CHAPTER 1

INTRODUCTION

Where law ends, there tyranny begins.[1]

Introduction

The thin blue line stands between order in our society and anarchy. At least, that's what those involved in law enforcement would like us to believe. In reality it is the law that is the divider between order and chaos. But it is the manifestation of the law from an abstract collection of rules and principles to its practical application in the criminal justice system that is crucial to its effectiveness, integrity and the preservation of underlying public confidence.

A democracy balances the rights of the State to investigate and prosecute criminal offences by bestowing upon each of its citizens a host of individual rights and privileges. On a broad scale the balance between the rights of the State and the rights of an individual is enshrined in legislation and entrenched in common law principles. The precise balance between State and individual rights is less certain where it is the outcome of a discretionary judgment rather than the application of a fixed rule. Discretions, whether vested in law enforcement officers, prosecutors or the judiciary are characteristic of the criminal justice system. Of these discretions, those vested in the judiciary are the most visible and most likely to be subjected to public criticism.

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1 William Pitt, Earl of Chatham 1770.

The judiciary is vested with an array of discretions that may be exercised in the regulation and conduct of a criminal trial. This paper will focus on the judicial discretion to admit or exclude improperly or unlawfully obtained evidence.[2] The public policy discretion is fundamentally different in nature and purpose to other judicial discretions,[3] which in the main are concerned with matters directly connected to a particular trial or their impact upon an individual accused person. The public policy discretion (as its name suggests) is concerned with "matters of high public policy"[4] and seeks to ensure that "those who enforce the law obey it themselves."[5]

Although the public policy discretion has been part of Australian law for thirty-five years, for much of that time it languished in the shadows of the fairness discretion. The overlap between the two different discretions distracted judicial attention from the public policy discretion because judicial focus was firmly fixed on the fairness discretion. Application of the public policy discretion was almost universally regarded as ancillary to the older and broader discretion[6] and it

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2 This judicial discretion is described as the "public policy discretion" and this title will be used throughout this paper.

3 For example see *Uniform Evidence Acts* 1995, sections 135 to 137; *R v Lee* (1950) 82 CLR 133; *R v Christie* [1914] AC 545.

4 *Ireland v The* Queen (1970) 126 CLR 321; Bunning *v Cross* (1978) 141 CLR 54, 77 Stephen and Aicken JJ; *Pollard v The Queen* (1992) 176 CLR 177; *Foster v The Queen* (1993) 65 A Crim R 112 Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Ridgeway v The Queen* (1995) 129 ALR 1 Toohey J; *Lawrie v Muir* (1950) JC 19; *The People v O'Brien* [1965] IR 142.

5 *Bunning v Cross* (1978) 141 CLR 54. 77 Stephen and Aicken JJ; *Pollard* v *The Queen* (1992) 176 CLR 177.

6 *Cleland v The Queen* (1982) 151 CLR 1 Dawson J first distinguished between the purpose of each discretion and how this should determine the application of each discretion.

prevailed only in those instances involving flagrant breaches of the law. The legacy of this history is that the public policy discretion has not been an effective instrument securing observance of the law by the police. Perhaps of greater concern is a consequential implication that infringement of an individual's rights and privileges will be excused in furtherance of a criminal investigation.

The history of Australian policing reveals an entrenched cycle of scandal, inquiry, and reform. Police malpractice is not a historical anachronism but an issue of contemporary relevance and importance. Recent events affirm the significance of this issue. Over the past six months, the NSW Supreme Court has criticised law enforcement officials for unlawful and/or grossly improper conduct during the investigation of serious criminal offences in two unrelated criminal prosecutions;[7] public allegations of police misusing their powers during the APEC summit in Sydney during September 2007, including the assault of a freelance news photographer and police officers removing their identification tags when policing staged protests;[8] serious allegations of corruption and malpractice within the Victorian Police arising during Office of Police Integrity hearings;[9] and the

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7 *Ballis v Randall & ors* Unreported, NSW Supreme Court, Hall J, 7 May 2007); *R v Ul-Haque* (Unreported, NSW Supreme Court, Adams J, 5 November 2007).

8 Jordan Baker, *Identity parade of the secret police* (2007) Sydney Morning Herald <www.smh.com.au/news/apec/identity-parade-of-the-secret-police/2007/09/09.html> at 14 November 2007; Paul Bibby, *Call for inquiry into clash that felled photographer* (2007) Sydney Morning Herald <www.smh.com.au/news/apec/call-for-inquiry-into-clash-that-felled-photographer/2007.html> at 14 November 2007; Edmund Tadros, *APEC name tags 'compromised safety'* (2007) Sydney Morning Herald <www.smh.com.au/news/national/apec-name-tags-compromised-safety/2007/09/18.html> at 14 November 2007.

9 Norrie Ross, *Inspector Glen Weir quizzed by OPI on phone taps* (2007) Herald Sun <www.news.com.au/heraldsun/story/0,21985,22741216-5014265,00.html> at 14 November 2007; Keith Moor, *Corruption probe takes new scalps* (2007) Herald Sun <www.news.com.au/heraldsun/story/0,21985,22748419-5014265,00.html> at 14

Surveillance Devices Bill 2007 before the NSW Parliament overhauling existing surveillance law by extending the authority of police to carry out covert surveillance and reducing judicial oversight and review of covert surveillance.[10]

Misuse of policing powers will potentially affect a subsequent criminal trial, especially where police misuse their powers to obtain evidence. While a criminal trial is not the proper forum for disciplining wayward police officers, a court nevertheless has a duty to protect the integrity of its processes from compromise by police malpractice. Intrinsically the court procedure seeks to ensure that an accused person is not tried unfairly but tried in accordance with the law. In this sense, the law includes both substantive and procedural law regulating the conduct of a criminal investigation and trial. The principal objective of procedural regulation is the attainment of relevant and reliable evidence. Recognition of individual rights and privileges has an essential role in protecting an individual from arbitrary or unfair treatment by the State through its law enforcement agencies and by prescribing the procedure for collection of certain evidence to ensure its veracity. The law seeks to strike a delicate balance between policing

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November 2007; Norrie Ross, *Paul Mullett admits giving Office of Police Integrity wrong answers* (2007) Herald Sun <www.news.com.au/heraldsun/story/0,21985.22754953-5014265,00.html> at 14 November 2007.

10 *Surveillance Devices Bill* 2007 was introduced in the lower house on 6 November 2007, the Minister delivered its second reading speech on 14 November 2007. Sydney Morning Herald 25 October 2007.

powers and individual rights. Misuse of policing powers will disturb this balance by infringing the rights and privileges of an individual. It falls to the court to decide whether evidence (the product of an infringement) should be admitted or excluded in the public interest.

The focus of the public policy discretion is the observance of the law. Observance of the law should not be restricted to monitoring compliance of law enforcement officials but should also be viewed in the context of recognition and enforcement of the human rights of individuals. For the law to be meaningful, it must be enforced. This paper will examine the effectiveness of the public policy discretion, at common law and under statute, and whether the current law should be amended to advance the purpose of this judicial discretion. The analysis will begin with a review of academic literature relevant to a discretion of this nature and then analyse the public policy discretion within the context of criminal justice administration.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

The public policy discretion and its more recent statutory equivalent have received limited academic attention. Much of the literature examining the admissibility of unlawfully or improperly obtained evidence primarily concerns confessional evidence, focusing on the fairness discretion and the vexed question of police discipline. Whether the little academic interest in this discretion has been (at least in part) influential in the 'conspicuous inactivity'[11] of the executive and legislative branches of government in tackling the issues of police misconduct and corruption infiltrating criminal justice administration[12] is open to debate. This chapter will review relevant academic literature tracing the history of the public policy discretion in Australian law.

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11 J B Dawson, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study" [1982] 31 *International and Comparative Law Quarterly* 513, 514.

12 Ibid; Peter Sallmann and John Willis, *Criminal Justice in Australia* (1984), 115-118.

2.2 Pre *Ireland's* Case

Prior to *The Queen v Ireland*[13] the issue of reception of unlawfully or improperly obtained evidence was confined to the fairness discretion.[14] Despite past judicial concerns about police conduct and propriety during criminal investigations, which culminated in the formulation of the *Judges' Rules*,[15] academic comment was sparse. Discovered relevant literature, predating *Ireland's* case, was limited to four articles written by two independent authors at proximate intervals.[16]

An English academic, Ian Brownlie, examined the *Judges' Rules* regulating the conduct of a criminal investigation and reception of prosecution evidence obtained contrary to those Rules.[17] Both articles were concerned with the questioning of suspects and the reception of confessional evidence. The author acknowledged the difficultly in reaching an appropriate balance between protecting an accused person's rights and granting police powers to effectively investigate

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13 (1970) 126 CLR 321.

14 *McDermott v The King* (1948) 76 CLR 501; *R v Lee* (1950) 82 CLR 133.

15 *Judges' Rules* were formulated in 1912 by the English Court of Appeal to provide guidance to the metropolitan (professional) police force about the exercise of policing powers. Although never part of the law, the *Judges' Rules* were often referred to by the court when evaluating acts of the police. The *Judges' Rules* 1912 were not received as part of the inherited English common law but used in the formulation of police standing orders, Commissioner's instructions and protocols for the policing. The revised *Judges' Rules* 1964 were never part of Australian jurisprudence.

16 Ian Brownlie, "Police Questioning, Custody and Caution" [1960] *Criminal Law Review* 298; F M Neasey, "Cross-Examination of the Accused on the Voir Dire" [1960] 34 *Australian Law Report* 110; Ian Brownlie, "Police Powers - IV Questioning: A General View" [1967] *Criminal Law Review* 75; Justice F M Neasey, "The Rights of the Accused and the Interests of the Community" [1969] 43 *Australian Law Report* 482.

17 Ian Brownlie, "Police Questioning, Custody and Caution" [1960] *Criminal Law Review* 298; Ian Brownlie, "Police Powers - IV Questioning: A General View" [1967] *Criminal Law Review* 75 in which the author examines the then new *Judges' Rules* of 1964 and, in particular, the significance of the new requirement of the *Judges' Rules* that police caution a suspect before questioning.

crime. In his second article, Brownlie forcefully argued against the proposition that police should not be subject to regulation because what occurred during a criminal investigation affected the conduct of the later trial:

> ... it is a fair view that the prosecution already has a great many tactical advantages. Moreover, it is a *non-sequitur* to suggest that the best way to combat crime is to tamper with legal procedure. ... it simply will not do for the police to regard legal safeguards, such as they are, as a scapegoat in face of a crime prevention problem of wide dimensions and many facets.[18]

The author of the other two articles was an Australian academic and later jurist F M Neasey.[19] Both articles examined different issues relating to the reception of confessional evidence. The latter article looked at the admission of confessional evidence in the context of an accused person's right to silence. Neasey argued that discretionary power was a convenient and expedient means by which the Court may control a criminal prosecution to safeguard an accused person's rights, emphasising the nexus between a criminal investigation and a criminal trial. Adopting a position similar to Brownlie, Neasey argued that the court had a duty to protect an accused person's rights by striking an acceptable balance between conflicting public interests:

> But the courts are and must remain in the final resort guardians of the basic principle of protection of the individual against overweening imposition of investigatory powers of the State, even when, as in most countries of British origin, no constitutional provisions require this, and their weapon in this particular area is the discretion to refuse to admit evidence improperly obtained.[20]

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18 Ibid [1967] 79.

19 F M Neasey, "Cross-Examination of the Accused on the Voir Dire" [1960] 34 *Australian Law Report* 110; Justice F M Neasey, "The Rights of the Accused and the Interests of the Community" [1969] 43 *Australian Law Report* 482.

20 Ibid [1969] 491.

2.3 Post *Ireland's* Case

Despite its importance, *The Queen v Ireland*[21] did not generate significant academic debate about the new public policy discretion nor generally about the reception of unlawfully or improperly obtained evidence. The first article examining the public policy discretion was published, three years after that landmark decision. The author was the Australian academic and later jurist J D Heydon.[22] Heydon reviewed the rule in English law[23] rendering relevant evidence admissible, regardless of how such evidence may have been obtained, subject to exclusion where reception of such evidence may be unfair to an accused person.[24] In his critique, Heydon criticised the then leading English case of *Kuruma v R*[25] and compared English law to the respective positions in Scotland and Ireland, and the United States of America. The author made no analysis of the then current position of the Australian law, other than to note that two of the four reported appellant decisions holding that the discretion should have been exercised to exclude the evidence were Australian cases.[26]

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21 (1970) 126 CLR 321.

22 Currently a member of the Australian High Court; J D Heydon, "Illegally Obtained Evidence (1)" [1973] *Criminal Law Review* 603.

23 This analysis was made prior to the passage of the *Australia Acts* 1986 that abolished the right of appeal from State Courts to the Privy Council, thereby making the High Court of Australia the ultimate court of appeal in Australian law. The leading English authorities of *Kuruma v R* [1955] AC 197 and *King v R* [1969] 1 AC 304 were both decisions of the Privy Council but neither were Australian appeals.

24 *Kuruma v R* [1955] A.C. 197.

25 Ibid.

26 Heydon, above n 22, 605; ibid n24.

A significant analysis of the public policy discretion during this period[27] took place by the Australian Law Reform Commission ("ALRC"). The ARLC prepared a report entitled *Criminal Investigation.*[28] The ALRC comprehensively reviewed police powers to detect and investigate criminal activity, and the individual rights and liberties connected with or arising during criminal investigations, before making recommendations for relevant legislation to strike an acceptable balance between those powers and rights.[29] A challenge for the ALRC was to reconcile criminal law theory and principles with the actual practice of criminal law, especially police compliance with substantive and procedural laws governing criminal investigations and collection of evidence, and the upholding of associated rights and liberties.[30] An integral part of achieving this balance was an exclusionary rule of evidence.

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27 Being the period following the decision of the High Court in *The Queen v Ireland* (1970) 126 CLR 321.

28 ALRC, *Criminal* Investigation, Interim Report No 2, (1975).

29 Ibid [1] sets out the terms of reference as follows:
"To inquire into and report as to the appropriate legislative means of safeguarding individual rights and liberties in relation to the criminal investigation activities of the new force, in particular in relation to:

(a) the conduct of investigations;

(b) powers of arrest, search and seizure;

(c) the rights of persons detained in custody to access to legal advice, protection against compulsory self-incrimination, speedy access to a justice or a magistrate, and to humane and dignified treatment;

(d) rights with respect to bail and speedy trial;

(e) the right to representation, and other means of ensuring fair trial; and

(f) the investigation of complaints against members of the Australia Police; and

(g) any other matter."

30 Ibid [287].

Under then current Australian law, relevant evidence, unlawfully or improperly obtained, was admissible "but the court had (*sic*) a discretion to exclude if its admission would operate unfairly against the accused."[31] The exclusionary rule applied to real evidence.[32] The ALRC reported that the discretion was "in practice a narrow one"[33] and was "rarely acted on."[34] The justification for the high rate of admission because of relevance and reliability was challenged by the ALRC on the basis that the reception of real evidence was dependant upon oral evidence describing how such items were discovered or obtained.[35] In support of its view, the ALRC referred to *Kuruma v R*[36] where the court admitted evidence of an illegal search by two constables, despite legislation prescribing that such searches could only be conducted by a senior police officer to prevent disputes about planting evidence.[37] The admission of evidence in that particular case appeared to cut across the purpose of the relevant legislation.

As part of its review, the ALRC also examined relevant law in Canada, the United States of America, Scotland and Ireland for the exclusion of unlawfully or

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31 Ibid [288].

32 This was the position prior to the High Court decision in *Cleland v The Queen* (1982) 151 CLR 1 that recognised the public policy discretion applied to confessional and real evidence.

33 ARLC, above n 29, [288].

34 Ibid.

35 Ibid [289]: "The notion that things, unlike men, cannot lie, is deceptive, because our belief in the existence of things depends on the fallible testimony of the men who said they found them. [35]

36 [1955] A.C.197.

37 Heydon, above n 26, 607.

improperly obtained evidence. Under Canadian law,[38] unlawfully obtained evidence may be excluded where its admission would be unfair to an accused person if its reception would be "gravely prejudicial,"[39] "tenuous,"[40] and its "probative force trifling."[41] In the United States of America, evidence obtained in contravention of an accused's constitutional rights will be excluded and evidence obtained in consequence of such contravention will be excluded under the "fruit of the poisonous tree"[42] doctrine. The exclusionary rule in Scots and Irish law is distinct from its Anglo-Australian and American counterparts. The Celtic exclusionary rule required the Court to balance the interests of the State against the interests of preservation of individual rights and liberties and the discouragement of unauthorised investigative methods.[43] The Court must take into account specified relevant matters when weighing the conflicting interests. This is said to be a 'more sophisticated"[44] approach and was ALRC's preferred model of an exclusionary rule.

The ALRC argued for a change to the existing exclusionary rule because:

1. "Increasing judicial concern about the incidence of wrongfully obtained evidence."[45]

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38 The leading Canadian case was *R v Wray* (1970) 11 DLR (3rd) 673.

39 ALRC, above n 29, [291].

40 Ibid.

41 Ibid.

42 ALRC, above n 29, [292].

43 ALRC, above n 29, [293]; see also *Lawrie v Muir* [1950] S.L.T. 37.

44 ALRC, above n 29, [290].

45 ALRC, above n 29, [298].

2. Strict rules of admissibility or exclusion in their own ways facilitate and encourage illegality on the part of the police and this, in turn, weakens public confidence in the law.[46]
3. Deterrence should be concerned with deliberate wrongdoing rather than minor or accidental breaches, or those breaches occurring in exigent circumstances.
4. The exclusion of illegally or improperly obtained evidence will not lead to a higher incidence of crime despite claims of this kind.[47]
5. If substantive and/or procedural laws obstruct or hinder criminal investigations, then these laws should be reviewed and amended rather than failing to enforce existing rules and admit the contentious evidence.[48]
6. The Australian judiciary is relatively small and "is capable, like the Scots, of administering a discretionary rule with reasonable uniformity."[49]

The ALRC recommended:

> (E)vidence obtained in contravention or in consequence of any contravention of any statutory or common law rule - including all the various rules of procedure that have been proposed in this report - should not be admissible in criminal proceedings for any purpose *unless* the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. The burden of satisfying the court that any illegally obtained evidence should be admitted should rest with the party seeking to have it admitted, i.e. normally the prosecution.[50] It would take twenty years before this recommendation was adopted and enacted in the form of

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46 Ibid 295-297.

47 Ibid 296: "An exclusionary rule by itself could scarcely be regarded as a serious factor in increasing the crime rate."

48 Ibid.

49 Ibid 297.

50 Ibid 298.

section 138 of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW). Unfortunately, the optimism of the ALRC that "(t)hings will change if the court has to find a positive reason for exercising its discretion in favour of admissibility"[51] has not been rewarded.

2.4 Post *Bunning v Cross*

In *Bunning v Cross*[52] the High Court declared that the public policy discretion in *The Queen v Ireland*[53] was part of the settled law of Australia. This decision generated some academic interest in the public policy discretion, both local and overseas.[54] Three common themes emerge from these academic writings, namely:

1. How should competing public interests of crime control and the protection of individual rights and controlling police malpractice be reconciled?
2. What is the nature and extent of the supervisory role of the judiciary in criminal justice administration?
3. What is the rationale for each different jurisdictional approach to unlawfully or improperly obtained evidence and does it influence admission or exclusion of impugned evidence? What is the preferred rationale?

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51 Ibid 298.

52 (1978) 141 CLR 54.

53 (1970) 126 CLR 321.

54 Justice M D Kirby, "Controls Over Investigation of Offences and Pre-Trial Treatment of Suspects: Criminal Investigation and the Rule of Law" (1979) 53 *Australian Law Journal* 626; Rosemary Pattenden, "The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia" (1980) 29 International and Comparative Law Quarterly 664; Meong Heong Yeo, "The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches" (1981) 13 *Melbourne University Law Review* 31; J E Dawson, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study" (1982) 31 *International*

2.4.1 Competing Public Interests

The context in which reconciliation of competing public interests occurs is relevant to understand how and why a particular balance is struck. Justice Kirby acknowledged that within a modern society facing a "perceived growth in the amount and complexity of crime and, lately, the advance of terrorism"[55] demands for greater police powers in criminal investigations must be balanced against longstanding rights and privileges that have underpinned our democratic system.[56]

Against this background, Justice Kirby argued for reform of the criminal law to ensure the "lawful and fair conduct of criminal investigations"[57] by the introduction of "new safeguards and remedies"[58] in conjunction with clearly defining and (where necessary) increasing police powers. The competition between the opposing public interests was analogous to the relationship between individual rights and police powers. Should police powers be increased then this inevitably will result in

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and Comparative Law Quarterly 513.

55 Kirby, above n 54, 626.

56 Ibid 627: "We should be concerned about increasing crime. We should be equally concerned to ensure that the rule of law is upheld in the criminal investigation process."

57 Ibid.

58 Kirby, above n 54, 628.

a reciprocal diminution of individual rights. This reciprocity is at the heart of the balancing exercise, and its recognition essential to strike an appropriate balance between relevant public interests.

The notion of balancing competing public interests was favoured by Rosemary Pattenden[59] over the English approach of focusing solely upon whether reception of improperly or unlawfully obtained evidence would be unfair to an accused person.[60] Pattenden argued that the issue of improperly or unlawfully obtained evidence should be seen as a "rights" issue, not an issue of police discipline. Considered in this way, improprieties and breaches of the law are seen as "violations of an accused's rights"[61] raising the question how should these rights be upheld? Disciplinary action or civil proceedings against individual officers do not provide effective compensation for a rights violation. The author argued that the remedy sought by an accused person (whose rights have been infringed) is exclusion of the impugned evidence.[62] Pattenden justified her position in these terms:

> ...if the community has seen fit to lay down procedures for gathering evidence, then normally the public interest demands that these procedures should be followed even if it means that some criminals cannot be prosecuted.[63]

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59 Lecturer in Law, University of East Anglia, England.

60 Rosemary Pattenden, "The Exclusion of Unfairly Obtained Evidence in England. Canada and Australia" (1980) 29 *International and Comparative Law Quarterly* 664.

61 Ibid 61.

62 Ibid.

63 Ibid 61.

Integrity of law enforcement process was the focus of Meng Heong Yeo[64] identifying the competing public interests to be "crime control"[65] and "protecting individual rights against official impropriety."[66] Yeo asserted that the English and Australian courts preferred the public interest of crime control in the discretionary exercise. This is attributable to the position under English law where the exclusion of improperly or unlawfully obtained evidence turns upon whether its reception would be unfair to the accused. Although Australian law had developed differently to its English counterpart, the author argued that the historical connection between the jurisdictions had favoured a conservative exercise of the discretion to admit the impugned evidence. Yeo advocated a "factors" approach as endorsed in Scottish, Irish and Australian law providing:

> tangible guidelines for the courts thereby bridging the gap between the general expression of the discretionary power and a particular case.[67]

J B Dawson[68]also considered the issue of improperly or unlawfully obtained evidence from the perspective of police discipline and accountability. The competing public interests were identified to be "crime control"[69] and "enforceable restrictions upon arbitrary police power."[70] Despite vigorous public debate over

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64 Lecturer in Law, National University of Singapore.

65 Meng Heong Yeo, "The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches" (1981) 13 *Melbourne University Law Review* 31, 32.

66 Ibid.

67 Ibid 45.

68 Barrister and solicitor of the High Court of New Zealand.

69 J B Dawson, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study" (1982) 31 *International and Comparative Law Quarterly* 513.

70 Ibid.

police powers of search and seizure, the author noted that there was little legislative or executive response, and that the protection of individual rights from police impropriety fell to the judiciary, which was not an altogether satisfactory situation:

> The judiciary has, if somewhat reluctantly, dominated this area of law, both because protection of individual rights is a traditional concern and because, more often than not, the executive and legislature, through conspicuous inactivity, have abdicated their role in the judiciary's favour. The judiciary, however, does not and must not exercise direct control over police behaviour in the field nor direct disciplinary authority over individual police officers unless they have been charged with a criminal offence. The courts may articulate rules to govern police conduct in search and seizure but such rules may be and are infringed and ignored and evidence so obtained may be offered before the courts.[71]

Although the manner of excluding improperly or illegally obtained evidence varied across jurisdictions, the author propounded "without the remedy of exclusion the laws of search and seizure may have no substance."[72] If this argument holds sway then it raises the spectre that judicial inclination to admit impugned evidence may undermine the substantive law.

2.4.2. Judicial Supervision of Criminal Justice Administration

It is common ground among the commentators that for the purposes of judicial supervision of criminal justice administration that the pre-trial and trial should not be seen as disparate parts of the criminal law system. The argument for broader judicial supervision is essentially that the duty of the court to ensure the fairness of

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71 Ibid 514.

72 Ibid 515.

a criminal trial of an accused person should not be confined to trial procedure but must logically include the conduct of the preceding criminal investigation when evidence to be presented against an accused is obtained. This argument is consistent with the fundamental premise of the "factors approach" or the public policy discretion articulated in Scots, Irish and Australian laws. Opposition to wider judicial supervision is usually made on the basis that it is not the role of the courts to discipline wayward police officers.

Judicial oversight of criminal investigation has gradually increased as law enforcement authorities utilitised technological and scientific advances, or when the incidence of police malpractice has gained such notoriety that the judiciary has been forced to intervene. Kirby proposed that judicial review be extended to "discretionary decisions anterior to a criminal trial"[73] arguing that it would be 'a check against unfairness and an additional weapon against unlawful, dishonest or unfair conduct."[74] Kirby argued that the then new Commonwealth administrative law regime[75] may allow judicial review of pre-trial decisions, which may provide safeguards and sanctions for breach of individual rights. Pattenden also advocated the expansion of judicial review over the pre-trial stage consistent with the fundamental premise of the public policy discretion[76] to protect "rights of the

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73 Kirby, above n 54, 643.

74 Ibid.

75 Ibid; *Administrative* Decisions *(Judicial Review) Act* 1977(Cth) was yet to commence at the time of publication of the Kirby article.

76 Enunicated in *Bunning v Cross* (1978) 141 CLR 54.

accused and the reputation of the courts.[77] *Bunning v Cross*[78] imposed an independent duty upon a trial judge to consider the exercise of his/her discretion where "unlawfulness or unfairness appears"[79] to ensure that an accused person is not tried unfairly. This duty arises regardless of whether the issue is raised by the parties. Like Kirby, Pattenden argued that the courts should not "turn a blind eye"[80] to police misconduct or "be acquiescent in the face of unlawful conduct"[81] by the police, but must expand judicial review to cover pre-trial investigations in order to protect its reputation.

Yeo rejected the English and Canadian positions that "fairness" is only concerned with trial procedure. Instead, the author advocated broader judicial review to incorporate pre-trial procedure. Judicial review of pre-trial procedures is also consistent with the relevant matters identified by the High Court in *Bunning v Cross*[82] for the purpose of the discretionary exercise. These factors include scrutinising the conduct of an individual police officer to determine if the discretion should be exercised to admit the impugned evidence.

Dawson presented a different perspective on the issue and argued that the law had very little influence on regulating the conduct of police and past attempts by the

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77 Pattenden, above n 60, 678.

78 (1978) 141 CLR 54.

79 *Bunning v Cross* (1978) 141 CLR 54.

80 Kirby, above n 54, 626.

81 Pattenden, above n 60, 678.

82 (1978) 141 CLR 54.

courts to exercise control over the police have failed.[83] The author argued that an independent external body should be established to supervise the police and deal with complaints against police.

2.4.3. Rationale

Apart from the United States which adopts a strict rule of exclusion on constitutional grounds, other common law jurisdictions are divided between jurisdictions where the issue of improperly or unlawfully obtained evidence is decided on the basis of fairness, and those jurisdictions where the issue is determined on public policy grounds. In England, improperly or unlawfully obtained evidence may be excluded if its prejudicial effect outweighs its probative value and such evidence is obtained from the accused, after commission of the offence, including but not limited to admissions and confessions. In practice, this discretion is rarely used to exclude evidence.[84] Thus real evidence obtained improperly or unlawfully, but not from an accused, will be admissible. Under Canadian law, the court has no discretion to exclude unfairly, improperly or unlawfully obtained evidence of substantial probative value,[85]nor evidence where its "admission would be calculated to bring the administration of justice into disrepute."[86] Where "fairness" is the determining criteria, the discretion is rarely used to exclude relevant evidence. Scottish, Irish and Australian jurisdictions determine exclusion on public policy grounds. These jurisdictions are more likely to exclude impugned evidence than those jurisdictions

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83 Dawson, above n 69, 548.

84 *R v Sang* [1979] 3 W.L.R. 263 (HL).

85 *R v Wray* [1970] 11 C.R.N.S. 235 (SC).

86 Ibid 248 (Martland J).

relying on fairness as the determinative criteria, although the general incidence of exclusion in Australian jurisdictions is comparatively low.

Kirby argued that the rationale for the public policy discretion was not police discipline, but "an ethical principle of public policy"[87] which he defined in terms of preserving the court's reputation and upholding individual rights:

> the protection of its own functions and the preservation of the purity of its own temple belongs only to the court,[88]

and

> society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.[89]

Kirby proposed "revitalising" the public policy discretion (as envisaged in ALRC Interim Report 2) arguing that judicial officers "can be trusted to strike a just balance between safeguarding individual rights and liberties and ensuring practical and effective law enforcement."[90] Kirby acknowledged, excepting submissions to the ALRC, a general lack of empirical evidence concerning the exercise of this discretion. He was also critical of the Norris Committee's rejection of the Victorian Bar's submission that the discretion is rarely used without any evidence to the contrary.[91]

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87 Kirby, above n 54, 644.

88 Ibid citing *Sorrells v United States* 287 U.S. 435 (1932).

89 Ibid citing Bunning *v Cross* (1978) 52 ALJR 561, 569; 19 ALR 641, 659 (Stephen and Aicken JJ).

90 Ibid 647.

91 Ibid 645.

Pattenden also formulated the rationale for the public policy for the "protection of the rights of the accused and the reputation of the courts."[92] Yeo does not articulate a rationale for the public policy discretion but simply referred to "evaluation of the relevant public policy considerations which inevitably underlie the exercise of the discretion."[93] It is implicit in Dawson's article that his rationale for the public policy discretion is judicial supervision of police practices.[94] This may incorporate both the protection of individual rights and reputation of the courts by sanctioning police misconduct.

There was unanimity among commentators that the public policy discretion or the "factors" approach prevailing in Scottish, Irish and Australian jurisdictions is preferable to the strict rule of exclusion operating in the United States and the ostensible rule of admissibility of England and Canada. The public policy discretion is heralded for its flexibility, clarity and guidance in directing the judicial mind to the relevant matters for consideration.

2.5 Sallmann & Willis

Academics Sallmann and Willis[95] gave a succinct but insightful commentary on the public policy discretion as part of their comprehensive review of Australian criminal justice. The authors began by identifying different dimensions of the criminal trial, namely, discovering the truth, fair treatment of individual accused, and "agents of

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92 Pattenden, above n 60, 678.

93 Yeo, above n 65, 32.

94 Dawson, above n 69, 540.

95 Peter Sallmann and John Willis, "*Criminal Justice in Australia*" (1984).

the criminal justice process"[96] complying with the law. The laws of evidence (including rules and discretions) are the principal means for the court to achieve these purposes.

According to the authors recognition of the public policy discretion as part of Australian law broadened the function of a criminal trial by requiring a trial judge to consider matters of high public policy in challenges to improperly or unlawfully obtained evidence, rather than whether admission of the evidence would be unfair to an accused. This fundamental change raised several issues. Is it appropriate for the judiciary to supervise law enforcement agencies and exercise control over their activities? Piecemeal judicial supervision delivered on a case-by-case basis "in the context of a specific set of facts"[97] was not satisfactory. The dearth of any empirical evidence of the workings of the public policy discretion has not advanced the debate. Instead, analyses of this discretion are generally found in anecdotal evidence of observations made by members of the legal profession and judiciary but its accuracy is not free from doubt. The authors acknowledged the pressing need for empirical research in this area.

The central problem with the public policy discretion arises from the balancing of matters of high public policy within the parameters of a particular criminal trial. This is best explained in the words of the authors:

> Furthermore, the means whereby the function of exercising some control over police practices is to be exercised - namely, the exclusion of relevant, admissible evidence - runs counter to the aim of protecting the community by having the guilty convicted. The trial judge is required, where the issue of improper police practice arises, to

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96 Ibid 115.

97 Ibid 117.

> exercise a sensitive and essentially political judgment of balancing these conflicting goals. In exercising this judgement, the assistance he will receive from the Crown and the accused (or his counsel) will be at best indirect, since both these parties are essentially concerned with the outcome of the specific case and not with the broader questions of public policy. To the extent that these broader issues are raised by either party, it will be for the narrower purposes of achieving the desired outcome of the actual case. The trial judge is thus called upon to exercise a discretion that may well be decisive of the outcome of the case with little direct assistance, and on criteria that are to a considerable extent outside the specific issues of the actual case. It is a more demanding and lonely task, and one that goes well beyond the more straightforward job of ensuring that the accused gets a fair trial.[98]

2.6 Uniform Evidence Acts

From 1990 onwards, academic writings on improperly or unlawfully obtained evidence were dominated by analyses of confessional law and, in particular, covert recordings of admissions and confessions made by an accused person.[99] Prior to the *Uniform Evidence Acts*, changes to the legal regime occurred through a series of judicial pronouncements on discretionary controls to reject confessional evidence.[100] During this period, the High Court displayed renewed interest in reform of criminal law in a series of decisions elucidating the "fair trial principles."[101]

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98 Ibid 118.

99 For example see, Stephen Odgers, "Police Interrogation: A Decade of Legal Development" (1990) 14 *Criminal Law Journal* 220; Jill Hunter, "Unreliable Memoirs and the Accused: Bending and Stretching Hearsay - Part One" (1994) 18 *Criminal Law Journal* 8; Sybil Sharpe, "Covert Police Operations and the Discretionary Exclusion of Evidence" [1994] *Criminal Law Review* 793; Justice K P Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" [1995] 19 *Criminal Law Journal* 258; Simon Bronitt, "Contemporary Comment - Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy" (1996) 20 *Criminal Law Journal* 144; Simon Bronitt, "Electronic Surveillance, Human Rights and Criminal Justice" [1997] *Australian Journal of Human Rights* 10; Peter Lowe, "Confessional Statements, Voluntariness and Protective Rights: Rights and Remedies under the Uniform Evidence Act" (2000) 74 *Australian Law Journal* 179; Lucy Martinez, "Confessions and Admissions to Undercover Police and Police Agents" [2000] 74 *Australian Law Journal* 39.

100 Jill Hunter, "Unreliable Memoirs and the Accused: Bending and Stretching Hearsay - Part One" (1994) 18 *Criminal Law Journal* 8.

101 Justice K P Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" [1995] 19 Criminal *Law Journal* 258; see also Justice M Kirby, "The Future of Criminal Law" (1999) 23 *Criminal Law Journal* 263

Evaluations of the public policy discretion gained prominence with the ALRC report on reform of the laws of evidence,[102] and immediately before and in the aftermath of *R v Swaffield; Pavic v R.*[103]

Reappraisal of the dual operation of the fairness and public policy discretions began with *Cleland v The Queen*[104] marking a shift from the fairness discretion to the public policy discretion on the question of confessional evidence obtained improperly or unlawfully.[105] This shift gathered momentum when the ALRC recommended reforms to confessional law, including the abolition of the fairness discretion, and refinement of the public policy discretion.[106] The ALRC endorsed the discretionary approach to admission of improperly or unlawfully obtained evidence. Although largely modeled on its common law counterpart, section 138 differs in several key respects from the public policy discretion. Most significant is the change to the onus of proof. Under section 138 a challenger must establish an alleged impropriety or illegality has occurred to enliven the discretion. Once enlivened, the onus moves to the prosecution[107] to satisfy the Court why the impugned evidence should be admitted. The ALRC justified the change of onus on three grounds. Firstly, "evidence was not often excluded under the *Bunning v*

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102 ALRC, *Evidence*, Interim Report No 26 (1985).

103 (1998) 151 ALR 98. For the remainder of this paper, this case will be referred to as *R v Swaffield*.

104 (1982) 151 CLR 1.

105 Duggan, above n 101

106 ALRC, above n 102, 22.

107 The party seeking to present the challenged evidence, usually the prosecution, bears the onus of satisfying the court why it should be admitted.

Cross discretion,"[108] implying that courts were inclined to favour crime control considerations over the protection of individual rights. The ALRC did not disclose what empirical evidence, if any, it relied upon to make this assertion. Secondly, it repeated its earlier recommendation for the court "to find a positive reason for exercising its discretion in favour of admissibility."[109] Thirdly, the prosecution is best placed to present evidence of good faith, urgency or other circumstances to justify admission.[110] The response from commentators to section 138 was mixed. On one hand ALRC recommendations to reverse the onus of proof and recognise the importance of human rights in the criminal law were welcomed and applauded.[111] On the other hand, another commentator overlooked the refinement and broader application of section 138 of the Act.[112]

The contentious issue of covert recordings of suspects became a central theme of academic writings where long held legal principles were under siege from the incursion of technological and scientific advances employed in criminal investigations. Electronic recording and surveillance were regarded as effective investigative tools, both in terms of reliability and cost.[113] Procedural laws

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108 ALRC, above n 102, 964.

109 Ibid, referring to the ALRC Interim Report 2 (1975) "Interim Report on Criminal Investigation."

110 Ibid.

111 Ian Dennis, "Codification and Reform of Evidence Law in Australia" [1996] *Criminal Law Review* 477.

112 Clifford Einstein QC, "Reining in the Judges? - An Examination of the Discretions conferred by the Evidence Acts 1995?" (1996) 19(2) *University of NSW Law Journal* 168.

113 Simon Bronitt, "Contemporary Comment - Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy" (1996) 20 *Criminal Law Journal* 144; Simon Bronitt, "Electronic Surveillance, Human Rights and Criminal Justice" [1997] *Australian Journal of*

regulating the use of these newer investigative tools (such as listening devices) did not extend to all forms of electronic recording and surveillance.[114] This created a situation where law enforcement officials could operate outside procedural law or investigative guidelines to obtain evidence against an accused.[115] Over a 16-year period, there has been an exponential increase in the use of listening devices in New South Wales that caused concern.[116] It also introduced a new dimension of incontrovertibility to confessional evidence, ordinarily associated with real evidence, prompting some commentators to warn of an increased likelihood of discretionary admission because cogency of the evidence would prevail over infringements of an accused person's legal and human rights.[117]

In a precursor to *R v Swaffield*,[118] academic Jonathan Clough[119] examined the legal basis upon which admission of confessional evidence may be challenged, identifying three grounds for exclusion, namely, voluntariness, the fairness

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Human Rights 10.

114 Simon Bronitt, "Contemporary Comment - Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy" (1996) 20 *Criminal Law Journal* 144; Simon Bronitt, "Electronic Surveillance, Human Rights and Criminal Justice" [1997] *Australian Journal of Human Rights* 10; Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" [1998] 22 *Criminal Law Journal* 325; Sybil Sharpe, "Covert Police Operations and the Discretionary Exclusion of Evidence" [1994] *Criminal Law Review* 793; see also *O'Neill* (1995) 81 A Crim R 458.

115 Bronitt, above n 114.

116 Bronitt (1997), above n 114, reported for the period from 1989 to 1995 there was 370% increase in the use of listening devices in NSW.

117 Sharpe, above n 114, 793; Bronitt (1996), above n 114, 144; Bronitt (1997), n 114, 10.

118 (1998) 151 ALR 98.

119 Lecturer in Law, Monash University.

discretion, and the public policy discretion.[120] Clough argued that principled decision-making required a realignment of the fairness and public policy discretions according to their respective rationales to clearly delineate the application of each discretion.[121] The author favoured a narrow view of the fairness discretion confining its operation to those matters affecting the fairness of an accused person's trial. Other matters such as police misconduct, which offend broad notions of fairness, were more properly dealt with under the public policy discretion. Three fundamental principles were considered, namely, the reliability principle, the disciplinary principle and the protective principle to identify the rationale for each discretion.[122] Clough reasoned that the reliability principle requiring the exclusion of unreliable evidence provided the justification for the fairness discretion.[123] Under the protective principle, the rights of an individual relevant to the lawful and proper conduct of a criminal investigation should be upheld and enforced.[124] This is the fundamental premise underlying the public policy discretion. Clough qualified the protective principle to apply only to those circumstances where infringement of an accused person's rights "produced a tangible disadvantage."[125]

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120 Jonathan Clough, "The Exclusion of Voluntary Confessions: A Question of Fairness" [1997] *University of New South Wales Law Journal* 25, 25-26.

121 Ibid 40.

122 Ibid 41.

123 Ibid 41-42. The author argued that the High Court in *Lee* (1950) 82 CLR 133 rejected the proposition that the disciplinary principle was the fundamental premises of the fairness discretion.

124 Ibid 42.

125 Ibid 43.

Judicial deliberation about the admissibility of covert recordings of admissions made by a suspect to a police agent or undercover operative led to a restatement of confessional law, which included a revision of the fairness and public policy discretions[126] sparking further academic interest. The significance of *R v Swaffield*[127] in terms of discretionary exclusion of confessional evidence was that it provided an authoritative statement that police misconduct and improprieties are more appropriately considered within the context of the public policy discretion, unless there is some associated doubt about the reliability of a confession, or as a consequence of the misconduct an accused person is at a forensic disadvantage.[128]

There were mixed analyses of the law post *R v Swaffield*.[129] Bronitt reviewed common law judicial remedies for entrapment in the context of greater police use of covert investigative techniques.[130] The author argued that the Australian public policy discretion "overtly took into account disciplining police"[131] in pursuit of its objective to "maintain public confidence in the administration of justice."[132] The author's empirical research does not appear to take into account that the public

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126 *R v Swaffield; Pavic v R* (1998) 151 ALR 98.

127 Ibid.

128 Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" [1998] 22 *Criminal Law Journal* 325, 340.

129 Ibid n114.

130 Simon Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?" (1999) 29 *Hong Kong Law Journal* 216.

131 Ibid 230.

132 Ibid.

policy discretion is not enlivened where the covert police activities are sanctioned under remedial legislation.[133] As a consequence, admission of evidence covertly but lawfully obtained is not determined by the public policy discretion. The discretion is not enlivened. Therefore it cannot be said to favour admission of such evidence. This point is not abundantly clear from the author's statements:

> ... empirical scrutiny reveals that almost *universally* the discretion favours the reception of evidence obtained by entrapment. It is not that trial courts are subverting the public policy discretion, but rather the law itself permits and legitimates most forms of entrapment.[134]

An analysis of *R v Swaffield*[135] describing the residual discretion enunicated by the High Court as a "broad form of the fairness discretion"[136] and ignoring the public policy discretion may be confusing. The law does not articulate two forms of the fairness discretion. Restatement of confessional law by the High Court sought, inter alia, to adopt a uniform approach at common law and under the *Uniform Evidence Acts* on the question of the discretionary exclusion of confessional evidence.[137] The fairness discretion should only be exercised where reliability is challenged or where an accused person is at a forensic disadvantage because of police misconduct. Otherwise, broad issues of fairness are considered within the public policy discretion.

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133 *Crimes Amendment (Controlled Operations) Act* 1996 (Cth); *Law Enforcement (Controlled Operations) Act* 1997 (NSW); *Criminal Law (Undercover Operations) Act* 1995 (SA).

134 Bronitt, above n 130, 230.

135 (1998) 151 ALR 98.

136 Peter Lowe, "Confessional Statements, Voluntariness and Protective Rights," (2000) 74 *Australian Law Journal* 179, 182.

137 see sections 90, 138 and 139.

In another review of confessional law post *R v Swaffield,*[138] an author argued that the residual discretion is the fusion of the fairness and public policy discretions,[139] noting that the courts have not universally exercised this new residual discretion but frequently resort to exercising the fairness and public policy discretions separately.[140] Martinez warned that the police may be placed under a "disproportionately heavy burden"[141] to justify reception of covertly recorded admissions if elicitation remained a relevant factor and *Swaffield*[142] was not confined to its facts. This warning is given without any empirical justification. Moreover, the author does not appear to appreciate the broader public interest in the protection of individual rights, when she concluded that:

> ... in the administration of justice, courts must be vigilant in resisting the tendency to disproportionately favour the rights of the accused over the rights of the community as a whole.[143]

An important analysis of the common law and statutory public policy discretions, post *Swaffield,*[144] was undertaken by Bram Presser[145] to test whether the discretions were "effective accountability mechanisms" of police conduct during

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138 (1998) 151 ALR 98.

139 Lucy Martinez, "Confessions and Admissions to Undercover Police and Police Agents" [2000] 74 *Australian Law Journal* 391, 398-399.

140 Ibid 399.

141 Ibid 404.

142 (1998) 151 ALR 98.

143 Martinez, above n 140, 404.

144 (1998) 151 ALR 98.

145 BA (Hons) (Melb), PhD Candidate (Criminology), Student of Law, University of Melbourne.

criminal investigations.[146] The author completed a study of criminal cases, "in which applications to invoke the public policy discretion had been made,"[147] recording the nature of the offence, nature of the impugned evidence, alleged police misconduct, and whether the court exercised its discretion, at trial or on appeal, to exclude the evidence. Despite the small size of the study,[148] the author found:

1. Trial judges rarely exercise their discretion to exclude impugned evidence.
2. Apart from the Australian Capital Territory ("ACT"), all jurisdictions revealed a significant degree of judicial tolerance of police misconduct.
3. The courts extended greater latitude to police misconduct in drug cases.
4. An appellant court is more likely to find police illegality when such a finding will not change the outcome of the case.
5. In serious cases, misconduct is unlikely to lead to exclusion of the evidence.
6. The courts are more likely to invoke the discretion where the defendant is a vulnerable person within the 'protected' class of persons.
7. Inconsistency between final decisions may be partly attributable to the nature of the discretionary exercise. This provides no guidance to police and may not encourage the police to comply with procedural law and guidelines, instead taking a calculated risk of a possible adverse ruling.

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146 Bram 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.

147 Ibid 763.

148 The author conducted an on-line search on the LexisNexis site to identify relevant cases. The initial sample was 371 cases, however, most of these cases were culled if they were civil cases, had a tenuous relevance to the public policy discretion, and the fairness discretion was applied. After this selection process only 39 cases remained.

8. Unlawfully obtained evidence is now prima facie inadmissible. A court is now compelled to scrutinise police conduct when deciding whether to exclude the evidence.

The study indicated that the use of the public policy discretion had increased slightly but "it is too early to discern a definite trend across the board."[149] The author concluded that the discretion was not an effective accountability mechanism because:

> unless judges throughout Australia become more willing to invoke the discretion when evidence has been improperly or illegally obtained, police will have no incentive to change their ways.[150]

The continuing existence of the public policy discretion was questioned by G L Davies, in his article on whether the exclusion of improperly or unlawfully obtained evidence was an appropriate means of achieving the discretionary objectives.[151] The author argued it was not appropriate because it "may result in the exclusion of relevant and highly probative evidence of guilt."[152] Davies proposed two reforms: firstly, a code of conduct for law enforcement officers; secondly, an independent disciplinary body to determine contraventions of the code of conduct and impose appropriate penalties. It is debatable whether these reforms would be successful.[153]

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149 Presser, above n 146, 784.

150 Ibid.

151 G L Davies, "Exclusion of Evidence Illegally or Improperly Obtained" [2002] 76 *Australian Law Journal* 170.

152 Ibid.

153 See Chapter 3.

The final two articles by Andrew Palmer attempt to identify general propositions extrapolated from *Swaffield*[154] to provide guidance to the courts in exercising the public policy discretion.[155] The author acknowledged that uncertainty continued about what covert methods of obtaining confessional evidence are acceptable. In this regard, *Swaffield*[156] had been of limited assistance and generally confined to its own facts. Palmer formulated the following general propositions:

1. "The *Swaffield*[157] approach applied to all forms of incriminating statements made to investigating officials or their agents.
2. Statements will only be excluded if they were actively elicited or induced by the investigating officials or their agents.
3. A pre-existing relationship between the suspect and the investigating official or agent is not in itself a ground for exclusion, but may be relevant to the question of elicitation, if manipulation of the relationship provided the means of inducing the statement.
4. The courts are more likely to exclude a statement made by a person while in custody, on the basis that the use of covert questioning of a suspect may be seen as an attempt to circumvent the legislative safeguards which apply to suspects in custody.

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154 (1998) 151 ALR 98.

155 Andrew Palmer, "Applying *Swaffield*: covertly obtained statements and the public policy discretion" (2004) 28 *Criminal Law Journal* 217; Andrew Palmer, "Applying *Swaffield* Part II: Fake gangs and induced confessions" (2005) 29 *Criminal Law Journal* 111. "The eighth proposition, the sole subject of the second article, was not published initially for legal reasons pending the outcome of a High Court appeal." See footnote 10 in the earlier article.

156 (1998) 151 ALR 98.

157 Ibid.

5. For reasons not entirely clear, the earlier during an investigation a statement is obtained the less likely it is to be excluded. Additionally, if there is some legitimate investigative purpose for the use of the covert techniques (other than the obtaining of a confession) then this strongly favoured admission.
6. The fact that the accused had exercised his or her right to silence prior to the covert approach strongly favoured exclusion (assuming the statement is actively elicited or induced). Although whether this was a decisive factor in favour of exclusion was unclear and it was not a pre-requisite for exclusion.
7. If a statement was to be admitted, the court may edit it for any prejudicial material."[158]
8. "Inducting a suspect into a fake criminal network in order to induce an admission to another crime is apparently acceptable and will not result in that admission being excluded from evidence."[159]

2.7 English Commentators

Articles by English academics examining the reception of improperly, unlawfully or unfairly obtained evidence predictably focus on English law with limited comparative analysis of Australian law. Generally speaking, English academics have endorsed the Australian position, whether in terms of the public interest premise[160] or alternatively the judicial guidance identifying relevant factors to be

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158 Palmer (2004), above n 155, 225.

159 Palmer (2005), above n 155, 111.

160 Rosemary Pattenden, "The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia" (1980) 29 *International and Comparative Law Quarterly* 664 C J W Allen, "Discretion and Security: Excluding Evidence under Section 78(1) of the Police and Criminal Evidence Act 1984" [1990] 49(1) *Cambridge Law Journal* 80; Geoffrey Robertson "Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?" [1994] *Criminal Law Review* 805.

considered in the discretionary exercise.[161]

Reviewed English literature examined the suitability of the English common law inclusionary rule and its exception, and the latter statutory discretion in section 78 of the *Police and Criminal Evidence Act* 1984. The English common law inclusionary rule states that relevant evidence, obtained by improper or unfair means, is admissible.[162] The exception to this rule is evidence of admissions and confession, or evidence obtained from the accused person after the commission of the offence may not be admitted.[163] The rationale for the exception is said to be the privilege against self-incrimination.[164] The common law rule has been criticised for failing to adequately protect an accused person's rights and placing the reputation of the judicial system at risk.[165]

Many commentators were disappointed that section 78 did not overcome the problems associated with the common law rule, nor did it prescribe the approach of Scottish or Australian jurisdictions.[166] Section 78 provides that a court has a discretion to exclude evidence which would have an "adverse effect on the fairness

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161 Allen, above n 160.

162 *Sang v DPP* (1979) 2 All ER 213.

163 Ibid.

164 *Sang v DPP* (1979) 2 All ER 213; Pattenden, above n 160.

165 Pattenden, above n 160; Mark Gelowitz "Section 78 of PACE 1984: Middle Ground or No Man's Land?" [April 1990] 106 *Law Quarterly Review* 327.

166 Richard May. "Fair Play at Trial: an interim assessment of section 78 of the Police and Criminal Evidence Act 1984" [1988] *Criminal Law Review* 772.

of the proceedings."[167] Instances of police acting improperly or in bad faith do not necessarily result in the exclusion of evidence.[168] Gelowitz[169] argued that public interests should be taken into account in the discretionary exclusion of evidence:

> such evidence ought to be excluded, as a matter of public policy, in order to dissociate the court firmly from disgraceful police conduct, and thus to prevent the courts from being perceived as instruments of illegality. An equally credible rational for exclusion, ... protecting the individual's rights, statutory or otherwise.[170]

2.8 The Protective Principle and A J Ashworth

For thirty years, respected English academic Andrew Ashworth[171] has advocated that the protective principle provided "stronger justification for exclusion of improperly obtained evidence."[172] The protective principle recognised rights of an accused person fundamental to the common law system of justice. Ashworth argued that a qualified protective principle was the preferred rationale:

> evidence obtained by means of a departure from a declared standard or procedure should be liable to exclusion, unless the court is satisfied that the accused in fact suffered no disadvantage as a result of the breach.[173]

Ashworth emphasised that the protective principle was concerned with the *actual* infringement of an accused person's rights, not whether the causal contravening act was deliberate or careless. The author's view on this point is open to challenge if the notion of an accused person is interpreted broadly to include not only the

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167 *Police and Criminal Evidence Act* 1984, section 78.

168 May, above n 166, 727-729; Gelowitz, above n 165, 366-341.

169 Gelowtiz, above n 165.

170 Ibid 341.

171 Q.C., Vinerian Professor of English Law, All Souls College, Oxford.

172 A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] *Criminal Law Review* 723.

173 Ibid 729.

person on trial but all members of the community. It is submitted that a broader interpretation legitimately permits an enquiry into the nature of the contravention to determine whether such breaches are intentional or accidental. Deliberate or reckless contraventions by law enforcement officials are more serious infringements of the legal and human rights fundamental to common law communities.

In a series of lectures delivered in 2002,[174] Ashworth canvassed the implications of the United Kingdom (a signatory to the European Convention on Human Rights) ratifying and passing domestic law requiring the courts and other public institutions to act in accordance with the Convention when there have been calls for greater police powers to tackle serious crime. Ashworth considered the "controversial right to be tried on evidence not obtained by violation of fundamental rights."[175] Ashworth rejected the view that admissibility and sanctions for breach of the law are discrete issues and should be dealt with separately and in different forums. The author argued that public policy considerations based on the rule of law should prevail. Firstly, law enforcement officials are not above the law and should comply with it. Secondly, "it is well established that the right to a fair trial extends to the fairness of pre-trial procedures."[176] Moreover, the moral authority of the courts would be undermined, if the courts permitted admission of evidence obtained in breach of fundamental human and legal rights, which resulted in the conviction of accused persons.

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174 Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (2002).

175 Ibid 35.

176 Ibid 35.

Ashworth examined the topical issue of the proliferation of covert investigative practices from a different perspective.[177] In his 1998 article, Ashworth looked at deceptive practices used by police during investigation, interrogation and the criminal trial and if their use was justified. The author concluded that lying in court, and, misleading or tricking an accused person about his/her rights was wrong and unjustifiable. The use of subterfuge, disguises, covert recordings or electronic surveillance was less objectionable, subject to compliance with appropriate safeguards. However, Ashworth astutely pointed out:

> For so long as the restrictions are regarded as pointless or irritating handicaps to the pursuit of proper goals, law enforcement officers will be tempted to try to circumvent them or simply to ignore them.[178]

Striking the right balance may depend upon the attitude of law enforcement officials and courts in determining whether improperly obtained evidence should be excluded.

2.9 Conclusion

In summary, academic commentators have largely supported the Australian position on the admissibility of improperly or unlawfully obtained evidence on the bases of its discretionary approach and theoretical premise. However, the literature has failed to substantively address the lack of any authoritative or wide-ranging empirical research on this issue. Nor has it resolved the unsatisfactory situation (arising from legislative inaction to address law enforcement compliance) of the judiciary taking what steps it can to deal with what is essentially a policy

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177 Andrew Ashworth, "Should the Police be allowed to Use Deceptive Practices?" [1998] *Police and Deceptive Practices* 108.

178 Ibid 140.

matter. Despite the earnest intentions of some commentators, the gap between the rhetoric and reality remains significant.

CHAPTER 3

THE POLICE: CONSTABLE, CULTURE & CORRUPTION

The simple fact is that corruption does not emerge suddenly. By its nature it is spawned in stealth, and grows in a climate in which it is comfortable.[179]

3.1 Introduction

The history of policing in New South Wales and elsewhere in Australia is marked by a cyclical relationship between periods of scandal and public inquiry on one hand, and subsequent periods of mooted reform before a resumption of "policing as usual"[180]on the other hand.[181]History tells us that the police are not successful at identifying, acknowledging, dealing with or eradicating systemic misconduct or corruption within their own ranks.[182] These failures on the part of the police are, to some degree, symptomatic of the nature of the police organisation itself. Despite

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179 NSW *Royal Commission of Inquiry into the NSW Police Service Final Report* (1997), 189.

180 Mark Finnane, *Police and Government Histories of Policing in Australia* (1993) 131.

181 Ibid; There is a long history of inquiries into aspects of policing in NSW beginning with NSW *Report of the Commissioners, State of Crime in the Braidwood District* (1867); NSW *Royal Commission on Alleged Chinese Gambling and Immorality and Charges of Bribery Against Members of the Police Force* (1891); NSW *Inquiry under the Police Inquiry Act* (1918); NSW *Royal Commission of Inquiry into the Matter of the Trial and Conviction and Sentences imposed on Charles Reeve and Others* (1920); NSW *Royal Commission of Inquiry into Allegations against the Police in connection with the suppression of Illicit Betting* (1936); NSW *Royal Commission on Liquor Laws in NSW* (1954); NSW *Royal Commission of Inquiry into certain matter relating to David Edward Studley-Ruxton* (1954); NSW *Royal Commission into Drug Trafficking* (1979); NSW *Commission to Inquire into NSW Police Administration* (1981); NSW *Royal Commission of Inquiry into Alleged Telephone Interceptions* (1986); NSW *Royal Commission into the Arrest, Charging and Withdrawal of Charges against Harold James Blackburn and Matters associated therewith* (1990) NSW *Royal Commission of Inquiry into the NSW Police Service Final Report* (1997). The other Australian states also have similar histories of inquiries into policing, including: Queensland, *Fitzgerald Inquiry* (1989); Queensland, *Inquiry into Criminal Investigation Branch* (1899); Queensland, *Royal Commission on Gambling* (1930s); SA *Inquiry on Stuart case* (1950s); SA *Royal commission on SA special branch*; Victoria, *Beach inquiry* (1976); Victoria, *Neesham Inquiry* (1986); Victoria, *Royal Commission into Police* (1906); Victoria, *Royal Commission on Off-Course Betting* (1958); WA *Inquiries into SP betting* (1948, 1959); WA *Kennedy Royal Commission* (2004).

182 Finnane, above n 180.

past reforms,[183] the causes of misconduct and corruption within the police ranks remain essentially the same.[184] This chapter will explore the nature, role and influence of a modern police organisation in contemporary criminal justice administration.

3.2 The Office of Constable and the Modern Police Force

An analysis of modern policing based upon an assumption that the common law office of constable is synonymous with the role of an officer in a modern professional police force is both simplistic and misconceived. Such an approach is predicated upon an equable comparison between an individual office and a large institution, but this does not accurately reflect the nature and role of modern policing. It is important to separate myth from fact. At common law, a constable held an independent office, responsible for keeping the Sovereign's peace and

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183 After NSW *Commission to Inquire into NSW Police Administration Final Report* (1981) delivered by Commissioner E A Lusher, the then NSW Commissioner of Police J Avery introduced reforms including anti-corruption measures, regionalisation, devolution of authority, and a flattening of the command hierarchy, community policing, creation of a single Police Service, establishment of Police Board responsible for promotions on the basis of merit, career development and recruitment, training and recruitment restructure, and extension of the Ombudsman's powers to investigate complaints against police as noted by Commissioner JRT Wood in his final report of NSW *Royal Commission of Inquiry into NSW Police Service* (1997), 67-68); The establishment of the Police Integrity Commission as part of the recommendations made by Commissioner JRT Wood; amendments to *Police Act* 1990 (NSW) ss 97, 181D, 206 and 211A.

184 NSW *Royal Commission of Inquiry into NSW Police Service Final Report* (1997); NSW *Police Integrity Commission Report Operation Jade* (1998); NSW *Police Integrity Commission Report Operations Copper, Triton and Nickel* (2000); NSW *Police Integrity Commission Report on Operation Oslo* (2001); NSW *Police Integrity Commission Report on Operation Saigon* (2001); NSW *Police Integrity Commission Report on Operation Pelican* (2001); NSW *Police Integrity Commission Report on Operation Florida* (2004); NSW *Police Integrity Commission Report on Operation Cobalt* (2004); and NSW *Police Integrity Commission Report on Operation Whistler* (2005); NSW *Police Integrity Commission Report on Operation Sandvalley* (2006); NSW *Police Integrity Commission Report on Operation Banff* (2006) NSW *Police Integrity Commission Report on Operation Mallard* (2007); NSW *Police Integrity Commission Report on Operation Rani* (2007).

detecting criminal activity.[185] The perception that an officer in a modern police force has the same degree of autonomy does not reflect contemporary law enforcement.

The establishment, structure and operations of the police are regulated by an amalgam of legislation, common law, and convention.[186] Professional police forces are creatures of statute,[187]established by the legislature to preserve the peace and detect crime.[188] Modern police organisations are large bureaucracies with a descending paramilitary command structure and hierarchy.[189] The Commissioner of Police is the chief officer charged with the management and control of the police, subject to ministerial direction.[190] All police officers, regardless of rank or

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185 *Enever v The King* (1906) 3 CLR 969.

186 This chapter will focus on the NSW Police with reference to other Australian Police by way of illustration or comparison. This approach is consistent with the overall focus of the paper which predominantly examines the law relating to the admission of improperly or illegally obtained evidence in NSW and other uniform *Evidence Act* jurisdictions with reference and comparison to the common law and other statutory jurisdictions in Australia as appropriate. By way of illustration see *Police Act 1990* (NSW), *Law Enforcement (Powers and Responsibilities) Act 2002*, *Search Warrants Act 1985* (NSW), *Enever v The King* (1906) 3 CLR 969, *Lippl v Haines* (1989) 47 A Crim R 148 (common law power of search and entry), *Clarke v Bailey* (1933) 33 SR (NSW) 303 (common law power search the body, clothing and property of an arrested person), the accepted convention that a Police Minister is responsible for policy and a Commissioner of Police is responsible for operational matters.

187 *Police Act 1990* (NSW) s 4; *Police Service Administration Act 1990* (Qld) s 2.1; *Police Regulation Act 1958* (Vic) s 4; *Police Act 1998* (SA) s 4; *Police Service Act 2003* (Tas) s 4; *Police* Act *1892* (WA) ss 5 & 6; *Australian Federal Police Act 1979* (Cth) s 6; Finnane, above n 180, 9-30.

188 Lawrence T Roach, QPM "Detecting Crime Part II: The Case for a Public Prosecutor" [2002] *Criminal Law Review* 566.

189 *Police Act 1990* (NSW) ss 5 & 12; *Police Service Administration Act 1990* (Qld) s 2.2; *Police Regulation Act 1958* (Vic) s 4; *Police Act 1998* (SA) s 4. *Police Service Act 2003* (Tas) s 4; *Police* Act *1892* (WA) ss 5 & 6; *Australian Federal Police Act 1979* (Cth) s 6.

190 *Police Act 1990* (NSW) s 8; similar provisions exist in other jurisdictions in Australia (except Western Australia) see *Police Service Administration Act 1990* (Qld) ss 4.6 & 4.8; *Police Regulation Act 1958* (Vic) s 5; *Police Act 1998*(SA) s6. *Police Service Act 2003* (Tas) s7; *Australian Federal Police Act 1979* (Cth) s37; Joseph Carabetta, "Employment Status of the

commission, are constables swearing an oath of office before taking up duties as a police officer.[191] Constables are the lowest ranked officers and are bound to follow instructions and obey commands of those superior in rank.[192] However, superior officers are not empowered to direct a constable how to exercise his/her discretion in the discharge of his/her duties. In this sense, a police officer retains constabulary independence.[193]

The discretionary independence of police officers is important in two respects. A police officer had original authority "exercised at his own discretion by virtue of his office,"[194] unlike public servants who exercised delegated authority. Additionally, the Commissioner of Police was not vicariously liable for "unjustifiable acts done by a constable in the intended exercise of his authority."[195] Responsibility rested with the individual police officer. This latter position has been altered by statute.[196]

The discretionary powers vested in a police constable are considerable and

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Police in Australia" [2003] *Melbourne University Law Review* 1.

191 *Police Act 1990*, s 13; *Police Regulation 2000* (NSW), reg 8(1); *Police Service Administration Act 1990* (Qld) s 3.3; *Police Regulation Act 1958* (Vic) s13; *Police Act 1998* (SA) s 25; *Police Service Act 2003* (Tas) s36; *Police Act 1892* (WA) s10; *Australian Federal Police Act 1979* (Cth) s36.

192 *Police Act 1990* (NSW) s 4; *Police Service Administration Act 1990* (Qld) s 2.1; *Police Regulation Act 1958* (Vic) s 4; *Police Act 1998* (SA) s 4; *Police Service Act 2003* (Tas) s 4; *Police Act 1892* (WA) ss 5 & 6; *Australian Federal Police Act 1979* (Cth) s6; Finnane, above n 180, 9-30.

193 Laurence Lustgarten, *The Governance of Police* (1986), 14.

194 *A-G for NSW v Perpetual Trustee Co (Ltd) and others* [1955] 1 All ER 846, 10

195 *Enever v The King* (1906) 3 CLR 969, (Griffith CJ) 2; cited and approved by Privy Council in *Attorney-General for NSW v Perpetual Trustee Co (Ltd) and others* [1955] 1 All ER 846 (Viscount Simmons) 5; *Griffith v Haines* [1984] 3 NSWLR 653.

196 *Law Reform (Vicarious Liability) Act* 1983 (NSW)

authorise a constable to do acts that otherwise would be classified as criminal or civil wrongs. It is this repository of discretionary powers that poses a unique challenge for police commanders in the management of a police force. Firstly, the range and nature of the discretions do not vary according to the rank of the police officer, but are common to all sworn officers. Secondly, there is limited scope to monitor the exercise of an officer's discretion, especially where those decisions are made in the field or when an officer decides not to exercise a particular power. Thirdly, this remnant of constabulary independence creates a situation that may be exploited for undesirable ends. This is particularly the case where process corruption is found to exist within a police organisation and is allowed to flourish with the apparent "tacit approval"[197] of senior police. Abuse or misuse of police powers may not attract official scrutiny nor result in the disciplining of an offending officer. This may create a situation where there is no deterrence for an officer acting in bad faith when exercising police powers or participating in process corruption to protect an offending officer from censure. Fourthly, the discretionary exercise of police powers sets in motion a series of events marking the progression of a criminal investigation through the various stages of the criminal justice system. What occurs during a criminal investigation has ramifications for the subsequent stages, most crucially the trial of an accused person. If police officers exercise their discretionary powers in bad faith then this may adversely affect an accused person's rights, including the right not be tried unfairly.

Criminal investigations are not private inquiries or personal quests of investigating police officers but are inquiries pursued by the State to detect and investigate

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[197] NSW *Royal Commission of Inquiry into the NSW Police Service Final Report* (1997), 66.

criminal activity with the desire of bringing perpetrators to justice. It is in this context that the role of police officers gathering and giving evidence for the State in criminal proceedings must be understood and distinguished from the position of civilian witnesses giving evidence for the prosecution. A police officer is a professional and trained criminal investigator with extensive statutory and common law powers. These powers authorise a police officer to, inter alia, investigate criminal activity; conduct physical and electronic surveillance; search a person, property or premises for evidence of criminal activity; seize relevant items; arrest, detain, and interrogate an accused person; and obtain forensic samples from an accused person or others suspected of relevant criminal offences. Both the legislature and the common law have sought to strike an acceptable balance between powers of the police and the rights of citizens by specifying the circumstances when a particular power may be exercised, and recognising certain rights of an accused person that arise during a criminal investigation or prosecution. If police exercise their powers in bad faith then there is a consequential infringement of an accused person's rights.

Unlike other prosecution witnesses, a police officer has a dual role, both as a criminal investigator and as a prosecution witness. The law does not regard a police officer as an expert witness,[198] but nor should it equate a police officer with the status of a lay witness. A police officer is accustomed to testifying in court, familiar with its procedures and rituals, and brings to the witness box the status of respectability and authority. Typically, a lay witness does not possess equivalent expertise and experience when giving evidence in a criminal prosecution. The

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198 For example see *Evidence Act 1995* (NSW) s79; *HG v The Queen* (1999) 197 CLR 424; *Idoport Pty Ltd v National Australia Bank Ltd* (Unreported, NSW Supreme Court, Einstein J, 12 March 2001).

disparity between police and civilian witnesses is more acute the more serious the criminal offence prosecuted. Criminal investigations involving serious, indictable offences, or organised criminal activities are usually undertaken by senior, experienced, more able and specially trained police officers. Consequently, during the investigation of serious criminal offences, the incidence of investigating police officers inadvertently or erroneously exercising police powers in bad faith should be negligible. This issue will be further discussed in later chapters.

3.3 The Minister and the Commissioner

Traditionally, conflicts between a police minister and commissioner have arisen where the minister has attempted to direct or intervene directly in police operational matters. Political interference in policing operations has not met with judicial approval.[199] Celebrated instances include the South Australian Vietnam Moratorium Marches in 1970[200]and political demonstrations in Queensland against the 1971 Springbok rugby tour of Australia and the Vietnam War.[201] More recent interventions by a police commissioner advocating law reform and other policy initiatives have not attracted the same degree of controversy.[202]

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199 *R v Commissioner of Police of Metropolis; Ex parte Blackburn* [1968] 2 QB 118, 135-136 (Denning LJ); *Griffith v Haines* [1984] 3 NSWLR 653, 658-659; *A-G for NSW v Perpetual Trustee Co (Ltd) and others* [1955] 1 All ER 846.

200 Finnane, above n 180, 39-41.

201 Ibid.

202 Sue Williams, *Peter Ryan The Inside Story* (2002), 192-195 referring to and quoting statements of the then Commissioner Ryan of NSW Police criticising current laws as being "heavily biased towards civil liberties" and arguing for law reform; advocating majority verdicts in jury trials; modifying the right to silence along the lines of "a British model" and legislation requiring the "advance disclosure of a defence case, pre-trial."

Established convention dictates that a minister is responsible for policy and a commissioner responsible for operational matters.[203] A minister oversees the management and administration of the police force by setting policy agenda, and direction. The commissioner is responsible for the day-to-day operations of the police in the investigation and detection of criminal activity. Commissioner Fitzgerald defined the role of a police minister to be:

> The Minister can and should give directions to the Commissioner on any matter concerning the superintendence, management and administration of the Force. The Minister may even implement policy directives relating to the resourcing of the Force and the priorities that should be given to various aspects of police work and will have responsibility for the development and determination of overall policy.[204]

Policing free from political interference is fundamental to the rule of law. This may be regarded as an extension of constabulary independence in that criminal investigations are not undertaken for political purposes or at the direction of political masters, but conducted by police officers independently exercising their statutory and common law powers according to the law. Seen in this way, constabulary independence assumes a wider purpose by making the commissioner and all police officers accountable at law for their actions. Lord Denning MR adopted this approach in *R v Commissioner of Police of Metropolis; Ex parte Blackburn,*[205] holding that the commissioner was answerable at law for operational decisions but was not accountable to the minister:

> ..I hold it to be the duty of the Commissioner of Police of the metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted: and,

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203 NSW *Royal Commission of Inquiry into the NSW Police Service Final Report* (1997), 244.

204 Finnane, above n 180, 42.

205 [1968] 2 QB 118

> if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep the observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.[206]

Although the conventional division of responsibilities between a minister and a commissioner does not accord with the Westminister principle of ministerial responsibility, [207]it is consistent with the fundamental principle of the rule of law.

3.4 Police Activitism

Over the past century, two significant developments in policing have influenced the politics of policing and the ensuing law and order debate. Firstly, the willingness and participation of police commissioners to engage in policy debate proposing law reform and other initiatives.[208] This is contrary to accepted convention.

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206 Ibid (Lord Denning MR) 135-136; cited in *Griffith v Haines* [1984] 3 NSWLR 653, 658-659.

207 Roger Bird, *Osborn's Concise Law Dictionary* (1983), 220 defines the constitutional doctrine of Ministerial responsibility to be: "every member of the Cabinet who does not resign is absolutely responsible for all that is done at Cabinet meetings; that is, Ministers are collectively responsible to Parliament and individual Ministers are responsible for all the acts of his own Department"; P J Hanks, *Constitutional law in Australia* (1991), 143.

208 Andrew Goldsmith, "The police we need" (1999) *Alternate Law Journal* 22; Dr Jenny

Controversial statements by a police commissioner in areas of policy do not generate the same level of condemnation that has been aroused when a Minister has sought to intervene in what is regarded as strictly police operational matters. There may be many reasons for this perception, for example, media reporting and manipulation by political parties. But it may also tellingly reveal the political sophistication and influence of the police in the powerful law and order debate.[209]

Fleming, "Les Liaisons dangereuses Relations between Police Commissioners and their Political Masters" *Tas Police Dec41-76.htm*; Finnane, above n 180, 36-7.

209 Goldsmith ibid; Finnane, above n 180, 36 "Rather for much of the twentieth century the police have sought to influence public policy in quite direct ways."

Secondly, the growth of police unionism has given rank and file police a voice not only on industrial matters but also on policing policy.[210] The participation of police in policy debates has been an opportunity for police to use the platform of the public discussion to pursue their own agenda.[211] Police associations have expressed strong opposition to calls for public inquiries into corruption claims;[212]organised mass protests over public corruption hearings and calls for the commissioner to resign;[213] fiercely opposed reforms to the police;[214] sought to influence the appointment of a police commissioner or minister;[215]and entered the law and order debate by proffering opinions on the performance of the judiciary, in particular, adequacy of sentences imposed upon individual offenders.[216] In early

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210 Finnane, above n 180, 162-5.

211 Peter A Sallmann, "The Police Powers Schemozzle" in Ian Freckelton and Hugh Selby (eds), *"Police in our Society,"* (1988) 111, 113.

212 Tim Prenzler, Arch Harrison and Andrew Ede, "The Royal Commission into the NSW Police Service Implications for Reform" *Current Affairs Bulletin*, April/May 1996, 4.

213 Andrea Petrie and Farrah Tomazin, *Face Off: police rift widens* (2006) The Age (Melbourne, Victoria) <www.theage.com.au/news/national/face-off-police-riff-widens/2006/09/21/11584318443.html> at 26 September 2006; John Silvester, *A train wreck - and everyone is getting hurt* (2006)*The Age* (Melbourne, Victoria) <www.theage.com.au/news/national/a-train-wreck-151-and everyone-is-getting-hurt/2006.html> at 26 September 2006; Staff reporters *Police demand chief's resignation* (2006) *The Age* (Melbourne Victoria) <www.theage.com.au/news/national/police-chief-rejects-quit-call/2006/09/221158431879.html> at 26 September 2006.

214 Prenzler, Harrison and Ede, above n 212.

215 Finnane, above n 180, 50-5; Queensland, Fitzgerald Inquiry (1989) Commissioner Fitzgerald rebuked the Queensland Police Association by condemning its activities to influence the selection of a Police Commissioner or Minister and stating that the Association should restrict its activities to industrial matters.

216 Denis Gregory, *Police basher fined $500* (2003) Sydney Morning Herald <www.smh.com.au/cgi-bin/articles/2003/11/01/1067.html> at 10 July 2005 reporting comments by NSW Police Association president Ian Ball that "Parliament had given the courts sentences for assaults on police officers which the courts had steadfastly refused to implement. If they continue down that path, they will forfeit their right to independence and the application of discretion, and that's not good for anybody. The second issue is, having

2007, startling revelations emerged of a secret agreement between the Victorian police association and the incumbent Bracks Labor government three weeks before the state election on 25 November 2006.[217] The agreement provided that the government would pay the legal costs of police officers under investigation by the Office of Police Integrity, secure a commitment from the government on police numbers and weapons if reelected and paved the way for future pay increases for members of the police force. After the agreement was made, the Victorian police association changed its public position from criticising to one of endorsing the Bracks Labor government over the opposition policing policy. The police commissioner and the Office of Police Integrity were unaware of the agreement

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been assaulted, are police officers not entitled to expect the courts to protect them?";

Editorial, *The 'law and order' babble* (2002) The Guardian <www.cpa.org.au/parchve5/1108edit.html> at 10 July 2005 "Not surprisingly the President of the NSW Police Association, Ian Ball welcomed the legislation while claiming that the courts are 'unable to do the job."

Geoff Wilkinson, *Heat on drink-drivers* (2005) Herald Sun (Melbourne Victoria) <heraldsun.news.com.au/printpage/o,5481,15711596,00.html> at 10 July 2005 stating that "Victoria Police Association assistant secretary Bruce McKenzie said the three-month penalty was manifestly inadequate."

Phil Davey, *Throw Key Away for Cop Killers* (2004) Labor News <www.labor.net.au/news/1096519773_9071.html> at 10 July 2005 reporting that: "Association President Bob Pritchard said the State Government needed to bring certainty into the legislation in line with community expectations. 'We regard mandatory life sentences for convicted cop killer as a minimum legal protection...introduce new laws into the Parliament.'

The true story of real crime, (2004) The Age (Melbourne, Victoria) (2002) <www.theage.com.au/articles/2002/10/29/1035683410562.html> at 10 July 2005 reporting that: "The media, as [Chief Commissioner] Nixon says, tend to talk up crime, as does the Police Association."

[217] ABC Television, "The Culture", Four Corners, 12 February 2007 <www.abc.net.au/4corners/content/2006/s1843824.htm> at 14 February 2007; David Rood, Paul Austin and Dan Oakes, *Bracks' secret deal with police union on legal aid* (2007), The Age <www.theage.com.au/news/national/bracks-secret-deal-with-police-union-on-legal-aid/2007/02/20.html> at 5 September 2007

between the government and the association. This situation occurred amid Office of Police Integrity public hearings into allegations of assault and perjury against members of the disbanded armed offenders squad. This raises serious concerns about the power of a police association and how such power can be wielded for the material advantage of police officers and to thwart anti-corruption inquiries.

3.5 Police Culture

Much has been written about the distinctive police working culture borne of a potent mix of a paramilitary bureaucratic organisation and the individual discretionary policing powers vested in each constable. Operational matters are the responsibility of the police commissioner but the conduct of police operations is largely dependant upon an investigating police officer exercising his/her discretionary policing powers. It is this dichotomy of authority that sets the police force apart from other large bureaucratic organisations: the authority of rank in a paramilitary body and the authority of discretion that resides in each police constable. The authority of rank imposes a discipline of order based upon a descending chain of command, whereas the authority of discretion conveys autonomy to an individual to use his/her judgment whether to exercise a discretionary power. Despite the fundamental disparity between the two sources of authority, the modern police organisation is a disciplined body that has cultivated a strong sense of loyalty and solidarity among its officers. This cloistered environment has, in turn, influenced and shaped the police working culture.

What is "police culture" and why is it said to be so powerful and instrumental in how and sometimes why police discharge their duties in a particular way?[218] The command structure of the modern police force provides the basic framework from which police working culture has evolved. The validity of police working culture is further reinforced by the methods used to educate and train police officers and recruits. Historically, police training was largely limited to on-the-job instruction and instructions or guidelines issued by the commissioner. Adopting the Wood Royal Commission recommendations, the NSW police force implemented a formal training program to educate police officers and recruits about policing powers and practices. This initiative was part of a policing strategy to raise standards and combat police corruption and malpractice. It has not been entirely successful.

An internal inquiry found that allegations of sexual harassment and threatening to fail a student for refusing to grant him sexual favours made against a senior police instructor at the NSW Police Academy were substantiated.[219]The NSW Ombudsman conducted an independent investigation into complaints made against academy staff and presented his report to Parliament.[220] Despite public assurances

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218 Robert Adlam *"Governmental Rationalities in Police Leadership: An Essay Exploring "Some of the Deep Structure in Police Leadership Praxis"* (2002) 12(1) *Policing and Society* 15; Maurice Punch *"Rotten Orchards: 'Pestilence, Police Misconduct and System Failure"* (2003) 13(2) *Policing and Society* 171; John Baldwin "Police Interview Techniques Establishing Truth or Proof?" [1993] 33 *The British Journal of Criminology* 325; Ian Brownlie, "Police Powers - IV Questioning: A General View" [1967] *Criminal Law Review* 75; Glanville Williams, "Questioning by the Police: Some Practical Considerations" [1960] *Criminal Law Review* 325; David Dixon, "Politics, Research and Symbolism in Criminal Justice: the Right of Silence and the Police and Criminal Evidence Act" (1999) (1) *Anglo-American Law Review*.

219 Kate McClymont, *Exposed: sex scandal police kept quiet* (2007) Sydney Morning Herald <www.smh.com.au/news/national/exposed-sec-scandal-police-kept-quiet/2007/09/07/1188.html> at 18 September 2007.

220 Ibid reporting that: 'in August 2006 the NSW Ombudsman presented a report to Parliament

by the Police Commissioner that all officers involved in the academy sex scandal had been transferred,[221] the officer remained in his position at the academy for another three years until the media published the story.[222]

This episode is significant for several reasons. Firstly, it illustrates that the police organisation is at times unaccountable and may conceal information for its own purposes. An affidavit of acting Assistant Commissioner, Tony McWhirter, filed in court proceedings initiated by the said officer, revealed that the police were "nervous about adverse publicity "[223] of the officer's continuing attachment to the academy because of possible detrimental effect upon recruitment and a government commitment to increase police numbers.[224] Secondly, the standard of the education and training of police officers and recruits is open to question. Thirdly, the reported actions of senior police, including the commissioner, to protect an officer found to have acted improperly raises serious concerns about the long-term commitment of the police force to adhere to strategies to combat corruption and misconduct.

The institutional approach to policing policy and practice is also conducive to cultivating police working culture. The gathering of criminal intelligence to assist the police in the detection and investigation of criminal activity involves identification

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entitled "Misconduct at the NSW Police Academy."

221 Ibid reporting that: "in July last year when the Commissioner, Ken Moroney, assured the public that police involved in sexual misconduct had been transferred out of the school."

222 Ibid.

223 Ibid.

224 Ibid.

of persons likely to be of interest to the police, whether by association, membership of or affiliation with a particular group, or ethnicity, and, recognition of events, particular locations or trouble spots that may require police presence or attention.[225] Stereotyping of either persons or places may be a byproduct of policing policy, but its effect is of greater import. It reinforces police attitudes towards certain persons, groups or locations within the community and so may indirectly influence the exercise of policing powers.

The Wood Royal Commission identified police culture by listing relevant characteristics:

- a sense of mission about police work;
- an orientation toward action;
- a cynical or pessimistic perspective about the social environment;
- an attitude of constant suspiciousness;
- an isolated social life coupled with a strong sense of solidarity with other police officers;
- a clear categorisation of the public between the rough and the respectable;
- a conservative stance in politics and morality:
- a machismo outlook that permits sexism and glorifies the abuse of alcohol and heterosexual indulgences;

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225 Russell Hogg and Mark Findlay, "Police and the Community: Some Issues Raised by Recent Overseas Research" in Ian Freckelton and Hugh Selby (eds), *Police in Our Society* (1988), 49.

> a prejudiced attitude towards minorities; and a pragmatic view of police work which discourages innovation and experimentation.[226]

Police working culture is universal throughout police organisations. It transcends any internal divisions between discrete groups (each with their own identity)[227] for example, uniformed and plainclothes officers, and, detectives attached to specialised squads and those attached to local commands. The roots of police working culture are found in separation. Police are set apart from the community both authoritatively and socially. Segregation of the police has fostered a culture of strong loyalty among police that has, in turn, reinforced the division between police and community and in some circumstances blossomed into a siege mentality of "us and them."[228] It is an understandable and a necessary incidence of policing that officers display loyalty to each other, especially in dangerous or life-threatening situations. Group loyalty encourages comradeship and boosts morale in police ranks. However, the dark side of strong loyalty is that it undermines constabulary independence by placing loyalty to a colleague above enforcement of the law, deliberately thwarting an attempt to investigate an officer's misconduct by adopting

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226 NSW *Royal Commission of Inquiry into the NSW Police Service Final Report* (1997), 31.

227 Ibid, 32, 51; Finnane, above n 180, 74-79; Robert Adlam, "Governmental Rationalities in Police Leadership: An Essay Exploring Some of the 'Deep Structure' of Police Leadership Praxis" (2002) 12(1) *Policing and Society* 15.

228 NSW *Royal Commission of Inquiry into the NSW Police Service Final Report* (1997), 32; Andrew Goldsmith, "Complaints Against Police: A Community Policing Perspective" paper presented at The Police and the Community in 1990s conference and based upon portions of a chapter entitled 'External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures" published in A J Goldsmith (ed) *Complaints against the Police: The Trend to External Review* (1990), 205.

a strategy of unity or silence, and ostracising whistle blowers.[229]

3.6 Corruption

Negative aspects of group loyalty provide a fertile ground for the "cultivation and proliferation of corruption."[230] The Mollen Commission[231] identified and explained the relationship between negative aspects of police culture and corruption:

> First, they encourage corruption by setting a standard that nothing is more important than the unswerving loyalty of officers to one another - not even stopping the most serious forms of corruption. This emboldens corrupt cops and those susceptible to corruption. Second, these attitudes thwart efforts to control corruption. They lead officers to protect or cover-up for others' crimes - even crimes of which they heartily disapprove.[232]

Corruption is not restricted to illegal or improper conduct for personal gain or financial reward but is:

> [the] deliberate unlawful conduct (whether by act or omission) on the part of a member of the Police Service, utilising his or her position, whether on or off duty, and the exercise of police powers in bad faith.[233]

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229 NSW *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997), 32-33; Tim Prenzler, Arch Harrison, and Andrew Ede, above n 212, 6; this is also illustrated by two well-known cases of whistle-blowers Philip Arantz and Deborah Locke, both former officers in the NSW Police. In 1971, Philip Arantz, then a Detective Sergeant, had official crime clear-up rates published in the Sydney Morning Herald to disclose publicly that the NSW Police had annually published false high crime clear-up rates. Arantz was identified as the "leak" and certified mentally sick by the Police Medical Officer Dr A A Vane and subsequently admitted to a mental hospital. The later psychiatric report found "no evidence of psychosis". On 20 January 1972 Arantz was dismissed from the Police without a pension. After a lengthy battle, the Wran government in 1985 paid Arantz compensation of $250,000. Deborah Locke, a former Detective, gave evidence of widespread police corruption to NSW Police Internal Affairs but no action was taken. Locke's life was allegedly in danger. In 1996 she was dismissed from the Police Service as "medically unfit". She gave evidence of the widespread corruption to the Wood Royal Commission.

230 NSW, *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997), 32-33.

231 United States of America, *The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department* (1994).

232 Ibid 51-52 and cited in NSW, *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997), 32.

233 NSW, *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997), 25

The abuse and misuse of police powers, or process corruption, is a serious matter. The law reposes in the police significant powers to investigate and detect criminal activity. These powers authorise acts that would otherwise be unlawful and encroach upon democratic rights of citizens. Police may abuse or misuse their powers by the use of excessive force, tampering with or fabricating evidence and/or carrying out unlawful searches and seizures of property.[234] Where there is an abuse or misuse of police powers there is a corresponding infringement of an individual's human rights and liberties:

> When we scrutinise the subject of police misconduct - particularly corruption and forms of police crime - we should be under no illusion as to the seriousness of the issues involved. These impinge on fundamental abuses of the rule of law, due process and human rights.[235]

In NSW, process corruption was found to be pervasive[236] and evident by the widespread tolerance and participation of police in this type of corruption, including the "appearance of tacit approval by senior officers."[237] Police officers, otherwise honest and diligent, will participate in process corruption to either secure a conviction against an accused person or

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Commissioner JRT Wood stated that corruption "includes participation by a member of the Police Service in any arrangement or course of conduct, as an incident of which that member, or any other member is expected or encouraged to neglect his duty, or to be improperly influenced in the exercise of his or her functions, fabricates or plants evidence, gives false evidence, or applies trickery, excessive force or threats to other improper tactics to procure a confession or conviction, or improperly interferes with or subverts the prosecution process, conceals any form of misconduct by another member of the Police Service, or assists that member to escape internal or criminal investigation, or engages himself or herself as a principal or accessory in serious criminal behaviour."

234 Ibid 26.

235 Punch, above n 218, 17.

236 NSW, *Royal Commission of Inquiry into the NSW Police Service. Final Report* (1997), 36.

237 Ibid 66.

to protect a colleague from scrutiny.[238] Process corruption is:

> justified by the police on the basis of procuring the conviction of persons suspected of criminal or anti-social conduct, or in order to exercise control over sections of the community.[239]

The "end justifies the means" rationale ignores the corresponding infringement of an accused person's human rights and the detrimental effect upon public confidence in the administration of criminal justice. In doing so, it implicitly trivialises the seriousness of the abuse or misuse of policing powers.

The incidence of process corruption and police reaction to it are indicative of a police working culture that encourages and endorses the view that the "police know best."[240] This cultural view strikes at the heart of the rule of law,[241] is a "serious perversion"[242] of the office of constable, and conflicts with Peel's principles of modern policing.[243] The existence of process corruption is illustrated by the typical responses of police commissioners and police associations to allegations of corruption by either:

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238 Ibid 32; United States of America, *The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department* (1994), 51-52.

239 NSW, *Royal Commission of Inquiry into the NSW Police Service. Final Report* (1997), 26

240 Adlam, above n 218, 30.

241 Finnane, above n 180, 92: "Further, if a fundamental characteristic of the police in a rule of law culture is its operation under publicly known and legally accountable rules, then the persistence of questions about the character of police practices in crime work suggests the very fragility of the concept of the rule of law in Australia."

242 NSW, *Royal Commission of Inquiry into the NSW Police Service. Final Report* (1997), 85.

243 Keith L Williams, "Peel's Principles and Their Acceptance by American Police: Ending 175 years of Reinvention" [2003] 76 *The Police Journal* 97.

> denying the allegation, particularly, if it is one of systemic corruption;[244] or
> if an individual officer is identified as corrupt, relying upon the now discredited rotten apple theory that the said officer is the sole "bad egg" in an otherwise clean service.[245]

Police solidarity has entrenched process corruption as "part of the way of life or ethos of the Police Service"[246] creating a culture that protects corrupt police and ostracises whistleblowers. It is a matter of serious concern when the judgment of an individual officer about the legality or propriety of certain acts (or omissions) may be so overborne by a group mentality to justify a wrongdoing or to actively participate in its concealment.[247] Process corruption is systemic[248] and carries the risk that:

> police deviance becomes virtually institutionalized, is affected by and affects other parts of the criminal justice system, and may be related to wider influences in the

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244 Prenzler, Harrison and Ede, above n 212; NSW, *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997) 49-50 Commissioner JRT Wood stated that Commissioner Lauer, whose assessment was largely mirrored by that of several other senior officers said: "In today's Police Service, institutionalised corruption does not exist within that meaning. That is to say, as I have said, that officers will not from time to time fail in their duty and act corruptly."

245 Prenzler, Harrison and Ede, above n 212; Punch, above n 218; NSW, *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997), 27 Commissioner JRT Wood said:"Consequently it would seem that acceptance by police managers and political elites, of a rotten apple concept of police corruption, is a defensive, face-saving exercise. The solution is simply seen as removing 'bent' officers without a need to evaluate organisational procedures. It is, in essence, a means of 'papering over the cracks' without admitting that there is a fundamental problem of major significance...The power of the police, and of the media, in constructing mythology of this kind for their own separate interests, should not be underestimated. It was not overlooked by members of the Criminal Investigation Branch (CIB) NSW, who were astute enough to build up a working relationship with some well-placed journalists." Williams, above n 202, 141-142.

246 NSW, *Royal Commission of Inquiry into the NSW Police Service. Final Report* (1997), 50.

247 Ibid 32, 70.

248 Ibid 26. Commissioner JRT Wood defined systemic corruption to be "the form of corruption which has become accepted as part of the way of life or ethos of the Police Service and which a significant proportion of its membership either pursues to tolerates at some stage of their police careers."

broader environment and leads to what I call 'system failure.'[249]

It presents as a significant problem in criminal justice administration, both in terms of discovery and redress.

3.7 Conclusion

The unpalatable observation is that corruption and malpractice will always exist (to some extent) within the ranks of the police force. It is the consequences of corruption and malpractice that present a most serious problem for criminal justice administration. Corrupt or improper conduct taints a criminal investigation and subsequent prosecution of an accused person. This may result in a miscarriage of justice; pose a threat to the integrity of the criminal justice system and its processes; and adversely affect public confidence in criminal justice administration.

The political might and influence of the police force and police association make the task of reform difficult as the most recent Victorian episode clearly demonstrates. The will of the police organisation to uncover and deal with corrupt conduct or malpractice wavers and dissipates the further in time a complaint is removed from the holding of a public inquiry or commission into police corruption. Police are not proficient at self-regulation. The necessity and importance of independent bodies investigating complaints against police officers cannot be understated. If history shows us anything it is that accountability of the police is dependant upon impartial and public scrutiny of the actions or omissions of police

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249 Punch, above n 218, 173.

officers.

The criminal courts are not appropriate forums for disciplining wayward police officers but they nevertheless have an important contribution to make in combating the ill effects of police corruption or malpractice infiltrating criminal justice administration. A criminal court has a duty to protect the integrity of its own processes, to minimise the risk of a miscarriage of justice and avoid bringing the criminal justice system into disrepute. Within this context the public policy discretion[250] has special significance providing the means by which a court can reject evidence improperly or unlawfully obtained on the basis that admission of such evidence would not be in the public interest. It allows the court to look beyond the issues of a particular criminal trial and take into account the broader public policy issues of crime control, human rights and integrity of the criminal justice administration. The focus of the public policy discretion is the conduct of the criminal investigation. Its objective is to ensure that "those who enforce the law uphold it."[251] Until recently the public policy discretion was secondary to the fairness discretion in considering the reception of evidence improperly or unlawfully obtained. The traditional approach failed to appreciate the nexus between the various stages of the criminal justice system, ignoring the ripple effect that police malpractice occurring during a criminal investigation may have upon the subsequent criminal prosecution. The issue of police malpractice should not be viewed in isolation but within the context of the criminal justice system. Considered

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250 See for example, *Evidence Act 1995* (NSW) s138; *Ireland v The Queen* (1970) 126 CLR 321, *Bunning v Cross* (1978) 141 CLR 54; *Ridgeway v The Queen* (1995) 129 ALR 41 (1995) 69 ALJR 484.

251 *Pollard v The Queen* [1992] HCA 69; (1992) 176 CLR 177.

in this way, the purpose of the public policy discretion assumes greater importance as part of the court's armoury to ensure that an accused person is not tried unfairly.

CHAPTER 4

BALANCING THE PUBLIC INTERESTS
THE TIGHTROPE OF RIGHTS & POLICE POWERS

The reality of a fair trial is largely dependent on the way in which power is exercised against the accused by investigation and prosecution agencies at the pre-trial stage.[252]

4.1 Introduction

One of the foundation stones of our criminal justice system is an accused person's right not to be tried unfairly.[253] This right is said to be "manifested in the rules of law and of practice designed to regulate the course of the trial."[254] The course of a trial is not restricted to matters of customary procedure and ritual but includes those rules governing the admissibility of evidence,[255]and the discretions vested in the court to reject unfairly prejudicial evidence[256]or admit improperly or illegally obtained evidence in the public interest.[257]

The criminal trial is an adversarial forensic contest between the parties to ascertain

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252 Mark Findlay. Stephen Odgers and Stanley Yeo, *"Australian Criminal Justice"*, 2nd edition Oxford University Press 1999, 125.

253 *Jago v District Court (NSW)* (1989) 168 CLR 23, 56-57 (Deane J):
Strictly speaking, however, there is not such directly enforceable 'right' since no person has the right to insist upon being prosecuted or tried by the State. What is involved is more accurately expressed in negative terms as a right not to tried unfairly or as an immunity against conviction otherwise than after a fair trial.

254 *Dietrich v The Queen* (1992) 177 CLR 292 (Mason CJ and McHugh J).

255 For example see *Evidence Act 1995* (NSW).

256 Ibid ss 135 to 137.

257 Ibid s 138.

"whether guilt has been proved beyond reasonable doubt."[258] A party may present evidence to the court either to prove its case or to challenge its opponent's position. However, where a party seeks to rely upon improperly or unlawfully obtained evidence its purpose is to gain a forensic advantage by its admission,[259]usually at the expense of its opponent's rights.

To properly understand the consequences that admission of improperly or unlawfully obtained evidence may have upon the trial of an accused person, or more generally for criminal justice administration, it is vital to take a holistic approach. The impugned act (or omission) should not be considered substantially in terms of the cogency of the evidence so obtained nor from the sole perspective of crime control. Rather it should be seen in the context of the competing broader public interests. Equally important is recognition that the administration of criminal justice consists of discrete but linked stages commencing with the initial criminal investigation through to the sentencing of convicted offenders. A criminal investigation is the foundation of a subsequent criminal prosecution. The manner and conduct of a criminal investigation has ramifications for the latter criminal trial not only in respect of the apprehension of an accused person and specifying the offences to be tried but also in terms of what evidence the State may present to prove its case. Judicial oversight of a criminal prosecution is not confined to those matters occurring after the presentment of charges or indictment but extends to those acts (or omissions) of investigating officers relevant to the apprehension of

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258 *Dietrich v The Queen* (1992) 177 CLR 292 (Gaudron J).

259 *Ridgeway v The Queen* [1994] HCA 33; (1995) 129 ALR 1.41 (Mason CJ, Deane and Dawson JJ).

an accused person and the gathering of evidence during the investigation stage.[260]

4.2 Public Interests

The criminal justice system is characterised by competing public interests, for example, the public interest in crime control and the public interest in upholding the rule of law. The conflict between the competing public interests is played out in different facets of criminal justice administration from the balancing of rights of the State against the rights of an individual to determining whether improperly or illegally obtained evidence should be admitted in the public interest. Regardless of context, the competing public interests are essentially the same.

Historically, the common law has strived to maintain a balance between the competing public interests through the recognition of private rights or interests to guard against miscarriages of justice.[261] These private rights or interests are fundamental to protect an individual against intrusive or arbitrary actions of the State and preservation of the presumption of innocence. So fundamental are they that the "very idea of democracy incorporates recognition of individual rights."[262] The approach of the common law continues to be influential in how the court approaches the balancing task by strictly interpreting legislation conveying powers

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260 The conduct of a criminal investigation may be subject to judicial review in various ways, including judicial discretions to admit or exclude impugned evidence on the grounds of public interest or for being unfairly prejudicial; applications for relief in the nature of the prerogative writs; or actions in damages for trespass, interference with goods, malicious prosecution, or false imprisonment; and actions for breach of privacy.

261 These rights include the right to silence; the privilege against self-incrimination; right to liberty; and the right to privacy.

262 Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (2nd ed, 1999) 173.

to law enforcement officials that infringe basic rights.[263]

Both general and statutory law implicitly recognise these private rights through the imposition of conditions and limitations regulating the exercise of policing powers. Generally, the exercise of a police power is discretionary rather than mandatory, and usually premised upon an investigating police officer having a reasonable belief or suspicion about the existence or validity of a relevant matter Validity of the exercise of a police power will depend upon various matters. These include the precise terms of such power; whether there were reasonable grounds for the holding of the relevant belief or suspicion; surrounding circumstances; the manner of exercise; and whether an accused person made an informed decision about asserting his relevant rights or privileges arising upon the exercise of a particular police power.

When policing powers are misused or exercised in bad faith then there is a corresponding infringement of an individual's human rights. Infringement of an accused's fundamental rights (such as rights to liberty, privacy, and silence) is more likely to occur during a criminal investigation than at any stage of the criminal justice system. Therefore, how the police exercise their powers to conduct a criminal investigation may have a significant and critical impact not only upon the outcome of a trial but also whether an accused person has been tried fairly in accordance with the law. Abstract references to policing powers are unhelpful, tending to downplay the seriousness of an infringement. To fully appreciate the

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263 *Coco v The Queen* (1994) 179 CLR 427; *Ousley v The Queen* [1997] HCA 49 (20 October 1997); *Potter v Minahan* (1908) 7 CLR 277; *Bropho v Western Australia* (1990) 171 CLR 1.

gravity of an infringement, the nature of the relevant policing power and the associated police malpractice must be clearly understood and scrutinised.

4.3 Policing Powers

Traditionally, acquisition of policing powers has occurred in an ad hoc manner and often in response to a perception that the police required more powers for effective law enforcement. As a consequence, uncertainty and confusion existed about the extent of some police powers and the manner in which they were to be exercised.[264] This situation was not conducive to judicial review or to minimise ignorant violations of policing powers.[265] Some jurisdictions have sought to address this problem by the legislative consolidation of policing powers.[266]

The authority of law enforcement officials resides in a collection of common law and statutory powers, both traditional and new. The more recent powers authorise overt or covert use of sophisticated, technical, technological or scientific means to investigate criminal activity subject to prescribed safeguards,[267] or involve

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264 This problem was described by Lord Devlin in 'Police Powers and Responsibilities: common law, statutory and discretionary?' (1967) 2 *Australian Police Journal* 122, quoted in the NSW LRC, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, Report 66 (1990) [1.66]:
It is quite extraordinary that, in a country which prides itself on individual liberty [the definition of police powers] should be so obscure and ill-defined. It is useless to complain of police overstepping the mark if it takes a day's research to find out where the mark is.

265 NSW, *Royal Commission of Inquiry into the NSW Police Service, Final Report* (1997), 428.

266 For example *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); *Police Powers and Responsibilities Act 2000* (Qld).

267 *Crimes Act 1914* (Cth) Part 1D; *Crimes (Forensic Procedures) Act 2000* (NSW); *Telecommunications (Interception) Act 1979* (Cth); *Listening Devices Act 1984* (NSW); *Listening Devices Act 1984* (NSW); *Invasion of Privacy Act 1971* (Qld); *Drugs Misuse Act 1986* (Qld) s25; *Listening Devices Act 1992* (ACT); *Listening Devices Act 1990* (NT); *Listening Devices Act 1972* (SA); *Listening Devices Act 1969* (Vic); *Listening Devices Act 1978* (WA).

legislative refinement of a traditional power.[268] The court and parliament recognise that balancing the rights of the State and the rights of individuals is a dynamic process that must be responsive to societal changes.[269]

4.4 Traditional Policing Powers

Traditional powers vest in the police authority to detain, arrest,[270] question,[271] and search an individual,[272] and to enter upon premises or other property to search for and seize items obtained unlawfully or as evidence of criminal activity.[273] These powers conflict with fundamental rights and liberties that citizens of a democracy enjoy (such as the rights of liberty, property and privacy) by authorising a police officer to commit acts that would otherwise be regarded as criminal or civil wrongs.

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268 *Criminal Procedure Act 1986* (NSW) s108; *Criminal Law (Detention and Interrogation) Act 1995* (Tas); *Crimes Act 1958* (Vic) s464H; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) Part 9.

269 *Bunning v Cross* (1978) 141 CLR 54, 76 (Stephen and Aicken JJ); *R v Swaffield: Pavic v R* (1998) 151 ALR 98, 142 (Kirby J).

270 *Crimes Act 1914* (Cth) s 3W; *Australian Federal Police Act 1979* (Cth) s14A; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) Part 8; *Crimes Act 1900* (NSW) Part 10; *Police Powers and Responsibilities Act 2000* (Qld), ss 198 and 206; *Criminal Law Consolidation Act 1935* (SA) s 271; *Police Offences Act 1935* (Tas) s55.

271 *Van der Meer* (1988) 35 A Crim R 232; *Law Enforcement (Powers and Responsibilities) Act 2005* (NSW) Part 9; *Crimes Act 1914* (Cth) Part 1C; *Criminal Law (Detention and Interrogation) Act 1995* (Tas), *Crimes Act 1958* (Vic) s464H.

272 *Law Enforcement (Powers and Responsibilities) Act 2005* (NSW), ss 21, 21A, 23A, and 87K; *Crimes Act 1914* (Cth) ss 3E, 3T, 3UD, and 3zh; *Misuse Drugs Act 2001* (Tas) ss 29, 30, and 33.

273 All Australian jurisdictions have statutes authorising search of premises by warrant, examples include *Law Enforcement (Powers and Responsibilities) Act 2002* Part 5; *Crimes Act 1958 (Vic)* s465; *Magistrates Court Act 1989* (Vic), s 75; *Police Administration Act (NT)* ss 117, 120B; *Crimes Act 1914* (Cth) Part IAA Division 2 ss 3E - 3S; *Customs Act 1901* ss198 -202A; *Crimes and Misconduct Act 2001* (QLD) Part 2; *Police Powers and Responsibilities Act 2000* (QLD), Chapter 3, ss 68-75; *Drugs Act 1908* (SA) s 36; *Criminal Investigation (Extra-Territorial Offences) Act 1984* (SA), s 5; *Search Warrants Act 1997* (Tas) s55; *Criminal Code* (WA), s711, *Police Act 1892* (WA) s70.

The legal authority of a police officer sets him/her apart from the rest of the community but does not put an officer beyond the law. The rule of law requires that all citizens, regardless of occupation, are bound to observe the law.[274] The magnitude of law enforcement powers is apparent in the language used by the court to describe its duty to "supervise critically or even jealously"[275] the exercise of policing powers,[276] and legal recourse to challenge the police exercising their powers.[277]

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274 *Plenty v Dillon* (1991) CLR 635 exception in exigent circumstances.

275 *IRC v Rossminster Ltd* [1980] AC 952, 1000 (Lord Wilberforce) referring to the power of search and seizure.

276 See also *Re Black and The Queen* (1973) 13 CCC (2d) 446, 448 (Berger J); *George v Rocket* (1990) 170 CLR 104, 110; *Crowley v Murphy* (1981) 52 FLR 123, 143-4 (Lockhart J); *R v Swaffield; Pavic v R* (1998) 151 ALR 98, 114 (Brennan CJ); *Grollo v Palmer & ors* [1995] HA 26 (31 May 1995); *R v Davidson* [1996] QCA 531 (20 December 1996) (Fitzgerald P); *R v O'Neill* [1996] 2 Qd R 326 (Fitzgerald P); *Williams v The Queen* (1986) 161 CLR 278; *Cleland v The Queen* (1982) 151 CLR 1, 26 (Deane J).

277 Police malpractice may provide the basis to bring common law tort claims in damages for trespass to a person or property; unlawful imprisonment; malicious prosecution; assault and/or battery.

The power of arrest is the most important policing power. Personal liberty is "the most elementary and important of all common law rights"[278] providing the foundation for other democratic rights.[279] Arbitrary arrest and detention are the antithesis of democratic rights and freedoms. The power of arrest is discretionary and its exercise compels an accused person to comply with police directives.[280] An arrest is a deprivation of personal liberty,[281] and the court will closely scrutinise the arrest of an accused person.[282] An arrest is also significant in that it marks the beginning of the accusatory stage of a criminal matter opening the way for judicial supervision of the criminal prosecution. Significantly, validity or invalidity of an arrest may have repercussions for subsequent acts. If an arrest is unlawful or becomes unlawful, then the acts taken consequent upon such an arrest may also be unlawful.[283] This may include personal searches, forensic procedures, and

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278 *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J); *Edgar Michaels* (1995) 80 A Crim R 542, 549-550, (GaudronJ).

279 Upon arrest, an accused is entitled to exercise his/her right to silence. *Blackstone Commentaries on the Laws of England* (Oxford 1765) Book 1, pp 120-131 cited with approval in *Williams v The Queen* (1986) 161 CLR 278 (Mason and Brennan JJ): "*Of the great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper... there would soon be an end of all other rights and immunities.*"

280 *Ex parte Evers; Re Leary and Another* (1945) 62 WN (NSW) 146; *Clarke v Bailey* (1933) 33 SR (NSW) 202; *Trobridge v Hardy* (1955) 94 CLR 147; *Drymalik v Feldman* [1966] SASR 227; *Pirani & Diggins v Hardy* (Unreported, Supreme Court of NSW, Smart J. 9 September 1994); *DPP V Carr* (Unreported, NSW Supreme Court, Smart AJ, 25 January 2002).

281 *Donaldson v Broomby* [1981] 60 FLR 124, 126 (Deane J).

282 *Cleland v The Queen* (1982) 151 CLR 1, 26 (Deane J): *"It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."*

283 *Adams v Kennedy and Others* [2000] 40 NSWLR 78.

police questioning of an accused.

Powers of entry, search and seizure allow the police to use reasonable force to enter upon a person's property to search for stolen goods or for another authorised purpose and seize relevant items.[284] Police are not entitled to exercise these powers randomly or arbitrarily but must satisfy certain conditions for legitimate entry upon subject property and comply with any lawful requirements regarding the subsequent search and any resulting seizure. The courts strictly interpret search warrant legislation and have repeatedly held that an authorised justice considering a search warrant application must discharge his/her duty responsibly and in accordance with the law.[285] A respondent may challenge a search warrant by seeking an injunction and/or declaration for relief in the nature of a prerogative writ. A search warrant may be quashed[286]if it is held there has been fraud, an error of law or jurisdictional error.[287] An unauthorised or unlawful search may expose a police officer to actions in damages for trespass and/or detinue for any items

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284 All Australian jurisdictions have statutes authorising search of premises by warrant, for example, *Law Enforcement (Powers and Responsibilities) Act 2002* Part 5 (NSW); *Crimes Act 1958* (Vic) s465; *Magistrates Court Act 1989* (Vic) s75; *Police Administration Act* (NT) ss 117, 120B; *Crimes Act 1914* (Cth) Part IAA Division ss 3E-3S; *Customs Act 1901* ss 198-202A; *Crimes and Misconduct Act 2001* (Qld) Part 2; *Police Powers and Responsibilities Act 2000* (Qld) Chapter 3, ss 68-75; *Drugs Act 1908* (SA) s 36; *Criminal Investigation (Extra-Territorial Offences) Act 1984* (SA) s5; *Search Warrants Act 1997* (Tas) s55; *Criminal Code (WA)* s711; *Police Act 1892* (WA) s 70.

285 *Re Black and The Queen* (1973) 13 CCC (2d) 446; *IRC v Rossminster Ltd* [1980] AC 952; *George v Rocket* (1990) 170 CLR 104; *Crowley v Murphy* [1981] 52 FLR 123; *Parker v Churchill* (1985) 9 FCR 316; *Jackson v Mijovich* (Unreported, New South Wales Supreme Court, Finlay J. 22 March 1991).

286 *ABC v Cloran* (1984) 4 FCR 151 (Lockhart J) held that the execution of a warrant does not prevent the making of an order to quash it.

287 *Re Titan Industries and The Queen* (1986) 31 CCC 3(d) 442; *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

seized.[288] Despite these remedies, items seized improperly or unlawfully may be admitted into evidence where admission is in the public interest.[289]

4.5 Recent Policing Powers

Law enforcement agencies have embraced advances in science, technology, technical knowledge, and investigative methods to be better equipped to investigate criminal activity of increasing sophistication and organisation. Most recent policing powers permit and regulate use of such innovations to investigate and obtain evidence of criminal activity. There are two areas of particular interest.

Firstly, forensic procedure legislation permits taking of intimate and non-intimate bodily samples for analysis.[290] Reasonable force may be used to obtain and protect the sample.[291] Arrest is not necessarily a prerequisite for the performance of a forensic procedure[292] and a suspect may be the subject of a forensic procedure.[293]

Forensic materials are not confined to bodily samples, but include photographs, fingerprints, handprints, footprints, toe prints, casts or impressions, and breathalyser measurements.[294] The purpose of a forensic procedure is to obtain

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288 *Law Reform (Vicarious Liability) Act 1983*, s 9C.

289 *Evidence Act 1995* (Cth) s 138; *Evidence Act* 1995 (NSW), s 138; *Bunning v Cross* (1978) 141 CLR 54.

290 *Crimes (Forensic Procedures) Act 2000* (NSW), section 47; *Crimes Act 1914* (Cth) Part ID.

291 See for example, *Crimes (Forensic Procedures) Act 2000* (NSW), section 47; *Crimes Act 1914* (Cth), Part ID.

292 *Crimes (Forensic Procedures) Act 2000* (NSW); *Road Transport (Safety and Traffic Management) Act 1999* (NSW), ss 13, 15.

293 *Crimes (Forensic Procedures) Act 2000* (NSW), ss 3, 7, 17, and 23.

294 Ibid.

real evidence. Unlike confessional evidence, the privilege against self-incrimination does not apply to real evidence obtained from an accused person by forensic procedure. The ALRC rejected an argument that the privilege against self-incrimination should extend to the compulsory taking of incriminating real evidence because:

> the probative value of this kind of evidence is such that it ought to be obtainable and admissible, provided that enforceable safeguards for the accused are built into the system.[295]

The rationale for this view is that it is "harder to fabricate physical evidence than a confession."[296] Physical evidence may not be conclusive in proving culpability of an accused person. For example, placing a person at the scene of a crime does not (without more) justify a decision that the person committed the said crime. Although the courts strictly interpret legislation interfering with fundamental rights, freedoms and immunities, and any legislative ambiguity will be construed in favour of an accused,[297] little protection may be provided where forensic evidence (obtained improperly or unlawfully) has been admitted into evidence on the balance of public interest.

Secondly, covert surveillance involves observation, monitoring and recording of those persons of interest in a criminal investigation, without the subject's knowledge. Parliament and courts have accepted the legal necessity for law

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295 ALRC. *Criminal Investigation*, Interim Report No 2 (1975) [134].

296 Dr Keith Tronc, Cliff Crawford, and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996), 148.

297 *Coco v The Queen* (1994) 179 CLR 427; *Fernando v Commissioner of Police* (1995) 36 NSWLR 567.

enforcement agencies to engage in "subterfuge, ruses and tricks"[298] to investigate criminal activity, particularly, drug offences. Legislation sanctions and regulates electronic surveillance.[299] Parliament has imposed safeguards to prevent arbitrary use of electronic surveillance.[300] Electronic surveillance is both pervasive and indiscriminate, executed secretly and may, on renewal, operate for an extended period. All telephone calls are monitored, including any conversations between the person of interest and his/her legal representative that under normal circumstances would be a privileged communication. Electronic surveillance is controversial not so much for privacy reasons but for the consequential infringements of fundamental rights, namely, the right not to be tried unfairly, the privilege against self-incrimination, right to silence and client legal privilege. It is the responsibility of the court to guard against unlawful or improper use of covert surveillance because:

> 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 courts regard as appropriate in a free society.[301]

Issuing a warrant is an administrative act, regardless of the type of warrant.[302]

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298 *R v Swaffield, Pavic v R* (1998) 151 ALR 98, 142 (Kirby J).

299 *Telecommunications (Interception) Act 1979* (Cth); *Listening Devices Act 1984* (NSW); *Invasion of Privacy Act 1971* (Qld); *Drugs Misuse Act 1986* (Qld) s25; *Listening Devices Act 1992* (ACT); *Listening Devices Act 1990* (NT); *Listening Devices Act 1972* (SA); *Listening Devices Act 1969* (Vic); *Listening Devices Act 1978* (WA).

300 These safeguards include: an eligible Judge determines application for a warrant; a telephone interception or listening device warrants are not investigatory tools of first recourse and the Judge must be satisfied that there are no alternative means of investigation; and the provision of a written report to the issuing Judge on the use of the listening device. See also NSW LRC, *Surveillance: an interim report* (2001) [5 38]; *Haddad and Treglia* (2000) 116 A Crim R 312.

301 *R v Swaffield, Pavic v R* (1998) 151 ALR 98, 114 (Brennan CJ)

302 *Love v A-G (NSW)* (1990) 169 CLR 307; *Grollo v Palmer & ors* (1995) 69 ALJR 724.

Unlike other (federal) administrative acts, the issue of a federal telephone interception warrant is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.[303] However, such warrants may be subject to a collateral challenge in criminal proceedings on the grounds of regularity of the warrant, but not the sufficiency of the grounds upon which it was issued.[304]

Courts will strictly interpret legislation that conveys power to infringe basic rights and will not imply a power authorising the police to trespass onto property to install or retrieve a listening device.[305] Warrants that failed to authorise the retrieval of a listening device upon expiry of the warrant[306]or failed to state the name of the officer in charge of the use of the listening device[307] have been found to be invalid.

However, a finding that a telephone interception or listening device warrant is invalid or a finding that an interception or listening device was used unlawfully will not be sufficient to prevent the admission of evidence so obtained.[308] Admission is a discretionary matter for the trial judge. A majority of the High Court in *Hilton v Wells*[309] referring to the *Telecommunications (Interception) Act 1979* (Cth) said:

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303 *Administrative Decisions (Judicial Review) Act 1977* Schedule One.

304 *Ousley v The Queen* [1997] HCA 49 (20 October 1997).

305 *Coco v The* Queen (1994) 179 CLR 427; Ousley *v The Queen* [1997] HCA 49 (20 October 1997); *Potter v Minahan* (1908) 7 CLR 277; *Bropho v WA* (1990) 171 CLR 1.

306 Ibid; *Bayeh v Taylor and ors* (Unreported, NSW Supreme Court, Grove J, 4 February 1998).

307 *Haynes v A-G (NSW)* (Unreported, NSW Supreme Court, James J, 9 February 1996).

308 *Hilton v Wells* (1985) 157 CLR 57; *R v Migliorini* [1981] Tas R 80; *R v W J Eade* (Unreported, NSW Court of Criminal Appeal, Priestly JA, Greg James J and Kirby J 15 November 2000).

309 (1985) 157 CLR 57.

> It will be observed that the admissibility of evidence in legal proceedings is not a subject that is dealt with by the section. ... Suffice it to say that questions of ... the discretion of the judge to reject relevant and admissible evidence which has been obtained unlawfully or in circumstances where it would be unfair to admit it remain to be considered by the trial judge. ... The discretion of a court when confronted with evidence which has been unlawfully obtained has been clearly explained in recent decisions of this Court: *The Queen v Ireland* (1970) 126 CLR 321 at p334; *Bunning v Cross* (1978) 141 CLR 54, at pp72-77; *Cleland v The Queen* (1982) 57 ALJR 15; 43 ALR 619. No doubt it is true, as Barwick CJ recognised in *Ireland* that acts in breach of a statute may more readily warrant the rejection of the evidence as a matter of discretion. But this is to do no more than confirm the existence of the discretion, a discretion that is to be exercised in the light of the competing public interests to which the Chief Justice referred.[310]

4.6 Surveillance without a Warrant

Covert recording of admissions made by persons of interest in a criminal investigation, to an undercover police operative or agent, has generated substantial controversy. The controversy centres on the purpose rather than the making of the secret recording. Whether its purpose was to elicit an admission from a suspect to circumvent his/her right to silence by sidestepping the obligation to caution a suspect or formally interview him/her. This issue has already attracted the attention of the High Court and the Queensland Court of Appeal.[311]

A finding of impropriety or illegality will not prevent the reception of a secret recording of an admission into evidence. This raises real concerns that the police may adopt tactics of secretly recording persons of interest to avoid legislative requirements governing the recording of admissions and confessions. The pursuance of such a strategy would undermine the legislative reforms that mandated electronic recordings of interviews between police and persons of

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310 Ibid (Gibbs CJ, Wilson and Dawson JJ).

311 *Swaffield v R; Pavic v R* (1998) 151 ALR 98; *R v Davidson* (Unreported, Queensland Court of Appeal, MacCrossan CJ, Fitzgerald P, Pincus JA, 20 December 1996); *R v O'Neill* [1996] 2 Qd. R 326.

interest.[312] It is incumbent upon the court to be on guard against a return to the past controversies about confessional evidence albeit in a different guise.

4.7 Conclusion

Competing public interests of crime control and public interests of human rights have a relationship of reciprocity within the jurisdiction of the criminal law. Equilibrium between the two competing public interests is maintained by due process. Where police powers are misused or exercised in bad faith, then there is a corresponding infringement of an accused person's rights, including the right not to be tried unfairly. If the equilibrium is disturbed then a miscarriage of justice may occur. There is also the risk that repeated or widespread abuse or misuse of police powers may call into question the integrity of criminal justice administration and weaken public confidence.

It is difficult to reconcile the court's stance of strictly interpreting legislative policing powers that impinge upon fundamental rights with the discretionary admission of evidence obtained in consequence of an infringement of those same rights. There is a risk for the judiciary that pronouncements of high principle and strict observation of legislative safeguards will be seen as empty rhetoric should the evidence obtained contrary to the subject legislation be subsequently admitted to prove the Crown case. It may give rise to the perception that the courts do not take

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312 *Swaffield v R* ibid. The majority of the High Court 129. (Toohey, Gaudron and Gummow JJ) held that the admissions made by the accused to an undercover police officer were elicited in *"clear breach of Swaffield's right to choose whether or not to speak."*

infringement of human rights seriously or at least censure of an infringement is secondary to the public interest of crime control. This issue will be examined in greater detail in later chapters.

CHAPTER 5

THE PUBLIC POLICY DISCRETION

Convictions obtained by the aid of unlawful or unfair acts
may be obtained at too high a price.
Hence the judicial discretion. [313]

5.1 Introduction

Admissibility of evidence in criminal proceedings is determined by a regime of procedural and evidentiary rules, including evidentiary discretions.[314] The rules of evidence and procedure regulating the conduct of a criminal trial are designed to protect an accused person from being tried unfairly and redress the power imbalance between a well-resourced State prosecutor and an individual accused,[315] so that only relevant and reliable evidence is considered by the trier of fact.

Exclusionary discretions vest authority in a court to exclude admissible evidence, if the reception of such evidence would be unfair or prejudicial to an accused person, or against public interest. The principal common law exclusionary discretions are the fairness discretion,[316] the discretion to exclude evidence that is more prejudicial then probative,[317] and the public policy discretion.[318] This chapter will concentrate

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313 *R v Ireland* [1970] ALR 727, 735 (Barwick CJ).

314 Janet Hope, "A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System" (1996) 24 *Federal Law Review* 173, 174: specific rules relating to the right to silence and the admissibility of confessional, improperly obtained evidence, identification, hearsay, or similar fact evidence, evidence of accomplices and informers.

315 Ibid: to minimise the risk that innocent people will be convicted as a result of the imbalance of power between the Crown as prosecutor and the individual defendant.

316 *R v Lee* (1950) 82 CLR 133.

317 *R v Christie* [1914] AC 545. This discretion is often called the *Christie* discretion.

on the common law public policy discretion, including an analysis of the relationship between that discretion and the fairness discretion. A detailed analysis of the fairness discretion will not be undertaken. The *Christie*[319] discretion is beyond the scope of this thesis and will not be discussed.

5.2 Unfairly, Improperly or Unlawfully Obtained Evidence

A discretion to exclude relevant evidence, obtained unfairly, improperly or unlawfully, can be traced to the early decades of the twentieth century.[320] Its recognition may be attributable partly to the establishment of the modern police force and partly in response to the *Judges Rules* introduced in 1912 providing guidance to police officers on the exercise of their powers.[321] The original basis for the discretion was fairness, whether it would be unfair to an accused person to admit the evidence. Its focus was the effect of police misconduct upon an individual accused.[322] Broader issues relating to matters of high public policy were not relevant. The discretion was restricted to confessional evidence.[323] In *R v Lee*[324] the High Court expressed the discretion in these terms:

> whether, having regard to the conduct of the police and all the circumstances of the

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318 *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54.

319 Ibid.

320 *Ibrahim v The King* [1914] AC 599; *McDermott v The King* (1948) 76 CLR 501, 512-513 Dixon J (as he then was).

321 Ibid; G L Teh "An Examination of the Judges' Rules in Australia" (1972) 46 *Australian Law Journal* 489.

322 Bram 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; *R v Lee* (1950) 82 CLR 133.

323 *McDermott v The King* (1948) 76 CLR 501; *R v Lee* (1950) 82 CLR 133.

324 (1950) 82 CLR 133.

case, it would be unfair to use his own statement against the accused?[325]

There are two central concerns of the fairness discretion;[326] firstly unreliability in terms of the confession itself or because its contents may result in an unreliable finding;[327]secondly, a procedural impropriety that may result in the making of or in the form of a contentious confession or admission.[328] It is the second of these manifestations of unfairness that is relevant to the present discussion. The language of the courts illustrates the historical connection between the public policy discretion and the fairness discretion. The changing use and context of the words "fair" and "fairness" to describe an act to obtain impugned evidence and the effect of such evidence marked a shift in judicial thinking. Under its original formulation, the public policy discretion was enlivened by "unlawful or unfair acts"[329] of law enforcement officers to procure or obtain relevant evidence that may be excluded in the public interest for "the protection of the individual from unlawful and unfair treatment."[330] This shift in judicial thinking was first discernible in how the court considered the effect of police misconduct as part of the discretionary exercise. In *Bunning v Cross*[331] "fairness to an accused" was identified as one factor of several

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325 Ibid 154.

326 Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" (1998) 22 *Criminal Law Journal* 325, 329.

327 A Ligertwood, *Australian Evidence* (2nd ed, 1993), 498-500.

328 Ibid.

329 *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ).

330 Ibid.

331 (1978) 141 CLR 54.

to be taken into account when balancing the two competing public interests.[332] The next significant change was in the description of the police conduct necessary to enliven the discretion. A majority of the High Court in *Cleland v The Queen*[333] preferred "improper" to "unfair" to describe impugned police conduct.[334] Subsequent cases have also preferred the word "improper" to describe the impugned police conduct.[335]

This is not a matter of semantics. "Improper" and "unfair" are not interchangeable terms. "Improper" means "unsuitable, inappropriate, not in accordance with propriety of behaviour or manner"[336]or "indicates the court disapproves of the method by which the evidence was obtained."[337] Whereas, "unfair" means "not fair, partial, inequitable"[338]or "indicates both disapproval of the method of obtaining the evidence and disapproval of the use of evidence so obtained against the accused at his trial."[339] The change in language is consistent with the development of the public policy discretion as a distinct and independent discretion best equipped to deal with challenges to the reception of evidence illegally or improperly obtained. It

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332 Ibid 75 (Stephen and Aicken JJ).

333 (1982) 151 CLR 1.

334 Ibid 16-17 (Murphy J); 19-20 (Deane J); and 31-32, 34 (Dawson J).

335 *Pollard v The Queen* (1982) 176 CLR 196; *Ridgeway v The Queen* (1995) 129 ALR 41; *R v Swaffield; Pavic v R* (1998) 151 ALR 98.

336 The Macquarie Dictionary (2nd ed, 1987).

337 Justice F M Neasey, "The Rights of the Accused and the Interests of the Community" (1969) 43 *Australian Law Journal* 482, 491.

338 The Macquarie Dictionary, above n 336.

339 Justice F M Neasey, "The Rights of the Accused and the Interests of the Community" (1969) 43 *Australian Law Journal* 482, 491.

is also consistent with the nature of the public policy discretion that is not grounded upon the notion of fairness.

5.3 Public Policy Discretion

Unlike English common law, the Scottish and Irish Courts approached the question of excluding evidence, the product of unfair, improper or unlawful police conduct, more broadly taking into account matters of public interest. This was a novel approach compared to the traditional common law position that relevant evidence (regardless of how it was obtained) was admissible unless a judge in his discretion held that its reception would be unfair to an accused.[340] In the leading Scottish case of *Lawrie v Muir*[341] Lord Justice-General Cooper explained the nature and purpose of a public policy discretion:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost.[342]

The Irish Supreme Court also recognised a judicial discretion excluding evidence procured or obtained by a "deliberate and conscious violation of constitutional rights"[343] of an accused person by law enforcement officers. Recognition of the public policy discretion in Australia was a significant departure from the English common law (as it then stood). The evolution of the public policy discretion in this

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340 *Leatham* (1861) 8 Cox C.C. 498; *Kuruma* [1955] AC 197.

341 (1950) JC 19 This case also involved real evidence seized in an illegal search. The evidence was excluded.

342 Ibid 26- 27 (Lord Justice-General Cooper).

343 *The People v O'Brien* [1965] IR 142.

country will be traced through a series of High Court pronouncements on the existence, nature, and application of this discretion.[344]

5.4 *R v Ireland*[345]

The seminal case of *R v Ireland*[346] was a watershed in Australian common law recognising the public policy discretion. Barwick CJ explained the rationale for the public policy discretion n the oft-quoted passage:

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. Whenever such unlawfulness or unfairness appears, the judge has the discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence, the judicial discretion.[347]

R v Ireland[348] is significant for two reasons. Firstly, the basis for exclusion of unfairly or unlawfully obtained evidence was broadened to matters of high public policy rather than a narrow focus of fairness to an accused person. Secondly, the discretion was not limited to evidence of a confessional nature but applied to real evidence as well.[349] In *R v Ireland*,[350] the Court held that photographs of the

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344 The common law public policy discretion applies in Victoria, Queensland, South Australia, Western Australian and the Northern Territory.

345 (1970) 126 CLR 321.

346 Ibid.

347 Ibid 335 (Barwick CJ).

348 Ibid.

349 Previous Australian State authorities recognising judicial discretion to exclude evidence unfairly or improperly obtained concerned confessional evidence, for example, see *R v Jeffries* (1946) 47 SR (NSW) 284. Barwick CJ in *R v Ireland* (1970) 126 CLR 321 referred to South Australian authorities of *Reg v Evans* [1962] SASR 303, *Lenthal v Curran* [1933] SASR 248, and *Bailey v The Queen* [1958] SASR 301all of which involved disputes about the admissibility of confessional evidence

accused's hand were inadmissible because a police officer could lawfully require a suspect to be photographed only for the purposes of identification.[351] The subject photographs were taken solely for the purpose of assisting a medical practitioner determine whether scratches on the accused's hand were consistent with handling a knife with a broken handle (the alleged murder weapon).

5.5 *Bunning v Cross*[352]

The principle in *R v Ireland*[353] was affirmed by a majority of the High Court in *Bunning v Cross*[354] as "settled law."[355] In the leading judgment, Stephen and Aicken JJ explained the public policy discretion in these terms:

> What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary concerned with broader questions of high public policy, unfairness to the accused being only one fact which, if present, will play its part in the whole process of consideration. Since it is with these matters of public policy that the discretionary process called for in *Ireland* is concerned it follows that it will have a more limited sphere of application than has that general discretion ... which applies in criminal cases. It applies only when the evidence is the product of unfair or unlawful conduct on the part of the authorities.[356]

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350 (1970) 126 CLR 321.

351 This was the position at common law and under statute.

352 (1978) 141 CLR 54.

353 (1970) 126 CLR 321.

354 (1978) 141 CLR 54.

355 Ibid 69 (Stephen and Aicken JJ).

356 Ibid 75 (Stephen and Aicken JJ).

The importance of *Bunning v Cross*[357] is threefold. Firstly, it clarified the rationale, purpose and application of the public policy discretion. Secondly, it acknowledged that on the issue of unfairly or unlawfully obtained evidence Australian law now differed from English law.[358] Thirdly, it provided guidance to trial courts on how the public policy discretion should be exercised by identifying five factors to be taken into account. The factors are:

1. Whether the conduct was deliberate, reckless or accidental?
2. Whether the nature of the conduct affected the cogency of the evidence so obtained?
3. The ease with which those responsible might have complied with the law in procuring the evidence in question.
4. The nature of the offence charged.
5. The legislative intention, (if any), in relation to the infringed law.[359]

5.6 *Ridgeway v R*[360]

The breadth of the public policy discretion was subsequently considered in *Ridgeway v The Queen.*[361] In that case, the High Court had to decide whether evidence of heroin importation from Malaysia (as part of a controlled delivery

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357 Ibid.

358 Ibid 73-74, (Stephen and Aicken JJ) referred to the English decisions of *Kuruma v The Queen* (1955) AC 197, *Spicer v Hold* (1977) AC 937, and *Jeffrey v Black* (1978) QB 490 then confirmed the principle that unfairly or unlawfully obtained real evidence will be excluded only if it would unfair to an accused to admit such evidence. This contrasts to the position in *Ireland* and is evident in the different objects of the public policy discretion and the fairness discretion.

359 Ibid 79-80 (Stephen and Aicken JJ).

360 (1995) 129 ALR 1.

361 Ibid.

organised by the federal police) could be excluded under the public policy discretion. The issue was "whether the public policy discretion to exclude illegally procured evidence also encompassed evidence of an illegally procured offence or where the illegal police conduct is itself an element of the subject offence." A majority of the High Court held that the public policy discretion did apply to illegally procured offences or illegal police conduct constituting an element of the offence.[362] Mason CJ, Deane and Dawson JJ in a joint judgment identified an additional relevant consideration to be taken into account namely:

> Whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings?[363]

A majority of the High Court emphasised that law enforcement officers are not above the law and a deliberate contravention of the law in furtherance of a criminal investigation (albeit of a serious offence) will not justify admission of evidence consequently obtained. In their joint judgment, Mason CJ, Deane and Dawson JJ reasoned that:

> In both categories, the objective of the unlawful conduct is the obtaining of curial advantage: the use of the unlawfully procured evidence in one category; the obtaining of a conviction for the unlawfully procured offence in the other. In both, the reception of the evidence by the courts is a critical step in the obtaining of that objective. If, in relation to either category, no judicial discretion existed to prevent the curial advantage being derived from the unlawful conduct, statements of judicial disapproval would be likely to be hollow and unavailing and the administration of justice would be likely to be 'demeaned by the uncontrolled use of the fruits of illegality in the judicial process.[364]

In the same case, McHugh J delivered a strong dissenting judgment arguing that

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362 See the joint judgment of Mason CJ, Deane and Dawson JJ; single judgment delivered by each of Brennan J and Toohey J.

363 Ibid 38 (Mason CJ, Deane and Dawson JJ).

364 Ibid 17 (Mason CJ, Deane and Dawson JJ).

the public policy discretion did not focus upon the cause of a crime but rather conduct in obtaining evidence after the commission of the subject offence.[365] The debate whether the public policy discretion extended to police conduct unlawfully procuring an offence or constituting an element of an offence in respect of controlled deliveries of imported illicit drugs is now largely academic.[366] Controlled delivery of the importation of illicit drugs is now the subject of legislation that gives immunity to investigating police from prosecution for their involvement in a controlled importation.[367]

5.7 Public Policy Discretion and Confessional Evidence

Confessional evidence was traditionally the most controversial area of criminal justice administration.[368] Special rules were developed to govern the admissibility of confessional evidence. In *Cleland v The Queen,*[369] a majority of the High Court held that the public policy discretion applied to confessional and real evidence. Both discretions were enlivened when there was "some illegality or impropriety on the part of law enforcement officers that results in the making of the confession."[370] The concurrent application of two independent discretions raised questions about the manner of determining an application to exclude a voluntary confession procured by illegal or improper means, whether priority should be given to one

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365 Ibid 49 (McHugh J).

366 *Nicholas v The Queen* [1998] (Unreported, High Court of Australia 2 February 1998).

367 *Crimes Act 1914* (Cth), s15X.

368 See for example, *Cleland v The Queen* (1982) 151 CLR 1, 13 (Murphy J); *Reg v Thompson* (1893) 2 QB 12; *Driscoll v The Queen* (1977) 137 CLR 517; *McKinney v The Queen* (1991) 171 CLR 468.

369 (1982) 151 CLR 1.

370 *Swaffield v R; Pavic v R* (1998) 151 ALR 98, 111 (Brennan CJ)

discretion over the other, and the basis for exclusion.

In *Cleland v The Queen*[371], Deane J gave some guidance on the overlap of the discretions:

> It follows that where it appears that a voluntary confessional statement has been procured by unlawful or improper conduct on the part of law enforcement officers, there arise two independent, but related, questions as to whether evidence of the making of the statement should be excluded in the exercise of judicial discretion. That does not mean that there will be a need for two independent inquiries on the voir dire. The material relevant to the exercise of both discretions will ordinarily be the same. The unlawful or improper conduct of the law enforcement officers will ordinarily be relevant on the question of unfairness to the accused and unfairness to the accused will ordinarily be relevant on the question of the requirements of public policy. The task of the trial judge, in such a case, will involve determining whether, on the material before him, the evidence of the voluntary confessional statement should be excluded for the reason that it would be unfair to the accused to allow it to be led or for the reason that, on balance, relevant considerations of public policy require that it should be excluded.[372]

Dawson J in *Cleland v The Queen*[373] argued that exclusion of a voluntary confession (procured by illegal or improper means) should be determined first under the fairness discretion, citing Brennan J in *Collins v R*[374] for support:

> When the admission of confessional evidence is in question, the material facts are evaluated primarily to determine whether it is unfair to the accused to use his confession against him, and it would be only in a very exceptional case that the residual question would arise as to whether the public interest requires the rejection of the confession.[375]

The Dawson approach on procedure was endorsed by a majority of the High Court

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371 (1982) 151 CLR 1.

372 Ibid 23-4 (Deane J).

373 Ibid.

374 (1980) 31 ALR 257.

375 Ibid 317 (Brennan J); cited with approval in *Cleland v The Queen* (1982) 151 CLR 1, 34-35 (Dawson J).

in *Foster v R*:[376]

> In a case where both discretions are relied upon to support an application for the exclusion of a voluntary incriminating statement obtained by unlawful police conduct, it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused.[377]

Convenience aside, the preferred order of procedure subtlety reinforced the historical bias favouring the fairness discretion over the public policy discretion. It failed to appreciate the different purpose of each discretion. Moreover, it ignored that "fairness" in each discretion means something different. The fairness discretion considers the effect of admitting contentious confessional evidence upon a particular accused and the fairness of his trial. Whereas "fairness" in the context of public policy refers to "public interest in the protection of the individual from unlawful and unfair treatment"[378] applying to all citizens of a society, not a particular individual on trial.[379] It is not a "simple question of ensuring fairness to an accused."[380] The different meanings of "fairness" in the context of the discretions must be recognised before the purpose and application of each discretion can be properly understood.

The focus of the public policy discretion is on "large matters of public policy" for the purpose of ensuring that law enforcement officers observe the law in detection and

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376 (1993) 113 ALR 1.

377 Ibid 6-7; 67 ALJR 550, 554 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

378 *R v Ireland* (1970) 126 CLR 321, 355 (Barwick CJ); see also *Swaffield v R; Pavic v R* (1998) 151 ALR 98, 107 (Brennan CJ).

379 *Pollard v The Queen* (1992) 176 CLR 177, 202 (Deane J).

380 *Bunning v Cross* (1978) 141 CLR 54, 74-75 (Stephen and Aicken JJ).

investigation of criminal offences. Since *R v Ireland*,[381] High Court statements on the operation of the public policy discretion have consistently favoured, in principle, a wider application of this discretion.[382] However, in practical terms, the opposite has occurred. The preference for treating public policy discretion as subordinate to the fairness discretion has rendered it largely ineffective in excluding improperly or unlawfully obtained confessional evidence, except in cases of flagrant breaches. Arguably, this infers that the public policy considerations are subordinate to the interests of an individual accused on trial, nullifying its exercise by making it unlikely that impugned evidence will be excluded on public policy grounds. The solution may lie in delineating the boundaries of each discretion along the lines of their respective purposes as put forward by Dawson J in *Cleland v The Queen*:[383]

> Whatever may have been the position before *Bunning v Cross*, that decision makes it clear, in my view, that the balancing of public interests which now forms the basis for the discretionary rejection of improperly or illegally obtained evidence, including evidence of confessional statements, is no longer a consideration in the exercise of the older discretion to exclude evidence of confessional statements. Such policy considerations as may have hitherto played a part in the exercise of that discretion have now been extracted to form part of the newer and wider discretion affirmed in *Bunning v Cross*. Considerations of fairness in the exercise of the older discretion relating to the exclusion of evidence of confessional statement must now be limited to fairness in the sense of fairness to the accused: whether it would be unfair to the accused to admit the evidence because of unreliability arising from the means by which, or the circumstances in which, it was procured. To view the situation otherwise would be to produce confusion because the newer discretion arising out of the decision in *Bunning v Cross* since it applies to all evidence, confessional or otherwise, necessarily encompasses the same policy considerations which may have hitherto played some part in the exercise of the discretion limited to evidence of confessional statements. Any function which the older discretion performed with regard to those policy considerations is now being performed by the application of the rule in *Bunning v Cross*.[384]

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381 (1970) 126 CLR 321.

382 *Bunning v Cross* (1978) 141 CLR 54; *Cleland v The Queen* (1982) 151 CLR 1; *Pollard v The Queen* (1992) 176 CLR 177; *Ridgeway v R* (1995) 129 ALR 1; *Foster v The Queen* (1993) 65 A Crim R 112.

383 (1982) 151 CLR 1.

384 Ibid (Dawson J).

The Dawson approach satisfactorily reconciled the differences between the two discretions and when they should apply to confessional evidence. Under this approach, the fairness discretion is restricted to situations where it would be unfair to an accused to admit confessional evidence on the grounds of unreliability, and exclusion of confessional evidence on policy grounds should be determined solely by the public policy discretion.[385] On Dawson's view, the overlap between the two discretions is limited to subject matter only, not in terms of application of principle.

In *Pollard v The Queen*[386] the accused was charged with sexual intercourse without consent. The issue was whether the accused, during questioning at two different police stations, made one or two confessions? The "first" confession was made at Frankston police station where the accused was held for approximately two and half hours before being taken to St Kilda Road police station for a formal interview. The accused had been cautioned on arrest but was not cautioned again at Frankston police station. Contrary to legislative requirements, neither the making or later confirmation of the Frankston confession was electronically recorded. This rendered the Frankston confession inadmissible. The conduct of the formal interview at St Kilda Road police station (electronically recorded), especially the manner of questioning, suggested that the interviewing officer already knew how the accused would answer particular questions. A majority of the High Court found that the record of the St Kilda Road interview should be excluded under both the fairness and public policy discretions.[387] All members of the majority considered

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385 Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" (1998) 22 *Criminal Law Journal* 325, 329.

386 (1992) 176 CLR 177.

387 Ibid (Mason CJ, Brennan, Dawson and Gaudron JJ), (Deane J).

that Detective Minisini had recklessly disregarded his statutory duty with the apparent acquiescence of other police.[388]

Foster v R[389] was the next major High Court decision on confessional evidence. The police arrested Mr Foster, an Aboriginal man, for questioning over a suspected arson attack on a local high school. About one hour after his arrest, the accused signed a seven-line typed confession, the only evidence of his involvement in the fire. All members of the Court in *Foster v R*[390] agreed that discretionary exclusion of a voluntary confession (procured by unlawful or improper means) should be considered under the fairness discretion and then under the public policy discretion. In a joint judgment, a majority of the High Court discussed the application of the fairness and public policy discretions to confessional evidence:

> It is now settled that, in a case where a voluntary confessional statement has been procured by unlawful police conduct, a trial judge should, if appropriate objection is taken on behalf of the accused, consider whether evidence of the statement should be excluded in the exercise of two independent discretions. The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence. The second of those discretions is a particular instance of a discretion that exists in relation to unlawfully obtained evidence generally, whether confessional or "real." It is the discretion to exclude evidence of such a confessional statement on public policy grounds. The considerations relevant to the exercise of each discretion have been identified in a number of past cases in the court. To no small extent, they overlap. The focus of the two discretion is, however, different. In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy' and the relevance and importance of fairness and unfairness to the particular accused will depend upon the circumstances of the particular case.[391]

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388 Ibid 5 (Mason CJ); 16-18 (Brennan, Dawson and Gaudron JJ); 29 (Deane J).

389 (1993) 65 A Crim R 112.

390 Ibid.

391 (1993) 113 ALR 1, 6-7; 67 ALJR 550, 554 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

The majority found that the confessional evidence should be excluded for three reasons:

1. the police infringements of the accused's rights were both serious and deliberate;
2. the accused was unlawfully arrested and detained by the police for questioning, placing the accused in a situation where he could not withdraw; and
3. in all the circumstances, a real question arose whether the confession was voluntary and whether the accused had exercised his right to speak or be silent.[392]

The majority held that the confessional evidence should be excluded under the fairness discretion and public policy discretion because of "the seriousness of the unlawful conduct on the part of the police."[393] The reasoning of the majority used language more akin to public policy considerations emphasising the unlawfulness of the police conduct in arresting and detaining the accused that resulted in serious and deliberate infringements of his fundamental rights. The discretionary exclusion of the confessional evidence indicated that the majority did not regard the public policy discretion as a secondary issue, at least, on the facts of this case where the accused, an indigenous Australian, is a member of an identifiable class of persons who are vulnerable in police custody when the only evidence of his involvement in the subject offence was a contentious confession.

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392 Ibid.

393 Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" (1998) 22 *Criminal Law Journal* 325, 330

5.8 *R v Swaffield & Pavic v R*[394]

The law governing the admissibility of confessional evidence was reviewed by the High Court in *R v Swaffield, Pavic v R.*[395] Both cases concerned the covert recording of a voluntary confession made by a suspect to an undercover police officer or a friend of the suspect (acting as a police agent) respectively. Importantly both covert recordings were made after each suspect had exercised his right to silence in a formal police interview. The issues were:

1. Should a confessional statement voluntarily made to a witness who, unbeknown to the confessionalist, is a police officer or is acting on behalf of the police, be admitted into evidence on the trial of the confessionalist for the offence to which the statement relates?
2. And does it matter that the confessionalist has previously refused to answer questions or make a confessional statement when interviewed by the police?[396]

The Court invited the parties to:

> consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.[397]

The invitation was similar to the approach advocated by Dawson J in *Cleland v The*

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394 (1998) 151 ALR 98.

395 Ibid. The High Court heard a Queensland appeal and a Victorian appeal together.

396 Ibid 99 (Brennan CJ).

397 Ibid 121 (Toohey, Gaudron and Gummow JJ).

Queen.[398] Each judgment in *R v Swaffield* will be examined below.

5.8.1 Chief Justice Brennan

Departing from his earlier view in *Duke*,[399] Brennan CJ accepted that the boundaries between the two exclusionary discretions should be redrawn[400] along the lines of:

> ... remitting consideration of the conduct of law enforcement officers to the public policy discretion in all cases except where that conduct makes the reliability of the confession dubious. The fairness discretion would then focus on cases where the conduct that induces the making of a voluntary confession throws doubt on its reliability and thereby establishes the unfairness of using the confession against the confessionalist on his trial. Taking this approach, the public policy discretion would focus on the kind and degree of illegal or improper conduct that produced the confession or produced the confession in a particular form. If the focus is on the conduct of the law enforcement officers, the issue can be sharply delineated: is the confession, albeit voluntary and apparently reliable, to be admitted in the public interest or is it to be excluded in the public interest because of the conduct by which it was obtained? In answering this question, the weight to be given to the competing factors would depend on the nature of the charge and the circumstances of the case.[401]

Brennan CJ argued that the public policy discretion should focus on the "nature and degree"[402] of police conduct because:

> ... under the heading of public policy clarifies the significance of any illegal or improper conduct of the part of law enforcement officers. If the confession is voluntary and apparently reliable, the only unfairness to an accused in admitting his confession against him is that he was induced to make the confession by conduct that is contrary to statue or to public policy.[403]

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398 (1982) 151 CLR 1.

399 (1989) 180 CLR 508.

400 Andrew Palmer. "Police Deception, the Right to Silence and the Discretionary Exclusion of Confession" (1998) 22 *Criminal Law Journal* 325. 331.

401 (1998) 151 ALR 98. 111 (Brennan CJ).

402 Ibid 112 (Brennan CJ).

403 Ibid.

This position was similar to the view expressed by Dixon J in *McDermott*[404] as to how the fairness discretion should be exercised.[405]

Voluntariness or reliability of the confession was not in issue. Despite no party arguing for exclusion on the grounds of public policy,[406] Brennan CJ held that each case should be determined under the public policy discretion. In *R v Swaffield*,[407] Brennan CJ found that the undercover officer had "deliberately sought admissions relating to the arson"[408] after the accused had exercised his right to silence in an earlier police investigation into the fire and exercised the public policy discretion by weighing:

> ...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 courts regard as appropriate in a free society. ... Against that interest, the public interest in having Swaffield's admissions available to the court on his trial for arson has to be weighed.[409]

Brennan CJ declined to express his general view about the propriety of the police eliciting and covertly recording admissions by a suspect. Instead the Chief Justice argued that the High Court would only interfere with a discretionary decision if shown that the court below acted on a wrong principle or perversely.[410] In *R v*

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404 (1948) 76 CLR 501.

405 Ibid, 513 Dixon J (as he then was) said that a trial judge:
"should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused."

406 *R v Swaffield; Pavic v R* (1998) 151 ALR 98, 100 (Brennan CJ).

407 Ibid.

408 Ibid 114 (Brennan CJ).

409 Ibid.

410 Ibid.

Swaffield,[411] the Chief Justice dismissed the Crown appeal to overturn the Court of Appeal decision to exclude the confessional evidence.[412] In *Pavic v R*,[413] Brennan CJ dismissed the accused's appeal that a covert recording of his admissions to a police agent should have been excluded on the grounds because the police agent was a civilian with no authority over the suspect the police had committed no impropriety, and the serious nature of the crime.

5.8.2 Justices Toohey, Gaudron and Gummow

The majority qualified their support of the approach proposed by Brennan CJ[414]because the fairness discretion is not solely concerned with reliability but also with procedural fairness in procuring confessional evidence. Procedural fairness involved "the protection of the rights and privileges of an accused,"[415] including procedural rights:

> to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.[416]

"Forensic disadvantage" does not arise only from the reception of improperly or unlawfully obtained evidence but also from the detriment to an accused's ability to

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411 Ibid.

412 R v *Swaffield; Pavic v R* (1998) 151 ALR 98.

413 Ibid.

414 Ibid 121-122 (Toohey, Gaudron and Gummow JJ) noted that the *Uniform Evidence Acts* 1995 was consistent with: "the approach suggested by the Chief Justice was already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material."

415 Ibid 124 (Toohey, Gaudron and Gummow JJ).

416 (1998) 151 ALR 98, 122 (Toohey, Gaudron and Gummow JJ).

conduct his/her defence should such evidence be admitted.[417] The majority argued that this qualification raised a more immediate question whether the common law should recognise a broad principle based upon "the right to choose whether or not to speak" or whether this was a matter for the legislature.[418]

The majority cited two dissenting judgments of Fitzgerald P of the Queensland Court of Appeal in *R v O'Neill*[419] and *R v Davidson and Moyle; Ex parte Attorney-General*[420] to support their position. His Honour Fitzgerald P approached the question of admission by assessing the gravity of an impropriety or illegality committed by the police against the gravity of an infringement of the legal rights of an accused person.[421] In *R v O'Neill,*[422] Fitzgerald P found that the accused had lost her privilege against self-incrimination by means of trickery:

> Lally's conduct, at police instigation, entrenched on the appellant's privilege against self-incrimination, which was a basic personal right and it did so for that express purpose. The appellant was deliberately tricked into surrendering her right to silence at the instance of law enforcement personnel by an implicit misrepresentation that Lally sought her confidence as a friend, not a police agent. That being so, in my opinion, it was unfair to the appellant to receive evidence of her recorded statements to Lally at the appellant's trial.[423]

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417 Ibid 124 (Toohey, Gaudron and Gummow JJ) ; Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" (1998) 22 *Criminal Law Journal* 325, 331.

418 Ibid 121-122 (Toohey, Gaudron and Gummow JJ).

419 [1996] 2 Qd R 326.

420 [1996] 2 Qd R 505.

421 *R v Davidson and Moyle; Ex parte Attorney-General* [1996] 2 Qd R 505, 507 (Fitzgerald P): "The judge at a criminal trial in considering the unfairness discretion is required only to determine whether the circumstances in which evidence was obtained, viewed in the context of the legal rights which the accused person enjoys with all other citizens, make it unfair to receive the evidence against him or her."

422 [1996] 2 Qd R 326.

423 Ibid 422 (Fitzgerald P).

The majority also referred to two decisions of the Canadian Supreme Court that distinguished between situations where police actively elicited admissions from those situations where a suspect voluntarily spoke.[424] This distinction depended upon the facts of an individual case and the Canadian Charter of Rights and Freedom. In the former situation, the evidence should be excluded because it was obtained in violation of an accused's right to choose whether or not to speak to the police. Whereas, the evidence would be admissible if a suspect volunteered to speak. Both Queensland and Canadian authorities emphasised that where police had acted deliberately to trick or deceive an accused person to surrender his/her right to silence by making admissions or eliciting admissions from the accused then the confessional evidence should be excluded.

The majority dismissed both appeals but for different reasons. In *R v Swaffield*,[425] the majority found that the absence of a caution did not automatically exclude the evidence but gave rise to a discretion whether to do so. The majority affirmed the decision of the Queensland Court of Appeal and held that the undercover officer had actively elicited admissions in "clear breach of Swaffield's right to choose whether or not to speak." Whereas in *Pavic v R*[426] the majority held that Clancy was an agent of the police but the admissions by Pavic were not actively elicited. The majority refused to interfere with the trial judge's decision to admit the evidence. Despite qualified support for the Brennan approach, it appears that the majority considered exclusion of the confessional evidence under the public policy

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424 *Herbert* [1990] 2 SCR 151. *Broyles* [1991] 3 SCR 595.

425 (1998) 151 ALR 98.

426 (1998) 151 ALR 98

discretion rather than the fairness discretion exercised by the lower courts.[427]

The different outcomes in *R v Swaffield*[428] and *Pavic v R*[429] are not easily reconciled. A transcript of their conversation shows that Clancy did question Pavic about the murder of Astbury in a manner not consistent with a conversation between friends but in the manner of an interrogation.[430] However, the different outcomes may be explicable in the context of the narrow basis upon which an appellant court may review a discretionary decision of a lower court. An appeal court cannot overturn a discretionary decision because it would have exercised the discretion differently. Unless the lower court applied a wrong principle or perversely exercised its discretion then the appellant court cannot interfere with the decision.

Furthermore, the majority's reasoning does not justify why a broad principle based upon the "right to choose whether or not to speak" is necessary. The protective aspect of the public policy discretion upholds fundamental rights of an accused person, including the right to silence or the privilege against self-incrimination.[431] The notion of "forensic disadvantage" and associated unfairness to an accused person are relevant factors to be considered as part of the discretionary exercise. The weight given to a relevant factor will vary according to the circumstances of

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427 Ibid 127-129 (Toohey, Gaudron and Gummow JJ); Andrew Palmer, "Applying *Swaffield*: covertly obtained statements and the public policy discretion" (2004) 28 *Criminal Law Journal* 217, 224, 336.

428 (1998) 151 ALR 98.

429 Ibid.

430 Ibid 143-144 (Kirby J); Andrew Palmer, "Applying *Swaffield*: covertly obtained statements and the public policy discretion" (2004) 28 *Criminal Law Journal* 217, 224.

431 See A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] *Criminal Law Review* 723.

each case. If a significant forensic advantage occurs, then the Court should give greater weight to consequential unfairness to the accused person when exercising the public policy discretion.

The notion of a "forensic disadvantage" is not a novel concept. In *Ridgeway v The Queen*,[432] Mason CJ, Deane and Dawson J jointly stated that the objective of unlawful police conduct in procuring evidence was "to obtain a forensic advantage by the admission of such evidence."[433] "Forensic advantage" is used in the same sense as a "forensic disadvantage", that is, the admission of illegally or improperly obtained evidence has unfairly advantaged the prosecution in discharging their legal and evidential burdens by admitting evidence obtained contrary to the law. A forensic advantage for one party will be a forensic disadvantage for the opposing party. It is arguable, in the absence of a Bill of Rights in this country, whether the development of a broad principle based upon "the right to choose whether or not to speak" is necessary given the purpose and operation of the public policy discretion and the right to silence. Moreover, the development of a new broad principle, similar in nature to the existing right to silence and privilege against self-incrimination, may resurrect the same problems that arose from the overlap of the fairness and public policy discretions that *R v Swaffield*[434] sought to resolve.

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432 (1995) 129 ALR 41.

433 Ibid.

434 (1998) 151 ALR 98.

5.8.3 Justice Kirby

Kirby J agreed with the reformulation of the tests for admissibility of confessional evidence suggested by Brennan CJ and accepted by the majority of the Court.[435] But Kirby J favoured a wider "overall discretion" encompassing both fairness and public policy discretions.[436] This interpretation puts Kirby J at odds with other members of the Court. In his analysis of the public policy discretion, Kirby J stated the issue in the discretionary exercise was:

> whether confessional or "real" evidence, obtained as a result of, or following, such official illegality or impropriety, should be excluded from that trial notwithstanding its probative value as contributing to bringing a guilty person to justice.[437]

Kirby J added two considerations to the relevant factors identified in *Bunning v Cross*[438] and *Ridgeway v R*,[439] namely:

1. Whether the conduct, if proved in court, would involve the court itself in giving, or appearing to give, effect to illegality or impropriety in a way that would be incompatible with the functions of a court, or such, or which might damage the repute and integrity of the judicial process?[440]

2. Whether the conduct would be contrary to, or inconsistent with, a right of the individual that should be regarded as fundamental?[441]

The first consideration articulated concern over a perception of judicial approval of unlawful or improper conduct by law enforcement officers. Arguably, this additional

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435 Ibid 132 (Kirby J).

436 (1998) 151 ALR 98, 134-136 (Kirby J).

437 Ibid 135 (Kirby J).

438 (1978) 141 CLR 54, 78-80 (Stephen and Aicken JJ).

439 (1995) 129 ALR 1, 38 (Mason CJ, Deane and Dawson JJ).

440 *R v Swaffield* (1998) 151 ALR 98, 136 (Kirby J).

441 Ibid.

factor is already accommodated under the existing common law and does not add much in the way of substance. The second consideration examines whether the offending conduct has infringed an accused's fundamental rights. Recognition of an accused's fundamental rights is a first step to uphold such rights. If such rights are ignored or trivialised, then they are effectively rendered nugatory. Inclusion of this consideration counterbalances the crime control public interests favouring the admission of cogent evidence and implicitly endorses the protective principle favoured by English academic A J Ashworth.[442]

The judgment of Kirby J focused on an accused person's right to silence and the privilege against self-incrimination. It looked at how these rights may be undermined by police tactics of secretly recording conversations to obtain admissions. While acknowledging the necessity and legitimate use of deception, subterfuge, ruses and tricks by police to investigate criminal offences (especially sophisticated or organised criminal activities) Kirby J stated the police would overstep the bounds of acceptable conduct:

> In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or a person acting as an agent of the police) in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent. Or it will be crossed where police have exploited any special circumstances of the relationship between the suspect and their agent so as to extract a statement that would not otherwise have been made.[443]

Kirby J held that the confessional statements of both accused should be excluded

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442 A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] *Criminal Law Review* 723 argued that the protective principle, based upon the recognition of fundamental rights of an accused, provides stronger justification for the exclusion of improperly obtained evidence than the reliability principle or the disciplinary principle. See also A J Ashworth QC, *Human Rights, Serious Crime and Criminal Procedure* (2002), 35-36.

443 Ibid 142 (Kirby J).

under the residual discretion. In *R v Swaffield*,[444] Kirby J dismissed the Crown appeal because the undercover officer had interrogated the accused. This "unfairly derogated from Mr Swaffield's free choice to speak or be silent."[445] Delivering the lone dissenting judgment in *Pavic v R*[446] Kirby J allowed the appeal, holding that the evidence of the conversation between the accused and Mr Clancy should have been excluded because, after the accused had exercised his right to silence, the police had arranged for Mr Clancy to act as their agent for the purpose of recording his conversation with the accused which was "designed effectively to deprive"[447] the accused of his right to speak or be silent. Kirby J was extremely critical of police engaging in this type of behaviour warning:

> But if such tactics become the common rule, the police caution and the right to speak or to be silent would be undermined and police would be encouraged to use family and close friends to circumvent the current law where that law proved an obstacle. It has been a common feature of totalitarian societies that police and security forces enlist the aid of family and friends to inform on suspects, overriding the legal rights of the accused. It has not until now been a feature of our society. [448]

5.8.4 *R v Swaffield* Conclusion

R v Swaffield[449] established a new approach to the admissibility of confessional evidence. A majority of the Court[450] expressly preferred that the common law

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444 Ibid.

445 Ibid 145 (Kirby J).

446 Ibid.

447 Ibid 145 (Kirby J).

448 Ibid (145).

449 Ibid.

450 Ibid 121 (Toohey, Gaudron and Gummow JJ), 135 (Kirby J).

develop consistently with the relevant provisions of the *uniform Evidence Acts*.[451] The development of a broad principle based upon "the right whether or not to speak" is an issue that requires further clarification from the High Court. Gummow J remains the only member of the majority still sitting on the High Court. It is not clear if there is support among current members of the High Court for the development of such a principle. An accused's right to silence continues to be considered an important safeguard and a relevant consideration in the discretionary exercise.[452]

Although concerned with the admissibility of confessional evidence, *R v Swaffield*[453] is instructive in the general exercise of the public policy discretion in respect of real and confessional evidence. The "overall discretion" formulated by Brennan CJ re-cast the public policy discretion. The Chief Justice acknowledged that the public policy discretion had evolved to such an extent to allow questions about the conduct of law enforcement officers in procuring evidence (real or confessional) to be confined to the public policy discretion. Doubts about the reliability of a confession should be dealt with under the fairness discretion. The new approach accommodated real evidence, the reliability of which is rarely in issue, by

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451 Ibid 127 (Toohey, Gaudron and Gummow JJ).

452 Andrew Palmer, "Applying *Swaffield*: covertly obtained statements and the public policy discretion" (2004) 28 *Criminal Law Journal* 217, 224-225.

453 (1998) 151 ALR 98.

highlighting the significance of police unlawfulness or impropriety that had occurred in the gathering of evidence. Moreover, it answered a major criticism that the fairness discretion lacked a suitable balancing mechanism and was not an appropriate means by which the admissibility of unlawfully or improperly obtained evidence should be considered because:

> By dressing up the question of procedural impropriety in terms of unfairness the importance of the balance is hidden, if not lost. It appears that exclusion depends only upon establishing an impropriety that may have influenced the accused. It is then argued that it is unfair to admit the evidence.[454]

5.9 Competing Public Interests

The public policy discretion involves the balancing of high matters of public policy by a comparative weighing of relevant factors to determine whether impugned evidence should be admitted.[455] These matters of high public policy represent various and competing public interests that define and underpin our system of criminal justice. What are these competing public interests? The public interest favouring admission of improperly or unlawfully obtained evidence has two limbs. The first limb is the public interest in crime control, that is, the conviction of guilty offenders.[456] The second matter of public interest is the presentment of all relevant and admissible evidence for consideration, by the trier of fact.[457] The public interest favouring exclusion of improperly or unlawfully obtained evidence also has two

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454 Andrew Ligertwood, *Australian Evidence* (2nd ed, 1993), 501; Andrew Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" (1998) 22 *Criminal Law Journal* 325, 331.

455 *Bunning v Cross* (1978) 141 CLR 54.

456 *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ); *Bunning v Cross* (1978) 141 CLR 54, 75 (Stephen and Aicken JJ).

457 *R v Swaffield; Pavic v R* (1998) 151 ALR 98, 111 (Brennan CJ).

limbs. The first limb is the protection of citizens against unlawful or improper treatment.[458] The second limb is the undesirability of curial approval of improper or unlawful conduct on the part of law enforcement officers by the reception of evidence so obtained.[459]

The authorities provided guidance on how the discretion should be exercised by identifying relevant considerations to be taken into account when balancing the competing public interests. These considerations may be divided into two categories. One set of factors that almost exclusively relate to the integrity of criminal justice administration as a whole. The other set of factors consists of matters more directly related to the trial of a particular accused. Broader considerations concerned with legitimacy and integrity of the criminal justice process include classification of police conduct, the ease with which police may have complied with the relevant law, legislative intention of the breached law,[460] whether the misconduct was encouraged or tolerated by those in higher command,[461] and the protection of an individual from unlawful or improper treatment.[462] The "protection of an individual" in this sense is not restricted to a particular accused on trial, but refers to all members of the community and their fundamental democratic rights.[463] Whereas, the narrower considerations are more

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458 *R v Ireland* (1970) 126 CLR 321, 335 Barwick CJ.

459 *Bunning v Cross* (1978) 141 CLR 54, 75 (Stephen and Aicken JJ); *R v Swaffield; Pavic v R* (1998) 151 ALR 98, 111 (Brennan CJ).

460 *Bunning v Cross* (1978) 141 CLR 54.

461 *Ridgeway v The Queen* (1995) 129 ALR 1.

462 *R v Ireland* (1970) 126 CLR 321; *R v Swaffield; Pavic* (1998) 151 ALR 98, 136 (Kirby J).

463 *Pollard v The Queen* (1992) 176 CLR 177, 204 (Deane J). A similar view was also

closely connected with the trial of a particular accused person, including considerations of fairness to an accused, nature of the offence and cogency of the evidence.[464] The conflict between the matters of high public policy is replicated in the tensions between the relevant considerations. These tensions are accommodated to a degree in the comparative weighing called for in the discretionary exercise. The weight given to a specific factor will vary according to the circumstances of a particular case.

5.10 Integrity of the Criminal Justice Administration

Legitimacy of criminal justice administration depends largely on public confidence. Fundamental to public confidence is the observance of the rule of law and the protection of fundamental democratic rights of citizens. In this regard, the court has a pivotal role. It is incumbent upon the courts to ensure that "justice is not only done, but is seen to be done." Should a perception arise that the judiciary is selective in their administration and enforcement of the law then the legitimacy and integrity of criminal justice administration may be threatened. Judicial declarations of principle critical of police impropriety or unlawfulness are counterproductive, unless the court exercises its public policy discretion in a manner consistent with declared principle. This is a point emphasised by Deane J in *Pollard v The*

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expressed in *Lawrie v Muir* (1950) JC 19 in that:

> The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. This protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.

464 *Bunning v Cross* (1978) 141 CLR 54.

Queen:[465]

> ... the principal considerations of 'high public policy' which favour exclusion of evidence procured by unlawful conduct on the part of investigating police ... is the threat which calculated disregard of the law by those empowered to enforce it represents to the legal structure of our society and the integrity of the administration of criminal justice. It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process.[466]

Flexibility of an exclusionary discretion is seen to provide protection against a miscarriage of justice that may arise by application of a strict rule of exclusion (or admission). This protection may be jeopardised or lost if an exclusionary discretion is invariably exercised in a particular way. Should this occur then the discretion may become an ostensible rule of practice. It may also expose disparities in how the court deals with challenges to the means or manner in which evidence is obtained and challenges to its admission. Under the present law, a court may quash a warrant to search and seize property or make adverse findings against the police executing a warrant for failing to comply with legislative requirements governing the issue and execution of a warrant. An adverse ruling does not prevent a court admitting the evidence in its discretion. Research shows that usually such evidence is admitted despite other adverse findings.[467] This places the courts and the law in an incongruous position. When considering

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465 (1992) 176 CLR 177.

466 Ibid 202-203 (Deane J).

467 Bram 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; J D Heydon, "Illegally Obtained Evidence" [1973] *Criminal Law Review* 603.

challenges to warrants (especially search warrants) the courts have consistently emphasised the importance of the role played by an authorised justice in determining applications for warrants,[468] and severely criticised those authorised justices "perfunctorily performing"[469] his or her duties. Such pronouncements do not sit easily with later discretionary rulings admitting evidence the product of improper or unlawful seizures. For the law to be meaningful, it must be consistently administered and enforced otherwise the law will be rendered ineffective and fall into disrepute.

5.11 Classifying Police Conduct

The object of the public policy discretion is the "deliberate or reckless disregard of the law by those whose duty it is to enforce it."[470] It is not intended to censure the police for a genuine mistake or oversight made during a criminal investigation. The court has a difficult task to distinguish between a deliberate or reckless disregard of

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468 *George v Rocket* (1990) 170 CLR 104; *Crowley v Murphy* (1981) 52 FLR 123; *Parker v Churchill* (1985) 9 FCR 316; *Jackson v Mijovich* (Unreported, NSW Supreme Court, Finlay J, 22 March 1991).

469 *Black v Breen & Anor* [2000] NSWSC 987 (27 October 2000), 5 (Ireland AJ).

470 *Bunning v* Cross (1978) 141 CLR 54, 77 (Stephen and Aicken JJ); Pollard *v The Queen* (1992) 176 CLR 177;*Foster v The Queen* (1993) 65 A Crim R 112 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Ridgeway v The Queen* (1995) 129 ALR 1 (Toohey J); *Lawrie v Muir* (1950) JC 19; *The People v O"Brien* [1965] IR 142.

the law and a mere oversight. This difficulty is compounded by several factors.

Firstly, because of the pervasiveness of process corruption throughout police services,[471] it would be naive to think that reforms (introduced as a consequence of various commissions and inquiries into police corruption) would successfully eliminate it from police ranks. Strong loyalty among police officers is a basal feature of police working culture creating an environment conducive to process corruption whereby participating officers are protected from external scrutiny. Manifestations of process corruption include active concealment of a colleague's impropriety or unlawful acts, acquiescence by other police officers in unlawful or improper activities, or superiors turning a blind eye. Against this background, the court's task to identify a deliberate or reckless disregard of the law is arduous and may be impossible.

Secondly, despite frequent criticisms to the contrary, the public policy discretion is not concerned with police discipline.[472] A criminal trial is not an appropriate nor indeed proper forum for disciplining police.[473] The court is charged with the responsibility of ensuring that an accused is tried fairly in accordance with the law. During a trial, any scrutiny of police misbehaviour is made from the perspective of its effect on the conduct of the proceedings or upon public policy grounds by means of an exclusionary discretion. Unlike Royal Commissions and similar inquiries into police corruption, a court does not engage in covert operations to gather evidence

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471 See chapter two.

472 *R v Swaffield: Pavic v R* (1998) 151 ALR 98, 135 (Kirby J).

473 G L Davies, "Exclusion of Evidence Illegally or Improperly Obtained" (2002) 76 *Australian Law Journal* 170.

of police misconduct. Should process corruption infiltrate a particular criminal investigation, then the court's ability to identify a deliberate or reckless breach of the law is severely restricted and commonly limited to the most flagrant breaches.[474]

Thirdly, the court is restricted in its ability to test the credibility of a police officer. A court cannot inquire into or hear evidence of past allegations against a police officer obtaining evidence improperly or illegally, unless such allegations have been proved.[475] Consequently, it is improbable that the court would ever be in a position to find that there is a pattern of misconduct on the part of an investigating officer. Obviously, this adversely affects the court's ability to properly classify an improper or unlawful act.

Classification of police conduct goes to the heart of the public policy discretion and is the most important of the considerations relevant to the discretionary exercise. Revelations of police corruption or misconduct and the inherent difficulties in uncovering evidence of such activities should serve as a warning of the potential risk to the integrity of criminal justice administration and the rule of law. It is critical that the court be able to properly and correctly classify contentious police behaviour (including acts or omissions), otherwise the discretionary exercise may be flawed.

5.12 Cogency of the Evidence

The common law recognised the importance of accurately classifying police behaviour. How police behaviour (acts or omissions) is classified will determine

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474 See for example, *Pollard v The Queen* (1992) 176 CLR 177; *Foster v R* (1993) 65 A Crim R 112.

475 *Regina v Roberts & Urbanec* (Unreported, Victorian Supreme Court, Court of Appeal, Batt, Buchanan and Chernov JJA, 6 February 2004); *R v Edwards* [1991] 2 All ER 266 (CA).

whether cogency is a relevant matter to be considered in the exercise of the discretion. Except where exigent circumstances require gathering evidence of a "perishable or evanescent nature,"[476] cogency should not be taken into account where the police deliberately or recklessly disregarded the law because to do so would:

> foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it.[477]

How the common law evaluates the relevance of cogency is consistent with the purpose of the public policy discretion to "ensure observance of the law rather than the fairness of the trial"[478] by the exclusion of evidence procured by means of a deliberate or reckless disregard of the law. Cogency of evidence should not be seen as giving police an imprimatur to ignore the law or official procedure. This is especially significant for real evidence where cogency is rarely disputed or doubted. Cogency in itself favours admission. The more probative the evidence, the more likely a court will receive it. The common law directed the court's attention to the conduct of the investigating police officers when deciding whether cogency should be taken into account. If the court is not in a position to distinguish between an intentional breach of the law and an unintentional oversight or mistake then this raises real questions about the effectiveness of an exclusionary discretion (particularly in relation to impugned real evidence) and whether its purpose may be thwarted by the restrictions on what evidence the court may receive.

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476 *Bunning v Cross* (1978) 141 CLR 54, 79 (Stephen and Aicken JJ).

477 Ibid 79 (Stephen and Aicken JJ).

478 *Cleland v The Queen* (1982) 151 CLR 1, 9 (Gibbs CJ).

5.13 Nature of the Offence

The "nature of the offence" has been the most controversial of the relevant factors in recent times. Much of the debate involved proceedings under the *Uniform Evidence Acts* and the differing views will be discussed in greater detail in later chapters. The controversy stems from the proposition that the gravity of the offence varies inversely with the desirability of exclusion of the impugned evidence. This proposition does not find support in the seminal cases,[479] which espouse the neutrality of the relevant factors (with the exception of cogency as noted above). The equilibrium of neutrality should be adjusted each time the court exercises its public policy discretion by the comparative weighing of the relevant factors according to the particular facts to determine admission. The comparative weighing of the relevant factors requires:

> some examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element in the process required by *Ireland's* case.[480]

Comparative weighing of the gravity of the offence and unlawful police conduct is best illustrated by the facts of the two foundation decisions. In *R v Ireland*,[481] the accused was charged with murder. Police deliberately and without lawful authority photographed the accused's injured hand for the purpose of obtaining medical evidence linking his injuries to the alleged murder weapon. The photographs and medical evidence were excluded. Whereas in *Bunning v Cross*,[482] the accused

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479 *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54.

480 *Bunning v Cross* (1978) 141 CLR 54, 80 (Stephen and Aicken JJ).

481 (1970) 126 CLR 321.

482 (1978) 141 CLR 54.

was charged with driving a motor vehicle under the influence of alcohol rendering him incapable of exercising proper control over the vehicle. The police directed the accused to undergo a breathalyzer test contrary to legislative requirements. A majority of the Court acknowledged that driving under the influence of alcohol was "not one of the most serious crimes"[483] but it was a matter of public interest deterring drivers from such conduct to protect other road users. The Court found that police officers had acted under a mistaken belief as to their powers and ordered that the evidence should have been admitted.

The respective decisions in *R v Ireland*[484] and *Bunning v Cross*[485] are reconcilable when considered in terms of the purpose of the public policy discretion. The crucial issue in both decisions was the conduct of the police officers, not the nature of the offence charged. This was the point of distinction. The approach laid down in *R v Ireland*[486] and *Bunning v Cross*[487] has been followed in the other leading authorities of *Pollard v The Queen*,[488] *Ridgeway v The Queen*,[489] *Foster v The Queen*,[490] and *R v Swaffield; Pavic v R*.[491]

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483 Ibid 80 (Stephen and Aicken JJ) with whom Barwick CJ agreed.

484 (1970) 126 CLR 321.

485 (1978) 141 CLR 54.

486 (1970) 126 CLR 321.

487 (1978) 141 CLR 54.

488 (1982) 176 CLR 196.

489 (1995) 129 ALR 41.

490 (1993) 65 A Crim R 112.

491 (1998) 151 ALR 98.

5.14 Illegally or Improperly Obtained Evidence - Other jurisdictional approaches

The law in England and the United States of America have not adopted a discretionary approach to the question of unlawfully or improperly obtained evidence. In England, evidence improperly obtained was admissible but may be excluded if the strict rules of admissibility operated unfairly against an accused.[492]The English rule has two parts, namely, a general rule of admissibility and a discretionary rule of exclusion.[493] The basis for exclusion is fairness to an accused rather than upon public policy grounds. The House of Lords in *Sang*[494] confirmed under English law a judge has no discretion to exclude relevant evidence because it was improperly or unlawfully obtained. Such evidence may only be excluded if admission would be unfair to an accused. Lord Diplock explained the rationale for this approach to be:

> ... the function of the judge at a criminal trial as respect to the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of the judge's function to exercise disciplinary powers over the police or prosecution in respect to that way in which evidence to be used at trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.[495]

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492 *Kuruma* [1955] AC 197, 203-204 (Goddard LJ).

493 J D Heydon, "Illegally Obtained Evidence" [1973] *Criminal Law Review* 603, 604-605.

494 [1979] 2 All ER 1222.

495 *Sang* [1979] 2 All ER 1222, 1230 (Diplock LJ).

The enactment of section 78 of the *Police and Criminal Evidence Act 1984* (UK) created a statutory discretion:

> The Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, 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.[496]

Although section 78 did not displace the common law discretion, it "effectively reversed the decision in *Sang*."[497] In *Khan (Sultan)*[498] the House of Lords confirmed the common law position was unchanged since *Sang*[499] but held section 78 discretion "may only be exercised where the admission of evidence would have an adverse effect on the fairness of the proceedings."[500] Fairness, not matters of public policy, remains the focus of English law on the question of improperly or unlawfully obtained evidence.[501]

The English position stands in contrast to the law of the United States of America, where an exclusionary rule operates to exclude unlawfully or improperly obtained evidence in contravention of an accused person's constitutional rights under the

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496 Simon Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?" 29 *Hong Kong Law Journal* 216.

497 Geoffrey Robertson Q.C., "Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?" [1994] *Criminal Law Review* 805. 809.

498 [1996] 3 All ER 289.

499 [1979] 2 All ER 1222.

500 Simon Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?" 29 *Hong Kong Law Journal* 216.

501 Mark A Gelowitz, "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land?" [1990] 106 *The Law Quarterly Review* 327; Richard May, "Fair Play at Trial: an Interim Assessment of section 78 of the Police and Criminal Evidence Act 1984" [1988] *The Criminal Law Review* 722.

fourth and fourteenth amendments to the Constitution.[502] The exclusionary rule applies in federal and state courts[503]and extends to "the fruit of the poisonous tree" being evidence obtained in consequence of an illegal search and seizure.[504]

The public policy discretion enshrined in Australian law represents a moderate position avoiding the harshness and possible injustices that may arise under English and American laws. Lord Justice-General Cooper explained the desirability of a discretionary approach in *Lawrie v Muir*[505] as:

> It is obvious that excessively rigid rules as to the exclusion of evidence bearing upon the commission of a crime might conceivably operate to the detriment and not the advantage of the accused, and might even lead to the conviction of the innocent; and extreme cases can easily be figured in which the exclusion of a vital piece of evidence from the knowledge of a jury because of some technical flaw in the conduct of the police would be an outrage upon common sense and a defiance of elementary justice.[506]

English commentators have endorsed the Australian approach to discretion. One leading English academic has advocated that English law should follow suit.[507]

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502 J D Heydon, "Illegally Obtained Evidence" [1973] *Criminal Law Review* 603, 610-611:

Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment provides that "a State shall not deprive any person of life, liberty or property, without due process of law."

503 *Mapp v Ohio* 367 U.S. 643 (1961).

504 J D Heydon, above n 502, 610.

505 (1950) JC 19

506 Ibid 26- 27 (Lord Justice-General Cooper).

507 Rosemary Pattenden, "The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia" (1980) 29 *International and Comparative Law Quarterly* 664. Geoffrey Robertson Q.C., "Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?" [1994] *Criminal Law Review* 805.

5.15 Conclusion

The public policy discretion is law in all Australian common law jurisdictions.[508] It is no longer regarded as an adjunct to the fairness discretion but accepted as an independent and separate discretion in its own right. *R v Swaffield*[509] is an important turning point in the history of the public policy discretion. By recasting the respective boundaries of the public policy discretion and the fairness discretion, the High Court eliminated the overlap between the two discretions and elucidated the discrete application of each discretion consistently with its own purpose. The majority of the High Court endorsed consistency between the public policy discretion and the discretion contained in section 138 of the *Uniform Evidence Acts*. Whether uniformity can be achieved in light of the fundamental differences between the common law and statutory discretions will depend upon how the courts interpret and apply *R v Swaffield*.[510]

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508 Common law jurisdictions are Victoria, Queensland, South Australia, Western Australia and the Northern Territory. *Uniform Evidence* legislation applies in jurisdictions of the Commonwealth of Australia, Australian Capital Territory, New South Wales, and Tasmania.

509 (1998) 151 ALR 98.

510 Ibid.

CHAPTER 6

UNIFORM EVIDENCE ACTS - SECTION 138 DISCRETION TO EXCLUDE IMPROPERLY OR ILLEGALLY OBTAINED EVIDENCE

> the question for the judge is whether
> the balance of public interest favours admission -
> he should consider all the factors
> on both sides of the equation.[511]

6.1 Introduction

The *Uniform Evidence Acts* signified a major overhaul and codification of evidentiary law in the participating jurisdictions.[512] The uniform legislation was the result of an extensive review of the law of evidence conducted by the ALRC that sought to achieve both uniformity and reform. The review process did not involve a complete rewriting of evidentiary law but proposed specific reforms and enactment of a comprehensive code. These reforms were introduced to address identified problems and valid criticisms of the then existing law, and to minimise uncertainty in the application of the proposed legislation. Some areas were substantially unchanged, whereas other areas underwent significant transformation.

Reform measures included changes to the exclusionary discretions, in particular, the public policy and fairness discretions. Despite a recommendation for its abolition, the *Lee* discretion[513]was retained in section 90 of the Act. A significant reform introduced under the *Uniform Evidence Acts* was the change to the law for

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511 *Bunning v Cross* (1978) 141 CLR 54, 74 (Stephen and Aicken JJ).

512 *Evidence Act 1995* (Cth) applying in the jurisdictions of the Commonwealth and the ACT; *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas).

513 *Lee* discretion is another name for the common law fairness discretion.

admission of confessional evidence. In a major departure from the common law, the *Uniform Evidence Act* abandoned the notion of voluntariness as a prerequisite for the reception of confessional evidence. Although, it is arguable that admissions not made voluntarily may fall foul of sections 84, 85 or 90 of the Act. Legislative reform of confessional law and the fairness discretion had implications for the public policy discretion, both in terms of principle and application. The preceding discussion of *R v Swaffield; Pavic v R*[514] illustrates this point. The remainder of this chapter will focus on the section 138 discretion. This is the discretion to exclude evidence obtained improperly or in contravention of the law or in consequence of the said impropriety or contravention.

6.2 Section 138 and the Public Policy Discretion

In broad terms, section 138 and the public policy discretion have a common approach to the admission of improperly or unlawfully obtained evidence. Both discretions require the court to make a comparative weighing of relevant factors to determine whether impugned evidence should be excluded (or admitted). But the discretions are not identical and there are important distinctions between them. Most significant is the reversal of the onus of proof. At common law an aggrieved party bore the onus of proving an alleged impropriety or unlawful act (or omission) to enliven the discretion and further to satisfy the court why the evidence should not be received. Under the *Uniform Evidence Act*, an aggrieved party must establish an alleged impropriety or unlawful act (or omission) to enliven the discretion. If the discretion is activated, then the onus shifts to the party seeking to acduce the

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514 (1998) 151 ALR 98.

evidence to justify why the impugned evidence should not be excluded.[515] Under the statutory discretion, the starting point is exclusion unless the court is persuaded to admit the evidence.[516] At common law the starting point is admission unless the court is satisfied that the impugned evidence should be excluded. The ALRC recommended that the onus of proof move between the parties to counter a perception that the small number of rulings excluding challenged evidence indicated an imbalance between the competing public interests caused by the dominance of public interest in crime control.[517] There was no empirical research published in ALRC report to substantiate these concerns.

Another notable distinction is that s138 applies to criminal and civil proceedings. Whereas the public policy discretion applies only to criminal matters, section 138 is not restricted to evidence obtained by law enforcement officers but applies to evidence to be adduced by any litigant.[518] Implicitly a wider application of section 138 gives greater recognition of and prominence to the public interest underpinning the "acceptability"[519] or legitimacy of the judicial system. Public interest requires the court to protect the integrity of its processes in order to maintain underlying public confidence in the judiciary. Empowering the court to exclude improperly or unlawfully obtained evidence allays concern about public perception of judicial

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515 *Downes v DPP* (Unreported, NSW Supreme Court, Studdert J, 16 November 2000). *R v Malloy* (Unreported, ACT Supreme Court, Crispin J, 9 November 1999).

516 *Coulstock* [1998] 99 A Crim R 143.

517 ALRC, *Evidence*, Interim Report No. 26 (1985) [964].

518 *Employment Advocate v Williamson* (Unreported, Federal Court of Australia, Gray, Branson and Kelly JJ. 24 August, 2001), [23] (Branson J).

519 ALRC, *Evidence*, Interim Report No. 26 (1985) [62].

approval of litigants (especially agencies of government) disregarding the law or engaging in improper methods to obtain evidence. It would be a mistake to assume that all civil proceedings involve private disputes and are devoid of a public aspect. The legislature has created many statutory and regulatory offences (of varying seriousness) that may be enforced by civil proceedings.[520] Civil prosecution of these offences touches upon broader public interests including regulation of particular industries, activities or positions and to deter others engaging in undesirable conduct and are not restricted to private matters.

The ALRC and NSW LRC identified three additional points of difference between the discretion, but the validity of these distinctions is debatable.[521] Firstly, the statutory discretion applies to derivative evidence.[522] There must be a causal connection between impropriety or contravention *and* obtaining impugned evidence.[523] What constitutes a "causal connection" has not been authoritatively determined.[524] The public policy discretion also applies to derivative evidence as

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520 *Corporations Act 2001* (Cth), s1041H (misleading or deceptive conduct); civil penalty provisions may apply to s1041A (market manipulation), s1041B (false trading), s1041C (market rigging), s1041D (disseminating information about illegal transactions), and s1043A (insider trading); civil penalty provisions also apply to breaches of statutory duties by directors sections 206C, 1317E, 1317G, 1317H.

521 ALRC, *Review of the Uniform Evidence Acts*, Issues Paper 28 (2004) [12.30]; NSW LRC, *Review of the uniform Evidence Acts*, Discussion Paper 47 (2005) [14.67].

522 ALRC, *Review of the Uniform Evidence Acts*, Issues Paper 28, [12.30]; NSW LRC, *Review of the uniform Evidence Acts*, Discussion Paper 47 (2005)[14.67]; *Evidence Acts* 1995, s138 (1)(b).

523 *R v Rondo* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Smart AJ, 24 December 2001).

524 *R v Haddad and Treglia* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ Newman and Greg James J, 6 September 2000.

the facts of *R v Ireland*[525] show. In that case police photographed an accused's hand for an unlawful purpose. The prosecution sought to tender photographs of the accused's injured hand and an expert medical report about these injuries. The Crown medical officer had relied upon the photographs to formulate his opinion whether the injuries to the accused's hand were consistent with the broken handle of the alleged murder weapon. The High Court excluded both the photographs *and* the medical evidence.

The second point of difference was the statutory discretion applied to confessional evidence.[526] This distinction is illusory. It is settled law that the public policy discretion applies to real and confessional evidence.[527]

Thirdly, section 138(3) provides a non-exhaustive list of specific matters that the court must take into account when exercising its discretion under section 138. The court may take into account additional relevant matters.[528] The common law factors identified in *Bunning v Cross*[529]are not exhaustive and the categories of relevant factors are not closed. The court has and will add relevant factors when circumstances require it. [530] The purpose of specifying relevant factors is to

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525 (1970) 126 CLR 321.

526 ALRC, *Review of the Uniform Evidence Acts* Issues Paper 28 (2004) [12.30]; NSW LRC, *Review of the uniform Evidence Acts*, Discussion Paper No. 47 (2005)[14.67]; *Evidence Act 1995* (Cth), s 138(2); *Evidence Act 1995* (NSW), s 138(2).

527 *Cleland v R* (1982) 151 CLR 1; *Pollard v R* (1992) 176 CLR 177; *Foster v R* (1993) 65 A Crim R 112; *R v Swaffield, Pavic v R* (1998) 151 ALR 98.

528 ALRC, *"Review of the Uniform Evidence Acts"*, Issues Paper 28 (2004) [12.30]; NSW LRC, *"Review of the uniform Evidence Acts"*, Discussion Paper No 47 (2005) [14.67].

529 [1978] 141 CLR 54.

530 *Bunning v Cross* (1978) 141 CLR 54, *Ridgeway v R* (1995) 129 ALR 1; *R v Swaffield, Pavic*

promote principled decision-making by providing guidance to the court about what matters it should take into account.[531]

6.3 Admissions and Confessional Evidence Improperly Obtained

A further point of difference is the manner in which each discretion accommodates admissions and confessional evidence. The public policy discretion applies to real and confessional evidence alike. In principle, the common law does not distinguish between the two types of evidence. Some differentiation may be made in the weighting of relevant matters called for in the balancing exercise but this will depend upon the facts of a particular case rather than the nature of the contentious evidence.

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v R (1998) 151 ALR 98, 136 (Kirby J).

531 *House v The* King (1936) 55 CLR 499; Norbis *v Norbis* [1986] 60 ALJR 335. If the court does not turn its mind to all relevant factors then this constitute grounds to appeal a discretionary decision.

In contrast, section 138 in conjunction with section 139 makes special provision for evidence of admissions. Mindful of public concerns about fabrication of confessional evidence, the ALRC considered that these concerns were best dealt with by an exclusionary discretion.[532] Sections 138(2) and 139(1) & (2) expressly define what acts (or omissions) by law enforcement officers when questioning an accused (or suspected) person will be regarded as improper conduct. Evidence of an admission or act, is deemed to be improperly obtained, in situations where the deemed improper conduct resulted in an admission or act by the interviewee.[533] These legislative provisions also include evidence obtained in consequence of any such admission or act.[534] This approach implicitly recognises the power imbalance between the police and a person suspected (or accused) of a criminal offence (especially those persons in police custody) during an official interrogation. The imposition of positive obligations upon the police to administer a caution,[535] not to impair substantially an interviewee's ability to rationally respond to questioning,[536] and not make a false statement likely to cause an interviewee to make an admission[537]lay down parameters for the conduct of a police interview and give practical effect to the legal protections afforded to a person suspected of criminal activity. The legislative constraints and controls over police interrogation methods

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532 ALRC, *"Evidence"* Interim Report No 26, (1985) [965].

533 *Evidence Act 1995* (Cth) s 138(2); s 139(1) and (2); *Evidence Act 1995* (NSW) s 138(2); s 139(1) and (2).

534 *Evidence Act 1995* (Cth) s 138(2); s 139(1) and (2); *Evidence Act 1995* (NSW) s 138(2); s 139(1) and (2).

535 *Evidence Act 1995* (Cth) s 139(1) & (3).

536 *Evidence Act 1995* (Cth) s 138(2)(a).

537 *Evidence Act 1995* (Cth) s 138(2)(b).

are exercised by the discretionary exclusion of admissions improperly obtained[538] or by the automatic exclusion of admissions influenced by threats of or actual "violent, oppressive, inhuman or degrading conduct."[539]

6.4 Improperly obtained Evidence

Reception of evidence obtained improperly or in contravention of an Australian law, (directly or consequentially) will depend upon whether the desirability of admission outweighs the undesirability of admitting the subject evidence.[540] Desirability of admission will be determined by a comparative weighing of the mandatory relevant factors and other additional factors that the Court may consider relevant.[541] The discretion is enlivened when an aggrieved party establishes that an impropriety or contravention has occurred [542]and there is a causal connection between the said impropriety or contravention and the obtaining of the impugned evidence.[543]

The *Uniform Evidence Act* does not define "impropriety" and "improperly" for the purposes of section 138.[544] This approach is consistent with the common law position,[545] permitting a court to determine on each set of facts whether police have

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538 *Evidence Acts 1995*, ss 138 and 139.

539 *Evidence Act 1995* (Cth), s 84.

540 *Evidence Act* 1995 (Cth), s 138(1).

541 *Evidence Act 1995* (Cth) s 138(3).

542 *Evidence Act 1995* (Cth) s 138(1); *DPP v Carr* (Unreported, NSW Supreme Court, Smart J, 25 January 2002).

543 *R v Rondo* (Unreported NSW Court of Appeal, Spigelman CJ, Simpson J and Smart AJ, 24 December 2001); *R v Haddad v Treglia* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Newman J and Greg James J, 6 September 2000).

544 Except subsection 138(2) that applies to admissions made during official questioning.

545 *Ridgeway v R* (1995) 184 CLR 19, 37(Mason CJ, Deane and Dawson JJ).

overstepped the bounds of propriety. It accommodates dynamic community standards and the changing mode of criminal investigation with increasing reliance on new or emerging technologies or scientific methods to obtain evidence of criminal activity.[546] The relevant enquiry is "whether what was done (or not done) is inconsistent with minimum standards of acceptable police conduct in all the circumstances?"[547]

An impropriety is something less than an illegality. Breaches of investigation protocols such as codes of conduct, Commissioner's instructions or internal guidelines may constitute an impropriety.[548] It does not necessarily involve a "subjective element of bad faith or abuse of process or abuse of power or intentional wrongdoing."[549] An act or omission that is irregular, inappropriate, unsuitable, or "inconsistent with acceptable minimum standards of police conduct"[550] may be characterised as an impropriety.

The legislative scheme does not favour a narrow construction of "improperly" and "in consequence of an impropriety" in the context of section 138.[551] In *Employment Advocate v Williamson*[552] Branson J expressly approved *Ridgeway v R*[553] for

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546 Ibid.

547 Ibid; cited with approval in *DPP v Carr* (Unreported, NSW Supreme Court, Smart AJ, 25 January 2002), [22].

548 Stephen Odgers, *Uniform Evidence Law* (5th ed, 2000), 457.

549 Ibid; *DPP v Carr* (Unreported, NSW Supreme Court, Smart AJ, 25 January 2002).

550 *Ridgeway v R* (1995) 184 CLR 19, 36-37 (Mason CJ, Deane and Dawson JJ).

551 *DPP v Carr* (Unreported, NSW Supreme Court, Smart AJ, 25 January 2002).

552 (Unreported, Federal Court of Australia, Gray, Branson and Kelly JJ, 24 August 2001). .

providing the correct understanding of "improperly" and "impropriety" within the meaning of section 138. Branson J cited the joint judgment of Mason CJ, Deane and Dawson JJ:

> The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances, including, amongst other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and any imminent danger to the community.[554]

In *R v Sotheren,*[555] Dowd J held that "impropriety" or "improper" should not be confused with acts that may be "immoral or undesirable,"[556] rather the words should be given their ordinary meanings. Dowd J elaborated on his view of impropriety, saying:

> Impropriety connotes, in my view, something more than the actions of the police in these proceedings, such as the false procurement of evidence and the obtaining of an admission or concession by lying or deception, such as an allegation that a co-offender has already confessed.[557]

These comments are not helpful. Firstly, obtaining an admission or concession in the manner described by Dowd J is already caught by subsection 138(2). Secondly, it is not clear what is meant by "false procurement of evidence" and how this may differ from a contravention of Australian law. It is doubtful that the view of Dowd J has contributed meaningfully to the debate about the general meaning of

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553 (1995) 184 CLR 19.

554 *Employment Advocate v Williamson* (Unreported, Federal Court of Australia, Gray, Branson and Kelly JJ 24 August, 2001) (Branson J) [23]; *Ridgeway v R* (1995) 184 CLR 19, 36-37 (Mason CJ, Deane and Dawson JJ).

555 (Unreported, NSW Supreme Court, Dowd J, 26 March 2001).

556 Ibid 5 (Dowd J).

557 Ibid.

"improper" or "impropriety" within the meaning of section 138.

An aggrieved party must establish, on the balance of probabilities, that an impropriety was committed.[558] The court "must take into account the importance of the evidence in the proceedings, and the gravity of the matters alleged."[559] Making proof of an impropriety dependant upon the importance of the evidence and the gravity of the allegation is an inherently flawed approach. The "importance of the evidence" is not relevant to establish whether the police acted or failed to act in a particular manner and if this constituted an impropriety or contravention of the law. It raises the question if the evidence is important enough will this excuse or justify conduct "inconsistent with acceptable minimum standards of police conduct?"[560] There is also the attendant risk that the prospect of classifying an act (or omission) as improper will vary inversely with the significance of the evidence. Linking proof of an impropriety to the gravity of the allegation is problematic. Gravity of an allegation is relevant to the exercise of section 138 discretion rather than its enlivenment. All of these matters make it more difficult for an aggrieved party to discharge its onus of proving an impropriety (or contravention) to enliven the discretion under section 138.

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558 *Uniform Evidence Acts 1995,* s 142(1).

559 *Uniform Evidence Acts 1995*, s 142(2).

560 *Ridgeway v R* (1995) 184 CLR 19, 36-37 (Mason CJ, Deane and Dawson JJ).

The preponderance of authorities indicate that typically a court will not find an act (or omission) to be improper in the absence of intentional wrongdoing or if the law enforcement officers had acted in good faith.[561] There are two notable exceptions to this supposition. In *DPP v Carr*[562] Smart AJ upheld a Local Court Magistrate's finding that a lawful arrest of the accused for a minor offence was in the circumstances a serious impropriety and evidence relating to other subsequent offences of resist, assault, and intimidate police was improperly obtained. Smart AJ said:

> This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded. ... The initial decision to arrest was born of expediency.[563]

In *R v Phung and Huynh*[564] Wood CJ at common law[565] excluded records of

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561 For example see *Coulstock* [1998] 99 A Crim R 143; *Regina v Phan* (Unreported, NSW Court of Criminal Appeal, 24 July 2003); *Albert Salem* (1997) 96 A Crim R 421; *R v Singh* (Unreported, ACT Supreme Court, 12 April 1999); *R v Southeren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001); *R v Workman* (Unreported, NSW Court of Criminal Appeal, 30 June 2004); *DPP v Coe* (Unreported, NSW Supreme Court 2003); *R v Thomson* (Unreported, NSW Court of Criminal Appeal 294, 2000); *R v Daley* (Unreported, NSW Supreme Court); *R v EM* (Unreported NSW Court of Criminal Appeal, Giles JA, Grove J and Hidden J, 3 November 2006); *R v Lee* (Unreported, NSW Court of Criminal Appeal, 1997); *R v Nicola* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Barr J and Bergin J, 11 March 2002); *R v Patsalis; R v Spathis* (Unreported, NSW Supreme Court, Kirby J, 20 July 1999); *R v Pearce* (Unreported, NSW Court of Criminal Appeal, Dowd J, Greg James J and Smart AJ, 7 November 2001).

562 (Unreported, NSW Supreme Court, Smart AJ, 25 January 2002).

563 Ibid (Smart AJ) [35-36].

564 (Unreported, NSW Supreme Court, Wood CJ at common law, 26 February 2001).

565 Wood CJ at common law, was the Royal Commissioner appointed to inquire into police

interview between the police and the accused. The accused Phung was 17 years old when arrested for murder and three counts of armed robbery. Phung had a disturbed childhood, limited education, limited English, and a drug history. In issue was the admissibility of two electronically recorded interviews between the police and the accused. Investigating police committed a series of transgressions in the conduct of interviews with the accused by failing to comply with or give effect to relevant legislative requirements. Wood CJ at Common Law held that separately each transgression did not justify exclusion of the records of interview but collectively they did justify exclusion. The court found that the police had not acted in an oppressive manner towards the accused nor were the transgressions deliberate on the part of the police.[566] A finding of impropriety was made because the police did not have an adequate understanding of the legislative requirements and had perfunctorily performed their statutory obligations. Wood CJ at Common Law declared:

> 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. Those rights, obviously, are of great importance when a child is facing a charge as serious as murder and armed robbery. The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law.
> ...Additionally, I observe that police should not automatically assume that their obligations under the legislation, can be met by a rote reading of the requisite cautions and advice, or by handing over of printed forms for an accused to read for himself or herself. Nor should they assume that compliance can be proved by securing a simple signature or initial on the custody management report.... Moreover, the regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights.[567]

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corruption in NSW during 1996-1997, also known as the Wood Royal Commission.

566 *R v Phung and Huynh* (Unreported, NSW Supreme Court, Wood CJ at common law) [43-44].

567 Ibid 38-39, 63 (Wood CJ at common law).

Generally speaking, the courts allow the police more latitude in the investigation of major drug offences (especially undercover operations) when deciding whether an act (or omission) was improper.[568] This may be attributable to the nature of the offence and the manner of investigation to infiltrate the drug subculture.[569]

6.5 Evidence obtained in contravention of an Australian law

Evidence obtained in contravention of an Australian law, directly or in consequence of such contravention, may also be excluded under section 138. An "Australian law" is defined as "a law of the Commonwealth, a State or a Territory"[570] and includes all current written and unwritten laws.[571] Establishing a contravention of an Australian law is less problematic than proving an impropriety.

6.6 Test for Admissibility

Section 138(1) states that evidence obtained improperly or contrary to an Australian law will not be admitted unless the desirability of admission outweighs the

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568 For example see, *Coulstock* [1998] 99 A Crim R 143 where the NSW Court of Appeal held that an undercover police officer, soliciting the accused to supply illicit drugs to him, did not commit any impropriety but gave the accused, a known drug dealer, the opportunity to commit the subject offence. Also *Regina v Phan* (Unreported, NSW Court of Criminal Appeal, Meagher ACJ, Hulme J and Hidden J, 24 July 2003) where the NSW Court of Appeal held that police acting on an anonymous tip off that illegal immigrants were at a particular address, attended those premises. Two officers went to the front door and three officers entered the backyard of the premises. The estranged wife of the accused answered the front door and gave the police oral permission to search the premises. Meanwhile, the other three officers searched the accused and the rear of the property, including a shed where the accused was seen leaving. Cocaine was found. The appellate Court allowed the Crown appeal and held that the police had acted in good faith and had committed no impropriety. The evidence of the searches and subsequent admissions made by the accused were admitted. See also Bram 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.

569 For example see *Ridgeway v* R (1995) 184 CLR 19, 36-37 (Mason CJ, Deane and Dawson JJ); *Swaffield v R; Pavic v R* (1998) 151 ALR 98, 142 (Kirby J).

570 *Uniform Evidence Acts 1995*, dictionary part 1.

571 *Uniform Evidence Acts 1995*, dictionary, part 2, clause 9.

undesirability of admission. The statutory test for admissibility adopts the common law approach of weighing competing public interests to determine admission.[572] The ALRC identified the two competing public interests to be:

1. Public interest that reliable evidence of an accused person's guilt be admitted at trial and considered by the tribunal of fact.[573]
2. Public interest minimising the extent to which law enforcement agencies act outside the scope of their lawful authority.[574]

The ALRC identified two aspects of the public interest favouring admission, namely, accurate fact determination and crime control. The former recognised a public interest in "an accurate assessment of material facts in both civil and criminal trials to maintain the legitimacy of the legal system."[575] The latter recognised a public interest in the punishment and deterrence of crime. The ALRC argued that a court cannot adequately or properly undertake its fact-finding task, if relevant evidence is excluded for an unrelated reason. This assumed that the impugned evidence was reliable and ignored the possibility that an alleged impropriety or contravention may adversely affect the reliability of evidence so obtained.[576]

The undesirability of admission was put forward in less forthright terms. The ALRC queried, "Should the courts should take into account the public interests that may be affected by misconduct of law enforcement agencies?" The ALRC then listed

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572 *Uniform Evidence Acts 1995*, s 138(1); *Bunning v Cross* (1978)141 CLR 54, 83 (Stephen and Aicken JJ).

573 ALRC, *"Evidence"* Interim Report No. 26 (1985) [958].

574 Ibid [959].

575 Ibid [958]; Stephen Odgers, *"Uniform Evidence Law"* (5th ed 2000) [1.3.14960].

576 For an alternative view see, J D Heydon, "Illegally Obtained Evidence" (1973) *Criminal Law Review* 603.

several relevant concerns said to comprise a legitimate public interest supporting exclusion, namely, disciplining the police for an unlawful act or impropriety; deterring future illegality; protection of individual rights; fairness at trial; executive and judicial legitimacy; and encouragement of other methods of police investigation.

The reasoning and language of the ALRC report tacitly favoured admission of evidence improperly or unlawfully obtained. The public interest favouring admission was clearly stated in an authoritative manner, whereas the validity of the public interest favouring exclusion was questioned and then presented as a collection of various relevant concerns said to form the subject public interest. The contrast in language created an impression that a public interest clearly articulated should be preferred over a public interest of questionable validity and loosely defined.

The ALRC report does not state whether order of the relevant concerns (forming the public interest favouring exclusion) indicated ranking. If the concerns are ranked in order of importance, then it may be inferred that police discipline was the principal concern prevailing over concerns of upholding individual rights, fairness of a trial, and legitimacy of the judicial system. Police discipline is not synonymous with observance of the law. Observance of the law means compliance and (where appropriate) enforcement of the law. Police discipline has aspects of compliance and punishment. The purpose of a public policy discretion is observance of the law, not disciplining or punishing police for malpractice. Elevation of police discipline to a position of prominence would be a major departure from the common law in this regard. Subsequent discussion of each concern also supported this

inference, in particular, a statement that for the protection of individual rights the "best solution would be one whereby the individual's rights were vindicated without the exclusion of the evidence."[577]

6.7 Subsection 138(3) - Mandatory matters for consideration

Subsection 138(3) states that the court must take into account specific matters when exercising its statutory discretion[578] in an endeavour to promote principled decision-making and minimise the incidence of disparate decisions.[579] It is not an exhaustive list and the court may take into account other matters that it considers relevant in a particular case. Nor are the prescribed matters identical to the relevant matters identified at common law.[580] The statutory considerations are of wider import, and, unlike the common law expressly include a factor protective of an accused person's rights.[581]

Subsection 138(3) mandates that a court must take into account all specified matters, regardless of whether all such matters have been raised by the parties.[582] The matters are presented in a neutral way. Neither the Act nor the preceding ALRC report 26 discriminate between the factors by indicating those favouring

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577 ALRC, *"Evidence"*, Interim Report 26 (1985) [959].

578 *Uniform Evidence Acts 1995*, s 138(3).

579 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

580 *Bunning v Cross* (1978) 141 CLR 54; *Ridgeway v R* (1995) 184 CLR 19.

581 *Uniform Evidence Acts* 1995, s 138(3)(f).

582 *R v Helmhout* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Hilme J and Sperling J, 19 September 2001); 16; *R v Rondo* (Unreported NSW Court of Criminal Appeal, Spigelman CJ, Simpson J, Smart AJ, 24 December 2001); *R v Bartle & ors* (Unreported, NSW Court of Criminal Appeal, 2003); Stephen Odgers, *"Uniform Evidence Law"* (5th ed., 2000) [1.3.15120].

admission and those favouring exclusion.[583] Whether a factor favours admission or exclusion and the weighting allocated to each factor is left to the court's discretion.

However, the authorities provide some guidance on how a court should deal with subsection 138(3) matters. A court must give due and proper consideration to each matter and not approach the task in a "mechanical way."[584] To properly consider subsection 138(3) matters, a court must understand the nature of the impropriety or contravention that enlivened the discretion declared Gleeson CJ in *R v Bozatsis and Spankakis*:[585]

> Furthermore, a proper consideration of the discretionary matters illustrated in section 138 of the *Evidence Act* would necessitate a clear and accurate appreciation of the nature and extent of any illegal conduct on the part of the police.[586]

The mandatory considerations in subsection 138(3) are:

a. probative value of the evidence; and

b. importance of the evidence in the proceedings; and

c. nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings; and

d. 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

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583 Jill Anderson, Jill Hunter, Neil Williams SC, "The New Evidence Law Annotations and Commentary on the Uniform Evidence Acts" (2002), 510.

584 *R v Salem* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL, Hidden J, 3 October 1997); Odgers, above n 582.

585 (1997) 97 A Crim R 296.

586 Ibid 305.

Political Rights; and

g. whether any other proceedings (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.

In addition to the above matters, the courts have recognised further relevant considerations including fairness to an accused,[587] whether those responsible for instituting criminal prosecutions tolerate unlawful conduct and whether police misconduct is tolerated by those high in authority[588]

6.8 Evidence - Probative Value and Importance

The strength and critical value of impugned evidence are mandatory relevant considerations under subsection 138(3). The statutory assessment of factors relating to the cogency of the evidence differs from the common law. "Probative value" in the context of the Act should be equated to "degree of relevance."[589] The *Uniform Evidence Act*s define "probative value" to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."[590] The public interest in accurate fact determination favours admission of probative evidence, in that, "the greater the probative value of an item

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587 *R v Helmhout* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Hulme J and Sperling J, 19 September 2001); *R v Phung and Huynh* (Unreported, NSW Supreme Court, Wood CJ at common law, 26 February 2001); *R v Farr* (2001) 118 A Crim R 399: Odgers. above n 582, [1.3.15020], [1.3.15300].

588 *R v Haughbro* (1997) 135 ACTR 15; Odgers, above n 582, [1.3.15300].

589 Odgers, above n 582, [1.3.15140].

590 *Uniform Evidence Acts 1995*, dictionary, part 1.

of evidence the greater the public interest in its admission."[591]

The importance of impugned evidence will correspond directly with desirability of admission. If the evidence is crucial in proving a party's case and no other evidence is available, then the public interest in admitting the evidence is greater. Conversely, the availability of other cogent evidence will lessen the importance of the evidence and so the public interest in admission is lower.[592]

Significantly the Act does not disqualify cogency as a relevant factor where the improper or unlawful conduct was deliberate or reckless. This is an important distinction between the statutory and common law discretions. The common law excluded cogency as a relevant factor where the impugned conduct (or omission) was deliberate or reckless warning that to do otherwise:

> may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it.[593]

The common law position is consistent with the object of the public policy discretion. The ALRC considered that the common law position was "too extreme,"[594] arguing that in each case, a judge "should consider all factors on both

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591 ALRC, *"Evidence"* Interim Report No 26, (1985) [964]; Odgers, above n 582; *R v Bartle & ors* (Unreported, NSW Court of Criminal Appeal, 2003); *R v McKeough* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 3 December 2003); *R v Southeren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001); *R v Helmhout* (Unreported, NSW Supreme Court, Ipp AJA, Hulme J and Sperling J, 23 February 2000).

592 ALRC, *"Evidence"* Interim Report 26 (1985) [964]; Odgers, above n 582; *R v Bartle & ors* (2003) 329 (Unreported, NSW Court of Criminal Appeal, 2003); *R v Eade* (Unreported, NSW Court of Criminal Appeal, Priestly JA, Greg James J and Kirby J, 15 November 2000); *R v McKeough* (Unreported NSW Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 3 December 2003); *R v Helmhout* (Unreported, NSW Supreme Court, Ipp AJA, Hulme J and Sperling J, 23 February 2000).

593 *Bunning v Cross* (1978) 141 CLR 54, 79 (Stephen and Aicken JJ).

594 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

sides of the equation,"[595] and that any perceived imbalance would be countered by the nature of the discretion itself, statutory guidance on its exercise, and the availability of other avenues of review.[596] This may seem appealing in theory but in practical terms cogency (by its very nature) must favour admission.

6.9 Nature of the offence, cause of action or defence

This factor has been the most controversial of all matters specified in subsection 138(3). Members of the NSW Court of Criminal Appeal were divided in *R v Dalley*[597] about the interpretation of subsection 138(3)(c) and the purported correlation between the public interest in admission and the seriousness of the offence. The ALRC also considered this issue as part of its review of the *Uniform Evidence Acts* 1995.[598]

"Nature of the offence" is a common consideration at general law and under the Act. At common law, "the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element"[599] of the discretionary exercise. The public interest in admission is determined by a

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595 Ibid.

596 Ibid.

597 (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Blanch AJ, 19 July 2002), (Spigelman CJ with whom Blanch AJ agreed) [7] held that "the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity." Simpson J (dissenting on this issue) [97] held that "it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of the law will be more readily condoned".

598 ALRC, *"Review of the Uniform Evidence Acts"* Issues Paper 28 (2004) [12.35]; NSW LRC, *"Review of the Uniform Evidence Acts"* Discussion Paper No. 47 (2005) [14.67].

599 *Bunning v Cross* (1978) 141 CLR 54, 80 (Stephen and Aicken JJ).

comparison between the seriousness of the offence *and*[600] the seriousness of the unlawful conduct. The nature of the offence is not determinative of admission. The view that the gravity of an offence would vary directly with likelihood of admission, was first expressed by Murphy J in *Cleland v The Queen*[601] when propounding the second of two exceptions to a general exclusionary rule:

> ... evidence obtained using unlawful or improper conduct should be almost automatically excluded in trials of minor offences, but otherwise in trials for the most serious offences.[602]

The Murphy view is problematic for three reasons. Firstly, it is inconsistent with the purpose of the public policy discretion. Secondly, it fetters the discretionary exercise in that admission is determined by the gravity of the offence. Thirdly, it does not accord with the comparative weighing called for in *Bunning v Cross*.[603]

The premise that the public interest in admission varied directly with the seriousness of an offence received qualified support from Deane J in *Pollard v R*[604] where the alleged unlawful or improper conduct was an oversight or genuine mistake:

> What is the weight to be given to the principal considerations of public policy favouring reliability and unequivocalness of the alleged confessional statement? The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence will vary according to other factors of which the most important will ordinarily be the nature and the seriousness of the unlawful conduct engaged in by law enforcement officers. In that regard, a clear distinction should be drawn between two extreme categories of case. At one extreme are cases in which what is involved is an

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600 My italics to emphasise the comparative weighing called for in *Bunning v Cross* (1978) 141 CLR 54.

601 [1982] 151 CLR 1.

602 Ibid 17 (Murphy J).

603 (1978) 141 CLR 54.

604 (1992) 176 CLR 177.

> 'isolated and merely accidental non-compliance" ... In such cases, particularly if the alleged offence is a serious one, it would ordinarily be quite inappropriate to exclude evidence of a voluntary confessional statement on public policy grounds.[605]

The ALRC expressly rejected as "too extreme"[606] the common law position that where improper or unlawful conduct was deliberate or reckless, the nature of the offence should be excluded from consideration. Instead the ALRC advocated that a court "should consider all factors on both sides of the equation."[607] Although ALRC Report 26 does not explicitly state that public interest will favour admission in prosecution of more serious offences, it is arguable that this view may be inferred from the following statement:

> [T]here is, for example, a greater public interest that a murderer be convicted and dealt with under the law than someone guilty of a victimless crime.[608]

The inference rests upon the assumption that a "victimless crime" is a less serious offence. Typically, examples given of victimless crimes are prostitution, administer prohibited drug, and a traffic matter not involving personal injuries or property damage. But this is not necessarily so. For example, arson may be considered a victimless crime where the alleged perpetrator, the property owner, committed the offence to obtain an insurance payment for property damage. Gravity of an offence was traditionally made to distinguish between indictable and summary offences and more recently by the prescribed maximum penalty.[609]

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605 Ibid 204 (Deane J).

606 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

607 Ibid.

608 Ibid.

609 *R v McKeough* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 3 December 2003) (Dunford J): "It was submitted on behalf of the respondent

Interpretation of subsection 138(3)(c) was considered on appeal in *R v Dalley*.[610] A majority held that the public interest favouring admission of improperly or unlawfully obtained evidence varied directly with the gravity of the offence.[611] Delivering a strong dissenting judgment on this issue, Simpson J rejected the Crown argument that section 138 and the preceding ALRC Report 26 supported the mooted general proposition, saying:

> There are two opposing ways in which the gravity of the charge may be taken into account and may be relevant. It is, obviously, in the interests of the community that persons guilty of more serious offences be dealt with according to law. As a general proposition, the more serious the charge, the greater the community interest in the conviction and punishment of the guilty. On the other hand, it may be equally be said that the more serious the charge faced, the more rigorous should be the insistence on adherence to statutory provisions enacted to protect the rights of individuals.[612]

Further arguing against the acceptance of a general proposition, Simpson J said:

> In my opinion it would be wrong to accept as a general proposition that, because the offence charged in a serious one, breaches of the law will be more readily condoned. In my judgment there may be cases in which the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence. That a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness.[613]

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that this was only a minor offence, a victimless crime. I disagree. Every dissemination of prohibited drugs in our community is a serious offence. ... It is an indictable offence and carries a maximum penalty of imprisonment for 15 years or a fine of $220,000 or both."

610 (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Blanch AJ, 19 July 2002).

611 Ibid, 7 (Spigelman CJ):
"In my opinion, the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, both at common law and pursuant to s138 (3)(c)."

Ibid (Blanch AJ) [102]:
... "I agree with the remarks of the Chief Justice that the public interest in conviction and punishment can be expected to have greater weight in crimes of greater gravity for the reasons given by the Chief Justice."

612 Ibid 96 (Simpson J).

613 Ibid 97 (Simpson J).

The preponderance of judicial decisions before and after *R v Dalley*[614] supports the position of the majority.[615] Collectively, these decisions indicate a general judicial tendency to give perfunctory consideration of subsection 138(3)(c).[616] Such an approach is not consistent with principled discretionary decision-making,[617] may act to fetter the discretionary exercise, and is contrary to the objective of the discretion.[618] The minority view expressed by Simpson J found limited support in the obiter dicta remarks of Mason P in *R v Ladocki*:[619]

> Turning to the nature of the relevant offence s138 (3)(c), the judge observed that it was serious having regard to the penalty it attracts and the attitude of the courts to it. This observation cuts a bit both ways in the discretionary calculus, but once again this part

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614 (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Blanch AJ, 19 July 2002).

615 For example see, *R v Helmhout & ors* (Unreported, NSW Supreme Court. Ipp AJA, Hulme J and Sperling J, 19 September, 2001); *R v Sotheren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001); *R v Singh* (Unreported, ACT Supreme Court, Crispin J, 12 April 1999); *R Dalton* (Unreported, NSW Supreme Court, Adams J, 15 December 2004); *R v Burrell* (Unreported, NSW Supreme Court, Sully J, 5 March 2001); *R v McKeough* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Dunford and Hidden J, 3 December 2003).

616 *R v Helmhout & ors* (Unreported, NSW Supreme Court, Ipp AJA, Hulme J and Sperling K, 19 September 2001):
"I next turn to the nature of the offence and it is sufficient to state that the accused is charged with murder";

R v Sotheren (Unreported, NSW Supreme Court, Dowd J, 26 March 2001):
"The nature of the events is, in respect of murder, at the top of the realm of seriousness, and indeed, the other offences are also serious";

R v Singh (Unreported, ACT Supreme Court, Crispin J, 12 April 1999):
"The offences charged included one count of murder and one of attempted murder...";

R Dalton (Unreported, NSW Supreme Court, Adams J, 15 December 2004):
"It is obvious that the offences are very serious."

617 *House v The King* (1936) 55 CLR 499.

618 *Regina v Salem* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL, Hidden J, 3 October 1997).

619 [2004] NSW CCA 336.

of the second judgment is unchallenged.[620]

The majority view in *R v Dalley*[621] has been subsequently endorsed by the ALRC,[622] subject to this qualification:

> Where the infringement involves isolated or accidental non-compliance, the weight to be given to the nature of the offence may be greater than if the infringement involves a serious and deliberate breach of procedure. Hence, the fact that the offence charged is serious is by no means determinative of how the discretion in s 138 will be exercised. The weight given to the nature of the offence will vary depending on the other factors to be considered pursuant to s 138(3).[623]

The ALRC emphasised the nexus between the nature of the offence and the nature of the impropriety or contravention in the balancing exercise, and the weighting given to the "nature of offence" will vary inversely with the seriousness or deliberateness of the impropriety or contravention. This statement is consistent with the common law position articulated in *Bunning v Cross*.[624]

6.10 Gravity of Impropriety or Contravention

The gravity of an impropriety or contravention encapsulates three relevant factors identified in *Bunning v Cross*.[625] The ALRC identified five relevant factors to make an objective assessment of the gravity of an impropriety or contravention:

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620 Ibid 66.

621 Ibid.

622 ALRC, *"Review of the Uniform Evidence Acts"* Discussion Paper No. 69 (2005); NSW LRC, *"Review of the Uniform Evidence Acts"*, Discussion Paper No. 47 (2005) [14.77-14.82].

623 Ibid [14.82].

624 (1978) 141 CLR 54 (Stephen and Aicken JJ with whom Barwick CJ agreed).

625 Ibid. Relevant factors are: whether the conduct was deliberate, reckless or accidental, the ease with which those responsible might have complied with the law in procuring the evidence in question, and the legislative intention (if any) in relation to the law that was said to have been infringed.

1. seriousness of misconduct;
2. pattern of misconduct;
3. circumstances of urgency;
4. ease of compliance; and
5. the intention of legislature.[626]

Additionally, the effect of the misconduct upon a particular accused (particularly those regarded as vulnerable persons) should be taken into account when assessing the gravity of such misconduct.[627]

Seriousness of misconduct is the degree to which the contentious act (or omission) departs from the law, investigation protocols or procedures.[628] If there are multiple breaches then the court may take a holistic approach and consider the cumulative effects of the breaches to decide whether to admit impugned evidence.[629] The court may also take into account whether there is a pattern of misconduct on the part of the investigating police. If police routinely or habitually breach investigation protocols or accepted police practice (regardless of the seriousness of such misconduct) then the public interest in exclusion should be given more weight.

The practical utility of this factor will be negligible because unless complaints of

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626 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

627 *R v Helmhout* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Hulme J and Sperling J, 19 September 2001) (Ipp AJA) [12], (Hulme J) [39-41, 50]; *R v Phung and Huynh* (Unreported NSW Supreme Court, Wood CJ at common law, 26 February 2001); *R v Rondo* (Unreported NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Smart AJ, 24 December 2001), (Smart AJ) [14]; Odgers, above n 582, [1.3.15200].

628 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

629 *R v Phung and Huynh* (Unreported, NSW Supreme Court, Wood CJ at common law, 26 February 2001).

past misconduct are proven against investigating officers, the accused will not be permitted to adduce evidence of past malpractice.[630] This situation is exacerbated by the court's apparent reluctance to find a police officer has acted improperly.[631] A history of misconduct may be relevant and helpful to a court in determining whether an impugned act (or omission) was deliberate or reckless, particularly, where an impropriety or contravention was committed in the course of a criminal investigation into serious or organised criminal activity. Major criminal investigations are led or undertaken by senior, experienced and (sometimes) specially trained officers. Accordingly, risk of an accidental breach, mistake or oversight of the law or official procedure should be low.

Urgent circumstances requiring the police to take immediate action to secure, procure or obtain evidence that would otherwise be lost, destroyed or contaminated may be sufficient to excuse the police for any associated misconduct. Common sense dictates that non-compliance occurring during an emergency or in situations of urgency should not be penalised. Such occurrences should be rare because of the after hours availability of duty Judges and authorised justices to deal with urgent applications for appropriate authorisation or orders.

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630 *Uniform Evidence Acts 1995*, ss 56, 102 -103; *R v Edwards* [1991] 2 All ER 266.

631 Bram 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.

When urgent circumstances will be paramount was illustrated in *R v Daley*.[632] Police arrested the accused for traffic offences and required him to undergo a breathalyzer test. The ulterior purpose of the arrest was to secure a DNA sample from the accused. Police later seized (without a warrant) the T-shirt worn by the accused. The court found the police had committed no impropriety and admitted the DNA evidence. Simpson J noted that this was an exceptional case, saying:

> ... it is relevant to consider the urgency of the task that police were performing. It is of some significance that surveillance police had observed the accused to be acting in a fashion that gave them reason to fear (if not believe) that, if he were the offender, there was a risk of a further, and imminent, attack or attacks. The protection of another victim, or other victims, is of no small moment in the assessment of the propriety of the conduct of the police officers.
>
> Ordinarily such a use of the power of arrest would properly be regarded as an abuse of power and amount to a significant impropriety. Two things counterbalance what would otherwise be an inevitable conclusion. Firstly, by engaging in the conduct (driving an unregistered and uninsured vehicle) the accused exposed himself to proper arrest and detention. It is not as though the police fabricated an allegation for the purpose of arrest. Secondly, the police had good reason to believe, not only that the accused was the perpetrator of seven sexual assaults and their associated armed robberies, but also that his behaviour was such that there was a real danger that he would attack again. A further female victim was (or further female victims were) at a significant risk if the perpetrator was not stopped. This is a factor of considerable importance in the evaluation of the police conduct and in the measure of censure that ought to be attached to it.[633]

Failure to comply with legislative or investigative requirements may have the opposite outcome. If police could have easily complied with the relevant requirements but failed to do so, then in situations where the police are found to be deliberately "cutting corners"[634] this factor will support exclusion. Conversely, failure to comply with a trivial requirement may render the misconduct less serious

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632 (Unreported, NSW Supreme Court, Simpson J, 14 September 2001).

633 Ibid (Simpson J) [17].

634 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

and favour admission.[635] Considerations of urgency and ease of compliance with relevant requirements is subject of s 138(3)(h). The same observations apply, especially the desirability of the court having knowledge of (any) history of malpractice.

Where a party (including the police) has contravened a particular statute, then admission of the resulting evidence may turn upon interpretation of the subject legislation. If the contravened legislation, expressly or impliedly, prohibits use of unlawfully seized or obtained evidence then this will favour exclusion.

6.11 Whether the impropriety or contravention was deliberate or reckless

This consideration is common to the general law[636]and the *Uniform Evidence Acts*. It is the most important of all the relevant factors, lying at the core of both discretions.[637] ALRC Report 38 gave some guidance as to how competing factors should be weighed to "strike the right balance" under section138. The weighting given to other factors depends upon the classification of an impropriety or contravention in that:

> Where the impropriety or illegality is a serious and deliberate one, the evidence would be excluded under the proposed discretion unless there were very strong competing considerations supporting its admissibility. If the impropriety or illegality were minor or unintentional, then the matters supporting admissibility would not be so weighty.[638]

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635 Ibid.

636 *Bunning v Cross* (1978) 141 CLR 54.

637 ALRC, *"Evidence"* Report No 38 [164 (a)]; *R v Bozatsis and Spanakakis* (1997) 97 A Crim R 296, 305 (Gleeson CJ): "A proper consideration of the discretionary matters illustrated in s138 ... would necessitate a clear and accurate appreciation of the nature and extent of any illegal conduct on the part of the police."

See also *Bunning v Cross* (1978) 141 CLR 54; *Pollard v R* (1992) 176 CLR 177, 11 (Deane J).

638 ALRC, *"Evidence"* Report No 38 [164 (a)].

The thrust of ALRC report 26 was the "mental state" of the law enforcement officer is relevant to ascertain whether an impropriety or contravention was intentional or reckless. The *Uniform Evidence Acts* do not define "reckless." The ordinary meaning of "reckless" is to be "utterly careless of the consequences of action, without caution."[639] The case law does not define "reckless" for the purposes of subsection 138(3)(e) but involves a law enforcement officer intentionally or wantonly disregarding legislative requirements or investigative protocols.[640]

Both ss 138(3)(d) and (e) of the Act involve aspects of disciplining and deterring police misconduct. Public interest in diligent and ethical law enforcement can be achieved by accurately identifying and classifying improprieties or contraventions committed by law enforcement officers. Practically, an accurate assessment of the gravity, seriousness or recklessness of an impropriety or contravention may be thwarted by other provisions of the *Uniform Evidence Acts* relating to the shifting onus of proof, admissibility of relevant evidence, and credibility of witnesses.[641]

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639 The Macquarie Dictionary, (2nd Revised Ed, 1987).

640 *DPP v Nicholls* [2001] 123 A Crim R 66, 23 (Adams J); *DPP v Leonard* (Unreported, NSW Supreme Court, James J, 14 September 2001), [103]; *DPP v Carr* (Unreported, NSW Supreme Court Smart AJA, 25 January 2002); *R v Helmhout* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Hulme J and Sperling J, 19 September 2001), (Hulme J) [33].

641 *Uniform Evidence Acts 1995*, ss 56, 102, 103, 138, and 142.

The aggrieved party (usually an accused) must establish, on the balance of probabilities, that an impropriety or contravention was committed to enliven the discretion. Once the discretion is enlivened then the onus of proof shifts to the party seeking to adduce the evidence (usually the Crown in criminal prosecutions) to satisfy the Court that evidence should be admitted. In discharging its onus of proof, an aggrieved party is not required to establish gravity or recklessness of the impugned conduct, although the tenor of such conduct will be intrinsically found in proof of its existence. A superficial classification of the gravity or recklessness of an impropriety or contravention based upon enlivenment of the discretion is not sufficient nor does it promote the purpose of s 138.

Apart from cross-examining Crown witnesses, an aggrieved party may not be in a position to present additional evidence to show a pattern of misconduct, degree of seriousness of alleged misconduct, or whether an impugned act (or omission) was deliberate or reckless. Details of past misconduct by investigating police may not be readily available or known. This inability may hinder the utility of cross-examination, raising unsubstantiated allegations to attack the credibility of a Crown witness will not be permitted.[642] It nullifies the effect of subsection 138(3)(d) to the extent of properly evaluating seriousness and pattern of misconduct. It also frustrates an evaluation of an impropriety or contravention under subsection 138(3)(e) because a court cannot scrutinise an impugned act (or omission) against a history of misconduct.

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642 *Uniform Evidence Acts 1995*, ss 56, 102 -103: *R v Edwards* [1991] 2 All ER 266.

6.12 International Covenant on Civil and Political Rights

S 138(3)(f) is peculiar to the Act by the inclusion of how an impropriety or contravention of the law has infringed upon an accused person's rights as a relevant factor for consideration. This is an important change for section 138 and the criminal law generally by recognising Australia's international obligations to uphold fundamental human rights. Compelling consideration of the infringement of an accused person's rights brings a new perspective to the discretion. However, this has not translated into greater judicial recognition of or deference to infringed rights and protections. For the most part, the authorities reveal that s 138(3)(f) attracts minimal judicial comment.[643]

6.13 Likelihood of any other proceedings in respect of the impropriety or contravention

An impropriety or contravention of the law may expose a police officer to civil, criminal or disciplinary action. The ALRC advocated that the instigation or likelihood of other actions arising from improper or unlawful conduct should be taken into account in the balancing exercise under s 138(1). Theoretically, an accused person may have civil remedies to pursue against a police officer. However, practically this argument carries little weight for the following reasons. Firstly, the vast majority of accused persons have neither the means nor inclination to pursue private litigation against the police. Secondly, any civil suit would not be determined until the conclusion of the criminal proceedings. Admission of impugned evidence at the criminal trial will not advance the prospects of an accused person successfully suing a police officer. A guilty verdict based upon

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643 *R v Bartle & ors* (Unreported, NSW Court of Criminal Appeal, Mason P and Barr J with Smart AJ agreed); *R v Sotheren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001).

evidence presented by the Crown (including the impugned evidence) will also be detrimental to the prospects of a civil action.

It is extremely unlikely that a private criminal prosecution would be initiated against a police officer for the same reasons. Criminal prosecutions against serving or former police officers are usually instigated after adverse findings by independent inquiries into police misconduct or corruption rather than isolated cases. Historically, the police force has not been successful at internally disciplining its own officers.[644] Unless adverse judicial findings are made against investigating officers or private complaints made to the independent watchdogs, such as the Ombudsman or in serious misconduct cases the Police Integrity Commission, then the likelihood of any disciplinary action against the offending police is very low.[645]

The efficacy of this factor must be questioned as the facts in *Foster v R*[646] aptly demonstrate. In that case, the High Court upheld an appeal against the decision of the trial judge to admit controversial confessional evidence and quashed the conviction of the accused for arson. The appeal was determined after the accused had served his term of imprisonment. Extraordinarily, the trial judge admitted the confessional evidence, despite the police officer admitting under cross-examination to wrongdoing. No record was found that the police officer in question was ever disciplined for his actions in this case.

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644 See chapter 3.

645 See chapters 3 and 4.

646 (1993) 113 ALR 1.

6.14 Conclusion

The ALRC sought to consolidate and improve evidence law in the drafting of the *Uniform Evidence Acts*. The substance of section 138 was designed to address identified problems with the common law public policy discretion, in particular, that "evidence is not often excluded under the *Bunning v Cross*[647] discretion."[648] Whether section 138 has been successful in this regard will be the subject of analysis in a survey of cases reported in the following chapter.

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647 (1978) 141 CLR 54.

648 ALRC, *"Evidence"* Interim Report 26 (1985) [964].

CHAPTER 7

SURVEY

Discretion, like public policy, may
be an unruly horse for the courts to ride but
elimination is neither practical nor desirable.[649]

7.1 Introduction

This chapter will report the findings and conclusions of a survey of common law and statutory decisions involving applications to exercise the judicial discretion to exclude (or admit) evidence improperly or unlawfully obtained. One of the aims of the survey is to test the validity of the proposition that this judicial discretion is usually exercised to admit challenged evidence.

7.2 The Study Sample

Ideally, a sample of relevant cases should be taken from all jurisdictions, where the judicial discretion is available, to be representative of how the courts approach and decide applications to admit or exclude admissible evidence upon public policy grounds. The analysis of the sample will take place on different levels. On a rudimentary level, a comparison will be made between the respective discretions exercised in the statutory and common law jurisdictions. This is to ascertain whether shifting the onus of proof to the party seeking reception of the challenged evidence, and changing the presumption from one in favour of admission to one in favour of exclusion, have had any real, discernible effect on the application of the discretion. The analysis of cases within each broad jurisdictional category will be more complex and involve the classification and comparison of cases of like and

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649 Rosemary Pattenden, *Judicial Discretion and Criminal Litigation*, (1990), 18.

dissimilar nature. Examples of the cases examined in the sample study include first instance and appellant case groupings, criminal and civil matters within the statutory jurisdiction and indictable and summary offences. I have examined the contrasts between violent, dishonesty, property, drug, and traffic offences.

Overwhelmingly, the vast proportion of criminal prosecutions and civil litigation are determined by lower courts,[650] which are inferior courts of record and ordinarily there are no published reports of their decisions.[651] Official transcripts of decisions may be available upon application where details of the particular case are known and upon payment of a prescribed fee. This situation posed some difficulties in researching lower court decisions. In an endeavour to overcome this problem, permission was sought to search the records of the largest trial court in Australia, the New South Wales District Court. Unfortunately, the Chief Judge declined a request to search District Court trial transcripts to identify and review relevant cases for practical reasons.

Consequently, a sample of relevant cases was obtained through the means of on-line searching of all Australian jurisdictions[652] since the High Court decision in *R v Swaffield.*[653] The sample consists of 198 cases, evenly divided between appellate

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650 Lower courts include district and local courts or their equivalent counterparts in other jurisdictions.

651 Excepting recent decisions of the District Court of South Australia, which are published on-line.

652 Namely the jurisdictions of Commonwealth, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, Northern Territory, and the Australian Capital Territory.

653 (1998) 151 ALR 98.

and first instance decisions.[654] Statutory and common law decisions are similarly proportioned at 96 and 102 respectively. Of the 198 cases sampled, three cases are included in both the trial case sample and the appeal case sample.[655] The relatively small number of such cases does not substantially alter or skew the sample observations. The significantly higher representation of criminal prosecutions over civil cases in the sample is not unexpected. Historically, the discretion did not apply to civil actions and this remains the position at common law. Additionally, the nature of the discretion suggests that civil litigants would have less recourse to this discretion then parties involved in criminal proceedings.

The sample may be criticised for not being representative of decisions of lower courts concerning less serious or summary offences. This criticism has merit,

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654 This was purely coincidental. Appellant and trial matters each totalled 99.

655 *Police v Modra* (Unreported, SA Supreme Court, Williams J, 19 April 2000), *Police v Modra* (Unmreported, SA Supreme Court, Court of Appeal), Prior, Lander and Bleby JJ, 3 November 2000) are both appeals against the conviction imposed by a magistrate for driving with the prescribed concentration of alcohol and a second appeal from the single Supreme Court judge who upheld the appeal on the grounds that the Magistrate erred in exercising his discretion to exclude evidence of the breath test. The second appeal was dismissed by the Full Court.

Regina v Favata (Unreported, Victorian Supreme Court, Teague J. 23 January 2004), and *Regina v Favata* (Unreported, Victorian Court of Appeal, Callaway, Buchanan and Teague JJA, 21 April 2006) are the trial and appeal decisions, respectively, involving a charge of murder against the accused. The defence objected to the reception of admissions allegedly made by the accused to undercover operatives. The trial judge found that the admissions were voluntarily made and that there was no basis to reject their reception on discretionary grounds. The appeal court upheld the trial judge's ruling in this regard but upheld the appeal on other grounds and ordered a new trial.

Regina v Tofilau (Unreported, Victorian Supreme Court, Osborn J, 6 June 2003), *Regina v Tofilau* (Unreported, Victorian Court of Appeal, Callaway, Buchanan and Vincent JJA, 21 April 2001) are the trial and appeal decisions, respectively for a charge of murder against the accused. At issue was the admission of a confession allegedly made by the accused to undercover operatives. The trial judge exercised his discretion to admit the confessional evidence. The appeal court found that the trial judge had not erred in exercising his discretion.

particularly, because of the differing judicial views whether the seriousness of an offence is a factor favouring admission of the evidence.[656] However, the restricted availability of official transcripts of trials and summary hearings is a practical barrier to obtaining such information for research purposes. Limited insight into the lower court decisions may be gained from the appellate cases involving less serious or summary offences. Although the sample cannot said to represent all cases, notably those disposed of summarily, it is of a sufficient size to permit some observations and conclusions to be made about the application of the judicial discretion, especially in relation to the more serious criminal offences.

7.3 Methodology

The analysis undertaken sought to review the entire discretionary process from preliminary findings to determine if the discretion was enlivened to the outcome of the discretionary exercise. A holistic approach was taken to explore fully the workings of the discretion and what, if any, observations could be drawn from the sample study. These observations will form a collection of verified facts about the judicial discretion that would be used to consider the following questions:

1. Is it more likely that the judicial discretion will be exercised in favour of admission of improperly or illegally obtained evidence rather than exclusion of the same?
2. Does the likelihood of admission or exclusion of improperly or illegally obtained evidence vary for particular categories of criminal offences or causes of action?
3. Does the study of the sample group reveal any factors in the reasoning

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656 See *Regina v Dalley* [2002] NSW CCA 284.

process that may influence the likelihood of findings of impropriety, illegality, no impropriety or no illegality?

4. Do the incidence of findings of impropriety or illegality compared to the incidence of findings of no impropriety or no illegality reveal anything about the discretionary exercise?
5. Are there any instances in which an act or omission said to involve an impropriety or illegality was or could be classified as "'process corruption"?[657]
6. Did any of the findings of impropriety or illegality involve consideration of an individual investigator's history of past transgressions?

General conclusions about the workings of the judicial discretion will be drawn from the answers to the questions above and, in particular, whether the judicial discretion is effective in achieving its objective?

7.4 Findings

1. *Is it more likely that the judicial discretion will be exercised in favour of admission of improperly or illegally obtained evidence rather than exclusion of the same?*

Broadly speaking in approximately 70% of the trial cases sampled, the challenged evidence was admitted.[658] There was little variation between the common law and statutory jurisdictions in this regard. Common law trial cases accounted for 53 of 99 trial matters examined. Of those 53 matters, the Court had given dual rulings

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657 For definition of process corruption see chapter 2.

658 Of 99 total trial cases, evidence was admitted in 72 of 99 cases equating to a probability of 70.6%, excluded in 24 of 99 cases equating to 23.5% probability and not enlivened in 6 of 99 cases equating to a 5.9% probability.

excluding and admitting select evidence in three cases. In order to calculate likelihood of admission or exclusion in percentage terms, these three cases were counted twice bringing the total common law trial matters to 56. Evidence was admitted in 40 of 56 cases or 71.4% of the sample, excluded in 10 of 56 cases or 17.9% of the sample, and the discretion held not to be enlivened in 6 of 56 cases or 10.7% of cases sampled. The statutory trial cases totalled 46. Of these cases, the Court admitted the evidence in 32 of 46 cases or 69.6% of the sample, and excluded the evidence in the remaining 14 matters or 30.4% of cases sampled. There were no rulings that the discretion was not enlivened.

Rulings of appellate courts were not so uniform between the jurisdictions. An analysis of appeal cases reflected the nature of the appellate procedure. The decision of the trial judge to admit or exclude the evidence was noted, then the determination of the appellate court whether or not the trial judge had applied correct principles, or the discretion had not been enlivened were recorded. In the common law jurisdictions, trial judges admitted evidence in 40 of 49 appeal cases representing 81.6% of the sample, and excluded evidence in the remainder of 9 cases, being 18.4% of the total appeal case sample.[659] In 28 of 49 cases, the appellate courts held that the trial judge had applied correct principles and so there was no basis to review the decision. This represented approximately 57.1% of common law appeal cases sampled. The appellate courts found that the trial judge had not applied the correct principles in 10 of 49 cases, representing approximately 20% of appeal cases sampled. In 11 of 49 cases or 22.4% of sampled appeal

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659 In percentage terms, evidence was admitted at trial in 81.6% of appeal cases, and excluded at trial in 18.4% of appeal cases.

cases, the appellate courts found that the discretion had not been enlivened.

The statutory appeal cases stand in contrast to common law cases both in terms of the incidence of reception of evidence at trial and the application of correct principles by the trial judge. There were 50 statutory appeal cases. The trial judge admitted the evidence in 32 of 50 appeal cases, representing 64% of the sample, and excluded the evidence in the remaining 17 matters or 34% of the sample.[660] Correct principles were applied by trial judges in half of the matters, 25 of 50 appeal cases, or 50% of the sample group, and incorrect principles applied in 23 of 50 appeal cases, or 46% of the appellate sample. There were two instances, where the appellant court found that the discretion was not enlivened.[661] The relatively high incidence of incorrect principles being applied may be attributable to the determinations by the trial judges being made in the early life of the *Uniform Evidence Act* and the time lag for the determination of the subsequent appeals.

Overall, the sample cases reveal that the trial judge admitted the evidence in 72.7% of appeal cases and the trial judge excluded the evidence in 26.3% of appeal cases sampled.[662] Correct principles were applied in 53.5% of all appeal cases, incorrect principles in 33.3% of all appeal cases and the discretion was not enlivened in

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660 There is an anomaly of 2% or one case in the calculation of the incidence rate. In *Regina v Lykouras* (Unreported, NSW Court of Criminal Appeal, Sully J, Hidden K and Howie J, 4 Fenruary 2005) the trial judge did not make a determination to admit or exclude the evidence.

661 The two cases accounted for 4% of the appellant sample.

662 Representing 72 of 99 appeal cases and 26 of 99 cases respectively. In two appeal cases, the trial judges found that the discretion had not been enlivened which represented 1% of the total appellant cases.

approximately 13.2% of all appeal cases.[663]

2. *Does the likelihood of admission or exclusion of improperly or illegally obtained evidence vary for particular categories of criminal offences or causes of action?*

The study results indicate that there is a correlation between particular categories of criminal offences and the incidence of admission. The impugned evidence was admitted in 70.6% of all trial cases sampled, and excluded in 23.5% of all trial cases sampled.[664] For the criminal category of offences against the person (including murder), evidence was admitted in 78.2% of the cases sampled and excluded in 12.7% of cases sampled. There was little variation between the incidence of admission or exclusion for common law and statutory matters. Admission of evidence at trial, subject of an appeal, was slightly higher again at 79.2% of the sample. So too the likelihood of exclusion of evidence at trial, the subject of an appeal, was higher at 20.8% of the sample. The incidence of admission is attributable to the dominance of murder cases in the sample study.[665] The reasons for the higher admission rate are discussed in the next section.

The sample of property offences was small[666] but evenly divided between admission and exclusion of evidence at trial. In trial matters, evidence was

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663 This translates to 53 of 99 appellant cases, 33 of 99 appellant cases and 13 of 99 appellant cases respectively.

664 There is 5.9% chance that the discretion will not enlivened.

665 The total murder cases, both trial and appeal, numbered 58 representing more than a quarter of the study sample of 198 cases.

666 A total of nine (9) trial cases and six (6) appeal cases for all common law and statutory jurisdictions.

admitted in 44% of the sample and excluded in 44% of the sample.[667] Admission of evidence at trial, the subject of an appeal, was 100% of the sample. The small sample size for appeal cases renders this result nugatory.

In drug matters, the trial judge excluded the evidence in 41.2% of the sample and admitted the evidence in 58.8% of the cases sampled. The higher rate of exclusion may be attributable to the relative high number of ACT trial decisions comparative to the sample size of 17. In each of the four ACT decisions, the court excluded the evidence and in one case the court gave dual rulings admitting and excluding select evidence.

The appeal case sample included 13 driving and/or traffic offences.[668] The sample of traffic case appeals revealed that evidence was admitted at hearing or trial in 67% of the sample cases and excluded in 33% of the sample cases. The incidence of admission of challenged evidence in driving and/or traffic matters, at first instance, was lower than the overall incidence of admission for the total trial cases sampled.[669] It was also found to be lower than those appeal cases where evidence had been admitted at trial.[670] These observations are consistent with the prevailing judicial view that the gravity of an offence is a factor favouring admission

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667 There was a 12% chance that the discretion was not enlivened.

668 Driving and/or traffic matters are classified summary offences and as such are heard in the first instance by a Magistrate. Generally, transcripts of the Local or Magistrates Court judgments are only available on written application and payment of the prescribed fees. Details of the particular case must be supplied for each transcript application. The driving and/or traffic offences included in the sample are: "drive whilst disqualified", "drive with higher than the prescribed concentration of alcohol", "drive manner dangerous", "drive speed dangerous", "drive under the influence of drugs".

669 Evidence was admitted in 70.6% of the trial case sample.

670 Evidence was admitted at trial in 79.2% of appellant case sample.

of the impugned evidence.[671] For the most part, driving and traffic offences are summary offences and are on the lesser scale of criminal offences. However, it should be noted the case sample indicated that the incidence of admission of impugned evidence was found to be twice the level of the incidence of exclusion for these types of offences.

The sample included 12 civil cases. The challenged evidence was admitted In 67% of civil cases sampled, compared to the remainder of 33% of civil cases sampled where evidence was excluded. Some caution should be exercised before placing too much weight on these observations. Firstly, the sample size is small. It cannot be safely regarded as representative of civil cases generally. Secondly, a judicial discretion to admit improperly or illegally obtained evidence in civil matters exists only in the statutory jurisdictions. In the past decade, since the enactment of the *Uniform Evidence Act,* there has only been a small body of case law considering the wider application and exercise of section 138 discretion outside its traditional criminal parameters. Nevertheless, the incidence of admission or exclusion do not depart greatly from the incidence of admission or exclusion in respect of criminal prosecutions and are consistent with the general proposition that the impugned evidence is more likely to be admitted than excluded.

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671 *Regina v Dalley* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Blanch AJ, 19 July 2002).

3. *Does the study of the sample group reveal any factors in the reasoning process that may influence the likelihood of findings of impropriety, illegality, no impropriety or no illegality?*

The sample of cases revealed a significant discrepancy between the number of findings of impropriety and/or illegality compared to the findings of no impropriety and/or no illegality. A closer examination of the court rulings suggest that there is a judicial inclination to downplay the seriousness of any misconduct or omission on the part of law enforcement officers when determining whether such misconduct or omission should be classified as improper or unlawful. This is borne out by the frequent rulings that such breaches were not "deliberate or reckless"[672] which resulted in either admission of the evidence or a finding of no impropriety or no illegality.[673] Such rulings are not confined to particular offences but were made

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672 For example see, *R v Southeren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001); *R v Dalton* (Unreported, NSW Supreme Court, Adams J, 15 December 2004); *R v Stankovich* (Unreported, ACT Supreme Court, Spender J, 1 October 2004); *R v Martin Ross Hausfield* (Unreported, NSW Supreme Court, Levine J, 3 July 2002).

673 There were 47 instances in the sample of 198 cases in which such rulings were made. See *Regina v Helmhout* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Hulme J and Sperling J, 19 September 2001); *Regina v Ladocki* (Unreported, NSW Court of Criminal Appeal, Mason P, Sully J and Sperling J, 1 October 2004); *R v Rondo* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson K and Smart AJ, 24 December 2001); *R v Southeren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001); *R v Pimentel* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 10 December 1999); *R v Dalton* (Unreported, NSW Supreme Court, Adams J, 15 December 2004); *R v Mallah* (Unreported, NSW Supreme Court, Wood CJ at common law); *The Queen v Taylor* (Unreported, ACT Supreme Court, Higgins J, 26 May 1999); *R v Stankovich* (Unreported, ACT Supreme Court, Spender J, 11 October 2004); *Regina v Knight aka Black* (Unreported, NSW Court of Criminal Appeal, Heydon JA, Studdert J and and Greg James J, 30 March 2001); *Comptroller-General of Customs v Stephen Edward Parker* (Unreported, NSW Supreme Court, Simpson J, 8 May 2006); *Ponizo v Multiplex Pty Ltd* (Unreported, Federal Court of Australia, Marshall J, 5 October 2005); *R v Martin Ross Hausfield* (Unreported, NSW Supreme Court, Levine J, 3 July 2002); *R v Lamb & Thurston* (Unreported, NSW Supreme Court, Dunford J, 24 April 2002); *Environment Protection Authority v McConnell Dowell Constructors (Australia) Pty Ltd* (Unreported, NSW Land and Environment Court, Pearlman J, 12 November 2002); *Regina v Toro-Martinez* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Newman J and Adams J, 7 June 2000); *Regina v Bowhay (No 2)* (Unreported, NSW Supreme Court, Dunford J, 11 November 1998); *Regina v Kane* (Unreported, NSW Court of Criminal Appeal, Hadley JA, Ipp AJA,

across all offence categories represented in the study sample. Typically, findings of impropriety and/or illegality were made in cases involving flagrant or blatant serious breaches of the law or proprieties.[674] In such cases, the courts condemned the conduct and generally excluded the evidence. An exception to general exclusion of such evidence occurs in drug prosecutions. Courts have recognised that

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Greg James J, 3 May 2001); *R v Deborah Joy Davidson & ors* (Unreported, NSW Supreme Court, Bell J, 28 February 2000); *R v Brown* (Unreported, Queensland Court of Appeal, McPherson JA, Chesterman and Mullins JJ, 28 April 2006); *R v Lobban* (Unreported, SA Supreme Court, Doyle CJ, Bleby and Martin JJ, 2 June 2000); *R v Burns & ors* (Unreported, SA Supreme Court, Olsson J, 18 November 1999); *R v Haydon (No 4)* (Unreported SA Supreme Court, Sulan J, 21 January 2005); *R v Bunting & Wagner (No 5)* (Unreported, SA Supreme Court, Martin J, 29 October 2003); *R v Gassy* (Unreported, SA Supreme Court, Vanstone J, 28 October 2004); *R v Domokos & ors (No 2)* (Unreported, SA District Court, Robertson J, 16 June 2004); *R v Paul Charles Elluli* (Unreported, SA District Court, Rice J, 2 February 2001); *R v Schaefer, Schiworki & Brown* (Unreported, SA District Court, Millsteed J, 17 December 2004); *R v Lewis* (Unreported, Victorian Supreme Court, Court of Appeal, Winneke P, Tadgell JA, and Hedigan AJA, 9 August 2000); *R v Favata* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Teague JJA, 21 April 2006); *R v Tofilau* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Frugtniet* (Unreported, Victoria Supreme Court, Court of Appeal, Brookings, Phillip and Buchanan JJA, 19 May 1999); *R v Hill* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Franklin* (Unreported, Victorian Supreme Court, Vincent J, 23 July 1998); *R v Favata* (Unreported, Victorian Supreme Court, Teague J, 23 January 2004); *R v Tofilau* (Unreported, Victorian Supreme Court, Osborn J, 6 June 2003); *R v Ng* (Unreported, Victorian Supreme Court, Teague J, 12 December 2002); *R v Marks* (Unreported, Victorian Supreme Court, Coldrey J, 24 November 2004); *R v Clarke* (Unreported, Victorian Supreme Court , Kellam J, 19 January 2004); *DPP V Ghiller* (Unreported, Victorian Supreme Court, Cummins J, 9 September 2003); *R v Su & Goerlitz* (Unreported, Victorian Supreme Court, Coldrey J, 29 July 2003); *R v KS & Said* (Unreported, Victorian Supreme Court, Coldrey J, 16 October 2003); *R v Gojanovic* (Unreported, Victorian Supreme Court, Coldrey J, 5 March 2002); *Jacobs v The Queen* (Unreported, WA Supreme Court, Court of Appeal, Kennedy J, Steytler J and Wheeler J, 25 May 2000); *R vTan* (Unreported, WA Supreme Court, McLure J, 5 October 2001); *The Queen v Bronwyn Rankin* (Unreported, NT Supreme Court, Thomas J, 4 December 1998); *The Queen v Spencer* (Unreported, NT Supreme Court, Thomas J, 21 June 2000).

674 *The Queen v Malloy* (Unreported, ACT Supreme Court, Crispin J, 9 November 1999); *Regina v Dungay* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Studdert J and Greg James J, 1 November 2001); *R v Cvitko* (Unreported, SA Supreme Court, Martin J, 1 March 2001); *R v Pirie* (Unreported, SA District Court, Bishop J, 26 October 1999); *R v Roba & ors* (Unreported, Victorian Supreme Court, Coldrey J, 7 February 2000); *R v Hartwick & ors* (No 1) (Unreported, Victorian Supreme Court, Smith J, 3 October 2002); *R v Chimirri* (Unreported, Victorian Supreme Court, Osborn J, 11 December 2002); *R v Dewhirst* (Unreported, Victorian Supreme Court, Coldrey J, 24 May 2001); *R v Thomas* (Unreported, Victorian Supreme Court, Court of Appeal, Maxwell P, Neave JA and Mandie AJA, 18 August 2006).

"subterfuge, ruses or tricks"[675] are necessary in the detection and investigation of drug offences, and accordingly given some latitude to the police in this regard. Although the likelihood of findings of impropriety and/or illegality are much greater in drug matters,[676] trial courts are more likely to admit the evidence than exclude it in these types of matters. Of the sample group, in 58.8% of drug cases the evidence was admitted compared to 41.2% of all drug cases where evidence was excluded.

The judicial approach to the discretionary exercise in drug matters stands in stark contrast to that taken in murder prosecutions. Charges for murder represent more than a quarter of the survey sample. In murder cases sampled, a finding of no impropriety was made in 46.4% of murder cases, a finding of no illegality was made in 39.1% of murder cases, a finding of an impropriety was made in 10.1% of murder cases, and a finding of an illegality was made in 4.4% of such cases. In an overwhelmingly 87.5% of murder cases sampled, the evidence was admitted and excluded in only 0.5% of all such cases.[677] These outcomes are consistent with prevailing judicial view that greater weight be given to the public interest favouring admission of such evidence in respect of more serious offences[678] and this is also reflected in the curt manner in which the nature and seriousness of the offence is

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675 *Swaffield v R; R v Pavic* (1998) 151 ALR 98, 142 (Kirby J).

676 In trial matters involving drug offences for all jurisdictions the probability of findings of no impropriety was 15.4%, no illegality was 19.2%, impropriety was 34.6% and illegality 30.8%. This contrasted to the probability of such findings in all trial matters for all jurisdictions, where the probability of findings of no impropriety was 35.9%, no illegality was 34.3%, impropriety was 17.7% and illegality was 12.1%.

677 The discretion was not enlivened in 7.5% of all murder cases sampled.

678 *Regina v Dalley* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ and Blanch AJ, 19 July 2002).

often considered in murder prosecutions.[679]

These results indicate that the nature of the offence is influential in the likelihood that findings of impropriety or illegality being made murder prosecutions and drug matters. It is also evident in the higher incidence of admission of the challenged evidence in prosecutions for such offences.

Conversely, in criminal prosecutions against vulnerable persons,[680] especially those against minors, the Court's response to infringements of the rights of accused persons, particularly persons held in custody, is sharper.[681] In *R v Phung and*

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679 Ibid (Simpson J), [15]: "As I have noted, her Honour simply observed that the charge was one of murder";

R v Helmhout & ors (Unreported, NSW Supreme Court, Ipp AJA, Hulme J and Sperling J, 23 February 2000): "I next turn to the nature of the offence and it is sufficient to state that the accused is charged with murder";

R v Southeren (Unreported, NSW Supreme Court, Dowd J, 26 March 2001), [5]: "The nature of the events is, in respect of murder, at the top of the realm of seriousness, and indeed, the other offences are also serious";

R v Singh (Unreported, ACT Supreme Court, Crispin J, 12 April 1999), [4-5]: "The offences charged included one count of murder and one of attempted murder.." ;

R v Dalton (Unreported, NSW Supreme Court, Adams J, 15 December 2001), [6]: "It is obvious that the offences are very serious.." The accused was charged with two counts of incitement to murder.

680 The law recognises "vulnerable persons" to include minors, indigenous persons, intellectually impaired persons and persons with language difficulties.

681 *R v Phung and Hunyh* (Unreported, NSW Supreme Court, Wood CJ at common law, 26 February 2001); *DPP v AM* (Unreported, NSW Supreme Court, Hall J, 2 May 2006); *DPP v CAD & Ors* (Unreported, NSW Supreme Court, Bar J, 26 March 2003); *Regina v G* (Unreported, NSW Court of Criminal Appeal, Grove J, Hidden J and Bell J, 25 August 2005); *R v LR* (Unreported, Queensland Court of Appeal, MacPherson and Keane JJA and Douglas J, 30 September 2005); *R v Lancaster* (Unreported, Victorian Supreme Court, Winneke P, Tadgell and Batt JJA, 22 June 1998); *R v Mohammed* (Unreported, Victorian Supreme Court, Kaye J, 24 August 2004); *R v KS & Said* (Unreported, Victorian Supreme Court, Coldrey J, 16 October 2003); *Cox v The Queen* (Unreported, WA Supreme Court, Court of Appeal, Anderson J, Templeman J and Olsson AJJ, 19 December 2002); *Nicholls v Woods* (Unreported, WA Supreme Court, Court of Appeal, Miller J, 1 December 2000); *Basil Dumoo v Donald Anthony Garner* (1998) 7 NTLR 129; *Regina v Amos Wilson*

Huynh[682] Wood J excluded the video record of interview between the police and a young offender charged with murder and three counts of armed robbery. The police had committed numerous breaches of the statutory safeguards to protect juvenile offenders during the interview procedure, which collectively justified exclusion. Wood J further stated that the police must understand and give full effect to their legislative obligations warning that perfunctory performance of such obligations is not acceptable.

(Unreported, NT Supreme Court, Kearney J, 20 November 1998).

682 (Unreported, NSW Supreme Court, Wood CJ at common law, 26 February 2001).

4. Do the incidence of findings of impropriety or illegality (compared to the incidence of findings of no impropriety or no illegality) reveal anything about the discretionary exercise?

Positive or negative findings of an impropriety or illegality are significant in understanding the exercise of the public policy discretion. The enlivenment of the discretion is dependant upon a positive finding of an impropriety or illegality. If no such finding is made, then the discretion is not enlivened. A positive finding of an impropriety or illegality does not necessarily result in the exclusion of the impugned evidence. Admission or exclusion of the challenged evidence will depend upon the court balancing the relevant factors.[683]

The incidence of positive or negative findings is also relevant in evaluating the effectiveness of the statutory discretion compared to its common law equivalent. This evaluation rests upon the two key differences between the discretions. The first difference is the shifting of the onus of proof. At common law, the objecting party bears the onus to establish the impropriety or illegality and to justify why the contentious evidence should be excluded. Conversely, upon enlivenment of the statutory discretion, the onus of proof moves from the objecting party to the party seeking to adduce the evidence. Secondly, altering the presumption favouring admission to a presumption favouring exclusion of the impugned evidence.

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683 *Uniform Evidence Acts 1995*, s 138(3); for the common law discretion see *Bunning v Cross* (1978) 141 CLR 54; *Ridgeway v The Queen* (1995) 129 ALR 41; *Regina v Swaffield* ; *Pavic v R* (1998) 151 ALR 98.

The incidence of negative findings will indicate the rate of success or failure for applications to the court to exercise its judicial discretion. It may also indicate whether there is any difference in the rate of success or failure for statutory or common law applications. Comparisons between the incidence of positive findings and the reported incidences of exclusion or admission of impugned evidence may also reveal something about the application of the judicial discretion.

Usually, the judge at first instance makes positive or negative findings of an impropriety or illegality, as part of the discretionary exercise. Such findings are rarely made by an appeal court. The sample observations indicate that negative findings of an impropriety or illegality greatly exceed a positive finding of this kind.

In the total trial sample, a finding of no impropriety was made in 35.9% of cases sampled, a finding of no illegality was made in 34.3% of cases sampled, a finding of an impropriety was made in 17.7% of cases, and a finding of an illegality was made in 12.1% of such cases. In other words, the incidence of a negative finding of impropriety occurred at more than twice the incidence of a positive finding of this nature. The incidence of a negative finding of illegality occurred almost three times more often than a finding to the contrary.

There was some divergence between common law and statutory trial matters in this regard. For common law trial matters, a finding of no impropriety was made in 36.5% of the sample, a finding of no illegality was made in 38.5% of the sample, a finding of an impropriety was made in 15.4% of the sample, and a finding of an illegality was made in 9.6% of such cases. However, for statutory trial matters a finding of no impropriety was made in 35.0% of cases, a finding of no illegality was

made in 28.6% of cases, a finding of an impropriety was made in 20.8% of cases, and a finding of an illegality was made in 15.6% of cases. Significantly, there are more than twice the number of murder prosecutions in the common law trial matters compared to statutory trial matters,[684] and this, it is submitted, is the likely explanation for the higher incidence of negative findings at common law.

With the exception of drug offences, this general pattern was replicated to varying degrees among other categories of criminal offences, and in the civil cases. In the category of offences against the person, a finding of no impropriety was made in 51.3% of cases, a finding of no illegality was made in 22.4% of cases, a finding of an impropriety was made in 18.4% of cases, and a finding of an illegality was made in 7.9% of cases. These reported instances are greatly influenced by the findings made in murder prosecutions. The disparity between the positive and negative findings was greater in murder prosecutions than for other categories of assault. For murder cases, a finding of no impropriety was made in 46.4% of cases, a finding of no illegality was made in 39.1% of cases, a finding of an impropriety was made in 10.1% of cases, and a finding of an illegality was made in 4.4% of cases. These results are consistent with and reflect the higher rate of admission of impugned evidence in murder cases.

The incidence of positive and negative findings was more closely aligned for property offences. For property offences, a finding of no impropriety was made in

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684 There were 27 common law murder prosecutions compared to 13 statutory murder prosecutions.

33.3% of cases, a finding of no illegality was made in 27.8% of cases, a finding of an impropriety was made in 16.7% of cases, and a finding of an illegality was made in 22.2% of cases. A similar picture is revealed for civil suits. In the sample of civil trials, a finding of no impropriety was made in 36.9% of cases, a finding of no illegality was made in 26.3% of cases, a finding of an impropriety was made in 26.3% of cases, and a finding of an illegality was made in 10.5% of cases.

For drug prosecutions, the correlation between positive and negative findings was the opposite. In the trial sample of drug prosecutions, a finding of no impropriety was made in 15.4% of cases, a finding of no illegality was made in 19.2% of cases, a finding of an impropriety was made in 34.6% of cases, and a finding of an illegality was made in 30.8% of such cases. Investigations into illicit drug activities often involve the use of undercover operatives and other covert techniques. This is a fact acknowledged and accepted by the courts. The peculiar nature of investigations of illicit drug offences and covert investigative tools used are the principal reasons for the incidence of positive and negative findings deviating from the general incidences of the same.

5. *Are there any instances in which an act or omission said to involve an impropriety or illegality was or could be classified as "'process corruption"?*

Process corruption is defined as the "abuse or misuse of police powers."[685] "Abuse" and "misuse" both involve wrong or improper use. In this sense, findings of impropriety and/or illegality against police in the exercise of their powers satisfies the definition of process corruption, although "process corruption" is not a term used by the courts to describe police misconduct or malpractice. A positive finding

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685 See chapter 3.

of impropriety or illegality is serious and not made lightly by a court.[686] To make a finding that an impropriety or illegality was "deliberate" the court must be satisfied that the police officer made a "conscious decision to breach a statutory duty."[687] To find that an impropriety or illegality was "reckless", the court must be satisfied that the police officer was aware of a possible breach of a statutory duty but decided to take the risk and act regardless.[688] It is a difficult task to satisfy either test. Among the cases sampled, the NSW decisions indicate that the courts are inclined to excuse police misconduct or malpractice rather than make findings of deliberateness or recklessness.[689] In *R v Ladocki*[690] the Court of Criminal Appeal upheld a trial judge's ruling that describing a police officer's conduct as reckless did not equate to a finding of recklessness.[691] Despite finding that the police had committed a deliberate impropriety, the trial judge in a criminal prosecution for murder and armed robbery admitted film of the accused person, which was relied upon for the purposes of identification.[692] The film was taken by the police at Long Bay Correctional Centre without the accused's permission and two days after the

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686 *DPP v Leonard* (Unreported, NSW Supreme Court, James J, 14 September 2007); *R v Ladocki* (Unreported, NSW Court of Criminal Appeal, Mason P, Sully J and Sperling J, 1 October 2004); *R v Southeren* (Unreported, NSW Supreme Court, Adams J, 26 March 2001).

687 *DPP v Leonard* (Unreported, NSW Supreme Court, James J, 14 September 2007), [14].

688 Ibid.

689 Ibid; *R v Ladocki* (Unreported, NSW Court of Criminal Appeal, Mason P, Sully J and Sperling J, 1 October 2004); *R v Southeren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001); *R v Dalton* (Unreported, NSW Supreme Court, Adams J, 15 December 2004).

690 (Unreported, NSW Court of Criminal Appeal, Mason P, Sully J and Sperling J, 1 October 2004).

691 Ibid [14]. The accused was tried for supplying a prohibited drug (heroin).

692 *R v Southeren* (Unreported, NSW Supreme Court, Dowd J, 26 March 2001).

accused's earlier refusal to participate in an identification parade or be interviewed unless his legal representative was present. Breaches or contraventions will be more readily excused where the police had acted in good faith.[693]

It also appears that adverse findings against the police occur less often where the alleged impropriety or illegality is the unlawful detention of an accused person.[694] Where the alleged impropriety or contravention is a covert recording of an accused person and an undercover agent, the judiciary's application of the discretionary principles to similar factual situations do not seem consistent. Where covert recordings are made as part of an elaborate undercover operation, the court appears inclined to excuse any impropriety or illegality and admit the evidence.[695] In other instances, where the court had found the police deliberately infringed an accused person's right to silence then the court has excluded the evidence.[696]

Debate about the validity of an arrest and the reception of evidence consequentially

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693 *R v Dalton* (Unreported, NSW Supreme Court, Adams J, 15 December 2004); *R v Pimentel* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 10 December 1999); *R v Mallah* (Unreported, NSW Supreme Court, Wood CJ at common law); *Regina v Cornwell* (Unreported, NSW Supreme Court, Howie J, 20 February 2003); *R v Brown* (Unreported, Queensland Court of Appeal, McPherson JA, Chesterman and Mullins JJ, 28 April 2006); *R v Ng* (Unreported, Victorian Supreme Court, Teague J, 12 December 2002).

694 *R v Rooke* (Unreported, NSW Court of Criminal Appeal, Newman, Levine and Barr JJ, 2 September 1997); *Regina v Kane* (Unreported, NSW Court of Criminal Appeal, Handley JA, Ipp AJA and Greg James J, 3 May 2001); *R v Deborah Joy Davidson & ors* (Unreported, NSW Supreme Court, Bell J, 28 February 2000).

695 *R v Ng* (Unreported, Victorian Supreme Court, Teague J, 12 December 2002); *DPP v Ghiller* (Unreported, Victorian Supreme Court, Cummins J, 9 September 2003); *R v Marks* (Unreported, Victorian Supreme Court, Coldrey J, 24 November 2004); *R v Clarke* (Unreported, Victorian Supreme Court, Kellam J, 19 January 2004).

696 *R v Chimirri* (Unreported, Victorian Supreme Court, Osborn J, 11 December 2002); *R v Hartwick & ors (No 1)* (Unreported, Victorian Supreme Court, Smith J, 3 October 2002).

obtained have been contentious issues in some cases. Generally, police should exercise the power of arrest for a proper purpose and as a last resort when other process is not appropriate for the initiation of criminal proceedings.[697] An arrest of an accused person for a minor offence, which escalated a volatile situation resulting in the commission of three further offences, was found to be improper.[698] The apprehension of juvenile offenders contrary to statutory requirements and guidelines for prosecuting young persons was also held to be improper.[699] In contrast, the arrest of an intoxicated person causing a disturbance on a suburban railway platform was held to be proper.[700]

In *Regina v Daley*[701] the police arrested an accused person ostensibly for traffic offences but with the underlying objective to obtain a DNA sample from him. The purpose of the DNA sample was to either confirm police suspicions about the accused person's involvement in a series of aggravated sexual assaults and armed robberies or to eliminate him from police inquiries. The trial judge Simpson J found no impropriety had occurred because:

1. Although prosecution of such traffic matters were usually by summons rather than charge, the offences were genuine and the accused person had

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697 *Regina v Dungay* (Unreported, NSW Court of Criminal Appeal, Ipp AJA, Studdert J and Greg James J, 1 November 2001); *DPP v Coe* (Unreported, NSW Supreme Court, Adams J, 5 May 2003); *DPP v AM* (Unreported, NSW Supreme Court, Hall J, 22 May 2006); *DPP v CAD & Ors* (Unreported, NSW Supreme Court, Barr J, 26 March 2003).

698 *DPP v Lance Carr* (Unreported, NSW Supreme Court, Smart AJ, 25 January 2002).

699 *DPP v CAD & Ors* (Unreported, NSW Supreme Court, 26 March 2003); *DPP v AM* (Unreported, NSW Supreme Court, 2 May 2006).

700 *Wilson v DPP* (Unreported, NSW Supreme Court, Cripps AJ, 10 October 2002).

701 (Unreported, NSW Supreme Court, Simpson J, 14 September 2001).

been found guilty of the subject offences.

2. The accused person was a suspect for a series of aggravated sexual assaults and armed robberies.
3. The police were fearful of further imminent attacks upon other women in the community.
4. The DNA sample would either confirm police suspicions or rule out the accused person as a person of interest.

The trial judge relied significantly upon the fact that the traffic prosecutions were bona fide and the risk to the community of further attacks.

The valid exercise of police powers to search a person or place typically depends upon the officer holding the requisite belief or suspicion and/or satisfaction of any legislative provisions to justify the search.[702] Challenges to evidence gathered in consequence of an unauthorised search often occur in drug prosecutions. The findings of the case study show that the Court is more likely to make findings of impropriety or illegality in drug matters than for any other category of criminal

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702 *Regina v Loc Huu Phan* (Unreported, NSW Court of Criminal Appeal, Meagher ACJ, Hulme J and Hidden J, 24 July 2003); *DPP v Farr* (Unreported, NSW Supreme Court, Smart AJ, 5 January 2001); *DPP v Leonard* (Unreported, NSW Supreme Court, James J, 14 September 2001); *R v Rondo* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Smart AJ, 24 December 2001); *R v McKeough* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 3 December 2003); *Darby v The Queen* (Unreported, NSW Court of Appeal, Giles JA, Ipp JA and McColl JA, 26 November 2004); *R v Stanikovich* (Unreported, ACT, Spender J, 1 October 2004); *R v Khajehnnoni* (Unreported, ACT Supreme Court, Gyles J, 9 August 2005); *Comptroller-General of Customs v Stephen Edward Parker* (Unreported, NSW Supreme Court, Simpson J, 8 May 2006); *R v MacDonald, Parsons and Radman* (Unreported, ACT Supreme Court, Gray J, 6 March 2002); *R v Trevitt* (Unreported, ACT Supreme Court, Higgins CJ, 7 June 2005); *O'Meara v Regina* (Unreported, NSW Court of Criminal Appeal, Simpson J, Buddin J and Hall J, 28 April 2006); *R v Bruno, Softley and Wilson* (Unreported, SA District Court, Sulan J, 29 March 1999); *R v Paul Charles Elluli* (Unreported, SA District Court, Rice J. 2 February 2001); *The Queen v Cant* (Unreported, NT Supreme Court, Thomas J. 25 May 2001).

offence. One explanation for the higher incidence of such findings may be the nature of a drug investigation, often involving some degree of covert police activity, which does not occur with the same frequency in other criminal investigations. The sample of drug matters does not reveal any inclination on the part of the courts to extend greater leniency to the police in the exercise of search powers in the investigation of drug offences as opposed to other crimes.[703]

The most controversial area of more recent times has been the covert recording of conversations between an accused and other witnesses. The admission of the secret recording is usually challenged on the basis that the accused's right to silence has been infringed or circumvented, particularly, if an accused had previously declined to answer police questions in a formal interview or the other participant in the conversation is a police operative or agent.

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703 For example see, *R v Rondo* (Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Simpson J and Smart AHJ, 24 December 2001); *R v Trevitt* (Unreported, ACT Supreme Court, 7 June 2005); *O'Meara v Regina* (Unreported, NSW Court of Criminal Appeal, 28 April 2006); *R v Moussa* (Unreported, NSW Court of Criminal Appeal, 15 November 2001).

Challenges may also be made to the validity of a telephone interception warrant authorising the recording. The prevailing judicial approach appears to extend some leniency to the police in the making of covert recordings, especially those made during undercover operations. The seriousness of the offence under investigation is preferred to the infringement of an accused person's right to silence. This situation raises genuine concerns and fears about the derogation of a fundamental democratic right.[704]

The courts acknowledge the broad problem of police corruption.[705] However, it is corruption in a narrow sense that is relevant to the discretionary exercise that is "possible corruption in relation to the parties or the cause or a 'corrupt testimonial intent for the case in hand'.'[706] Restricting incidents of process corruption to those connected with the current proceedings is consistent with the rule of evidence that admissible evidence should be relevant, directly or indirectly, to a fact in issue. Historical incidents of process corruption or an investigator's personal antecedents of misconduct may raise questions of credibility, but evidence of such is not relevant unless the past allegations were proven resulting in either conviction or substantiation of a complaint,[707]or in limited circumstances to prove propensity of a

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704 *Swaffield v R; R v Pavic* [1998] 151 ALR 98, (Kirby J); *R v O'Neill* [1996] 2 Qd R 326; *R v Davidson and Moyle; Ex parte Attorney General* [1996] 2 Qd. R 505.

705 *DPP v Ghiller* (Unreported, Victorian Supreme Court, Cummins J, 9 September 2003); *R v Clarke* (Unreported, Victorian Supreme Court, Kellam J, 19 January 2004); *R v Norton* (Unreported, WA Supreme Court, Hasluck J, 30 March 2001).

706 *R v Roberts & Urbanec* (Unreported, Victorian Supreme Court, Court of Appeal, Batt, Buchanan and Chernov JJA, 6 February 2004), [68-69].

707 Ibid.

prosecution witness to act in a particular manner.[708]

6. *Did any of the findings of impropriety or illegality involve consideration of an individual's history of past transgressions?*

The short answer is no. Apart from *R v Roberts & Urbanec*[709] none of the cases in the study sample involve any issue regarding an individual's history of past transgressions. In *R v Roberts & Urbanec*[710] the defence argued that the investigating officers, Detectives Rosenes and Paton, had planted the drugs on the accused persons. At the time of the trial, both Detective Rosenes and Paton were under investigation for corruption. The Victorian Court of Appeal affirmed the trial judge's ruling that evidence of the then current internal investigation of Detectives Rosenes and Paton for corruption was inadmissible because "unproven allegations gave rise to the officers' claim of privilege against self-incrimination which was upheld to prevent cross-examination."[711]

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708 Ibid; *R v Harmer* (1985) 28 A Crim R 35; *R v Polley* (1997) 67 SASR 227.

709 *R v Roberts & Urbanec* (Unreported, Victorian Supreme Court, Court of Appeal, Batt, Buchanan and Chernov JJA, 6 February 2004).

710 Ibid.

711 Ibid (Batt Buchanan and Chernov JJA), [70-72].

7.5 Conclusions

What are the conclusions that can be drawn about the workings of the judicial discretion to admit improperly or illegally obtained evidence? An analysis of judicial determinations based solely upon statistics must be treated with some caution because of the nature of discretionary judicial decisions. Application of correct principles is not formulaic. The rationale for admission or exclusion may be valid on the same facts, despite contrary determinations. However, statistics are relevant and do reveal some insights into the workings of this judicial discretion, particularly, where there are significant or consistent patterns across the jurisdictions. This is of particular interest when comparing the findings made in respect of the common law and statutory jurisdictions. The conformity between the jurisdictional outcomes question the effectiveness of presumptions in favour of admission or exclusion of challenged evidence. Once enlivened, the statutory discretion has a presumption of exclusion of the impugned evidence, unless the party seeking admission can justify why the court should receive such evidence. This contrasts to the position at common law, where the onus falls upon the objecting party to establish the alleged impropriety or illegality to enliven the discretion and why the court should reject such evidence. In theory, altering the presumption and shifting the onus of proof to the party seeking admission are significant amendments to the law but the survey results indicate that they had little, if any, impact on the exercise of the discretion. The conclusions drawn from the survey findings are set out below.

Firstly, the findings of the case sample support the proposition that improperly or illegally obtained evidence is more than likely to be admitted than excluded. The

study shows that admission is more than twice as likely as exclusion. This finding was consistent across the common law and statutory jurisdictions as well as the trial and appellate jurisdictions. Conformity across all jurisdictions reinforces the proposition that the judicial discretion will more likely be exercised to admit improperly or illegally obtained evidence.

Secondly, the incidence of positive and negative findings of impropriety and illegality also reveal that determinations favourable to law enforcement officers are more likely than those that are unfavourable. The disparity between the incidence of positive and negative findings vary to some degree according to the nature of the criminal offence charged, with the exception of drug prosecutions where the incidence of a negative finding was much greater than a positive finding.

Thirdly, if a measure of abuse or misuse of police power was taken from the discretionary rulings of the court then the reported incidence of process corruption would be low. This contradicts other research, findings and recommendations of commissions and inquiries into police corruption, and policing history itself that show that process corruption is both systemic and entrenched in police forces.[712]

Fourthly, the effectiveness of the judicial discretion must be tested by whether it achieves its purpose. The purpose of the judicial discretion is directed at the "reckless or calculated disregard of the law by law enforcement officers."[713] Its aim is to differentiate between deliberate and reckless acts or omissions, and those

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712 See chapter 2.

713 *Bunning v Cross* (1978) 141 CLR 54, 77(Stephen and Aicken JJ); *Pollard v The Queen* (1992) 176 CLR 177; *Foster v The Queen* (1993) 65 A Crim R 112 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Ridgeway v The Queen* (1995) 129 ALR 1 (Toohey J); *Lawrie v Muir* (1950) JC 19; *The People v O'Brien* [1965] IR 142.

acts or omissions that are careless or inadvertent. The study findings indicate that generally the court will give investigating police officers the benefit of doubt when determining if an impropriety or illegality has been committed, except for flagrant breaches of the law or proprieties. In taking this approach the court appears to ignore that investigations into serious criminal offences, tried on indictment, are usually conducted by experienced, able and capable officers including those attached to specialist units or possessing particular investigative expertise, and so the incidence of inadvertent or careless mistakes should be minimal. Additionally, the classification of an act or omission is made in isolation without regard to past breaches of law or proprieties committed by the investigating officers. If an investigator repeatedly disregards procedures or protocols during the conduct of a criminal investigation then this may suggest that the act or omission is deliberate or reckless. The context in which the act or omission is examined is crucial. If viewed in isolation then the court can only determine the nature of the breach on the testimony of witnesses and the gravity of the act or omission. The inability of the court to probe into or hear evidence of an investigating officer's past improprieties or illegalities means that the court is unlikely to find an impropriety or illegality has been committed except in the most blatant or flagrant instances.

Despite the elucidation of principles governing its exercise, the judicial discretion remains largely ineffective in preventing "statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct."[714] This remains the position, despite the key differences between the statutory and common law discretions. The incidence of

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714 *Pollard v The Queen* (1992) 176 CLR 177, 23-24 (Deane J).

admission or exclusion of impugned evidence amongst the sample statutory and common law cases is comparable. The statutory presumption favouring exclusion of such evidence and shifting the onus of proof to the applicant party has not had a material effect upon the discretionary exercise. The purpose of this paper is to explore and identify how the court may be placed in a better position to determine whether there has been a deliberate or reckless disregard of the law or proprieties or whether such acts or omissions are merely careless or inadvertent. This will be the topic for further discussion in subsequent chapters.

Appendix to Chapter 7

Saad v Canterbury City Council (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Grove J and Barr J, 18 April 2002); *R* v *Anthony James Daley* (Unreported, New South Wales Supreme Court, Simpson J, 14 September 2001); *Employment Advocate v Williamson* (Unreported, Federal Court of Australia, Gray, Branson, and Kelly JJ, 24 August 2001); *Regina v Burrell* (Unreported, New South Wales Supreme Court, Sully J, 5 March 2001); *Regina v Loc Huu Phan* (Unreported, New South Wales Court of Criminal Appeal, Meagher ACJ, Hulme J, and Hidden J, 24 July 2003); *DPP v Lance Carr* (Unreported, New South Wales Supreme Court, Smart AJ, 25 January 2002); *Leslie James Coulstock* (1998) 98 A Crim R 143; *Regina v Dalley* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Simpson J and Blanch AJ, 19 July 2004); *DPP v Farr* (Unreported, New South Wales Supreme Court, Smart AJ, 5 January 2001); *Regina v Eade* (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Greg James J and Kirby J, 15 November 2000); *Tony Haddad and Guivanni Tregali* (2000) 16 A Crim R 312; *R v Helmhout* (Unreported, New South Wales Court of Criminal Appeal, Ipp AJA, Hulme and Sperling JJ, 19 September 2001); *DPP v Leonard* (Unreported, New South Wales Supreme Court, James J, 14 September 2001); *DPP v Nicholls* (2001) 123 A Crim R 66; *R v Phung and Huynh* (Unreported, New South Wales Supreme Court, Wood CJ at CL, 26 February 2001); *R v Singh* (Australian Capital Territory Supreme Court, Crispin J, 12 April 1999); *Regina v Workman* (Unreported, New South Wales Supreme Court, Grove J, Dowd J, and Sperling J, 30 June 2004); *R v Bartle & ors* (Unreported, New South Wales Supreme Court, Mason P, Bar J, and Smart AJ, 3 December 2003); *R v Ladocki* (Unreported, New South Wales Court of Criminal Appeal. Mason P, Sully

J and Sperling J, 1 October 2004); *R v Rondo* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Simpson J and Smart AJ, 24 December 2001); *R v Southeren* (Unreported, New South Wales Supreme Court, Criminal Division, Dowd J, 26 March 2001); *R v Pimentel* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 10 December 1999); *The Queen v Malloy* (Unreported, Australian Capital Territory Supreme Court, Crispin J, 9 November 1999); *R v Ho, Tam* v *DPP* (Unreported, New South Wales Supreme Court, 15 May 1998); *R v Patsalis; R v Spathis* (No 3) (Unreported, New South Wales Supreme Court, Kirby J, 27 September 1999); *R v Walker* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Ireland J and Simpson J, 23 March 2000); *Downes v DPP* (Unreported, New South Wales Supreme Court, Studdert J, 16 November 2000); *R v Han Ming Deng* (Unreported, New South Wales Court of Criminal Appeal); *R v Pearce* (Unreported, New South Wales Court of Criminal Appeal, Dowd J, Greg James J, and Smart AJ, 7 November 2001); *R v Nicola* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Barr J and Bergin J, 11 March 2002); *See v Hardman & anor* (Unreported, New South Wales Supreme Court, Bryson J, 21 March 2002); *R v TO* (Unreported, New South Wales Court of Criminal Appeal, Sheller AJ, Barr J, and Greg James J, 26 June 2002); *Taylor v Burgess* (Unreported, New South Wales Supreme Court, Barrett J, 25 July 2002); *Wilson v DPP* (Unreported, New South Wales Supreme Court, Cripps AJ, 10 October 2002); *R v McKeough* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Dunford J and Hidden J, 3 December 2003); *R v Dalton* (Unreported, New South Wales Supreme Court, Adams J, 15 December 2004); *R v Mallah* (Unreported, New South Wales Supreme Court. Woods CJ at CL. 11 February 2005); *Regina v*

Dungay (Unreported, New South Wales, Court of Criminal Appeal, Ipp AJA, Studdert J, and Greg James J, 1 November 2001); *R v Fernando & anor* (Unreported, New South Wales Court of Criminal Appeal, Newman J, Studdert J and James J, 14 April 1999); *Regina v Cornwell* (Unreported, New South Wales Supreme Court, Howie J, 20 February 2003); *DPP v Coe* (Unreported, New South Wales Supreme Court, Adams J, 5 May 2003); *R v Sarlija* (Unreported, Australian Capital Territory Supreme Court, Gray J, 30 November 2005); *The Queen v Taylor* (Unreported, Australian Capital Territory Supreme Court, Higgins J, 26 May 1999); *Darby v The Queen* (Unreported, New South Wales Court of Appeal, Giles JA, Ipp JA, and McColl JA, 26 November 2004); *ACCC v The Rural Press Ltd* (Unreported, Federal Court of Australia, Mansfield J, 10 February 2000); *The Queen v Hardy* (Unreported, Australian Capital Territory Supreme Court, Higgins J, 2 November 2001); *Byrne v Byrne* (Unreported, Family Court of Australia, Halligan JR, 27 September 2002); *R v Mehajer & Jacobs* (Unreported, New South Wales Supreme Court, Studdert J, 17 April 2003); *Salters v Telstra Corporation Ltd* (Unreported, Administrative Appeals Tribunal of Australia, 23 August 2000); *R v Stankovich* (Unreported, Australian Capital Territory Supreme Court, Spender J, 1 October 2004); *DPP v AM* (Unreported, New South Wales Supreme Court, Hall J, 2 May 2006); *Griffiths and Migration Agents Registration Authority* (Unreported, Administrative Appeals Tribunal of Australia, 27 March 2001); *Robinson v Woolworths Ltd* (Unreported, New South Wales Court of Criminal Appeal, Basten JA, Barr J and Hall J, 14 December 2005); *Regina v Waters* (Unreported, Australian Capital Territory Supreme Court, Gray J, 15 March 2002); *Violi v Berrivale Orchards Ltd* (Unreported, Federal Court of Australia. Branson J, 14 June 2000); *M v Commission for Children and Young People* (No 2) (Unreported,

New South Wales Industrial Relations Commission, Boland J, 24 May 2004); *Hadgkiss v Blevin & ors* (Unreported, Federal Court of Australia, Conti J, 21 October 2003); *R v Chen & ors* (Unreported, New South Wales Court of Criminal Appeal, Heydon JA, Sully J, and Levine J, 11 June 2002); *Regina v MM* (Unreported, New South Wales Court of Criminal Appeal, McClelland AJA, Grove J and James J, 25 October 2004); *R v Lawrence* (No 3) (Unreported, New South Wales Supreme Court, Howie J, 25 February 2003); *DPP v CAD & ors* (Unreported, New South Wales Supreme Court, Barr J, 26 March 2003); *Regina v Knight aka Black* (Unreported, New South Wales Court of Criminal Appeal, Heydon JA, Studdert J and Greg James J, 30 March 2001); *Athens & anor v Randwick City Council* (Unreported, New South Wales Court of Appeal, Hodgson JA, Santow JA, and Tobias JA, 16 September 2005); *The Queen v Gregory Martin Hinton* (Unreported, Australian Capital Territory Supreme Court, Higgins J, 16 March 1999); *R v Khajehnnoni* (Unreported, Australian Capital Territory Supreme Court, Gyles J, 9 August 2005); *Regina v G* (Unreported, New South Wales Court of Criminal Appeal, Grove J, Hidden J and Bell J, 25 August 2005); *Scanruby Pty Ltd v Caltex Petroleum Pty Ltd & anor* (Unreported, New South Wales Industrial Relations Commission, Peterson J, 7 June 2000); *Riley v Seip* (Unreported, Australian Capital Territory Court of Appeal, Higgins CJ, Crispin P and Gray J, 27 March 2006); *Lester v Adelaide City Council* (Unreported, South Australian Supreme Court, Doyle CJ, Prior and Vanstone JJ, 27 February 2004); *Rollings v Barter* (Unreported, Australian Capital Territory Supreme Court, Higgins CJ, 21 July 2003); *Bankstown City Council v Le* (Unreported, New South Wales Land and Environment Court, Bignold J, 23 December 2003); *Comptroller-General of Customs v Stephen Edward Parker* (Unreported, New South Wales Supreme

Court, Simpson J, 15 November 2001); *Ponizo v Multiplex Pty Ltd* (Unreported, Federal Court of Australia, Marshall J, 5 October 2005); *R v Martin Ross Hausfield* (Unreported, New South Wales Supreme Court, Levine J, 3 July 2002); *Regina v Fowler* (Unreported, New South Wales Court of Criminal Appeal, Studdert J, Simpson J, and Dowd J, 7 September 2000); *R v MacDonald, Parsons and Radman* (Unreported, Australian Capital Territory Supreme Court, Gray J, 6 March 2002); *R v Trevitt* (Unreported, Australian Capital Territory Supreme Court, Higgins CJ, 7 June 2005); *R v Lamb and Thurston* (Unreported, New South Wales Supreme Court, Dunford J, 24 April 2002); *Environment Protection Authority v McConnell, Dowell Constructors (Australia) Pty Ltd* (Unreported, New South Wales Land and Environment Court, Pearlman J, 12 November 2002); *Regina v Toro-Martinez* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Newman J and Adams J, 7 June 2000); *Regina v Bowhay* (No 2) (Unreported, New South Wales Supreme Court, Dunford J, 11 November 1998); *Miller v Sweeney* (Unreported, New South Wales Supreme Court, Dunford J, 30 June 2000); *Mosman Municipal Council v Sahade* (Unreported, New South Wales Land and Environment Court, Talbot J, 5 March 1999); *R v Peter Buchanan, Justin Robert Smith and Trevor Thomas* (Unreported, New South Wales Supreme Court, Buddin J, 10 August 2004); *Regina v Kane* (Unreported, New South Wales Court of Criminal Appeal, Handley JA, Ipp AJA and Greg James J, 3 May 2001); *Regina v Arthur Stanley Smith* (Unreported, New South Wales, Court of Criminal Appeal, Stein JA, Dunford J, and Sperling J, 14 June 2000); *R v Richards* (Unreported, New South Wales Court of Criminal Appeal, Powell JA, Grove J and Simpson J, 1 May 2001); *Regina v Hamoui* (No 1) (Unreported, New South Wales Supreme Court, Kirby J, 11 November 2004); *R v Deborah Joy Davidson & ors* (Unreported, New

South Wales Supreme Court, Bell J, 28 February 2000); *R v Ye Zhang* (Unreported, New South Wales Supreme Court, Simpson J, 1 December 2000); *JD v Director of Public Prosecutions & anor* (Unreported, New South Wales Supreme Court, Black J, 27 March 1998); *O'Meara v Regina* (Unreported, New South Wales Court of Criminal Appeal, Simpson J, Buddin J and Hall J); *R v L Cassar; R v E Sleiman* (Unreported, New South Wales Supreme Court, Sperling J, 9 July 1999) *R v B* (Unreported, Queensland Court of Appeal, McMurdo P, Davies JA and Williams J, 11 February 2000); *R v Crooks* (Unreported, Queensland Court of Appeal, McMurdo P, McPherson JA, and Atkinson J, 28 May 1999); *R v Burt* (Unreported, Queensland Court of Appeal, McPherson JA, Thomas J and White J, 18 December 1998); *R v M* (Unreported, Queensland Court of Appeal, de Jersey CJ, Davies JA and Mullins J, 7 November 2002); *R v Long; ex parte A-G (QLD)* (Unreported, Queensland Court of Appeal, McMurdo P, Davies and Jerrard JJA, 28 February 2003); *R v Fraser* (Unreported, Queensland Court of Appeal, de Jersey CJ, Davies JA and MacKenzie J, 2 April 2004); *R v Kassulke* (Unreported, Queensland Court of Appeal, Davies, Williams and Jerrard JJA, 8 May 2004); *R v LR* (Unreported, Queensland Court of Appeal, MacPherson and Keane JJA, and Douglas J, 30 September 2005); *R v R* (Unreported, Queensland Court of Appeal, McPherson and Jerrard JJA, and Mullins J, 28 February 2003); *R v Batchelor* (Unreported, Queensland Court of Appeal, McMurdo P, McPherson JA, and Philippedes J, 10 June 2003); *R v Brown* (Unreported, Queensland Court of Appeal, McPherson JA, Chesterman and Mullins JJ, 28 April 2006); *R v CU* (Unreported, Queensland Court of Appeal, (de Jersey CJ, Jerrard J and Jones J, 5 October 2004); *The Queen v Bellington Sam* (Unreported, Queensland Supreme Court, MacKenzie J, 20 October 2000); *Jones v The Queen* (Unreported,

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(Unreported, South Australian District Court, Bishop J, 25 March 2004); *R v Domokos & ors* (No 2) (Unreported, South Australian District Court, Robertson J, 16 June 2004); *R v Nicholson* (Unreported, South Australian District Court, Tilmouth J, 22 December 2005); *R v Paul Charles Elluli* (Unreported, South Australian District Court, Rice J, 2 February 2001); *R v Schaefer, Schiworski & Brown* (South Australian District Court, Millsteed J, 17 December 2004); *R v Lancaster* (Unreported, Victorian Supreme Court, Winneke P, Tadgell and Batt JJA, 22 June 1998); *DPP v Moore* (Unreported, Victoria Supreme Court, Court of Appeal, Batt, Chernov and Eames JJA, 29 July 2003); *R v Sahin* (Unreported, Victorian Supreme Court, Court of Appeal, Phillips CJ, Callaway and Chernov JJA, 17 August 2000); *R v Carter* (Unreported, Victorian Supreme Court, Court of Appeal, Charles J, Chernov JJA and Hedigan AJA, 15 February 2000); *R v Lewis* (Unreported, Victorian Supreme Court, Court of Appeal, Winneke P, Tadgell JA and Hedigan AJA, 9 August 2000); *R v Favata* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Teague JJA, 21 April 2006); *R v Tofilau* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Vincent JJA, 21 April 2001); *R v Frugtinet* (Unreported, Victorian Supreme Court, Court of Appeal, Brookings, Phillip and Buchanan JJA, 19 May 1999); *R v Hill* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Roberts & Urbanec* (Unreported, Victorian Supreme Court, Court of Appeal, Batt, Buchanan and Chernov JJA, 6 February 2004); *R v Marks* (Unreported, Victorian Supreme Court, Court of Appeal, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Nguyen* (Unreported, Victorian Supreme Court, Teague J, 26 October 1999); *R v Ince* (Unreported, Victorian Supreme Court, Ince J, 1 September 1999); *R v Franklin*

(Unreported, Victorian Supreme Court, Vincent J, 23 July 1998); *R v Roba & ors* (Unreported, Victorian Supreme Court, Coldrey J, 7 February 2000); *R v Favata* (Unreported, Victorian Supreme Court, Teague J, 23 January 2004); *R v Tofilau* (Unreported, Victorian Supreme Court, Osborn J, 6 June 2003); *R v Hartwick & ors* (No 1) (Unreported, Victorian Supreme Court, Smith J, 3 October 2002); *R v Ng* (Unreported, Victorian Supreme Court, Teague J, 12 December 2002); *R v Qiang Sun* (Unreported, Victorian Supreme Court, Teague J, 10 August 2004); *R v Chimirri* (Unreported, Victorian Supreme Court, Osborn J, 11 December 2002); *R v Mitchell & Brown* (Unreported, Victorian Supreme Court, Whelan J, 2 March 2005); *R v Marks* (Unreported, Victorian Supreme Court, Coldrey J, 24 November 2004); *R v Mohammed* (Unreported, Victorian Supreme Court, Kaye J, 24 August 2004); *R v Clarke* (Unreported, Victorian Supreme Court, Kellam J, 19 January 2004); *R v Morgan & anor* (Unreported, Victorian Supreme Court, Teague J, 19 December 2002); *DPP V Ghiller* (Unreported, Victorian Supreme Court, Cummins J, 9 September 2003); *R v Su & Goerlitz* (Unreported, Victorian Supreme Court, Coldrey J, 29 July 2003); *R v KS & Said* (Unreported, Victorian Supreme Court, Coldrey J, 16 October 2003); *R v Dewhirst* (Unreported, Victorian Supreme Court, Coldrey J, 24 May 2001); *DPP v Starr* (Unreported Victorian Supreme Court, Eames J, 5 May 1999); *R v Gojanovic* (Unreported, Victorian Supreme Court, Coldrey J, 5 March 2002); *R v Thomas* (Unreported, Victorian Supreme Court, Court of Appeal, Maxwell P, Neave JA and Mandie AJA, 18 August 2006); *Bentick v Nguyen* (Unreported, Western Australian Supreme Court, Court of Appeal, Barker J, 16 September 2004); *Bounds v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Murrary J, Steytler J and McKenchie J, 7 January 2005); *Vale v The Queen* (Unreported, Western Australian Supreme Court, Court of

Appeal, Malcolm CJ, Ipp J, and Wallwork J, 12 February 2001); *Ferry v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Murray J, Anderson, and Wheeler J, 3 September 2003); *Carr v The State of Western Australia* (Unreported, Western Australian Supreme Court, Court of Appeal, Steytler J, McLure J and Buss JA, 28 June 2006); *De La Espriellavelasco v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Roberts-Smith JA, Pullin JA and Miller AJA, 10 March 2006); *Simon v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Steytler J, Templeman J, Roberts-Smith J, 10 October 2002); *Cox v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Anderson J, Templeman J and Olsson AJ, 19 December 2002); *Ahmad v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Wallbank, Steytler and Miller JJ, 28 March 2002); *Nicholls v Woods* (Unreported, Western Australian Supreme Court, Court of Appeal, Miller J, 1 December 2000); *Taylor v Younge* (Unreported, Western Australian Supreme Court, Court of Appeal, Scott J, 16 March 2000); *Jacobs v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Kennedy J, Steytler J and Wheeler J, 25 May 2000); *MacKenzie v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Malcolm CJ, Wheeler J and McLure J, 2 July 2004); *Hoy & ors v The Queen* (Unreported, Western Australian Supreme Court, Court of Appeal, Anderson J, Wheeler J and Miller J, 22 October 2002); *R v Tan* (Unreported, Western Australian Supreme Court, McLure J, 5 October 2001): *The State of Western Australia v Chatsfield* (Unreported, Western Australian Supreme Court, Simmonds J, 21 December 2005); *R v Norton* (Unreported, Western Australian Supreme Court, Hasluck J. 30 March 2001); *The State of Western Australia v Lauchlan & anor* (Unreported,

Western Australian Supreme Court. EM Heenan J, 7 December 2005); *R v Miller* (Unreported, Western Australian Supreme Court, Hasluck J, 30 March 2001); *The Queen v Bronwyn Rankin* (Unreported, Northern Territory Supreme Court, Thomas J, 4 December 1998); *The Queen v Spencer* (Unreported, Northern Territory Supreme Court, Thomas J, 21 June 2000); *Basil Dumoo v Donald Anthony Garner* (1998) 7 NTLR 129; *The Queen v Mellors* (Unreported, Northern Territory Supreme Court, Thomas J, 21 June 2000); *Regina v Amos Wilson* (Unreported, Northern Territory Supreme Court, Kearney J, 20 November 1998); *R v Nelson* (Unreported, Northern Territory Supreme Court, Mildren J, 4 June 2003); *The Queen v Murdoch* (Unreported, Northern Territory Supreme Court, Martin CJ, 15 December 2005); *R v Al Jenabi* (Unreported, Northern Territory Supreme Court, Mildren J, 7 September 2004); *Quo Cheng Lai v The Queen* (Unreported, Northern Territory Supreme Court, Bailey J, 4 September 2001); *The Queen v Cant* (Unreported, Northern Territory Supreme Court, Thomas J, 25 May 2001); *Regina v Lykouras* (Unreported, New South Wales Court of Criminal Appeal, Sully J, Hidden J and Howie J, 4 February 2005); *Regina v Suckling* (Unreported, New South Wales Court of Criminal Appeal, McInerney J, Ireland J and Adams J, 12 March 1999).

CHAPTER 8

THE PROPOSAL

As empirical studies demonstrate,
respect for the rule of law and human rights,
while exalted in judicial rhetoric,
is invariably trumped by the
practical exigencies of crime control.[715]

8.1 Introduction

An analysis of the public policy discretion invites the question why is there such a disparity between the judicial pronouncements of principles underlying and guiding the exercise of the judicial discretion, and the rulings made by the courts (usually) admitting unlawfully or improperly obtained evidence. Special significance attaches to this question when considered in the context of the chequered history of policing in Australia.[716] Many reasons may be put forward to explain this phenomenon. One persuasive explanation is the inherent conflict between the nature of the discretionary exercise and the circumstances in which it is exercised. A judicial officer is required to balance competing public interests to decide whether to admit improperly or illegally obtained evidence in the trial of an accused person. Arguments and submissions made by the parties' representatives will, naturally, seek to advance each particular party's position and will not debate the broader public interests on the scale of high public policy. The challenge for the trial judge is even more acute when the discretionary ruling can be critical to or determinative of the final outcome of the trial. It is, perhaps, understandable that in the charged atmosphere of a criminal trial where an individual stands accused of a serious

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715 Simon Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?" (1999) 29 *Hong Kong Law Journal* 216.

716 See chapter 3.

criminal offence that there is a tendency to give greater weight to the public interests of crime control over those public interests in the protection of the rights and privileges of those accused of criminal offences.

This tendency is further exacerbated by the strict limitations upon courts to receive evidence of past misconduct of individual police officers. It is difficult to reconcile the court's apparent reluctance to make findings of a deliberate impropriety or illegality against senior and experienced police officers investigating serious criminal offences with the recent findings of the Wood Royal Commission and the Police Integrity Commission about the existence and extent of corruption within the NSW Police Force. The likelihood of senior, experienced and professional police officers committing accidental breaches of the law, when investigating serious criminal offences, should be low. However, this is not reflected in the survey findings reported in the previous chapter. Instead, the survey findings suggest that the courts are reticent about making findings of an impropriety or illegality and classifying a contravention as deliberate or reckless, except in those instances where there has been a flagrant disregard of the law or procedure.

Reception of illegally or improperly obtained evidence does not feature prominently in the public law and order debate. When concerns are raised about incidents of police corruption or malpractice infiltrating the criminal justice system, two observations can be made. Firstly, corruption and misconduct allegations are usually grave and involve police fabricating or planting evidence to be used against an accused person or receiving bribes to turn a blind eye to specific criminal activity. Complaints about police breaching the law or official procedures to obtain evidence of criminal activity are less sensational and largely ignored in the debate.

But the consequences can be equally serious as those arising from prosecutions based upon fabricated or planted evidence. Downplaying the significance of the court receiving improperly or illegally obtained evidence perpetuates the notion that contraventions of this type are less serious and ignores the extent to which police engage in conduct, contrary to the law or official procedure, to obtain evidence of criminal activity. Secondly, there are the predictable responses of the Police Force and Police Association, respectively, remonstrating against their critics, often employing emotive language to advance their particular positions.[717] Criticisms of the police are usually met with strident denials of any wrongdoing, presented as personal or vindictive attacks upon individual officers, or countered with claims of escalating crime rates or the lone bad apple theory.[718] Such strategies have not usefully advanced the debate, but rather have mired the discussion with the "us and them" attitude discernible in police culture.

This paper has sought to present an objective appraisal of the effectiveness of the public policy discretion in achieving its objective. Research findings and academic literature support the conclusion that the public policy discretion has failed to satisfactorily address the "real evil"[719] at which it is directed, namely, the deliberate and reckless disregard of the law by those who enforce it.[720] This chapter will outline a proposal to amend the current law to assist trial and appellate courts in

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717 See chapter two.

718 See chapter two.

719 *Pollard v The Queen* (1992) 176 CLR 177, 204 (Deane J).

720 *Bunning v Cross* (1978) 141 CLR 54 (Stephen and Aicken JJ); *Pollard v The Queen* (1992) 176 CLR 177; *Foster v The Queen* (1993) 65 A Crim R 112 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Ridgeway v The Queen* (1995) 129 ALR 1 (Toohey J); *Lawrie v Muir* (1950) JC 19; *The People v O'Brien* [1965] IR 142.

determining whether an unlawful or improper contravention was deliberate, reckless, or accidental.

8.2 The Proposal

The threshold for admissibility of evidence is relevance. The public policy discretion is not concerned with the question of relevancy, but considers on the balance of public interest whether admissible evidence,[721] (unlawfully or improperly obtained), should be received by the court. An impropriety or contravention must be established to enliven the discretion. Once enlivened, the impropriety or contravention may be classified to be a deliberate, reckless or accidental disregard of the law. This classification is crucial to the outcome of the discretionary exercise and is considered the most important of all relevant factors.[722]

The ability of the court to classify an impropriety or contravention will be dependant upon what evidence the court is able to receive. Under present law, a court is able to receive evidence relating to the occurrence of the alleged impropriety or contravention. Evidence relating to the credibility of a witness, or his/her tendency or propensity to act in a particular way may be admissible if certain conditions are satisfied. Consequently, the court may not necessarily receive evidence of past malpractice by an individual police officer. If such evidence is rejected, then the

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721 For evidence to be admissible, it must be relevant, directly or indirectly, to a fact in issue.

722 *R v Bozatsis and* Spankakis (1997) 97 A Crim R 296 (Gleeson CJ); *Pollard v The Queen* (1992) 176 CLR 177, 203-204 (Deane J).

court may not be best placed to classify an impugned act (or omission) in isolation from an individual officer's personal history.

The implementation of this proposal will require either specific legislation regulating collection, access, searching, retrieval of stored information and permitting its reception as admissible evidence,[723] or the creation of a new category of exception to the collateral rule; or by amending the sections 97, 98 and/or 100 of the Evidence Acts to permit the reception of evidence of past malpractice against police officers. The options are given in order of preference.

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723 Proposed legislation may create an additional subsection to section 138 authorising the collection, storage, access and use of information stored at the proposed central databank. Otherwise separate legislation to the same effect could be passed, similar to procedural legislation for the electronic recording of police interviews with suspects or allowing witnesses to appear or give evidence by audio and audio-visual links.

It is proposed that a databank be established to store details of all applications in contested criminal matters for the discretionary exclusion of admissible evidence on public policy grounds, including nature and circumstances of alleged misconduct or omission, evidence presented, and rulings of the court. The NSW Attorney Generals Department or another independent body under the control of the Attorney General should maintain the databank. A party may apply to the Court for leave to search the databank index for records relating to past applications involving either prosecution or defence witnesses. The requirement for leave provides a safeguard against misuse of stored information. Notification must be given to all parties involved in the proceedings, including any co-accused. The Court may make orders to search the index and retrieve relevant information on such terms it deems appropriate. Should any party propose making an application for the discretionary exclusion of evidence under section 138 of the Evidence Act then notice must be given to each party to the proceedings and such application heard by the trial judge or magistrate on a voir dire before the commencement of the hearing proper. Scrutiny of past conduct will not be restricted to police officers but will also extend to past applications involving accused persons. If an accused person routinely makes allegations of misconduct against the police, then the court may take into account evidence of past complaints in reaching its decision. Past adverse findings against an individual in respect of section 138 applications may be disregarded if a period of ten consecutive years has elapsed without further criticism of the same person.[724] Evidence of past discretionary applications,

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724 A period of ten (consecutive) years is consistent with prescribed time periods imposed by other comparable legislation, namely, the *Criminal Records Act 1991* s 9 which states that certain convictions are "spent" upon expiration of a crime free period of ten consecutive years; and *Firearms Act 1996* which provides that a defendant/subject of an apprehended violence order may be issued with a firearms licence if a period of ten years or more has

including databank records, will only be admissible for the purpose of determining section 138 applications and will not be admissible for any other purpose, except in consequential disciplinary or corruption proceedings against an individual. Powers will be vested in the court to refer proven allegations of misconduct to the Ombudsman, Police Integrity Commission or appropriate body for further investigation and possible disciplinary proceedings.

The objective of the databank is to permit the court to receive relevant evidence of past applications that will assist it determining:

1) whether an act or omission constitutes an impropriety or contravention of the law; and
2) if so, whether such an act or omission was a deliberate, reckless or accidental disregard of the law.

The survey findings reported in chapter seven reveal that the general incidents of findings of impropriety or illegality are significantly less likely than findings of no impropriety or illegality. This may be partly attributable to the perceived standing of a police officer as a professional witness with "notionally pristine character"[725] whose testimony is often corroborated by a fellow officer. This contrasts with the perceived standing and position of an accused person, particularly those persons in custody. Reception of evidence relating to previous section 138 applications involving complaints and findings against an individual officer may lead the court to

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passed since the expiration of the apprehended violence order. It is noted that an application for an apprehended violence order is a civil matter, however, the enforcement of any such order is a criminal proceeding.

725 David Wolchover, "Attacking Confessions with Past Police Embarrassments" [1988] *Criminal Law Review* 573, 576.

treat the evidence given by that particular officer with caution and so increase the likelihood of findings of an impropriety or contravention.

Evidence of previous section 138 applications will also assist the court in classifying the impugned act or omission. If an individual police officer has a history of "cutting corners" by failing to follow legislative or procedural requirements, particularly if the officer concerned is an experienced investigator, then this is highly relevant in determining whether the subject contravention was deliberate, reckless or accidental. Repeated transgressions may indicate that the officer has a cavalier approach to criminal investigations manifesting in a deliberate or reckless disregard of the law.

8.3 Case for the Proposal

The case for change is founded upon the survey findings reported in chapter seven and the academic literature critiqued in chapter one. The general likelihood of admission of impugned evidence is far greater than that of rejection. This conclusion does not sit comfortably with the recent findings of police corruption within the NSW Police Force. The Wood Royal Commission's findings of the incidence and extent of process corruption within New South Wales Police are disturbing.[726] The activities of the Police Integrity Commission illustrate, despite subsequent reforms, process corruption remains a problem within the NSW Police Force.[727] The success of both the Wood Royal Commission and Police Integrity Commission in detecting corruption and misconduct has been largely due to covert

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726 See chapter two.

727 Ibid.

surveillance and recordings of suspected officers. The use of covert investigative tools was necessary to pierce the veil of solidarity among police colleagues to uncover corruption and misconduct. Process corruption is not confined to cover ups of a fellow officer's indiscretions because of a misguided sense of loyalty, but includes the misuse or abuse of police powers, which may involve serious and intentional breaches of the law.[728] When seen in this way, the importance of the public policy discretion as a curial means of protecting the court processes, especially criminal litigation, from the taint of corruption is beyond question.

There are real concerns about the effectiveness of the public policy discretion to identify and address deliberate and reckless breaches of the law. It is doubtful under the current law, whether the court is in a position to give proper consideration to the factors in section 138(3)(d) and (e), to evaluate the gravity of the impropriety or contravention, or whether the impropriety or contravention was deliberate or reckless. Addressing these concerns is the crux of the proposal. At present, a court is hampered in its deliberations from probing into the past conduct of an investigating officer to ascertain whether there is a pattern of misconduct. The objective of the proposal is to remove this barrier with attendant safeguards restricting use of historical evidence for limited purposes.

In making the case for the proposal, the advantages arising from its adoption are discussed below.

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728 Ibid.

1. *Better informed decision-making*

The presentment of evidence of previous section 138 applications, involving prosecution and/or defence witnesses, may assist the Court in determining the veracity of the complaint. This works both ways. Past rulings critical of police or civilian witnesses may be highly relevant to the enlivening and exercise of the discretion. Conversely, past rulings, which either endorse police practice or uphold an accused person's complaint may also be highly relevant for the same reasons.

2. *Accumulation of a body of case law on section 138 applications that will provide guidance to trial courts in the exercise of the judicial discretion and facilitate review of the discretionary exercise on appeal*

Access to a specialised body of case law will promote principled and consistent decision-making. This will permit trial judges to see firsthand how their fellow judges approach and perform the discretionary task. The opportunity for a trial judge to review rulings made in other trials should prove to be beneficial, especially given the narrow basis upon which a discretionary decision may be appealed. Furthermore, appellant courts will be better placed to observe how the lower courts exercise the section 138 discretion and to decide if further judicial guidance is required in this regard.

3. *Greater accountability of the police force and individual officers for their conduct of criminal investigations*

The proposed change should also make the police hierarchy more accountable for its management of the police force. Commissioned and senior police officers will be discouraged from tacitly endorsing poor practices or turning a blind eye to misconduct where such activity will render the police force liable to public criticism and individual censure. Hopefully, it will also encourage a real and ongoing

commitment of senior police hierarchy to the education and training of its officers, and so minimise the incidence of accidental breaches of the law.

4. *Improved professionalism within the police force*

Continuing on the same theme, individual responsibility and a collective desire for a knowledgeable police force should enhance greater professionalism among police officers. If education of police officers includes not only police powers but extends to law protecting individual rights and liberties then this may foster a better understanding of the public policy discretion and be conducive to improved police practices. It may also counter the siege mentality noted in police culture.[729]

5. *Disincentive to accused persons from making unsubstantiated allegations of misconduct against the police*

The proposal is not an open invitation to complain about the police. It holds both police and accused persons accountable for their conduct. If an accused person routinely or habitually makes unsubstantiated, frivolous or vexatious complaints about a police officer then this may be adverse to the complainant's credibility and place at risk the success of any future complaints.

6. *Application to expunge the record of previous complaint after expiration of prescribed period*

The court has a discretion to note on the court record those officers held responsible for the breach. The power to expunge the record of an old complaint, after a ten-year period of good behaviour, will allow police officers an opportunity to redeem his/her good reputation. It seeks to address the situation where a mistake made by a young or inexperienced officer will not be fatal to his/her career

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729 See chapter two.

prospects. However, the seriousness of an adverse ruling will be reinforced by the length of the period that must elapse before it can be expunged and furthermore act as deterrent to police officers exercising their powers without due care.

7. *Judicial powers to refer proven allegations of misconduct to appropriate bodies for further investigation and possible disciplinary action*

If a trial judge is satisfied that there are reasonable grounds to suspect that a police officer is engaged in serious or systematic misconduct then the trial judge may refer the matter for investigation by the appropriate investigative or disciplinary body. The purpose of the judicial referral power is threefold. Firstly, it may lead to the early detection of corrupt behaviour or misconduct before it escalates to more serious endeavours. Secondly, it may minimise miscarriages of justice, which resulted from criminal investigations tarnished by corruption or misconduct by police officers, occurring over substantial periods. Thirdly, the vesting of referral powers creates another independent means of identifying suspect behaviour, which is more appropriately to be investigated by appropriate bodies. In so doing, it indirectly places further pressure on the police force to monitor the conduct of its officers. Otherwise, the police hierarchy may be subject to public criticism for failing to take action before the court referral.

8.4 Case against the Proposal

Opposition to the proposal must, at least implicitly, reject the findings of the survey and accept that the public policy discretion is effective in its purpose. The survey is open to criticism. Firstly, the number of cases surveyed represents a very small proportion of criminal trials. It is arguable whether the survey provides an accurate indication of the discretionary rulings. Secondly, first instance discretionary rulings

are under represented. This may distort the outcome of the findings. Thirdly does the inherent nature of a discretion render it incapable of statistical analysis? These are valid questions. The limitations of the survey are acknowledged and are taken into account when drawing conclusions from the analysis. Obviously, a higher representation of trial matters would have been welcomed but access to trial transcripts was not forthcoming. It is not selective surveying but an analysis of material available online. Despite these criticisms, the findings do reveal a significant and consistent pattern in discretionary rulings, which cannot be ignored.

The effectiveness of the public policy discretion must be in doubt for the reasons given above. The present law is not adequate for this purpose. Some specific problems associated with the proposal are discussed below.

1. *Delegation or assignment of responsibility among criminal investigators as members of a team or task force*

Imposing responsibility upon individual police officers for certain decisions, actions or omissions may be unfair, impractical and/or unjustified, especially when a consequential unfavourable ruling may be held against that officer for a period of ten years. Mistakes or misconduct, which were the product of inadequate training or inexperience, should not be held against an individual officer. Unfavourable rulings will jeopardise career prospects for an officer, resulting in a loss of reputation and financial loss. A prescribed period of ten years is too long.

Investigations into serious or complex criminal activity will be more likely to come under greater scrutiny. Individual responsibility and accountability may act as a deterrent to officers willing to perform plainclothes criminal investigations or joining specialist investigative squads or task forces. Furthermore, the police service is a

quasi-military hierarchical organisation where officers are compelled to obey instructions and orders given by their superiors. It is not appropriate to make junior officers accountable for the decisions or orders of their superiors. The proposal makes an allowance in this regard, permitting the trial court to decide whether a junior officer should be held accountable or responsible in such situations. Finally, members of a specialist investigative squad or task force may number many. It may not be practical or appropriate to impose personal accountability for certain decisions and actions taken during a criminal investigation.

2. *Delay between the event and ruling, and potential repercussions for officers in other unrelated investigations*

Inevitably, there will be a delay between the occurrence of the impugned act or omission and the discretionary ruling by the court. During this period, police officers will investigate other matters, which may ultimately lead to criminal trials at some future time. Should an unfavourable ruling against a police officer relating to an earlier investigation be made during the delay between investigation and trial, should this be used to expose the officer to criticism. It may result in unfairness to the police officer, especially if the act or omission occurred as a result of orders or instructions given by a superior officer, poor training and/or inexperience. Under the proposal, the trial judge may extend some leniency towards the officer when ruling on responsibility for the impugned act or omission.

3. *Desirability of creating a special witness category for section 138 applications depriving police officers from the protection afforded by the credibility rule to challenge the witness's good character and in effect putting the police on trial*

Under the collateral rule, a witness's answer to an issue of credit is final. There are

exceptions to the general rule, namely, a prior inconsistent statement; previous conviction; evidence of reputation for untruthfulness; medical evidence affecting the reliability of a witness's evidence; and evidence of bias, corruption or interest. The collateral rule and relevant exceptions will be discussed in more detail below. Unlike other exclusionary discretions, the public policy discretion is concerned with matters of high public policy rather than issues pertinent to the trial at hand, and any police history of misconduct is relevant to the discretionary exercise.[730] The proposal does not create a special category of witness nor does it put police on trial. But it does recognise the status of the police within the community creates a general perception that all police officers are persons of good character and integrity. Evidence of past malpractice is received on the voir dire hearing, in the absence of the trier of fact. Consequently, a jury will not hear the evidence or observe the witnesses testifying on the voir dire. Should the court not accept an officer's evidence on the voir dire, this does not preclude acceptance of evidence given by the officer on other issues.[731] This also applies to an accused person. For the purposes of the trial, evidence of previous section 138 applications involving either prosecution or defence witnesses are strictly limited to the discretionary application.

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730 *Evidence Act 1995* (Cth), s 138(3)(d) and (e).

731 *Cubillo v The Commonwealth* (Unreported, Federal Court of Australia, O'Loughlin J, 11 August 2000).

4. *Introduction of the proposal would unnecessarily complicate criminal proceedings causing inefficiencies, incurring higher costs, and duplication of process*

One purpose of the proposal is to facilitate the speedy and just resolution of criminal proceedings. The pre-trial interlocutory application to search the databank records and retrieve relevant information is akin to having documents produced under subpoena prior to the trial. Objection to pre-trial evidentiary rulings has some merit. It may be, in some cases, that rulings should be made during the trial. If so, then the trial judge has the power to delay making a ruling until a later time or give a preliminary ruling. This is not a departure from current practice. Moreover, pre-trial voir dire may prevent committing resources to run a criminal trial in matters where the prosecution will not be able to discharge its onus if the challenged evidence is rejected.

5. *Greater incidence of the rejection of admissible evidence will result in higher crime rates*

A strict evidentiary rule of exclusion, like the United States exclusionary rule, is often criticised for contributing to or causing higher crime rates. Such a claim is an absurdity. The causes of crime are well known and include poverty, lack of education, disenfranchisement from the community, drug use, alcohol, and dysfunctional families. An evidentiary rule and/or exclusionary discretion are not among the causes of crime. Any suggestion that a higher incidence of discretionary exclusion of improperly or illegally obtained evidence will increase the crime rate should be completely dismissed.

8.5 Credibility of a Witness and the Collateral Rule

The general rule for admissibility of evidence is that such evidence must be relevant, directly or indirectly, to a fact in issue. An exception to the general rule is evidence of collateral matters, notably, the credibility of a witness. The finality rule provides that a witness's answer to a question of credit is final and cannot be contradicted.[732] The policy of the law is that such answers are final to avoid a multiplicity of issues that may confuse or distract the trier of fact from the real issues of the case. The finality rule is a rule of convenience or case management.[733] Evidence, relevant both to a fact in issue and credit, is not caught by the rule. It applies to evidence that is only relevant to the credit of a witness.[734]

There are, of course, exceptions to the finality rule. The relevant exceptions are "bias," "corruption," "previous convictions," and "police prepared to go to improper lengths to secure a conviction." The first two exceptions of 'bias' and 'corruption' are related, connoting "untrustworthy partiality"[735] on the part of a witness. Wigmore defines "bias" as "all varieties of hostility or prejudice against the opponent personally or of favour to the proponent personally."[736] It is not dependant upon the relationship between the witness and party but extends "to all matters which affect the motives, temper and character of the witness □ with

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732 *Harris v Tippett* (1811) 2 Camp 637; *A-G v Hitchcock* (1847) 1 Ex 91; 154 ER 38; *Goldsmith v Sandiland* (2002) 190 ALR 370.

733 *Nicholls v The Queen, Coates v The Queen* (2005) 219 CLR 196; *Natta v Canham* (1991) 32 FCR 282; *Piddington and Bennett v Woods Propriety Limited* (1940) 63 CLR 533 (Starke J); *Palmer v The Queen* (1998) 193 CLR 1, 23 (McHugh J).

734 *Adam v The Queen* (2001) 207 CLR 96.

735 *Nicholls v The Queen, Coates v The Queen* (2005) 219 CLR 196.

736 Ibid.

reference to his feeling towards one party or the other."[737] Under the bias exception there must be connection between a specific motive or purpose, which a witness seeks to advance by giving evidence, and the testimony of that witness.[738] It is not sufficient to make a general complaint of bias against a witness.[739]

"Corruption" is said to be "the conscious false intent which is inferrible (sic) from giving or taking a bribe or from expressions of a general unscrupulousness for the case in hand"[740] being evidence showing "the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony."[741] There must be a nexus between the corruption and the case at hand. The corruption exception is narrow and does not extend to evidence showing a general predisposition to act in a certain way nor is evidence of systemic corruption within a police service admissible.[742]

The exception of "previous convictions" permits the prosecution to cross-examine an accused person about his/her past convictions in retaliation to defence challenges to the good character or truthfulness of prosecution witnesses. Insofar as this exception is applicable to the cross-examination of police witnesses, police officers can only be cross-examined in respect of proven criminal or disciplinary

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737 Ibid 266.

738 Ibid 266-268; *Smith v The Queen* (1992) 9 WAR 99.

739 *A-G v Hitchcock* (1847) 1 Exch 91; 154 ER 38.

740 Ibid 262.

741 Ibid.

742 *R v Roberts & Urbanec* (Unreported, Victorian Supreme Court, Court of Appeal, Batt, Buchanan and Chernov JJA, 6 February 2004), [68-69]; *R v Edwards* [1991] 2 All ER 266.

charges, not mere allegations of perjury or misconduct.[743] Application of this exception to permit cross-examination of police officers about past misconduct or perjury is rare. On-line case searches have failed to uncover any decisions permitting the cross-examination of a police officer about a proven disciplinary charge against him/her to challenge the credibility of that officer's testimony. It is trite to say that a police officer convicted of perjury would not retain the confidence of the Commissioner and consequently be dismissed from the police service. In this sense, the exception is available in theory but has little, if any, practical application.

Recognition of a new exception of "the police prepared to go to improper lengths to secure a conviction"[744] has not been universal. This new category of exception was expressly recognised by the English Court of Appeal in *Regina v Funderbank*,[745] which cited *R v Busby*[746] as the relevant authority. Whether *R v Busby*[747] proclaimed a new category of exception is uncertain, but that decision may be also explained in terms of the bias exception, consistent with accepted authorities.[748] In Australia, *Funderbank*[749] is accepted as authority for the proposition that the categories of exception are not closed but acceptance does not

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743 *R v Edwards* [1991] 2 All ER 266.

744 Ibid 274 (Lord Lane CJ).

745 [1990] 1 W.L.R. 587.

746 (1981) 75 Cr App 79.

747 Ibid.

748 *R v Edwards* [1991] 2 All ER 266; *Goldsmith v Sandiland* (2002) 190 ALR 370 (McHugh J).

749 *Regina v Funderbank* [1990] 1 W.L.R. 587.

extend to endorsement of the new exception noted above.[750] In *Natta v Canham,*[751] the full court of the Federal Court of Australia favoured a more liberal application of the finality rule and its exceptions to allow "sufficiently relevant"[752] matters to be raised in testing a witness's credit.[753]

The ALRC proposed amending the common law finality rule and its exceptions by limiting cross-examination to those matters of 'substantial probative value on the question of credibility[754] and further "permitting evidence proving a witness had committed an act impugning his credibility, contrary to that witness's denials.[755] The exception under section 103 differs from its common law equivalent in one important respect. At common law, a witness could be cross-examined at large about his/her credibility, provided that the evidence was directly or indirectly relevant to a fact in issue. There was no requirement that the strength of the evidence was a factor relevant to admissibility. The statutory exception now limited such cross-examination to those matters of "substantial probative value, which could rationally affect the assessment of the credit of a witness."[756] Section 106 restates and adds to the common law exceptions to the finality rule. Permissible

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750 *Natta v Canham* (1991) 32 FCR 282; *Urban Transport Authority of NSW v Nweiser* (1992) NSWLR 471.

751 (1991) 32 FCR 282.

752 Ibid 42.

753 Ibid.

754 Ibid; see *Evidence Act 1995* (NSW), s 103.

755 Ibid; see *Evidence Act 1995* (NSW), s 106.

756 *R v RPS* (Unreported, NSW Court of Criminal Appeal, Hunt CJ at CL, 13 August 1997); Odgers, above n 582, [1.3.7740].

rebuttal evidence is limited to prescribed categories of exception, which unlike the common law exceptions are closed. Restricting evidence to the prescribed categories has been criticised for preferring efficiency in litigation over possible fairness.[757]

Admissibility of evidence challenging a witness's credibility will depend upon whether the evidence is also relevant to an issue in the proceedings or, alternatively, comes within one of the exceptions to the finality rule. The policy justifying limited reception of evidence of collateral facts may be persuasive in theory, however, its practical application is not without controversy. A noted example is the leading High Court case of *Piddington v Bennett and Wood Proprietary Limited*[758] where a majority rejected evidence of a bank manager which cast doubt upon the testimony of an eye-witness that he was present at the scene of an accident. All members of the court were in unison on the relevant law but were divided on its application to the facts of that particular case. *Piddington*[759] highlights two difficulties associated with the application of the finality rule. Firstly, it is often very difficult in practice to distinguish between evidence relevant, directly or indirectly, to an issue, and, evidence relevant only to a witness's credit. Secondly, the connection between "the credibility of the evidence"[760] and "the credibility of its deponent"[761] is usually ignored.

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757 ALRC, *Uniform Evidence Law*, Final Report No. 102, (2006) [12.66].

758 (1940) 63 CLR 533.

759 Ibid.

760 *Palmer v The Queen* (1998) 193 CLR 1, 24 (McHugh J).

761 Ibid.

The evidentiary distinction between a fact in issue and a witness's credit is an artificial one,[762] based on "policy rather than logic,"[763] made for the purposes of confining the trial process and to extend fairness to a witness under cross-examination.[764] The distinction between material and collateral facts is fundamental to the finality rule and has been strongly criticised as "indistinct and unhelpful"[765] and "absurd."[766] Common law authorities reveal that the courts have, at times, adopted a flexible approach in this regard often blurring the distinction between issues of fact and credit.[767] Moreover, acceptance of this arbitrary distinction ignores the proposition that credibility is not restricted to character but includes the testimony given by a witness. A point made by McHugh J in *Palmer v The Queen:*[768]

> Evidence concerning the credibility of a witness is as relevant to proof of an issue as are the facts deposed to by that witness. There is no distinction, so far as relevance is concerned, between the credibility of the witness and the facts to which he or she deposes. The credibility of evidence is locked to the credibility of its deponent. The truth of that proposition is in reality recognised by the rule that a witness can be cross-examined as to matters of credit. Because that is so, it is irrational to draw a rigid distinction between matters of credit and matters going to the facts-in-issue.[769]

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762 ALRC, *Evidence*, Interim Report 26 (1985) [226].

763 *Palmer v The Queen* (1998) 193 CLR 1, 22 (McHugh J).

764 Ibid 22-24 (McHugh J).

765 Ibid 22 (McHugh J).

766 Ibid 22 (McHugh J).

767 *R v Lawrence* (2001) (Unreported, Queensland Court of Appeal, MacPherson and Thomas JJA, White J, 19 October 2001) refers to a line of common law authorities that permit the "relaxation of the finality rule where a matter of credibility is inextricably linked with the principal issue in the case." See also *Wakeley and Bartling v The Queen* (Unreported, High Court of Australia 7 June 1990); *Urban Transport Authority of NSW v Nweiser* (1992) NSWLR 471; *R v Beattie* (1996) 40 NSWLR 155; *Chandu Nagrecha* [1997] 2 Cr App R 401.

768 (1998) 193 CLR 1.

769 Ibid 24 (McHugh J).

The concept of "credibility" has two aspects, namely, veracity or truthfulness and reliability. It is not the "believability" of the testimony of a witness in the sense that a witness is persuasive in giving his/her account, either in the manner of delivery or demeanour, but it is the veracity and reliability of the testimony that is critical. The link between the credibility of a witness and the credibility of his/her testimony is vital and assumes greater importance where the perceived standing of opposing parties or witnesses differ. A professional or practised witness, such as a police officer, may enjoy some advantage over an accused person when an assessment of credibility is made. A more polished testimony will hold greater sway over the testimony of an inarticulate or uneducated witness.[770]

In its Interim Report on Evidence,[771] the ALRC opposed the cross-examination of witnesses on any "negative aspect of character or misconduct"[772] for the purposes of testing credibility because:

> The research of psychologists suggests that emphasis should be placed on evidence of conduct which is similar to testifying untruthfully (ie involves false statements) and which took place in circumstances similar to those of testifying (ie the witness was under a substantial obligation to tell the truth at the time).[773]

The ALRC declined to formulate proposed reforms based upon the above research findings on the grounds that it may unduly fetter cross-examination of witnesses. However, the psychological research, noted above, may lend support for the current proposal to amend the law. In essence, these research findings favour a

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770 *Polley* (1997) 67 SASR 227 88 (Mullighan J); *Carr v The Queen* (1998) 165 CLR 314, 337-338 (Deane J).

771 Ibid.

772 Ibid.

773 Ibid.

comparison of behaviour occurring in analogous situations for the purposes of testing credibility. The proposal, detailed in this chapter, adopts a similar rationale by permitting the court to take into account past police malpractice involving an individual police officer when determining whether that office, by his or her act or omission during the subject investigation, has committed an impropriety or illegality, and if such act or omission was deliberate or reckless.[774] An amendment to the credibility by creating a new exception allowing evidence of police malpractice to be received by the court in applications for the admission or exclusion of improperly or illegally obtained evidence would be an appropriate means to implement the mooted proposal.[775] A statutory exception of this nature would remove any doubt about the correctness or application of the principle enunciated in *R v Funderbank*[776] and also overcome the other difficulties discussed above.

8.6 Tendency and Coincidence Evidence

The reception of tendency and coincidence evidence[777] is "exceptional"[778]and will only be "admissible where it would be an affront to common sense to exclude it."[779] Intrinsically, tendency and coincidence evidence has a greater risk that its

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774 *Wassem Malik* [2000] 2 Cr App 8, the English Court of Appeal held that it was not necessary that malpractice occurring on the second occasion should be identical to the earlier incident of malpractice.

775 See also Rosemary Pattenden, "Evidence of Previous Malpractice by Police Witnesses and R v Edwards" [1992] *Criminal Law Review* 549.

776 [1990] 1 W.L.R. 587.

777 *Uniform Evidence Acts* replaced the common law concept of similar fact and propensity evidence with notions of tendency and coincidence evidence. The terms "tendency and coincidence" evidence will be used to describe all evidence purporting to show a person has a disposition or inclination to act in a particular way.

778 *Markby* (1978) 140 CLR 108 (Gibbs CJ); *R v Katipa* [1986] 2 NZLR 121.

779 *Markby* ibid.

admission may have an unfairly prejudicial effect on the fairness of an accused person's trial. The law has recognised this attendant risk in formulating its stringent approach to the reception of such evidence.[780]

Much of the case law dealing with tendency or coincidence evidence concerns the reception of such evidence against an accused person. Reception of evidence of this type as part of the prosecution case must be justified upon the grounds that the 'probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant."[781]The policy of the law prohibits the prosecution from leading "evidence of propensity to commit the crime charged, of bad character and prior convictions"[782] that may adversely affect the fairness of the trial of an accused person.[783] This policy prohibition does not apply to the defence.[784] An accused person may present tendency or coincidence evidence in disproof of his or her guilt of an alleged offence,[785] but admission of such evidence against prosecution witnesses will be rare.[786]

Police misconduct or malpractice may be adduced as tendency and coincidence

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780 *Uniform Evidence Acts* ss 97, 98, 100;see also *Harriman* (1989) 167 CLR 590; *Fraser* (1998) (Unreported, NSW Court of Criminal Appeal, 10 August 1998); *Hoch* (1988) 165 CLR 292; *Garrett* (1977) 139 CLR 437; *Young* (1996) 90 A Crim R 80.

781 *Evidence Act* 1995 (NSW), s101; *Ellis* (2003) 58 NSWLR 700.

782 *Brett David Harmer* (1985) 28 A Crim R 35, 41 (Kaye, Marks and Gray JJ) applied *Attwood* (1966) 102 CLR 353.

783 Ibid.

784 Ibid; *Knight v Jones, ex parte Jones* (1981) Qd. R 98.

785 Cross on Evidence (7th Australian ed) [21155]; *Knight v Jones, ex parte Jones* (1981) Qd. R 98.

786 *R v Livingstone* [1987] 1 Qd. R 38.

evidence to establish that a police officer was inclined to act in a particular way. Such evidence may be admitted where there is a "strong similarity"[787] between the facts of the subject trial and the other relevant incidents, and such events were proximate in time to each other.[788] A review of the relevant case law reveals the difficulties associated with applications to admit such evidence. In *Knight v Jones, ex parte* [789] Jones the appellant was arrested and charged with driving under the influence of alcohol. The critical issue was whether his arrest was lawful? A majority held that the evidence given by two independent witnesses, each alleging to have been unlawfully arrested by Constable Knight in similar circumstances within the preceding six months, was admissible to show that a 'propensity or disposition on the part of (Constable) Knight to arrest persons unlawfully."[790] In a dissenting judgment, Macrossan J strongly disagreed with the other members of the Court, saying that:

> The alleged similar fact evidence in the present case, in my opinion, amounts to no more than claims that on other quite separate occasions, Knight treated citizens roughly or showed a disposition to adopt a technique of violent arrest.[791]

In *Regina v Harmer*[792] the full court upheld an appeal against a trial judge's rejection of an independent witness's evidence that he was assaulted by the arresting police officer in "a similar manner about three or four months

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787 *R v Kapita* [1986] 2 NZLR 121; *Knight v Jones, ex parte Jones* (1981) Qd. R 98; *Brett David Harmer* (1985) 28 A Crim R 35.

788 Ibid.

789 [1981] Qd. R 98.

790 Ibid 104 (Sheahan J with whom Lucas ACJ agreed).

791 Ibid 110 (Macrossan J).

792 (1985) 28 A Crim R 35.

previously."[793] In *Regina v Edwards*[794] the accused appellant had been charged with the armed robbery of a post office. The investigating police officers were attached to the later disgraced and subsequently disbanded West Midlands Serious Crime Squad. The appellant alleged that the police had fabricated an admission allegedly made by him. The English Court of Appeal rejected outright the appellant's submission that:

> (submissions borrowed from the prosecution's right to call similar fact evidence in certain cases) the defence are entitled to call evidence as to an alleged course of conduct or system by the police officers to defeat the provisions of the *Police and Criminal Evidence Act* 1984.[795]

This decision has been criticised. The respected English academic, Rosemary Pattenden, argued that the defence should be able to present "similar fact" evidence to challenge a police officer's credibility or testimony because:

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793 Ibid 41.

794 [1991] 2 All ER 266.

795 Ibid, 278 (Lord Lane CJ) delivering the judgment of the Court said: "This submission seems to use to be misconceived. There is as far as we can see, no legal basis for it."

> Evidence that these police had done this sort of thing several times before would be highly probative on the issue of his guilt and ought not to be excluded.[796]

In *Regina v Polley*[797] the accused was charged with three counts of possession of prohibited drugs.[798] The police had stopped and searched the accused's motor vehicle. The accused challenged the legality of the search and objected to the evidence of the drugs consequently found. Key issues on appeal were whether the defence could present evidence that the investigating police had acted in a similar manner on previous occasions when searching other persons and if evidence of complaints made against the investigating police officers could be received. A majority enunciated the relevant test for admission to be:

> In my view, it was not necessary to show that the two police officers, or either of them, had on an earlier occasion behaved in a manner which was strikingly similar in the context of search and seizure such as would satisfy the test for admissibility of evidence of similar facts against an accused person. It was sufficient if there was evidence which could show that they, or either of them, had behaved in disregard, in a serious way, of preconditions for the exercise of statutory or common law powers regarding the rights or liberty of the subject.[799]

On the second issue, the majority held that the defence was entitled to cross-examine the police officers about complaints made against them concerning previous misconduct.[800] The trial judge expressed reservations about the evidence given by Constable Pearce and was ambivalent about the corroborating evidence given by Constable Walker-Roberts but accepted unreservedly the evidence given

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796 Rosemary Pattenden, "Evidence of Previous Malpractice by Police Witnesses and R v Edwards" [1992] *Criminal Law Review* 549, 552.

797 (1997) 68 SASR 227.

798 Drugs, the subject of the charges, were cocaine, methylamphetamine and cannabis. The appeal was lodged only in respect of the possession of cannabis.

799 *Regina v Polley* (1997) 68 SASR 227, (Mullighan J with whom Nyland J agreed).

800 Ibid 248-250 (Mullighan J).

by Sergeant Williams, also present at the scene. Mullighan J of the appeal court aired his concerns about the ramifications of these observations:

> This rejection of the appellant's version of events was of critical importance. If Constable Pearce behaved in the manner described by the appellant, there could be no justification for the search of the vehicle. Behaving in such a high-handed way and in total disregard fo the law and the rights of the appellant would normally result in the evidence of what was found upon the illegal search being excluded in the exercise of the discretion: see *Bunning v Cross* (1978) 141 CLR 54, 76-78. In that event the case against the appellant would have collapsed and he would have been entitled to a verdict of acquittal.
>
> ... What tipped the scales against the appellant was the acceptance of the evidence of Sgt Williams. ...
>
> It appears that it was the demeanour of Sgt Williams in the witness box that carried the day. Often the demeanour of an experienced witness reveals little about whether a witness is telling the truth and is accurate and reliable. ... The appellant had a substantial hurdle to overcome in practical terms."[801]

What these cases show is that reliance on tendency and coincidence evidence is not a satisfactory solution. The requirement to show a striking similarity of fact and proximity in time may hinder the presentment of evidence that shows a pattern of general disregard of the law or official procedures. Often the only witnesses to alleged misconduct or malpractice are the police and the accused person. The evidentiary ruling will depend upon whose evidence is accepted. In this situation, the accused person is at a practical disadvantage, not unlike a victim in a sexual assault matter. This is because of the accused person's inability to corroborate his/her account together with the issue that the police witnesses usually outnumber those of the accused. The demeanour of each witness when testifying is also of importance. The use of complaints against police or disciplinary charges to show tendency or coincidence is also problematic. On one hand, it is unfair to challenge the propriety or legality of an officer's actions on the basis of unproven complaints or disciplinary charges, especially with the inherent danger of frivolous or vexatious

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801 Ibid.

complaints. However, on the other hand, delays in finalising complaints or disciplinary matters may have a deleterious effect on the conduct and outcome of a criminal trial. Moreover, complainants may not be willing to reveal their identities or give evidence in an unrelated criminal trial and this may deter complainants coming forward. For these reasons, it is more appropriate that the proposal (in the terms outlined) be implemented either by discrete legislation or as a statutory exception to the credibility rule.

8.7 Identification Evidence

Much of the discussion about the reception of illegally or improperly obtained evidence concerns confessional and real evidence, but rarely any discussion in relation to identification evidence. Identification evidence is inherently unreliable. Like confessional evidence, identification evidence may often be crucial to the prosecution case against an accused person. In this regard, adherence to legal and procedural requirements to obtain identification evidence assumes critical importance. The established judicial approach is to treat identification evidence with caution and where necessary warn a jury of the dangers of convicting on identification evidence alone. Curiously, the courts have not utilitised the public policy discretion to reject irregularly obtained identification evidence. In the leading authority of *Alexander v R*[802] the police did not organise an identification parade, but relied upon the identification of the accused person from photographs. A majority of the court declined to consider the reception of the identification evidence on public policy grounds, preferring to dispose of the appeal on the question whether there was a risk of any miscarriage of justice.

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802 (1981) 145 CLR 395.

In *R v Burchielli*[803] two members of the court left open the question whether identification evidence, obtained in consequence of a police strategy of procuring such evidence by unorthodox means, could be excluded in the court's discretion. McInerney J noted:

> For myself, I would wish to reserve the question whether in the light of observations of Barwick CJ in *R v Ireland* (1970) 126 CLR 321, 335 and of Stephen and Aicken JJ in *Bunning v Cross* (1978) 19 ALR 641; 141 CLR 54, 74, 77-78, a discretion similar to that exercised to exclude evidence illegally obtained would not be exercisable if it appeared that the police or Crown were pursuing a practice of obtaining evidence of identification in knowing disregard of the high risk of mistake pointed out in *Davies and Cody v R* and the strong disapproval expressed by the High Court of the procedure condemned in that case. I would be reluctant to believe that the Court would have no power to deal with such a practice if it ever developed.[804]

McGarvie J expressed a similar sentiment:

> I would wish to reserve the question whether, if it became the practice of the police or the Crown to obtain identification evidence in the way in which it was obtained from Mrs Campbell, it would not be appropriate and legally justifiable for trial judges to take that into account as a reason for exercising their discretion to exclude it or for this Court to hold that such evidence ought to be excluded.[805]

Impropriety to procure identification evidence is not restricted to the form of identification but may also extend to the circumstances in which the identification is made. In *The Queen v Hallam and Karger*[806] two accused persons were arrested for armed robbery of a taxi-driver and assaulting a second taxi-driver with intent to commit robbery in company. The second taxi-driver gave a description of his attackers to the police. Shortly after the second incident, uniform police spoke to

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803 [1981] V.R. 611.

804 Ibid 621 (McInerney J).

805 Ibid 623 (McGarvie J).

806 [1985] 42 S.A.S.R. 126.

the two accused persons at a deserted shopping centre.[807] The second taxi-driver received a radio message that the police required his attendance at the same shopping centre. Before his arrival, the accused persons, after establishing that they were not under arrest, attempted to leave the shopping centre. The police then arrested them for using offensive language. The taxi-driver arrived and identified the accused persons as his attackers. The police allege that the accused persons confessed to robbing the first taxi-driver and assaulting the second driver with intent to rob him, but refused to sign the notebook confessions. Two improprieties are involved this situation. Firstly, exercising the power of arrest for a minor offence not for the purpose of taking the accused before a justice but to detain him for identification by a witness and, to interrogate him in respect of a more serious crime. The exercise of the power of arrest for these purposes was an "abuse of power."[808] King CJ stated that:

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807 The accused persons were spoken to at the shopping centre in the early hours of the morning.

808 Ibid 134 (King CJ).

> They were there in consequence of being arrested on a charge of indecent language. It is true that they did use indecent language at the shopping centre. It is significant, however, that no move was made to arrest them for that conduct until they showed an inclination to assert their legal right to depart. I feel no doubt that the police had summoned Mr Roberts to come to the shopping centre to identify the appellants and the inference is irresistible that the decision to arrest on the charge of indecent language was made in order to hold the appellants there until he could come to identify them. ... I have no doubt that that was not the real purpose of their being taken to the police station. The fact that they had used indecent language no doubt made their arrest for that offence lawful. But it was still, in my opinion, no more than a subterfuge to procure the appellant's presence at the police station for the purpose of interrogation with respect to the offences against the taxi drivers.[809]

Secondly, the manner of identification is open to criticism. The Court regarded the identification evidence of little weight, stating that:

> It should be emphasised that the proper method of procuring evidence of identification is by identification parade. Identification by selection of photographs is open to grave objections and should be resorted to only where unavoidable. ... Identification by confronting the victim with the suspect in circumstances that tends to suggest to the victim that the suspect is under suspicion is a virtually valueless form of identification that should be resorted to only in the most exceptional situations.[810]

The Court allowed the appeal and overturned the trial judge's discretionary ruling to admit the confessional evidence on public policy grounds, saying that:

> The exercise of discretion was therefore vitiated. In deciding how the discretion should be exercised it is necessary to give weight to the importance of discouraging impermissible police practices by depriving the prosecution of the fruits of the use of such practices. ...[811]

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809 Ibid 132-33 (King CJ).

810 Ibid 130 (King CJ). The other members of the court, Mohr and O'Loughlin JJ agreed with the Chief Justice.

811 Ibid 135 (King CJ).

Access to the proposed databank housing records of police malpractice by individual officers would also be beneficial to a court when determining the reception of identification evidence, procured by improper means. Identification evidence is peculiarly vulnerable to suggestion. Failure by a police officer to follow official procedures to obtain evidence of identification may influence a witness to identify a particular person as the culprit. Furthermore, if a witness harbours some doubt about his/her identification of a suspect, this doubt may be extinguished by confirmation (overt or subtle) from the police that the identification is correct. Psychological research shows that in such circumstances, the confidence of the witness that his/her identification is accurate will move from one of being reasonably sure at the point of identification to one of certainty at the time of trial.[812] Should this occur, it will doubtless have significant and adverse consequences for the accused person to effectively challenge the accuracy of the identification evidence, and increase the likelihood that the identification evidence will be accepted by the trier of fact.[813] Acknowledgement by the court was given in *Gbric v Pitkethly*:[814]

> The discretion to exclude such evidence from a jury or the discretion in a tribunal of fact to decline to act on such evidence requires not only a question as to the prejudicial tendency of such evidence but also as to the fairness of acting on it. "Fairness" in this context does not only mean impropriety in obtaining the evidence, such as improperly 'briefing' or prompting an identification witness. It goes also to a failure to use available means to test such evidence, particularly where such failure has been the result of a deliberate choice.[815]

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812 ABC Radio National, "Interview with Professor Neil Brewer of Flinders University, South Australia," *Life Matters with Julie McCrossin*, Monday 13 December 2005; N Brewer & G L Wells, "The confidence-accuracy relationship in identification; Effects of lineup instructions, foil similarity and target absent"(2000), *Experimental Psychology: Applied* 12.

813 Ibid.

814 (1992) 65 A Crim R 12.

Identification evidence is a two-edged sword. On one hand, its inherent unreliability is a product of human frailty in accurately identifying an assailant, whom a witness may have seen only once, briefly and under stressful circumstances. On the other hand, doubts about the accuracy of the identification may be dispelled by a confident testimony of an eyewitness. In this regard, identification evidence provides a unique example of how contraventions of the law or prescribed procedures can have significant and even drastic consequences upon an accused person's conduct of his/her defence, the fairness of the trial process and the outcome of the trial itself. The adoption of the proposal would address these concerns by allowing a court to hear evidence of past incidents of police failing to follow prescribed procedures to formally identify a suspect in order to determine whether evidence of the identification should be received. If the evidence of past incidents shows a pattern of misconduct then the court will be less likely to receive the identification evidence. This may deter police officers from departing from prescribed procedures to identify suspects, including briefing or prompting a witness, thus, avoiding the unwelcome scenario that a confident testimony will be more persuasive than an accurate identification.

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[815] Ibid 42 (Higgins J).

8.8 Conclusion

A repository of the records of police malpractice will assist the court in making better informed decisions about allegations of breaches of the law or procedures when exercising its discretion to admit improperly or illegally obtained evidence. Unless the court is privy to previous incidents of malpractice then it will not be able to properly determine if the contravention was deliberate, reckless or accidental. The idea of collecting and using information about past police malpractice was also raised by an English commentator, David Wolchover, in respect of police perjury.[816] Mr Wolchover suggested that criminal law solicitors locally pool their resources to share information about police perjury, which may be used in cross-examining police officers in subsequent cases. No record has been found that the Wolchover proposal was implemented or seriously discussed.

The proposal, outlined in this chapter, advocates the creation of a central repository to store transcripts and other relevant records relating to past applications for the exercise of the public policy discretion within the jurisdiction of New South Wales. The availability of such records and their reception as evidence on a voir dire hearing seeks to facilitate efficacy in the exercise of the judicial discretion to admit improperly or unlawfully obtained evidence and further its objective.

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816 David Wolchover, "Attacking Confessions with Past Police Embarrassments" [1988] *Criminal Law Review* 573.

CHAPTER 9

CONCLUSION

A discussion about the reception of unlawfully or improperly obtained evidence is a complex and contradictory discourse. It involves matters of high public policy intertwined with fundamental principles that define our criminal justice system, all of which are viewed through the prism of a criminal trial of an accused person. It is a conflict of competing public interests. It is a clash of the old and the new, where time-honoured legal principles are threatened and modified to accommodate scientific and technological innovations harnessed by law enforcement agencies to investigate criminal activity. It involves the reconciliation of the abstract principle to the reality of criminal justice administration. Resolution of these conflicts is integral to the reception of improperly or illegally obtained evidence.

Little wonder that the high incidence of admitting improperly or unlawfully obtained evidence sparks controversy, especially among defence lawyers critical of curial preference for the public interests in crime control over those public interests favouring exclusion of such evidence. Despite the disquiet of criminal law defenders, there has been little academic research or debate about the utility of the public policy discretion.

The objective of the public policy discretion comes into sharp focus when considered in the context of the current law and order debate, a feature of the contemporary political landscape. Law enforcement agencies are given greater and more intrusive powers to investigate criminal activity, tempered by legislative

safeguards in the execution of such powers.[817] However, this legislative balancing of competing public interests may be undermined if the court routinely or predictably excuses breaches of the statutory protections and safeguards. This is a particular concern within a modern western democracy facing the challenge of "sophisticated crime and crime detection"[818]and the threat of terrorism. Predictable discretionary outcomes are undesirable and contrary to the nature and purpose of a discretionary power. Moreover, predictability may be conducive to police malpractice. Officers may take a calculated risk deciding to ignore or disregard legal or procedural requirements to obtain evidence of a criminal offence because the likelihood of censure and rejection of impugned evidence is not such as to deter undesirable behaviour.

When analysing the public policy discretion it is easy to be immersed in a debate over policing powers, police malpractice, and personal rights and privileges but one should step back and reflect on what this discretion is about - public policy and public interest. It is not in the public interest to give the police a green light to ignore or disregard the law or official procedure that regulates the conduct and manner of a criminal investigation. Nor is it in the public interest for police to be criticised and punished for honest mistakes and genuine oversights. It is not in the public interest that personal rights, liberties and privileges are deemed dispensable to further a criminal investigation. It is not in the public interest that the reputation

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817 See chapter 4; *Surveillance Bill* 2007 presently before the NSW Parliament increase powers of the police to conduct overt and covert surveillance and reduce judicial authorisation and review of surveillance powers.

818 *Bunning v Cross* (1978) 141 CLR 54, 76 (Stephen and Aicken JJ); M D Kirby "Controls over Investigation of Offences and Pre-Trial Treatment of Suspects, Criminal Investigations and the Rule of Law" (1979) 53 *Australian Law Journal* 626.

of our courts may suffer should judicial statements of high rhetoric and principle not translate into how the law is practised. What is in the public interest is a strong system of criminal justice that has the rule of law as its "guiding star"[819] to administer, apply and enforce the law without fear or favour but with equanimity.

Public policy discretion provides a unique opportunity to the court to legitimately take into account matters of public interest to determine an evidentiary question in a particular trial and also send a clear message to the community and law enforcement agencies about acceptable policing standards. The utility of the public policy discretion will be lost in all but instances of the most flagrant unlawful or improper conduct, unless the court is placed in a position to properly classify the controversial act (or omission) by the police. This is a matter for the legislature. The current law should be reformed in the manner proposed because the effectiveness of the public policy discretion is in the balance.

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819 Justice K P Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" [1995] 19 *Criminal Law Journal* 258.

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