



Victorian Aboriginal Legal Service Co-operative Ltd.

Head Office:
6 Alexandra Parade,
P.O. Box 218
Fitzroy, Victoria 3065
Phone: (03) 9419 3888 (24 Hrs)
Fax: (03) 9419 6024
Toll Free: 1800 064 865

Mr Anthony Lawrie
Department of Justice
Level 3, 55 St Andrews Place
EAST MELBOURNE VIC 3002

Dear Mr Lawrie,

Re: Possible *Crimes Act 1958* amendments to allow fingerscans to be admitted as evidence in court and to validate Forensic Procedure Orders made under section 464ZF(3) *Crimes Act 1958*.

VALS does not have any objection to an amendment to the Crimes Act 1958 to allow 'electronic' fingerprints (ie: fingerscans) to be admitted as evidence in court proceedings. It is the opinion of VALS that if technology exists that has the potential to improve the efficiency, reliability and accountability of the justice system then it should be utilized. Such technology can aid equally in convicting criminals and clearing the names of persons wrongly accused of crimes.

VALS objects to the amendment to the Crimes Act 1958 to validate forensic procedure orders made under section 464ZF(3) (on or before 4 April 2003) without the subject of the order being given notice or heard (except in relation to children). Such orders were cast into doubt by the judgment in *Pavic v Magistrates' Court of Victoria & Chief Commissioner of Police* [2003] VSC 99 (4 April 2003) (*Pavic*). VALS is in agreement with the judgment in *Pavic* and does not approve the proposed amendment because it attempts to retrospectively override *Pavic*, which is the most recent case law authority.

The proposed amendment is in line with the finding in *Lednar & Ors v Magistrates' Court & Anor* [2000] VSC 549 (22 December 2000) (*Lednar*). It was held that it is the legislative intention of 464ZF(3) of the Crimes Act 1958 to exclude a subject's right to be given notice or heard. It is significant that this argument was not followed in *Pavic*, which was handed down three years later in the same court of law (Victorian Supreme Court). It was held in *Pavic* that it is not the legislative intention of 464ZF(3) of the Crimes Act 1958 to exclude a subject's right to be given notice or heard, and in the circumstances of the case the failure to afford the subject an opportunity to be heard was a denial of natural justice.

The reasoning of Justice Nettle in *Pavic* can be summarized as follows:

- "...[W]here a statute confers power on a public official to destroy, defeat or prejudice a person's rights, interests, or legitimate expectations, the rules of

- natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.¹
- The fact that the Crimes Act does not expressly confer on adults a right to notice and a hearing is hardly a compelling basis for inferring an intention thereby to exclude an adult's right to be given notice or be heard.²

VALS agrees with the above arguments raised in Pavic and for that reason does not support the proposed amendment to validate forensic procedure orders made under section 464ZF(3) (excluding applications for orders in relation to children). This is because an outright exclusion of an adult's right to be given notice and heard has the potential to be a breach of natural justice. The amendment will have the potential to wind back the civil rights recognized in Pavic.

VALS agrees with the finding in Pavic that “[s]ubject to the rules of natural justice, there is no reason to think that the Magistrate could not impose some restrictions upon the right to be heard under s. 464ZF according to the circumstances of the case”.³ The proposed amendment will fetter a Magistrates’ flexibility to impose restrictions upon the right to be heard depending on the circumstances of the case.

In summary, VALS considers it to be in the interests of procedural fairness that an adult subject have the right to be given notice or heard. VALS does not support the amendment to the Crimes Act 1958 to validate forensic procedure orders made under section 464ZF(3) without the subject of the order being given notice or heard (except in the case of children).

Author: Greta Jubb (Research Officer)

¹ Pavic v Magistrates' Court of Victoria & Chief Commissioner of Police [2003] VSC 99 (4 April 2003), para 5

² Pavic v Magistrates' Court of Victoria & Chief Commissioner of Police [2003] VSC 99 (4 April 2003), para 16

³ Pavic v Magistrates' Court of Victoria & Chief Commissioner of Police [2003] VSC 99 (4 April 2003), para 37