



Forensic Procedures, including Fingerprinting

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Forensic Procedures under Part ID of the *Crimes Act 1914*

Background

1. Part ID of the *Crimes Act 1914* (Cth) provides a statutory basis for the collection of DNA from suspects in relation to indictable offences, serious offenders in relation to prescribed and serious offences and volunteers. Part ID allows for intimate and non-intimate forensic procedures to be carried out to obtain samples and regulates DNA database systems for storing and matching DNA profiles.
2. The most commonly used form of forensic sampling is by the taking of a buccal swab. A sample is taken by inserting a foam swab into the mouth and rubbing the inside of the cheeks. Sampling can be self-administered. The taking of a buccal swab is classified as a non-intimate forensic procedure.

Volunteers

3. Forensic procedures are generally carried out on volunteers on the basis of informed consent. An order from a magistrate or judge is only required in very limited circumstances in relation to the carrying out of a forensic procedure on a child or incapable person (see section 23XWU) or where there is no consent given and then a hearing is required.
4. The legislation does not provide for the CDPP making an application for an order for the carrying out of a forensic procedure on a volunteer who is a child or incapable person and as such the CDPP will not be involved in applying for orders in relation to volunteers.

Suspects

5. An order for a non-intimate forensic procedure can be made by a senior police officer in relation to a suspect (Part ID, Division 4), in most cases without the need to seek an order from the court. "Senior police officer" is defined in s.23WA and means a constable of the rank of sergeant or higher. "Constable" is defined in section 3 and means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory. "Suspect" is defined broadly in s.23WA and includes a person charged with, or summonsed on, an indictable offence. The CDPP is not an "authorised applicant" for an order in relation to suspects (see s 23WA) and the CDPP will

ordinarily not be involved in applying for such orders or appearing on behalf of the “authorised applicant” before a Magistrate.

6. However, where a suspect is charged with, or summonsed on, an indictable offence and the CDPP already has carriage of the prosecution, consideration will be given on a case by case basis to a request for the CDPP to appear on behalf of the authorised applicant as there may be compelling reasons justifying such a course.

Serious Offenders

7. Serious offenders are persons who are under sentence for a serious offence, being one punishable by a maximum of 5 years imprisonment or more: s 23WA. ‘Under sentence’ is broadly defined in s 23WA(8) and includes a person who is serving a sentence in a prison, is serving a sentence or order under 20AB, is released under a parole order made under s19AL(1) or (2) or is conditionally released under 20(1). A constable can make an order to carry out a non-intimate forensic procedure on a serious offender (Part 1D, Division 6A - s 23XWC), in most cases without the need to seek an order from the court. In addition, a constable in charge of a police station, the investigating constable or the CDPP may apply to a court for an intimate or non-intimate forensic procedure on a serious offender: ss 23XWO, 23WA.
8. When an application is made pursuant to s 23XWO, the court is required to take into account *inter alia* the seriousness of the circumstances surrounding the commission of the offence and whether the carrying out of the forensic procedure is justified in all the circumstances: s 23XWO(7).

When the CDPP will make an application for a forensic order

9. In many cases, non-intimate forensic orders can be dealt with by informed consent or through an order by a senior police officer (suspects) or constable (serious offenders). Nevertheless, the AFP has indicated that it is more convenient in some circumstances for the CDPP to seek a s 23XWO order for a buccal swab as part of a sentencing hearing.
10. The CDPP may apply for a s 23XWO order for a buccal swab where:
 - (1) The investigating officer requests that the CDPP apply for such an order and confirms that they are prepared to supervise compliance with any order that may be made;
 - (2) The person is a serious offender under s 23WA;
 - (3) The matter is dealt with on indictment in one of the following categories:
 - (a) Narcotics and precursors;
 - (b) Child exploitation;
 - (c) Frauds involving \$100,000 or more, or the use of false identities;
 - (d) Matters that both the CDPP and the investigating agency consider appropriate;
 - (4) The order is to be sought at the same hearing as the sentence;
 - (5) The investigating officer has ascertained that a DNA profile of the person has not been uploaded to the suspects index of the Commonwealth database during the course of the investigation or previously;
 - (6) The investigating officer has ascertained that the person is prepared to consent to the forensic procedure and does not oppose the order being made;
 - (7) The investigating officer has prepared the application, affidavit in support and draft order using the templates available on the CDPP website and provided those to the CDPP case officer in adequate time to enable assessment of the application; and
 - (8) In all the circumstances, the CDPP is satisfied that it is appropriate to make the application.
11. If the court is not prepared to grant the application at the sentence hearing and wishes to hear argument on the application at an adjourned date, the CDPP will not pursue the application. The application would then be a matter for the Australian Federal Police.

Fingerprint and photograph orders pursuant to section 3ZL of the *Crimes Act 1914*

12.Section 3ZL provides that a judge or magistrate may order fingerprints and/or photographs to be taken at a sentencing hearing in relation to any Commonwealth offence or State offence with a federal aspect (see ss 3C, 3ZL(1)). It is not confined to serious offenders.

13.The power to apply for a Fingerprint Order is an important one that assists in ensuring the integrity of the criminal justice system. Identification of a convicted person is necessary to ensure that the person is appropriately sentenced for any subsequent offence that he or she may commit, that is, prior convictions are appropriately taken into account. The taking of fingerprints and photographs are a clear means of identification.

When an application for a Fingerprint Order should be made

14.The CDPP may apply for a s 3ZL order where resources permit and where:

- (1) The investigating officer requests that the CDPP apply for such an order and confirms that they are prepared to supervise compliance with any order that may be made; and
- (2) The investigating officer has ascertained that the person's fingerprints are not already held.

When an application for a Fingerprint Order will not be necessary

15.An application for a Fingerprint Order will not be necessary when:

- the prosecution was instituted by way of arrest and charge, and the offender was fingerprinted and photographed at the time of the arrest; or
- the offender is sentenced to an immediate custodial sentence, and it can be expected that the offender's fingerprints and photograph will be taken by Corrections authorities upon commencing to serve that sentence.

Forensic Procedures and Fingerprint Orders not available where s 19B utilised

16. Orders under ss 3ZL or 23XWO may only be made where the offender is 'convicted' of an offence: see ss 3ZL(1) and 23XWB(3) respectively. Accordingly, an order may not be made where the offender is dealt with under s 19B of the *Crimes Act 1914*.