



# Justice Legislation Amendment (Police and Other Matters) Bill 2019

## Bill Brief

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**Commencement:** The Act (except Parts 2, 3, 4, 5 and 6, and Divisions 1 and 2 of Part 8 and Divisions 1 and 3 of Part 9 and clauses 50 and 51) comes into operation on the day after the day the Act receives the Royal Assent. Subject to subsection (3), Parts 2, 3, 4, 5 and 6 and Divisions 1 and 2 of Part 8 and Divisions 1 and 3 of Part 9 and sections 50 and 51 come into operation on a day or days to be proclaimed. If a provision referred to in subsection (2), except sections 50 and 51, does not come into operation before 1 December 2019, it comes into operation on that day.

Links to key documents including the Bill, Explanatory Memorandum, Statement of Compatibility and Second Reading Speech can be found at the Library's InfoLink [page for this Bill](#).

For further information on the progress of this Bill, please visit the [Victorian Legislation and Parliamentary Documents website](#).

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## Executive summary

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In 2016, the Victorian Government published its first *Community Safety Statement*, an agreement between itself and the Chief Commissioner of Police. The Statement sets out the community safety outcomes the government hopes to achieve in five key priority areas, and the range of reforms that it is seeking in order to do so. In 2017, the Government appointed a Community Safety Trustee to provide advice about community safety and delivery of the proposed reforms. Then, in 2018, the Government published a follow-up *Community Safety Statement 2018/19*, which recommitted the Government and Victoria Police to the key priority areas outlined in the initial Statement.

In 2018, the Justice Legislation (Police and Other Matters) Bill 2018 was introduced to deliver on a number of the commitments outlined in the first and second Community Safety Statements. The Bill passed the Legislative Assembly without amendment, and then lapsed at the conclusion of the 58<sup>th</sup> Parliament.

In 2019, the Justice Legislation Amendment (Police and Other Matters) Bill 2019 was introduced at the beginning of the 59<sup>th</sup> Parliament. It seeks to amend the *Crimes Act 1958* (Vic) and to reintroduce a range of reforms in the 2018 Bill under the 58<sup>th</sup> Parliament. This Bill Brief looks primarily at the reform to include a new class of procedure known as a ‘DNA profile sample’, which seeks to grant police the ability to authorise the taking of DNA samples from persons suspected of committing indictable offences.

The amendments concerning DNA sampling proposed in the Bill have been supported by Victoria Police and the Police Association of Victoria. The Law Institute of Victoria and Victoria Legal Aid, among others in the legal and community sectors, however, have criticised and expressed concern about aspects of these amendments.

The proposed reforms in some ways mirror the laws governing DNA profile sampling and forensic procedures in certain other Australian jurisdictions—for example, in the ability to take a DNA profile sample without a court order. However, they also differ in a number of ways, such as the age at which a sample can be taken from a person, and the safeguards in place for Aboriginal and Torres Strait Islander peoples.

# Introduction

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## Background

In December 2016, the Victorian Government published its first *Community Safety Statement (CSS)*. The CSS is an agreement between the Victorian Government and the Chief Commissioner of Police, and sets out the community safety outcomes that the government is seeking to achieve, including its priorities for Victoria Police, and how Victoria Police will be resourced to deliver on those priorities.<sup>1</sup>

The CSS identifies five priority areas. These include:

- reducing harm;
- increasing connection to the community;
- putting victims first;
- holding offenders to account; and
- improving Victoria Police capability, culture and technology.<sup>2</sup>

In April 2017, the Government appointed its inaugural Community Safety Trustee, Mr Ron Iddles, whose role is to provide advice to the government about community safety and delivery of the proposed reforms.<sup>3</sup> In June 2017, the Trustee published the first progress report on the implementation of the CSS, and reports publicly twice a year on its initiatives and reforms.<sup>4</sup>

A year later, in April 2018, the Government published its *Community Safety Statement 2018/19*, which recommits the Government and Victoria Police to the five key priority areas outlined in the initial CSS.<sup>5</sup> The updated CSS draws on the feedback of 4,900 Victorians regarding community safety priorities.<sup>6</sup>

## Bills introduced

In June 2018, the Government introduced the Justice Legislation (Police and Other Matters) Bill 2018. According to the Minister for Police's second reading speech, the Bill sought to deliver on a number of the commitments outlined in the first and second Community Safety Statements. The Minister stated:

The Bill makes important reforms to the Victorian justice system to ensure Victoria Police has the powers it needs to investigate and prosecute offenders and hold them to account. It improves the protection of our police, protective safety officers and police custody officers from the harm they face in the performance of their duties. It facilitates a safer and more supportive organisational culture within Victoria Police.<sup>7</sup>

In July 2018, the Justice Legislation (Police and Other Matters) Bill 2018 passed the Legislative Assembly without amendment. It was later second read in the Legislative Council, then lapsed at the conclusion of the 58<sup>th</sup> Parliament. The Justice Legislation Amendment (Police and Other Matters)

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<sup>1</sup> Victorian Government (2016) *Community Safety Statement 2017*, Melbourne, Victorian Government.

<sup>2</sup> *ibid.*, p. 6.

<sup>3</sup> L. Neville, Minister for Police and Emergency Services (2017) *An independent voice for community safety*, media release, 20 April.

<sup>4</sup> Department of Justice and Community Safety (2019) 'Community Safety Assurance Reports', Department of Justice and Community Safety website.

<sup>5</sup> Victorian Government (2018) *Community Safety Statement 2018/19*, Melbourne, Victorian Government.

<sup>6</sup> *ibid.*, p. 13.

<sup>7</sup> L. Neville, Minister for Police (2018) 'Second reading speech: Justice Legislation (Police and Other Matters) Bill 2018', *Debates*, Victoria, Legislative Assembly, 21 June, p. 2,156.

Bill 2019 (the Bill) was introduced into the Legislative Assembly on 5 February 2019. It is largely a reintroduction of the previous Bill, with some amendments.<sup>8</sup>

This Bill Brief provides an overview of the Bill and includes key points from the Minister's second reading speech, as well as discussion of the purposes of the Bill. It then focuses specifically on proposed amendments to the *Crimes Act 1958* (Vic) (the Crimes Act)—in particular, the creation of new powers for police to take a DNA sample from certain suspects and offenders without a court order.

The Brief then provides an overview of stakeholder views on the proposed DNA sampling reforms, including responses by the policing sector and the law community, and concludes with a jurisdictional comparison.

- Please note that this Bill Brief does not cover the Bill in its entirety.

## Second reading speech

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In delivering the second reading speech, the Minister for Police and Emergency Services, the Hon. Lisa Neville MP, stated that the Bill seeks to reintroduce a range of reforms that were seen in the previous Bill. The Minister also confirmed that the new Bill is again informed by the commitments outlined in the Government's first and second Community Safety Statements, and is aimed at 'keeping the community safe'.<sup>9</sup>

The expansion of police DNA powers is the first reform discussed by the Minister in the second reading speech. It reflects one of the commitments made by the Government in the 2017 CSS, which promised 'streamlined DNA testing for Victoria Police, with new powers and additional resources'.<sup>10</sup>

The reason provided by the Minister for this reform is that there are around 11,000 unsolved crimes in Victoria where an unidentified DNA sample has been recorded, and also that, under current practice, the state's level of forensic capture is not as extensive as some other jurisdictions in Australia. The Minister argued, therefore, that the proposed reforms 'will address this matter and result in improved forensic capability which is essential to modern and contemporary policing'.<sup>11</sup>

This aspect of the proposed reforms was also discussed in a media release, in which the Minister stated that the 'new powers will enhance Victoria Police's ability to identify criminals, particularly serious recidivist offenders, reduce the administrative burden on police and courts, and help solve serious and high-volume crime'.<sup>12</sup>

This proposed reform is discussed in further detail below.

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<sup>8</sup> See, for example, cl 35 of the Bill, which now stipulates that under the *Victoria Police Act 2013* (Vic) the Secretary to the Department of Justice and Community Safety may establish the restorative engagement process; in the previous Bill, this power was given to the Chief Commissioner.

<sup>9</sup> L. Neville, Minister for Police and Emergency Services (2019) 'Second reading speech: Justice Legislation Amendment (Police and Other Matters) Bill 2019', *Debates*, Victoria, Legislative Assembly, 6 February, p. 231.

<sup>10</sup> Victorian Government (2016) *op. cit.*, p. 12.

<sup>11</sup> L. Neville, Minister for Police and Emergency Services (2019) *op. cit.*, p. 231.

<sup>12</sup> L. Neville, Minister for Police and Emergency Services (2019) *Tougher laws to solve crime and protect police*, media release, 5 February.

# The Bill

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The Bill seeks to amend 15 Acts. Some of its main aims include to:

- create new powers in the Crimes Act for police to take a DNA sample from certain suspects and offenders without a court order;
- introduce new criminal offences and sanctions in the Crimes Act, *Sentencing Act 1991* (Vic) and *Bail Act 1977* (Vic) for acts that harm or threaten harm to police officers, protective services officers, and police custody officers;
- increase penalties for commercial drug trafficking under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic); and
- amend the *Victoria Police Act 2013* (Vic) and *Protected Disclosure Act 2012* (Vic) to facilitate the creation of a standalone restorative engagement process to support Victoria Police employees who have been victims of sexual harassment or discrimination by another Victoria Police employee, and exempt such victims from any sanction if they do not report the conduct.

The Bill also seeks to make a number of other amendments relating to firearms, sex offender registration, second-hand dealers and maternity leave in Victoria Police.

## New powers to take a DNA profile sample

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As mentioned above, the Bill seeks to expand the power of police to collect DNA samples through proposed amendments to the Crimes Act.

The Bill does this through introducing a new class of procedure called a **DNA profile sample**. The DNA profile sample is defined as:

A sample taken for the purpose of deriving a DNA profile that is—

- a blood sample;
- a sample of hair, other than pubic hair, including the root if required;
- a sample of saliva;
- a scraping taken from the mouth.<sup>13</sup>

A sample can only be requested of a **DNA person**, defined in the Bill as:

- an adult suspected of having committed, or attempted to commit, an indictable offence; or who has been charged with an indictable offence; or who has been summonsed to answer to a charge for an indictable offence; or
- a child of or above the age of 15 years but under the age of 18 years who is suspected of having committed or attempted to commit a DNA sample offence; or who has been charged with a DNA sample offence; or who has been summonsed to answer to a charge for a DNA sample offence.<sup>14</sup>

A **DNA sample offence** is defined as any indictable offence specified in proposed new Schedule 9 to the Crimes Act, and includes child homicide, murder, manslaughter and treason, among others.<sup>15</sup>

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<sup>13</sup> [Justice Legislation Amendment \(Police and Other Matters\) Bill 2019](#), cl 52(1).

<sup>14</sup> *ibid.*, cl 52(1).

<sup>15</sup> *ibid.*, cl 78.

A police officer may request a DNA person to give a DNA profile sample only if the police officer is satisfied that the taking of the sample is 'justified in all of the circumstances'.<sup>16</sup>

A DNA profile sample may be taken from a DNA person as defined above, if the person is an adult and gives informed consent or, in the case of a child, with the informed consent of the child and of a parent or guardian.<sup>17</sup>

If consent is not given, then a **senior police officer** may give an **authorisation** for a sample to be taken, under proposed new section 464SE. The Bill stipulates that prior to granting authorisation, certain conditions must first be met, including that:

- the senior police officer giving authorisation is not involved with investigating the offence for which the sample is required; and
- the DNA person is either under lawful arrest by warrant, under section 458 or 459 of the Crimes Act, or by provision of any other Act; or the DNA person is in the custody of an investigating official in accordance with an order of the Magistrates' Court or the Children's Court under section 464B(5) and, at the time of the application for that order, the person was held in a prison or police gaol; and
- the person is not incapable of giving informed consent by reason of mental impairment; and
- the adult person—or the child along with their parent or guardian—has refused to give consent; and
- there are reasonable grounds to believe the adult person has committed the indictable offence in respect of which the authorisation is sought or, in the case of a child, that the child has committed a DNA sample offence in respect of which the authorisation is sought; and
- the taking of the sample without the consent of the person is justified in all of the circumstances.<sup>18</sup>

The Bill thus removes the requirement for police to first obtain a court order before being able to take a DNA sample.

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<sup>16</sup> *ibid.*, cl 55, new s 464SC(1)(2).

<sup>17</sup> *ibid.*, cl 55, new s 464SC(3)(4).

<sup>18</sup> *ibid.*, cl 55, new s 464SE (1).

## Responses from major interest groups

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DNA sampling has become a key feature in criminal investigation, and scientific and technological innovation in this field continues to alter the ways in which it is used.<sup>19</sup> A recent systematic review conducted by the Australian Institute of Criminology analysed five studies relating to the impact of collection or testing of DNA samples on certain serious offences. The review found that, overall, ‘the collection or testing of DNA was associated with a significant increase in convictions’.<sup>20</sup>

The proposed amendments, that seek to grant police the ability to authorise the taking of DNA samples from persons suspected of committing indictable offences, have received both support and criticism from a variety of groups and organisations.

A core consideration in the taking of DNA samples in the criminal justice system relates to balancing the right to personal privacy for accused persons, as well as for their relatives, with the ability of police to investigate and obtain evidence in relation to serious crimes.<sup>21</sup> In evidence to a parliamentary inquiry into forensic sampling and DNA databases in 2003, the Victorian Privacy Commissioner stated the following in relation to DNA sampling and police powers:

[I]t is up to Parliament and others to balance rights, in this case security and law enforcement, against privacy and individual liberty.<sup>22</sup>

The adequacy of safeguards and other oversight mechanisms have an important role in determining whether the above considerations are appropriately balanced. A number of relevant safeguards are discussed in the statement of compatibility to the Bill.<sup>23</sup>

This section discussed some of the views and responses to the amendments proposed in the Bill, including from Victoria Police, the Victorian law community and other groups.

### Police

The Forensic Services Department at Victoria Police is responsible for undertaking forensic science services, including the collection and analysis of DNA samples. According to an article published in *The Age*, the Department has estimated that if the proposed amendments were implemented, the number of DNA samples held in their database would rise from about 8,000 to approximately 70,000.<sup>24</sup> This would, in turn, assist with future DNA matching.

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<sup>19</sup> See, for example, M. May and R. Clements (2018) ‘[Next Generation Forensics: Changing the role DNA plays in the justice system](#)’, blog post, *Harvard University*, 9 November; and J. Ang (2016) ‘[Advances in portable DNA analysis bring us closer to a future with medical tricorders](#)’, *Phys.org*, 11 July.

<sup>20</sup> It did not, however, find any significant impact in relation to charges being laid, prosecution, plea bargains and/or sentence length. See, A. Higginson, E. Eggins and L. Mazerolle (2017) ‘[Police Techniques For Investigating Serious Violent Crime: A Systematic Review](#)’, *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, no. 539, October, p. 6.

<sup>21</sup> See, for example, K. Parven (2013) ‘[Forensic Use of DNA Information v Human Rights and Privacy Challenges](#)’, *University of Western Sydney Law Review*, 17, pp. 41-65; Australian Law Reform Commission (2003) *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96, ALRC, Chapter 39: Forensic Uses of Genetic Information; and J. Gans and G. Urbas (2002) ‘[DNA Identification in the Criminal Justice System](#)’, *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, May, p. 6.

<sup>22</sup> Victorian Parliament Law Reform Committee (2004) *Forensic sampling and DNA databases in criminal investigations: final inquiry report*, Parliament of Victoria, p. 116.

<sup>23</sup> Justice Legislation Amendment (Police and Other Matters) Bill 2019, [statement of compatibility](#).

<sup>24</sup> E. Pearson (2018) ‘[Victorians under arrest to be DNA swabbed under new legislation](#)’, *The Age*, 19 June.

The Deputy Commissioner of Victoria Police, Shane Patton, has advocated the benefits of the amendments:

The proposed new powers will significantly increase the number of DNA samples taken annually from suspects, further enabling our ability to cross match with 'person to crime' and 'crime to crime' unsolved cases where DNA has been located at the scene of an offence....

These additional powers and the resulting increase in DNA samples will identify serious recidivist offenders and reduce the high harm and high volume crimes to better protect the community.<sup>25</sup>

Victoria Police has indicated that if the legislation is brought into effect, it would aim to work with the Victorian Government to coordinate the administrative detail of the changes, such as means of collection and processing times.<sup>26</sup>

During early discussion of the proposed changes in 2016, the Secretary of the Police Association of Victoria, Ron Iddles, supported the reforms as being able to assist and streamline police work. He stated that the current process of seeking court orders is 'time-consuming', and that the planned new system would have appropriate safeguards in place. Importantly, he suggested that the proposal 'should also enable police in Victoria to dramatically increase (we estimate, tenfold) the number of DNA samples it can analyse'.<sup>27</sup>

## Law community

A number of groups in Victoria have broadly opposed the amendments to procedures around DNA sampling. The president of the Law Institute of Victoria (LIV), Stuart Webb, has stated that court approval of samples is crucial to protect against misuse of police powers.<sup>28</sup> This is because under the current scheme, courts have the discretionary power to approve forensic procedure orders after hearing from both sides and taking privacy and other concerns of the suspect into consideration.

Regarding the serious nature of DNA sampling, Mr Webb added the following:

It appears this has been made in an effort to make the process more consistent with fingerprint procedures ... However, the two procedures are very different. Obtaining DNA is a far more invasive procedure than fingerprinting. DNA samples are also a source of much more personal and private information. As such, the LIV maintains that stronger protections should be applied to the collection and use of DNA.<sup>29</sup>

In a submission to the 2003 parliamentary inquiry discussed above, Victoria Legal Aid echoed similar concerns regarding internal police authorisation of DNA testing:

Judicial supervision of the process is fundamental to engendering confidence in the forensic process and is appropriate given the extent of the intervention to individual liberty. Coercive powers that have been granted to law enforcement agencies need to be balanced with the very important principle that the right to privacy and other basic human rights are not infringed without proper process. Police investigations must be subject to procedural fairness and the most appropriate way to safeguard this is through judicial review. The need for procedural fairness and judicial supervision in criminal matters far outweigh any arguments related to speeding up the approval process for sampling. The police

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<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> P. Akerman (2016) 'Privacy concerns over new DNA laws for cops', *The Australian*, 13 December.

<sup>28</sup> K. Derkley (2019) 'New DNA powers go too far', *Law Institute Journal, Law Institute of Victoria*, 6 February.

<sup>29</sup> *ibid.*

force should not be given the power to order DNA samples and it is in fact unreasonable to ask police as a law enforcement body to exercise judicial power.<sup>30</sup>

A representative of the Australian Lawyers Alliance also voiced apprehension around the lack of independent oversight in an interview with the *Herald Sun*. In addition, he noted the assumptions that come with collecting DNA evidence:

DNA is a very dangerous tool, there have been many cases where DNA has led to wrongful convictions...

Simply because a person's DNA is located near to a crime scene or at a crime scene, does not mean they have committed a crime.<sup>31</sup>

A representative of youth community legal centre and advocacy group, Youthlaw, raised the issue of appeals of decisions to take a forensic sample, which are available through the current court order system, but would no longer be available to suspects through the amended system.<sup>32</sup> Under the provisions that would be inserted into the Crimes Act by the Bill, a police officer is required to inform a suspect that authorisation to take their DNA has been given by a senior police officer.<sup>33</sup> However, there are no specific provisions relating to a right to appeal this decision.

With regard to the applicability of the amended scheme to teenagers, Mr Webb voiced concern around the use of these broadened powers on suspects between the ages of 15 and 18.<sup>34</sup>

Further, the LIV has raised concerns about the use of DNA samples to 'unjustly implicate other family members', in the context of the significant increase of samples that is expected should the amendments come into effect.<sup>35</sup>

## Other groups

The Associate Director of Research, Innovation & Reform at the RMIT Centre for Innovative Justice, Stan Winford, emphasised the important role that courts play in oversight of the collection and use of DNA in the criminal justice system.<sup>36</sup>

Similarly, Liberty Victoria highlighted concerns in 2016 regarding police authorisation for the taking of certain DNA samples:

Just as search warrants are a significant invasion of privacy, so too is taking someone's DNA...

...There has to be independent oversight. Just as we have seen that police investigating police never works, it is likely that taking a suspect's DNA will simply evolve into being standard at the end of an interview, with the threat of force, or the potential for greater punishment, if the person refuses.<sup>37</sup>

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<sup>30</sup> Victoria Legal Aid (2002) [Submission 15 to the Law Reform Committee, Inquiry into Forensic Sampling and DNA Databases in Criminal Investigations](#), Melbourne, July, p. 2.

<sup>31</sup> B. Travers (2018) '[Victoria Police to gain new powers to take DNA samples from offenders without court orders](#)', *Herald Sun*, 20 June.

<sup>32</sup> Derkley (2019) op. cit.

<sup>33</sup> See [Justice Legislation Amendment \(Police and Other Matters\) Bill 2019](#), cl 55, new s 464SF.

<sup>34</sup> Derkley (2019) op. cit.

<sup>35</sup> Derkley (2019) op. cit.

<sup>36</sup> Channel 10 (2019) '[Civil libertarians are outraged over a new parliamentary bill giving police unprecedented powers to solve crimes using DNA](#)', *10 News First*, online transcript, 5 February.

<sup>37</sup> Liberty Victoria (2016) '[Liberty Victoria Welcomes Government's Assisted Dying Announcement](#)', Liberty Victoria, 12 August.

## Jurisdictional comparison

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In each of Australia's states and territories, there are laws governing DNA profile sampling and forensic procedures. In 1991, a Model Criminal Code Officers Committee (MCCOC) was established, made up of representatives of the governments of each Australian jurisdiction. The MCCOC is a sub-committee of the Standing Committee of Attorneys-General. In 1995, it produced 'model legislation' as a tool to assist the states and territories in formulating laws around forensic sampling in criminal investigation.<sup>38</sup> Notably, in February 2000, MCCOC prepared a revised model Bill, which set out a legislative regime to deal with DNA sampling and forensic procedures.<sup>39</sup>

The MCCOC's model Bill has been influential in relation to the provisions adopted throughout Australia, with most states and territories broadly following the model, albeit to varying degrees. For example, each jurisdiction distinguishes differently between 'intimate' and 'non-intimate' forensic procedures. In the Australian Capital Territory, South Australia, the Northern Territory and Tasmania, buccal swabs (scraping of the mouth) are categorised as non-intimate procedures, whereas under Commonwealth and Victorian laws they are classified as intimate, and in New South Wales, they are categorised separately. This is an important distinction as there are fewer limitations on non-intimate forensic procedures compared to intimate procedures.

According to the former state Attorney-General, the Hon. Martin Pakula MP, if the new Bill is passed, this will help to 'streamline' the process of forensic procedures, making them more in line with the rest of Australia's states and territories.<sup>40</sup>

This section will draw a comparison between Victoria's forensic procedural methods under the Crimes Act with other parts of Australia. This section will also identify where the new Bill will align or differentiate Victoria's forensic procedures from those of other states and territories.

### Commonwealth

Commonwealth legislation based on the 1995 model legislation was passed in 1998, inserting Part 1D into the *Crimes Act 1914* (Cth) (Commonwealth Crimes Act). The Commonwealth Crimes Act governs the carrying out of forensic procedures on persons suspected of committing Commonwealth offences and provides for the storage, use and destruction of material obtained from those procedures.

There are some similarities between both the current Victorian Crimes Act and the Commonwealth Crimes Act. For example, both legislate for forensic procedures to be carried out on suspects, volunteers and certain convicted offenders.<sup>41</sup> Both Acts require non-intimate compulsory procedures be carried out by senior police officers, who must consider the circumstances surrounding the commission of a forensic procedure.<sup>42</sup>

There are also some noteworthy differences. For example, unlike Victoria, Commonwealth legislation classifies buccal swabs as a non-intimate procedure.<sup>43</sup> However, if the Bill is enacted, it will further align Victoria with the Commonwealth in respect to this. This is because the Bill classifies buccal swabs

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<sup>38</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) (1999) Model Forensic Procedures Bill and the Proposed DNA Database, p. 11.

<sup>39</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (2000) Model Forensic Procedures Bill – DNA Database Provisions – Explanatory notes.

<sup>40</sup> P. Akerman (2016) op. cit.

<sup>41</sup> *Crimes Act 1914* (Cth) Div. 2, Div. 3, Div. 6A; *Crimes Act 1958* (Vic) s 464ZGB, s 464SA.

<sup>42</sup> *Crimes Act 1914* (Cth) s 23WO; *Crimes Act 1958* (Vic) s 464SA.

<sup>43</sup> *Crimes Act 1914* (Cth) s 23WA.

under a new class of procedure—the DNA profile sample—which imposes fewer limitations on swabs (as is the case under the Commonwealth Crimes Act).

A second difference is that Commonwealth legislation provides specific safeguards for Aboriginal and Torres Strait Islander peoples for forensic procedures, whereas Victoria currently does not.<sup>44</sup> A third difference is that senior police officers under Commonwealth legislation can carry out non-intimate forensic procedures on suspects who are in lawful police custody but not under arrest.<sup>45</sup> Again, if the new Bill is enacted, this will further align Victoria’s laws with the Commonwealth as it allows DNA samples to be taken from persons suspected of committing serious offences without a court order.<sup>46</sup>

Under the Victorian Crimes Act, police must consider whether requesting or ordering a forensic procedure is ‘justified in all the circumstances’ before asking for consent or making the order.<sup>47</sup> The Commonwealth legislation goes a step further by requiring police to balance the public interest in obtaining evidence against the public interest in upholding the physical integrity of the suspect.<sup>48</sup> It also outlines factors the officer must consider in conducting this balancing exercise, including:

- the seriousness of the offence;
- the circumstances surrounding its commission;
- the degree of the suspect’s alleged participation;
- personal characteristics of the suspect (including age, health, cultural background); and
- whether evidence of the suspect’s involvement in the offence can be gained in a less intrusive way, any reasons given for refusing consent, and other relevant matters.<sup>49</sup>

## New South Wales

The *Crimes (Forensic Procedures) Act 2000* (NSW) (NSW Act) is the relevant New South Wales statute. As is the case in Victoria, the NSW Act permits carrying out forensic procedures on suspects, volunteers, and convicted indictable offenders.<sup>50</sup> In the case of non-intimate forensic procedures, both the NSW Act and the Victorian Crimes Act require the suspect to be 18 years and over; for the suspect to be under arrest (or in custody with a court order); and for the procedure to be justified in all the circumstances. However, the passage of the Victorian Bill would see the two states’ provisions diverge in this area. The Bill changes the age for which DNA samples can be obtained without court oversight to 15—a significantly younger age than stipulated in NSW.<sup>51</sup> The Bill will further deviate from NSW forensic procedural laws by allowing DNA samples to be taken from suspects who are not already under arrest.

The NSW provisions relating to destruction of DNA samples are similar to those in Victoria. Overall, the current Victorian legislation and NSW legislation are quite similar. Notably, however, unlike Victoria, NSW enshrines safeguards for Aboriginal and Torres Strait Islander peoples under its Act.<sup>52</sup> This remains unchanged if the Bill is passed.

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<sup>44</sup> *Crimes Act 1914* (Cth) s 23WG.

<sup>45</sup> *ibid.*, s 23WO.

<sup>46</sup> *Justice Legislation Amendment (Police and Other Matters) Bill 2019*, cl 55, new ss 464SC, 464SE, 464SF.

<sup>47</sup> *Crimes Act 1958* (Vic), s 464SA.

<sup>48</sup> *Crimes Act 1914* (Cth), s 23WO.

<sup>49</sup> *ibid.*

<sup>50</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), ss 18, 61, 76.

<sup>51</sup> *Justice Legislation Amendment (Police and Other Matters) Bill 2019*, Div. 1, cl 52.

<sup>52</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), Part 3, s 8.

## Tasmania

In Tasmania, the *Forensic Procedure Act 2000* (Tas) allows forensic procedures to be carried out on suspects or people charged with a serious offence. There are a few similarities with the Victorian legislation. For example, Aboriginal and Torres Strait Islander peoples are not afforded protections, the destruction provisions are similar, and sharing DNA profiles with other jurisdictions are facilitated under both states' laws.

However, there are several differences. Firstly, there is no criteria governing when police may ask a suspect to consent to a forensic procedure.<sup>53</sup> Secondly, the requirements as to when and where a police officer may order a suspect to consent to a forensic procedure are less onerous. For instance, the Tasmanian Act states:

An Officer of Police may make an order authorising the carrying out of a non-intimate forensic procedure on a suspect or charged person who is not in custody, if the Officer of Police is satisfied there are reasonable grounds to suspect that the forensic procedure may produce evidence ...<sup>54</sup>

Under current Victorian law, a non-intimate forensic procedure cannot be carried out on a person under the age of 18, whereas in Tasmania, children over the age of 15 are treated similarly to adults for forensic procedures.<sup>55</sup> However, if the Bill is enacted, the two states will be more closely aligned in this respect.

In addition, buccal swabs and the taking of blood samples are classified as non-intimate forensic procedures in Tasmania—meaning fewer limitations are imposed on the taking of such samples. Thus, it follows that the laws between the two states will further align in the event that the Bill passes, as the introduction of a new class of procedure—DNA profile samples—will result in blood and saliva samples being used less restrictively.

## Northern Territory

Of Australian jurisdictions, the Northern Territory has the least rigorous regulations in respect of forensic procedures. The Northern Territory's laws relating to forensic examinations (including DNA sampling) are covered under Division 7 of the *Police Administration Act 1978* (NT) and the *Youth Justice Act 2005* (NT).

One similarity between the two jurisdictions is that both contain provisions that allow for the sharing of information kept on their respective databases with other jurisdictions.<sup>56</sup>

Disparities between Victoria and the Northern Territory include that, in the Northern Territory:

- buccal swabs are classified as 'non-intimate';<sup>57</sup>
- any person can undergo a non-intimate procedure by consent—there is no criteria governing when the police can request a person undergo a non-intimate procedure.<sup>58</sup> In Victoria, on the other hand, a police officer must not request a child under the age of ten, suspected of having committed an offence, undergo a procedure (unless the Children's Court has made a court order); and

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<sup>53</sup> *Forensic Procedures Act 2000* (Tas), s 9.

<sup>54</sup> *ibid.*, s 12.

<sup>55</sup> *ibid.*, s 8.

<sup>56</sup> *Police Administration Act 1978* (NT), s 147.

<sup>57</sup> *ibid.*, s 4.

<sup>58</sup> *ibid.*, s 145(B).

- in the absence of consent, non-intimate procedures can be carried out by order of a senior police officer. It is enough that police reasonably suspect the person has committed a crime, or that the person has been charged with an offence punishable by imprisonment.<sup>59</sup> This is not the case currently in Victoria.

In the event that the Bill is enacted, the changes will allow for senior police authorisation of DNA profile samples from adults and children (aged 15 to 17 years) who are suspected of, or charged with, an indictable offence. This is more in line with the Northern Territory, where a non-intimate procedure can be conducted on a person under the age of 18 with the approval of a police officer.<sup>60</sup> The child must be a suspect or be charged with committing a crime.<sup>61</sup>

In the Northern Territory, taking a blood sample is classified as ‘intimate’, meaning more limitations are imposed on its use for forensic procedural purposes.<sup>62</sup> If the Bill is passed, taking a blood sample will be subject to fewer limitations, divergent from the Northern Territory’s position.

The enacted Bill would also align the Northern Territory and Victoria in that both would enable specified DNA samples to be taken by authorised police officers from suspects without a court order.

## South Australia

Forensic procedures in South Australia are governed by the *Criminal Law (Forensic Procedures) Act 2007 (SA)*, which repealed the *Criminal Law (Forensic Procedures) Act 1988 (SA)*.

In line with current Victorian laws, buccal samples and finger-pricking are seen as ‘simple identity procedures’ (non-intimate) and blood samples are classified as ‘intrusive forensic procedures’.<sup>63</sup> South Australia also has no specific safeguards in place for Aboriginal and Torres Strait Islander peoples.

The kind of sampling permitted under the legislation varies depending on whether the person to undertake the procedure is a suspect, an offender, a victim or a volunteer, as well as the nature of the forensic procedure. Differing from Victoria, however, a suspect or offender in South Australia has no right to refuse a request for a ‘simple identity procedure’—it is an offence to obstruct or resist, and a simple identity procedure does not require the authorisation of a senior police officer.<sup>64</sup>

Additionally, a simple forensic procedure can be carried out on a suspect whether or not they are in custody—the police may issue directions for a person to attend a police station for the purpose of providing a DNA sample.<sup>65</sup> However, any other forensic procedure conducted on a person suspected of having committed a serious offence (aside from a simple forensic procedure) requires authorisation by a senior police officer.<sup>66</sup> As such, the passage of the Bill would see Victoria align more closely with South Australia by introducing fewer limitations around the collection of DNA samples, with less court involvement.

In contrast, hair samples in South Australia may be taken for conducting hair comparison tests, but cannot be taken for the purposes of DNA analysis, unless the person specifically requests that the DNA

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<sup>59</sup> *ibid.*, s 145(A).

<sup>60</sup> *Youth Justice Act 2005 (NT)*, s 31.

<sup>61</sup> *ibid.*

<sup>62</sup> *Police Administration Act 1978 (NT)*, s 4.

<sup>63</sup> *Criminal Law (Forensic Procedures) Act 2007 (SA)*, s 3.

<sup>64</sup> *ibid.*, s 32.

<sup>65</sup> *ibid.*, s 14.

<sup>66</sup> *ibid.*, s 20B.

profile be obtained for this purpose.<sup>67</sup> In Victoria, there are fewer limitations around hair samples as they are considered ‘non-intimate.’ This does not change with respect to the Bill.

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<sup>67</sup> *ibid.*, s 34.

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## Relevant legislation

### Victoria

- [Crimes Act 1958](#) (Vic)

### Other jurisdictions

- [Crimes \(Forensic Procedures\) Act 2000](#) (NSW)
- [Crimes Act 1914](#) (Cth)
- [Criminal Law \(Forensic Procedures\) Act 2007](#) (SA)
- [Forensic Procedures Act 2000](#) (Tas)
- [Police Administration Act 1978](#) (NT)
- [Youth Justice Act 2005](#) (NT)

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