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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES AMENDMENT (FORENSIC PROCEDURES) BILL 1995

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of
the Minister for Justice, the Hon Duncan Kerr MP)

CRIMES AMENDMENT (FORENSIC PROCEDURES) BILL 1995

GOVERNMENT AMENDMENTS

General outline

With the exception of amendment (5), amendments (1) to (11), (13), (16) and (17) deal with time limits for forensic procedures and related matters. Under the amendments, all forensic procedures conducted under Part 1D must be completed within a reasonable period, subject to the following upper limits:

- (i) consensual procedure on a suspect not in custody - 4 hours (excluding 'dead time');
- (ii) procedure by consent or ordered by a constable, on a suspect in custody - the existing 'investigation period' time limit (2 or 4 hours, with potential for an extension for up to 8 hours) under section 23C of the *Crimes Act 1914*; and
- (iii) procedure ordered by a magistrate - 4 hours (excluding 'dead time').

2. While a suspect undergoing a procedure by consent may terminate the procedure at any time, a time limit is still imposed, to guard against police taking advantage of any confusion on the part of a suspect as to this right.

3. The existing 'investigation period' time limit has been retained where a suspect is in custody and undergoes a procedure by consent or on the order of a constable, because in these situations police have a power to detain a suspect both for questioning and to carry out a procedure. If a separate block of time had been built in for forensic procedures, this would have allowed a suspect to be held for an unacceptable period of time before being taken before a magistrate - for example, 4 hours for questioning, and then 4 hours for a forensic procedure.

4. 'Dead time' is time not included in calculating the time allowed for a procedure. This is time during which a procedure must be suspended or delayed, for the suspect's benefit or to comply with Bill. For example, time spent awaiting the arrival of the suspect's medical practitioner, or time during which the suspect is communicating with an interview friend, is dead time. Without provision for dead time, the 4 hour limit could expire before the procedure commenced.

5. The amendments also clarify the relationship between the 'investigation period' (in this context, time allowed for questioning a suspect) under section 23C of the *Crimes Act 1914*, and the separate period allowed for a magistrate ordered procedure.

6. The amendments provide that where a magistrate orders a procedure, the questioning of a suspect may continue. The time allowed for the procedure only starts to run when questioning ends and preparations for the procedure begin. Once the procedure commences, no questioning is to take place until the procedure is completed. The time during which the procedure is taking place (including dead time) is not to count as 'questioning time' under Part 1C. After the procedure is over, questioning may be resumed (if there was time left for further questioning when the procedure began).

7. In addition to the 'time limit' amendments, there are four further amendments:
- amendment (5) closes a gap identified in section 23WG regarding an Aboriginal or Torres Strait Islander suspect's right to communicate with a lawyer.
 - amendment (12) inserts a provision requiring a constable to provide a suspect with an interpreter in certain circumstances; and
 - amendment (14) corrects an inaccurate cross-reference in the *Crimes Amendment Act 1995*.
 - amendment (15) changes the numbering of proposed new section 15G of the *Crimes Act 1914* to section 15FA as 15G is already being used in the Crimes Amendment (Controlled Operations) Bill 1995.

Financial impact

8. It is not anticipated that the amendments will have any financial impact.

NOTES ON CLAUSES

Amendment (1)

9. This replaces the previous commencement provision (proposed section 2), to allow the correct cross-reference in section 7 of the *Crimes Amendment Act 1995* to be inserted as if it had been included that Act at the time of its commencement. See amendment 18.

Amendment (2)

10. Amendment (2) amends the heading to Division 2, to reflect the fact that Division 2 now contains a table setting out the time limits for procedures carried out in different circumstances. The new heading is 'Authority and time limits for forensic procedures - summary of rules'.

Amendment (3)

11. The amendment inserts section 23WCA into Division 2 of the Bill. This section contains a table outlining out the time limits applying to the carrying out of forensic procedures in different circumstances, and identifying the provisions regulating those time limits.

Amendment (4)

12. This amendment adds subsections (3) and (4) to proposed section 23WD. Proposed subsection 23WD(3) provides that where a suspect in lawful custody gives informed consent to undergo a forensic procedure, that procedure must be carried out within the investigation period provided for by section 23C of the *Crimes Act 1914*. The investigation period is the period reasonably necessary for the conduct of an investigation, to a maximum of 4 hours (2 hours in the cases of suspects who are Aboriginals, Torres Strait Islanders or aged under 18). The investigation period may be extended by a magistrate, once only, by up to 8 hours, under the existing section 23D.

13. Proposed subsection 23WD(4) makes it clear that neither Part 1C or Part 1D prevent a forensic procedure being conducted, with informed consent, within the investigation period allowed by section 23C. It also makes it clear that the time taken to conduct the procedure, and any delays associated with the conduct of a procedure, do not extend the investigation time period.

14. If the investigation period, including any extension granted by a magistrate, is insufficient for the conduct of a procedure, police must release the suspect from custody and again go through the process for requesting informed consent to conduct the remaining part of the procedure. Alternatively, they can seek a magistrate's order to conduct the remaining part of the procedure but must explain why the procedure could not be conducted within Part 1C time limits.

Amendment (5)

15. This amendment closes a gap identified section 23WG of the Bill as introduced. In that Bill, Aboriginals and Torres Strait Islanders who are not disadvantaged in comparison with the rest of the Australian community, or who had waived the right to an interview friend, were not given an opportunity to communicate with a legal practitioner after being asked to consent to the procedure (cf paragraph 23WF(2)(c) regarding non-Aboriginal suspects). The proposed new subsection 23WG(6) overcomes this problem.

16. While making amendments to correct this, the opportunity was taken to re-order this provision so it follows a more logical sequence.

Amendment (6)

17. This amendment will insert proposed section 23WLA into the Bill to impose a time limit on the conduct of a forensic procedure with the informed consent of a suspect who is not in custody.

18. A suspect in this category is free to terminate the procedure at any time (see proposed section 23WK). Nonetheless, a suspect may fail to assert this right. The time limit builds in an extra safeguard, so that such a suspect is not inconvenienced for an undue period of time.

19. Proposed subsection 23WLA(1) provides that the procedure must be carried out as soon as reasonably possible after the suspect presents him or herself for the procedure, to a maximum of four hours. Time only starts to run when the suspect presents him or herself for the procedure rather than immediately upon consent, because, for example, a suspect may prefer to undergo the procedure at a more convenient time.

20. Under proposed subsection 23WLA(2), certain time is to be disregarded in calculating the elapse of time allowed for the procedure. The categories of disregarded time relate either to compliance with the requirements of the Bill, for example, conveying the suspect to premises where the procedure can be carried out; or to the suspension or delay of a procedure for the benefit of the suspect, for example, to allow the suspect to communicate with a friend or relative. Time during which a procedure is suspended or delayed at a suspect's request is also to be disregarded.

21. If such time was not disregarded, there would be cases in which police would have a strong incentive to rush a suspect in exercising rights under the Bill, or face having the 4 hours elapse without having completed, or indeed commenced, the procedure.

Amendment (7)

22. This amendment adds a new subsection (4) to proposed section 23WM, to make it clear that if a procedure is to be carried out on the order of a constable, it must be carried out within the investigation period provided for in section 23C of the *Crimes Act 1914*.

23. The purpose of section 23C is to impose a maximum time limit on the period for which a suspect may be detained in lawful custody in relation to an investigation, before being released or brought before a magistrate. If a separate and additional

period of time were allowed for the conduct of a forensic procedure, the integrity of the 'investigation period' time limit imposed by section 23C would be undermined.

24. If the investigation period, including any extension granted by a magistrate, is insufficient for the conduct of a procedure, police can seek a magistrate's order to conduct the remaining part of the procedure, but must explain why the procedure could not be conducted within Part 1C time limits.

Amendment (8)

25. This amendment is consequential to amendment (10). It amends proposed subsection 23WV(2), to provide that the time for which a suspect may be held in temporary custody to allow the conduct of a forensic procedure ordered by a magistrate, is to be regulated by proposed section 23XGD which imposes the maximum time limit of four hours on the detention of a suspect for the conduct of a procedure.

Amendment (9)

26. This omits proposed section 23WZ, which was to have regulated the arrest and detention of a suspect to allow the conduct of a magistrate ordered procedure. These matters are now dealt with by the proposed sections to be inserted by amendment (10).

Amendment (10)

27. This amendment inserts a new Subdivision, Subdivision CA, into Division 5 of the Bill to impose time limits on the conduct of forensic procedures which have been ordered by a magistrate.

28. Proposed section 23XGA provides that the new Subdivision will apply to magistrate-ordered procedures.

29. Proposed section 23XGB applies the same time limit to a magistrate ordered procedure on a suspect not in custody as applies to a procedure carried out on a suspect not in custody with informed consent under amendment (6).

30. Proposed subsection 23XGB(1) provides that the procedure must be carried out as quickly as reasonably possible after the suspect presents him or herself for the procedure, to a maximum of four hours. Time only starts to run when the suspect presents him or herself for the procedure, because, for example, a suspect may prefer to undergo the procedure at a more convenient time.

31. Under proposed subsection 23XGB(2), certain time is to be disregarded in calculating the elapse of time allowed for the procedure. The categories of disregarded time relate either to compliance with the requirements of the Bill, for example, conveying the suspect to premises where the procedure can be carried out, or to the suspension or delay of a procedure for the benefit of the suspect, for example, to allow the suspect to communicate with a friend or relative. Time during which a procedure is suspended or delayed at a suspect's request is also to be disregarded.

32. If such time was not disregarded, there would be cases in which police would have a strong incentive to rush a suspect in exercising rights under the Bill, or face

having the 4 hours elapse without having completed, or indeed commenced, the procedure.

33. Proposed section 23XGC deals with the issuing of a warrant for the arrest of a suspect to allow a magistrate-ordered procedure to be carried out.

34. Proposed subsection 23XGC(1) provides that where a suspect is not in custody when a magistrate orders a forensic procedure, a constable may apply for a warrant to arrest the suspect for the purpose of carrying out the procedure, and that the magistrate may issue the warrant, subject to compliance with:

- the procedural requirements of proposed subsection 23XGC(2); and
- the substantive requirements of subsection 23XGC(3)).

35. Proposed subsection 23XGC(2) requires a constable's application for a warrant under subsection 23XGC(1) to be made by information on oath (or, where allowed by the law, an affirmation - see paragraph 27(b) of the *Acts Interpretation Act 1901*) and to be accompanied by an affidavit dealing with the matters of which the magistrate must be satisfied to issue the warrant, set out in subsection 23XGC(3).

36. Proposed subsection 23XGC(3) provides that for a magistrate to issue an arrest warrant, he or she must be satisfied that the arrest is necessary to ensure that the forensic procedure can be carried out, or that the issue of the warrant is otherwise justified.

37. Proposed subsection 23XGC(4) prohibits the issue of more than one warrant in relation to a particular order for a procedure, to prevent this being used to arrest a suspect more than once pursuant to a single order of a magistrate and thereby evading the four hour time limit.

38. Proposed section 23XGD regulates the period of time for which a suspect may be held in custody to allow a forensic procedure ordered by a magistrate to be conducted.

39. Proposed subsection 23XGD(1) provides that where a suspect is in custody, he or she may be detained for as long as is reasonably necessary to allow the forensic procedure to be carried out, to a maximum of 4 hours. Subject to the provision for certain time to be disregarded - see proposed subsection 23XGD(2) - the time allowed for the procedure starts at the time the magistrates orders the procedure, unless the suspect is arrested under a warrant issued under proposed section 23XGC, in which case the time does not start to run until the suspect is arrested pursuant to the warrant.

40. Proposed subsection 23XGD(2) identifies a number of periods of time that are to be disregarded in deciding whether the detention of a suspect under subsection 23XGD(1) is for a reasonable period, or within the maximum 4 hours allowed. The categories of disregarded time relate either to compliance with the requirements of the Bill for example, conveying the suspect to premises where the procedure can be carried out, or to the suspension or delay of a procedure for the benefit of the suspect, for example, to allow the suspect to communicate with a friend or relative.

41. If such time was not disregarded, there would be cases in which police would have a strong incentive to rush a suspect in exercising rights under the Bill, or face

having the 4 hours elapse without having completed, or indeed commenced, the procedure.

42. Finally, time during which the suspect is being questioned, or during which questioning is suspended or delayed in accordance with the equivalent 'dead time' provisions in Part 1C, is also to be disregarded. This will allow police to continue questioning a suspect (but only where this is otherwise allowed by Part 1C), before commencing a procedure. This will allow an important line of questioning to be completed, or prevent unnecessary delay while awaiting the commencement of a procedure. Questioning during a procedure will not be allowed - see amendment (11).

Amendment (11)

43. This amendment inserts proposed section 23XIA which provides that the questioning of a suspect must be suspended while a forensic procedure is being carried out. Questioning may be resumed (if authorised by Part 1C) when the procedure has been completed.

Amendment (12)

44. This amendment inserts proposed section 23YDA, which is described (as proposed section 23YE) in the explanatory memorandum that accompanied the introduction of the Bill into the House on 28 June 1995.

45. Under this proposed provision, when a constable intends to take any action listed in proposed subsection 23YDA(2), and believes on reasonable grounds that the suspect is unable to communicate orally with reasonable fluency in the English language, either because of inadequate knowledge of that language or because of a physical disability, then the constable must arrange for an interpreter and defer taking any action listed in proposed subsection 23YDA(2) until that interpreter arrives.

46. Under proposed subsection 23YDA(2) the actions for which an interpreter may be required are asking a suspect to consent to a forensic procedure, ordering the carrying out of an intimate or non-intimate forensic procedure, carrying out or arranging to carry out a forensic procedure and finally, giving the suspect the opportunity to view any video taken during the process.

47. This requirement is in addition to the obligation in proposed subsection 23WA(4) that any information provided to any person (being a suspect or another person such as an interview friend) must be provided through an interpreter if necessary in a language (including sign language or braille) in which the person is able to communicate with reasonable fluency.

Amendment (13)

48. This amendment inserts proposed section 23YJA, which places the burden on the prosecution, in any proceedings, to show that any time asserted to be disregarded time under proposed subsection 23WLA(2), 23XGB(2) or 23XGD(2) was properly disregarded under that provision.

49. This will mean, for example, that if a suspect argues that procedure results should be excluded from evidence because he or she was detained for longer than

allowed by Part 1D, the prosecution would need to prove that any time that had been disregarded by police was properly disregarded.

Amendment (14)

50. This amendment corrects a cross-referencing error in the *Crimes Amendment Act 1995*. Section 5 of that Act inserted a new subsection 7(6) in the *Crimes Act 1914*. This contains a cross-reference to section 7B. The cross-reference should be to section 86. Section 7B was to have replaced section 86 as the conspiracy provision in the *Crimes Act 1914*. Subsequently, a decision was made to retain section 86, but this cross-reference was not amended accordingly.

Amendment (15)

51. This amendment will change the numbering of proposed section 15G, to be inserted into the *Crimes Act 1914* by item 9 of Schedule 2 of the Bill, to section 15FA. Section 15G is already being used in the amendments being inserted into the Crimes Act by the Crimes Amendment (Controlled Operations) Bill 1995.

Amendment (16)

52. This amendment will delete items 10, 11, and 12 from the Bill as introduced. These proposed amendments have been superseded with the introduction of the time limit provisions and accompanying provisions for 'dead time'.

53. The replacement item 10 will amend the definition of 'questioning' in subsection 23B(6) of the *Crimes Act 1914*, to exclude the conduct of a forensic procedure under Part 1D from that definition. The previous definition of 'questioning' was broad enough to include the carrying out of a forensic procedure, and would have defeated the attempt to treat the periods of time allowed for questioning and conducting a forensic procedure separately.

54. This amendment does not prevent a forensic procedure being conducted within the 'investigation period' period under section 23C, where provided for by the Bill.

Amendment (17)

55. Where a magistrate orders a forensic procedure on a suspect in lawful custody, two periods of time are relevant. These are the investigation period (primarily relating to questioning) under section 23C of the *Crimes Act 1914*, and the period for which the suspect may be detained to allow the procedure to be conducted, under proposed section 23XGD (see amendment (10)).

56. This amendment to subsection 23C(7) provides that the period from the commencement to the completion of the forensic procedure, including all 'dead time', is to be disregarded in calculating the elapse of the investigation period.

57. Without the amendment, if police sought a magistrate's order to conduct a forensic procedure early in the investigation period, they would lose their remaining questioning time.

58. An additional reason for this amendment is to prevent a situation in which the investigation time period begins running with every pause in the forensic procedure. This would make it impossible for police to keep track of the two time limits.



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