

LAWS2311

CRIMINAL PROCEDURE

EXAM NOTES

CLIENT LEGAL PRIVILEGE

<p>1. WHAT IS CLIENT LEGAL PRIVILEGE?</p>	<p>Entitles a party to <u>resist the giving of information or the production of a document</u> for inspection and <u>precludes the making of judicial orders</u> to compel production of a privileged document <i>Daniels Corporation International v ACCC (2002)</i></p> <p>Rationale</p> <ul style="list-style-type: none"> - The proper functioning of the legal system depends upon the freedom of communication between legal advisers and their clients <i>Baker v Campbell</i> - Inherent tension between the need to protect confidences and the public interest in parties to litigation having access to all relevant evidence <i>AFP v Propend Finance (1997)</i>
<p>2. IN WHICH PROCEEDINGS CAN CLP BE CLAIMED?</p>	<p>Client Legal Privilege can be claimed in PRE-TRIAL AND TRIAL PROCEDURES</p> <ul style="list-style-type: none"> - NEW s131A (EA 1995) extends the operation of privilege to proceedings including: <ul style="list-style-type: none"> o Pre-trial discovery o Non-party discovery o Interrogatories o A notice to produce o Request to produce a document under Div1 PT4.6 <p>Under statute—ONLY APPLIES TO JUDICIAL PROCEEDINGS</p> <ul style="list-style-type: none"> o NB- documents sought by ACCC have automatic CLP s155(7B) CCA 2010 <p>Under common law- APPLIES TO JUDICIAL AND NON JUDICIAL inquiries and ALL FORMS of compulsory disclosure (such as search warrants) <i>Baker v Campbell</i></p>
<p>3. WHO BEARS THE ONUS?</p>	<p>Onus to prove privilege and dominant purpose is upon the party who seeks to claim legal professional privilege <i>Mitsubishi Electric v Victoria Work Cover (2002)</i></p> <ul style="list-style-type: none"> - Must be proven on a balance of probabilities <i>Southland Coal (2006)</i>
<p>4. IS THE PERSON A CLIENT?</p>	<p>s117- Definitions (EA 1995)</p> <p>“Client”</p> <ul style="list-style-type: none"> a) A person who engages a lawyer to provide legal services or who employs a lawyer b) An employee or agent of a client
<p>5. IS THE COMMUNICATION CONFIDENTIAL?</p>	<p>Communication may be <u>oral, written or electronic</u> <i>AFP v Propend Finance (1997)</i></p> <p>Confidential= when the person who prepared the document, OR the person for whom it was prepared is under an <u>express or implied obligation NOT to disclose it’s contents</u> (regardless of whether an obligation arises under law) s117 (EA 1995)</p>

6. IS THE PURPOSE LEGAL ADVICE OR LITIGATION?	Legal Advice
	<p><i>Daniels Corporation International v ACCC (2002)</i> S118 (EA1995) <u>Evidence is NOT to be adduced if, on objection by a client, the court finds that the evidence would result in disclosure of:</u></p> <ul style="list-style-type: none"> a) <u>A confidential communication made between the client and lawyer</u> b) A confidential communication made <u>between 2 or more lawyers acting for the client</u> c) The contents of a confidential document prepared by the client, lawyer and another person (regardless of whether it was delivered or not) <p>For the dominant purpose of the lawyer or lawyers <u>providing legal advice</u></p>
	Litigation:
	<p><i>Grant v Downs</i> S119 (EA 1995) <u>Evidence is NOT to be adduced if, on objection by a client, the court finds that the evidence would result in disclosure of:</u></p> <ul style="list-style-type: none"> a) A confidential communication between the client and another person or between a lawyer acting for the client and another person that was made or, b) The <u>contents of a confidential document</u> that was prepared <p>For the dominant purpose of the client being provided with professional <u>legal services relating to a proceeding or anticipated proceeding</u>, in which the client is or may be a party.</p>
	Third Party Communications
	<p>Created between the client or their legal agent and a third party- for use in actual or anticipated litigation <i>Ritz Hotel v Charles of the Ritz (1988)</i></p> <ul style="list-style-type: none"> - The function of the communication must be to enable the client to obtain legal advice- EVEN IF the communications are not directed to the clients lawyers <i>Southland Coal (2006)</i> <p><u>Is litigation reasonably anticipated?</u> Litigation is reasonably anticipated if its initiation is <u>likely or reasonably probable</u> there must be a <u>real prospect as distinct from a mere possibility</u> but does NOT have to be more likely than not.</p>
Unrepresented Parties:	
<p>Privilege EXTENDS to unrepresented parties S120 (EA 1999) <u>Evidence is NOT to be adduced if, on objection by a party who is not represented in the proceedings by a lawyer, the court finds that adducing the evidence would result in disclosure of:</u></p> <ul style="list-style-type: none"> a) A confidential communication between the party and another person or b) The contents of a confidential document that was prepared either by or at the direct request of the party, <p>For the dominant purpose of preparing of conducting proceedings</p>	

7. IS THE PURPOSE THE DOMINANT PURPOSE??	Which test?
	Dominant purpose test is preferred over a sole purpose test- acknowledging that there may be trivial or incidental purposes to the communication <i>Esso v Commissioner of Taxation (1999)</i>
	What is “dominant”
	Dominant= Purpose that was the <u>ruling, prevailing or most influential</u> <i>Federal Commissioner of Taxation v Spotless (1996)</i>
	- If there are two equal purposes one of which is NOT to obtain legal advice/ prepare for litigation then it is UNLIKELY that the dominant purpose test will be satisfied <i>Southland Coal (2006)</i>
	NOT sufficient merely to claim that the document was for the dominant purpose of legal advice.
	Copies of non-privileged documents may be privileged if the copy is taken for the dominant purpose of legal advice or for the use in litigation <i>AFP v Propend Finance (1997)</i>
	How is it judged?
	Dominant Purpose is a question of fact – construed objectively
Test of dominant purpose is <u>objective</u> however the <u>subjective intention</u> of the person creating the document MAY be given weight <i>Sydney Airports Corp v Singapore Airlines (2005)</i>	
- Generally purpose is assessed by the maker of the document HOWEVER not always—i.e where a solicitor requests a report the relevant intention is that of the solicitor <i>Mitsubishi Electric v Victorian Work Cover (2002)</i>	
Documents produced in the ordinary course of business will NOT be privileged <i>Southland Coal (2006)</i>	
- Nor will documents that assist in making a decision as to whether or not to grant indemnity or advice on commercial alternatives attract privilege	
When?	
The purpose of the creation of the document is taken to be the one <u>in existence at the time of the confidential documents creation or preparation</u> <i>Barnes v Commissioner of Taxation (2007)</i>	
- The use for which a document is put <u>after it is brought into existence</u> is immaterial—only the purpose at creation is important <i>AFP v Propend Finance</i>	
Power of the Court	
The court has the power to inspect the document to determine privilege	
- ALSO if the person seeking privilege fails to call evidence as to the issue of purpose- the court is entitled to infer that such evidence would NOT have assisted the purpose argument (as seeker has onus to prove)	

<p>8. WOULD EVIDENCE ACTUALLY DISCLOSE COMMUNICATIONS?</p>	<p>Disclosure does NOT occur if mere “wonder and speculation” as to what legal advice has been communicated would be created by the evidence being adduced <i>Southland Coal (2006)</i></p> <p>IF NO DISCLOSURE= CAN be adduced as evidence</p> <ul style="list-style-type: none"> - No inference can be drawn by relying on it <p>IF YES DISCLOSURE= CANNOT be adduced UNLESS privilege has been waived</p>
<p>9. HAS PRIVILEGE BEEN WAIVED?</p>	<p>Generally:</p> <p>S121 (EA1995)</p> <ol style="list-style-type: none"> 1. This division does not prevent evidence relevant to a question concerning intentions of a <u>client who has died</u> 2. Does not prevent the adducing of evidence if it would <u>prevent an order from being enforced</u> 3. Does not prevent the adducing of evidence of a communication or document that <u>affects a right of a person</u> <p>Consent + Inconsistency</p> <p>S122 (EA 1995)</p> <ol style="list-style-type: none"> 1. Evidence may be adduced if the <u>client gives consent</u> 2. If the client has <u>acted in a way that is inconsistent</u> with objections to the adduction of evidence 3. A client has <ol style="list-style-type: none"> a) <u>Knowingly and voluntarily disclosed the substance of the evidence to another person</u> b) The <u>substance</u> of the evidence has been disclosed with the <u>express or implied consent</u> of the client. <p>Can also be waived by a legal practitioner on behalf of the client EVEN IF the client instructs otherwise <i>Esso Australia Resources v Commissioner of Taxation (1999)</i></p> <p>A subjective intention to waive the protection is not essential (i.e. may occur accidentally) <i>Mann v Carnell (1999)</i></p> <ul style="list-style-type: none"> - i.e. even if the client INTENDS to keep the communication privileged their actions may waive the privilege - Additionally even if the client mistakenly believes that privilege did not attach to the document in the first place—the privilege may be waived <i>Fenwick v Wambo Coal (2011)</i> <p>MAY NOT be waived where the communication is disclosed between ministers/ employees with the instructions that the communication is confidential and should not be passed on <i>Mann v Carnell</i></p> <p>Disclosure of the “SUBSTANCE” of advice will include: express or implied summary of the document, the conclusions of the document, the reasoning behind the conclusions <i>Fenwick v Wambo Coal (2011)</i>- however ULTIMATELY is a question of degree.</p> <ul style="list-style-type: none"> - Mere inadvertent reference to the document will NOT be a waiver

	<p>Joint Clients</p> <p>S124 (EA 1995)</p> <ol style="list-style-type: none"> 1. Applies to <u>civil proceedings</u> in which 2 or more persons have jointly retained a lawyer 2. Does NOT prevent one of those parties from adducing evidence of: <ol style="list-style-type: none"> a. a <u>communication made by any one</u> of them to a lawyer b. the <u>contents of a confidential document prepared</u> by or at the direction or request of any one of them <p>In connection with the matter Therefore - privilege may be waived on your behalf by another joint client.</p> <hr/> <p>Misconduct</p> <p>S125 (EA 1995)</p> <ol style="list-style-type: none"> 1. This does NOT prevent the adducing of evidence of: <ol style="list-style-type: none"> a) A communication made ...in furtherance of the <u>commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty</u> b) A communication which the client or lawyer <u>knew or ought reasonably to have known</u> was made or prepared in furtherance of a <u>deliberate abuse of power</u> <hr/> <p>Related Communications</p> <p>If, because of the application of ss121-125 the division does NOT prevent the adducing of evidence of a communication or document- those sections do NOT prevent the adducing of evidence of ANOTHER communication if it is reasonably necessary to enable a proper understanding of the communication or document. (Even if that document would otherwise be privileged)</p> <hr/> <p>IF WAIVED: Privileged document CAN be adduced as evidence IF NOT WAIVED or SUBJECT TO AN EXCEPTION to the waiver= CANNOT BE ADDUCED</p>
<p>10. IS THERE AN EXCEPTION TO THE WAIVER?</p>	<p>S122(5)</p> <p>A client is <u>NOT taken to have acted in a manner inconsistent</u> with the objection to the adducing of evidence merely because:</p> <ol style="list-style-type: none"> a) the substance of the evidence has been disclosed: <ol style="list-style-type: none"> i. in the course of making a confidential communication or preparing a confidential document, or ii. as a <u>result of duress or deception</u>, or iii. under <u>compulsion of law</u>, or iv. if the client or party is a body established by, or holding office under, an Australian law b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing professional legal services to both of them or a disclosure to a person with whom the client had, at the time of the disclosure a common interest relating to the proceedings in an Australian court or a foreign court

SAFEGUARDS RELATING TO POWERS

WIPE PROVISIONS:

- Warn that failure to comply may be an offence
- Inform of the reason for the exercise of power
- Provide your name and place of duty
- Evidence that you are a police officer

1. WHEN DO SAFEGUARDS APPLY?	<p>S201(3) LEPRA</p> <p>This section applies to the exercise of the following powers:</p> <ol style="list-style-type: none"> a. a power to <u>search or arrest a person</u> b. a power to <u>search a vehicle</u>, vessel or aircraft c. a power to <u>enter premises</u> (not being a public place) d. a power to <u>search premises</u> (not being a public place) e. a power to <u>seize any property</u> f. a power to <u>stop or detain a person</u> g. a power to <u>request a person to disclose their identity</u> or the identity of another person (INCLUDING a power to require the removal of a face covering for identification purposes) h. a power to <u>establish a crime scene</u> at premises (not being a public place) i. power to give a <u>direction to a person</u> j. a power under s21A to request a person to <u>open their mouth or shake their hair</u> k. a power under s26 to request a person to <u>submit to a frisk search</u> <p>DOES NOT APPLY</p> <ul style="list-style-type: none"> - Exercise or power to enter or search premises and vehicles <u>conferred by a covert search warrant s201(3AAA)</u>
2. WHAT INFORMATION SHOULD THE POLICE PROVIDE?	<p>POs must provide person with the following information:</p> <ul style="list-style-type: none"> - Evidence that the PO is a PO (unless in uniform) s201(1)(a) - The name of the PO and their place of duty s201(1)(b) - Reasons for the exercise of the power s201(1)(c) <ul style="list-style-type: none"> o SCOPE as discussed in <i>Johnstone</i>
3. WHEN MUST THE INFORMATION BE PROVIDED?	<ul style="list-style-type: none"> - <u>Before or at the time of exercising the power</u>, if it is practicable to do so s201(2)(a) - If NOT practicable- <u>as soon as reasonably practicable</u> after exercising the power s201(2)(b) <p>HOWEVER in some circumstances you MUST provide the information <u>BEFORE</u> exercise of power where:</p> <p>S201(2A)</p> <ul style="list-style-type: none"> - Requesting a person to disclose their identity or the identity of another (including the power to require the removal of a face covering) s201(3)(g) - Giving directions to a person s201(3)(i) - Requesting a person under s21A to open their mouth or shake their hair s201(3)(j)

S201(2C)

If exercising a power to make a direction or request that person is required to comply with the PO must, as soon as is reasonably practicable provide the person with:

- a) A warning that the person is required by law to comply with the request or direction AND
- b) If the person does not comply after that warning and PO believes that the failure to comply is an offence, another warning that the failure to comply is an offence.

POWER TO ARREST

1. DOES THE PO HAVE A POWER TO ARREST?	Specific Powers to Arrest: 99(1)
	<p>PO May, without a warrant:</p> <ul style="list-style-type: none"> - Arrest a person if they <u>are committing</u> an offence s99(1)(a) LEPRA - Arrest a person if they have <u>just committed an offence</u> s99(1)(b) LEPRA - Arrest a person if they have committed a <u>serious indictable offence</u> for which they haven't been tried s99(1)(c)LEPRA
	Suspicion on Reasonable Grounds: 99(2)
	<p>PO may without warrant arrest a person IF the PO <i>suspects on reasonable grounds</i> that the person has committed an offence under any act s99(2) LEPRA</p> <p><u>What is suspicion on reasonable grounds?</u> <i>R v Rondon (2001):</i></p> <ul style="list-style-type: none"> o Reasonable suspicion involves <u>less than a reasonable belief</u> but MORE than a possibility o MORE than a reason to consider or look into the possibility of existence <p><u>When is it assessed?</u></p> <ul style="list-style-type: none"> o Assessed by considering the <u>information in mind of the PO at the time</u> <p><u>How is it assessed?</u></p> <ul style="list-style-type: none"> o Must be something which would create in the mind of a <u>reasonable person</u> an <u>apprehension</u> or fear of one of the states of affairs in s36 LEPRA o NOT arbitrary- <u>must be based on facts</u>- Materials must have PROBATIVE VALUE o MAY be based on hearsay or other materials which would be inadmissible o Regard should be had to the source of the information = its content <p>EG: The youthfulness of the driver and evidence of panel damage is NOT SUFFICIENT to form "reasonable suspicion: that the person has committed an offence <i>R v Rondo</i></p>

<p>2. IS THE ARREST NECESSARY?</p>	<p>ONCE s99(1) OR 99(2) has been fulfilled is it NECESSARY to arrest the person?</p>
	<p>POLICY- The most basic of human rights requires that a person is NOT to be unlawfully deprived of their liberty and therefore arrest should ONLY be as a <u>LAST RESORT</u></p> <p>Must NOT arrest unless it is NECESSARY to achieve one or more of the purposes set out in s99(3) LEPRA <i>Hage- Ali v NSW</i></p> <p>S99(3) LEPRA: A PO must NOT arrest a person for the purpose of taking proceedings for an offence against the person UNLESS the PO suspects on reasonable grounds that it is NECESSARY to arrest the person to achieve one or more of the following purposes:</p> <ol style="list-style-type: none"> a) To ensure the <u>appearance of the person before a court</u> in respect of the offence, b) To <u>prevent a repetition or continuation of the offence</u> or the commission of another offence, c) To <u>prevent the concealment, loss or destruction of evidence</u> relating to the offence d) To <u>Prevent harassment of or interference with, a person who may be required to give evidence</u> in proceedings in respect of the offence e) To <u>prevent the fabrication of evidence</u> in respect to the offence f) To <u>preserve the safety or welfare</u> of the person <p><u>What is “necessary”</u></p> <ul style="list-style-type: none"> ○ Must show that alternatives to arrest are insufficient to achieve the same purposes <i>Hage-Ali v NSW</i> <ul style="list-style-type: none"> • Caution • Warning • Infringement notice • Penalty notice • Court attendance notice • Youth justice conference • Power to give reasonable directions in public places (s197 move along orders) <p>NOTE- s99(3) does NOT include the power to arrest for the purposes of <u>investigation</u>- this is UNLAWFUL <i>R v McLean</i></p> <ul style="list-style-type: none"> ○ Deprivation of liberty CANNOT be justified merely for the purpose of asking questions <i>R v Eyres</i>

3. HAS POWER TO ARREST BEEN EXECUTED CORRECTLY?	ONCE s99(1) or 99(2) have been fulfilled and arrest is determined NECESSARY under s99(3)- Must consider whether the arrest was EXECUTED CORRECTLY
	Police Entry of Premises
	<p>What classifies as “premises”??</p> <p><i>Halliday v Nevill</i></p> <ul style="list-style-type: none"> ○ Arrest will only be lawful if it is determined that police AREN”T trespassing, therefore PO require licence to enter <ul style="list-style-type: none"> ○ Express licence= Person permits entry. May be revoked at will. ○ Implied license= implied unless there is something which leads to the conclusion that an implied licence was negated or revoked by express refusal or implied refusal (eg. Signage or locked gate). <p><u>Police entry without licence:</u></p> <p>S10 LEPPRA</p> <p>PO have power to “enter to arrest or detain someone or to execute a warrant”:</p> <ol style="list-style-type: none"> 1. A police officer may enter and <u>stay for a reasonable time</u> in order to <u>arrest</u> a person, or <u>detain</u> a person under the Act or arrest a person named in a <u>warrant</u> 2. PO may ONLY enter a dwelling to arrest or detain a person IF the PO <u>believes on reasonable grounds</u> that the person is <u>inside the dwelling</u> 3. PO who enters the premises under this section MAY <u>search the premises for this person</u> 4. DOES NOT authorize a PO to enter the premises to detain a person if the PO has <u>not complied</u> with the requirements imposed on a PO under the Act 5. In this section “arrest” of a person in a warrant includes <u>apprehend, take into custody, detain or remove</u> to another place for examination or treatment.
	Inform of true reason for arrest:
<p>POLICY:</p> <ul style="list-style-type: none"> ○ Person should be put in a position to be able to give an explanation of any misunderstanding <i>NSW v Dely</i> ○ If a person is informed the person may have an opportunity to conduct themselves in such a way that no offence is committed <i>Johnstone v NSW</i> <p>S201 LEPPRA- Codifies common law rule that the arresting officer is required to inform the person arrested of the true ground on which the arrest is being made <i>Christie v Leachinsky</i></p> <p><u>What must be said??</u></p> <p><i>Christie v Leachinsky</i> cited in <i>Johnstone v NSW</i></p> <ul style="list-style-type: none"> - Where a policeman arrests without a warrant...he must in ordinary circumstances <u>inform the person of the true grounds for arrest</u> <ul style="list-style-type: none"> ○ Words must be unequivocal or self-evidently refer to the true ground for the arrest. ○ Does NOT need to be the exact charge- rather the substance of the reason for the offence ○ How much information the person needs to be told will depend upon the circumstances. 	

If the citizen is not so informed but is nevertheless seized, the policeman will generally be liable for false imprisonment

Exceptions:

- The requirement does not exist if the circumstances are such that he must know the general nature of the alleged offence
- Person arrested CANNOT complain that they have not been supplied with information if they themselves produced the situation which makes it practically impossible to inform him (i.e running away)

Use of force:

POs may use such force as is reasonably necessary to carry out their powers

S231 LEPPR:

A PO or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest

S230 LEPPR:

It is lawful for a PO exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the PO to use such force as is reasonably necessary to exercise the function.

What is "reasonably necessary"?

Woodley v Boyd:

- Degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose PROVIDED that those means adopted are such as a reasonable man placed in the circumstances would NOT consider it disproportionate to the evil to be prevented

Moses v State of NSW

- When evaluating the reasonable necessity of conduct take into account:
 - o Pressure of events
 - o Agony of the moment
 - o NOT hindsight

4. ARREST BY PRIVATE PERSONS

S100 LEPPR

1. A person other than a PO may, without a warrant, arrest a person if:
 - a. The person is in the act of committing an offence of,
 - b. The person has just committed any such offence, or
 - c. The person has committed a serious indictable offence for which the person has not been tried
2. A person who arrests another person under this section MUST, as soon as reasonable practicable, take the person and any property found on the person, before an authorized officer to be dealt with according to the law

Similarly as for PO arrest- citizens arrest CAN ONLY be effected if the offence was actually being committed or immediately thereafter under **s100(a) or (b)** however CANNOT be undertaken for the purposes of investigation.

<p>5. CONSEQUENCES OF UNLAWFULNESS OF ARREST</p>	<p>Burden is upon the defendant to PROVE the lawfulness of the arrest <i>Zavarinos v NSW</i></p> <p><i>NSW v Ibbett (2006)</i></p> <ul style="list-style-type: none"> ○ s5 Crown Proceedings Act- renders the estate vicariously liable for torts committed by officers <ul style="list-style-type: none"> ○ This applies where the PO commits the torts <u>in the course of their duty</u> s8 Law Reforms (Vicarious Liability) Act ○ Claims for torts committed by POs in their normal functions as officers may NOT be made against individual officers rather MUST be made against the Crown s9B(2) Police Legislation Amendment (Civil Liability) Act ○ IF the Crown denies that it is vicariously liable for the alleged tort a person as the actions which gave rise to the tort were OUTSIDE the functions authorized as a PO= MAY bring the PO into the proceedings s9B (3) Police Legislation Amendment (Civil Liability) Act ○ The State may claim damages or seek contribution or indemnity against the POS s9E(b) Police Legislation Amendment (Civil Liability) Act <ul style="list-style-type: none"> ○ State is NOT rendered vicariously liable for police torts if it otherwise would not be so liable (s9E(a) + <i>NSW v Ibbett</i>) ○ Court may award exemplary and aggravated damages—in order to restrain arbitrary and outrageous use of executive power and prevent oppressive, arbitrary and unconstitutional action by the servants of the government”.
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DETAINING A PERSON AFTER ARREST

1. WHAT MUST HAPPEN AFTER ARREST?	<p>Certain procedures are <u>essential</u> after a person is arrested</p> <p>S99(4) LEPRA- A person is to be taken <u>as soon as reasonably practicable</u> before an authorized person (usually a magistrate) to be dealt with according to the law</p> <ul style="list-style-type: none"> - At this point charges will be laid by the police, the accused will be entitled to legal representation and bail will be granted or denied
2. IS THERE DELAY?	<p>Where there is a delay in fulfilling s99(4)- courts must decide whether the time lapse was <u>reasonable in the circumstances</u></p> <ul style="list-style-type: none"> - Unlawful detention in some circumstances may become lawful, where the POs form an intention to bring the person before a justice without undue delay <i>Edgar Michaels v The Queen (1995)</i>
3. WHO IS COVERED BY THE SAFEGUARDS OF Pt 9?? (Investigation and questioning rule + rules and rights in detention)	<p>S110(2)</p> <p>A reference in this part to a <u>person who is under arrest</u> or a person who is arrested <u>includes reference to a person who is in the company of a police officer</u> for the purpose of participating in an investigative procedure if:</p> <ol style="list-style-type: none"> a) The PO believes that there is <u>sufficient evidence</u> to establish that the person has committed an offence that is or is to be the subject of the investigation, or b) The PO <u>would arrest the person if the person attempted to leave</u> c) The PO has the given the person <u>reasonable grounds for believing</u> that the person <u>would not be allowed to leave</u> if the person wished to do so <p>THEREFORE: Anyone who is arrested or in the company of a PO in the above circumstances and entitled to the below rights re investigation and detention</p>

4. DETENTION	<p>Under s114 a person may be detained for the investigation period under s115</p> <ul style="list-style-type: none"> - The investigation period begins when the person is arrested and ends at a time that is reasonable, but NOT exceeding 4 hours - The period may be extended by a detention warrant under s118
	Can the person be detained?
	<p>A person who is under arrest may be detained (s114(1)) for the purposes of investigation (s114(2)). During the investigation PO can investigate other offences (s114(3)). HOWEVER the person must be released or brought before a court within the investigation period (s114(4))</p>
	<p>S114 Detention after arrest for purposes of investigation</p> <ol style="list-style-type: none"> (1) PO in accordance with this section <u>may detain a person who is under arrest</u>, for the investigation period provided for by s115 (2) PO may so detain a person for the <u>purpose of investigating whether the person committed the offence</u> for which the person is arrested (3) IF, while a person is so detained, the PO forms a reasonable suspicion, the <u>PO may also investigate the person's involvement in that other offence</u> during the investigation period. (CAN INVESTIGATE OTHER OFFENCES) (4) The person must be: <ol style="list-style-type: none"> a. <u>Released</u> (whether unconditionally or on bail) within the investigation period, or b. <u>Brought before an authorized officer or court</u> within that period, or if it is not practicable to do so within that period, as soon as practicable after the end of that period.
	What is the investigation period?
<p>S115 Investigation period</p> <ol style="list-style-type: none"> 1. The investigation period is a period that <u>begins when the person is arrested and ends at a time that is reasonable</u> having regard to all the circumstances, but does NOT exceed the maximum investigation period 2. The <u>Maximum investigation period is 4 hours</u> or such longer period as the maximum investigation period may be extended to by a detention warrant 	

What is “reasonable time” according to s115?

Burden lies with prosecution to show that the time was reasonable (s116(3)) taking into account all relevant circumstances (s116(1) and (2))

S116 Determining Reasonable Time

1. In determining what is a reasonable time for the purposes of s115(1) all the relevant circumstances of the particular case must be taken into account
2. Without limiting the relevant circumstances that must be taken into account, the following circumstances are to be taken into account:
 - a. The person’s age, physical capacity and mental capacity
 - b. Whether the presence of the person is necessary
 - c. The number, seriousness and complexity of offences under investigation
 - d. Whether the person has indicated a willingness to make a statement
 - e. The time taken for police officers connected with the investigation to attend the place where the person is being detained
 - f. Whether the police officer reasonably requires time to prepare
 - g. The time required for facilities for conducting investigative procedures in which the person is to participate (OTHER than facilities for complying with s281 Criminal Procedure Act) to become available
 - h. The number and availability of other persons who need to be questioned
 - i. The need to visit the place where any offence concerned is believed to have been committed, or any other place reasonably connected with the investigation
 - j. The time during which the person is in the company of the police before and after the person is arrested
 - k. The time taken to complete any searches or other investigative procedures that are reasonably necessary to the investigation
 - l. The time required to carry out any other activity that is reasonably necessary for the proper conduct of the investigation

In any criminal proceedings in which the reasonableness of any period of time that a person was detained under this Part is at issue the burden lies on the prosecution to prove on the balance of probabilities that the period of time was reasonable.

Time NOT included in investigation period?

Any time that is discounted, the onus lies on the prosecution to prove on the balance of probabilities (s117(2)) that the time fell within one of the exceptions listed (s117(1)(a)-(n))

S117 Certain times to be disregarded in calculating investigation period

1. The following times (to the extent that those times are times during which any investigative procedure in which a person who is detained under this part is to participate is reasonably suspected or deterred) are not to be taken into account in determining how much of an investigation period has elapsed:
 - a. Any time that is reasonably necessary to convey the person from the place where the person is arrested to the nearest premise where facilities are available for conducting investigative procedures
 - b. Any time that is reasonably spent waiting for the arrival at the place where the person is being detained of police officers, whose particular skills are necessary to the investigation
 - c. Any time that is reasonably spent waiting for facilities for complying with s281 of the Criminal Procedures Act to become available
 - d. Any time that is required to allow the person to communicate with a friend, relative, guardian, independent person, Australian legal practitioner or consular official
 - e. Any time that is required to allow a person mentioned in (c) to arrive at the place where the person is being detained
 - f. Any time that is required to allow the person to consult at the place where they are being held
 - g. Any time that is required to arrange for an allow the person to receive medical attention
 - h. Any time that is required to arrange for the services of an interpreter for the person and allow the interpreter to arrive at the place
 - i. Any time that is reasonably required to allow for an identification parade to be arranged and conducted
 - j. Any time that is required to allow the person to rest or receive refreshments or to give the person access to toilet and other facilities
 - k. Any time that is required to allow the person to recover from the effects of intoxication due to alcohol or other drugs
 - l. Any time that is reasonably required to prepare, make and dispose of any application for a detention warrant
 - m. Any time that is reasonably required to carry out charging procedures in respect of the person
 - n. Any time that is reasonably required to carry out a forensic procedure
2. In any criminal proceedings in which the question of whether any particular time was a time that was not to be taken into account because of this section, the burden lies on the prosecution to prove on the balance of probabilities that he particular time was not to be taken into account.

5. EXTENSION OF DETENTION	Can the investigation period be extended?
	<ul style="list-style-type: none"> - A PO may apply to extend the investigation period (s118(1)), this application can be made in person or by telephone (s119(1)). - The application MUST fulfil the requirement of s120 in order to be considered. - Considering the conduct of the interview, the reasonable necessity, alternative means and impracticality (s118(5)) an authorized officer MAY extend the maximum by up to 8 hrs (s118(3)) - HOWEVER this can only occur once (s118(4)). - Burden lies on the prosecution to prove the warrant was issued (s199(2)). - A person is entitled to defend the application (s118(2)). - After the detention warrant is issued the custody manager must inform the person in writing and orally of the warrant and its effect (s118(6))
	What must an application for extension include?
	<p>S120 Information in application for detention warrant</p> <ol style="list-style-type: none"> 1. must NOT issue a detention warrant ULESS the application includes : <ol style="list-style-type: none"> a. The <u>nature of the offence</u> under investigation b. The <u>general nature of the evidence</u> on which the person to whom the application relates was arrested c. <u>What investigation has already taken place and what further investigation is proposed</u> d. <u>The reasons for believing that the continued detention of the person is reasonably necessary</u> e. <u>The extent to which the person is cooperating in the investigation</u> f. <u>If any previous applications have been made, details of the previous application and of the refusal and any additional information required</u> 2. The applicant must provide (either orally or in writing) such further information as the authorised officer requires concerning the grounds on which the detention warrant is being sought. 3. Don't need to disclose the identity of person whom information was obtained.
Process of extension	
	<p>S118- Detention warrant to extend investigation period</p> <ol style="list-style-type: none"> 1. PO may <u>before the end of the investigation period</u>, apply for a warrant to <u>extend the maximum investigation period beyond 4 hrs</u> 2. The person to whom an application for a detention warrant relates, or the person's legal representative may <u>make representations</u> (defence) 3. The authorized officer may issue a warrant that <u>extend the maximum investigation period by up to 8 hrs</u> 4. The maximum investigation period <u>cannot be extended more than once</u> 5. MUST NOT issue a warrant to extend UNLESS satisfied that <ol style="list-style-type: none"> a. <u>the investigation is being conducted diligently and without delay</u> b. further detention is <u>reasonably necessary to complete the investigation</u> c. <u>The is no reasonable alternative means</u> of completing the investigation other than by continued detention d. Circumstances exist in the matter that make it <u>impracticable for the investigation to be completed within the 4 hr period</u>

6. As soon as reasonably practicable after a detention warrant is issued, the custody manager for the person to whom the warrant relates
 - a. Must give the person a copy of the warrant
 - b. Must orally inform the person of the nature of the warrant and its effect.

S119 Detention Warrants:

1. An application for a detention warrant may be made by the applicant in person or by telephone
2. In any criminal proceedings the burden lies on the prosecution to prove on the balance of probabilities that the warrant was issued
3. Where the application is made by telephone, the applicant must , within one day, give or transmit to the authorized officer an affidavit setting out the information on which the application was based

6. RIGHTS IN DETENTION	What rights + safeguards exist for persons in detention?
	<ul style="list-style-type: none"> - s122: Custody manager to caution the detained person and given them a summary of part 9 - s123: Right to communicate with friend, relative, guardian or legal representative - s124: Right of foreign nationals to communicate with consular office - s126: provision of information to a friend, relative or guardian - s127: Provision of information to certain other persons - s128: Provision of an interpreter - s129: Right to medical attention - s130: Right to reasonable refreshments and facilities. (See full legislation at end) <p>IF ANY of these requirements are breached then the detention will become unlawful</p>
	When can these requirements NOT be complied with?
	<p>125 Circumstances in which certain requirements need not be complied with</p> <p>(1) A requirement imposed on a custody manager under section 123 relating to a friend, relative, guardian or independent person need not be complied with if the custody manager believes on reasonable grounds that doing so is likely to result in:</p> <ul style="list-style-type: none"> (a) an accomplice of the detained person avoiding arrest, or (b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or (c) hindering the recovery of any person or property concerned in the offence under investigation, or (d) bodily injury being caused to any other person. <p>(2) Further, in the case of a requirement that relates to the deferral of an investigative procedure, a requirement imposed on a custody manager under section 123 relating to a friend, relative, guardian or independent person need not be complied with if the custody manager believes on reasonable grounds that the investigation is so urgent, having regard to the safety of other persons, that the investigative procedure should not be deferred.</p>

7. VULNERABLE PERSONS	Who is vulnerable?
	<p>S24 Vulnerable persons</p> <ol style="list-style-type: none"> 1. Reference to a vulnerable person is a reference to a person who falls within one or more of the following categories <ol style="list-style-type: none"> a. <u>Children</u> b. Persons who have <u>impaired intellectual functioning</u> c. Persons who have <u>impaired physical functioning</u> d. Persons who are <u>Aboriginal persons or Torres Strait Islanders</u> e. Persons who are of <u>non-english speaking background</u> <p style="margin-left: 40px;"><u>BUT does not include a person whom the custody manager reasonably believes is not a person falling within any of those categories</u></p>
	Specific provisions for vulnerable persons?
	<p>S25 Custody manager to assist vulnerable person</p> <p>The custody manager for a detained person who is a vulnerable person <u>must as far as practicable, assist the person in exercising the persons rights under pt9 of the act</u> including any right to make a telephone call to a legal practitioner, support person or other person</p> <p>S26 Support Person</p> <p>A person may be a support person for a detained person who is a vulnerable person for the purposes of this division <u>ONLY if they are aged 18 years and over and is</u></p> <ol style="list-style-type: none"> a. in the case of a child <ol style="list-style-type: none"> i. <u>A parent or guardian</u> ii. A person who is <u>responsible for the care of the child</u> iii. <u>An adult who has the consent of the parents or guardians</u> iv. If the child is over 14y/o any person who has the <u>consent of the child</u> v. <u>Legal practitioner of the child's own choosing</u> b. In the case of a detained person who is not a child <ol style="list-style-type: none"> i. <u>Guardian or any other person who is responsible for the care of the detained person</u> ii. <u>Relative, friend or any other person who has consent of detained person</u> iii. If none of the persons in the above paragraph are available- <u>a person (other than a PO) who has expertise in dealing with vulnerable persons of this category</u>
8. BREACH OF SAFEGUARDS AND RIGHTS in DETENTION	<p>Whether or not an error leads to invalidity of the warrant or detention will depend upon the <u>circumstances PARTICULARLY the nature and significance of the inaccuracy</u> <i>R v Rondo</i></p> <ul style="list-style-type: none"> - The breach of one requirement may not by itself lead to invalidity- however combined with other errors it may <ul style="list-style-type: none"> ○ IN <i>R v Rondo</i> the requirements of s118(5) of which the authorized officer must be satisfied AND the need for an affidavit under s119(3) were emphasized ○ SEE ALSO <i>Neal v Ambulance Services</i> (medical attention) and <i>Cambell and 4 Ors v DPP</i> (Aboriginal people)

DIV 3- SAFEGUARDS RELATING TO PERSONS IN CUSTODY FOR QUESTIONING

122 Custody manager to caution, and give summary of Part to, detained person

(1) As soon as practicable after a person who is detained under this Part (a "**detained person**") comes into custody at a police station or other place of detention, the custody manager for the person must orally and in writing:

(a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and

(b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised officer and that the person, or the person's legal representative, may make representations to the authorised officer about the application.

(2) The giving of a caution does not affect a requirement of any law that a person answer questions put by, or do things required by, a police officer.

(3) After being given the information referred to in subsection (1) orally and in writing, the person is to be requested to sign an acknowledgment that the information has been so given.

123 Right to communicate with friend, relative, guardian or independent person and Australian legal practitioner

(1) Before any investigative procedure in which a detained person is to participate starts, the custody manager for the person must **inform the person orally and in writing that he or she may**:

(a) **communicate, or attempt to communicate, with a friend, relative, guardian or independent person**:

(i) to inform that person of the detained person's whereabouts, and

(ii) if the detained person wishes to do so, to ask the person communicated with to attend at the place where the person is being detained to enable the detained person to consult with the person communicated with, and

(b) **communicate, or attempt to communicate, with an Australian legal practitioner** of the person's choice and ask that Australian legal practitioner to do either or both of the following:

(i) attend at the place where the person is being detained to enable the person to consult with the Australian legal practitioner,

(ii) be present during any such investigative procedure.

(2) If the person wishes to make any communication referred to in subsection (1), the custody manager **must, as soon as practicable**:

(a) **give the person reasonable facilities** to enable the person to do so, and

(b) **allow the person to do so in circumstances in which, so far as is practicable, the communication will not be overheard.**

(3) The custody manager **must defer for a reasonable period any investigative procedure** in which the person is to participate:

(a) to allow the person to make, or attempt to make, a communication referred to in subsection (1), and

(b) if the person has asked any person so communicated with to attend at the place where the person is being detained:

(i) to allow the person communicated with to arrive at that place, and

(ii) to allow the person to consult with the person communicated with at that place.

(4) If the person has asked a friend, relative, guardian or independent person communicated with to attend at the place where the person is being detained, the custody manager **must allow the person to consult with the friend, relative, guardian or independent person in private and must provide reasonable facilities for that consultation.**

(5) If the person has asked an Australian legal practitioner communicated with to attend at the place where the person is being detained, the custody manager must:

(a) **allow the person to consult with the Australian legal practitioner in private** and must provide reasonable facilities for that consultation, and

(b) if the **person has so requested, allow the Australian legal practitioner to be present** during any such investigative procedure and to give advice to the person.

(6) **Anything said by the Australian legal practitioner** during any such investigative procedure is **to be recorded and form part of the formal record of the investigation.**

(7) An investigative procedure is **not required to be deferred under subsection (3) (b) (i) for more than 2 hours** to allow a friend, relative, guardian, independent person or Australian legal practitioner that the person has communicated with to arrive at the place where the person is being detained.

(9) The duties of a custody manager under this section owed to a detained person who is not an Australian citizen or a permanent Australian resident are in addition to the duties of the custody manager owed to the person under section 124.

(10) After being informed orally and in writing of his or her rights under this section, the person is to be requested to sign an acknowledgment that he or she has been so informed.

124 Right of foreign national to communicate with consular official

(1) This section applies to a detained person who is not an Australian citizen or a permanent Australian resident.

(2) Before any investigative procedure in which a person to whom this section applies is to participate starts, the custody manager for the person must inform the person orally and in writing that he or she may:

(a) **communicate, or attempt to communicate, with a consular official of the country** of which the person is a citizen, and

(b) **ask the consular official to attend at the place where the person is being detained** to enable the person to consult with the consular official.

(3) If the person wishes to communicate with such a consular official, the custody manager must, as soon as practicable:

(a) **give the person reasonable facilities** to enable the person to do so, and

(b) allow the person to do so in **circumstances in which, so far as is practicable, the communication will not be overheard.**

(4) The custody manager **must defer for a reasonable period** any investigative procedure in which the person is to participate:

(a) to allow the person to make, or attempt to make, the communication referred to in subsection (2), and

(b) if the person has asked any consular official so communicated with to attend at the place where the person is being detained:

(i) to allow the consular official to arrive at that place, and

(ii) to allow the person to consult with the consular official.

(5) If the person has asked a consular official communicated with to attend at the place where the person is being detained, the **custody manager must allow the person to consult with**

the consular official in private and must provide reasonable facilities for that consultation.

(6) An investigative procedure **is not required to be deferred** under subsection (4) (b) (i) **for more than 2 hours** to allow a consular official that the person has communicated with to arrive at the place where the person is being detained.

(7) An investigative procedure is not required to be deferred to allow the person to consult with a consular official who does not arrive at the place where the person is being detained within 2 hours after the person communicated with the consular official.

(8) After being informed orally and in writing of his or her rights under this section, the person is to be **requested to sign an acknowledgment** that he or she has been so informed.

(9) This section **does not apply if the custody manager did not know, and could not reasonably be expected to have known**, that the person is not an Australian citizen or a permanent Australian resident.

126 Provision of information to friend, relative or guardian

(1) The custody manager for a detained person **must inform the person orally** of any **request for information as to the whereabouts of the person** made by a person who claims to be a friend, relative or guardian of the detained person.

(2) The custody manager **must provide, or arrange for the provision of, that information to the person who made the request unless:**

(a) the detained person **does not agree** to that information being provided, or

(b) the custody manager believes on reasonable grounds that the person **requesting the information is not a friend, relative or guardian of the detained person**, or

(c) the custody manager believes on reasonable grounds that doing so **is likely to result in:**

(i) an **accomplice of the detained person avoiding arrest**, or

(ii) the **concealment, fabrication, destruction or loss of evidence** or the **intimidation of a witness**, or

(iii) **hindering the recovery of any person or property** concerned in the offence under investigation, or

(iv) **bodily injury** being caused to any other person.

127 Provision of information to certain other persons

(1) The custody manager for a detained person **must inform the person orally of any request** for information as to the whereabouts of the person made by a person who claims to be:

(a) an **Australian legal practitioner representing the detained person**, or

(b) in the case of a detained person who is not an Australian citizen or a permanent Australian resident, a **consular official** of the country of which the detained person is a citizen, or

(c) a **person** (other than a friend, relative or guardian of the detained person) **who is in his or her professional capacity concerned with the welfare of the detained person**.

(2) The custody manager **must provide, or arrange for the provision of, that information to the person who made the request unless:**

(a) the **detained person does not agree** to that information being provided, or

(b) the custody manager **believes on reasonable grounds that the person requesting the information is not the person who he or she claims to be.**

128 Provision of interpreter

(1) The custody manager for a detained person **must arrange for an interpreter to be present** for the person in connection with any investigative procedure in which the person is to participate if the custody manager has reasonable grounds for believing that the person is unable:

(a) because of **inadequate knowledge of the English language**, to communicate with reasonable fluency in English, or

(b) because of any **disability, to communicate with reasonable fluency.**

(2) The custody manager must ensure that any such **investigative procedure is deferred** until the interpreter arrives.

(3) However, the custody manager **need not:**

(a) **arrange for an interpreter to be present** if the **custody manager believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable**, or

(b) **defer any such investigative procedure** if the custody manager believes on reasonable grounds that **the urgency of the investigation, having regard to the safety of other persons, makes such deferral unreasonable.**

(4) If an **interpreter is not available** to be present for the person in connection with any investigative procedure in which the person is to participate, the custody manager must instead arrange for a **telephone interpreter for the person.**

(5) The custody manager must ensure that any such investigative procedure is deferred until a telephone interpreter is available.

(6) However, the custody manager **need not:**

(a) arrange for a telephone interpreter if the custody manager believes on reasonable grounds that the difficulty of obtaining such an interpreter makes compliance with the requirement not reasonably practicable, or

(b) defer any such investigative procedure if the custody manager believes on reasonable grounds that the urgency of the investigation, having regard to the safety of other persons, makes such deferral unreasonable.

129 Right to medical attention

The custody manager for a detained person **must arrange immediately for the person to receive medical attention** if it appears to the custody manager that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody manager.

130 Right to reasonable refreshments and facilities

(1) The custody manager for a detained person must ensure that the person is provided with **reasonable refreshments and reasonable access to toilet facilities.**

(2) The custody manager for a detained person must ensure that the person is provided with facilities to **wash, shower or bathe and (if appropriate) to shave if:**

(a) it is **reasonably practicable** to provide access to such facilities, and

(b) the custody manager is satisfied that the **investigation will not be hindered by providing the person with such facilities.**

POLICE SEARCH OF PERSON AND SEIZURE

1. DIFFERENT TYPES OF SEARCHES	<p>S3 LEPPRA</p> <p>FRISK: Quick running of hands or metal detection device over outer clothing. Examining anything worn or carried that is conveniently and voluntarily removed</p> <p>ORDINARY: Search of person or articles in their possession which may include requiring removal and examination of overcoat, jacket or similar and gloves, shoes, socks and hat</p> <p>STRIP: Search of person or articles in their possession. May include requiring removal of all clothes, examination of their body and the clothes. DOES NOT include cavity search</p>
2. DO SAFEGUARDS APPLY?	<p>The power to search a person is one which attracts the safeguards of s201</p> <p>201 Supplying police officer's details and giving warnings</p> <ol style="list-style-type: none"> 1. A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following: <ol style="list-style-type: none"> a. <u>evidence that the police officer is a police officer</u> (unless the police officer is in uniform), b. the <u>name of the police officer and his or her place of duty</u>, c. the <u>reason for the exercise of the power</u>. 2. A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)): <ol style="list-style-type: none"> a. <u>if it is practicable to do so, before or at the time of exercising the power</u>, or b. if it is not practicable to do so before or at that time, <u>as soon as is reasonably practicable</u> after exercising the power. 2C. If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with: <ol style="list-style-type: none"> a. <u>a warning that the person is required by law to comply with the request or direction</u> (unless the person has already complied or is in the process of complying), and b. if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, <u>a warning that the failure to comply with the request or direction is an offence</u>.

**3. SPECIFIC
RULES IN
CONDUCTING
A SEARCH**

s32 Preservation of privacy and dignity during search

1. A police officer or other person who searches a person must, as far as is reasonably practicable in the circumstances, comply with this section.
2. The police officer or other person must inform the person to be searched of the following matters:
 - a. whether the person will be required to remove clothing during the search,
 - b. why it is necessary to remove the clothing.
3. The police officer or other person must ask for the persons co-operation.
4. The police officer or other person must conduct the search:
 - a. in a way that provides reasonable privacy for the person searched, and
 - b. as quickly as is reasonably practicable.
5. The police officer or other person must conduct the least invasive kind of search practicable in the circumstances.
6. The police officer or other person must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer or person suspects on reasonable grounds that it is necessary to do so for the purposes of the search.
7. A search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned.
8. A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.
9. A person must be allowed to dress as soon as a search is finished.
10. If clothing is seized because of the search, the police officer or other person must ensure the person searched is left with or given reasonably appropriate clothing.

CONDUCT OF A STRIP SEARCH

33 Rules for conduct of strip searches (cf Cth Act, s 3ZI)

1. A police officer or other person who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following:
 - a. the strip search must be conducted in a private area,
 - b. the strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched,
 - c. except as provided by this section, the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.
2. A parent, guardian or personal representative of the person being searched may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present.
3. A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must, unless it is not reasonably practicable in the circumstances, be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the child or person, in the presence of another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person.
4. A strip search must not involve a search of a person's body cavities or an examination of the body by touch.
5. A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.
6. A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.
7. A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.
8. This section is in addition to the other requirements of this Act relating to searches.

34 No strip searches of children under 10 years

A strip search must not be conducted on a person who is under the age of 10 years.

4. SEARCH WITHOUT ARREST

21 Power to search persons and seize and detain things without warrant

1. A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:
 - a. the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,
 - b. the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,
 - c. the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,
 - NB Dangerous Article = A firearm, spare barrel or any ammunition, prohibited weapon, spear gun, article or device capable of discharging any irritant in liquid, powder, gas or chemical or any substance of causing bodily harm (s3)
 - d. the person has in his or her possession or under his or her control, in contravention of the Drug Misuse and Trafficking Act 1985, a prohibited plant or a prohibited drug.
2. A police officer may seize and detain:
 - a. all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and
 - b. all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and
 - c. any dangerous article, and
 - d. any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985, found as a result of a search under this section.

21A Ancillary power to search persons

1. In conducting a search of a person under section 21, a police officer may, if the police officer suspects on reasonable grounds that a thing referred to in section 21 (1) (a), (b), (c) or (d) is concealed in the person's mouth or hair, request the person:
 - a. to open his or her mouth, or
 - b. to shake, or otherwise move, his or her hair.
2. Subsection (1) does not authorise a police officer to forcibly open a person's mouth.
3. A person must not, without reasonable excuse, fail or refuse to comply with a request made by a police officer in accordance with this section and section 201.

204 Detention period for search limited

A police officer who detains a vehicle, vessel or aircraft for a search must not detain the vehicle, vessel or aircraft any longer than is reasonably necessary for the purpose.

SCOPE OF POWERS TO STOP + DETAIN under s21

Lassanah v State of NSW:

Illustrated the difference between arrest, false imprisonment, and detaining

- Detention, even if for over an hour on a footpath is NOT an arrest, it is a legitimate exercise of police powers under s21 to stop, search and detain
- HOWEVER it may amount to false imprisonment as it can occur where “a defendant’s actions direction, intentionally or negligently cause the confinement of the plaintiff for however short a period of time”
- Liability for false imprisonment - extended to someone giving false info to the police- however must “be active in promoting and causing the imprisonment as opposed to the mere giving of information to a police officer.

SEARCHES IN PUBLIC PLACES + SCHOOLS

26 Power to search for knives and other dangerous implements

1. PO may request a person who is in a public place or a school to submit to a frisk search if the PO suspects on reasonable grounds that the person has a dangerous implement (other than a laser pointer) in his or her custody.
 - 1A. PO may request a person to submit to a frisk search if the PO suspects on reasonable grounds that the person has a laser pointer in his or her custody
2. If the person is in a school and is a student at the school, the police officer may also request the person to do either or both of the following:
 - a. to submit to a search of any bag or other personal effect
 - b. to submit to a search of the person’s locker at the school
3. For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement (other than a laser pointer) in his or her custody.
4. Case of a search of a student in a school and if reasonably possible, allow the student to nominate an adult who is on the school premises to be present
5. In conducting a search a police officer may request the person to produce either or both of the following:
 - a. anything that the police officer has detected and has reasonable grounds to suspect is a dangerous implement,
 - b. anything detected during the search by an electronic metal detection device that the device indicates is of a metallic nature.

27 Failure to comply with requests relating to search and dangerous implements

A person must not, without reasonable excuse:

- a. fail or refuse to produce anything detected when requested to do so by a police officer in accordance with sections 26 and 201, or
- b. fail or refuse to comply with a request made by a police officer

28 Power to confiscate knives or other dangerous implements

1. A police officer may, in a public place or school:
 - a. take possession of anything that the police officer has reasonable grounds to suspect is a dangerous implement that is unlawfully in a person’s custody, and
 - b. confiscate the thing.

5. USE OF DRUG DETECTION DOGS	Can dogs be used?
	Use of drug detection dogs is authorized by s146
	146 General authority to use drug detection dogs
	<ol style="list-style-type: none"> 1. If a police officer is authorised to search a person for the <u>purpose of detecting a drug offence</u>, the officer is entitled to use a dog for that purpose. 2. A police officer is, for the purpose of detecting a drug offence, <u>entitled to be accompanied by a dog under the officer’s control if the officer is entitled to enter, or be in or on, particular premises</u> in the exercise of the officer’s functions. 3. Neither the State nor a police officer is liable to any action, liability, claim or demand merely because a dog entered, or was in or on, premises as provided by this section
	General use of Dogs
Use of dogs for “general drug detection”—ie for general situations of detention OUTSIDE of a situation where an officer searching a person has a reasonable suspicion of a drug offence- authorized under s147	
147 Use of dogs for general drug detection authorised	
A police officer is <u>authorised to use a dog to carry out general drug detection</u> , but only as provided by this Division.	
Use of dogs WITHOUT a warrant:	
Limited under s148 to:	
<ul style="list-style-type: none"> - Liquor sale + consumption - Public places where there is a sporting event, concert or other entertainment - Entering or leaving a bus/train on a prescribed route - Entering/ leaving Tattoo Parlours 	
148 General drug detection with dogs in authorised places	
<ol style="list-style-type: none"> 1. A police officer may, <u>without a warrant</u>, use a dog to carry out general drug <u>detection</u> in relation to the following persons: <ol style="list-style-type: none"> a. persons at, or seeking to enter or leave, any part of <u>premises being used for the consumption of liquor that is sold at the premises</u> (other than any part of premises being used primarily as a restaurant or other dining place) b. persons at, or seeking to enter or leave, a <u>public place at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held</u>, c. persons on, or seeking to <u>enter or leave</u>, a <u>public passenger vehicle</u> that is travelling on a route prescribed by the regulations, or a <u>station, platform or stopping place</u> on any such route, d. persons at, or seeking to <u>enter or leave</u>, any part of premises that the officer is authorised to enter under the <u>Tattoo Parlours Act 2012</u> to carry out general drug detection using a dog. 	

Use of dogs WITH a warrant

149 General drug detection with dogs by warrant

1. A police officer may use a dog to carry out general drug detection if authorised to do so by a warrant under this section.
2. A police officer who has reasonable grounds for believing that the persons at any public place may include persons committing drug offences may apply to an authorised officer for a warrant under this section.
3. An authorised officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a warrant authorising any police officer to use a dog to carry out general drug detection in the public place during the period or periods specified in the warrant.
4. An application for a warrant under this section must disclose whether any general drug detection to be carried out under the warrant will be part of a covert police operation.

Does a dog= search?

Darby v DPP

- Majority held that sniffing and bunting by a sniffer dog does NOT constitute a search as he was “merely completing the identification of the person who was in possession of the drug”
- Drug detection dogs are considered an extension of an officers olfactory senses and therefore RAISE reasonable suspicion as opposed to constituting a search

6. SEARCH WITH ARREST

23 Power to carry out search on arrest

1. A PO who arrests a person for an offence or under a warrant, may search the person at or after the time of arrest, if the officer suspects on reasonable grounds it is prudent to do so to ascertain if the person is carrying anything:
 - a. present a danger to a person, or
 - b. assist a person to escape from lawful custody, or
 - c. thing with respect to which an offence has been committed, or
 - d. provide evidence of the commission of an offence, or
 - e. that was used, or is intended to be used, in or in connection with the commission of an offence
2. A police officer who arrests a person for the purpose of taking the person into lawful custody, may search the person at or after the time of arrest, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything
 - a. that would present a danger to a person, or
 - b. that could be used to assist a person to escape from lawful custody.
3. A police officer may seize and detain a thing found in a search if it is a thing of a kind referred to in subsection (1) or (2)

23A Ancillary power to search persons

1. In conducting a search of a person under section 23, a PO, if suspects on reasonable grounds that a thing of a kind referred to in section 23 (1) or (2) is concealed in the person's mouth or hair, request the person:
 - a. to open his or her mouth, or
 - b. to shake, or otherwise move, his or her hair.
2. Subsection (1) does not authorise a police officer to forcibly open a person's mouth
3. A person must not, without reasonable excuse, fail or refuse to comply with a request made by a police officer in accordance with this section and section 201.

NOTE: These are NOT arbitrary powers- PO must still suspect on reasonable grounds that it is prudent to conduct a search

- Note however this requirement is lenient as suspicion must only be that it is "prudent" rather than "suspicion that certain circumstances exist"

<p>7. SEARCH AFTER ARREST</p>	<p>24 Power to carry out search of person in custody A police officer may search a person who is in lawful custody (whether at a police station or at any other place) and seize and detain anything found on that search.</p> <p>VERY BROAD power- no requisite reasonable suspicion AND search can be for ANY item (rather than a specific list of items)</p> <p><u>What constitutes “lawful custody”?</u> Debate as to what is meant by the phrase “lawful custody”</p> <ul style="list-style-type: none"> - Reference to “police station” of “other place” suggests that custody is defined by location - May also mean “under physical restraint” <i>R v McKellar</i> - HOWEVER the fact that s24 falls after s23 indicates a legislative intention that “custody” refers to a police station and not the field areas covered by the other sections.
<p>8. USE OF FORCE IN SEARCH</p>	<p><u>How much force can be used in the search?</u> S230 It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to <u>use such force as is reasonably necessary to exercise the function.</u></p>

POLICE ENTRY AND SEARCH OF PREMISES

1. POLICE ENTRY OF PREMISES	<p>Four circumstances in which PO may enter premises: Warrant + Implied License + S9- Breach of peace + S10- Enact arrest</p> <p>If police do not have an implied license or a warrant and do not comply with s9 or 10 LEPR then the entry will be unlawful</p> <ul style="list-style-type: none"> - Any subsequent search + evidence obtained will also be unlawful
	1. Warrant SEE SEARCH WARRANTS pg
	2. Implied License
	<p><i>Halliday v Nevill</i></p> <ul style="list-style-type: none"> - The law will imply a license in favour of any member of the public to go upon a path or driveway to the entrance of a dwelling for the purpose of lawful communication with, or delivery to any person in a house - Implied license can be revoked by express or implied refusal (sign +gate) <p><u>Are there exceptions- can police enter when implied license has been revoked?</u></p> <p><i>Plenty v Dillon</i></p> <p>ISSUE: Whether a PO serving a summons is authorized to enter premises without consent?</p> <ul style="list-style-type: none"> - <i>Semaynes Case</i>- Justification for entry when purpose is to “execute the kings process” <ul style="list-style-type: none"> o HOWEVER the serving of a summons is NOT considered to be a part of the King’s process as it is not coercive in nature
	3. Prevent breach of the peace (s9)
	<p>Power to enter under s9 if there has been or is likely to be a breach of the peace or someone has been injured or will be injured (i.e. domestic violence calls)</p> <p>S9 Power to enter in emergencies</p> <ol style="list-style-type: none"> 1. PO may enter premises if the PO <u>believes on reasonable grounds</u> that: <ol style="list-style-type: none"> a. A <u>breach of the peace is being or is likely to be committed</u> and it is <u>necessary to enter the premises</u> immediately to end or prevent the breach of the peace, or b. A <u>person has suffered significant physical injury or there is imminent danger of significant physical injury</u> to a person and it is necessary to enter immediately to prevent further significant physical injury 2. A PO who enters premises under this section is to <u>remain on the premises only as long as is reasonably necessary</u> in the circumstances <p><u>Scope of s9??</u></p> <p><i>Kuru v State of NSW</i></p> <ul style="list-style-type: none"> - Police have the power to enter premises to STOP or PREVENT a breach of the peace occurring HOWEVER this power DOES NOT extend to entry for the purposes of <u>investigating</u> whether there has been a breach of the peace or determining whether one is threatened <ul style="list-style-type: none"> o MUST be a continuing breach of the peace to justify police entry and stay

4. To enact arrest (s10)

Power to enter under **s10** to arrest a person or to detain a person under an Act

- In order to exercise this power police must believe on reasonable grounds that the person to be arrested or detained is actually on the premises *R v Merritt*

PRE-REQUISITES TO s10

There are three threshold conditions before police can exercise their powers to enter premises under **s10** lawfully.

1. MUST have a power to arrest or detain a person (under s99, under a warrant or under another power (i.e. power to detain under *Mental Health Act*)
2. MUST believe on reasonable grounds that the person in question is ON the premises *George v Rockett*
3. MUST comply with any requirements under LEPPRA (i.e. announcement under s201)

S10 Power to enter to arrest or detain someone or execute warrant

1. PO may enter and stay for a reasonable time on premises to arrest a person, or detain a person under an Act, or arrest a person named in a warrant
2. However, the PO may enter ONLY if believes on reasonable grounds that the person to be arrested or detained is in the dwelling
3. PO who enters under this section may search the premises for the person
4. This section does not authorize a police officer to enter premises to detain a person under an act if the PO has not complied with any requirements imposed

Scope of s10:

R v Merritt

- PO's must state a lawful reason for entry
 - o This must be done BEFORE entry
 - o Stating "in relation to a couple of driving matters" is NOT sufficient

DPP(NSW) v Nassif and Anor

- Forcible entry by police officers is permitted where there is reasonable and probable grounds for belief that the person sought is in the premises
 - o Proper announcement must be specific BUT NEED NOT use precise words/ cite legislation
 - o Police need NOT state that they are police officers if they are in uniform.

Scope of s10(3)- Power to search

- Once a PO has gained entry they are permitted to search for the person
- HOWEVER s10 is limited to searching the premise for the person to be arrested. It does NOT give police the power to search for any evidence connected with the offence NOR does it give police power to seize any goods found.
- Can only look where a person would be found—i.e. search of drawers is unlawful (person cannot fit in drawers)

2. EXERCISING POWERS OF ENTRY	When exercising powers to enter under s9 and 10 there is the expectation that police comply with the safeguards of s201 and ss230 and s231
3. SEIZURE OF GOODS FOUND	<ul style="list-style-type: none"> - If PO is lawfully on the premises they may seize and detain “any dangerous article that the PO finds on the premises”, if they “suspect on reasonable grounds that the dangerous article is being used or was being used in connection with the commission of a relevant offence” s21 - There may also be a common law power to search a person or property outside the limits of s21 or 22 <ul style="list-style-type: none"> o <i>Laurens & Anor v Williams</i> <ul style="list-style-type: none"> ▪ Goods may be seized without a warrant if they are in possession of a person at the time of their arrest <i>Field v Sullivan</i> ▪ Goods must be in the possession of the arrested person and be the subject of, or evidence of an offence <i>Levine v O’Keefe</i> ▪ May seize goods if the officer can do so without force or violence <i>Dalton v McNaughton</i>
4. SEARCH OF VEHICLES	<p>S36 grants power to the police to search a vehicle and seize things in the vehicle .</p> <p>36 Power to search vehicles and seize things without warrant</p> <ol style="list-style-type: none"> 1. A police officer may, <u>without a warrant, stop, search and detain a vehicle</u> if the police officer suspects on reasonable grounds that: <ol style="list-style-type: none"> a. the vehicle contains, or a person in the vehicle has in possession or under control, anything <u>stolen or otherwise unlawfully obtained</u>, b. the <u>vehicle is being, or was, or may have been, used in or in connection with the commission of a relevant offence</u>, c. the vehicle contains anything used or intended to be used in or in connection with the commission of a relevant offence, d. the vehicle is <u>in a public place or school and contains a dangerous article that is being, or was, or may have been, used in or in connection with the commission of a relevant offence</u>, e. the vehicle contains, or a person in the vehicle has in his or her possession or under his or her control, <u>a prohibited plant or prohibited drug in contravention of the Drug Misuse and Trafficking Act 1985</u> f. circumstances exist on or in the vicinity of a public place or school that are likely to <u>give rise to a serious risk to public safety</u> and that the exercise of the powers may lessen the risk. 3. A police officer <u>may seize and detain</u> <ol style="list-style-type: none"> a. all or part of a thing that the police officer suspects on reasonable grounds is <u>stolen or otherwise unlawfully obtained</u>, and b. all or part of a thing that the police officer suspects on reasonable grounds may <u>provide evidence of the commission of a relevant offence</u>, and c. <u>any dangerous article</u>, and d. <u>any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985, found as a result of a search under this section.</u>

SEARCH WARRANTS

<p>1. WHAT DOES A SEARCH WARRANT AUTHORISE?</p>	<p>“authorized invasion of premises without the consent of the person in lawful possession or occupation thereof” <i>George v Rockett</i></p> <ul style="list-style-type: none"> ○ Attempt to balance private individuals from over zealous police action <p>47A General authority conferred by search warrants</p> <ol style="list-style-type: none"> 1. A search warrant authorises any executing officer for the warrant: <ol style="list-style-type: none"> a. <u>to enter the subject premises, and</u> b. <u>to search the premises for things connected with a particular searchable offence</u> in relation to the warrant. <p>Section 67 requires that an occupier of the premises entered under a search warrant (other than a covert search warrant) be given notice on entry or as soon as practicable afterwards..</p> <p>49 Seizure of things pursuant to search warrant</p> <ol style="list-style-type: none"> 1. A person executing a search warrant issued under this Division: <ol style="list-style-type: none"> a. <u>may seize and detain a thing (or thing of a kind) mentioned in the warrant, and</u> b. <u>may, in addition, seize and detain any other thing that the person finds in the course of executing the warrant</u> and that the person has reasonable grounds to believe is connected with any offence. 2. Without limiting subsection (1), the power to seize and detain a thing includes: <ol style="list-style-type: none"> a. <u>a power to remove the thing</u> from the premises where it is found, and b. <u>a power to guard the thing</u> in or on those premises, and c. <u>if it is a covert search warrant that authorises the placing of a kind of thing in substitution for a seized thing--a power to place a thing of that kind on the subject premises in substitution for a thing seized.</u> <p>50 Search of persons pursuant to warrant</p> <p>A person executing a search warrant issued under this Division may <u>search any person found in or on the premises whom the person executing the warrant reasonably suspects of having a thing mentioned in the warrant.</u></p>
<p>2. IS THE WARRANT VALID?</p>	<ul style="list-style-type: none"> - Unless entry and search is authorized under a valid warrant it is trespass <i>Coco v The Queen</i> <ul style="list-style-type: none"> ○ Any seizure of evidence will be unlawful and its admissibility can be challenged. <p>CONSIDER:</p> <ol style="list-style-type: none"> 1. SEARCHABLE ? 2. APPLICATION? 3. ISSUE?

**2.1 IS THE
OFFENCE A
SEARCHABLE
OFFENCE?**

There must be a searchable offence in relation to which the search warrant is sought

Searchable offences are listed in **s46A**

46A Searchable offences

1. For the purposes of this Part, "searchable offence" in relation to a warrant:
 - a. means any of the following:
 - i. an indictable offence,
 - ii. a firearms or prohibited weapons offence,
 - iii. a narcotics offence,
 - iv. a child abuse material offence,
 - v. an offence involving a thing being stolen or otherwise unlawfully obtained, and
 - b. if the warrant is a covert search warrant means a serious offence, and
 - c. if the warrant is a criminal organisation search warrant means an organised crime offence.
2. In subsection (1) "serious offence" means the following
 - a. any indictable offence punishable by imprisonment for a period of 7 or more years and that involves the following:
 - i. the supply, manufacture or cultivation of drugs or prohibited plants,
 - (ii) the possession, manufacture or sale of firearms within the meaning of the Firearms Act 1996,
 - ii. money laundering
 - iii. car and boat rebirthing activities,
 - iv. the unauthorised access to, or modification or impairment of, computer data or electronic communications,
 - v. an activity involving theft carried out on an organised basis
 - vi. violence causing grievous bodily harm or wounding
 - vii. the possession, manufacture or supply of false instruments,
 - viii. corruption,
 - ix. destruction of property,
 - x. homicide,
 - xi. kidnapping,
 - b. any offence under Division 10 - Offences in the nature of rape, offences relating to other acts of sexual assault
 - c. an offence under section 80D (Causing sexual servitude)
 - d. an offence under section 93FA (Possession, supply or making of explosives) of the Crimes Act 1900
 - e. an offence under Division 15 (Child prostitution) or 15A (Child pornography) of Part 3 of the Crimes Act 1900,
 - f. an offence under section 308F (Possession of data with intent to commit serious computer offence) or 308G (Producing, supplying or obtaining data with intent to commit serious computer offence) of the Crimes Act 1900
 - g. an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting, an offence

2.2 IS THE APPLICATION VALID?	i) Has the correct person applied?
	<p>S46- Any police officer may be an eligible applicant for an ordinary search warrant</p> <p>46 Interpretation</p> <p>1. In this Part: "eligible applicant", for a search warrant, means:</p> <ol style="list-style-type: none"> a. any police officer, or b. if it is a covert search warrant any person authorised to apply for such a warrant under section 46C, or c. if it is a criminal organisation search warrant a police officer authorised to apply for such a warrant under section 46D.
	ii) On reasonable grounds?
	<p>S47- For an ordinary search warrant an applying officer MUST BELIEVE (not just suspect) on reasonable grounds that there is or within 72 hours will be, in or on the premises a thing connected with a searchable offence in relation to the warrant</p> <p>47 Power to apply for search warrants</p> <ol style="list-style-type: none"> 1. <u>A police officer may apply to an eligible issuing officer for a search warrant (other than a criminal organisation search warrant) in respect of any premises if the police officer believes on reasonable grounds that there is, or within 72 hours will be, in or on the premises a thing connected with a searchable offence in relation to the warrant.</u> 2. Without limiting subsection (1), a police officer may apply to an eligible issuing officer for a search warrant if the police officer <u>believes on reasonable grounds that a child prostitution offence has recently been committed, is being committed, or within 72 hours will be committed, on or with respect to premises.</u>
iii) Does it fulfil formal requirements?	
<p>66 Form of warrant</p> <ol style="list-style-type: none"> 2. A warrant is to be in the form prescribed by the regulations. 3. Without limiting subsection (1), a covert search warrant must specify the following: <ol style="list-style-type: none"> a. <u>the address or other description of any premises that adjoin or provide access to the subject premises that may be entered under the warrant for the purposes of entering the subject premises,</u> b. <u>the name of the following persons:</u> <ol style="list-style-type: none"> i. <u>the occupier (if known) of the subject premises,</u> ii. <u>any person believed to have committed, or to be intending to commit, the searchable offence to which the warrant relates,</u> c. <u>whether the occupier is believed to be knowingly concerned with the commission of that searchable offence,</u> d. <u>any conditions imposed in relation to the execution of the warrant,</u> e. <u>a description of the kinds of things that may be placed in substitution for a seized thing,</u> f. any other matter required by the regulations. 	

2.3 IS THE WARRANT VALIDLY ISSUED?	i) Is the person authorised to issue a search warrant?
	S3- Authorised officers for ordinary search warrants are <u>Magistrates, registrars of the local court and authorised employees of the AG's department</u>
	ii) Does it fulfil the formal requirements?
	Issuing officer MUST NOT issue a warrant unless the application for the warrant fulfils the formal requirements 62 Information in, and consideration of, application for warrant 1. An eligible issuing officer must not issue a warrant unless the application for the warrant includes the following information: a. the <u>name of the applicant and details of the authority</u> of the applicant to make the application for the warrant, b. <u>particulars of the grounds on which the application is based</u> , including (without limitation) the nature of the searchable offence or other offence involved, c. the <u>address or other description of the subject premises</u> , d. if the warrant is required to search for a particular thing- <u>a full description of that thing and, if known, its location</u> , e. if the warrant is required to search for a kind of thing- <u>a description of the kind of thing</u> , f. if a previous application for the same warrant was refused <u>details of the refusal and any additional information required</u> by section 64, g. any other information required by the regulations.
	iii) Are the reasonable grounds for belief?
S48 Issue of search warrants: 1. An eligible issuing officer to whom an application for a search warrant is made under s47 may, <u>if satisfied that there are reasonable grounds for doing so</u> , issue the search warrant What is “belief on reasonable grounds”?? Belief on reasonable grounds is DIFFERENT from suspects on reasonable grounds <i>George v Rockett</i> - Belief is an inclination of the mind towards assenting to, rather than rejecting a proposition o Suspicion on the other hand is more than a mere idle wondering whether it exists or not but a positive feeling of actual apprehension or mistrust- amounting to a “slight opinion but without sufficient evidence” - MUST establish a reasonable belief that the item to be searched is connected with the offence a. Facts should support the reasonable belief, not mere assertions <i>Microwave Safety Systems v Commissioner for Fair Trading</i>	

iv) What should be taken into consideration in determining reasonable belief

62 Information in, and consideration of, application for warrant

3. An eligible issuing officer, when determining whether there are reasonable grounds to issue a warrant, is to consider (but is not limited to considering) the following matters

- a. the reliability of the information on which the application is based, including the nature of the source of the information
- b. if the warrant is required to search for a thing in relation to an alleged offence whether there is sufficient connection between the thing sought and the offence.

v) Is there sufficient connection?

Warrant should “refer to a particular offence and authorise seizure by reference to that offence”

Microwave Safety Systems v Commissioner for Fair Trading

- Where “no particular items are listed, only classes and the items are not limited to those that could provide evidence of any specified identified offence” the warrant will be invalid as it doesn’t enable any person receiving the warrant to understand or ascertain the scope or reason for the search warrant

vi) Is there sufficient particularity?

Need to find a balance between being sufficiently specific to connect the object to the offence but also sufficiently broad so as to ensure that the object will actually be found on the premises

- The specificity in a search warrant will determine the ease with which an officer may issue the warrant and scope of the warrant
 - EG if the warrant is more specific as to the object to be searched for then an issuing officer may be more readily satisfied that the thing is connected to the offence to which the warrant relates

TEST: Whether the description of the offence in the warrant must be sufficiently clear to enable the person whose premises are being held to know the exact object of the search

A warrant may fail however if it does not provide reasonable particularity of any alleged offence, including a failure to specify the dates of the alleged offence

Majzoub v Kepreokis & Ors

vii) Is it invalidated by any errors?

76 Defects in warrants

A warrant is not invalidated by any defect, other than a defect that affects the substance of the warrant in a material particular.

Description of offence:

- The incorrect citation of a section or statute does not invalidate a search warrant that otherwise clearly sets out the substance of the alleged offence
Parker v Churchill
 - o A warrant may be sufficiently particular if it specifies the substance of the offence in question—even if the name of the act is not disclosed
- Provided that an incorrect reference does not detract from the nature of the offence or render the description of the object of the search unintelligible or ambiguous, it will not invalidate a warrant *Majzoub v Kepreokis & Ors*

Description of Premises:

Way Out West Adult Shop v Kraus

- o It will often be a question of fact and degree whether premises are described with sufficient particularity
 - o Errors in describing the premises- while MAYBE seen as a not authorising a search of that specific premises may be sufficiently described the premises such that they can be identified with reasonable certainty by the authorised officer and the executing police
 - o It is IRRELEVANT if the police already know where the premises are *Gassy*—the premises must be reasonably ascertained from the face of the warrant

3. HAS THE WARRANT BEEN VALIDLY EXECUTED?	a) Has notice been given?
	<p>If the occupiers notice is NOT served correctly then the warrant may be invalidated</p> <ol style="list-style-type: none"> 1. <u>BEFORE the execution</u> of the search warrant, the judge must prepare and give an occupiers notice to the applicant 2. Occupiers notice <u>must be served as soon as practicable</u> after warrant is executed s67(8) a. Unless the service is postponed under s67A (can be postponed for up to 6 months per postponement, multiple times for up to 3 years) <p>67 Notice to occupier of premises entered pursuant to warrant</p> <ol style="list-style-type: none"> 1. eligible <u>issuing officer must prepare and give occupier's notice</u> to the applicant 2. An occupier's notice: <ol style="list-style-type: none"> b. is to be in the form prescribed by the regulations, and c. must specify the following: <ol style="list-style-type: none"> i. the <u>name of the person who applied for the warrant</u>, iii. the <u>date and the time</u> when the warrant was issued, iv. the <u>address or other description of the premises</u> in warrant, and c. <u>must contain a summary of the nature of the warrant</u> and the powers conferred by the warrant. 3. <u>may be served personally or in such other manner</u> as issuing officer directs 4. Time for service of notice--: <ol style="list-style-type: none"> a. <u>on entry into or onto the premises or as soon as practicable after entry</u>, serve the occupier's notice on a person who appears to be an occupier of the premises and to be of or above the age of 18 years, or b. if no such person is then present in or on the premises, serve the occupier's notice on the occupier of the premises <u>within 48 hours</u> after executing the warrant. 5. If an occupier's notice cannot practicably be served on a person in accordance with subsection (4) (b), the eligible issuing officer may, direct that, such steps be taken to bringing the occupier's notice to the attention of the occupier. <p><u>Adjoining Occupiers Notice</u></p> <p>Adjoining Occupiers notice must be prepared by the applicant if the execution of the warrant involved entering the adjoining property s67B</p> <ol style="list-style-type: none"> b. A judge must approve these before the execution of the warrant c. Must specify <ol style="list-style-type: none"> i. Name of the applicant ii. Date of warrant issue iii. Address or other description of the premise iv. Any matters required by the regulations d. Must be served on the occupier at the time of service of the occupiers notice on the occupier of the subject premises <p><u>Exceptions to the service of occupiers notice:</u></p> <ul style="list-style-type: none"> - Police are not required to comply with s68 (announcement on entry) if they believe on reasonable grounds that immediate entry is required - Police are not required to comply with s69 (duty to show warrant) when executing covert search warrants

b) Has announcement occurred prior to entry?

68 Announcement before entry

1. One of the persons executing a warrant must, before any of the persons executing the warrant enters the premises:
- a. announce that the person is authorised by the warrant to enter the premises, and
 - b. give any person then in or on the premises an opportunity to allow entry into or onto the premises.

c) Has the warrant been shown?

69 Duty to show warrant

A person executing a warrant other than a covert search warrant must produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier.

d) Has force been used?

70 Use of force etc to enter and search premises

1. A person authorised to enter premises pursuant to a warrant may use such force as is reasonably necessary for the purpose of entering the premises.
- 1A. An executing officer authorised to enter premises pursuant to a warrant may, if it is reasonably necessary to do so for the purpose of entering those premises, do any of the following:
- (a) disable any alarm, camera or surveillance device at the premises,
 - (b) pacify any guard dog at the premises.
2. May if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purposes of that search.
3. may do anything that it is reasonably necessary to do for the purpose of preventing the loss or destruction of, or damage to, any thing connected with an offence -including by blocking any drains
4. A person authorised to search premises pursuant to a warrant may do anything that it is reasonably necessary to do to render safe any dangerous article found in or on the premises.

e) Executed at an appropriate time?

72 Execution of warrant by day or night

1. A warrant may be executed by day, but must not be executed by night unless the eligible issuing officer, by the warrant, authorises its execution by night.
2. not to authorise the execution by night unless satisfied of reasonable grounds for doing so. Those grounds include:
 - (a) the execution by day is unlikely to be successful because, for example, the thing that is likely to be on the premises only at night
 - (b) less risk to the safety of any person if it is executed by night,
 - (c) an occupier is likely to be on the premises only at night to allow entry without the use of force.
3. In this section: "by day" means during the period between 6 am and 9 pm on any day. "by night" means during the period between 9 pm on any day and 6 am on the following day.

f) Have assistants been used?

71 Use of assistants to execute warrant

A person may execute a warrant with the aid of such assistants as the person considers necessary.

g) Has the warrant expired?

73 Expiry of warrant

1. A warrant ceases to have effect, unless it is sooner withdrawn or extended, as follows:
 - a. when it has been executed, or at the time specified in it for its expiry, whichever first occurs,
2. An eligible issuing officer must specify in the warrant the time when the warrant is to expire.
3. The time so specified for a warrant is to be 72 hours or less after the issue of the warrant
4. The issue of a warrant for a period exceeding 72 hours is permitted by this section if:
 - a. the eligible issuing officer is satisfied that the purpose for which the warrant was issued cannot be satisfied within 72 hours, or
 - b. in any other case--the eligible issuing officer is satisfied that the warrant cannot be executed within 72 hours.
5. If no time of expiry is specified in a warrant (other than a telephone warrant, a covert search warrant or a criminal organisation search warrant), the warrant expires 72 hours after issue.

Has the warrant been extended?

73A Extension of warrant

1. A warrant (other than a covert search warrant, a criminal organisation search warrant or a telephone warrant) that expires 72 hours after its issue may be extended by the eligible issuing officer who issued the warrant:
 - a. in the case of a warrant issued under Division 2 of Part 11--if the eligible issuing officer is satisfied that the purpose for which the warrant was issued cannot be satisfied within 72 hours, and
 - b. in any other case--if the eligible issuing officer is satisfied that the warrant cannot be executed within 72 hours.
4. The time for expiry of a warrant that can be extended (other than a telephone crime scene warrant) may be extended only once.
6. Any extension of a warrant under this section:
 - a. must not extend the period for which the warrant has effect beyond 144 hours after its issue, except as provided by subsection (7), and
 - b. must be made on the application of the person to whom the warrant was issued or any other person who is authorised to execute the warrant, and
 - c. must be made on a written application made in person, unless it is impractical for the applicant to appear before an eligible issuing officer before the warrant expires, and
 - d. must be made before the expiry of the warrant, and
 - e. must be made by issuing a replacement warrant (specifying the new time for expiry of the warrant) and replacement occupier's notice.

COVERT SEARCH WARRANTS

HISTORY OF COVERT SEARCH WARRANTS	<p><i>Ballis v Randall</i></p> <ul style="list-style-type: none"> - Covert execution of warrants was NOT a valid practice - HOWEVER the intended covert execution of the warrants was NOT a matter which in any way influenced or related to the antecedent or primary decisions to grant the warrants <ul style="list-style-type: none"> o The validity of warrants depends upon general provisions related to the issue of search warrants, the terms of application and the authority of the justice. - <i>Ousley v The Queen</i>- Recognition if given to the importance of enabling persons whose rights of privacy stand to be affected to satisfy themselves of the authority for such an action <p><i>Black v Breen</i>- failure to hand the plaintiff a complete occupiers notice meant that the execution of the warrant was contrary to law.</p>
	<p>47A General authority conferred by search warrants</p> <p>(1) A search warrant authorises any executing officer for the warrant:</p> <ol style="list-style-type: none"> a. to <u>enter the subject premises</u>, and b. to <u>search the premises</u> for things connected with a particular searchable offence in relation to the warrant. <p>(2) If the search warrant is a <u>covert search warrant</u>, the executing officer is also authorised:</p> <ol style="list-style-type: none"> a. to <u>conduct the entry and search of the subject premises without the knowledge of any occupier</u> of the subject premises, and b. if necessary to do so to enter and search the subject premises--to <u>enter premises adjoining or providing access to the subject premises ("adjacent premises")</u> without the knowledge of the occupier of the adjacent premises, and c. to <u>impersonate another person</u> for the purposes of executing the warrant, and d. to do <u>anything else that is reasonable for the purpose of concealing anything</u> done in the execution of the warrant from the occupier of the premises.

IS THE COVERT SEARCH WARRANT VALID?	a) Is it a searchable offence?
	A searchable offence MUST be a serious offence (s46A) (See under regular warrants P)
	b) Is the application Valid?
	<ol style="list-style-type: none"> 1. <u>Authorised person?</u> Only a police officer holding a rank of superintendent or above, a Commissioner or Assistant Commissioner of the Police Integrity Commission or the NSW Crime Commission may apply for a covert search warrant s46C 2. <u>Reasonable Grounds?</u> S46C (2) Applicant must: <ol style="list-style-type: none"> a. Suspect on reasonable grounds that there is or within 10 days will be, in or on the premises a thing of a kind connected with a search offence in relation to the warrant AND b. Considers that it is <u>necessary</u> for the entry and search of those premises to be conducted without the knowledge of the occupier 4. <u>Affidavit?</u> Applicant MUST verify the information on oath or by affidavit s60(2) 5. <u>Correct form?</u> <ol style="list-style-type: none"> 1. Warrant must be in the form prescribed in s66 2. Must specify the following <ol style="list-style-type: none"> b. Address or other descriptions of property c. Names of: <ol style="list-style-type: none"> 1. The occupier 2. Any person intending to commit a searchable offence d. Whether the occupier is knowingly concerned with the commission of the offence e. Any conditions imposed in relation to the execution of the warrant f. A description of the kinds of things that may be placed in substitution for a seized thing g. Any other thing required by the regulations

	<p>d) Was it validly issued?</p> <p>If the issue violates ANY of the steps of issue it will be INVALID</p> <ol style="list-style-type: none"> 1. <u>Authorised person?</u> Application for the warrant must be made to an eligible judge (Supreme Court or Judge as declared eligible by the AG) s46B 2. <u>Does the application fulfil formal requirements?</u> Judge must not issue the warrant unless the application includes the following s62(2) <ol style="list-style-type: none"> a. Name of the following persons <ol style="list-style-type: none"> i. name of the occupier of the premise ii. Name of the person believed to have committed the offence b. Whether the occupier is believed to be knowingly concerned with the commission fo the offence c. Whether it is necessary to enter adjoining premises + Address or other description of the premises and why access is sought d. The powers that will be exercised on entry to the subject premises e. Details of any previous covert search warrant 3. <u>Judge must be satisfied that there are reasonable grounds for issuing the warrant</u> s62(3) <ol style="list-style-type: none"> a. Reliability of information b. If the warrant is to search for a thing in relation to an offence S62(4) <ol style="list-style-type: none"> a. Extent to which it is necessary for the entry and search of premises to be covert b. Nature and gravity of the searchable offence c. Extent to which the privacy of a person is to be affected d. Whether any conditions should be imposed in relation to the execution of the warrant e. Whether it is reasonably necessary to enter adjoining premises <ol style="list-style-type: none"> a. Whether this is reasonably necessary in order to avoid compromising the investigation of searchable offence
<p>IS THE COVERT SEARCH WARRANT VALIDLY EXECUTED??</p>	<p>Principles of execution of regular search warrants (see p) PLUS:</p> <p><u>Special provisions for Cover search warrants:</u></p> <ul style="list-style-type: none"> - Covert search warrants may be executed day or night s73 - An executing officer may do anything (including impersonating another person) which is reasonable for the purpose of concealing the execution of the warrant s47A (2) - A covert search warrant authorises re-entrance to the property in order to return things seized or retrieve things placed on the premises s49A <ol style="list-style-type: none"> a. Entry must occur within 7 days of the warrants performance - Following the execution of a covert search warrant- a report must be made to the issuing officer on the execution of the warrant s74A

AFFIDAVITS

1. WHAT IS AN AFFIDAVIT?	<p>Written evidence that is given under oath OR affirmation before an authorised person</p> <ul style="list-style-type: none"> - NOTE- witness statements DIFFER from affidavits as they are NOT given under oath, the witness signs the document but doesn't testify its truth until the actual hearing <p><u>Benefits of affidavits?</u></p> <ul style="list-style-type: none"> - Time effective - Clarifies evidence before trial proceedings - Allows no surprises from witness evidence during trial
2. COURT REQUESTED AFFIDAVIT	<p>31.4 Court may direct party to furnish witness statement</p> <ol style="list-style-type: none"> 1. The court may <u>direct any party to serve on each other active party a written statement of the oral evidence that the party intends to adduce in chief on any questions of fact to be decided at any hearing (a "witness statement")</u>. 2. A direction under subrule (1): <ol style="list-style-type: none"> a. <u>may make different provision</u> with regard to different questions of fact or different witnesses, and b. may require that notice be given of any objection to any of the evidence in a witness statement and of the grounds of any such objection. 6. A <u>party who fails to comply with a direction given under this rule may not adduce evidence</u> to which the direction relates, except by leave of the court. 7. <u>This rule does not deprive any party of the right to treat any communication as privileged</u> and does not make admissible any evidence that is otherwise inadmissible.

<p>3. WHO CAN DEPOSE AN AFFIDAVIT?</p>	<p>NB- Rules differ for the Local court (EXAM—is this in the local court??)</p> <p>35.3 Persons who may make affidavit</p> <ol style="list-style-type: none"> 1. If a party is required by these rules to file an affidavit or to verify any matter by affidavit, such an <u>affidavit may be made by the party</u> or: <ol style="list-style-type: none"> a. if the party is a person under <u>legal incapacity, by the party’s tutor</u>, or b. if the party is a <u>corporation, by a member or officer of the corporation</u> or (if it is in liquidation) by its liquidator, or c. if the party is a <u>body of persons</u> lawfully suing or being sued <ol style="list-style-type: none"> i. <u>in the name of the body</u>, or ii. in the name of any member or officer of the body, or iii. in the name of any other person associated with the body, by a member or officer of the body, or d. if the party is the Crown or an officer of the Crown suing or being sued in his or her official capacity, <u>by an officer of the Crown</u>, or e. if the proceedings are being brought in the plaintiff’s name by some other person pursuant to a right of subrogation: <ol style="list-style-type: none"> i. by that other person, or ii. if that other person is a corporation, by a member or officer of the corporation or (if it is in liquidation) by its liquidator. 2. Such an affidavit may also be made, in relation to proceedings in the <u>Local Court</u>: <ol style="list-style-type: none"> a. <u>by the party’s solicitor</u>, or by a commercial agent with respect to debt collection (within the meaning of the Commercial Agents and Private Inquiry Agents Act 2004), in relation only to proceedings on an application for: <ol style="list-style-type: none"> i. an instalment order, or ii. an order for examination, or iii. a writ of execution, or iv. a garnishee order, or v. default judgment (but only in the Small Claims Division), or b. by a person holding a licence as a real estate agent, strata managing agent or on-site residential property manager within the meaning of the Property, Stock and Business Agents Act 2002 in relation only to: <ol style="list-style-type: none"> i. proceedings on an application referred to in paragraph (a), or ii. the filing of a certificate under section 51 of the Consumer, Trader and Tenancy Tribunal Act 2001 . <p>(2A) <u>If more than one person is qualified to make an affidavit on behalf of a party, it is sufficient for such an affidavit to be made (subject to subrules (1) and (2)) by any one or more of them.</u></p> 3. Subject to any order of the court, the person by whom an affidavit is made <u>must be a person having knowledge of the facts deposed to in the affidavit.</u> 4. If an affidavit is made by a person other than the party required to file or verify the affidavit, the <u>affidavit must set out the facts that qualify the person to make the affidavit.</u> 5. Subject to subrule (1), a requirement of these rules for an affidavit as to any matter may be satisfied by separate affidavits made by separate persons in relation to separate aspects of that matter.
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4. HAVE FORMAL REQUIREMENTS BEEN FULFILLED? (UCPR)

35.3A Heading to affidavit

The heading to an affidavit must include the name of the deponent and the date on which the affidavit is made.

35.4 Format of affidavit dealing with more than one matter

If the body of an affidavit alleges or otherwise deals with more than one matter:

- a. it must be divided into paragraphs, and
- b. each matter must, so far as convenient, be put in a separate paragraph, and
- c. the paragraphs must be numbered consecutively.

35.5 Alterations

If there is any interlineation, erasure or other alteration in the jurat or body of an affidavit, the affidavit may not be used, except by leave of the court, unless the person before whom the affidavit is sworn initials the alteration and, in the case of an erasure, rewrites in the margin of the affidavit any words or figures written on the erasure and signs or initials them

35.6 Annexures and exhibits

1. A document to be used in conjunction with an affidavit may be made:
 - a. an annexure to the affidavit, or
 - b. an exhibit to the affidavit.
2. An annexure to an affidavit must be identified as such by a certificate endorsed on the annexure (and not on a page separate from the annexure) signed by the person before whom the affidavit is made.
3. The pages of an affidavit, together with any annexures, must be consecutively numbered in a single series of numbers.
4. An exhibit to an affidavit must be identified as such by a certificate attached to the exhibit entitled in the same manner as the affidavit and signed by the person before whom the affidavit is made.
5. An exhibit to an affidavit must not be filed.
6. If any other party so requires, a party who serves an affidavit to which a document is an exhibit:
 - a. must produce the document for inspection by that other party, or
 - b. must provide a photocopy of the document to that other party, or
 - c. must produce the document at some convenient place to enable it to be photocopied by that other party

35.7A Name of legal practitioner or commissioner for affidavits on affidavit

1. A legal practitioner who takes and receives an affidavit concerning any matter must, by use of a stamp or otherwise, add, below signature, the legal practitioner's name and address together with the word "barrister" or "solicitor",
2. ALSO applied for commissioner for affidavits

35.7B Each page of affidavit to be signed

Each page of an affidavit must be signed by the deponent and by the person before whom it is sworn.

<p>5. HAVE PROCEDURAL REQUIREMENTS BEEN FULFILLED? (Oaths Act)</p>	<p>a) Taken in front of the correct persons?</p>
	<p>26 Before whom oaths or affidavits may be taken</p> <p>1. Any oath declaration or affidavit required for the purpose of any court or for the purpose of the registration of any instrument in the State of New South Wales or for the purpose of any arbitration may be taken or made:</p> <ol style="list-style-type: none"> <u>in any place in the said State before any justice of the peace, and</u> <u>in any country or place out of the said State before a notary public, or any person having authority in that country or place, and</u> <u>in any country out of the said State before a British Consular Officer or an Australian Consular Officer</u> <p>27 Authority to take and receive affidavits</p> <p>1. <u>An Australian legal practitioner is, except in so far as the Chief Justice of the Supreme Court by order under his or her hand otherwise directs, authorised to take and receive, affidavits</u></p> <p>26B Appointee of foreign authority may, in certain circumstances, administer oath</p> <p>1. In this section "<u>foreign authority</u>" means a court, judge, person or body authorised by the law of a place outside New South Wales to take or receive evidence in that place.</p>
	<p>b) Identification requirements fulfilled?</p>
	<p>NEW LEGISLATION!! 30 April 2011</p> <p>Identification Legislation Amendment Act (2011)</p> <p>OATHS ACT 34 Identification of person making statutory declaration or affidavit</p> <p>1. A person who takes and receives a statutory declaration or affidavit in this State</p> <ol style="list-style-type: none"> <u>must see the face of the person making the declaration or affidavit, and</u> <u>must know the person</u> who makes the declaration or affidavit or <u>confirm the person's identity</u> in accordance with the regulations, and <u>must certify on the declaration or affidavit</u> in accordance with the regulations that this section has been complied with. <p>2. may request a person to <u>remove so much of any face covering worn by the person as prevents the authorised witness from seeing the person's face.</u></p> <p>3. The regulations may make provision for or with respect to compliance with this section and, in particular, may:</p> <ol style="list-style-type: none"> provide that a person is not known to an authorised witness unless the authorised witness has known the person for a minimum specified period, and provide for the steps that will satisfy the requirement to confirm the identity of a person making a statutory declaration or affidavit (including prescribing the kinds of documentation that may or must be relied on for that purpose), and <u>exempt an authorised witness from the requirement to comply with subsection (1) (a) for medical or other reasons.</u> <p>4. <u>A failure to comply with this section does not affect the validity of any statutory declaration or affidavit.</u></p>

<p>8. PERSONS WHO CANT READ</p>	<p>UCPR 35.7 Affidavits by persons who cannot read An affidavit made by a blind or illiterate person may not be used unless:</p> <ol style="list-style-type: none"> a. the <u>affidavit bears a certificate</u> referred to in section 27A of the <i>Oaths Act 1900</i> , or b. the court is otherwise satisfied: <ol style="list-style-type: none"> i. that the <u>affidavit was read to the deponent</u> in the presence of the person before whom it was made, and ii. that it appeared to that person that the <u>deponent understood the affidavit</u>. <p>Oaths Act 27A Affidavits by persons unable to read If it appears to the person before whom an affidavit is made ("the authorised person") that the person making the affidavit ("the deponent") is blind or illiterate, the authorised person must certify, in or below the jurat:</p> <ol style="list-style-type: none"> a. that the <u>affidavit was read to the deponent</u> in the presence of the authorised person, and b. that it appeared to the authorised person that <u>the deponent understood the affidavit</u>, and c. that the deponent <u>subscribed the affidavit</u> (by signature or mark) in the presence of the authorised person.
<p>7. PERSONS INCAPABLE OF TAKING AN OATH</p>	<p>32 Person may make declaration instead of oath</p> <ol style="list-style-type: none"> 1. This section applies to the making of an affidavit by a person before a justice or other person authorised to take an affidavit when the justice or other person is satisfied, having regard to any matter thought relevant (including age and capacity to hear, understand or communicate) that the <u>person is not competent to take an oath</u>. 2. The affidavit by the person is to be allowed, <u>as if it were taken on oath, so long as:</u> <ol style="list-style-type: none"> a. the justice or other person tells the person that it is important to tell the truth, and b. the person makes a declaration, by responding appropriately when asked, that he or she will not tell lies in the affidavit. 3. <u>However, the affidavit is not to be allowed</u> if the justice or other person is satisfied that: <ol style="list-style-type: none"> a. <u>the person does not understand the difference between the truth and a lie</u>, or b. <u>the person is not able to respond rationally to questions</u>. 4. It is to be presumed, unless the contrary is established to the satisfaction of the justice or other person, that the person understands the difference between the truth and a lie and is able to respond rationally to questions. 5. This section does not make evidence admissible if it would otherwise be <u>inadmissible</u>. 6. In this section, <i>affidavit</i> includes a deposition and a statement made in an information or complaint.

<p>8. CONSIDERATIONS OF A LAWYER</p>	<p><u>Who to choose:</u> Aside from the specific requirements- is the deponent, where possible, a person who can attest to the truth of the fact from their own knowledge and not simply reporting on matters told to them by another</p> <p><u>Content of affidavit:</u></p> <ul style="list-style-type: none"> - Irrelevant statements must not be allowed to “creep into an affidavit” - Hearsay and unqualified statements are inadmissible <p><u>Other considerations:</u></p> <ul style="list-style-type: none"> - Identify the deponent and their relationship to the dispute - Set out the matters in the affidavit in a logical manner - Use the witness’s own words - Conversations should be stated in direct speech - State facts that the witness has personal and actual knowledge of, not opinions or assumptions UNLESS the affidavit is for an expert witness - Be concise but complete - Use headings and in longer affidavits a table of contents <p>NOTE CASE of <i>Ying v Song</i></p> <ul style="list-style-type: none"> - It is destructive to the utility of the evidence by affidavit if a solicitor or anyone else attempts to express witness evidence in words that are not their own <i>Macquarie Developments v Forrester</i> - Witness evidence is NOT independent if it is formed by way of a cut and paste exercise between various affidavits <i>Dialog v Addease</i>
<p>9. FALSE SWEARING OF AFFIDAVITS</p>	<p><u>Obligations of a lawyer:</u> Professional Conduct and Practice Rules 1995 (Solicitors Rules)</p> <p>17.1 If a practitioner is:</p> <p>17.1.1 aware that a client is withholding information required by an order or rule of a court, with the intention of misleading the court; or</p> <p>17.1.2 informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular;</p> <p>and the client will not make the relevant information available, or allow the practitioner to correct the false evidence; the practitioner must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.</p> <p>17.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:</p> <p>17.2.1 factual material already available to the practitioner provides a proper basis for the allegation;</p> <p>17.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and</p> <p>17.2.3 the client wishes the allegation to be made after having been advised of the seriousness of the allegation.</p>

- Must also NOT permit an affidavit to be sworn if the person has reason to believe that the deponent does not understand its contents or the nature of the document *Bourke v Davis*
- Legal practitioners must NOT partake in the preparation of false affidavits *Myers v Elman*

Consequences for false swearing (Oaths Act)

29 Penalty for swearing falsely in affidavits

Except as provided by section 33, every person wilfully swearing falsely in any affidavit made before any such justice of the peace or other person so authorised to take affidavits, shall be deemed guilty of perjury and shall incur and be liable to the same pains and penalties as if the person had wilfully sworn falsely in open Court in a judicial proceeding in the Supreme Court.

30 Untrue document purporting to be affidavit

Where a person wilfully makes and subscribes a document that purports to be, but is not, an affidavit taken and received in accordance with the requirements of section 11A, knowing it to be untrue in a material particular not related to any requirement or formality necessary for the making of an affidavit, that person is guilty of an offence and:

- a. upon conviction on indictment—liable to imprisonment for 5 years, or
- b. upon conviction by the Local Court—liable to a penalty not exceeding 5 penalty units or imprisonment for a term not exceeding six months.

31 Alternative verdict where false swearing not proved

Where, on the trial of a person for false swearing in an affidavit, it appears that the document purporting to be the affidavit was not taken in accordance with the requirements of section 11A but the jury is satisfied that the accused wilfully made and subscribed the document knowing it to be untrue in a material particular not related to any requirement or formality necessary for the making of an affidavit the accused may be acquitted of the offence charged and convicted of an offence under section 30

33 False statements

1. Any person who, having made an affidavit under section 32, wilfully makes a false statement in the affidavit, knowing the statement to be false, is taken to be guilty of perjury if the making of the statement, had it been on oath, would by law have been perjury.
2. No prosecution for an offence referred to in subsection (1) is to be commenced without the sanction of the Attorney General.

ADMISSIONS + ADMISSIBILITY

1. HAS AN ADMISSION BEEN MADE?

Part 1 Definitions UEA:

“Admission” means a previous representation that is

- a) made by a person who is or becomes a party to a proceeding” AND
- b) is “adverse to the person’s interest in the outcome of the proceeding”.

“Representation” includes:

- a. express/implied
- b. inferred from conduct (eg. Nod, wink, re-enactment of crime etc.)
- c. representation not intended to be communicated to or seen by others
- d. representation that for any reason is not communicated

An admission is any representation made by an accused and capable of rationally supporting the probable existence of facts asserted in the prosecution case **R v JGW(1999)**

Does silence count as an admission?

NO

Evidence Act s89 Evidence of silence

1. In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
 - a. to answer one or more questions, or
 - b. to respond to a representation,

put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

2. Evidence of that kind is not admissible if it can only be used to draw such an inference.
3. Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
4. In this section:

"inference" includes:

an inference of consciousness of guilt, or
an inference relevant to a party’s credibility

Petty v The Queen:

- No adverse inference can be drawn against a person who refuses to provide information
- If a person answers some questions but not others- inferences can ONLY be drawn from the answers to the questions.
 - o A response of “no comment” has been held to be equivalent to silence.

MOREOVER if you later give evidence which appears to contradict the silence, it STILL cannot be used against you. *Sanchez v R*

Sanchez v R

A judge should instruct the jury that the accused has a right to silence and was entitled to exercise that right when the issue is first raised in trial **Sanchez v R**

- It is also advisable that the judge repeats this instruction in summing up

NOTE: s89 is NARROWER than the common law right as it applies only “in the course of questioning by an investigating officer who at that time was performing functions in connection with an investigation into the commission or the possible commission of, an offence”

2. WHO MADE THE ADMISSION??

IF the defence raises doubt about the identity of a maker of an admission or whether a representation was an admission- the standard of proof is “reasonably open”

S88 UEA: Proof of Admissions

For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is “reasonably open” to find that a particular person made the admission

What is “reasonably open”?

R v Hall & Ors

- A trial judge can only determine whether evidence has the capability of rationally affecting a matter in issue by application of his or her own senses rather than a conjecture as to what others might perceive

R v Olivieri

- It is ‘reasonably open’ that evidence amounts to an admission, where representations adverse to the accused’s interests in the outcome of the proceeding are capable of rationally affecting a matter in issue

3. HAVE TAPING REQUIREMENTS BEEN FULFILLED?

An admission will ONLY be admissible if it was taped according to **s281CPA**

Criminal Procedure Act 1986 ---281 Admissions by suspects

1. This section applies to an admission:
 - a. that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and
 - b. that was made in the course of official questioning, and
 - c. that relates to an indictable offence.
2. Evidence of an admission is not admissible unless:
 - a. there is available to the court:
 - i. a tape recording made by an investigating official of the interview in the course of which the admission was made, or
 - ii. there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, AND INSTEAD a tape recording of an interview with the person who made the admission, in the course of which the person states that he or she made an admission in those terms, (THE READ BACK) or
 - b. there was a reasonable excuse as to why a recording could not be made.
3. The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).

4. In this section:

"investigating official" means:

- a. a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
- b. a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences prescribed by the regulations.

"official questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission

"reasonable excuse" includes:

- a. a mechanical failure, or
- b. the refusal of a person being questioned to have the questioning electronically recorded, or
- c. the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

"tape recording" includes:

- a. audio recording, or
- b. video recording, or
- c. a video recording accompanied by a separately but contemporaneously recorded audio recording.

S281(2)(a)(ii) The Read-Back:

- If admission is not on tape, outcome can be achieved by the read-back.
- As soon as practicable, re-record and reading back what was said—person MUST substantially confirms either having made the admissions alleged or the facts in the alleged admissions.

The following checklist MUST be satisfied in order for s281 to apply

a) Was the accused a suspect?

S281: (1)“ This section applies to an admission: (a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence”

If the accused was NOT a suspect at the time of the admission then s281 does NOT apply to the statement and the evidence CANNOT be excluded on the basis that it was not taped

What is “actual suspicion”?

- Suspicion turns on what was in an investigating officers mind or what was known to the investigating official *Gonzales v Regina*
- MUST be arrived at on the basis of material that is capable of supporting the formation of opinion—FACTUAL BASIS *R v Taouk*
- A person cannot be reasonably suspected by a police officer of having committed an offence, unless something that has been said or done provides grounds for the police officer suspecting
EG: Suspicion does not arise until AFTER T says “I’ve shot someone” and therefore only statements made AFTER this will be afforded the protection of s281, the statements leading to this suspicion will not be covered

b) Was the admission made in the course of official questioning?

281: “(1) This section applies to an admission: (b) that was made in the course of official questioning”

- **S281(4)** “Course of official questioning” is defined as “questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence”

When does the course of official questioning begin/ end?

Kelly v R

- o Begins when reasonable suspicion arose or ought to have arisen in the minds of the PO detaining that person
- o It is NOT terminated or interrupted by silence on the part of the police

When does official questioning end?

- Official questioning is not concluded at the termination of any formal interview
- termination only occurs when the investigation of the offence is terminated either by the release of that person or by bringing the accused to a judicial officer

NOTE ALSO:

- Admissions do NOT necessarily need to be responsive to any particular question (legislation does not state that it must be made “in response to a question put” rather “in the course of questioning”)

c) Is there an indictable offence?

281: "(1) This section applies to an admission: (c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person."

IF THE ADMISSION HAS NOT BEEN TAPED?

Is there a reasonable excuse for NOT taping the admission?

S281 " (4) In this section... "reasonable excuse" includes:

- a. a mechanical failure, or
- b. the refusal of a person being questioned to have the questioning electronically recorded, or
- c. the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned."

The onus is upon the prosecution to show the "reasonable excuse"

Nicholls v R : Coats v R

- Take into account in determining reasonability:
 - (a) Conduct of the police - Was non-compliance deliberate or a product of reckless disregard of the provisions by the PO or was it inadvertent or otherwise excusable?
 - (b) Ultimately- would it be "in the interests of justice" to admit the evidence?

R v LMW

- The refusal of a person to have any questioning recorded is expressly recognized as a reasonable excuse and POs are NOT required to persist

McKinney Warning:

McKinney Warning= Given to the jury whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated *McKinney v R*

Have there been consecutive interviews?

Heatherington v The Queen:

Do all interviews have to be recorded?

- S281 does NOT state that a confession is inadmissible unless the entire interrogation is recorded
- "Confessions made during the course of questioning" refers NOT to overall interrogation but to the particular episode in which confession was made.
 - o THEREFORE if several periods of questioning- a confession will not be inadmissible due to an earlier stage of questioning not being recorded

Necessary to determine whether periods of questioning are same or separate:

In determining whether periods of questioning are to be characterised as the same or separate interviews must consider factors of:

- proximity of time and venue,
- relationship between the occasions on which the questioning took place
- the relationship between the interrogations (whether they refer to each other)

WHERE a suspect refuses to be recorded- can notes of the interview be admitted?

Where **s281** doesn't apply—police officers may be required to comply with **s86**

- HOWEVER for notes to be admitted it must be acknowledged by the defendant that the document is a true record of the question **s86(2)**

S86 EXCLUSION OF RECORDS OF ORAL QUESTIONING:

1. This section applies only in a criminal proceeding and only if an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official
2. A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response
3. The acknowledgement must be made by signing, initialing or otherwise marking the document
4. In this section “document” does not include
 - a. A sound recording or a transcript of a sound recording
 - b. Recording of visual images and sounds or a transcript of the sounds so recorded

When does s86 Apply?

s86 only applies where s281 does NOT require operation. That is, s86 MIGHT apply to

- (i) Admissions made in relation to NON-indictable offences
 - (ii) Admissions to indictable offences that can be dealt with SUMMARILY
 - (iii) Questioning that was NOT made in the course of official questioning
 - (iv) Admissions made FREELY without any questioning
 - (v) Admissions made by a NON-suspect
- There are limited cases in which s86 will apply, given the wide use of recording devices

AFTER proved that there IS an admission and it HAS fulfilled the requirements of s281 (or s281 doesn't apply) there are other considerations before the admission will be admissible

4. GENERAL DISCRETION OF THE COURT TO EXCLUDE EVIDENCE	<p>S135 UEA General discretion to exclude evidence</p> <p>The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:</p> <ol style="list-style-type: none"> a. be <u>unfairly prejudicial</u> to a party; or b. be <u>misleading or confusing</u>; or c. cause or result in <u>undue waste of time</u>.
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5. HAS CAUTION BEEN GIVEN BEFORE QUESTIONING?	<p>If interview DOESN'T comply with s139(1)(c)—it will be improper under s138 and therefore must be subject to the balancing test</p> <p>S139 UEA Cautioning of persons</p> <ol style="list-style-type: none"> 1. For the purposes of paragraph 138(1)(a), evidence by a person during questioning is <u>taken to have been obtained improperly</u> if: <ol style="list-style-type: none"> a. the <u>person was under arrest</u> for an offence at the time; and b. the <u>questioning was conducted by an investigating official</u> who was at the time empowered, because of the office that he or she held, to arrest the person; and c. before starting the questioning did not caution that the person does not have to say or do anything but that anything the person does say or do may be used in evidence. 2. Evidence of a statement made or an act done by a person during questioning is taken to have been <u>obtained improperly</u> if: <ol style="list-style-type: none"> a. The questioning was conducted by an <u>official who did not have power to arrest the person</u> b. statement was made, or the act was done, after the investigating official <u>formed a belief that there was sufficient evidence to establish that the person has committed an offence</u>; and c. before the statement was made or the act was done, <u>caution that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.</u> 3. The <u>caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.</u> <p><i>State of Tasmania v Stojkovic</i> Reasonable fluency means “fluency sufficient to enable the person concerned to understand the caution”</p> <ul style="list-style-type: none"> ○ The caution will fail to satisfy s139 if the the officer knew or ought to have known that the caution has not been understood ○ NO FAILURE if a reasonable person in the position of the PO did not and would not have perceived that the suspect did not understand <p style="background-color: #4F81BD; color: white; padding: 5px;">IF YES= ADMISSIBLE subject to other requirements</p> <p style="background-color: #4F81BD; color: white; padding: 5px;">IF NO= APPLY THE BALANCING TEST</p>
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<p>6. HAS AN INTERPRETAR BEEN PROVIDED?</p>	<p>LEPRA 128 Provision of interpreter</p> <ol style="list-style-type: none"> 1. The custody manager <u>must arrange for an interpreter to be present for the person in connection with any investigative procedure</u> if the custody manager has <u>reasonable grounds for believing that the person is unable:</u> <ol style="list-style-type: none"> a. because of <u>inadequate knowledge of the English language</u>, to communicate with reasonable fluency in English, or b. because of <u>any disability</u>, to communicate with reasonable fluency. 2. Must <u>ensure investigative procedure is deferred until interpreter arrives.</u> 3. However, the custody manager <u>need not:</u> <ol style="list-style-type: none"> a. arrange for an interpreter if the <u>difficulty of obtaining an interpreter makes compliance with requirement not reasonably practicable</u>, or b. <u>defer any investigative procedure</u> if the custody manager believes on reasonable grounds that the <u>urgency of the investigation, having regard to the safety of other persons, makes such deferral unreasonable.</u> 4. If an interpreter is not available to be present the custody manager must <u>instead arrange for a telephone interpreter for the person.</u> 5. Must ensure that any such investigative procedure is <u>deferred until a telephone interpreter is available.</u> 6. However, the custody manager <u>need not:</u> <ol style="list-style-type: none"> (a) arrange for a telephone interpreter <u>the difficulty of obtaining such an interpreter makes compliance with the requirement not reasonably practicable</u>, or (b) defer any such investigative procedure <u>the urgency of the investigation, having regard to the safety of other persons, makes such deferral unreasonable.</u> <p><i>State of Tasmania v Stojakovic</i> There will only be non-compliance if the circumstances were such that the officer knew or OUGHT to have known that the person in custody did not have a knowledge of the English language sufficient to enable that person to understand the questions</p>
	<p>IF YES= Evidence Admissible- subject to other provisions IF NO= May be improper conduct according to s138 THEREFORE need to apply balancing test</p>

7. IS THERE ILLEGALITY OR IMPROPRIETY?

Onus is on the party seeking to exclude evidence (defence)

Section 138 UEA: 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, an act in the course of the questioning even though they knew or ought reasonably to have known that it was likely to impair substantially the ability of the person to respond rationally to the questioning, or
 - b. made a false statement in the course of the questioning even though they knew or ought reasonably to have known that the statement was false and was likely to cause the person to make an admission.

IMPROPER does NOT amount to unlawfulness

Parker v Comptroller General

Inducement of another to commit a crime through subterfuge or trickery NOT amounting to a contravention of legal prohibition= NOT improper

Is improper where:

- Pretending to have a warrant to induce voluntary search
- Exercise of a warrant known to be invalid

Robinson v Wollworths Ltd

- 1) Consider what, may be viewed as “the minimum standards which a society such as ours should expect of those with powers of law enforcement” → factors include nature of the offence, and purpose underlying prohibition
- 2) Conduct must not contravene those standards in some minor respect; it must be “quite/ clearly inconsistent with” those standards.
- 3) Concepts “harassment” and “manipulation” suggest some encouragement, persuasion or importunity in relation to the commission of an offence
- 4) Entrapment is an impropriety, situation of opportunity is not *Parker*
 - opportunity: accused is wholly responsible for actions; law enforcement merely participates or takes adv of opp.
 - entrapment: law enforcement officers instigate the illegal conduct
 - *R v Sloane*: ‘accused is induced to commit a crime which he or she otherwise would have been unlikely to commit’

NOTE: Contravention of s139= Improperly obtained under s138

IF YES: PROCEED TO BALANCING TEST

IF NO: s138 does NOT apply and CANNOT be used to exclude the evidence

<p>8. APPLYING THE BALANCING TEST</p>	<p>If improperly or unfairness or absence of caution exists – DOES THE DESIRABILITY OF ADMITTING THE EVIDENCE OUTWEIGHT THE UNDESIRABILITY OF ADMITTING THE EVIDENCE?</p>
	<p>Section 138: Exclusion of improperly or illegally obtained evidence</p> <p>1. Evidence that was obtained:</p> <ul style="list-style-type: none"> a. improperly or in contravention of an Australian law, or b. in consequence of an impropriety or of a contravention of an Australian law, <p>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.</p> <p>Trial judge <i>MUST</i> take into account s 138(3) factors when exercising his/her discretion under s 138(1)(b), other factors <i>may</i> also be taken into account</p> <p><i>Parker v Comptroller General</i></p> <p>Application of s138(3) MUST be undertaken in light of its statutory purpose, the resolution of the “apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval of unlawful conduct”</p> <p><u>Checklist:</u></p> <p>3.</p> <ul style="list-style-type: none"> 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 <i>International Covenant on Civil and Political Rights</i>; 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. <p>WEIGH the factors FOR AND AGAINST the exercise of discretion to admit the evidence</p>
	<p>138(3)(a) Probative value of evidence</p>
	<p>Part 1 Definitions</p> <p>Probative value of evidence= The extent to which the evidence could rationally affect the assessment of the probability of the existence of the facts in issue</p> <p><i>Parker v Comptroller</i></p> <p>“the higher the probative value of the evidence, the greater the public interest in its admission, in the interests of accurate fact-finding”</p>

S138(3)(b) Importance of the evidence in the proceedings

Parker v Comptroller

“the public interest in admitting evidence where other evidence is untainted by impropriety is available is weaker than may be the case where there is no untainted evidence”

IS THERE OTHER EVIDENCE THAT CAN BE USED?

S138(3)(c) Nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding

R v Dalley

‘As a general proposition, the more serious the charge, the greater the community interest in the conviction and punishment of the guilty. On the other hand, it may equally be said that the more serious the charge faced, the more rigorous should be the insistence on adherence to statutory provisions enacted to protect the rights of individuals.’

S138(3)(d) Gravity of the impropriety or contravention

The graver the impropriety the less encouragement to admit the evidence.

s 138- the common law’s public policy discretion to balance competing interests

1. convicting the guilty
2. ensuring those that enforce the law uphold the law

DPP v Marjancevic

The gravity of the impropriety is heightened where the improper conduct is widespread or entrenched

Range of improper conduct:

- **Least serious end:** improper conduct 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.
- **Middle:** conduct 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.
- **Most serious:** conduct 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.

S138(3)(e) Whether the impropriety or contravention was deliberate or reckless

If the impropriety/illegality was deliberate or reckless the public policy to encourage police to abide the law would diminish any inclination to admit the evidence

DPP v Marjancevic

→state of mind must be deliberate or reckless

→ Conduct would be reckless if the officer had foresight that it might be illegal but proceeded with indifference as to whether that was so.

S138(3)(f) Whether the impropriety or contravention was contrary or inconsistent with a right of a person recognized by the ICCPR

Offending rights in the ICCPR would diminish any inclination to admit the evidence

KEY ICCPR Provisions:

- Art 6: No one shall be arbitrarily deprived of his life
- Art 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Art 9: Right to liberty and security of person, freedom from arbitrary arrest or detention.
 - If deprived of liberty, must be in accordance with such procedure as est. by law.
 - If arrested, must be informed as to reasons and charges against him
 - Entitled to trial within a reasonable time or to release
- Art 10: Persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.
- Art 14: Minimum guarantees in the determination of any criminal charge against a person- promptly informed of nature and cause of charge, time and facilities to prep defence, no undue delay, legal assistance, access to interpreter if he cannot understand or speak the language used in court, not to be compelled to testify against himself or to confess guilt
- Art 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence
- Art 21: right of peaceable assembly, except where restrictions are necessary...
- Art 22: right to freedom of association
- Art 26: all persons are equal before the law and entitled without any discrimination to the equal protection of the law
- Art 27: right of minority groups to enjoy their own culture, freely practice their own religion and use their own language

S138(3)(g) Whether any other proceeding (in or outside of court) has been or is likely to be taken in relation to the impropriety or contravention

Parker v Comptroller

- If a PO is likely to be disciplined for the impropriety- it may be thought that the “sanction” of excluding the evidence is unnecessary
- HOWEVER this may be difficult as it will not always be possible to know whether disciplinary proceedings are likely to be taken

S138(3)(h) The difficult (if any) of obtaining the evidence without the impropriety or contravention of an Australian law

If it would have been difficult to obtain evidence without the impropriety this would increase the inclination to admit the evidence and vice versa

Examples of application of the TEST:
Parker v Comptroller
R v Camm; R v Cary; R v Quince
Campbell v DPP
DPP v Marjancevic

Weighing up all these factors- Does the desirability of admitting the evidence outweigh the undesirability of the impropriety?
YES= Evidence may be admissible subject to other evidentiary rules + exclusions
NO= Evidence should be excluded by exercise of discretion

NOTE: Evidence admitted under s138 may still be UNFAIR

<p>9. WAS ADMISSION INFLUENCED BY VIOLENCE OR OPPRESSIVE CONDUCT?</p>	<p>S84 UEA Exclusion of admissions influenced by violence and certain other conduct</p> <ol style="list-style-type: none"> 1. Evidence of an admission is <u>not admissible unless the court is satisfied that the admission</u>, was not influenced by: <ol style="list-style-type: none"> a. <u>violent, oppressive, inhuman or degrading conduct</u>, whether towards the person who made the admission or towards another person; or b. a <u>threat of conduct</u> of that kind. 2. This will only be considered by the court if party who made admission raises the issue about whether the admission was so influenced. <p><i>R v Ye Zhang</i> Burden is on the prosecution to show that the admissions were not a product of violence and oppression</p> <ol style="list-style-type: none"> 1. Establish facts surrounding the admission 2. Determine whether there was violent, oppressive or threatening conduct 3. IF YES- determine whether the admission was INFLUENCED by the conduct <p>NO DISCRETION IN s84- If there is ANY influence or prohibited conduct, the evidence of the admission is NOT admissible</p>
<p>10. WAS THE TRUTH OF THE ADMISSION ADVERSELY AFFECTED?</p>	<p>S 85 UEA Criminal proceedings: reliability of admissions by defendants</p> <ol style="list-style-type: none"> 1. This section applies <u>only in a criminal proceeding</u> and only to evidence of an admission made by a defendant: <ol style="list-style-type: none"> a. <u>to, an investigating official</u> who at that time was performing functions in connection with the investigation of the commission, of offence; or b. <u>as a result of an act of another person</u> who was, <u>capable of influencing the decision</u> whether a prosecution of the defendant should be brought or should be continued. 2. <u>Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.</u> 3. Without limiting matters the court may consider, it is to take into account: <ol style="list-style-type: none"> a. any <u>relevant condition or characteristic</u> of the person who made the admission: age, personality and education and mental, intellectual or physical disability to which the person is or appears to be subject; and b. if the admission was made in response to questioning: <ol style="list-style-type: none"> i. the <u>nature of the questions</u> and the manner in which they were put; and ii. the <u>nature of any threat, promise or other inducement</u> made to the person questioned. <p><i>R v Ye Zhang</i></p> <ul style="list-style-type: none"> - This section is not directed to the truth or falsity of the admission but rather to the CIRCUMSTANCES and their reflection upon the reliability of the admission

<p>11. WOULD IT BE UNFAIR TO ALLOW THE ADMISSION?</p>	<p>S90 UEA Discretion to exclude admissions</p> <p>In a criminal proceeding, the court may <u>refuse to admit evidence</u> of an admission, or refuse to admit the evidence to prove a particular fact, if:</p> <ol style="list-style-type: none"> a. the <u>evidence is adduced by the prosecution</u>; and b. having <u>regard to the circumstances</u> in which the admission was made, it <u>would be unfair to a defendant to use the evidence</u>. <p><i>Em v The Queen</i></p> <p>Meaning of “unfair”= UNCLEAR</p> <ul style="list-style-type: none"> - Reliability of evidence is one relevant factor to unfairness - Focus of s90 is the incorrectness of assumptions made by accused persons - <u>Inducing incorrect assumptions could but unfair HOWEVER No unfairness for failing to correct existing assumptions</u> - Application= highly fact-specific <p><u>ONUS lies with the accused to prove unfairness under s90</u></p> <p>ULTIMATELY s90 is a last resort provision – to apply where other options to exclude evidence have been exhausted</p>
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