Illegally or Improperly Obtained Evidence: Time to Reform s 138 of the Uniform Evidence Legislation?

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Section 138 of the uniform evidence legislation deals with the discretion to exclude improperly or illegally obtained evidence, "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". Unlike the common law, s 138 places the onus of proof on the Crown to justify the admission of improperly or illegally obtained evidence. This article argues that this should be reversed. The balancing exercise is undertaken through an examination of a non-exhaustive list of matters to be taken into account by the court as set out in s 138(3)(a)–(h), and whether these matters should be prioritised in some form. The interaction between s 138 and the s 90 discretion to exclude admissions is also considered.

I. Introduction

> All this is misguided sentimentality … making justice inefficient and … coddling the law evading classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.[1]

This article supports the common law discretionary approach to the admission of illegally or improperly obtained evidence in Australia, as set out in the case of *Bunning v Cross*,[2] and argues that the statutory version of the *Bunning v Cross* discretion found in s 138 of the uniform evidence legislation sets the admissibility bar too high against the Crown in adducing illegally or improperly obtained evidence. In *Slater v The Queen*, the Victorian Supreme Court of Appeal explained the public policy underpinning the exclusion of evidence under s 138 in these terms:

> It is not merely the public interest in excluding the specific evidence obtained by or in consequence of the relevant impropriety or contravention. It is the public interest in not admitting any evidence obtained in the relevant way. In other words, the section looks not only at what was done in the instant case, but at the undesirability of the same thing being done in other cases.[3]

For present purposes, it is significant that (in a footnote) the Victorian Supreme Court of Appeal observed that at common law the position might have been different because arguably the public interest supporting exclusion was narrower than under s 138.[4]

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[1] John Henry Wigmore, *Evidence* (Little Brown and Co, 3rd ed, 1940) Vol 8, § 2184, 36, criticising the Supreme Court's decision in *Weeks v United States*, 232 US 383 (1914), which provided the foundation stone of the federal exclusionary rule that prohibits illegally obtained evidence from being admitted in a criminal trial. The basis of the rule lies in the Supreme Court's broad interpretation of the Fourth Amendment of the *United States Constitution* as a means of enforcing "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". See also Debra Osborn, "Supressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia" (2000) 7(4) *Murdoch University Electronic Journal of Law* 2.

[2] *Bunning v Cross* (1978) 141 CLR 54.

[3] *Slater v The Queen* [2019] VSCA 213, [55] (McLeish and Weinberg JJA and Tinney AJA).

[4] *Slater v The Queen* [2019] VSCA 213, [55] fn 24 (McLeish and Weinberg JJA and Tinney AJA), citing in support *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, 288, where Doyle CJ (with whom Cox and Matheson JJ agreed) stated that "the discretion is directed to preventing the curial advantage that would be gained from the use of the evidence, and from avoiding the appearance of approval by allowing the use of the evidence".

This article respectfully endorses the position taken by L'Heureux-Dubé J that the public policy test for bringing "the administration of justice into disrepute" under s 24(2) of the *Canadian Charter of Rights and Freedoms* should be measured by reference to the fact that "the courts' primary concern must lie in maintaining the integrity and legitimacy of the judicial system in the eyes of the Canadian community, assuming that community to be reasonable, dispassionate, and fully apprised of the circumstances".[5] Thus, as Osborn pointed out, the public policy test for bringing the administration of justice into disrepute "must be viewed from a community rather than a judicial perspective".[6] This article adopts the "dispensing of justice according to law" as a definition of judicial administration.[7]

A former Chief Justice of Australia writing extra-judicially stated: "As the law is, and will always be, changing to accommodate what is seen as the needs of the contemporary community, the demands of sound judicial administration will change too."[8] The learned author went on to identify two primary objectives of judicial administration – namely, "the efficient and timely resolution of particular disputes and the informed and sound definition of the law".[9] This article addresses the latter objective in the context of the admission of illegally or improperly obtained evidence in Australia, and contends that the balancing exercise under s 138 of the uniform evidence legislation does not provide a sound definition of the law.

As the Victorian Court of Appeal acknowledged in *Slater v The Queen*, "the application of the balancing exercise required by s 138 calls for 'value judgments in respect of which there is room for reasonable differences of opinion', such that no particular opinion is 'uniquely right'",[10] as opposed to s 138 demanding a unique outcome because the section requires "a binary choice as to the desirability of admitting or rejecting the evidence".[11] Such differences of opinion are compounded given that s 138 encompasses derivative evidence, a point also recognised by the Victorian Court of Appeal:

> More generally, there is a judgment to be made about each piece of evidence which satisfies the test in s 138(1)(b) by having been obtained in consequence of a particular impropriety or contravention, and it is not necessary that the outcome of the balancing exercise be the same in respect of every piece of evidence. As the connection becomes more tenuous, and evidence is obtained through lawful means, in spite of that connection, the various factors weighing in the public interest will not necessarily remain constant.[12]

Further, in Australia a separate judicial discretion that applies solely to illegal evidence, based not on fairness but on public policy concerns related to deterrence and the standing of courts, has emerged both at common law and under statute. In the context of the implications for judicial administration and a sound definition of law, Van Caenegem highlighted the open-ended nature of this separate public policy discretion under statute:

> Where this discretion was then translated into statutory provisions, these typically identify a non-exhaustive list of factors favouring or opposing admission to be weighed up by courts, without attaching any differential weight to them, and allowing for non-prescribed factors to play a role in a given case.[13]

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[5] *R v Burlingham* [1995] 2 SCR 206, [72]. Sopinka J identified a similar test at [141]: "The test with respect to what could bring the administration of justice into disrepute was stated in *Collins* to be grounded in longer term community values rather than the public passion of the moment. These long-term community values are to be assessed in terms of the views of the hypothetical, reasonable, well-informed and dispassionate person in the community."

[6] Osborn, n 1, 6 [25].

[7] "Judicial Administration" in *Merriam-Webster Dictionary* <https://www.merriam-webster.com/dictionary/judicial%20administration>.

[8] Hon Sir Gerard Brennan, "Key Issues in Judicial Administration" (Paper presented at the *AIJA 15th Annual Conference*, Wellington, 20–22 September 1996) 2 <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aija1.htm>.

[9] Brennan, n 8.

[10] *Slater v The Queen* [2019] VSCA 213, [40] (McLeish and Weinberg JJA and Tinney AJA), citing *In the Marriage of Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ).

[11] *R v Riley* [2020] NSWCCA 283, [101] (Bathurst CJ).

[12] *Slater v The Queen* [2019] VSCA 213, [45] (McLeish and Weinberg JJA and Tinney AJA).

[13] William Van Caenegem, "New Trends in Illegal Evidence in Criminal Procedure: General Report – Common Law" (Paper presented at the *World Congress of the International Association of Procedural Law*, Rio De Janeiro, 16–21 September 2007) 5 <https://pure.bond.edu.au/ws/portalfiles/portal/27498256/New_trends_in_illegal_evidence_in_criminal_procedure.pdf>.

Van Caenegem also stressed that the public policy discretion is based on the twin pillars of deterrence and public confidence in the courts:

> In Australia the public policy discretion is not concerned with ensuring fairness to the accused, but rather with on the one hand deterrence, ie to prevent the authorities from gaining comfort from the admission of illegal evidence, and engaging in the improper and illegal conduct in the future. On the other hand, underlying the separate development of this discretion in the common law and its inclusion in the Uniform Evidence Act, is also the concern to maintain the public standing of the court and its processes, and not allow it to be tainted by apparently condoning illegal conduct. These public interest concerns play a role in the balancing exercise that constitutes the core of the public policy discretion in the common law and statutory states.[14]

From a judicial administration perspective, the first pillar of deterrence raises the possibility of dealing with the issue in some other manner, such as disciplinary action in the case of police officers, rather than exclusion of the evidence.[15] Similarly, the second pillar of maintaining the public standing of the court is a double-edged sword if the integrity and legitimacy of the judicial system in the eyes of the Australian community is being undermined by excessive judicial zeal in excluding tainted evidence and in so doing protecting criminals from the full force of the law. This judicial tightrope is brought into sharp focus by competing public interests.

In Australia, the origin of the exercise of competing public requirements when relevant evidence has been obtained illegally or improperly can be found in the judgment of Barwick CJ in *R v Ireland*:

> On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.[16]

Barwick CJ's broad statement of two competing public interests was refined in the seminal judgment of Stephen and Aickin JJ in *Bunning v Cross*[17] into a list of five relevant factors for the trial judge to consider in deciding whether or not to admit the tainted evidence:[18]

(1) whether a deliberate disregard for the law was involved;
(2) whether the nature of the illegality affects the cogency of the evidence so obtained;
(3) the ease with which the law might have been complied with in procuring the evidence in question;
(4) the nature of the offence charged; and
(5) the intent of the legislation.

As regards the fourth factor above (ie the nature of the offence charged), Stephen and Aickin JJ pointed out that "[s]ome examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element in the process required by *Ireland's Case*".[19]

Hemming and Layton observed that the weighing of the five factors in the trial judge's balancing exercise as to whether to admit the illegally obtained evidence is one in which judicial minds will differ, revealing "a fluidity or spectrum of possibilities in the weighing of the two competing public policy considerations".[20]

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[14] Van Caenegem, n 13, 7.

[15] *R v Gallagher* [2015] NSWCCA 228, [45] (Beech-Jones J): "The absence of any disciplinary action against Officer Hembrow is a factor in favour of the rejection of the evidence because it leaves exclusion of the evidence as the only means of vindicating the law that was contravened." *Ridgeway v The Queen* (1995) 184 CLR 19, 39 (Mason CJ, Deane and Dawson JJ): "[I]f the police conduct is disowned by those in higher authority and criminal proceedings have been instituted against the police as well as the accused, it is unlikely that considerations of public policy relating to the integrity of the administration of criminal justice would require the exclusion of evidence."

[16] *R v Ireland* (1970) 126 CLR 321, 325.

[17] *Bunning v Cross* (1978) 141 CLR 54, 78–80.

[18] In the United States such evidence is referred to as the "fruit of the poisonous tree": *Nardone v United States*, 308 US 338 (1939); *Silverthorne Lumber Co v United States*, 251 US 385, 392 (1920) (Holmes J).

[19] *Bunning v Cross* (1978) 141 CLR 54, 80.

[20] Andrew Hemming and Robyn Layton, *Evidence Law in Qld, SA and WA* (Thomson Reuters, 2017) 723 [11.145].

Unlike Queensland and South Australia that retain the common law in the form of the *Bunning v Cross* balancing exercise for the admission of illegally obtained evidence, Western Australia is the only jurisdiction outside of the uniform evidence regime to have adopted a statutory version of the *Bunning v Cross* balancing exercise under s 155(3) of the *Criminal Investigation Act 2006* (WA). Section 155(4) states that the probative value of the evidence does not by itself justify its admission. The full s 155 is as follows:

> Section 155 Inadmissible evidence, court may allow admission
>
> (1) This section applies if under another section a court may make a decision under this section in relation to evidence that is not admissible in proceedings in the court.
> (2) The court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.
> (3) In making a decision under subsection (2) the court must take into account
> (a) any objection to the evidence being admitted by the person against whom the evidence may be given;
> (b) the seriousness of the offence in respect of which the evidence is relevant;
> (c) the seriousness of any contravention of this Act in obtaining the evidence;
> (d) whether any contravention of this Act in obtaining the evidence –
> (i) was intentional or reckless; or
> (ii) arose from an honest and reasonable mistake of fact;
> (e) the probative value of the evidence;
> (f) any other matter the court thinks fit.
> (4) The probative value of the evidence does not by itself justify its admission.

In *Cockram v Western Australia*, Blaxell J helpfully explained the process to be adopted when exercising judicial discretion under s 155, in a case where there was no "reasonable excuse" for the absence of a recording within the meaning of s 118 of that Act.[21]

Blaxell J made two salient observations: first, the factors in s 155(3) are contradictory in their effect; and second, under s 155, the exercise of judicial discretion has shifted from the common law discretion to exclude the evidence to one of a statutory discretion to receive the evidence. The latter is an important change, and is consistent with the approach taken in s 138(1) of the uniform evidence legislation:

> EVIDENCE ACT 1995 CTH – SECT 138
>
> Discretion to exclude 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

[21] *Cockram v Western Australia* [2010] WASC 211, [55]–[56].

(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.

Under s 138(1), the accused must establish that the evidence was improperly or illegally obtained:

> If impropriety or illegality is established, then the onus shifts to the Director of Public Prosecutions to establish that, notwithstanding that conclusion, the evidence should be admitted pursuant to the considerations in s 138 of the Evidence Act.[22]

This raises the issue of the reasons for the shift in the onus of proof, for which it is necessary to turn to the Australian Law Reform Commission (ALRC) Interim Report, which sought to justify why the onus should not be on the party seeking to exclude reliable evidence and to reverse the existing common law *Bunning v Cross* discretion:

> But the policy considerations supporting non-admission of the evidence suggest that, once the misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations support this approach. Evidence is not often excluded under the *Bunning v Cross* discretion. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations.[23]

Significantly, the ALRC acknowledged that practical considerations underlying reliable but illegally obtained evidence led to such evidence not often being excluded at common law under the *Bunning v Cross* discretion. This was a key factor in the ALRC advocating a reversal of the onus of proof, preferring to make it much harder for the Crown to adduce reliable but illegally obtained evidence on dubious public policy grounds. Such a public policy, designed to protect the integrity of the judicial system, is a double-edged sword – is it better to admit tainted evidence or to condone the avoidance of the full force of the law by restricting the evidence-gathering capacity of law enforcement agencies?

Twenty years later, as part of a review of the operation of the uniform evidence legislation, the ALRC (in conjunction with the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission) revisited this section and concluded there was no need to recommend any changes to the policy basis underpinning s 138:

> The Commissions are of the view that the onus of proof in s 138 helps to provide an appropriate balance between the public interest in crime control and the rights of accused persons. The Commissions consider that no convincing case has been made out for revisiting the policy basis of s 138 and therefore recommend that no changes be made in relation to the onus of proof or to the balancing test required by the section.[24]

This article respectfully disagrees with the conclusion reached by the three Commissions and argues that the pendulum has swung too far in favour of exclusion as it leans too heavily on the side of the accused. Apart from the issue of the onus of proof, other differences with the common law are considered, such as the application to derivative evidence under s 138(1)(b) and to evidence of admissions under s 138(2), as well as the non-exhaustive list of factors under s 138(3).

[22] *R v Borg* (2012) 220 A Crim R 522, 524 [5] (Lasry J); [2012] VSC 26.

[23] Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) Vol 1, [964].

[24] Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005) [14.79] (*Law Reform Commission Discussion Paper*).

II. Submissions and Consultations on s 138 to the Review of the Uniform Evidence Acts

> The criminal will go free because the constable has blundered.[25]

As mentioned above, in the Review of the Uniform Evidence Acts the three Law Reform Commissions concluded that there was no need to recommend any changes to the policy basis underpinning s 138. This part considers the submissions and consultations that formed the basis for such a conclusion. One of the reasons why the three Commissions recommended the status quo be maintained was because there were few submissions and consultations. This part of the Commissions' Discussion Paper can usefully be set out in full:

> Submissions and consultations
>
> IP 28 asks how s 138 of the uniform Evidence Acts has operated in practice, whether it has raised any concerns and how any such concerns should be addressed [ALRC, *Review of the Evidence Act 1995*, IP 28 (2004) Q 12-7]. In particular, IP 28 asks whether the factors to be taken into account in s 138(3), for example s 138(3)(c) in relation to the influence of the nature of the relevant offence, require clarification [ALRC, *Review of the Evidence Act 1995*, IP 28 (2004) Qs 12-8, 12-9].
>
> The primary concern expressed in relation to s 138 pertains to the factors in s 138(3) and how they should apply to the balancing test. Whilst some judicial officers express the view that these factors are facilitative and do not create any difficulties [NSW Local Court Magistrates, *Consultation*, Sydney, 5 April 2005], other commentators express concern that it is uncertain what weight ought to be given to each factor [J Garbett, Sydney, 28 February 2005] and whether the factors weigh in favour of or against admission [G Bellamy, *Consultation*, Canberra, 8 March 2005]. One view is that the section should be amended so as to specify how the factors in s 138(3) should be applied to the balancing test [G Bellamy, *Consultation*, Canberra, 8 March 2005]. Another view is that such difficulties should not be resolved via legislative amendment, and that judicial education is a preferable solution [J Garbett, Sydney, 28 February 2005].
>
> In relation to the question of how the "nature of the offence" influences a determination as to whether to exclude evidence, the NSW PDO submits:
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> > The approach taken by the majority [in *R v Dalley*] assumes what the prosecution is required to prove; that is, that the accused is guilty. It is further submitted that the more serious the offence, the greater should be the public and private interest in ensuring that accused persons are not convicted on the basis of improperly obtained evidence. It is the Public Defenders submission that the reference to "the nature of the relevant offence" be omitted from s 138 [NSW Public Defenders, *Submission E 50*, 21 April 2005].
>
> Another senior practitioner supports Simpson J's reasoning in *R v Dalley* [(2002) 132 A Crim R 169; [2002] NSWCCA 284], that the more serious the offence, the more the public interest weighs in favour of ensuring that correct procedures for obtaining evidence are adhered to [S Tilmouth, *Consultation*, Adelaide, 11 May 2005].
>
> One submission considers that although the section works well in practice, for reasons of principle the wording should be altered so as to render presumptively inadmissible any evidence obtained as a result of any illegal action [Confidential, *Submission E 31*, 22 February 2005]. It is stated:
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> > There are cases where the public interest in prosecuting offenders is great, and therefore there should be a provision for the admissibility of illegally obtained evidence in exceptional and highly restricted cases, limited to offences of the most serious type, but specifically excluding alleged "terrorism", "national security" and immigration cases. In those cases the provisions of the law give such power to law enforcement authorities that there is no need for them to act illegally … it is important that the legislature indicate to law enforcement authorities that any illegal action done in furtherance of investigation will be fruitless [Confidential, *Submission E 31*, 22 February 2005].
>
> In addition, one view queries whether s 138 should operate at all in civil proceedings to exclude evidence that has been illegally or improperly obtained [G Bellamy, *Consultation*, Canberra, 8 March 2005]. It is

[25] Cardozo J in *People v Defore*, 242 NY 13, 21; 150 NE 585, 587 (1926), criticising the exclusionary rule. For a critique of the exclusionary rule in the United States, see Ellis Washington, "Excluding the Exclusionary Rule: Natural Law vs. Judicial Personal Policy Preferences" (2005) 10(2) *Deakin Law Review* 772.

> also suggested that the onus of proof be reversed so as to reflect the discretion at common law [G Bellamy, *Consultation*, Canberra, 8 March 2005].[26]

In the Commissions' Final Report, this summary of the submissions and consultations was repeated but also included two more submissions:

> Victoria Police expresses concern that shifting the onus of proof onto the prosecution may impact upon evidence gathered by undercover operations [Victoria Police, *Submission E 111*, 30 September 2005].
>
> Civil Liberties Australia (CLA) submits that illegally obtained evidence should not be subject to a discretionary test on the bases that: it leads to uncertainty of outcome; in practice, trial judges exercise the discretion predominately in favour of the state; and appellate courts seldom overturn the decision not to exclude illegally or improperly obtained evidence. CLA also submits that this problem is exacerbated in small communities where the magistrate is likely to have an association with the police officers, and is therefore less likely to exercise the discretion against the police officers. CLA considers that there should be mandatory exclusion of illegally obtained evidence where the laws infringed were intended to protect individual liberty, freedom and privacy. It states:
>
> > We recommend that s 138(1) be amended such that a judge may rule evidence admissible only if there are strong and compelling reasons why the illegally obtained evidence should be admitted, and the reasons for the admission must be set out in writing [Civil Liberties Australia (ACT), *Submission E 109*, 16 September 2005].[27]

The thrust of the submissions received can be divided into three categories:

(1) those who favoured further clarification on how the balancing exercise in s 138(3) is to be applied;
(2) those who favoured the mandatory exclusion of illegally obtained evidence unless there are strong and compelling reasons to admit this evidence; and
(3) those who favoured the reversal of the onus of proof consistent with the common law such that the onus to exclude is on the party seeking to exclude the illegally obtained evidence.

This article supports the submissions that sit within categories (1) and (3), which were dismissed by the three Commissions' Report.

As mentioned above, the three Commissions rejected any changes to the balancing test or the onus of proof. In particular, they considered it was inappropriate to attempt to guide the balancing test in s 138(3) legislatively because "the weight to be given to any particular factors listed in s 138(3) will vary depending on which of the other factors in that subsection arise in the context of a particular case".[28]

One factor highlighted in the submissions was s 138(3)(c), which deals with the seriousness of the offence. The Commissions felt obliged to specifically address this factor because it had been raised and was also the subject of a divided opinion in the New South Wales Court of Criminal Appeal in the case of *R v Dalley*.[29]

In *R v Dalley*, Spigelman CJ (with whom Blanch J agreed) was of the opinion that "[t]he more serious the offence, the more likely it is that the public interest requires the admission of the evidence",[30] citing in support Deane J in *Pollard v The Queen*[31] and Sully J in *R v Burrell*.[32] Spigelman CJ concluded that "the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, both at common law and pursuant to s 138(3)(c)".[33]

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[26] See *Law Reform Commission Discussion Paper*, n 24, [14.71]–[14.76].

[27] Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005) 576–577 [16.89]–[16.90] (*Law Reform Commission Report*).

[28] *Law Reform Commission Report*, n 27, 578 [16.93].

[29] *R v Dalley* (2002) 132 A Crim R 169; [2002] NSWCCA 284.

[30] *R v Dalley* (2002) 132 A Crim R 169, 171 [3]; [2002] NSWCCA 284.

[31] *Pollard v The Queen* (1992) 176 CLR 177, 203–204.

[32] *R v Burrell* [2001] NSWSC 120, [38].

[33] *R v Dalley* (2002) 132 A Crim R 169, 172 [7]; [2002] NSWCCA 284.

By contrast, Simpson J, who dissented on this point, was of the view that in certain cases the more serious the offence the greater the insistence on compliance with procedural provisions, holding "it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of the law will be more readily condoned".[34]

The three Commissions essentially endorsed Simpson J's dissenting opinion, a position also supported by Gans, Palmer and Roberts who considered the majority approach in *R v Dalley* to be "dubious, because it ignores the impact of these factors [referring to ss 138(a)–(c)] on the competing 'public policy' consideration of counteracting the harmful effects of investigative misconduct".[35] While on the one hand the Commissions accepted the proposition that the more serious the offence the more weight should be given to admitting the evidence, on the other hand they acknowledged the countervailing weight to be given to serious and deliberate breaches of procedure:

> The nature of the offence is only one of the factors which the court is to take into account in the exercise of this discretion … Hence, the fact that the offence charged is serious is by no means determinative of how the discretion in s 138 will be exercised.[36]

This article, in supporting those submissions that favoured further clarification on how the balancing exercise in s 138(3) is to be applied, respectfully disagrees with the three Commissions and Simpson J, and endorses the view taken by the majority in *R v Dalley* that greater weight should be given to crimes of greater gravity irrespective of the seriousness of the breach of procedure in obtaining the evidence. The importance of clarification in the application of the balancing process takes on added significance from a judicial administration perspective given appellate courts regularly apply the principles in *House v The King*[37] when reviewing decisions made in the balancing process under s 138:

> As a result, the applicant must show that the judge acted upon a wrong principle, was affected by irrelevant matters, mistook the facts, failed to take a material matter into account, or made a decision that was unreasonable or plainly unjust to the extent that it can be inferred that he must have failed properly to exercise the power to decide under s 138(3).[38]

The three Commissions found support for their position by virtue of the onus of proof resting on the Crown:

> This approach to the interpretation of s 138(3)(c) is also supported by the fact that s 138 addresses the public interest supporting exclusion by placing the onus on the prosecution to justify admission in the event that impropriety or illegality is found.[39]

This article, in line with the majority view in *R v Dalley*, agrees with those submissions that favoured the reversal of the onus of proof consistent with the common law, such that the onus is on the party seeking to exclude the illegally obtained evidence.

In the context of where the onus of proof should lie, the three Commissions did not refer to s 5F(3A) of the *Criminal Appeal Act 1912* (NSW),[40] which confers a right of appeal on the Director of Public Prosecutions against an evidentiary ruling that substantially weakens the prosecution case:

> CRIMINAL APPEAL ACT 1912 NSW – SECT 5F
>
> 5F APPEAL AGAINST INTERLOCUTORY JUDGMENT OR ORDER

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[34] *R v Dalley* (2002) 132 A Crim R 169, 189 [97]; [2002] NSWCCA 284.

[35] Jeremy Gans, Andrew Palmer and Andrew Roberts, *Uniform Evidence* (OUP, 3rd ed, 2019) 491 [16.5.4.1]. "Arguably, investigative misconduct is more harmful when it involves more serious offences, or more significant evidence, because it ultimately exposes defendants to a higher risk of serious punishment. Moreover, a reliance on those factors [referring to ss 138(a)-(c)] may encourage investigators to be less careful about legality and impropriety, when investigating serious crimes or seeking to obtain significant evidence" (491–492 [16.5.4.1]).

[36] *Law Reform Commission Report*, n 27, 578–579 [16.95].

[37] *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

[38] *Slater v The Queen* [2019] VSCA 213, [41] (McLeish and Weinberg JJA and Tinney AJA).

[39] *Law Reform Commission Report*, n 27, 579 [16.96].

[40] Section 5F(3A) was inserted by the *Crimes Legislation Further Amendment Act 2003* (NSW) Sch 3, para 8.

> (3A) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.

This provision was primarily directed at ss 138(3)(a) and (b), which deal with the probative value of the evidence and the importance of the evidence respectively, with the intention of seeking to influence the balancing exercise on appeal. In introducing the *Crimes Legislation Further Amendment Bill 2003* (NSW), the Minister for Police explained why s 5F(3A) was necessary as part of an overall design to improve the administration of the criminal justice system:

> Under section 5F(2) of the *Criminal Appeal Act 1912*, the Director of Public Prosecutions or the Attorney General may currently appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which section 5F applies. The Court of Criminal Appeal has held that an evidentiary ruling by a trial judge that effectively excludes the entire Crown case is a judgment or order for the purposes of section 5F(2) of the Act because the ruling effectively stays the Crown case. However, a ruling excluding Crown evidence which weakens but does not destroy the Crown case has been held not to be a judgment or order, and is therefore not appellable under the existing section 5F(2).[41]

In other words, without s 5F(3A), the Crown was unable to appeal an order that weakened but did not destroy the Crown case; and in the context of a weakened case, ss 138(3)(a) and (b) of the *Evidence Act 1995* (NSW) are the key subsections in the balancing exercise. The amendment ensured that the strength of the case against a defendant would not be lost following an erroneous evidentiary ruling leading to acquittal.

In a report on Criminal Appeals in 2014,[42] the NSWLRC considered the operation of s 5F(3A). The justification for the insertion of s 5F(3A) was to allow the Director of Public Prosecutions the opportunity to appeal rulings that weakened but did not destroy the Crown case:

> Prior to this amendment, the DPP's appeal rights included decisions by the trial judge that effectively excluded the entire Crown case. They did not, however, extend to rulings that weakened, but did not destroy, the Crown case. This amendment ensured that a defendant did not derive the benefit of an acquittal secured as a result of an erroneous evidentiary ruling.[43]

The NSWLRC observed that the use of s 5F(3A) should be exercised sparingly and did not appear to have been abused:

> The New South Wales Court of Criminal Appeal has noted that the DPP's appeal right under s 5F(3A) should be exercised with restraint, to avoid the undesirable situation of trials being aborted [*R v NKS* [2004] NSWCCA 144, [18]; *R v Holton* [2004] NSWCCA 214, [47]–[54]; *R v ELD* [2004] NSWCCA 219, [27]–[28]], and it does not appear that this right is being abused.[44]

A recent example of the use of s 5F(3A) can be found in *Kadir v The Queen*,[45] discussed further in Part III dealing with cases involving s 138(3)(h), a subsection that was not mentioned in the three Commissions' Discussion Paper or Report. This reflects the somewhat surprising outcome that s 138, a section that gives wide-ranging discretion to the trial judge and upon which judicial minds can be expected to differ to no little extent, was not the subject of particular attention in the submissions to the three Commissions.

III. Cases Involving s 138(3)(h) of the Uniform Evidence Legislation

> It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should

[41] New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 December 2003, A8503 (John Watkins).

[42] New South Wales Law Reform Commission (NSWLRC), *Criminal Appeals*, Report No 140 (2014).

[43] NSWLRC, n 42, 280, Appendix D, Table D.2: Key legislative amendments to the *Criminal Appeal Act 1912* (NSW).

[44] NSWLRC, n 42, 214 [11.27]. In Table 11.1, the total number of appeals under s 5F(3A) between 2003 and 2013 is shown as 41 appeals.

[45] *Kadir v The Queen* (2020) 267 CLR 109; [2020] HCA 1.

> not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.[46]

This article has so far focused attention on the nature of the balancing exercise in s 138(3) and the onus of proof being on the Crown under s 138(1) of the uniform evidence legislation. In this part, s 138(3)(h) ("the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law") is singled out for consideration, given that the evidence obtained is often derivative and therefore falls within s 138(1)(b) ("in consequence of an impropriety or of a contravention of an Australian law"). Indeed, in *Director of Public Prosecutions v Kaba*, it was held that "it is not necessary for the causation to be direct and that a chain of causation linking the obtaining of the evidence and the impropriety or contravention is sufficient".[47]

The first point to note about cases involving s 138(3)(h) of the uniform evidence legislation is that they typically deal with the capacity of the agency involved to have obtained the evidence legally and whether the impropriety was an oversight or deliberate. In *ASIC v Sigalla (No 2)*, White J observed that the Australian Securities and Investments Commission could have obtained the evidence without difficulty, a fact that both parties argued favoured their case:

> [I]n *Parker v Comptroller-General of Customs* [2007] NSWCA 348, Basten JA said that the factor will often be treated as either neutral or equivocal (at [61]). I think the factor is equivocal. There would be a stronger case for excluding the evidence if ASIC had no power to issue a notice for it. But the fact that a notice could readily have been given that was within power is a factor for excluding the evidence when no real effort was made to comply with the regulation as to the form the notice was to take.[48]

For present purposes, the description of s 138(3)(h) as being either neutral or equivocal (ie open to more than one interpretation) is of some significance. However, common sense will sometimes dictate the outcome, as in *R v Pimentel*,[49] where Dunford J (with whom Spigelman CJ and Hidden J agreed) clearly distinguished the facts from those in *Ridgeway v The Queen*[50] in interpreting the exercise of discretion under s 138 of the uniform evidence legislation:

> Counsel for the appellant submitted that the discretion was wrongly exercised and referred to *Ridgeway v The Queen* [1995] HCA 66; (1995) 184 CLR 19, but that was a very different case in that the police there instigated, organised and took part in the whole operation leading to the importation which would not otherwise have taken place, whereas here the police merely intervened at or near the very end of the importation process to prevent the narcotic goods being landed and becoming available to the Australian population. Moreover, there was no deliberate flouting of the laws … It could have been argued that to refuse to admit the evidence in the circumstances of this case would have been a perverse and erroneous exercise of the discretion.[51]

As in *R v Pimentel*, the courts have been at pains to classify the nature of the impropriety into a spectrum of improper conduct. The best example of this is in the judgment of the Victorian Court of Appeal in *Director of Public Prosecutions v Marijancevic* – a case where the trial judge had refused to admit evidence of alleged drug manufacture and trafficking because warrants had not been sworn as required under s 81 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic):

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[46] *Rothman v The Queen* [1981] 1 SCR 640, 697 (Antonio Lamer J).

[47] *Director of Public Prosecutions v Kaba* (2014) 44 VR 526, 618 [337] (Bell J); [2014] VSC 52, citing in support *Re Lee* (2009) 212 A Crim R 442; [2009] ACTSC 98 where police retained a photograph obtained during a search carried out in reliance on a defective warrant. Police used the photograph a year later in a surveillance operation that produced identification evidence. Penfold J held that the evidence was obtained in consequence of the impropriety or contravention because there was a "clear chain of causation" between the two (449 [31]). In *R v Petroulias (No 8)* (2007) 175 A Crim R 417, [25]; [2007] NSWSC 82, Johnson J held: "A connection between the improper conduct and the obtaining of the evidence may be indirect. There could be a sufficient connection found between a misstatement in an application or affidavit in support of a warrant and the evidence obtained as a result of the issuing of the warrant so as to engage s 138(1) of the Act."

[48] *ASIC v Sigalla (No 2)* (2010) 240 FLR 327, [128]; [2010] NSWSC 792.

[49] *R v Pimentel* (1999) 110 A Crim R 30; [1999] NSWCCA 401. The first ground of appeal was that the trial judge erred in admitting into evidence the facts relied on by the Crown to prove there had been an importation of cannabis resin into Australia.

[50] *Ridgeway v The Queen* (1995) 184 CLR 19.

[51] *R v Pimentel* (1999) 110 A Crim R 30, [24]; [1999] NSWCCA 401.

> At the least serious end of the spectrum of improper conduct would be that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range would be conduct which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal. At the most serious end of the range would be conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct. Cases such as *Ridgeway* exemplify this category of impropriety. There are of course other factors which will bear upon how seriously the impropriety should be characterised such as the nature of the illegality and the extent to which it is widespread.[52]

The Victorian Court of Appeal went on to observe that s 138 requires an "overall assessment" given the factors listed in s 138(3):

> Because the assessment called for a value judgment in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion with which we are not entitled to interfere unless persuaded that it was an opinion that was not reasonably open.[53]

In other words, irrespective of how an appeal court would have exercised the discretion, only if the exercise of discretion was not reasonably open would the decision be overturned. This article contends that this adds strength to the proposition that greater legislative guidance is required in the weighing of the factors in the balancing exercise under s 138(3). The argument for greater legislative guidance gathers strength when it is understood that a balancing exercise is also taking place within individual factors such as s 138(3)(h), as mentioned in *ASIC v Sigalla (No 2)*.[54] The courts have struggled with how to treat "the difficulty (if any) of obtaining the evidence". Is ease of compliance a reason to exclude or admit the evidence?

This question was considered in *R v Borg*[55] in regard to compliance with s 465(1) of the *Crimes Act 1958* (Vic), which deals with the issue of a search warrant by a magistrate who requires a police officer to swear "on oath or by affirmation or affidavit". In the County Court, Montgomery J determined that the failure to swear the oath was not a trivial breach of s 465(1) and thus excluded the evidence obtained as a result of the search warrants in question, notwithstanding the fact that compliance with s 465 would have been a very simple matter.

However, on appeal by the Crown to the Supreme Court, Lasry J took the opposite view in admitting the evidence and recognised that "[t]he only difference between what happened and what could have happened is the time it would have taken to swear the oath" (estimated at 15 seconds).[56] Lasry J went on to conclude that the police officers considered themselves as bound by the contents of the search warrants and set out to tell the truth:

> In my opinion, the result is that the documents would have had the same content whether sworn or unsworn. It would be quite a different and more serious situation if, hypothetically, I had concluded that the police members did not take the oath because they had little or no confidence in the content of the document and wished to avoid the risk of being charged with perjury or some other offence.
>
> Thus, whilst these breaches were not trivial, the ease of compliance in the circumstances of this case as I have just described, mitigates the seriousness of the breach.[57]

A similar outcome occurred in *R v Gallagher*,[58] where the primary judge had excluded the evidence and the New South Wales Court of Criminal Appeal had reversed the decision, after the Director of Public

[52] *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440, 458 [67] (Warren CJ, Buchanan and Redlich JJA); [2011] VSCA 355.

[53] *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440, 463 [90] (Warren CJ, Buchanan and Redlich JJA); [2011] VSCA 355.

[54] *ASIC v Sigalla (No 2)* (2010) 240 FLR 327, [128] (White J); [2010] NSWSC 792.

[55] *R v Borg* (2012) 220 A Crim R 522; [2012] VSC 26.

[56] *R v Borg* (2012) 220 A Crim R 522, 547 [103]; [2012] VSC 26.

[57] *R v Borg* (2012) 220 A Crim R 522, 547–548 [107]–[108]; [2012] VSC 26 .

[58] *R v Gallagher* [2015] NSWCCA 228.

Prosecutions appealed against the ruling under s 5F(3A) of the *Criminal Appeal Act 1912* (NSW). Senior Constable Hembrow had attended two rural properties to conduct a firearms audit during which by accident he discovered cannabis plants. Following this discovery, search warrants were obtained. The defendant successfully argued in the District Court that Hembrow had conducted an unlawful search, and the primary judge held that the evidence was obtained as a consequence of the trespass under s 138(1)(b), such that the balancing exercise favoured exclusion of the evidence.

In the Court of Criminal Appeal, the leading judgment was given by Beech-Jones J (with whom Gleeson JA and Adams J agreed), who observed that neither party had addressed s 138(3)(h) before the trial judge, which requires the court to examine a police officer's state of mind and motivations for their conduct:

> [I]f Officer Hembrow had not trespassed but instead had only unlawfully seized the cannabis plants in circumstances where he believed on reasonable grounds that no warrant was necessary then the fact that he could and would have obtained a warrant to take the same step would tend in favour of the admission of the evidence. Conversely, if Officer Hembrow knew that he needed a warrant to seize the cannabis plants but proceeded without a warrant then a combination of s 138(3)(h) and s 138(3)(d) and (e) would justify the rejection of the evidence.
>
> However in circumstances where the discovery of the evidence was accidental such that, but for the contravention, the evidence would never have been discovered then this factor is neutral … no error has been demonstrated by the primary judge's failure to expressly refer to it.[59]

In allowing the appeal, Beech-Jones J concluded that "the contravention was a relatively minor trespass and that at its highest the trespass by Officer Hembrow could only be characterised as careless"[60] as opposed to reckless under s 138(3)(e). In other words, recklessness must be distinguished from negligence or carelessness. By contrast, it is difficult to conceive of the evidence being deemed inadmissible at common law irrespective of whether the trespass was categorised as careless or reckless, both because the onus of proof is upon the defendant and because derivative evidence does not come within the *Bunning v Cross* discretion.

The most recent High Court consideration of s 138(3)(h) was in *Kadir*, a 2020 case dealing with the alleged use of rabbits as "live bait" in training racing greyhounds, in which both *R v Borg* and *R v Gallagher* were cited.[61] The Crown (the respondent in the High Court) sought to tender three categories of evidence in the District Court of New South Wales: (1) surveillance evidence obtained from seven video recordings covertly recorded by Animals Australia; (2) search warrant evidence obtained by the Royal Society for the Prevention of Cruelty to Animals (RSPCA) following receipt of the video recordings made by Animals Australia; and (3) alleged admissions made by Mr Kadir. The critical point here being that as the surveillance evidence was obtained contrary to s 8(1) of the *Surveillance Devices Act 2007* (NSW), the search warrant evidence and the admissions evidence were obtained in consequence of the illegal video recordings under s 138(1)(b).

As the High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) noted, following a voir dire hearing in the District Court of New South Wales where the focus was on the application of s 138(3)(h), the trial judge, Buscombe J, refused to admit each of the three categories of evidence:

> The parties appear to have approached the determination upon the view that proof of the improbability that the police or the RSPCA would have been able to lawfully obtain evidence of acts of animal cruelty was a factor which weighed in favour of admitting the evidence.
>
> The trial judge found that there would have been some difficulty in obtaining the evidence without contravening the law, but the degree of difficulty was not easy to gauge because no steps had been taken in an endeavour to obtain evidence lawfully. His Honour ruled in relation to each of the three categories that the desirability of admitting the evidence was outweighed by the undesirability of admitting evidence obtained in the way the evidence had been obtained.[62]

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[59] *R v Gallagher* [2015] NSWCCA 228, [47]–[48].

[60] *R v Gallagher* [2015] NSWCCA 228, [55].

[61] *Kadir v The Queen* (2020) 267 CLR 109, 128 [20]; [2020] HCA 1.

[62] *Kadir v The Queen* (2020) 267 CLR 109, 120–121 [3]–[4]; [2020] HCA 1.

Given the Crown case had effectively been eliminated, the Director of Public Prosecutions appealed under s 5F(3A) of the *Criminal Appeal Act* to the New South Wales Court of Criminal Appeal (Ward JA, Price and Beech-Jones JJ), contending that "the trial judge failed to properly assess the difficulty of obtaining the evidence without contravening an Australian law".[63]

On the surveillance evidence, the Court of Criminal Appeal distinguished the first video recording from the subsequent six recordings, on the grounds that the police would have been unlikely to investigate an anonymous complaint and would have referred the complaint to the RSPCA, which in turn had an understanding to share such complaints with Greyhound Racing (NSW):

> The factor which here tips the balance in favour of admission of the first recording is the difficulty of obtaining that evidence without more than an anonymous complaint – i.e., here, the difficulty of obtaining the evidence without a contravention of the *Surveillance Devices Act* … [T]here were real concerns as to the unlikelihood of an anonymous complaint being able to be properly and effectively investigated (not least because of the risk that an official investigation or even the lodgement of a complaint might lead to a tip-off by people associated with the greyhound racing industry) and the suspected criminal activities was of a high degree of seriousness.[64]

The Court of Criminal Appeal took the view that the subsequent six recordings were correctly excluded because "once there was evidence in the form of the first recording, then whatever difficulties were (or were perceived to be) attendant on investigation of an anonymous complaint must have been lessened".[65]

As to the search warrant evidence and the alleged admissions made by Mr Kadir, the Court of Criminal Appeal held that both types of evidence should be admitted because of material differences in the "way" each was obtained:

> [T]he "way" in which this evidence was obtained also encompasses the circumstance that the search warrants were obtained by a body vested with legislative responsibility for animal welfare, which conformed with the limits of its legislative authority, was not found to have breached Australian law and had no prior knowledge or involvement in the relevant contravention of an Australian law. As stated the rejection of search warrant evidence obtained by RSPCA in circumstances where it did not contravene the law has the potential to undermine the legislative policy of vesting it with regulatory functions …
>
> [T]he "way" in which the alleged admissions were obtained was not the same as the "way" that the surveillance evidence was obtained vis a vis the contraventions of Australian law. There was no direct illegality or impropriety in the procuring of the admissions. The connection between the alleged admissions and the prior contraventions of Australian law was tenuous … [and] meant that the reception of the alleged admissions into evidence is unlikely to amount to "curial approval, or even encouragement" of the unlawful conduct involved in procuring the surveillance evidence (*Bunning v Cross*).[66]

Consequently, in regards to the first recording, the search warrant evidence and the alleged admissions made by Mr Kadir, the Court of Criminal Appeal held that the balancing exercise favoured each type of evidence being admitted.[67]

The High Court gave the appellants special leave to appeal and held that "the basis upon which the parties and the Courts below approached s 138(3)(h) was misconceived: demonstration of the difficulty of obtaining evidence of the commission of acts of animal cruelty lawfully at the Londonderry property did not weigh in favour of admitting evidence obtained in deliberate defiance of the law".[68]

The High Court's argument was based on the significance of factor (h) varying depending on the circumstances. Thus, the High Court differentiated between:

(1) the circumstance where action was urgent to preserve evidence, which would weigh in favour of admission;

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[63] *Kadir v The Queen* (2020) 267 CLR 109, 121 [5]; [2020] HCA 1.

[64] *R v Grech* [2017] NSWCCA 288, [111].

[65] *R v Grech* [2017] NSWCCA 288, [103].

[66] *R v Grech* [2017] NSWCCA 288, [128], [141].

[67] *R v Grech* [2017] NSWCCA 288, [112], [130], [142].

[68] *Kadir v The Queen* (2020) 267 CLR 109, 122–123 [9]; [2020] HCA 1.

(2) the circumstance where factor (e) was engaged because the illegality was deliberate or reckless, which would weigh against admission; and
(3) the circumstance where the illegality was neither deliberate nor reckless, which would be treated in a neutral fashion.

Under this analysis, the assumption by the parties "that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides".[69]

For present purposes of supporting the contention that s 138 requires reform, it is important to understand the nature of the difference between the Court of Criminal Appeal and the High Court as to the admissibility of the first video recording. As mentioned above, the Court of Criminal Appeal identified the trial judge's error as a failure to weigh factor (d) ("the gravity of the impropriety") separately from factor (h) ("the difficulty of obtaining the evidence without contravention of Australian law") as regards the first video recording.[70] This followed because once the first video recording had been obtained, it could be passed on to the appropriate authorities and tipped the balance in favour of admission.[71]

The High Court held that in differentiating the first recording from the later six recordings, the Court of Criminal Appeal had fallen into error because all seven recordings fell into category (2) above – namely, factor (e) was engaged because the illegality was deliberate, which weighed against admission:

> The gravity of the contravention (factor (d)) and the difficulty of obtaining evidence lawfully (factor (h)), along with whether the impropriety or contravention was deliberate or reckless (factor (e)), are overlapping factors. In the circumstances of this case, the trial judge did not err in failing to weigh the s 138(3) factors separately in relation to the first video-recording. His Honour was right to find that each video-recording was the product of a serious contravention of Australian law. The seriousness of the contravention was in each case the greater because the recording was made in deliberate contravention of the law with a view to assembling evidence which it was believed the proper authorities would be unable to lawfully obtain. To the extent that it was more difficult to lawfully obtain evidence of live baiting before the first video-recording was made, this was a factor which weighed against admitting it. There is no suggestion that the trial judge erred in his assessment of the other s 138(3) factors. His Honour's determination that none of the surveillance evidence is admissible is correct.[72]

The High Court's description of factors (d), (e) and (h) as "overlapping" is, with respect, difficult to comprehend. Effectively, factors (d) (gravity) and (e) (whether the impropriety was deliberate or reckless) are very similar, and are in contradistinction to factor (h) (the difficulty of obtaining the evidence without impropriety), which in turn lines up with (a) (the probative value of the evidence), (b) (the importance of the evidence) and (c) (the nature of the relevant offence). Section 138(3) is better described as a list of eight factors, (a)–(h), that line up on opposite sides of the admissibility of evidence ledger, which is skewed against admission by virtue of s 138(1) placing the onus of proof on the Crown in the case of a criminal proceeding.

While the High Court found that the trial judge was correct to exclude all seven video recordings, the High Court determined that the Court of Criminal Appeal was correct in finding the search warrant evidence to be admissible:

> The RSPCA had no advance knowledge of Animals Australia's plan to illegally record activities at the Londonderry property. There is nothing to suggest a pattern of conduct by which Animals Australia or other activist groups illegally collect material upon which the RSPCA takes action. The desirability of admitting evidence that is important to the prosecution of these serious offences outweighs the undesirability of not admitting evidence obtained in the way the search warrant evidence was obtained.[73]

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[69] *Kadir v The Queen* (2020) 267 CLR 109, 127–128 [20]; [2020] HCA 1 .

[70] *R v Grech* [2017] NSWCCA 288, [102]–[105].

[71] *R v Grech* [2017] NSWCCA 288, [111].

[72] *Kadir v The Queen* (2020) 267 CLR 109, 133 [37]; [2020] HCA 1.

[73] *Kadir v The Queen* (2020) 267 CLR 109, 137 [48]; [2020] HCA 1.

As to the admissions by Mr Kadir, the High Court endorsed the Court of Criminal Appeal's finding that the admissions were admissible:

> Since the evidence of the admissions is capable of rational acceptance, consideration of the probative value of the admissions is to be assessed upon the assumption that the evidence will be accepted. Their probative value is high and they are important evidence in the case against Mr Kadir. … Their Honours' conclusion, that the bare connection between the contravention of Australian law and obtaining the admissions is unlikely to convey curial approval or encouragement of the contravention, is apt. The undesirability of admitting evidence obtained in the way the admissions were is outweighed by the desirability of the evidence being admitted in support of the prosecution case.[74]

Thus, the appeal to the High Court was successful to the extent that the first video recording and therefore all the surveillance evidence was deemed inadmissible, while the search warrant evidence and the admissions by Mr Kadir were deemed admissible.

In accepting the Court of Criminal Appeal's reasons for admitting the search warrant evidence and the admissions by Mr Kadir, the High Court agreed with the Court of Criminal Appeal's observation that "s 138 does not enact the doctrine that prevailed in the United States, requiring the exclusion of the 'fruit' of official illegality unless the impugned evidence was derived 'by means sufficiently distinguishable to be purged of the primary taint'".[75] Under such an analysis, notwithstanding the balancing exercise also applies to derivative evidence under s 138(1)(b), the RSPCA's search warrant evidence was admissible because it "was obtained by a regulator acting lawfully and without prior knowledge of the contravention, albeit that it was procured on the strength of the surveillance evidence"[76] as opposed to a private body (Animals Australia).

Therefore, according to the High Court, on the one hand all the surveillance evidence should be excluded because it fell into category (2) (the circumstance where factor (e) was engaged as the illegality was deliberate or reckless, which would weigh against admission), while on the other hand an innocent third party (here the RSPCA) can leverage the surveillance evidence to trigger a search warrant.

This thin distinction is thrown into sharper focus when the subject matter of the surveillance is posited to be more serious than animal cruelty, such as an anonymous tip that illegal operations involving body parts were occurring on a property. Assuming the police are reluctant to act on an anonymous tip, then the third party might well deliberately undertake surveillance evidence and provide that evidence to the police. Under the High Court's reasoning, because factors (d) and (e) are engaged, the surveillance evidence would be prima facie inadmissible and the police would have to rely on any evidence they were able to gather from a search warrant. It may be objected that under such a factual scenario, factor (c) (the nature of the relevant offence) would tip the scales in favour of admission. If this be the case, the High Court is essentially constructing an implicit list of offences that so shock the public conscience that, even where factors (d) and (e) are engaged, the surveillance evidence would be admissible. Clearly, animal cruelty is not on such a list.

In any event, the origins of the High Court's decision in *Kadir* as it relates to third parties can be found in an earlier High Court case also involving animal cruelty, where the innocent third party was the Australian Broadcasting Corporation (ABC) rather than the RSPCA.

IV. Comparison of Kadir v The Queen and Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.[77]

[74] *Kadir v The Queen* (2020) 267 CLR 109, 138–139 [51]; [2020] HCA 1 (citations omitted).

[75] *Kadir v The Queen* (2020) 267 CLR 109, 134–135 [40]; [2020] HCA 1, citing *R v Grech* [2017] NSWCCA 288, [120], which in turn cited *Wong Sun v United States*, 371 US 471, 484, 488 (1963).

[76] *Kadir v The Queen* (2020) 267 CLR 109, 135 [41]; [2020] HCA 1.

[77] *United States v Garsson*, 291 F 646, 649 (Judge Learned Hand) (SDNY, 1923).

Kadir has strong similarities with the case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (*ABC v Lenah*),[78] which was decided by the High Court nearly 20 years before under the common law and predated the Tasmanian adoption of the uniform evidence legislation. In *ABC v Lenah*, Animal Liberation Ltd had covertly installed hidden cameras that captured footage depicting the slaughter of possums in Lenah's possum meat processing plant in Tasmania. Animal Liberation Ltd sent the footage to the ABC anonymously. On becoming aware that the ABC intended to broadcast the footage, Lenah sought an interlocutory injunction to restrain the ABC from doing so. As with the RSPCA in *Kadir*, there had been no involvement by the ABC in the trespass or the installation of the cameras. Further, the ABC is a publicly funded broadcaster and the RSPCA is a widely respected organisation providing a public service; arguably, both organisations were obliged under their respective charters to act on the illegally obtained information that had been provided to them. However, where the illegally obtained material has been provided by a third party, there is no obvious category within the spectrum of improper conduct as identified by the Victorian Court of Appeal.[79]

For present purposes, the focus here is upon Lenah's argument that the footage had been obtained by virtue of the trespass and therefore it would be unconscionable to allow the ABC to broadcast the footage. On the question of unconscionability, Gleeson CJ called in aid several cases in support of the argument that the "step from the illegality of the behaviour of the trespassers to a conclusion that the appellant must not publish"[80] was a step too far. His Honour cited Stevens J in the United States Supreme Court case of *Bartnicki v Vopper*[81] for the principle that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party".[82]

Gleeson CJ continued by citing both English and Australian authority to similar effect:

> That statement, it is true, was made in a context influenced by the First Amendment to the United States Constitution. But Lord Wilberforce, in *Gouriet v Union of Post Office Worker* [1978] AC 435 at 476-484 examined the reasons of history and policy that explain why enforcement of the criminal law by civil injunction at the suit of a private litigant is an exceptional and narrowly confined jurisdiction. In *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50, Mason J rejected an attempt to rely upon a contravention of the *Crimes Act 1914* (Cth) as a basis to restrain the publication of classified government documents.[83]

On this point, Gummow and Hayne JJ noted: "[I]t is not alleged that there was any knowing participation by the ABC in what is alleged to have been the relevant wrongdoing – the trespasser's act of trespass as distinct from a separate act of wrongdoing by misusing the tape."[84]

Kirby J took a different tack by stressing the freedom of political communication and the protection of public debate on animal welfare issues:

> *Governmental and political discussion of animal welfare*: The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation …

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[78] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

[79] *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440, 458 [67] (Warren CJ, Buchanan and Redlich JJA); [2011] VSCA 355.

[80] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 228; [2001] HCA 63 [47].

[81] *Bartnicki v Vopper*, 69 USLW 4323, 4328 (Stevens J) (2001). In *Bartnicki v Vopper*, a radio host (Vopper) broadcast a tape, which had been surreptitiously recorded by an anonymous third party in breach of the *Electronic Communications Privacy Act 1986* (US), of a teacher union official (Bartnicki) discussing negotiations with the union president. The Supreme Court held that the radio station was not liable because it was not party to the illegal act, and anti-wiretapping statutes against individuals who merely disseminate material illegally obtained by third parties runs afoul of the First Amendment, which protects the right of individuals to engage in speech on matters of public concern. See also *United States v Stevens*, 559 US 460 (2010), where the Supreme Court ruled that 18 US Code § 48 (a federal statute that criminalised the commercial production, sale or possession of depictions of cruelty to animals) was an unconstitutional abridgment of the First Amendment's right to freedom of speech.

[82] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 228–229 [48]; [2001] HCA 63.

[83] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 229 [49]; [2001] HCA 63.

[84] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 247–248 [104]; [2001] HCA 63.

> Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate.[85]

Thus, there are two strands to the High Court's decision to refuse interlocutory relief to Lenah:

(1) the trespasser's act is separate from the use of the product of that act by another party who was not involved in the trespass; and
(2) where the product is a legitimate matter of public debate, it ought not be suppressed.

The first of these strands was in play in *Kadir*,[86] where the High Court distinguished the trespass and breach of s 8(1) of the *Surveillance Devices Act* by Animals Australia from the search warrant secured by the RSPCA, which in turn was driven by the surveillance evidence illegally obtained by Animals Australia. Arguably, the second strand was also a live issue under factor (c) (the nature of the relevant offence), given the widespread community outrage towards the barbarous training of greyhounds leading to the NSW Greyhound Welfare Code of Practice, which came into effect on 1 January 2021.[87]

Therefore, the tension in s 138(3), as interpreted by the High Court, is that the "fruit of the poisoned tree" (here the surveillance evidence in *Kadir*) is prima facie inadmissible, but the product of the fruit is prima facie admissible when an innocent third party is involved. While the High Court did not refer to *ABC v Lenah* in *Kadir* as it was decided under the common law, *Kadir* is clearly consistent with *ABC v Lenah* on this point because the respective roles of the RSPCA and the ABC are identical.

By contrast, in the United States it was held in *Silverthorne Lumber Co v United States*[88] that to permit derivatives would encourage police to circumvent the Fourth Amendment, which prohibits unreasonable searches and seizures. Such a strict rule brings the argument full circle as to whether the primary remedy should be disciplinary action against police officers rather than exclusion of potentially reliable and probative evidence. As Davies highlighted, the exclusion of such evidence may cause the administration of criminal justice to fall into disrepute because it is viewed in the community as "judicial abdication of an obligation to punish proved criminal behaviour".[89] The same point had been made previously by McHugh J when his Honour stated: "Ultimately, the judge must determine whether the public interest will be advanced or impaired by admitting the evidence."[90] Essentially, the judicial integrity principle is a double-edged sword; this article argues that the pendulum has swung too far in favour of exclusion, which has implications for the administration of justice.

This begs the question: should the fruit/product of the fruit distinction be explicitly set out in a revised s 138, or is it better to simply repeal s 138(1)(b) ("in consequence of an impropriety or of a contravention of an Australian law"), which would have the effect of returning to the common law by removing derivative evidence from the reach of s 138? And further: what are the implications for s 138(3)(h) that flow from the High Court's decision in *Kadir*? These two questions, as well as other proposals for the reform of s 138 flagged above, are addressed below.

V. Proposed Reform of s 138 of the Uniform Evidence Legislation

> The rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism, because it makes courts look oblivious to violations of the criminal law and involves prosecutors, defense attorneys and judges in charade trials in which they all know the defendant is guilty.[91]

[85] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 286–287 [217]–[218]; [2001] HCA 63.

[86] *Kadir v The Queen* (2020) 267 CLR 109; [2020] HCA 1.

[87] New South Wales Government, *NSW Greyhound Welfare Code of Practice* (2020) <https://www.gwic.nsw.gov.au/__data/assets/pdf_file/0011/893225/Code_of_Practice_A4_24pp_FNL.pdf>.

[88] *Silverthorne Lumber Co v United States*, 251 US 385 (1920).

[89] G Davies, "Exclusion of Evidence Illegally or Improperly Obtained" (2002) 76 ALJ 170, 179.

[90] *Ridgeway v The Queen* (1995) 184 CLR 19, 83.

[91] Christopher Slobogin, "Why Liberals Should Chuck the Exclusionary Rule" (1999) *University of Illinois Law Review* 363, 436–437.

In the quotation above, Slobogin is referring to the exclusionary rule in the United States that prevents the admission of evidence gathered in violation of the *United States Constitution*. The decision in *Mapp v Ohio*[92] established that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment. Slobogin argued that "the primary judicial remedy for illegal searches and seizures should be monetary penalties, preferably exacted from the searching officers when they knowingly or recklessly violate the Fourth Amendment, and from the police department in all other cases of illegality".[93] In the absence of a Bill of Rights in Australia and the need to address a Fourth Amendment equivalent, rather than place the primary judicial remedy for illegally or improperly obtained evidence on monetary penalties, the better view is to reform s 138 of the uniform evidence legislation.

As described above, s 138(3) includes a list of eight factors, (a)–(h), that line up on opposite sides of the admissibility of evidence ledger, which is skewed against admission by virtue of s 138(1) placing the onus of proof on the Crown in a criminal proceeding. This article respectfully disagreed with the conclusion of the three Commissions that there was no need to recommend any changes to the policy basis underpinning the public policy discretion set out in s 138. Instead, it was argued that the pendulum had swung too far in favour of exclusion and that the common law as expressed in *Bunning v Cross*[94] is to be preferred, subject to the list of factors being prioritised consistent with the majority view in *R v Dalley*, where Spigelman CJ concluded that "the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, both at common law and pursuant to s 138(3)(c)".[95]

Reform of s 138 consistent with the adoption of the approach taken by the common law case of *Bunning v Cross*[96] would:

(1) place the onus of proof on the party seeking to have the challenged evidence excluded by changing the wording in s 138(1);
(2) remove the application to derivative evidence under s 138(1)(b) and to evidence of admissions under s 138(2); and
(3) remove the words "without limiting the matters" under s 138(3) to avoid a non-exhaustive list of factors, thereby avoiding potential judicial expansion of the list and providing parties with greater certainty.

In addition, it is proposed that the list of factors under s 138(3) should be prioritised so as to specify how they should be applied to the balancing test, consistent with some submissions to the Review of the Uniform Evidence Acts.[97]

In arguing for a common law treatment of improperly or illegally obtained evidence under s 138, it is important to consider the architecture of the uniform evidence legislation and in particular the other sections that provide for judicial discretion to exclude evidence – such as s 90, which deals with the fairness discretion to exclude admissions and includes a significant note at the end:

> EVIDENCE ACT 1995 – SECT 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.

[92] *Mapp v Ohio*, 367 US 643 (1961).

[93] Slobogin, n 91, 366.

[94] *Bunning v Cross* (1978) 141 CLR 54, 78–80.

[95] *R v Dalley* (2002) 132 A Crim R 169, 172 [7]; [2002] NSWCCA 284.

[96] *Bunning v Cross* (1978) 141 CLR 54, 78–80 (Stephen and Aickin JJ).

[97] *Law Reform Commission Report*, n 27, [14.72].

Part 3.11 contains five discretions as follows:

> 135 General discretion to exclude evidence
>
> 136 General discretion to limit use of evidence
>
> 137 Exclusion of prejudicial evidence in criminal proceedings
>
> 138 Discretion to exclude improperly or illegally obtained evidence
>
> 139 Cautioning of persons

Of the above five discretions, ss 138 and 139 refer specifically to admissions, while ss 135–137 are general discretions, with s 137 reflecting the *R v Christie* discretion.[98] As Gans, Palmer and Roberts observed, "[t]here is considerable scope for overlap between the discretion in s 138, and the fairness discretion in s 90",[99] although in a later case "two members of the High Court indicated that the fairness discretion was residual in nature, and should generally be exercised after the other, more specific, discretions; such as the discretion in s 138".[100] Thus, the repeal of s 138(2) would not remove judicial discretion to exclude evidence of an admission under the fairness discretion in s 90. In any event, there is further protection given to suspects being interviewed under s 139 (Cautioning of persons), as well as the adoption in all Australian jurisdictions of legislation requiring police officers to record admissions.[101]

In both *ABC v Lenah* and *Kadir*, the High Court wrestled with the problem of the admissibility of derivative evidence. Most recently in *Kadir*, in interpreting s 138(1)(b) the High Court chose to distinguish between the fruit of the improperly obtained evidence (the surveillance evidence), which was held inadmissible, from the product of the fruit of the improperly obtained evidence (the search warrant obtained by the RSPCA), which was held to be admissible evidence in the hands of an innocent third party.

It is contended that explicitly setting out this distinction in a revised s 138(1)(b) that would adequately deal with the status of an innocent third party would be fraught with drafting difficulties, and that it would be better to simply repeal s 138(1)(b) and revert to the common law for the admissibility of derivative evidence acquired from improperly obtained evidence in the hands of an innocent third party. In other words, the position taken by the High Court in *ABC v Lenah*.

Consistent with the proposal to follow the common law in s 138(1) by placing the onus of proof on the party seeking to have the challenged evidence excluded, the position taken by the New South Wales Court of Criminal Appeal in *R v Grech*[102] that the difficulty of obtaining the evidence without impropriety or contravention of an Australian law is a factor that weighs in favour of admitting evidence pursuant to s 138(3)(h) is to be preferred. The High Court admonished the Court of Criminal Appeal because the significance of factor (h) varied depending on the circumstances, and in *Kadir* factor (e) was engaged because the illegality was deliberate, which weighed against admission.[103] Under the proposed reform of s 138, the existing policy of exclusion provided under s 138 and endorsed by the three Commissions is inverted.

Consolidating these proposed reforms to s 138 would have the following legislative drafting outcome:

> EVIDENCE ACT 1995 CTH – SECT 138
>
> Discretion to exclude improperly or illegally obtained evidence
>
> (1) Evidence that was obtained improperly or in contravention of an Australian law is to be admitted unless the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

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[98] *R v Christie* (1914) AC 545.

[99] Gans, Palmer and Roberts, n 35, 495 [16.5.5], citing *R v Swaffield* (1998) 192 CLR 159, 182 (Brennan CJ); [1998] HCA 1.

[100] Gans, Palmer and Roberts, n 35, 495 [16.5.5], citing *Em v The Queen* (2007) 232 CLR 67, 104 (Gummow and Hayne JJ); [2007] HCA 46.

[101] See, eg, *Criminal Procedure Act 1986* (NSW) s 281; *Police Powers and Responsibilities Act 2000* (Qld) s 436; *Crimes Act 1958* (Vic) s 464H.

[102] *R v Grech* [2017] NSWCCA 288, [111].

[103] *Kadir v The Queen* (2020) 267 CLR 109, 127–128 [20]; [2020] HCA 1.

(2) The court is to take into account the following matters under subsection (1):

(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 public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, pursuant to s 138(3)(c).

The difficulty of obtaining the evidence without impropriety or contravention of an Australian law is a factor which weighs in favour of admitting evidence, pursuant to s 138(3)(h).

In *Ridgeway v The Queen*, it was stated by three members of the High Court that "the basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes".[104] In a recent address, the Chief Justice of New South Wales took up this theme in measuring the judicial integrity principle against the moral legitimacy of the criminal justice system in the eyes of the public:

> As such, the principle requires that different public interests be weighed against each other in order to determine whether the admission or exclusion of evidence would undermine the integrity of the justice system. The only way for the court to sensibly and justly give effect to differing community values and public policy concerns is by an objective and impartial consideration of set factors, which is the approach of s 138.[105]

However, as Osborn pointed out, the judicial integrity justification rationale for excluding illegally or improperly obtained evidence "relies on public support to justify its existence yet that support is almost non-existent outside the legal profession".[106] Osborn went on to cite Rex Lee, a former United States Solicitor-General: "For the overwhelming majority of people in America, the thief, the rapist, and the kidnapper pose a significantly greater threat not only to our happiness, but also more specifically to our liberties, than the policeman and the jailor."[107] Osborn concluded that "there is no reason to believe that the people of Canada, England and Australia feel any differently".[108]

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[104] *Ridgeway v The Queen* (1995) 184 CLR 19, 31 (Mason CJ, Deane and Dawson JJ). The *Law Enforcement (Controlled Operations) Act 1997* (NSW) was enacted to overcome *Ridgeway* where the High Court recognised at common law the substantive defence of entrapment. The appellant (Ridgeway) had sought to import heroin into Australia from an acquaintance in Malaysia who had become a police informant. With the collaboration and assistance of the Australian Federal Police, a quantity of heroin was the subject of a controlled delivery by Malaysian police to Australia so that it might be sold to the appellant, thereby leading to his arrest. The *Law Enforcement (Controlled Operations) Act* legitimised certain actions of undercover officers and permitted evidence obtained in authorised controlled operations to be classified as legal and prima facie admissible. However, if an authorised action is invalid then the shield of the Act is removed "which would bring s 138 of the *Evidence Act 1995* (NSW) into play, but only if and to the extent that the substantive evidence sought to be adduced by the Crown was itself obtained improperly or illegally": *R v Ladocki* [2004] NSWCCA 336, [52] (Mason P).

[105] Hon TF Bathurst (Chief Justice of New South Wales), "Illegally or Improperly Obtained Evidence: In Defence of Australia's Discretionary Approach" (Evidence Act CDP Seminar, UNSW Law School, 2 March 2016) [63] <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20160302.pdf>.

[106] Osborn, n 1, 38 [85].

[107] Osborn, n 1, 38 [85], citing Rex Lee, "The Supreme Court's 1983 Term: Individual Rights, Freedom, and the Statue of Liberty" (1984) 19(1) *Georgia Law Review* 1, 6.

[108] Osborn, n 1, 38 [85].

VI. Conclusion

> It matters not how you get it; if you steal it even, it would be admissible in evidence.[109]

This article has sought to redress a perceived imbalance in s 138 of the uniform evidence legislation that, in relation to the common law, makes improperly or illegally obtained evidence more difficult to be admitted, predominantly because of the reversal of the onus of proof and the reach of s 138 to cover derivative evidence and admissions. It criticised the ALRC for recommending the reversal of the onus of proof for illegally or improperly obtained evidence on weak public policy grounds, as it overlooked the primary concern of maintaining the integrity and legitimacy of the judicial system. Further, the ALRC's concern regarding the practical considerations under the *Bunning v Cross* discretion appear to be little more than an aversion to the quantum of illegally or improperly obtained evidence admitted at common law. Finally, the Review of the Uniform Evidence Acts undertaken by the three Commissions simply ignored those submissions that called for guidance as to the weighting of the factors in s 138(3), preferring to treat the relatively few submissions dealing with s 138 as a cue to recommend no changes be made to that section.

The focus here has been upon two animal welfare cases – *ABC v Lenah* and *Kadir* – which demonstrate that matters of public debate often come to light because evidence has been surreptitiously obtained. As Kirby J pointed out in *ABC v Lenah*,[110] many advances in animal welfare, such as the transport of live sheep and cattle, and the condition of circus animals and battery hens, only occurred because of public debate after exposure of appalling treatment shocked the public conscience.

The extent of the imbalance came into sharp focus in *Kadir*, where the High Court criticised the New South Wales Court of Criminal Appeal for ruling that the first of the illegally obtained surveillance video recordings was admissible, on the grounds that treating the difficulty in lawfully obtaining the surveillance evidence as a factor that weighed in favour of admitting evidence obtained in deliberate defiance of the law inverted the policy of the exclusion for which s 138 provided.[111] It is contended that this policy, which the three Commissions endorsed, has tilted the balance too far in favour of exclusion, as evidenced by New South Wales seeking to influence the balancing exercise by introducing s 5F(3A) of the *Criminal Appeal Act* that confers a right of appeal on the Director of Public Prosecutions against an evidentiary ruling that substantially weakens the prosecution case.

As a result, this article set out a revised s 138 that takes up some of the submissions rejected by the three Commissions, such as adopting the common law's treatment of the onus of proof and derivative evidence, as well as prioritising the list of factors in s 138(3). More particularly, the view of the majority in *R v Dalley* that s 138(3)(c) is entitled to greater weight[112] has been adopted.

Finally, revising s 138 to be more consistent with the common law might offer some modest encouragement to jurisdictions like Queensland and South Australia to reconsider joining the uniform evidence regime.

[109] *R v Leatham* (1861) 8 Cox CC 498, 501 (Crompton J).

[110] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 286–287 [217]–[218]; [2001] HCA 63.

[111] *Kadir v The Queen* (2020) 267 CLR 109, 127–128 [20]; [2020] HCA 1.

[112] *R v Dalley* (2002) 132 A Crim R 169, 172 [7] (Spigelman CJ); [2002] NSWCCA 284.