“Well I killed him because he called me a dog and the two other old cunts had nothing to do with it…I killed him, I just choked him and snapped his neck”: *R v Moffat* [2000] NSWCCA 174 at [12]

MISSION IMPOSSIBLE? EXCLUDING ADMISSIONS TO POLICE

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INTRODUCTION

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The Purpose of the Paper

1. Excluding admissions to police is a complex and intellectually challenging topic. It is also enormous. The paper does not purport to address the myriad of legal and factual issues that may arise. It is intended to be instructive and overarching rather than comprehensive, specific or academic. The paper will hopefully constitute a useful starting point for defence practitioners seeking to challenge the admissibility of confessional statements made to police officers.

2. In particular, we have sought to:

   - Set out some of the more important legislative provisions
   - Identify the relevant common law authority and principles
   - Identify practical problems and propose possible solutions

3. The paper attempts to state the law as at 22 July 2019.

Preliminary Observations

4. Before turning to the exclusionary provisions, there are four preliminary questions that practitioners might benefit from considering.

5. One, does the evidence amount to an "admission"? The question is addressed at p 26 of this paper.

6. Two, do you want the admission out? An admission may be both inculpatory and exculpatory. For example, assume the accused admits to police, in the absence of a caution, that he struck the complainant but asserts he was acting in self-defence. If the defence case theory is ultimately self-defence, is there a forensic advantage in seeking the exclusion of the admission?

7. Three, if the admission is made at a time when police officers are purportedly exercising a statutory power, query whether the pre-conditions for the exercise of that power have been satisfied (for example, if relevant, have police complied with s 201 of LEPRA?). Furthermore, have they exceeded the ambit of that legislative power?[1] Similarly, have the officers adhered to relevant police guidelines such as the NSW Code of Practice for CRIME? The answer to these

[1] See, for example, Daniel's analysis of LEPRA below

questions may inform the availability of objections under s 138 and, possibly, other provisions of the *Evidence Act 1995.*

8. Four, an admission may be objectionable on several grounds. You might think about ordering your submissions in this way:

    - Address s 281 of the *Criminal Procedure Act 1986* and/or s 13 of the *Children (Criminal Proceedings) Act 1987* before the *Evidence Act 1995* provisions. This is because, if certain statutory circumstances are satisfied, the evidence will be rendered inadmissible under s 281 or presumed inadmissible under s 13.

    - Under the *Evidence Act 1995,* begin with ss 84 and 85 because the onus rests upon the Crown and the exclusion of evidence is neither discretionary nor subject to a balancing exercise.

    - Generally, address s 90 before s 138 because s 90 avoids the vexed questions of impropriety, causation and the balancing of competing public interests. However, note the contentious "safety-net" line of authority and the criticism in *R v Cooney* [2013] NSWCCA 312 of an approach which utilises s 90 to "side-step" s 138 (see below at [123]-[125]).

9. Regrettably, the paper does not deal with s 13 of the *Children (Criminal Proceedings) Act 1987*. Fortunately, there are several helpful papers on this subject – see the resources page. Furthermore, the recent decision of *R v Mercury* [2019] NSWSC 81 is illuminating. The accused's confession to the murder of a child during a formal police interview in 1971 was excluded under s 13. R A Hulme J traced the legislative history of the provision and its underlying rationale. His Honour declined to exercise his discretion to admit the evidence under s 13(2)(b)(ii) having concluded that the accused was a particularly vulnerable 17 year old who was not afforded the protection envisaged by the legislation.

SECTION 281, CRIMINAL PROCEDURE ACT 1986

Author – Daniel Pace

10. In *Nicholls v The Queen* [2005] HCA 1 the Court said at [108]

> ……Legislature has set its face against admitting unrecorded admissions by suspects except in special circumstances. When interviewing police officers encourage the making of off-camera admissions, despite the presence of recording equipment, and then fail to refer to the admissions when the recording resumes, the policy of the legislation points strongly to excluding the admissions even though, if the officers' evidence is accepted, the case comes within an exception specified in s 570D(2). Given the legislative policy of recording interviews of suspects wherever possible so that disputes concerning admissions can be reduced to a minimum, attempts to avoid the effect of that policy should be perceived as unfair attempts to obtain evidence and such evidence should be excluded.

11. s 281 Criminal Procedure Act

(*1) This section applies to an admission:*

(a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and

(b) that was made in the course of official questioning, and

(c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.

(2) Evidence of an admission to which this section applies is not admissible unless:

(a) there is available to the court:

(i) a tape recording made by an investigating official of the interview in the course of which the admission was made, or

(ii) if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or

(b) the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.

(3) The hearsay rule and the opinion rule (within the meaning of the Evidence Act 1995) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).

(4) In this section:

investigating official means:

(a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or

b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences prescribed by the regulations.

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

reasonable excuse includes:

(a) a mechanical failure, or

(b) the refusal of a person being questioned to have the questioning electronically recorded, or

(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

tape recording includes:

(a) audio recording, or

(b) video recording, or

(c) a video recording accompanied by a separately but contemporaneously recorded audio recording

What was mischief that s 281 was seeking to address?

12. The mischief s281 was seeking to address is properly identified in the Attorney General's Second Reading Speech (Parliamentary Debates, Legislative Council, 24 May 1995 at 117), in which four objectives were set out:

(i) To provide the court with a reliable account of statements made by persons accused of crime whilst in police custody.

(ii) To provide an objective means of resolving disputes about the conduct and substance of police interviews.

(iii) To deter and/or prevent the use of unfair practices by the police prior to, during, and after interviews.

(iv) To deter the making of unfair and false allegations of improper behaviour by police

13. In *Kelly v R* (2004) 205 ALR 274, Gleeson CJ, Hayne and Heydon JJ observed:

Though for many years before the 1960s legal rules had been developed in some detail to regulate the proof of confessions to police officers, from the 1960s on concern about that topic increased. The key questions, from case to case, were whether a confession was made; if so, in what terms; whether it was to be excluded as involuntary; whether it was to be excluded in the court's discretion either as having been obtained unfairly, or as having been obtained illegally or improperly; and whether it was reliable. All these issues were capable of being affected by the means by which the confession was perceived, recorded or recollected, and then transmitted to the court.

Particular concern was directed to allegedly fabricated confessions. …

But the problem went well beyond possible fabrication. Disputes could arise in circumstances including the following:

(a) where an oral confession was not noted down;
(b) where an oral confession was noted down, whether contemporaneously (for example, by a police typist laboriously recording each question and answer) or otherwise, and whether by a single police officer, or by two or more police officers acting separately or collaboratively;
(c) where an oral confession was reduced to writing but not signed by its maker;
(d) where an oral confession was reduced to writing by police officers before being signed by its maker; and
(e) where a confession was written out by its maker.

The disputes could turn on questions not only of fabrication, but also of misunderstanding, misrecollection, coercion, or oppression in a broad sense. Considerable amounts of court time were taken up, generally in the absence of the jury, in resolving disputes about confessions. Considerable amounts of police time, too, were taken up in interviews slowly recorded by officers operating typewriters or writing in notebooks. Grave allegations were commonly

> made suggesting police perjury, brutality and pressure. Unfounded though many of these allegations may have been, they were damaging to public confidence in the criminal justice system. Over time the courts, law reform agencies and legislatures began to respond to this state of affairs. In particular, as audio recording became more common in commercial and social life, and as the necessary equipment became more efficient, easier to operate, and cheaper, it was increasingly suggested that, either as a matter of sensible practice or as a precondition to admissibility, police interviews in criminal investigations should be electronically recorded. Pilot studies were conducted which suggested the utility of this technique. It was hoped that the introduction of a reliable means of recording confessions would not only save police and court time directly, and reduce the need for police officers to spend long periods at court, but also encourage more, and earlier, pleas of guilty. All this would save public money as well as improving the integrity of the trial process and the efficiency of the police.
>
> …
>
> As a result, it came to be viewed as a commonplace, not only in circles favourable to defence interests but also in police circles, that, despite its financial cost, the electronic recording of police interviews, particularly video-recording, would generate real advantages. It would be useful in providing a means of establishing exactly what was said; in proving that requirements for cautioning and other formalities had been complied with; in narrowing the time within which it could be alleged that threats had been made; in helping to estimate the fairness and propriety of the questioning; and in helping to evaluate, by assessment of the demeanour and manner of the interviewee in responding, the reliability of what was said. (pars 22-25, 29)

14. McHugh J made observations to similar effect. His Honour said:

> Acting on the recommendations and findings of various Commissions and Inquiries, all Australian legislatures have enacted legislation that seeks to protect the rights of accused persons during a period when their rights are vulnerable by reason of the mistaken recollection or lies of police officers. The enactments of the various legislatures are broadly similar in principle although they differ in detail. In general, they identify the period of vulnerability as commencing with the time when the facts raise a suspicion of the accused's guilt. In most jurisdictions, the period is thereafter open-ended. The enactments recognise that miscarriages of justice may occur when there is no mechanical record confirming an allegation by police officers that the accused has confessed to a crime or made a damaging admission after he or she was or ought reasonably to have been seen as a suspect. The evident policy of the enactments is that it is against the interests of justice to admit evidence of such

confessions or admissions unless there is a mechanical record of such confession or admission or an acknowledgment of it, or in some jurisdictions that exceptional circumstances justify the admission of the evidence. (par 96)

15. As early as 1977 in *Driscoll v R* [1977] HCA 43 at [30], Murphy J suggested that, if police wish to have supporting evidence of an interrogation there are other methods, such as tape recording, or the use of video-tape, which would be likely to be more effective than the production of unsigned records of interview, and would not be open to the same objection. He said that an admission of an unsigned record would in some cases tip the scales unfairly against the accused.

The importance of compliance with s281 or its predecessor s424A of the Crimes Act in relation to matters that are non-indictable or summary offence

16. If your matter is not a summary or non-indictable offence the provisions of s 281 **must** be complied with: *R v Schiavini* (1999) 108 A Crim R 161 at [16]; *R v Rowe* (2001) 50 NSWLR 510 at [19].

17. There is no discretion permitting the tender of admissions not complying with either s 281 of the *Criminal Procedure Act* or s 86 of the *Evidence Act*: *R v Hinton* (1999) 103 A Crim R 142 at [39].

18. If the pre-conditions of s281 are met and the Court finds that there has been non-compliance of the same, the effect is that the admissions sought to be relied upon by the Crown will be excluded.

19. The authorities are clear that if the relevant fall back provisions contained in the Evidence Act, such as s137/s138, there exist no discretionary consideration to admit the evidence if the Court finds that there has been a non-compliance with s281.

20. In R v Reid [1999] NSWCCA 258, both Smart AJ and Spigelman CJ remarked that attempts to circumvent s424A (predecessor to s 281 of the Criminal Procedure) will not be tolerated. That the precise and rigorous requirements of s424A Crimes Act must be satisfied and that a failure to do so would be critical. At [65 – 69] Smart AJ said; that attempts to circumvent s424A will not be tolerated. The stratagems so far used have included interviews at the scene or in a police car or at a police station and of the recorded in a police notebook, whether signed or unsigned. These occur before any ERISP and sometimes in substitution for an ERISP. Further he said; the strongly preferable course is that, in cases of serious crime, interviews with questions asked and answers given at crime scenes be recorded by an audio tape recorder, albeit that it is a pocket one and only one recording can be made…..

> It is important that, if no adequate recording is made at the scene, the admissions alleged to have been made there and intended to be adduced in evidence are put to the accused in a fully recorded interview as early as possible for his acceptance or denial. <u>Failure to do so would be critical unless, of course, the accused declined to participate in such an interview.</u>

21. Spigelman CJ at [6] said:

> Smart AJ makes a number of comments as to the application of s424A and what is desirable conduct on the part of police with respect to these matters. His Honour's remarks are based on an assumption that the prosecution will seek to rely on any admissions. Police investigations may proceed in accordance with such inquiries as they may properly pursue. <u>However, if it is sought to tender admissions made in the course of such investigations, then the precise and rigorous requirements of s424A must be satisfied.</u>

Application of s281

22. Below is a 'check list' of eight matters that one should consider in determining if the s 281(1) criteria apply with respect to their clients set of admissions. That is:

    i. That the accused is an "accused person" (as defined in s 3);
    ii. The accused made "admissions" (per the evidence act)
    iii. At the time of the admissions the accused was (or could reasonably have been) suspected as having committed an offence.
    iv. The admissions were made to "investigating officials"
    v. The admissions were made in the course of "official questioning".
    vi. The admissions relate to an indictable offence.
    vii. A relevant tape recording was <u>not</u> made.
    viii. No reasonable excuse exists not to record the admissions.

Three primary questions to consider in determining whether the prohibition under s281 applies to your case are:

a. ***At the time the admission was made was the accused a person capable of being reasonably suspected of committing an offence***

b. **Was the admissions made during the course of official questioning to an investigating official.**

c. **Did the police have a reasonable excuse as to why a tape recording could not be made?**

23. If the answer to either questions (a) or (b) are in the negative, then the prohibition under s281 does not apply and you will then revert to the relevant provisions in the evidence act referred to in this paper.

24. If the answer to question (c) is in the affirmative, then then the prohibition under s281 does not apply and you will revert to the relevant provisions in the evidence act referred to in this paper.

Question One - At the time the admission was made was the accused a person capable of being reasonably suspected of committing an offence

25. In responding to the question focus, will be on the words, 'could r*easonably have been suspected;'*s281 (1)(a). This was the subject of consideration in *R v Taouk* (2005) 154 A Crim R 69 and *R v Frangulis* [2006] NSWCCA 363.

26. In *R v Taouk* (2005) 154 A Crim R 69 the focus was upon the objective test in s281(1)(a), that is, whether a person "could reasonably have been suspected."

27. In R v Frangulis [2006] NSWCCA 363, the focus was upon the subjective and objective test in s281(1)(a), that is, whether a person did in fact suspect a person could reasonably have been suspected."

28. What remains undetermined is should the objective test be considered only in the light of the knowledge of the "investigating official" conducting the "official questioning", or should regard be had to the whole of the information available to the police involved in the enquiry.

29. In *R v Frangulis* [2006] NSWCCA 363, the accused provided a statement to police after a fire was extinguished at his restaurant. The Crown argued (on an s5F appeal) that he was the victim and was not a suspected person at the time he made admissions to the Detective. However, the court said, given the knowledge that police had prior to interview (that accelerants were found at fire and that he was the owner) that was sufficient to find he was a suspect and therefore s281 was at play.

30. In *R v Frangulis*, at [13] – [15] and [18] Hidden J said:

> 13 ……His Honour (Keleman DCJ) concluded that "at least from the time Det Thornton asked the accused at the scene to attend the police station and to make a statement

and during the course of taking the statement, he suspected the accused of being involved in deliberately lighting the fire". Expressing his conclusion in the words of s281(1)(a), his Honour said that the respondent "was or could have reasonably have been suspected by an investigating official of having committed an offence.

14 His Honour approached s281(1)(a) guided by the following passage from the judgment of Hall J in *R v Taouk* (2005) 154 A Crim R 69 at [160]-[161]:

> …The basis of the suspicion referred to in s281(1)(a) is the state of mind of an investigating official. That state of mind is more than mere surmise. Applying a similar approach as has been applied with respect to search warrant legislation, it is one arrived at on the basis of material that is capable of supporting the formation of an opinion, even if only a slight opinion, that the person in question (the accused) could have committed an offence. As to this approach generally, see *George v. Rockett* (1990) 170 CLR 104 at 115-116. See also *R v. Rondo* (2001) 126 A. Crim. R. 562 at 576.
>
> In summary, the suspicion must be one which *could reasonably* have been held by an investigating officer at the relevant point in time, namely, the time when the admission was made. Whether the suspicion satisfies the specified requirement as to reasonableness, is to be determined by the existence of grounds for the suspicion, which grounds must be based on or sourced in facts that do or tend to implicate the accused in possible criminal conduct of the relevant kind, an indictable offence, and that therefore are capable of giving rise to or supporting the requisite state of mind. It follows that a mere possibility that a person referred to in s281(1)(a) could have committed an offence is insufficient.

15 Hall J's observations were made in a case in which the focus was upon the objective test in s281(1)(a), that is, whether a person "could reasonably have been suspected" of having committed an offence. In the present case his Honour's primary finding was that Det Thornton did in fact suspect the respondent, although he added that the objective test was also satisfied. The matters raised by Hall J are relevant to the application of both tests, subjective and objective.

18 …. The evidence was capable of supporting a finding that Det Thornton saw the respondent as a suspect, and it was certainly an adequate basis for a finding that he could reasonably have been regarded as such. To adopt the expression used by Hall J in the passage from *Taouk* quoted above, the evidence admitted of more than "a mere possibility" that the respondent could have committed an offence.

Question Two - Was the admissions made during the course of official questioning to an investigating official

31. "Official Questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence; s281(4).

32. Each case will turn on its facts in determining what does and does not constituted official questioning.

33. The following authorities are examples of matters where the Court determined that the admissions that were made were NOT in the course 'official questioning':

- In *R v Naa* [2009] NSWSC 851, police were attempting to negotiate with an armed accused. During the course of the conversation, the accused made admissions; he had not been cautioned. Howie J held that s 139 did not apply because the admissions were not made during "questioning": at [101]. His Honour said that *"…the section was aimed at formal or informal interrogation of a suspect by a police officer for the purpose of the officer obtaining information, whether or not at the time of the interrogation the suspect was formally under arrest":* [98].

- In *DPP (NSW) v Owen*, the Court said that a failure to caution an accused at the time of the execution of an arrest warrant did not engage s 139 because he was not being questioned.

- In Bryant v R [2011] NSWCCA 26, the accused participated in a recorded interview and after the interview was completed he admitted to one offence but refused to comment about other alleged offences, the custody manager advised Mr Bryant that he was going to be charged with several armed robbery offences. The accused replied "yes I do not know about the others but I admitted to three. Two here and one in Canberra." It was held that, even if the conversation amounted to questioning, that it did not occur in the course of official questioning, as the investigation had ceased.

- In R v Blackman 2018 NSWSC 395; the accused made admissions to police who were guarding the accused was at Tweed Heads Hospital between 8.30 pm on Sunday 6 April, and 5 am on Monday, 7 April 2014. Police had typed the admissions into a laptop but did not electronically record them. Button J found at [509] – [511]; that the police were not intending to question the accused. They were simply intending to guard him. That the admissions were not made in response to questions that they asked. It was not official questioning.

34. The following authorities are examples of matters where the Court determined that the accused admissions were made in the course ‘official questioning’ to an ‘investigating offical’:

a) *R v Frangulis* [2006] NSWCCA 363, an insurance officer (a former police officer) had agreed with the police to share the information that they had obtained from their investigation against the accused. Mr Frangulius participated in an interview with the insurance officer (not recorded) where he made admissions to being the last person at his business premises before it was burnt down (the admissions relied on). The difficulty, was that the accused participated in the interview because he was advised by his solicitor that he had a contractual obligation to do so if he wished to pursue his insurance claim. What the accused was not advised of was that his interview would be handed over to the police. The solicitor in this case gave evidence that if he had known the interview would have been provided to the police that he would have provided the accused with additional legal advice, namely, informing his client of his right to silence. The Court found in this case that the insurance officer was embarking in a role as an investigating official and that the interview constituted official questioning. The Court found that any admissions obtained by the insurance officer and handed to police were caught by s281.

b) In *R v Murray* [2019] NSWDC 63, Neilson DCJ, rigorously applied s281 and excluded the admissions. The two admissions were positive responses to police questions that there drugs in the car and that were drugs on her person. The admissions were made before any caution was administered by the police.

   Neilson DCJ said the important question is why, in the first place, did Detective Senior Constable Bock ask the accused, “Do you have any drugs in the car?” That question was asked three times before there was a positive response. His honour considered that the context available to the officer meant:

   - At the time of the admissions the accused was (or could reasonably have been) suspected as having committed an offence - s281(1)(a)
   - The admissions were made in the course of “official questioning” - s281(1)(b)

   Nielson DCJ analysis is set out at [14] - [16] below:

   14 Detective Senior Constable told me, frankly, that she formed the view that there may have been something suspicious going on for a number of reasons: (1) both the

accused and Dane were behaving nervously; (2) Dane was sweating profusely, to the extent that the Detective Senior Constable had seen nothing like that before; (3) she knew, from her personal conversations in the past with the accused, that she was a consumer of methylamphetamine, and (4) she was aware that the accused had driven her vehicle earlier that day from premises at 10 Francis Street, Dee Why, which were known by police to be a “drug house”.

15 If one needed any further consideration, one such as Detective Senior Constable Bock could have raised the point of a large amount of cash in $100 and $50 notes passing one way or the other, either from the accused to Dane or from Dane to the accused. The inference to be drawn is that the lady’s wallet belonged not to Dane but to the accused, as the Detective Senior Constable believed.

16 Given those facts, it was quite open to the Detective Senior Constable to form a view that there may have been drugs in the car and there may have been a transaction taking place between the accused and Dane which involved those drugs. In the circumstances, it is my view that the Detective Senior Constable ought to have administered a caution to the accused prior to demanding of her as to whether there was any drug in her car or any drug on her person. In my view, the two admissions made by the accused were obtained improperly, that is contrary to the provisions of s 281 of the *Criminal Procedure Act 1986* and ought not be admitted into evidence.

Question Three - Did the police have a reasonable excuse as to why a tape recording could not be made?

35. In *Nicholls v The Queen* [2005] HCA 1 at [106] McHugh J said:

> 106 …..The focus of any inquiry directed to the application of the "reasonable excuse" exception must take account of the conduct of the police, as well as the fairness or otherwise to the accused of permitting the admissions to be admitted. In construing similar provisions in *MDR* (2002) 135 A Crim R 19 at 30, (citing *R v Day* (2002) 82 SASR 85 at 89 per Perry J) , Wicks J held that the conduct of the police officers was relevant to the question whether it would be "in the interests of justice" to admit evidence of admissions by the accused. His Honour thought relevant matters included whether non-compliance with the provisions was deliberate or the product of a reckless disregard of the provisions or was inadvertent or otherwise excusable. Such matters are also relevant in determining whether there was a "reasonable excuse" for not recording the admission. Most importantly of all, however, is whether the officers attempted to have the off-camera admission recorded. If, on-camera, the accused denies making an off-camera admission, it will be highly relevant in determining

whether there was a "reasonable excuse" "for there not being a recording on videotape of the admission." Even then it will be necessary for trial judges to bear in mind the observations of Slicer J in a related context in *R v Heinicke* [2001] TASSC 93 at [23]:

> "[I]t would be a denial of the spirit of the [Tasmanian provision] if courts as a matter of course permitted the reception of a videotaped interview comprising denials followed by a recanting recording interview made after a short unrecorded series of events which were themselves not subject to verification or which had not been fully and openly adopted in the following recorded interview."

36. Further in *Regina v Bullock* [2005] NSWSC, 825 at [20] Buddin J said "*The ultimate question is of course whether there exists a 'reasonable excuse' as to why a tape recording should not be made.*" His Honour referred to authority which suggests that the word "could" introduces a concept of impracticability in order to excuse the lack of a tape recording. His Honour referred to authority that it is <u>appropriate to take into account the conduct of the police</u> in considering this question

The following authorities are examples of matters where the Court determined that the prosecution had established a reasonable excuse as to why a tape recording Court not be made

37. In *R v Reid* [1999] NSWCCA 258 at [67], Smart AJ, confirms that so far as a tape recording about the earlier making of the admissions is concerned, that where an accused declined to be interviewed that this factor, establishes a reasonable excuse. His honour said that the inclusive definition of "*reasonable excuse*" includes such a consideration.

38. In R v Blackman [2018] NSWSC 395, Button J (facts referred to above), the Court found a reasonable excuse to exist when police obtained admissions from the accused who was being guarded by them at hospital. Button J at [511] said:

> …..Senior Constable Dutton and Senior Constable Cecil were not intending to question the accused. They were simply intending to guard him. They did so.
>
> Further, he said that he would accept that the prosecution had established that there *was* a reasonable excuse for the absence of a subsequent audio recording in which the accused was asked to "adopt" the admissions previously made. That is because he accepted the evidence of Detective Sergeant Frost that, if the accused had not exercised his right to silence on legal advice, the Detective <u>*proposed*</u> to engage in an electronically recorded interview with the accused, and to ask him during it whether he adopted the set of admissions. He said in other words, the exercise of the right to silence by the accused, in the particular circumstances of this case, would, in my opinion, constitute a reasonable excuse for the absence of a subsequent electronically recorded adoption.

39. In R v Bullock [2005] NSWSC 825, Police were attending upon a reported fight, not knowing that they were about to be thrust into a homicide investigation. Buddin J, found that the accused not only initiated the conversation with police but appeared to be anxious to volunteer information to them about his participation in the incident. The Court took into account the scene in which the officer was confronted and that the officer was not anticipating that he would require recording device on this day. He said the above was sufficient to establish that a reasonable excuse existed for not recording the admissions of the accused.

40. In Regina v Raad Fajloun [2007] NSWDC 364, Cogswell DCJ at [18], relied on the combination of factors before finding that a reasonable excuse existed:

> 18 In this respect I have regard to the following factors. The police in this case were responding to what was reported as a domestic violence offence, they had no idea that it might involve far more serious crimes. Secondly, they were general duties police. Thirdly, this was an open ended conversation between the police officer and Mr Raad Fajloun at a time when the other officer was interviewing the woman in another room. Although, objectively speaking, Mr Raad Fajloun could reasonably have been suspected of committing an offence, the police officer at the time was waiting to see what the result of the conversation between her partner and the complainant would produce.

The following authority is an example of matter where the Court determined that the prosecution had NOT established a reasonable excuse as to why a tape recording Court not be made

41. In *R v Linda Maree Troutman* [2013] NSWDC 316 [16] – [27], Tupman DCJ, was not satisfied that the prosecution had established a reasonable excuse as to why a tape recording could not be made in the circumstances of this case. Paragraphs [16] – [26] provides for a helpful analysis for your consideration in dealing with matter of this type**:**

> 16 Neither of these two conversations was recorded by tape recording. There was a notebook recording of the conversations made but that does not overcome the requirements of s 281. In any event, there is some confusion about whether or not the recording of the relevant pieces of conversation was contemporaneous and more probably than not these conversations were not recorded until some two hours or so after they were had. But as I have said, that is beside the point, given that s 281 does not allow that as a substitution for a tape recording.

17 So pursuant to s 281(2), evidence of such an admission is not admissible if a tape recording is not available. Therefore, on a prima facie basis, these admissions are not admissible, but may become admissible if the prosecution establishes that there was reasonable excuse as to why the tape recording could not be made.

18 "Reasonable excuse" is defined in s 281(4) as including a mechanical failure or a refusal to have questions electronically recorded. Neither of those applies here. It also includes the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned. As I understand it, that is the basis on which the Crown seeks to establish a reasonable excuse here.

19 I accept that the officer did not have a portable tape recorder. I accept that it is not the practice for officers to be issued with tape recorders in the field and that there is no approved tape recorder issued to officers to carry with them in circumstances like here, where they were responding to a report of a recent offence. I also accept that they did not expect to find the person who they suspected as having committed this offence when they attended. They were attending because of the report of a crime that had just occurred.

20 However, I am not satisfied that the Crown has proved that there was a lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned. The officer had, in fact, arrested the accused before he had these further conversations with her. He has agreed that Redfern police station, to which he was attached, was about a kilometre away.

21 As a result of arresting the accused he was then obliged to take her to a police station as soon as possible and to enter her into custody complying with all the *LEPRA* provisions. He had already summoned a female police officer to attend to assist with the search of the accused at a time when he had already announced to the accused that he had reason to believe she had committed the break and enter involving the victim and that he was intending to search her in order to locate the stolen property. His request for a female officer was made after that time and it would have been possible for him to request her to attend with a tape recorder. There was no reason why they could not have remained at the scene whilst a tape recorder was obtained.

22 Lest it be thought that the application of this section places investigating officers under unreasonable constraints, I accept that the legislative purpose for this provision was to ensure confidence in the administration of justice to overcome what, for a period of time in New South Wales, was seen to be a tendency to rely on alleged verbal admissions by accused and to ensure that there was in place a regime whereby

such propositions could not be put to a Court again, to ensure ongoing confidence in the justice system.

23 The provisions are strict and are meant to be so. I accept from the decisions of the Court of Criminal Appeal that they have been referred to as precise and rigorous requirements. That is a decision of the then Chief Justice in the *R v Reid* [1999] NSWCCA 258.

24 The provisions do not seek to deter officers from investigating or in pursing investigations that they might think appropriate and Hulme J in *R v White and Ors* observed that in Reid's case the then Chief Justice observed that police investigations may proceed with such inquiries as the officers wish to pursue but, when it comes to tendering admissions made in the course of such investigations, precise and rigorous requirements of what was then the equivalent of s 281 of the *Criminal Procedure Act* must be satisfied. In other words the Chief Justice sought to draw a distinction between the investigating role of the police and the reliance by the prosecuting authorities, in due course, on any admissions made during the course of such investigations.

25 It has not been suggested in this trial that the officer adopted this course in any way that sought to trick the accused. On the face of it, more probably than not, the officer did not even turn his mind to the fact that the likely answer to the two questions he was asking, if admissions, may not have been admissible in subsequent Court proceedings.

26 The fact that the accused elected to exercise her right to silence when taken back to the police station, of course even if he had turned his mind to it, would have made it more difficult because he was not in a position then to have her adopt that which she said. There has been no suggestion on this voir dire that his recollection or written record of what is alleged to have been said was not accurate. The question is whether or not the prosecution has established a reasonable excuse as to why a tape recording of these admissions was not made.

27 It may be that the outcome in this case would be different if the police were operating in a more remote area, where gaining access to a tape recorder was physically more difficult, but that is not the case here. There are good policy reasons why this particular provision ought be applied strictly and rigorously, and I am not satisfied that the prosecution has established a reasonable excuse as to why a tape recording could not be made.

<u>LAW ENFORCEMENT AND POWERS RESPONSIBILITIES ACT 2002</u>

Author – Daniel Pace

42. Since the introduction of body worn cameras by police and with the development of mobile phone technology, there have been an increase in situations where police officers are conducting detailed recorded interviews with accused persons at the scene.

43. The focus of this part of the paper is to give consideration to the exclusion of admissions (recorded or otherwise), in circumstances where:

    a. An accused person has been placed under arrest

    b. That some time has passed after their arrest, which is outside of the ordinary time required or expected to transport the accused from the scene to the police station

    c. That during that time the police embark on an ERISP style interview with the accused

44. This section of the paper does <u>not</u> go through in detail all of the relevant provisions of LEPRA and the how they interact with one another on this issue. It should also be clear that the opinions expressed are that of the author.

45. It is arguable that by highlighting police impropriety or non-compliance with the relevant LERPA provisions, that it may assist in crystallising the level of unfairness for which your client was exposed in a particular case. These are matters crucial to an applications pursuant to s138 Evidence Act.

46. In Pavic v The Queen [1997] HCA108 at [91] the majority said:

> However, the notion of compulsion is not an integral part of the fairness discretion and it plays no part in the policy discretion. In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. This invests a broad discretion in the court but it does not prevent the development of rules to meet particular situations.

47. The long standing common law position is that "*it is unlawful for a police officer having the custody of an arrested person to delay taking him before a justice in order to provide an opportunity to investigate that person's complicity in a criminal offence, whether the offence under investigation is the offence for which the person has been arrested or another offence."see Williams v R* (1986) 161 CLR 278 Brennan and Mason JJ at [15].

The Issue

48. Given the common law position stated above, an issue for your consideration may arise where police have placed the accused under arrest (as a result of s99(1)(b) LERPRA being satisfied) and then at that stage they launch into a detailed 'ERISP' style interview. It is arguable (subject to the evidence in your matter) that this approach is demonstrative of a complete disregard of their obligations under LEPRA. That is to ***as soon as is reasonably practicable****, take the person before an authorised officer to be dealt with according to law.*

49. A question to consider is; does this conduct demonstrate an attempt by police to circumventing the safeguards afforded to accused persons under Part 9 LEPRA and speak against the common law position stated above?

50. The foundation of any submission as to the admissibility of an admissions captured in this way is the unfairness. The unfairness relied upon here is the unacceptable conduct on the part of the investigating police[2]. Obviously, that allegation raises questions of public policy which are broader than concerns confined to the fairness of the trial of the particular accused – see R v Pavic HCA at [136].

What are the considerations?

51. Section 99(3) LERPA states:

    A police officer who arrests a person under this section must, ***as soon as is reasonably practicable****, take the person before an authorised officer to be dealt with according to law.*

52. Section 239 Criminal Procedure Act states:

    A person who is arrested under a warrant must be brought before a Judge, a Magistrate or an authorised officer ***as soon as practicable****.*

53. Section 3(1) LERPA states:

    authorised officer means:

[2] *Swaffield v The Queen* unreported, Court of Appeal of Queensland, 19 July 1996 per Helman J at 7.

(a) a Magistrate or a Children's Magistrate, or

(b) a registrar of the Local Court, or

(c) an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office.

54. In *Ainsworth* (1991) 57 A Crim R 174 Hunt J considered the question of what the test of 'reasonable practicability' means in the context of a legislative requirement to bring a person before a court. Hunt J stated:

> *"..It permits reasonable time to be taken to decide to charge the person arrested and to prefer that charge...It does not permit any delay for the purpose of interrogating or investigating the offence, although each is permitted - provided that the arrested person is still brought before a justice when it becomes reasonably practicable to do so".*

55. In *Michaels v The Queen* (1995) 184 CLR 117 Brennan, Deane, Toohey and McHugh JJ stated:

> *"..on one aspect the law is quiet clear. It is unlawful for a police officer to delay taking an arrested person before a Justice in order to question the person or to make further inquiries relating to the offence for which the person has been arrested, or to some other offence".*

56. In short, the long standing principle is that arrest for the purposes of questioning is unlawful. 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 an authorised officer as soon as practicable[3]. 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.

57. However, since the operation of Part 9 it can therefore be understood as an exception to the general state of the law as created by the common law principals discussed above. It allows an arrested person to be further detained for the purpose of investigation and questioning. For example it represents an exception to common law principals, by providing a limited period of time (6 hours but it can be extended by virtue of detention

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[3] 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.

warrant[4]) during which the police may investigate the offence and question the suspect before taking him to court.

58. However, Part 9 also confers certain rights and protections to detained persons subject to questioning and other investigative procedures. Those rights are better known as safeguards which are contained in Division 3 in the form of legislative obligations placed on the 'custody manager'.

59. Those legislative obligation are identified in sections s122-s130 LERPA. The custody manager at the police station is required to caution the suspect and summarise the provisions about detention (s122). The custody manager is required to inform the suspect before any investigative procedure starts that the suspect can contact a friend, relative or lawyer to inform them of his whereabouts, consult them, or in the case of a lawyer to be present during the investigative procedures. The custody manager is required to provide facilities for the suspect to communicate with the friend, relative or lawyer (s123). Similarly the custody manager is obliged to inform foreign nationals of their right to communicate with a consular official of the country of which the suspect is a citizen (s 124).The custody manager must arrange for an interpreter to be present during any investigative procedure if it appears that because of inadequate knowledge of English the person cannot communicate with reasonable fluency in English (s128) and receive refreshments (s130).

Analysis

60. Consider this; when a person is arrested per common law, per s99(3) or deemed arrest per s110 and they are not taken straight to the police station for their continued detention as Part 9 permits[5] (with the relevant safeguards in place) is it not arguable to that the police are (deliberately or recklessly, depending on your evidence) 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.

61. Consider the following:

    a. By police launching into a detailed, 'ERISP style' interview after arrest and before they have been given their Part 9 rights, is this not arguably a clear breach of this law, as there is no provision for interrogation without Part 9?

[4] s 115 LERPA
[5] Be aware however of s122 of LEPRA. As it 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

b. Doesn't this type conduct demonstrates 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?

c. Isn't this conduct inconsistent with the NSW Police Code of Practice for CRIME see topic "Preliminary Interviews" below:

> *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".*

d. Isn't this conduct inconsistent with the object of the relevant Part of the Act; s109

e. Is it inconsistent with a person's fundamental right to silence?

62. Furthermore by circumventing Part 9 in this way it is arguable that:

a. In relation to 'vulnerable suspects', such as ATSI persons, Division 3 of the LERPRA cannot be complied with outside a police station. To continue questioning an accused person may be seen as police taking advantage of their vulnerability and is arguably inherently unfair.

b. Medical and Mental Health issues cannot be adequately assessed or addressed.

c. Issues surrounding the need for an interpreter cannot be assessed.

d. Issue surrounding an accused state of intoxication cannot be assessed. For example ‘time outs’ cannot be given at the scene as compared to if the accused was before the custody manager.

e. There may be other circumstances playing on the mind of the suspect at the time that cannot be assessed on the road side, rather than a considered decision to fore go their right to silence after it has been explained clearly to them by an indepent officer without an interest in their matter.

63. So that it is clear, consideration of the above argument has not be determined on any authority that the author has been able to obtain. It is really only suggested in circumstances where there is evidence of either a deliberate or reckless attitude taken by police in delaying your client being taken from the scene to the police station/authorised officer so that they can conduct an ERISP style interview with your client. One may view more force of the argument in circumstances where your client suffers from; a mental health disorder, language barrier, ATSI persons or is highly intoxicated.

Other things to look for?

64. It is also worth investigating whether the Accused had been in custody for a period that did not exceed the maximum investigation period provided under s 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002; 6 hours.*[6]

65. Be conversant of the fact that certain times are to be disregarded in calculating the investigation period under s 117(1). For example time allowed for your client to recover from the effects of a prohibited substance or alcohol will be allowed and will not count toward the investigation period; s117(1)(k).

66. Be conversant in the fact that noncompliance with these provisions can lead to an unlawful detention of your client.

[6] The maximum investigation period that was in force on 18 April 2015 was 4 hours; s 115(2).

<u>EVIDENCE ACT 1995</u>

Author – Riyad El-Choufani

Preliminary

67. Consistent with the purpose of this paper, it is not my intention to address every relevant provision in the *Evidence Act 1995*. I have focussed upon the most commonly invoked evidentiary provisions: ss 84, 85, 90, 139 and 138. Similarly, the analysis is designed to be illustrative rather than comprehensive.

68. However, it is important to view the *Evidence Act* holistically. Preliminary questions, which ought to be answered before engaging with the exclusionary provisions, might include the following.

69. One, is the evidence an "admission"? In the Dictionary to the *Evidence Act 1995:*

    - An "admission" means a "previous representation" that is:

        (a) Made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and

        (b) Adverse to the person's interest in the outcome of the proceeding.

    - A "previous representation" means a representation made otherwise than in the course of giving evidence in the proceeding.

    - A "representation" includes:

        (a) an express or implied representation (whether oral or in writing), or

        (b) a representation to be inferred from conduct, or

        (c) a representation not intended by its maker to be communicated to or seen by another person, or

        (d) a representation that for any reason is not communicated.

70. It is readily apparent that "admission" is defined broadly. It will capture, for example, previous representations made by the accused:

    - Which are exculpatory on their face if the Crown relies upon them as constituting an implied admission of guilt: *R v Esposito* (1998) 45 NSWLR 442 at 458.

    - Which the Crown rely upon as deliberate lies: *R v Horton* (1998) 45 NSWLR; *R v Kaddour* [2005] NSWCCA 303.

- Which may amount to implied representations that demonstrate that an accused possessed a state of mind adverse to his or her interests in the outcome of the proceeding: see *Severino v R* [2017] NSWCCA 80 at [70]-[74].

71. Two, is the evidence of the admission "first-hand"? : see s 82. That is, subject to an exception, the hearsay rule will prevent the prosecution from adducing evidence of an admission unless the evidence of the admission is given by a person who saw, heard or otherwise perceived the admission being made [s 82(a)] or it is a document in which the admission is made [s 82(2)(b)].

72. Three, if police have prepared a document containing an admission, the document will not be admissible to prove the admission unless the accused has acknowledged that the document is a true record of the admission: see 86(2). Note, however, that s 86 will not preclude a police officer who saw, heard or otherwise perceived the admission from giving that evidence.

The actual truth of the admission and admissibility

73. Section 189 of the *Evidence Act 1995* deals with the voir dire. Relevantly for our purposes:

> *(1) If the determination of a question whether:*
>
> *(a) evidence should be admitted (whether in the exercise of a discretion or not), or*
>
> *(b) evidence can be used against a person, or*
>
> *(c) a witness is competent or compellable,*
>
> *depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.*
>
> *………*
>
> *(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.*
>
> *(emphasis added)*

74. In *R v Ye Zhang* [2000] NSWSC 1099, Simpson J, after considering s 189 of the EA, observed at [52]:

> …the truth or falsity of the admission is to be disregarded unless that issue is introduced by the accused. It seems to me that subs (3) is designed to obviate a "bootstraps" argument in the determination of the admission of the evidence. That is, evidence of an admission will not be admitted because the admission can be shown, by other evidence, to be truthful. The attention of

the court is to be directed to the circumstances in which the admission was made, excluding evidence that would substantiate or contradict the admission. The legislation delineates the circumstances in which the admission was made from its independently verifiable (or otherwise) content. An exception to that position, provided in s 189(3), is made where the accused introduces the question of truth or falsity of the admission.

75. For example, in *R v Esposito* at 460*,* Wood CJ at CL said (in the context of s 85(2)) that the inquiry undertaken by the Court *"…is not concerned with the question whether the admission was in fact made, or whether it was true (or untrue); each is for the jury (s 189(3) Evidence Act)."* However, that position is not absolute; the accused may introduce the actual truth or untruth of the admission pursuant to s 189(3): *Ye Zhang* at [51]-[52].

76. Five practical tips:

- Section 189(3) will most obviously apply to s 85. However, it may also be relevant to s 84, the exercise of the discretion under s 90 and the balancing exercise under s 138.
- Invoke s 189(3) if a prosecutor, during the course of a legal argument concerning the admissibility of an admission, proposes to rely upon evidence to establish the actual truth of the admission. Similarly, if the accused is giving evidence on the voir dire, s 189(3) will preclude a prosecutor from cross-examining about the truth or falsity of the admission.
- Challenging the actual truthfulness of an admission on behalf of the accused allows a prosecutor to respond in kind. Furthermore, the persuasive force of any submission seeking exclusion may be damaged should the court reject the defence evidence. For example, in *R v Helmhout & Ors* [2000] NSWSC 185 at [20] the accused raised the issue of truthfulness in his evidence on the voir dire; the trial judge rejected his account in several material respects: at [20]-[29].
- Care ought to be taken to avoid inadvertently introducing the actual truth or untruth.
- In the appropriate case, however, there may be a forensic advantage in introducing evidence that casts doubt upon the actual truthfulness of an admission.

Section 84 – Oppressive Conduct

The provision

84 Exclusion of admissions influenced by violence and certain other conduct

(1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:

(a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or

(b) a threat of conduct of that kind.

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

Key principles

77. Mark Dennis has authored two fantastic papers dealing with s 84 of the *Evidence Act 1995:* see the resources page. Therefore, it is my intention to briefly outline the relevant principles.

78. In accordance with s 189(3), the truth of the admission is irrelevant to application of s 84: *R v Sumpton* at [132].

79. The defendant must "raise an issue" that the admission was influenced by violent, oppressive, inhuman, or degrading conduct: s 84(2). There is authority that the defendant may only raise the issue if there is a proper evidentiary basis; the evidentiary basis may arise on the prosecution case or it may be adduced by the defendant on the voir dire: see *R v GH* (2000) 105 FCR 419 at [59].

80. If the issue is properly raised, the evidence is inadmissible unless the Court is satisfied that the conduct was not oppressive, inhuman, or degrading or, if there has been conduct of that kind, that the making of the admission was not influenced by that conduct: *R v Ye Zhang* [2000] NSWSC 1099 at [38]. Therefore, the Crown bears the onus of proof; the standard of proof is the balance of probabilities (s 142).

81. If the Crown fails to discharge its onus, the evidence is inadmissible. There is no discretion to admit the evidence: *R v Ye Zhang* at [38]; *R v Sumpton* [2014] NSWSC 1432 at [141].

82. The test is not whether the accused's will was overborne nor is it whether the admission was involuntary: *R v Sumpton* at [139]. The test is simply whether the conduct influenced the making of the admission.

83. The conduct does not need to be the sole, or even the dominant, factor influencing the confession. In *R v Ye Zhang,* Simpson J said at [44]:

> However, s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If the oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible.

84. Conduct may be "oppressive" if the exercise of authority or power occurs in a burdensome, harsh or wrongful manner: *R v Sumpton* at [129]. Hamill J was "drawn to that conclusion" in *R v Sumpton* at [135] for a number of reasons including:

- The accused was unlawfully detained for a period of many hours.
- Aspects of the questioning at the time of his arrest and towards the end of the ERISP was unfair and improper.
- Police implied that he terminated his ERISP because he was guilty of murder. The accused was never dissuaded of that implication.
- The incriminating interview occurred in the accused's cell after the termination of the ERISP. The custody manager played no role in that interview.
- He was approached to provide the further information in his cell after he had clearly and repeatedly sought to exercise his right to silence.
- He was subject to emotional and psychological pressure to change his version of events.
- The incriminating interview occurred in a small confined space.

Section 85 – Reliability

The provision

85 Criminal proceedings: reliability of admissions by defendants

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note: Subsection (1) was inserted as a response to the decision of the High Court of Australia in Kelly v The Queen (2004) 218 CLR 216.

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put, and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

Onus and Standard of Proof

85. The defence must first satisfy the Court, on the balance of probabilities, that the admission was made in the circumstances set out in s 85(1)(a) or s 85(1)(b): s 142, *Evidence Act 1995*.

86. The onus then shifts to the Crown to prove, on the balance of probabilities (s 142), that the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected: s 85(2); *R v Esposito* (1998) 45 NSWLR 442 at 460 per Wood CJ at CL.

It does not operate as a discretion

87. In *Bin Suleman v R* [2013] NSWCCA 283 R A Hulme J (Beazley P & Bellew J agreeing) said at [80]: *"(s)ection 85 is not expressed in discretionary language. Admissibility of the evidence is determined by a finding of fact on the criteria in s 85(2) and the matters in s 85(3)."*

88. That is, the court <u>must</u> exclude an admission if the court is:

- Satisfied that the admission was made:

  (a) to or in the presence of investigating official performing functions connected with the investigation of an offence or possible offence, or;

  (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued, and;

- Not satisfied that the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

Investigating Official – s 85(1)

89. The question of whether a person is an "investigating official" is considered in other parts of this paper: for example, see s 281 of the *Criminal Procedure Act 1986* and also s 139 of the *Evidence Act 1995*.

The terms of the confession are relevant – s 85(2)

90. In *R v Donnelly* (1997) A Crim R 432, a forensic psychiatrist had given evidence that the accused's disturbed mental state raised the possibility that he had made a "false confession" during a recorded police interview. Hidden J declined to exclude the interview. At 439, his Honour said that *"the terms of the confession itself are not to be ignored"*; he subsequently observed that:

- The accused's answers to questions were lucid, detailed and responsive.
- The questioning was appropriate and did not evidence any pressure.
- The video recording of his interview depicted a *"…truly remorseful man, bent upon unburdening his soul":* at [439].

91. Rare cases may arise where the terms of the confession are of little significance. This was implicitly recognised by Hidden J himself in *R v Braun* (unreported, NSWSC, 24 October 1997) which is considered in greater detail below at [103]-[105]. In *R v Braun,* the accused suffered from a personality disorder which was *"…such as to cause a blurring between*

reality and fantasy…”. His Honour said it was “not to the point” that the accused appeared to understand questions and responded appropriately. The accused’s subjective state, including her tendency towards confabulation, warranted exclusion under s 85(2).

You do not need to establish police impropriety – s 85(2)

92. The section may be engaged without police impropriety: *R v Jung* [2006] NSWSC 661 at [7]; *The Queen v McLaughlan* [2008] ACTSC 49 at [59]; *The Queen v Gareth Munday* [2016] VSC 26 at [8].

93. For example, *The Queen v McLaughlan* was a special hearing where the accused was tried for an offence of setting fire to a house. In response to police questioning at the scene, the accused admitted to lighting the fire. There was no police impropriety; Refshauge J said *“...it would be very proper and entirely expected that Constable Dzuibinski should ask the question he did”:* at [59]. Nonetheless, the admission was excluded under s 85 because the accused’s personal characteristics (she was intoxicated, mentally unwell, and cognitively impaired) deprived the admission of its reliability: at [72].

The questioning – s 85(3)(b)

94. Commonly, admissions occur in response to “questioning” from an investigating police officer. The court must, when determining if the admission was made in circumstances which make it unlikely that the truth of the reliability was adversely affected under s 85(2), take into account – the nature of the questions, the manner in which questions are put, and the nature of any threat, promise or inducement made to the accused: s 85(3); *Regina v Munce* [2001] NSWSC 1072 at [23].

95. For example, in *Doklu v R* [2010] NSWCCA at [36] the Court held that s 85 did not warrant the exclusion of admissions made by the accused at the time of his arrest in response to a police officer’s questions because, inter alia, the questions:

- Were simple
- There was no reason to think the accused did not understand them
- Were not unfair or misleading

How are the accused’s subjective circumstances taken into account – s 85(3)(a)?

96. In determining if the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected, the court must to take into account the subjective characterises of the accused person: s 85(3)(a).

97. However, the extent and manner in which an accused's subjective characteristics inform the inquiry under s 85(2) is not settled.

The "narrow" approach

98. In *R v Rooke* (unreported, CCANSW, 2 September 1997) Barr J considered the predecessor to the current s 85. His Honour said:

> I think that the expression "the circumstances in which the admission was made" as used as in subs(2) is intended to mean the circumstances of and surrounding the making of the admissions, not the general circumstances of the events said to form part of the offence to which the admissions are relevant. That is because, first, it is the plain meaning of the words. Secondly, it follows because subs(1) intends the section to have effect only where there is official questioning (or an act of the kind relevant under para(1)(b)).
>
> So far as the present appeal is concerned, the section may be said to be intended to require courts to inquire, where appropriate, into the process by which official questioning produces evidence tendered at trial. <u>If the circumstances of the official questioning are such as to produce untruthful or unreliable evidence of admissions - adversely to affect their truth - the evidence is inadmissible. But the section is only concerned with the truth or reliability of evidence of admissions in this limited way. It has generally no part to play in the admissibility of evidence of admissions which may be untrue or unreliable for other reasons.</u> Untruthfulness or unreliability in those circumstances is not a question for the trial judge at all, but for the jury.
>
> (Emphasis added)

99. That is, the question of reliability is confined to an assessment of whether the circumstances of the interviewing process were such as to make it unlikely that the truth of the admissions made by a person with particular subjective characteristics were adversely affected: see also *Regina v Munce* [2001] NSWSC 1072 at [25]-[28] per McLellan CJ at CL; *R v Lou* [2017] ACTSC 127 at [56]-[84].

100. In *Regina v Munce* the accused suffered from significant mental health issues. He confessed to killing a man on a merchant ship in a formal interview with police. He had voluntarily attended a police station and participated in an interview which was described as "scrupulously fair". He was not intoxicated and was able to understand and respond to questions: at [27]. In refusing an application to exclude the evidence under s 85, McClellan J explicitly disregarded the accused's mental health conditions. His Honour said at [28]:

> Although, by reason of his undoubted psychiatric problems there may be real doubt as to whether the accused was giving an accurate account of the events, there is nothing arising from the objective circumstances of the interview which would impact upon the truth of the admission.

The "broad" approach

101. Conversely, there is a line of authority which asserts that, when assessing the reliability of an admission to an investigating official, a court is not confined to the manner in which police conducted the interviewing process. The subjective characteristics of an accused, without more, may adversely affect the likelihood of the truthfulness of the admission for the purpose of s 85(2): *R v Braun* (unreported, NSWSC, 24 October 1997, per Hidden J); *R v Taylor* [1999] ACTSC 47 at [26]-[32]; *R v McLaughlan* [2008] ACTSC 49 at [59]-[67]; *R v McNiven* [2011] VSC 397 at [62]-[63]; *R v Munday* [2016] VSC 26.

102. Higgins J in *R v Taylor* referred to *Rooke v R* but then observed at [27]:

> However, it is obvious from the terms of s 85(2) that the "circumstances" are not confined to those known to the interrogator. Nor are they confined to any objective tendency in the questions or the manner in which they had been put to produce an unreliable or untruthful answer.
>
> Subs 85(3) makes it plain that the range of such circumstances can and will include the physical and mental characteristic of the person being interviewed.

103. In *R v Braun,* the accused made a series of admissions to deliberately setting a fire which caused the death of her brother. She also confessed to police in a formal record of interview which was video and audio recorded.

104. The accused was 22 years old and had a history of admissions to psychiatric units; her participation in the record of interview occurred shortly after her discharge from psychiatric care. She was diagnosed with a severe borderline personality disorder characterised by attention seeking behaviour. Consistent with that disorder, she had a history of telling false stories about herself with the intention of eliciting sympathy or attracting attention.

105. Hidden J said it was "not to the point" that the video recording of the interview revealed that police were courteous and that Ms Braun understood police questions and responded appropriately. His Honour placed determinative significance upon the accused's subjective features in excluding the police record of interview under s 85.

<u>Suggestions</u>

106. It is trite to observe that a broad construction of s 85(2) will generally assist defence practitioners. Should this become a relevant issue in a matter, it might help to think about three things:

- If the factual matrix allows, look for an “intersection” between the accused’s subjective condition and the police interviewing process which may have cumulatively adversely affected the truthfulness of an admission: see the discussion in *Queen v McLaughlan* where Refshauge J, adopting the broad approach, cited Ligertood, A, *Australian Evidence Law* (LexisNexis Butterworths, Sydney, 4th ed, 2004, p644). If such an intersection exists, the court need not confront the divergent lines of authority.

- If it must be addressed, note that the narrow line of authority generally emanates from *R v Rooke* which considered s 85 <u>*before*</u> it was amended in 2004. Barr’s J narrow construction of reliability or truthfulness was influenced, in part, by the terms of the “old” s 85(1)(a) which confined s 85 to admissions made during “official questioning”: see above at [98]. However, the current s 85(1)(a) captures admissions made to or in the presence of investigating officials without the constraint of “official questioning”.

- There is significant force in a broad construction of s 85(2) because it accords with the text of the statutory provision and addresses the mischief to which it was directed; that is, *“as a mechanism for ensuring that only true and reliable admissions are allowed into evidence”*: ALRC 102 at [10.97]; see also Odgers, *Uniform Evidence Law,* 12th edition, at [85.210].

Specific issues - mental illness and intellectual disability

107. In *R v Michael John Parker* (1990) NSWLR 177 at 183, Gleeson CJ set out a series of principles concerning the admissibility and weight of admissions made to police by mentally unwell or intellectually disabled accused persons. The decision pre-dates the *Evidence Act* yet it continues to offer guidance. In particular, his Honour observed that *“persons who are intellectually handicapped or who suffer from disease or disorder of the mind are by no means necessarily incapable of telling, or admitting, the truth.”*

108. Whether an accused’ mental illness or intellectual disability *will* affect the likelihood that the truth of the admission was not adversely affected, is a question of fact and degree to be determined on a case-by-case basis.

109. Leaving the "broad" or "narrow" construction of s 85(2) to one side, relevant considerations may include the following.

110. The *interviewing process and its effect upon a person suffering from a mental illness or intellectual disability.* For example, in *R v McNiven* admissions made by a cognitively impaired accused in a record of interview were excluded under s 85(2) because, inter alia, the accused: did not obtain adequate legal advice before the interview; did not understand the caution, and; the manner of questioning was often suggestive or did not seek a detailed account: at [71]-[74]. See also at [41] where Lasry J observed that the questioning exhibited a degree of cross-examination and the accused's answers to police questions were *"...much more in the nature of accepting the thrust of what is being put to her."*

111. In contrast, in *R v Lou,* Burns J held that *"(t)he circumstances of the questioning of the applicant did not act upon him, as a mentally ill person, in such a way as to adversely affect the truth of the admission"*: at [83].

112. *The state of the accused at the time of the confession.* In *The Queen v McLaughlan,* the accused's admission to police was excluded because, inter alia, she was observed at the material time to be disorientated, rambling, and unable to remain still: at [72].

113. Conversely, in *Ye Zhang,* Simpson J rejected an application to exclude admissions under s 85 (the admissions were excluded on a different basis). The accused confessed to two counts of murder during a recorded interview and again in a walkthrough of his premises. He was subsequently diagnosed with schizophrenia. Simpson J observed that there was no evidence he was psychiatrically disturbed *at the time* of the admissions. Furthermore, the video of the walkthrough depicted the accused willingly answering questions, identifying relevant parts of the premises and demonstrating what had taken place: at [62]-[65]. See also the discussion of *R v Donnelly:* above at [90].

114. The *severity of the illness or intellectual disability at the time of the admission*. In *R v Munday,* T Forrest J excluded a confession to attempted murder pursuant to s 85(2). His Honour noted that he was unable to accept that the admissions were unlikely to be adversely affected because *"(i)n a psychotic state he* [the accused] *was asked to recall the events and thoughts of six days earlier, when, on balance, he was also psychotic"*: at [22].

115. If the *illness or intellectual disability engenders a risk of confabulation.* See for, example, *R v Braun* which was discussed above at [103]-[105].

Specific issues - alcohol & drug affectation

116. The principles that guide the application of s 85 to mentally ill or intellectual disabled accused persons are apposite to persons affected by alcohol or drugs.

117. Other relevant factors may also include:

- If the interview and/or other evidence suggest that the appellant has developed a significant tolerance to alcohol then significant alcohol consumption may not adversely affect the truthfulness of any admission: see, for example, *R v Moffat* [2000] NSWCCA 174 at [52]; *R v Munce* at [27].
- The absence or presence of signs such as slurred speech when interviewed: *R v Moffat* at [52].
- If the appellant provided contemporaneous accounts to other witnesses which were broadly consistent with the admissions to police: *R v Moffat* at [52]; *Severino v R* [2016] NSWCCA 80 at [76].
- If the accused's answers to questions were lucid and responsive: *R v Moffat* at [54].
- The nature of the police questioning: see *Severino v R* [2016 at [76] where the questioning was neither threatening nor persistent.
- If the accused's alcohol or drug consumption or history of such consumption rendered him or her vulnerable to memory loss at the time of the interview: see *R v Taylor* at [12] and *R v McNiven* at [71] where this factor was taken into account in excluding admissions under s 85(2).
- If the accused's alcohol or drug consumption or history of such consumption exacerbated any cognitive impairment or vulnerable mental condition: see *R v McNiven* at [71].
- If the alcohol or drug-affectation impaired the accused's capacity to understand his or her legal rights. For example, an accused person's inability to appreciate the ramifications of a caution in *R v Taylor* at [14] and [31] or legal advice in *R v McNiven* at [72] militated in favour of exclusion. Conversely, in *Severino v R,* the applicant's answers to police questions (for example, the accused told one police officer "I'm not going to incriminate myself": at [15]), demonstrated – an awareness of his legal interests; sophisticated reasoning; and an understanding of his position: at [76].

Section 90 – Unfairness

The provision

90 Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

(a) the evidence is adduced by the prosecution, and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note. Part 3.11 contains other exclusionary discretions that are applicable to admissions.

The Common Law

118. Section 90 is a statutory formulation of a longstanding common law discretion (commonly called the *"Lee* discretion") that permitted courts in criminal trials to exclude an admission made by accused persons if the circumstances in which the admission was obtained would render the use of the admission at the trial unfair: *R v Burton* [2013] NSWCCA 335 at [88]; *R v Simmons; R v Moore (No 2)* [2015] NSWSC 143 at [52].

119. Therefore, the common law authorities[7] continue to guide and inform the application of s 90: for example, *Em v R* at [73] per Gleeson CJ & Heydon J in relation to reliability; *Em v R* at [188] per Kirby J; *R v Helmhout & Ors* [2000] NSWSC 185 at [62].

Onus and Standard of Proof

120. The onus rests on the party seeking exclusion of the evidence (i.e. the accused): *EM v The Queen* at [64]. The standard of proof is the balance of probabilities: s 142, *Evidence Act 1995*.

What is meant by "unfairness"?

121. In *Van Der Meer v The Queen* (1988) ALJR 656 at 66, the court said:

> [T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him…Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.

[7] See, for example – *The King v Lee & Others* (1950) 82 CLR 133; *Cleland v The Queen* [1982] HCA 67; *Van Der Meer v The Queen* (1988) ALJR 656; *Foster v The Queen* (1993) 66 A Crim R 112; *R v Swaffield; Pavic v The Queen* [1998] HCA 1

122. The purpose of the discretion is not to sanction or discipline police; it is to "safeguard a person from the unfairness of using his confession against him at his trial": *The Queen v Swaffield; The Queen v Pavic* at p173 per Brennan J. See also *Em v The Queen* at [107] per Gummow & Hayne JJ.

Does s 90 operate as a final or "safety net" provision?

123. In *Em v The Queen,* Gummow and Hayne JJ at [109]-[122] suggested that:

   - Section 90 only falls to be considered after more specific exclusionary provisions are applied.
   - The gravamen of those other specific exclusionary provisions cannot then be taken into account under s 90.
   - Therefore, s 90 operates as a final or "safety-net provision".
   - For example, neither the impropriety of police conduct nor the unreliability of admissions made to police are relevant to the s 90 discretion because those considerations are dealt with under ss 138 and 85 respectively.

124. In *R v Cooney* [2013] NSWCCA 312 Leeming JA (with Latham & Johnson JJ agreeing), without seeking to authoritatively articulate a principle of general application, appeared to adopt the "safety-net" construction of s 90 by holding that the primary judge erred in "side-stepping" s 138: at [8].

125. Practitioners should generally resist an attempt by the court or the prosecution to rely upon the judgment of Gummow and Hayne JJ. A "safety-net construction" substantially narrows the operative effect of s 90 in a manner that is arguably inconsistent with the breadth of the statutory language; practically, it will often leave s 90 with little work to do. Two important points to bear in mind:

   - In *Em v The Queen,* the safety-net construction was not adopted by either the majority judgement of Gleeson CJ and Heydon J or the dissenting judgment of Kirby J. Gleeson CJ and Heydon J may not have determined the point but their Honours' reasons are inconsistent with the proposition that the gravamen of other exclusionary provisions cannot be taken into account under s 90. For example, their Honours said that the reliability or unreliability of admissions to police had a significant bearing on the exercise of the discretion: at [73]. More directly, Kirby J confronted and disavowed the "safety-net" construction.

- Furthermore, as Arjun Chhabra has noted,[8] the NSW Civil Trial Bench Book at [4-0900] reads *"…until some binding decision expresses a contrary view, it is suggested that Em v The Queen should be taken as holding that: (a) s 90 may be relied on as an alternative to reliance on any of the other specified sections; and (b) the interpretation of s 90 is not affected by the more particular or specific provisions of the Evidence Act."*

Irrelevant considerations

126. Section 90 does not call for an assessment of the probative value of the evidence: *R v Burton* at [89]; *R v Em* [2003] NSWCCA 374 at [110].

127. Nor is the seriousness of the offence relevant to its application: *R v Em* [2003] NSWCCA 374 at [113].

Relevant considerations

128. "Unfairness" is a nebulous and protean concept. In *Em v The Queen* [2007] HCA 46 at [56], Gleeson CJ and Heydon J said that: *"(t)he language in s 90 is so general that it would not be possible in any particular case to mark out the full extent of its meaning…the application of s 90 is likely to be highly fact-specific"* (emphasis added).

129. Relevant, albeit non-exhaustive considerations, may include:
    - The reliability of the admissions.
    - If the accused's freedom not to speak was impugned by the conduct of the police.
    - If the accused will suffer an unfair forensic disadvantage if the admission is allowed into evidence.

One: Are the admissions unreliable?

130. The reliability or unreliability of the admission is an important aspect of the unfairness discretion: *Em v The Queen* [2007] HCA 46 per Gleeson CJ & Heydon J at [73]. That is, if the admission was made in circumstances that adversely affected its reliability, this may militate in favour of exclusion.

131. The circumstances in which the admission was made may include the accused's personal characteristics (such as if the accused was intoxicated or mental unwell): see, for example, *R v Leung* [2012] NSWSC 1451 at [23]; *R v Gallagher* [2013] NSWSC 1102.

[8] "Excluding Admissions (Handout)", ALS Central South Eastern Region Conference, Saturday 2 May 2015

132. However, there is authority for the proposition that if the jury would be able to properly evaluate and assess the effect of the accused's personal characteristics upon the reliability of the admission, then exclusion under s 90 <u>may</u> not be justified because allowing the admission into evidence would not be unfair to the accused: *R v Nelson* [2002] NSWCCA 231 at [54]-[55]; *Riley v R* [2011] NSWCCA 238 at [227].

133. Importantly in *R v Gallagher* [2013], Bellew J qualified and distinguished *R v Nelson* and *Riley v R:* at [222]-[232]. His Honour excluded admissions made by a cognitively impaired accused to undercover police because her personal characteristics supported the conclusion that the admissions were unreliable. In particular, Bellew J found that at the time the admissions were made:

- The accused's capacity to comprehend questions was impaired
- Her thought processes were disorganised
- Her ability to effectively communicate was diminished
- She had a propensity to become easily confused
- Her "illnesses were productive of a propensity to confabulate": see also *R v Medcalfe* [2002] ACTSC 83.

134. A further three things to bear in mind:

- *"...while unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone": Swaffield* at 189. Therefore, a court may exclude an admission under s 90 notwithstanding its apparent reliability: see, for example, *R v Mercury* [2019] NSWSC 81 at [100]-[101]; *R v FE* [2013] NSWSC 1692 at [124].
- Like s 85, the actual truth or falsity of the admission is irrelevant unless the accused introduces that issue: s 189(3); *R v Moffat* at [46].
- Reliability for the purpose of s 90 is arguably of broader ambit than reliability under s 85. For example, s 90 is not limited to admissions made in the presence of investigating officials or persons capable of influencing a decision to prosecute: cf s 85(1).

Two: Was the accused person's freedom not to speak impugned by the conduct of police?

135. Whether the accused's capacity to exercise their right to silence has been impugned often assumes paramount significance: see, for example, *R v Em* at [78] per Gleeson CJ & Heydon J) and at [133] per Kirby J (dissenting in the outcome).

136. A slightly different and perhaps broader formulation is that it may be unfair to admit a confession which would not have been made at all if the police investigation had been properly conducted: *R v Swaffield* at [19], [22] & [54]*; R v Helmhout & Ors* [2000] NSWSC 185 at [62].

137. In *R v FE* [2013] NSWSC 1692, Adamson J excluded admissions made to police by a 15 year old girl accused of murder. Her Honour said at [124]-[125]:

> In my view, the circumstances referred to above show that the accused was effectively deprived of the right to choose whether to speak or not, because she was ignorant of her right to silence and she was neither cautioned, nor informed, in language that she could understand, or at all, what her rights were.
>
> Although the admissions the accused made may well be reliable I consider the price of their admission to be too high to be worth paying since they were obtained only by failing to comply with the laws and procedures referred to above and disregarding the rights of a 15-year-old girl who was unable to look after her own interests. In the present case the ends, in my view, fall far short of justifying the means.

138. Conversely, in *Em v R,* Gleeson CJ and Heydon J at [78] concluded that the deliberate omission of a full caution did not impugn the appellant's freedom not to speak to police.[9] The following factors were emphasised:

- The accused knew he was speaking with police.
- He knew police were investigating two home invasions, one involving a murder.
- He spoke to police willingly and knowingly.
- He had an awareness of his rights and a capacity to act on them.
- He was free to leave.
- The questions were not overbearing.

Three: will the accused suffer a forensic disadvantage unless the admission is excluded?

139. In *R v Swaffield* at [195] the plurality (Toohey, Gaudron and Gummow JJ) said:

> One aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.

[9] cf Kirby's J powerful dissenting judgment at [126]-[239]

140. In *Foster v R* (1992) 113 ALR 1, the accused (a 21 year old Aboriginal man) gave evidence that police had forced him to sign a false confession. At the time of the alleged confession: he had been unlawfully arrested and detained at a police station; he was deprived the opportunity of speaking with a lawyer, and; the interview was not electronically recorded. Mason CJ excluded the admissions under the common law unfairness discretion. His Honour observed that the accused's unlawful detention effectively deprived him of any chance of corroborating his account that police had coerced the confession; that is, to admit the confession would expose him to the risk of conviction on evidence which he was inhibited from properly challenging: pp 7 & 10.

141. Although not involving an admission to police, *R v Leung* [2012] NSWSC 1451 is illustrative. Price J exercised his discretion under s 90 to exclude an admission made to a nurse who bore a duty of confidentially because, inter alia, allowing the admission into evidence would expose the accused to the unfair forensic disadvantage of having to explain the admission during the substantive trial: at [24].

Some practical considerations

142. It is important to remember that the exercise of the s 90 discretion is both highly fact-specific and that the burden of proof rests upon the accused. Therefore, adducing cogent evidence on the voir dire is crucial. Two questions which will often be relevant: should I call my client and should I tender medical material?

<u>One: Should I call my client?</u>

143. For instance, in *R v FE* the accused gave evidence on the voir dire that the conduct of police contributed to her belief that she could not exercise her right to silence in the face of questioning: *R v FE* at [62], [68] & [124]-[125]. Conversely, in *EM v The Queen,* the appellant's failure to give evidence that he believed his conversation with detectives was "off the record" increased the difficulty of discharging the onus of proof: at [64] per Gleeson CJ and Heydon J.

<u>Two: Should I tender medical evidence?</u>

144. The manner in which an accused's personal circumstances might inform the reliability of an admission or inhibit the freedom not to speak to police may not be readily apparent. In such cases, contemporaneous medical material or expert evidence may illuminate the unfairness of allowing an admission into evidence. For example, in *R v Mercury,* historical records and expert evidence detailed the accused's disturbed mental state, immaturity, below average intelligence, and disturbed upbringing. His personal attributes, inter alia, warranted

exclusion of his confession to the abduction and murder of a child pursuant to s 13 of the *Children (Criminal Proceedings) Act 1986* and, alternatively under s 90: at [101].

S 139, EA

The Provision

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.

(2) 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 questioning was conducted by an investigating official who did not have the power to arrest the person, and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence, and

(c) the investigating official did not, before the statement was made or the act was done, 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.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(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.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth, or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

Preliminary

145. A statement made or act done is deemed to have been improperly obtained if:

- The accused was under arrest at the time the statement was made or act done, and;
- The statement was made or act done during questioning, and;
- The questioning was conducted by an investigating official, and;
- The accused was not cautioned.

146. Three points to bear in mind:

- The burden of satisfying the court that there has been a failure to comply with s 139 rests on the person seeking its exclusion: *R v Ql* [2017] NSWSC 1253 at [20]. The standard of proof is the balance of probabilities: s 142, EA.
- The obligation to caution does not arise if the accused person is required to answer questions under the law: s 139(4) & (6).
- S 139 only operates to deem any statement made or act done improperly obtained; an application to exclude the statement or act must be made under s 138, EA.

Was the accused under arrest?

147. Section 139(5) extends the definition of "arrest" under s 139(1)(a) to three additional circumstances.

148. One, where the official believes there is sufficient evidence to establish the commission of the offence the subject of questioning: s 139(5)(a). Mere suspicion is insufficient; it must be demonstrated that the officer possessed the specified belief: *R v Pearce* [2001] NSWCCA

447. In *George v Rockett* (1990) 170 CLR 104 at 116, the High Court observed in a different context that:

> Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

149. Two, where the official would not allow the person to leave if the person wished to do so: s 139(5)(b); for an example, see *R v Ql* [2017] NSWSC 1253 at [26] where a police officer conceded that he would have stopped the accused had she sought to leave the crime scene.

150. Three, where the official has given the person reasonable grounds to believe that he or she would not be allowed to leave if the person wished to do so: s 139(5)(c). In *R v FE* [2013] NSWSC 1692 at [102], Adamson J said that the question of reasonable grounds must be assessed by reference to the context. Her Honour was satisfied that s 139(5) was established taking into account the age of the accused (a 15 year old), that police led her to an office, and that she was told to wait.

151. It is important to note s 139(6) – a person is not under arrest if the investigating official is merely exercising certain functions or powers. It was considered in *Severino v R* [2017] NSWCCA 80 where the applicant was involved in a car accident which caused the death of a passenger. Attending police questioned him. He was not "free to leave" at the time he was questioned [see s 139(5)(b)]. He was not cautioned. The applicant submitted (on appeal but not in the court below) that any admissions were therefore improperly obtained because police had not complied with s 139. The Crown relied upon s 139(6); it was argued that:

- The questioning arose from the exercise of a statutory power that permitted police to require the applicant to disclose the identity of the driver and passenger (see ss 11 & 14, LEPRA).
- Therefore, s 139(5) did not apply pursuant to s 139(6), and;
- As a consequence, police were not required to caution the applicant under s 139(1).

152. The Court rejected the Crown's contention that s 139(6) applied. The Court held at [78]-[93]:

- Although the questioning was generally confined to the identity of the passenger and driver, police had failed to comply with s 201 which was a necessary pre-condition to the valid exercise of powers under ss 11 and 14 of LEPRA.
- Therefore, s 139(6) did not apply.

- The applicant was hence under arrest for the purpose of s 139(5) and the failure to caution him contravened s 139.
- However, the applicant's admissions would inevitably have been admitted under s 138, EA. Therefore, there was no miscarriage of justice.

Was the statement made or act done <u>during questioning</u>? s 139(1) & (2)

153. Section 139 is concerned with cautioning before <u>questioning</u>: *DPP (NSW) v Owen* [2017] NSWSC 1550 at [75]-[76].

154. In *R v Naa* [2009] NSWSC 851, police were attempting to negotiate with an armed accused during a siege situation. He was not cautioned. During the course of the negotiations, he made admissions. Howie J held that s 139 did not apply because the admissions were not made during "questioning": at [101]. His Honour said that *"...the section was aimed at formal or informal interrogation of a suspect by a police officer for the purpose of the officer obtaining information, whether or not at the time of the interrogation the suspect was formally under arrest":* [98].

155. The principles in *R v Naa* were:

- Applied but the facts distinguished in *Severino v R* [2017] NSWCCA 80 – police had "questioned" the applicant for the purpose of s 139 at the scene of a car accident: at [79]-[80].
- Applied in *DPP (NSW) v Owen* – a failure to caution an accused at the time of the execution of an arrest warrant did not engage s 139 because he was not being questioned.

156. See also Daniel's consideration of s 281 above.

What is an Investigating Official? s 139(1) & (2)

157. Under the Dictionary to the EA, an "investigating official" is defined as:

- a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or;
- a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences.

158. Three important observations:

- The definition of "investigating official" extends beyond "a police officer". For example, an ATO officer may be an investigating official: *R v Pearce* [2001] NSWCCA 447 at [91].
- Even if the investigating official does not have a power of arrest, he or she may be required to administer a caution: s 139(2), EA.
- S 139 will not apply to undercover police officers.

How ought the caution be communicated? s 139(3).

159. There is authority in support of a broad construction of 139(3). In *The Queen v Michael John Taylor* [1999] ACTSC 47, the accused was intoxicated and suffering from the long-term effects of alcohol use. It appears he was fluent in the English language. He was cautioned but did not appear to understand the meaning of the caution. Higgins J held that s 139(3) had not been satisfied. Relevantly, his Honour said:

    - Usually a suspect's acknowledgment that he or she has heard and understood a caution will suffice: at [20].
    - However, this was a case where police ought to have undertaken further enquiries to ensure the suspect understood the caution: at [20].
    - A caution will fail to meet s 139(3) if the circumstances are such that the officer knows, or ought to know, that the caution has not been understood: at [19].
    - An officer complies with s 139(3) if a reasonable person in the position of the officer, acting with proper respect for the rights of suspects, did not and could not reasonably have been expected to perceive that the suspect did not understand the caution: [19].

160. In *R v Deng* [2001] NSWCCA 153, James J said at [17]:

    > In my view the section is <u>purposive</u>. It does not operate on an accused's general language ability. It operates on the ability to understand the concept underlying the caution and the function of a caution. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence.
    >
    > (emphasis added)

161. Note also the Northern Territory decision of *R v Anunga* (1976) 11 ALR 412 at 414 regarding the obligation of police to ensure Aboriginal suspects understand the meaning and effect of a caution.

Questioning that will not require a caution: s 139(4)

162. Sections 139(4) and 139(6) appear to raise analogous considerations. Therefore, although the Court did not specifically address s 139(4), *Severino v R* [2017] NSWCCA 80 may prove instructive (see above at [151]- [152]). For example, it could be argued that s 139(4) will not be satisfied if a police officer fails to comply with statutory pre-conditions (such as s 201, LEPRA) before purporting to exercise a power that requires a person to answer questions.

S 138, EA

The provision

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law, or

(b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note: The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 of the Commonwealth.

Preliminary Observations

163. The below analysis occurs through the prism of excluding admissions to police.

Onus & Standard of Proof

164. The burden of satisfying the court that the evidence has been improperly or unlawfully obtained is on the party seeking its exclusion: *R v Ql* [2017] NSWSC 1253 at [20].

165. If the court is satisfied that the evidence was improperly or unlawfully obtained, the party seeking to adduce the evidence carries the burden of persuading the court that the balancing exercise favours the admission of the evidence: *Parker v Comptroller-General of Customs* [2009] HCA 7 at [28] per French CJ.

166. The standard of proof is the balance of probabilities: s 142.

S 138(1) – what does "improperly" or "impropriety" mean?

167. The words "improperly" and "impropriety" are not defined in the *Evidence Act 1995*.

168. In *Robinson v Woolworths Ltd* [2005] NSWCCA 426 at [23], Basten JA suggested two broad general propositions in relation to "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 powers of law enforcement". Secondly, 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.

169. In assessing if police conduct is clearly inconsistent with those minimum standards, any breach of applicable internal police guidelines and instructions will be relevant: *R v Em*

[2003] NSWCCA 374. Hall J in *Director of Public Prosecutions v Am* [2006] NSWSC 348 said at [42]:

> In determining whether law enforcement officers in obtaining information have acted improperly for the purposes of s.138, it will often be necessary to identify the content of relevant or applicable standards of conduct. These may be informed by particular legislative provisions or administrative guidelines or instructions or codes of practice issued by the Commissioner of Police given to and which operate with respect to the actions or conduct of law enforcement officers.

170. The test for determining whether evidence has been "improperly obtained" does not necessarily depend upon establishing a state of mind indicative of intentional conduct or a consciousness of impropriety: *Director of Public Prosecutions v Am* at [38]; *R v Cornwell* [2003] NSWSC 97 at [20]; *DPP v Carr* [2002] NSWSC 194 at [34].

S 138(1)(b) – "obtained" and "obtained in consequence of"

171. There must be a clear chain of causation between the impropriety or contravention of the law and the obtaining of the evidence: *Application of Lee* [2009] ACTSC 98 per Penfold J at [31]. Her Honour also said at [31]:

> …evidence may be obtained "in consequence of" an impropriety not only where the evidence is an immediate product of the impropriety but also where the evidence can be directly linked to the impropriety (albeit through a process involving several steps).

172. Evidence that is obtained <u>before</u> the commission of any improper or unlawful conduct will not engage s 138: *R v Dalley* [2002] NSWCCA 284 at [86].

173. Evidence of <u>an offence</u> may have been improperly/unlawfully obtained or obtained in consequence of an impropriety/a contravention of law for the purpose of s 138: see, for example, *DPP v Carr*. The requisite causal connection in such circumstances is a vexed question.

174. In *Director of Public Prosecutions v Coe* [2003] NSWSC 363 at [24], Adams J said that mere causal link was insufficient; the police must have engaged in the conduct with the <u>intention</u> or <u>expectation</u> of achieving the commission of the offences: cf *DPP v Carr*.

175. However, in Hall J in *Director of Public Prosecutions v Am* at [82]-[84] rejected the proposition that <u>intention</u> was an essential consideration. To the extent that <u>expectation</u> informed whether evidence of an offence was "obtained" or "obtained in consequence of" police misconduct, it was only determined objectively and as an aspect related to causation.

176. Hall J set out the following propositions at [80]:

- Evidence of an offence will be obtained as a consequence of impropriety if police engaged in conduct with the intention or expectation to induce the commission of an offence

- Evidence of an offence may not be obtained as a consequence of impropriety if the offending conduct was a disproportionate response to an ill-advised or unnecessary arrest.

- Evidence of an offence may be obtained as a consequence of impropriety if the offences that stem from an unnecessarily or ill-advised arrest were, objectively considered, the anticipated or expected outcome of that arrest.

  (My emphasis)

S 138(2) – circumstances when the obtaining of admissions is deemed improperly obtained

177. A few important observations in relation to s 138(2):

- If the circumstances in s 138(2)(a) or s 138(2)(b) are satisfied, the admission is deemed to be improperly obtained: *DPP v Carr* at [34].

- A requirement that the questioner "knew" [s 138(2)(a)] or "made a false statement knowing" [s 138(2)(b)] connotes actual knowledge which is determined subjectively: *DPP v Carr* at [34].

- A requirement that the questioner "ought reasonably to have known" [s 138(2)(a) & (b)] is determined objectively: *DPP v Carr* at [34].

S 138(1) & (3) - the balancing exercise & improperly obtained admissions: some examples

R v Helmhout [2001] NSWCCA 372 – reckless or deliberate, s 138(3)(e) & failure to advise ALS

178. The appellant was convicted of murder. He appealed against the conviction. The only ground of appeal was that a record of interview with police ought to have been excluded under s 138.

179. The interview had been improperly obtained – before the appellant was questioned by police, the custody manager had failed to comply with a legislative requirement[10] to tell the appellant that ALS would be notified nor did he notify ALS that the appellant was in custody. However, the primary judge admitted the interview under s 138. Relevantly, her

[10] At the time, cl 28 of *Crimes (Detention after Arrest) Regulation 1998*. But now see cl 37, *Law Enforcement (Powers & Responsibilities) Regulation 2016*.

Honour accepted the custody manager's evidence that he ordinarily complied with the legislative requirement but that he had simply "overlooked" it on this occasion. Her Honour therefore held that the impropriety was neither deliberate nor reckless for the purpose of s 138(3)(e).

180. The Court agreed; the impropriety was neither deliberate nor reckless and the interview was properly admitted under s 138. Two important statements of principle were articulated.

181. First, Hulme J (AJA Ipp & Sperling J agreeing) at [33] said that the concept of recklessness under s 138(3)(e):

> …must involve as a minimum some advertence to the possibility of, or breach of, some obligation, duty or standard of propriety, or of some relevant Australian law or obligation and a conscious decision to proceed regardless or alternatively a "don't care" attitude generally, in this case, by Sergeant Dagwell. The mere failure to comply with clause 28 on one occasion cannot, without more, demonstrate these matters.[11]

182. Two, as a general proposition a judge should, when considering s 138 and in particular the gravity of the impropriety under s 138(3)(d), direct attention to an accused's personal characteristics: Hulme J at [41]. Ipp AJA appeared to agree; his Honour offered the following illuminating analogy at [12]:

> I do not see how the gravity can be considered without reference to the consequences of the contravention on the individual concerned. A contravention of cl 28 involving an Aboriginal youth, who does not have a good command of English, who has had no dealings with police, who has lived his entire life in, say, desert surroundings and has never lived in a town or city, could well be severe. On the other hand, the consequences if the Aboriginal person is of mature years, has had many dealings with police and is not intimidated by the idea of being questioned by them, and who, generally, may be regarded as a well educated (sic), sophisticated and worldly wise person, are likely to be minimal.

Regina v Dungay [2001] NSWCCA 443 – gravity of the impropriety/contravention, s 138(3)(d) & unlawful detention

183. The appellant was convicted of sexual assault after a trial despite the complainant giving evidence which absolved him of criminal liability. The Crown case relied solely on admissions made by the appellant to police during a lengthy record of interview. The trial

[11] This statement on "recklessness" was affirmed in *R v Gallagher; R v Burridge* [2015] NSWCCA 228 at [50] and *Gedeon v R* [2013] NSWCCA 257 at [210] subject to one qualification – the reference to "don't care" must be understood as meaning that the person in question recognised that the conduct might be improper but determined to engage in it not caring whether it was or not.

judge admitted the record of interview over objection. The appellant appealed against the conviction.

184. Ipp AJA (James & Studdert JJ agreeing) quashed the appeal and entered a verdict of acquittal. Relevantly, his Honour held that the interview should have been excluded under s 138 of the EA.

185. First, the record of interview was improperly or unlawfully obtained because the appellant's arrest and detention was unlawful. He was arrested for the purpose of questioning alone; it was not the intention of the police to bring him before a magistrate or justice until he made admissions during the interview. Ipp AJA said at [28]:

> The trial judge did not bear in mind that it is a requisite for a valid arrest that the arrest be for the purpose of taking the arrested person before a judicial officer to be dealt with according to law as soon as is reasonably practicable. As the arrest of the appellant was solely for investigative purposes, it was unlawful.

186. Two, the Crown had failed to discharge its onus; the balancing exercise favoured exclusion of the evidence under s 138. Importantly, Ipp AJA said the following about the gravity of the impropriety [s 138(3)(d)]:

> Section 356C(1) of the *Crimes Act* makes it clear that Pt 10A does not confer any power upon the police to detain a person who has not been lawfully arrested. The common law has always jealously guarded citizens against arbitrary arrest: *Williams v R*. The duty to bring an arrested person before a judicial officer as soon as is reasonably possible is one of the foundations of a democratic society. Our law recognises that no person should be arrested merely for the purposes of investigating whether he or she has committed a crime. Part 10A does not detract from this fundamental principle. In my opinion, the illegality involved in the appellant's arrest has to be regarded as being serious indeed.

R v FE [2013] NSWSC 1692 – gravity of the impropriety/contravention, s 138(3)(d) & the right to silence

187. The accused was charged with murder and affray. At her trial, Adamson J excluded two records of interview with police.

188. The first interview occurred after she voluntarily attended Parramatta police station. She was led to an office and told to wait. She was interviewed by police. She was not cautioned. It does not appear that she was provided the opportunity to obtain legal advice.

189. The second interview occurred after she was arrested and charged. Despite advising police that she did not wish to participate in an interview, which was also communicated to police

orally and in writing by a solicitor from the Children's Legal Aid Hotline service, she was escorted to an interview room where she participated in a lengthy record of interview.

190. Adamson J concluded that both interviews were improperly obtained; she should have been cautioned before the first interview (at [103]) and the second interview had occurred despite FE invoking her right to silence (at [127]).

191. The interviews were excluded under s 138. Her Honour made the following observations regarding the gravity of the impropriety at [113]-[114]:

> I regard these improprieties as very grave. The accused's right to remain silent and not be compelled to answer questions that might tend to incriminate her in the commission of the crime of murder has been described as a "fundamental . . . bulwark of liberty", which is not merely a rule of evidence but a basic and substantive common law right…
>
> Although the accused was, relevantly, a suspect when she presented herself at the Parramatta police station on 12 July 2012, she was not informed of her right to silence in circumstances where she believed that she was obliged to answer the questions put to her by Detective Marino.

CONCLUSION

192. We hope this paper contributes to the helpful existing commentary (see the Reference and Resources Page) regarding this difficult area of evidentiary law. If you are grappling with an admission to police dilemma please feel free to give either of us a call or shoot us an email.

Riyad El-Choufani and Daniel Pace

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REFEENCE AND RESOURCES PAGE

- *Uniform Evidence Law,* 12th edition, Stephen Odgers

All of the below papers are found on Mark Dennis's CLE site https://criminalcpd.net.au/

- *Bashing Cunning Constables, Torching ERISP Interviews – An Anarchist's Guide to Section 84 of the Evidence Act 1995 (NSW),* Mark Dennis SC, March 2017
- *Oppressive Conduct and Section 84 of the Evidence Act 1995 (NSW) – A Case Study Concerning R v Sumpton [2014] NSWSC 1432.* Mark Dennis SC – May 2015
- *Excluding ERISP's Of Clients With An Intellectual Disability*, Elizabeth Nicholson – May 2015
- *Excluding Admissions,* Arjun Chhabra – May 2015
- *The Voir Dire, Section 138 and Roadside ERISP's*, Mark Davies – March 2014
- *Admissibility of Admissions – Aboriginal and Torres Strait Islanders Suspects*, Her Honour Judge Yehia SC – August 2012 (link to PD website)
- *The Gathering and Adducing of Admissions in NSW and The ACT* Stephen Lawrence – August 2012
- *Admissibility Issues Arising From Detention of Suspects for Investigation Under Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, Stephen Lawrence – March 2012
- *Excluding Evidence of Admissions,* Her Honour Judge Yehia SC – March 2010 (link to PD website)
- *Section 13 of the Children (Criminal Proceedings) Act 1987 (NSW) – A Practical Approach* Angela Cook – January 2013
- *The Role of The Responsible Adult in Children's Interviews With Police*, Lester Fernandez – April 2004