

Process by which someone is arrested



S138 EVIDENCE ACT 2008 (VIC) – all evidence

Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained—

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

EVIDENCE ACT 2008 - SECT 90 - just admissions

Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if—

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

CRIMES ACT 1958 (Vic)

S464(1)

Definitions – have they actually been arrested?

(1) For the purposes of this Subdivision a person is in custody if he or she is—

(a) under lawful arrest by warrant; or

(b) under lawful arrest under section 458 or 459 or a provision of any other Act; or

(c) in the company of an investigating official and is—

Breach of obligation to arrange an interpreter

R v Li [1993] 2 VR 80 held that it was not voluntary as Li did not understand he had a choice to answer questions and thus evidence was inadmissible

Exclusion of admission because not voluntary

- A confessional statement is made voluntary if it has “substantially...been made in the exercise of free choice” *McDermott v The King* (1948) 76 CLR 501
- The prosecution has onus at trial of establishing, on the balance of probabilities that a confession/admission is voluntary and reliable **S464J(b) Crimes act 1958 (Vic)** and **S464j (ba) Crimes act 1958 (Vic)**
S464J Crimes Act 1958 (Vic)
 - (a) the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations except where required to do so by or under an Act or a Commonwealth Act; or
 - (b) the onus on the prosecution to establish the voluntariness of an admission or confession made by a person suspected of having committed an offence; or
 - (ba) the onus on the prosecution to prove that an admission or confession was made in such circumstances as to make it unlikely that the truth of the admission or confession was adversely affected; or
 - (c) the discretion of a court to exclude unfairly obtained evidence; or
 - (d) the discretion of a court to exclude illegally or improperly obtained evidence.

Oppressive conduct/Inducements

If an admission is ‘the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure it is not voluntary’ *McDermott v The Queen* (1948) and thus must be excluded

Inducements can be used, these may be

- Positive inducements, in that they offer something or an advantage *Cornelius v The Queen* (1936)
 - Telling someone ‘you will feel better if you confess’ is not an inducement *R v Bodsworth* (1968)
- Negative inducements, are a threat and these can make admissions involuntary *Foster v The Queen* (1993)



SS84 and SS85

- If admission is not voluntary it must be excluded
- S84 must be raised at trial by the accused
- Voluntariness is a subjective test – the issue is whether the particular accused made a voluntary admission, not whether a reasonable person in the same circumstances would have made a voluntary admission, must look at age/experience/ background/ disabilities/ prior experience with police/circumstances etc.



At trial

Potential juror is told

- Type of charge
- Name of accused
- Names of main witnesses
- Estimated length of trial

Can apply to be excused and should inform judge if knows witness/accused *R v Pintori*

Majority verdict in juries is 9/10 or 11/12

Unanimous verdict is 12/12

Challenges of jurors

Challenges for cause

These are unlimited however they must be made on a proper basis and the cause must be clear i.e. relative of witness cannot be made on things like sex *Judge of the District Courts at Brisbane & Paul Shelly*

JURIES ACT 2000 - SECT 37

Challenges for cause in criminal trials

In a [criminal trial](#), the number of potential jurors that each person arraigned or the Crown may challenge for cause is unlimited.

JURIES ACT 2000 - SECT 40

Determination of challenges for cause

(1) A challenge to a potential juror for cause must be tried by the judge before whom the jury is being empanelled.

(2) If a challenge to a potential juror for cause is upheld, the person challenged must not be empanelled on the jury in that [trial](#).

- (1) Unless the [court](#) otherwise orders, a potential juror in respect of whom a challenge for cause has been upheld must return to the jury [pool](#) and may be selected or allocated to a [panel](#) in another [trial](#).

JURIES ACT 2000 - SECT 39

Peremptory challenges in criminal trials

(1) Each person arraigned is allowed to challenge peremptorily—

- (a) 6 potential jurors, if only 1 person is arraigned in the [trial](#); or
- (b) 5 potential jurors, if 2 persons are arraigned in the [trial](#); or
- (c) 4 potential jurors, if 3 or more persons are arraigned in the [trial](#).

(2) In a [criminal trial](#), each peremptory challenge must be made as the potential juror comes to take his or her seat and before he or she takes it.