ARTICLES

CONTROLLED OPERATIONS, CONTROLLED ACTIVITIES AND ENTRAPMENT

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This article explores the boundaries between, on the one hand, controlled operations and activities under Chapter 5 of the Police Powers and Responsibilities Act 2000 (Qld) and, on the other hand, entrapment of a kind liable to lead to the exclusion of evidence. 'Entrapment' involves improper facilitation or inducement of an offence for the purpose of obtaining evidence for its prosecution. Chapter 5 was designed primarily to authorise participation in otherwise unlawful activities during covert investigations, and thereby to avoid evidence being excluded on the ground that the offence committed to obtain evidence was disproportionate to the offence to be prosecuted. It is, however, still possible for evidence to be excluded because an improper mode of facilitation or inducement was used or because the target of the investigation was selected in an improper way. The article examines the scope for either of these other forms of entrapment to occur following the enactment of Chapter 5.

Chapter 5 of the Police *Powers and Responsibilities Act 2000* (Qld) (hereafter, the 'PPRA') is entitled 'Controlled Operations and Controlled Activities'. It establishes a scheme for authorising law enforcement officers and, in some instances, their agents to engage in what would otherwise be unlawful conduct during investigations of serious offences. It also permits officers engaged in controlled operations or activities to go beyond what has been authorised where this becomes reasonably necessary for certain prescribed purposes. The scheme is directed to covert investigations, during which operatives participate in offences for the purpose of obtaining evidence against other participants. The scheme extends to officers of the Crime and Misconduct Commission (hereafter, the CMC) as well as to police officers. The term 'controlled' refers to operations and activities which are authorised under the Act.[1] 'Controlled operations' can extend over a period of time and involve various activities whereas 'controlled activities' involve just single meetings.[2]

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1 See the definitions in Schedule 4 to the PPRA.

2 The terms 'operation' and 'activity' are not specifically defined in the PPRA. Sections 190-191, dealing with the authorisation of controlled activities, refer only to single meetings. Section 173(5)(f), dealing with the authorisation of controlled operations, refers to 'general classes of otherwise unlawful activities'.

Some other Australian jurisdictions have similar legislation.[3] These legislative schemes were introduced in response to the 1995 decision of the High Court of Australia in *Ridgeway v The Queen*.[4] The effect of the *Ridgeway* decision was that all evidence of the commission of an offence is liable to be excluded if that offence was the product of entrapment by law enforcement officers or agents.[5] Exclusion is not mandatory but may occur through the exercise of the 'policy' discretion, that is, the judicial discretion to exclude unlawfully or improperly obtained evidence on grounds of public policy. In *Ridgeway* itself, officers had arranged for narcotics to be unlawfully imported for the purpose of prosecuting a suspected trafficker for subsequent possession of those narcotics. The High Court held that the seriousness of the offence committed by the officers justified the exclusion of all evidence of the offence of possession. In response to this decision, several jurisdictions enacted schemes to authorise participation in otherwise unlawful activity for investigative purposes and thereby to remove one possible argument for excluding evidence obtained in this way. Section 194 of the PPRA expressly provides:

> It is declared that evidence gathered because of a controlled operation or controlled activity is not inadmissible only because it was obtained by a person while engaging in an unlawful act if the unlawful act was authorised under this chapter.

The purpose of this article is to explore the boundaries between, on the one hand, controlled operations and activities and, on the other hand, entrapment of a kind liable to lead to the exclusion of evidence. Chapter 5 of the PPRA lays down stringent conditions for controlled operations and activities. The conduct of a covert operative may be improper despite being part of a controlled operation or activity if the authorisation breached the conditions of the Act. Furthermore, the conduct of a covert operative may be unlawful if it exceeded the terms of the authorisation in a way unrecognised by the Act. Quite apart from the terms of the Act, evidence is still liable to be excluded if it was obtained in an improper way. The concept of entrapment is analysed in the next part of the article, before the structure of Chapter 5 of the PPRA is examined.

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3 See *Crimes Act 1914* (Cth) ss 15G-15X; *Criminal Law (Undercover Operations) Act 1995* (SA); *Law Enforcement (Controlled Operations) Act 1997* (NSW).

4 (1995) 184 CLR 19.

5 See especially the judgments of Mason CJ, Deane and Dawson JJ and of Brennan J. Toohey J agreed with the exclusion of the evidence in that case but disagreed that it could be described as a matter of entrapment. Gaudron J and McHugh J viewed entrapment as a ground for a stay of proceedings rather than the exclusion of evidence.

Entrapment defined

'Entrapment' is usually used as a pejorative term, referring to actions which are improper. There are some acceptable ways in which offences may be facilitated or induced in order to gain evidence for their prosecution. For example, a covert operative may offer to purchase a product or service from someone suspected of breaching the terms of a licence or may offer a bribe to an official suspected of corruption. Depending on the circumstances, such investigative practices may involve what would technically be unlawful participation in the resulting offences under general principles of secondary liability. Yet, few people would criticise such investigative practices if there were a reasonable suspicion of criminal activity, if there were no other viable way of obtaining evidence for a prosecution, and if the operative was to do no more than provide an opportunity for the offence to occur under controlled circumstances. Where, however, evidence is sought by *improperly* facilitating or inducing the commission of offences, the term 'entrapment' may be used to describe what has happened.

The boundary between permissible and impermissible conduct in covert investigations can be conceived in either behavioural or normative terms. The traditional conception of entrapment has been 'behavioural', in the sense that what the operative does to facilitate or induce the offence to be prosecuted is taken to determine whether entrapment has occurred. Thus, it has often been said that entrapment requires conduct which goes beyond facilitating or providing an opportunity for an offence and instead amounts to instigating it or causing it to occur.[6] Commonly-given examples of more-active forms of inducement include pressuring someone to commit an offence by persistent importuning or by making threats. In some versions of this kind of test, the question asked is whether the offence would otherwise have been committed or whether the conduct of the operative was objectively likely to have induced commission of an offence that would not otherwise have been committed.[7]

The traditional, behavioural approach has diminished in favour for two reasons. The first concerns the exigencies of investigating some offences, including drugs offences.[8] Merely facilitating or providing opportunities may not be sufficient to generate the commission of these offences under controlled circumstances. Greater activity such as a display of enthusiasm or even persistent importuning may be expected before an approach to commit an offence is taken seriously and accepted as genuine. An operative may therefore need to engage in more active

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6 See, eg, *Amato v The Queen* [1982] 2 SCR 418, 446, adopted in *Ridgeway v The Queen* (1995) 184 CLR 19, Toohey J at [14].

7 See, eg, *R v Mack* [1988] 2 SCR 903, [120]; *Ridgeway v The Queen* (1995) 184 CLR 19, McHugh J at [18], [31].

8 See *R v Loosely* [2001] UKHL 53, [69], [102]. See also *Ridgeway v The Queen* (1995) 184 CLR 19, McHugh J at [32].

forms of inducement if there is to be any real chance of success. The second reason is that it is difficult to describe some cases, condemned as 'entrapment' by the courts, as involving the more-active forms of inducement. It is often said that entrapment can extend to providing an opportunity to commit an offence to a person who is not reasonably suspected of being ready to engage in that form of crime.[9] This practice can amount to random 'virtue-testing' and it might be objectionable even if there is no special inducement or pressure. In addition, the High Court of Australia in *Ridgeway* applied the label of entrapment to a case where objection was taken, neither to the manner of facilitation or inducement nor to the grounds for selecting the target for a covert operation, but rather to the relationship between the offence prosecuted and offence committed in order to obtain evidence for the prosecution. The accused in *Ridgeway* did not need to be given any special inducement or subjected to any special pressure because he was planning to deal in imported drugs before he came to official attention. Moreover, he was targeted for a covert operation because there were grounds to reasonably suspect him of preparing to engage in drugs offences. Nevertheless, the evidence of his offence was excluded. The crucial factor in the exclusion was that law enforcement officers had committed the legally primary offence, importing narcotics, in order to obtain evidence of a secondary offence, possession of those narcotics.[10]

The alternative, 'normative' conception of entrapment takes as its starting point the impropriety of the operative's conduct rather than its impact on the person under investigation. Instigating an offence or causing its commission is not the only form of misconduct which can occur in a covert operation. 'Entrapment' occurs whenever law enforcement officers, in facilitating or otherwise inducing offences for the purpose of prosecuting them, violate the law or otherwise depart from accepted standards for criminal investigation. This was how entrapment was conceived in the recent decision of the House of Lords in *R v Loosely*, where it was stressed that a multiplicity of factors needs to be taken into account.[11] Lord Hoffmann said: 'An examination of the authorities demonstrates, in my opinion, that one cannot isolate any single factor or devise any formula that will always produce the correct answer.'[12] Similarly, Gaudron J in *Ridgeway* said: "Entrapment' is not a term of art; nor is it a term with any precise meaning. It has been used to cover a variety of situations in which law enforcement agents resort to undercover activity.'[13]

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9 See, eg, *R v Mack* [1988] 2 SCR 903, [119]; *R v Loosely* [2001] UKHL 53, [56]-[65].

10 See Mason CJ, Deane and Dawson JJ at [34]-[36]; Brennan J at [15]-[16]. Toohey J at [29]-[30] also agreed that the evidence should be excluded for reasons similar to those of the majority but disagreed that the case could properly be described as one of entrapment.

11 [2001] UKHL 53, [25]-[29] (Lord Nicholls), [48]-[71](Lord Hoffman), [100]-[102] (Lord Hutton).

12 Ibid [48].

13 (1995) 184 CLR 19, [19].

There are three types of case to which the label 'entrapment' has been commonly applied in recent years.[14]

First, there are cases where an operative contributes in an improper way to the commission of the offence to be prosecuted. This is the type of case which gave rise to the traditional, behavioural conception of entrapment. In most such cases, the conduct of an operative goes beyond merely facilitating or providing an opportunity for criminal activity that could have occurred anyway and engages in more-active forms of inducement which either generate or objectively risk generating an offence that would not otherwise have occurred.[15] The conduct of an operative might, however, be improper even though it goes no further than facilitation or the provision of an opportunity. For example, it might involve the exploitation of either a relationship with the person who is entrapped or a particular vulnerability of that person.[16] In *Loosely*, it was suggested that, while it might be acceptable for a covert operative to provide an 'unexceptional' or 'ordinary' opportunity to commit an offence, anything more could amount to entrapment.[17] Similarly, McHugh J in *Ridgeway* observed that, to avoid the label of entrapment, the manner in which an offence was induced would have to be 'consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity'.[18]

Secondly, there are cases where the selection of a target for investigation is improper, even though no more is done than to facilitate or provide an opportunity for an offence. In the decision of the Supreme Court of Canada in *R v Mack*, the example was given of planting a wallet in a park in the hope of being able to catch someone stealing it.[19] Lamer CJ said that it is entrapment to provide 'an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*'.[20] There are two main bases for reasonable suspicion that the person targeted would be prepared to commit the offence in any event. There may be information about the specific person targeted. Alternatively, there may be information about criminal activity in a particular location where the person is present.[21] Without a reasonable suspicion on some such foundation, law enforcement officers are engaged in random 'virtue-testing' rather than in offering

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14 These categories may not be exhaustive. In *R v Loosely* [2001] UKHL 53, [60], Lord Hoffman suggested that there may be entrapment where there is no proper supervision of undercover operatives who induce the commission of offences.

15 See, eg, *R v Mack* [1988] 2 SCR 903, [119]-[120]; *Ridgeway v The Queen* (1995) 184 CLR 19, Gaudron J at [19], [36], McHugh J at [18], [31].

16 See, eg, *R v Mack* [1988] 2 SCR 903, [126]; *R v Loosely* [2001] UKHL 53, [28].

17 *R v Loosely* [2001] UKHL 53, [23], [102].

18 (1995) 184 CLR 19, [32].

19 [1988] 2 SCR 903, [115].

20 Ibid [119]. See also *R v Loosely* [2001] UKHL 53, [24], [56]-[65].

21 See, eg, *R v Barnes* [1991] 1 SCR 449. See also *R v Loosely* [2001] UKHL 53, [65].

controlled opportunities for offenders to commit their offences. Moreover, even if the condition for reasonable suspicion is satisfied, it may still be improper to select a target for ulterior reasons, perhaps ideological or personal, unconnected with a *bona fide* investigation of criminal activity.[22]

In a third category of entrapment, the impropriety involves disproportionate unlawfulness between an offence committed in order to obtain evidence and the offence for which evidence is sought. The commission of an offence for investigative purposes cannot be justifiable if that offence is worse than the offence for which evidence is sought. This was the kind of impropriety faced by the High Court of Australia in *Ridgeway*,[23] where narcotics were unlawfully imported for the purpose of obtaining evidence of their subsequent possession. The target of the operation was actively seeking to import narcotics before the law enforcement officers intervened. Nevertheless, the case was labeled as 'entrapment' by a majority of the High Court.[24] Gaudron J sought to bring the case within the category of entrapment by improper mode of inducement, on the ground that the particular offence of possession (that is, an offence occurring at a particular time and place and concerning a particular quantity of narcotics) would not have been committed without law enforcement officers supplying the narcotics.[25] The officers therefore technically procured the offence of possession. Yet, it would be misleading to say that their actions induced or risked inducing the commission of an offence that would not otherwise have been committed. Indeed, several judges observed that admitting the evidence would not have been unfair to the accused.[26] The notion of an offence that would not otherwise have been committed is best understood as meaning an offence *of a kind* that would not otherwise have been committed. For that reason, it seems preferable to treat cases like *Ridgeway* as constituting a separate category of entrapment.

Impropriety and unlawfulness are separate but related issues. The mere provision of an opportunity to commit an offence does not constitute unlawful participation in that offence. Yet, under some special circumstances, it can be improper. Unlawfulness is therefore not a necessary condition for entrapment. Furthermore, there has traditionally been some tolerance of unlawful participation in offences for investigative purposes. Unlawfulness is therefore not a sufficient condition for entrapment. Entrapment does, however, usually involve conduct which is unlawful as well as improper. Moreover, the unlawfulness of

22 See *R v Mack* [1988] 2 SCR 903, [114].

23 *Ridgeway v The Queen* (1995) 184 CLR 19.

24 Toohey J at [15] held that there was no entrapment because the law enforcement officers had not instigated the offence. He nevertheless held that there was an abuse of process. This was also how a 'reverse sting' operation was characterised in *R v Campbell and Shirose* [1999] 1 SCR 565, [22], where it was said that there was no plausible case for entrapment.

25 (1995) 184 CLR 19, [42].

26 Ibid Mason CJ, Deane and Dawson JJ at [33]; Brennan J at [14]; Toohey J at [29].

some conduct by law enforcement officials or agents may provide a reason for regarding it as improper. Arguments that unlawful participation should not be tolerated may be particularly strong now that the PPRA provides for otherwise unlawful conduct to be authorised.

The provisions of the PPRA dealing with controlled operations and activities were designed to deal primarily with the third type of entrapment. Evidence obtained through an authorised operation or activity cannot now be excluded on the ground that a disproportionate offence was committed. There still remains, however, the possibility of exclusion on some other ground of impropriety. The PPRA has not eliminated the other grounds. Moreover, by establishing a scheme for otherwise unlawful activity to be authorised, the PPRA has shaped the law on what constitutes improper facilitation or inducement and improper selection of a target for investigation.

The next part of this article will examine the conditions for activities to become lawful under the Act. Subsequent parts will examine the remaining potential for entrapment to occur in Queensland.

Controlled operations and activities

Under Chapter 5 of the PPRA, two types of activity are exempted from criminal liability. First, there are activities falling within the specific terms of an authorisation for a controlled operation or activity.[27] With respect to controlled operations, s 179 of the PPRA declares that it is lawful for a covert operative to engage in the otherwise unlawful activity described in the approval of the operation. In addition, s 193(4) affirms that there is no criminal liability for acts or omissions which are in accordance with 'an approval given for a controlled operation' or 'an authority given for a controlled activity; and an entity's policy about controlled activities'. Secondly, s 193(5) exempts an operative who is a police or CMC officer from liability for certain other activities which, during the course of a controlled operation or activity, become reasonably necessary either to take advantage of an opportunity to gather evidence of additional criminal activity or to protect the safety of any person or the identity of an operative. Effectively, such additional activities are treated as impliedly authorised. The exemption does not, however, extend to causing serious harm to persons or property or to encouraging or inducing criminal activity of a kind that otherwise could not reasonably be expected to occur. [28] Nor does it extend to operatives who are not police or CMC officers.

The PPRA regulates these activities in several ways: (1) by prescribing the purposes for which controlled operations and activities may be undertaken and for

27 PPRA s 193(4).
28 PPRA s 193(6).

which an operative may engage in otherwise unlawful activities; (2) by prescribing who may engage in such activities; (3) by prescribing how authorisation is to be given; (4) by prescribing what may be authorised and what else may be done. The regulatory scheme is generally tighter for controlled operations than for controlled activities. This is because, whereas a controlled activity merely involves a single meeting, a controlled operation may well involve more active conduct and the commission of what would otherwise be a series of offences.

Section 164 of the PPRA provides that the regulatory scheme does not apply in two instances: (1) 'the investigation of minor matters or investigative activities that, by their nature, can not be planned but involve the participation of police officers in activities that may be unlawful'. This is an obscure provision. The reference to unplannable activities in the second part suggests that, if they were viewed as acceptable before the enactment of Chapter 5, they will continue to be acceptable even though unauthorised. The exclusion is, however, confined to activities which are unplannable 'by their nature'. What is covered by this expression is unclear. It might be intended to cover cases where there is an unanticipated opportunity to investigate an offence and no time to get authorisation. In such cases, however, the investigative activities would be unplannable because of their context rather than their nature. Similarly, the significance of excluding 'the investigation of minor matters' is unclear. On its face, it suggests that it is never acceptable to engage in unlawful activity when investigating minor offences. This seems sensible. It would be odd, however, to juxtapose such a prohibition with an endorsement of the acceptability of some unplannable unlawful activity. The structure of the provision would make more sense if the reference to 'minor matters' were to mean that authorisation need not be obtained for engaging in unlawful activity during their investigation. It is, however, difficult to see why unauthorised action should be permitted in this context. The need for authorisation arises from the character of the investigative activity rather than from the character of the offence to be investigated. The character of an offence may be relevant in deciding whether an activity should be authorised, but it is major not minor offences which are more likely to justify an authorisation.

The purpose of a controlled activity must be to obtain evidence of the commission of an offence and the activity must be reasonably necessary for this purpose.[29] For a controlled operation, the purpose must be to gather evidence of serious criminal activity or official misconduct and the operation must represent 'an effective use of public resources'.[30] More precisely, the purpose of a controlled operation must be to investigate an offence falling into one of three categories:[31] 'serious indictable

29 PPRA s 190.
30 PPRA s 177(3)(b)-(c).
31 PPRA ss 163, 165, 177(3)(b).

offences',[32] 'misconduct offences',[33] or 'organised crime'. [34] These categories cover most serious offences against persons or property, serious drugs offences, official misconduct, and offences related to prostitution or SP bookmaking (which have historically been connected with police corruption). The same restrictions on categories of offences apply in the event that an operative goes beyond the scope of an authorised operation or activity in order to investigate additional criminal activity.[35] In addition, as was noted earlier, an operative can go beyond what was authorised not only for investigative purposes but also in order to protect the safety of any person or the identity of an operative.

The scheme for authorising controlled activities permits only the use of police or CMC officers as covert operatives.[36] In contrast, the scheme for controlled operations permits the use of other persons. It must, however, be 'wholly impractical in the circumstances' for a police or CMC officer to perform the role of the covert operative.[37] In addition, an operative who is not a police or CMC officer is exempt from liability only when acting within the terms of the authorisation; such a person cannot take advantage of the protection for additional activities conferred by s 193(5). There are also, as will be described below, special requirements for the drafting of an authorisation for someone who is not a police or CMC officer.[38] Whoever is to be the operative, that person must have received 'appropriate training for the purpose'. [39]

Separate procedures are prescribed for authorising activities and operations. The procedure for activities is relatively simple. Authorisation for them can be given by police officers of at least the rank of inspector or by the chairperson or an assistant commissioner of the CMC, in accordance with any policy of the relevant

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32 'Serious indictable offence' is defined in Schedule 4 of the PPRA as an offence involving any of: '(a) serious risk to, or actual loss of, a person's life; (b) serious risk of, or actual, serious injury to a person; (c) serious damage to property in circumstances endangering the safety of any person; (d) serious fraud; (e) serious loss of revenue to the State; (f) official corruption; (g) serious theft; (h) money laundering; (i) conduct relating to prostitution or SP bookmaking; (j) child abuse, including child pornography; (k) an offence against the *Drugs Misuse Act 1986* punishable by at least 20 years imprisonment'.

33 'Misconduct offence' is defined in Schedule 4 of the PPRA as an offence of official misconduct under the *Crime and Misconduct Act 2001* or the *Police Service Administration Act 1990*.

34 The category appears to cover no ground that is not already covered by 'serious indictable offence'. 'Organised crime' is defined in Schedule 4 of the PPRA as 'an ongoing criminal enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation'.

35 See text to n 27.

36 PPRA ss 190-191.

37 PPRA s 177(3)(d).

38 See text to n 45.

39 PPRA s 177(3)(c).

agency.[40] For operations, there is a more elaborate scheme involving a two-tiered structure of control. Authorisation can be given by an 'approving officer'. For the police service, this means the commissioner, a deputy commissioner or an assistant commissioner responsible for crime operations; for the CMC, it means the chairperson or an assistant commissioner.[41] Unless there are urgent circumstances, however, approval can ordinarily only be given on the recommendation of a 'controlled operations committee' chaired by a retired Supreme Court judge.[42] Where there are urgent circumstances, an approving officer can act without a recommendation but must afterwards refer the application for approval to the committee for non-binding advice.[43] An application for the approval of a controlled operation must be written and must include enough information for it to be properly considered.[44] The particulars must include a description of the criminal activity to be investigated, the name of each covert operative, and a description of the otherwise unlawful activity in which the operative will engage: for an operative who is a police or CMC officer, this description can refer to 'general classes' of activities but, for other operatives, the description must be 'precise'.[45] An approval must also be written and must include the same information as well as a statement of the period for which the approval has effect.[46] The approval may subsequently be varied with respect to the time period, the particulars of a covert operative and the criminal activity to be investigated, but not with respect to description of the activity in which an operative will be engaged.[47] If approval is wanted for additional activities, a new application must be made.

For present purposes the most important prescriptions pertain to what may be authorised and what else may lawfully be done. There are two sets of prohibitions. One relates to the commission of harm to persons or property. A controlled operation must not be approved if it is 'probable' that it will cause injury or death to a person or serious damage to or loss of property.[48] Similarly, an operative going beyond the terms of an authorisation must not actually cause

40 PPRA ss 190-191.

41 PPRA s 173(2). Where, however, the CMC is investigating a police officer, only the chairperson may approve the operation: PPRA s 173(3).

42 PPRA ss 172(1), 174(1), 177(1), (3). The chairperson of the CMC can act following informal consultation and agreement rather than a formal recommendation: PPRA s 175(2).

43 PPRA s 176. See also PPRA s 175(3), permitting the chairperson of the CMC to seek the informal advice of certain members of the committee rather than the committee as a whole.

44 PPRA s 173(4).

45 PPRA s 173(5).

46 PPRA s 178(1). There is, however, a procedure for concealing the actual identity of a covert operative: see PPRA ss 178(2), 186-189.

47 PPRA ss 180-185.

48 PPRA s 177(2)(a)-(c).

such harm.[49] The other relates to the undesirability of manufacturing offences. A controlled operation must not be approved if it is 'probable' that, because of the way it is to be conducted, 'someone could be encouraged or induced by a covert operative to engage in criminal activity of a kind the person could not reasonably be expected to have engaged in if not encouraged or induced by the covert operative to engage in it'.[50] Similarly, an operative going beyond the terms of an authorisation is not exempted from liability for conduct that actually results in someone being encouraged or induced to engage in criminal activity of a kind that otherwise could not reasonably have been expected.[51] The prohibitions respecting conduct exceeding what has been authorised apply to controlled activities as well as controlled operations. Curiously, they are not expressly made applicable to approvals for controlled activities. The view might have been taken that they are implicit in the restriction of a controlled activity to a 'single meeting'.[52] Yet, a single meeting could conceivably be conducted in a way which risks encouraging or inducing an offence of a kind that would otherwise not have occurred.

The PPRA does not explicitly address the position of an operative who acts under an improperly granted authorisation. In principle, the operative should be able to rely on an authorisation that is not defective on its face.[53] The prescriptions governing authorisations would then be directory rather than mandatory, in the sense that failure to comply with them should not affect the validity of an authorisation. Yet, even if this interpretation is correct, the issue of the authorisation would still be improper. Furthermore, it could be viewed as improper for an operative to engage in otherwise unlawful activity under an improperly granted authorisation. An argument to this effect would be particularly strong if the prohibitions on authorising certain types of operation have been breached. Thus, even if the conduct of an operative has been authorised, it may still amount to entrapment if it was probable at the time of the authorisation that that conduct could encourage or induce criminal activity that could not otherwise have been reasonably expected.

The prohibitions on what may be authorised in a controlled operation are framed in terms of objective risks attaching to the way the operation is to be conducted. Thus, if the way of conducting an operation will probably cause injury or death to a person or serious damage to or loss of property, the operation must not be approved. If approval is given despite these risks being present, the operation is

49 PPRA s 193(6)(a)-(c).
50 PPRA s 177(2)(d).
51 PPRA s 193(6)(d).
52 PPRA ss 190-191.
53 A difficulty for this interpretation is presented by the wording of the exemption from criminal liability for controlled activities, since one of the stated conditions for the exemption is that the authorisation complies with the entity's policy about controlled activities. An operative might be unaware of a relevant policy. The denial of an exemption in this instance might be viewed as an anomaly caused by legislative error.

improper even though none of the risks materialise. Moreover, if the way of conducting an operation makes it probable that someone could be encouraged or induced to commit a kind of offence that otherwise could not reasonably be expected to occur, it is immaterial that the target happens to be predisposed to commit such an offence. The target's predisposition is not part of 'the way the proposed operation is to be conducted'.[54] The position differs, however, where an operative exceeds the terms of an authorisation for investigative or protective purposes. The operative's conduct is unlawful if it actually causes injury or death to a person or serious damage to or loss of property but not if it merely risks these outcomes. Moreover, although an operative must not encourage or induce the commission of an offence that otherwise could not reasonably have been expected to occur, a reasonable expectation could presumably be based on knowledge of the target's predisposition to commit such an offence. It is unclear why the focus switches in this context from the objective risks to the actual outcomes of an operative's conduct. Perhaps recognition is given to the difficulties an operative can face in the field, needing to make quick decisions without the opportunities for calm reflection that would be available to an approving officer or a controlled operations committee.

It is 'probable' rather than 'possible' risks which must not be run when controlled operations are authorised. Although the meaning of the term 'probable' has been disputed, Australian law does not generally make a sharp distinction between probabilities and possibilities. In the leading case of *Boughey v The Queen*, it was said that 'likely' and 'probable' are synonyms, the ordinary meaning of which is 'to convey the notion of a substantial – a 'real and not remote' – chance regardless of whether it is less or more than 50 percent'.[55] Nevertheless, the choice of 'probable' rather than 'possible' does indicate that the risk must be a substantial one.

It might, however, be misleading to talk of substantial risks in the context of s 177(2)(d) of the PPRA. That provision says that an operation must not be approved if 'it is probable that … someone could be encouraged or induced …'. The risk here must only be that someone *could*, not *would*, be encouraged or induced to commit an offence that could not otherwise reasonably be expected to occur. There is little if any difference between the propositions that (1) it is probable that some event could occur and (2) it is possible that it would occur. Interpreted as a whole, therefore, s 177(2)(d) may prohibit authorising any

54 PPRA s 177(2). The approach adopted in other Australian jurisdictions has been to focus on the risk that the particular person who is the target of a controlled operation might be encouraged or induced to commit an offence that otherwise would not have been committed. See *Crimes Act 1914 (*Cth) s 15M; *Criminal Law (Undercover Operations) Act 1995* (SA) s 3(d); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 7(1). On this alternative approach, evidence of the target's criminal predisposition would be relevant.

55 (1986) 161 CLR 10, 21, Mason, Wilson and Dawson JJ. See, however, the different views of Gibbs CJ at 14 and Brennan J at 43-45.

operation carrying a significant risk of encouraging or inducing someone to commit an offence that would not otherwise be expected to occur, regardless of whether the risk is 'substantial'. Nevertheless, if 'probable' is to have any meaning in this context, it presumably excludes a category of remote risks.

The remaining parts of this article will examine in more depth what can still constitute entrapment in Queensland.

Improper facilitation or inducement

The paradigm of entrapment is probably the case where law enforcement officers or agents act towards a person in a way which goes beyond facilitating or providing an opportunity for an offence and amounts to inducing the commission of an offence that otherwise would not have been committed. Following the enactment of Chapter 5 of the PPRA, however, there are three, somewhat distinct, categories of entrapment through improper mode of facilitation or inducement in Queensland.

The first category comprises cases where law enforcement personnel facilitate or induce an offence in a way that is unlawful. There are now two sets of conditions for unlawfulness. First, the conduct of the law enforcement personnel must constitute an offence under the general criminal law. Secondly, the conduct of the law enforcement personnel must fall outside the protective umbrella of Chapter 5 of the PPRA.

The conduct of the law enforcement personnel must fall within the scope of an offence before the protective umbrella of the PPRA is needed to make it lawful. Usually, an operative will be a secondary party to the offence to be prosecuted, having aided, counselled or procured it contrary to s 7 of the Criminal Code.[56] Alternatively, in some bilateral transactions such as selling drugs or sexual services, it may be that the conduct of the operative would amount to aiding, counselling or procuring except that there is no liability because of the doctrine of implied legislative exclusion. That is the doctrine that, where the terms of an offence apply to only one party to a bilateral transaction, secondary liability for the other party is impliedly excluded. The scope of the doctrine is uncertain and it may only apply to offences designed for the protection of the other party.[57] Even if it is given broader scope, some other offence will usually be committed.

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56 It is conceivable that the liability of an operative as a secondary party may be extended to additional offences by virtue of ss 8-9 of the Criminal Code. It is also conceivable that the operative may have committed an offence as a principal, for the purpose of having the target prosecuted for that offence as a secondary party.

57 On the more restrictive view, the doctrine still apples to an offence such as incest. See, eg, *R v Starr* [QWN] 23 (SC). It probably does not, however, apply to offences related to the selling of drugs or sexual services. See, eg, the competing views on the

Traditionally, the view has been taken that participating in an offence for investigative purposes does not always amount to entrapment. There has been a measure of tolerance for lower levels of secondary participation. For example, in *R v Swift*,[58] the Queensland Court of Appeal upheld the conviction of a corrupt police officer who had agreed to accept a bribe offered by an undercover operative.[59] There has even been some judicial support for the acceptability of a degree of persistent importuning of drugs dealers.[60] The argument has been that a display of persistence is expected of prospective purchasers and that dealers will often refuse to sell in its absence. This acceptance of lower levels of secondary participation on the part of covert operatives might perhaps be defensible in the absence of mechanisms for conducting controlled operations and activities lawfully. That rationale, however, is no longer available in Queensland now that Chapter 5 of the PPRA provides a scheme for the authorisation of otherwise unlawful activity. Given the existence of that scheme, unauthorised participation in offences for investigative purposes should generally be viewed as entrapment.[61]

The scope of secondary participation in offences is broad. 'Aiding' an offence obviously includes providing material assistance for its commission. It also extends to providing psychological encouragement or support during the commission of an offence.[62] Psychological support usually involves some active communication but mere presence can be sufficient if it indicates readiness to help should the need arise.[63] 'Counselling' means encouraging its commission beforehand. 'Procuring' is an obscure concept but is probably best equated with causing an offence to be committed by someone else. There is some overlap between the concepts of counselling and procuring. For example, a person who pesters another person to commit an offence would usually be said to counsel rather than to procure it. Counselling is, however, one way in which an offence can be caused. On the other hand, in cases where the label 'procuring' is used, there will often be some element of counselling. Usually, however, a procurer also

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application of the doctrine to prostitution offences in *Scott v Killiam* (1985) 40 SASR 37 (FC). See also, eg, the contrasting views of English and Canadian courts on whether the doctrine applies to selling drugs: *Sayce v Coupe* [1953] 1 QB 1 (Div Ct); *R v Dyer* (1972) 5 CCC (2d) 376 (NSCA; *R v Meston* (1975) 28 CCC (2d) 497 (Ont CA).

58 (1999) 105 A Crim R 277.

59 There was some argument in the case over whether the undercover operative had acted unlawfully. The Court of Appeal, however, upheld the conviction on the assumption that the offer was unlawful.

60 See above n 8.

61 Section 164 of the PPRA apparently excuses proceeding without authorisation in some circumstances. The scope of that provision, however, is unclear. See text following n 28.

62 See, eg, Beck (1989) 43 A Crim R 135 (Qld CCA).

63 See, eg, ibid.

contributes to the causation of an offence in some other way, such as through offering a material inducement for its commission.

An unauthorised operation or activity could conceivably trigger an offence and yet be lawful because no more was done than to facilitate it or provide an opportunity for it to occur. There was no material assistance for the offence or active encouragement of it and there was no procurement of it because the contribution to its occurrence was insufficient for causal responsibility.[64] For example, suppose that an undercover operative attended a nightclub where the selling of prohibited drugs was suspected and that the operative adopted an appearance unlikely to arouse the concern of a dealer. A dealer then approached the operative and offered to sell drugs. Even leaving aside the possible application of the doctrine of implied legislative exclusion, the presence and appearance of the operative would not be sufficient for secondary participation in the dealer's offence. There would admittedly be a causal contribution to the occurrence of the drugs offence. Nevertheless, it would be effectively a matter of chance that the approach was made to the operative rather than someone else. Suppose also that for the purpose of tempting thieves, goods were put in a location where they could be easily stolen and this location was then kept under observation, as happened in the English case of *Williams and O'Hare v DPP*.[65] This might not amount to procuring the stealing as long as other, similar, opportunities for stealing were open to the thieves. Again, it could be argued that the causal contribution was minimal because, given the other opportunities for stealing, it was effectively a matter of chance that an offence occurred in the location under observation rather than somewhere else. On the other hand, there would presumably be procuring if suspects were offered an exceptional opportunity of a kind they would not ordinarily encounter.

Yet, the threshold for secondary participation in an offence is not high and will be crossed in many undercover operations and activities. It will almost certainly be crossed in a case where an operative uses threats, unusually attractive inducements or persistent importuning to get the target to commit the offence.

To be unlawful, the conduct of law enforcement personnel must also fall outside the protective umbrella of Chapter 5 of the PPRA. It may escape the protective umbrella either because there was no authorisation for the activity or because, if there was an authorisation, the conduct of the operative impermissibly exceeded its scope, breaching both its terms and the extended authorisation conferred under s 193(5-(6) of the PPRA.[66] Section 193(6) prohibits additional action if it results in someone being encouraged or induced to engage in criminal activity of a kind that

64 On the concept of causal responsibility, see especially *Royall v The Queen* (1991) 172 CLR 378, 441-442, McHugh J.

65 (1994) 98 Cr App R 209.

66 See text to above n 28.

otherwise could not reasonably be expected to have occurred. The best way of establishing that would be to show both that there was no evidence of the target previously committing that kind of offence and that the conduct of the operative was likely to induce its commission by a person lacking predisposition to engage in the activity. In an extreme case, the manner of inducement alone might suffice, even though the target had previously engaged in the activity. An example might be the facts of the leading Canadian case of *R v Mack*.[67] The target in that case was subjected to persistent approaches over several months to supply drugs to a police informer. He eventually succumbed after the informer adopted a 'threatening manner'. The Supreme Court of Canada held that there was entrapment despite the police having held a reasonable suspicion that the target was involved in criminal conduct.[68]

The second category of entrapment by improper manner of facilitation or inducement comprises cases where an operative has been improperly authorised to engage in what would otherwise be criminal activity. The conduct is lawful because there is an authorisation under Chapter 5 of the PPRA. However, the conduct of the operative is improper because the authorisation should not have been issued. The prescriptions for authorising controlled operations were discussed in the preceding part of this article. To summarise: these prescriptions cover the purposes for which an authorisation may be issued, the persons who may be granted an authorisation, the procedures to be used in issuing an authorisation, and the kinds of activity which can be authorised. Most importantly, a controlled operation must not be authorised (a) if there is an objective risk of it probably causing injury or death to a person or serious damage to or loss of property or (b) if the way of conducting it makes it objectively probable that someone could be encouraged or induced to commit a kind of offence that otherwise could not reasonably be expected to occur. It was suggested earlier that the latter prescription prohibits the authorisation of an operation to be conducted in a way that carries a significant risk of encouraging or inducing someone to commit an offence that otherwise would not be expected to occur.[69] Another way of posing the issue would be to ask whether there is a significant risk of an ordinary person succumbing to the encouragement or inducement. That should rule out authorising operations in which the target will be threatened or offered an inducement so attractive that it might appeal to the greed of the ordinary person. An example might be provided by the facts of *Attorney General's Reference Number 3 of 2000*, a case decided by the House of Lords together with *R v Loosely*.[70] In the *Attorney General's Reference*, the initial approach by the police involved an offer to supply the target with smuggled cigarettes. There was evidence that the target's subsequent agreement to a request to supply heroin was

67 [1988] 2 SCR 903.
68 Ibid, [156]-[159].
69 Text to above n 55.
70 [2001] UKHL 53.

induced by the prospect of a profitable trade in cigarettes. The House of Lords held that there was entrapment in the *Attorney General's Reference* because the inducement was exceptional for the drugs trade. [71] An operation like this might also be improper in Queensland because of the risk of the inducement tempting an ordinary person. On the other hand, an ordinary person might be expected to resist a financial inducement like that in *R v Swift*,[72] where $3000 was offered for information about police investigations of dealings in drugs. An ordinary person can also presumably be expected to show some resilience in the face of straightforward importuning and even pestering.

The third category of entrapment by improper manner of facilitation or inducement comprises cases where an operative improperly exploits a personal relationship or a particular vulnerability of the target.[73] In such cases, there is a special risk of the operative bringing about the commission of an offence that would not otherwise have occurred. An attempt to generate criminal activity might succeed even though it would ordinarily be ineffective.

Of course, cases of entrapment by exploitation are often likely also to fall within one of the other categories of entrapment. Exploitative conduct will often involve counselling or procuring the offence, so that it will be unlawful unless it has been authorised under Chapter 5 of the PPRA. It was earlier argued that unlawful participation in offences in order to prosecute them now generally amounts to entrapment. If this is correct, most cases of entrapment by exploitation will probably also involve entrapment by unlawful conduct. If, on the other hand, some lower-levels of secondary participation continue to be regarded as acceptable, exploitation could become a significant factor. It could be the additional ingredient which makes an operative's conduct improper. For example, suppose it were to be regarded as generally acceptable for undercover operatives to make unauthorised requests for the supply of drugs. It might nevertheless be improper for an operative to direct such a request to a partner in an intimate relationship, playing on susceptibilities arising from the relationship. It is perhaps unlikely that this kind of exploitation would ever be authorised under Chapter 5 of the PPRA. If it happened, however, it could be argued that the conditions of the Act were breached because of the risk of ensnaring someone who would otherwise not have committed an offence of supplying.

There might also be improper exploitation in a case where the conduct of the operative would not ordinarily be unlawful. Suppose that an undercover operative establishes an intimate relationship with a person suspected of being involved in drugs offences. The operative then vaguely expresses a desire for drugs and frustration at difficulty in obtaining them, hoping that this may generate an offer

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71 Ibid, [81], [116].
72 (1999) 105 A Crim R 277 (Qld CA). See text to above n 58.
73 See text to above n 16.

to supply them. The other person obliges out of compassion. Since the operative did not ask for drugs, it is questionable whether the operative counselled or procured an offence of supplying. The operative perhaps just provided an opportunity for the offence to be committed. The view might nevertheless be taken that the operative improperly exploited the relationship. Similarly, suppose that an operative investigating drugs offences strikes up a casual acquaintanceship with a young, mentally handicapped associate of some suspects. In the presence of the youth, the operative talks vaguely about wanting drugs but does not advance any specific request. The youth foolishly does what the operative has been hoping for and offers to supply drugs. The view might be taken that the operative improperly exploited vulnerabilities connected with immaturity and mental handicap.

Improper target selection

Entrapment can occur not only when the mode of facilitating or inducing an offence is improper but also when a target for investigation is selected in an improper way. It would be wrong to facilitate or induce the commission of an offence if the target is not reasonably suspected of already being prepared to commit that kind of offence.[74] This could be entrapment even though it merely involves facilitating an offence or providing an opportunity for it to occur. Consider the example of planting a wallet in a park in the hope of being able to catch someone stealing it, which was discussed in *R v Mack*.[75] It is questionable whether this would amount to procuring unless some exceptional temptation was offered.[76] Nevertheless, it might be condemned as an exercise in 'random virtue-testing'. Admittedly, randomly tempting people will catch some persons who are predisposed to engage in the criminal activity. Unfortunately, many people have occasional 'weak' moments when the element of greed in human nature overcomes normal inhibitions on dishonest behaviour. Randomly tempting people therefore always carries some risk of inducing criminal activity by persons who would otherwise have stayed within the bounds of the law. There is no good reason why this risk should be run. Moreover, tempting some persons but not others could be unfair unless they are selected on the basis of reasonable suspicion.

In cases where random virtue-testing involves what would ordinarily be unlawful conduct, authorisation under Chapter 5 of the PPRA is required. It is questionable whether the PPRA scheme contains specific safeguards against improper target selection. The issue is how to interpret the prohibition in s 177(2)(d) on authorising an operation where it is probable that someone could be encouraged or induced to engage in criminal activity of a kind that otherwise could not

74 It might also be viewed as entrapment if, although there are grounds for reasonable suspicion, action is taken for ulterior and improper reasons. See text to above n 20.

75 [1988] 2 SCR 903, [115]. See text to above n 19.

76 See text to above n 65.

reasonably be expected to occur. It was suggested earlier that the provision is directed to modes of encouragement or inducement carrying a risk which might be aptly described as 'significant'.[77] Unless the temptation is particularly great, the risks associated with random virtue-testing may not be sufficiently large to be excluded by s 177(2)(d). And, if great temptation is offered, the operation should be barred because the mode of encouragement or inducement is improper, independently of any impropriety in the selection of the target. In any event, selecting a target without reasonable suspicion is improper. Even if the PPRA scheme does not prohibit the practice, it also does nothing to legitimise it. The practice is improper even if there is only a relatively low risk of tempting someone who could not otherwise reasonably have been expected to commit an offence. Moreover, a court could hold a controlled operation or activity to constitute entrapment on this ground.

There is an instance in which the improper selection of a target may be the factor making an operative's conduct unlawful. Section 193(6)(d) of the PPRA restricts the exemption from liability for an operative who goes beyond the terms of an authorisation to take advantage of an opportunity to gather evidence in relation to additional offences. An operative remains liable for conduct resulting in someone being encouraged or induced 'to engage in criminal activity of a kind the person could not reasonably be expected to have engaged in if not encouraged or induced by the covert operative to engage in it'. That result would usually occur because the manner of inducement was too aggressive, perhaps involving threats or financial inducements too attractive for the ordinary person. If there was an approach which the ordinary person could reasonably be expected to withstand, such as a degree of importuning, s 193(6)(d) would ordinarily protect the operative. Suppose, however, that the inducement was directed at someone for whom there was no evidence of predisposition to commit the offence. If the target happened to respond by committing the offence, the operative could also be liable for the offence under general principles respecting secondary participation. Since the target lacked predisposition, there could not have been a reasonable expectation that offence would be committed without the importuning. The PPRA would therefore afford no protection to the operative.

Suspicion has been described in this way:

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence'.[78]

77 On the interpretation of this provision, see text to above n 55.

78 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303, Kitto J.

The quantity and quality of information needed for reasonable suspicion can be debatable. One issue is what use can be made of 'tip-offs' and other information received from third parties. In principle, it would seem that reasonable suspicion can be grounded upon information of this kind. The House of Lords has said in another context that reasonable suspicion can be based on hearsay information.[79] Much may depend, however, on what is said by the informant. In *R v Loosely*,[80] the House of Lords approved an operation where there was a reasonably strong case for suspicion. There, attention had first focused on a public house where drug dealing was suspected. A person in the public house then provided an undercover operative with the name and telephone number of the appellant and suggested telephoning him if drugs were desired.[81] A weaker case would be *Teixeira de Castro v Portugal*.[82] In that case, undercover police officers initially targeted someone (the first intermediary) who was suspected of trafficking in drugs. That person claimed to be unable to supply any drugs but mentioned the name of the applicant as a possible supplier. Despite making this identification, the first intermediary did not know how to contact the applicant and had to obtain his address from a second intermediary. The intermediaries and the undercover police officers then approached the applicant and persuaded him to obtain heroin for them. The European Court of Human Rights held that, despite the information received from the intermediaries, the police had no good reason to suspect the applicant was a drugs trafficker. The information had amounted to no more than a mention of his name as some one who 'might be able' to find some heroin.[83] In addition, he had no prior record and he was unknown to the police.[84] Moreover, he did not have any drugs in his home and had to obtain them for the police from yet another party. The court did not indicate what its conclusion would have been if the information gathered in the initial stages of the operation had tended to confirm rather than dispel the suspicion. Nor did it indicate whether it would have taken a different view if the initial information had come from a particularly reliable source.

It was earlier noted that there are two main bases for reasonable suspicion that someone would be prepared to commit an offence.[85] There could be information either about the specific person targeted or about activity in a particular location where the person is present. In the latter case, of course, the suspicion might only attach to persons with a particular characteristic, such as a particular age or gender. In some instances, suspicion might even fall upon persons with particular

79 *O'Hara v Chief Constable of the RUC* [1997] AC 286, 293, 298.
80 [2001] UKHL 53.
81 Ibid [84].
82 (1998) 28 EHRR 1.
83 Ibid [10].
84 Ibid [38].
85 Text to above n 21.

characteristics regardless of their location. It would then, however, be very difficult to defend the suspicion as being 'reasonable'.

With respect to suspicion of a specific person, a major issue is how much use can be made of information about the history of the person. Exclusive reliance on historical matters is unlikely to be acceptable. The Supreme Court of Canada has said, in the context of a case on entrapment, that 'the mere existence of a prior record is not usually sufficient to ground a 'reasonable suspicion".[86] An Australian court might be expected to adopt a similar position as a matter of general principle. In addition, the dictionary in Schedule 4 to the PPRA states: "reasonably suspects' means suspects on grounds that are reasonable in the circumstances'. If this provision is to add anything, the reference to 'circumstances' should be taken to focus attention on current activities rather than the past character of a person. Nevertheless, historical information can presumably be taken into account when information about current activities is interpreted. Suppose, for example, that a tip-off is received that someone is dealing in drugs. If that person has a prior record of drug-dealing, that will strengthen the argument for a reasonable suspicion of engagement in the activity now.

With respect to suspicion of persons in a particular location, one issue is how the boundaries of locations are to be determined. In *R v Barnes*,[87] the Supreme Court of Canada indicated that law enforcement officers should have some flexibility in planning the location of undercover operations. In that case a drugs operation targeted an area of approximately six city blocks. Drug-dealing was scattered throughout the area but was particularly common at certain locations within it. It was held to be legitimate for an undercover police officer to approach a dealer in the larger area but away from the most commonly used locations. The court noted that traffickers tend to modify their techniques in response to police investigations.[88] The court also suggested, however, that an operation could become illegitimate if its boundaries went beyond the concentration of criminal activity.[89]

Another issue is how frequently offences must occur in a location before they can be targeted. In the English case of *Williams and O'Hare v DPP*,[90] police put a partly opened van containing visible cigarette cartons (actually dummies) under observation to see who might take the cartons. This was held to be justifiable investigative practice by the Divisional Court. The area in which the van was put

86 *R v Mack* [1988] 2 SCR 903, [118].
87 [1991] 1 SCR 449.
88 Ibid [18].
89 Ibid [20].
90 (1994) 98 Cr App R 209.

had 'high motor vehicle crime'.[91] The judgment, however, did not discuss the significance of this or of crime rates generally. The degree of suspicion attaching to any individual within a location will typically be less than when suspicion is based on information about a specific person. This may be acceptable. Nevertheless, if people are to be targeted on the basis of presence in a location, the rate of offences in that location should be high enough to justify the particular operation. Account should therefore also be taken of the nature of the operation and the nature of the offence under investigation. For example, the more exceptional is the inducement to be used, the higher may be the threshold rate for targeting a location. In *R v Loosely*, it was said: 'The greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it.'[92] This is because of the increased risk of ensnaring an 'unwary innocent' who is not predisposed to commit the offence. On this approach, the acceptability of an operation like that in *Williams and O'Hare* would depend, not only on the magnitude of the rate of vehicle crime, but also on how exceptional was the opportunity offered for stealing. It would be easier to justify the operation by reference to the rate of vehicle crime if the opportunity offered was similar to what would ordinarily be available in the location. Conversely, the more serious is the offence under investigation, the lower may be the threshold rate for targeting a location. The risk of ensnaring an 'unwary innocent' becomes more acceptable when very serious offences are at stake and capturing an offender becomes a matter of urgent need.

Conclusions

Entrapment occurs when the commission of an offence is improperly facilitated or induced so that it will occur under circumstances where evidence can be obtained for its prosecution. Evidence obtained by entrapment is liable to be excluded under the 'policy' discretion. Prior to the enactment of Chapter 5 of the PPRA, and similar schemes in other jurisdictions, law enforcement officers and agents had no special authority to participate in offences for investigative purposes. They relied on the tolerance of the courts. Chapter 5 was designed to narrow the scope for covert operations and activities to be labelled 'entrapment'. In particular, it was designed to deal with the problem which arose in *Ridgeway*, where it was held to be entrapment for law enforcement officers to commit an offence disproportionate to the offence to be prosecuted. Chapter 5 of the PPRA effectively eliminates that problem by establishing a scheme for authorising officers and, in some instances, their agents to commit what would otherwise be offences in the course of investigating serious crime.

Nevertheless, entrapment can still occur because a law enforcement officer or agent contributed to the commission of an offence in an improper way. It is

91 Ibid 211.
92 [2001] UKHL 53, Lord Nicholls at [24].

generally acceptable for an operative to facilitate or provide an opportunity for the commission of an offence as long as what is done is not sufficient to make the operative a secondary party to the offence. Traditionally, tolerance has also been extended to law enforcement officers and agents engaging in lower-levels of secondary participation in some offences for investigative purposes. However, following the establishment of the scheme for authorising such conduct in Chapter 5 of the PPRA, unauthorised secondary participation should now generally be regarded as entrapment. Chapter 5 has therefore expanded the scope for secondary participation to amount to entrapment. In addition, even if it has been authorised, encouraging or inducing the commission of an offence will be improper if the authorisation breached the conditions of the PPRA. In particular, authorisation must not be given for an operation to be conducted in a way which carries a significant risk of encouraging or inducing someone to commit an offence that otherwise would not be expected to occur. It has been argued that an operation using methods with this objective risk will be improper even though the particular target happens to be predisposed to commit the offence. Even if authorisation is not required, because the operative does no more than facilitate an offence or provide an opportunity for it to occur, the conduct of the operative may still be improper and therefore amount to entrapment if it involves exploitation of a personal relationship or a particular vulnerability of the target. Exploitation would also be a factor to be taken into account in the event that some tolerance were to continue to be given to unauthorised use of lower-levels of secondary participation. The operative's conduct might still be improper if it involved exploitation.

In addition, entrapment can still occur because the target of a covert operation or activity was selected in an improper way. A covert operation or activity should be directed by reasonable suspicion that an offence will be committed in any event. Random temptation carries an unacceptable risk of manufacturing crime and can also involve unfairness. Entrapment through improper selection can occur even though nothing more is done than to facilitate or provide an opportunity for an offence, so that the conduct of the law enforcement operative is lawful regardless of the PPRA. Although the general principles in these respects are clear, the concept of reasonable suspicion needs further elaboration by the courts. Outstanding issues include the extent to which suspicion of a person can be based on that person's past record and the conditions under which suspicion can attach to persons on the basis of their presence in a location associated with criminal activity.

Of course, it does not necessarily follow from a determination of entrapment that evidence of the offence will be excluded. In *Ridgeway*, it was said that this sanction for entrapment should ordinarily only be used 'where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of

criminal justice require exclusion of the evidence'.[93] Nothing in the PPRA changes the criteria governing the discretion to exclude evidence obtained by entrapment.

93 (1995) 184 CLR 19, 39. It was also said that evidence should be excluded in cases where law enforcement officers committed the principal offence. This was the scenario which Chapter 5 of the PPRA was designed to avoid.