Children’s Legal Service Conference 2012

Advocacy: cross-examining police officers in the Children's Court

Introduction

In this paper I have chosen to use an example involving cross-examination of police in the context of attempting to have admissions excluded, in this case pursuant to the provisions of Section 138 of the *Evidence Act*. I have done this because many practitioners in the Children’s Court have had experience in having attempted this exercise. In choosing this example I hope to highlight matters that are relevant particularly to children. The reason for this is that this is a Children’s Legal Service Conference, and also because about half an hour ago in Dubbo Mark Dennis from my chambers delivered a paper to the Aboriginal Legal Service titled: “Cross-examining Police Officers” which I have attached to this paper and deals with techniques for cross-examination of police officers generally.

It is frequently the case that admissions are obtained from children by the police. This will sometimes occur when the police attend the home of the child in order to question them or to arrest them. The exclusion of such evidence pursuant to the provisions of Section 138 involves a two-stage process. The first is proving that evidence is "improperly or illegally obtained" pursuant to the provisions of Section 138 of the *Evidence Act*. The second (and in my experience more difficult task) is preventing the Crown from satisfying the Magistrate that "the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained" (ie. improperly or illegally).

Much of the content below is also applicable to exclusion of evidence under Section 138 in circumstances where the police have misused other powers under LEPRA , such as the power conferred in Section 21 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (the “stop, search and detain” power) and Section 99 of *LEPRA* (the arrest power with associated requirements of Section 8 *Children (Criminal Proceedings) Act*, Section 201 *LEPRA* (requirements as to form of arrest). Where possible I have made reference to these issues in the paper in a less-comprehensive manner than the analysis of the exclusion of admissions.

Once you have read the brief and determined that a damaging admission has been made, it is important to have a thorough knowledge of the relevant legislative provisions relating to admissions to determine if their may be grounds for having it excluded.

Below is some of the legislation that you should be aware of relevant to circumstances in which an admission has been obtained. Please note that for present purposes I have assumed that the requirements of Section 13 *Children (Criminal Proceedings) Act 1987* have been complied with. That provision has been analysed extensively previously and my guess is that most practitioners at this conference are familiar with it.

Section 139, *Evidence Act* – Establishing an arrest

In my view the starting point for such admissions is Section 139 *Evidence Act*. The parts of that Section that is most likely to be relevant to the circumstances of cases frequently before the Children's Court are as follows:

> ***139 Cautioning of persons***
> *(1) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:*
> *(a) the person was under arrest for an offence at the time, and*
> *(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and*
> *(c) before starting the questioning the investigating official did not 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.*

The question will often be at that point whether the child was under "arrest" for the purpose of Section 139(1)(a). Thankfully the legislation has thought fit to provide some prescription with regards to what constitutes "arrest" and this avoids dredging up the old *Christie v Leachinsky* [1947] AC 573, and other ancient legislation to argue that your client was no longer the "master of his own destiny" when being questioned by the police.

Section 139(5) provides as follows:

> *(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:*
> *(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or*
> *(b) the official would not allow the person to leave if the person wished to do so, or*
> *(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.*

The Need to Cross-Examine the Officer to whom the Admission was made.

A frequent circumstance will be that the police officer obtains an admission contrary to your client's interests without a formal arrest and caution having been given. In these circumstances (and assuming you wish to exclude the evidence) you will often need to

cross-examine the police officer to establish that your client was under "arrest" pursuant to Section 139(5) and was therefore required to be provided with a caution pursuant to Section 139(1)(c).

In order to establish whether the officer had sufficient evidence to establish that the person has committed an offence you will need to know what evidence he/she actually had! This can cause some difficulties because it will involve cross-examining in evidence that could otherwise be described as "intelligence" that may be otherwise inadmissible in the hearing. It is for this reason that I believe rather than objecting in the course of the evidence it is better that such evidence be given during a voire dire pursuant to Section 189 of the *Evidence Act*. Magistrates will often be resistant to this course. However, the wording of the legislation (including constant reference to the phrase "if there is a jury" lends support to the contention that the legislature envisaged circumstances where the section would be utilized in a defended hearing.

Some Example Cross-Examination – The reason for approach

Some typical cross-examination to determine the intention of the police officer at the time he/she approached your client could be:

> *"So earlier in the day you had been present at a briefing at Redfern Police station in relation to the robbery of taxi driver Billy Bloggs?*
> *And who was it that was conducting that briefing?*
> *And during that briefing the accused was identified as a suspect for the robbery?*
> *Was anyone else mentioned as a potential suspect?*
> *Only the accused?*
> *And you considered that there was credible information linking him to the commission of the offence?*
> **(If no press for the content of the information he had been told)**
> *And you attended his residence at 4PM that day in order to arrest him for the offence."*

Alternatively:

> *"You were the officer in charge in respect of the robbery of Billy Bloggs*
> *As officer in charge you were aware of the COPS event records relating to the investigation.*
> **(Good time to call on them if you want!)**
> *On the day you went to the home of the young person you had formed a suspicion that it was him who had committed the robbery.*
> *You went to his home on that day to arrest him."*

If there no joy in respect of the above (for example, because the officer states that he just wanted to talk to the accused about the matter) you might consider setting the trap for a possible Section 139(2)(b) or (c) submission:

> *"So you say you went to the house just to speak with him.*

To ask him some questions.
You know who the young person is.
You know his mother.
You have telephoned her before have you not.
You could have rung the young person and asked him those questions.
(Smart officer will give Section 13 response!)
When he opened the door you said to him "Come here I want to talk to you"
You wanted to speak to him.
If he had run out of the house at that point you would have stopped him.
Physically if necessary.
He was not free to go where he pleased was he.
(If yes)
Well did you tell him that?
Why not?
Not because you had no intention of letting him walk away from you at that stage.
Did you explain to him that he didn't have to stand there and speak to you?
Didn't think to tell him that either?
Not because you wanted to see if you could get an admission without giving him the caution?
Not because you thought if you gave him the caution he would be less likely to make admissions to you."

It may also be an effective tool in cross-examining a police officer who tells the Court that he only wanted to question the Young Person to use something along the lines of the following:

"You are aware that the Law Enforcement (Powers and Responsibilities) Act provides power for you to detain someone for the purpose of investigation?
This includes questioning of the suspect as part of that investigation.
That power includes obligations of behalf of the police to caution the suspect.
To provide him or her with information about their rights while they are in custody.
To communicate with a friend, relative, guardian etc.
To access legal advice if they would like to.
To assist in making sure any admissions made by the person are given freely and voluntarily is that right? **(cheeky and probably inadmissible but you should get away with it)***.*
You decided to question the young person.
Without providing any caution.
Without informing him of the right to legal advice.
Or any of the other safeguards he would have had had if he had been placed under arrest.
With a view to obtaining admissions from him that would incriminate him in an offence."

Section 138 – The Exercise of Discretion

I am sure that many of you share the experience that I have that establishing illegality or impropriety on behalf of the police is often the easy bit. Convincing the Magistrate that the

Crown has not discharged their burden under Section 138 is quite a different kettle of fish. The starting point for many Magistrates is that unless deliberate disregard for the lawful exercise of power is evident, the evidence goes in. If deliberateness was the test, Section 138(3)(e) would be the only consideration! Unfortunately the case of *R v Cammilleri* (2007) 169 A Crim R 197 (at para 35) provides any Magistrate minded to think in this way with ample ammunition.

Unfortunately we do not get two bites at the cherry in terms of the different considerations of Section 139 and 138 and so your cross-examination of the police officer will have to cover matters relevant both to establishing illegality or impropriety and matters relevant to the exercise of discretion to allow the evidence to be admitted. Indeed, although Section 139 is restricted to issues of evidence that has been obtained "improperly" it certainly does not cover the field with regard to the scope of what could be considered "improper". Some relevant authority concerning impropriety is found in the High Court authority of *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494. French CJ noted (at 28) that the definition of "improper" contained in the Oxford English Dictionary includes "*not in accordance with truth, fact, reason, or rule; abnormal, irregular; incorrect, inaccurate; erroneous, wrong*". The word "improperly" should not be narrowly construed (*DPP v Carr* (2002) 127 A Crim R 151).

The broad definition of "improperly" allows broad scope to cross-examine police in respect of police policy. There are two main documents that practitioners in the Children's Court should have a thorough knowledge of, being the NSW Police Force- Youth Police Statement and the Code of Practice for Crime. It is my experience that many police officers have knowledge at least of the existence of these documents. These documents can be used to argue that the conduct of the police officer (if inconsistent with the document) is "improper". In *Robinson V Woolworths Ltd* (2005) 158 A Crim R 546, Basten JA stated (at paragraph 23) in respect of the meaning of impropriety: "First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with the powers of law enforcement." Second, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with those standards".

In my view it would be difficult to argue against the proposition that "society" is entitled to consider that the minimum standards required of a police officer are those standards that they enforce upon themselves in their policy documents and make accessible to the public!

Non-adherence to the statements contained in the documents can also be used to argue that the gravity of the impropriety is high and in some circumstances (if the officer admits

knowledge of the contents but his/her actions do not adhere to it) the consideration of whether the impropriety was deliberate or reckless.

1. NSW Police Force – Youth Policy Statement
(http://www.police.nsw.gov.au/about_us/policies__and__procedures/policies/youth_policy_statement**)**

a. An important relevant extract – Discretion in use of police powers

> *"Police officers have discretion in relation to how police powers are used. Officers will ensure this discretion is used in an appropriate, fair and professional manner when dealing with all people, including young people."*

Example Questions:

"You are aware of the Youth Policy Statement of the NSW Police Force.
Part of that policy statement reads **(read above)***.*
So the existence of a power is in itself not sufficient reason to exercise it.
You retain a discretion.
In this case you say you had a power to question the young person without caution as he was not under arrest.
Because at that stage you did not have a reasonable suspicion he has committed an offence.
Aware as a young person he is a vulnerable person.
Did not have to question him at that point even though you had a power to do so.
Could have made further enquiries with other persons.
Could have asked him to attend the police station as a volunteer.
In which case he would have been told of certain rights for people in that situation.
Instead you decided to question him.
Without giving him a caution.
Without any of the safeguards that he would have been entitled to if he had been arrested and taken to the police station."

b. An important relevant extract – Accountability

> *"Police decisions regarding young people must be transparent and able to be justified. Maintenance of rights of young offenders will show the need to respect the rights of others."*

Example Questions:

As before re: awareness of policy statement, then:
"So you are aware that it is important that the right to silence be respected for any accused?
Whether adult or child?
And the caution forms part of that respect for the right to silence.
And police policy dictates that maintaining the right of young people is important in showing them the need to respect the rights of others.

So you would agree that it is especially important in the case of children to maintain their rights.
Your own policy dictates that.
But you did not give him/her a caution in this case."

NOTE: Also worth using in submissions to the Magistrate regarding the exercise of discretion pursuant to Section 138. A good way of helping the police achieve their goal of accountability is by excluding the evidence!

c. An important relevant extract – Equity

> *"Police will interact with young people in ways that is appropriate to the circumstances of the situation and not on the characteristics of the young person."*

Example Questions:

"You knew that the Young Person was a child.
And you knew that because of your previous dealings with him.
You decided to stop the Young Person and search him pursuant to Section 21 of LEPRA.
Because it was 3AM in the morning.
And he looked away when you made eye contact with him.
And he was in an area that was known to you as being an area in which there was a high incidence of robbery offences.
Not because you knew the young person to be involved in robberies.
Because to target him like that would be a breach of the equity principle contained in the Youth Policy Statement wouldn't it?
And you understand the importance of adherence to that Statement. "

2. Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) (http://www.police.nsw.gov.au/about_us/policies__and__procedures/legislation_list/code_of_practice_for_crime)

a. An important relevant extract – Adherence to the rule of law and preservation of freedoms

> *"Both Codes are based on each member of the NSW Police acting in accordance with the following values:*
> - *the rule of law is upheld*
> - *the rights and freedoms of individuals are preserved"*

Example Questions

"You have given evidence you have been a police officer for 7 years.
You are familiar with the police Code of Practice for Crime.
Forms part of your training as a police officer.
Believe that it is important in your position as a police officer to adhere to the Code.
Part of the objects of the Code are as follows: **(Read from above)**.
So you would agree that the Code encourages you be rigid in adherence to the powers conferred on you in LEPRA.

And also to respect the rights and freedoms of individuals
Including the right to silence.
Even more important in circumstances where the suspect is a child.
Yet you did not provide him with a caution before you questioned him.
When what you were hoping to achieve by those questions was an answer that would incriminate him with regard to a criminal offence. "

b. An important relevant extract – Adherence to the rule of law and preservation of freedoms

Under the big heading "*Powers of Arrest*", the following appears in large letters as the first thing:

> *"You cannot arrest a person solely for questioning. The only purpose for which you can arrest a person without a warrant is for the purpose of taking the suspect before a justice to be dealt with according to law.*
> *You may **arrest** by touching, or by words and consent. Refer to the dictionary for a definition of **arrest** for this Code.*
> *Dictionary Definition: For the purpose of Part 9 of LEPRA, arrest includes when a person is in the company of a police officer for the purpose of participating in investigative procedures if:*
> *the police officer believes there is sufficient evidence to establish the person has committed an offence that is or is to be the subject of the investigation, or*
> *the officer would arrest the person if they attempted to leave, or*
> *the officer gives the person reasonable grounds for believing the person would not be allowed to leave if they wished to do so."*

Example Questions:

"So you are aware that an arrest is not just affected by saying the words "you are under arrest".
An arrest can also be affected by your conduct.
By directing the accused to move to a certain place.
In fact by restricting his liberty in any way would you agree?
You have given evidence that the accused was not under arrest.
He was free to leave.
But at the same time you were aware that your conduct or direction could mean that he was in fact arrested.
And even that if you told him something that made him believe that he was not free to go if he had wanted to that that could be an arrest.
Would you accept that it could be considered a bit of a grey area as to whether someone is under arrest or not?
You could have just told him "your free to go at any time" to make sure he knew he was not under arrest.
But you didn't.
And the reason that you didn't is because you thought if you did he might do exactly that.
And then you wouldn't get your chance to get an admission from him."

c. An important relevant extract – Arrest of children (Breach of Section 99 *LEPRA*)

> *"As well as the general restrictions on making arrests under section 99(3) of LEPRA (see Exercising the power to arrest), you must also consider the requirements of section 8 of the Children (Criminal Proceedings) Act 1987 that criminal proceedings against children should be commenced by court attendance notice unless the exceptions in that section apply."*

Example Questions:

"You have given evidence that you are aware of the provisions of Section 99 of LEPRA.
And you are well aware of the factors that are to be taken into account when deciding whether to arrest.
And you have given evidence you are very familiar with the Code of Practice for Crime.
So you knew about Section 8 of the Children (Criminal Proceedings) Act 1997?
Those rights are in addition to those contained under LEPRA.
Yet you decided to arrest the Young Person for goods-in-custody.
Even though you knew the Young Person had lived at that address with his mother and step-father for several years.
Even though you knew he had only received one caution previously."

c. An important relevant extract – Interviewing children

> *"Do not question a child you suspect of committing a criminal offence unless a support person is present. Do not use a NSW Police employee for this. Refer to section 13 of the Children (Criminal Proceedings) Act 1987. This does not stop you from speaking to a child. Where possible, interview the child at home."*

d. An important relevant extract – Written Statements.

This is going off on a bit of a tangent but interesting nonetheless.

> *"If someone wants to make a statement of their own choosing give them the opportunity, after cautioning them. Ensure statements are freely and voluntarily made. If they read the statement: do not question further but you may draw attention to matters in the statement which are not clear"*

e. An important relevant extract – Questioning

> *"You do not have any power to detain or arrest someone merely to question them. All people have the Common Law right to silence, except where the law requires them to provide information."*

Example Questions:

"You have indicated that you are familiar with the Code of Practice for Crime.
You are aware that a person has a right to silence.

That right exists independently of your obligation to provide a caution in various circumstances under LEPRA.
You are taught to respect that right.
Part of respecting that right is to provide suspects with a caution.
So they understand if they decide to give up that right what the consequences might be.
That what they say could be used against them.
But in this case you did not inform the Young Person of that right.
And what the consequences might be if he decided to forego that right
And you did not tell his father who was present either.
Instead you just asked him where he had been at 10PM the previous night."

f. An important relevant extract – Understanding caution

> *"Before questioning suspects be satisfied they understand the caution and implications of actions following it.*
> *Where you feel they do not understand the caution, ask clarifying questions and record the answers in full: eg: What do you understand by what I have just said?*
> *Ensure each question is clearly understood by the suspect.*
> *Record all admissions and statements in the exact words used by the people making them. Do not paraphrase.*
> *Once a suspect makes it clear that they will not answer anymore questions, as a matter of fairness to them, put the details of the allegations to them (eg: In fairness to you I am going to put the allegation to you. Do you understand that?). If the suspect comments and answers the allegations you may continue to ask questions until the suspect objects. However, once you put the allegation/s in full don't continue questioning suspects if they make it clear they are not prepared answer your questions.*
> *If you fail to caution at the appropriate time, or if the suspect does not fully understand it, any subsequent conversation or admission might be ruled to be improperly obtained and inadmissible. Particular care should be taken in relation to vulnerable persons."*

PLEASE NOTE THE ABOVE PARAGRAPH IS QUOTED IN THE MINORITY JUDGMENT OF JUSTICE KIRBY IN *EM v THE QUEEN* [2007] HCA 46.

> *The initial caution is:*
> *I am going to ask you some questions. You do not have to say or do anything if you do not want to. Do you understand that?*
> *We will record what you say or do. We can use this recording in court. Do you understand that?*
> *You do not have to follow the caution as a formal script, however, record what you say. It is essential you communicate to people they do not have to say or do anything in response to your questions and that anything they say or do may be used in evidence. Take into account their apparent intellectual capacity, age, background, level of intoxication, language skills etc when cautioning."*

Example Questions:

"You told the Young Person that he did not have to say anything and that anything he did say would be recorded and later be used in Court.
He answered "HMMMM".
You have given evidence that you are familiar with the Code of Practice for Crime.
Understand that it is particularly important to make sure that a person understands the caution.
Understand that you should take particular care with vulnerable persons such as the young person.
Code indicates when giving the caution you should take into account age.
So you should be especially careful with young people to administer the full caution.
And make sure that they understand it.
You didn't think to ask the Young Person to elaborate on the word "HMMMM".
Instead that was enough to satisfy you that he understood the content of the caution.
In fact you did not even think to ask him if he understood the caution.
Even though the Code of Practice stipulates that you should have done so even if he had been an adult.
In fact you should have asked that question twice."

FINALLY A TIP

In relation to a failure to caution or incomplete caution or other impropriety affecting client's right to silence, grab a quote from Justice Kirby in *Em v The Queen* [2007] HCA 46. Some beauties are:

Para 211:

> *"The importance of the second part of the caution has been explained in many cases. In Miranda v Arizona [145] the Supreme Court of the United States explained:*
>
> > *"The warning of the right to silence must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make [a suspect] aware not only of the privilege, but of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system- that he is not in the presence of persons Acting solely in his interest."*

Para 214:

> *"Either this Court is serious about the right to silence and the need for police and like officials to caution suspects about the incidents of that right, or it is not."*

GO ON, I DARE YOU!

Para 215 in relation to the police who deliberately administered an incomplete caution:

> *"I acknowledge their frustrations. I am willing to accept the sincerity of their objectives. But if their conduct on this occasion is vindicated by this Court, we must face the reality that what they did will be repeated. By condonation, it may well become common or general practice. I will not willingly accept that development. It carries with it the seeds of the destruction of the suspect's right to silence and the undermining of the accusatorial character of criminal proceedings."*

Justice Kirby argued that the evidence of an admission made by a murder suspect should have been excluded as being procured in circumstances that made it unfair. He lost. And most of the time so will you. But keep up the good fight!

Troy Edwards
Forbes Chambers.