

## **Crimes (Amendment) Bill**

### **EXPLANATORY MEMORANDUM**

#### **PART 1—PRELIMINARY**

- Clause 1 sets out the purposes of the Bill.
- Clause 2 provides for the commencement of the various provisions of the Bill.
- Clause 3 provides that the **Crimes Act 1958** is the Principal Act

#### **PART 2—SEXUAL OFFENCES**

##### **Division 1—Amendment of Crimes Act 1958**

- Clause 4 amends section 37 of the Principal Act by requiring that the directions set out in section 37 are given only where relevant to the facts in issue in a proceeding and not otherwise. It also provides that where a direction is given pursuant to section 37, the judge must relate that direction to the facts in issue in a proceeding to assist the jury to understand the direction.
- Clause 5 amends section 47A of the Principal Act by removing the requirement that the accused have "care, supervision or authority" over the complainant. It clarifies that the offence contemplated by this provision can be made out where the three acts are different acts that constitute different offences and that there is no requirement that the acts be the same or similar. It also clarifies that any act referred to in sub-sections (2)(a) or (b) does not have to be proven to the same degree of specificity required to successfully prosecute that act as a discrete offence.
- Clause 6 amends section 61 of the Principal Act. The wording of the present delay warning in section 61(1)(b)(i) carries an implication that there is a reason to suspect that late complaints may be false. Sub-clause (1) substitutes a new delay warning that removes that implication. Juries will now be directed that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it.

Sub-clause (2) inserts a new sub-section (3). The new section 61(3) is inserted to ensure that comments made under section 61(2) concerning the reliability of the complainant's evidence are only made where necessary to ensure a fair trial. These amendments are intended to ensure that:

- (1) the delay warning is not given where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness; and
- (2) the warning should not be expressed in such terms as to undermine the purpose of section 61 by suggesting a stereotyped view that complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual assault is invariably a sign that the complainant's evidence is false.

Clause 7 inserts sub-sections (3AA), (3AB) and (3AC) in section 372 of the Principal Act. It creates a presumption that sexual offence counts properly joined pursuant to the joinder provisions in the **Crimes Act 1958** will not be severed. The presumption is not rebutted merely because evidence on one count is not admissible on another count on the presentment. This provision is in accordance with the approach of the House of Lords in *Reg v Christou* [1995] 2 AC 596, and overrules *De Jesus -v- R* (1987) 61 ALJR 1.

Clause 8 inserts transitional provisions in the Principal Act.

### **Division 2—Amendment of Evidence Act 1958**

Clause 9(1) inserts paragraph (aa) in section 37A(1) of the **Evidence Act 1958** which provides that an application to cross examine the complainant about his or her prior sexual activity must be in writing in accordance with the requirements set out therein, and given to the DPP within specified time limits.

Clause 9(2) substitutes the word "made" with the word "heard" in section 37A(1) of the **Evidence Act 1958**.

Clause 9(3) inserts rules (5A), (5B) and (5C) in section 37A(1) of the **Evidence Act 1958**. These rules provide that the Director of

Public Prosecutions must forward the application received to the Magistrates' or County Court as appropriate. They also give the court a discretion to hear an application that is out of time and waive the requirement that it be in writing where exceptional circumstances exist.

Clause 10 amends section 37C of the **Evidence Act 1958** which enables the court to direct that alternative arrangements be made for the giving of evidence by certain types of witnesses. The amendment removes the additional eligibility criteria in section 37C(2)(b) which applied to adult sexual assault witnesses.

Clause 11 inserts a transitional provision.

### **Division 3—Amendment of Magistrates' Court Act 1989**

Clause 12 amends clause 11(1)(b) of Schedule 5 to the **Magistrates' Court Act 1989** to provide that a Magistrate is required to advise an accused person of the requirements of section 37A of the **Evidence Act 1958** at the close of the committal proceedings.

Clause 13 inserts a transitional provision

### **PART 3—PROPENSITY EVIDENCE**

Clause 14 inserts a new section 398A in the Principal Act which sets out the admissibility criteria for propensity evidence.

New section 398A(1) provides that the section applies to proceedings for an indictable or summary offence.

New section 398A(2) provides that propensity evidence will be admissible if the court considers in all the circumstances that it is just to admit the evidence despite any prejudicial effect it may have on the accused person. This in accordance with the test enunciated by the House of Lords in *Director of Public Prosecutions -v- P* [1991] 2 AC 447 which was accepted by the High Court in *Pfennig -v- the Queen* [1994-5]182 CLR 461.

The test for the admissibility of propensity evidence (which includes similar fact evidence) is not based on any rigid criteria but provides for a general approach. There is no essential prerequisite feature (such as striking similarity) in any case.

New section 398A(3) provides that the possibility of a reasonable explanation consistent with the innocence of the accused person is not relevant to the question of the admissibility of propensity evidence. The provision overrules the common law principle that where there exists a "possibility" of concoction, or collusion, or infection, or coincidence of the allegations between the complainants, the evidence in respect of one complainant is inadmissible in respect of another on this basis, and the trials should thus be severed. Such possibilities have been expressed in the provision as "reasonable explanations consistent with the innocence of the accused".

New section 398A(4) provides that such issues are more properly directed to the assessment of the credit of witnesses and are not threshold questions of admissibility. This in accordance with the most recent approach of the House of Lords in England in *Reg -v- H* [1995] 2 AC 596

Clause 15 inserts a transitional provision.

#### **PART 4—FORENSIC PROCEDURES**

Clause 16 amends section 464(2) of the Principal Act.

Paragraph (a) inserts a definition of "approved mental health service".

Paragraph (b) substitutes a new definition of "medical practitioner".

Paragraph (c) inserts a definition of "nurse".

Paragraph (d) repeals the definition of "registered medical practitioner".

Paragraph (e) inserts a definition of "related material and information".

Paragraph (f) amends the definition of "relevant suspect".

Paragraph (g) inserts a definition of "security patient".

Clause 17 amends section 464T(3)(c) of the Principal Act under which a court may order a suspect to undergo a compulsory procedure. Applications for an order requiring a suspect to undergo a

compulsory procedure can now be made in situations where a victim of an offence has not been found, and where a child is conceived as a result of an alleged offence against a provision of Subdivision (8A), (8B) or (8C) of the Principal Act, and the conduct of the procedure may be relevant in determining the paternity of that child.

- Clause 18 amends section 464U(3) of the Principal Act to extend the range of offences for which a member of the police force may apply to the Children's Court for an order directing a child to undergo a compulsory procedure.
- Clause 19 amends the Principal Act by providing that, in addition to medical practitioners, nurses may also conduct forensic procedures including the taking of intimate samples.
- Clause 20 amends section 464Y(1) of the Principal Act and the circumstances under which a police member is required to administer a caution before a forensic procedure is conducted.
- Clause 21 amends section 464Z(6) of the Principal Act to insert paragraph (ab) and to amend paragraph (c)(i) so that at the time a sample is taken or a physical examination is conducted, a member of the police force must only be present for the purpose of witnessing the taking of a sample or the conduct of a physical examination.
- Clause 22 sub-clause (1) amends section 464ZA(1) of the Principal Act to authorise members of the police force to use reasonable force to assist medical practitioners, nurses, dentists or other persons in the conduct of a forensic procedure carried out in accordance with section 464ZF.

Sub-clause (2) amends sub-section 464ZA(5) of the Principal Act to provide that forensic procedures conducted in accordance with section 464ZF must be video-taped, if practicable, or witnessed by an independent person.

Sub-clause (3) amends section 464ZA of the Principal Act by inserting new sections 464ZA(6) and (6A). Under the new provisions, a member of the police force must give a copy of the court order to the person on whom a compulsory procedure was conducted. If the procedure was video-recorded, the copy must be endorsed and signed by the person who video recorded the

conduct of the procedure or the police witness, or otherwise, by the independent witness.

Sub-clause (4) amends section 464ZA(7) of the Principal Act by providing that like the requirements for a court ordered compulsory procedure, a copy of the video-tape of a court ordered forensic procedure must be given or sent to the person on whom the procedure was conducted.

Clause 23 inserts sub-sections (2), (3) and (4) into section 464ZC of the Principal Act. Section 464ZC provides that if there is sufficient material available for analysis, part of that material, upon request, must be delivered to the person from whom the sample was taken. Clause 23 imposes a similar requirement for delivery upon request to that person when the sample has been taken by reason of the additional circumstances inserted by clause 17.

Clause 24 sub-clause (1) amends section 464ZE(1) of the Principal Act to extend the operation of the provisions relating to the admissibility of evidence obtained from samples.

Sub-clause (2)(a) amends section 464ZE(2) of the Principal Act to include a sample voluntarily given by a person in accordance with new sections 464ZGB to 464ZGD.

Sub-clause (2)(b) amends section 464ZE(2)(a) of the Principal Act to remove the onus from the prosecution to prove that there are exceptional circumstances that warrant the reception by a court of evidence that is otherwise inadmissible by reason of section 464ZE(1)(a).

Sub-clause (3) inserts new sections 464ZE(2A) and (3) into the Principal Act. Section 464ZE(2A) lists the range of matters which the court may have regard to in determining whether the circumstances justify the reception of evidence otherwise inadmissible by reason of section 464ZE(1)(a). Section 464ZE(3) provides that the probative value of the evidence obtained does not by itself justify the reception of the evidence.

Clause 25 inserts new sections 464ZF and 464ZFA into the Principal Act.

Under the present section 464ZF of the Principal Act, a member of the police force may apply to the court for an order directing a

person found guilty of committing a 'serious sexual offence' (as defined), to provide a blood sample.

Clause 25 inserts a new section 464ZF into the Principal Act.

New section 464ZF(1) defines "child" and "forensic sample offence" for the purposes of section 464ZF.

New section 464ZF(2) provides that a member of the police force may apply to the court for an order directing a person found guilty of committing a "forensic sample offence" to undergo a forensic procedure.

New section 464ZF(3) provides for retroactive operation. It permits a member of the police force to apply to the Magistrates' Court or Children's Court for an order directing a person who is currently serving a term of imprisonment or period of detention or as a security patient for any offence, and who has been previously found guilty of a forensic sample offence, to undergo a forensic procedure.

New section 464ZF(4) provides that in making an application, the member of the police must specify the type of sample sought to be taken.

New section 464ZF(5) provides that if the forensic procedure is sought to be conducted on a child, notice of the application must be served on the child and the child's parent or guardian.

New section 464ZF(6) provides that an order directing a person to undergo a forensic procedure must not be executed in relation to the forensic sample offence until either the appeal period has expired or the appeal (if any) is finally determined and the conviction for the offence is upheld (whichever is the later).

New section 464ZF(7) provides that if on appeal a conviction for a forensic sample offence is quashed, an order made under section 464ZF(2) or (3) ceases to have effect.

New section 464ZF(8) provides that the court, in exercising its discretion to make an order under section 464ZF(2) or (3), must take into account the seriousness of the circumstances of the forensic sample offence and be satisfied that the making of such an order is justified.

New section 464ZF(9) provides that the court, in making an order under section 464ZF(2) or (3), must give reasons and cause a copy of the order to be served.

New section 464ZF(10) provides that a failure to comply with sub-section (9) does not invalidate the court order.

New section 464ZF(11) provides that if a forensic procedure has been conducted, a copy of every forensic report must be given or sent as soon as practicable, but not more than 7 days after the procedure was conducted to the person on whom the procedure was conducted. If that person is a child, the copy of the report must be given to the child and the child's parent or guardian.

New section 464ZFA allows a court to issue a warrant for the arrest and detention of a person who is the subject of an application under section 464ZF(3) to undergo a forensic procedure if that person has been released from the prison, gaol, youth training centre or approved mental health service prior to the order being made. The person may be arrested and brought before the court for the hearing of the application and, if the application is granted, be detained for as long as reasonably permits the conduct of the forensic procedure.

Clause 26 inserts new sections 464ZFB to 464ZFE into the Principal Act.

New section 464ZFB authorises a member of the police force to apply to the court for an order to retain any sample taken and any related material and information (defined by clause 16 (e)), if the person from whom the sample was taken is found guilty of an offence referred to new section 464ZFB(1)(b) in relation to which a forensic procedure to take the sample was conducted. The court, in exercising its discretion as to whether or not to make an order for retention, must take into account the same considerations as in new section 464ZF(8).

New section 464ZFC provides for the destruction of any sample taken in the investigation into the commission of an offence, and any related material and information, following the finding of guilt.

New section 464ZFC(1) provides that, subject to section 464ZFD(2), if a member of the police does not make an



application under section 464ZFB within the period of time specified in section 464ZFB(1), or a court refuses to make an order under section 464ZFB, the Chief Commissioner of Police must without delay destroy or cause to be destroyed, any sample taken and any related material and information (defined by clause 16 (e)).

New section 464ZFC(2) provides that if a sample and any related material and information is required to be destroyed in accordance with section 464ZFC, the Chief Commissioner of Police must, if requested by the person on whom the forensic procedure was conducted, notify the person in writing of whether the destruction has occurred.

New section 464ZFC(3) provides that a person is guilty of an offence if he or she fails to destroy or uses, or causes or permits to be used, a sample or related material and information required to be destroyed by section 464ZFC.

New section 464ZFC(4) provides that a person is guilty of an offence if at any time he or she uses, or causes or permits to be used, or otherwise disseminates information derived from, any sample or related material and information required to be destroyed by section 464ZFC except in good faith for the purposes of section 464ZFD(2).

New section 464ZFD provides for the establishment of computerised databases.

New section 464ZFD(1) provides that identifying information obtained from analysis of samples taken or procedures conducted in accordance with sections 464R to 464ZA, section 464ZF or sections 464ZGB to 464ZGD, and which in accordance with the Subdivision may be retained, may be included in a computerised database.

New section 464ZFD(2) provides that information (other than information which identifies a person) may be retained and included in a computerised database for statistical purposes.

New section 464ZFE provides that the Chief Commissioner of Police must submit a quarterly report to the Attorney-General, which contains information that identifies all samples taken in

accordance with the Subdivision and all samples destroyed within the period to which each report relates.

Clause 27 amends section 464ZG which provides for the destruction of identifying information.

Sub-clause (1) repeals section 464ZG(2) of the Principal Act.

Sub-clauses (2)(b) and (3)(b) amend sections 464ZG(3)(a) and (4)(a) of the Principal Act. They increase the period from 6 months to 12 months before which there is an obligation on the Chief Commissioner of Police to destroy or cause to be destroyed any sample or related material and information.

Sub-clause (4) substitutes section 464ZG(7) of the Principal Act to provide that the obligation on the Chief Commissioner of Police to give notice of the destruction of any sample or related material and information is now upon request.

Sub-clauses (5) and (6) amend the offences in section 464ZG(8) and (9).

Clause 28 inserts new sections 464ZGA to 464ZGF into the Principal Act.

New section 464ZG(1) provides that where a forensic procedure has been conducted on a person as a child and the sample taken is not required to be destroyed in accordance with the Subdivision, and that person is not found guilty of any further offence before attaining 26 years, the Chief Commissioner must without delay destroy the sample and any related material and information.

New section 464ZG(2) lists the offences to which section 464ZG(1) has no application.

New section 464ZGB provides that a person may volunteer to give a forensic sample. A person must be of or above the age of 17 years and must have given his or her consent in accordance with the requirements in section 464ZGB(3). A person is taken to have consented if, in the presence of an independent person, a member of the police force informs the person of the matters set out in section 464ZGB(3). The police member must record the giving of this information and the person's responses, if any, in

writing and by video-taping if practicable or otherwise by audio-taping.

New section 464ZGC provides the manner in which a person may withdraw his or her consent prior to giving a sample.

New section 464ZGD provides that if a person consents to give a sample in accordance with section 464ZGB, the procedure to take a sample must be in accordance with section 464Z and must be video-recorded, if practicable, and if the person consents.

New section 464ZGE provides that if a sample is taken from a person who gave consent in accordance with section 464ZGB, that person may at any time withdraw consent to the retention by police of that sample by notice in writing to the Chief Commissioner of Police. In accordance with the circumstances referred to in section 464ZGE(2) and within the time periods expressed in section 464ZGE(3), the Chief Commissioner must destroy any sample taken and any related material and information. This section does not prevent a member of the police force from requesting the person who has voluntarily given a sample to undergo a forensic procedure under section 464R, or from making an application under sections 464T or 464V directing that person to undergo a compulsory procedure.

New section 464ZGF provides that if the matters set out in subsection (1) are present, a member of the police force may apply to the Magistrates' Court for an order to retain any voluntary sample given by a person and any related material and information. In determining whether to make an order for retention, the court must be satisfied on the balance of probabilities that there are reasonable grounds to believe that the person has committed the offence in respect of which the application is made.

- Clause 29 amends section 464ZH of the Principal Act. Sub-clause (1) provides that no legal proceedings will lie against nurses as well as the other persons described if, in the course of conducting a forensic procedure pursuant to section 464R, or pursuant to a court order, or following the giving of consent a sample is voluntarily provided in accordance with sections 464ZGB to 464ZGD, the conduct of the procedure was properly and necessarily done. Sub-clause (2) inserts new section 585(2) into

the Principal Act. Section 585(2) provides that it is the intention of clause 29(1) of the Bill to alter or vary section 85 of the **Constitution Act 1975**.

**Clause 30** inserts a new section 589 into the Principal Act. Section 589 inserts the transitional provisions for the amendments made by Part 4 of the Bill to the Principal Act.

**Clause 31** inserts a new Schedule 8 into the Principal Act which specifies the offences which are forensic sample offences.