

Episode 73: Summary

Episode name: Objection! Excluding Illegally or Improperly Obtained Evidence in Criminal Proceedings

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What area(s) of law does this episode consider?

Excluding improperly or illegally obtained evidence.

Why is this topic relevant?

Renowned English jurist William Blackstone wrote that “[i]t is better that ten guilty persons escape than that one innocent suffer”. This idea is a cornerstone of our legal system, playing out in practice day-in and day-out in criminal courts across Australia.

The imbalance of power between the state and someone accused of a crime is vast, and ensuring that the evidence used by the state to convict someone is properly obtained is crucial to the administration of the criminal justice system.

Enter section 138 of the *Evidence Act*, which provides for the exclusion of improperly or illegally obtained evidence in contravention of Australian law - unless the desirability of admitting that evidence outweighs the undesirability of its admission.

Understanding when it’s appropriate to seek to exclude evidence is a key skill for an Australian lawyer.

What legislation is considered in this episode?

Evidence Act 1995 (NSW) (**Evidence Act**)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Law Enforcement (Powers and Responsibilities) Regulation 2016 (NSW)

What cases are considered in this episode?

[Robinson v Woolworths Ltd \(T/as Woolworths Plus Petrol Werrington\) \[2005\] NSWCCA 426](#) (Jade Link)

- The Department of Health sent two under-18s into a Woolworths operated petrol station to buy cigarettes as part of a compliance testing program. The teenagers were sold tobacco by the location without verification of age. In issue was whether the evidence was improperly obtained. The petrol station was randomly selected as part of the program and there was no complaint or suspicion that the location regularly sold tobacco to minors. The minors employed no deception and were instructed to tell the truth if asked. In the result, the conduct was found not to be improper.

[Kadir v The Queen \[2020\] HCA 1](#) (Jade link)

- An animal protection organisation engaged a photographer to set up a surveillance device. The device captured evidence of live greyhound baiting. Installing the cameras was a contravention of section 8 of the *Surveillance Devices Act 2007* (NSW), which criminalises the use of such equipment without consent. This was then provided to the RSPCA, which went on to execute a search warrant. Mr Kadir disputed the admissibility of the surveillance evidence, search warrant evidence, and his admission evidence.

The High Court found the surveillance device recording itself inadmissible, but the subsequent evidence obtained by the RSPCA by lawful means through the search warrant was admissible.

What are the main points?

- If evidence is improperly or illegally obtained, not only is it a matter of fairness that it's excluded from being used in court, but it is also an issue of public policy.
- The criminal justice system relies on seeking the truth through reliable evidence, meaning ensuring the evidence is properly obtained is crucial in upholding the integrity of the system
- While illegally is easily defined, improperly is not defined in the Evidence Act.
- The onus is on the party that's seeking to exclude the evidence to establish that it's been improperly or illegally obtained - this is usually the defence.
- If established, the onus then switches to the party (usually the Crown) that's seeking to adduce the evidence to persuade the court that despite the impropriety or illegality, that the court should exercise its discretion to admit the evidence.
- Section 138(3) is a non-exhaustive list of what the Court is required to consider in determining whether evidence which has been illegally or improperly obtained should be admitted.

What are the practical takeaways?

- When presented with evidence in a criminal matter, scrutinise the evidence. If something seems unfair, explore that evidence. There's rarely anything to lose by bringing it to the Court's attention.
- When deciding to make a section 138 objection, be conscious of the purpose of the section, the competing public policy issues, and take all of that into account when formulating submissions.
- For those entering the profession and criminal law in particular, find a mentor at an early stage that will take you on either in the capacity of a solicitor, paralegal or law clerk.
- Watch and absorb as much as possible. Criminal law provides great experience as you get to appear often, you get to meet your clients directly and the subject matter is inherently interesting.

Show notes

[Centre for Policy Development. *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems*, 2020](#)

[Mark Halsey. *Pathways into Prison: Biographies, Crimes, Punishment*, 2008](#)

[William Blackstone. *Commentaries on the Laws of England*, 1769](#)