Queensland Council for Civil Liberties
PO Box 2281 Brisbane 4001

13 June 2016

Mr Stephen Finnimore
Research Director
Legal Affairs & Community Safety Committee
By email: lacsc@parliament.qld.gov.au

Dear Mr Finnimore

RE: **AUSTRALIAN CRIME COMMISSION (QLD) AND OTHER LEGISLATION AMENDMENT BILL**

At the end of each weekly sitting of the Queensland Parliament I have a clerk within my office provide me with a briefing as to police and criminal law matters which came before the Parliament in a particular sitting week.

My clerk brought to my attention the above Bill last week and I had a chance to look at it over the weekend just gone.

I particularly refer to the introduction speech by the Honourable W S Byrne, Minister for Police etc on 24 May 2016. The Minister made the following comment at page 1937 of Hansard:

- When investigating an indictable offence, a police officer must comply with safe guards in the PPRA with regard to the recording of admissions or confessions. On occasion, due to circumstances beyond the control of police, there may not be full compliance with safeguards.

- For example, in a matter regarding the unlawfully trafficking of drugs, the Defendant refused to make admissions during a recorded interview due to a fear of retribution but after the interview made admissions to police. At trial, even though the admissions made were not disputed or in any respect unreliable, police were prevented from providing oral testimony of the admissions. In these instances, it is intended that Section 439 of the PPRA provides the judiciary with the discretion to admit evidence. However the current wording of the Section does not permit this. The Bill amends Section 439 of the PPRA, allowing the judiciary to admit evidence where there is non-compliance or insufficient evidence of compliance with relevant safeguards. This will address judicial concerns that, without the discretion, people guilty of serious crimes, may go free". (emphases added)

In the Explanatory Notes the following observation is made at page 2016:

- In R v McMillan [2010] QSC309, the Applicant was charged with unlawfully trafficking dangerous drugs. During the interview with police the Applicant expressed reservations about answering questions, citing a fear of retribution if recorded incriminating others. The interview concluded and it was after the recording had

> stopped, but before the police and the Applicant left the interview room that the Applicant made admissions. Oral testimony of the police officers regarding the admissions were subsequently excluded from evidence due to the drafting of Section 439 of the PPRA. Subsequent cases such as R v Wayne Robert Purnell [2012] QSC60 have reiterated the need to redraft the Section. The Bill will redraft Section 439 and omit references to the term 'record' in order to resolve this issue. (emphasis added)

In view of the fact that the ruling in McMillan occurred in 2010, questions need to be asked as to the following:

- Why was this amendment introduced into an "omnibus" piece of legislation?
- Did the QPS put before the Minister the full facts of this case?
- Why was there no consultation with groups such as the Law Society, The Bar Association and the Civil Liberties Council about this change before it was approved by Cabinet?

The Minister's speech demonstrates the problems which were identified in the Fitzgerald report where significant amendments to criminal law legislation are effected without the QPS and the Minister consulting beyond law enforcement agencies.

In the Minister's introduction speech he indicated (presumably in a speech written for him by the QPS) that "on occasion, due to circumstance beyond the control of police, there may not be full compliance with safeguards". (emphasis added)

In the case of McMillan nothing could be further from the truth.

I **enclose**[1] herewith the Outline of Submissions on behalf of the Applicant in McMillan. My law firm Robertson O'Gorman was involved in that case as is apparent from the Judgment of Byrne SJA (**enclosed**[2]).

You will see at paragraph 16 of the Outline that the following observation was made:

- No attempt was made to read (Detective) Collins notes to the Applicant, no attempt was made to give him a copy of those notes. There was no opportunity for the Applicant to dispute, by drawing attention to any error or omission in those notes, any aspect of that which was recorded therein. The breach of Section 447 is stark.

Further, observations in the Applicant's submission are pertinent particularly at paragraphs 19 and 20:

- 19 – That which occurred here went beyond the 'casual disregard' of parliamentary requirements which will ordinarily lead to the exclusion of such material. The Applicant was under arrest and in a police station. He had, in the period prior to the interview, consumed a large quantity of mind altering drugs. There must have been a substantial risk that he was sleep deprived and there was, as was necessarily admitted by an impenitent Detective Sergeant Collins, "not a great reason" for the failure to do that which was required by law. The rather lame reflection that it was a

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[1] Outline of Submissions
[2] Judgement of Byrne SJA

"time frame issue" is no explanation as to why there was no attempt – even by delegation – to provide the Applicant with a copy of the notes at any stage.

- 20 – The impossibility of the police position is underlined when it is acknowledged that (police officer) Huttley had made a separate visit to the Applicant's residence subsequent to the interview, but made no attempt to take with him a copy of the notes in question. (emphasis added)

It is therefore submitted that for the Minister to be briefed that the circumstances in McMillan were "beyond the control of police" is simply wrong.

A further comment made by the Minister in his introduction speech was to the effect that this (amendment) "will address judicial concerns that, without the discretion, people guilty of serious crimes, may go free".

It is sought to be provided with the details of the "judicial concerns" (plural) to which the Minister refers.

Submission

It is not surprising that the QPS have attempted to push this amendment through without consultation with relevant stakeholders. The Committee should be concerned that the well established processes post the Fitzgerald Inquiry of changes to the criminal law being put out for public comment and submission before Cabinet signs off on such changes has not occurred in this instance.

This proposed change is not a minor or technical change. It will, in my submission, lead to the re-emergence of the 'verbal' where there are already too frequent challenges by accused persons to non-compliance with the provisions of the PPRA.

The Fitzgerald Inquiry highlighted how rife the verbal was in the 70s and 80s.

To open up the possibility 26 years after the Fitzgerald Inquiry that police will be able to more energetically engage in a verbal is a significant worry.

In conclusion, your attention is drawn to the comments by President McMurdo in R v Smith [2003] QCA76 where Her Honour, in referring to verballing practices in Queensland's past made the observation:

- To allow in such evidence here would be to ignore the safeguards for those the subject of the police investigation and questioning provided by...the Act and to risk a return to an earlier less accountable period when police evidence of verbal admissions was regularly challenged in the Courts as fabricated, often with justification".

In an era where police are wearing body cams and Detectives have readily available access to digital tape recorders the failure of the police in McMillan to tape record the so called 'off tape' confession by McMillan races significant questions about the motives and the propriety of the police involved.

As well, there were a number of occasions of contact between the police and McMillan in the days after the so called confession but no attempt was made to provide McMillan in

the subsequent contact with a copy of the notes made by the investigating police of the so called admission with an invitation to McMillan to sign and adopt the notes.

As observed at the outset, that such a significant change to the admissibility of confessions would be introduced in an Omnibus Bill without any prior consultation with the legal profession throws up profound issues of QPS accountability and the apparent failure of the Cabinet process to ensure that law changes that emanate from a government department (particularly the QPS) are widely circulated to stakeholders before Cabinet makes the decision on such changes.

Yours faithfully
ROBERTSON O'GORMAN

TERRY O'GORMAN

LTR LACSC 20160613 TOGRW

Indictment Number: 157 of 2010

IN THE SUPREME COURT
AT BRISBANE

THE QUEEN

v

BEAU JOSEPH MCMILLAN

OUTLINE OF SUBMISSIONS

(RESPONDENT)

1. **Background:**

1.1. There is an indictment before the Supreme Court charging the applicant with trafficking in a dangerous drug, possessing a dangerous drug in excess of 2 grams, possessing a dangerous drug in excess of 500 grams, possessing property obtained from trafficking and possessing a thing used in connection with trafficking in dangerous drugs.

1.2. The circumstances of the offences are that on 28 April 2009 at 11.50 pm the police attended 9 Roscoe Court, Burpengary, to locate Kurt Andrew Reynolds who was wanted by the police. The applicant's parents granted police access to search the house for Reynolds and in doing so, they detected the smell of burnt cannabis and observed a smoking utensil in the garage of the house. The garage was the applicant's bedroom. As a result, an emergent search was conducted.

1.3. During the search, the police located a clipseal plastic bag containing cannabis in a drawer, 2 coffee grinders, scissors and 2 electronic scales in the garage. Also, in the garage, the police located a locked safe, which when opened was found to contain: 428 tablets containing 4.205 grams of pure 4-Bromo-2,5-dimethoxyphenethylamine, 1187.3 grams of cannabis sativa, $12,350 in cash, a photograph of the applicant's girlfriend (Ashley Rose), a vehicle key and various receipts and personal papers under the applicant's name.

1.4. The police also located a laptop in the room on which was saved a document titled "beau.doc". The document appeared to be a story about the writer's drug trafficking activities. Tick sheets were also located, as well as, a mobile telephone on which police found drug related text messages.

1.5. The search was electronically recorded. After declaring the emergent search, the police gave the applicant's his rights. After he indicated that he did not want to answer any questions and wanted to speak to a lawyer, police did not question him further regarding any involvement he might have in the commission of an indictable offence.

1.6. At the conclusion of the search, the applicant and Rose were arrested and conveyed to the Caboolture Police Station. Rose was arrested because she indicated that she would not voluntarily accompany police to the station. Rose was also an occupant of the room where the items of interest were located.

1.7. At the police station, the applicant took part in an interview with Detective Sergeant Daniel Collins and Plain Clothes Constable Kelly Hutley. The electronic record of interview commenced at 6.10 am and was suspended at 6.30 am at the applicant's request so that he could speak to his father. Immediately prior to the suspension of the interview, the applicant expressed reservations about answering questions while the interview was being recorded.[1] The applicant expressed his fear of retribution if he was recorded incriminating those with whom he was involved.

1.8. During the break, the applicant was afforded the opportunity to speak to his father by telephone at the police station. Following the conversation with his father, the applicant indicated he was willing to resume the interview. The electronic record of interview re-commenced at 6.56 am and was terminated at 7.15 am. Prior to the interview being terminated, the applicant changed his version of events, indicating that he no longer wanted to persist with his claim that the safe belonged to his cousin but instead, would accept that it was his, on the basis that he didn't "wanna get hurt".[2]

1.9. After the electronic recording equipment was stopped but before the police and the applicant had left the interview room, he made the admissions the subject of this application to the police. Detective Sergeant Collins made a written record of that admission in his police notebook at the end of his shift, at approximately 9.30 am, after he had finalised the paperwork and the applicant had been charged.[3] After Detective Sergeant Collins made the written record he showed it to Plain Clothes Constable Hutley. Plain Clothes Constable Hutley consequently initialled and wrote his registration number at the bottom of each page, indicating his adoption of the notes as an accurate record.

2. Grounds of Application:

2.1 The applicant seeks a ruling that the written record of the admission made by Detective Sergeant Collins is inadmissible.

2.2 The respondent seeks the exercise of the discretion under section 439 *Police Powers and Responsibilities Act 2000* to admit the written record of the admission made by Detective Sergeant Collins despite non-compliance with section 437.

2.3 The respondent seeks leave for the return of the indictment to amend the dates of count 1 to "between the fourteenth day of April 2008 and the twenty-ninth of April, 2009".

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[1] Transcript of Record of Interview 29 April 2009 pp 14-16
[2] Transcript of Record of Interview 29 April 2009 pp 30-31
[3] Committal Hearing Transcript pp 6-7

3. **Written Record of Admission:**

3.1 The applicant was a "relevant person" in the company of the police for the purpose of "questioning" and so the provisions of Chapter 15 Part 3 Division 7 *Police Powers and Responsibilities Act 2000* apply. Those provisions provide that a confession or admission is only admissible if it is recorded in accordance with sections 436(4) or 437. However, section 439 provides that a court may admit a record of an admission in evidence although it considers that there has been a lack of compliance with sections 436 and 437 if, having regard to the nature of and the reasons for non-compliance and any other relevant matter, the court is satisfied that in the special circumstances of the case, the admission of the evidence would be in the interests of justice: *R v Duong* [2000] QSC 266; *R v Smith* (2003) 138 A Crim R 172.

3.2 The respondent submits that the police did not electronically record the admission because it was not practicable. The admission was made after the recorded interview was terminated and in circumstances where the applicant had made clear that he had no desire to have his answers electronically recorded if they incriminated others for fear of retribution. There is no failure therefore to comply with section 436(4) because; compliance with that section is predicated on the recording of the question being practicable: section 436(2).

3.3 The respondent submits that the police did comply with section 437(3) by making a written record of the admission as soon as is reasonably practicable after the questioning. However, the respondent accepts that the police did not comply with sections 437(4), (5), (6) and (7).

3.4 The respondent submits that the failure of the police to comply with those provisions needs to be considered in light of the following factors:

- The notes were prepared after the applicant had already been charged and granted bail and so was not available to be shown the notes;[4]
- The notes were prepared just before Detective Senior Constable Collins was due to finish his shift. The shift being the seventh in a row and he was in his ninth hour of overtime and was due to take five days off.[5]
- Detective Senior Constable Collins stated at the committal hearing: "I should have gone round his house at that time and shown him those notes, but I did not, so, they are what they are, unfortunately"[6].
- It could be assumed that there would be a reluctance on the part of the applicant to permit the police to comply with section 437(7) given, the attitude to incriminating others on record demonstrated by him during the electronically recorded interviews.

3.5 The failure of the police to comply with those provisions when considered with those factors in mind demonstrates that the non-compliance was not by reason of a deliberate disregard of the law or cutting of corners but rather the constraints of time and a sense of lost opportunity.

3.6 This is not a case where there has been a complete lack of compliance with section 437 but rather partial non-compliance. Arguably, the provisions that were not complied with are the provisions that were enacted especially to safeguard against the problems confronted in *McKinney v R* (1991) 171 CLR

[4] Committal Hearing Transcript p 27 lines 10-17
[5] Committal Hearing Transcript p 27 lines 18-27
[6] Committal Hearing Transcript p 27 lines 25-27

SUPREME COURT OF QUEENSLAND

CITATION:	*R v McMillan* [2010] QSC 309
PARTIES:	**R** (respondent) **v** **BEAU JOSEPH McMILLAN** (applicant)
FILE NO/S:	Indictment No 157 of 2010
DIVISION:	Trial
PROCEEDING:	Application under s 590AA *Criminal Code*
ORIGINATING COURT:	Brisbane
DELIVERED ON:	27 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2010
JUDGE:	Byrne SJA
ORDER:	**1. The evidence of a conversation, said to have occurred between the Applicant and Detective Sergeant Daniel Collins and Plain Clothes Constable Kelly Hutley shortly after 7.15am on 29 April 2009 ("the disputed conversation"), is inadmissible.** **2. The matter be adjourned to the Supreme Court Sittings at Brisbane on 3 September 2010.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – Records of interview – Other matters – where applicant charged with serious drug offences – where applicant made admissions which were not electronically recorded – where interviewing police officer made notes but did not comply with the requirements of the *Police Powers and Responsibilities Act 2000*, s 437 – where applicant contends that the evidence of the admissions is inadmissible at trial – whether the Court's discretion under s 439 to admit the "record" could be exercised – interpretation of s 439 CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – Records of interview – Other matters – where applicant charged with serious drug offences – where applicant made admissions which were not

electronically recorded – where interviewing police officer made notes but did not comply with the requirements of the *Police Powers and Responsibilities Act 2000*, s 437 – where applicant contends that the evidence of the admissions is inadmissible at trial – circumstances in which evidence of the admissions is admissible

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – Records of interview – Other matters – where applicant charged with serious drug offences – where applicant made admissions which were not electronically recorded – where interviewing police officer made notes but did not comply with the requirements of the *Police Powers and Responsibilities Act 2000*, s 437 – where applicant contends that the evidence of the admissions is inadmissible at trial – factors the Court may have regard to under s 439

Acts Interpretation Act 1954, s 14B, s 14C
Evidence Act 1977
Police Powers and Responsibilities Act 2000, s 415, ss 436 – 439

A Raptis & Sons Holdings Pty Ltd v Commissioner of Stamp Duties (No. 1) [1999] 1 Qd R 458, cited
Herring v United States No. 07-513, slip op., US, 14 January 2009; 172 L Ed 2d 496 (2009), cited
Kelly v The Queen (2004) 218 CLR 216, cited
Minister for Immigration and Citizenship v SZJGV (2009) 238 CLR 642, cited
R v Faumuina [2004] QSC 264, followed
R v Gaffney, ex parte Builders Registration Board of Qld [1987] 1 Qd R 90, cited
R v Smith (2003) 138 A Crim R 172, applied, questioned
R v Stead [1994] 1 Qd R 665, cited
Ridgeway v The Queen (1995) 184 CLR 19, cited
Sevmere Pty Ltd v Cairns Regional Council [2009] QCA 232, cited
Stapleton v The Queen (2002) 136 A Crim R 65, considered
Taylor v Centennial Newstan Pty Ltd [2009] NSWCA 276, cited
Vu v Ministry of Fisheries [2010] NZHC 728, cited
W & T Enterprises (Qld) Pty Ltd v Taylor [2005] QSC 360, considered
Walker v Walker (1937) 57 CLR 630, cited

COUNSEL: P J Callaghan SC for the applicant

C N Marco for the respondent

SOLICITORS: Robertson O'Gorman for the applicant

Director of Public Prosecutions (Qld) for the respondent

[1] Beau McMillan is charged with serious drug offences, including that he carried on the business of unlawfully trafficking in cannabis sativa and 4-Bromo-2, 5 - dimethoxyphenethylamine. By this application pursuant to s 590AA of the *Criminal Code*, he seeks a ruling that a conversation with Detective Sergeant Daniel Collins that took place shortly after 7.15 am on 29 April 2009 is inadmissible at his trial.

Search

[2] The circumstances surrounding the conversation were these:

[3] At 11.50 pm on 28 April 2009, the police went to a house at Burpengary looking for Kurt Reynolds. The house was the residence of the applicant's parents. Reynolds was a nephew. They allowed the police to search the house.

[4] While looking for Reynolds, the police smelt burned cannabis. They saw a smoking utensil in a garage. The garage was the applicant's bedroom.

[5] During an emergent search of the bedroom, the police located a clip-seal plastic bag containing cannabis, coffee grinders, scissors and electronic scales Also in the garage was a locked safe. It held: 428 tablets containing 4.205 grams of pure 4-Bromo-2, 5-dimethoxyphenethylamine, 1187.3 grams of cannabis sativa, and $12,350 cash. The police also located a laptop computer in the garage. A document on it appeared to be a story about the author's drug trafficking activities.

[6] The applicant, informed of his rights, said that he did not want to answer questions and wished to speak to a lawyer. He was arrested.

[7] All pertinent conversations to that point had been digitally recorded.

Recorded interview

[8] At about 3.00 am, the applicant was taken to the Caboolture Police Station. There, at first, police spoke to the applicant's parents and girlfriend. At 6.10 am, the applicant was interviewed by Collins and Constable Kelly Hutley, both of whom had been involved in the search. The interview was recorded.

[9] The applicant told the police that a bong in the bedroom was his, and that he had smoked "probably twenty cones" with it the previous evening. He was asked where he sourced his cannabis. There was equivocation on that topic. The applicant also expressed reservations about answering questions, mentioning a fear of retribution if recorded incriminating others.

[10] The interview was suspended at 6.30 am to allow the applicant to speak to his father. After that, the applicant was willing to resume the interview. It recommenced at 6.56 am.

[11] The applicant told the police that he felt addicted to cannabis because of "life problems". Asked about the safe, initially, he said that he had got it from Reynolds the previous Friday. When it was put to him that his parents and girlfriend had said that he had had the safe longer, he suggested that they must have been talking about a different safe. Eventually, however, he admitted that the safe was his.

[12] During the interview, the applicant asked whether he could help himself to "look better in front of a judge". The police would not give him legal advice. He raised the prospect of protection, which was, he said, "the only way I could ever say anything about these people." No such promise was extended. The applicant was reminded that he could contact a solicitor for legal advice.

[13] When asked if he sold drugs, the applicant said that he was going to be sick. The interview concluded shortly afterwards.

Other admissions

[14] After the recording equipment was stopped but before the police and the applicant had left the interview room, the applicant made the admissions that are the subject of this application.

[15] Collins made notes of the conversation at about 9.30 am, after he had finalised paperwork and the applicant, who remained under arrest, had been charged. Hutley signed the notes that evening, adopting them as an accurate record.

[16] These are the notes:

> "Start: 0656
> Finish: 0715
> Interview terminated by McMillan.
>
> McMillan: Sorry, I just don't want to talk on tape. I am shit scared. I will tell you stuff. Just not on tape.
> I said: What do you want to tell me?
> McMillan: This is what happens right, I get the stuff, the pills & grass from these blokes. I am not telling you who cause they will kill me. They would. I get the stuff and give it to my friends who go and sell it.
> I said: When do you pay for it.
> McMillan: At the end. I get money back from my mates, who sell it, I take my cut and then I pay the blokes who gave me the stuff.
> I said: What do you do with your share of the money.
> McMillan: Just live you know. Nothin much.

Collins said: How long have you been selling drugs?
McMillan: Since I had my car accident. I owe some money so I started doing this
I said: Do you now owe money for the drugs & cash we seized tonight?
McMillan: Yes
I said: What will happen about that?
McMillan: I don't know man. I am fucked. They are fuckin bad people man. They will be after me.
I said: Are you prepared to give me this information on tape?
McMillan: No. I don't know what to do. Tell me what to do.
I said: I can't tell you what to do. Your Dad is coming in, have a chat to him.
McMillan: Sorry, I am just scared. You don't know what these people are capable of.
I said: Alright, just sit in here & I will bring your Dad up when he gets in.
McMillan Father attend and bought to i/view room. McMillan and father have private discussion refused to be further i/viewed.
McMillan taken to w/house & charged."

Statutory regime

[17] The relevant provisions of the *Police Powers and Responsibilities Act 2000* ("the Act") are:

> "**436 Recording of questioning etc.**
>
> (1) This section applies to the questioning of a relevant person.
>
> (2) The questioning must, if practicable, be electronically recorded …
>
> (3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 437.
>
> (4) If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.
>
> **437 Requirements for written record of confession or admission**
>
> (1) This section applies if a record of a confession or admission is written.
>
> (2) The way the written record of the confession or admission is made must comply with subsections (3) to (7).

(3) While questioning the relevant person, or as soon as reasonably practicable afterwards, a police officer must make a written record in English of the things said by or to the person during questioning, whether or not through an interpreter.

(4) As soon as practicable after making the record –

(a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and

(b) the person must be given a copy of the record.

(5) Before reading the record to the person, an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.

(6) The person must be given the opportunity, during and after the reading, to draw attention to any error in or omission from the record he or she claims were made in the written record.

(7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading, and anything else done to comply with this section.

438 Access to electronic recordings of questioning etc.

(1) This section applies to the electronic record of the questioning, confession or admission, or confirmation of a confession or admission, of a relevant person that is made under section 436 or 437(7).

(2) A police officer must, without charge –

(a) if the recording is –

(i) an audio recording only – make a copy of the recording available to the person or the person's lawyer within 7 days after making the recording; or

(ii) a video recording only – make a copy of the recording available to the person or the person's lawyer within 14 days after making the recording; or

(b) if both audio and video recordings were made –

(i) make a copy of the audio recording available to the person or the person's lawyer within 7 days after making the recording; and

(ii) notify the person or the person's lawyer that, if the person asks, an opportunity will be provided to view the video recording; or

(c) if a transcript of an audio recording is made – on request, give to the person or the person's lawyer a copy of the transcript.

(3) Subsection (2) applies subject to any other Act.

439 Admissibility of records of questioning etc.

(1) Despite section 436 and 437, the court may admit a record of questioning or a record of a confession or admission (the *record*) in evidence even though the court considers this division has not been complied with or there is not enough evidence of compliance.

(2) However, the court may admit the record only if, having regard to the nature of and the reasons for the non-compliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice."

Statutory inadmissibility

[18] By s 436(3), the "confession or admission" recorded in Collins's notes is not "admissible in evidence" because what the applicant said was not "recorded as required by subsection (4) or section 437".

[19] Section 436(4) is inapplicable: what was said was not electronically recorded. None of the requirements of s 437(3), (4), (5), (6) or (7) was satisfied. It was reasonably practicable for Collins to have made his notes within the two hours or so that elapsed between the confession and when he composed notes. And as the applicant remained at the station, under arrest, for at least an hour after the conversation took place, there was ample time for Collins, after making his record, to have complied with the requirements of s 437(4) – (7).

[20] At the committal hearing, Collins acknowledged that he was aware of applicable requirements in the Act: in particular, to have shown the notes to the applicant and invited him to sign them. He acknowledged that he had ready access to a handheld recorder of the kind that had been used during the house search. His explanation for not asking the applicant to consider the notes was a desire to finish work. Collins spoke of having completed a ninth hour of overtime over two days and that he was "just starting five days off".

[21] In the circumstances, in the absence of an order or direction under s 439(2), the police officers cannot testify to the applicant's post-interview admissions. The prosecution seeks the favourable exercise of the s 439(2) discretion to allow them to do so.

Section 439

[22] Section 439(2) requires the Court to have regard, among other factors, to the nature of the non-compliance and the reasons for it.

[23] The non-compliance was extensive: indeed, it was complete. It was also deliberate, not the product of inadvertence or an inability to perform the s 437 duties. Moreover, Collins had the time to have made his notes, promptly shown them to the applicant and otherwise satisfied the s 437 requirements[1] before completing what he called "other paperwork" and finishing his shift.

[24] In short, compliance was both practicable and not unduly bothersome.

[25] Those considerations tend against the exercise of discretion – if there be one – to admit evidence of the recorded confession.

[26] There are, however, "other relevant matters" pointing in a different direction.[2]

[27] First, the accuracy of the notes as a true account of the conversation is not challenged.

[28] Secondly, it is not suggested that the confession to selling drugs was either equivocal or in any respect unreliable.[3]

[29] In those circumstances, admission of the conversation would not conflict with the main policy considerations that underpin the legislative regime: put shortly,[4] ensuring the accuracy of evidence of confessional revelations and avoiding the trouble and expense of a dispute about what was said.

[30] Thirdly, drug trafficking is a serious offence. Admitting the confession would increase the chances of a conviction. The prosecution case would no longer be circumstantial. And social costs commonly attend the acquittal of someone guilty of a serious criminal offence.[5]

[31] Fourthly, the confession was not recorded electronically only because the applicant, for his own purposes, wanted things that way.

[32] All considered, in the special circumstances of this case, it would be in the interests of justice to admit the evidence of the inculpatory conversation.

[33] The applicant contends, however, that, on the proper construction of s 439, there is no discretion to do so.

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1 It may be that s 437(7) might not have been able to have been complied with in view of the applicant's reluctance to permit recording of his post-interview confessional statement.
2 s 439(2).
3 cf *Stapleton v The Queen* (2002) 136 A Crim R 65, 69.
4 See *Kelly v The Queen* (2004) 218 CLR 216.
5 cf *R v Stead* [1994] 1 Qd R 665, 671-2; *Ridgeway v The Queen* (1995) 184 CLR 19, 30-1, 38; *Herring v United States* No. 07-513, slip op., US, 14 January 2009; 172 L Ed 2d 496 (2009), 505.

[34] At the trial, the prosecution would wish to call the officers to testify to what they heard the applicant say in the post-interview confession. Their recollections might be refreshed by reference to the notes, which is the conventional way of adducing evidence-in-chief of an oral, incriminating statement by an accused where the statement is neither electronically recorded nor acknowledged by the accused as a substantially accurate. The notes themselves would not go into evidence – at least not unless they became admissible and were let into evidence because of the way in which the defence chose to conduct the case.[6]

[35] According to Dr Forbes, there is a statutory discretion to permit testimony to be given of oral confessions that are not electronically recorded in compliance with the legislative prescriptions:[7]

> "...there is now a statutory requirement that police interviews with persons in custody be electronically recorded whenever possible. There is a discretion to admit statements not so recorded – for example, where the recording apparatus fails to work, or when a spontaneous statement is made before recording equipment can be activated or reactivated. An unrecorded statement may also be admitted when the defendant prefers to speak "off the record"…[8]

[36] On the applicant's case, however, there is no such discretion.

Setting

[37] If s 439(2) has the effect attributed to it in the Explanatory Notes that accompanied the *Police Powers and Responsibilities Bill 2000* ("the Bill") when it was before the Legislative Assembly, the provision would confer a judicial discretion to admit into evidence at trial testimony of Collins and Hutley about the confession recorded in the notes.

[38] Clauses 226 – 229 of the Bill became ss 436 – 439 of the Act.

[39] The Explanatory Notes[9] described the Bill as completing a "process of consolidation of police powers" that had commenced with the *Police Powers and Responsibilities Act 1997* (the "1997 statute"). "[A]dditionally", those Notes said, "the Bill seeks to rectify any technical defects contained in the [1997 statute]".

[40] Of cl 229, which became s 439, the Explanatory Notes said:

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6 This prospect is addressed at paras [62] and [69], and footnote 20. The prosecution could not in the present case call in aid s 93 of the *Evidence Act 1977*.

7 J R S Forbes, *Evidence Law in Queensland* (7th ed, 2008) p. 517.

8 Footnotes omitted.

9 As to using such Notes as an aid to statutory interpretation, see *W&T Enterprises (Qld) Pty Ltd v Taylor* [2005] QSC 360, [23]-[24] and fn 20.

> "Clause 229 provides that if this Division is not complied with or there is a lack of evidence of compliance, the court may still admit the evidence in the interest of justice."

[41] Apparently, the author of the Notes thought that the Parliament was being asked to legislate for just such a discretion as the prosecution now seeks to invoke.

[42] When the Bill was considered in Committee, clauses 226 to 229 provoked no discussion. Hansard merely records:

> "Clauses 221 to 231, as read, agreed to."[10]

[43] No mention was made of clauses 236 – 239 in the Second Reading speeches.

[44] These are distinct indications that Parliament enacted s 439 on the basis that the Explanatory Notes accurately summarised its effect.

[45] In a statute that largely consolidated other legislation on police powers, it might have been expected that s 439 would adopt the language of its statutory precursor. However, new words were chosen.

[46] Sections 436 – 439 of the Act were based on s 104 of the 1997 statute. Section 104 was restricted in its reach to a "person in custody". Section 436 operates more broadly, extending to a "relevant person": that is, someone "in the company of a police officer for the purpose of being questioned as a suspect…".[11] Apart from that and two or three other, presently immaterial, differences, s 104 of the 1997 statute imposed an identical regime. By s 104(3), a confession or admission during questioning was "admissible as evidence against the person in a proceeding only if it is recorded as required by this section." If written, the record had to comply with subsections (6) to (10).[12] During the questioning or as soon as reasonably practicable afterwards, a written record had to be made.[13] As soon as practicable after the record was made, it had to be read over and a copy given to the person.[14] An opportunity had to be given to draw attention to any error in or omission from the record.[15] An electronic recording had to be made of that reading.[16]

[47] Section 104(11) and (12) contained the same provisions as were to become s 438 in 2000.

[48] Importantly, s 104 concluded with:

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10 Queensland, Parliamentary Debates, Legislative Assembly, 16 March 2000, p. 548.
11 s 415 of the Act.
12 s 104(5).
13 s 104(6).
14 s 104(7).
15 s 104(9).
16 s 104(10).

> "(13) If a court considers this section has not been complied with or there is not enough evidence of compliance, the court may, despite the noncompliance, admit evidence to which this section applies if, having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice."

[49] Unlike s 104(13), s 439(2) does not speak of a discretion to "admit *evidence*...if...admission of the evidence would be in the interests of justice." Instead, it allows the Court to "admit *a record* ...if... admission of the evidence would be in the interests of justice."[17]

[50] The explanatory notes that had accompanied the Bill for the 1997 statute described the effect of s 104(13) in this way:

> "...a court may admit evidence obtained in non compliance with this clause if it is the interests of justice."

[51] The similarity of purpose to that stated in the Explanatory Notes concerning cl 229 of the 2000 Bill is obvious.

Interpretation of s 439

[52] The extrinsic material[18] does not suggest that s 439 was intended to alter the effect of s 104(13). There is nothing to indicate that s 104(13) was thought to suffer from some technical defect; nor to suggest that the change in language was designed to restrict the width of operation of the judicial discretion that s 104(13) had conferred.

[53] If the applicant's argument is right, however, s 439 has emasculated the s 104(13) discretion.

[54] On the applicant's case:

- Testimony of the police officers concerning the admissions would not be a "record". So s 439 would not allow that evidence to be adduced.

- No other statutory provision[19] nor any principle of the general law of evidence would make the notes admissible in the prosecution case.[20] And

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17 My emphasis.

18 See *Acts Interpretation Act 1954*, s 14B.

19 Such as s 93 of the *Evidence Act*.

20 At least not unless some misadventure in the conduct of the defence case could be used to achieve that outcome: as examples, if, inexplicably, counsel called for Collins's notes (see *Walker v Walker* (1937) 57 CLR 630) or cross-examined him about them: J D Heydon, *Cross on Evidence*, vol 1 (Service 125), [17240].

s 439 does not change the rules of evidence to permit them to go before the jury.

[55] The legislative history and other extrinsic material – in particular, the 2000 Explanatory Notes – indicate that no such alteration to the breadth of the s 104(13) discretion was envisaged.

[56] But if Parliament did not intend new consequences to be attached to them, what accounts for the different words in s 439? Why, in other words, has "a record" been substituted for "evidence"?

[57] The likely explanation is no compliment to the drafter.

[58] It rather looks as though the author of s 439 did not realise that, while oral evidence about a confession would be admissible, usually the written record would not;[21] and, acting on that misapprehension, chose what s 14C of the *Acts Interpretation Act 1954* ("the AIA") calls a "simpler style" of expression.

[59] Where that happens, "the ideas must not be taken to be different merely because different words are used."[22] Taking that legislative command in combination with the purposive approach mandated by s 14B of the AIA, s 439 might have been construed to the same effect as s 104(13). Even different words in the one statute may bear the same meaning.[23] And, as the Court of Appeal has said:[24]

> "...
>
> "Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object...The days are gone when judges, having identified the purpose of a particular statutory provision, can legitimately say, as Lord Macmillan said in *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641, of the means used to achieve the purpose: 'The legislature has plainly missed fire'. Lord Diplock, in an extrajudicial comment on that decision has said, that 'if...the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed': 'The Courts as Legislators', *The Lawyer and Justice* (Sweet & Maxwell) (1978) at 274."
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> These words of McHugh JA, though contained in a dissenting judgment, have often been approved in judgments of authority. They

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21 Ordinarily, a written record of a confession which, as here, is neither signed nor otherwise adopted by the suspect as accurate, is not admissible: see *Cross on Evidence*, [33735].

22 *Acts Interpretation Act 1954*, s 14C.

23 cf *R v Gaffney, ex parte Builders Registration Board of Qld* [1987] 1 Qd R 90.

24 *A Raptis & Sons Holdings Pty Ltd v Commissioner of Stamp Duties (No. 1)* [1999] 1 Qd R 458, 460-61.

> accord with s. 14A(1) of the *Acts Interpretation Act*, which provides that "the interpretation that will best achieve the purpose of the Act is to be preferred"..." [25]

[60] That approach, however, is yet to prevail in relation to s 439.

The issue decided

[61] *R v Smith*[26] concerned an admission by a suspect during police questioning. The statement was not electronically recorded. Notes were not made of it until months afterwards. The non-compliance with the statutory regime meant that testimony about the admission was not admissible. The trial judge had, however, allowed a police officer to testify to hearing the admission spoken.[27] The Court of Appeal held that s 439, then s 266 of the Act, did not confer a discretion to permit the testimony to be given.

[62] McPherson JA, with whom Mullins J agreed, said:[28]

> "Section 266 is directed to the admissibility of records of questioning. It provides in s 266(1) that, despite the provisions of ss 263 and 264, the court may admit a record of questioning or a record of a confession or admission even though the court considers that Div 5 has not been complied with or there is not enough evidence of compliance: see s 266(1). However, the record may be admitted only if, "having regard to the nature of and the reasons for the non-compliance and any other relevant matters", the court is satisfied "in the special circumstances of the case" admission of the evidence "would be in the interests of justice".
>
> ...
>
> Under s 266(1) it was nevertheless open to the court to exercise a discretion to admit in evidence "a record of questioning" or "a record of a confession or admission" even though it considered that Div 5 had not been complied with or there was not enough evidence of compliance. The word "record" in this context is not defined, but it is not easy to equate it with Kitching's unrecorded recollection of the conversation at any time before to 16 May 2002, when he first wrote it down in his witness statement. After that date, there was a "record" in the form of the witness statement which he prepared for the proceedings against the appellant. However, it was not that "record" or written statement that the trial judge was asked to admit in evidence at the trial. Instead, it was Kitching's oral evidence based on his recollection of the conversation that was tendered and admitted. He may in fact have refreshed his memory by reading his

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25 Footnotes omitted.
26 (2003) 138 A Crim R 172.
27 No attempt was made to put the notes into evidence.
28 (2003) 138 A Crim R 172, 177-80.

> statement again before giving evidence at the trial on 7 August 2002. He did not, however, ask for leave to do so at the trial, but gave his evidence of the conversation as something he was able to do of his own unaided and independent recollection. It was something he was not questioned about. According to the decision in *King v Bryant (No 2)* [1956] St R Qd 570, he was not obliged to seek leave to refresh his memory in that way. Doing so would not in any event have made his statement or "record" of the conversation admissible unless defence counsel had chosen to make it so by cross-examining him and then tendering it, which it was hardly likely he would have wished to do.
>
> The result is that his Honour had no power or discretion under s 266 to admit, or for that matter to reject, the evidence of Det Sgt Kitching. It was not "a record of questioning" or "a record of confession or admission" that was tendered at the trial, but Kitching's independent recollection of what had been said to him in the course of the conversation on 21 October 2001. In consequence, s 266 did not apply so as to authorise the court to admit the evidence if it was not otherwise admissible under the Division. Even though it was not a "record" of the questioning or the confession or admission, was it otherwise not admissible? That inquiry must in my opinion be answered in the affirmative. Section 263(3) renders a confession or admission admissible in evidence in a proceeding against the person making it *only* if it is recorded as required by s 263(4) (electronically) or s 264 (in writing). The confession or admission here was, for the reasons I have given, not recorded as required by s 264(4) and by force of s 263(3), was not admissible in evidence at the appellant's trial. Under s 266(1), the judge had no power or discretion to admit."

[63] That literal interpretation[29] of s 439 obliges me[30] to conclude that there is no discretion to allow Collins or Hutley to testify to their recollections of what the applicant told them in the unrecorded conversation.[31]

Notes admissible?

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29 McMurdo P, with whom Mullins J also agreed, disposed of the point briefly, saying (at p. 176): "Section 266 of the Act allows a record of questioning to be admitted despite non-compliance with the Act where the court is satisfied "in the special circumstances of the case, admission of the evidence would be in the interests of justice". Here, however, it was not sought to tender any written record but rather Kitching was permitted to give oral evidence of the conversation. The discretion conferred by s 266 was therefore of no assistance to the respondent…".

30 Presumably, the Court was not referred to the extrinsic material mentioned. That consideration, however, cannot affect the authority of *Smith* for a judge at first instance.

31 It is immaterial whether, had the question been novel, another view might have prevailed and the legislative mistake been judicially corrected: see, generally, B Coxon, 'Open to Interpretation: The Implication of Words Into Statutes' (2009) 30 *Statute Law Review* 1; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 651, 669; *Sevmere Pty Ltd v Cairns Regional Council* [2009] QCA 232, [56]-[57], [60]-[63]; *W&T Enterprises (Qld) Pty Ltd v Taylor* [2005] QSC 360, [23]-[33]; *Taylor v Centennial Newstan Pty Ltd* [2009] NSWCA 276; *Vu v Ministry of Fisheries* [2010] NZHC 728, [25]-[29], [37]-[39].

[64] The *Smith* interpretation would not matter so much if s 439 confers a discretion to allow the written record into evidence despite non-compliance with s 437. Does s 439 allow Collins's notes to be adduced in the prosecution case?

[65] There are curiosities about the notion that the notes may go into evidence in circumstances where the Act prohibits testimony that the words recorded were spoken.

[66] First, why would the legislature forbid oral evidence of the confession – typically, with the witness refreshing recollection by looking at the notes while testifying – yet stipulate that the notes themselves might go into evidence? No satisfying answer occurs to me.

[67] Secondly, it is not easy to conceive of circumstances in which it would be in the interests of justice to admit a written record of a confession – a disputed one at any rate – if the witness cannot be cross-examined about what was said and recorded.

[68] Moreover, there is no indication in the legislative history or other extrinsic material that, in enacting s 439, the Parliament was intending to alter the law of evidence to render admissible a record which is otherwise inadmissible.

[69] In view of the restrictive interpretation of "record" in *Smith*, however, s 439 has very little work to do unless it has amended the law of evidence to permit the record to go in. There may be a handful of cases where s 93 of the *Evidence Act* would sustain admissibility of the notes. And in the course of a trial, conduct of the case by the defence could allow the notes to be admitted.[32] Such circumstances will be rare. Otherwise, it is difficult to identify circumstances in which the discretion might be enlivened.

[70] Mr Callaghan SC contends that s 439 could be invoked where the requirements of s 438 had not been satisfied. Non-compliance with s 438, however, is not expressed[33] to impact on admissibility of any record, which would explain why s 439 begins with "[d]espite sections 436 and 437", not s 438.

Faumuina

[71] In *R v Faumuina*, Fryberg J held that s 439 does not change the rules of evidence to allow into evidence a record that is otherwise inadmissible, saying:[34]

> "Looking at the section in its context, it seems to me that it is designed to provide a limited exemption to the operation of ss 263 and 264 and no more. I do not read it as entitling a party to tender

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32 See the illustrations referred to in footnote 6.
33 Section 436(3) imposes a consequence for non-compliance with s 436 and s 437; not s 438.
34 [2004] QSC 264, p. 8.

> evidence which is otherwise inadmissible, even if the requirements of subs (2) are complied with.
>
> It may be thought unfortunate that the Parliament had enacted legislation which excludes evidence which the Court might think it is in the interests of justice to put before the jury. Excluding such evidence may bring the law into disrepute. It means the jury must decide the case on a false basis. Nonetheless, that, it seems to me, is the intent of ss 263, 264 and 266. Section 263(3) seems clearly designed to exclude evidence of a confession or admission if it is not recorded. It does not matter whether it is in the interests of justice that the confession should be put before the jury. The interests of justice are to be subordinated to the correct following of procedure by the police force. The use of s 266 to evade that consequence is, in my view, not permissible if the evidence is not otherwise admissible."

[72] I am obliged to follow *Faumuina* unless convinced that it is wrongly decided. Despite the highly inconvenient consequences, it will be apparent that I am not so persuaded.

Ruling

[73] In the result, testimony may not be adduced from Collins or Hutley concerning the admissions in question; nor, as things now stand, may the notes be put into evidence.

Reform

[74] Unless, happily, this ruling is reversed on appeal, s 439 deserves the attention of the legislature. Otherwise, people guilty of serious crimes will likely go free.