FOLEY'S LIST

KADIR IN THE HEADLIGHTS

Improperly or Illegally Obtained Evidence – s 138 of the Uniform Evidence Acts

Michael Stanton and Julia Kretzenbacher

Introduction

1. In a 2016 speech to the UNSW Law School, Bathurst CJ said:[1]

> When evidence which has been improperly obtained is relevant, reliable or highly probative, courts are faced with a fundamental dilemma. On the one hand, there is a public interest in convicting offenders who are found on relevant and reliable evidence to have committed a crime beyond reasonable doubt. On the other hand, there is a public interest in ensuring that law enforcement officers who engage in illegal or improper investigatory practices are disciplined and deterred, that the rights of citizens are upheld, and that the integrity of court processes are maintained.

2. Bathurst CJ set out a defence of the Australian discretionary approach and discussed the competing public policy considerations founding s 138 of the Uniform Evidence Acts (***EAs***).

3. His Honour outlined the following principles underpinning the balancing exercise required at common law and now by s 138:

    a. **Seeking the truth through relevant and reliable evidence**: the purpose of a criminal trial is to determine whether an accused has committed a crime beyond reasonable doubt. Genuine convictions are secured when relevant and reliable evidence is before the court, and there is a public interest in admitting all relevant, reliable and probative evidence;

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[1] The Hon T F Bathurst, Chief Justice of New South Wales, 'Illegally or Improperly Obtained Evidence: In Defence Of Australia's Discretionary Approach', Speech to UNSW Law School (Web Page, 2 March 2016) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20160302.pdf>, [4]. See further *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed); *Bunning v Cross* (1978) 141 CLR 54, 74 (Stephen and Aickin JJ, with who Barwick CJ agreed); *Kadir v The Queen; Grech v The Queen* (2020) 267 CLR 109, 125 [12] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

b. The **deterrence/disciplinary principle**: there is a need to avoid future police misconduct by disciplining police so that they are deprived of evidence unlawfully obtained, as well as deterring future conduct by removing any incentive for police to act improperly or unlawfully in conducting criminal investigations;

c. The **protection of rights principle**: the law outlines certain standards of conduct for police investigations and if there are breaches of rights, then the accused ought to be placed in the same position they were in as if the breach had not occurred by excluding improperly or unlawfully obtained evidence; and

d. The **judicial integrity principle**: admission of improperly or unlawfully obtained evidence undermines the integrity and legitimacy of the administration of justice. Courts are concerned with more than just accurate verdicts but also the legitimacy of the administration of justice. Bathurst CJ said that this rationale is particularly important where police have obtained evidence improperly or unlawfully for the express purpose of obtaining a curial advantage.

4. Bathurst CJ concluded that, with regard to the principles favouring exclusion, the last principle is the most convincing. His Honour also discussed how Australia has attempted to find a middle ground between the UK approach which is more permissive of admitting evidence in circumstances of impropriety or illegality (where reliability is not adversely affected), and the US approach which favours exclusion in requiring strict compliance (the 'fruit of the poisonous tree' doctrine).

5. This paper will consider the history of the common law discretion, the Australian Law Reform Commission (**ALRC**) reports on the law of evidence, and the text and purpose of s 138 of the *EAs*. This will include considering each of the s 138(3) factors that are required to be considered by judicial officers when undertaking the balancing exercise. We will outline important principles drawn from the authorities, including the unanimous judgment of the High Court in *Kadir v The Queen; Grech v The Queen* (2020) 267 CLR 109 (***Kadir***). After our conclusion we also provide four case studies.

History and foundation of s 138 – common law discretion

6. There are three key High Court judgments which outlined the common law discretion of judicial officers to exclude evidence on 'public policy' grounds and formed the foundation of s 138 of the *EAs*:

    a. *R v Ireland* (1970) 126 CLR 321: involved the persistent questioning of a murder suspect by police after he had indicated that he intended to exercise his right to silence. Police also photographed his hands and arranged for an examination by a doctor. Barwick CJ (with whom McTiernan, Windeyer, Owen and Walsh JJ agreed) held that evidence that has been unfairly or unlawfully obtained is not for that reason alone inadmissible; the court has to conduct a balancing exercise where competing public policy requirements are weighed up.[2] In holding that the evidence should have been excluded and ordering a re-trial, Barwick CJ said that '[c]onvictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion';[3]

    b. *Bunning v Cross* (1978) 141 CLR 54 (***Bunning***): inculpatory evidence of a breath test was sought to be excluded because there was a failure by police to administer a mandatory preliminary test. In finding that the evidence was admissible, Stephen and Aickin JJ (with whom Barwick CJ agreed) said that the power to rule inadmissible unlawfully obtained evidence was not only concerned with fairness to an accused but also a weighing up of competing public policy requirements. On the one hand there is the goal of achieving a conviction and on the other hand the undesirable effect of giving judicial approval or even encouragement of particular unlawful conduct by police;[4] and

[2] At 334.
[3] At 335.
[4] At 74.

c. *Ridgeway v The Queen* (1995) 184 CLR 19 (***Ridgeway***): involved the accused 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. The Court (Mason CJ, Deane and Dawson JJ) upheld the principles enunciated in *Ireland* and *Bunning* and said:

> 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.[5]

It should be noted that 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*.[6] They protect law enforcement officers from criminal and civil liability in tightly controlled circumstances, but prohibit inducement.[7]

Australian Law Reform Commission Reports

7. In 1979, the ALRC was commissioned to review the existing law of evidence and consider whether there should be a uniform law.

8. Two reports were produced by that review: ALRC Report 26[8] (1985 interim report which included proposed legislation), and ALRC Report 38[9] (1987 final report which revised the interim legislation after extensive consultation).

[5] At 31.
[6] See the comments in *Ridgeway*, 43-4 (Mason CJ, Deane and Dawson JJ), 53-4 (Brennan J).
[7] See further *Wu (A pseudonym) v The Queen* [2020] VSCA 94.
[8] Evidence (Interim) [1985] ALRC 26 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/1985/26.html>.
[9] Evidence [1987] ALRC 38 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/1987/38.html>.

9. In 2004, there was a further ALRC review of the operation of the *EAs* which was conducted by the NSW and Victorian law reform commissions. The final report was ALRC Report 102.[10]

10. The three reports are useful in order to understand the background and purpose of particular *EA* provisions.[11]

11. ALRC Report 26 said the following in respect of the discretionary approach to excluding unlawfully or improperly obtained evidence:

> A discretionary approach seems the most appropriate one to take in dealing with illegally and improperly obtained evidence. This is the approach that has been developed by the High Court. Admittedly, any approach that is discretionary and subject only to limited appeal rights, relies heavily on the judgment of the individual judge. It also, by definition, lacks certainty of result, and therefore sacrifices predictability to flexibility. Nevertheless, it is suggested that the conflicting concerns in this area, and the wide variety of circumstances, necessitate such an approach. The Law Reform Commission of Canada has stated:
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> > ... there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities. It gives to the courts the role of guardians of the public's freedom.
>
> An approach based on the existing discretionary approach is that which is preferred. The proposal, however, makes some changes to the law to meet some criticisms of it. ...[12]

12. The Report provides an important analysis of the reasons underpinning drafting decisions and the competing policy issues. For example:

> In *Bunning v Cross* it was said that the issue of unfairness to the accused will be 'one factor which, if present, will play its part in the whole process of consideration. Consideration was given to its inclusion among the list of factors. To refer to 'unfairness to the accused' will not, however, give guidance as is shown by the experience of the *Lee* discretion. The total scheme of rules of admissibility and exclusionary discretions should ensure fairness to the accused.
>
> An argument against taking the probative value, the importance of the evidence or the seriousness of the offence into account is that law enforcement agencies will modify their behaviour accordingly, eg they may believe that they can get away with murder in a murder case. As Justices Stephen and Aickin stated in *Bunning v Cross*, 'to treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning

[10] *Uniform Evidence Law* [2005] ALRC 102 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/2005/102.html>.
[11] See *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iv).
[12] At [964] (citations omitted).

> enough that will of itself suffice to atone for the illegality involved in procuring it'. The question is whether this danger justifies excluding from consideration some, or all, of the factors which support admission of the improperly obtained evidence. This seems too extreme an approach. One solution would be to exclude them from consideration only where officers have deliberately acted improperly – only then will consideration of these factors be relevant. But to exclude them from consideration would seem too extreme an approach. The question for the judge is whether the balance of public interest favours admission – he should consider all the factors on both sides of the equation. The officers themselves, while they should avoid improper conduct, will be faced with situations where the legal requirements are vague. It would be legitimate for the judge to consider these factors. Safeguards are provided by the existence of a discretion, by inclusion as a factor on the other side whether the impropriety was part of a wider pattern of misconduct, and by the existence of other forums of review.[13]

13. ALRC Report 38 concluded:

> ***Improperly obtained evidence.*** The court should exclude evidence obtained illegally or improperly unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. The discretion should also apply to evidence obtained in consequence of improperly obtained evidence…[14]

14. Interestingly, this approach had attracted criticism from both sides:

> [I]t was strongly urged upon the Commission that the retention of a discretion to exclude illegally obtained evidence was a totally inadequate solution. It unduly favoured the prosecution. Instead, there should be an approach of automatic exclusion of any evidence obtained illegally or improperly. On the other hand, it was argued that the proposed discretion (which placed the onus on the prosecution to justify admission of such evidence and required that it be demonstrated that the advantages of admitting the evidence substantially outweighed the disadvantages) was a proposal that would unnecessarily and improperly tilt the balance in favour of the accused.[15]

15. It is useful to go back to both common law authorities and the ALRC reports when constructing submissions based on s 138. It should be noted that 'public policy' considerations are also related to relevant principles concerning abuse of process and stays, where the courts will act in a way to protect the fundamental tenets of the justice system.[16] Keeping these principles in mind is important when preparing a s 138 argument – it can help guide your enquiries and cross-examination of police during contesting hearings, committals, and/or preparatory cross-examination pursuant to s 198B of the *Criminal Procedure Act 2009* (Vic).

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[13] At [964] (citations omitted).
[14] At [66].
[15] At fn 47.
[16] See, eg, *Strickland (a pseudonym) & Ors v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325, 367-8 [100] (Kiefel CJ, Bell and Nettle JJ).

Section 138 of the *Evidence Act 2008* (Vic)

16. Section 138 of the *EA* provides:

> **Exclusion of improperly or illegally obtained evidence**
>
> (1) Evidence that was obtained –
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law—
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
>
> (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning –
>
> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
>
> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
>
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account –
>
> (a) the probative value of the evidence; and
>
> (b) the importance of the evidence in the proceeding; and
>
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
>
> (d) the gravity of the impropriety or contravention; and
>
> (e) whether the impropriety or contravention was deliberate or reckless; and
>
> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
>
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
>
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law. …

Note

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

Section 138 – two-stage process

17. Once it has been established by the party seeking exclusion that the evidence in question has been improperly or illegally obtained, or obtained in consequence of an impropriety or illegality, then *prima facie* the evidence is not to be admitted. The onus then shifts to the party seeking to rely on the evidence to persuade the court, having regard to the non-exhaustive mandatory considerations under s 138(3), that the evidence should be admitted.

18. In *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 (***Parker***) French CJ observed:

> The party seeking to exclude the evidence has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking the admission of the evidence to persuade the court that it should be admitted. There is thus a two stage process. The party seeking admission of the evidence has the burden of proof of facts relevant to matters weighing in favour of admission. It also has the burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained.[17]

19. See further *Wu (A pseudonym) v The Queen* [2020] VSCA 94 (***Wu***), where T Forrest and Emerton JJA and Croucher AJA observed:

> [W]hile exclusion under the common law is discretionary, s 138 is expressed in mandatory terms: upon satisfaction that the evidence was obtained improperly or in contravention of an Australian law, the judge *must* exclude the evidence, *unless* the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.[18]

20. In *Kadir*, the High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held:

> In the event, s 138 enacts a "discretion" which is wider than the modified *Bunning v Cross* discretion discussed by the ALRC in the Interim Report. *Bunning v Cross* is an exclusionary discretion that applies in criminal proceedings and requires the court to balance the desirable goal of convicting wrongdoers against the undesirable effect of giving curial approval, or even encouragement, to the unlawful conduct of those whose task it is to enforce the law. Section 138 provides for the conditional exclusion of evidence obtained by, or in consequence of, impropriety or illegality in any proceeding to which the Act

[17] At 500-1 [28] (citations omitted).
[18] At [72] (citations omitted).

> applies. Notably, the exclusion is not confined to evidence that is improperly or illegally obtained by police or other law enforcement agencies. The "discretion" conferred is to admit the evidence, should the court be persuaded that the balance of the competing public interests requires that outcome.
>
> As s 138 is not confined to criminal proceedings or to evidence obtained by, or in consequence of, the misconduct of those engaged in law enforcement, the public interests that the court is required to weigh are broader than those weighed in the exercise of the *Bunning v Cross* discretion. The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally. In a criminal proceeding in which the prosecution seeks to adduce evidence that has been improperly or illegally obtained by the police (or another law enforcement agency), the more focused public interests identified in *Bunning v Cross* remain apt.[19]

21. In the above passage 'discretion' is in quotation marks because it is not resolved whether it is truly a discretion or not.[20] However, it is clearly a balancing exercise involving competing considerations and the courts have consistently applied the *House v King* (1936) 55 CLR 499[21] principles when considering applications and appeals against s 138 decisions.[22]

Establishing impropriety or Illegality – balance of probabilities

22. Section 142 of the *EA* provides:

> **Admissibility of evidence – standard of proof**
>
> (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding –
>
> (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
>
> (b) any other question arising under this Act –
>
> have been proved if it is satisfied that they have been proved on the balance of probabilities.
>
> (2) In determining whether it is so satisfied, the matters that the court must take into account include –
>
> (a) the importance of the evidence in the proceeding; and
>
> (b) the gravity of the matters alleged in relation to the question.

[19] At 125 [12]-[13] (citations omitted).
[20] See *Kadir*, 122-3 [9].
[21] At 503 (Dixon, Evatt and McTiernan JJ).
[22] See, eg, *Slater v The Queen* [2019] VSCA 213, [40] (McLeish and Weinberg JJA and Tinney AJA); *DPP v Marijancevic & Ors* (2011) 33 VR 440, 444 [13], 463 [90]-[91] (Warren, Buchanan an Redlich JJA) applying *DPP v MD* (2010) 29 VR 434.

23. This reflects the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336,[23] and may be relevant when a party alleges impropriety or illegality.[24]

What does 'improperly' mean?

24. There is no definition of 'improperly' or 'impropriety' in the *EAs*.

25. In *Parker*, French CJ observed that the meaning of 'improper' in the Oxford English Dictionary includes 'not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong'.[25]

26. In respect of admissions, ss 138(2) and 139 helpfully set out circumstances which are improper, namely:

    a. A person did or omitted to do an act in the course of questioning which was likely to substantially impair the ability of the person to rationally respond to the questioning (consider for example acts of coercion, police oppressively 'cross-examining' a suspect or breaching the rule in *Palmer*[26] and asking the accused why a witness would lie);

    b. Making a false statement in the course of questioning even though the person knew that the statement was false and would likely cause the person who was being questioned to make an admission (consider for example acts of deception, such as lying about what a particular witness said, or saying that investigators have fingerprint/DNA evidence of the suspect when they do not);[27]

    c. Failing to caution a person who was under arrest, and being questioned by an 'investigating official'[28] when there was no caution:

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[23] At 361-3 (Dixon J).
[24] *DPP v Marijancevic & Ors* (2011) 33 VR 440, 461 [80] (Warren CJ, Buchanan and Redlich JJA).
[25] At 501 [29].
[26] *Palmer v The Queen* (1998) 193 CLR 1.
[27] Although see *R v Weaven (No 1)* [2011] VSC 442, [64] (Weinberg JA) in the context of a 'Mr Big' covert operation, and *Lyon v The Queen* [2019] VSCA 251, [35]-[36] (T Forrest, Emerton and Weinberg JJA) in the context of a pretext call.
[28] See *DPP v Hou* [2020] VSCA 190, [117]-[131] (Maxwell P, T Forrest and Weinberg JJA) regarding a useful discussion of who might be an 'investigating official'.

i. This can be in circumstances of actual or *de facto* arrest (ie the person did not think they could leave);

ii. It is improper if the investigating official did not have power to arrest; and

iii. It is improper if the caution is not translated when required.

27. Otherwise, the common law guides us.

28. In *Parker v Comptroller-General of Customs* (2007) 232 FLR 362 (upheld by the High Court in *Parker*), Basten JA (with whom Mason P and Tobias JA agreed) observed:

> Putting aside confessional evidence, which is dealt with in s 138(2), the best known example of improper conduct, not amounting to unlawfulness, is the action of an agent provocateur or person who induces another to commit a crime through subterfuge or trickery. …
>
> There may be circumstances in which it is not the commission of the crime itself, but the obtaining of evidence of an antecedent crime which is attended by trickery or deception, not amounting to a contravention of a legal prohibition. For example, a police officer may induce the occupant of premises to allow a search to be undertaken voluntarily, in the false belief, induced by the officer, that he or she had a warrant which could be relied upon if consent were not forthcoming. Improper conduct may also occur in circumstances where a police officer has a warrant and seeks to exercise a search based on its authority, knowing that the warrant was for some reason invalid. One can envisage variations on the theme: the warrant may in fact have been invalid for reasons which the police should have been aware of, but were not. The warrant may in fact have been valid, but was believed by the officers to be invalid.[29]

29. It is important to recognise that the Courts, while conscious of the dangers of 'extreme' cases, have given some latitude to investigating police. In *Ridgeway*, Mason CJ, Deane and Dawson JJ said:

> [C]ircumstances can conceivably exist in which a law enforcement officer intentionally brings about the opportunity for the commission of a criminal offence by conduct which is not criminal but which is quite *inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement*. Extreme cases of creating circumstances of temptation under which a vulnerable but otherwise law-abiding citizen commits an offence of a kind which (so far as the police are concerned) he or she otherwise might not have committed provide possible examples. As the Supreme Court of Canada pointed out in *R v Mack*, "there are inherent limits on the power of the state to manipulate people and events for the purpose of

[29] At 378 [55].

> attaining the specific objective of obtaining convictions". The rationale of the discretion requires that it extend to cases where those "inherent limits" are exceeded.
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> …
>
> The effective investigation by the police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use will ordinarily be legitimate notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity. *It is neither practicable nor desirable to seek to define with precision the borderline between what is acceptable and what is improper in relation to such conduct. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances*, including, amongst other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and any imminent danger to the community. A finding that law enforcement officers have engaged in such clearly improper conduct will not, of course, suffice of itself to give rise to the discretion to exclude evidence of the alleged offences or of an element of it. As with the case of illegal conduct, the discretion will only arise if the conduct has procured the commission of the offence with which the accused is charged.[30]

30. Accordingly, there will be circumstances in which evidence obtained by non-illegal deceptive tactics will be admissible, where such tactics do not involve conduct that clearly falls short of the minimum standards of propriety expected by society.

31. In *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 (***Robinson***), Basten JA (with whom Barr J agreed) said:

> It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as “the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement”. Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be “quite inconsistent with” or “clearly inconsistent with” those standards. Thirdly, the concepts of “harassment” and “manipulation” suggest some level of encouragement, persuasion or importunity in relation to the commission of an offence: thus, in describing the first category of cases (at 39) the joint judgment in *Ridgeway* referred to offences being procured or induced.[31]

[30] At 36-7 (emphasis added) (citations omitted).
[31] At 618-9 [23]. Cited with approval in *Wu*, [74] (T Forrest and Emerton JJA and Croucher AJA).

32. Basten JA also held 'mere doubts about the desirability or appropriateness of particular conduct will not be sufficient to demonstrate impropriety'.[32]

33. It should be noted that in *Tofilau v The Queen* (2007) 231 CLR 396, 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.[33]

Illegality

34. 'Australian law' is defined in the Dictionary to the *EAs* as 'a law of the Commonwealth, a State or a Territory', and 'law' in turn is defined to include unwritten law, which would include the common law.

35. See, for example, s 125 of the *Victoria Police Act 2013* (Vic) (***VPA***):[34]

> **Breaches of discipline**
>
> (1) A police officer or protective services officer commits a breach of discipline if he or she—
>
> (a) contravenes a provision of this Act or the regulations; or …
>
> (h) engages in conduct that is likely to bring Victoria Police into disrepute or diminish public confidence in it; or …
>
> (j) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or

[32] At 622 [36].
[33] At 465 [219]. See further 527-9 [410]-[414]. Although see the judgment of *R v Hart* [2014] 2 SCR 544 where the Supreme Court of Canada held that '[w]here 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': at [85] (Moldaver J). However, this is not the law of Australia, see *Weaven v The Queen* [2018] VSCA 127, [42] (Priest JA, with whom Whelan and Kyrou JJA agreed).
[34] See also the definition of 'misconduct' pursuant to s 166 of the *VPA*.

(k) is negligent or careless in the discharge of his or her duty; or …

(m) acts in a manner prejudicial to the good order or discipline of Victoria Police; …

36. See also s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***): if a public authority (defined as including Victoria Police[35]) conducts itself in a way that is incompatible with the Charter or fails to give proper consideration to a relevant human right, then they may have acted unlawfully.[36]

37. In *DPP v Kaba* (2014) 44 VR 526 (***Kaba***), Bell J held:

> Under s 38(1) of the *Charter*, it is "unlawful" for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to human rights in making a decision. Section 39(1) contemplates relief or remedy being given in respect of such unlawfulness in the specified circumstances. As police are public authorities under the *Charter*, it is a source of the standards expected of law enforcement officers in Victorian society. This is relevant to determining whether police actions are improper under s 138(1) of the *Evidence Act*. Further, acting or *making* decisions in contravention of an obligation imposed by s 38(1) of the Charter represents a contravention for the purposes of s 138(1) of the *Evidence Act*. In a case like the present, this too will likely be contrary to or inconsistent with the individual's rights under the ICCPR, which will be a relevant discretionary consideration under s 138(3)(f).[37]

38. Consider the role of the *Charter* when interpreting s 138 as well (for the Victorian *EA*, not other *EA* jurisdictions).[38]

39. Section 32(1) of the *Charter* requires that, so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.[39] Consider also the Victoria Police Manual (**VPM**)[40] – breaches of some parts of the VPM may amount to illegality or impropriety.[41]

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[35] Section 4(1)(d).
[36] See further *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 497 [174] (John Dixon J).
[37] At 617 [334].
[38] Note that in a proceeding in the County Court or Supreme Court of Victoria, pursuant to s 35 of the *Charter* notice must be given to the AG (Vic) and VEOHRC if a question of law arises that relates to the application of the *Charter* or a question arises with respect to the interpretation of a statutory provision in accordance with the *Charter*.
[39] Section 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question: *R v Momcilovic* (2010) 25 VR 436. In *Momcilovic v The Queen* (2011) 245 CLR 1, the High Court was divided about the correct methodological approach to ss 32(1) and 7(2) of the *Charter*, and the Court of Appeal has continued to apply *R v Momcilovic* (2010) 25 VR 436: *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* (2012) 38 VR 569.
[40] Available for order here: <https://www.police.vic.gov.au/procedures-and-legislation>.
[41] Although see *AG (Tas) v Wright* (2013) 22 Tas R 322.

The causal link

40. In order to engage s 138, evidence must be obtained: (1) improperly or in contravention of an Australian law; or (2) *in consequence* of an impropriety or of a contravention of an Australian law.

41. The chain of causation between the illegality or impropriety and the evidence sought to be adduced may be direct or indirect provided that the chain represents a course of rational, inferential reasoning. The link need not be immediate. It may arise through various steps.[42]

42. In *Kadir*, the High Court held that where the causal link is 'tenuous', this may affect the weighing of the public interest in not giving curial approval or encouragement to the unlawful conduct.[43]

43. See also *Slater v The Queen* [2020] VSCA 270 (***Slater***), where McLeish and Weinberg JJA and Tinney AJA held:

> The degree of connection between evidence obtained 'in consequence of' an impropriety or contravention and that impropriety or contravention is plainly a matter capable of bearing on the balancing exercise. If the impropriety or contravention bears only a distant causal relationship to the evidence, the public interest in deterring impropriety or contravention of the law by obtaining evidence in the manner concerned might be thought more likely to be outweighed by the public interest in admitting probative evidence. Conversely, exclusion of evidence closely connected to the impropriety or contravention might more obviously serve the public interest in deterring the obtaining of evidence in that manner.
>
> More generally, there is a judgment to be made about each piece of evidence which satisfies the test in s 138(1)(b) by having been obtained in consequence of a particular impropriety or contravention, and it is not necessary that the outcome of the balancing exercise be the same in respect of every piece of evidence. As the connection becomes more tenuous, and evidence is obtained through lawful means, in spite of that connection, the various factors weighing in the public interest will not necessarily remain constant.[44]

[42] *Kaba*, 618 [337], 648 [472] (Bell J).
[43] *Kadir*, 135 [41] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[44] At [44]-[45].

The balancing exercise

44. None of the factors in s 138(3) can be considered in isolation.[45]

45. In *Wu*, the Court of Appeal (T Forrest and Emerton JJA and Croucher AJA) observed:

> The type of balancing exercise contemplated by s 138 is not amenable to a scientific of quantitative calculation. Ultimately, a decision maker will need to balance competing public interests within the unique factual setting of the individual case.[46]

46. In *DPP v Marijancevic & Ors* (2011) 33 VR 440 (***Marijancevic***), the Court of Appeal (Warren CJ, Buchanan and Redlich JJA) described the balancing exercise as follows:

> The discretionary judgment called for does not involve a simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty, the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice.[47]

47. This involves different considerations to other *EA* exclusionary provisions such as those provided by ss 84, 85, 90 and 137, though fairness to the accused may be a factor.[48]

48. In *Bunning*, the High Court held (Stephen and Aickin JJ):

> The relevance of the competing policy considerations to which we have referred becomes of especial importance in an age of sophisticated crime and crime detection when law enforcement increasingly depends upon electronic surveillance and eavesdropping, the unannounced search of premises or of the person and upon scientific methods, whether of identification, by fingerprints or voiceprints, or of ascertainment of bodily states, as by blood alcohol tests and the like. In many such cases the question of fairness does not play any part. "Fair" or "unfair" is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners. *There is no initial presumption that the State by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry. It is not fair play that is called in question in such cases but rather society's right to*

[45] *Kadir*,135 [42] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[46] At [124].
[47] At 445 [18] (citations omitted).
[48] See the common law position as explained in *Bunning*, 69 (Stephen and Aickin JJ, with whom Barwick CJ agreed). *Ridgeway*, 38 (Mason CJ, Deane and Dawson JJ). See further *R v Swaffield*; *Pavic v The Queen* (1998) 192 CLR 159, 175 (Brennan CJ) in relation to confessions and the overlap at common law between the fairness discretion and the public policy discretion.

> *insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.* A discretion exercisable according to the principles in Ireland's Case serves this end whereas one concerned with fairness may often have little relevance to the question.[49]

The s 138(3) factors

49. The s 138(3) factors will be considered in turn.

(a) the probative value of the evidence

50. The higher the probative value of the evidence, the greater the public interest in it being admitted.[50]

51. Pursuant to *IMM v The Queen* (2016) 257 CLR 300 (***IMM***) when assessing 'probative value' the judicial officer is required to take the evidence at its highest, and no question as to the credibility or reliability of the evidence arises.[51] However, there may be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury and therefore would not meet the criterion of relevance.[52]

52. *Kadir* makes clear that this applies when assessing probative value under s 138(3)(a).[53]

53. However, when assessing probative value, the circumstances may still result in the probative value being low: see *IMM* and Heydon J's identification in 'foggy' conditions example.[54]

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[49] At 75 (emphasis added).

[50] See, eg, *Wu*, [47], [84] (T Forrest and Emerton JJA and Croucher AJA); *Visser v CDPP* [2020] VSCA 327, [119] (McLeish, Emerton and Osborn JJA); *DPP (Cth) v Farmer* (2017) 54 VR 420, 433 [48] (Maxwell P and Beach JA). Note that in *Bunning* the High Court (Stephen and Aickin JJ, with who Barwick CJ agreed) observed at 79:

> To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless. To this there will no doubt be exceptions: for example where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist.

[51] At 315 [52] (French CJ, Kiefel, Bell and Keane JJ).

[52] At 317 [58] (French CJ, Kiefel, Bell and Keane JJ).

[53] *Kadir*,138 [51] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

[54] At 315 [50].

54. For an application of *IMM* still resulting in exclusion see *Bayley v The Queen* (2016) 260 A Crim R 1 where Warren CJ, Weinberg and Priest JJA observed (in relation to s 137 of the *EA*):

> Adopting the approach described by Heydon, and seemingly endorsed by the majority in *IMM*, GH's purported identification from Facebook was, in our view, not merely weak, but "simply unconvincing". Moreover, given the circumstances of the Facebook identification and the publicity surrounding the applicant's known involvement in the Jill Meagher case, the later photo board identification was virtually of no probative value whatever.[55]

55. For a discussion of the difficulties caused by applying the approach of the majority in *IMM*, see further Justice Beale's Pocket Evidence Law.[56]

(b) the importance of the evidence in the proceeding

56. The more important the evidence in the proceeding, the greater the public interest in it being admitted.[57]

57. For example, there may be cases where the impugned evidence is essentially the entire Crown case.[58]

58. However, as stated in *Kadir*, '[e]vidence may possess high probative value but not be important in the proceeding in a case in which other equally probative evidence is available to the prosecution'.[59]

59. Further, even important evidence, the exclusion of which may substantially weaken the prosecution case, may be excluded after undertaking the balancing exercise.[60] In some circumstances, this includes cases where exclusion of the evidence would be fatal to the prosecution case with the result that the prosecution should be stayed because it will inevitably fail.[61]

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[55] At 12 [55].
[56] 30 October 2020, pp 37-9. Available online at the Judicial College of Victoria website <https://www.judicialcollege.vic.edu.au/resources/uniform-evidence-resources>.
[57] See, eg, *Visser v CDPP* [2020] VSCA 327, [119] (McLeish, Emerton and Osborn JJA); *DPP (Cth) v Farmer* (2017) 54 VR 420, 433 [48] (Maxwell P and Beach JA).
[58] *Wu*, [48], [86] (T Forrest and Emerton JJA and Croucher AJA).
[59] At 135 [42] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). See also *Bunning v Cross*, 79 (Stephen and Aickin JJ, with who Barwick CJ agreed).
[60] See, eg, *Marijancevic*, 443 [9] (Warren CJ, Buchanan and Redlich JJA).
[61] *Ridgeway*, 43 (Mason CJ, Deane and Dawson JJ), 51 (Brennan J).

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

60. The more serious the offence, the greater the public interest in convicting the wrongdoer.[62]

61. In *R v Dalley* (2002) 132 A Crim R 169, Spigelman CJ (with whom Blach AJ agreed) said:

> In my opinion, the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, both at common law and pursuant to s 138(3)(c): see also *Burrell* [2001] NSWSC 120 at [38] per Sully J.[63]

62. In dissent on this issue (but concurring regarding the resolution of the appeal), Simpson J said:

> In my opinion it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of the law will be more readily condoned. In my judgment there may be cases in which the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence. That a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness.[64]

(d) the gravity of the impropriety or contravention

63. The greater the gravity of the impropriety or contravention, the more the public interest in excluding the evidence.[65]

64. This consideration overlaps with sub-ss 138(3)(e) and (h).[66]

65. This involves considering both objective and subjective factors when assessing the gravity of the impropriety or contravention.

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[62] *Wu*, [88] (T Forrest and Emerton JJA and Croucher AJA). See also *Visser v CDPP* [2020] VSCA 327, [120] (McLeish, Emerton and Osborn JJA); *Bunning v Cross*, 80 (Stephen and Aickin JJ, with who Barwick CJ agreed).
[63] At 171-2 [1]-[7].
[64] At 189 [97].
[65] See, *Kadir*, 133 [37] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Marijancevic*, 458 [65] (Warren CJ, Buchanan and Redlich JJA).
[66] See *Kadir* at 133 [37] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

66. It will be an important consideration if the conduct breaches a comprehensive legislative regime requiring strict compliance whereby any breach must be taken very seriously.[67]

67. For example, if the impugned actions could never be lawful, a breach would be serious indeed.[68]

68. In the alternative, if powers were lawfully available, the impropriety may fall at 'the least serious end of the spectrum of improper conduct' in circumstances where nothing done by officers was known to be improper or illegal, and where the action was not taken for the purpose of obtaining a benefit or advantage that could not have been obtained by proper or lawful conduct.[69]

69. It is important to recognise that in *Kadir* the High Court made it plain that s 138 of the *EAs* do not enact the US 'fruit of the poisonous tree' doctrine.[70] Where the causal link to the impropriety or contravention is 'tenuous' this will be a relevant consideration.[71]

70. With regard to assessing issues of intent, in *Marijancevic*, the Court of Appeal said:

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

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[67] *Wu*, [82] (T Forrest and Emerton JJA and Croucher AJA). *R v Ireland* (1970) 126 CLR 321, 334 (Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed); *Bunning v Cross*, 80 (Stephen and Aickin JJ, with who Barwick CJ agreed).
[68] *Wu*, [96] (T Forrest and Emerton JJA and Croucher AJA).
[69] *DPP (Cth) v Farmer* (2017) 54 VR 420, 434 [54] (Maxwell P and Beach JA). Cf Priest JA at 482 [229].
[70] At 134 [40] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Wu*, [106] (T Forrest and Emerton JJA and Croucher AJA).
[71] *Kadir*, 135 [41] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Slater*, [44] (McLeish and Weinberg JJA and Tinney AJA).

> If the conduct was deliberate as the trial judge has found, and we assume for present purposes that his Honour meant thereby that it was knowingly illegal, it was not conduct that fell at the most serious end of the range. It was not engaged in for the purpose of obtaining an advantage that could not by proper conduct have been obtained. We are not, however, persuaded that his Honour intended by the use of the phrase 'impropriety of the highest order' to convey more than was submitted by the respondents, that the impropriety was 'of such a high order' as to justify the exclusion of the evidence. This specific error is therefore not made out.[72]

71. This sub-section also requires consideration of any particular characteristics or vulnerabilities of the accused that are relevant to the gravity of the impropriety or contravention. In this regard, there might be a need to cross-examine police on their particular knowledge of the vulnerability as well as call evidence on this issue (from experts, family members, and/or or the accused).

72. In *R v Helmhout* (2001) 125 A Crim R 257 (***Helmhout***), Ipp AJA said:

> Many factors bear upon an individual's vulnerability. Age, education, personality, and general experience of life are some that are relevant to an individual's capacity to deal with police questioning. Plainly, that capacity varies from individual to individual. This means that a contravention of [the relevant regulation] must have different consequences depending upon the particular characteristics of the individual who is interviewed by the police.[73]

73. Police attitudes towards the rule of law may affect the admissibility of the evidence, including subsequent conduct. In *Slater*, McLeish and Weinberg JJA and Tinney AJA cited[74] the following from Blow J in *Tasmania v Crane* (2004) 148 A Crim R 346 with approval:

> It is true that the improper making of misleading statutory declarations was not an impropriety of the type referred to in s 138. It was an impropriety that occurred after the evidence was obtained, rather than an impropriety at the time the evidence was obtained. However, when evidence is improperly or illegally obtained by police officers, I consider that the attitude of those officers to the rule of law, *as displayed during the relevant investigation and any associated prosecution, before, during and after the obtaining of the evidence, must be relevant to the exercise of the discretion conferred by s 138*.[75]

[72] At 458-9 [67]-[68] (Warren CJ, Buchanan and Redlich JJA). First paragraph cited with approval in *McElroy v The Queen* (2018) 55 VR 450, 468 [123] (Santamaria, Beach and Ashley JJA), and *DPP (Cth) v Farmer* (2017) 54 VR 420, 434 [53] (Maxwell P and Beach JA).
[73] At 258-9 [9].
[74] At [57] and [59].
[75] At 354 [21] (emphasis added).

74. The Court in *Slater* also referred with approval[76] to *R v Hunt* (2014) 286 FLR 59, where Hiley J took into account the way in which some police officers gave evidence engaging in 'unreasonable semantics' in order to give a more favourable impression to the Court about their evidence (without his Honour finding that they had lied). Hiley J said:

> Conduct of this kind, namely conduct that has occurred well after the events the subject of the particular searches, is relevant to one of the two parts of the balancing process, namely the public interest in ensuring not only that evidence is obtained properly and lawfully, but also in ensuring that the facts and circumstances during and leading up to the relevant searches, can be revealed and examined by others including a court at some later time.[77]

75. Accordingly, if an attempt has been made to conceal any impropriety, that is also relevant, because this would lead to one of the purposes of s 138 being undermined.[78]

76. With regard to the inquiry about the attitudes of police officers (or other investigating officers), the degree to which the conduct is widespread or entrenched in the police force or other organisation may have a bearing on the seriousness of the impropriety, particularly in light of the importance of the public policy consideration of protecting the administration of justice.[79]

77. Whether or not the improper or illegal conduct was 'condoned', 'encouraged' or 'tolerated' by those in higher authority may be relevant.[80]

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

78. It is important to consider whether the impropriety or contravention was deliberate, reckless, negligent or careless. Intentional or reckless impropriety or illegality will be more likely to result in exclusion of the evidence.[81]

79. In *Helmhout*, Hulme J said:

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[76] At [58]
[77] At 85-6 [149].
[78] *Slater*, [56] (McLeish and Weinberg JJA and Tinney AJA).
[79] *Marijancevic*, 458 [65]-[67] (Warren CJ, Buchanan and Redlich JJA).
[80] See, eg, *Ridgeway*, 39 (Mason CJ, Deane and Dawson JJ).
[81] In *Bunning v Cross*, 79 (Stephen and Aickin JJ, with who Barwick CJ agreed) the High Court observed:

> Where, as here, the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had. It bears upon one of the competing policy considerations, the desirability of bringing wrongdoers to conviction.

> In the context of "improperly or in contravention of an Australian law" the concept "reckless" must involve as a minimum some advertence to the possibility of, or breach of, some obligation, duty or standard of propriety, or of some relevant Australian law or obligation and a conscious decision to proceed regardless or alternatively a "don't care" attitude generally.[82]

80. In *Marijancevic* the Court of Appeal cited that passage with approval and said:

> Conduct would be reckless if the officer had foresight that it might be illegal but proceeded with indifference as to whether that was so. What is described as an alternative of a "don't care" attitude expressed in the passage from *Helmhout* must be understood as meaning that the offender, recognising that the conduct might be illegal, did not care whether it was. As can be seen from the passage of his Honour's reasons quoted above, he employed the "don't care" attitude in adopting the first respondent's written submission that the officers' conduct was of such carelessness that the reception of the evidence could be seen to compromise the integrity of the legal process. Any confidence that his Honour drew the necessary distinction between recklessness and carelessness is not enhanced by the observations that he made to counsel during argument that "whether careless and reckless have the same meaning is probably neither here nor there."[83]

81. This demonstrates the importance of determining with precision the mental state of the person engaged in the impropriety or contravention.

82. It will be relevant and tend towards admission if investigators held an 'honest and reasonable belief' that they were acting lawfully.[84]

83. A deliberate 'cutting of corners' will tend against admission. However, as noted above, this factor may also involve consideration of what would have occurred had lawful steps been taken (and whether the impropriety or contravention was significant).[85]

84. There may be examples where, even though the impropriety was not deliberate (or even reckless) the evidence should still be excluded.[86] In Unform Evidence Law,[87] Stephen Odgers SC cites the observations of Kiefel CJ, Bell and Nettle JJ in *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions*

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[82] At 262-3 [33].
[83] At 462 [85] (Warren CJ, Buchanan and Redlich JJA).
[84] *Wu*, [109] (T Forrest and Emerton JJA and Croucher AJA). See also, eg, *McElroy v The Queen* (2018) 55 VR 450, 471 [135] (Santamaria, Beach and Ashley JJA); *Bunning v Cross*, 78 (Stephen and Aickin JJ, with who Barwick CJ agreed).
[85] *Bunning v Cross*, 79 (Stephen and Aickin JJ, with who Barwick CJ agreed).
[86] See the observations of Priest JA (in dissent) in *DPP (Cth) v Farmer* (2017) 54 VR 420, 481-2 [228]-[229].
[87] At [EA.138.570] (Thomson Reuters online, amendments to December 2020).

(2018) 266 CLR 325 (a case involving the granting of a permanent stay of proceedings as a result of unlawfully compelled interrogations of the accused):

> No doubt, society and therefore the law ordinarily looks more askance on instances of deliberate or advertent reckless disregard of a duty or obligation than upon the accidents of incompetence. As a rule, the former are conceived of as entailing greater moral culpability and for that reason their condonation is conceived of as more likely to bring the administration of justice into disrepute. But ultimately it is a question of degree which substantially depends upon the nature of the duty or obligation. If a duty or obligation is of no more than peripheral significance, condonation of its breach, even of an intentional breach, may appear justified in the interests of relatively more pressing considerations of justice. The power to stay proceedings is not available to cure venial irregularities. But if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice, condonation of its breach will bring the administration of justice into disrepute regardless of the culprit's mentality.[88]

85. That passage followed the Court citing with approval[89] Kirby J's observations in *Truong v The Queen* (2004) 223 CLR 122:

> … relief [in the form of a stay] is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of.[90]

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

86. This is a rare example of where domestic law expressly requires a decision maker to have regard to Australia's international obligations to protect human rights. In *Parker v Comptroller-General of Customs* (2007) 232 FLR 362, (upheld by the High Court in *Parker*), Basten JA (with whom Mason P and Tobias JA agreed) observed:

> What can be said without equivocation is that obtaining evidence in deliberate, wilful or even reckless disregard of an individual's civil rights is likely to be a strong factor against the exercise of the discretion to admit the evidence.[91]

87. In Victoria, regard should be had to the human rights protected by the *Charter* – see for example ss 24 (right to a fair hearing) and 25 (rights in criminal proceedings).

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[88] At 367-8 [100].
[89] At 367 [99].
[90] At 171-2 [135].
[91] At 381 [65].

88. In *Kaba*, Bell J said that 'any violation of a *Charter* right should be regarded as serious as the violation itself represents damage to the administration of justice and the rule of law'.[92] See also Bell J's discussion of the effect of improper and unlawful police conduct under common law, the ICCPR and the *Charter*.[93]

89. Pursuant to s 32(2) of the *Charter*, the content of human rights can be informed by international law, such as UN general comments and decisions of the UNHRC and the ECHR.

90. This factor will regularly involve questions as to the degree of violation. For example, in *Kadir* while the accused's right to privacy was breached by unlawful surveillance, it was held to be relevant that the surveillance was of his property but not his home and accordingly this factor was afforded no particular weight.[94]

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

91. If there are other proceedings that have been or are likely to be taken in relation to the impropriety or contravention, then this reduces the need for deterrence by exclusion of the evidence.[95]

92. While the fact that there is no other proceeding may weigh in favour of exclusion, this can be mitigated if the investigators held an 'honest and reasonable' belief that they were acting lawfully.[96]

93. In *Visser v CDPP* [2020] VSCA 327, the Court of Appeal (McLeish, Emerton and Osborn JJA) accepted that Nicola Gobbo and Victoria Police are exposed to a range of investigations (including the Royal Commission) and sanctions.[97] The Court observed that if there was impropriety or contravention, '[t]he appellant's trial was far from the only forum in which condemnation of the conduct of Ms Gobbo and Victoria Police could, or was likely to, occur'.[98]

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[92] at 650 [482] (citations omitted).
[93] *Kaba*, 646-9 [457]-[470].
[94] At 137 [47] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[95] *Kadir*, 126, [16] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[96] *Wu*, [115] (T Forrest and Emerton JJA and Croucher AJA).
[97] At [125]-[126].
[98] At [126].

94. When considering this sub-section, consider whether the public policy consideration of a person's rights being breached is adequately addressed by any other proceeding. For example, has any other proceeding been commenced? Does it rely on executive action/decision? Disciplinary proceedings may not be commenced until after criminal proceedings are finalised.

95. Also consider whether any other proceeding adequately addresses the public policy consideration of the administration of justice being brought into disrepute.

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

96. In *Kadir*, the High Court corrected an erroneous interpretation of this sub-section by the trial judge and the NSW Court of Criminal Appeal and said:

> The significance of factor (h) to the balancing of the competing public interests under s 138(1) will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor (h) would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or illegality. Putting such a case to one side, where the impropriety or illegality involved in obtaining the evidence is deliberate or reckless (factor (e)), proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission. By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration. The assumption on which the parties and the Courts below proceeded, that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides.[99]

97. Accordingly, in most (non-urgent) cases, the fact the evidence was difficult to obtain without impropriety or contravention will not weigh in favour of admission. Indeed, where the impropriety or contravention was deliberate or reckless, this factor will weight against admission.

98. As noted above, in *Kadir*, the High Court also said that '[t]he gravity of the contravention (factor (d)) and the difficulty of obtaining evidence lawfully (factor (h)), along with whether the impropriety or contravention was deliberate or reckless (factor (e)), are overlapping factors'.[100]

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[99] At 127-8 [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[100] At 133 [37] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

Conclusion

99. Section 138 of the *EAs* raises myriad considerations. When preparing for hearings and drafting submissions practitioners need to be conscious of the purpose of the section, and the competing 'public policy' issues.

100. When preparing to conduct contests, committals and/or pre-trial hearings, attention needs to be given well beyond establishing the occurrence of a particular improper or unlawful act. For example:

    a. The mental state of the person engaged in the alleged improper or unlawful conduct needs to be determined with precision. This is likely to be a very important consideration in almost all cases;

    b. It needs to be understood how the evidence forms part of the overall prosecution case. Does the prosecution case necessarily fail if the evidence is excluded, or is there other probative evidence?;

    c. Attention needs to be given to how widespread the improper or unlawful conduct is, the attitudes of those supervising the alleged conduct, and whether there have been any attempts to conceal the conduct; and

    d. Consideration needs to be given to any particular vulnerabilities of the accused person and whether evidence needs to be adduced on that issue.

101. Lastly, in contrast to the common law discretion, it must be remembered that Parliament has made a deliberate decision that, where there is impropriety or illegality, there be a rebuttable presumption that the evidence will be excluded.

M D Stanton
J Kretzenbacher
Foley's List
11 March 2021

Selected Case Studies

***DPP v Marijancevic & Ors* (2011) 33 VR 440**

Facts

102. Three co-accused were facing trial the County Court for alleged drug manufacture and trafficking offences.

103. Much of the evidence against the co-accused was obtained by investigators after the execution of warrants which had been obtained on the basis of warrants that had not been sworn as required by s 81 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The affidavits had been signed (but not sworn) in the presence of a police inspector authorised to take affidavits.

104. The trial judge found the warrants were invalid, that each of the entries by police to land and premises constituted a trespass (and was therefore unlawful), and refused to admit the relevant evidence pursuant to s 138 of the *EA*.

105. The DPP sought leave to bring an interlocutory appeal.

Decision

106. The Court of Appeal (Warren CJ, Buchanan and Redlich JJ) granted the DPP leave to appeal but dismissed the appeal. It was held that the trial judge's decision to refuse to admit the evidence was open in the exercise of his Honour's discretion.

107. It was observed that the common law jealously guarded private property rights. The warrants were obtained *ex parte*, and permitted conduct that would otherwise be a trespass. To proffer to a magistrate material which was not sworn in order to obtain a search warrant had a tendency to subvert a fundamental principle of law.

108. The Court held that it was open for the trial judge to find that the officer's conduct was knowingly illegal (deliberate) and that the gravity of the impropriety was of a high order.

109. The Court of Appeal said:

> At the least serious end of the spectrum of improper conduct would be that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range would be conduct which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal. At the most serious end of the range would be conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct. Cases such as *Ridgeway* exemplify this category of impropriety. There are of course other factors which will bear upon how seriously the impropriety should be characterised such as the nature of the illegality and the extent to which it is widespread.
>
> If the conduct was deliberate as the trial judge has found, and we assume for present purposes that his Honour meant thereby that it was knowingly illegal, it was not conduct that fell at the most serious end of the range. It was not engaged in for the purpose of obtaining an advantage that could not by proper conduct have been obtained. We are not, however, persuaded that his Honour intended by the use of the phrase 'impropriety of the highest order' to convey more than was submitted by the respondents, that the impropriety was 'of such a high order' as to justify the exclusion of the evidence. This specific error is therefore not made out.[101]

110. The Court also warned about the need for precision when making findings regarding the mental state of those engaged in impropriety or contravention and said:

> Conduct would be reckless if the officer had foresight that it might be illegal but proceeded with indifference as to whether that was so. What is described as an alternative of a "don't care" attitude expressed in the passage from *Helmhout* must be understood as meaning that the offender, recognising that the conduct might be illegal, did not care whether it was. As can be seen from the passage of his Honour's reasons quoted above, he employed the "don't care" attitude in adopting the first respondent's written submission that the officers' conduct was of such carelessness that the reception of the evidence could be seen to compromise the integrity of the legal process. Any confidence that his Honour drew the necessary distinction between recklessness and carelessness is not enhanced by the observations that he made to counsel during argument that "whether careless and reckless have the same meaning is probably neither here nor there."[102]

111. In dismissing the appeal. the Court expressly cautioned that it may not have reached the same decision if there had been a finding of inadvertent or careless conduct.

[101] At 458-9 [67]-[68] (Warren CJ, Buchanan and Redlich JJ).
[102] At 462 [85] (Warren CJ, Buchanan and Redlich JJ).

***DPP v Kaba* (2014) 44 VR 526**

Facts

112. Mr Kaba was a passenger in a vehicle that was being driven by another young man in the streets of Flemington.

113. Police stopped the vehicle for a random licence (s 59(1)(a) of the *Road Safety Act 1986* (Vic) (***RSA***)) and registration check. They also obtained permission to search the vehicle. The police focus was on intercepting an 'adequate quota' of vehicles and the driver and Mr Kaba were not suspected of committing any offences before or at the time of the stop.

114. Mr Kaba was angry at the delay and left the vehicle to walk along the footpath. As he was walking away, police asked him for his name and identification and were told to 'fuck off'. Police again asked for his name and Mr Kaba again refused and swore.

115. Police said to Mr Kaba that they needed his name 'to say I spoke to you'. Mr Kaba further swore at police and refused to provide his name.

116. Police then said that Mr Kaba had committed the offence of using offensive language. Police further asked him for his name and he refused. Police then said that they would arrest Mr Kaba until they could ascertain his identify and Mr Kaba said '[t]his is fucking bullshit, you're just harassing me because I am black'.

117. Mr Kaba was then arrested for failing to state his name and address. As he was placed in the police vehicle Mr Kaba was alleged to have assaulted police.

118. Mr Kaba challenged the admissibility of the evidence of police pursuant to s 138 and said that the criminal charges came about because of unlawful and improper conduct by police because of the random licence check, breach of Kaba's right of freedom of movement under s 12 of the *Charter* and demanding his name and address contrary to his right to privacy under s 13 of the *Charter*.

119. At first instance the Magistrate ruled that the stop of the vehicle was unlawful and there were breaches of Mr Kaba's right to freedom of movement and right to privacy, and excluded evidence of the alleged assault pursuant to s 138 of the *EA*.

Decision

120. After the DPP sought judicial review, Justice Bell held that the random vehicle stop was authorised by s 59(1)(a) of the *RSA*, but that Mr Kaba's rights were unlawfully breached.

121. Ultimately Justice Bell remitted the matter to the Magistrates' Court for reconsideration by the Magistrate according to law, because the Magistrate's finding in respect of the *RSA* was a jurisdictional error.

122. However, *Kaba* makes some important and useful points re s 138:

    a. A breach of the *Charter* by a public authority (including Victoria Police) is a contravention of the law for the purposes of s 138;[103]

    b. The causation required for evidence to be obtained 'in consequence' of an impropriety or contravention does not need to be direct and a chain of causation that links the obtaining of the evidence and the impropriety is enough;[104]

    c. Under s 138(1)(b) evidence of offending which was caused by the impropriety or contravention can be characterised as evidence which was obtained 'in consequence' of that impropriety or contravention;[105]

    d. The way in which police in this case interfered with Mr Kaba's *Charter* rights meant they were acting without legal authority. There was no legislative provision or other law which meant the police could not have acted differently to how they did (s 38(2) of the *Charter*). Because the police's actions were incompatible with the *Charter* and there was no statute, the police's actions were unlawful.[106]

[103] At 617 [334].
[104] At 618 [337].
[105] At 618 [339] referring to *Robinett v Police* (2000) 78 SASR 85 and *DPP v Carr* (2002) 127 A Crim R 151.
[106] At 647 [468].

***Slater (a pseudonym) v The Queen* [2019] VSCA 213**

Facts

123. Police intercepted a vehicle driven by Mr Brown. They saw that he had a suspended licence and a prior conviction for driving while suspended. The car was impounded.

124. Mr Brown was on crutches and police offered to assist him in removing valuables from the car. In doing that police officer looked at and removed number of items from the car. She noticed three cigarette packets on the passenger seat and shook them to see if they were empty or full. She opened one of the packets, without asking permission, and saw a snap lock bag containing a white crystalline substance, later established to be methylamphetamine.

125. Further investigations took place, and Mr Brown was charged. Those charges were discontinued after a County Court judge found that the opening of the cigarette packet was part of an illegal search and that the evidence of that search was inadmissible under s 138.

126. Before that trial, there were further investigations which led to charges being brought against Mr Brown's partner, Ms Slater.

127. There were further (lawful) searches of Mr Brown's parent's home and a storage unit in Mr Brown's name.

128. Mr Brown was remanded and he made Arunta calls, through which Ms Slater came to the attention of police. It was established through the calls that Ms Slater was the bondholder of a rental in Glen Iris. Police would not have found out about the Glen Iris address without the phone calls. A search of that address yielded evidence against Ms Slater. The search was under warrant and the warrant was based on Arunta calls and other things.

129. A police officer had initially said that the relevant operation was an investigation into both Mr Brown and Ms Slater. After the evidence in Mr Brown's trial was ruled inadmissible, that officer made a further statement that said that the 'sole target' of the Operation was Ms Slater.

130. The judge at first instance ruled that evidence against Ms Slater was admissible despite the unlawful search of Mr Brown's car and Ms Slater appealed.

Decision

131. The Court of Appeal upheld decision at first instance.

132. The Court discussed the degree of connection required between evidence obtained 'in consequence of' an impropriety or contravention and the impropriety and contravention itself. The Court said:

> The degree of connection between evidence obtained 'in consequence of' an impropriety or contravention and that impropriety or contravention is plainly a matter capable of bearing on the balancing exercise. If the impropriety or contravention bears only a distant causal relationship to the evidence, the public interest in deterring impropriety or contravention of the law by obtaining evidence in the manner concerned might be thought more likely to be outweighed by the public interest in admitting probative evidence. Conversely, exclusion of evidence closely connected to the impropriety or contravention might more obviously serve the public interest in deterring the obtaining of evidence in that manner.
>
> … As the connection becomes more tenuous, and evidence is obtained through lawful means, in spite of that connection, the various factors weighing in the public interest will not necessarily remain constant.[107]

133. See further the discussion in respect of police/investigation officer attitudes to the impropriety and illegality, including after investigation and during trial.[108]

[107] At [44]-[45] (McLeish and Weinberg JJA and Tinney AJA).
[108] At [55]-[59] (McLeish and Weinberg JJA and Tinney AJA).

***Kadir v The Queen; Grech v The Queen* (2020) 267 CLR 109**

Facts

134. After an anonymous complaint of animal cruelty, the organisation Animals Australia engaged a photographer to obtain surveillance evidence from a property where K and G trained greyhounds.

135. The photographer entered the property on 11 occasions and made video recordings contrary to s 8(1) of the *Surveillance Devices Act 2007* (NSW). The recordings supported the allegations of animal cruelty.

136. Animals Australia supplied the footage to the RSPCA. The RSPCA, which was unaware that the material had been obtained unlawfully, obtained a search warrant which was executed on the property and provided further evidence of animal cruelty.

137. The photographer again attended the property pretending to be a greyhound owner and K allegedly made admissions.

138. The trial judge excluded all of the evidence (the video surveillance footage, the search warrant evidence, and the purported admissions), holding that 'but for' the illegality the evidence would not have been obtained.

139. On appeal, the NSW Court of Criminal Appeal overturned the ruling of the trial judge and ruled that the first video recording was admissible, and that the search warrant evidence and evidence of the purported admissions were also admissible.

140. It was held that the first video recording was admissible because it was accepted that, having regard to s 138(3)(f) of the *EA*, the difficulty of obtaining evidence lawfully favoured admission (there was some evidence that an officer of Animals Australia thought that a judicial officer was highly unlikely to issue a surveillance device warrant on the strength of an anonymous complaint). However, once the first video recording was obtained, any perceived difficulty associated with the investigation of the anonymous complaint must have been lessened, so the other video recordings were excluded.

141. K and G were granted special leave to appeal to the High Court.

Decision

142. In a unanimous judgment, the High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that all the video surveillance evidence was inadmissible, and upheld the Court of Criminal Appeal's finding that the search warrant and purported admission evidence was admissible.

143. The High Court rejected the 'but for' test employed by the trial judge, observing:

> As the Court of Criminal Appeal observed, s 138 does not enact the doctrine that prevailed in the United States, requiring the exclusion of the "fruit" of official illegality unless the impugned evidence was derived "by means sufficiently distinguishable to be purged of the primary taint". Section 138 provides for the exclusion of evidence obtained by, or in consequence of, impropriety or illegality, unless the product of balancing the competing public interests favours admitting the evidence.[109]

144. The High Court observed:

> Section 138 provides for the conditional exclusion of evidence obtained by, or in consequence of, impropriety or illegality in any proceeding to which the Act applies. Notably, the exclusion is not confined to evidence that is improperly or illegally obtained by police or other law enforcement agencies. …
>
> In a criminal proceeding in which the prosecution seeks to adduce evidence that has been improperly or illegally obtained by the police (or another law enforcement agency), the more focused public interests identified in *Bunning v Cross* remain apt.[110]

145. The Court held:

> Here, the surveillance evidence was obtained in contravention of the law by a private body (or persons engaged by it), whereas the search warrant evidence was obtained by a regulator acting lawfully and without prior knowledge of the contravention, albeit that it was procured on the strength of the surveillance evidence. The causal link between the contravention and the admissions was tenuous, a consideration which the Court of Criminal Appeal was right to find was capable of affecting the weighing of the public interest in not giving curial approval or encouragement to the unlawful conduct. …
>
> The RSPCA had no advance knowledge of Animals Australia's plan to illegally record activities at the Londonderry property. There is nothing to suggest a pattern of conduct by which Animals Australia or other activist groups illegally collect material upon which the RSPCA takes action. The desirability of admitting evidence that is important to the prosecution of these serious offences outweighs the undesirability of not admitting evidence obtained in the way the search warrant evidence was obtained.[111]

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[109] At 134 [40] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[110] At 125 [12]-[13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) (citations omitted).
[111] At 135 [41] and 137 [48] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

146. The High Court corrected the erroneous interpretation of s 138(3)(h) of the *EA* by the trial judge and the Court of Criminal Appeal and said as follows:

> The significance of factor (h) to the balancing of the competing public interests under s 138(1) will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor (h) would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or illegality. Putting such a case to one side, where the impropriety or illegality involved in obtaining the evidence is deliberate or reckless (factor (e)), proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission. By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration. The assumption on which the parties and the Courts below proceeded, that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides.[112]

[112] At 127-8 [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).