

## Exclusion of improperly or illegally obtained evidence (Section 138)

### Legislative provision

#### Section 138 Exclusion of improperly or illegally obtained evidence

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

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

## **Statement of the rule**

Evidence that was obtained improperly or in contravention of an Australian law (or as a consequence of an impropriety or contravention) is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was obtained in the way in which the evidence was admitted.

Evidence of an admission made due to questioning is deemed to have been obtained illegally or improperly if the person conducting the questioning:

- Did or omitted to do something which he or she knew or ought reasonably to have known was likely to substantially impair the speaker's ability to respond rationally to the questioning;
- Made a false statement during the questioning and knew or ought reasonably to have known that the statement was false and making the false statement was likely to cause the speaker to make an admission.

## **Information about onus**

The accused must prove, on the balance of probabilities, that the evidence was obtained improperly or illegally.

The prosecution must prove, on the balance of probabilities, that the desirability of admitting the evidence outweighs the undesirability of admitting improperly or illegally obtained evidence.

## **Considerations**

In weighing the desirability of admitting the evidence, the court **must** consider:

- a) the probative value of the evidence;
- b) the importance of the evidence in the proceeding;
- c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
- d) the gravity of the impropriety or contravention;
- e) whether the impropriety or contravention was deliberate or reckless;
- 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;
- 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;
- h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of Australian law.

## Guidance on the considerations

- When assessing the probative value of the evidence, the court must take the evidence at its highest, excluding credibility and reliability factors (*DPP v Riley* [2020] NSWCCA 283, [120]).
- The importance of the evidence depends on both its probative value, and the availability of other evidence which is not tainted (*Kadir & Grech v The Queen* (2020) 267 CLR 109, [42]).
- As the gravity of the offence charged increases, the public interest in convicting the accused increases, despite an impropriety in how the evidence was obtained (*Wu & Phan v The Queen* [2020] VSCA 94, [88]).
- The gravity of the impropriety must be assessed by the specific conduct in the case, rather than the gravity of improprieties in general (*McElroy & Wallace v The Queen* (2018) 55 VR 450, [124]).
- The gravity of the impropriety is likely to overlap with consideration of whether the contravention was deliberate or reckless, and the difficulty of obtaining the evidence (*Kadir & Grech v The Queen* (2020) 267 CLR 109, [37]).
- A deliberate contravention for the purpose of securing evidence that cannot be obtained legally is more serious than a contravention that occurs due to an honest but erroneous belief that the conduct was permitted. However, a widespread erroneous belief among police will be a factor that supports excluding the evidence (*Kadir & Grech v The Queen* (2020) 267 CLR 109, [37]; *McElroy & Wallace v The Queen* (2018) 55 VR 450, [128]-[134]).
- A contravention is relevantly reckless if the accused realised the conduct might be illegal or improper but proceeded with indifference as to the illegality or impropriety (*DPP v Marjanovic* (2011) 33 VR 440, [85]).
- One ICCPR right which may be relevant is the right to privacy. The degree of intrusion, and the degree to which privacy would be expected in the circumstances, is relevant to the balancing exercise (*Kadir & Grech v The Queen* (2020) 267 CLR 109, [47]).
- The existence of disciplinary procedures to punish the illegal or improper conduct is a factor in favour of admission, while the absence of such procedures will mean that excluding the evidence will be the only way to mark the contravention (*McElroy & Wallace v The Queen* (2018) 55 VR 450, [137]).