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The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sir/Madam

Please find attached a submission into the current Australia Law Reform Commission Inquiry into the uniform Evidence Acts from Civil Liberties Australia (ACT) Inc.

Civil Liberties Australia (CLA) is a no political partisan organisation committed to protecting and advancing civil liberties and human rights and responsibilities. It aims to act as a watchdog, catalyst, publicist and educator in relation to these objectives. CLA aims to bring to public notice instances or situations which may involve infringements of, or undue restrictions on, civil liberties or human rights and responsibilities, or the inequitable treatment of persons, groups or classes of people.

Our submission deals with the discretionary exclusion contained in section 138 of the uniform Evidence Acts for courts to exclude evidence which has been illegally or improperly obtained.

Our comments are directed predominantly at criminal and not civil proceedings.

If CLA can be of any further assistance to the commission in its deliberations, please do not hesitate to contact us.

Yours sincerely

Dr. Kris Klugman
President, Civil Liberties Australia (ACT) Inc.

1. The judicial discretion to exclude illegally obtained evidence contained in section 138 of the *Evidence Act 1995* (Cth), like all discretions, balances competing interests. Here we have the interests of the state being balanced against the interests of accused people and the integrity of the justice system. It is submitted that the discretion has been exercised in a manner that is skewed in favour of the state. As a result the interests of accused people, the integrity of the judiciary, the ability to ensure that law enforcement obeys the law, and the rule of law itself, have all been compromised.

A DISCRETIONARY TEST: A PROBLEM IN AND OF ITSELF

2. Although judges exercise the discretion in section 138 in light of the considerations enumerated within the section and previous cases decided on these matters, the admissibility of illegally obtained evidence is largely intended to "rely heavily on the judgement of the individual judge."[1] It is not determined by 'hard and fast' rules, but rather it is "…based on the application of very general standards such that different minds might reasonably reach different conclusions on the same material."[2]

3. Discretion in this area offends against the principle that the law should provide certainty, which feeds into the doctrine of *stare decisis* which holds, *inter alia,* that it is important to promote certainty:

> "because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in the future will be the same as is currently applied... Finally, *stare decisis* promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. "[3]

4. The Australia Law Reform Commission as much as conceded that this undesirable effect would occur when it said of section 138 that it "lacks certainty of result, and therefore sacrifices predictability to flexibility"[4]

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[1] Australian Law Reform Commission, *Evidence,* Report No 26 1985 (interim) 26 [964].
[2] *Employment Advocate v Williamson* [2001] FCA 1164, 78 (per Branson J).
[3] *Telstra Corporation v Treloar* [2000] FCA 1171, 28.
[4] Australian Law Reform Commission, *Evidence,* Report No 26 1985 (interim) 26 [964]. Such an example of an inconstant application of discretion can be found in the cases of *R v Sammuk* (Unreported, Supreme

5. That an accused's fate may ultimately be influenced to a large extent by the personal disposition of an individual judge, and not determined in line with a consistent standard, is highly undesirable. This is particularly so in criminal proceedings where an accused's fate, turning on the individual prejudices of a judge, may mean extended loss of personal liberty.

6. CLA also has concerns about the ability of Magistrates working in small communities to act objectively. We refer to the comments of the ALRC in its report No. 26 (interim) when it noted that:

> [C]lose relationship that develop between magistrates and police officers thrown together in country towns. It was asserted that to ask for true objectivity where a magistrate is called upon to exercise a discretion against a police officer with whom he has a friendly association and in favor of some accused he has never met is to ask altogether too much of human nature[5]

7. Given that only a small percentage of appeals against a discretionary decision not to exclude illegally or improperly obtained evidence succeed[6] it is hard to see how this area of the law provides for justice amongst accused people. They can have no expectation of same or even treatment, and they can have no confidence that like cases will be decided alike. Citizens should be entitled to expect the same treatment from the court as other people who have come before the same or similar court in similar circumstances.

Court of Tasmania, Underwood J, 10 August 1992) and *R v Williams* (Unreported, Supreme Court of Tasmania, Court of criminal Appeal, Neasy, Cox and Underwood JJ, 14 May 1985). In both cases the admission of evidence was based on strikingly similar grounds where an accused was unlawfully detained for more than 25 hours on suspicion of theft before being presented to a magistrate; in the former case the evidence was admitted, in the latter it was excluded. . It is important to note that these cases were not decided per section 138 of the *Evidence Act* or a corresponding provision, but it is illustrative of the broader point that discretion can lead to inconsistent outcomes.

For further analysis on this area see: Bram Presser, "Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence" (2001) 25(3) *Melbourne University Law Review* 757

[5] Australian Law Reform Commission, *Evidence,* Report No 26 1985 (interim) 26 [469].

[6] See Bram Presser, "Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence" (2001) 25(3) *Melbourne University Law Review* 757

PUBLIC POLICY AND DETERING WRONGDOING BY THE STATE

8. So strong is the imperative that law enforcement be deterred from breaking laws intended to safeguard freedoms and liberties that the United States Supreme Court has concluded that it is "a less evil that some criminals should escape than that the Government should play an ignoble part."[7] As Spender J argues:

> "To condone unlawful conduct may subtly, or not so subtly, encourage it… Where the legislature has defined the circumstances in which a person's liberties might be infringed or their rights curtailed, it should not readily be concluded that conduct outside the defined authorisation is to be tolerated or excused. Judges ought not, by a wink and a nod, weaken the protection which the law gives to the rights and liberties of citizens."[8]

9. Despite populist claims that criminals are always 'getting off' on technicalities, statistical data relating to the discretion to exclude illegally obtained evidence clearly shows that in reality the evidence will most likely be admitted despite having been stained by police impropriety or illegality.[9] A study conducted by Bram Presser where he examined 39 appellate cases involving a judicial discretion to include or exclude illegally obtained evidence yielded some interesting findings, including the following:
    - Evidence is only rarely excluded in the exercise of a judge's discretion at trial level. In only six of 39 cases (15%) did the objection raised on the *voire dire* lead to the evidence being excluded.
    - There is a general reluctance amongst appellate judges to find that the trial judge erred in failing to exclude the contested evidence. Of the 26 cases that went to appeal only three decisions (11.5%) were overturned and sent back for retrial.
    - There appears to be a significant degree of tolerance of police misconduct, such that judges are willing to give police a high degree of latitude in the conduct of their criminal investigations.

[7] *Olmstead v United States,* 277 US 438, 470 (1928).
[8] *Pressler v Holzberger* (1989) 44 A Crim R 261, 271-72 (per Spender J).

10. Statistical data on the application of the discretion shows that if the discretion is supposed to be a balance between convicting guilty people on the one hand and giving curial approval of unlawful conduct and bring the law into disrepute on the other, than the balance is significantly skewed in favour of law enforcement, with little weight being given the need to engage in curial approval of illegal behaviour.

11. **CLA submits that this distorted balance is unacceptable, and will become even more dangerous in an era where law enforcement agencies are being given unprecedented and greater powers.[10] As the threat to individual liberty becomes greater, so should the law be more unwilling to condone threats and permit abuses to these liberties.**

ALTERNATIVES TO EXCLUSION OF EVIDENCE TO DETER POLICE WRONGDOING

12. It is argued that exclusion of illegally obtained evidence is not the most desirable way of deterring wrongdoing by law enforcement, and that such exclusions have little effect in any event.[11] Some suggest that internal police disciplinary provisions[12] or a claim for civil damages[13] are a more effective approach.

13. In evaluating these questions, it is worthwhile to analyse the United States' experience as the US Supreme Court grappled with the issue of the effectiveness of excluding illegally obtained evidence as a deterrent to police wrongdoing in the 1950s and 60s. In *Weeks v United States*[14] the Court held that evidence obtained in violation of the Fourth Amendment must be excluded in

[10] For example, see the *Anti-Terrorism Act 2004* (Cth), recent amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) and the Prime Minister's announcement of his intention on 8 September 2005 to give even further anti-terror powers to law enforcement agencies.
[11] See G L Davies, "Exclusion of Evidence Illegally or Improperly Obtained" (2002) 76(3) *Australia Law Journal*, 170, 180-81.
[12] Larry Glasser, "The American Exclusion Rule Debate: Looking to England and Canada for Guidance" (2003) 35(1) *The George Washington International Law Review*, 159
[13] *R v Sang* [1970] 3 W.L.R. 263, 271 (per Diplock LJ)
[14] *Weeks v United States,* 232 US 383 (1914).

Federal proceedings to maintain the integrity of the judicial system.[15] In *Wolf v Colorado*[16] the Court held that state courts are not required to exclude evidence obtained in violation of the Fourth Amendment if they had "other methods which, if consistently enforced, would be equally as effective" in deterring illegal searches.[17]

14. However, when the court revisited the effectiveness of the test in *Mapp v Ohio*[18] the Court was forced to the conclusion, based on the experiences of other states, that attempts to deter illegal searches through other means had proven to be "worthless and futile."[19] The Court observed that before 1949 almost two-thirds of the states were opposed to a mandatory exclusion of illegally obtained evidence, but by 1961 more than half the states had concluded, either through the courts of the legislatures, that a mandatory discretion was the only effective deterrent as other measures had proven ineffective.[20] The U.S. Supreme Court noted that the California Supreme Court was forced to the conclusion that "because other remedies have completely failed to reach compliance with the constitutional provisions,"[21] the only effective deterrent against police wrongdoing was a mandatory exclusion of illegally obtained evidence.

THE RULE OF LAW

15. Aside from arguments as to whether the exclusion of evidence is an effective deterrent, we would submit that even if it was to be conceded that there are other more effective deterrents against police wrong doing, which we don't, that to admit such illegally obtained evidence does irreparable damage to the rule of law. The rule of law is

[15] *Weeks v United States,* 232 US 383, 392 (1914).
[16] *Wolf v Colorado,* 338 US 25 (1949)
[17] Ibid at 31.
[18] *Mapp v Ohio,* 367 US 643 (1961).
[19] Ibid at 652-55.
[20] *Mapp v Ohio,* 367 US 643, 652-55 (1961).
[21] Ibid 652, quoting from *People v Cahan,* 44 Cal.2d 434, 445, 292 P.2d 905, 911 (1955)

> "… the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."[22]

16. For section 138 to allow Australian Courts to permit evidence obtained in contravention of a law it is to allow Australian Courts to show contempt fro the law itself and ultimately those who made it. On this point, the opinion of Clark J of the US Supreme Court is poignant:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws… As Mr Justice Brandeis, dissenting, said in *Olmes v United States*:
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> > Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example… If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[23]

RECOMMENDATION:

17. Civil Liberties Australia (ACT) is of the view that:
    - Given the inherent undesirability of the use of a discretion; and
    - Given that courts are statistically heavily disposed to admitting illegally obtained evidence; and
    - given that the admission of such evidence does not to deter wrongdoing by law enforcement; and
    - given the significant threat that the admission of such evidence has to a citizens rights, liberties and freedoms, and given the disastrous effect it has on the government's adherence to the rule of law

    the discretion found in section 138 of the *Evidence Act* be fundamentally changed. CLA favours a mandatory exclusion of illegally obtained evidence. Where the evidence was to be legally obtained, the law that was infringed would invariably be one intended to protect individual liberty, freedom or privacy, i.e. laws relating to search warrants and the circumstances under which police can

[22] *S157/2002 v Cth* [2003] HCA 2 (4 February 2003)] at 37 (per Gleeson CJ) quoting from *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (per Brennan J)
[23] *Mapp v Ohio,* 367 US 643, 658 (1961).

enter a private premises. We would not advocate that the provision be applied to laws not intended to protect these rights. For example, we would not advocate evidence be subject to mandatory exclusion because it was obtained subsequent to police illegally parking their vehicles.

18. Should that not be adopted, we recommend that section 138(1) be amended such that a judge may rule evidence admissible only if there are strong and compelling reasons why the illegally obtained evidence should be admitted, and the reasons for the admission must be set out in writing.