FOLEY'S LIST

So they've spilled the beans – what does that mean?

Admissions under Part 3.4 of the *Evidence Act 2008* (Vic)

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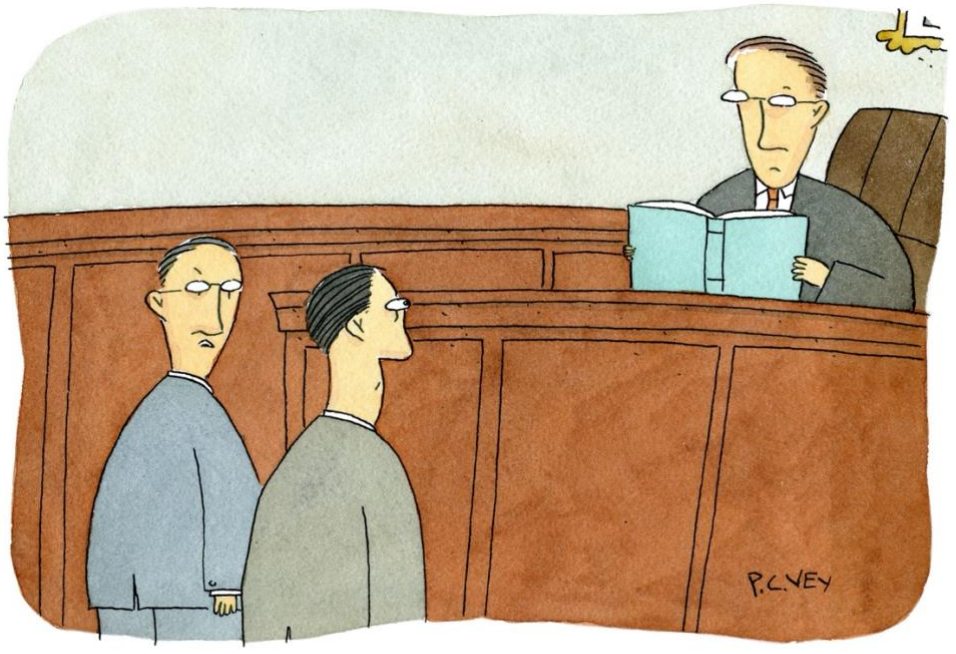
Foley's February 2025

20 February 2025



"Next time write the book about the crime after you've been convicted."

With thanks to Julia Kretzenbacher and the legal assistants at Brian Bourke Chambers for their assistance.

Part A: Background

I shot the sheriff
But I didn't shoot no deputy…

\- *Bob Marley*

1. Just as adducing admissions can result in convictions, excluding admissions can result in acquittals or discontinuances.

2. Admissions can be a very powerful type of evidence, and an important body of rules has been developed which governs when they can be admitted into evidence.[1]

3. This paper considers those rules, and some of the recent cases from the Court of Appeal, including:

    a. *Ridley (a pseudonym) v The King* [2024] VSCA 308;

    b. *Alhassan v The King* [2024] VSCA 233; and

    c. *Headland (a pseudonym) v the King* [2023] VSCA 174.

What is an admission?

4. Dictionary to the *Evidence Act 2008* (Vic) (*EA*):

> **admission** means a previous representation that is—
>
> (a) **made by a person** who is or becomes **a party to a proceeding** (including an accused in a criminal proceeding);
>
> (b) **adverse to the person's** interest in the outcome of **the proceeding**.

5. Includes both "confessions" and "admissions" at common law.[2]

6. The definition likely extends to a representation that may appear exculpatory but is actually inculpatory (such as a false alibi).[3]

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1 *Uniform Evidence Law* (ALRC Report 102), 17 August 2010, [10.2].
2 Ibid, [10.2] fn 4.
3 Beale J, Pocket Evidence Law, Pt 3.4 (citing *R v Esposito* (1998) 45 NSWLR 442).

7. The representation has to be adverse in light of a "fact in issue" in the proceeding (so, for example, not an admission of presence when that is not in issue at trial).[4]

   - Think about this before making concessions.

8. There are some types of post-offence representations and conduct that can amount to an **implied admission** to the alleged offence (incriminating conduct).

   a. This paper will not focus on incriminating conduct, which is governed by Part 4, Division 1 of the *Jury Directions Act 2015* (Vic) (***JDA***);

   b. It should be noted, however, that important guidance on this issue has been given by the Court of Appeal in *DPP v Lynn* [2024] VSCA 62.[5]

Structure

9. This paper takes the following structure:

   (1) Part A: Overview of Part 3.4 of the EA;

   (2) Part B: Records of interview;

   (3) Part C: *Ridley (a pseudonym) v The King* [2024] VSCA 308;

   (4) Part D: "Scenario Evidence" and "Mr Big" Operations; and

   (5) Part E: Concluding thoughts.

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[4] *Abenethy & Hawkins v The Queen* [2020] VSCA 96; (2020) 282 A Crim R 513, 525 [60]-[61] (Niall and Emerton JJA):

> Accordingly, nothing said by Abernethy in his statement about his presence at the scene or his physical contact with Hunter was "adverse to his interests in the outcome of the proceeding". Those "representations" were either irrelevant to the outcome, because those matters were not in issue in the proceeding, or they were favourable to Abernethy, because he relied on them in his own defence. The same applies to the representations in Hawkins' statement.
>
> It follows, in our view, that the argument based on s 83(1) of the *Evidence Act* failed at the threshold.

[5] See, in particular, at [116] (Emerton P, Taylor and T Forrest JJA):

> The combination of these provisions indicates that the *JDA* contemplates that post-offence conduct evidence may be presented to the jury as evidence of incriminating conduct of the offence charged that ultimately may not be able to be treated as such by the jury because there are other reasonable explanations for that conduct. In other words, evidence of conduct explicable by more than one reasonable argument will, usually, pass through the gateway in s 20(1)(b).

See also the recent judgment of *Wu v The King* [2025] VSCA 4, [85]-[95] (Boyce, Kaye and T Forrest JJA) regarding purported lies during cross-examination of an accused person.

Part A: Overview of Part 3.4 of the EA

> *At common law there are several grounds upon which otherwise admissible evidence of out of court admissions made by the accused can be excluded. These are lack of voluntariness, unfairness to the accused and where the admission was illegally or improperly obtained. There is also a general discretion to exclude evidence that will be 'unduly prejudicial' to the accused. Controls over admissibility of admissions at common law reflect a mixture of policy objectives such as a desire to maximise evidentiary reliability (that is, to safeguard the truth of admissions), to safeguard the interests of the individual in relation to state interference, and to deter official misconduct and ensure judicial legitimacy.*
>
> *Australian Law Reform Commission (ALRC)*[6]

10. Codification in the *EA*, ss 81 – 90 deal with admissions:

Section 81

- 81(1): **hearsay rule and opinion rule does not apply** to evidence of an admission (therefore an admission can be used in proof of the asserted fact).
- 81(2): or to **proximate representations** reasonably necessary for context.
- In relation to mixed statements, see *Nyugen v the Queen* [2020] HCA 23; (2020) 269 CLR 299 regarding the prosecution's duty of fairness – a fair trial contemplates the presentation by the Crown of all available, cogent and admissible evidence.[7]

Section 82

- Makes it clear that s 81 of the *EA* only applies to **first-hand hearsay**.
- Note: Section 60 of the *EA* does not apply in a **criminal proceeding** to evidence of an admission (whereby evidence admissible for a non-hearsay purpose is then admissible for all purposes subject to a limiting direction being given): s 60(3).[8]

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6 *Uniform Evidence Law* (ALRC Report 102), 17 August 2010, [10.6] (citations omitted).

7 *Nyugen v the Queen* [2020] HCA 23; (2020) 269 CLR 299, 314 [36] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).

8 A response to *Lee v The Queen* (1998) 195 CLR 594.

Section 83

- Evidence of an admission can only be used **against a third-party** with that party's consent.
- A third party is a party **to the proceeding** other than the party who made the admission or adduced the evidence.
- 83(3): consent cannot be given in respect of part only of the evidence.
- See *Abernethy v The Queen* [2020] VSCA 96; (2020) 282 A Crim R 513.[9]

Section 84

- Exclusion of admissions influenced by **violent, oppressive, inhuman or degrading conduct** (or threats of such conduct).
- Together with s 85 of the *EA*, this provision replaces the common law test of voluntariness.[10]
- 85(2): only arises if a party against whom the evidence of the admission is adduced has **raised the issue.**
- **Not discretionary** – mandates exclusion of admissions which meet terms.[11]
- Significant scope to result in exclusion of admissions; see, eg, the observations in *DPP v Hou* [2020] VSCA 190; (2020) 62 VR 1.[12]
- This section will be considered in more depth below.

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9 At 524 [57] (Niall and Emerton JJA):

> What matters for present purposes is the statutory language. As already noted, a representation will only be an admission if it is made by a person who is or becomes a party to a proceeding and is "adverse to the person's interest *in the outcome of the proceeding*". In our view, the requirement that an admission be made by a party and the highlighted words direct attention to the proceeding in which the question of admissibility arises and, more particularly, to the matters in issue in the proceeding at the point when that question arises. Counsel for the applicants in this Court properly conceded that this must be so.

10 *Uniform Evidence Law* (ALRC Report 102), 17 August 2010, [10.8].

11 *DPP v Hou* [2020] VSCA 190; (2020) 62 VR 1, 8 [28] (Maxwell P, T Forrest and Weinberg JJA).

12 At 31-2 [149]-[50] (Maxwell P, T Forrest and Weinberg JJA).

Section 85

- Exclusion of potentially unreliable admissions made by an accused person in a criminal proceeding to:

  a. **investigating officials performing functions in connection with the investigation**; or

  b. as a result of the actions of another person who the accused knew, or reasonably believed to be, **capable of influencing the prosecution** that may be unreliable (this could extend, for example, to a complainant or parent of a complainant who held themselves out as capable of influencing the prosecution).[13]

- 85(2): "Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected".

- Factors in s 85(3).

- **There has to be a factual basis**, on the evidence, for the issue to arise.[14]

- In relation to s 85(1)(a), the "investigating official" should encompass a **full range of statutory investigations** and not be narrowly construed.[15]

- However, the definition of "investigating official" in the Dictionary to the *EA* specifically **excludes "a police officer who is engaged in covert investigations under the orders of a superior**" (so this does not apply to the type of conduct considered below in Part D).

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13 See, eg, *FMJ v The Queen* [2011] VSCA 308, [40] (Weinberg JA, with whom Hansen JA and Beach AJA agreed).

14 Ibid, [50] (Weinberg JA, with whom Hansen JA and Beach AJA agreed).

15 See, eg, Crown Casino "special employees" in *DPP v Hou* [2020] VSCA 190; (2020) 62 VR 1, 28 [131] (Maxwell P, T Forrest and Weinberg JJA).

- As with s 84, not discretionary – mandates exclusion if terms are met.[16]

- Reference in s 85(1)(a) to admissions made "in the course of official questioning" removed in response of *Kelly v The Queen* (2004) 218 CLR 216.

Section 86

- Exclusion of documentary **records of oral questioning** (other than audio-visual recordings).

- Intended to address "verballing" but oral evidence of admissions by an accused person may still be given by others.[17]

- See s 464H of the *Crimes Act 1958* (Vic) (***CA***) regarding the requirements of interviews.

- See s 139 of the *EA* in respect of the requirements of cautioning.

Section 87

- **Admissions made with authority**.

- Extends to the common law **co-conspirator's rule** (that admission by one co-accused in furtherance of the agreement can be used in evidence against another co-accused).

- However, there still has to be ***prima facie*** **evidence** of an accused person's participation in the enterprise before the evidence can be used in this way.[18]

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16 Ibid.

17 See Pocket Evidence, referring to the EM to the *EA* which states:

> The purpose of this clause is to limit the circumstances in which documentary evidence, such as a statement of evidence containing an admission, is used to prove the contents of the statement.
>
> However, it does not in any way limit the admissibility of oral evidence regarding any such admission, where this evidence comes within an exception to the hearsay rule.

18 See, eg, *Lindsey v The Queen* [2021] VSCA 230; (2021) 64 VR 510, [10]-[11] (Maxwell P, Kyrou and Niall JJA).

Section 88

- **Proof of admissions** – admissions will be admissible against a person if it is "reasonably open" to find that they made the admission.

Section 89

- **Evidence of silence** – adverse inferences must not be drawn from a failure or refusal to answer one or more questions from an investigating official.
- Further, s 44 of the *JDA* abolished the common law position explained in *Weissensteiner v The Queen* [1993] HCA 65; (1993) 178 CLR 217.
- See also s 25(2)(k) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), which provides that a person **charged** with an offence has a minimum guarantee "not to be compelled to testify against themselves or to confess guilt".[19]

Section 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 an accused to use the evidence.

- *EM v The Queen* [2007] HCA 46; (2007) 232 CLR 67.
- "A safety net". Other exclusionary provisions are to be considered first.

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[19] However it has been applied "'more generally, [to] the compulsion of persons to give evidence on oath and then to have that evidence subsequently used against them"; *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381; (2009) 24 VR 415 [162]-[163] (Warren CJ).

- A question has arisen as to whether consideration can be given the to the *reliability* of the evidence in light of *IMM v The Queen* [2016] HCA 14; (2016) 257 CLR 300.

- This has been answered in *Ridley (a pseudonym) v The King* [2024] VSCA 308. Fox AJA (with whom Taylor JA agreed) held that reliability may be a factor affecting the fairness discretion, but it is not determinative:

> … whether an admission was made, and whether it is reliable, are ordinarily questions for a jury to determine. However, the circumstances in which an admission is made may call into question the reliability of the admission for the purposes of s 90.[20]

11. Other relevant provisions:

    a. Section 137: see "The Fog of Law – Section 137 of the Evidence Act" (Stanton, Kretzenbacher and Vuu) including our paper;

    b. Section 138: see "Kadir in the Headlights: Improperly or Illegally Obtained Evidence – s 138 of the Uniform Evidence Acts" (Stanton and Kretzenbacher) including our paper.

    c. See also categories of impropriety:

        - s 138(2) regarding questioning that was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or where a false statement was made and the person 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; and

        - s 139 regarding a failure to properly caution before interview.

12. There is also the common law discretion that was held to still exist in *Haddara v The Queen* [2014] VSCA 100; (2014) 43 VR 53, described by Redlich and Weinberg JJA as "a broad common law discretion to exclude evidence which is unfair to an accused".[21]

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[20] At [52].
[21] At 58 [14].

Part B: Police Interviews

13. The form and nature of police interrogations have evolved over time in line with modern human rights and evidentiary constraints around voluntariness and reliability. Yet, significant power imbalances persist in the context of records of interview, by virtue of the vast resources of the state and the strategies employed by law enforcement.

14. An accused person, by way of contrast, often participates in a record of interview unaware of the extent of the allegations and evidence against them, whilst also deprived of their liberty. This power imbalance is compounded when an accused person possesses additional vulnerabilities, such as cognitive impairments, mental illness, linguistic or cultural barriers, youth, Aboriginality, intoxication, fatigue or a history of abuse.

15. The legislated power of police to interview suspects reflects the public interest in the enforcement of the criminal law and protection of the community.[22] It creates an environment that is ripe for admissions to be made, including those that are either involuntary or unreliable, giving rise to questions of admissibility in criminal proceedings.

Protections in the Context of Police Interviews

16. Significant requirements and protections exist across a variety of sources to ensure the fairness, voluntariness, reliability and accuracy of any admissions made. These sources include legislation, the common law and internal police manuals. They set both general expectations applying to all accused persons and specific obligations for particularly vulnerable groups. When considering the admissibility of an admission made in a record of interview, it is important to refer to the materials that set the requirements and guidelines to identify any departures from the established guardrails.

Established General Protections

17. The following protections exist generally to all persons facing interview for suspected criminality.

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[22] Section 464A(2)(a).

Right to Silence

18. Section 464A(3) of the *CA* requires investigating officials to inform a person of their right to silence before any questioning or investigation commences.

19. The potential exclusion of a police interview on the basis of a failure to comply with s 464A(3) of the *CA* was considered in *Willis v The Queen.*[23] Regarding s 138 of the *EA*, the majority discussed the 'shifting onus', noting that the party seeking exclusion initially bears on the onus of showing that the evidence was improperly or illegally obtained.[24]

20. In practice, *Willis* made clear that discharging this onus may involve calling an accused person to give evidence that they were not informed of their right to silence, or to rebut assertions made by investigating officials that s 464A(3) had been complied with.

Right to Communicate with a Friend, Relative or Lawyer

21. Section 464C of the *CA* requires an investigating official to inform a person of their right to communicate with a friend or relative and a legal practitioner, with limited exceptions, prior to any questioning or investigation.

22. They must also afford the person reasonable facilities to make this communication as soon as possible. If a person elects to communicate with a legal practitioner, they must, as far as practicable, ensure that the communication will not be overheard.

23. These rights are reiterated in the Victoria Police Manual (**VPM**) at 1.4 – *Interviews and Statements*, which outlines the processes officers should follow when an accused person elects either to seek legal advice or waives their right to communicate with a lawyer. Where access to communication is denied, the VPM also requires details of the grounds for the refusal to be recorded in the Attendance Module and the investigating member's notes.

Failure to Caution

24. Section 139 of the *EA* deals with evidence obtained in the absence of a caution:

[23] [2016] VSCA 176.
[24] [104].

Cautioning of persons

(1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

(a) the person was under arrest for an offence at the time; and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

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

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

(c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

25. Importantly, s 139(3) also provides that caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency.

26. Where s 139(1) or (2) applies, the potential exclusion of the evidence will turn on the various considerations contained in s 138(3) of the *EA*.

Recording Requirements

27. Pursuant to s 464H(1) of the *CA*, evidence of admissions made to investigating officials is inadmissible in proceedings for indictable offences unless a recording is available to be tendered in evidence and certain recording requirements are met.

28. The recording requirements are set out in s 464H(1), deeming the evidence inadmissible unless:

(c) the confession or admission was made before the commencement of questioning, the confession or admission was recorded by audio recording or audiovisual recording, or the substance of the confession or admission was confirmed by the person and the confirmation was recorded by audio recording or audiovisual recording; or

(d) if the confession or admission was made during questioning at a place where facilities were available to conduct an interview, the questioning and anything said by the person questioned was recorded by audio recording or audiovisual recording; or

(e) if the confession or admission was made during questioning at a place where facilities were not available to conduct an interview, the questioning and anything said by the person questioned was recorded by audio recording or audiovisual recording, or the substance of the confession or admission was confirmed by the person questioned and the confirmation was recorded by audio recording or audiovisual recording; or

(f) if the confession or admission was made during questioning in accordance with an order made under section 464B(5), the questioning and anything said by the person was recorded by audiovisual recording;

29. Despite non-compliance with the above, s 464H(2) of the *CA* allows the court to admit the evidence if, on the balance of probabilities, exceptional circumstances exist that justify the reception of that evidence.

30. In *DPP v Tran (Ruling No 1)*,[25] Bell J considered the admissibility of an unrecorded admission pertaining to involvement in the bashing of an elderly woman. The admission was made voluntarily to two police officers who recorded it in their notes. However, officers had asked a "...dangerously open-ended question".[26] The substance of the admission was also not confirmed in a subsequent recorded interview. The evidence was ultimately excluded because exceptional circumstances did not exist.

31. By way of contrast, *DPP v Zheng (Ruling No 1)*[27] involved admissions made whilst the accused was being transported in a police vehicle. Given the setting, the police officer did not have access to a recording device. The admissions made were "…in no way induced or encouraged",[28] and the accused had been repeatedly cautioned and made aware that he would have an opportunity to speak with a lawyer. The accused declined to comment on the conversation in a later recorded interview. The circumstances were found to be exceptional, justifying the reception of the evidence.[29]

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25 [2019] VSC 823 (***Tran***).
26 Ibid, [35].
27 [2024] VSC 70 (***Zheng***).
28 Ibid, [95].
29 Ibid, [96].

32. Recording procedure and recommended practice for indictable offences is captured in the VPM at 2.6 – *Interviews and Statements*. These were referenced in the abovementioned case of *Tran*.

Brief Case Study – R v Lynn (Rulings 1-4)

33. In *R v Lynn (Rulings 1-4)*,[30] Croucher J considered the exclusion of a written statement made by the accused and a covert recording of the taking of that statement, at a time when he was both a suspect and in custody.[31] The statement was made in the absence of a caution or advice about his rights pursuant to s 464A(3) (right to silence) and s 464C(1)(b) (right to communicate). After engaging in the balancing act required by s 138(3), the statement was ultimately excluded. Croucher J observed at [235]:

> ...I am satisfied that the deliberate and grave nature of the improprieties and contraventions, when combined with absence of the prospect or fact of any disciplinary proceedings or the like, are such as to tip the balance in favour of exclusion of the evidence, notwithstanding its potential probative value, its importance to the prosecution case, and the gravity of the charges.

Protections Specific to Vulnerable Persons

34. A number of additional protections apply to different categories of vulnerable persons facing interview.

<u>*Young Persons*</u>

35. Pursuant to s 464E(1) of the *CA,* if a person in custody is under the age of 18, an investigating official must not question or carry out an investigation unless:

    (a) a parent or guardian of the person in custody or, if a parent or guardian is not available, an independent person is present; and

    (b) before the commencement of any questioning or investigation, the investigating official has allowed the person in custody to communicate with his or her parent or guardian or the independent person in circumstances in which as far as practicable the communication will not be overheard.

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30 [2024] VSC 373 (***Lynn (Rulings 1-4)***).

31 Whether he was, in fact, a suspect and in custody was contested by the prosecution.

36. The requirement for an Independent Third Person (**ITP**) when interviewing a young person is also contained in the VPM at 10.9 – *Community Policing* and 6.1 & 6.6 – *Interviews and Statements*.

37. This ITP requirement is subject to the exceptions contained in s 464E(2) of the *CA*. These concern situations where the investigating official believes on reasonable grounds that firstly, the communication may result in the escape of an accomplice or fabrication/destruction of evidence or secondly, the questioning is so urgent that is should not be delayed, having regard to the safety of other people.

People with Cognitive Impairments

38. The VPM requires that an Independent Third Person be present during the interview of any person with a cognitive impairment (see 8.7 – 8.8 – *Interviews and Statements*). The accused person must also be allowed to consult with the ITP before the interview commences (see 8.8 – *Interviews and Statements*).

39. The VPM at 8.8 - *Interviews and Statements,* also requires officers to:

> Ensure that the person being interviewed understands the purpose of the interview and clearly understands their caution and rights prior to the interview proceeding. Ask the suspect to explain in their own words what the caution means and what their rights are. Advise the ITP if you have any concerns about the suspect's understanding of the caution and rights.

40. At 8.1 – *Interviews and Statements*, police officers are required, through observations and by making active inquiries, to seek to identify whether a person may have a cognitive impairment, which can be achieved by:

    1. observing the person's words or actions;
    2. asking the person directly;
    3. checking police records relating to any previous interactions; or
    4. contacting the person's nearest Medical Health Triage or Disability Service Intake to check whether they are or have been a client of the medical health or disability service.

Disabilities

41. The VPM states at 7 – *Interviews and Statements*, that:

    a. Under the *Equal Opportunity Act 2010* (Vic), members of Victoria Police must make reasonable adjustments for people with disabilities. Not doing so constitutes discrimination.

    b. Reasonable adjustments in an interviewing situation means providing support, resources and adaptive practices to enable equitable and inclusive access to justice.

Linguistically Diverse Persons

42. Section 464D(1) of the *CA* provides:

> If a person in custody does not have a knowledge of the English language that is sufficient to enable the person to understand the questioning, an investigating official must, before any questioning or investigation under section 464A(2) commences, arrange for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present.

43. Relevantly, records of interview have been excluded in a number of noteworthy cases where an accused was found incapable of understanding the caution and their rights prior to interview.[32]

Persons with Mental Health Issues

44. The VPM at 8.2 – *Interviews and Statements* states that where:

> …a person to be interviewed appears to be experiencing mental health issues, has a physical condition that mirrors mental illness and/or is self harming, police members should get clinical advice from a Forensic Medical Officer (FMO) to determine that persons fitness for interview.

Persons Affected by Alcohol or Drugs

45. At 8.4 - *Interviews and Statements*, the VPM requires officers who know or suspect a person to be affected by alcohol or other drugs to consider its impacts on the person's mental state and ability to be interviewed. Where doubt exists as to the effects of alcohol or drugs, officers should contact the Victorian Institute of Forensic Medicine for advice as to the fitness of the person.

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[32] See *R v Li and Anor* [1993] 2 VR 80; *R v Nguyen* (1995) 78 A Crim R 582.

First Nations Persons

46. Section 464AAB of the *CA* requires that an investigating official ask a person in custody whether they are an Aboriginal or Torres Strait Islander person:

    (a) as soon as practicable after the person is taken into custody; and

    (b) in any event, before any questioning or investigation under 464A(2) commences.[33]

47. In line with the recommendation from the Royal Commission into Aboriginal Deaths in Custody,[34] s 464FA of the *CA* then requires an investigating official to notify the Victorian Aboriginal Legal Service (VALS) if a person is taken into custody that identifies as Aboriginal or Torres Strait Islander or the investigating official knows or is of the opinion they are so.[35]

48. Relevantly, VALS operates a 24/7 pre-interview advice line which is available to First Nations persons, should they request to communicate with a lawyer pursuant to s 464C. Accordingly, there should be extremely limited opportunities where police officers cannot facilitate pre-interview advice.

49. With respect to interviewing First Nations persons, the 'Anunga Rules', as explained by Forster J in *R v Anunga*,[36] were intended to provide guidance to investigating officials interviewing Aboriginal or Torres Strait Islander people in order to remove or obviate some of the disadvantages they face in dealings with police.

50. The language and articulation of the rules is somewhat reflective of the reality of the Northern Territory in the 1970s. While the principles expressed were displaced by the Uniform Evidence Acts, the principles expressed continue to provide an ongoing level of guidance.[37]

51. The rules are as follows:

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33 See also 1.3 – Interviews and Statements, Victoria Police Manual.
34 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 4, rec 224.
35 See also 11 – Interviews and Statements, Victoria Police Manual.
36 (1976) 11 ALR 412.
37 *The Queen v BL* [2015] NTSC 85 at [33], cited in *Headland* at [60].

(1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding;

(2) When an Aboriginal is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal has apparent confidence…;

(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of their right to remain silent…;

(4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used;

(5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources …

(6) Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen, it is particularly important that they be offered a meal … They should also be offered tea or coffee … They should always be offered a drink of water… They should be asked if they wish to use the lavatory…;

(7) It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness … Interrogation should not continue for an unreasonably long time;

(8) Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue; and

(9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

52. In *Headland*,[38] the Victorian Court of Appeal considered the Anunga rules and clarified their intended purpose as follows:

> It is important to understand that the Anunga guidelines were formulated to deal with police interviews of Aboriginal people who were vulnerable by reason of their poor comprehension of English, and by virtue of cultural imperatives.[39]

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38 *Headland (a pseudonym) v The King* [2023] VSCA 174 (***Headland***), [61].

39 Ibid, [61]

53. In defining the intended purpose, arguments for exclusion based on the Anunga Rules may be difficult in circumstances where the vulnerability does not stem from the poor comprehension of English and "cultural imperatives". It is unclear whether the phenomenon of "gratuitous concurrence", which is addressed by Anunga Rules 3 and 4, is captured by the concept of 'cultural imperatives', but there is a strong argument that it should be, and that the principle should apply regardless of whether or not the given First Nations person has a poor comprehension of English.

Consequences of Non-Compliance

54. Unless explicitly stated, non-compliance with the provisions and standards discussed above will not automatically result in evidence being inadmissible. Instead, questions of admissibility are dealt with in the ordinary way and will regularly turn on the exclusionary provisions contained in the *EA*, including the balancing exercise required by s 138(3). However, arguments for exclusion will be bolstered by reference to the failure to comply with the standards set at law or in various protocols.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic)

55. The legislative regime in relation to admissions, and the *EA* more broadly, should be interpreted (so far as it is possible to do so consistently with its purpose) with the human rights protected by the Charter.[40]

56. It should also be remembered that members of Victoria Police are public authorities under the Charter,[41] and this requires police officers to act compatibly with the Charter where possible, and to give due consideration to Charter rights.[42] Failure to comply with these obligations may provide a basis to exclude the evidence pursuant to s 138 of the *EA*.

57. Interestingly, s 138(3)(f) of the *EA* provides that, when considering whether to exclude evidence under that section, regard must be had to whether the impropriety or contravention was contrary to, or inconsistent with a right of a person recognised

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40 Charter, s 32(1).

41 Charter, s 4(1)(d).

42 Charter, s 38. See further *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, and at 497 [174] the "useful roadmap" prepared by the Victorian Equal Opportunity and Human Rights Commission.

by the International Covenant on Civil and Political Rights (**ICCPR**), which in turn provided a foundation for the human rights protected by the Charter.

58. For background on the Charter, see "The Convention on the Rights of the Child and Domestic Human Rights Legislation: Opportunities and Future Directions" (Stanton and Brown).

59. Rights that may well be relevant when considering the admissibility of admissions include:

    a. The criminal rights of a person charged, including the presumption of innocence and freedom from self-incrimination (s 25(2)(a) and (k));

    b. The right of equality before the law and equal and effective protection against discrimination (s 8);[43] and

    c. The cultural rights of Aboriginal persons (s 19(2)).

60. A useful example of how the Charter can be used in practice is *DPP v Kaba*,[44] where Bell J held that it was correct for a Magistrate to find that there had been a breach of the right to privacy of a passenger of a vehicle stopped after a purportedly random interception by police, which had formed a basis for the Magistrate to exclude the evidence of an alleged assault against police pursuant to s 138(1) of the *EA*.[45]

Selected Case Studies

***Headland (a pseudonym) v The King* [2023] VSCA 174**

Facts

61. The accused was alleged to have been complicit in an aggravated burglary, by virtue of driving two men to an address, knowing they were armed and intending to threaten and intimidate the person in the premises.

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43 Section 3 of the Charter makes it clear that "discrimination", in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of that Act. That includes the protected attribute "disability", which in turn is defined to include "a mental or psychological disease or disorder".

44 [2014] VSC 52; (2014) 44 VR 526.

45 Although the matter was remitted because of an error in relation to the construction of s 59(1) of the *Road Safety Act 1986* (Vic) regarding the 'stop and check' powers of police in relation to motorists.

62. The applicant was interviewed two days later, during which time she made various admissions, including driving the two men to the address, knowing they had a knife, and that she was concerned about what she was getting herself into. She subsequently signed a statement consistent with these admissions.

63. At first instance, defence sought exclusion of the record of interview pursuant to ss 85(2) (unreliability) and 90 (fairness) of the *EA*. Defence led evidence from the accused's treating clinical psychologist, while the prosecution introduced evidence from a consultant forensic psychologist/clinical neuropsychologist, as well as two police officers responsible for conducting the record of interview.

64. Defence relied on a number of factors to show that the truth of any admissions was adversely affected or, in the alternative, that it would be unfair to permit their use. These included the accused's personality, education, mental and intellectual functioning, ingestion of a combination of substances and alcohol, fatigue, experience of domestic violence, her experience as an indigenous woman and her relationship with the co-accused.

65. The prosecutor submitted that there was no direct evidence of the influence of substances, her mental state, her level of fatigue, her capacity to understand the caution or her rights, or that her participation wasn't free or voluntary.

66. The trial judge held that evidence should not be excluded. Having watched the interview and considered the evidence, her Honour held that the accused did not appear substance affected, seemed well-capable of answering the questions put to her and exercising her rights, which included declining to speak with a lawyer. Her Honour also found that she was appropriately cautioned and that the questions were fairly put.

67. Leave to appeal was sought on the basis that the trial judge erred in failing to take into account that the accused was an Aboriginal woman who had been the victim of domestic violence.

Decision

68. The Court of Appeal refused leave to appeal, upholding the decision at first instance.

69. During the hearing of the appeal, Counsel for the applicant raised the failure of the trial judge to consider the *Anunga Rules*, which required officers to take great care when administering the caution (rule 3) and formulating questions (rule 4). This was not relied upon at first instance.

70. The Court observed that these guidelines were formulated to address Aboriginal vulnerability "by reason of their poor comprehension of English, and by virtue of cultural imperatives".[46] The Court found that there was no evidence that the applicant was vulnerable in such a way.[47]

71. Returning to the primary question, the Court held that it was untenable to suggest that the trial judge lost sight of the applicant's status as an Aboriginal woman with a history of abuse. In any event, the Court held that the evidence did not establish any issues of unreliability or unfairness flowing from the applicant's status as an Aboriginal woman with a history of abuse that would animate ss 85 or 90:

> As far as we are able to see, there was nothing in the circumstances in which the admissions in the record of interview were made which could have led the judge to find other than it was unlikely that the truth of the alleged admissions was adversely affected. Counsel for the applicant failed to demonstrate any connection between the applicant's status as an indigenous person (with a history of abuse) and the admissions she made. Plainly, without more, the mere fact that she was an Aboriginal woman (with a background of abuse) could not have engaged the provisions of ss 85(2) and 90.[48]

72. The Court made clear that Aboriginality or a background of abuse alone, without evidence of the way it impacted the reliability of the admissions made, could not engage the provisions of ss 85(2) and 90.

***Nguyen v The Queen* [2020] HCA 23; (2020) 269 CLR 299**

Facts

73. The accused had been interviewed by police about allegations of throwing a bottle of beer, resulting in charges of unlawfully causing serious harm and assault with a weapon. In the interview, he made both admissions and exculpatory statements (**mixed statements**). His explanation gave rise to a claim of self-defence.

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46 [61].
47 [63].
48 [72].

74. At the first trial, the record of interview was played. The jury were unable to reach a verdict. At the retrial, the record of interview was not tendered by the Crown because it would not assist their case, despite being relevant and admissible.

75. The retrial was stayed whilst the Full Court of the Supreme Court of the Northern Territory considered, primarily, whether the prosecution was obliged to tender the record of interview, containing 'mixed statements'. Ultimately, the Court held that they were not so obliged.

Decision

76. The appeal was allowed.

77. In determining whether the prosecution were obliged to tender a mixed statement, the majority, consisting of Kiefel CJ, Bell, Gageler, Keane and Gordon JJ, turned to common law practices and procedures fundamental to the conduct of criminal trials, as opposed to the provisions of the *EA*:

> One such fundamental rule is that it is for the prosecution to decide which witnesses are to be called and what evidence is necessary for the proper presentation of the case for the Crown. Another fundamental principle affecting the conduct of a trial is that the prosecution must put its case both fully and fairly before the jury.[49]

78. The Court explored the divergent lines of authority in Australian jurisdictions, whilst recognising that the prosecution's obligation to present its case fully and fairly was universally applicable:

> …there can be no question about the obligation of the prosecution to present its case fully and fairly. It is an obligation which informs the rules of conduct of prosecutors which apply to members of the legal profession in the Northern Territory. It is an obligation which has been reiterated in a number of decisions of this Court as a fundamental principle. And it is that fundamental principle which resolves the question on this appeal.[50]

79. The majority clarified that prosecutorial discretion is not "unconfined". Its proper exercise requires consideration of a number of factors, including the credibility of the evidence, fairness to the accused and whether it is in the interests of justice that the evidence be tendered:

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[49] At [26].
[50] At [31].

> What was said in *Soma* should be understood not just as a caution to prosecutors about being selective but rather as a reminder about the prosecutorial obligation to present all available, cogent and admissible evidence. Cases involving the omission of a vital witness may provide somewhat more stark examples of a failure properly to exercise that discretion than a mixed statement given by an accused in a police interview, but the latter may have just as important an impact on the outcome of the trial and the need for a new one.[51]

80. Applying these general principles to the principal question, the Court held:

> …where an accused provides both inculpatory and exculpatory statements to investigating police officers, it is to be expected that the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met.[52]

81. Nettle and Edelman JJ, whilst in agreeance, questioned whether the obligation of fairness extended to the presentation of "all available, cogent and admissible evidence", as expressed by the majority.

***R v Ye Zhang* [2000] NSWSC 1099**

Facts

82. The accused was charged with two counts of murder and subsequently found unfit to be tried. The Crown case rested almost entirely on admissions made by the accused in recorded interviews and in a "walkaround" of the scene, in which he gave a detailed account of the murders. The admissibility of this evidence was challenged at a *voir dire*, in the context of a special hearing.

83. The principal contention was that the admissions lacked the necessary quality of voluntariness. The accused invoked ss 84, 85, 90, 138 and 139 of the *EA*.

84. In the *voir dire*, the accused argued that, firstly, his decision to answer questions was influenced by oppressive and violent conduct, and secondly, that the answers he gave were figments of his imagination. Primarily, the relevant conduct included:

    a. Being provided with an ultimatum involving two choices. The two options were that he either cooperate and receive witness protection or refuse to cooperate and face two charges of murder;

    b. Applying pressure by suggesting there would be no further opportunities to cooperate; and

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51 At [39].
52 At [41].

c. Threats of physical violence (a punch in the face).

Decision

85. In determining the relevant facts, the Court sided with the accused's account of events over that of the two officers, given inaccuracies in their evidence.

86. Regarding s 84, the prosecution argued that the admissions were influenced by the emotional vulnerability of the accused caused the breakdown of a relationship, rather than by the conduct of police.

87. The Court was ultimately satisfied that the conduct of police was designed to and did oppress the accused, even if the relationship breakdown contributed in part to his willingness to cooperate. This dictated that the evidence not be admitted:

> … s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible.[53]

88. In considering reliability per s 85, the Court came to a different conclusion. The accused gave evidence on the *voir dire* that he was untruthful, requiring the court to consider all of the evidence concerning the veracity of the admissions. The Court found that the facts that supported oppression under s 84 generally did not adversely affect reliability in this instance. Some details contained in the admission were objectively verifiable, while others, including key bits of evidence such as the positions of the bodies, could be disproved. Ultimately, it was a video of the "walkaround" that proved determinative – a compelling piece of evidence where the accused demonstrated what he said had taken place.

89. Regarding the discretion to exclude admissions pursuant to s 90, the Court held that s 90 was also satisfied based on the findings under s 84. Accordingly, the evidence was excluded.

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[53] At [44].

Part C: ***Ridley (A Pseudonym) v The King*** **[2024] VSCA 308**

90. *Ridley* was an interlocutory application for leave to appeal against a decision of the trial judge to admit evidence of admissions made by the applicant in his trial for aggravated home invasion and other offences.

The Alleged Offending

91. It was alleged that the applicant, with three co-accused, forced his way into a house in Melton South in the early hours of the morning. Three complainants were sleeping inside the house.

92. It was alleged that the co-accused kicked in the front door to enter the house. The applicant had a handgun, one co-offender had a rifle and another had a knife. They demanded keys, drugs and money.

93. At one point, applicant discharged the handgun in the house.

94. The applicant ran from the scene to enter a Mazda that was nearby with his girlfriend waiting in it. He got into the driver's seat and drove away. The other three co-offenders fled the scene in a separate stolen car.

95. The Mazda was photographed by a traffic camera. It had a distinctive sticker on the rear windscreen and the rear licence plate was captured.

96. The applicant was also a person of interest in connection with another matter involving a discharge of firearm which occurred some months before this offending in Lalor. This unrelated matter was being investigated by police informant Gilbert.

97. About five weeks before this aggravated home invasion, police conducted a Firearm Probation Order (**FPO**) compliance check at the applicant's address. At that time they observed a Mazda with different registration plate and a distinctive sticker on the rear windscreen.

98. About a month after the alleged offending, police issued a media release which included CCTV footage of the offending and information about the Mazda.

99. The applicant was arrested. At that time the Mazda was in the driveway of his address with the sticker having been removed. The same sticker was found on another car in the driveway.

Interactions with Police

100. The applicant was arrested and transported to Geelong police station. He had the following interaction with police:

a. First interview: The applicant advised that he would be interviewed about the aggravated home invasion in Melton South – he was given caution and rights.

- This first interview was short and did not deal with the subject matter of the allegation. The interview was suspended for further enquiries.

b. Second interview: took place later in the afternoon where the applicant answered numerous questions put to him.

- This interview was not recorded due to an equipment failure.

- Informant and corroborator took notes which were "reasonably detailed but not a compete account of what occurred during the second interview".[54]

c. First undercover interaction: Following the second recorded interview with police, the applicant was then lodged in the cells where he met and spoke with two undercover police operatives. This conversation was recorded.

d. Third interview: After some time in the cells with the undercover police, the applicant was returned to the interview room and record of interview re-commenced. At this stage, the police were unaware of the earlier equipment failure. At the conclusion of the interview the applicant was told that he would be charged with aggravated home invasion.

e. 'Gilbert interview': At the conclusion of the third interview, the applicant was then interviewed again by different police in relation to a different matter. This matter, related to the discharge of a firearm at an address in Lalor some months before the aggravated burglary. He answered "no comment" when asked about that incident.

[54] *Ridley (A Pseudonym) v The King* [2024] VSCA 308, [16].

f. Second undercover interaction – The applicant was returned to police cells where he interacted with the same undercover operatives again. These conversations were recorded.

101. The prosecution did not seek to rely on anything said in first or second interview with police. The prosecution did, however, seek to rely on third interview with police and both of the undercover interactions.

The Evidence

102. During the first undercover interaction, the applicant made admissions relating to the vehicle and being present at the scene at the relevant time. He admitted to evading police, but did not admit to committing the aggravated burglary.

103. In the third interview, the applicant again admitted to being present. He said he was "giving people a lift".[55] He did not admit to committing the aggravated burglary.

104. In the second undercover interaction, the applicant made detailed admissions to the undercover police that he had committed the alleged offence. He provided more detail of the offence, including matters which were said not to be known to police.

105. At a pre-trial hearing, defence relied on evidence of psychologist who conducted a neuropsychological assessment of the accused. The witness made the following observations:

a. He was 21 at the time of offending with a lengthy children's court criminal history (including periods of confinement);

b. This was his first time in adult custody;

c. His general intelligence was in "very low to low average range" for his age;

d. It was "plausible" that autism spectrum disorder or social communication disorder may be a "more appropriate conceptualisation" for the applicant's difficulties. It was beyond scope to provide definitive diagnostic opinion;

e. He had weaknesses in verbal skills;

[55] Ibid, [17].

f. It was hypothesised that the applicant tends to "go along" with discussions, or re-directs discussions, to cover up his underlying cognitive and comprehension difficulties; and

g. It was "entirely probable" that the applicant engaged in conflated or embellished discussions with undercover operatives who he perceived at the time to be potential "peers".

At trial

106. At trial, the defence sought to exclude evidence of third record of interview and both of the covert operative interactions.

107. The defence argued that the failure to record the second interview cast doubt on the reliability of the admissions that were made after that.

108. This was because the police had provided the accused with details of the offending during the second interview (which was lost). The defence sought to suggest that everything the applicant told the undercover police originated from what he was told by police during that second interview. It was argued that the loss of that interview had deprived a jury of the ability to compare what the applicant was told about the offending, with what he said by way of 'admissions' later.

109. It was also argued that the interposing the 'Gilbert interview' jeopardised the reliability of his admissions. That interview happened after the third interview and just before the applicant was returned to the cells with the undercover police. Defence argued that some of the admissions that are relied on from that second covert conversation are ambiguous, and it may be that the applicant was referring to a different shooting that happened in Lalor.

110. The defence relied on both s 85 (although this was later abandoned) and s 90 of the *EA* in support of its application to exclude the admissions at trial.

111. The applicant accepted that undercover police operatives are excluded from the definition of 'investigating official', so s 85 of the *EA* had no application to the interactions with undercover officers.[56]

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[56] In relation to s 85(1)(a), 'investigating official' is defined in the Dictionary and specifically excludes a police officer engaged in covert investigations under the orders of a superior.

112. The application to exclude the third record of interview pursuant to s 85 of the *EA* was refused. The trial judge observed that:

    a. There was no indication of "oppressive questioning, threats or promises";

    b. The failure to record the second record of interview was not the fault of police;

    c. In the third record of interview, the applicant had denied involvement in the aggravated home invasion, but admitted to other matters including:

        - His presence at the location;
        - Driving people to the scene; and
        - The police pursuit.

113. The trial judge was satisfied, on balance, that the truth of the admissions was unlikely to have been adversely affected by the circumstances relied on by the applicant.

Section 90

114. The argument to exclude the admissions under s 90 of the *EA* essentially relied on the same matters that were pressed under s 85.

115. The trial judge observed that the applicant did not give any evidence about his mental state at the time of the incident.

116. With respect to the third record of interview, the trial judge observed that the applicant:

    a. Made selective "no comment" answers;

    b. Corrected the informant as to when the sticker was taken off the Mazda;

    c. Complained bitterly about police behaviour;

    d. Did not adopt matters put to him in the interview; and

    e. Provided strong "no comment" to matters put to him in the following 'Gilbert interview'.

117. With respect to the undercover interactions, the trial judge observed that:

    a. The applicant was a "robust responder" who initially denied any role in the aggravated home invasion;

b. Prior to the second covert conversation – he provided strong "no comment" to matters put to him in 'Gilbert interview';

c. He clearly understood the difference between the two sets of allegations;

d. In second interaction with undercover police he was laughing – including laughing at what he regarded as the inefficiency of police when they searched his property under warrant; and

e. He went on to make detailed admissions.

118. Ultimately, the trial judge held:

> I have no hesitation in finding that the defence have not proved that [the applicant] has, as a result of discussions with the undercover operatives or informant, adopted any behaviour put to him in the undercover conversations or in the third record of interview, whereby he has falsely implicated himself by admissions, in the sense of being "so overborne", as referred to in *James*, despite their being no impropriety alleged.[57]

119. The 'possible scenario' provided by psychologist in evidence was rejected.[58]

120. Finally, the trial judge emphasised that, when considering s 90, the focus must be on the fairness of using the evidence at trial. Whether they are admissions, and reliable, are matters for the jury. While the question of whether the admissions are unreliable is not a matter for the trial judge, if he were asked to determine that, he would find no unreliability.

Court of Appeal

Applicant's submissions

121. On appeal, the applicant only relied on s 90 of the *EA*. The applicant submitted that the use of the admissions would give rise to "unfair forensic disadvantages in the conduct of the defence", in particular:

a. The forensic disadvantage stemming from the fact that the second record of interview was not recorded. As part of the trial, the jury would need to consider whether the admissions are truthful. Given the loss of the second record of interview, the defence could only rely on 'unsatisfactory evidence'

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57 Ibid, [28].
58 Ibid.

to make good their argument that the admissions are not reliable or truthful;[59] and

b. The applicant faced an "impossible forensic decision" concerning the 'Gilbert interview'. The applicant submitted that the interposing of this interview, about another shooting, immediately before his second interaction with the undercover police would "jeopardize the reliability of the applicant's admissions in that it created a real scope for ambiguity."[60] The 'impossible forensic decision' was the need to refer to the 'Gilbert interview' to contextualise the admissions on one hand, and the prejudice to the accused in doing so on the other.

122. At the heart of the applicant's submissions addressing whether it would be unfair to rely on the admissions at trial were matters which concerned their unreliability.

123. It was submitted that the applicant may well have played the role of "hardened criminal" when he made the admissions to undercover operatives. They told him that they had seen the footage on the news and made admiring remarks about it. They were older than the applicant and he was to be remanded with them.

124. The applicant submitted that the judge had erred when refusing to substantively consider the matters relating to reliability of the admissions when assessing whether it would be unfair for the evidence to be led at trial. The applicant relied on *DPP v Natale* [2018] VSC 339 (see Bell J at [34]): "Unreliability … is an important consideration but it is not conclusive, or a necessary prerequisite of exclusion".

125. It was also submitted that the trial judge wrongly imposed a positive onus on the applicant to prove that his admissions were due to his will being 'overborne', such as in the scenario as suggested by the psychologist.

Considerations

<u>Section 90 – discretion to exclude</u>

126. The Court observed that s 90 derives from the common law fairness discretion. It may arise in different ways and cannot be described exhaustively. The focus is

[59] Ibid, [31].
[60] Ibid, [32].

whether the use of the evidence at trial would be unfair. As Gummow and Hayne JJ stated in *Em*:[61]

> …the central issue is whether the evidence of admissions should not have been admitted because, having regard to the circumstances in which they were made, it would be unfair to the defendant to use the evidence. That question requires consideration of whether there was identified some aspect of the circumstances in which the admissions were made that revealed why the use of the evidence, at the trial of the person who made the admissions, 'would be unfair'. That is, the focus of s 90 falls upon the fairness of using the evidence at trial, not directly upon characterising the circumstances in which the admissions were made, including the means by which the admissions were elicited, as 'fair' or 'unfair'

127. The defendant bears the burden of persuasion.[62]

128. The probative value of the admission has little or no bearing on the exercise of the discretion.[63]

129. "Unfairness" has been described as a highly fact specific concept. Relevant considerations may include whether an admission was voluntary, the means used to obtain the admission or whether there has been any improper conduct on the part of the investigating officials.[64]

130. It is necessary to read the *EA* as a whole when considering s 90,[65] particularly with reference to sections 84, 85, 86, 137, 138 and 139. Section 90 will only be engaged as a final or "safety net" provision.[66]

Section 90 and reliability

131. Reliability may be a factor affecting the fairness discretion, but is not determinative. Whether an admission is made, and whether it is reliable, are ordinarily questions for a jury to determine. However, the circumstances in which the admission is made may call into question the reliability of the admission for the purposes of s 90.[67]

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61 *Em* (2007) 232 CLR 67, 103 [107] (Gummow and Hayne JJ).
62 *Ridley*, [46].
63 Ibid, [47].
64 Ibid, [48].
65 Ibid, [49].
66 Ibid. See *Em* (2007) 232 CLR 67, 83 [42] (Gleeson CJ and Heydon J).
67 Ibid, [52].

The Decision

Third Record of Interview

132. The Court observed that the argument in support of exclusion under s 90 were the same as had been previously relied on under s 85, including the potential unreliability of the admissions and, in particular, the failure to record the second record of interview.

133. In respect of the third record of interview, the Court stated that:

    a. No criticism was made of the way police conducted the interview (the questions were not leading or confusing or unduly persistent);

    b. The applicant answered responsively and voluntarily;

    c. The applicant was not affected by drugs or alcohol;

    d. The applicant did not suffer from any impairment or disability:

        - The evidence of the psychologist did not suggest that the applicant did not understand or follow the questioning, or that he was not able to manage the situation he was in; and

        - The applicant was capable of choosing which questions to answer and when to answer 'no comment';

    e. The applicant complained about the way police behaved during execution of warrant – "just being dogs";

    f. The applicant asked questions about who else might be a police suspect; and

    g. The 'Gilbert interview' occurred after this interview, so the argument that there was some conflation of the two allegations was not relevant to these admissions.

134. With respect to the forensic disadvantage caused by failure to record the second record of interview, the Court referred to decision of the High Court in *R v Edwards*,[68] which dealt with the impact of lost material on the fairness of the trial. Relevantly, in that case the Court stated that:

[68] [2009] HCA 20; (2009) 83 ALJR 717.

> Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair.[69]

135. The court observed that the applicant would be able to adequately explore the circumstances of the second record of interview before the jury, should he wish to.[70] Both the corroborator and informant made notes of the interview and could give evidence as to the content of the second record of interview.

136. Further, the third record of interview revisited some matters raised in the second interview. At no point did the applicant dispute what was out to him about what was said in the second record of interview. The court held that a jury would be able to assess the third record of interview, and that the loss of the second record of interview did not remove, restrict or unfairly impede a jury's ability to do so.

137. Accordingly, it was found that "[t]he failure to record the second interview has not resulted in any unfair forensic disadvantage."[71] If necessary, a forensic disadvantage direction could be given.[72]

Covert conversations

138. The court observed that during both interactions with undercover police, the applicant:

    a. Was sober and rational;

    b. Was not subject to threats, inducements, pressure or intimidation; and

    c. Laughed and talked freely with the undercover operatives and volunteered information.

139. In the first conversation with covert operatives, the applicant admitted to being in the area, evading police and offering a name of a person that he was with. He did not admit to committing the offence. Rather, he said that he told police that he did not do it, but that he might have driven people there. Accordingly, the Court rejected the argument that the applicant was moved to make admissions because he wanted

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69 Ibid, 722 [31] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
70 *Ridley v The King* [2024] VSCA 308, [57].
71 Ibid, [57].
72 Ibid, [58].

to impress his cellmates when they spoke admiringly about the people who committed the offence.

140. In the second conversation with covert operatives, the applicant was said to have arguably disclosed information that was not known to police. For example, he offered information about the type of gun used. While there was no independent evidence which supported the applicant's admissions about the gun, the Court held that that did not necessarily make the admission unreliable. In many cases, the subject matter of an admission is known only to the person making the admission.

141. The Court observed that s 90 of the *EA* places an onus on applicant to show that the admission of the evidence would be *unfair*. However, it is not for the applicant to 'prove' that he adopted the suggestions put to him by the undercover operatives; or that he made false admissions to "fit in". To the extent that the trial judge suggested otherwise was wrong.[73]

142. The Court held that these were not facts that were *necessary* for trial judge to decide in the exercise of his discretion, however, the trial judge's assessment of these facts was correct.[74]

143. The court observed that there was nothing to suggest that the applicant adopted suggestions put to him by the undercover operatives. Indeed, it was the applicant who was volunteering information and controlling the narrative. There was also no evidence to suggest that he made false admissions to impress the undercover operatives, or to fit in with them. The court said that "such suggestions are merely speculative".[75]

144. It was noted that the applicant did not give evidence on a *voir dire.*

<u>Unfair forensic disadvantage</u>

145. The Court considered the applicant's argument of "unfair forensic disadvantage" due to the loss of the second record of interview. That is, that applicant would be unable to effectively suggest that he may have been simply repeating information that he learned in second record of interview to undercover operatives.

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73 Ibid, [62].
74 Ibid.
75 Ibid.

146. The Court observed that this submission can only really be relevant to the second covert conversation – because in the first interaction, he maintained that he was not involved in the aggravated burglary itself, and gave no account of what happened.

147. The Court identified several difficulties with the applicant's submissions:

a. *The first difficulty – what was said in the second record of interview:*

- There were police notes, memory, and some 'revisiting' of matters in third record of interview, so it was difficult to see the forensic disadvantage to the applicant. "Arguably, he has been *advantaged* – because admissions he made have been lost."[76]

b. *The second difficulty – the explanation proposed by the applicant, while ultimately a matter for a jury, was not plausible*:

- Given the level of detail, the court found it difficult to accept that the applicant would have been able to recite what he just learned, despite having played no part in the events in Melton South. It is "difficult to see how the applicant could successfully argue before a jury that he made detailed false admissions based on what he had learned from police without giving evidence about that matter".[77]

c. *The third difficulty – no direct evidence as to the applicant's state of mind at the time:*

- The applicant relied on inferences only, and there was no basis to infer that admissions were made falsely.

d. *The fourth difficulty – the jury could be directed in relation to forensic disadvantage*.

e. *The fifth difficulty – there was "no merit in the argument that by interposing the 'Gilbert interview', the admissions made in second undercover interaction are jeopardized or unreliable"*:[78]

- It was clear that the applicant understood the difference between the two incidents and there was no basis to suggest that he had conflated them. As such, there was no "impossible forensic decision".[79]

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76 Ibid, [65].
77 Ibid, [66].
78 Ibid, [69].
79 Ibid.

Part D: "Scenario Evidence" and "Mr Big" Operations

148. There is no defence of entrapment in Australia. However, unlawful or improper conduct by investigators may result in evidence being excluded pursuant to s 138 of the *EA*.[80]

149. *Ridgeway v The Queen*[81] involved the accused person taking possession of heroin that had been illegally imported by police. The majority of the High Court held that the evidence of the importation should have been excluded because it was procured by illegal police conduct and accordingly the prosecution should have been stayed because it would inevitably fail.

150. The Court (Mason CJ, Deane and Dawson JJ) upheld the principles enunciated in *Ireland* and *Bunning* and said 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. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of "high public policy" relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty.[82]

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80 For further background, see Adam V Chernok, "Entrapment under controlled operations legislation: A Victorian Perspective" (2011) 35 Crim LJ 361.

81 (1995) 184 CLR 19 (***Ridgeway***).

82 At 31.

151. The statutory controlled operations regimes (such as provided by Part IAB of the *Crimes Act 1914* (Cth) and the *Controlled Operations Act 2004* (Vic)) were introduced as a consequence of *Ridgeway*.[83] They protect law enforcement officers from criminal and civil liability in tightly controlled circumstances, but prohibit inducement.[84]

152. Since that time, the Courts have had to consider the legality of "scenario evidence" and "Mr Big" operations.

153. In *Tofilau v The Queen*[85] the High Court held that "scenario evidence" was admissible. As explained by Callinan, Heydon and Crennan JJ:

> [S]cenario evidence is confessional evidence obtained in the following way. Undercover police officers pose as members of a gang. They solicit the cooperation of a person whom they think has committed a serious crime, although they do not believe that they are yet able to prove it. They encourage that person to take part in "scenarios" involving what the person wrongly thinks is criminal conduct. Provided that the person informs the head of the gang of anything which might attract the adverse attention of the police, they offer the person two advantages. One is the opportunity of material gain by joining the gang. The other is the certainty that the head of the gang can influence supposedly corrupt police officers to procure immunity from prosecution for the serious crime.[86]

154. Courts in other jurisdictions have taken a different approach. In *R v Hart*,[87] the Supreme Court of Canada held:

> Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect.[88]

155. In *Weaven v The Queen*,[89] the Court of Appeal observed that *Tofilau* was clear and binding precedent.[90]

156. One of the concerns with undercover operations is the potential for inducement. This has led, for example, to the permanent stay of proceedings in *CDPP v Carrick (a pseudonym)*.[91] That case concerned what the Magistrate regarded as conduct likely

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83 See the comments in *Ridgeway*, 43-4 (Mason CJ, Deane and Dawson JJ), 53-4 (Brennan J).
84 See further *Wu (A pseudonym) v The Queen* [2020] VSCA 94.
85 (2007) 231 CLR 396 ('*Tofilau*').
86 Ibid, 465 [219]. See further 527-9 [410]-[414].
87 [2014] 2 SCR 544.
88 Ibid, [85] (Moldaver J).
89 [2018] VSCA 137.
90 *Weaven v The Queen* [2018] VSCA 127, [42] (Priest JA, with whom Whelan and Kyrou JJA agreed).
91 [2023] VChC 1.

to further radicalise a vulnerable child (who was only 13 years' old when the operation commenced and had low IQ and autism with a tendency for fixation towards violent extremism). Even more concerningly, the child's parents have gone to police for help.

157. There are other concerning examples of inducement, which has been found to be a circumstance of mitigation.[92]

158. There have been other attempts to consider the legality of these kinds of operations.

***Case Study – Alhassan v The King* [2024] VSCA 233**

159. Interlocutory appeal concerning the applicant (who was then aged 18) making alleged admissions to an undercover police operative about an alleged murder and aggravated home invasion at Sunshine North on 24 August 2021, during which he was alleged to have shot the victim.

160. On 16 December 2021, after the execution of a search warrant at the applicant's premises, he was arrested and placed in the cells of the Melbourne West Police Station with two undercover officers (UCOs) prior to police interview. This commenced the scenario operation, and the UCOs and the applicant formed a relationship. The UCOs represented that they were associated with a criminal organisation, and the applicant was engaged in various fictitious criminal scenarios.

161. It was alleged that, on 11 March 2022, the applicant told one of the UCOs at a park about his involvement in the home invasion, but he said the killing was accidental. He then gave a similar account to another person later that same day. He gave significant details about the circumstances of the alleged offending.

162. This was in contrast to the applicant's record of interview on 16 March 2022, where he denied involvement in the home invasion.

163. Before the trial judge, the applicant relied on ss 90, 137 and 138 of the *EA* (but not s 84). The trial judge refused to exclude the admissions.

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92 See, eg, *R v Halis & Ors* [2021] VCC 1277, [176]-[221] (Judge O'Connell). See in particular at [221]: "But for the inducement, it is likely that there would have been no offence". See further Mahmood Fazal, "The Infiltrator Who Helped Hatch a Terror Plot", ABC Background Briefing, 5 December 2021, https://www.abc.net.au/listen/programs/backgroundbriefing/the-infiltrator-who-helped-hatch-a-terror-plot/13659518.

164. On appeal, the applicant argued, amongst other things, that the right to silence affected whether the admissions were obtained improperly or in consequence of an impropriety that that the evidence should have been excluded pursuant to ss 138 and/or s 90 of the *EA*. The main issue on appeal was whether, in order to preserve the right to silence, a suspect must be put on notice that he or she is the target of suspicion in relation to an allegation.[93]

165. The Court of Appeal (Priest, Beach and Boyce JJA), considered the relevant authorities:

> In *Swaffield*, Brennan CJ remarked:
>
> > "The investigation of crime is not a game governed by a sportsman's code of fair play. Fairness to those suspected of crime is not the giving of a sporting opportunity to escape the consequences of any legitimate and proper investigation or the giving of a sufficient opportunity 'to invent plausible falsehoods'."
>
> And in *Tofilau*, Gleeson CJ observed that:
>
> > "The use by the police of deception in the hope of eliciting admissions is not new. The particular technique of deception adopted in the present cases seems to have been imported into Australia from Canada. … The use of undercover police operatives always involves deception. Such operatives are undercover precisely because they are trying to deceive somebody about something. … "[94]

166. The Court observed:

> [T]hree interlinked propositions seemed to underpin the applicant's submissions: first, before employing the scenario technique, the police had an obligation of some kind — counsel abandoned the notion that it was a "duty" — to "respect" (or at least, "not disregard") a suspect's right to silence; secondly, the police could only respect (or not disregard) a suspect's right to silence if they gave the suspect some form of "notice" that he or she was suspected of a crime and were under investigation; and, thirdly, failure to give such "notice" amounted to "improper" conduct.[95]

167. The Court emphasised[96] what was said in *Headland*:

> As the authorities make clear, the application of s 90 is 'highly fact-specific'. The focus must be upon the circumstances in which the impugned admission was made, and the way in which those circumstances would render the use of the evidence of the admission unfair to the accused at trial. That is, the focus of s 90 is upon the fairness of using the evidence at trial, not directly upon characterising the circumstances in which the admission was made — including the manner in which it was elicited — as fair or unfair. Consideration must be given to whether there is some aspect of the circumstances in which the admission was made that reveals

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93 At [35].
94 Ibid, [42]-[43] (citations omitted).
95 Ibid, [51].
96 Ibid, [70].

why it would be unfair to use the evidence of the admission in the trial of the person who made it.

168. The Court observed that the High Court judgment of *Tofilau* was clear, and concluded:

> [T]here was nothing in the manner in which the applicant's admissions were obtained that would render the use of the evidence unfair to him at trial. It is plain that the police did not coerce the applicant into getting things off his chest. He did not have to tell the covert police the things he did. His admissions to Solomone and Kosta were made to individuals whom he trusted. Quite clearly, in our view, the applicant's admissions were made in the exercise of a free choice whether to speak or to remain silent, in circumstances where the police were under no obligation to give the applicant notice that he was a suspect. Indeed, we regard the fact that he was not put on notice that he was under suspicion to be utterly irrelevant. That the applicant was deceived into thinking that he was divulging secrets to trusted individuals cannot, in the circumstances of this case, engage s 90. The police conduct in failing to give the applicant the "notice" purportedly required, was not improper, so that s 138 has no application. And quite clearly, the probative value of the impugned evidence far outweighs any risk of unfair prejudice, so that s 137 is not animated. As to that, we consider that any risk of rank propensity reasoning will be amenable to acceptable amelioration by judicial direction.

169. The Court also agreed with the trial judge that the purpose of the cell deployment of the UCOs was "rapport building" and "not specifically to obtain admissions prior to interview".[97] Accordingly, it was found that the SOP was not infringed which stated that "a cell deployment MUST not occur prior to the target being formally interviewed about the matter under investigation should the deployment relate specifically to admissions for these offences".[98]

Violent, Oppressive, Inhuman or Degrading Conduct

170. Section 84 of the *EA* provides:

> **Exclusion of admissions influenced by violence and certain other conduct**
>
> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by—
>
> a. violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards someone else; or
>
> b. a threat of conduct mentioned in paragraph (a).
>
> (2) Subsection (1) only applies if the party against whom evidence of the admission is presented has raised in the proceeding an issue about whether the admission or its making were influenced in a way mentioned in subsection (1).

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97 Ibid, [76]-[78].
98 Ibid, SOP extracted at [28].

171. Pursuant to s 84 of the *EA*, once the issue of violent, oppressive, inhuman or degrading conduct is raised by the defence, pursuant to s 142 of the *EA,* it is for the prosecution to establish on balance that the purported admissions were not *influenced* by such conduct.

172. In *R v GH*,[99] Miles J held:

> If the evidence in the prosecution case is capable of leading to a finding that the making of an admission was influenced by the sort of conduct provided for by s 84(1), then the accused is entitled to raise the issue of non-admissibility of an admission under s 84(1). Once the issue is raised, the court is bound to give effect to the provisions of the section and not to admit the evidence of the admission unless the prosecution has discharged the onus.

173. In *Higgins v The Queen*,[100] Hoeben J (Sully and Bell JJ agreeing) held that s 84 of the *EA* does not require the isolation of a single reason or a single incident of conduct provoking the confession, and relevant conduct "can encompass mental and psychological pressure".

174. Importantly, in *R v JF*,[101] it was concluded that the reliability of the purported admission is *not* relevant to the application of the provision.[102]

175. In *JF*,[103] Refshauge J considered the authorities and observed the following principles with regard to the operation and effect of s 84 of the *EA*:[104]

    (a) the source of the conduct prohibited by the section is immaterial, it does not have to come from a person in authority or during "official questioning";

    (b) clearly, the prohibited conduct must be causally connected to the admission;[105]

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99 (2000) 105 FCR 419; [2000] FCA 1618, [59].
100 [2007] NSWCCA 56, [26].
101 (2009) 237 FLR 142 (***JF***).
102 Ibid, [33].
103 Ibid, [32].
104 The rule against the admissibility of evidence obtained by means of the influence of 'violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards someone else', or the threat of such conduct.
105 *R v Douglas* [2000] NSWCCA 275, [58]-[61].

(c) the prohibited conduct need not be the only influence on the accused; there may be other reasons why the admission is made;[106]

(d) the test to determine the causal relationship between the conduct and the admission is not a stringent test;[107] and

(e) inhuman conduct means conduct incompatible with the International Covenant on Civil and Political Rights (opened for signature 19 December 1966, 999 UNTS 171, entered into force 23 March 1976).[108]

176. As held *per curiam* by the Court of Appeal of the Supreme Court of New South Wales in *Habib v Nationwide News Pty Ltd*,[109] the test pursuant to s 84 of the *EA* is not whether the admission was in fact influenced by such conduct, but:[110]

> There must be some evidence that indicates through legitimate reasoning that there is a *reasonable possibility* an admission or its making were influenced by proscribed conduct.

177. In *Habib* the Court of Appeal cited with approval[111] the following passage from *Zhang*:[112]

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

178. In *Habib* the Court of Appeal disagreed with Refshauge J's comments in *JF* that "the conduct involved should be of a relatively significant level of impropriety".[113] The Court held, "…with respect, that imposes a gloss on the section which, in our view, is not warranted by its language. The only question s 84(1) poses is whether the 'admission and [its] making' were 'not influenced by' conduct of the nature identified".

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106 *R v Ye Zhang* [2000] NSWSC 1099, [44].
107 Ibid.
108 *Truong* (1996) 86 A Crim R 188, 192.
109 (2010) 76 NSWLR 299; [2010] NSWCA 34 (***Habib***).
110 Ibid, [234] (Hodgson JA, Tobias JA and McColl JA) (emphasis added).
111 Ibid, [239].
112 [2000] NSWSC 1099, [44] (emphasis added).
113 (2010) 76 NSWLR 299; [2010] NSWCA 34, [241].

179. Further, in *Habib* the Court of Appeal observed that it is not necessary that the relevant s 84(1) conduct actually take place at the time the admission is made – the relevant inquiry to which s 84(1) directs the Court is as to whether any admission was not influenced by s 84(1) conduct. It is clear that that conduct may have occurred prior to any relevant interview and need not have been the conduct of those interviewing the relevant party. The question is whether such conduct did not have any influence.[114]

180. In *R v Sumpton*,[115] Hamill J observed that 'the concept of "oppressive conduct" should be read *ejusdem generis* with the other proscribed conduct identified in s 84. That is, the meaning of oppressive conduct should draw some meaning and content from the fact that s 84 also refers to '"violent, inhuman and degrading" conduct'.[116] Hamill J observed:

    a. "The operation of s 84 does not require consideration of whether 'the truth of the admission was adversely affected'";[117]

    b. "The relevant test is not whether the will of the accused was overborne";[118]

    c. "I have concluded that the accused was subjected to conduct that can properly be described as 'oppressive'. It involved the exercise of authority and power in a burdensome, harsh and wrongful manner and imposed on the accused unreasonable and unjust burdens".[119] This was drawn from the dictionary definition of oppression adopted in *R v Fulling*;[120] and

    d. "For the evidence to be admissible I must be satisfied that the admission, and the making of the admission, were not influenced by the oppressive conduct that I find took place".[121]

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114 Ibid, [280].
115 [2014] NSWSC 1432.
116 Ibid, [123].
117 Ibid, [132].
118 Ibid, [133].
119 Ibid, [134].
120 [1987] 2 All ER 65. Ibid, [128].
121 [2014] NSWSC 1432, [136].

181. The Concise Oxford English Dictionary (11th Ed Rev) defines 'oppressive' as:

(1) Harsh and authoritarian; and

(2) Weighing heavily on the mind or spirits.

***Case Study – R v Eastman (No 28)* [2018] ACTSC 2**

182. The operation of s 84 of the *Evidence Act 2011* (ACT) (the equivalent provision) was considered by Kellam J in *R v Eastman*.[122]

183. The accused sought exclusion of purported admissions to a murder recorded on covert listening devices (**LD**) placed in his home between 1989 and 1992. During this time police had engaged in a regime of "overt surveillance" intended to pressure the accused which was submitted to be a "prolonged campaign of harassment".

184. It was submitted that the police had deliberately engaged in the conduct in order for the accused to be isolated and in circumstances where he would then ruminate in his home and make utterances captured by the LD. This was in circumstances where the police had been advised by Dr Milton, a psychiatrist, about the accused's mental state and of his need to tell someone or talk to himself about the alleged murder.[123]

185. In the Martin Report (which had led to the *Eastman* retrial), Justin Martin observed:

> Knowing that the applicant suffered from a Paranoid Personality Disorder, and aware that keeping the murder investigation in the forefront of the applicant's mind might, in the applicant's social isolation, push the applicant to a breaking point where he would feel compelled to talk to himself in the confines of his home, Mr Ninness [the informant] and others played on the applicant's mental state both in their conduct and in their conversations with him. The harassing and provocative conduct was undertaken with the deliberate intention of provoking the applicant into saying something incriminating which could be recorded on listening devices in his home.
>
> In following this course of action, police relied on the advice of Dr Milton concerning the applicant's mental state and his need to tell someone or talk to himself about the murder. However, it must be emphasised that Dr Milton did not advocate, and was not aware of, the type of activities that have emerged in the evidence which amounted to harassment and provocation of the applicant.
>
> …. it must be said that there were occasions when police crossed the line and engaged in both unfair and unlawful conduct toward the applicant. For example, verbal harassment of the type described by Mr Ninness when collecting the

122 *(No 28)* [2018] ACTSC 2 (***Eastman***).
123 Ibid, [34].

> applicant's car, sticking a foot in the door of the applicant's premises and the aggressive confrontation at the city markets were occasions of conduct which forms no part of legitimate investigatory techniques. Similarly, repeatedly surrounding the applicant and invading his personal space on the street is not acceptable conduct on the part of investigating officers. Nor was the conduct of Mr McQuillen during the interview of 26 June 1990. The inappropriate nature of the conduct is exacerbated when regard is had to the applicant's mental state and the intention of police to play upon and aggravate that mental state.[124]

186. While it was not accepted by the defence that the accused had made admissions (there were issues with the quality of the recordings which was argued separately), a ruling was sought on the provisional basis that admissions had been made.

187. The accused did not give evidence on a *voir dire*. He did, however, rely on the expert psychiatric evidence of Dr Brereton (who had interviewed the accused), including that he would have felt "particularly keenly affected by the surveillance and harassment".[125] The prosecution relied on the expert evidence of Dr Milton, refuting any link between the purported surveillance and the admissions.

188. It was also submitted by the accused that the *Human Rights Act 2004* (ACT) (***HRA***) should be considered when determining the proper interpretation of s 84 of the Act. In short, Kellam JA concluded that the *HRA* did not influence the proper construction of the Act for these purposes.[126]

189. Kellam JA found that some of the conduct by police "can be said to be harsh and authoritarian to the point of being oppressive on a number of occasions".[127] The conduct of other police in confronting the accused and invading his personal space was also oppressive.[128] Accordingly, the proscribed conduct was established.

190. Kellam JA concluded:

> [T]here is clear evidence that the accused was from time to time the subject of oppressive conduct by police… in essence, the highest point the evidence reaches is that such conduct would have been part of the cause of stress for the accused which in turn would make it more likely that he would ruminate and talk to himself in the confines of his home.
>
> In my view any connection between the oppressive conduct of the police and the admissions relied upon by the prosecution is so tenuous that there is no reasonable possibility that the making of the admissions was influenced by the conduct.

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124 Ibid, [34].
125 Ibid, [93].
126 Ibid, [80].
127 Ibid, [89]
128 Ibid.

> Accordingly in my view the accused has failed to meet the evidentiary onus required of him by s 84(2) of the Act.[129]

191. In the alternative, Kellam JA held that it could be concluded on the balance of probabilities that the conduct did not influence the making of the admissions.[130]

192. In reaching that conclusion, Kellam JA considered evidence given by the accused at his first trial that the harassment did not cause him stress (although he said that it did cause him to fear for his life),[131] that the conduct of police was temporally remote from the purported admissions, and that Dr Brereton did not distinguish between legitimate surveillance and oppressive conduct.

193. Kellam JA stated:

> Whilst I accept that the constant surveillance by police and the oppressive behaviour did have the effect of keeping the allegations at the forefront of the mind of the accused and were connected to his ruminations at home, it is a substantial leap in logic to say that that conduct influenced the admissions made by the accused against his own interests in the course of those ruminations.[132]

194. Accordingly, the purported admissions were not excluded.

195. This ruling can be contrasted to the observations of the Court of Appeal in *DPP v Hou*,[133] where the Court (Maxwell P, T Forrest and Weinberg JJA) observed:

> *Having regard to the fact that the term 'oppressive conduct', in that section, has been construed as extending to 'mental and psychological pressure', it might be thought that the judge could have excluded the evidence pursuant to that section without having to rely upon s 90.*
>
> It has been held that the exercise of authority and power in a 'burdensome, harsh, and wrongful manner' can constitute oppressive conduct. Importantly, for the purposes of s 84, it is irrelevant whether the conduct in question was engaged in by a police officer, an investigating official, or any third party. The section is not limited to any category of person. *The term 'influenced by' imposes a fairly minimal level of causation.* Importantly, the onus rests upon the prosecution to demonstrate that the conduct referred to did not have any causal effect on the making of the admission. These matters were drawn to the attention of the judge by way of written submissions. However, as has been seen, his Honour was not persuaded by those submissions. Without saying anything definitive about the matter, there was considerable force in the argument that s 84, on its own, was sufficient to warrant the exclusion of this evidence.[134]

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129 Ibid, [173]-[174].
130 Ibid, [176]
131 Ibid, [178]
132 Ibid, [184].
133 [2020] VSCA 190; (2020) 62 VR 1.
134 Ibid, 31-2 [149]-[150] (citations omitted) (our emphasis added).

R v Lynn (Rulings 1-4)

196. In *R v Lynn (Rulings 1-4),*[135] Croucher J applied the relevant authorities and excluded from evidence a record of interview conducted in November 2021. The police had engaged in oppressive conduct (which was accepted by the prosecution[136]) by interviewing the accused over four days even after he largely gave "no comment" answers for two-and-a-half days.

197. Croucher J referred to dictionary definitions of the word "oppressive", noting it extended to conduct that was "burdensome" and "unjustly harsh".[137]

198. The matter having been properly raised on the evidence, it was for the prosecution to establish on the balance of probabilities that the admissions, and their making, were not influenced by oppressive conduct.[138]

199. Croucher J held that the prosecution did not meet that burden, and in any event his Honour was "positively satisfied that the conduct influenced – or caused – him to reject his solicitor's advice to make no comment and instead make admissions.[139]

135 [2024] VSC 373.
136 Ibid, [265].
137 Ibid, [260]-[262].
138 Ibid, [273].
139 Ibid, [275].

Part E: Concluding thoughts

200. Common law *Burns*[140] directions:

a. Before using a confession against an accused, the jury must be satisfied that it had been made by the accused and that it was truthful;

b. At common law, it was customary to direct the jury that these two matters must be established beyond reasonable doubt.[141]

201. Contrast with the *JDA*, s 61:

> **What must be proved beyond reasonable doubt**
>
> Unless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are—
>
> (a) the elements of the offence charged or an alternative offence; and
>
> (b) the absence of any relevant defence…
>
> **Examples**
>
> The trial judge may relate the evidence in the trial to directions under section 61 in many different ways, for example—
>
> - when directing the jury that an element must be proved beyond reasonable doubt, the trial judge may refer to the evidence relied on by the prosecution to prove that element and direct the jury that it must be satisfied that that evidence proves that element beyond reasonable doubt; or
> - where the only evidence relied on by the prosecution to prove an element is an alleged admission made by the accused, the trial judge may refer to the alleged admission and direct the jury that it must be satisfied that that evidence proves that element beyond reasonable doubt.[142]

202. Judicial College of Victoria:

> Under the *Jury Directions Act 2015*, the only matters that must be proved beyond reasonable doubt are the elements and the absence of any relevant defences. (*Jury Directions Act 2015* s 61. See also *Payne v R* [2015] VSCA 291, [13]; *DPP v Roder* [2024] HCA 15, [15]).

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140 *Burns v The Queen* (1975) 132 CLR 258 (***Burns***); *R v PAB* [2006] QCA 212; [2008] 1 Qd R 184.

141 Judicial College of Victoria, Confessions and Admissions, [32] citing *R v Franklin* (2001) 3 VR 9; *R v Kotzman* [1999] 2 VR 123; *Walford v McKinney* [1997] 2 VR 353; *R v Russo* (2004) 11 VR 1; *McKinney v The Queen* (1991) 171 CLR 468.

142 (Our emphasis added).

> However, in some cases, an admission may be substantially the only evidence of one or more elements. In such cases, it may be appropriate for the judge to clearly identify for the jury the importance of the admission. Judges should discuss the issue with counsel and hear submissions on what additional directions or comments are appropriate. One option is to refer to the evidence of the confession or admission and direct the jury that it must be satisfied that that evidence proves the element beyond reasonable doubt (*Jury Directions Act 2015* s 61, Example). The judge should identify the charge or charges in respect of which the evidence is capable of constituting an admission (*CG v R* [2011] VSCA 211).[143]

203. Think about these issues early:

    a. Defence responses – concessions can affect the "facts in issue", whether admissions are "adverse" to the accused, and whether mixed statements are admissible;

    b. Is there a need for expert evidence?

    c. Do you need to call your client on a *voir dire*?

204. Section 84 of the *EA* (admissions influenced by violent, oppressive, inhuman or degrading conduct) is an important protective provision.

205. If s 84 conduct (and/or ss 85, 137 or 138 conduct) is not engaged in a given case, consider how would it be unfair for the admission to be admitted pursuant to s 90 of the *EA* as a "safety net".

206. The Charter is largely an untapped resource, both in the way it might affect the interpretation of Part 3.4 of the *EA*, and in terms of the obligations on public authorities.

Michael Stanton SC, Katarina Ljubicic, Patrick Hurst

Foley's List

20 February 2025

[143] Judicial College of Victoria, Confessions and Admissions, [33]-[34].