

## TASMANIA

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# FORENSIC PROCEDURES AMENDMENT BILL 2014

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# **FORENSIC PROCEDURES AMENDMENT BILL 2014**

*(Brought in by the Minister for Health, the Honourable  
Michael Darrel Joseph Ferguson)*

## **A BILL FOR**

### **An Act to amend the *Forensic Procedures Act 2000***

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

#### **1. Short title**

This Act may be cited as the *Forensic Procedures Amendment Act 2014*.

#### **2. Commencement**

This Act commences on the day on which this Act receives the Royal Assent.

#### **3. Principal Act**

In this Act, the *Forensic Procedures Act 2000*\* is referred to as the Principal Act.

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\*No. 101 of 2000

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**4. Section 3 amended (Interpretation)**

Section 3 of the Principal Act is amended as follows:

- (a) by omitting “a database (whether in computerised or other form and however described)” from the definition of *DNA database system* in subsection (1) and substituting “an electronic database”;
- (b) by inserting the following paragraph after paragraph (a) in the definition of *informed consent* in subsection (1):
  - (ab) a parent of a young child, has the meaning given by section 34D(2); and
- (c) by inserting “or for a young child” after “child” in paragraph (a) of the definition of *parent* in subsection (1);
- (d) by inserting “or of a young child” after “child” in paragraph (b) of the definition of *parent* in subsection (1);
- (e) by inserting “of a child or of a young child” after “parent” in paragraph (c) of the definition of *parent* in subsection (1);
- (f) by inserting the following definition after the definition of *responsible person* in subsection (1):

*sampling procedure*, in relation to a young child, means –

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- (a) the taking of a sample of saliva from the young child; and
  - (b) the taking of a sample from the young child by buccal swab;
- (g) by inserting the following paragraph after paragraph (a) in the definition of *serious offence* in subsection (1):
  - (ab) against section 8, 9 or 10 of the *Animal Welfare Act 1993*; or
- (h) by inserting the following paragraph after paragraph (b) in the definition of *serious offence* in subsection (1):
  - (ba) against section 9, 74, 111, 112 or 113 of the *Firearms Act 1996*; or
- (i) by omitting “known.” from paragraph (b) of the definition of *volunteers (unlimited purposes) index* in subsection (1) and substituting “known;”;
- (j) by inserting the following definition after the definition of *volunteers (unlimited purposes) index* in subsection (1):

***young child*** means a person under the age of 10 years.

- (k) by inserting in subsection (4) “, or forensic material taken from a young

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child by a sampling procedure,” after  
“procedure”;

- (l) by inserting in subsection (4)(b) “or  
young child” after “person”;
- (m) by inserting in subsection (4)(b)  
“electronic” after “searchable”.

**5. Section 4 substituted**

Section 4 of the Principal Act is repealed and the  
following section is substituted:

**4. Prohibition on application of Act to children  
under age of 10 years except in limited  
circumstances**

- (1) Nothing in this Act authorises the  
carrying out of a forensic procedure on a  
person who is a young child.
- (2) A sampling procedure may be carried  
out, in accordance with Part 4B of this  
Act, on a person who is a young child.

**6. Section 8 amended (Circumstances for carrying out  
forensic procedure)**

Section 8(3) of the Principal Act is amended by  
omitting “under the age of 15 years,” and  
substituting “between 10 and 14 years of age  
(both years inclusive),”.

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**7. Section 12 amended (Circumstances in which police officer may order non-intimate forensic procedure)**

Section 12(5) of the Principal Act is amended by omitting “e-mail” and substituting “electronic mail”.

**8. Section 14 amended (Application for forensic procedure order)**

Section 14(1) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (a) “of any age” and substituting “who is 10 years old or older”;
- (b) by omitting from paragraph (b) “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

**9. Section 15 amended (Securing the presence at hearing of a suspect or charged person who is under 15 and not in custody)**

Section 15(1) of the Principal Act is amended by omitting “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

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**10. Section 16 amended (Procedure at forensic procedure application hearing if suspect or charged person under 15)**

Section 16(1) of the Principal Act is amended by omitting “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

**11. Section 18 amended (Application for interim forensic procedure order)**

Section 18 of the Principal Act is amended as follows:

- (a) by omitting from subsection (1) “of any age or a non-intimate forensic procedure on a suspect or charged person who is under the age of 15 years” and substituting “who is 10 years old or older or a non-intimate forensic procedure on a suspect or charged person who is between 10 and 14 years of age (both years inclusive)”;
- (b) by omitting from subsection (3) “e-mail” and substituting “electronic mail”.

**12. Section 19 amended (Interim forensic procedure order)**

Section 19 of the Principal Act is amended as follows:

- (a) by omitting from subsection (1) “of any age or a non-intimate forensic procedure



on a suspect or charged person who is under the age of 15 years” and substituting “who is 10 years old or older or a non-intimate forensic procedure on a suspect or charged person who is between 10 and 14 years of age (both years inclusive)”;

- (b) by omitting from subsection (3) “e-mail” and substituting “electronic mail”.

**13. Section 29 amended (Circumstances for carrying out forensic procedures on volunteers)**

Section 29(2) of the Principal Act is amended by omitting “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

**14. Section 30 amended (Informing volunteer or parent of forensic procedure)**

Section 30 of the Principal Act is amended by omitting “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

**15. Section 32 amended (Application for order to retain forensic material, &c.)**

Section 32(3) of the Principal Act is amended by omitting “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

**16. Part 4B inserted**

After section 34C of the Principal Act, the following Part is inserted:

**PART 4B – SAMPLING PROCEDURES ON  
CHILDREN UNDER AGE OF 10 YEARS**

**34D. Circumstances for carrying out sampling procedures on young children**

- (1) A sampling procedure may be carried out on a young child in accordance with this Act, for a purpose referred to in section 34J(1) –
  - (a) if a parent of the young child has given informed consent to the carrying out of the sampling procedure on the young child; or
  - (b) on the order of a magistrate.
- (2) For the purposes of this Part, a parent of a young child gives informed consent to the carrying out of a sampling procedure on the young child if the parent consents to the carrying out of the sampling procedure after a police officer has –
  - (a) requested the parent to consent to the sampling procedure under section 34E(1); and
  - (b) informed the parent in accordance with section 34E(2).

**34E. Police request for consent to sampling procedure**

- (1) A police officer may request a parent of a young child to consent to the carrying out of a sampling procedure on the young child.
- (2) If a police officer makes a request under subsection (1), the police officer must inform the parent of the young child of the following matters:
  - (a) the purpose for which the sampling procedure is to be carried out;
  - (b) the way in which the sampling procedure is to be carried out;
  - (c) that the sampling procedure may produce evidence that might be used in a court of law;
  - (d) that the sampling procedure will be carried out by a person who is authorised under section 34K(2) to carry out the procedure;
  - (e) that the parent may refuse to consent to the carrying out of the sampling procedure and that the refusal to consent to the sampling procedure may result in a police officer applying to a magistrate to make an order authorising the

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carrying out of the sampling procedure;

- (f) that the parent may withdraw his or her informed consent to the carrying out of the sampling procedure on the young child.

**34F. Withdrawal of consent to sampling procedure**

- (1) A parent of a young child may inform –

- (a) the police officer to whom the parent gave his or her informed consent to the carrying out of a sampling procedure on the young child; or

- (b) an Officer of Police –

that the parent withdraws his or her informed consent to the carrying out of a sampling procedure on the young child.

- (2) If a police officer or an Officer of Police is informed of a withdrawal of informed consent under subsection (1), the police officer or Officer of Police is to immediately notify the person authorised under this Act to carry out the sampling procedure on the young child to whom the withdrawal of informed consent relates that the consent has been withdrawn.

- (3) If a person authorised under this Act to carry out a sampling procedure on a young child is notified of a withdrawal of informed consent under subsection (2), the person must not commence, or continue to carry out, the sampling procedure on the young child to whom the withdrawal of informed consent relates.
- (4) Despite this section, a sampling procedure may be carried out on a young child in accordance with this Act, for a purpose referred to in section 34J(1), on the order of a magistrate.

**34G. Application for order of magistrate authorising sampling procedure**

- (1) For the purposes of section 34D(1), a police officer may apply to a magistrate for an order authorising the carrying out of a sampling procedure on a young child.
- (2) An application under subsection (1) must –
  - (a) be in writing; and
  - (b) be supported by evidence on oath, or an affidavit, dealing with the matters referred to in section 34I(6); and

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- (c) specify the purpose or purposes, as set out in section 34J(1), for which the sampling procedure is required to be carried out on the young child; and
- (d) specify the type of sampling procedure sought to be carried out on the young child.

**34H. Notice of hearing of application**

After an application is made to a magistrate under section 34G, a copy of the application and notice of the time and place of the hearing of the application must be served on a parent of the young child to whom the application relates.

**34I. Procedure at sampling procedure application hearing**

- (1) The hearing of an application under section 34G for an order in respect of a young child must be held in a closed court.
- (2) A young child may be represented, at the hearing of an application under section 34G for an order in respect of the young child, by an Australian legal practitioner.
- (3) The Australian legal practitioner is to act in the best interests of the young child,

having regard to any evidence reasonably available to the Australian legal practitioner.

- (4) The Australian legal practitioner, or a parent of the young child, may –
  - (a) cross-examine the applicant for the order; and
  - (b) with the leave of the magistrate, call or cross-examine any other witnesses; and
  - (c) address the magistrate.
- (5) A magistrate must not give leave under subsection (4)(b) unless 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.
- (6) Before a magistrate makes an order authorising the carrying out of a sampling procedure on a young child, the magistrate is to take into account the following matters:
  - (a) the age of the young child;
  - (b) the best interests of the young child;
  - (c) so far as can be ascertained, whether the young child understands what will be

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involved in carrying out the sampling procedure and any wishes of the young child with regard to whether the sampling procedure should be carried out;

- (d) the purpose for which the sampling procedure is required;
- (e) whether the carrying out of the sampling procedure is justified in all the circumstances.

**34J. Sampling procedure order**

- (1) On the hearing of a sampling procedure application in respect of a young child, a magistrate may make an order authorising the carrying out of a sampling procedure on the young child if the magistrate is satisfied that it is necessary for a sampling procedure to be carried out on the young child for one or more of the following purposes:
  - (a) to identify the young child, if a police officer is of the opinion that the young child is lost or abandoned;
  - (b) to identify a deceased person, if the young child is the only person available to provide DNA for the purpose of identifying the deceased person;



- (c) to identify or locate a missing person, if the young child is the only person available to provide DNA for the purpose of identifying or locating the missing person;
  - (d) to establish the young child's parentage, if the young child is not a victim of a crime to which the sampling procedure application relates but the young child's DNA may provide evidence of the commission of that crime;
  - (e) to differentiate the young child's forensic material from other forensic material found at a particular crime scene.
- (2) On making an order under subsection (1) in respect of a young child, the magistrate must –
  - (a) give reasons for making the order; and
  - (b) ensure that a written record of the order is kept and a copy of it is provided to the applicant for the order and a parent of the young child.
- (3) An order under subsection (1) in respect of a young child may include directions as to the time and place at which, and

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manner in which, the sampling procedure is to be carried out on the young child.

- (4) On his or her own initiative or on the application of an Officer of Police or a police officer, a magistrate may order a parent of a young child to make the young child available, as specified in an order under subsection (1) authorising a sampling procedure to be carried out on the young child, for the purpose of carrying out that sampling procedure.
- (5) A parent of a young child provided with a copy of an order under subsection (2)(b) must comply with an order under subsection (4).

Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.

**34K. General rules for carrying out sampling procedures**

- (1) A sampling procedure –
  - (a) must be carried out by a person who is authorised to carry out a sampling procedure; and
  - (b) must be carried out in circumstances affording reasonable privacy to the young child undergoing the procedure; and

- (c) is to be carried out in a manner consistent with appropriate medical or other relevant professional standards.
- (2) For the purposes of this Act, the following persons are authorised to carry out a sampling procedure:
  - (a) a medical practitioner;
  - (b) a dentist;
  - (c) a nurse;
  - (d) a police officer.
- (3) A person authorised to carry out a sampling procedure under subsection (2) may ask another person to help him or her carry out the procedure.
- (4) A person who is asked to help carry out a sampling procedure need not be –
  - (a) a medical practitioner; or
  - (b) a dentist; or
  - (c) a nurse; or
  - (d) a police officer.

**34L. Presence of parent or witness while sampling procedure is carried out**

- (1) In this section –

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***independent witness*** means a person who is 18 years old or older and is neither a police officer nor a parent of the young child undergoing a sampling procedure;

***unavailable***, in relation to a parent of a young child on whom a sampling procedure is to be carried out, means that the parent –

- (a) has declined to be present during the carrying out of the sampling procedure; or
- (b) has been notified by an Officer of Police, under subsection (5), that he or she is not to be present during the carrying out of the sampling procedure; or
- (c) cannot be located after a reasonable attempt has been made to locate the parent; or
- (d) has died; or
- (e) does not have the mental capacity to be able to consent.

- (2) Except as provided in subsection (3), a sampling procedure may be carried out on a young child only if there is present during the carrying out of the procedure –
  - (a) at least one of the young child's parents; or
  - (b) if none of the young child's parents is available, an independent witness.
- (3) If a parent of a young child, or an independent witness, unreasonably interferes with, or obstructs, the carrying out of a sampling procedure on the young child –
  - (a) the parent or independent witness may be excluded from the place where the sampling procedure is being carried out; and
  - (b) the carrying out of the sampling procedure may then proceed in the absence of that parent or independent witness.
- (4) A parent of a young child, or an independent witness, must not unreasonably interfere with, or obstruct, the carrying out of a sampling procedure on the young child.

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Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.

- (5) If an Officer of Police believes a conflict of interest may exist between a young child who is to undergo a sampling procedure and a parent of that young child or that a parent of a young child may unreasonably interfere with, or obstruct, the carrying out of a sampling procedure on the young child, the Officer of Police is to notify the parent, in writing, that –
- (a) the parent is not to be present during the carrying out of the sampling procedure on the young child; and
  - (b) an independent witness will be present during the carrying out of the sampling procedure on the young child.
- (6) A parent who is notified under subsection (5)(a) must comply with the notification.

Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.

**34M. Presence of police officers during sampling procedure**

Police officers may be present during the carrying out of a sampling procedure on a young child for the purposes of safety, security, continuity of evidence, investigation and the effective carrying out of the procedure in accordance with this Act.

**34N. Limit on use of forensic material taken under this Part**

Despite any other provision of this Act, information obtained from the analysis of forensic material taken from a young child under section 34D(1) may only be matched with other information, whether or not that information, or that other information, is on the DNA database system, if that matching is for the purpose or purposes for which the forensic material was taken from the young child.

**17. Section 38 amended (Withdrawal of consent)**

Section 38(1) of the Principal Act is amended by omitting “under the age of 15 years,” and substituting “between 10 and 14 years of age (both years inclusive),”.

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**18. Section 44 amended (Presence of parent or witness while forensic procedure is carried out)**

Section 44 of the Principal Act is amended as follows:

- (a) by omitting from subsection (2) “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”;
- (b) by omitting from subsection (3) “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”;
- (c) by omitting from subsection (4) “under the age of 15 years” and substituting “between 10 and 14 years of age (both years inclusive)”.

**19. Section 51B inserted**

After section 51A of the Principal Act, the following section is inserted in Part 7:

**51B. Destruction of forensic material taken under Part 4B**

Forensic material, and any information obtained from an analysis of forensic material, taken from a young child under Part 4B must be destroyed as soon as practicable after it is no longer required for the purpose or purposes for which it was taken.



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**20. Section 53 amended (Use of information on DNA database system)**

Section 53(2) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (h) “Part 4A.” and substituting “Part 4A.”;
- (b) by inserting the following paragraph after paragraph (h):
  - (i) the purpose of forensic comparison with forensic material obtained under Part 4B.

**21. Section 58 amended (Database information)**

Section 58(1) of the Principal Act is amended as follows:

- (a) by inserting in paragraph (a)(i) “identifying a deceased person, identifying or locating a missing person,” after “requirements,”;
- (b) by inserting in paragraph (a)(ii) “identifying a deceased person, identifying or locating a missing person,” after “requirements,”;
- (c) by inserting in paragraph (b)(i) “identifying a deceased person, identifying or locating a missing person,” after “requirements,”;

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- (d) by inserting in paragraph (b)(ii) “identifying a deceased person, identifying or locating a missing person,” after “requirements,”.

**22. Section 63 amended (Disclosure of information)**

Section 63(2) of the Principal Act is amended by inserting after paragraph (f) the following paragraph:

- (fa) the purpose of identifying a deceased person or identifying or locating a missing person;

**23. Repeal of Act**

This Act is repealed on the three hundred and sixty fifth day from the day on which it commences.