

Forensic Procedures

ss17-21 & 32 Crimes (Forensic Procedures) Act (NSW) 2000

No-one should ever consent to a forensic procedure. Police can order a person to undergo a procedure but there is a clear procedure that must be followed and a written record of the order and reasons for it must be given. If the requirements are not observed, then the forensic procedure is an unlawful assault and the evidence obtained may be excluded pursuant to the court's discretion.¹ This paper aims to assist legal practitioners in the state of New South Wales.

Authority & Records

A senior police officer (meaning one of or above the rank of sergeant), can order a non-intimate forensic procedure be carried out on an arrested person.² However, before making the order, the senior officer must consider and be satisfied of certain factors. Furthermore, they must create and sign a record of the order and the reasons³ and make this available to the accused person as soon as practicable after the order is made.⁴

Section 20 Crimes (Forensic Procedure) Act provides that the senior officer must be satisfied of the following:

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

So, the senior officer must have reasonable grounds to believe that the procedure will produce evidence relevant to the offence for which the person has been arrested in order for it to be justified in the circumstances. Whether there are reasonable grounds will turn on the nature of the case. If the person is suspected of sexual assault, then it would be reasonable to collect DNA to rule them in or out. Whereas, if the person is arrested for drink driving, then collecting DNA looks like a violation of the person's civil rights.

Counsel must always obtain the contemporaneous written reasons for the order. Whether the procedure is justified will turn on the information that senior officer had at the time and recorded in the written order. If police do not comply with the Act, then the evidence obtained is presumed to be inadmissible⁵ and the burden is on prosecution to persuade the court to exercise its discretion to admit it after having regard to the factors in s82(5).

¹ s138 Evidence Act (NSW) 1995

² s17 Crimes (Forensic Procedure) Act (NSW) 2000

³ s21(4) Crimes (Forensic Procedure) Act (NSW) 2000

⁴ s21(5) Crimes (Forensic Procedure) Act (NSW) 2000

⁵ s82(4) Crimes (Forensic Procedure) Act (NSW) 2000

Intimate Forensic Procedures

Intimate procedures cannot be authorized by a senior police officer. They must be authorized by a magistrate or an 'authorized officer'.⁶ The Act adopts the definition of 'authorized officer' in LEPR:⁷

- (a) a Magistrate or a Children's Magistrate, or
- (b) a registrar of the Local Court, or
- (c) an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office.

The authorized officer can only make an interim order in relation to 'prescribed offences' and if satisfied that the matter is urgent and that a magistrate is reasonably likely to be satisfied when the application is finally determined.

Procedures

Intimate	Non-Intimate
<ul style="list-style-type: none"> (a) external examination of a person's private parts, (b) other-administered buccal swab, (c) blood, (d) pubic hair, (e) any matter, by swab or washing, from the person's private parts (f) by vacuum suction, scraping or lifting by tape, from the person's private parts, (g) dental impressions, (h) photograph of the person's private parts, (i) an impression or cast of a wound from the person's private parts 	<ul style="list-style-type: none"> (a) 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) self-administered buccal swab, (c) hair, other than pubic hair, (d) nails or of matter from under the person's nails, (e) by swab or washing, from any external part of the person's body, other than the person's private parts (f) 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) hand print, finger print, foot print or toe print, (h) photograph of a part of a person's body, other than the person's private parts, (i) impression or cast of a wound from a part of the person's body, other than the person's private parts, (j) 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.

I'm available every day if you have any interesting issues.

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⁶ s32 Crimes (Forensic Provisions) Act (NSW) 2000

⁷ Law Enforcement (Powers & Responsibilities) Act (NSW) 2002