

Victims of Crime Assistance and Other Legislation Amendment Bill 2023

Explanatory Notes

For

Amendments to be moved during consideration in detail by the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence

Title of the Bill

Victims of Crime Assistance and Other Legislation Amendment Bill 2023

Objectives of the Amendments

The Queensland Government has committed to implementing the recommendations from the Commission of Inquiry into Forensic DNA Testing in Queensland (2022 Commission of Inquiry) and Commission of Inquiry to examine DNA Project 13 concerns (Project 13 Commission of Inquiry) (together, Commissions of Inquiry), to ensure transparency and restore public confidence in Queensland's forensic service framework. This includes establishing a legislative framework for Forensic Science Queensland's provision of forensic services that supports the administration of criminal justice.

The amendments will amend the *Police Powers and Responsibilities Act 2000* (PPRA) to ensure sufficient processing time for current DNA samples and to support implementation of the recommendations from the Commissions of Inquiry in relation to historical case review.

Overview of the PPRA

The PPRA provides powers to take and analyse several categories of samples. These categories include samples obtained from crime scenes and exhibits, and DNA samples from victims and suspects.

Section 490(1) of the PPRA requires DNA samples and results of DNA analyses (collectively referred to as 'DNA material') taken from a person suspected of committing an indictable offence

to be destroyed within a reasonably practicable time after the end of one year from specified events. Section 490(1)(d) requires the DNA material to be destroyed after one year from the date the sample is taken if no proceedings for an indictable offence have commenced. Sections 490(1)(a) to (c) require DNA material to be destroyed where an arrest or proceeding is discontinued or where proceedings commence and a person is found not guilty. In these circumstances, DNA material must be destroyed after one year from the discontinued arrest, discontinued proceeding, or not guilty finding.

Sections 490(2) to (5) of the PPRA outline circumstances where the destruction requirements under section 490(1) do not apply, including if a person has been found guilty of another indictable offence, or if the person has been proceeded against for another indictable offence.

Testing backlog

Forensic Science Queensland is currently experiencing a substantial backlog in crime scene sample DNA processing and reporting. Processing crime scene samples is typically more challenging and time consuming than processing reference samples, such as those taken from suspects. This is because crime scene samples may contain lower and/or degraded amounts of DNA.

Processing times for these samples increased significantly from the time the 2022 Commission of Inquiry commenced on 13 June 2022. Forensic Science Queensland was immediately impacted by resourcing challenges associated with the diversion of staff to assist the Commission of Inquiry and the later implementation of its recommendations.

Processing times for many cases in this backlog are expected to exceed one year. Some have already exceeded this timeframe.

Without crime scene samples being processed, the reference samples obtained from suspects under chapter 17 of the PPRA, which are associated with the crime scene samples, cannot be used for elimination or comparative analysis purposes. Due to the testing backlog, DNA material from suspects in serious criminal offences will approach the timeframe for destruction under section 490(1)(d) of the PPRA before they can be compared against crime scene samples.

The objective of the amendments is to ensure that testing delays do not adversely impact current investigations into serious criminal offences. If the PPRA is not amended, there is a significant risk that a suspect's DNA material will need to be destroyed before it can be compared to the relevant crime scene evidence to inform further investigations or decisions to bring proceedings. Destruction of this DNA material may result in proceedings against likely suspects never eventuating.

Reviews of historical cases

Queensland Health has identified historical DNA material that was retained in contravention of the PPRA destruction requirements. This material could be relevant to conducting reviews of historical cases as recommended by the Commissions of Inquiry. All historical records that have been identified to date are hard copy records of analyses.

Recommendations 13, 14, 17, 44 to 46, 105 and 106 from the 2022 Commission of Inquiry's final report and recommendations 1 and 2 of the Project 13 Commission of Inquiry's final report relate

to consideration of historical case reviews of DNA material for cohorts previously subjected to potential sub-optimal DNA analyses. For example:

- recommendation 13 of the 2022 Commission of Inquiry provides that priority 1 or major crime cases that include a sample or samples reported as ‘DNA insufficient for further processing’ since 2018 should be subject to further testing, analysis, or interpretation; and
- recommendation 1 of the Project 13 Commission of Inquiry final report requires the retrospective review of historical cases between 29 October 2007 and 21 November 2016 processed using a particular automated DNA extraction process.

The purpose of conducting reviews of historical cases is to determine whether further DNA information probative to the case is available. Such new information may identify suspects and support the initiation of new proceedings, or justify re-opening of criminal proceedings that lead to findings of guilt or support appeals against guilty convictions.

The destruction of historical DNA material in accordance with section 490 of the PPRA may affect the comprehensiveness of historical case reviews and result in a failure to identify suspects, impacting prospects of new prosecutions. Destroying DNA material may also mean suspects cannot be eliminated from an investigation.

The historical case review process may involve retesting of previously extracted DNA samples or reanalysis of case evidence to produce new DNA results, with subsequent comparison of any new DNA results obtained against historical DNA material. The historical case review process may identify that the DNA obtained from the crime scene or victim matches the DNA on the suspect’s historical DNA record therefore assisting with any decision about initiating proceedings. Crime scene and victim samples have been obtained in accordance with the PPRA and the PPRA does not include specific requirements for their destruction.

The objective of the amendments is to permit the retention of historical DNA material to ensure all available information can be used to comprehensively conduct reviews of historical cases.

Achievement of the Objectives

Testing backlog

The amendments provide that any DNA sample obtained from a suspect between 13 June 2022 and 13 June 2025, and any associated results of DNA analyses, may be kept for up to three years from when the sample is obtained if a proceeding for an indictable offence has not commenced. This will allow Forensic Science Queensland an additional two years to test crime scene samples and compare them against DNA material from suspects.

However, if a person is arrested or a proceeding against the person suspected of committing an indictable offence commences before the end of the three years from when the sample is obtained, the destruction requirements under section 490(1)(a) to (c) will continue to apply. That is, the DNA material will need to be destroyed within a reasonably practicable time after the end of one year from:

- the person’s arrest being discontinued; or
- the proceeding being discontinued before a court; or

- the person being found not guilty, including on appeal.

The amendments do not alter the exemptions to destruction requirements in section 490(2) to (5) of the PPRA.

The amendments do not affect destruction requirements outlined elsewhere in section 490. For example, under section 490 there is no requirement to destroy DNA material if a person is found guilty of an indictable offence.

The amendments provide that the retention of DNA material already held longer than 12 months due to the backlog is declared to have always been valid and lawful, as if the amendments were in force when the destruction of the DNA material was required. The amendments also make clear that the use of DNA material held longer than 12 months, due to the backlog in processing, for evidence or another purpose in a proceeding for an indictable offence is valid and lawful. This ensures DNA material that has been retained in contravention of section 490 at the time the amendments commence can be validly retained and used.

Reviews of historical cases

The Bill retrospectively authorises the retention of historical DNA material relating to samples obtained from a suspect between 1 January 2007 and 12 June 2022 that were not destroyed in accordance with section 490 of the PPRA. The 1 January 2007 date ensures samples that were tested on or after 29 October 2007 can be retained as some samples would have been collected prior to this date. Various categories of samples dating from 29 October 2007 onward have been identified by the Commissions of Inquiry as potentially impacted by sub-optimal DNA analyses.

The amendments allow the DNA material to be retained for three years from when the amendments commence. The DNA material that is retained can be dealt with under chapter 17 of the PPRA as if it was not required to be destroyed under section 490. This will, for example, allow parties authorised under the PPRA to use historical DNA material to compare with results of other DNA analyses such as crime scene samples under section 489(1)(e). It would also allow results of analysis to be included on the QDNA database under section 489(1)(d).

If, within the three-year period, a person is arrested for an indictable offence or a proceeding for an indictable offence is started, the destruction requirements under section 490(1)(a) to (c) will apply. That is, the DNA material may be retained until a reasonably practicable time after the end of one year from:

- the person's arrest being discontinued; or
- the proceeding being discontinued before a court; or
- the person being found not guilty, including on appeal.

These destruction requirements apply to an arrest, discontinuance or proceeding that occurs after the amendments commence.

The amendments do not alter the exemptions to destruction requirements in section 490(2) to (5) of the PPRA, or require destruction of DNA material of a person who is found guilty of an indictable offence.

The amendments provide that the retention of historical DNA material is declared to have always been valid and lawful, as if the amendments were in force when the destruction of the DNA material was required. The amendments also make clear that using the historical DNA material for evidence or another purpose in a proceeding for an indictable offence is valid and lawful. This ensures that historical DNA material that has been retained in contravention of section 490 at the time the amendments commenced can be validly retained and used.

Alternative Ways of Achieving Policy Objectives

There are no other ways of achieving the policy objectives. If legislative amendments are not progressed, DNA material relevant to current and historical cases may need to be destroyed before it can be used in investigations and proceedings.

Estimated Cost for Government Implementation

On 15 December 2022, the Queensland Government announced an initial funding investment of more than \$95 million towards the implementation of the 2022 Commission of Inquiry's findings, including the implementation of historical case review.

In September 2023, the Queensland Government approved an additional \$75.1 million investment over four years to continue progress in implementing the 2022 Commission of Inquiry's recommendations. This includes funding to support a range of initiatives, including forensic infrastructure and equipment upgrades, implementation of a 'case management' investigation approach and historical review of cases potentially affected by sub-optimal DNA analysis.

Consistency with Fundamental Legislative Principles

The amendments have been drafted with regard to the fundamental legislative principles in the *Legislative Standards Act 1992*. All potential departures have been carefully considered and wherever possible, the impact of the potential departures have been minimised.

The potential departures are considered justified to improve the justice outcomes of Queenslanders, maintain public confidence in the criminal justice system and deliver recommendations from the Commissions of Inquiry.

Right to privacy and confidentiality

Section 4(2)(a) of the Legislative Standards Act provides that legislation must have sufficient regard to the rights and liberties of individuals. The Scrutiny of Legislation Committee has noted that the right to privacy is relevant to whether legislation has sufficient regard to the rights and liberties of individuals.

New section 490A provides that DNA material impacted by the testing backlog may be retained for three years from when the sample is taken. New section 490B authorises the continued retention of historical DNA material for up to three years from when the amendments commence.

DNA material contains identifying information and other potentially sensitive information about an individual. The continued retention of DNA material, as well as the use and sharing of this information, may impact a suspect's right to privacy.

Legislation regulating the retention of DNA material must adequately balance the forensic use of DNA for law enforcement and administration of justice purposes, and the protection of an individual's right to privacy. This requires consideration of whether an investigative measure is so adverse to the suspected individual, that it outweighs the public interest and the rights of victims of crime.

DNA material can be crucial in identifying a suspect in criminal cases and informing investigations and prosecutions. DNA profiles of suspects are used to compare with profiles stored on relevant databases, or profiles generated from crime scene samples, to assist the Queensland Police Service and Forensic Science Queensland to determine whether evidence can be linked to a suspect or eliminate a suspect.

The retention of a DNA sample and the DNA profile record generated from it during a specific investigation is considered a proportionate response to support criminal investigations, so long as the retention does not constitute a disproportionate interference with a suspect's rights.

To date, retained historical DNA material that has been identified pertains to hard copy records of DNA analyses and not DNA samples. These retained hard copy records of DNA analyses relate to reference samples, which generally produce high quality results due to the DNA sampling methodology. These records will therefore generally contain robust and reliable results that may assist an investigation or proceeding.

The amendments achieve a legitimate purpose of supporting law enforcement, building public confidence in the justice system, and protecting victims' rights. It is in the public interest that current case investigations are not impacted by testing backlogs and historical case reviews recommended by the Commissions of Inquiry are conducted as thoroughly as possible. The amendments ensure that a suspect's DNA material is not destroyed before it can be compared against crime scene evidence, and used to inform investigations or prosecutions in current and historical cases.

The amendments set clear limitations on the duration and scope of the retention, and do not authorise a blanket or indiscriminate power to retain DNA material of persons suspected of convicting an indictable offence. Clause 4C specifies that DNA material impacted by the testing backlog must be destroyed within three years of the DNA sample collection. Clause 4C also specifies that historical DNA material must be destroyed within three years from the commencement of the provisions if a proceeding for an indictable offence has not been brought in this time. Forensic Science Queensland and the Queensland Police Service may implement operational procedures to specify further requirements for when historical DNA material must be destroyed as long as they are consistent with the provision.

There are also a range of safeguards and oversight mechanisms to ensure sensitive information of suspects is handled appropriately, including restrictions on who can access DNA information, how it can be used, and consequences for unauthorised use. This includes the *Information Privacy Act 2009* and public sector codes of conduct. In addition, if the *Information Privacy and Other Legislation Amendment Bill 2023* is passed by the Legislative

Assembly, it will put beyond doubt that the use and disclosure of genetic information is protected by the privacy principles in the Information Privacy Act.

Confidentiality obligations in various pieces of legislation provide further safeguards for the privacy of individuals involved. Forensic Science Queensland, Queensland Police Service and other public sector employees who will be responsible for conducting reviews of historical cases and investigations into current cases are bound by confidentiality obligations and only authorised to use or disclose confidential information as permitted under legislation. For example, section 532 of the PPRA and section 142 of the *Hospital and Health Boards Act 2011* create offences for the inappropriate disclosure of confidential information. They have respective maximum penalties of 2 years imprisonment and 100 penalty units. Chapter 17 of the PPRA also contains provisions to safeguard DNA material to ensure it is not misused and is only used for its intended purpose.

Nothing in the Bill prevents DNA material being destroyed earlier than the three-year review timeframe including, for example, where historical material is identified as being out of scope for review, or if it is determined that DNA evidence is not probative in a particular case.

Whether the legislation adversely affects rights and liberties of individuals, or imposes obligations, retrospectively (Legislative Standards Act 1992, s 4(3)(g))

Section 4(3)(g) of the Legislative Standards Act provides that one of the factors in determining whether legislation has sufficient regard to the rights and liberties of individuals is whether it adversely affects rights and liberties or imposes obligations retrospectively.

This fundamental legislative principle reflects the common law presumption that Parliament intends legislation to operate prospectively rather than retrospectively. However, this presumption in no way limits the sovereignty of parliament to legislate retrospectively and the presumption can be displaced if the legislation expressly states an intention to apply retrospectively or if the intention is clearly implied in the words of the statute.

The amendments retrospectively authorise the retention of historical DNA material to facilitate use of DNA material affected by the Forensic Science Queensland testing backlog or potentially in scope for historical case review. This authorises the retention of DNA material that otherwise should have been destroyed in accordance with the requirements under section 490 of the PPRA. This adversely affects the rights and liberties of suspects, because it engages the right to privacy as outlined above.

The privacy rights of suspects must be weighed against the interest of victims and the community. The amendments to the PPRA are necessary to ensure investigations into serious criminal offences are not impacted by testing backlogs and that historical case reviews can be conducted with all available information. The amendments do not authorise the indefinite retention of DNA material and prescribe time limits for when DNA material must be destroyed.

Importantly, DNA material that is retained may benefit the suspected individual, as it may be used to eliminate them from an investigation.

In addition, the legislation does not limit rights and liberties of individuals in relation to criminal proceedings. Any new or re-opened proceedings, or appeals will be conducted in accordance with the law.

The wider public interest, including the interests of victims of crime, and the interests of justice more generally, justifies the any limits to the rights and liberties of individuals resulting from the amendments' retrospectivity.

Consultation

External stakeholders were not consulted during development of the amendments due to the urgent need to amend PPRA to ensure DNA material relating to current and historical cases can be retained to inform historical case review, current case investigations, and prosecutions. The amendments contain important safeguards and strike an appropriate balance between the need to maintain public confidence in the criminal justice system while upholding fundamental legislative principles.

Consistency with legislation of other jurisdictions

While all Australian states and territories have legislation relating to the management and retention of DNA material, the amendments are specific to the current forensic testing landscape in Queensland.

Notes on provisions

Amendment of the Police Powers and Responsibilities Act 2000

Amendment 1 inserts part 2A (Amendment of the Police Powers and Responsibilities Act 2000) in the Victims of Crime Assistance and Other Legislation Amendment Bill 2023.

Part 2A consists of clauses 4A to 4E.

Act amended

Clause 4A states that part 2A amends the *Police Powers and Responsibilities Act 2000*.

Amendment of s 490 (When DNA sample taken from suspected person and results must be destroyed)

Clause 4B amends section 490 of the Police Powers and Responsibilities Act to clarify that section 490 applies subject to new sections 490A and 490B.

Insertion of new ss 490A and 490B

Clause 4C inserts new sections 490A and 490B in the Police Powers and Responsibilities Act.

Section 490A modifies the destruction timeframes in section 490 of the Police Powers and Responsibilities Act for analysing particular DNA samples. Section 490 states a DNA sample taken from a person suspected of having committed an indictable offence, and the results of a DNA analysis of the sample, must be destroyed within a reasonably practicable time after the end of one year from particular events. Section 490(1)(d) provides that if a proceeding for the indictable offence is not started within one year after the sample is taken, the DNA sample and results of analysis must be destroyed within a reasonably practicable time after the end of one year from the day the sample is taken.

Section 490A(1) provides that modified destruction timeframes apply in relation to a DNA sample and the results of a DNA analysis of the sample if:

- the sample is taken from a person suspected of having committed an indictable offence; and
- the sample is taken during the period starting at the beginning of the day on 13 June 2022 and ending at the end of the day on 13 June 2025.

Section 490A(2) modifies the application of section 490(1)(d) in relation to these samples. It provides that if a proceeding for an indictable offence is not started within three years after the

DNA sample is taken, the sample and results of analysis must be destroyed as soon as reasonably practicable after the end of three years from when the sample is taken.

Section 490A(3) provides that a reference in the Police Powers and Responsibilities Act or another Act to section 490 includes a reference to new section 490A, if the context permits.

Section 490B modifies powers and destruction requirements for review of particular DNA samples.

Section 490B(1) provides that the modified powers and destruction requirements apply in relation to a DNA sample and the results of a DNA analysis of the sample if:

- the sample was taken from a person suspected of having committed an indictable offence (the *relevant offence*); and
- the sample was taken during the period starting at the beginning of the day on 1 January 2007 and ending at the end of the day on 12 June 2022; and
- immediately before the review period started, the DNA sample and results were required to be destroyed under section 490 but had not been destroyed as required.

Review period is defined in section 490B(7) as the period starting on the commencement and ending on the day that is three years after the commencement. Under section 32F of the *Acts Interpretation Act 1954* commencement means the time that section 490B comes into operation.

Sections 490B(2) and (3) modify the application of section 490 in relation to these samples and clarify the powers that apply to the samples.

Section 490B(2) provides that the DNA samples and results are not required to be destroyed other than under section 490B. It also provides that they may be dealt with under chapter 17 of the Police Powers and Responsibilities Act as if they were not required to be destroyed other than under section 490B.

Section 490B(3)(a) provides that if a circumstance mentioned in section 490(1)(a), (b) or (c) occurs in relation to the relevant offence after the review period starts, the DNA sample and results must be destroyed within a reasonably practicable time after the end of one year from the day mentioned in the relevant paragraph. The specified days are:

- for section 490(1)(a), which applies if an arrest for the offence is discontinued under particular sections – the day the arrest is discontinued (the reference to section 379(6) in section 490(1)(a) will be updated when section 27 of the *Police Powers and Responsibilities and Other Legislation Amendment Act (No. 2) 2023* commences);
- for section 490(1)(b), which applies if a proceeding for the offence is discontinued before a court – the day the proceeding is discontinued; and
- for section 490(1)(c), which applies if a person is found not guilty of the offence, including on appeal – the day the person is found not guilty of the offence.

Section 490B(3)(b) provides that if a proceeding for the relevant offence is not started before the end of the review period, the DNA sample and results must be destroyed within a reasonably practicable time after the end of the review period.

Section 490B(4) provides that the destruction requirements under section 490B(3) do not apply if, after the review period starts, an excluding circumstance occurs in relation to the DNA sample. *Excluding circumstance*, is defined in section 490B(7) as a circumstance mentioned in section 490(2), (3) or (4) that would have disapplied section 490(1) if that section had applied in relation to the sample. The effect of section 490B(4) is that section 490A(2) does not modify existing exceptions to destroying records.

Section 490B(5) provides that the DNA results may be destroyed in the way mentioned in section 490(5).

Section 490B(6) provides that a reference in the Police Powers and Responsibilities Act or another Act to section 490 includes a reference to section 490B, if the context permits.

Section 490B(7) inserts definitions for *excluding circumstance* and *review period*.

Amendment of ch 24, hdg (Repeals and transitional provisions)

Clause 4D amends the heading of chapter 24 of the Police Powers and Responsibilities Act by omitting ‘Repeals’ and inserting ‘Repeal, validation’.

Insertion of new ch 24, pt 25

Clause 4E inserts new part 25 (Validation provision for Victims of Crime Assistance and Other Legislation Amendment Act 2023) in chapter 25 of the Police Powers and Responsibilities Act. New part 25 consists of new section 898 (Validation for particular DNA samples affected by modifying sections).

Section 898(1) provides that section 898 applies if on the commencement, a modifying section applies in relation to a DNA sample and the results of a DNA analysis of the sample, and immediately before the commencement, the sample and results were required to be destroyed under former section 490(1).

Section 898(2) provides that the keeping of the DNA sample and results is declared to be, and to always have been, as valid and lawful as if the modifying section had been in force when destruction of the DNA sample and results would otherwise have been required under former section 490(1).

Section 898(3) provides that the use of the DNA sample and results in evidence or for any other purpose related to starting, continuing or discontinuing a proceeding for an indictable offence is declared to be, and to always have been, as valid and lawful as if the modifying section had

been in force when the destruction of the sample and results would otherwise have been required under former section 490(1).

Section 898(4) defines *former section 490(1)* and *modifying section* for section 898.

Amendment of long title

Amendment 2 amends the long title of the Victims of Crime and Other Legislation Amendment Bill to include the *Police Powers and Responsibilities Act 2000*.