

## Truth vs Fairness

**Q:** To the extent that factual accuracy is inhibited by the rules of evidence, what is the rationale? What other goals might the system be pursuing?

**Thesis:** Exclusionary rules play an important role in protecting procedural fairness (explain this in intro). However, essay will argue 2 main issues:

1. Leads to exclusion of highly probative evidence → shift away from *truth* finding
2. Enlarges the role of judges and shrinks the role of juries in fact finding.

Exclusionary rules exclude significant evidence with high probative value that could lead to conviction/justice, but this is done for fairness

### Criticism #1 Exclusion of Probative Evidence

- Arguably, the paramount goal of the legal system is ultimately ‘truth finding’
  - Conceptions of justice and righteousness require some extent of objectiveness – those who are guilty should be convicted, and those who are not guilty should be acquitted
  - “*Public confidence in the administration of justice requires that the system must be directed to discovering the truth of the facts*” → JJ Spiegelman, ‘Truth and the law’ (2011, Winter)
- **Point 1: Exclusion of Probative Evidence:**
  - Rigid application of procedural rules sees a shift in the goal of the system – it becomes accepted that highly probative and most likely truthful evidence is to be excluded where it may be procedurally ‘unfair.’
  - E.g. *Nicholls v The Queen 2005*: D being questioned re attempted murder. He asked for a toilet break and then, once recording was turned off, made an admission in an attempt to negotiate a deal with police. A rigid application of the rules under s 88 of EA and s 281(1) CPA meant that this evidence, despite its high probative value, was inadmissible.
- **Point 2: Truth shifts away from objectivity**
  - As there becomes more procedures/limitations on what evidence can be admitted, the ‘truth’ becomes less objective and more of a construction by the processes of the parties – open to manipulation etc
- **Example: Pell Case**
  - HCA overturned Pell conviction due to a rigid application of evidence rules
    - There was significant tendency evidence excluded – multiple other victims had similar stories of sexual assault. Equivalent of s 97 rule.
    - This evidence was particularly important given the 20 year time since the alleged offending, which meant that there was a lack of any objective/forensic evidence.
  - Criticism raised in David Hamer, ‘Process and Outcome: The construction of the Pell acquittals’ (2023) 46(2) Melbourne University Law Review 372
    - “*Rather than striving for objective truth, the adversarial trial allows parties to participate in the ‘construction’ of procedural truth.*”
- **Overall:** The legal system shifts from focusing on outcome fairness to instead striving for process fairness as the means becomes more important than the end

## Criticism #2 Shrinking Role of Jury

- **Principle:** Beyond the issue of the truth becoming more constructed, the application of exclusionary rules also shift fundamental conceptions of *who* should be the finders of fact and the distinct roles of the judge vs jury in the adversarial system
- **Point 1: Traditionally, Jury as Fact Finder**
  - Avoids Abuse: The role of juries as the finder of fact is a fundamental pillar of the western tradition of **rule of law** – this protects against arbitrariness and abuse of power
  - Reflection of Society: Similarly, the role of juries reflects the notion of ‘trial by peers’- idea that community attitudes and values should inform concepts of ‘guilt/not guilt’ as well as strict legal interpretations
  - **Reflected by Court:** HCA has consistently warned against judges overregulating the fact-finding function of the jury when making decisions re the use of evidence
    - *IMM v The Queen 2016:* The HCA emphasised that decisions around the credibility and reliability of evidence are for the *jury*, not the judge. When determining admissibility, judge must take the evidence at its *highest*.
      - “*The judge is not permitted to assess the weight which the jury can be expected to ultimately attach to the evidence. The judge does not usurp the fact finding role of the jury. The judge does not anticipate how the jury is likely to perform the fact finding role.*” [88].
- **Point 2: Arguably being usurped**
  - More pre-trial decisions: As exclusionary rules become enlarged, more and more decisions re evidence are being made by judges and at the pre-trial stage rather than being put to the jury to draw their own inference
    - One point made in JD Jackson, ‘Hearsay: The Sacred Cow that Won’t be Slaughtered?’ *The International Journal of Evidence and Proof* 1998, Vol. 2(3) 166-189.
    - Criminal process has shifted more towards pre-trial hearings and disclosure
    - There is a more active role of judges and parties in deciding what evidence is/is not put to jury
  - Judges have wide discretion to exclude probative evidence
    - Explain application of s 135 (power to refuse to admit evidence that could be prejudicial/misleading/waste of time) and s 138 (power to exclude evidence where obtained improperly)
    - Given that judgements of ‘prejudice’ and ‘probative value’ are largely discretionary, the discretions enlarges the role of judges in deciding what facts the jury can/cannot consider in coming to their verdict
    - **Examples:**
      - *DPP v Marjancevic 2011:* D charged with drug manufacture – Judge excluded significant evidence of drug manufacture found at D’s premises because the search warrants had not been properly sworn. Main evidence of the offending was thus excluded from being put to the jury and no conviction obtained.
      - *Kadir v The Queen 2020:* Judge excluded evidence of surveillance recordings which showed that D had been unlawfully providing live rabbits for dog training. This evidence was *the* most probative evidence, but was excluded due to being obtained by trespass.
- **Overall:** As more exclusionary rules are applied and judges have more discretion to exclude evidence, more of the decisions re truth and fact finding are made by the judge and less by the juries. Potentially an usurping of jury, where it is arguable that a true trial by peers requires that all evidence be put to the jury and they are trusted to draw their own inferences on reliability, whether it should be used etc.

## Improperly Obtained Evidence

- **Rule**
  - **S 138:** Evidence obtained improperly or in consequence of impropriety is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability
  - Explain s 138 weighing factors
- **Pos**
  - **Public policy/normative implications**
    - Do not want to encourage unlawful conduct by those who enforce the law – disallowing this evidence to be used in any way is the strongest way to discourage unlawful practices in obtaining evidence
    - This is crucial to protection of civil liberties, preventing abuse of power (rule of law), legitimacy
    - *DPP v Marjancevic 2011:*
      - *“The discretionary judgement called for does not involve a simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, namely the public interest in admitting reliable and probative evidence... and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice.”* [18]
- **Neg**
  - **One Side: Exclusion of Probative Evidence**
    - Highly probative/ important evidence often excluded on the basis of procedural problems etc. This diminishes truth finding in favour of procedural fairness.
    - *DPP v Marjancevic 2011:* D charged with drug manufacture – Judge excluded significant evidence of drug manufacture found at D’s premises because the search warrants had not been properly sworn. Main evidence of the offending was thus excluded from being put to the jury and no conviction obtained.
    - *Kadir v The Queen 2020:* Judge excluded evidence of surveillance recordings which showed that D had been unlawfully providing live rabbits for dog training. This evidence was *the* most probative evidence, but was excluded due to being obtained by trespass.
  - **Other Side:** On other hand, it is arguable that this evidence should be entirely excluded and not subject to a discretion to admit the evidence
    - Civil Liberties Australia submissions to ALRC Report on Uniform Evidence Law: Leads to uncertainty of outcome, exposes system to bias where judicial officers know/work with police (small communities etc
    - E.g. *Em v The Queen 2007*
      - Court found that evidence of admission was admissible – this admission was made after D asserted right to silence but police tricked him into having casual convo. No proper caution given. Court found this ‘trickery’ did not amount to ‘impropriety’ for purpose of s 138. Court reasoned that it is part of police role to take advantage of persons ignorance and stupidity.
      - Kirby J Dissent: [228].
        - *“This approach implies that the educated and clever enjoy a special position under the law which the ignorant and stupid do not. I could never agree with such a view.”*