Fruits of the Poisonous Tree
Evidence derived from illegally or improperly obtained evidence
Kerri Mellifont
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Reviewed by Duncan Kerr SC

In a short foreword the Hon JA Jerrard QC, a former Justice of the Queensland Court of Appeal, explains that the title of Fruit of the Poisonous Tree comes from the expression used in the United States of America to describe derivative evidence ‘derived from primary evidence; and primary evidence...in turn means evidence directly obtained by means of illegal or improper conduct of law enforcement officials.’ A simple example of derivative evidence would be a murder weapon found as a result of an improperly obtained confession.

One aspect of this book that is likely to have significant practical importance in Tasmania is the author’s detailed examination of when a later confession, or a series of later confessions, can be challenged if it has, or they have, been obtained only after an accused has made an earlier inadmissible admission.

Dr Mellifont points out that multiple interviews of a suspect by police occurred with some frequency in the Australian cases she studied.

Her discussion of how to carefully work through the series of exclusionary rules of evidence and her analysis of when and why subsequent admissions of guilt (even if otherwise lawfully obtained) may be held inadmissible by reason of the continuing influence of the earlier improperly or unlawfully obtained confession throws new light on an important aspect of criminal trial advocacy that, until now, has been very little studied.

Although the author states that her objective was to better equip defence practitioners to make assessments as to whether or not to seek exclusion of the primary and/or derivative evidence, and to better equip prosecutors to respond, I have no doubt that this book will prove greater benefit to those exploring reasons to exclude, rather than to admit, inculpatory evidence.

A great strength of this short book is its tight focus. It is also very readable—the language is direct and accessible.

Not surprisingly for a text that began its life as a doctoral thesis the author introduces her subject by discussing four distinct theories that have been referred to as justifying the exclusion of illegally or improperly obtained evidence by judges sitting in the higher courts of Britain, the United States of America and Australia: reliability, deterrence, rights protection and judicial integrity.

Practitioners should not skip that chapter because much of Dr Mellifont’s later examination of the Australian legislation and cases assumes a reader will have absorbed the first chapter and have an understanding of those concepts.

My one criticism relates to the middle two chapters of the book: those specifically examining UK and US practice. For a book directed at an Australian readership their content could have been condensed without much being lost.

That quibble aside, this book fills an important niche. It will surprise me if lawyers with a criminal practice don’t find it worthwhile to draw on for its insights.