

**public interest in the balance -
does the public policy discretion work?**

**by
Carolyn Middleton**

**Dissertation submitted in fulfillment
of requirements for the award of
LLM, University of New England**

February, 2008

Carolyn Ann Middleton
Student No. 203144350

Candidature's Certification

I certify that the substance of this thesis has not already been submitted for any degree and is not currently being submitted for any other degree or qualification.

I certify that any help received in preparing this thesis, and all sources used, have been acknowledged in this thesis.

A solid black rectangular box used to redact the signature of the candidate.

.....
Carolyn Ann Middleton

Table of Contents

Acknowledgments	
Abbreviations	
Abstract	
1. Introduction	1
2. Literature Review	6
2.1 Introduction	6
2.2 Re Ireland's Case	7
2.3 Post Ireland's Case	9
2.4 Post Bunning v Cross	14
2.4.1 Competing Public Interests	15
2.4.2 Judicial Supervision of Criminal Justice Administration	18
2.4.3 Rationale	21
2.5 Sallmann & Willis	23
2.6 Uniform Evidence Acts	25
2.7 English Commentators	36
2.8 The Protective Principle & A J Ashworth	38
2.9 Conclusion	40
3. The Police: Constable, Culture & Corruption	42
3.1 Introduction	42
3.2 The Office of Constable and the Modern Police Force	43
3.3 The Minister and the Commissioner	48
3.4 Police Activism	50
3.5 Police Culture	54

3.6	Corruption	59
3.7	Conclusion	63
4.	Balancing the Public Interests: The Tightrope of Rights & Police Powers	66
4.1	Introduction	66
4.2	Public Interests	68
4.3	Policing Powers	70
4.4	Traditional Police Powers	71
4.5	Recent Police Powers	75
4.6	Surveillance Without a Warrant	79
4.7	Conclusion	80
5.	The Public Policy Discretion	82
5.1	Introduction	82
5.2	Unfairly, improperly or unlawfully obtained evidence	83
5.3	Public Policy Discretion	86
5.4	<i>R v Ireland</i>	87
5.5	<i>Bunning v Cross</i>	88
5.6	<i>Ridgeway v R</i>	89
5.7	Public Policy Discretion and Confessional Evidence	91
5.8	<i>R v Swaffield; Pavic v R</i>	98
5.8.1	Brennan CJ	99
5.8.2	Toohey, Gaudron and Gummow JJ	101
5.8.3	Kirby J	106
5.8.4	<i>R v Swaffield</i> Conclusion	108
5.9	Competing Public Interests	110
5.10	Integrity of the Criminal Justice Administration	112
5.11	Classifying Police Conduct	114

5.12	Cogency of the Evidence	116
5.13	Nature of the Offence	118
5.14	Illegally or Improperly Obtained Evidence - Other Jurisdictional Approaches	120
5.15	Conclusion	123
6.	Uniform Evidence Acts - Section 138 Discretion: the discretion to exclude improperly or illegally obtained evidence	124
6.1	Introduction	124
6.2	Section 138 discretion and the public policy discretion	125
6.3	Admissions and confessional evidence improperly obtained	129
6.4	Improperly obtained evidence	131
6.5	Evidence obtained in contravention of an Australian law	137
6.6	Test for admissibility	137
6.7	Subsection 138(3) - mandatory matters for consideration	140
6.8	Evidence - probative value and importance	142
6.9	Nature of the offence, cause of action or defence	144
6.10	Gravity of impropriety or contravention	149
6.11	Whether the impropriety or contravention was deliberate or reckless	153
6.12	International covenant on civil and political rights	156
6.13	Likelihood of any other proceedings in respect of the impropriety or contravention	156
6.14	Conclusion	158
7.	Survey	159
7.1	Introduction	159
7.2	The Study Sample	159
7.3	Methodology	162

7.4	Findings	163
7.5	Conclusions	185
	Appendix to Chapter 7	189
8.	The Proposal	200
8.1	Introduction	200
8.2	The Proposal	203
8.3	Case for the Proposal	207
8.4	Case against the Proposal	211
8.5	Credibility of a Witness and the Collateral Rule	216
8.6	Tendency and Coincidence Evidence	223
8.7	Identification Evidence	229
8.8	Conclusion	235
9.	Conclusion	236
	Bibliography	239

Acknowledgments

A major research task of this magnitude cannot be completed without the support, assistance and guidance of many people. I thank my supervisor Mr Michael Eburn for his guidance that has proved helpful over the life of this paper, particularly navigating the muddied and muddled waters of its early days. I thank Associate Professor Russell Hogg for his insightful and constructive comments that have been invaluable in providing proper perspective for my thoughts and shining a torch on the real issues. Without the support and understanding of my husband Paul and my children Roy and Ingrid this paper would have never begun nor ended. I thank my trio most gratefully. Finally I wish to pay tribute to John Nicholson, a former public defender, whose reported comments that curial approval of police malpractice was the biggest problem facing the criminal justice system provided the inspiration for this paper.

Carolyn Middleton
Sydney, New South Wales
24 November 2007

Abbreviations

Abbreviations appearing in the text area and footnotes are as follows:

AC	Appeal Cases
ACT	Australian Capital Territory
ACTR	Australian Capital Territory Report
ACTSC	Australian Capital Territory Supreme Court
A Crim R	Australian Criminal Report
AJHR	Australian Journal of Human Rights
ALJ	Australian Law Journal
ALJR	Australian Law Journal Report
All ER	All England Report
ALRC	Australian Law Reform Commission
Alt LJ	Alternative Law Journal
APEC	Asia Pacific Economic Convention
CLR	Commonwealth Law Report
Crim LJ	Criminal Law Journal
DNA	Deoxyribonucleic acid, the unique genetic code for each person
DP	Discussion Paper
DLR	District Law Report
FCA	Federal Court of Australia
FLR	Federal Law Report
HCA	High Court of Australia
Hong Kong L J	Hong Kong Law Journal
HL	House of Lords
ICLQ	International and Comparative Law Quarterly
IR	Irish Report
JC	Court of Justiciary
LBC	Law Book Company
MULR	Melbourne University Law Report
NSW	State of New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Report
NSWLRC	New South Wales Law Reform Commission
NSWSC	New South Wales Supreme Court
NSW Sup Ct	New South Wales Supreme Court
NTSC	Northern Territory Supreme Court
Qd.R	Queensland Reports
QCA	Queensland Court of Appeal
SADC	South Australian District Court
SASC	South Australian Supreme Court
SC	Supreme Court
SCR	Canadian Supreme Court Report
USA	United States of America
UNSWLJ	University of New South Wales Law Journal
VR	Victorian Report
VSC	Victorian Supreme Court
VSCA	Victorian Supreme Court of Appeal
WASC	Western Australia Supreme Court
WLR	Weekly Law Report

ABSTRACT

The issue of police malpractice is one of historic interest and contemporary importance. It is a thorn in the side of criminal justice that potentially may infiltrate a criminal prosecution to the extent of occasioning a miscarriage of justice and in so doing undermine the fabric of the criminal justice system. The law has responded to this challenge by the declaration of a judicial discretion to exclude evidence improperly or unlawfully obtained where the balance of the public interest requires it. The focus of the public policy discretion is the deliberate or reckless disregard of the law by those charged to enforce it. Despite the articulation and refinement of the public policy discretion, research suggests that exclusion of evidence is largely confined to instances of flagrant breaches of the law. Its objective will continue to be impeded unless the court can receive evidence of past malpractice to determine if there is a pattern of misconduct and whether an alleged breach was intentional, reckless or accidental. This paper will critically examine the public policy discretion, both in its common law and statutory forms, and propose reform of the current law to enhance its effectiveness.