

8. CRIMINAL DIVISION - INVESTIGATION

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8.1 Search warrants

There are a large number of statutory provisions which empower a judge or magistrate to issue a warrant to search premises (and/or sometimes a person) for particular items. Applications for search warrants are generally supported by an affidavit sworn by a police officer of or above a specified rank and are usually heard in chambers. Most search warrants authorising the search of premises for an item also authorise the arrest of any person found in possession or control of the item. Some of the more common search warrants include:

STATUTORY PROVISION		PURPOSE IS TO BREAK, ENTER & SEARCH PREMISES AND SEIZE
Crimes Act 1958 (Vic)	s.92(1)	stolen goods (includes search of person)
	s.317(9)	explosive substances (includes search of person)
	s.341	any object relevant to the investigation of an offence against a law of a reciprocating State
	s.465	any item of evidence in relation to the commission of an indictable offence
Crimes Act 1914 (Cth)	ss.3E & 3R	" evidential material " in relation to the commission of an offence (may also authorise an ordinary or frisk search of a person suspected to have "evidential material" or "seizable items" in his or her possession)
		[s.3R involves an application by phone or other electronic means]
Customs Act 1901 (Cth)	s.198	" evidential material " other than "forfeited goods" (may also authorise an ordinary or frisk search of a person suspected to have "evidential material" in his or her possession)
	ss.203 & 203M	" forfeited goods " or " special forfeited goods " (may also authorise an ordinary or frisk search of a person suspected to have such items in his or her possession)
		[s.203M involves an application by phone or other electronic means]
Drugs, Poisons & Controlled Substances Act 1981 (Vic)	s.81	drugs , documents or other evidence of the commission of an offence under the Act
Firearms Act 1996 (Vic)	s.146	any evidence in relation to the commission of the firearms offence named in the warrant
Fisheries Act 1995 (Vic)	s.103	<ul style="list-style-type: none"> any evidence of an offence against the Act or anything used in connection with such offence and destroy any aquatic noxious species and any fish believed to be dangerous for consumption by humans or animals at the premises
Lotteries, Gaming & Betting Act 1966 (Vic)	ss.45 & 61	all instruments of gaming and all money and securities found therein or thereon or upon any person
Prostitution Control Act (Vic)	s.63	any item of evidence of the commission of the offence of carrying on business at the premises as a prostitution service provider without holding a licence
The above non-exhaustive summary of legislation in relation to the issuing of search warrants is taken from a much more extensive private research paper [not available to the public] prepared for the magistracy by Magistrate Jennifer Bowles in March 2002.		

In *Director of Public Prosecutions v Marjancevic, Joseph; Preece, Caine; Preece, Nola* [2011] VSCA 355 the respondents were charged with various offences related to drug manufacture and trafficking. Much of the evidence comprising the prosecution case was obtained by the execution of warrants issued under s.81 of the *Drugs, Poisons & Controlled Substances Act 1981* (Vic). During pre-trial argument it emerged that the deponent to certain affidavits in support of the warrants had not sworn as to the truth and accuracy of their content but had merely signed them in the presence of an inspector authorized to take affidavits. The trial judge accordingly found the search warrants were invalid and that the entries, purportedly under warrant, were unlawful and constituted a trespass. The prosecutor applied to have the evidence admitted pursuant to s.138(1) of the *Evidence Act 2008* (Vic). This provides that evidence that was obtained improperly or illegally is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. The trial judge refused the application. The Court of Appeal, applying *DPP v MD*, proceeded on the basis that the exclusion of an admission pursuant to s.138 involves an exercise of discretion which, on appeal, attracts the operation of the principles in *House v The King* (1936) 55 CLR 499. At [54]-[57] the Court of Appeal discussed the nature of an affidavit and the importance of making an affidavit in order to obtain a search warrant. At [58] it said:

“To proffer to a magistrate material which is not sworn or affirmed in order to obtain a search warrant has a tendency to subvert a fundamental principle of our law.”

In granting special leave to appeal but dismissing the appeal the Court of Appeal said at [91]-[92]:

"The [judge's] decision was reasonably open because of the finding that the [deponent's] conduct was deliberate, meaning knowingly illegal, and that the gravity of the impropriety was of a high order.

Although we have concluded that the appeal must be dismissed we would not wish it to be thought that the discretion should necessarily be exercised in the same way were the same issues to arise again for consideration in similar circumstances."

8.2 Records of interview/Confessional statement

It is not uncommon for an accused to seek to have excluded from evidence the whole or part of a confessional statement, that is a statement acknowledging, or from which an acknowledgment might be drawn, that he or she was guilty of the offence charged. A leading authority is *The Queen v Swaffield; Pavic v The Queen* [1998] HCA 1; (1998) 192 CLR 159. In the joint judgment of Toohey, Gaudron & Gummow JJ at [50]-[52] their Honours discerned in decisions of the High Court four bases for the rejection of a statement by an accused person:

[50] "The first lies in the fundamental requirement of the common law that a confessional statement must be voluntary, that is, 'made in the exercise of a free choice to speak or be silent': *R v Lee* (1950) 82 CLR 133 at 149; see also *MacPherson v The Queen* (1981) 147 CLR 512 at 519; *Cleland v The Queen* (1982) 151 CLR 1 at 5; *Collins v The Queen* (1980) 31 ALR 257 at 307. The will of the statement-maker must not have been overborne. The relevant principle was stated by Dixon J in *McDermott v The King* (1948) 76 CLR 501 at 511.

[51] The second, third and fourth bases for the rejection of a statement made by an accused person proceed on the footing that the statement was made voluntarily. Each involves the exercise of a judicial discretion.

[52] The second basis is that it would be unfair to the accused to admit the statement. The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of the accused person. The third basis focuses, not on unfairness to the accused, but on considerations of public policy which make it unacceptable to admit the statement into evidence, notwithstanding that the statement was made voluntarily and that its admission would work no particular unfairness to the accused. The purpose of the discretion which is brought to bear with that emphasis is the protection of the public interest. The fourth basis focuses on the probative value of the statement, there being a power, usually referred to as a discretion, to reject evidence the prejudicial impact of which is greater than its probative value. The purpose of that power or discretion is to guard against a miscarriage of justice."

In *R v Lewis* [2000] 1 VR 290 at [53] the Court of Appeal appears to have added to the four primary rejection bases identified in the above extract from *Swaffield/Pavic* a fifth broad discretion, described as an "overall" discretion, requiring consideration of all of the circumstances.

Swaffield/Pavic has been referred to in a number of subsequent Victorian cases, including *R v Carter* (2000) 1 VR 175; *R v Chimirri* [2002] VSC 555 (Osborn J); *R v Franklin* [1998] VSC 217 (Vincent J); *R v Ghiller*; [2003] VSC 350 (Cummins J); *R v Heaney & Welsh* [1998] 4 VR 636; *R v Juric* [2002] 4 VR 411; *R v Lewis* [Supreme Court of Victoria, unreported, 15/06/1998, Teague J-ruling]; *R v Roba* (2000) 110 A Crim R 245 (Coldrey J); *R v Vale* (2001) A Crim R 322; *R v Malcolm Clarke* [2004] VSC 11 (Kellam J); *R v Mohammed (Ruling)* [2004] VSC 408 (Kaye J); *R v Hassan* [2004] VSC 85 (Redlich J), *R v Mitchell and Brown (Ruling No.1)* [2005] VSC 42 (Whelan J); *R v Tofilau* [2003] VSC 188 (Osborn J). In the last-mentioned case, Osborn J referred - in some instances in considerable detail - to over 30 cases from Australian and other jurisdictions. His Honour's ruling was upheld by the Court of Appeal: [2006] VSCA 40 at [141]-[191] (Vincent JA with whom Callaway & Buchanan JJA agreed). In *R v Hill* [2006] VSCA 41; *R v Clarke* [2006] VSCA 43 and *R v Favata* [2006] VSCA 44 identically constituted Courts of Appeal enunciated the same principles.

See also *R v Marks* [2004] VSC 476 at [57]-[117] where Coldrey J discussed the legal background to the question of the admissibility of confessional material, citing numerous cases in relation to the

issues of basal involuntariness, inducement, reliability and the unfairness and public policy discretions. His Honour's ruling was subsequently upheld by the Court of Appeal: [2006] VSCA 42.

8.2.1 Voluntariness

At common law a confession of crime is only admissible against the person making it if it was voluntary, that is that it was "made in the exercise of a free choice to speak or be silent": *R v Lee* (1950) 82 CLR 133 at 149; *Collins v R* (1980) 31 ALR 257 at 307 [Full Federal Court]. A confession of crime includes any inculpatory statement as well as a full admission of guilt: *Customs and Excise Commissioners v Harz and Power* [1967] 1 AC 760 at 818. The Supreme Court of Canada has, by majority, extended this to include exculpatory statements: *Piche v R* (1970) 11 DLR (3d) 709. The onus of proof in establishing voluntariness is borne by the Crown on the balance of probabilities: *Wendo v R* (1963) 109 CLR 559. The common law principle was stated thus by Dixon J in *McDermott v The King* (1948) 76 CLR 501 at 511-512:

"At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement was made: per Cave J in *R v Thompson* (1893) 2 QBD 12 at 17. The expression 'person in authority' includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority (*Ibrahim v The King* [1918] 1 KB at 537-538; *R v Voisin* [1914] AC at 609, 610). That is the classical ground for the rejection of confessions and looms largest in a consideration of the subject."

In *R v Thomas* [2006] VSCA 165 at [66] the Court of Appeal (Maxwell P, Buchanan & Vincent JJA) said of this dictum: "What his Honour said was adopted by a unanimous court in *R v Lee* (1950) 82 CLR 133 at 144 and has continued to be applied ever since." At [67] the Court of Appeal noted that the principle "represented an aspect of a very carefully constructed balance between the respective rights and obligations of the State and the individual and have been developed to ensure that reliability and integrity is maintained in a system directed to the protection of the rights of both the community and the individual and to the advancement of the interests of justice." See also *R v Tofilau* [2006] VSCA 40 at [152].

In *R v Li* [1993] 2 VR 80 at 87, in excluding a record of interview as involuntary, Coldrey J said:

"The breadth of the concept of voluntariness is often misunderstood. In my view it extends to and encompasses the situation where answers are given by an accused person who lacks understanding that such questions need not be answered, and, as a result, feels compelled to participate in the interview process. In such circumstances, the interview will be non-voluntary. This is so even though the interview itself may be conducted in an ostensibly co-operative fashion."

In *R v Thomas* [2006] VSCA 165 at [89] the Court of Appeal adopted dicta from *R v Tofilau* [2006] VSCA 40 at [155] about what constituted "free choice" for determining whether or not an individual's confessional statement was voluntary:

"There are almost certainly, in any given situation, a multiplicity of situational and psychological factors operating on the mind of an individual when considering whether anything and, if so what, should be said about a matter that may affect them or others around them. The notion of a free choice does not require an absence of possible benefits or detriments upon which the will may operate, but the absence of pressure that overbears the individual's will thereby restricting the available choices or the manner of their exercise."

The common law doctrine in relation to "voluntariness" has now been enshrined in s.84 of the Evidence Act 2008 which provides:

- “(1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by-
 - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
 - (b) a threat of conduct of that kind.
- (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.”

In *R v Aujla & anor* [2012] VSC 213 at [4] T Forrest J summarized the legal principles inherent in s.84:

- “(i) Once the issue of voluntariness is raised the onus rests with the prosecution to demonstrate that the admissions were not influenced by violent, oppressive, inhuman or degrading conduct or a threat of that kind.
- (ii) Oppressive conduct is not limited to physical or threatened physical conduct. It may involve mental or psychological pressure and may also involve a combination of factors: *Higgins v The Queen* [2007] NSWCCA 56 at [26].
- (iii) Causation is critical however. Perceived psychological pressure that is either predicament related, or related to subjective factors peculiar to the suspect being interviewed cannot be the product of oppressive conduct: See for example *The Queen v Tang* [2010] VSC 578.”

Applying these principles his Honour held that the admissions made by the accused were not influenced by any violent, oppressive, degrading or inhuman conduct or threats of same by any police officer and hence were admissible in evidence.

8.2.2 Regulation of conduct by investigating official

Sections 464A-H of the Crimes Act 1958 (Vic) regulate the conduct by an investigating official of questioning or an investigation under ss.464A(2) or 464B(5) of a person (including a child) in custody who is suspected of having committed an offence. A member of the Australian Federal Police is not an 'investigating official' within subdiv. (30A) although in certain circumstances he or she may have the powers and duties of one: *R v Fruginet & Fruginet* [1999] 2 VR 297 at 308-11.

8.2.3 Tape-recording of confessions and admissions

This is generally mandatory for an indictable offence and is regulated by s.464H. Section 464H(1) provides that, subject to the exceptional exceptions in s.464H(2), evidence of a confession or admission made to an investigating official by a person who-

- (a) was suspected; or
 - (b) ought reasonably to have been suspected-
- of having committed an offence is inadmissible against the person in proceedings for an indictable offence unless if the confession or admission was made-
- (c) before the commencement of questioning, it was tape-recorded or its substance was confirmed by the person and the confirmation was tape-recorded; or
 - (d) during questioning at a place where facilities were available to conduct an interview, the questioning and anything said by the person was tape-recorded; or
 - (e) during questioning at a place where facilities were not available to conduct an interview, the questioning and anything said by the person was tape-recorded or the substance of the confession or admission was confirmed by the person and confirmation was tape-recorded; or
 - (f) during questioning in accordance with an order made under s.464B(5), the questioning and anything said by the person was video-recorded-
- and the tape-recording or video-recording is available to be tendered in evidence.

8.2.4 Whether the person in custody is a 'suspect'

The question of whether or not a person in custody is a 'suspect' for the purposes of ss.464H(1) - and thus of 464A(2) – was discussed in detail by the Court of Criminal Appeal in *R v Heaney* [1992] 2 VR 531 at 547-8:

"The question of the meaning of the words 'a person who was suspected or ought reasonably to have been suspected' was considered by the [trial] judge. His Honour considered *George v Rockett* (1990) 83 ALR 485, *Walsh v Loughnan* [1991] 2 VR 351 and a ruling given by Hampel J on 27/03/1990 in *R v Redenbach and Ors*. In *Redenbach*, Hampel observed: '

'I don't think that for the purpose of categorizing a person as a suspect one has to go further than to take the view that there are circumstances which tend to arouse suspicion of complicity. It doesn't have to be supported by objective direct evidence. The Act seeks to protect persons who are suspected of committing certain offences from interrogation contrary to the provisions of [s.464H]. The whole purpose of this legislation is to ensure that if the person moves from the position of being a suspect to a position of being an accused, the Court has before it information in the form which renders *voir dire*s unnecessary in most cases.'

In *George v Rockett* the High Court, in drawing a distinction between 'suspicion and belief' as a state of mind, stated that 'it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person', at p.488.

The distinction between suspicion and belief as a state of mind was analysed by Vincent J in *Walsh v Loughnan*, at pp.356-7: 'Although the creation of a suspicion requires a lesser factual basis than the creation of a belief, it must, nonetheless, be built upon some factual foundation.'

In our opinion, that observation is plainly correct. The section is not concerned with a state of mind founded upon speculation or 'mere idle wondering' (Kitto J in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, at p.303) but is concerned with a state of mind arrived upon consideration of known facts out of which an apprehension that a person might possibly have committed an offence is created." '

In *R v Alexander* [1994] 2 VR 249 at 255-6 the Court of Criminal Appeal approved and applied the above dicta and held: "In the ebb and flow of preliminary enquiry, mere advertence of an investigating officer to the possibility of a person having committed an offence falls far short of the purview of s.464H(1)(a) and (b)." See also *Pollard v R* (1992) 176 CLR 177 discussed below. See *R v Cuong Quoc Lam & Ors* [2004] VSC 469 and *R v Laracy* [2007] VSC 19 for instances of cases in which the accused was a witness, not a suspect, at the time a statement was taken.

8.2.5 Questioning within reasonable time, information about offence and right to silence

Section 464A(1) provides: "Every person taken into custody for an offence (whether committed in Victoria or elsewhere) must be—

- (a) released unconditionally; or
 - (b) released on bail; or
 - (c) brought before a bail justice or the Magistrates' Court—
- within a reasonable time of being taken into custody."

Section 464A(2) provides that if a person suspected of having committed an offence is in custody for that offence, an investigating official may, within a reasonable time (referred to in s.464A(1))-

- (a) inform the person of the circumstances of the offence; and
- (b) question the person or carry out investigations in which the person participates in order to determine the involvement (if any) of the person in that offence.

In determining what constitutes a 'reasonable time', the 12 matters set out in s.464A(4) may be considered. See also *R v Saxon* [1998] 1 VR 503 at 514-21; *DPP v Karen Hollis (a pseudonym) & Alex Hull (a pseudonym)* [2019] VSCA 110 at [10]-[13].

Section 464A(3) requires that before any questioning (other than the person's name and address) or investigation under s.464A(2) is commenced, an investigating official must inform the suspect that he or she does not have to say or do anything but that anything the suspect does say or do may be given in evidence.

In *R v Lancaster* [1998] 4 VR 550 the Court of Appeal construed s.464A(2) as follows-

- at 555 per Tadgell JA with whom Winneke P agreed: Section 464A(2)(a) "should be read as a kind of proviso" to s.464A(2)(b):

"The information, I consider, must be provided at the latest before the questioning goes too far when the information would become, if not useless, then less useful to the person being questioned than it would be if it were provided at the outset." ' "

- at 557 per Batt JA with whom Winneke P agreed: Questioning pursuant to s.464A(2) may occur lawfully only if, at some stage during custody of the person to be questioned and before the questioning proceeds beyond preliminaries, the information referred to in that section was given: cf. *Pollard v R* (1992) 176 CLR 177 at 195.
- at 557 per Batt JA with whom Winneke P agreed: What is required by s.464A(2) was sufficient information about the circumstances of the offence to enable the suspect both to understand what he is to be asked about or the investigations he is to participate in, and also to make an informed decision concerning his or her rights, such as the right of silence and the right to communicate with a friend, relative or lawyer. The amount and content of the information required will vary from case to case, but it does not require a statement of all the facts of the offending then known to the official nor a statement of the elements of the offence or its name: cf. *R v Vollmer* [1996] 1 VR 95; *R v Roy* [Court of Criminal Appeal, unreported, 16/11/1993]. See also at 555-6 per Tadgell JA.

In *R v Kirk* [2000] WLR 567 police officers had questioned a suspect in relation to an offence of robbery and he admitted to taking the shopping bag. Only then did the police officers tell him that the owner had died of injuries sustained in the incident. He was charged with robbery and manslaughter. On trial for manslaughter the admission was excluded as unfairly obtained, the Court holding that in such circumstances the police should make a suspect aware of the true nature of the investigation in order that he may decide whether or not to exercise his various rights. In *R v Hannah* [unreported, 23/06/1998] the Court of Appeal held that advice to a suspect that police wanted to question him about a fire at his premises at a particular address and how and why it started complied with s.464A(2)(a). In *R v Olden* [2001] VSC 81 at [4] Coldrey J held that a statement by the interviewing police officer: "I intend to interview you about the death of Paul Lisinski" satisfied the requirements of s.464A(2)(a).

In *DPP v Dalton (Ruling No 1)* [2019] VSC 226 Beale J excluded a record of interview and crime scene re-enactments in which accused had participated, describing at [54] the gravity of the illegality of the police behaviour as "being of a high order" and holding at [47]-[48] & [50]:

[47] "In my view, Dalton was illegally detained when she was not released from custody on the night of the 24 October 2017 after the Watson interview. Clearly, the police did not have enough evidence to charge her at that time, a point conceded by the prosecution. Further, she had indicated to Watson a number of times in the course of that interview that she had received advice from her barrister to answer no comment and that she intended to stick to that advice. Whilst Watson and the other detectives may have wanted to gather more information regarding her possible involvement in the killing of Goodwin and to put that information to her in due course, they could not just ignore the protections afforded to her by s 464A, especially given her reliance on the right to silence. In all the circumstances, s464A required them to release her unconditionally on the night of 24 October because to hold her in custody overnight and beyond, was to hold her for more than a reasonable time."

[48] By keeping her in custody overnight and throughout the next two days, there was a real potential for Dalton's right to silence to be undermined, for her to be worn down, whether or not that was the intention of the police at the time. It is not difficult to see how a suspect's resolve to act on her lawyer's advice to answer no comment can be weakened and possibly overcome if the suspect is kept in custody for an extended period of time. As the period of detention wears on, the suspect may well reason that, since silence in response to questioning has not brought about her extrication from police custody, one way or another, the only hope is to start answering questions...

[50] "In summary, I am satisfied that there was a contravention of s 464A(1) and that there was a causal nexus between Dalton's illegal detention and the police obtaining the impugned evidence."

8.2.6 Questioning or investigation of person already held in custody for another matter

This is regulated by s.464B. In particular s.464B(5) empowers the Children's Court to order the transfer of the custody of a child suspect to an applicant investigating official for the purpose of questioning or investigation for a maximum period of time specified in the order, being a reasonable time within which the questioning or investigation may take place. Section 464B(10) provides that for the purposes of s.464B, "child" means a person who at the time of the suspected commission of the

offence was under the age of 18 years but does not include any person who is of or above the age of 19 years at the time of the making of the application for him or her under s.464B. However, it is clear from the decision of Pagone J in *Detective Jason Wallace v Bandali Debs & Anor* [2009] VSC 355 that s.464B only applies to questioning or investigation in relation to "an offence under Victorian law and not to any offence under the laws of any other place, whether another jurisdiction in Australia or elsewhere in the world."

8.2.7 Right to communicate

Section 464C(1) confers a general right on a suspect in custody to communicate with a friend or relative and with a legal practitioner prior to such questioning or investigation.. This right may be abrogated in urgent situations: ss.464C(1)(c)-(d).

Section 464F(1) confers a similar right on a foreign national to communicate with the consular office of the country of which he or she is a citizen.

8.2.8 Right to an interpreter

Section 464D provides that if a person in custody does not have a knowledge of the English language that is sufficient to enable the person to understanding the questioning, an investigating official must, before any questioning or investigation commences, arrange for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present. This provision does not apply to questioning or investigation in connection with a drink-driving offence under s.49(1) of the Road Safety Act 1986 (Vic).

8.2.9 Right of person under 18 to presence of parent, guardian or independent person

Section 464E(1) provides that if a person in custody is under the age of 18 years, an investigating official must not, save for urgent situations referred to in s.464E(2), question or carry out an investigation ss.464A(2) or 464B(5) unless-

- (a) a parent or guardian of the person in custody or, if a parent or guardian is not available, an independent person is present; and
- (b) before the commencement of any questioning or investigation, the investigating official has allowed the person in custody to communicate with his or her parent or guardian or the independent person in circumstances in which as far as practicable the communication will not be overheard.

In *R v JPD* [2002] VSC 202 the investigating police members, "conscious of their obligations" under s.464E, had made some endeavours to secure the attendance of a parent of the accused but "the impression was formed that, for one reason or another, this was unlikely to be arranged" and an independent person was used at the child's interview. Vincent J held that the investigators had acted reasonably and had complied with s.464E. At [7] he said:

"[T]he availability of a parent or guardian is essentially a question of fact but it does involve the assessment of the practicability of arranging attendance in the particular circumstances having regard to the situation of the young person and the investigation. In the present matter, when it appeared that the presence of a parent could not be secured, at least for some time, a clearly appropriate independent person was contacted."

In *DPP v Blake* [1989] 1 WLR 432 the Divisional Court held that the mere presence of an adult who comes within the definition of an appropriate adult but with whom the juvenile has no empathy does not satisfy the English equivalent of s.464E. By contrast, in *R v Cotton* (1990) 19 NSWLR 593 at 595; 48 A Crim R 316, it was held under relevant NSW legislation that the presence of a father who did not have the day to day care of the child and with whom the child was not living nevertheless fulfilled the statutory requirement.

In *H (A Child)* (1996) 85 A Crim R 481 Hidden J discussed the role of an adult attending a child's interview pursuant to the relevant NSW legislation, which is expressed in rather broader terms than s.464E. After citing with approval dicta of Roden J in *Williams* [Supreme Court of NSW, unreported, 09/08/1982], Hidden J said at 486-7:

"The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protect

against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in an interview in the absence of legal advice...Obviously, the right of an adult to intervene in the course of an interview is not unfettered. Police should not be required to tolerate behaviour which is abusive or obstructive. Nor should the adult be permitted to become the child's 'mouthpiece', so that the answers supplied are not really those of the child. Unacceptable behaviour of that kind may justify interviewing police in demanding that the adult leave the interview room. In that event, however, the interview should not continue until the presence of another appropriate adult has been secured".

The role of an independent person in Victoria was discussed by Hampel J in *R v G* [Supreme Court of Victoria, unreported, 22/071994]. G was a 14 year old Aboriginal boy with an IQ of 72 who was on trial for murder. He had made admissions to police in a record of interview. Before the interview G had spoken with a Mr R in the following circumstances, recounted by Hampel J at pp.172-3 of the transcript:

"He had made an admission at the police station...He then spoke to a solicitor whose advice he did not want and probably did not trust, so much so that later he did not even want to have him in the room. He had a private conversation with two men who were to act as independent persons while the accused was to be questioned, or at least one of them was to act in that capacity...The accused would have perceived those two, particularly Mr R, to be people in authority upon whose help he could rely. Mr R was in fact chosen by the accused to sit in on the interview. It was Mr R, during the private conversation, who perceived that the accused may not have realized the seriousness of his position and hoped that Mr R would take him home. Mr R was in fact related to him. The accused had met him before. It was in those circumstances and in that relationship between them that Mr R questioned the accused about the very matter that was to be the subject of the interrogation by the police...It is clear, in my view, that although the accused realized that he did not have to answer questions, he would probably have concluded from what was said to him by Mr R that some help and assistance would be available if he told the truth both to Mr R and the police. He may well have hoped that Mr R would be able to take him home. All this, of course, must be considered by reference to the fact that the accused was a 14 year old boy with an IQ of 72, which is only 3 points above what is classified as intellectually disabled."

Hampel J excluded the record of interview, finding that it was not "voluntary in the legal sense":

"I think what was said to [G] during these private conversations [with Mr R], in the circumstances in which he found himself, and given his age and intellectual capacity, very probably operated as an inducement to answer questions, despite the fact that he had been told, and I think, understood, that he did not have to do so."

At p.175 of the transcript, his Honour also made some observations about the role of independent persons in terms which suggest that an independent person would be wise to make and retain fairly detailed notes of his or her conversation with a young suspect prior to questioning.

"[I]n my view problems will inevitably arise if an accused is questioned by [an independent] person about the crime under investigation and is offered assistance, coupled with advice, particularly about telling the truth. Problems will also arise, as I think they have arisen here, where the independent person is not able to give a fairly full and accurate account of what transpired during the private conversation with the accused once any issue about the effect of such conversations arises."

In *DPP v Toomalatai* [2006] VSC 256 the defendant, who was 16 years and 2 months old, was charged with affray, manslaughter and intentionally or recklessly causing serious injury. His father having declined to attend the interview, police arranged for a Justice of the Peace to attend as an independent person pursuant to s.464E(1) of the Crimes Act 1958 (Vic). In the independent person's presence the police properly cautioned the defendant and then interviewed him. Just before the interview began, the independent person admonished the defendant for being involved in the incident, told him that his father would be devastated and conveyed the impression it would be in the defendant's interests to speak to the police. During the interview the defendant made gushing and reckless admissions about his role in the fight. The independent person was genuinely trying to help the defendant but in the interview he just sat passively by. At [89] Bell J held that admissions made by

the defendant were made voluntarily but that evidence of them should be excluded in the exercise of his judicial discretion on the basis that the failings of the independent person were so serious, the disadvantages faced by the defendant in the interview were so great and the admissions made by him so unreliable that it would be unfair to allow them to be used against him in the trial. At [33]-[34] Bell J held that the independent person was a "person in authority", relying on dicta of Hampel J in the aforementioned case of *R v G* and of Wood J in *R v Dixon* (1992) 28 NSWLR 215 at 229. In the course of his extensive ruling Bell J discussed a number of cases under the following headings:

- [48]-[50]: How failing to comply with a procedural rule affects the exercise of the unfairness discretion.
- [51]-[54]: Failing properly to interrogate children: a short survey of the Australian cases.
- [59]-[64]: What is the proper role of an independent person?
- [65]-[75]: Failing properly to perform the functions of an independent person: a short survey of the Australian cases.

8.2.10 Consequence of failure to comply with the statutory requirements

Non-compliance with any of sections 464A-H of the Crimes Act 1958 (Vic) does not automatically lead to the inadmissibility of any ensuing record of interview: see e.g. *R v Lancaster* [1998] 4 VR 550 at 556 per Batt JA with whom Winneke P. agreed. However, non-compliance does give rise to a common law discretion to exclude the impugned evidence, a discretion discussed in *Bunning v Cross* (1978) 141 CLR 54 which requires the consideration of and the weighing of competing public requirements against each other. As Stephen & Aickin JJ said at p.74:

"...[This] involves no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrong doer, and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."

In *Cleland v R* (1982) 151 CLR 1 at 34 Dawson J explained that the discretion was broader than that discussed in *Bunning v Cross* and had two limbs, ❶ unfairness and ❷ public policy-

"Clearly, if a confessional statement has been obtained by the use of improper or illegal means but nevertheless can be shown to be voluntary, a discretion is exercisable by the trial judge to exclude it from evidence on the basis that to admit it would be unfair to the accused. The exercise of that discretion will not turn upon the policy considerations which must otherwise exercise the judge's mind in the case of evidence which is improperly or illegally obtained. It will entail a consideration of the result of such methods and whether it would be unfair to the accused to admit it in evidence in the sense that to do so would result in an unfair trial. If it would, then that is an end of the matter and the confessional statement will be excluded from evidence. If it would not, then there still remains to be considered whether the policy considerations referred to in *Bunning v Cross* nevertheless require rejection of the evidence...The rule in *Bunning v Cross* posits an objective test, concerned not so much with the position of an accused individual but rather with whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end."

In *R v Warrell* [1983] 1 VR 671 the Court of Criminal Appeal adopted this dicta and added at 681-

"These concepts of voluntariness, fairness, and public policy are integral to the operation of our criminal justice system. They are designed to ensure that any finding of guilt arrived at, on the basis of confessional evidence, is not only reliable but that the evidence itself has been obtained in a socially acceptable fashion. It is important to keep in mind, in this context, that they are concerned not only with the recognition and protection of the rights of those who may be suspected of the commission of criminal offences, but that any such finding is not surrounded by an aura of possible injustice which compromises both the system and the society which supports it. It is against this background that, over recent years, there has been increased attention given to the problems encountered by specific groups within our community with respect to our investigative and legal process. The need for the adoption of special procedures when dealing with children has long been accepted."

Other cases where the exercise of a discretion to exclude was discussed include:

- *R v Percerep* [1993] 2 VR 109 at 120 where the Court of Criminal Appeal, in upholding the admission of an impugned interview, said: "It is abundantly clear that *Pollard* underlines the necessity for a trial judge to make an assessment of the seriousness of a breach of s.464C, so as to enable him to decide whether on the grounds of fairness to the accused, or of public policy, the evidence ought to be rejected".
- *R v Jukov* (1994) 76 A Crim R 353 where a record of interview was excluded in the exercise of the fairness discretion where an accused, who was subject to persistent cross-examination and had an IQ of 71, had indicated an unwillingness to answer any questions but did in fact choose to answer a number of questions.
- *R v Frugtinet & Frugtinet* [1999] 2 VR 297 where the Court of Appeal held that-
 - o a record of interview was properly admitted notwithstanding breaches of ss.464A(3) & 464C(1) because there was no residual unfairness to the accused;
 - o although 14 hours was a long time between being taken into custody and being taken before a bail justice, it was a reasonable time given the complexity of the investigation.
- *R v Dupas* [2001] VSCA 109 where the Court of Appeal held at [38] that the fact that a taped record of a conversation in a police car "was not available because the machine malfunctioned unbeknown to the police enlivened the court's discretion under s.464H(2)" and constituted 'exceptional circumstances'.
- *R v JPD* [2002] VSC 202 at [8], where Vincent J found no grounds for excluding the impugned interview, stating:

"Even if I am incorrect in my understanding of the terms and effect of s.464E, the participation in the interview by the accused was voluntary and I am able to see no justification for the exclusion of the evidence in the exercise of discretion. It has not been demonstrated, in my opinion, that there has been any deliberate non-compliance or wilful blindness or casual disregard of the rights of the accused or any other consideration present which would require the exclusion of the evidence on public policy grounds. There was nothing in the circumstances as disclosed by the evidence given on the *voir dire*, that would enliven the discretion to exclude the evidence on the basis of the unfairness of its admission in the trial. And finally, the impugned evidence possesses probative value and there is no counter-balancing prejudicial impact capable of affecting the situation."

The common law public policy exclusionary discretion discussed in *Bunning v Cross* has now been modified by s.138 of the Evidence Act 2008 which provides:

- (1) Evidence that was obtained-
 - (a) improperly or in contravention of an Australian law; or
 - (b) in consequence of an impropriety or of a contravention of an Australian law-
Is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
- (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning-
 - (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
 - (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account-
 - (a) the probative value of the evidence; and
 - (b) the importance of the evidence in the proceeding; and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.”

In *R v Aujla & anor* [2012] VSC 213 at [4] T Forrest J summarized legal principles inherent in s.138:

- “(i) The onus rests with the accused to demonstrate that the admissions were improperly or illegally obtained.
- (ii) Should the accused demonstrate this the onus shifts to the prosecution to persuade the court that the evidence should be admitted: *Robinson v Woolworths* (2005) A Crim R 546; *R (C’th) v Petradias (No 8)* (2007) A Crim R 417.
- (iii) Section 138 modifies the common law public policy exclusionary discretion set out in *Bunning v Cross* (1978) 141 CLR 54. The court must not admit improperly or illegally obtained evidence, or evidence obtained as a result of improper or illegal conduct unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.”

However, his Honour held that the admissions made by the accused in two interviews were not improperly or illegally obtained and accordingly s.138 was not engaged.

In *DPP v Dalton (Ruling No 1)* [2019] VSC 226 Beale J was satisfied at [50] that there was a contravention of s 464A(1) and that there was a causal nexus between Dalton’s illegal detention and the police obtaining the impugned evidence. At [54] & [56] his Honour described the gravity of the illegality “as being of a high order” although he did “not find there was a deliberate or reckless disregard of the requirements of section 464A by the relevant police officers” but “neither [did he] find that it was mere carelessness”. At [57] his Honour noted that “the police had a reasonable and obvious alternative to just keeping her in custody, an alternative that respected her right to liberty, did not risk undermining her right to silence and did not prevent them from questioning her again.” Balancing the matters in s.138 of the Evidence Act 2008 his Honour excluded the interview and the re-enactments, holding at [58]: “I am not satisfied by the prosecution that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was obtained when Dalton was being illegally detained.”

In *Kadir v The Queen; Grech v The Queen* [2020] HCA 1 the appellants were jointly charged with acts of serious animal cruelty arising from the alleged use of rabbits as live bait in training racing greyhounds. At the trial the prosecution proposed to tender seven video recordings made by Animals Australia in contravention of s.8(1) of the *Surveillance Devices Act 2007* (NSW) plus material obtained under search warrant and admissions obtained in consequence of that contravention. Holding that the desirability of admitting the evidence was outweighed by the undesirability of admitting evidence obtained in the way the evidence had been obtained the trial judge, applying s.138(1) of the Evidence Act 2008, ruled that each of the 3 categories of impugned evidence was inadmissible. The Court of Criminal Appeal reversed this ruling, holding that the desirability of admitting each of the 3 categories of evidence outweighed the undesirability of admitting evidence obtained in the way the evidence was obtained: [2017] NSWCCA 288 at [111], [130] & [142]. In its joint judgment the High Court (Kiefel CJ, Bell, Keane, Nettle & Edelman JJ) took an intermediate position, holding at [9]:

“The trial judge’s conclusion that all of the surveillance evidence should be excluded was correct. The Court of Criminal Appeal was right to find that the trial judge’s assessment of the admissibility of the search warrant evidence and the admissions was flawed. The Court of Criminal Appeal’s conclusion that each of these items of evidence is admissible is correct.”

A more detailed summary of the judgment of the High Court – and the Court’s analysis of s.138 of the Evidence Act 2008 – is in section 3.5.3.5 of these Research Materials.

8.2.11 *Pollard v R* (1992) 176 CLR 177

In this difficult leading High Court case the accused had been detained by police, given a " cursory warning", and taken to a police station at Frankston where facilities were available to conduct a taped interview. He was asked questions about the allegations against him, he made certain admissions and his responses were noted. He was not given a caution and was not told that he could communicate with a friend, relative or lawyer. No tape-recording was made of the conversation. He was then taken by car to the St Kilda Road police station and the questioning continued in the car. At St Kilda Road he was cautioned and told of his right to communicate with a friend, relative or lawyer. A videotaped record of interview then immediately took place in which he made significant admissions.

The trial judge had admitted the St Kilda Road interview and his ruling was upheld by the Court of Criminal Appeal. An appeal to High Court was allowed by the whole Court on the basis that the confessional statement should have been excluded from evidence in the exercise of the trial judge's discretion. There were 4 individual judgments (Mason CJ, Deane J, Toohey J & McHugh J) and one joint judgment (Brennan, Dawson & Gaudron JJ). Some key issues in contention, other than the appropriateness of a discretionary exclusion, were resolved differently in different judgments, in particular a central question as to whether the St Kilda Road videotape was rendered inadmissible by reason of a breach of s.464H of the Crimes Act 1958 (Vic). This involved a determination of a subsidiary question, described by Mason CJ (at 183) as the "critical question...whether the [accused] made separate confessions at Frankston and at St Kilda Road or whether he made one confession in the course of questioning at both places."

The following summary of reasons is based in large part on the headnote in the Commonwealth Law Reports and the page references are to that report.

1	<p>The confessional statement should have been excluded in the exercise of the trial judge's discretion as a consequence of a breach by the investigating officer of s.464C(1) and in the view of the minority of s.464A(3).</p> <p>The various reasons are set out opposite.</p>	<p>Mason CJ (183-184 largely adopting the reasoning of Deane J), Brennan, Dawson & Gaudron JJ (196-197), Deane J (200-211) & McHugh J (235-237) The obligation to give the caution required by s.464C(1) arose before the commencement of questioning which occurred at Frankston and the consequence of that failure extended to the interview at St Kilda Rd.</p> <p>Mason CJ (183-184 adopting the reasoning of Deane J), Deane J (200, 205-206) & Toohey J (222) Section 464C(1) had not been complied with because the police had failed to defer questioning for a reasonable time after they had advised the accused of his rights.</p> <p>McHugh J (231-233) The police had not complied with s.464C(1) because they had not made clear that the accused had a right to make the requisite communication before the questioning began.</p> <p>Brennan, Dawson & Gaudron JJ (195-197) There had been a failure to give the caution required by s.464A(3) before the questioning began at Frankston.</p>
2	<p>Mason CJ (184 adopting the reasoning of Deane J), Deane J (200-203), Brennan, Dawson & Gaudron JJ (196-197), Toohey J (223), McHugh J (234-235) Whether otherwise admissible evidence of what is said in answer to questions asked in breach of s.464C(1) should be received in evidence is to be determined by the general law, under which the trial judge has a discretion to exclude the evidence either because its reception would be unfair to the accused or on grounds of public policy. <i>R v Ireland</i> (1970) 126 CLR 321 at 334-5 <i>Bunning v Cross</i> (1978) 141 CLR 54 at 74-5 <i>Cleland v The Queen</i> (1982) 151 CLR 1 applied.</p>	
3	<p>Brennan, Dawson & Gaudron JJ (195), Deane J (200) & McHugh J (228) Questioning for the purposes of s.464A(2) commences when a person in custody for an offence is informed of the circumstances of that offence and is first questioned.</p>	

4a	<p style="text-align: center;">MAJORITY OPINION</p> <p>The videotape of the interview at St Kilda Rd was not rendered inadmissible by s.464H.</p> <p style="text-align: center;">Mason CJ (183)</p> <p>"The question...is whether s.464H(1)(d) is capable of being read as a requirement that, where confessions are made at two places at which the requisite facilities are available, the interrogation at both places must be tape-recorded if the later confession is to be admissible." His Honour answered that question 'no' but added: "I acknowledge that the interpretation which I have given to s.464H(1) produces some unsatisfactory consequences, especially because it enables the recorded interrogation to be admitted in circumstances in which it is preceded by an unrecorded interrogation [which] can give rise to the very sort of problem against which the relevant provisions provide some safeguard. However, in my view, the language and structure of the provisions dictate the interpretation which I favour."</p>
	<p style="text-align: center;">Deane J (197-198)</p> <p>"In a case where questioning encompasses different periods of questioning at different places, the phrases 'questioning at a place' and 'the questioning' in s.464H(1)(d) refer not to the whole of the overall questioning but to the particular period of questioning in which the confession or admission was made."</p> <p style="text-align: center;">Toohy J (219)</p> <p>An earlier occasion of questioning may be treated by the Court as part of the same questioning for the purposes of s.464H(1) if circumstances, in particular proximity of time and place, so dictate.</p> <p style="text-align: center;">McHugh J (226-229)</p> <p>Construed s.464H in the same manner as did Mason CJ & Deane J.</p>
4b	<p style="text-align: center;">MINORITY OPINION</p> <p>The videotape of the interview at St Kilda Rd was rendered inadmissible by s.464H.</p> <p style="text-align: center;">Brennan, Dawson & Gaudron JJ (194-195)</p> <p>"[O]nce it is recognized that s.464H contemplates, as it does, the one questioning commencing at a particular point of time and possibly continuing at different times and places, the admissions made at St Kilda Road were part of the questioning which commenced at Frankston, continued in the car and concluded at St Kilda Road...Since neither that portion of the questioning which occurred at Frankston nor that in the car on the way to St Kilda Road was tape-recorded, evidence of the admissions made at St Kilda Road was not admissible, notwithstanding the fact that the questioning which took place at St Kilda Road was video recorded. The result is...required by the structure and language of sub-div (30A), in particular s.464H. And as already indicated, it also accords with one of the main purposes for which the legislation was enacted...If evidence of a confession or admission made during a tape-recorded interview at one police station were admissible under s.464H even when it was preceded by an interview at another police station which was not tape-recorded, a principal object of the legislation would be likely to be largely defeated."</p>

In *R v Thomas* [2006] VSCA 165 at [113]-[114] the Court of Appeal (Maxwell P, Buchanan & Vincent JJA) respectfully adopted dicta of McHugh J (236) & Deane J (202-203) in *Pollard v R*, holding that what their Honours said in relation to s.464C(1) of the Crimes Act 1958 (Vic) applied with equal force to the practically identical s.23G(1) of the Crimes Act 1914 (Cth).

See also the decisions of the High Court in *Heatherington v R* (1994) 179 CLR 370 in relation to the Victorian legislation and *Kelly v The Queen* [2004] HCA 12 in relation to similar Tasmanian legislation.

8.2.12 Unfairness & public policy in absence of direct illegality

In *R v KS & Anor.* [2003] VSC 418, KS was a 15 year old youth who - pursuant to an order of the Children's Court under s.464B Crimes Act 1958 - was interviewed by Homicide Squad members about the death of his mother's boyfriend. He made a "no comment" record of interview and was thereafter charged with murder. In this process there had been no illegality. Subsequently a justice of the Supreme Court issued a warrant authorizing the placement of a listening device in KS' room and another inmate KW was deliberately placed in the same room in order to stimulate conversation with KS. There was no illegality in this process. In a subsequently recorded conversation KS made admissions. These were not involuntary in the legal sense.

Counsel for KS submitted that the conversation should be excluded on two grounds:

- ❶ the **unfairness** deriving from a circumvention of KS' procedural rights, specifically his right to silence; and
- ❷ the use of a listening device in the custody centre and the placement by centre authorities of an inmate in KS' cell to facilitate the potential production of confessional material was contrary to **public policy**.

Coldrey J agreed and excluded the conversation from evidence in an exercise of both the fairness and public policy discretions. This being the first case in Victoria which has raised the relationship between the use of listening devices and an accused's right to silence and the first case in which a listening device had been placed inside a Juvenile Justice Centre, His Honour's reasons have been quoted in some detail:

[26] "There are now an increasing number of cases relating to the eliciting of admissions or confessions from accused persons by the use of agents acting on behalf of the police or indeed undercover police officers. Many have considered the question of whether evidence garnered in this fashion infringes the requirements of s.464 ff. of the Act and, if so, whether the fairness and public policy discretions are thereby enlivened.

[27] It is abundantly clear that each case turns on its individual facts and fine distinctions and questions of degree abound. However, among the propositions which emerge are the following. The fact that an accused has given a "no comment" record of interview does not, of itself, provide a reason for ruling inadmissible subsequent admissions elicited by a third party (*R v Swaffield and Pavic* (1998) 192 CLR 159); nor does the fact that the accused was in custody at the time that such admission were made necessarily render them inadmissible (*R v Davidson* (1996) 92 A Crim R 1; *R v Lewis* (2000) 1 VR 290; *R v Franklin* (2001) 3 VR 9), although it may result in exclusion depending upon the circumstances (*R v Pfennig (No.1)* (1992) 57 SASR 507; *R v Smith and Turner* (1994) 63 SASR 123; *R v Roba* (2000) 110 A Crim R 245; *R v Dewhurst* (2001) 122 A Crim R 403; *R v Juric* (2002) 4 VR 411).

[28] Further, the investigation or indeed the gathering of evidence of criminal activity is not embargoed once a charge has been laid. If this was so, gaol yard confessions, not all of which are unreliable, would never be permitted to be adduced in evidence by the Crown...

[34] In the circumstances of the present case, it cannot be argued that what the police investigators did in having a listening device installed was illegal. Indeed, they had proceeded correctly in obtaining the warrant of a Supreme Court judge to do so. The admissions themselves were not involuntary and on the evidence before this court, a finding cannot be made that they were obtained by any form of interrogation conducted at the behest of the investigating police...

[39] Both the legislature, (by the enactment of such provisions as s.464ff of the Act), and the Courts, have recognised that protection is to be accorded to juveniles who lack the maturity and judgement of adults. These are qualities which might enable adults to remain silent about matters which are to their disadvantage.

[40] Having exercised his right to silence under the legislation, the accused may well have continued to do so had the authorities not required him to share his room with another inmate. It is perhaps trite to observe that there will inevitably be great psychological pressure on an individual to talk to, and establish an accord with, inmates with whom that person is forced to co-exist within an institution. That imperative is likely to increase if that inmate is one with whom a room must be shared. These are psychological pressures to which a juvenile is likely to be particularly vulnerable.

[41] In *R v Heaney and Welsh* [1998] 4 VR 636, I endeavoured to analyse the current application of the fairness and public policy discretions. I remarked (at p.644):

'Putting aside the issue of voluntariness, the current approach of the majority of the High Court to the exclusory discretions seems to be as follows. The fairness discretion encompasses considerations of the effect of the conduct of law enforcement officers upon the reliability of the impugned material. The term 'law enforcement officers' may be regarded as including persons acting as their agents. The fairness discretion will also come into play where some impropriety by law enforcement officers or their agent has eroded the procedural rights if the accused, occasioning some forensic disadvantage.

Those procedural rights include the right to choose whether or not to speak to the police. Importantly, the method of eliciting the admission or confession will clearly be relevant in determining whether or not it would be unfair to an accused to admit it into evidence.

The discretion to exclude evidence on the grounds of public policy may be enlivened where no unfairness to the accused is occasioned, but nonetheless, the method by which the confessional evidence has been elicited is unacceptable in the light of prevailing community standards. This broad discretion will involve a balancing exercise.'

[42] In my opinion the procedures embarked upon by the police in conjunction with the authorities at the Juvenile Justice Centre ultimately had the effect of subverting the accused's procedural rights. Moreover, the forensic disadvantage occasioned is such that the impugned material should not be admitted into evidence.

[43] Insofar as the public policy discretion is concerned, there are good public policy reasons for ensuring the protection of young persons placed in Juvenile Institutions from the course of conduct undertaken by the investigators and custodial authorities which ultimately resulted in the eliciting of the admissions.

[44] Even taking into account the seriousness of the offence, the fact that the police and the Centre authorities acted in good faith, and that the process of gathering evidence is not governed by any equivalent of the 'Marquis of Queensberry rules', the balance falls in favour of excluding this material."

8.2.13 Reliability

In *R v Malcolm Clarke* [2004] VSC 11 at [33]. Kellam J said:

"The leading authority on the question of admissibility of confessional statements made by an accused person to a person who, unbeknown to the accused is a police officer is *R v Swaffield and Pavic* (1997-8) 192 CLR 159. That decision establishes that the admissibility of confessional material turns first on the question of voluntariness, next upon issues of **reliability**, and finally on an overall discretion taking into account all the circumstances, including the means by which any admission was elicited and whether unfair forensic advantage may be obtained by the prosecution by admission of the evidence: see *R v Juric* (2002) 4 VR 411 at 439."

On the issue of reliability, Kellam J concluded at [62] that it was neither "appropriate or necessary" for him "to make findings as to the truth or otherwise of the [accused's] admissions...The question is whether the account given is such that the jury would be entitled to consider, on the evidence before it, that it is reliable." As to the relevant law His Honour said at [63]-[64]:

[63] "There are a number of authorities which deal with the issue of reliability confessions made by persons suffering from psychiatric disorders: *R v Sinclair* (1946) 73 CLR 316 at 338; *R v Morris* (1987) 163 CLR 454; *R v Starecki* [1960] VR 141 and *R v Parker* (1990) 19 NSWLR 177 are such cases. In *R v Pfitzner* (1996) 85 A Crim R 120 the Chief Justice of South Australia gave consideration to the test in relation to unreliability of a confession given by a person suffering from a psychiatric disorder. He concluded that the test in those circumstances should be based upon 'an affirmative satisfaction that the admissions are inherently unreliable as distinct from possibly unreliable'.

[64] Whilst it is true that those authorities relate to confessions given in different circumstances (i.e. where there is a psychiatric disorder), it seems to me that a similar approach should be adopted in relation to the question of unreliability now raised before me."

Applying this test, His Honour concluded at [64]-[65]:

[64] "I am satisfied that the admissions are not inherently unreliable and that it would be open in all the circumstances for a jury to consider that the manner in which the admissions are shown to have been made on the video tape is such that they are reliable.

[65] In my view, in the absence of a conclusion by me that the admissions are inherently unreliable, it is appropriate that the jury consider what weight should be given

to the admissions rather than having me make a decision to exclude the evidence because of the possibility of unreliability."

See also *R v Tofilau* [2003] VSC 188 at [17]-[22] & [55]-[58] (Osborn J), *R v Mitchell and Brown* (Ruling No. 1) [2005] VSC 42 at (Whelan J).

8.3 Fingerprinting

8.3.1 Adult or child aged 15 or above

No court order is required for a police officer to take the fingerprints of an adult or a child aged 15 or above. Section 464K(1) of the Crimes Act 1958 (Vic) [as amended] authorises a member of the police force to take, or cause to be taken by an authorised person, the fingerprints of a person of or above the age of 15 years who-

- (a) is believed on reasonable grounds to have committed; or
- (b) has been charged with; or
- (c) has been summonsed to answer a charge for-
an indictable offence or a summary offence referred to in Schedule 7.

If the person is a child aged 15, 16 or 17 years a parent or guardian or, if a parent or guardian cannot be located, an independent person must be present during the request for the fingerprints, the giving of the information referred to in s.464K(2) and the taking of the fingerprints: s.464K(7).

8.3.2 Child aged under 10

A child under the age of 10 must not be requested to give his or her fingerprints or have his or her fingerprints taken: s.464L(1).

8.3.3 Child aged 10 to 14

By contrast with adults and children aged 15 or above, the taking of fingerprints from a child aged 14 or under requires:

- consent of both the child and a parent or guardian; or
- a court order.

Section 464L(2) of the Crimes Act 1958 (Vic) [as amended] authorises a member of the police force to take, or cause to be taken by an authorised person, the fingerprints of a child aged 10 years or more but under 15 years who-

- (a) is believed on reasonable grounds to have committed; or
- (b) has been charged with; or
- (c) has been summonsed to answer a charge for-
an indictable offence or a summary offence referred to in Schedule 7 if-
- (d) both the child and a parent or guardian of the child consent; or
- (e) where consent is refused or the parent or guardian cannot be located, the Children's Court makes an order under s.464M(5).

Section 464L(3) requires the member of the police force wishing to fingerprint a child aged 10-14 to inform the child and the parent or guardian of the child, in language likely to be understood by each of them-

- (a) of the purpose for which the fingerprints are required; and
- (b) of the offence which the child is believed to have committed or with which he or she has been charged or summonsed; and
- (c) that the fingerprints may be used in evidence in court; and
- (d) that the child's parent or guardian may refuse consent to the child's fingerprints being taken; and
- (e) that if consent is refused an application may be made to the Children's Court for an order directing the child to give his or her fingerprints; and
- (f) that if the child is not charged with a relevant offence within 6 months or is so charged but the charge is not proceeded with or the child is found not guilty of the offence or any other relevant offence before the end of that period, the fingerprints will be destroyed.

Section 464L(4) requires a parent or guardian of the child to be present during the request for fingerprints, the giving of the above information and the taking of fingerprints with consent.

8.3.3.1 Application for an order for fingerprinting

Section 464M(1) provides that if the subject child or his or her parent or guardian refuses to consent to the taking of the child's fingerprints or the parent or guardian cannot be located, a member of the police force may apply to the Children's Court for an order under s.464M(5).

Section 464M(2) requires that such application be in writing supported by evidence on oath or by affirmation or by affidavit. Section 464M(3) provides that notice of the application must be served on-

- (a) a parent or guardian of the child; and
- (b) the child if he or she is not in custody.

Section 464M(4) permits service on a parent or guardian to be dispensed with by the Court if satisfied that it is impracticable for the applicant to comply.

The above provisions are complex and ambiguous. The major source of ambiguity is whether or not the refusal of a child to consent to fingerprinting is sufficient to ground an application under s.464M(1) for a court order or whether such application can be made only after the child has refused a request made in the presence of the parent or guardian.

In *Ann Dunn (as litigation guardian for RT) v McQ & Another* [Supreme Court of Victoria, unreported, 07/08/1997] Hedigan J adopted the latter construction. The child RT had been charged with burglary of 3 houses, including his mother's house. RT was interviewed in the presence of an independent person and made no admissions. The informant had chosen not to have the mother present because she was an alleged victim. The father lived at Geelong and an attempt to contact him was unsuccessful. RT was also requested to give his fingerprints and refused. Subsequently RT, but not the parents, was served with an application for an order to fingerprint him. The application was contested by RT but an order was made by a magistrate under s.464M(5). On appeal the order was quashed. Hedigan J held:

- at pp.10-11: The "correct construction of ss.464L and 464M...is that the refusal to give fingerprints, which founds the jurisdiction in a refusal case, must have been a refusal consequent upon a request that complied with the requirements of s.464L(3) and (4). There are two bases upon which the police may apply to the Court for an order that fingerprints be taken. The first is when there has been an refusal after a request which complies with [s.464L(3) and (4)]. The second is where no parent or guardian can be located to enable compliance with s.464L(4) and its associated sub-sections. The non-location of a parent within s.464M(1) does not depend on any refusal by the child. Such a refusal is irrelevant. The application is made because the parent or guardian cannot be located so as to enable compliance with sub-s.(4). The requirement of s.464L(4) is clearly mandatory."
- at pp.11-12: "If there is a refusal by the child without a parent or guardian being present at the time of the request, that is not a request within the meaning of [ss.464L(3) and (4)], although it is, of course, a refusal in fact. Simply, if the child refuses and an application is sought to be based upon the first part of s.464M(1) on that refusal, it must be a refusal annexed to a request made in the presence of the parent or guardian."
- at p.13: "A construction which firmly requires that the presence of a parent or guardian in every case in which they are capable of being located is to be favoured, the only exception being inability to locate them."
- at p.14: "[T]here was no refusal within the meaning of s.464M(1) in this case because there was no request in the form required by s.464L(4) ever made, because no parent or guardian was present. The necessary jurisdictional fact was not established and the order was a nullity."
- at p.15: Service of the written application upon the parents is a mandatory jurisdictional pre-requisite unless pursuant to s.464M(4) service is impracticable.

8.3.3.2 Procedure at hearing of application

Though the subject child may be represented by a legal practitioner or, with the leave of the Court, a parent or guardian [s.464M(8)], he or she is not a party, may not call or cross-examine any witnesses, and may not address the Court other than in respect of any matter referred to in ss.464M(5) or (6) [s.464M(7)].

8.3.3.3 Order for fingerprinting

Section 464M(5) provides that the Court may make an order directing a child aged 10 years or more but under 15 years to give his or her fingerprints if satisfied on the balance of probabilities that-

- (a) there are reasonable grounds to believe that the child has committed an indictable offence or a summary offender referred to in Schedule 7; and
- (b) in all the circumstances the making of the order is justified taking into account, amongst other things the matters set out in s.464M(6)-
 - the seriousness of the circumstances surrounding the commission of the offence;
 - the alleged degree of participation by the child; and
 - the age of the child.

A decision by the Court under s.464M involves an administrative function and does not involve the exercise of judicial power: *Grollo v Bates* (1994) 125 ALR 492. Hence it is not applicable to federal offences pursuant to s.68 of the Judiciary Act because it is not a law "respecting arrest or custody" or pursuant to s.79 because it is not a law "relating to evidence": *ibid*.

8.3.3.4 Warrant to arrest for fingerprinting

Section 464M(12) empowers the Court to issue a warrant to arrest a child the subject of an order under s.464M(5) and take the child without delay to the nearest accessible police station for fingerprinting.

8.3.3.5 Mandatory reasons

If the Court makes an order under s.464M(5) or issues a warrant under s.464M(12), it must give reasons for its decision and cause a note of the reasons to be entered in the records of the Court: s.464M(13).

8.3.3.6 Taking of fingerprinting

Sections 464M(9) to (11) & 464N regulate the taking of fingerprints pursuant to a Court order.

8.3.4 Other relevant provisions

s.464NA	Fingerscanning for identification purposes of an adult or a child aged 15 or above
s.464O	Destruction of records
s.464P	Records of juveniles
s.464Q	Evidence of fingerprints

8.4 Forensic procedure - Compulsory procedure

8.4.1 Whether there is any difference between the terms

Forensic procedure is defined in s.464(2) of the Crimes Act 1958 (Vic) as the taking of a sample from any part of the body, whether an intimate or a non-intimate sample or any other type of sample, or the conduct of any procedure on or physical examination of the body but does not include the taking of a fingerprint.

Compulsory procedure is defined in s.464(2) as the taking of an intimate or non-intimate sample or the conduct of a physical examination.

Given their similarity, it is not immediately clear why both terms are used. In some sections, **forensic procedure** is used in connection with a voluntary sample [e.g. s.464T(1)(a)] while **compulsory procedure** is used in connection with a court-ordered sample [e.g. s.464T(3)]. But in s.464Y **forensic procedure** is used in relation to either a voluntary or court ordered procedure and in s.464ZF **forensic procedure** is used in relation to a court-ordered procedure.

8.4.2 Child aged under 10

A child under the age of 10 must not be requested to undergo a forensic procedure or ordered to undergo a compulsory procedure: s.464U(1).

8.4.3 Child aged 10 to 17

Section 464U(2) prohibits a member of the police force from requesting a child aged 10 years or more but under 18 years who-

- (a) is suspected of having committed; or
- (b) has been charged with; or
- (c) has been summonsed to answer a charge for-

an offence, whether indictable or summary, to undergo a forensic procedure or request that a compulsory procedure be conducted on the child unless the Children's Court has made an order under s.464U(7) or s.464V(5).

8.4.3.1 Application for an order for compulsory procedure

Sections 464U(3) to (6) regulate an application for an order that a child undergo a compulsory procedure. A member of the police force may apply to the Children's Court for an order that a child undergo a compulsory procedure if the child-

- is suspected on reasonable grounds of having committed or attempted to commit an indictable offence listed in s.464U(3)(a); or
- has been charged with an indictable offence listed in s.464U(3)(b).

Such application must be in writing supported by evidence on oath or by affirmation or by affidavit, must state the type of compulsory procedure sought to be conducted and must, if the child is a detained or protected person, state that fact and identify the place where the child is held or resides. Notice of the application must be served on-

- (a) a parent or guardian of the child; and
- (b) the child if he or she is not in custody; [if the child is in custody the Court may issue a warrant under s.464U(14), read with ss.464T(9) & (10), for delivery of the child to and from Court].

The service conditions are mandatory, save that s.464U(6) permits service on a parent or guardian to be dispensed with by the Court if it is impracticable for the applicant to comply. In *Kirsch v Dolman & Anor* [2001] VSC 234 the plaintiff had not been served with an application for a compulsory procedure under the corresponding adult provision s.464T(2). In forthright terms at [10]-[11], Gillard J overturned the magistrate's order:

"The provisions in sub-division 30A substantially encroach upon the rights of the individual. The legislation has been carefully drawn to ensure that the interference with the rights of the individual are kept to a minimum. It is absolutely vital that members of the force and Magistrates ensure that, before any orders are made under any of the sections in sub-division 30A, all statutory requirements have been satisfied. This present matter is another example where insufficient attention was paid, both by the defendant and the Magistrates' Court, in respect of the application concerning the plaintiff. The plaintiff should have been given notice of the application, and the order should not have been made until he was present at the Court."

Since ss.464U(3) to (6) are in similar terms to the fingerprinting provisions in ss.464M(2) to (4), it is probable that the dicta of Hedigan J in *Ann Dunn (as litigation guardian for RT) v McQ & Another* [Supreme Court of Victoria, unreported, 07/08/1997] is also applicable to compulsory procedure applications.

Sections 464SA & 464SB allow a senior police officer – who is not involved in the investigation of the offence for which a compulsory procedure is required – to authorise the conduct of a non-intimate compulsory procedure on an adult in certain circumstances without a court order. These provisions do not apply to children.

8.4.3.2 Procedure at hearing of application

Though the subject child may be represented by a legal practitioner or, with the leave of the Court, a parent or guardian [s.464U(13)], he or she is not a party, may not call or cross-examine any witnesses, and may not address the Court other than in respect of any matter referred to in ss.464U(7) or (8) [s.464U(12)].

Although the role of a legal practitioner or parent or guardian representing a child is a very restricted one, there is still an obligation on the court to afford procedural fairness to the subject child within the

confines of the legislation: see *Reid v Tabbitt & Anor* [2008] VSC 75 at [10] & [30] per Coghlan J adopting dicta of Ashley J in *O'Sullivan v Freeman* [2003] VSC 45 at [19].

8.4.3.3 Order for compulsory procedure

Section 464U(7) provides that the Children's Court may make an order directing a child to undergo a compulsory procedure if satisfied on the balance of probabilities that-

(a)	SUSPECTED OR CHARGED	the child is suspected on reasonable grounds of having committed or attempted to commit an indictable offence listed in s.464U(3)(a) or has been charged with an indictable offence listed in s.464U(3)(b).; and
(b)	BELIEF OF GUILT	there are reasonable grounds to believe that the child has committed the offence in respect of which the application is made; and
(c)	DNA MATERIAL OF VICTIM OR SUSPECT BELIEVED TO EXIST	in the case of an application other than one referred to in paragraph (d) either- (i) material reasonably believed to be from the body of the offender has been found at the scene or on the victim or associated clothing/item or on an object or person reasonably believed to have been associated with the offence; or (ii) there are reasonable grounds to believe that material from the body or clothing of the victim is present on the person or associated clothing/item or on an object reasonably believed to have been associated with the offence; and
(d)	IF FIREARM WAS DISCHARGED	in the case of an application to take a sample or washing from the skin to determine the presence of gunshot residue, a firearm was discharged during the commission of the offence; and
(e)	DISTINGUISHING MARKS OR INJURIES	in the case of an application to conduct a physical examination, the person who committed the offence had distinguishing marks or injuries, whether acquired during the commission of the offence or otherwise; and
(f)	CONFIRM OR DISPROVE	there are reasonable grounds to believe that the conduct of the procedure on the child may tend to confirm or disprove his or her involvement in the commission of the offence; and
(g)	ORDER JUSTIFIED	in all the circumstances the making of the order is justified, taking into account, amongst other things the matters set out in s.464U(8)- <ul style="list-style-type: none"> • the seriousness of the circumstances surrounding the commission of the offence; • the alleged degree of participation by the child; and • the age of the child.

In *Loughnan v Magistrates Court of Victoria sitting at Melbourne & Another* [1993] 1 VR 671, the Court of Appeal, construing an earlier but similar statutory provision, held:

- at 692: Section 464U(7)(b) does not require the court to be satisfied, even to some *prima facie* stage, that the suspect has committed the offence; the court need be satisfied only that there are reasonable grounds to believe that the suspect has committed the offence.
- at 692: Evidence put forward in support of the existence of reasonable grounds to believe that the suspect has committed the offence might be inadmissible at any trial of the suspect if it was sought to prove through the applicant what his information was. But it is not hearsay for the purposes of the applicant's attempt at proof of the matter in s.464U(3)(b) for the information is put forward, not as evidence of its own truth, but simply as information: as part of the material which it is said gives the applicant reasonable grounds for belief.
- at 693: Hearsay evidence may be relied upon for the purposes of an application under s.464U(7).
- at 694: The onus of proving the matters set out in s.464U(7) lies on the applicant. The standard of proof is the civil standard of the balance of probabilities, "bear[ing] in mind the principle that the degree of satisfaction...may vary according to the gravity of the fact to be proved".
- at 696: The Court must be satisfied that there are grounds for the belief in question and that these grounds are reasonable. That reasonable grounds exist for believing that the suspect has committed the offence is not necessarily inconsistent with the fact that other possibilities exist too, based upon further and different material.

See also *Walsh v Loughnan* [1991] 2 VR 351; *Glare v Magistrates' Court of Victoria* [1992] 1 VR 91; *W & Anor v Children's Court of Victoria & Anor* [2002] VSC 75.

In *Stevenson v Ellis* (1996) 85 A Crim R 49, a case where the victim of an alleged rape described tattoos on the buttocks of the alleged offender, Nathan J upheld a magistrate's order requiring the accused to undergo a physical examination of his buttocks. The decision was upheld by the Court of Appeal: *Ellis v Stevenson* (1996) 86 A Crim R 368. In that appeal Brooking, Phillips & Charles JJA commented at 375, without deciding, that a court may have no power to refuse an application under the equivalent adult provision, s.464T, if the court is otherwise satisfied that the jurisdictional pre-conditions have been made out. In other words, on this analysis, the only area of discretion in s.464U(7) is that in s.464U(7)(g): "in all the circumstances, the making of the order is justified."

In *O'Sullivan v Freeman* [2003] VSC 45 {MC18/03} at [19], Ashley J sounded a caution to applicants for orders for compulsory procedure under the corresponding adult provision s.464T, a caution which is equally applicable to applicants for orders in relation to child respondents under s.464U:

"Having regard to the peculiar nature of s.464T of the Crimes Act, it involving a procedure to which the suspect is not a party and in respect of which the party has no right of cross-examination, no right to call evidence and a very limited opportunity to be heard, it seems to me very important that a court asked to make an order be **fully appraised** of the state of an investigation. Matters plainly tending to favour a conclusion that the person referred to in s.464T(1)(d) did not have reasonable grounds for the belief there referred to, or to favour a conclusion that reasonable grounds for the belief referred to in s.464T(3)(b) were not established, ought to be revealed to the court. In my opinion this court would not have its hands tied if it were to emerge that an order had been made by the Magistrates' Court on a premise which was likely to have been false. It might be said in such a case that the suspect, however restricted his or her rights, had not been afforded the hearing required by the rules of procedural fairness. There is a possible analogy with the circumstances considered in *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 WLR 976. The cases dealing with warrants which are discussed in *Aronson and Dyer, Judicial Review of Administrative Action* (2nd ed., pp.210-211), may also be of relevance. The Court's readiness to act would be the greater if there was a contention of substance that the failure of disclosure was deliberate or actuated by want of good faith."

In *Marks & Buick & Anor* [2003] VSC 488 at [12] & [14] Hansen J., in discussing s.464T(3)(f), said:

[12] "It requires satisfaction that there are reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence. This the magistrate is, in my opinion, entitled to consider regarding the evidence before him objectively, and it is important to note that it is sufficient that the conduct of the procedure may tend, not that it will, not that it must, not that it probably will, but merely that it may tend to confirm or disprove the involvement of the subject person in the commission of the offence. A positive or a negative might come out of the test. It does not matter. It is..., in my view, an investigative tool, notwithstanding that in this case Marks has already been charged with murder. But the trial has not yet occurred..."

[14] The magistrate was entitled to take account of all of the materials that he had before him and to consider whether, on those materials, he was satisfied, on the balance of probabilities, that there were reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence. The error, I think, at least in part, in the submission [of counsel for Marks] is in the attempt it makes to demonstrate a lack of utility in the test in terms of aiding the Crown case at trial. Admissibility, let alone a prognostication as to it, is not the decisive issue in my view. It is whether the test may tend to confirm or disprove. It seems to me that it was open to the magistrate to conclude as he did that there were reasonable grounds in terms of para. (f)."

8.4.3.4 Child must be present

Except in relation to an interim order made under ss.464V or 464W, the Children's Court must not make an order under s.464U(7) unless the child is physically present in court or is present by means of audio visual link [s.464U(11)].

8.4.3.5 Warrant to arrest for application for compulsory procedure

Section 464X(1) empowers the Court to issue a warrant to arrest a child the subject of an application under ss.464U(3) or 464V(2) and bring the child before the Court for the hearing of the application for an order directing the child to undergo a compulsory procedure.

8.4.3.6 Mandatory reasons & explanation

Section 464U(9) requires a court making an order under s.464U(7) to-

- (a) give reasons for its decision; and
- (b) state the evidence on which it is satisfied of the matters referred to in s.464U(7);
- (c) cause a note of the reasons to be entered in the records of the Court; and
- (d) inform the child that a member of the police force may use reasonable force to enable the procedure to be conducted.

Section 464X(2) provides that if the Court issues a warrant under s.464X(1), it must-

- (a) give reasons for its decision; and
- (b) cause a note of the reasons to be entered in the records of the Court.

8.4.3.7 Application for interim order for compulsory procedure

Section 464V(2) permits a member of the police force to apply, with or without notice to any other person, for an interim order directing a person to undergo a compulsory procedure (other than the taking of a blood sample), if the member believes on reasonable grounds that the sample or evidence sought to be obtained by the compulsory procedure is likely to be lost if the procedure is delayed until the final determination of the application.

Section 464V(4) permits a member of the police force to apply for an interim order by telephone in accordance with the procedure set out in s.464W if he or she believes on reasonable grounds-

- (a) that it is necessary to obtain an interim order; and
- (b) that the sample or evidence sought to be obtained by the compulsory procedure is likely to be lost if the making of an application for an interim order is delayed until the time when the application could be made in person.

8.4.3.8 Interim order for compulsory procedure

Section 464V(5) provides that the Children's Court may make an interim order directing a child to undergo a compulsory procedure if-

- (a) the Court is satisfied that the sample or evidence sought is likely to be lost if the procedure is delayed until the final determination of the application; and
- (b) on the evidence, whether sworn or unsworn, before it at the time, it appears to the Court that there may be sufficient evidence to satisfy it of all of the matters in s.464U(7); and
- (c) on an application by telephone, the Court is satisfied that the sample or evidence sought is likely to be lost if the making of the application is delayed until the time when the application could be made in person.

Section 464V(6) provides that if the Court makes an interim order-

- it must adjourn the further hearing of the application to enable the compulsory procedure to be conducted;
- s.464U applies to the further hearing which must not be conducted by telephone; and
- the subject child must attend the further hearing either in person or by audio visual link.

On the further hearing s.464V(7) provides that-

- (a) if the Court is satisfied of the matters set out in s.464U(7), it must confirm the interim order; or
- (b) if it is not so satisfied, it must order the destruction of any sample taken and any other evidence obtained as a result of the compulsory procedure.

8.4.3.9 Conduct of forensic procedure or compulsory procedure

Sections 464Y, 464Z & 464ZA regulate the conduct of a forensic procedure or a compulsory procedure.

8.4.4 Other relevant provisions

- s.464ZFB Retention of information following finding of guilt
- s.464ZFC Destruction of information following finding of guilt
- s.464ZGA Forensic information from juveniles

