

# FACT SHEET

## For Lawyers



**IMPORTANT – This Document only provides general information.**

**It is not intended to be a substitute for you getting your own specific legal advice.**

## People with intellectual disability under arrest

### What the Police must do for people with intellectual disability at the station

Police are required to follow certain procedures when a person they have detained has an intellectual disability, so it is in the person's interests to tell the Police they have an intellectual disability, or for someone to do so on their behalf. These procedures are contained in the ***Criminal Procedure Act 1986 (NSW), NSW Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME), Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and Law Enforcement (Powers and Responsibilities) Regulations 2005 (NSW)***.

According to CRIME if a person has an intellectual disability, then they are considered to be a "vulnerable person" and steps need to be taken to get a support person for them and other adjustments made to the interview and custody process. CRIME states that "[i]f the custody manager suspects the person is a vulnerable person immediate steps will be taken to contact a support person".

Also, the ***Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*** and ***Law Enforcement (Powers and Responsibilities) Regulations 2005 (NSW)*** have provisions that require police to modify the way they conduct investigations, questioning and interviews (including allowing a support person to be present) where they are aware that the person being investigated has an intellectual disability.

## **The accused's right to a support person**

In order to comply with CRIME and the legislation, the Custody Manager at the Police station must organise for the accused with intellectual disability (**the vulnerable person**) to have a support person present with them at the Police station and during any Police interview.

## **Police responsibilities**

The Custody Manager must inform the support person that they can assist the person with intellectual disability and ensure that the interview is conducted properly and fairly, and that they should identify any communication problems that arise.

Police must also ensure that the detained person understands the warning the Police give about the right to remain silent. This warning is sometimes referred to as the caution. This might require the Custody Manager to repeat the caution, explaining it in different terms or asking the support person to help explain it.

## **Excluding evidence in court**

Where there is any doubt about whether an accused with intellectual disability understands the caution, or about the fairness of questioning or an interview or about whether a confession is genuinely voluntary, the accused's lawyer can ask the court to exclude the evidence.

Confessions by an accused with intellectual disability to Police may be unreliable or not genuinely voluntary for a number of reasons, including the accused's:

- willingness to please authority figures
- failure to understand questions
- failure to understand the caution
- desire to 'get it over with' and leave the Police station quickly.

While CRIME is not legally enforceable, it can be taken into account by a court in deciding whether to exclude evidence or a confession given by a person with intellectual disability.

## **Forensic procedures and requests for samples**

Under the Crimes (Forensic Procedures) Act 2000 (NSW) police have wide powers to obtain forensic samples from suspects and prisoners. Samples include saliva from mouth swabs, fingerprints, hair strands and photographs of parts of a person's body. With advances in DNA technology, these samples can be useful for police to help with investigations into unsolved crimes. However, obtaining forensic samples can be very invasive and traumatic for a person with intellectual disability.

There are two main ways that police can take a forensic sample – with the informed consent of the person, or with an order of the Court. Also, different rules apply depending upon whether the forensic procedure is non-intimate or intimate.

## **Forensic procedures with the informed consent of the person**

Any forensic procedure can be carried out with the informed consent of a person. However, the legislation says that children and "mentally incapable" people cannot give their consent. If police want to take a forensic sample from a person with intellectual disability the prudent course is to seek an order of the Court to do so as it may be that they are not able to give an informed consent.

'Informed consent' carries with it a requirement that police inform the person of their rights and, in particular, the fact that the forensic procedure may produce evidence against that person which could be used in court.

If the person is an Aboriginal or Torres Strait Islander, the police must notify an Aboriginal legal aid service, and must not ask the person to consent without an interview friend being present, unless the person expressly waives the right to have an interview friend.

## **'Non-intimate' forensic procedures**

Forensic procedures are divided into 'intimate' and 'non-intimate' procedures. Non-intimate forensic procedures include:

- examining, photographing, taking a swab or sample or cast or impression or measurement of part of the body other than the genitals, buttocks, or (in the case of a woman) the breasts
- taking a sample of hair other than pubic hair
- taking a sample of or from under a nail
- taking a hand print, fingerprint, foot print, or toe print.

A senior police officer (of the rank of sergeant or above) can order the making of a non-intimate forensic procedure on a person if the senior police officer is satisfied that:

1. the person is a suspect and is under arrest;
2. the suspect is not a child or a "mentally incapable" person;
3. there are reasonable grounds to believe that the suspect committed an indictable;
4. there are reasonable grounds for believing that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the offence; and
5. the carrying out of the forensic procedure without consent is justified in all the circumstances.

## **Intimate forensic procedures**

Intimate forensic procedures include:

- examining, photographing, taking a swab or sample from the genitals, buttocks or (in the case of a woman) breasts
- taking a sample of blood, taking of a sample of saliva other than by a mouth swab

- taking a sample of pubic hair
- taking a dental impression

Intimate forensic procedures can only be carried by order of a Magistrate or other authorised justice, after a hearing at which the person must normally be present. Before making such an order, the Magistrate must be satisfied of the following:

1. that the person is a suspect (defined as meaning someone who has been arrested or charged with the offence, or whom the police reasonably suspect of having committed the offence);
2. that there were reasonable grounds to believe that the suspect had committed a prescribed (i.e. indictable) offence or a related offence;
3. that there were reasonable grounds to believe that the particular forensic procedure might produce evidence tending to confirm or disprove that the suspect had committed the offence of which he or she was suspected; and
4. that the carrying out of the forensic procedure was justified in all the circumstances

The Magistrate must make a finding that each of these matters has been established before an order can be made. In particular, the Magistrate must make a specific finding that there are reasonable grounds for believing that the suspect has committed the offence.

## **Carrying out forensic procedures**

A forensic procedure must be carried out in circumstances affording reasonable privacy to the person undergoing the procedure and must be carried out in accordance with appropriate medical standards.

A forensic procedure may only be carried out by an authorised person. The Crimes (Forensic Procedures) Act 2000 (NSW) contains a list of all forensic procedures and

the persons authorised to carry out those procedures. These are generally medical practitioners, nurses, dentists, and in some circumstances, police officers.

If practicable, an intimate forensic procedure (other than the taking of a dental impression or an x-ray) is to be carried out by a person of the same sex as the person undergoing the procedure. A non-intimate forensic procedure for which the person must remove clothing that covers intimate parts of the body is also to be carried out by a person of the same sex.

All forensic procedures on suspects or charged persons under 15 years of age must be carried out in the presence of a parent, or if both parents are unavailable, an independent witness over 18 years of age who is not a police officer and is not the suspect or charged person's parent.

Police officers may be present during the carrying out of forensic procedures for the purposes of safety, security, continuity of evidence, investigation and the effective carrying out of the procedure in accordance with the Crimes (Forensic Procedures) Act 2000 (NSW).

#### Forensic procedures and prisoners

There are provisions in the Crimes (Forensic Procedures) Act 2000 (NSW) that apply to 'serious indictable offenders' – that is, prisoners who are serving sentences for offences which carry a maximum penalty of 5 years or more. Police officers are given the power to make an order that a sample of hair (other than pubic hair) or a hand print, fingerprint, foot print or toe print be taken from a serious indictable offender in prison. A Magistrate's order is required for the taking of a sample of blood or a mouth swab from a prisoner.

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