



IN THE CHILDREN'S COURT OF NEW SOUTH WALES
AT PARRAMATTA

Children's Magistrate Mulroney

13 May 2010

POLICE v "NS"

REASONS FOR DECISION

Introduction

1. The young person who is the accused in these proceedings has been charged with committing an offence of break, enter and steal in July 2009. Critical in the prosecution case is evidence relating to his fingerprints and the admissibility of evidence of his fingerprinting in January 2010. If that evidence is not admitted the prosecution will fail. I have to determine whether that evidence should be admitted.

Factual Circumstances

2. The evidence in these proceedings is constituted by a number of statements, known as the prosecution brief, which were tendered by consent. No oral evidence was given.
3. Some time between 3 p.m. on 4 July 2009 and 9 a.m. on 6 July 2009 someone broke into an office occupied by the UNSW Community Development Project in Waterloo. A digital camera valued at \$769 was stolen.
4. A Scene of Crime Officer from New South Wales Police conducted a forensic examination and a fingerprint examination on 6 July. Fingerprints were located on a filing cabinet and on the inside of a broken glass pane of the front door of the office. Constable Gibson, the police officer in charge of the investigation received a fingerprint notification in December 2009 that the accused young person was a suspect for the offence. I infer that fingerprints of the young person were already on police records for some reason. Constable Gibson listed the accused young person as being wanted to this offence.
5. Early in the morning of 8 January 2010 Senior Constable Williams saw the accused young person walking along a street in Waterloo. He knew that an arrest warrant was outstanding with regard to the accused young person. I infer from his statement that he was already familiar with the young person. Senior Constable Williams arrested the young person and took him to Redfern Police Station. He was entered into police custody by the Custody Manager there. Senior Constable Williams contacted the Aboriginal Legal Service but the young person declined the opportunity to speak with them. Senior Constable Williams also unsuccessfully attempted to contact a support person for the young person so that he might be interviewed.
6. The young person was apparently fingerprinted at Redfern Police Station by a Constable Townsend on 8 January whilst in custody. There is no direct evidence of the process by which his fingerprints were obtained. Detective Senior Constable Forsyth, a fingerprint expert, received a set of finger and palm print impressions said to be those of the accused young person taken by Constable Townsend. He compared the fingerprints of the young person with two palm prints taken from the filing cabinet and concluded that each was made by the same person. A different person made the fingerprints on the broken glass pane.
7. The person responsible for the office where the offence occurred said in her statement that she did not know the accused young person and there was no reason for him to have been in



her office. The only reasonable conclusion is that the fingerprints were left during the course of the offence.

The Objection to Admissibility

8. An objection was made to the admissibility of evidence flowing from the taking of the accused young person's fingerprints on 8 January 2010. It is argued on behalf of the accused young person that the Crimes (Forensic Procedures) Act 2000 (CFPA) was not complied with and that it is necessary to follow the processes set out in that legislation in order for fingerprints to be available for comparison with those found at the scene of the break enter and steal offence. No application was made to a magistrate for an order for a forensic procedure. When the young person's fingerprints were taken none of the conditions set out in Ss.26 or 30 were satisfied.
9. S. 3 CFPA defines a forensic procedure.

forensic procedure means:

- (a) an intimate forensic procedure, or
- (b) a non-intimate forensic procedure,
- (c) (Repealed)

but does not include:

- (d) any intrusion into a person's body cavities except the mouth, or
- (e) the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

Note. Paragraph (e) makes it clear that the Act only applies to samples taken for forensic purposes and not to samples taken purely to establish the identity of a person.

A non-intimate forensic procedure is defined as:

non-intimate forensic procedure means any of the following:

- (a) an external examination of a part of a person's body, other than the person's private parts, that requires touching of the body or removal of clothing,
- (b) the carrying out on a person of a self-administered buccal swab,
- (c) the taking from a person of a sample of the person's hair, other than pubic hair,
- (d) the taking from a person of a sample (such as a nail clipping) of the person's nails or of matter from under the person's nails,
- (e) the taking from a person of a sample of any matter, by swab or washing, from any external part of the person's body, other than the person's private parts,
- (f) the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from any external part of the person's body, other than the person's private parts,
- (g) the taking from a person of the person's hand print, finger print, foot print or toe print,



Children's Law News

- (h) *the taking of a photograph of a part of a person's body, other than the person's private parts,*
- (i) *the taking from a person of an impression or cast of a wound from a part of the person's body, other than the person's private parts,*
- (j) *the taking of a person's physical measurements (whether or not involving marking) for biomechanical analysis of an external part of the person's body, other than the person's private parts.*

By virtue of subsection (g) the taking of a fingerprint is a forensic procedure.

- 10. S.5 CFPA provides that for a child at least 10 but under 18 (whether or not under arrest) a forensic procedure is to be authorised by order of a Magistrate or an authorised officer under Part 5.
- 11. When an application is made S. 26 provides that
 - a written application must be made
 - supported by evidence on oath, or by affidavit
 - specifying the type of forensic procedure sought to be carried out, and
 - the application must ordinarily be heard in the presence of the suspect.
- 12. S.30 provides that for a suspect who is a child or who identifies as an Aboriginal person:
 - an interview friend must be present, and
 - the suspect may be represented by a legal representative. The practice in the Children's Court is that suspects are invariably represented on such applications.
- 13. Does the CFPA provide a code which covers all forensic procedures which result in evidence to be tendered in court? There is no express indication in the legislation that this is the case. Nevertheless this would seem to be the intention given the provisions of S.82 which renders inadmissible evidence of a forensic procedure where there has been a failure to comply with any provision of the Act.
- 14. Further support for this view can be gained from the Second Reading Speeches made when the legislation was considered in Parliament.

Mr WHELAN (Strathfield—Minister for Police): I move:

That this bill be now read a second time.

I am pleased to introduce the Crimes (Forensic Procedures) Bill. This bill will reform policing as we know it in New South Wales. DNA is the fingerprint of the twenty-first century. It will allow police to work smarter using forensically driven intelligence to solve crime. The bill introduces into New South Wales a regime for carrying out procedures on suspects, convicted serious indictable offenders and volunteers.

.....
Furthermore, a child or incapable person cannot give consent to a forensic procedure—the court's authorisation for the procedure must be gained. An incapable person is defined in clause 3 of the bill as an adult who is incapable of understanding the general nature and effect of a forensic procedure, or who is incapable of indicating whether or not he or she consents to a forensic procedure being carried out. Before requesting consent to a forensic procedure, a police officer must be satisfied of the following: that the suspect is not a child or an incapable person; that there are reasonable grounds to believe that the procedure might produce evidence



Children's Law News

tending to confirm or disprove that the suspect committed an offence; and that the request for consent is justified in all the circumstances.

.....
The bill, for instance, sets out certain safeguards for Aboriginal and Torres Strait Islander suspects. For example, an Aboriginal or Torres Strait Islander suspect must not be asked to consent to a procedure until after a representative of an Aboriginal legal aid organisation has been notified.

.....
The bill provides a comprehensive regime regulating the taking and use of forensic material for the purposes of criminal investigation. It involves striking a balance between the need to enable police to effectively investigate crime and the civil liberties of suspects. The bill confirms the Government's commitment to addressing crime and improving the operation of the criminal justice system in New South Wales. It will enable law enforcement agencies to identify or exclude suspects by comparing forensic material taken from them with material found at crime scenes. It will link seemingly unrelated crimes by comparing DNA profiles found at different crime scenes. This legislation has the potential to assist victims of crime in New South Wales by encouraging guilty pleas and hence avoiding often traumatic and lengthy court proceedings.

The Hon. J. W. SHAW (Attorney General, and Minister for Industrial Relations) I move:

That this bill be now read a second time.

The purpose of the bill is to introduce a regime for carrying out forensic procedures on suspects, serious indictable offenders and volunteers to provide for the use and destruction of material derived from those procedures, and to set out rules for placing and matching profiles derived from forensic material on a national DNA database. In 1995 the Government introduced legislation to enable police to take samples of blood, saliva and hair from a person in lawful custody.

.....
First, the bill contains special provisions relating to children and incapable persons. A child or incapable person cannot be asked to consent to a forensic procedure. A forensic procedure, no matter how unintrusive, may only be carried out on a child or incapable person with the court's authorisation. An incapable person is defined in clause 3 of the bill as an adult who is incapable of understanding the general nature and effect of a forensic procedure, or who is incapable of indicating whether or not he or she consents to a forensic procedure being carried out. In addition to the requirement to seek a court order in respect of children and incapable persons, the bill provides further safeguards for such suspects.

.....
An interview friend, such as a parent, guardian or legal practitioner, must be present at the hearing of an application for a court order and must, if reasonably practicable, be present when a forensic procedure is carried out. Second, there are similar safeguards relating to Aboriginal and Torres Strait Islander suspects. An Aboriginal or Torres Strait Islander suspect must not be asked to consent to a forensic procedure until after a representative of an Aboriginal legal aid organisation has been notified, unless the suspect has waived this right or has engaged another legal practitioner. An interview friend must be present when an Aboriginal or Torres Strait Islander is asked to consent to a forensic procedure during the hearing of an application for a court order and, if reasonably practicable, when a forensic procedure is carried out.

15. The Interpretation Act 1987 provides that:

33 Regard to be had to purposes or objects of Acts and statutory rules



Children's Law News

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

34 Use of extrinsic material in the interpretation of Acts and statutory rules

(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or

(b) to determine the meaning of the provision:

- i. if the provision is ambiguous or obscure, or*
- ii. if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.*

(2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:

.....
(f) the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House,

(3) In determining whether consideration should be given to any material, or in considering the weight to be given to any material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

16. In particular notice should be taken of the statements in the speeches that:

- The bill introduces into New South Wales a regime for carrying out procedures on suspects, convicted serious indictable offenders and volunteers.
- The bill provides a comprehensive regime regulating the taking and use of forensic material for the purposes of criminal investigation.
- The purpose of the bill is to introduce a regime for carrying out forensic procedures on suspects
- A forensic procedure, no matter how unintrusive, may only be carried out on a child or incapable person with the court's authorisation.



In Support of Admissibility

17. The prosecution relies on the provisions of S.133 Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA).

133 Power to take identification particulars (cf [Crimes Act 1900](#), s 353A)

(1) *A police officer may take or cause to be taken all particulars that are necessary to identify a person who is in lawful custody for any offence.*

(2) *If the person is over the age of 14 years, the particulars may include the person's photograph, finger-prints and palm-prints.*

(3) *This section does not authorise a police officer to take from any person, or to require any person to provide, any sample of the person's hair, blood, urine, saliva or other body tissue or body fluid.*

(4) *Subsection (3) does not affect a police officer's power to take any such sample, or to require the provision of any such sample, for the purposes of, and in accordance with the requirements of, any other Act or law.*

Note. See, for example, the powers conferred by the [Crimes \(Forensic Procedures\) Act 2000](#).

The predecessor of this section, s 353A Crimes Act, was considered in **Reg v Carr** [1972] 1 NSWLR 608. In that case the argument was that:

..... these fingerprints, which were used in court for the purpose of identifying the accused with the man who broke and entered, were not admissible in evidence because they were obtained compulsorily and the accused was therefore being compelled to convict himself. (at 610)

Court of Criminal Appeal, held at p611 that:

It is said that he was not fingerprinted for the purpose of his identification, but we doubt whether it is identification to the police, to whom he may have been well known, that is the concern of the section. We think it is identification to the court that matters, and whether as a matter of regular routine or as a matter of fairness to the prisoner, this set of fingerprints was taken and used specifically for this purpose.

18. In **R v McPhail** (1988) 36 A Crim R 390, the Court of Criminal Appeal considered the same section with regard to photographs.

*The section in defining the power of the officer to take finger prints etc, uses the expression "all such particulars as may be deemed necessary for the identification of such person" and it is plain that this gives an officer a very wide discretion as to when particulars of identification can be required. The power of the police officer under the section is not limited to cases where he might suspect that identification will be in dispute at the trial but is available in every case where it is considered by him to be necessary for the identification of the accused in court in whatever circumstances that may arise. Nor are the police restricted to using photographs taken of a person in custody after arrest only for the purpose of identifying him at the trial of the offence for which he has been arrested. In *Duffield v Police (No 2)* [1971] NZLR 710 at 712 Haslam J delivering the judgment of the Court said: "It would be an unduly narrow approach to confine the operation of this enabling section to instances where, as the prosecution's case stood at the moment when the particulars were demanded, the identity of the offender was still at large in respect of the offence for which he had been arrested. The*



procedure envisaged by s57(1) would usually be adopted at an early stage of the police inquiry immediately after arrest, and before the person in custody had been brought before a Court and remanded. At that point of time police officers would be unable to forecast with certainty what particulars might ultimately be needed on the day of trial to identify the offender. In addition, this section must be considered in relation to the general function of the police force in its broader aspects. If the offender were to disappear during a remand after the granting of bail, or to escape from lawful custody, his identification, wherever he might be, would arise on the execution of a warrant issued for his apprehension, and particulars relating to his identity would be needed in that event to pursue inquiries amongst persons outside the force. Again in the instant case, the transfer, illness, or even death of one of the policemen who at the moment of his apprehension had personal knowledge of the appellant, might well have caused difficulty in proof of his participation at the scene of the trespass. There could even be cases where precision in taking particulars at the outset could serve to exonerate an innocent suspect of similar personal characteristics."

19. An objection taken in **McPhail**, which was not raised here, is that fingerprints should not be taken as a matter of course but should only be taken where necessary to identify a person. The Court considered this issue

*In **Sernack v McTavish** (1970) 15 FLR 381 Fox J considered s353A(3) in regard to finger prints and identified a limitation on the power of the police to take such. He said:*

"It is plain that the power given by s353A is a discretionary power to be exercised by the officer in charge of police at the police station in relation to individual cases. The officer in charge must exercise his own judgment and it is wrong both for the commissioner to lay down a common rule for all cases and for the officer to act on the basis of such a common rule."

*I would agree with that proposition. But while it is certainly only for "the officer in charge of police at the station" to make the decision his decision cannot be impugned provided he makes it bona fide, ie that he bona fide considers that it is appropriate to take and keep photographs or finger prints for the purpose of the identification of the defendant in court at a later date. As Haslam J said in *Duffield v Police (No 2)* (supra) at 713, "the Court could examine the propriety of taking such particulars 'as may be deemed necessary' only in the rarest instances." The section makes it clear that it is a matter for the officer in charge of the police at the station to determine what particulars of identification he will require and, of course, this entitles the officer to make a choice if he so wishes. eg finger prints but no photograph or both.*

20. Section 353A gave this power only to the officer in charge of a police station. S.133 extended the power to all police. There was more than just a repetition of the previous law in the consolidating act, LEPR.
21. The most obvious way of dealing with these provisions logically is to treat S.133 as providing a basis for police action with respect to what was called in *Duffield* "...the general function of the police force in its broader aspects..." which is administrative (having identification details which will make records of people arrested, charged and convicted more reliable) or investigatory (having information which will allow investigators to use forensic techniques in the investigation of offences) and to treat the CFP as providing a scheme for obtaining information which can be used in evidence in court. The difficulty with this is that *Reg v Carr* determined that the purpose of S.353A was for identification to the court and not just for these purposes.
22. Further, S.133 LEPR was enacted after the C(FP)A and could be interpreted as an implied amendment or qualification of the C(FP)A. No specific reference was made to the section in the second reading speeches in Parliament.

How is the apparent conflict resolved?



23. The clear intention behind the enactment of C(FP)A was to provide a scheme for the taking of forensic samples for the purpose of presenting evidence in court. In **Orban v Bayliss** [2004] NSWSC 428 Simpson J, stated that:

30 The Forensic Procedures Act conferred new and unprecedented powers upon, inter alia, magistrates that would have the result of compelling persons suspected of criminal offences (including those against whom charges have not been laid) to cooperate in the investigation of the crime(s) of which they are suspected, and to provide, from their own bodies, evidence which may be used against them (and which, of course, may also be used to exonerate them). The Parliament was, in my view, seeking to maintain a delicate balance between preserving the traditional rights of citizens and individuals, including those suspected of crime, to decline to participate in investigations or to cooperate with investigating authorities, and the overall interests of the community and of justice in facilitating the investigation of crime, and the administration of justice, in securing the conviction of the guilty and the non-prosecution or acquittal of the not guilty. The Act was a specific response to scientific and technological developments, but in the context of valued traditional civil liberties.

31 The conditions that must be met before an order can be made demonstrate that the purpose of the legislation is not to enable investigating police (or other authorised persons) to identify a person as a suspect; it is to facilitate the procurement of evidence against a person who already is a suspect.

Hall J, in **Walker v Bugden** [2005] NSWSC 895 at [18] agreed with this view.

24. Additional safeguards in C(FP)A protecting children and aboriginal people were also important in maintaining what Simpson J, referred to as the “delicate balance”. I can only conclude that, although LEPRA is the later legislation, it was not intended that this would water down the effect of C(FP)A. The enactment of the C(FP)A means that the legislative context is now different from 1972 when **Reg v Carr** was decided and has rendered that decision no longer applicable in the circumstances of this case. It introduced a scheme for the taking of fingerprints and other forensic samples for evidentiary purposes. I therefore conclude that there was a failure to comply with the provisions of C(FP)A requiring that an application be made to a Magistrate for the taking of fingerprints.
25. Evidence that fingerprints are those of a young person is only admissible if the provisions of C(FP)A have been complied with or if a decision to admit the evidence has been made pursuant to S.82 of that Act, which provides as follows:

82 Inadmissibility of evidence from improper forensic procedures

(1) This section applies where:

- (a) a forensic procedure has been carried out on a person, and
- (b) there has been any breach of, or failure to comply with:
 - (i) any provision of this Act in relation to a forensic procedure carried out on a person (including, but not limited to, any breach of or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out), or
 - (ii) any provision of Part 11 with respect to recording or use of information on the DNA database system.

(2) This section does not apply if:

- (a) a provision of this Act required forensic material to be destroyed, and



(b) the forensic material has not been destroyed.

Note. Section 83 applies where this Act requires forensic material to have been destroyed.

(3) This section applies:

- (a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person by a forensic procedure, and
- (b) to evidence of any results of the analysis of the forensic material, and
- (c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.

(4) If this section applies, evidence described in subsection (3) is not admissible in any proceedings against the person in a court unless:

- (a) the person does not object to the admission of the evidence, or
- (b) in the opinion of the court the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was not obtained in compliance with the provisions of this Act, or
- (c) in the opinion of the court, the breach of, or failure to comply with, the provisions of this Act arose out of mistaken but reasonable belief as to the age of a child.

(5) The matters that may be considered by the court for the purposes of subsection (4) (b) are the following:

- (a) the probative value of the evidence,
- (b) the reasons given for the failure to comply with the provision of this Act,
- (c) the gravity of the failure to comply with the provisions of this Act, and whether the failure deprived the person of a significant protection under this Act,
- (d) whether the failure to comply with the provision of this Act was intentional or reckless,
- (e) the nature of the provision of this Act that was not complied with,
- (f) the nature of the offence concerned and the subject matter of the proceedings,
- (g) whether admitting the evidence would seriously undermine the protection given to suspects by this Act,
- (h) whether the breach of or failure to comply with the provision of this Act was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights,
- (i) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply,
- (j) the difficulty (if any) of obtaining the evidence without contravention of an Australian law,
- (k) any other matters the court considers to be relevant.

(6) The probative value of the evidence does not by itself justify the admission of the evidence.



- (7) If a judge permits evidence to be given before a jury under subsection (4), the judge must:
- (a) inform the jury of the breach of, or failure to comply with, a provision of this Act, and
 - (b) give the jury such warning about the evidence as the judge thinks appropriate in the circumstances.

26. The onus is on the prosecution to satisfy me that the evidence should be admitted. I must give consideration to the matters raised in S.82(5)

(a) the probative value of the evidence

It is clear that the probative value of the evidence is quite high. If the evidence is admitted there is no other reasonable explanation for the presence of the accused young person's fingerprints being found where they were than that it happened during the commission of the break enter and steal offence. No argument to the contrary was made on behalf of the accused young person.

(b) the reasons given for the failure to comply with the provision of this Act,

No oral evidence was given in these proceedings and the statements in the prosecution brief do not contain any explanation for the failure to comply with the provisions of the Act. I am not satisfied that the failure was intentional or reckless. I can only infer that the police involved in this matter did not appreciate the significance of the C(FP)A and its relevance in these circumstances.

(c) the gravity of the failure to comply with the provisions of this Act, and whether the failure deprived the person of a significant protection under this Act,

The failure to comply with the provisions of C(FP)A was significant and grave. It deprived the accused young person of an opportunity to make submissions to a Magistrate regarding whether or not his fingerprints could be taken. It is necessary therefore to consider whether an application made properly would have been successful in obtaining an order for the fingerprinting of the accused young person.

It is likely that an order would have been made if a magistrate was informed that fingerprints found at a crime scene without lawful explanation were the same as those for a young person whose fingerprints were already on police records.

(d) whether the failure to comply with the provision of this Act was intentional or reckless,

See (b) above.

(e) the nature of the provision of this Act that was not complied with,

The provisions of the Act that were not complied with provide for preconditions before an order can be made which involve a Magistrate being satisfied regarding certain factual matters and various protections of the interests of children and aboriginal people. The importance of these provisions makes compliance with the Act even more important than for adult accused.

(f) the nature of the offence concerned and the subject matter of the proceedings,

The offence under consideration is certainly not amongst the most serious of offences, nor can it be regarded as a minor offence. The maximum penalty is a substantial term of imprisonment but a young person without a significant criminal record would be unlikely to



Children's Law News

receive a custodial penalty and could well be dealt with under the provisions of the Young Offenders Act 1997 providing for referral to a youth justice conference.

(g) whether admitting the evidence would seriously undermine the protection given to suspects by this Act,

The circumstances of this case are very similar to many others that are dealt with in the Children's Court. It is a common occurrence that the location of fingerprints at a crime scene will result in a match with fingerprints already held by the police. It is also a common occurrence that in those circumstances an application for a forensic procedure is made to the court. To provide a shortcut by sanctioning non-compliance is likely to seriously undermine the protection given to suspects. This is not the first time that the argument in this proceeding has arisen in a case that I have dealt with.

(h) whether the breach of or failure to comply with the provision of this Act was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights,

(i) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply,

No submissions were made with respect to these matters and I do not consider them relevant in my determination.

(j) the difficulty (if any) of obtaining the evidence without contravention of an Australian law,

Applications are made under the provisions of this legislation in Children's Courts in New South Wales many times each week. As the application would have been for fingerprints, which do not decay or degrade over time, there was no urgency or likelihood of the loss of evidence. The Act provides for an application for an interim order which can be made on an urgent basis if any concerns are held about the loss of evidence. There would have been no difficulty in complying with the law to obtain the evidence.

(k) any other matters the court considers to be relevant.

There are no other matters that I regard as relevant.

27. In addition to S.82 the provisions of s 138 of the [Evidence Act](#) are also relevant. See *R v White* [2005] NSWSC 60 per Studdert J. The considerations are similar to S.82 and in my view the same result would occur if only the provisions of that section were considered.

28. Although the failure by police was negligent and not more serious, an order would likely have been made by a magistrate for fingerprinting and the refusal to admit the evidence will result in the dismissal of the charge, this does not outweigh the necessity for a law to be complied with.

29. As Wood CJ at CL said in *R v Phung and Huynh* [2001] NSWSC 115 at 38:

It is important that police officers appreciate that the regime now established is designed to secure ethical and fair investigations, as well as the protection of individual rights, of some significance, which attach in particular to children.

30. A court should be reluctant to sanction the failure of police to observe a law which is well known and which sought to deal seriously with the balance between police power and the rights of an individual. I am not satisfied that the evidence should be admitted. As a consequence of this decision the charge is dismissed.