

# Section 138 Exclusion for Police Misconduct:

Overtaken by “Execution of Duty”?

# Introduction

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- # Me
  - # The story of this paper
  - # Haunted by section 138
  - # criminalcle.net.au
  - # Section 138 is not dead, but is on the endangered species list
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# Brief Outline of s138

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## **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.

# Basics

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- # Bunning v Cross (1978) HCA 22
- # Shifting onus and burden
  - R v Coulstock (1988) A Crim R 143
- # The three stage test:
  - Is there an impropriety or illegality
  - Was the evidence obtained in consequence
  - Should the evidence be excluded

# The s138 Revolution

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DPP v Carr [2002] NSWSC 194, Smart J

- # Facts in Carr
- # Stage one
- # Stage three
- # Stage two
- # Developments since....

# Execution of Duty

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## 189A Assaults on police

- (1) Any person who unlawfully assaults a police officer **in the execution of the officer's duty** is guilty of a crime and is liable to imprisonment for 5 years or, upon being found guilty summarily, to imprisonment for 2 years.
- (2) If the police officer assaulted:
  - (a) suffers harm, the offender is liable to imprisonment for 7 years or, upon being found guilty summarily, to imprisonment for 3 years; or
  - (b) suffers serious harm, the offender is liable to imprisonment for 16 years.

# Revisiting Carr Again

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Q: Do you agree with this proposition: you may only arrest when it is necessary?

A: Yes

Q: I put it to you that there were other options available to you other than arrest?

# Two Elementary Mistakes

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1. Uniform wearing = execution of duty
2. The second or subsequent officer

Why these are mistakes:

Coleman v Powers and Ors [2004] HCA per  
McHugh J at 118

# Key Quote One

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It is not part of an officer's duty to engage in unlawful conduct. If the officer acts outside his or her duty, an element of the offence is missing. In *Re K*, after reviewing the authorities on the scope of an officer's duty, the Full Court of the Federal Court said[94]:

"The effect of all those cases is that a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein."

## Key Quote 2

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**An officer who unlawfully arrests a person  
is not acting in the execution of his or her  
duty...it cannot be said that a police  
officer is acting in the execution of his  
duty to facilitate an unlawful search and  
arrest.**

# Key Quote 3

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it is an important principle of law that **no man has the right to deprive another of his liberty except according to law**, and if he does so the person so unlawfully deprived has a perfect right to use reasonable efforts to beat him off and get out of his custody."

# Key Quote 4

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although the second officer acted in good faith, his conduct was also unlawful and he was not acting in the execution of his duty when assisting the first officer to effect an unlawful arrest...

# The NSW situation

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# Semaan v Poidevin [2013] NSWSC 226

# LEPRA

“In the absence of evidence of compliance with s201 of LEPRA prosecuting authorities are not entitled to rely on or to assert that the conduct was lawful”.

# How would Carr be run now?

# But s138 is not dead and buried?

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**R v Ali Alkan [2010] NSWLC 1**

# Facts

# Charge

# Three part test

# Findings

# Issues for the future

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- # Running s138 AND “execution of duty”
- # Issues for the defence
- # Issues for the prosecution
- # Issues for the bench
- # Revisiting the causation issue

# A Difficult Issue for the Future

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These authorities show that **once the conduct of an officer is unlawful, the level of physical response offered by an accused is irrelevant to a charge involving the "execution of duty" or "performance of duty".**

- # What about where the resisting/assaulting is really serious?
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# Concluding Comments

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