

REASONABLE CAUSE CLE

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DEFENDING FORENSIC PROCEDURES IN THE LOCAL COURT AND CHILDREN'S COURT

For the purpose of this paper, 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 paper is a reference to a section of the CFPA unless otherwise specified.

A. APPLICATION FOR AN ORDER FOR FORENSIC PROCEDURE IN RELATION TO A SUSPECT

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"), seeking the taking of a forensic sample. The legislation provides for (at least) four categories of applications:

- An application in relation to a "suspect".
- An application in relation to a person who is a "serious indictable offender".
- An application in relation to a person who is an "untested former offender".
- An application in relation to a person who is a registrable person.

The most common application for an order for forensic procedure relates to a “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 can apply for a forensic procedure?

An “authorised applicant” can apply for an order for forensic procedure. 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
- The investigating police officer in relation to an offence; or
- The Director of Public Prosecutions.

2. Types of forensic procedures

Section 3 of the CFPA defines a forensic procedure as:

- An intimate forensic procedure (as further defined in section 3); or
- A non-intimate forensic procedure (as further defined in section 3

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].

An intimate forensic procedure is defined in section 3 as:

"Intimate forensic procedure" means any of the following:

- (a) an external examination of a person's private parts,
- (b) the carrying out on a person of an other-administered buccal swab,
- (c) the taking from a person of a sample of the person's blood,
- (d) the taking from a person of a sample of the person's pubic hair,
- (e) the taking from a person of a sample of any matter, by swab or washing, from the person's private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from the person's private parts,
- (g) the taking from a person of a dental impression,
- (h) the taking of a photograph of the person's private parts,
- (i) the taking from a person of an impression or cast of a wound from the person's private parts.

A non-intimate forensic procedure is defined in section 3 as:

"non-intimate forensic procedure" means any of the following:

- (a) an external examination of a part of a person's body, other than the person's private parts, that requires touching of the body or removal of clothing,
- (b) the carrying out on a person of a self-administered buccal swab,
- (c) the taking from a person of a sample of the person's hair, other than pubic hair,
- (d) the taking from a person of a sample (such as a nail clipping) of the person's nails or of matter from under the person's nails,
- (e) the taking from a person of a sample of any matter, by swab or washing, from any external part of the person's body, other than the person's private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from any external part of the person's body, other than the person's private parts,

- (g) the taking from a person of the person's hand print, finger print, foot print or toe print,
- (h) the taking of a photograph of a part of a person's body, other than the person's private parts,
- (i) the taking from a person of an impression or cast of a wound from a part of the person's body, other than the person's private parts,
- (j) the taking of measurement of a person's body or any part of a person's body (other than the person's private parts) whether or not involving the marking of the person's body.

3. Who may authorise a forensic procedure in different circumstances?

The question of who can authorise a forensic procedure hinges upon whether the person is a child/ adult, incapable person, whether the person is under arrest/ or not and whether the procedure sought is an intimate or non-intimate forensic procedure: see section 5.

For a **child or incapable person** the order must be made by a Magistrate for an intimate or non-intimate forensic procedure or an authorised officer under Part 5.

For an **adult not under arrest**:

- Intimate forensic procedure – with informed consent or by order of a magistrate or authorised office under Part 5.
- Non-intimate forensic procedure - with informed consent or by order of a magistrate or authorised office under Part 5.

For an **adult under arrest**:

- Intimate forensic procedure - with informed consent or by order of a magistrate or authorised office under Part 5.

- Non-intimate forensic procedure – with informed consent or by order of a senior police officer under Part 4.

4. Consenting to a forensic procedure

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 that the suspect must be informed of before giving consent [section 13].

5. 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 24; 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): see section 30(1).

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)].

6. 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 24 (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 **on the balance of probabilities** that **all** of the criteria in section 24 have been established, that is:

In the case of an **intimate forensic procedure**:

- That there are reasonable grounds to believe that the suspect committed a **prescribed offence**; and
- That there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove the prescribed offence.
- That the forensic procedure is justified in all of the circumstances.

In the case of a non-intimate forensic procedure:

- That there are reasonable grounds to believe that the suspect committed **an offence**; and
- That there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the offence.
- That the forensic procedure is justified in all of the circumstances.

Section 24 (4) sets out a number of circumstances that the court is to take into account in balancing the public interest in obtaining the evidence as against upholding the suspects physical integrity.

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].

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)”.

There is authority to 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.

7. 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) 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 24 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).

(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)].

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 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)].

8. 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 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 (if requested) unless to do so would prejudice the investigation of any offence. The suspect must be made aware of the right to make the request [section 60(2)].

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].

9. Case law

R v SA, DD and ES [2011] NSWCCA 60 (28 March 2011)

Prior to this decision it was regularly argued that fingerprints and photographs taken pursuant to section 133 Law (Enforcement Powers and Responsibilities) Act 2002 could not be used for comparison of fingerprints at a crime scene or in photo identification boards in the absence of the Children's Court granting an order for forensic procedure.

In the case of SA (15 yo), DD (14 yo) and ES (15 yo) police took fingerprints and photographs pursuant to section 133. The police did not make any application under the Crimes (Forensic Procedure) Act for an order authorising the taking of fingerprints and photographs. The fingerprints taken were compared to weapons/ exhibits found at the crime scene. The photographs taken were used in identification boards with various witnesses.

In the joint trial in the District Court, it was argued that the evidence regarding the fingerprints and photographs should be excluded because an order for a forensic procedure authorising the taking of fingerprints and photographs had not been sought/ granted. The young persons were successful in the District Court in excluding the relevant evidence and the Crown appealed pursuant to section 5F(3A) Criminal Appeal Act. On appeal, the CCA determined that there was no inconsistency between the powers available in the Crimes (Forensic Procedures) Act and the Law (Enforcement Powers and Responsibilities) Act and that:

The power of the police to take fingerprints and photographs of persons in lawful custody to identify the suspect and to provide evidence of the commission of the offence had been in existence since 1951 at the time the CFPA was enacted. The Act clearly indicated in s 112 that this power should continue and there is nothing in the LEFRA to suggest any change to that policy. Indeed it is clear from that Act the power remains unchanged [para 40].

The appeal court determined that there was no illegality or improper conduct by the police and allowed the Crown appeal and set aside the District Court order that rejected the evidence.

Importantly, section 133 only enables police to taken fingerprints and photographs from persons above the age of 14. An order for a forensic procedure is still required for children under 14 years of age. The objection remains available for child clients under the age of 14.

LK v Commissioner of Police and Anor [2011] NSWSC 458 (20 May 2011)

Prior to this decision Walker v Bugden [2005] NSWSC 898 was regularly used as authority for the blanket proposition that without evidence of a DNA deposit from a crime scene that was suitable for comparison, the test in section 24(3)(b) Crimes (Forensic Procedure) Act¹ could not be made out as a matter of law.

This issue was considered in LK where Her Honour Fullerton J was not persuaded that Walker v Bugden was authority for the blanket proposition outlined above. Her Honour noted:

- That the court in Walker v Bugden concluded that the absence of a DNA sample was fatal **in that case** because without it there was insufficient factual basis to induce a reasonable belief that a comparison DNA could be undertaken that might provide evidence of the kind required.
- 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 [para 32].
- Photographic or electronic evidence establishing a suspect's presence at the scene of a crime at a relevant time and/ or a suspects physical contact with an item or items in some way involved with the commission of an offence, or perhaps admissions by a suspect to a similar effect, are examples of

¹ That there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence.

evidence that may carry sufficient weight on an application for final orders under s24 of the Act despite the fact that crime scene DNA evidence is unavailable [para 32].

Since LK careful consideration needs to be given to whether various facts, as they exists, are sufficient to found a reasonable belief in the mind of the magistrate that the forensic procedure might producing evidence tending to confirm or disprove the suspect committed the offence. Assumptions, theoretical possibilities and speculation are insufficient to ground a reasonable belief.

Coffen v Goodhart [2013] NSWSC 1018 (31 July 2013)

This case was about whether the measurement of a person's height fell within the definition of a "non-intimate forensic procedure". The court held that it did not. However, subsequent to this decision the definition of "non-intimate forensic procedure" has been amended to ensure that measurements for the purpose of biometric analysis falls within the definition.

KC v Sanger [2012] NSWSC 98 (21 February 2012)

This case tested various things including the meaning of (1) whether there was reasonable grounds that the person was a suspect, and (2) whether the evidence tends to "confirm or disprove that the suspect has committed the offence".

In relation to the issue of suspect, importantly, the case confirmed that the applicant must set out the ground upon which the suspicion is based and that it is for the magistrate to determine whether those grounds are reasonable. The officer's assertion that there were reasonable grounds was not determinative: see para [17].

In relation to tending to "confirm or disprove", the court held that the section should not be construed as requiring the evidence to establish the offence by

itself. It is sufficient if the forensic procedure may prove one or two elements of the suspected offence.

10. Considerations for defending a forensic procedure application

Following are some considerations to keep in mind when defending an order for forensic procedure:

- 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? Does the application and supporting material clearly set out the grounds upon which the person is a suspect. 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? Are the facts otherwise sufficient to found a reasonable belief in the magistrate that the forensic procedure might produce evidence tending to confirm or disprove the suspect committed the offence.
- Do the circumstances require such a procedure? Is the procedure justified in all of the circumstances of the case?
- Should I invite the magistrate to give reasons?

B. FORENSIC PROCEDURE AFTER CONVICTION OF SERIOUS INDICTABLE OFFENDER

The Act allows a forensic procedure to be obtained from from a person who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre.

If the offender does not consent to the order, the application can be made to the court: section 69(3) or 74.

The application can be made at the time of sentencing or any time later: section 74(4).

The test for the granting of the application is whether the forensic procedure is justified in all of the circumstances of the case: section 74(5). There is no guidance in the legislation as to what factors are to be taken into account in determining whether the order is justified in all of the circumstances of the case.

These provisions apply whether or not the conviction was before or after the commencement of the Act

C. FORENSIC PROCEDURE FOR AN UNTESTED FORMER OFFENDER

An untested former offender is a person who has served a sentence of imprisonment for a serious indictable offence and has been served with a CAN for an indictable offence and the person's DNA profile is not in the DNA database system: section 75A.

If the person does not consent to the order an application can be made to the court: section 75H(3).

A senior police officer may order the forensic procedure if the order is a non-intimate forensic procedure, if the suspect has not consented and the former offender is under arrest or otherwise in custody: section 75I.

The test for the granting of the application is whether the forensic procedure is justified in all of the circumstances of the case: section 75L(2). There is no guidance in the legislation as to what factors are to be taken into account in determining whether the order is justified in all of the circumstances of the case.

D. FORENSIC PROCEDURE ON REGISTRABLE PERSON

A person who is a registrable person for the purpose of the Child (Protection Offender Registration) Act may be subject to an order for forensic procedure.

A senior police officer may make the order: section 75Y.

The authorised applicant may apply to the court for an order regardless of whether the person has been requested to consent: section 75ZB.

The test is whether the order is justified in all of the circumstances of the case. There is no guidance in the legislation as to what factors are to be taken into account in determining whether the order is justified in all the circumstances of the case.

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