

## **Practical Considerations and Tactics Relating to the Exclusion of ERISP Interviews – Children’s Court**

### Homework

#### 0. Preparation

- The Checklist
- Instructions – especially in relation to possible factual disputes
- Conference with and Statement from Support Person
- Conferences with other witnesses (if needed)

#### 1. Documents

- Full brief of evidence
- Custody Management Record
- ERISP tape
- Whether to subpoena – especially CMR  
- What to ask for

#### 3. Onus of Proof

- Who bears it in each situation
- Whether you need to call any evidence

#### 4. Consideration of relevant case law

### The Big Day

#### 1. Speaking with the other side

- Whether to raise admissibility issues – the “band aid” principle

#### 2. Voir Dire

- When to make application
- Awareness of s 189
- Pinpoint the issue

#### 3. Evidence

- Informant – arrest, caution
- Custody Manager – Pt 10A, Proper Support person, Contact CLS
- Custody Management Records – timeouts, corroborate Custody Manager
- Support Person
- Young person? – understand his/her rights
- Any other witness – arrest/caution/intoxication etc

### Your Turn

#### 4. XX

- Objectives – the “checklist”
- Use of terms included in the Legislation
- Compartments
  - Isolate each issue – complete before moving on
  - Get the complete answer or picture before moving on
  - Press until the matter is answered
  - “Don’t keep trying to sell it after its sold”

#### 5. X

- Objectives
- Use of the same terms as in the Legislation

Imagine Magistrate has the same checklist as you. Aim is to have, by the end of the VD, the Magistrate placing a mark in the same box/boxes of the checklist that you did.

### Submissions – Persuading the Magistrate

- Identify evidence relevant to your submission
- Present copies of case law you will rely on
- Make clear whether you seek mandatory or discretionary exclusion
- Spell out your view as to the applicable test

### If All Else Fails – Damage Control

#### 1. Excluding Parts of the ERISP

- Improper questions
- Questions relating to “fresh” offences without a further caution
- xx disguised as ERISP interview
- Evidence of silence, including partial silence – *R v Tolmie*, s 89 Ev Act

Swatting Up – a Partial Case Reading List

*R v Phung & Huynh* [01] NSWSC 115

*R v Tang* [01] NSWCCA 210

*H*(1996) 85 A Crim R 481

*McKellar & Booth v Smith* [1982] 2 NSWLR 950

*R v Tolmie* (14/7/93, NSWCCA, unrep)

*R v LT & ME* (3/10/02, NSWSC, Dowd J, unrep)

*R v Lamb & Thurston*[02] NSWSC 357

*T* (2001) 122 A Crim R 206

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## **Examples of (All too Common) “Problematic” Situations**

1. Child under 16 years – mum/dad doesn't want to come down to station. Cops ask Young Person who s/he would like to sit in on interview
2. Support Person from Salvos, or something similar – no discussion with YP prior to the interview, no intervention throughout. YP has no idea they could have relied on or expected the support person to help out.
3. Support person tries to intervene and is told to “butt out”
4. Support person is co-accused's mother.
5. Support person has no idea what the YP's – or their rights – are in relation to the interview.
6. Support person is in fact the victim of alleged offence

GENERALLY

- Lawful Arrest?
- Constructive Arrest?
- Reasonable Suspicion?

SECTION 13

- Presence of parent/responsible adult?
- Adult with consent of parent/guardian?
- (Over 16) Adult with consent of child?
- Legal Practitioner of Child's choosing?
- Member of Police force?
  - Any proper reason for non-compliance?

Pt 10A CRIMES ACT

- Lawful Arrest (Dungay)?
- Properly Cautioned at Police Station by Custody Manager?
  - Part 10A summary given and explained to YP?
    - Opportunity to communicate with friend/relative/guardian/independent person/legal adviser?
    - Assistance given to communicate?
      - CLS contacted?
- Facilities provided for any communication b/w YP and support person to be in private?

CRIMES (DETENTION AFTER ARREST) REGS

- All reasonable assistance provided to YP by Custody Manager?
- Support person allowed to be present during investigative procedure?
  - YP and Support Person allowed private conversation?
- No issues re: accomplices avoiding arrest, evidence being concealed/lost, hindering recovery of evidence or urgency of investigation for safety of other persons?
- Support person informed of their rights/responsibilities in ERISP interview?
  - Support person given Part 10A summary?
- Caution administered/repeated in presence of Support Person?

EVIDENCE ACT

- Any allegation of violence/oppression of YP?
- Are admissions reliable having regard to the characteristics of the YP and the nature of the questions or any threat/inducement?
  - Is it fair to admit the admission?
  - No discretionary exclusion available?

Calculations if there is a likely Issue Regarding the period of Detention After Arrest

<u>Event</u>	<u>Start</u>	<u>Finish</u>	<u>Hours/Mins</u>
• <u>Arrest-Release/brought before justice (Investigation Period)</u>			
• <u>Time taken to get YP to premises with facilities to conduct investigative procedure</u>			
• <u>Waiting for arrival of investigating police</u>			
• <u>Waiting for recording facilities to become available</u>			
• <u>Waiting for support person/friend/legal adviser etc to arrive</u>			
• <u>Time spent communicating between YP and support person</u>			
• <u>Time spent by YP communicating at the place YP is detained</u>			
• <u>Time spent getting medical attention</u>			
• <u>Time spent arranging for interpreter</u>			
• <u>Time spent arranging for ID parade</u>			
• <u>Time spent on refreshments or toilet breaks</u>			
• <u>Waiting for YP to recover from intoxication</u>			
• <u>Time spent preparing for extension warrant or search warrant</u>			
• <u>Time taken in charging process</u>			
• <u>Totals</u>			

Are the “timeout” periods claimed Reasonable?

## Keeping the ERISP Out – Practical Considerations and Tactical Tips

### **1. Before the Day - Preparation**

#### Examination of Brief and Analysis of your Case

- Examination of the brief – the “checklist”
- Instructions
- Conference with and statement from support person
- (If needed) conferences with other witnesses

#### Essential Documents

- Full brief of Evidence
- Custody Management Record
- ERISP Tape

#### Subpoena

- Costs and Benefits
- Useful material – notebooks, video of custody area etc

#### Onus of Proof

- Who bears it in each circumstance
- Therefore, whether you will need to call any evidence

#### Consideration of Relevant Case Law

- Advisability of ongoing personal research

### **2. At Court**

#### Speaking with the Other Side

- Whether to speak with the police
- Whether to raise admissibility issue with the Prosecutor

#### Application for Voir Dire

- When to take objection
- Section 189 Evidence Act – “Preliminary Questions”
- Identifying the Issue – Using the Checklist

### Evidence on Voir Dire

- Informant
- Custody Manager
- ERISP transcript/video
- Custody Management Records
- Support Person\*
- Any other persons
- Will you call any evidence?

Truth, or otherwise, of admission irrelevant s 189(3)

### Cross Examination

- Objective – the “checklist”
- Use the terms used in the legislation
- “Compartments”
  - Isolate each issue, and complete before moving on.
  - Do confirm that the answer is complete representation of situation before moving on.
  - Do not be reluctant to press an issue until it is answered.
  - Answers obvious enough, don’t ask for them again.

### Examination in Chief

- Objective – the “checklist”
- Use of terms in the legislation

Imagine the Magistrate has the same checklist as you. Your aim is, by the end of the VD to have the Mag put a cross in the same box as you did.

### Submissions

- Evidence relied upon to exclude the admission
- Reliance on, and copies of, relevant case law read and ready
- Clearly distinguish between mandatory, and discretionary exclusion
- First principle – protection of the child, paternalistic nature of the Legislation.

### **3. If all else Fails - “Cutting Out” Damaging Parts of ERISP**

#### Exclusion of Parts of ERISP

- Improper questions

#### Evidence of Silence



- Section 89 Evidence Act
- *R v Tolmie*

Brief (abridged) Case list. – not meant to be Exhaustive.

*R v Phung & Huynh* [01] NSWSC 115

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