The Voir Dire, s138 and 'Road Side ERISPs'[1]

The Voir Dire

- *" A trial within a trial"* per ***Toohey v Metropolitan Police Commissioner*** (1965) A.A 595 at 608.

- Section 189 of the *Evidence Act* governs the use, limits and conduct of a voir dire

When a Voir Dire is to be used

- despite what some Magistrates might tell us a voir dire is available in the Local Court.

    - s4 of the *Evidence Act* states that the Act applies to proceedings in a NSW court,
    - s189 contains nothing that limits the use of the voir dire to matters proceeding upon indictment,
    - s189 contains language that assumes tribunals of fact other than those with juries.
    - ***DPP (NSW) v Zhang*** [2007] NSWSC 308 at [111] –[114] per Johnson J seems to make it abundantly obvious that a voir dire may be held, where appropriate in the circumstances, in the Local Court of NSW.

- there is no statutory right to a voir dire hearing and the court must be satisfied by the party asserting that there is an issue requiring such a proceedings: ***R v Lee****(unrep.)* NSWCCA, 5/5/1997)

- Counsel must exactly, precisely and explicitly state the issue which requires determination; ***R v Salender Salindera*** *(unrep)* NSWCCA 25/10/1996

- the voir dire is often used with respect to the admissibility of admissions (NB. s189(3) directs the LCM to disregard the issue of the admissions truth or untruth unless raised by the accused). The accused is entitled to give evidence as to the circumstances surrounding the admissions, as to unfairness, whilst denying that the admissions were actually made; ***R v Rooke*** *(unrep.)* NSWCCA 2/9/97; See also ***R v Burton*** [2013] NSWCCA 335 for an example of a voir dire relating to admissions.

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[1] Prepared by Mark Davies for Western Region ALS Conference, March 2014. NB. This paper is designed to be spoken to and encourage exchange of ideas. It is not designed as a stand alone research paper. With acknowledgement to Mr Brett Eurell, Barrister, 16 Wardell Chambers, for his valuable assistance with respect to the s138 discussion.

- there is a distinction between the admissibility of admissions and the weight/reliability/credibility of admissible admissions. A voir dire is not the appropriate forum to ventilate the latter; ***R v Donnelly*** (1997) 96 A Crim R 432*,* ***R v RG*** [2006] NSWSC 15

- the voir dire can be used and may be necessary in many other situations, including; testimonial qualifications, capacity and competence, interest, dying declarations, expert evidence, search and seizure to name a few.

Standard of Proof/Rules of Evidence

- the rules of admissibility per Chapter 3 of the *Evidence Act* apply to a voir dire (s189(7)) – although note the limited scope of the voir dire will limit the amount of material relevant per s55 and will protect your client somewhat if called to give evidence

- generally, the Crown bears the onus of proof on the balance of probabilities (s142 of the *Evidence Act*). However, if the defence are seeking to use s138 to exclude unlawful or improperly obtained evidence then the defence has the onus of proving, on balance, the evidence was obtained unlawfully or improperly (or as a result thereof) Then the Crown the onus moves to the Crown to prove the desirability of admitting the evidence outweighs the undesirability of admitting it; ***Parker v Comptroller-General of Customs*** (2009) 83 ALJR 494.

Voir Dire Material Admissible in Case Generally

- whilst the law is not completely settled it is usual practice for the LCM to admit evidence taken on a voir dire as evidence in the hearing proper. There is some authority suggesting that this is appropriate; ***ASIC v Rich*** [2004] NSWSC 1062 and ***Dixon v McCarthy*** (1975) 1 NSWLR 617. In any case, the court has the general power under s11 which would cover this issue.

Practical Tips

- if it's not in issue it's not an issue. If the evidence doesn't hurt your case then let it slide,

- negotiate with the Police Prosecutor first and they may well agree not to lead the evidence,

- if the voir dire requires evidence from your client make sure you've tested his evidence and he is capable,

- have your head around the law you intend to rely upon, the evidence which supports your argument, any cross-examination you may need to

do; all with a view to your final submissions. A voir dire is not something to do on the spur of the moment.

s138: Discretion to Exclude Improperly or Illegally Obtained Evidence

General

- s138 is often the subject of a voir dire

- "*the right to personal liberty is not what is left over after a police investigation has finished"* ***Williams v R*** (1986) 161 CLR 278 at 396-398 per Mason and Brennan JJ

- this section is designed, in the individual case, to protect the individual against excesses of the State (whether they be deliberate, reckless or accidental) and ensure a fair trial. On a public policy scale, this section is designed to promote and maintain faith in the administration of justice, protect fundamental human rights, deter future illegality and encourage proper police conduct.

- each case is determined according to its own facts and circumstances with due regard to the seriousness of the impropriety/illegality and the outcome of such a finding; ***R v Cornwell*** [2003] NSWSC 97

- it is not the case that every defect, inadequacy or failing would result in an exclusion; (ibid).

- to be excluded the conduct need not necessarily be wilful or committed in bad faith or as an abuse of power and it need not be deliberate or reckless; ***DPP (NSW) v AM*** [2006] NSWSC 348

- probative value is a relevant consideration in terms of s138. The less probative the evidence the greater the argument for exclusion; ***R v Camilleri*** [2007] NSWCCA 36

- if the impugned evidence relates to admissions, s90 (discretion to exclude admissions) does not involve an assessment of the probative value or the seriousness of the charge and may be a good alternative route to exclusion; ***R v Em*** [2003] NSWCCA 347

‘Improper’ and ‘Contravention’

- In ***Parker v Comptroller-General of Customs*** (supra) French CJ explained that the core meaning of “contravention” is a disobedience of a command expressed in a rule of law which can be either statutory or non-statutory, involving an act which is forbidden by law, or failing that which is required by law to be done.[2] Whether the failure to satisfy a condition necessary for the exercise of a statutory power should be considered to be sufficient is a matter subject of conflicting opinion.[3]

- The term “improper” is intended to cover a wider range of conduct than “contravention.”[4] In ***Parker v Comptroller-General of Customs*** French CJ noted that the definition contained in the *Oxford English Dictionary* includes “*not in accordance with truth, fact, reason or rule, abnormal, irregular, incorrect, inaccurate, erroneous, and wrong.”* Whether methods used to obtain evidence are improper is a matter for the courts to determine on a case by case basis.[5]

- Section 139 of the *Evidence Act* expressly provides that admissions will have been obtained improperly. Section 139 provides that evidence of a statement (or act) by a person during questioning is obtained improperly if: (a) a person is under arrest; (b) the questioning was conducted by an investigating official who was empowered to arrest; and (c) before starting the questioning the investigating official did not caution the person that they ‘did not have to say or do anything but that anything they did say or do may be used in evidence.’ That caution must also be given in, or translated into, a language which the person is able to communicate with reasonable fluency.[6]

- The circumstances in which evidence could be considered to have been obtained improperly are not limited by the prescriptions of the *Evidence Act.* It also includes cases;

    - where police officers use the power of arrest for a minor offence when a summons could be effective,[7]

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2 (2009) 83 ALJR 494 per French CJ at 28

3 Ibid, compare reasons of French CJ at 30 with Heydon at 162-163

4 *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 per French CJ at 30

5 *Ridgeway v The Queen* (1995) 184 CLR 19 at 36 per Mason CJ Deane and Dawson JJ

6 Section 139(3) of the *Evidence Act 1995*

7 *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151; [2002] NSWSC 194; *Director of Public Prosecutions (NSW) v CAD* [2003] NSWSC 196; *Director of Public Prosecutions (NSW) v AM* (2006) 161 A Crim R 219; [2006] NSWSC 348

- making a misstatement of fact in an affidavit in support of a warrant,[8]
- inducing an occupant of a premises to falsely believe that he had a search warrant to gain consent to enter private property.[9]
- entrapment[10]
- Crown attempting to call evidence from a witness after an inducement offered to that witness that they would not have to give evidence[11]

- ***R v Em***[12] is a significant decision of the Court of Criminal Appeal where it was held that a breach of an internal police guideline and instruction could be an impropriety for the purposes of section 138 of the *Evidence Act.* In ***DPP v AM***[13] Hall J explained that in order to ascertain whether police officers (or other law enforcement officers) have acted improperly by not following a guideline or instruction, it will often be necessary to identify the content of relevant or applicable standards of conduct (such as guidelines or instructions or codes of practice) issued by the Commissioner of Police. A court must then make an objective assessment as to whether the behaviour of officers was consistent with those standards.

Balancing Exercise

- Section 138 requires the court to engage in a balancing exercise, weighing considerations which support the exclusion of evidence against those which support its admission.[14] The former common law test was enunciated by the High Court in ***Bunning v Cross***[15] where it was explained that balancing exercise requires a court to weigh the competing requirements of public policy: on the one hand the desirable goal of bringing conviction to the wrongdoer, and on the other hand, 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.

- In ***R v Camilleri***[16] McClellan J found that cases involving an innocent but mistaken belief that the actions of a person were authorised by law, "only a minimal level of impropriety was involved." Similarly, in ***DPP v Langford***[17] Fullerton J held that a magistrate had erred in excluding unlawfully obtained evidence

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8 *R v Cornwell* (2003) 57 NSWLR 82; 141 A Crim R 164; [2003] NSWSC 97
9 See for example the views of Basten JA in *Parker v Comptroller-General of Customs* (2007) 243 ALR 574
10 *Ridgeway v The Queen* (1995) 184 CLR 19
11 *Ho v DPP(C'th) (1998) 102 A Crim R 37*
12 [2003] NSWCCA 374
13 [2006] NSWSC 348
14 *R v McKeough* [2003] NSWCCA 385
15 (1978) 141 CLR 54 per Stephen and Aickin JJ at 74
16 [2007] NSWCCA 36
17 [2012] NSWSC 310

because, in performing the balancing exercise required by section 138(1), there was a failure to properly assess the gravity of the illegality which had been found. Fullerton J remarked that the police officers appeared to have been acting under a "genuine but mistaken belief" that they were authorised to arrest the defendant and take her to hospital, and that this did not amount to a grave breach of the law. It is apparent from these authorities that defence counsel need to be able to demonstrate that there has been something other than innocent error by a police officer.

Practical Tips

- You should be familiar with the NSW Police 'Code of Practice For CRIME' and 'Commissioner's Instructions'. These are publicly available. If you have a particularly serious matter it may be worth issuing a subpoena for documents related to training, 'law notes' and training courses presented in the relevant area of issue.

- You should be familiar with LEPRA, LEPRR and their schedules. They prescribe in some detail how the police are to treat accused persons and, in particular, suspects in custody.

- Prepare your cross-examination of the police with a view to your final submissions on the voir dire.

- It is rare that police will maliciously or intentionally fail to comply with laws, rules or policies. It is most often the case the contravention or impropriety is due to lack of experience and training or laziness or poor supervision. Most will agree to their failings if cross-examined properly.

Road Side 'ERISPs'

Issue

There is an increasing incidence of police officers conducting hand held audio recordings with suspects prior to taking them to the police station and affording them their rights pursuant to Part 9 of LEPRA. In some cases this may subvert an accused person's rights as legislated in LEPRA.

- It is completely proper and legal to record a conversation with another person as long as s7(3) of the *Surveillance Devices Act* is complied with.

- Police are within the bounds of the law, assuming the SDA is complied with, to record their interactions with the public, their attempts at determining whether an offence has occurred and by whom, various permissions to search, enter and detain and exercise of other powers

- The issue arises where police have satisfied themselves that the person they are speaking to has committed an offence and that s99(1)(b) is satisfied and at that point they launch into a detailed 'ERISP' style interview without taking the suspect to the police station and ensuring their Part 9 rights are complied with.

- This is particularly relevant for ATSI persons, given the specific provisions within LEPRA relating to their custody management, especially contacting ALS.

- Unfortunately, s122 of LEPRA, is not clear and can be construed to mean that only after the suspect is brought to the police station (as opposed to placed under arrest) are the Part 9 rights to be afforded as soon as practicable;

122 Custody manager to caution, and give summary of Part to, detained person

(cf *Crimes Act 1900*, s 356M)

(1) As soon as practicable after a person who is detained under this Part (a ***detained person***) comes into custody at a police station or other place of detention, the custody manager for the person must orally and in writing:

(a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and

(b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised officer and that the person, or the person's legal representative, may make representations to the authorised officer about the application.

(2) The giving of a caution does not affect a requirement of any law that a person answer questions put by, or do things required by, a police officer.

(3) After being given the information referred to in subsection (1) orally and in writing, the person is to be requested to sign an acknowledgment that the information has been so given.

- There appears to be two different concepts encapsulated in this section which gives rise to complexity and provides a method for police to get around Part 9;
    - Firstly, all persons to whom Part 9 applies must be 'under arrest'[18]. This includes the concept of 'arrest/detention' as per the common law[19] (deprivation of liberty, submission to control of police, with or without touching, not free to leave if wishes to do so etc) which must be as a last resort and which must be for a purpose defined in s99(1)(b) of LEPRA. This concept of arrest is extended by s110 of LEPRA to cover some specific situations which would not satisfy the common law definition of arrest.
    - However, the LEPRA concept of detention for the purposes of Part 9 requirements is only engaged once a person comes into custody at a 'police station or other place of detention'. The concept of 'other place of detention' is unlikely to mean on the road side with the police, rather a Corrective Service's police room or the like.

Method of Exclusion

- I think that this statutory interpretation issue, whilst interesting, is a weak argument and unlikely to be accepted by the courts. The better argument is for exclusion per s138/s85/s90.
- Where a person is arrested per common law or deemed arrest per s110 and they are not taken straight to the police station for their Part 9 rights then the police are avoiding compliance with the protections afforded by Part 9 which Parliament clearly intended to apply before an accused person waives their fundamental right to silence.

[18] s99(4) LEPRA

[19] Lavery (1978) 19 SASR 515, C (1997) 93 A Crim R 81

Considerations

- There is no power at common law for the police to detain a person for the purposes of questioning or investigation. Once arrested a person must be brought before the court as soon as practicable[20]. As soon as practicable means the time it takes to process and transport the person, it does not include any time for interrogation or investigation. Part 9 represents an exception to this by providing a limited period of time (usually 4 hours but it can be extended by virtue of detention warrant) during which the police may investigate the offence and question the suspect before taking him to court.

- To launch into a detailed, 'ERISP style' interview after arrest is a clear breach of this law as there is no provision for interrogation without Part 9.

- To launch into a detailed, 'ERISP style' interview after arrest is circumvention by the police of the rights intended by Parliament to be afforded to suspects by Part 9 and should be excluded on public policy grounds.

- To launch into a detailed, 'ERISP style' interview after arrest is inconsistent with the object of the relevant Part of the Act; s109

- To launch into a detailed, 'ERISP style' interview after arrest is inconsistent with a person's fundamental right to silence

- With respect to vulnerable suspects, such as ATSI persons, Division 3 of the LEPRR cannot be complied with on the side of the road and to continue to question is to take advantage of their vulnerability and is inherently unfair.

- lack of video recording brings further into question the probity of questioning

- medical and mental health issues, which impact on the probity of admissions, cannot be adequately assessed or addressed on the side of the road

- there may be other circumstances playing on the mind of the suspect at the time, rather than a considered decision to fore go their right to silence

- The NSW Police Code of Practice for CRIME may be breached by a detailed 'roadside ERISP':

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[20] See *Williams v R* (1986) 161 CLR 278, *Michaels v The Queen* (1995), s99(3) LEPRA, s20 Bail Act, s239 CPA, Code of Practice for CRIME – P66.

"Preliminary interviews

Do not conduct lengthy preliminary interviews with a suspect before a formal, electronically recorded interview at a recognised interviewing facility.
Preliminary questioning, other than at a recognised interviewing facility, should be conducted only for the purposes of clearing up any doubt and/or ambiguity, unless delay would be likely to:

- *interfere with or physically harm other people*
- *lead to interference with evidence connected with an offence*
- *lead to the alerting of other people suspected of having committed an offence but not yet arrested*
- *hinder the recovery of property.*

Once the risk has been averted or questions have been put to attempt to avert the risk stop interviewing.

Where a confession, admission or statement has been made during preliminary questioning before arriving at a recognised interviewing facility record it in full in your notebook. Ask the suspect to sign it.

Where you make contemporaneous notes of any admissions or statement have other police present at the time sign it and compile a complete typewritten statement of it". Page 76

- each situation should be dealt with according to its own facts and circumstances including the length and detail of the interview, the characteristics and intoxication of the suspect, the circumstances of the interview, other conduct of police around the time of the interview, seriousness of the offence, probative value of the evidence etc