



HD APPROVED

# CRIMINAL PROCEDURE

## MLP218

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

NB: The word *here* refers to the preceding case in *blue*.

### Abbreviations:

- PO = police officer
- SPO = senior police officer
- IO = investigating official
- SC = Supreme Court
- CC = County Court
- MC = Magistrates' Court
- MCA = Magistrates' Court Act
- CPA = Criminal Procedure Act
- FP = forensic procedure
- CFP = compulsory forensic procedure
- FSO = forensic sample offence

### Table of Contents

<b>Entry onto Land for Search and Arrest</b>	2
<b>Search of a Person and their Possessions</b>	3
By Consent	3
Following lawful arrest (common law) - Cloutier v Langolis	3
With Warrant	3
Evidence Connected to an Indictable Offence: s 456 Crimes Act	4
Search for Stolen Goods: s 92 Crimes Act	4
Drugs: Drugs, Poisons and Controlled Substances Act - s 81	4
Without Warrant (statutory)	5
Inadvertent Discovery	6
<b>Forensic Procedure</b>	7
Definitions - s 464(2) Crimes Act:	7
Voluntary Adult Forensic Procedure - s 464ZGB Crimes Act	7
Non-Voluntary Adult Forensic Procedure - s 464R Crimes Act	7
Forensic Sample Offences - s 464ZF Crimes Act	9
Adult DNA samples - s 464SC Crimes Act	9
Forensic Procedure for Children Aged 10 - 18	10
DNA Samples from a Child Aged 15 - 18 Years: s 464SE Crimes Act	10
Fingerprinting: finger, palm, toe and sole prints - s 464(2) Crimes Act	10
Fingerprinting for Identification - s 464NA Crimes Act	10
Conditions under which a person may be fingerprinted for evidence	11
Procedure for Taking of Fingerprints, Destruction of Prints, and Consequences for POs for Breach	12
Consequences of Breach of Forensic Procedure	12

<b>Police Questioning</b>	14
Provision of Name and Address Details	14
Silence and Privilege Against Self-Incrimination	14
Questioning in Police Custody	14
‘Reasonable Period’ Questioning - s 464A Crimes Act	14
What is a “Reasonable Period” of detention?	14
Procedure for “Reasonable Period” questioning	15
Handling of Admissions	16
Admissibility of Confessions in the course of Official Questioning - s 464H(1) Crimes Act	16
Continuity of Interviews/ Multiple Police Interviews	17
Admissibility of Improperly Obtained Evidence - s 138 Evidence Act	18
<b>Identification Evidence</b>	18
Visual Identification - s 114 Evidence Act	19
Picture Identification - s 115 Evidence Act	20
Jury Warnings for Identification Evidence	20
Judicial Discretion to Exclude Prejudicial Identification Evidence - s 137 Evidence Act	20
<b>Commencement of Criminal Proceedings</b>	22
<b>Arrest - can be separate from the commencement of Criminal Proceedings</b>	22
Statutory power to arrest - With Warrant	22
Arrest without warrant - s 457 Crimes Act	23
Elements of a legal arrest	23
<b>Commencing Trial</b>	25
Decision to Prosecute	25
Choice of Court for Trial	25
Place of Hearing for Trial - s 169 CPA	25
Joint or Separate Trials for Multiple Offenders or Multiple Charges - s 170 CPA	26
Discontinuance of Prosecution - s 177 CPA	26
Trial for Indictable Offences	26
Committal Procedure - Criminal Procedure Act	27
Arraignment for Trial and Pleas - s 215 CPA	28
Rule against Double Jeopardy	28
Exceptions to Double Jeopardy - s 327H CPA (borne of public outrage at Carroll v R)	29
Jury Selection for Trial	30
Eligibility for Jury Service: s 5 Juries Act	30
Empanelment of Jury	30
Judicial Discretion to Discharge a Juror - s 43 Juries Act	31
Conduct of the Jurors	32
Jury Verdicts	32

# Entry onto Land for Search and Arrest

- Consent - governed by the common law of trespass
  - Implied - general implied licence to enter property up to front door if no locked gate or signs - *Halliday v Nevill*
    - May be expressly or impliedly revoked, absent another authority - *Plenty v Dillon*
  - Express - no use of force for warrantless arrest, reasonable force for arrest with warrant
    - May generally be revoked with reasonable notice given to Police, unless another authority can sustain presence on property - *Nicholson v Avon*
- Arrest without Warrant - s 495A *Crimes Act*
  - (1) for arrests under s 458 or 459 *Crimes Act*, a Police Officer may enter and search any place the police officer on reasonable grounds believes an offender to be, where:
    - (a) the police officer believes on reasonable grounds that the offender has (i) committed a serious indictable offence in Victoria, (ii) committed an offence elsewhere which would be a serious indictable offence in state, (iii) to be escaping from legal custody
    - (b) the offender is committing a serious indictable offence
  - (2) Police officer may use reasonable force in such entries
- Arrest with Warrant - authority is conveyed by the warrant: s 64(1) *Magistrates Court Act*

# Search of a Person and their Possessions

## By Consent

- Genuine consent that is not obtained by deception - *R v Jamieson*
- Onus to prove consent on the prosecution - *R v Meyers*
  - Eg. signed authority from searchee

## Following lawful arrest (common law) - *Cloutier v Langolis*

- Person who is lawfully arrested may be searched to:
  - preserve evidence on their person - *Bessell v Wilson*
  - or to reasonably search and seize weapons or implements that may be used to escape or harm police, themselves or others - *Lindley v Rutter*
- **Victoria:** What is reasonable to search depends on the circumstances, but in Victoria the power to search may extend beyond the above authorities - *DPP v Tupper*
  - Consider police's reasonable belief as to the likelihood that the prisoner will attempt to conceal evidence or something to escape or harm someone against the arrestee's privacy and dignity
  - Likely does not extend to intrusive seizure of intimate clothing (underwear), but very well could depending on the circumstances
- Person must be told the true and specific purposes for the search - *Brazil v Chief Constable of Surrey*
  - Here, being told a search was for 'safety' was insufficient, and a subsequent search with no communicated purpose was also insufficient
- Limits to search and seizure - only items found in the possession or under the control of D to be used as evidence to support guilt for the specific offence that D has been arrested for - *Elias v Passmore*

- Does not extend to searching the home of D away from the location of the initial offence without a warrant for evidence relating to a second offence - *Jeffrey v Black*

## With Warrant

- General requirements - *Majzoub v Kepreokis*
  - Warrant must sufficiently identify the offence and its nature (but not necessarily to full specificity of an indictment)
    - Objective assessment of whether this is achieved is required by looking at the warrant in its entirety
    - Failure to specify any offence is invalid, but failure to specify correct section numbers or the relevant act while still setting out nature of offence is valid
  - Consequences of invalidly issued warrant - *R v Borg* - warrant is invalid and trial judge must make a determination whether evidence acquired is of sufficiently great probative value at trial to overcome prejudice to the accused - s 138 *Evidence Act*
    - *Here*: failure by PO to issue oath/ affirmation supporting evidence invalidated search warrants
- **Evidence Connected to an Indictable Offence: s 456 *Crimes Act***
  - (1) Magistrate may grant a search warrant when satisfied by evidence provided by senior sergeant or above under oath/ affidavit that there are reasonable grounds to believe that a building or vehicle contains anything
    - (a) in respect of which an indictable offence has been committed, is being committed or will be committed within 72 hours
    - (b) that there is grounds to believe will be evidence regarding the commission of an indictable offence
    - (c) which there is a reasonable ground to believe will be used for committing an indictable offence against the person for which the offender may be arrested without warrant (weapons)
  - **Purpose**: uncover evidence that is relevant (but not necessarily conclusive) to the potential guilt of a person of an offence - *Crowley v Murphy*
  - **Safeguards**: Judiciary must ensure strict compliance with statutory conditions for grant of warrants due to highly invasive and *ex parte* nature of the powers granted - HCA obiter in *George v Rockett*
- **Search for Stolen Goods: s 92 *Crimes Act***
  - (1) Magistrate may grant a search warrant when satisfied by oath/ affidavit that if there is reasonable cause to believe to believe that a person has stolen goods
    - (a) on their person
    - (b) on any premises of the person
    - (c) in a particular vehicle
  - (2) A police officer of rank Inspector or higher may give written authority to a constable to search premises for stolen goods if
    - (a) the person who occupies the premises has been convicted in the past five years of handling stolen goods or any dishonesty offence punishable by imprisonment
    - (b) a person convicted of handling stolen goods within the past five years has occupied the premises within the last 12 months

- **Safeguards:** intention of parliament that this only be used 'in the most urgent of circumstances'
- **Drugs: *Drugs, Poisons and Controlled Substances Act* - s 81**
  - (1) Magistrate may grant search warrant when satisfied by evidence on oath/ affirmation by PO of sergeant or above that there is reasonable grounds to believe that a premises or vehicle will contain
    - (a) any thing in respect of which an offence under this Act has been committed or is likely to be committed within 72 hours (drugs)
    - (b) any thing relating to an offence under this act (paraphernalia)
    - (c) any document relating to transactions or dealings contrary to this act
    - Scope: sub s (3)(c)(i) - search land or premises, or any vehicle or person found on the land for the above (a), (b), or (c), and to (3)(b) arrest persons found contravening the act

## Without Warrant (statutory)

- **Drugs - s 82 *Drugs, Poisons and Controlled Substances Act***
  - (1) PO may (f) search and (g) seize without warrant when they have reasonable grounds for *suspecting* that a drug of dependence is
    - (a) in a vehicle in a public place,
    - (b) on an animal
    - (c) in the possession of a person
    - (d) on a boat or vessel
    - (e) on a plane
  - *DPP v Darby* - sniffer dogs' sensory perception does not amount to a search, and can sustain reasonable grounds for suspicion above
- **Weapons - s 10 *Control of Weapons Act***
  - (1) PO may search (d) person, their vehicle and anything under their control, and (e) seize weapons if (a) they have reasonable grounds for suspecting that a person has in their possession in a public place a weapon contrary to the Act
    - (2) presence in a high crime area can inform reasonable grounds for suspicion

## Inadvertent Discovery

- Without a Warrant - *Ghani v Jones*, *Greer v Commissioner of NSW Police* (uncertain status in Australian law)
  - Reasonable grounds for believing that a serious offence has been committed, that the person in possession of the item has committed it, is implicated or an accessory, and that the item discovered is either:
    - Proceeds of crime, instrument by which crime has been committed, or material evidence to prove crime
  - Item must be in plain view
  - Genuine Inadvertent Discovery by Police
  - Lawful right to have initial vantage (eg. no trespass or illegal search)
- With a Warrant - *Chic Fashion v Jones*
  - Were a lawful search warrant is executed and other items not named in the warrant are reasonably believed by PO executing warrant to have been stolen, and to be material evidence on a charge of stealing

# Forensic Procedure

Taking of a sample from any part of the body (intimate or non-intimate), or the conduct of any procedure on or physical examination of the body that does not include the taking of fingerprint or DNA profile sample

## Definitions - s 464(2) *Crimes Act*:

- **Non-Intimate Samples**
  - Includes non-pubic hair, matter under toenails or fingernails, sample from external region of non-intimate part of the body
    - Person may elect to give a buccal swab as an alternative to a hair sample - s 464SB(4)(d), s 464Z(3AA) *Crimes Act*
- **Intimate Samples**
  - Includes blood, pubic hair, sample from external of an intimate region, saliva, buccal swab, dental impression
- **'Relevant suspect'**: - a person over 18 who is
  - (a) suspected of having committed an indictable offence, or
  - (b) someone who has been charged with an indictable offence

## Voluntary **Adult** Forensic Procedure - s 464ZGB *Crimes Act*

- (1) anyone over the age of 18 years may volunteer to give a sample to a PO
- (2) person must give (3) informed consent in front of an independent person
  - (b) DNA sample will be placed in National Database
  - (ba) the volunteer can nominate the purpose the sample will be used for
  - (bb) the sample may be used as evidence
  - (c) the person is under no obligation to give a sample
  - (d) the person may withdraw consent to giving a sample at any time; and
  - (f) may withdraw consent at any time to the retention of the sample (including after being charged with an offence), but (g) PO may apply to Magistrates Court to retain sample despite withdrawal of consent

## Non-Voluntary **Adult** Forensic Procedure - s 464R *Crimes Act*

- (1) PO may request a suspect undergo a FP if there are reasonable grounds to believe that the FP would confirm or disprove their involvement in the commission of an indictable offence, and the suspect
  - (a) is suspected on reasonable grounds of having committed an indictable offence
  - (b) has been charged with an indictable offence
  - (c) has been summonsed to answer a charge for an indictable offence
- (2) where the suspect
  - (a) has given their informed consent - s 464S *Crimes Act*, or
    - (1) person undergoing a FP must be informed of
      - (a) the purpose of the FP
      - (b) the nature of the FP
      - (c) that the person may nominate a medical professional to perform the FP
      - (d) the offence that the person is suspected of

- (e) that the results of the FP may be used as evidence against them
- (ea) that DNA collected from the FP will go into the National Criminal Investigation DNA Database
- (f) that the person may refuse to undergo the procedure, but that (g) the Magistrates Court may make a ruling authorising the FP, or that (h) a senior police officer may authorise a non-intimate compulsory procedure
- (2)(a) the provision of the above and the person's responses must be recorded audiovisually
- (b) **has declined to give consent**, but is the subject of a **Magistrates Court order** under s 464T(3) or 464(5) *Crimes Act*
  - s 464(T)(1) - PO may apply to the MC for order authorising a compulsory FP where
    - (a) suspect has refused to give consent, or is incapable of giving informed consent (s 464S *Crimes Act*)
    - (b) it is possible to collect the desired sample via a compulsory FP
    - (c) the person is a relevant suspect (s 464(2) definition above)
    - (d) the PO believes on reasonable grounds that the person has committed the offence in respect of which the CFP is being sought
    - (3) Court must be satisfied on the balance of probabilities that:
      - (a) the person is a relevant suspect
      - (b) there are reasonable grounds to believe the person has committed the offence
      - (c) there are reasonable grounds to believe that the desired sample will link the person to (A) the scene, (B) the victim, or (C) objects or persons reasonably believed to be associated with the crime
      - (f) there are reasonable grounds to believe the sample sought will confirm or disprove their involvement in the commission of the offence
      - (h) in all the circumstances, that the order is justified
  - Natural justice demands that suspect must be informed that such an application has been made to the court - *Kirsch v Dolman*
- (c) **has declined to give consent**, but is the subject of an **authorised compulsory non-intimate procedure** - s 464SA(2) *Crimes Act*
  - (2) **senior police officer** may authorise a non-intimate compulsory sample collection if they are satisfied that
    - (a) the person is a relevant suspect (s 464(2) above) who is (i) under lawful arrest by warrant; or (ii) under lawful arrest per s 458 or 459 *Crimes Act*
    - (b) the person is over 18 years of age
    - (c) the person is not incapable of informed consent, and (d) has actually refused a request to voluntarily give a sample
    - (e) there are reasonable grounds to believe that the person has committed the relevant offence
  - (3) SPO must not give authorisation if a previous application to under this section has been made on the same grounds and was refused
  - s 464SB(1) - suspect or their lawyer must be given reasonable opportunity to inform SPO why the compulsory non-intimate procedure should not be conducted

## Forensic Sample Offences - s 464ZF *Crimes Act*

- (2) PO may apply to the MC for authorisation to collect a forensic sample from **anyone convicted of a Forensic Sample Offence within 6 months** of the lapse of their appeal period
  - Forensic Sample Offence - (1) any indictable offence or offence listed in Sch 8 CA
- (3)(b) - as above but for any **current prisoner convicted of ANY offence**
- Determining Factors to be Considered: (8)
  - (a) must take into account the seriousness of the circumstances of the FSO
  - (b) must be satisfied that, in all the circumstances, the making of the order is justified
  - Merely being convicted of a FSO is not sufficient to justify such an order - *R v Abebe*

## Adult DNA samples - s 464SC *Crimes Act*

- (1) PO may request a DNA person give a DNA sample if they are satisfied that taking a sample is justified in the circumstances, and that the person
  - (a) is suspected on reasonable grounds of having committed an indictable offence, or
  - (b) has been charged with an indictable offence, or
  - (c) has been summonsed to answer a charge of an indictable offence
- (3)(a)(i) where the person has given **informed consent**, or
  - s 464SD(2) - informed consent includes being made aware of all of the elements listed
  - s - 464SD(3) Conveyance of s 464SD(2) information and the person's responses must be recorded
- (3)(a)(ii) where the person has not given consent, a senior police officer not involved in the investigation gives authorisation under s 464SE where satisfied that
  - (a) the person is over 18 and a relevant suspect who is (i) under lawful arrest by warrant; or (ii) under lawful arrest per s 458 or 459 CA
  - (b) the person is not incapable of informed consent, and (c) has actually refused a request to voluntarily give a sample
  - (e) there are reasonable grounds to believe that the person has committed the relevant offence
  - (g) the taking of a DNA sample without consent is justified in all of the circumstances
  - (2) senior police officer must not give an authorisation where
    - (a) a previous application to the MC for an order on the same grounds was denied
    - (b) a previous application for authorisation on the same grounds was denied
  - **'DNA Person'**: s 464(2) - person above the age of 18 years who (i) is suspected of having committed an indictable offence, (ii) has been charged with an indictable offence, or (iii) has been summonsed to answer a charge for an indictable offence

# Forensic Procedure for **Children Aged 10 - 18**

## Compulsory Forensic Procedure on a Child - s 464U *Crimes Act*

(3) PO may apply to CCt for an order under 464U(7) if the child is –  
Suspected or charged with certain indictable offences

(7) The Children’s Court may make the order if satisfied on the balance of probabilities that

- *Reasonable grounds to believe* child has committed the offence;
- DNA material of victim or suspect believed to exist;
- If firearm was discharged...(skin sample, gunshot residue);
- Distinguishing marks or injuries...;
- Reasonable grounds to believe that procedure will confirm or disprove involvement of child in offence;
- Order justified in all circumstances.

(8) In considering whether justified, must take into account seriousness of offence, alleged degree of participation of S and age of S.

(9) Must give reasons, state the evidence considered and inform the S that a police officer may use reasonable force to enable the procedure to be conducted

## DNA Samples from a Child Aged 15 - 18 Years: s 464SE *Crimes Act*

- (2) PO may request a DNA sample from a child if the taking of the sample is justified in all the circumstances, and
  - Same (a) - (c) circumstances as for Adults (above), but only for **DNA sample offences**
- (3)(b) A DNA sample may be taken from such a child if
  - (i) **BOTH** the child and the parent give informed consent - s 464SD
    - Same informed consent requirements as for adults
  - (ii) Senior PO authorises the taking of the DNA sample - s 464SE
    - As for Adults (above), but only for **DNA sample offences** where **BOTH** the child and parent have refused to give consent
- DNA Sample offences: specified in Sch 9 - s 464(2)

## Fingerprinting: finger, palm, toe and sole prints - s 464(2) *Crimes Act*

### Fingerprinting for Identification - s 464NA *Crimes Act*

- (2) person aged over 15 years may have their fingerprints taken by a police officer for the purpose of establishing their identity if they
  - (a) have been charged with an indictable offence or a Sch 7 offence (below), and
  - (b) are present in a police station or have been remanded in custody
- (3) person to be informed of the purpose of fingerprinting (identification), and that it is not admissible as evidence against them
- (4) reasonable force can be used by the PO to secure the identifying fingerprints

- (6) such fingerprints cannot be admitted into evidence against the person

## Conditions under which a person may be fingerprinted **for evidence**

- Fingerprints and other physical evidence are not covered by the common law privilege against self-incrimination - *Sorby v Cth*
- **Under 10 Years: no fingerprinting** - s 464L(1) *Crimes Act*
- **10 to 15 Years** - only in limited circumstances - s 464L(2) *Crimes Act*
  - s 464K procedure below applies only IF both the child and the parent/guardian consent to fingerprinting, OR the Children's Court makes an order
  - (3) Child and parent/ guardian to be informed of s 464K(2) matters in a language they are likely to understand
    - Child/ Parent/ Guardian may refuse consent, PO then may apply for an **order to give prints** under s 464M(5) from the Children's Court
      - (2) supported by oath or affidavit, served on (3)(a) parent/ guardian, (b) child if not already in custody
      - (5) CC must be satisfied on balance of probabilities that
        - i) there are reasonable grounds to believe the child has committed an indictable offence or a Sch 7 offence (see below); and
        - ii) in all circumstances, the order is justified
        - **Factors to Consider:** (6) CC to consider the seriousness of the surrounding circumstances of the offence, the degree of the child's alleged complicity in the offence, and the age of the child
        - (12) CC may issue warrant to arrest for fingerprinting under s 464M(5) order, authorising PO to break, enter and search any place named child in warrant is suspected to be
        - **Consequences of Order:** (9)
          - (a) Parent/ guardian/ Independent Party must be present during the taking of fingerprints
          - (b) police may use reasonable force
          - (c) the fingerprinting must be recorded (audiovisual > audio)
  - (4) Parent/ guardian must be present for
    - i) request for fingerprints, ii) Provision of information in (2), and iii) taking of the fingerprints,
  - (5) PO must record provision of information in (3)
- **15 Years or older** - general fingerprinting provisions apply - s 464K *Crimes Act*
  - (1) PO may fingerprint person if they
    - (a) are believed on reasonable grounds to have committed; or
    - (b) has been charged with; or
    - (c) has been summonsed to answer a charge of any indictable offence or Schedule 7 summary offence
  - (2) PO must inform person of the following before taking a print:
    - (a) purpose for which the prints are taken
    - (b) the related offence
    - (c) that the fingerprints may be used as evidence against them
    - (d) officer may use reasonable force to obtain prints in the case of refusal
    - (e) the prints will be destroyed in accordance with s 464O(3) *Crimes Act* (below)

- (3) provision of information in (2) should be ((4) and must be for indictable offences) audiovisually recorded
- (7) reasonable force must be authorised by PO of rank of sergeant or higher
  - This cannot be backdated, and the requirements of s 464K *Crimes Act* must be 'rigorously adhered to' to prevent unlawful assault by police - *Watkins v Victoria*
- (8) If the person is 15 to <18 years of age,
  - (a) parent/guardian or independent party must be present during
    - i) request for fingerprints, ii) Provision of information in (2), and iii) taking of the fingerprints
  - (b) if reasonable force is authorised, the taking of the prints must be recorded
- **Schedule 7 Offences** for which a Person may be Fingerprinted
  - 1. Where the maximum penalty is or includes a period of imprisonment.
  - 2. An offence under section 3(2) or 3(4) of the *Court Security Act 1980*.
  - 3. An offence under section 6(2) of the *Control of Weapons Act 1990*.
  - 4. An offence under section 36A of the *Drugs, Poisons and Controlled Substances Act 1981*.
  - 5. An offence under section 97 of the *Police Regulation Act 1958*.
  - 6. An offence under specified sections of the *Prevention of Cruelty to Animals Act 1986*.

## Procedure for Taking of Fingerprints, Destruction of Prints, and Consequences for POs for Breach

- By fingerscan, or by any other means - s 464N(1) *Crimes Act*
  - (2) where reasonable force is used, the PO should be the same gender as the person, and should not be involved in the investigation
- **Destruction of Prints**
  - **Adult prints:** s 464O(3) *Crimes Act* - prints are to be destroyed
    - (a) within 6 months of the taking of fingerprints, if no charges are laid, or charges are laid but not proceeded with; or
    - (b) within one month of a finding of not guilty after charges have been laid
  - **Juvenile prints:** s 464P(1)(c) *Crimes Act* - to be destroyed if the person is not found guilty of any further offence before the age of 26, except in the case of (2) serious offences punishable by 15 years maximum sentence or greater
  - **Consequences for failure to destroy:**
    - Person who fails to destroy or uses prints that should have been destroyed is guilty of a summary offence - s 464O(7) *Crimes Act*
- **Consequences for failure to comply:**
  - (1) Prints are inadmissible as part of a prosecution case where
    - (a) requirements of s 464K - N are not complied with; or
    - (b) the prints have not been destroyed per s 464O - P
  - **Exception:** (2) s 464K - N *Crimes Act*: deficiency can be overcome if
    - (a) prosecution satisfies court on balance of probabilities that there are exceptional circumstances that justify the admissibility of the evidence; or
      - (3) mere probative value alone does not create exceptional circumstances
    - (b) the accused consents to admission