**THE HON T F BATHURST**

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# ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE: IN DEFENCE OF AUSTRALIA'S DISCRETIONARY APPROACH

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## Introduction

1. I would like to begin by respectfully acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, past and present.

2. Today I have chosen to speak on s 138 of the Evidence Act and to provide a defence of a discretionary approach to excluding illegally or improperly obtained evidence. The issue of what to do with evidence which results from improper or illegal investigatory practices is one which has vexed Australian and international courts for centuries. What happens when relevant and damning evidence is obtained by police misconduct, improper investigatory practices or by means of a flagrant violation of the rights of an accused? What should courts do with evidence that is obtained by an illegal search, through the use of unwarranted force or other improper or illegal behaviour?

3. The increasingly popular documentary series, 'Making a Murderer', with which I'm sure many of you are familiar, puts on display the panoply of questionable conduct that police and prosecutors may engage in to secure a criminal conviction. Without spoiling the series for those of you who didn't binge watch it over Christmas, the show follows the story of Steven Avery, a man from Manitowoc County, Wisconsin who was exonerated after serving 18 years in prison for sexual assault and attempted murder, only to be

[*] I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

convicted a couple of years later for murder. I would not dare offer my opinion on the case, particularly because it seems that the online group 'anonymous' are already launching their own cyber investigations. However, the police conduct in the series, such as the questioning of Avery's nephew, Brendan Dassey, and the questionable tactics used to search Avery's house and property, demonstrates many of the ways in which police may fail to follow proper practices when investigating criminal conduct.

4. When evidence which has been improperly obtained is relevant, reliable or highly probative, courts are faced with a fundamental dilemma. On the one hand, there is a public interest in convicting offenders who are found on relevant and reliable evidence to have committed a crime beyond reasonable doubt. On the other hand, there is a public interest in ensuring that law enforcement officers who engage in illegal or improper investigatory practices are disciplined and deterred, that the rights of citizens are upheld, and that the integrity of court processes are maintained.

5. While judicial officers such as myself are known for our, sometimes obsessive, fixation with technical points of law, today I will take a broad approach and outline some of the competing policy concerns that arise in this area. Broadly, there are three approaches which can be taken to improperly or illegally obtained evidence. First, all relevant and reliable evidence can be admitted, regardless of the way in which it was obtained. Second, improperly or illegally obtained evidence can be excluded. Third, courts can retain a discretion to admit or exclude such evidence. Ultimately, I will argue that a discretionary approach, such as that embodied in s 138, combined with the implementation of alternative strategies for disciplining and deterring illegal or improper conduct by law enforcement officers, provides the best way to give effect to competing principles and policy concerns.

6. Before I discuss some of these policy concerns, I will provide a brief overview of the discretionary approach in NSW.

## *A brief overview of s 138 of the Evidence Act*

7. Australian courts have adopted a discretionary approach to determining whether to admit improperly obtained evidence from the time of the seminal judgment of Chief Justice Barwick in *R v Ireland*[1] in 1970.[2]

8. Section 138 of the *Evidence Act* was enacted in 1995 following recommendations by the Australian Law Reform Commission in 1985 and 1987.[3] Under the section, illegally or improperly obtained evidence is prima facie inadmissible unless the desirability of admitting the evidence outweighs the undesirability of admitting it.

9. The decisional criteria for weighing the desirability and undesirability of admitting the evidence are defined in s 138(3) as being: the probative value of the evidence; its importance in the proceedings; the nature of the alleged crime; the gravity of the impropriety or illegality and whether it was deliberate or reckless or contrary to a right recognised by the *International Covenant on Civil and Political Rights*; whether any other proceeding has been, or is likely to be, taken in regard to the misconduct; and the difficulty of obtaining the evidence without the impropriety or illegality. These factors are non-exhaustive.

10. Before I assess the efficacy of this approach, I will outline the competing principles and public policy concerns which arise when evidence is obtained as a result of police misconduct.

[1] (1970) 126 CLR 321.
[2] See too *Bunning v Cross* (1978) 141 CLR 54, 74.
[3] Australian Law Reform Commission (ALRC), *Evidence,* Report No 26 (1985); ALRC, *Evidence,* Report No 38 (1987).

## Competing principles and public policy concerns

### *Seeking the truth through relevant and reliable evidence*

11. The first public policy concern that comes into play is the truth-seeking purpose of a criminal trial. The purpose of a criminal trial is to determine whether an accused has committed a crime beyond reasonable doubt.[4] Genuine convictions are secured when relevant and reliable evidence is before the court. On many occasions, the High Court has explicitly recognised the public interest in admitting all relevant, reliable and probative evidence.[5]

12. It is due to this truth-seeking purpose that many argue that all such evidence should be admissible, regardless of the means by which it was obtained. Advocates of this approach, which I will discuss in greater detail later, argue that such evidence should only be excluded if the manner in which it was obtained has some effect on its relevance or reliability. The position can be summarised as follows. The rules of evidence should be formulated to enable courts to reach correct determinations regarding certain factual issues in dispute. As illegally and improperly obtained evidence may be as probative as that which is lawfully obtained, and as the court requires all reliable evidence to be before it to determine material facts, the impropriety through which evidence is obtained should be immaterial to its admissibility.[6]

[4] See ALRC Report No 26, above n 3, [31]; ALRC Report No 38, above n 3, [20].
[5] *Ireland* at 335 per Barwick CJ; *Bunning v Cross* at 74 per Stephen and Aicken JJ, at 64 per Barwick CJ.
[6] See P G Polyviou, 'Illegally obtained evidence and *R v Sang*' in *Crime, Proof & Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981), 226-7.

## *Upholding the Rule of Law through deterrence, rights protection and judicial integrity*

### The importance of compliance with rules of practice and procedure in criminal investigations

13. Turning to the justifications for excluding improperly obtained evidence, the three main principles that provide an alternative to the reliability argument are all founded on the importance of compliance with the rules of practice and procedure in criminal investigations.

14. It is axiomatic that a modern criminal justice system, such as we have in Australia, must contain clear and prescriptive rules for the investigation and prosecution of crimes. The Rule of Law dictates that all persons, including members of the executive, such as the police, are equal before the law and must obey it.

15. Unlike regular citizens, law enforcement officers are granted certain powers by legislation and the common law, many of which impinge upon the personal liberty of individual citizens. For example, unlike the rest of us, police can have powers to enter private property uninvited. However, these powers are strictly regulated by substantive and procedural rules, such as the requirement that police officers only enter private property with a warrant.

16. Many procedural rules for investigating criminal conduct are in place to protect the individual liberty of accused persons during criminal investigations. These rules serve to protect certain values and human rights. For example, the protection of bodily integrity, humane treatment and non-discrimination on the grounds of race, religion, sex, gender, sexual orientation etcetera.

17. In order for the criminal justice system to be perceived with legitimacy and moral authority, there must be adherence to the substantive and procedural rules that it has agreed to abide by. As stated by Zalman and Siegel, "governments exist only to serve specified ends and properly function according to specified rules", therefore, governments must be "carried on within publically known and enforceable restraints."[7] Where police officers or other investigators act improperly, this weakens the legitimacy of the entire criminal justice system.[8] In *R v Swaffield,* the High Court recognised that "there is a public interest in ensuring that the police do not adopt tactics that are designed simply to avoid the limitations on their inquisitorial functions that the court regards as appropriate in a free society."[9]

18. Studies have indicated that people who perceive law enforcement officers to be performing their duties in an unfair or unjust manner are less likely to abide by the law, as they do not view the law or law enforcement bodies as being legitimate.[10] Further, personal experiences of police misconduct increase feelings of dissatisfaction with law enforcement authorities and increase instances of future non-compliance with the law. Conversely, people are more likely to comply with the law when they view the police as acting in a fair and just manner.[11] It is for this reason that many studies support the notion that making "the style and substance

[7] M Zalman and LJ Siegel, *Criminal Procedure: Constitution and Society* (West Group, 1991), 27.
[8] As passionately stated by Justice Brandeis of the Supreme Court of the United States in 1928, "existence of the government will be imperilled if it fails to observe the law scrupulously. … Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man [and woman] to become a law unto himself [or herself] …": *Olmstead v United States* 277 US 438 (1928), 485.
[9] (1998) 192 CLR 159, 185 per Brennan CJ.
[10] See LA Slocum, SA Wiley and F Esbensen, 'The Importance of Being Satisfied: A Longitudinal Exploration of Police Contact, Procedural Injustice, and Subsequent Delinquency' (2016) 43(1) *Criminal Justice and Behavior* 7, 8-9.
[11] Ibid at 9-10.

of police practices more 'legitimate' in the eyes of the public, particularly high-risk juveniles, may be one of the most effective long-term police strategies for crime prevention."[12]

19. The three principles which provide a basis for the exclusion of improperly obtained evidence all recognise the importance of police compliance with rules of practice and procedure in a democratic, free society. These principles recognise that while the admission of all relevant and reliable evidence furthers the truth-seeking purpose of a criminal trial, the search for truth is not the only objective of a trial and does not hold absolute. The High Court has often quoted the 1846 statement by Knight Bruce V-C that while

> [t]he discovery and vindication and establishment of truth are main purposes … the obtaining of these objects … cannot be usefully pursued without moderation … unfairly [pursued] or gained by unfair means, not every channel is or ought to be open to them … Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.[13]

20. With this in mind, I will now turn to the three main rationales for the exclusion of improperly and illegally obtained evidence.

## *The deterrence/disciplinary principle*

21. The deterrence or disciplinary rationale for excluding improperly or illegally obtained evidence is that, in order to avoid future police misconduct, law enforcement officers who obtain evidence through improper means should be disciplined by the exclusion of the evidence.

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[12] Ibid at 23.
[13] *Pearse v Pearse* (1846) 1 De G & Sm 12; 63 ER 950, 957, cited in *Ireland* per Barwick CJ*; Ridgeway v The Queen* (1995) 184 CLR 19 per Brennan CJ; *Nicholas v The Queen* (1998) 193 CLR 173 per Gaudron J.

This rationale encompasses two slightly different, but related, purposes.

22. The first purpose is to discipline errant law enforcement officers by depriving them of the fruits of their improper behaviour. This purpose finds its basis in the Rule of Law, which dictates that there must be some sanction or consequence for breaches of rules of procedure by police and prosecutors. If there is not, public trust in the criminal justice system is eroded. The Law Reform Commission has noted that "[t]he greater the departure from set procedures and standards … the greater the need to adopt as many forms of discipline as possible (including, in particular, evidentiary exclusion)."[14]

23. The second related purpose is to deter future misconduct by removing any incentive for law enforcement officers to act illegally or improperly in conducting criminal investigations. Dr Mellifont summarises the position as follows, "[b]y sanctioning investigative impropriety through exclusion, the court is impliedly looking to control future investigations by establishing standards of conduct to be observed and discouraging improper practices in the investigation of crime."[15]

24. This rationale has provided the main basis for the exclusion of evidence obtained in breach of constitutional rights in the United States,[16] which I will discuss later in this address. However, in my view, this rationale is flawed in the following respects and cannot provide the main basis for the exclusion of evidence.

[14] ALRC Report No 26, above n 3, [964].
[15] K Mellifont, *Fruit of the Poisonous Tree: Evidence Derived From Illegally or Improperly Obtained Evidence* (Federation Press, 2010), 25-6.
[16] See *United States v Calandra* 414 US 338 (1974), 348; *United States v Peltier* 422 US 531 (1975), 538-9.

25. First, the disciplinary rationale is predicated on the assumption that the exclusion of evidence *is* a sanction for investigative impropriety. However, there are many persuasive reasons why the exclusion of evidence does not discipline errant police officers. Studies conducted in the United States have concluded that the exclusionary rule is ineffective in deterring police misconduct.[17] While the methodology of these studies has been called into question, and the effect of exclusion on police officers is difficult to measure, there does not appear to be any evidence that exclusion *does* have an effect on police conduct.[18]

26. Police officers are only 'punished' by the exclusion of evidence in a highly attenuated sense. In reality, it is the prosecution and the public who suffer from the exclusion of such evidence. At best, police officers are only indirectly disciplined. As noted by Dr Mellifont, the fact of exclusion may not even be made known to the police officers who engaged in the misconduct.[19]

27. In addition, many argue that it is not the role of a criminal trial court to discipline police. Rather, it is the court's role to determine whether the accused committed the offence beyond reasonable doubt. This has been the consistent position of English courts.[20] Justice Davies of the Queensland Court of Appeal, writing extra-judicially, likewise notes that "a criminal court is not equipped for or

[17] See SR Schlesinger, *Exclusionary Injustice: The Problem of Illegally Obtained Evidence* (Marcel Dekker Inc, 1977), 50 ff.; DH Oaks, 'Studying the Exclusionary Rule in Search and Seizure' (1970) 37 *University of Chicago Law Review* 665, 755; CA Wright, 'Must the Criminal Go Free if the Constable Blunders?' (1972) 50 *Texas Law Review* 736.
[18] GL Davies, 'Exclusion of Evidence Illegally or Improperly Obtained' (2002) 76 *Australian Law Journal* 170, 181. See too C Harlow, 'Report of the Royal Commission on Criminal Procedure' (1981) 52(2) *The Political Quarterly* 239, [4126].
[19] Mellifont, above n 15, 29.
[20] See *R v Sang* [1980] AC 402, 436; *R v Grant* [2006] QB 60, [55]; *R v Bailey and Smith* (1993) 97 Cr App R 365, 370; *R v Oliphant* [1992] Crim LR 40; *Fox v Chief Constable of Gwent* [1986] 1 AC 281, 292 per Lord Fraser.

intended as a full inquiry into such conduct."[21] Whether or not this is the case, I am inclined to think that there are more effective means of disciplining police misconduct than evidentiary exclusion. I will discuss these measures later in this address.

## *The protection of rights principle*

28. The second rationale for the exclusion of improperly obtained evidence is the protection of the rights of an accused. In 1977, Professor Ashworth enunciated what he called the 'protective principle' as the most persuasive rationale for excluding improperly or illegally obtained evidence.[22]

29. The principle is based on the following logic. First, the law prescribes certain standards for the conduct of criminal investigations by the police. Correspondingly, citizens have certain rights to be treated according to those prescribed standards. Thus, a legal system which protects those rights must not place citizens whose rights have been infringed at any disadvantage. The only way to ensure that no disadvantage is suffered by an accused whose rights have been breached is to place her or him in the same position as if the breach had not occurred, i.e., by excluding the evidence obtained as a result of the breach. As stated by Professor Mirfield, the exclusion of such evidence "[s]upports whatever minimum standards for the treatment of suspects are chosen by demanding that, once a legal system declares that they should be met, that system should take seriously what it says."[23]

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[21] Davies, above n 18, fn 96.
[22] AJ Ashworth, 'Excluding Evidence as Protecting Rights' [1977] *The Criminal Law Review* 723.
[23] P Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press, 1997), 18. See, in particular, Mirfield's discussion of the importance of protecting the right to silence through excluding evidence obtained in breach of that right.

30. Similar to the criticism directed at the disciplinary principle, the protective principle can be criticised for assuming that the exclusion of evidence is the best way to protect the rights of those who have been victims of police misconduct. Ashworth does not state *why* rights violations trigger the remedy of exclusion and not some other remedy such as in tort, human rights law, criminal compensation or punishment.

## *The judicial integrity principle*

31. The final rationale for the exclusion of improperly obtained evidence, and the rationale that I find most convincing, is that the admission of such evidence would undermine the integrity and legitimacy of the administration of justice. Integrity and legitimacy is undermined if, in admitting improperly obtained evidence, the courts are seen to be participating in and, in effect, condoning, police misconduct.

32. Criminal courts should be concerned with more than simply the attainment of accurate verdicts and must consider the adverse impact of improperly obtained evidence on the legitimacy of the administration of justice and the resulting moral authority of a guilty verdict attained through the admission of such evidence.[24]

33. This rationale is particularly potent where police misconduct has taken place for the express purpose of obtaining a curial advantage. As stated in *Ridgeway,* if courts do not take away this curial advantage by excluding evidence, statements of judicial disapproval are somewhat hollow and the justice system places itself at risk of being "demeaned by the uncontrolled use of the

[24] See A Choo and S Nash, 'What's the Matter with Section 78?' [1999] *Criminal Law Review* 929, 933, 939.

fruits of illegality".[25] In that case, Justice McHugh added that courts should ensure "that public confidence in the justice system is not undermined by the perception that the courts of law condone or encourage unlawful or improper conduct on the part of those who have the duty to enforce the law."[26]

34. Not only must courts refrain from being seen to condone police misconduct, but courts should not place themselves at risk of being seen to be a party or accomplice to such misconduct. As stated by Justice Brennan of the Supreme Court of the United States, "by admitting unlawfully seized evidence, the judiciary becomes a part of what is, in fact, a single governmental action."[27]

35. Public confidence in the court as a dispenser of punishment for criminal misconduct is founded on a belief in the moral legitimacy of the criminal justice system. The moral legitimacy of the system is dependent on a variety of factors, one being judicial responses to breaches of the law. As stated by Justice Traynor in the United States, "out of regard for its own dignity as an agency of justice and custodian of liberty the court should not itself have a hand in such 'dirty business'".[28]

## Assessing Australia's Discretionary Approach

36. Now that I have provided a brief overview of the competing principles and public policy concerns that come into play, namely, the truth-seeking purpose of a criminal trial, the importance of police adherence to proper investigatory procedures, the disciplining of police

[25] *Ridgeway* at 32 per Mason CJ, Deane and Dawson JJ, citing *Pollard v The Queen* (1992) 176 CLR 177.
[26] *Ridgeway* at 83.
[27] *United States v Leon* 468 US 897 (1984), 933.
[28] *People v Cahan* 282 P 2d 905 (1955), 912.

misconduct, the protection of the rights of an accused and the protection of the integrity of the administration of justice, I will outline the three approaches that can and have been taken by courts when faced with improperly obtained evidence. I will briefly outline these three approaches and state why, in my opinion, if combined with appropriate measures for the deterrence and disciplining of police misconduct, Australia's discretionary approach provides the most effective means to deal with improperly obtained evidence.

## *The admission of all relevant and reliable evidence: the United Kingdom approach*

37. The first approach is to simply disregard the manner in which evidence was obtained, unless it has some effect on reliability. This was the approach of early common law courts and also forms the foundation for the current approach in the United Kingdom.

38. Until at least the mid-nineteenth century, the mere fact that evidence was obtained through improper or illegal means did not render it inadmissible.[29] As famously stated by Justice Crompton in 1861, "[i]t matters not how you get it; if you steal it even, it would be admissible".[30] Evidence was only excluded if the impropriety or illegality through which it was obtained rendered it unreliable. For example, confessions obtained by physical or psychological compulsion, rendering them involuntary, were excluded. The sole reason for their exclusion was that such confessions were untrustworthy.[31]

39. The approach in the United Kingdom still contains vestiges of the old common law approach. The

[29] See Davies, above n 18, 172.
[30] *R v Leatham* (1861) 8 Cox CC 498, 501.
[31] See *Warwickshall's Case* (1783) 1 Leach 263, 264.

exclusionary rule in regard to confessions appears in statutory form in s 76 of the *Police and Criminal Evidence Act*.[32] That section dictates that confessions which are obtained through oppression, or other means likely to render the confession unreliable, are inadmissible. The section is clearly only concerned with reliability.

40. However, under s 78 of that Act, judges also have a discretion to exclude prosecution evidence if:

> having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

41. Despite the broad language of that section, English courts are still "increasingly wedded to the principle of reliability".[33] For the most part, English courts have accepted a narrow construction of s 78 as being that evidence will not be excluded based on the manner in which it is obtained, no matter how unfair or improper, unless it raises an issue of reliability that cannot be fairly resolved at trial.[34] In other words, 'fairness' in s 78 refers to the potential for the evidence to be unreliable.

42. While such an approach may enhance the truth-seeking function of a criminal trial, I do not think that it provides the best way to give effect to the competing principles and policy concerns I have mentioned. The approach does not recognise the function of courts to ensure that criminal practices are fair, to protect the integrity of its processes and to uphold the Rule of Law. In my view, courts cannot simply ignore the way in which evidence is

[32] *Police and Criminal Evidence Act 1984* (UK).
[33] Mellifont, above n 15, 61-2.
[34] *R v Chalkley and Jeffries* [1998] QB 848, 875-6; *R v Shannon* [2001] 1 WLR 51; *R v Khan* [1997] AC 558; *R v Loosely* [2002] 1 Cr App R 29, [12]. See too Davies, above n 18, 174.

obtained during criminal investigations; this would be contrary to the historical role of courts in overseeing the entire criminal process and ensuring that it is fair.[35] Further, as noted by the Law Reform Commission, "such an approach would ignore the reality that, on occasion, there are no real alternative methods to obtain justice available to an individual citizen whose rights have been infringed."[36]

43. Thus, in my view, this approach is too restrictive as it prevents courts from considering the reasons which may justify the exclusion of improperly obtained evidence, such as deterrence, the protection of rights and judicial integrity.

## *Strict exclusion of improperly obtained evidence: the United States approach*

44. The second approach is that of strict exclusion of improperly or illegally obtained evidence. This approach has been adopted in the United States in regard to evidence obtained in breach of constitutional rights.

45. The approach in the United States reflects the importance of constitutionally enshrined rights in America's rules of procedure and evidence. Thus, all evidence obtained in violation of constitutional rights under the fourth, fifth, sixth and fourteenth amendments, will be suppressed and inadmissible. Initially, only evidence obtained in violation of the constitutional rights in the fourth amendment, namely, the right to be free from unreasonable searches and seizures, was automatically suppressed. Later, exclusionary rules were developed to protect the rights enshrined in the fifth, sixth and fourteenth amendments. A related *Miranda*

[35] ALRC Report 26, above n 3, [960].
[36] Ibid.

exclusionary rule, excluding confessions obtained from an accused who has not been informed of her or his rights, including the right to remain silent, was later developed as an adjunct to the fifth amendment exclusionary rule, which excludes involuntary confessions.

46. The exclusionary rule in the US is remarkable for its severity. The rule is peremptory, i.e., once it is established that evidence was obtained in breach of one of the aforementioned constitutional rights, the evidence is excluded, no matter how cogent or persuasive the evidence is, no matter how trivial the illegality and no matter whether the illegality occurs in good faith. For example, if a warrant to search private property contains a deficiency, financial records obtained as a result of the 'illegal' search would be regarded as having been obtained through a breach of the fourth amendment. As such, those records would not be admissible in court and other evidence obtained as a result of those records would also not be admissible.

47. In the last two decades, there has been some circumscription of the operation of the exclusionary rules through various exceptions.[37] These exceptions are inflexible, and, once the exception is established, the evidence is automatically admissible.

48. The strict exclusionary rule in the United States has been the subject of intense criticism, most notably from Supreme Court judges themselves. In 1970, former Chief Justice Burger, in a dissenting judgment, criticised the rule for being "a mechanically inflexible response to widely varying degrees of police error", with the result

[37] See discussion in Mellifont, above n 15, 79-80.

being that society pays a high price as guilty parties are permitted to go free due to "[i]nadvertent errors of judgment that do not work any grave injustice".[38]

49. As stated by Dr Mellifont:

> Almost from inception, the exclusionary rule was unpopular. The rule made no attempt to balance the competing needs of the criminal justice system … took no account of factors such as the seriousness of the offence or the seriousness of the breach. Its application was mechanical and could result in the acquittal of an accused charged with a heinous crime based on a minor infraction by a well-intentioned police officer.[39]

50. In my view, the strict exclusionary approach goes too far. Despite the fact that evidence may have been obtained in breach of an accused's rights, the strict approach does not allow for any flexibility and, as stated by the Law Reform Commission, "treats unconscious, accidental or trivial illegalities in the same manner as deliberate and serious illegalities."[40]

## *The discretionary approach in s 138 of the Evidence Act*

51. The final approach to dealing with improperly or illegally obtained evidence is a discretionary approach, embodied in s 138 of the *Evidence Act.* This approach requires the court to weigh the competing goals of determining the guilt of offenders on all relevant and reliable evidence against the undesirable effects of curial approval of police misconduct, the need for deterrence and the protection of the rights of accused persons. In my view, such a balancing approach is the best way to give effect to the competing public policy concerns which arise in this area.

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[38] *Bivens v Six Unknown Agents* 403 US 388 (1971), 396-7.
[39] Mellifont, above n 15, 107.
[40] ALRC Report 26, above n 3, [961].

52. As I have mentioned, s 138 of the *Evidence Act* was enacted in 1995 following recommendations made by the Australian Law Reform Commission. While the section resembles the common law, and the common law does inform its interpretation, the section made two major changes to the common law approach. First, once it is established that evidence has been improperly or illegally obtained, the onus is now on the prosecution to satisfy the court that it should be admitted. Second, s 138 sets out the factors that must be considered by a court in exercising its discretion to admit improperly obtained evidence.

53. The fact that evidence obtained by police misconduct is now prima facie inadmissible manifests a commitment by the legislature to the Rule of Law and to the judicial integrity principle. As the evidence has been obtained by the breach of proper investigatory practice, the shifting of the onus means that it is necessary for such conduct to be justified and explained and for the court to be persuaded that such evidence be admitted despite the impropriety through which it was obtained.[41]

54. Further, the shifting of the burden of proof should force judges to scrutinise the relevant misconduct carefully and to consider all of the competing policy concerns which come into play before admitting such evidence. This approach ensures that even if the evidence is ultimately admitted, police misconduct is not ignored by the courts.

55. Under the common law, courts were not required to consider any specific factors when exercising their

[41] See ALRC Report No 26, above n 3, [964]; B Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757, 783.

discretion to exclude improperly obtained evidence. In order to minimise the inherent difficulties associated with the uncertainty of the exercise of judicial discretion, and avoid large discrepancies between judgments, s 138(3) now spells out precisely what factors and policy concerns must be taken into account in exercising the discretion.[42] Each of the factors in s 138(3) reflects a different aspect of the public policy concerns that I have noted above, most of which had been previously identified at common law.[43]

56. The requirement to consider the probative value and importance of the evidence reflects the fact that the greater these are, the more likely that the exclusion of the evidence will endanger the truth-seeking function of a criminal trial.

57. The requirement to consider the nature of the proceedings reflects the fact that there is a greater public interest in convicting persons who have committed serious offences involving violence, such as murder, than so-called 'victimless' crimes.[44]

58. The requirement to take into account whether the misconduct was reckless or deliberate reflects the fact that, one the one hand, if the misconduct was unintentional or inadvertent, the need to discipline the police officers or for the court to distance itself from the misconduct is reduced.[45] On the other hand, if the conduct was deliberate or reckless, there is a greater need for discipline and to avoid the appearance that the

[42] See ALRC Report No 26, above n 3, [468].
[43] See *Bunning v Cross; Ridgeway; Swaffield*.
[44] However, that does not mean that misconduct will be condoned simply because the alleged crime is serious. As stated by Simpson J, in dissent, in *R v Dalley* (2002) 132 A Crim R 169, [95], the fact that "a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness."
[45] ALRC Report No 26, above n 3, [964].

court is condoning deliberate misconduct. Indeed, the admission of evidence obtained by a deliberate disregard for the law is more likely to bring the administration of justice into disrepute.[46] However, the fact that the misconduct was inadvertent does not affect the deterrent or protection of rights rationales. The exclusion of such evidence may still encourage officers to discover and conform to rules of procedure.[47] Further, the infringement of rights has still occurred and "the damage [an accused] has suffered is the same, regardless of the mental state of the officer."[48]

59. The requirement to take into account the gravity of the police misconduct or whether it infringed the rights of a person, recognises that the greater the police departure from rules of conduct and procedure, the greater the need to uphold the Rule of Law, to discipline and deter misconduct, to distance the courts from such misconduct, and to protect the rights of an accused.[49]

60. The requirement to consider whether the misconduct has been the subject of other proceedings is directed towards the disciplinary rationale. If alternative disciplinary procedures have been taken, the need for the court to discipline and deter police through the exclusion of evidence is reduced. If such alternative proceedings compensate victims of police misconduct, there is also less of a need for the court to protect the rights of an accused.

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[46] See *Bunning v Cross* at 78; *Swaffield* at 182; *Foster v The Queen* (1993) 67 ALJR 550; *R v Edelsten* (1990) 21 NSWLR 542, 557.
[47] Mellifont, above n 15, 153; ALRC Report No 26, above n 3, [964].
[48] Mellifont, above n 15, 153.
[49] In considering this factor, trial judges also consider whether the breach is part of a pattern of misconduct, in which case there is a greater need for deterrence and discipline: ALRC Report No 26, above n 3, [964]; *Cleland v The Queen* (1982) 151 CLR 1, 34; *Milner v Anderson* (1982) 42 ACTR 23.

61. This factor also encompasses a consideration of whether police misconduct is "tolerated by those in higher authority in the police force" or "responsible for the institution of criminal proceedings."[50] As stated by the majority in *Ridgeway,* if such conduct is disowned or criminal proceedings are instituted, the integrity of the administration of justice does not require exclusion of the evidence. However, if the conduct is condoned, those considerations of public policy raise a "formidable case for exclusion".[51] Indeed, as described by Finlay, Odgers and Yeo, if meaningful procedures are not adopted for disciplining police misconduct, courts should be more inclined to exclude evidence and "police the police", as this may be the only remedy available.[52]

62. Modern authority under the Evidence Act, and numerous High Court judgments, have emphasised that while deterrence and rights protection rationales remain part of the exclusionary rule's stated objectives,[53] judicial integrity is the paramount principle which guides the discretion.[54] In my view, the judicial integrity principle provides the most persuasive argument for the exclusion of evidence, and the discretionary approach provides the best way to give effect to it.

63. The judicial integrity principle has, as its core, an intention to imbue the criminal justice system with moral legitimacy in the eyes of the public. As such, the principle requires that different public interests be weighed against each-other in order to determine whether the admission or exclusion of evidence would

[50] *Ridgeway* at 39; *Swaffield* at 174; *Foster*.
[51] *Ridgeway* at 39.
[52] M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2nd ed, Oxford University Press, 1999), 184.
[53] See, for e.g., *Swaffield*.
[54] See *Ridgeway* at 31; *Nicholas*; *Foster*.

undermine the integrity of the justice system. The only way for the court to sensibly and justly give effect to differing community values and public policy concerns is by an objective and impartial consideration of set factors, which is the approach of s 138.

## Criticism of the approach in s 138

64. However, the approach in s 138 is not without its flaws. Indeed, as indicated by one study, in the majority of cases, trial judges have exercised their discretion to admit improperly or illegally obtained evidence.[55] This may indicate some need for reform.

65. The discretionary approach, by its very definition, lacks certainty and consistency, making it difficult for prosecutors and police to predict the outcome of their conduct. Commentators have criticised the uncertainty of the approach as potentially "allow[ing] police to take calculated risks if they believe that they have an equal chance of having the evidence admitted or excluded."[56]

66. This uncertainty appears to me to be an inevitable casualty of the desire to take competing public policy concerns into account. It is due to the uncertainty inherent in the discretionary approach that I would advocate for a comprehensive and clear regime for the disciplining of police misconduct. Such a regime should go some way to providing a greater degree of certainty to police regarding the outcomes of their conduct and should dissuade police from engaging in improper investigatory practices.

67. Another criticism is that, as the approach is discretionary, *House v The King* rules apply and

[55] Presser, above n 41.
[56] Ibid at 782.

appellate courts have generally been reluctant to overturn the decisions of trial judges under s 138.[57] There is perhaps some consideration to be given to whether this is an area in which there should be full appellate review, with appellate courts re-exercising the discretion for themselves. However, there are good reasons for limited appellate review, namely, that a trial judge is best placed to assess competing public policy concerns – she has heard the witnesses and followed all aspects of the trial. Importantly, general merits review may well lead to the result that cases in which such evidence has been admitted are left entirely uncertain, thus bringing the administration of justice into disrepute.

68. Another criticism is that the section fails to attribute any priority to the factors in s 138(3), and may enable trial judges to admit evidence even when there has been a flagrant violation of the human rights of an accused. For obvious reasons of public interest, law enforcement officers should not be permitted, under any circumstances, to engage in extreme forms of physical coercion such as acts of violence, torture or inhuman or degrading treatment.

69. Civil Liberties Australia submitted to the Law Reform Commission that "there should be mandatory exclusion of illegally obtained evidence where the laws infringed were intended to protect individual liberty, freedom and privacy."[58] While such an approach may run into the same difficulties as the American approach, there is certainly scope to consider whether the rule could be amended such that there must be strong and compelling reasons for overturning the presumption of exclusion in

[57] Ibid.
[58] ALRC, *Uniform Evidence Law,* Report No 102 (2006), [16.90].

the case of a breach of such rights. Indeed, in extreme cases of physical coercion, automatic exclusion may be appropriate.

## Alternative methods of disciplining police

70. I will now move on to briefly mention some alternative methods of disciplining police misconduct outside of the rules of evidence. Respect for the Rule of Law and the rights of individuals in a free and democratic society requires that police misconduct not be met with impunity. While in some cases, the exclusion of improperly obtained evidence may result in deterrence, as I have discussed, there is no evidence that the exclusionary principle has a specific disciplinary or deterrent effect. Further, s 138 is limited in its operation to evidence obtained as a result of police impropriety or illegality. It does not address instances where misconduct does not contribute to the obtaining of evidence. As such, in my opinion, in order for the Rule of Law to be upheld, any exclusionary rule must be combined with other measures designed to discipline and prevent police misconduct.

71. The available research on the prevention of police misconduct suggests that there is a need for a comprehensive and clear code of conduct for police officers, providing appropriate sanctions and penalties, ranging from disciplinary measures to criminal penalties. There is also a need for an independent body to investigate complaints of police misconduct and refer such complaints to relevant disciplinary tribunals or criminal courts.[59]

72. In New South Wales, the Police Integrity Commission, established in 1996, is an independent statutory body

[59] See Davies, above n 18, 183-4.

responsible for detecting, investigating and preventing police misconduct by officers of the police force and NSW Crime Commission. The Commission focuses on serious police misconduct such as corruption, serious assaults and crimes attracting a minimum of five years imprisonment. Less serious forms of misconduct are dealt with by the NSW Ombudsman's Office and the Police Force itself.

73. Some commentators and judges have argued that the current system for investigating and disciplining police misconduct in Australia is insufficient and a more comprehensive and accessible scheme must be developed.[60] In November last year, the Police Minister announced that the Police Integrity Commission will be replaced by a new Law Enforcement Conduct Commission to "streamline and strengthen oversight of the NSW Police Force and NSW Crime Commission". The Minister stated that the legislation to form the commission will be introduced into Parliament this year and the Commission will become operational in 2017.[61]

74. In my view, any scheme for disciplining and investigating police misconduct should also include a parallel scheme for the compensation of persons whose rights have been infringed. This is crucial for the protection of the rights of citizens affected by criminal investigations. There are many flaws with our current system of providing civil remedies to victims of police misconduct. For one, often such victims are impecunious and may not have the resources or wherewithal to bring legal proceedings. Further, the fact that civil proceedings can only be

[60] Ibid at 184; Mellifont, above n 15, 29-30.
[61] See NSW Government, Justice Department, 'New law enforcement watchdog for NSW' (Media Release, 26 November 2015) available at <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/New-law-enforcement-watchdog-for-NSW.aspx>.

implemented where a private cause of action is established may hinder the ability of many victims to receive compensation.[62]

75. More research needs to be done to determine whether our current system, or the one being introduced, is or will be sufficient to deter and discipline police misconduct and provide adequate remedies for victims of such misconduct. Ultimately, the exclusionary rule in Australia has as its main objective the maintenance of the integrity of our courts of law. Other measures to deter and discipline police misconduct must be implemented if we are to give full respect to the Rule of Law and the rights of individuals.

76. Of necessity, this address has focused on police misconduct. However, while the problem commonly does arise in relation to conduct by police, it has also arisen in respect of the conduct of investigatory bodies such as the Crime Commission.[63] Indeed, it might be said that the extent of the power given to such bodies and the lack of transparency of their processes provides a greater opportunity for such misconduct than is traditionally available to law enforcement officers.

77. I should add that this paper is not intended to suggest that conduct of the nature referred to is widespread. However, as I have sought to indicate, the consequences of such conduct are serious, need to be deterred and, unless properly dealt with, can lead to significant miscarriages of justice.

[62] See Mellifont, above n 15, 30; Mirfield, above n 41, 23.
[63] See e.g., *Gedeon, Gilbert v R* [2013] NSWCCA 257.

## Conclusion

78. In conclusion, I hope that today I have provided you with a taste of some of the issues that arise when a court is faced with improperly or illegally obtained evidence. While criminal trials exist to determine the guilt of accused persons beyond reasonable doubt, no legal system values truth over all other imperatives. Respect for the Rule of Law, the public interest in disciplining and deterring police misconduct, the recognition of the rights of accused persons and the desire to uphold the integrity of the criminal justice system have contributed to the development of rules in Australia and other jurisdictions for the admission or exclusion of improperly or illegally obtained evidence.

79. In my view, the only way to give full effect to the competing principles and public policy concerns which arise in this area is to adopt a discretionary approach to the exclusion of improperly obtained evidence, which we have, but combine this approach with the implementation of a comprehensive scheme for the investigation, disciplining and deterrence of police misconduct.

80. Section 138 of the Evidence Act is clearly directed at meeting the competing principles and policy concerns that I have described in this address and it goes a long way to providing a clear and appropriate response to these concerns. However, that is not to say that the section is without flaws. Indeed, in an area such as this, where conceptually incommensurable, but equally as important, public interests must be reconciled; it is difficult to keep everyone happy. With that in mind, it is important for us to continue to assess whether the Australian exclusionary approach is meeting the needs of the community such that public confidence in the

integrity of the courts and law enforcement bodies is maintained.