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Prohibited Methods of Obtaining and Presenting Evidence

Australian Report

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Obtaining Evidence

1. Describe briefly the legal rules in your country that restrain persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity and privacy

In Australia at the federal level there are no formally legally entrenched fundamental rights and, apart from some rights that have been recognized by the High Court as implicit in the Australian Constitution (such as freedom of political association and ensuring the independence of the courts) we continue to rely upon the common law and legislation to ensure the physical and moral integrity, privacy etc of the citizen. This is achieved through criminal laws applying generally to prohibit assaults, killings, thefts, frauds, trespasses etc and more specifically through laws regulating the investigating of offences by law enforcement authorities.[1] These laws are detailed and sophisticated and, on the whole, provide adequate protection for the citizen against arbitrary investigation. (see, for example, legislation permitting the taking of bodily samples from suspects and other citizens for the purposes of forensic examination[2]). There are of course exceptions, for example recent laws enacted to permit more "effective" investigation of alleged terrorist offences, permitting extensive detention and denial of access to legal advice.[3] In these cases the laws cannot be challenged as in breach of formally entrenched fundamental rights.

The federal government has recently determined that it will not legislate to entrench fundamental rights and will continue the approach whereby the Human Rights Commission maintains a watching role over abuses of fundamental human rights, with authority to conciliate complaints

[1] For these investigatory powers see generally LexisNexis, *Halsbury's Laws of Australia*, looseleaf, vol 20, para [320]ff, 'Police and Emergency Services'. The principal statutory powers are found in Crimes Act 1914 (Cth) Pts, 1AA, 1AB, 1AC, 1C, 1D; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); *Crimes (Forensic Procedures) Act 2000* (NSW) (discussed in *L v Lyons* (2002) 56 NSWLR 600); *Police Powers and Responsibilities Act 2000* (Qld); *Summary Offences Act 1953* (SA) ss 67–82; Criminal Law Consolidation Act 1935 (SA) ss 271–273; *Criminal Law (Forensic Procedures) Act 2007* (SA) (earlier version of the Act discussed in *Stephanopoulos v Police* (2001) 79 SASR 91; *Police v Beck* (2001) 79 SASR 98); Criminal Code (Tas) s 27; *Forensic Procedures Act 2000* (Tas); *Crimes Act 1958* (Vic) ss 459, 459A, 464–464ZL, 465; *Criminal Investigation Act 2006* (WA); *Criminal Investigation (Identifying People) Act 2002* (WA); Crimes Act 1900 (ACT) Pt 10; *Crimes (Forensic Procedures) Act 2000* (ACT); *Police Administration Act 1978* (NT) Pt VII. In addition to these general powers, specific powers to question and search are given in many Acts of parliament.

[2] The legislation is referred to in fn 1 above.

[3] See for example *ASIO Act 1979* (Cth) Pt III Div 3 (persons may be detained, with judicial approval, for the purpose of questioning, not only where reasonably suspected of terrorism but where reasonably suspected of being able to provide information relating to terrorist acts and in certain circumstances access to a lawyer, or at least a lawyer of choice, may be restricted during questioning).

of alleged discrimination and human rights breaches (see Australian Human Rights Commission Act 1986 and related legislation prohibiting discrimination on grounds of age, disability, race and sex).

However, at the state and territory level, legislation has been passed in Victoria (*Charter of Human Rights and Responsibilities Act 2006*) and the Australian Capital Territory (*Human Rights Act 2004*) giving expression to fundamental rights. Although not generally providing any direct remedy to the aggrieved individual to have investigative laws declared invalid, these enacted rights may, nevertheless, create standards of propriety for courts in deciding whether to exclude evidence 'improperly' obtained.

More specifically, by virtue of s 138 of 'uniform evidence legislation', which applies in federal, ACT, New South Wales, Victorian and Tasmanian courts, and applies equally in civil and criminal proceedings, evidence obtained 'improperly or in contravention of an Australian law' or 'obtained in consequence of' such an impropriety or contravention' 'is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.' Significantly s 138(3)(f) provides that in deciding whether to admit such evidence the court may take into account 'whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights.' In this way fundamental rights are given recognition in determining whether improperly or unlawfully obtained evidence may be received under s 138.

In courts in the remaining states and territories – Queensland, South Australia, Western Australia and the Northern Territory – the common law applies to permit exclusion of improperly or unlawfully obtained evidence. In a landmark decision, *Bunning v Cross* (1978) 141 CLR 54, the High Court departed from English common law authority and recognized a public policy discretion empowering courts to exclude, on grounds of public policy, improperly or unlawfully obtained evidence. This common law discretion is of a scope equivalent to that enacted in the uniform evidence legislation, and again applies in both civil and criminal proceedings; but whereas under the uniform legislation improperly or unlawfully obtained evidence must be excluded unless the court can be persuaded to admit it, at common law the onus remains upon the party seeking to exclude such evidence to convince the court that, in the 'interests of justice' the evidence should not be received. Nevertheless, at common law impropriety as interpreted by the High Court is a wide concept[4] and a court would not be prohibited from taking into account fundamental rights both in determining whether there was impropriety and in deciding whether to exercise the discretion to exclude that evidence. In other contexts judges have expressly recognized that they can have regard to fundamental rights in determining the appropriate content of Australian law.[5]

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[4] The breadth of 'impropriety' as opposed to 'contravention' is adverted to by French CJ in *Parker v Comptroller-General of Customs* (2009) 252 ALR 619; [2009] HCA 7 at [29]–[30]. The leading High Court cases are *Ridgeway v R* (1995) 184 CLR 19, *R v Swaffield; Pavic v R* (1998) 192 CLR 159; *Tofilau v R* (2007) 231 CLR 396.

[5] For example, courts will 'not not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.' *Coco v The Queen* (19940 179 CLR 427 at 437 quoted with approval by Gleeson CJ in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19].

2. What are the legal/procedural consequences of such breaches?

Action may be taken directly against investigators who have breached criminal or civil laws in obtaining evidence, and investigators may be subject to other disciplinary action where they have contravened procedures for obtaining evidence. But, as mentioned above, the immediately practical consequence of evidence having been obtained improperly or unlawfully is that at trial the court has a discretion in relation to the admissibility of that evidence.

But two important points require emphasis. First, the evidence must be created or obtained as a consequence of the impropriety or illegality. Impropriety that does not have that causal effect does not enliven the exclusionary discretion.[6] The rationale for this given at common law is that the discretion exists to ensure courts do not demean their status by allowing prosecutors to benefit from their impropriety.[7] It is the acting upon such impropriety that brings the administration of law into disrespect. While the discretion may have as a consequence the effect of discouraging law enforcement officers for acting improperly or unlawfully, this is not its specific rationale. Thus, the rationale does not extend to evidence lawfully obtained but, for example, unlawfully destroyed to prevent examination by the accused.[8] Other action may be taken to punish that unlawfulness. However in such a case the courts possess another discretion, to exclude evidence where this is required to ensure a fair trial (see generally at common law *R v Lobban* (2000) 77 SASR 24, *Police v Hall* (2006) 95 SASR 482, and ss 135-7 of the uniform legislation), and loss of the opportunity to examine evidence may result in such unfairness (again the rationale of the 'fairness' discretion is not to punish law enforcement officers). But this 'fairness' discretion must be distinguished from the 'public policy' discretion to exclude evidence improperly or illegally obtained.[9]

Secondly, at common law the onus remains upon the party seeking exclusion of improperly or unlawfully obtained evidence to persuade the court to exercise its discretion to exclude it. On the other hand, under s 138 of the uniform legislation the onus is reversed. Once the evidence is shown to have been improperly or unlawfully obtained, the evidence must be

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[6] *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281 at 287–8 (Doyle CJ); *R v Lobban* (2000) 77 SASR 24 at [39]–[41] (Martin J). A more liberal approach to causation is suggested in *Robinett v Police* (2000) 78 SASR 85 at 101 (Bleby J) (criticised by Grant, (2001) 25 *Crim Law Journal* 97, but followed by Smart AJ in *DPP v Carr* [2002] NSWSC 194 at [50]–[72]). In *R v Haddad* (2000) 116 A Crim R 312; [2000] NSWCCA 351 at [69]–[76] Spigelman CJ, disapproving of Martin J's comments in *Lobban* at [39], suggests the words 'obtained in contravention' in s 138 may 'encompass the entirety of an integrated scheme … designed to protect fundamental freedoms' and thus encompass impropriety following the obtaining of evidence; but cf narrower approach in *R v Dalley* (2002) 132 A Crim R 169; [2002] NSWCCA 284 at [86]; and *State of Tasmania v Crane* [2004] TASSC 80 at [21] (Blow J). Doyle CJ in *Police v Hall* (2006) 95 SASR 482; [2006] SASC 281 at [39]–[45], expressly modified his narrow position in *Lobban* and followed Chernov JA in *DPP v Moore* (2003) 6 VR 430 at [55] in agreeing that impropriety after the obtaining of evidence may be so closely related as to give rise to this discretion (for example, improper failure to provide defendant with blood-test kit following taking of breathalyser test). See also *DPP v Riley* (2007) 16 VR 519.

[7] *Ridgeway v R* (1995) 184 CLR 19 at 31 (Mason CJ, Deane and Dawson JJ); *Nicholas v R* (1998) 193 CLR 173 at [35]–[36] (Brennan CJ), [101] (McHugh J), [211]–[214] (Kirby J).

[8] See also *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281 where the court refused to exercise the discretion to exclude evidence lawfully obtained under a search warrant where police had later given deliberately false evidence in court about how they had executed the warrant.

[9] For a full discussion of the fairness and public policy discretions and the distinctions between them see Ligertwood and Edmond, *Australian Evidence*, 5th Ed, LexisNexis Butterworths, Sydney, 2010 at [2.28]ff.

excluded unless the court can be persuaded to exercise its discretion to admit it. Given the strongly adversarial nature of proceedings in common law countries this is an important procedural reform.

3. Do the consequences vary with the gravity of the matter (*eg*, are there special rules for serious crimes)?

There are no special rules for serious crimes but at both common law and under the uniform legislation an important factor in determining exercise of the discretion is the gravity of the crime before the court. Generally this results in courts being reluctant to exclude improperly obtained evidence where this impropriety does not undermine the reliability of the evidence and where the evidence is necessary to ensure the conviction of persons alleged to have committed serious crimes. This is most vividly illustrated by recent cases that have upheld the admissibility of evidence of confessional statements obtained by deception through police undercover agents posing as members of criminal organizations (see *Tofilau v R* (2007) 231 CLR 396). At the other end of the spectrum courts may be more willing to exclude evidence obtained in breach of procedures for gathering evidence concerning traffic violations (for example, where procedures for taking blood alcohol tests have been breached: see eg *DPP v Moore* (2003) 6 VR 430; *DPP v Riley* (2007) 16 VR 519). But these decisions remain exercises of discretion rather than application of definitive rule.

4. Do the rules that apply to evidence obtained by the prosecution differ from those that apply to the defense?

The rationale of the discretion applies equally to evidence obtained improperly by prosecution and defence (or by parties in civil proceedings) and the common law rules and s138 of the uniform legislation apply equally to evidence presented by all parties and in any proceedings, civil or criminal. But in practice it is generally the defence in criminal cases that is seeking to have excluded evidence obtained improperly on behalf of the state. It should also be stressed that in exercising the discretion in respect to defence evidence an additional factor to be taken into consideration will be the protection of an innocent person against wrongful conviction. Consequently one might argue that, relevant defence evidence, although unlawfully obtained, should generally be considered by a court if the court is to ensure this protection and, in consequence, maintain its integrity and respect.

5. Describe the practical effect of these rules and how they are applied by the courts.

It is difficult to obtain clear evidence about how the exclusionary discretion operates in practice. Many exercises of discretion occur in lower courts and are never subject to appeal. Courts are most wary of prosecution evidence obtained in deliberate disregard of the law or other standards of propriety.[10] But even here courts are prepared to allow tender where the crime is serious and

[10] See: *Bunning v Cross* (1978) 141 CLR 54 at 77–8 (Stephen and Aickin JJ); *Parker v Comptroller-General of Customs* [2007] NSWCCA 348 at [59]. But this deliberation is not necessarily determinative: ALRC 26 (1985), vol 1, [964]. Where the activity of police officers is unlawful but they are unaware of the unlawfulness, because they

there is no other practical way of obtaining evidence against the accused. Section 138(3) of the uniform legislation, which largely reflects the factors taken into account by the common law in exercising the exclusionary discretion, provides that in exercising the inclusionary discretion under s 138(1) the court:

> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—
> (a) the probative value of the evidence; and
> (b) the importance of the evidence in the proceeding; and
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
> (d) the gravity of the impropriety or contravention; and
> (e) whether the impropriety or contravention was deliberate or reckless; and
> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

To these one might add the effect that any impropriety or unlawfulness has upon the person from whom the evidence has been obtained. For example, to illegally and clandestinely record a conversation with an accused might not be excluded if it is clear the accused would still have held the conversation if aware it was being recorded.[11]

It should also be noted that it is always difficult for an aggrieved person to appeal against an adverse exercise of discretion by a trial judge; appellate courts will generally only interfere if it can be shown that the exercise of discretion was wrong – in the sense that it proceeded upon the basis of some error of law or fact (see for example *R v Ridgeway* (1998) 71 SASR 73 at 85 per Doyle CJ).

Presenting Evidence

6. Does the law in your country prohibit certain means of presenting evidence (*eg*, hearsay testimony) due concerns about its probative value?

Common law jurisdictions have complex and sophisticated rules to ensure the fair adversarial presentation of evidence by parties to an independent court. Evidence is presumptively in the

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falsely believe their authority is valid under the appropriate legislation — such as the *Law Enforcement (Controlled Operations) Act 1997* (NSW) — courts may take a sympathetic approach: see eg *Dowe v R* [2009] NSWCCA 23.

[11] Cf *R v Swaffield; Pavic v R* (1978) 141 CLR 54. Cases under the uniform legislation also appear to have regard to the effect of impropriety upon the accused as an aspect of 'fairness' to be considered in exercising the s 138 discretion: *DPP v Farr* (2001) 118 A Crim R 299; [2001] NSWSC 3 at [86] (Smart AJ); *R v Dungay* [2001] NSWCCA 443 at [31]–[51] (Ipp AJA); *R v Helmhout* [2001] NSWCCA 372 at [11], [12] (Ipp AJA); *R v Phuong* [2001] NSWSC 115 at [48]–[50], [59] (Wood CJ at CL).

form of oral testimony from memory by witnesses called and examined on oath by one party and then made available for cross-examination by any other parties to proceedings. While this procedure embodies the right to confrontation to say it is based upon this right would be very much an over-simplification.

Hearsay evidence is generally prohibited to maintain this testimonial presentation, regarded as the most effective and fair means for determining the reliability of evidence. But there are many exceptions to the hearsay rule and the uniform legislation now more generally admits first-hand hearsay in both civil and criminal cases. But even in jurisdictions not subject to the uniform legislation there are many statutory exceptions to the hearsay rule, permitting the tender of business records and other documents.

7. What are the legal/procedural consequences of presenting evidence by such means?

Where evidence is sought to be presented in breach of the above rules parties must object to the evidence and the trial judge will rule whether the evidence will be permitted. Failure to object may at common law constitute waiver of an applicable rule of evidence (cf s 190 of the uniform legislation). A person who objects to a trial judge's ruling cannot generally appeal against that decision except following verdict, and then only as a ground of appeal against an adverse verdict. And in the case of a verdict of not guilty given by a jury in a criminal case, although the prosecution can state a case on a point of law to an appeal court, that verdict will stand despite the prosecution being able to establish error.[12]

8. Do the consequences vary with the reliability of the evidence and its necessity for the record?

At trial evidential rules in theory should be strictly applied but in practice these decisions depend upon decisions of fact and exercises of 'discretion' that are nearly always open to debate. Where the accused appeals against a verdict of guilt upon the basis of the improper admission of evidence, even if the error is found to be one of law, the appeal will not succeed if the prosecution can convince the court that the error has produced no substantial miscarriage of justice (*Weiss v R* (2005) 224 CLR 300). Where, in a case tried without a jury, the prosecution may appeal against a verdict of acquittal again it will have to be shown that any error affected that verdict. On the other hand where following acquittal by a jury the prosecution states a case on appeal the point of law will simply be decided in the abstract.[13]

9. Do different rules apply to the evidence relevant to the claim or the defence?

Generally evidential rules apply equally to prosecution and defence but there are exceptions. For example, both at common law and under the uniform legislation there are special rules relating to the giving of evidence by defendants, designed to ensure the right to silence and the privilege

[12] On appeals see generally Ligertwood and Edmond, *Australian Evidence* 5th Ed, LexisNexis Butterworths, 2010, [2.14]ff.

[13] Again see generally Ligertwood and Edmond, *Australian Evidence* 5th Ed, LexisNexis Butterworths, 2010, [2.14]ff.

against self-incrimination. No inference of guilt my be drawn from a defendant's choice not to testify (see s 20 of the uniform evidence legislation, which reflects the common law position). Special rules also apply to the tender by the prosecution of a defendant's admissional statements ('confessions'). At common law these seek to ensure the right to silence and privilege against self-incrimination by demanding that the confession be voluntarily made, but under the uniform legislation the object appears to be to protect the defendant from violence and inhuman and degrading treatment (s 84), and from conduct by investigators that might affect the reliability of any admissions (s 85).

The exceptions to the hearsay prohibition in s 65 of the uniform legislation impose, where witnesses are unavailable to testify, restrictions upon the tender of their first-hand hearsay to ensure its reliability, but s 65(8) permits the defendant to tender any first-hand hearsay to raise doubt about his or her guilt (eg the out of court confession by a third party to the crime alleged). And this defence evidence is subject to rebuttal by the prosecution with its own first-hearsay statements relating to that same matter.

10. Describe the practical effect of these rules and how they are applied by the courts.

It is difficult to answer this question as it raises the question of the efficacy of the adversarial evidential regime as a whole. But courts strive above all for accurate decisions (in criminal cases the proof of guilt beyond reasonable doubt), and, given the inherent uncertainty of proof, decisions cannot be determined as accurate unless based upon fair process.

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