

Will Mercy Season Justice?¹ An Analysis of Victorian Proposals Relating to the Physical Examination of Suspects

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INTRODUCTION

In recent years there has been increased public interest in forensic science and its role in criminal investigations. This is demonstrated by the number of television programmes, magazine and newspaper articles devoted to the subject, and this public and media interest has escalated with the recent introduction of genetic profiling technology. A direct result of this interest has been increased pressure upon governments to award more extensive powers of investigation to police as irrespective of other considerations the usefulness of scientific methods of identification is dependent upon the powers given to police to make relevant examinations of suspects and to take suitable samples for analysis.

The introduction of such increased powers must be considered carefully as whilst we have become accustomed to the routine use of scientific techniques in criminal investigations, we cannot allow ourselves to become complacent and accept such developments as a matter of course, merely relying upon the assurances of those who advocate their introduction.

The purpose of this article is to look at issues relevant to the general question of whether such increased powers should be granted and to undertake an analysis of the difficulties inherent in establishing a suitable statutory framework for the regulation of such powers. This involves an analysis of relevant legislation and common law principles from a variety of jurisdictions, viewed in the light of proposals made by the Victorian Attorney General's Consultative Committee on Police Powers of Investigation with a view to distilling an appropriate approach to be adopted in Victoria.

However, beyond mere logistics one must also address a number of more fundamental issues which are raised in this context and it is hoped that this article challenges the reader to question the desirability of violating certain fundamental principles, and to undertake a balancing process between the benefits which may ensue from such measures, and the means which must be adopted in order to ensure their effectiveness.

Whilst this article is directed almost exclusively towards viewing this issue in the Victorian context, it is of more general interest as the present situation in Victoria presents a unique opportunity for a comprehensive analysis of this area. Victoria is the last Australian state to fully address this issue and there-

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¹ 'But mercy is above this scept' red sway; It is enthroned in the hearts of kings, It is an attribute to God himself, And earthly power doth then show likest God's When mercy seasons justice.' *William Shakespeare, The Merchant of Venice Act IV i 192.*

fore has the benefit of reviewing the legislative approaches adopted by a number of other jurisdictions, and can draw upon their collective experience.

THE PRESENT SITUATION IN VICTORIA²

At present the law in Victoria does not direct itself specifically to the physical examination of suspects. Rather, it is necessary to refer to the broad wording of s464A of the *Crimes Act* 1958 (Vic),³ the main purpose of which was to alter the law relating to the detention of suspects prior to being charged from the previous limit of six hours to the new requirement of a 'reasonable time'.

Whilst the amendments were comprehensive in this respect, virtually no changes were made in relation to police powers to conduct investigations in respect of the suspect during the period of detention. These powers are defined by s464A(2) which provides that where a person is in custody on suspicion of having committed an offence, an investigating official may, within the reasonable time referred to in s464(1), 'question the person or carry out investigations in which the person participates in order to determine the involvement (if any) of the person in that offence'.

There are two major inadequacies associated with having to rely upon this provision in order to carry out a physical examination of a suspect. The first is that it is questionable whether this section does in fact confer such a power upon police officers. Whilst it is clear that this section only permits the performance of investigative procedures 'in which the person participates', that is, consents; the ambit of the phrase 'carry out investigations' is unclear.

Reference to the *Victoria Police Manual* 1986 reveals that the police force considers that it does indeed have power to have a suspect medically examined with the suspect's consent but this does not clarify the extent of such a power.⁴

It could be suggested that the section should be interpreted in the light of the common law powers of police to conduct physical examinations of suspects, but this is of little assistance as the scope of such a common law power is similarly unclear. It has been held that physical examination of a suspect at common law does not extend to rectal examination by a medical practitioner,⁵ but in Canada the courts have approved the search of a person's mouth for narcotic capsules.⁶ It seems that the application of such a power at common law will vary with a number of factors including the intrusiveness of the procedure, the type of evidence sought, etc., and therefore does not appreciably clarify the scope of s464A of the *Crimes Act* 1958 (Vic).

² The contents of this article are correct as at April 1990.

³ Inserted by s5 of the *Crimes (Custody and Investigation) Act* 1988 (Vic). Section 4 of this Act repealed s460 of the *Crimes Act* 1958 (Vic). The commencement date of this Act was 15th March 1989. *Gaz G* 11, 15/3/89, p589.

⁴ *Victoria Police Manual* 1986 Paragraphs 29.9-29.20.

⁵ *Boulton* (1871) Cox CC 87, 92-3; also see *Re Laporte and The Queen* (1972) 29 DLR (3d) 651, 658.

⁶ *R v Brezack* (1949) 96 CCC 97, 101.

Second, the section does not set out any guidelines by which the conduct of police officers involved would be regulated in the event that a suspect did consent to such an investigative procedure being carried out. As such physical examinations involve action which would constitute an assault if carried out *without* consent or statutory authority, and many of which necessarily involve intimate contact with the suspect, the legislation should set out guidelines regulating the conduct of all people involved in these procedures to ensure that the rights of the suspect are protected during the investigation as even if a suspect has consented to a particular investigative procedure it should not be thought that they thereby forsake any right to complain of improper conduct on the part of the police.

Such guidelines would also assist police officers as it would be clear to them what action could and could not be taken in relation to such investigative procedures and therefore so long as they act within the guidelines there is less chance of them being accused of misconduct, and any allegation of abuse of power will be more clearly defined. This can be compared with the situation in relation to out of court identification of suspects which are not subject to any legislative guidelines. Therefore, such identifications may be carried out in irregular and often ingenious ways⁷ and it is left to the discretion of the trial judge in such instances to determine whether such evidence should be rejected on the grounds of unfairness.⁸ Such a situation can be avoided at least to some extent by the enactment of clear legislative guidelines which regulate comprehensively the conduct of such procedures.

The ambiguity and uncertainty of this section is wholly unnecessary as nowhere else in Australia is legislation relating to this area so inadequate. However, it is likely that the present situation will soon be rectified as the law relating to the physical examination of suspects was recently the subject of a report by the Attorney-General's Consultative Committee on Police Powers of Investigation which was headed by the Victorian Director of Public Prosecutions Mr John Coldrey QC.⁹ One piece of legislation has already been passed after consideration of this report by Parliament and that is the as yet unproclaimed *Crimes (Blood Samples) Act 1989 (Vic)*.¹⁰ However the specific nature of this Act necessarily means the breadth of its applicability will be limited and therefore, given the recommendations of the Coldrey Committee,¹¹ it seems more extensive legislation will need to be enacted. Whilst this need may be satisfied by the *Crimes (Police Power of Investigation) Bill 1988 (Vic)*, clause 4'464M' of which deals specifically with the medical examination of suspects, it is likely that the limited provisions of this Bill will undergo considerable revision given the recommendations of the Coldrey Committee.

⁷ For example, see *R v Clune* [1982] VR 1, 3.

⁸ *Alexander v R* (1981) 34 ALR 289.

⁹ Hereafter referred to as the 'Coldrey Committee' and the 'Coldrey Committee Report'.

¹⁰ Author's Note: This Act was subsequently proclaimed on 1/6/90; Victorian Government Gazette 30 May 1990, G21, 1662.

¹¹ *Infra* pp10-11.

RELEVANT ISSUES

In order to regulate such investigative procedures comprehensively, whether they are carried out with or without the consent of the suspect, it is essential that the legislation should address a number of major factors:

1. What Forms Of Examination Should Be Permitted By The Legislation?

Whilst renewed consideration of this area occurred largely as a result of the recent availability of genetic profiling technology for which blood would be the preferable sample to be taken from a suspect, it must be remembered that other body samples may be required for use in other forms of scientific analysis where genetic profiling is inappropriate or inapplicable. Also, physical examination of a suspect, including dental examination, may provide valuable evidence such as distinguishing features or injuries.

Further, where a person is compelled to submit to an investigative procedure there may be situations where their religious or other beliefs prevent them from, for example, providing a sample of blood. In such situations a sample of skin cells obtained by scraping the inside of the mouth may be a more acceptable alternative. Therefore various types of medical procedures may be necessary and it would be inadequate for legislation to restrict such procedures to the taking of blood samples alone.

There are essentially two approaches which can be adopted in drafting legislation to adequately define the type of examination which may be carried out pursuant to the legislation. The first allows 'such an examination of the person so in custody as is reasonable in order to ascertain the facts which may afford such evidence'¹² and has been adopted by a number of Australian States.¹³

This can be contrasted with provisions which specifically refer to the taking of *samples* for subsequent analysis or examination.

Such legislation may either set out clearly what samples may be taken¹⁴ or may adopt an inclusive definition of 'sample' as is the case under s145(12) of the *Police Administration Act 1978* (NT) which states that 'specimen' includes 'any sample of, or taken from, the body of the person and any substance found on the body of the person'.¹⁵

At first it may appear that whichever approach is adopted makes little difference as it is clear from judicial interpretation of these statutes in Australia that the ambit of the phrase 'medical examination' will not be limited to superficial physical examinations. In the case of *R v Franklin*¹⁶ the Supreme Court of South Australia held that provided all formalities and conditions precedent were complied with, 'an examination may proceed beyond mere

¹² Section 353A(2) *Crimes Act 1900* (NSW).

¹³ See also s236 *Criminal Code Act 1913* (WA); s81(2) *Police Offences Act 1953-1975* (SA), and cl4 '464M' of the *Crimes (Police Powers of Investigation) Bill 1988* (Vic).

¹⁴ As in s65 of the *Police and Criminal Evidence Act 1984* (Eng).

¹⁵ Also see s6(5) of the *Criminal Process (Identification and Search Procedures) Act 1976* (Tas) which combines the two approaches to some extent.

¹⁶ (1979) 22 SASR 101.

scrutiny of the person, and extend to the taking of specimens or the recovery of foreign bodies where those specimens or bodies may afford evidence of the charge in question.¹⁷

Notwithstanding this there is also a long established presumption used in statutory interpretation that penal statutes are to be interpreted very strictly. In the case of *R v Galvin & McAulay; Ex parte Bara*¹⁸ it was held by Justice Muirhead of the Supreme Court of the Northern Territory that where the statute is a penal one it must be interpreted strictly so that it does not intrude upon personal rights such as liberty, protection against self-incrimination, and protection against interference with bodily integrity, 'unless the language is irresistible'.¹⁹ He further stated that 'if an Act empowering compulsory physical or medical examination was expressed in terms which left doubt as to whether a particular procedure was empowered, then those doubts should be sufficient to hold the procedure beyond power.'²⁰ Thus it is arguable that legislation which referred specifically to the taking of *samples* should not be read broadly as including other forms of medical examinations as such examinations would be inconsistent with the clear wording of the statute.

Arguably the most practical approach to this issue may be found in the *Criminal Code, Evidence Act and other Acts Amendment Act 1989 (Qld)*.²¹ Section 25(3) of this Act states that under prescribed circumstances a medical practitioner may:

- (a) (i) examine the person of the person in custody including the orifices of the body;
- (ii) take samples of blood, saliva or hair;
- (iii) require him or her to provide a sample of urine;
- (iv) collect from the person a substance or thing (including from the body orifices) if the collection of it would be unlikely to cause bodily harm if they co-operate therewith.

In addition to this a dentist may:

- (b) (i) examine the mouth of the person in custody,
- (ii) take a sample of saliva, and
- (iii) take dental impressions.

The wording of this section is extremely comprehensive and seems to encompass all situations which could conceivably arise in this context. Even if not totally comprehensive, the wording is such as to make the intention of the legislature 'irresistible'.²² The advantage of this approach is that it expressly allows a general medical examination of the suspect to be carried out, thereby removing any doubt as to whether or not the legislation permits such an examination. It also expressly limits what samples may be taken from a suspect pursuant to the Act thereby helping to alleviate ambiguities in inter-

¹⁷ *Id* 106 per Wells J. A similar view has been adopted in: *R v Harrison* [1975] Tas SR 140; *R v Galvin & McAulay; Ex parte Bara* (1983) 72 FLR 276; *Re PW Franklin* (1979) 1 A Crim R 1; *McAneny v Kearney; Ex parte Kearney* [1966] Qd R 306, 311.

¹⁸ (1983) 72 FLR 276.

¹⁹ *Id* 278.

²⁰ *Id* 282.

²¹ The Commencement date of this Act was the 3/7/1989. Gaz 93, 24/6/1989, p1821.

²² *R v Galvin & McAulay; Ex parte Bara* (1983) 72 FLR 276, 278.

pretation of the legislation in determining what evidence may be lawfully obtained pursuant to such an examination.²³

Whilst the *Crimes (Blood Samples) Act 1989* (Vic) obviously deals only with blood samples,²⁴ the Coldrey Committee has recommended that Victorian legislation should permit a broad range of tests and examinations including physical examinations to observe injuries and distinguishing marks, the taking of physical measurements, the taking of gunshot residues from external skin surfaces, hair samples, fingernail scrapings, blood samples, skin swabs and washings, saliva samples, and scrapings from the inside of the mouth.²⁵ Therefore it would seem that a legislative scheme similar to that adopted in the *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld) would be most appropriate. However, the Coldrey Committee has specifically recommended that 'examination' of a suspect be restricted to an external examination.²⁶ It may be that the Coldrey Committee intends to deal with this issue more thoroughly in the future as it has indicated that it intends to deal with procedures dealing with the removal of foreign objects from within the body of a suspect by surgical or other means when it deals with the laws relating to search and seizure.²⁷

The effectiveness of such legislation would be maximised by adopting the recommendations of the Coldrey Committee to set out in regulations to the *Crimes Act 1958* (Vic) the basic methods to be applied in conducting various tests and examinations where such specification is necessary to ensure safety, reliability, and validity.²⁸

2. Who Should Perform The Examinations?

All legislation in Australia which expressly deals with the examination and/or taking of samples from suspects provides that such procedures must be carried out by a legally qualified medical practitioner.²⁹ The major practical disadvantage which stems from this approach is the delay which may result

²³ Sections 145(1) and 145(3) of the *Police Administration Act 1978* (NT) also draw a distinction between an examination and the taking of samples but not in as clear a fashion as the *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld).

²⁴ Clause 4 '464M' of the *Crimes (Police Powers of Investigation) Bill 1988* (Vic) allows the 'examination' of a suspect as well as the taking of 'samples' but these terms are not clarified further.

²⁵ Coldrey Committee Report pp263-5.

²⁶ Coldrey Committee Report p263.

²⁷ Coldrey Committee Report p21. Sections which allow the examination of the body orifices of a person: Section 65 of the *Police and Criminal Evidence Act 1984* (Eng); section 259 *Criminal Code Act 1899* (Qld) as amended by s25 of the *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld).

²⁸ Coldrey Committee Report pp158-9. Also see s5 '464S(3)' of the *Crimes (Blood Samples) Act 1989* (Vic) and regulations 1400-13 of the *Motor Car Regulations 1984* (Vic).

²⁹ Section 353A(2) *Crimes Act 1900* (NSW); section 236 *Criminal Code Act 1913* (WA); section 81(2) *Police Offences Act 1953-1975* (SA); section 6(1) *Criminal Process (Identification and Search Procedures) Act 1976* (Tas); section 145(1),(3) *Police Administration Act 1978* (NT); section 25 *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld); section 5 '464S(3) *Crimes (Blood Samples) Act 1989* (Vic); clause 4 '464M'(1) of the *Crimes (Police Powers of Investigation) Bill 1988* (Vic).

from having to secure the attendance of a medical practitioner whilst the suspect is in police custody. However, this is clearly outweighed by the fact that most of the relevant procedures could only be carried out safely and effectively by a medical practitioner and are of such an intimate nature that the potential for abuse is obvious. Therefore any delay occasioned is clearly in the suspect's interest. Nonetheless, there are some procedures which it may be necessary to carry out in a particular case which do not necessarily require a medical practitioner to perform them safely. This is demonstrated by s62 of the *Police and Criminal Evidence Act 1984* (Eng) which introduces a distinction between 'intimate' and 'non-intimate' samples. Under s65 'intimate sample' is defined as:

blood, semen, or any other tissue fluid, urine, saliva, or pubic hair, or a swab taken from a person's body orifice.

'Non-intimate sample' is defined as:

hair other than pubic hair, a sample from a nail or from under a nail, a swab from any part of the body except for an orifice.

This classification is obviously an attempt to distinguish between, and treat differently procedures which involve varying degrees of violation of a suspect's person, as well as those which require varying amounts of expertise to perform them safely and effectively. Under s62(9) intimate samples, except urine or saliva, may only be taken by a registered medical practitioner. The inference therefore is that urine, saliva, and non-intimate samples may be taken by a police officer or other non-medical person. This attempt to facilitate the expeditious obtaining of samples which do not involve appreciable risk or embarrassment to the suspect is commendable from the perspective of avoiding unduly prolonged detention as well as the unnecessary expense incurred if a medical practitioner was required to perform such relatively simple procedures.

However a more important consideration is that the presence of an independent medical practitioner provides a safeguard against abuse by police officers of any powers awarded to them in this context. This in itself is a very persuasive factor for requiring a medical practitioner to perform *all* such procedures whether 'intimate' or 'non-intimate'. It also allows the physical and mental condition of a suspect to undergo a preliminary assessment before any examination is carried out.

The English approach is unlikely to be adopted in Victoria given the Coldrey Committee's recommendation that physical examinations and the taking of blood samples must be performed by a medical practitioner,³⁰ and the taking of samples from the mouth must be performed by a medical practitioner or a suitably qualified health professional, for example a nurse or presumably in appropriate cases a dentist. It is recommended that those

³⁰ Coldrey Committee Report pp231-4; section 5 '464S(3)' of the *Crimes (Blood Samples) Act 1989* (Vic); clause 4 '464M'(1) *Crimes (Police Powers of Investigation) Bill 1988* (Vic).

people who would constitute 'duly qualified health professionals' would be set out in regulations to the Act.³¹

In this context there are also a number of related considerations which take into account the balance which must be found between ensuring that the legislation is effective in that it achieves the purpose for which it was enacted, whilst still maintaining a degree of humanity which is necessary when subjecting people who are not yet convicted, to procedures which are intimidating and often involve violation of their physical integrity. This balance should be a primary consideration in relation to all aspects of the legislation but it is demonstrated by a number of incidental provisions which have been adopted in some jurisdictions.

For example, s6(2) of the *Criminal Process (Identification and Search Procedures) Act 1976* (Tas) provides that even where the procedures are to be carried out by a legally qualified medical practitioner the suspect may request that the procedure be carried out by a medical practitioner of the same sex as the suspect and this request, if made, must be complied with unless compliance is not reasonably practicable. There is also a requirement under s8 that the suspect must be provided with adequate clothing at all times.

Under s25(11) of the *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld) where a person informs a police officer of any person they wish to have present, the police officer must take all reasonable steps to have that person attend within a reasonable time and the procedure shall not be carried out until the expiration of that period.³²

Under s145(8) of the *Police Administration Act 1978* (NT) a suspect may request the attendance of a medical practitioner or dentist of his or her choice, and this must be complied with before the examination is performed unless compliance is impracticable.³³

Section 81(3) of the *Police Offences Act 1953-1975* (SA) provides for the person's medical practitioner or dentist to actually perform the examination in addition to that performed by the police medical practitioner or dentist where this is practicable.

All of these provisions require that the suspect be told of his or her right to make such a request and a similar provision is contained in s5 '464T(c)' of the *Crimes (Blood Samples) Act 1989* (Vic).

In this context the Coldrey Committee has recommended that procedures performed pursuant to the legislation should only be carried out in a facility affording sufficient privacy, and with only those personnel necessary being present. Further, if the procedure involves the suspect removing their clothes all of those people present including the medical practitioner must, where practicable, be of the same sex as the suspect.³⁴

A number of recommendations made by the Coldrey Committee already have legislative form in the recently proclaimed *Crimes (Fingerprinting) Act*

³¹ Coldrey Committee Report p234.

³² Also see s25(4) *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

³³ Also see *Victoria Police Manual 1986* paragraph 29.1(2).

³⁴ Coldrey Committee Report pp233, 250.

1988 (Vic).³⁵ These are that if the reasonable force approach is adopted then the person or person's applying reasonable force should, where practicable, be of the same sex as the suspect, and also not be officers involved in the investigation of the offence for which the evidence is sought.³⁶

The Coldrey Committee has also recommended that if a reasonable force approach is adopted for the compulsory taking of samples or examination of the suspect then such procedures must be witnessed by an independent person or video-taped.³⁷ However the Report makes no attempt to define exactly who would constitute an 'independent person' for the purposes of the legislation. In attempting to define such a phrase it is impossible to find a perfect solution, each approach has some drawbacks. It is a matter of choosing the most practical and most effective approach overall.

One alternative is that the procedure be witnessed by a police officer but it could strongly be argued that any police officer, even if not connected with the investigation for which the sample is required would not strictly be an *independent* person.

Another alternative is that the procedure be witnessed by a member of the public but the impracticality of such a proposal would make the requirement an absurdity.

The approach which would be in the best interests of the suspect would be for the legislation to require that the suspect's solicitor be present throughout the proceedings. The major advantage of this option is that the solicitor would present a real deterrent to any contemplated abuse of power and in addition the suspect would have the benefit of legal advice.³⁸

It could be argued that as the procedures must be carried out by a medical practitioner then the practitioner should satisfy the requirement that it be witnessed by an 'independent person'. However, as the medical practitioner is performing the examination at the request of the police, there may be a legitimate *perception* of bias even if there was no actual bias and therefore a medical practitioner should not be regarded as an 'independent person' for the purposes of the legislation.

I submit that the most practical approach is that video-taping of the procedure be made mandatory and only where video-taping is impracticable will the presence of an 'independent person' be sufficient as although video-taping only shows the procedure itself and cannot indicate whether any unreasonable coercion was used prior to the actual sample being taken, a video camera is still, generally speaking, the most independent of observers. The onus should of course be on the prosecution to establish the impracticability of video-taping the procedure and Parliament must decide what definition of the phrase 'independent person' should be adopted.

³⁵ The commencement date of this Act except ss6, 7(b) and 10 was the 1/1/1990. Gaz G 50, 20/12/1989, p3290.

³⁶ Coldrey Committee Report p222. Also see s4 '464O' of the *Crimes (Fingerprinting) Act 1988 (Vic)*; section 5 '464Y(2)(a)(b)' of the *Crimes (Blood Samples) Act 1989 (Vic)*.

³⁷ Coldrey Committee Report p222. Also see s4 '464O' of the *Crimes (Fingerprinting) Act 1988 (Vic)* and s5 '464Y(3)' of the *Crimes (Blood Samples) Act 1989 (Vic)*.

³⁸ *Miranda v Arizona* 86 S Ct 1602 (1966).

It is arguable that such procedures should be adopted even where the examination is performed with the consent of the suspect in order to guard against any later accusations of abuse of power. However the cost involved and the delay occasioned outweigh the relatively minor benefits to the suspect as the procedures must be carried out by a medical practitioner or suitably qualified health professional and therefore this should satisfy the requirement of an 'independent person' for the purposes of procedures carried out with the suspect's consent.

3. If Consent Is Given What Form Should It Take?

This is an important consideration as it is vital that a suspect give his or her consent to an investigative procedure out of the exercise of his or her own free will and not because of ignorance as to the ramifications of giving such consent, or as a result of intimidation or physical coercion on the part of the police officers involved. Many Australian States do not make specific provision as to the form in which consent should be given; they merely state that a medical examination of the suspect may be carried out if there are reasonable grounds for it to be performed, and the issue of the suspect being given an opportunity to consent willingly to such an examination is not addressed.³⁹ Although police officers would presumably provide a suspect with the opportunity to consent, the accused should be given an opportunity to state his or her informed consent in a formal manner whether or not consent is strictly required, thus affording evidence of his or her willingness to cooperate. This approach has been adopted in the *Police and Criminal Evidence Act 1984* (Eng) but the most comprehensive requirements relating to the consent of an accused are set out in the *Crimes (Fingerprinting) Act 1988* (Vic) and in substance these have been adopted by the Coldrey Committee.⁴⁰ This Act requires that the police officer must inform the suspect of:

- (a) The offence of which he or she is suspected of having committed;
- (b) The procedure sought to be carried out;⁴¹
- (c) The purpose of that procedure;
- (d) That the procedure may produce evidence which may be used as evidence in court;
- (e) Where the suspect is not in custody, that the suspect may refuse to submit to such a procedure.

Where the suspect is in custody or on remand the Coldrey Committee rec-

³⁹ Section 353A(2) *Crimes Act 1900* (NSW); section 236 *Criminal Code Act 1913* (WA); section 81(2) *Police Offences Act 1953-1975* (SA); section 6(1) *Criminal Process (Identification and Search Procedures) Act 1976* (Tas); section 259 *Criminal Code Act 1899* (Qld) as amended by s25 *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld); clause 4 '464M' *Crimes (Police Powers of Investigation) Bill 1988* (Vic). Also see ss 145(1), (3) *Police Administration Act 1978* (NT) which expressly address the requirement of consent but make no further provision as to what constitutes adequate consent.

⁴⁰ Coldrey Committee Report pp187-8. Also see s4 '464L(1)' of the *Crimes (Fingerprinting) Act 1988* (Vic).

⁴¹ Such a provision would be most effective if the nature of the procedure was fully explained to the suspect.

ommends that in addition to the requirements outlined above, the suspect be informed that if he or she refuses to comply with a procedure an application may be made to a magistrate for an order authorising the procedure.⁴²

The giving of such information and consent must be recorded either on tape or in writing signed by the accused and copies of these must be supplied to the suspect within seven days.⁴³ It is also recommended that where a procedure is video-taped, a copy of the video-tape must be supplied to the suspect within seven days.

4. Upon Whose Instructions Should Such Investigative Procedures Be Carried Out?

A number of States provide that such procedures can only be carried out at the request of any officer of police of or above the rank of sergeant,⁴⁴ whilst others simply state that the examination may be carried out 'at the request of a police officer'.⁴⁵

Another alternative is that the procedures can only be carried out at the request of the police officer in charge of the police station, thereby ensuring that the most senior officer available is made responsible for the decision. This is the case under s353A(3) of the *Crimes Act* 1900 (NSW) and it was held in *Fullerton v Commissioner of Police*⁴⁶ that the phrase 'officer in charge' in s353A(3) meant officer in charge of all of the police at the station, not just some.⁴⁷

As these provisions confer very wide discretions to request and in some cases order an examination to be carried out⁴⁸ it is imperative that such a discretion should only be placed in the hands of a senior police officer as whilst this does not guarantee it will be exercised properly in all cases, it at least minimises the risk of abuse by ensuring the discretion is exercised by a police officer of some seniority.

This consideration may apply irrespective of whether or not the investigation can only be carried out if the suspect consents as unless there is a provision in the legislation requiring this consent to be informed consent, there is a real possibility that in such a situation consent may be given out of ignorance, especially when they are in the intimidating circumstances and surroundings associated with the arrest and detention of suspects. They may

⁴² Coldrey Committee Report pp188-9.

⁴³ Coldrey Committee Report pp188-9. Also see s4 '464L' of the *Crimes (Fingerprinting) Act* 1988 (Vic) and s5 '464T(2)(b)' of the *Crimes (Blood Samples) Act* 1989 (Vic).

⁴⁴ Section 353A(2) *Crimes Act* 1900 (NSW) and s81(2) *Police Offences Act* 1953-1975 (SA); clause 4 '464M' *Crimes (Police Powers of Investigation) Bill* 1988 (Vic). Also see ss62(2) & 63(3) of the *Police and Criminal Evidence Act* 1984 (Eng).

⁴⁵ Section 145 *Police Administration Act* 1978 (NT); section 259 *Criminal Code Act* 1899 (Qld) as amended by s25 *Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Qld); section 236 *Criminal Code Act* 1913 (WA); section 6(1) *Criminal Process (Identification and Search Procedures) Act* 1976 (Tas).

⁴⁶ [1984] 1 NSWLR 159, 163.

⁴⁷ Also see clause 4 '464M' *Crimes (Police Powers of Investigation) Bill* 1988.

⁴⁸ *Sernack v McTavish* (1970) 15 FLR 381.

unwittingly give consent in the mistaken belief that it is in their interest, or that they have no choice.

The Coldrey Committee does not expressly address this issue but it seems that Victorian legislation will require that a 'member of the police force' may direct that such procedures be carried out as this is the requirement contained in s5 '464T' and '464U' of the *Crimes (Blood Samples) Act 1989* (Vic) and is also the position under s4 '464L' and '464M' of the *Crimes (Fingerprinting) Act 1988* (Vic). However given the recommendation that consent be informed and that a magistrate's order must be obtained before non-consensual procedures can be carried out, it seems that the potential for abuse in this particular context will be minimal.

5. In What Circumstances Should Such A Request Be Made?

Most Australian States allow such examinations to be carried out where the person is charged with committing 'an offence' and there are reasonable grounds for believing that an examination of his or her person will afford evidence as to the commission of the offence.⁴⁹ There is no requirement that the relevant offence be of a serious nature. Section 6(1) of the *Criminal Process (Identification and Search Procedures) Act 1976* (Tas) is limited to offences specified in Schedule 1 to that Act but this states that the section applies to every offence which is a crime within the meaning of the *Criminal Code Act 1924* (Tas), as well as a number of additional offences and therefore does not appreciably limit the number of offences to which this section is applicable. Section 62(2)(a) of the *Police and Criminal Evidence Act 1984* (Eng) specifies the offence must be a 'serious arrestable offence' if an 'intimate' sample is to be taken, and the suspect must simply be in custody on the authority of a court if the sample is 'non-intimate'.

The Coldrey Committee has made no recommendations in this respect but s5 '464S' of the *Crimes (Blood Samples) Act 1989* (Vic) restricts the taking of blood samples to 'relevant suspects'; that is, people suspected of committing murder or attempted murder, a sexual offence, or manslaughter. It further extends to people who have been charged with murder, attempted murder, manslaughter, or a sexual offence. This obviously reflects the view that only certain offences justify such violations of personal integrity.

If, as seems likely,⁵⁰ the police must obtain a magistrate's order before they can take a sample or perform an examination of the suspect without the suspect's consent, then the broad wording of 'an offence' could safely be adopted as it would be within the magistrate's discretion as to whether or not the offence is one which warrants the employment of the particular investigative

⁴⁹ Section 353A(2) *Crimes Act 1900* (NSW); section 236 *Criminal Code Act 1913* (WA); section 81(2) *Police Offences Act 1953-1975* (SA); sections 145(1), (3) *Police Administration Act 1978* (NT); section 259 *Criminal Code Act 1899* (Qld) as amended by s25 *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld); section 4 '464M' of the *Crimes (Police Powers of Investigation) Bill 1988* (Vic).

⁵⁰ *Infra* pp38-9, 42-4.

procedure. This approach is less restrictive than a fixed legislative classification of offences.

6. What Use May Be Made Of Samples Obtained Pursuant To The Legislation?

A number of Australian States make no provision whatsoever as to the use which may be made of such forensic evidence once obtained,⁵¹ and yet an essential requirement which must be included if the rights of suspects are to be preserved is one dealing with the use of samples obtained pursuant to the legislation where the suspect is subsequently discharged from custody, is not committed for trial, or is acquitted. This is dealt with in only one state of Australia and that is in s147 of the *Police Administration Act 1978* (NT).⁵²

The Coldrey Committee has specifically addressed this issue⁵³ and recommended that all samples, records, reports, etc. should be destroyed as soon as the person is acquitted or eliminated from the investigation, but where the person is convicted of an indictable offence the materials may be kept for the purposes of future criminal investigations. This recommendation is very broadly worded in that it does not limit the relevant indictable offence to the offence in respect of which the sample was taken, an offence arising out of the same circumstances, or some other offence in which evidence arising out of the procedure was used.

This raises the consideration of whether or not the evidence obtained as a result of such procedures must be used only in respect of the offence for which the person was taken into custody, or whether it can be used in relation to other offences which the person is suspected of committing. The importance of this is that if the legislation is not drafted clearly, the statute may be interpreted in such a way that it allows the use of 'holding-charges'; that is, a suspect is charged with one offence in order to secure evidence which connects him or her with a more serious offence. The legislature may of course sanction such a course of action if they feel it is warranted but this issue must be considered so that the legislation does not condone such practices inadvertently.

The relevant legislation in most Australian States impliedly restricts the use of the evidence to the particular offence charged⁵⁴ but under s7(1) of the *Criminal Process (Identification and Search Procedures) Act 1976* (Tas) it is

⁵¹ Section 353A(2) *Crimes Act 1900* (NSW); section 236 *Criminal Code Act 1913* (WA); section 259 *Criminal Code Act 1899* (Qld) as amended by s25 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1988* (Qld); section 6 of the *Criminal Process (Identification and Search Procedures) Act 1976* (Tas); section 81 *Police Offences Act 1953-1975* (SA).

⁵² Similar provisions are also contained in s65 of the *Police and Criminal Evidence Act 1984* (Eng). Also see clause 4 '464M(5)' *Crimes (Police Powers of Investigation) Bill 1988* (Vic).

⁵³ Coldrey Committee Report pp 251-60.

⁵⁴ Section 81 *Police Offences Act 1953-1975* (SA); section 259 *Criminal Code Act 1899* (Qld) as amended by s25 *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld); section 353A(2) *Crimes Act 1900* (NSW); section 236 *Criminal Code Act 1913* (WA); clause 4 '464M' *Crimes (Police Powers of Investigation) Bill 1988* (Vic).

possible to obtain a magistrate's order in order to allow the use of the evidence in respect of an offence other than that with which the suspect was originally charged. Under ss145(1)(3) of the *Police Administration Act* 1978 (NT) and s62 of the *Police and Criminal Evidence Act* 1984 (Eng) the evidence may be used in respect of any offence punishable by imprisonment.

The Coldrey Committee has taken a very liberal approach to this issue and has recommended that, subject to the destruction requirements,⁵⁵ material lawfully obtained pursuant to the legislation which is relevant may be used to assist in any other *existing* investigation.⁵⁶

7. Equal Opportunity For The Defence

A major consideration is the ability of the defence to have equal access to samples and findings obtained as a result of examinations performed pursuant to the legislation as usually only the police force have access to samples from crime scenes and often the limited samples will be exhausted therefore leaving no opportunity for the defence to have a test done independently. Bearing in mind that identification will be made on the basis of an expert opinion, the only way for the defence to effectively challenge this opinion is to be allowed access to the findings of the State scientists and have them evaluated by an independent expert.

In Victorian criminal trials there are no laws which require the prosecution to disclose a witness's statements to the defence before trial. As Chief Justice Barwick stated in *Lawless v R*⁵⁷:

It is good practice . . . in general for the prosecution to inform the defence of the identity of any witness from whom a statement in the possession of the prosecution has been obtained . . . But . . . there is no obligation of any kind resting on the prosecution to provide the defence with a copy of such a statement.⁵⁸

This situation presents an enormous imbalance in favour of the prosecution who have far greater access to the required facilities than does the defence.

However, the defence does have access under s75 of the *Magistrates (Summary Proceedings) Act* 1975 (Vic) to the depositions of all prosecution witnesses who are called to testify⁵⁹ and there is also a right at common law for the defence to be allowed access to all exhibits sought to be tendered by the prosecution.⁶⁰

This imbalance could easily be redressed by enacting express provisions in the appropriate legislation allowing for pre-trial disclosure of such evidence,

⁵⁵ *Supra* p22.

⁵⁶ Coldrey Committee Report pp255-6.

⁵⁷ (1979) 142 CLR 659.

⁵⁸ *Id* 667.

⁵⁹ Also see ss4, 5, 8 and 75A of the *Evidence Act* 1958 (Vic).

⁶⁰ *R v Beaney* (1866) 3 VLR(L) 73; *R v Ekert* [1975] QdR 429; and *R v Lambeth Metropolitan Stipendiary Magistrate; Ex parte McComb* [1983] QB 551. See generally IG Campbell, 'Discovery in Criminal Trials; Prosecutorial Duties and Judicial Remedies' (1984) 13 *University of Queensland Law Review* 154.

thus allowing the defence to have them independently evaluated. This approach is adopted in s25(10) of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) which provides that the results of any test conducted with respect to any sample taken or collected pursuant to the section shall be furnished to that person or a person nominated by him or her as soon as is practicable after the results are available to any police officer. This provision seems to be unnecessarily limited to the analysis of *samples* obtained pursuant to the legislation. It would be more effective if it should relate also to the disclosure of medical reports made pursuant to an *examination* made under the section as is the case under s145(9) of the *Police Administration Act 1978* (NT) which provides that upon application by the person he or she must be provided with a copy of the report of the medical practitioner or the dentist furnished in respect of the examination or of the report of the analysis or other examination of the specimen.

An alternative and potentially much more far reaching approach is that adopted in s81(1) of the *Police and Criminal Evidence Act 1984* (Eng) which provides that the *Crown Court Rules* may make provision for:

- (a) requiring any party to the proceeding before the court to disclose to the other party or parties any expert evidence which they propose to adduce in the proceedings; and
- (b) prohibiting a party who fails to comply with (a) from adducing that evidence without the leave of the court.

The Coldrey Committee has recommended that where a sufficient crime-scene sample is available to permit independent analysis on behalf of the accused, the accused should have access to a sufficient portion of the sample in order to allow such analysis.⁶¹ It has also recommended that copies of all reports be made available to the accused or his or her nominee as soon as practicable after they are received by the prosecution or in any event within seven days of receipt.⁶²

THE NON-CONSENSUAL PHYSICAL EXAMINATION OF SUSPECTS

The most controversial and contentious aspect of such legislation is the non-consensual physical examination of suspects and once again we are confronted with a number of possible alternatives. The first, and one which has largely been overshadowed by the pressure put on politicians by the public and police to increase police powers, is that the non-consensual physical examination of suspects should not be sanctioned by legislation thereby keeping the position as it is today in Victoria where such an examination without consent would constitute assault. Much of our criminal law is concerned with the protection of personal rights and freedom from unnecessary intrusions

⁶¹ Coldrey Committee Report p245.

⁶² Coldrey Committee Report p248.

and it is arguable that compelling a suspect to submit to a physical examination is contrary to at least two of these principles.

1. The Presumption Of Innocence

This is one of the most basic and fundamental principles upon which our system of justice is based and in Australia the principle was stated in *R v Phillips*⁶³ where it was said that 'the prisoner is presumed to be innocent until he is proved to be guilty, and he is entitled to the benefit of every reasonable doubt that is raised in the case.'⁶⁴

It is generally assumed by the courts that certain procedures in respect of the person would *per se* be contrary to the presumption of innocence. In *Dumbell v Roberts*⁶⁵ Scott LJ in referring to the taking of fingerprints without statutory sanction said 'such treatment is inconsistent with our British presumption of innocence until proof of guilt; and it is natural for it to be regarded as a slur on a man's character. Without free consent it involves trespass to the person . . .'.⁶⁶ Similarly in *Marcoux & Solomon v The Queen*,⁶⁷ Justice Dickson of the Supreme Court of Canada in speaking about an accused's refusal to participate in an identification line-up said: 'I do not think such evidence should normally be tendered. The danger . . . is that it may impinge on the presumption of innocence, the jury may gain the impression there is a duty on the accused to prove he is innocent.'⁶⁸

Just as it is clear that such procedures would *per se* impinge upon the presumption of innocence, it is equally clear that Parliament may legislate contrary to this presumption. Even in countries such as the United States and Canada where such a presumption is entrenched within a constitutional document⁶⁹ and therefore 'colors all of the government's actions towards persons not yet convicted'⁷⁰ it is generally circumscribed quite easily where it is deemed expedient to do so. Paragraph 1 of the *Canadian Charter of Rights and Freedoms* states that the *Charter* guarantees the rights and freedom set out in it 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The Victorian Parliament is not even hampered to this extent. Section 16 of the *Constitution Act 1975* (Vic) states that the Parliament may make laws in and for Victoria 'in all cases whatsoever'.

Parliament's ability to legislate contrary to even such a fundamental com-

⁶³ (1868) 8 SCR (NSW) 54.

⁶⁴ *Id* 57. Also see *R v Madden* (1977) 41 CCC (2d) 413; *Barnett v McGregor* [1959] QdR 296, 303 and *Mahoney v Fielding; Ex Parte Fielding* [1959] QdR 479. The presumption of innocence is also entrenched within Article 14, Paragraph 2 of the *International Covenant of Civil and Political Rights* to which Australia is a signatory. However this will have only limited effect until it is enacted in appropriate legislative form.

⁶⁵ [1944] 1 All ER 326.

⁶⁶ *Id* 330.

⁶⁷ (1975) 24 CCC (2d) 1.

⁶⁸ *Id* 9-10.

⁶⁹ For example, paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*; Part I of the *Constitution Act 1982*, Schedule B to the *Canada Act 1982* (Eng).

⁷⁰ *Bell v Wolfish* 99 SCt 1861, (1979) fn 11 1897.

mon law principle is clearly stated in the Canadian case of *R v McGregor*⁷¹ where Justice Griffiths stated that 'in law, neither the presumption of innocence nor the fairness of an accused's trial are affected by statutory provisions which authorize the police to require an accused to submit to physical tests or procedures which may produce incriminating evidence.'⁷²

However, although the presumption of innocence does not present a *legal* barrier to the enactment of legislation allowing the physical examination of suspects without consent it stands to remind us of the concept of adversarial fairness which forms the basis of our system of justice and it is then for Parliament to decide if the particular situation warrants legislating contrary to this principle.

2. The Privilege Against Self-Incrimination

Inextricably linked with the presumption of innocence is the privilege against self-incrimination, the common law formulation of which was stated by Goddard LJ in *Blunt v Park Lane Hotel Ltd*:⁷³

the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for.⁷⁴

Whilst it would seem arguable that this privilege could extend to situations where an accused is forced to provide *real* evidence which may incriminate him or her the courts have clearly rejected this approach. However their reasoning does not seem to be one of logic derived from the principle behind the privilege which is stated, at least in respect of its formulation in the United States's Bill of Rights, in the famous case of *Miranda v Arizona*:⁷⁵

our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours, rather than by the cruel, simple expedient of compelling it from his own mouth.⁷⁶

Rather, the courts' approach stems from the fact that due to its historical development the privilege has been limited to oral testimony. The cases do not address the question of whether this is simply because during the development of the privilege the use of real evidence obtained from the suspect in the sense in which this occurs today would have been virtually nonexistent, they have simply refused to extend the privilege. In the case of *King v*

⁷¹ (1983) 3 CCC (3d) 200.

⁷² Id 211.

⁷³ [1942] 2 KB 253.

⁷⁴ Id 257. Also see *Ex parte P; Re Hamilton* (1957) 74 WN (NSW) 397. This privilege has been affirmed by ss26 and 29 of the *Evidence Act* 1958 (Vic) and s184 of the *Crimes Act* 1958 (Vic).

⁷⁵ 86 S Ct 1602 (1966).

⁷⁶ Id 1620.

*McLellan*⁷⁷ the Full Court of the Victorian Supreme Court held that there is no doubt that:

there is a fundamental principle that no man can be compelled to incriminate himself but this 'has only been accorded, in respect of a right to refuse to answer incriminating questions . . . when being interrogated in some form of judicial inquiry . . . "it is not merely any and every compulsion that is the kernel of the privilege, . . . but testimonial compulsion" . . . There is also a distinction to be maintained between a statement made by a prisoner and a fingerprint . . . or other physical characteristics of a person. These exist as a physical fact and are 'not susceptible of misrepresentation in any relevant sense.'⁷⁸

This approach was adopted by the High Court of Australia in the case of *Sorby v The Commonwealth*⁷⁹ where it was said 'the privilege prohibits the compulsion of a witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body.'⁸⁰

A similar view has been expressed in Canada where Dickson J of the Supreme Court of Canada commented that 'evidence of bodily condition such as features, clothing, fingerprints, photographs, and measurements do not violate the principle of self-incrimination';⁸¹ and in the United States where the privilege is 'clothed . . . with the impregnability of a constitutional enactment',⁸² it has been stated that 'compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it [the privilege against self-incrimination]'.⁸³ This view is also held by the Coldrey Committee.⁸⁴

Even if it were held that the taking of such samples and their subsequent use as evidence against the accused is contrary to the privilege against self-incrimination, it is clear the Parliament would still have the legislative power to legislate contrary to this privilege. In *R v Scott*⁸⁵ Lord Campbell CJ referred to 'the great maxim of English law "*nemo tenetur se ipsum accusare*"' and commented that 'Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be incriminated.'⁸⁶

This is so even if the issue is considered in terms of an individual's right to act freely within the law which was the approach adopted in *Warnecke v*

⁷⁷ [1974] VR 773.

⁷⁸ Id 776.

⁷⁹ (1983) 46 ALR 237.

⁸⁰ Id 244 per Gibbs CJ. Also see *R v Carr* [1972] 1 NSWLR 608, 611; *R v Mursic* [1980] QdR 482.

⁸¹ *Curr v The Queen* [1972] SCR 889. Also see *Marcoux & Solomon v The Queen* (1975) 24 CCC (2d) 1.

⁸² *Brown v Walker* 16 SCt 644, 647.

⁸³ *Schmerber v California* 86 SCt 1826, (1966) 1832. Also see *Miranda v Arizona* 86 SCt 1602 (1966), 1620.

⁸⁴ Coldrey Committee Report p139.

⁸⁵ (1856) D & B 47; 169 ER 909.

⁸⁶ (1856) D & B 47, 59; 169 ER 909, 914.

*Pope*⁸⁷ where it was held that ‘the basic principle of the common law is “freedom within the law” and it follows that the common law right of the individual is wider than any privilege against self-incrimination. It is the right to do as he pleases — to speak or to hold his tongue — unless the questioner can point to some power, given by the law, as his authority for requiring an answer.’⁸⁸

Nonetheless, the courts will only interpret legislation as abrogating a principle as fundamental as the privilege against self-incrimination where ‘a legislative intent to do so clearly emerges, either by express words or by necessary implication.’⁸⁹

LEGISLATIVE ALTERNATIVES

In enacting such legislation the government will be faced with a number of alternative measures by which a suspect can be forced to submit to a physical examination. There are essentially three ways in which this can be done:

1. Reasonable Force

This is certainly the most effective method in terms of obtaining the primary evidence and has been adopted by a number of Australian states.⁹⁰ It is also the approach which is most open to abuse by police officers and must therefore be considered with a great deal of caution.

The controversy surrounding the use of reasonable force in such circumstances is somewhat surprising when one considers that under s56(2) of the *Road Safety Act 1986* (Vic) it is an offence for a medical practitioner *not* to take or cause to be taken a blood sample for analysis from a person of or over the age of 15 years if that person enters into or is brought into a designated place for treatment in consequence of an accident involving a motor vehicle, whether or not that person consents to the taking of such a sample. Under s56(7) it is also an offence for a person to refuse to allow or fail to allow a

⁸⁷ [1950] SASR 113.

⁸⁸ *Id* 117. Also see *Clough v Leahy* (1904) 2 CLR 139, 157.

⁸⁹ *Sorby v The Commonwealth* (1983) 46 ALR 237. An example of a provision in which the privilege is expressly removed is s399(4) of the *Crimes Act 1958* (Vic).

⁹⁰ Section 145(4) *Police Administration Act 1978* (NT); section 81(2) *Police Offences Act 1953–1975* (SA); section 236 *Criminal Code Act 1913* (WA); section 6(6) *Criminal Process (Identification and Search Procedures) Act 1976* (Tas); section 259 of the *Criminal Code Act 1899* (Qld) as retained in s25(1) of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld); clause 4 ‘464M’ *Crimes (Police Powers of Investigation) Bill 1988* (Vic). Also see s353A(2) *Crimes Act 1900* (NSW) which does not explicitly refer to the use of reasonable force being used to compel a suspect to submit to a medical examination. Nonetheless it is arguable that the wording of the section implicitly permits the use of reasonable force. This is supported by the decision of *R v Carr* [1972] 1 NSWLR 608, 612, where the court stated ‘that section [s353A(3)] did not, as we see it, alter the common law. It merely gave statutory recognition to the taking of fingerprints by force in certain circumstances.’ This was affirmed in *Carr v R* (1973) 127 CLR 662, 663. Section 353A(3) is phrased as far as the relevant sections are concerned in a similar way to s353A(2). The reasonable force approach is also adopted in the *Identification of Criminals Act* (Can) RS, chap 1–1, s2(1).

legally qualified medical practitioner to take a sample under this section or hinder or obstruct a medical practitioner attempting to take a sample under this section and s56(8) provides that no action lies against a medical practitioner in respect of anything 'properly and necessarily done' in the course of taking any sample of blood which the medical practitioner believes on reasonable grounds was required to be taken from any person under this section. This seemingly implies that a medical practitioner *may* use reasonable force under this section.

Further, under s57(2) of the *Road Safety Act* 1986 (Vic) the evidence as to blood alcohol obtained pursuant to the legislation may be used in a trial for manslaughter as well as in a number of less serious offences. Whilst not suggesting that the regime contained within the *Road Safety Act* 1986 (Vic) is necessarily an appropriate model for general application, it seems absurd that Parliament should give such powers in relation to these offences, and yet allow legislation to remain which is so inadequate in regulating the investigative procedures applicable to the majority of criminal offences.

One disadvantage associated with the use of reasonable force is the danger that one of the personnel involved in carrying out the procedure, particularly where a blood sample is to be taken, may be inadvertently stabbed with a needle or similar instrument. This is of particular concern because of the possibility that transmission of the AIDS virus, or other similarly infectious diseases, could occur. Unfortunately this is a hazard which could be very difficult to guard against and therefore must be considered before such an approach is adopted.

Essentially there are two different approaches to the use of reasonable force when a request, if any, is made by the relevant police officer and consent is then refused by the suspect.

The first involves the use of reasonable force as soon as such a refusal is made. This is illustrated by a number of provisions⁹¹ all of which are phrased in a way that permits the interpretation that the medical practitioner involved could apply reasonable force. This therefore raises the issue that the medical practitioner involved could be made the subject of an action in tort although the possibility of such actions being brought is minimised by the recommendation by the Coldrey Committee that where the use of reasonable force is required the role of the authorised person will be limited to the performance of the relevant procedure.⁹²

A number of jurisdictions have specific provisions ensuring the medical practitioner is immune from such actions if the requirements of the legislation are complied with.⁹³ However the Coldrey Committee have recommended that the authorised person should be indemnified by the

⁹¹ Section 236 *Criminal Code Act* 1913 (WA); section 81(2) *Police Offences Act* 1953-1975 (SA); section 6(6) *Criminal Process (Identification and Search Procedures) Act* 1976 (Tas); section 259 *Criminal Code Act* 1899 (Qld).

⁹² Coldrey Committee Report p232.

⁹³ See generally s145(10) *Police Administration Act* 1978 (NT); section 6(4) *Criminal Process (Identification and Search Procedures) Act* 1976 (Tas), and s2(1) *Identification of Criminals Act* (Can) RS, chap I-1. Also see s5 '464ZE' of the *Crimes (Blood Samples) Act* 1989 (Vic).

Government for any costs arising out of any civil action brought as a result of the performance of procedures under the legislation.⁹⁴ Surely it is preferable to provide statutory immunity in a similar form to that outlined above as this thereby avoids the considerable inconvenience and possible damage to reputation which may be occasioned as a result of being the subject of such a civil claim. Such damage could not be offset merely by having out-of-pocket expenses paid.

Further, this recommendation does not appear to differentiate between those civil actions which are brought as a result of procedures carried out in compliance with the relevant legislative requirements, and those which are not. If immunity is provided for procedures carried out in compliance with the legislation, then the only tortious acts will be those in breach of the legislation. It would seem that in the latter situation the Government should not compensate authorised persons for such actions as this would seem to sanction implicitly the breach of the legislation.

Questions of civil liability aside, there is also an argument that a medical practitioner is placed in a dilemma as by being a party to an act of force perpetrated against a person who is effectively a patient, he or she is acting in a way which is contrary to the best interests of that patient. This applies even where it is a *police officer who applies reasonable force* as the medical practitioner is nonetheless a party to this and is thereby acting in the interests of the State and not in the interests of their patient. This issue has been addressed by the Coldrey Committee which consulted the Victorian branches of the Australian Medical Association, the Australian Dentists Association, the Victorian Nursing Council, and the Office of the Police Surgeon, all of which indicated that it was their policy that their members should only act in such procedures with the informed consent of the suspect.⁹⁵ Whilst the Coldrey Committee disputes this view⁹⁶ it nonetheless respects the right of an individual medical practitioner to refuse to assist in such procedures and therefore a medical practitioner's participation in such procedures is to be on a strictly voluntary basis. However this would not appear to be a significant impediment to the enactment of such legislation as similar provisions are currently in force in a number of jurisdictions.

A variation on the use of reasonable force and what I submit is the most acceptable approach to the non-consensual physical examination of suspects is one which requires a magistrate's order to be obtained before reasonable force can be exercised. This approach is found in ss145(1)(3) of the *Police Administration Act 1978 (NT)* and s25(4)(b) of the *Criminal Code, Evidence Act and other Acts Amendment Act 1989 (Qld)* and has been recommended by the Coldrey Committee in respect of both the reasonable force and adverse

⁹⁴ Coldrey Committee Report p259.

⁹⁵ Coldrey Committee Report pp140–1. The Coldrey Committee also suggested that it may be necessary to provide for a statutory exemption of authorised persons from disciplinary proceedings by their own professional bodies. Coldrey Committee Report p232.

⁹⁶ Coldrey Committee Report p142.

inference approaches.⁹⁷ It recommends that where a suspect refuses to consent to an authorised procedure the police may apply to a magistrate for an order authorising the carrying out of the procedure. Such an application must be supported by evidence either by affidavit or on oath showing that:

1. The suspect is in custody within the meaning of s464(1) of the *Crimes Act 1958* (Vic);
2. There are reasonable grounds to believe the suspect has committed the offence for which he or she is in custody;
3. Information (including crime scene samples) has been [obtained] which when allied with the [sought procedure] will [be relevant in determining] the suspect's involvement with the offence under investigation;
4. The suspect has declined to undergo the proposed procedure.⁹⁸

These requirements are more onerous than any similar legislative provisions, particularly in requiring that information relevant to the sought procedure be already obtained. The great advantage in this approach is that it delineates the discretion to be exercised to some extent by clearly stating in the legislation certain factors which the magistrate must be satisfied of before the order can be granted, while at the same time phrasing the test in such a way that the granting of an order is never mandatory, it is always discretionary. This allows the magistrate to take additional factors into account if he or she feels it is appropriate to do so.

A particularly innovative and commendable requirement is that the suspect must be present at the time the application is made.⁹⁹ This presumably allows the magistrate to take into account the suspect's reason for refusing consent although this is not expressly stated in the recommendations. It is my submission that the legislation should expressly require that the suspect or their representative be allowed to make a representation to the court before such an order is made so that the decision to physically examine the suspect against his or her will is a more balanced and reasoned one. Reasonable force should not be regarded as a tool to be used automatically on the basis of a unilateral decision arrived at by a police officer that it is necessary in the circumstances.

2. The Use Of A Sanction

An alternative approach is the use of a sanction, that is, making refusal of consent in such circumstances a criminal offence or a contempt of court and imposing a suitable penalty. As a matter of logic this approach would seem to be ineffective as any penalty imposed would necessarily have to be less severe

⁹⁷ The relevant procedures are set out at pp209–14 of the Coldrey Committee Report, and similar provisions with some variation are recommended in the case of suspects who are on bail, remand, or serving a custodial sentence, and in the case of young persons. Also see pp225–31 re. issues relating to young people and mentally or intellectually disabled people. Also see s5 '4645U' and '464V' of the *Crimes (Blood Samples) Act 1989* (Vic). It should be noted that the Coldrey Committee expressly recommends that procedures not be carried out on people under the age of ten.

⁹⁸ Coldrey Committee Report pp210–11.

⁹⁹ Coldrey Committee Report p204.

than that imposed in respect of the primary offence and it is far more likely that a suspect would suffer a penalty for a minor offence rather than risking a severe penalty for a more grave offence. This view is supported by the fact that the Coldrey Committee rejected this as an option.¹⁰⁰

Also, this approach is arguably superfluous as such a sanction is already contained in s31(1) of the *Crimes Act 1958* (Vic) which states that any person who assaults or threatens to assault, resists or intentionally obstructs a member of the police force in the due execution of his or her duty; or a person acting in aid of a member of the police force, knowing that the member or person is such a member or person; is guilty of an indictable offence. The maximum penalty is five years imprisonment. It could be argued that this offence would apply to the conduct of a medical examination carried out pursuant to the legislation as a police officer would be acting in the execution of his or her duty, and the medical practitioner would be acting under his or her direction.

3. Adverse Inference

The third approach is one whereby an adverse inference may be drawn at trial from the suspect's refusal to submit to a medical examination. This is based on the premise that such a refusal must be due to a fear of incrimination on the part of the suspect and implicit in this is the idea that if a person has nothing to hide they will consent as they will gladly avail themselves of the opportunity to clear themselves of the offence for which they are suspected. Whilst there is clearly some validity in this approach it is obviously a blatant reversal of the presumption of innocence.¹⁰¹

This approach has already been adopted in England and is found in s62(10) of the *Police and Criminal Evidence Act 1984* (Eng) in relation to the taking of 'intimate' samples. The section states that where the appropriate consent is refused without good cause, in any proceedings against that person for an offence, the court in determining whether to commit that person for trial or whether there is a case to answer, or the court or jury in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper.

The major advantage of such an approach is that it is non-intrusive and therefore avoids to a large extent the potential for abuse, particularly where intimate examinations are required.

Further, such a statutory enactment *ensures* that such a refusal is admissible at trial as at common law its admissibility is unclear. Such evidence would arguably be admissible on the basis that a refusal to submit to a physical examination is an implied admission of guilt and is therefore analogous to cases where the conduct of the accused, particularly flight, has been considered to be such an admission. For example in *R v Gay*¹⁰² the Full Court of the Victorian Supreme Court states that 'flight may be tantamount to an

¹⁰⁰ Coldrey Committee Report pp148-9.

¹⁰¹ *Supra* pp27-9.

¹⁰² [1976] VR 577.

admission of guilt . . . Evidence which tends to prove the guilt of an accused person is always prejudicial in that sense but that is no ground for its exclusion.¹⁰³

One disadvantage is that an informed criminal may prefer to take the risk of an adverse inference being drawn against him or her at trial rather than face the possibility of very damning evidence being produced as a result of, for example genetic profiling.

However, its major disadvantage in addition to it being contrary to the presumption of innocence is that there is great uncertainty in the inferences which a jury may draw from such a refusal. The guilt or innocence of an accused should not be determined by the possibly capricious conclusions reached by a jury on the basis of a suspect's refusal to submit to a medical examination, particularly when at law he or she is presumed to be innocent until proven guilty. As was pointed out by the Coldrey Committee a suspect may have reasons for refusing to submit to such an examination, even if it would be considered an unreasonable one by most people; for example, religious beliefs or a fear of contracting AIDS.¹⁰⁴ Under the English legislation, such a refusal would presumably be regarded as being 'without good cause', and whilst the accused may have an opportunity to explain his or her reasons at trial and in this way influence the inferences which the jury may draw, there may already be an inference of the accused's guilt in the minds of the jury by this stage, thus prejudicing the accused's attempts to explain his or her reasons.

The form which the Coldrey Committee envisages such an approach would take is similar to the reasonable force approach, in fact the reasonable force approach would be retained for non-intimate procedures. Where a magistrate authorises the carrying out of an intimate procedure and the suspect refuses to acquiesce, such a refusal may be given in evidence at *any* subsequent trial and the court or jury may use such a refusal as an inference of the suspect's consciousness of guilt.

A further aspect of the English legislation is that such a refusal may be treated as, or as capable of amounting to, corroboration of any evidence against the person in relation to which the refusal is material. This extended approach is unlikely to be adopted in Victoria as the Coldrey Committee has stated that if the adverse inference approach were to be adopted, it would be a matter for the discretion of the trial judge as to whether evidence of the suspect's refusal should go to the jury, and what conclusions may be drawn from it.¹⁰⁵ Further, the committee only mentions that an inference of guilt may be drawn from the evidence, not that it will constitute corroborative evidence.

There is some uncertainty as to whether the adverse inference or the reasonable force approach will ultimately be adopted in Victoria. The Col-

¹⁰³ Id 586. Also see *R v Bridgman* (1980) 24 SASR 278, 282 and *R v McKenna* (1956) 73 WN(NSW) 345.

¹⁰⁴ Coldrey Committee Report p219.

¹⁰⁵ Coldrey Committee Report pp223-4.

drey Committee is proposing the use of reasonable force in relation to non-intrusive procedures which do not involve exposure of the suspects private parts, or do not involve penetration of the skin or examination of body orifices. However, in relation to intrusive procedures such as the taking of blood samples, oral swabs, and examination of private parts and body orifices, the committee is divided as to which approach should be adopted.¹⁰⁶

I submit that the reasonable force approach is the most appropriate in such circumstances. My basis for this submission is that as is acknowledged by the Coldrey Committee,¹⁰⁷ on the basis of evidence from other jurisdictions, the number of applications made is likely to be small as in a majority of cases suspects will consent when requested to submit to such procedures, or will consent when a magistrate's order is obtained. Therefore, it will only be in a minority of cases that reasonable force will have to be employed. Whilst it is arguable that the fact that reasonable force will only be required in a small number of cases suggests its introduction is neither warranted nor justified, the use of such force is preferable as it allows the suspect's guilt or innocence to be determined on the basis of real evidence, rather than uncertain inferences drawn by the jury in relation to a suspect's conduct whilst under police investigation.

THE ADMISSIBILITY OF UNLAWFULLY OR UNFAIRLY OBTAINED EVIDENCE

'Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much.'

Knight-Bruce V-C.
*Pearse v Pearse*¹⁰⁸

If legislation is enacted allowing police officers to use reasonable force in order to physically examine and/or take samples from suspects without the consent of the suspect, this will not remove the possibility that the issue of illegally or unfairly obtained evidence will be raised. Where police are prevented from obtaining such evidence pursuant to the statute because of, for example, a magistrate refusing to grant the appropriate order, they may be tempted to obtain such evidence by alternative means or they may 'cut corners' in their compliance with the relevant legislation, either deliberately or inadvertently, thus tainting the evidence with the stigma of being unlawfully obtained.

Such a situation often occurs in the area of 'drinking-driving' offences despite the fact that the police have extensive powers in this area. One need only look to a number of cases to comprehend the dilemma faced by the courts when confronted by this issue. For example, in *Ujvary v Medwell*¹⁰⁹ the court

¹⁰⁶ Coldrey Committee Report p215.

¹⁰⁷ Coldrey Committee Report p209.

¹⁰⁸ (1846) 1 De G & Sm 12, 28-9; 63 ER 950, 957.

¹⁰⁹ (1985) 39 SASR 418.

admitted evidence obtained as a result of analysis of a blood sample despite the fact that the police officers involved had failed to 'facilitate' the taking of the sample. This can be compared with *Ouwerkerk v Whalan*¹¹⁰ where the court held that the discretion to exclude unlawfully obtained evidence ought to have been exercised as the blood sample was taken from the suspect whilst he was in hospital despite the fact that he had not suffered an 'injury' within the meaning of the relevant legislation.¹¹¹

This issue was specifically addressed by the Coldrey Committee and it recommended that where evidence is obtained through a breach of the legislative requirements it will be admissible only in 'exceptional circumstances' and it expressly states that the fact that a 'flawed' procedure produces a sample which conclusively matches a crime-scene sample should not be regarded as an exceptional circumstance.¹¹² Some Australian States have legislation which contains limited provisions in this respect¹¹³ but these are not as far reaching as the proposals made by the Coldrey Committee which in substance are given legislative form in s4 '464P' of the *Crimes (Fingerprinting) Act 1988* (Vic) and in s5 '464ZD' of the *Crimes (Blood Samples) Act 1989* (Vic). Both of these provisions provide that evidence will be inadmissible if it has not been destroyed in compliance with the legislation¹¹⁴ and that the suspect may consent to the admission of evidence otherwise excluded by the legislation.¹¹⁵ Such evidence may also be admissible if the prosecution can establish, on the balance of probabilities, that exceptional circumstances exist.

The Coldrey Committee has further recommended that the breach should be one of substance rather than merely technical or minor. It states that this is to be seen as a test which is additional to, not merely in substitution for, the current judicial discretion to exclude unlawfully or unfairly obtained evidence which has more prejudicial effect than probative value.¹¹⁶ It was further recommended that if evidence was excluded as a result of the exercise of this judicial discretion then the court should make an order that the relevant evidence be destroyed.

What then is the form of this 'general judicial discretion'? The essence of the discretion is that such evidence involves the court in a balancing process between two competing considerations. One is the obvious desirability of utilising all evidence which will help secure the apprehension and punishment of a criminal. The other is the argument that the courts should not be seen to acquiesce to such conduct and thereby implicitly sanction the use by police of illegal or improper investigative methods.

In this context we are concerned with illegally or improperly obtained *real*

¹¹⁰ (1986) 41 SASR 287.

¹¹¹ Also see *Watters v Harjamaki; ex parte Watters* [1981] QDR 147.

¹¹² Coldrey Committee Report pp235-6.

¹¹³ Section 81(3) *Police Offences Act 1953-1975* (SA) and s25(8) of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

¹¹⁴ Section 4 '464P(1)(b)' *Crimes (Fingerprinting) Act 1988* (Vic) and s5 '464ZC(1)' of the *Crimes (Blood Samples) Act 1989* (Vic).

¹¹⁵ Section 4 '464P(2)(b)' *Crimes (Fingerprinting) Act 1988* (Vic) and s5 '464ZC(2)(b)' *Crimes (Blood Samples) Act 1989* (Vic).

¹¹⁶ Coldrey Committee Report pp235-6.

evidence and as the reliability of real evidence, unlike confessional evidence, is generally not affected by the circumstances in which it was obtained it is arguable that such evidence should be admitted even if it was obtained illegally or improperly. It should also be noted that whilst there is a clear practical distinction between evidence which is obtained unlawfully and that which is obtained unfairly or improperly, in terms of the discretion to be exercised in excluding such evidence the courts seem to make no distinction between the two.

Courts in the United States have generally expressed views similar to that expressed by Holmes J in *Olmstead v US*¹¹⁷ where he thought 'it a less evil that some criminals should escape than that the government should play an ignoble part.'¹¹⁸ They have therefore tended to reject evidence which is procured by illegal means, although their decisions tend to also be influenced by the United States Constitution. The leading case in this respect is the decision of the United States Supreme Court in *Mapp v Ohio*¹¹⁹ where it was stated that the purpose of the exclusionary rule was 'to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'¹²⁰

Notwithstanding such noble sentiments the courts in the United States have modified their position in certain cases and admitted such evidence where the circumstances in which it was obtained were reasonably incidental to the making of a valid arrest.¹²¹

Courts in Australia and England have generally not adopted this approach. The general approach in both of these countries can be found in the English case of *Kuruma v R*.¹²² where the Privy Council stated the principle that if the evidence is relevant, it is prima facie admissible regardless of how it was obtained, subject to the discretion of the trial judge. It is in the exercise of this discretion that there is a divergence in the approaches of the Australian and English courts.

In defining the English position *Kuruma's* case has been treated as establishing that the courts are not concerned with how the evidence was obtained, rather they are concerned with whether it will prejudice the 'fairness' of the accused's trial. There is strong support for this proposition in the House of Lords decision in *R v Sang*¹²³ in which Lord Diplock made very clear his views as to the role of the trial judge in such situations. He stated that:

Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not

¹¹⁷ 48 SCt 564 (1927).

¹¹⁸ Id 575.

¹¹⁹ 81 SCt 1684 (1961).

¹²⁰ Id 1692 quoting from *Elkins v US* 80 SCt 1437 (1960), 1444.

¹²¹ *Cupp v Murphy* 93 SCt 2000 (1973); *Schmerber v California* 86 SCt 1826 (1966). Also see *R v McGregor* (1983) 3 CCC (3d) 200, 209.

¹²² [1955] AC 197.

¹²³ [1980] AC 402.

concerned with how it was obtained¹²⁴ . . . It is not part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.¹²⁵

The operation of *Kuruma's* case was elaborated upon further by Martland J of the Canadian Supreme Court in *R v Wray*¹²⁶ where he said:

The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.¹²⁷

Therefore, the English courts appear to adopt a distinction between excluding evidence because it would *operate* unfairly against the accused, and excluding it because it was *obtained* unfairly.

The discretion of the trial judge in Australia is not so limited, as is indicated in the statement by Chief Justice Dixon that he did not believe that *Kuruma's* case had put at rest 'the controversial question whether evidence which is relevant should be rejected on the ground that it is come by unlawfully or otherwise improperly.'¹²⁸ The Australian courts have tended to adopt the broader view that the trial judge in exercising his discretion may exclude evidence in order to discourage unlawful or improper conduct on the part of police officers.

The first major decision indicating this was the decision of the High Court of Australia in *R v Ireland*¹²⁹ in which Chief Justice Barwick stated the principle that evidence which is relevant is not inadmissible solely because it was obtained unlawfully, but it is not necessarily admissible either. The court has a discretion to exclude evidence after balancing the competing interests of the desirability of convicting wrongdoers, as opposed to protecting the individual from unlawful and unfair treatment. It is irrelevant whether or not the unlawfulness stems from statute or the common law, but it is possible that the statute may, on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms.

Any doubt as to the authority of *Ireland's* case because of its apparent inconsistency with *Kuruma's* case was put to rest by the decision of the High Court of Australia in *Bunning v Cross*.¹³⁰ Justices Stephen and Aickin stated

¹²⁴ Id 437.

¹²⁵ Id 436.

¹²⁶ (1970) 11 DLR (3d) 673.

¹²⁷ Id 689.

¹²⁸ *Wendo v R* (1963) 109 CLR 559, 562.

¹²⁹ (1970) 126 CLR 321, affirmed in *Merchant v R* (1971) 126 CLR 414, 417-8.

¹³⁰ (1978) 19 ALR 461.

that the exercise of the discretion in relation to unlawfully obtained evidence is not a simple matter of ensuring fairness to the accused, it is a matter of balancing the competing interests. The central point is not fairness to the accused, it is concerned with questions of public policy, unfairness to the accused being only one factor. They stated that:

The relevance of the competing policy considerations to which we have referred becomes of especial importance in an age of sophisticated crime and crime detection when law enforcement increasingly depends upon . . . scientific methods, whether of identification, . . . or of ascertainment of bodily states.¹³¹

The Court therefore adopted a stance intermediate to that adopted in the United States and the United Kingdom. This is indicated by the fact that the court takes a wide range of factors into account in order to determine the admissibility of the evidence, rather than automatically admitting or excluding such evidence. Whilst they made it clear that these were not to be regarded as definitive considerations in all cases, 'otherwise the exercise of judicial discretion may become fettered by rules, seemingly apt enough when first conceived but inappropriate to all the varied circumstances with which courts will be confronted in the future',¹³² they are instructive in that they are illustrative of the Court's approach to this issue.

The relevant factors outlined were:¹³³

1. Was the unlawfulness the result of a mistaken belief?
2. Does the nature of the illegality affect the cogency of the evidence?¹³⁴
3. The ease with which the law might have been complied with.¹³⁵
4. The nature of the offence charged.
5. Intention of the legislature to restrict narrowly the power conferred upon the police.

The Court expressly referred to the discretion applicable in England as stated in *Kuruma's* case and stated that the discretion in Australia now differs from that in England.

The difference between the approaches can be demonstrated by looking to the objects which they seek to achieve. The English approach is concerned solely with ensuring fairness to the accused in the context of his or her trial and therefore excluding evidence which may have little probative value or which may generate bias in the minds of the jurors. The Australian approach however looks to a number of different factors, and one of these may be to discourage the police from using illegal or unfair methods in their investigations. On this interpretation it is difficult to see how unlawfully or unfairly

¹³¹ Id 659.

¹³² Id 660.

¹³³ Id 661-3. Also see *R v Addabbo* (1982) 33 SASR 84, 97-8.

¹³⁴ The Court indicated that cogency should generally play no part in the exercise of the discretion where the illegality is intentional or reckless as otherwise the erroneous view may be fostered that if such evidence is damning enough that will of itself atone for the illegality in procuring it.

¹³⁵ Conduct of the police officers involved was considered in *R v Larson & Lee* [1984] VR 559 and *Milner v Anderson* (1982) 60 FLR 225.

obtained *real* evidence would ever be excluded under the English discretion as the cogency of such evidence is not affected by the circumstances in which it was obtained, and these circumstances could not be said to create an unfair bias against the accused in the minds of the jurors.

It is interesting to note that whilst courts and textwriters state assertively that the English and Australian courts adopt distinct approaches in this context, there are a number of obiter dicta in the English cases which suggest otherwise. In *Kuruma's* case itself it was stated that 'if, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.'¹³⁶ Similarly in *Fox v Chief Constable of Gwent*¹³⁷ it was indicated that the discretion may be exercised if the police had employed some trick or deception or had acted oppressively and Lord Elwyn-Jones treated as correct the statement by Lord Justice-General Cooper in *Lawrie v Muir*¹³⁸ that:

The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.¹³⁹

Irrespective of whether or not this alters the state of the law as it stands in England it does serve to reinforce the assertion that the approach adopted by the Australian courts is the more pragmatic. A blanket prohibition excluding all evidence obtained unlawfully or improperly would be ludicrous as it would render inadmissible evidence which may be highly probative, simply because of some minor noncompliance with the relevant legislation. Conversely, the strict view attributed to the English courts ignores the danger of encouraging the police to adopt such improper practices, and the undesirability of the accused being convicted as a result of the officers involved disregarding the laws which they are employed to uphold.

The argument that it is a sufficient deterrent that police officers may be subject to an action in tort or to disciplinary measures by their own internal disciplinary bodies is somewhat fallacious as if convicted a suspect is often not in a position to launch an action against the police officer concerned for a number of reasons. The person may be imprisoned, or may be financially unable to assume the risk of losing such an action. Further, such cases are often notoriously difficult to prove, especially when the action may be brought some time after the event. If the police have acted improperly, there is little solace for the suspect in the matter being left to the police force's own internal disciplinary body to decide what punitive action to take. Surely the greatest sanction is suffered where not only is the offending officer punished

¹³⁶ [1955] AC 197, 204 per Lord Goddard CJ.

¹³⁷ [1986] AC 281; [1985] 3 All ER 392.

¹³⁸ (1950) JC 19, 26-7.

¹³⁹ [1986] AC 281, 293-4; [1985] 3 All ER 392, 398. Also see *R v Sang* [1980] AC 402, 435 per Lord Diplock; *R v Demicoli* [1971] QdR 358, 365 where Wanstall ACJ stated that '*Ireland's* case . . . is directly in line with *Kuruma v The Queen*.'

for his or her improper conduct but the evidence procured as a result of such conduct is rendered inadmissible thus serving as a disincentive to others to engage in such unlawful or improper conduct.

Further, it should be noted that to adopt the Australian approach does not automatically exclude considerations of fairness to the accused at trial as this is still a relevant factor, it is simply not the sole factor.¹⁴⁰

The approach as stated in *Bunning v Cross*¹⁴¹ can now be said to be the law in Australia¹⁴² but this raises difficulties in defining the rather nebulous concept of 'unfair'. The concept of unlawfulness is more easily quantifiable as it simply involves a breach of the relevant legislation, or action which is unlawful at common law; for example, if excessive force was used, this would constitute an assault at common law.¹⁴³ Even this, however, becomes more complicated when a discretion is conferred upon a police officer as in order for such a procedure to be unlawful, the discretion must have been exercised improperly and it appears that the courts are loathe to impugn the decision of the appropriate police officer where he or she has acted bona fide.¹⁴⁴

Even if the relevant conduct is held to be unlawful, it seems the courts will exercise their discretion in favour of the prosecution if they believe the evidence to be sufficiently probative.¹⁴⁵

The question of what conduct constitutes 'unfair' conduct is one which the courts have had some difficulty grappling with. There is an indication that they will be reluctant to exclude evidence on the basis of unfairness in the statement by the High Court in *Bunning v Cross*¹⁴⁶ that 'there is no initial presumption that the State, by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry'.¹⁴⁷

This is further supported by the decision in *Phillips v Cassar*¹⁴⁸ where it was warned that the 'judge is not entitled to reject admissible material on some undefined and subjective view of unfairness'.¹⁴⁹

Nonetheless these cases bring us no closer to understanding what is meant by 'unfair'. It seems probable that the courts will not extend the concept beyond that adopted by the leading English cases which have treated 'unfair' conduct as being limited to breaches of the applicable police code of conduct,¹⁵⁰ although this would generally encompass the conduct outlined in *R v*

¹⁴⁰ *R v Hulse* (1971) 1 SASR 327.

¹⁴¹ (1978) 19 ALR 641.

¹⁴² See generally *R v McPhail*, Unreported Judgement NSW Court of Criminal Appeal 15 December 1988; *R v Dugan* [1984] 2 NSWLR 554. It has also been adopted in relation to unlawfully or unfairly obtained confessions: *Cleland v R* (1982) 43 ALR 619.

¹⁴³ *R v Franklin* (1979) 22 SASR 101.

¹⁴⁴ *Duffield v Police (No/2)* [1971] NZLR 710, 713; *R v McPhail*. Unreported Judgement NSW Court of Criminal Appeal 15 December 1988, 17; *Sernack v McTavish* (1970) 15 FLR 381.

¹⁴⁵ *R v Mursic* [1980] QDR 482.

¹⁴⁶ (1978) 19 ALR 641.

¹⁴⁷ Id 659 per Aickin and Stephen JJ.

¹⁴⁸ [1979] 2 NSWLR 430.

¹⁴⁹ Id 434. Also see *R v Hass* [1072] NSWLR 589, 592.

¹⁵⁰ *R v Sang* [1980] AC 402.

*Carr*¹⁵¹ where it was said that the court may exercise the discretion if the evidence has been obtained by 'false representations, tricks, threats or bribes.'¹⁵²

The only conclusion which one can draw in respect of the courts' exercise of their discretion in these circumstances is that it is decided on very much a case-by-case basis and therefore it seems that such a stance, although undoubtedly the most practical, nonetheless results in a situation whereby if the prosecution have unlawfully or unfairly obtained probative evidence it is in their interest to seek to adduce it at trial and run the risk of it being rejected as by doing so they suffer no additional penalty other than that which they will suffer regardless of the court's ruling as to the admissibility of the evidence.

Whilst the Coldrey Committee's recommendations in this respect might at first seem superfluous as they appear to merely reiterate what the courts in Australia have clearly stated the general judicial discretion to be, there is nonetheless an advantage in making clear provisions in the legislation as to how evidence obtained in breach of that legislation should be treated as this provides a framework upon which the court can exercise their discretion¹⁵³ and in this way Parliament can help ensure that to some extent 'a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.'¹⁵⁴

CONCLUSION

It is beyond the scope of this article to undertake a complete analysis of the many and varied issues raised in the Coldrey Committee's detailed and comprehensive report. However, it is hoped that this article has drawn attention to a number of the more fundamental issues involved and placed a more balanced perspective upon these issues. Any legislation in this area, whilst clearly having the capacity to benefit society in general, also has the potential to infringe upon, or to remove certain fundamental personal freedoms. It is therefore vital that the enactment of such legislation occurs in an informed and rational environment as 'it cannot be assumed that, because we enjoy the advantage of governments freely elected by majorities, we are immune from the erosion of liberty.'¹⁵⁵

¹⁵¹ [1972] 1 NSWLR 608.

¹⁵² *Id* 611.

¹⁵³ It has been held that 'acts in breach of a statute may more readily warrant the rejection of the evidence as a matter of discretion.' *Hilton v Wells* (1985) 157 CLR 57, 77 per Gibbs CJ and Wilson and Dawson JJ; *R v Ireland* (1970) 126 CLR 321, 334.

¹⁵⁴ *Bunning v Cross* (1978) 19 ALR 641, 659.

¹⁵⁵ I Temby QC, 'Individual Freedom' [1985] NZLR 299.