telex, facsimile or other form of written communication, the senior police officer must ensure that:

(a) the suspect or the suspect's legal representative, if any, and

(b) the suspect's interview friend, if any,

are given an opportunity to make a written submission to the senior police officer, or to speak to the senior police officer by telephone, radio or other form of oral communication.

(4) The senior police officer must, at the time of, or as soon as practicable after, making an order under section 18, make a 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 must sign the record.

(5) The senior police officer must ensure that a copy of the record is sent to or made available to the suspect as soon as practicable after the record is made.