

2.5 SAFEGUARDS ON THE POLICE EXERCISE OF POWER

<b>LEPRA Limits of Police Power</b>	
<b>s 201</b>	<b>Police powers to which this Part applies</b> (1) This Part applies to the exercise of the following powers by police officers: (a) a power to stop, search or arrest a person, (b) a power to stop or search a vehicle, vessel or aircraft,
<b>s 202</b>	<b>Police officers to provide information when exercising powers</b> (1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power: (a) evidence that the police officer is a police officer (unless the police officer is in uniform), (b) the name of the police officer and his or her place of duty, (c) the reason for the exercise of the power.
<b>s 203</b>	<b>Police officers to give warnings when giving or making directions, requirements or requests that must be complied with</b>
<b>s 204</b>	<b>Detention period for search of vehicles etc limited</b> A police officer who detains a vehicle, vessel or aircraft for a search must not detain the vehicle, vessel or aircraft any longer than is reasonably necessary for the purpose of the search.
<b>s 204A</b>	<b>Validity of exercise of powers</b> (paraphrase) If an officer does not provide their name and place of duty, the arrest is not unlawful (at least on that basis) <i>unless</i> the person asked police for their name and place of duty.

**EVIDENCE ACT**

- This section is purposefully vague to give judges the discretion
- Exclusion of evidence is not automatic, and the court needs to carry out a balancing act between (1) and (3)
  - How serious was the offence v how strong the evidence is

**s 138 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.

**(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:**

- (a) the probative value of the evidence, and
- (b) the importance of the evidence in the proceeding, and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
- (d) the gravity of the impropriety or contravention, and
- (e) whether the impropriety or contravention was deliberate or reckless, and

## 2.6 ESSAY STYLE QUESTIONS

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### THEMES OF THIS TOPIC

- The invisibility of the pre-trial process
- Systemic and institutional issues in the CJS
- Judicial discretion relating to illegally obtained evidence s 138

## TOPIC 3: BAIL AND APPEALS

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### PURPOSE OF BAIL IN THE CJS

- Protection of the community (and particular individuals) by preventing further serious offending
- Protection of the integrity of the trial process
- Maintain the presumption of innocence and the right to general liberty – bail not meant to be punishment

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*HAWI [2014] NSWSC*

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### **Competing imperatives of bail law.**

(Harrison J) ‘The *Bail Act* endeavours to **strike a balance between the need to protect the community** from unacceptable risks associated with the release of people charged with offences on the one hand, **and the need to respect the liberty of these citizens as they await their trial** on the other hand. Neither side of that equation is necessarily or obviously entitled to more weight than the other.’

### PERSPECTIVE OF INDIVIDUAL

- Consequences of bail refusal – lose freedom
- Lose job – who will take care of family if children are involved?
- Mental health – impact of custody is highly stressful on a person
- Effects ability to prepare for trial – limited access to lawyer
- No legal limit of length of remand – and if ultimately found not guilty then that person would have been held lawfully anyway
- Trial process – can affect the procedure of trial and affect perceptions of legal authorities
- Stigma – can’t hide even if not guilty, if you are on remand you have to tell family, employer etc
- Safety inside remand – deaths in custody, 18% come from people in remand (medical, suicide etc)

### PERSPECTIVE OF COMMUNITY

- Consequences of bail grant – danger from accused
- Security – will the accused repeat offend, the victim might be at risk
- Risk for witnesses – potential interference, other evidence might be compromised
- Accused might try to flee the country – criminal process relies on person turning up to court