

AN ANALYSIS OF DISCRETIONARY REJECTION IN RELATION TO CONFESSIONS

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[The exercise of judicial discretion to reject legally admissible confessional evidence involves balancing a number of considerations. On the one hand, there is the desirable goal of admitting relevant evidence and bringing wrongdoers to conviction; on the other hand, there is the undesirable effect of giving curial approval to improper practices on the part of police and other authorities (the disciplinary principle) or the accused being convicted in a manner which is seen to involve substantial unfairness (the fairness principle). The exercise of this discretion is governed by law in a manner not unlike the application of legal rules, and the courts have developed and refined principles and guidelines to be used by trial judges in the exercise of that discretion. These guidelines reflect a consciousness that a confession meeting the requirements for legal admissibility is likely to be reliable, and that the step of excluding relevant and reliable evidence for reasons of policy or fairness should only be taken in cases where the argument for exclusion is strong.]

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I INTRODUCTION

The legal requirements for admissibility of a confession are well settled. At common law, an admissible confession must be voluntary in the sense of not

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having been obtained as a result of an overbearing of the will of the accused ('basal voluntariness'), or in consequence of a threat or promise exercised or held out by a person in authority (an inducement).¹ Under the uniform *Evidence Acts*, the confession must not have been the result of violence or oppression, made in the course of official questioning or the result of an act of an official, unless the circumstances were such as to make it unlikely that the truth of the confession was adversely affected.² In each jurisdiction, legislation mandates the taping of a confession in almost all cases.³

More problematic is the exercise of a trial judge's discretion to reject a confession that *is* legally admissible.⁴ The aim of the present article is twofold: first, to consider the nature of judicial discretion as it applies to confessions, the functions it serves and the proper scope to be accorded to it; and secondly, to analyse the principles and considerations which influence and guide the courts in their exercise of this discretion.

II THE NATURE OF JUDICIAL DISCRETION

A Principles of Exclusionary Discretion

In common law jurisdictions, legally admissible real and confessional evidence may be excluded on the grounds that to receive the evidence would be unfair to the accused or contrary to public policy. This discretion exists alongside the discretion to exclude evidence on the ground that it may be unreliable, as well as

¹ See, eg, *Cornelius v The King* (1936) 55 CLR 235, 245 (Dixon, Evatt and McTiernan JJ); *McDermott v The King* (1948) 76 CLR 501, 511 (Dixon J); *R v Bodsworth* [1968] 2 NSWLR 132, 137 (Herron CJ, Nagle and Lee JJ); *MacPherson v The Queen* (1981) 147 CLR 512, 519 (Gibbs CJ and Wilson J); *Tofilau v The Queen* (2007) 231 CLR 396, 410–22 (Gummow and Hayne JJ) ('*Tofilau*').

² *Evidence Act 1995* (Cth) ss 84–5; *Evidence Act 1995* (NSW) ss 84–5; *Evidence Act 2001* (Tas) ss 84–5. For a discussion of these provisions, see Stephen Odgers, *Uniform Evidence Law* (7th ed, 2006) 329–43. See also *R v Esposito* (1998) 45 NSWLR 442, 458–60 (Wood CJ); *Moffatt v The Queen* (2000) 112 A Crim R 201, 209 (Wood CJ); *R v Taylor* [1999] ACTSC 47 (Unreported, Higgins J, 26 May 1999) [23]–[32]; *R v Munce* [2001] NSWSC 1072 (Unreported, McClellan J, 14 November 2001) [22]–[29]; *R v Waters* (2002) 129 A Crim R 115, 122–5 (Gray J); *R v Fischetti* [2003] ACTSC 9 (Unreported, Gray J, 26 February 2003) [7]–[10].

³ *Crimes Act 1914* (Cth) s 23V; *Criminal Procedure Act 1986* (NSW) s 281; *Police Administration Act 1978* (NT) s 142; *Police Powers and Responsibilities Act 2000* (Qld) s 436; *Summary Offences Act 1953* (SA) ss 74C–74G; *Evidence Act 2001* (Tas) s 85A; *Crimes Act 1958* (Vic) s 464H; *Criminal Investigation Act 2006* (WA) s 118. For a discussion of situations in which taping is not required, see C R Williams, 'Issues of Verbal Confessions and Admissions' (2006) 28 *Australian Bar Review* 171, 172–3.

⁴ On discretionary rejection of confessional evidence, see generally Suzanne B McNicol, 'Strategies for Reform of the Law Relating to Police Interrogations' (1984) 33 *International and Comparative Law Quarterly* 265; Jonathan Clough, 'The Exclusion of Voluntary Confessions: A Question of Fairness' (1997) 20 *University of New South Wales Law Journal* 25; Andrew Palmer, 'Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions' (1998) 22 *Criminal Law Journal* 325; Bram Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757; Andrew Palmer, 'Applying *Swaffield*: Covertly Obtained Statements and the Public Policy Discretion' (2004) 28 *Criminal Law Journal* 217; Andrew Palmer, 'Applying *Swaffield* Part II: Fake Gangs and Induced Confessions' (2005) 29 *Criminal Law Journal* 111.

an exclusionary discretion on the ground of prejudice.⁵ The term ‘prejudice’ is used here in the sense adopted by John Henry Wigmore — that is, the danger that a jury is likely to believe an accused guilty of a charge because the accused is a person who is likely to do such acts, or the danger that a jury is likely to be biased against the accused.⁶ Issues of prejudice arise particularly in the area of propensity or similar fact evidence, where the key to admissibility is to be found in a balance of probative force weighed against the risk of prejudice.⁷ Discretionary rejections of illegally and improperly obtained real evidence, confessions or admissions do not normally involve significant issues of probative value or danger of prejudice. The fact that real evidence is obtained as a consequence of unlawful or improper activity on the part of police or other investigating authorities does not lessen the probative value of the evidence nor does it invest the evidence with an element of prejudice. In the case of confessions, however, the fact that they have been obtained as a consequence of improper activity on the part of investigating authorities may bear on the *reliability* of the confession. In most cases, however, an impropriety not sufficient to render a confession legally inadmissible will be unlikely to render a confession unreliable. Confessions and admissions likewise do not normally raise questions of prejudice.

A structure of discretionary rejection similar to that at common law exists under the uniform *Evidence Acts*. The legislation requires a judge to exclude evidence as a matter of law in criminal cases if its probative value is outweighed by the danger of unfair prejudice to the accused,⁸ and propensity evidence (termed ‘tendency evidence’ and ‘coincidence evidence’) is to be rejected unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.⁹ There is no specific provision creating a general discretion to reject evidence on the ground of unreliability, although evidence can be excluded if there is a danger that it might be misleading or confusing.¹⁰ In the case of official questioning in criminal cases, unreliability results in inadmissibility as a matter of law.¹¹ In relation to confessions and admissions in criminal

⁵ *Noor Mohamed v The King* [1949] AC 182; *Harris v DPP* [1952] AC 694, 707 (Viscount Simon); *R v Edelsten* (1990) 21 NSWLR 542, 552 (Carruthers, Allen and Badgery-Parker JJ); *R v Swaffield* (1998) 192 CLR 159, 183–4 (Brennan CJ), 191–3 (Toohey, Gaudron and Gummow JJ) (‘*Swaffield*’).

⁶ John Henry Wigmore, *Evidence in Trials at Common Law* (revised ed, 1983) vol 1A, 1212–13. Wigmore states that the principle of undue prejudice is said to comprise two reasons typically given by the courts for excluding evidence of the accused’s bad deeds: first, the tendency to believe the accused guilty of the charge merely because they are a person likely to do such acts; and secondly, the tendency to condemn an accused because they have escaped unpunished from other (previous) offences: at 1215.

⁷ See generally C R Williams, ‘Approaches to Similar Fact Evidence: England and Australia’ in Peter Mirfield and Roger Smith (eds), *Essays for Colin Tapper* (2003) 21. Issues of prejudice also arise in the context of exercising discretion to disallow cross-examination of the accused purely to lead character evidence: *Phillips v The Queen* (1985) 159 CLR 45.

⁸ *Evidence Act 1995* (Cth) s 137; *Evidence Act 1995* (NSW) s 137; *Evidence Act 2001* (Tas) s 137.

⁹ *Evidence Act 1995* (Cth) s 101; *Evidence Act 1995* (NSW) s 101; *Evidence Act 2001* (Tas) s 101.

¹⁰ *Evidence Act 1995* (Cth) s 135(b); *Evidence Act 1995* (NSW) s 135(b); *Evidence Act 2001* (Tas) s 135(b).

¹¹ *Evidence Act 1995* (Cth) s 85(2); *Evidence Act 1995* (NSW) s 85(2); *Evidence Act 2001* (Tas) s 85(2). See above n 2 and accompanying text.

cases, unfairness¹² and public policy¹³ are, as at common law, grounds for rejection in the exercise of discretion.¹⁴

B *The Rationale for Discretion in Relation to Confessions*

The legal requirements for admissibility of a confession find their primary justification in the fear that an involuntary confession may be untrue.¹⁵ This consideration was termed ‘the reliability principle’ by the Great Britain Criminal Law Revision Committee.¹⁶ In Victoria, the reliability principle is supported by statutory provisions mandating that a confession shall not be rejected on the ground that a promise or threat was held out to the accused unless the trial judge is of the opinion that the inducement was really likely to cause an untrue admission of guilt to be made.¹⁷

In the area of legal admissibility, the reliability principle is supported by two further principles. First, there is the public policy consideration that if involuntary confessions were to be received in evidence, investigating authorities would be tempted to seek confessions by means of inducements or other improper conduct. The use of exclusionary rules of evidence to discourage improper police activity was termed ‘the disciplinary principle’ by the Great Britain Criminal Law Revision Committee.¹⁸ Secondly, there is the somewhat less precise notion that it is ‘unfair’ for an accused to have their statements used against them when those statements were not made voluntarily. The principle of ‘unfairness’ in relation to confessions appears to have originated from considerations similar to those underlying the privilege against self-incrimination.¹⁹

¹² *Evidence Act 1995* (Cth) s 90; *Evidence Act 1995* (NSW) s 90; *Evidence Act 2001* (Tas) s 90.

¹³ *Evidence Act 1995* (Cth) s 138(1); *Evidence Act 1995* (NSW) s 138(1); *Evidence Act 2001* (Tas) s 138(1).

¹⁴ See also *Evidence Act 1995* (Cth) ss 138(2), (3); *Evidence Act 1995* (NSW) ss 138(2), (3); *Evidence Act 2001* (Tas) ss 138(2), (3). Section 138(2) elaborates on what may amount to an impropriety, and s 138(3) provides a non-exhaustive list of factors to be taken into account in the balancing process. For a discussion of s 138, see generally *R v Bozatsis* (1997) 97 A Crim R 296; *R v Haddad* (2000) 116 A Crim R 312; *Helmhout v The Queen* (2001) 125 A Crim R 257; *DPP (NSW) v Carr* (2002) 127 A Crim R 151; *R v Cornwell* (2003) 57 NSWLR 82; *R v Phan* [2003] NSWCCA 205 (Unreported, Meagher ACJ, Hulme and Hidden JJ, 24 July 2003).

¹⁵ *R v Warickshall* (1783) 1 Leach 263, 263–4; 168 ER 234, 234–5 (Nares J and Eyre B); *Tofilau* (2007) 231 CLR 396, 412–6 (Gummow and Hayne JJ), 481–4 (Callinan, Heydon and Crennan JJ).

¹⁶ Great Britain Criminal Law Revision Committee, *Evidence (General)* (Report No 11, 1972) 35.

¹⁷ *Evidence Act 1958* (Vic) s 149, previously *Evidence Act 1928* (Vic) s 141. For a discussion of the Victorian provision, see *Cornelius v The King* (1936) 55 CLR 235, 238–9 (Starke J), 245–6 (Dixon, Evatt and McTiernan JJ); *R v Lee* (1950) 82 CLR 133, 142–51 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ). In New Zealand, the nature of any threat, promise or representation made to the accused is a factor that a judge may take into account when deciding whether or not to exclude the confession: *Evidence Act 2006* (NZ) s 28(4)(d).

¹⁸ Great Britain Criminal Law Revision Committee, above n 16, 35.

¹⁹ See Zelman Cowen and P B Carter, *Essays on the Law of Evidence* (1956) 47–51; Mark Schragger, ‘Recent Developments in the Law Relating to Confessions: England, Canada and Australia’ (1981) 26 *McGill Law Journal* 435, 439–40. See also *Rogers v Richmond*, 365 US 534, 540–1 (Frankfurter J for Warren CJ, Black, Frankfurter, Douglas, Harlan, Brennan and Whittaker JJ) (1960).

In the area of discretion, the disciplinary principle and the unfairness principle become paramount. What is involved in this context is an attempt to balance the desirability of placing cogent evidence of guilt before a court on the one hand, and the protection of citizens from unauthorised and improper treatment by investigating authorities on the other. The reliability principle does play a role in this area of discretion to the extent that, if the trial judge is of the view that ‘the unlawful or improper conduct complained of is unlikely to have produced a false confession, that is a good reason, though not a conclusive one, for allowing the evidence to be given’.²⁰ It is proper to place the factor of ‘reliability’ on the balance scales in such a manner — it is obviously a more drastic step to reject a wholly reliable confession in the exercise of discretion than to reject one of doubtful value. In the area of discretion, however, reliability is a subsidiary factor; the primary considerations are the requirements of the competing principles of public policy and unfairness.

C Determining the Scope for Judicial Discretion

The recognition that discretion should play a major role in the law of evidence is a comparatively modern phenomenon. In early times, statements critical of judicial discretion were commonplace. John Selden ridiculed the discretion of the equity courts, equating it with the length of the Chancellor’s foot.²¹ A V Dicey likened discretion with arbitrariness and contrasted it with the rule of law.²² Numerous judicial statements critical of discretion can readily be found in the older cases.²³

The arguments urged against discretion are as follows. First, the way in which discretion is likely to be exercised in any given case is uncertain. The use of discretion is, in its nature, unpredictable.²⁴ Secondly, the concepts used in exercising discretion (such as the notion of ‘fairness’) are similarly too uncertain to be susceptible of precise definition.²⁵ Thirdly, the use of discretion can result in the overturning of accepted legal rules without adducing adequate justification for such change in the law.²⁶ Fourthly, when discretion is involved, the judge must make a decision largely uncontrolled by law in which the judge’s individual personality and idiosyncrasies may play a significant role.²⁷

²⁰ *R v Banner* [1970] VR 240, 251 (Winneke CJ, Smith and Gowans JJ). See also *R v Lee* (1950) 82 CLR 133, 153 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ); *R v Hart* (1977) 17 SASR 100, 110 (White AJ); *Williams v The Queen* (1986) 161 CLR 278, 286 (Gibbs CJ); *Swaffield* (1998) 192 CLR 159, 197 (Toohey, Gaudron and Gummow JJ); *Em v The Queen* (2007) 239 ALR 204, 225 (Gleeson CJ and Heydon J) (‘Em’).

²¹ Sir Frederick Pollock, *Table Talk of John Selden* (1927) 43.

²² A V Dicey, *Law of the Constitution* (10th ed, 1960) 188.

²³ See, eg, *Freeman v Tranah* (1852) 12 CB 406, 413–14; 138 ER 964, 967 (Maule J); *Haywood v Cope* (1858) 25 Beav 140, 151; 53 ER 589, 594 (Romilly MR); *Morgan v Morgan* [1869] LR 1 P & D 644, 647 (the Judge Ordinary).

²⁴ Bernard Livesey, ‘Judicial Discretion to Exclude Prejudicial Evidence’ (1968) 26 *Cambridge Law Journal* 291, 302–8.

²⁵ *Ibid* 307–8.

²⁶ *Ibid* 308–9.

²⁷ See Nathan Isaacs, ‘The Limits of Judicial Discretion’ (1923) 32 *Yale Law Journal* 339, 343.

The fallacy involved in all of these lines of argument is their failure to appreciate that a decision as to the exercise of discretion is a decision governed by law just as much as a decision regarding the applicability of a legal rule. In a detailed analysis of judicial discretion, Professor Roscoe Pound argued that the complexity of modern life and the variety of circumstances which may confront a court make it impossible to reduce to discrete rules every issue which a court must resolve.²⁸ Where a matter is not suitable for regulation by rule, discretion may be conferred upon the court. In exercising such discretion, the court will be guided by 'principles', which Pound defined as 'authoritatively declared and established starting points for reasoning'.²⁹

This analysis of principles and the role they play in governing decisions has been developed and refined by Professor Ronald Dworkin.³⁰ Dworkin distinguishes between 'policies' and 'principles'. A 'policy' is 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'.³¹ A 'principle' is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality'.³² On this analysis, the 'unfairness' discretion would be seen as embodying a principle rather than a policy. Principles and policies differ from rules in that rules apply in an all or nothing fashion while principles and policies operate to influence a decision in a particular way. These standards also differ from rules in that they have a dimension of weight (that is, some are more important than others). Where a judge is called upon to exercise their discretion, such standards incline the judge's discretion in one direction or another. They may, in some cases, dictate a decision as clearly as a legal rule:

If a judge believes that principles he is bound to recognize point in one direction and that principles pointing in the other direction, if any, are not of equal weight, then he must decide accordingly, just as he must follow what he believes to be a binding rule.³³

A decision reached by the application of principles is in no sense arbitrary. Standards are derived from authoritative sources and therefore constitute part of the law, just as legal rules do:

²⁸ Roscoe Pound, 'Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case' (1960) 35 *New York University Law Review* 925, 927. On the theory of judicial decision making, see generally Roscoe Pound, *An Introduction to the Philosophy of Law* (1922) ch 3; Roscoe Pound, 'The Theory of Judicial Decision' (Pt 1) (1923) 36 *Harvard Law Review* 641; Roscoe Pound, 'The Theory of Judicial Decision' (Pt 2) (1923) 36 *Harvard Law Review* 802; Roscoe Pound, 'The Theory of Judicial Decision' (Pt 3) (1923) 36 *Harvard Law Review* 940.

²⁹ Pound, 'Discretion, Dispensation and Mitigation', above n 28, 927.

³⁰ Ronald Dworkin, *Taking Rights Seriously* (1977) chs 2–3. See also Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624.

³¹ Dworkin, *Taking Rights Seriously*, above n 30, 22.

³² *Ibid.*

³³ *Ibid.* 35–6.

we make a case for a principle, and for its weight, by appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings. There is no litmus paper for testing the soundness of such a case — it is a matter of judgment, and reasonable men may disagree.³⁴

When is an area for decision-making suitable to be governed by legal rules and when is it more suitable to be left for determination in the exercise of judicial discretion? Rules clearly are most suitable for situations in which the value of certainty is at a premium, particularly with respect to property and commercial transactions and the substantive criminal law. Discretion is more suitable for situations in which it is difficult to anticipate all future cases, where those cases cannot be described with sufficient certainty or comprehensiveness and might otherwise involve a conflict between competing principles or policies.

The rejection of improperly obtained confessions is a particularly appropriate context for the operation of discretion. The relevant question is whether a basic policy (legal admissibility of relevant evidence), when embodied in a clear rule (a confession should be admissible if shown to be voluntary), is subject to qualification in the interests of promoting an important, albeit subsidiary, policy (discouraging unlawful or improper conduct on the part of the police and other authorities) or principle (protecting the accused from unfairness). This is not a context in which certainty becomes an important consideration. No advantage would be secured by advising investigating authorities of the precise point at which impropriety on their part would render a confession inadmissible. Equally, the variety of circumstances and the inability to anticipate all future cases render impractical any formulation of a rule (or rules) spelling out circumstances in which a confession should be rejected.

This view was adopted by the Australian Law Reform Commission in framing the uniform *Evidence Acts*. In explaining the rationale for what is now s 138 of the Acts, the Commission stated:

A discretionary approach seems the most appropriate one to take in dealing with illegally and improperly obtained evidence. This is the approach that has been developed by the High Court. Admittedly, any approach that is discretionary and subject only to limited appeal rights, relies heavily on the judgment of the individual judge. It also, by definition, lacks certainty of result, and therefore sacrifices predictability to flexibility. Nevertheless, it is suggested that the conflicting concerns in this area, and the wide variety of circumstances, necessitate such an approach.³⁵

What is involved is anything but a decision unguided by law. The Australian courts have developed guidelines consisting of principles and policies designed to assist trial judges in the exercise of their discretion. The Australian Law

³⁴ Ibid 36.

³⁵ Law Reform Commission, *Evidence*, Interim Report No 26 (1985) vol 1, 534. In their review of the uniform *Evidence Acts*, the Australian, New South Wales and Victorian Law Reform Commissions recommended no changes to ss 90 and 138 of the uniform *Evidence Acts*: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law: Report* (2005) 347–54, 574–9.

Reform Commission similarly recognised the importance of providing guidelines for the exercise of discretion. The Commission stated:

One method of minimising the inherent difficulties in the exercise of discretionary power, and, to a certain extent, of avoiding the danger of too great a disparity between legal decisions, is to indicate precisely the nature of the conflicting interests which should be balanced and to articulate the factors which should be taken into account in the exercise of discretion.³⁶

III THE DEVELOPMENT AND STRUCTURE OF DISCRETION IN RELATION TO CONFESSIONS

The common law rules governing admissibility have always recognised a discretionary power to exclude legally admissible confessional evidence.³⁷ In *McDermott v The King*, Dixon J stated that in deciding whether to reject a confessional statement, the judge ‘should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.’³⁸ In *R v Lee*, the High Court affirmed the existence of the discretion to exclude where, having regard to all the circumstances of the case including the propriety of the conduct of police, there would be unfairness in admitting the evidence against the accused.³⁹ Although the language of ‘unfairness’ discretion was employed in these statements, it would seem that the Court was primarily considering the possibility of unreliable evidence.⁴⁰

Both clarification of the nature of the discretion as well as development of the principles guiding its application have taken place more recently. Development of public policy discretion occurred initially in the area of unlawfully and improperly obtained real evidence. The key case was *R v Ireland*.⁴¹ The accused was convicted of murder by stabbing, in circumstances where it was likely the perpetrator had sustained injury to his hand. The accused was required by police to have his hand both photographed and examined by a doctor. Those photos were tendered at trial and the doctor gave evidence for the prosecution. On appeal, the High Court held that the police had acted improperly and that, as the trial judge had not adequately considered the question of discretion, the accused

³⁶ Law Reform Commission, *Evidence*, above n 35, 534.

³⁷ The existence of an exclusionary discretion was affirmed by the Privy Council in *Ibrahim v The King* [1914] AC 599, 611–14 (Lord Sumner) and by the English Court of Criminal Appeal in *R v Voisin* [1918] 1 KB 531, 539 (Lawrence, Lush and Salter JJ).

³⁸ (1948) 76 CLR 501, 513. See also the judgment of Latham CJ: at 506–7.

³⁹ (1950) 82 CLR 133, 149–50, (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ).

⁴⁰ See *Cleland v The Queen* (1982) 151 CLR 1, 29–30 (Dawson J). This interpretation would explain the statement in *R v Lee* (1950) 82 CLR 133, 150 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ) that what is now s 149 of the *Evidence Act 1958* (Vic) is imperative and leaves no room for the exercise of discretion in any relevant sense.

⁴¹ (1970) 126 CLR 321.

was entitled to a retrial.⁴² Barwick CJ (with whom the other members of the Court agreed) stated:

Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. ... On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.⁴³

In *Bunning v Cross*, the decision in *R v Ireland* was affirmed and guidelines were spelt out to assist trial judges in the exercise of discretion.⁴⁴ On a charge of driving while under the influence of alcohol, police had mistakenly believed they were entitled to require the defendant to undertake a breathalyser test without first conducting a preliminary on-the-spot test. The results of the test were rejected by the magistrate. On appeal to the High Court, Stephen and Aickin JJ isolated a set of principles and guidelines to be taken into account by trial judges in exercising their discretion. First, account should be taken of whether the police deliberately disregarded the law. Where the illegality occurs as a consequence of mistake, that is a factor pointing in favour of admissibility.⁴⁵ Secondly, consideration may be given to the question of whether the illegality affects the cogency of the evidence. Cogency should play no part in the exercise of discretion where the illegality was intentional or reckless.⁴⁶ However, where 'the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had.'⁴⁷ Thirdly, consideration should be given to the ease with which the law might have been obeyed in procuring the evidence in question. While a deliberate 'cutting of corners' ought not to be tolerated, the fact that the evidence could easily have been

⁴² Ibid 335 (Barwick CJ).

⁴³ Ibid 334–5.

⁴⁴ (1977) 141 CLR 54. See also *Ridgeway v The Queen* (1995) 184 CLR 19, 31 (Mason CJ, Deane and Dawson JJ); *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, 287 (Doyle CJ); *R v Lobban* (2000) 77 SASR 24, 34–5 (Martin J). The *Bunning v Cross* guidelines are substantially reproduced in s 138 of the uniform *Evidence Acts*. On the differences between the *Bunning v Cross* guidelines and s 138, see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, above n 35, 575. In Western Australia, s 155 of the *Criminal Investigation Act 2006* (WA) gives a general discretion to the court to admit evidence otherwise inadmissible under the Act if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. In making a decision under s 155(2), the court is to take into account s 155(3) (which substantially adopts the *Bunning v Cross* guidelines).

⁴⁵ *Bunning v Cross* (1977) 141 CLR 54, 78.

⁴⁶ Ibid 79.

⁴⁷ Ibid.

procured without illegality had different procedures been adopted may point towards admissibility.⁴⁸ Fourthly, regard should be had to the nature of the offence charged. The more serious the offence, the stronger are the arguments in favour of admissibility.⁴⁹ Finally, regard should be had to the scheme of any legislation the police may have failed to obey. If the legislation shows a deliberate attempt to restrict the powers of investigating authorities from obtaining certain evidence, that consideration will point towards rejection of evidence obtained in breach of such legislation.⁵⁰ Applying these considerations, the Court held that the results of the breathalyser test should have been admitted as evidence.⁵¹ Two factors were crucial: first, the unlawful conduct of the police had resulted from a mistake and not from deliberate or reckless disregard of the law; and secondly, the nature of the illegality had in no way affected the cogency of the evidence.⁵²

In *Cleland v The Queen*, the High Court held that the public policy discretion was applicable to confessions and admissions.⁵³ The accused was charged with shop-breaking and armed robbery. It was alleged that an oral confession was made by the accused at a time when the failure to bring the accused before a magistrate or bail justice had rendered his detention unlawful. The trial judge admitted the confession on the basis of the public policy discretion.⁵⁴ In allowing the appeal, the High Court held that in such cases the judge should consider both (i) whether the statement should be excluded on the ground of unfairness to the accused; and (ii) whether, on balance, relevant considerations of public policy require that it be excluded. Gibbs CJ, with whom Wilson J agreed, stated that the public policy discretion in no way intruded upon the unfairness discretion, which was 'designed to protect an accused person from being convicted on evidence which it would be unfair to use against him'.⁵⁵ The recognition that both discretions apply to confessions raised the issue of the relationship between them. Gibbs CJ took the view that there would be limited scope for application of the public policy discretion following an application of the unfairness discretion, stating that 'if the court decides that it would not be unfair to use the confession, the court still has, in theory, a discretion to reject the evidence on the ground that it was unlawfully obtained.'⁵⁶ Dawson J, however, sought to limit the potential for overlap by narrowing the unfairness discretion to one concerned with issues of reliability, defining unfairness as 'unfair to use against the accused because its reliability has been affected by the unfair, improper or illegal methods used to procure it.'⁵⁷

⁴⁸ Ibid.

⁴⁹ Ibid 80.

⁵⁰ Ibid.

⁵¹ Ibid 65 (Barwick CJ), 80 (Stephen and Aickin JJ), 82 (Jacobs J). Murphy J dissented: at 86.

⁵² Ibid 65 (Barwick CJ), 78–9 (Stephen and Aickin JJ), 82 (Jacobs J).

⁵³ (1982) 151 CLR 1.

⁵⁴ Ibid 4 (Gibbs CJ).

⁵⁵ Ibid 8.

⁵⁶ Ibid 9.

⁵⁷ Ibid 33. See generally *Van Der Meer v The Queen* (1988) 82 ALR 10.

In *Pollard v The Queen*, the accused was taken to a police station and questioned without being cautioned or told of his right to communicate with a friend, relative or lawyer.⁵⁸ No tape recording was made of the conversation. The accused was then taken to another police station where he was cautioned and told of his rights. A video-taped interview then took place in which the accused made certain admissions.⁵⁹ The High Court held that the consequences of the failure to either caution or advise the suspect of his right to consult with a lawyer or other person prior to the initial interview extended to the later taped interview and rendered that interview inadmissible.⁶⁰

The Court thus adopted a wide view of the scope of the unfairness discretion. Mason CJ distinguished the public policy and unfairness discretions, and held that the taped confession should be excluded in the exercise of both discretions.⁶¹ In a joint judgment, Brennan, Dawson and Gaudron JJ stated that in considering discretionary rejection, the unfairness discretion should be examined first, followed by the public policy discretion.⁶² Their Honours stated:

In a case where it is established that a confession or admission by an accused was made voluntarily but the evidence warrants further consideration of whether it ought to be admitted, it will often be a convenient course for a trial judge to ask first whether it would be unfair to the accused to use the confession or admission against him before considering, if the evidence warrants it, whether it should be excluded on the ground that it was illegally or improperly obtained. If the first question is answered in the affirmative, it will be unnecessary to proceed to the second question.⁶³

Their Honours held that the trial judge had failed to consider the exercise of either discretion.⁶⁴ In separate judgments, Deane and Toohey JJ distinguished the two discretions, holding that both had miscarried.⁶⁵ McHugh J limited his consideration to the unfairness discretion. His Honour stated:

If a voluntary confession or admission was obtained in breach of a procedural rule whose object is to protect an accused person against unfair methods of obtaining incriminating evidence, the sound exercise of a judicial discretion may require the rejection of the evidence. Impropriety by police officers in obtaining a confession or admission is not itself a sufficient ground for excluding a voluntary confession or admission unless the impropriety is such that public policy requires that the confession or admission be rejected as evidence. However, the effect of the impropriety may make it unjust to the accused to admit the confession or admission into evidence.⁶⁶

⁵⁸ (1992) 176 CLR 177.

⁵⁹ Ibid 185–6 (Brennan, Dawson and Gaudron JJ). On the issue of the relationship between the two interviews, see Williams, 'Issues of Verbal Confessions and Admissions', above n 3, 174–5.

⁶⁰ *Pollard v The Queen* (1992) 176 CLR 177, 184 (Mason CJ), 197 (Brennan, Dawson and Gaudron JJ), 210–11 (Deane J), 224 (Toohey J), 237 (McHugh J).

⁶¹ Ibid 184.

⁶² Ibid 197.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid 210 (Deane J), 223–4 (Toohey J).

⁶⁶ Ibid 235. See also *Markovina v The Queen* (1996) 16 WAR 354, 375–8 (Malcolm CJ).

In *Foster v The Queen*, the High Court affirmed the following points: (i) that unfairness is not limited to considerations of reliability; (ii) that notwithstanding a degree of overlap the two discretions are independent of each other; and (iii) that the criterion for distinguishing them is their primary focus.⁶⁷ The accused was convicted of arson. He had been unlawfully arrested and held incommunicado by police for the purpose of questioning. The only evidence against the accused was a typed confessional statement which he had signed while in custody. The Court held that the confession should have been rejected in the exercise of both unfairness and public policy discretions.⁶⁸ In a joint judgment, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ stated:

It is now settled that, in a case where a voluntary confessional statement has been procured by unlawful police conduct, a trial judge should, if appropriate objection is taken on behalf of the accused, consider whether evidence of the statement should be excluded in the exercise of either of two independent discretions. The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence. The second of those discretions is a particular instance of a discretion which exists in relation to unlawfully obtained evidence generally, whether confessional or 'real'. It is the discretion to exclude evidence of such a confessional statement on public policy grounds. ... To no small extent, they overlap. The focus of the two discretions is, however, different. In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy' and the relevance and importance of fairness and unfairness to the particular accused will depend upon the circumstances of the particular case.⁶⁹

In *R v Swaffield* ('*Swaffield*'), appeals from two unrelated trials were heard together by the High Court.⁷⁰ In the first (an arson trial), the judge admitted secretly recorded admissions made by the accused (*Swaffield*) to an undercover police officer. In the second (a murder trial), the judge admitted a tape recording of admissions made by the accused (*Pavic*) in a conversation with a friend who was taping their conversation on behalf of the police. Before the conversation in which the admissions were made, *Swaffield* had declined to answer questions during a formal police interview. *Pavic* had refused to attend such an interview. The Queensland Court of Appeal overturned the conviction in the first trial,⁷¹ while the Victorian Court of Appeal dismissed the appeal against conviction in the second trial.⁷² The High Court dismissed the Crown's appeal in relation to

⁶⁷ (1993) 113 ALR 1.

⁶⁸ *Ibid* 10 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

⁶⁹ *Ibid* 6–7 (citations omitted).

⁷⁰ (1998) 192 CLR 159.

⁷¹ *Swaffield v The Queen* (1996) 88 A Crim R 98.

⁷² *Pavic v The Queen* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Southwell and Vincent AJJA, 19 December 1996).

Swaffield, holding that the actions of the police had amounted to impugning the freedom of the accused to choose not to speak to the police.⁷³ In relation to Pavic, a majority of the High Court held that the Court should not interfere with the trial judge's decision to allow the admissions into evidence.⁷⁴ The factual differences between the two cases do not provide an obvious explanation for the divergence in outcomes. In each case, however, the decision of the state Supreme Court was upheld. The nature of judicial discretion is one of considerable open texture and wide in scope, and for these reasons a higher court will give great weight to the decision of the court below.⁷⁵ The fact that Pavic was charged with murder while Swaffield faced a charge of arson may be regarded as of some significance.⁷⁶ The view recognised in *Bunning v Cross* that the seriousness of the crime involved is a consideration weighing towards admissibility was affirmed in *Tofilau v The Queen* ('*Tofilau*').⁷⁷ Moreover, Swaffield was dealing directly with an undercover police officer, whereas Pavic had been speaking with a personal acquaintance. However, since both the undercover officer and the acquaintance were acting on behalf of investigating authorities, this difference may be regarded as of limited significance.⁷⁸

Brennan CJ took the view that issues involving the conduct of law enforcement officers should be treated as governed by the public policy discretion, with the unfairness discretion being limited to cases where the confession is rendered unreliable.⁷⁹ His Honour stated:

there is much to be said for remitting consideration of the conduct of law enforcement officers to the public policy discretion in all cases except where that conduct makes the reliability of the confession dubious. The fairness discretion would then focus on cases where the conduct which induces the making of a voluntary confession throws doubt on its reliability and thereby establishes the unfairness of using the confession against the confessionalist on his trial.⁸⁰

Kirby J, on the other hand, held that unreliability should be regarded alongside lack of voluntariness as a distinct basis for legal inadmissibility. Where a confession is voluntary and reliable, then unfairness and public policy discretions should be considered.⁸¹

⁷³ *Swaffield* (1998) 192 CLR 159, 185 (Brennan CJ), 203 (Toohey, Gaudron and Gummow JJ), 224–5 (Kirby J).

⁷⁴ *Ibid* 186 (Brennan CJ), 204 (Toohey, Gaudron and Gummow JJ). Kirby J dissented: at 224.

⁷⁵ See, eg, *House v The King* (1936) 55 CLR 499, 503 (Starke J); *Tofilau* (2007) 231 CLR 396.

⁷⁶ This is noted by Palmer, who suggests that it is not a legitimate consideration as 'we are left with the rather uncomfortable conclusion that rights such as the right to silence can indeed be circumvented or undermined if the crime being investigated is serious enough': 'Applying *Swaffield* Part II: Fake Gangs and Induced Confessions', above n 4, 115.

⁷⁷ (2007) 231 CLR 396, 432 (Gummow and Hayne JJ), 527 (Callinan, Heydon and Crennan JJ).

⁷⁸ This point is developed further below in Part IV(E).

⁷⁹ *Swaffield* (1998) 192 CLR 159, 181.

⁸⁰ *Ibid*. In so stating, his Honour departed from the opinion he had expressed in *Duke v The Queen* (1989) 180 CLR 508, 513 that it was 'too confined a view to regard the unfairness discretion as applicable only to those cases where unreliability in the confession might have been produced by impropriety or unlawfulness on the part of the investigating police.' See also *Van Der Meer v The Queen* (1988) 82 ALR 10, 20 (Mason CJ).

⁸¹ *Swaffield* (1998) 192 CLR 159, 207–8.

Toohey, Gaudron and Gummow JJ delivered a joint judgment. Following a determination that a confession was voluntary, their Honours held that the judge should first consider whether to exercise discretion to reject the confession on the ground of unreliability, before moving to consider rejection in the exercise of an overall discretion involving issues both of unfairness and public policy.⁸² Their Honours stated:

it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.⁸³

On this analysis, there is an unreliability discretion as well as a ‘wide discretion’ that includes the overlapping but distinct elements of unfairness and public policy. Following *Foster v The Queen*, the distinction between the two elements of that wide discretion is one of emphasis. The focus of the unfairness element is the effect of the relevant conduct on the particular accused, while the public policy element focuses on more general considerations as to what is desirable (or at least acceptable) behaviour on the part of investigating officials. Their Honours stressed that this wide discretion is not limited to issues of public policy but includes unfairness to the accused in the context of the particular case.⁸⁴ Their Honours stated that ‘the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.’⁸⁵ Their Honours further stated:

Unreliability is an important aspect of the unfairness discretion but it is not exclusive. As mentioned earlier, the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.⁸⁶

In neither case before the Court was there an issue of reliability, and the accused had not been placed at a forensic disadvantage in the conduct of his defence. The consideration which warranted rejection of the confession in the first case was the violation of the right of the accused to choose whether or not to speak to the police. This involved elements both of unfairness to the accused and issues of public policy.

In *Tofilau*, the High Court heard four appeals involving ‘scenario evidence’, that is, confessional evidence obtained by undercover police officers posing as

⁸² Ibid 194.

⁸³ Ibid.

⁸⁴ Ibid 189.

⁸⁵ Ibid 195.

⁸⁶ Ibid 197.

members of a criminal gang.⁸⁷ The case was primarily argued in the High Court on the issue of legal admissibility, with a majority holding that the evidence had been properly received.⁸⁸ On the question of discretion, which was argued by only one of the appellants (albeit unsuccessfully), the majority adopted the structure of discretionary rejection outlined in *Swaffield*.⁸⁹

The nature of the unfairness discretion was most recently considered by the High Court in *Em v The Queen* ('*Em*').⁹⁰ The accused, facing charges of murder and other offences arising out of a home invasion, had refused to have his record of interview taped. The police subsequently obtained a warrant under s 16 of the *Listening Devices Act 1984* (NSW) and went with the accused to a park. They repeatedly assured the accused he was not being tricked and engaged in general disarming banter with the accused while questioning him about the home invasion. Part of that conversation, including admissions made by the accused, was received at trial. The New South Wales Court of Criminal Appeal held that these statements had been properly received,⁹¹ and the accused's appeal to the High Court was dismissed by a majority.⁹² In the High Court, it was not argued that the circumstances were such as to make it unlikely that the truth of the admissions was adversely affected or that the police had acted improperly. It was submitted that unfairness arose as a consequence of the police exploiting the accused's belief that the conversation was not being recorded and consequently could not be used in evidence. Gleeson CJ and Heydon J held that a mistaken assumption that a confession was not being recorded could not, without more, be unfair.⁹³ Their Honours stated:

To reach the opposite conclusion would be for the judiciary, by exercise of its capacity to reach a judgment characterising conduct as 'unfair' under s 90, to create an automatic and universal rule of exclusion in place of a provision calling for case-by-case judgment. For the courts to adopt such a rule would be to substitute their view about the merits of the statutory scheme involving judicially sanctioned covert surveillance as an aid to the detection of crime for that which has been adopted by the legislature. ... To conclude that while it is not unfair to use an admission which its maker did not believe was being recorded, it is unfair to use an admission which its maker did not believe could be used, when the reason for the second false assumption is the existence of the first, is illogical.⁹⁴

Gummow and Hayne JJ reached a similar conclusion. In analysing discretion, their Honours took a different approach to that adopted in *Swaffield*. Rather than

⁸⁷ (2007) 231 CLR 396.

⁸⁸ *Ibid* 410 (Gleeson CJ), 426–9, 433 (Gummow and Hayne JJ), 529–30 (Callinan, Heydon and Crennan JJ). Only Kirby J dissented: at 457.

⁸⁹ *Ibid* 402 (Gleeson CJ), 432–3 (Gummow and Hayne JJ), 525 (Callinan, Heydon and Crennan JJ).

⁹⁰ (2007) 239 ALR 204.

⁹¹ *Em v The Queen* [2006] NSWCCA 336 (Unreported, Giles JA, Grove and Hidden JJ, 3 November 2006).

⁹² *Em* (2007) 239 ALR 204, 231 (Gleeson CJ and Heydon J), 236 (Gummow and Hayne JJ). Kirby J dissented: at 261.

⁹³ *Ibid* 224–5.

⁹⁴ *Ibid*.

treating public policy and unfairness as distinct elements of a wide discretion, their Honours took the view that unfairness under the uniform *Evidence Acts* is a final discretion to be exercised only after other discretions have been applied.⁹⁵ Their Honours described s 90 as

a discretion that will fall to be considered only after applying the other, more specific, provisions of the Act referred to at the start of these reasons. The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90. The consequence is that the discretion given by s 90 will be engaged only as a final or 'safety net' provision.⁹⁶

Kirby J dissented. His Honour held that the failure to caution the accused that the conversation was being recorded and the manner in which the police lulled the accused into a belief that he was engaged in an off-the-record conversation violated the right of the accused to choose whether or not to make admissions that would later be used against him at trial.⁹⁷ His Honour concluded:

Self-evidently, resolving a serious murder is a matter of very high public importance for any society. However, s 90 of the Act (as well as the antecedent common law) provides that such resolution may not be achieved by reliance on admissions procured in circumstances that render their use unfair to the suspect. In evaluating fairness courts must take into account a suspect's right to silence and the concomitant entitlement 'to choose whether or not to speak to the police'.⁹⁸

IV THE EXERCISE OF JUDICIAL DISCRETION IN RELATION TO CONFESSIONS

In this Part, consideration will be given to the attitude taken by the courts towards certain forms of actual or potential unfairness and to particular forms of impropriety. Notwithstanding the considerable amount of analysis and discussion of discretionary rejection at the appellate level, it is to be expected that the circumstances in which a legally admissible confession will be rejected in the exercise of discretion are fairly constrained. The strictness of the legal requirements for admissibility, coupled with the requirement of taping in almost all cases, means that unreliable confessions are likely to be rejected as a matter of law. Rejection of reliable evidence in the exercise of discretion is a step courts may be expected to take only where compelling considerations support such action.⁹⁹

⁹⁵ Ibid 234.

⁹⁶ Ibid.

⁹⁷ Ibid 258.

⁹⁸ Ibid 260–1 (citations omitted).

⁹⁹ Cf *Tofilau* (2007) 231 CLR 396, 443–4 (Kirby J); *Em* (2007) 239 ALR 204, 248, 251–2 (Kirby J); *Carr v Western Australia* (2007) 239 ALR 415, 442, 448–9 (Kirby J). In each case, Kirby J took the view that the adversarial nature of the legal process and the right to silence were sufficiently powerful considerations to justify rejection notwithstanding the reliability of the confessional evidence.

A *The Mental and Physical Condition of the Accused*

In a number of cases, confessions have been rejected because the mental or physical condition of the accused at the time of making the confession rendered the confession so unreliable as to make it dangerous to admit it. Rejection on these grounds may involve issues of legal admissibility and exercise of both the reliability and unfairness discretions.

Under the uniform *Evidence Acts*, an admission made in the course of official questioning (or as a result of the act of another who is capable of influencing the prosecution) is inadmissible unless the circumstances were such as to 'make it unlikely that the truth of the admission was adversely affected.'¹⁰⁰ At common law, such considerations may also lead to legal inadmissibility.¹⁰¹ What little authority there is on the point, however, would suggest a very narrow view of rejection on such grounds. In *Sinclair v The King*, the accused was convicted of murder, the only substantial evidence against him being a number of confessions.¹⁰² The trial judge admitted these confessions, although it was conceded that the accused was suffering from paranoid schizophrenia when they were made.¹⁰³ On appeal, the High Court upheld the trial judge's decision. Dixon J adopted a strict criterion for rejection, stating that the confession should be excluded only if the accused's 'unsoundness of mind is such that no account ought to be taken of his self-incriminating statements for any evidentiary purpose as proof of the criminal acts alleged against him.'¹⁰⁴ Some of the other members of the Court adopted a similarly narrow view of the circumstances in which such a confession should be rejected.¹⁰⁵ While it may be accepted that a high degree of mental or physical disability or debilitation should be required before a confession that is otherwise admissible is rejected, it is submitted that the High Court set the standard unduly high in *Sinclair v The King*. In that case, Dixon J described the accused's main confession as 'a florid and affected narrative ... employing the clichés and fustian of the "crime and horror" story', and stated that '[t]here is much in the document itself to indicate that it is the product of a mind whose world is unreal and whose responses to a situation are histrionic and dramatic and not those of sensible behaviour.'¹⁰⁶ When regard is had to the fact that there was no real evidence to connect the accused with the crime other than his confessions, it is difficult not to be concerned at the dangers of a conviction resting upon the jury's assessment of such a document.

¹⁰⁰ *Evidence Act 1995* (Cth) ss 85(1), (2); *Evidence Act 1995* (NSW) ss 85(1), (2); *Evidence Act 2001* (Tas) ss 85(1), (2).

¹⁰¹ *Sinclair v The King* (1946) 73 CLR 316; *R v Williams* [1959] NZLR 502; *Swaffield* (1998) 192 CLR 159, 209–10 (Kirby J).

¹⁰² (1946) 73 CLR 316.

¹⁰³ *Ibid* 319–20 (Latham CJ), 327 (Starke J), 329 (Dixon J).

¹⁰⁴ *Ibid* 338.

¹⁰⁵ *Ibid* 323 (Latham CJ), 328 (Starke J), 340 (McTiernan J). Latham CJ favoured an even stricter test, holding that admissibility should be governed by the principles which apply in determining the competency of witnesses: at 323.

¹⁰⁶ *Ibid* 330. See also *Basto v The Queen* (1954) 91 CLR 628, 639–40 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

A less strict approach to rejection was taken in the New Zealand case *R v Williams*.¹⁰⁷ The accused, a sailor, was charged with murder. After the incident in which the deceased died, the accused attempted to commit suicide, first by taking poison and then by throwing himself into the harbour. When police arrived, they found him in his cabin frothing at the mouth and in a miserable and shivering condition. He was taken to hospital where he was subjected to violent remedial treatment with a stomach pump. In holding that the accused's confession was inadmissible, Hardie Boys J stated that in order to be admissible, a confession

must be the result of conscious recollection of the detail of the events described and not a reconstruction put together while the body is exhausted and the mind in a condition to be overborne, so that every instinct would be to have it finished as shortly and as simply as possible and gain respite and rest from what here must have been nearly seven hours of debilitating experiences.¹⁰⁸

Rejection of a confession in such circumstances is more likely to be achieved by an argument focusing on discretion than an argument directed to legal admissibility. In *Klemenko v Huffa*, Bray CJ held that a confession made by a suspect who was in a mentally disturbed condition, though strictly admissible, should have been excluded by the exercise of discretion.¹⁰⁹ In *R v Parker*, the NSW Court of Criminal Appeal held that the fact that an accused person suffered from some unsoundness of mind or psychiatric disorder at the time that a confession was allegedly obtained from the person does not necessarily make evidence of the confession inadmissible, but may be relevant as to whether the judge should exclude the evidence in the exercise of their discretion.¹¹⁰ In circumstances similar to those in *Sinclair v The King*, the confession would certainly now be rejected, if not as a matter of law then in the exercise of discretion.

¹⁰⁷ [1959] NZLR 502.

¹⁰⁸ *Ibid* 506. See also *R v Burnett* [1944] VLR 115, 116–17 (O'Bryan J); *R v Phillips* [1949] NZLR 316, 322–3 (Gresson J). Cf *R v Starecki* [1960] VR 141, 146–7 (Sholl J); *Naniseni v The Queen* [1971] NZLR 269, 273–4 (Turner J).

¹⁰⁹ (1978) 17 SASR 549, 557. See also *R v Bradshaw* (1978) 18 SASR 83, 86–7 (Bray CJ); *R v Williams* (1992) 8 WAR 265, 277 (Rowland and Owen JJ). Cf *R v Buchanan* [1966] VR 9, 11 (Winneke CJ); *R v Pfitzner* (1996) 66 SASR 161, 177 (Doyle CJ).

¹¹⁰ (1990) 19 NSWLR 177, 183 (Gleeson CJ). See also *Gillespie v The Queen* (1988) 36 A Crim R 235, 241–2 (Lee J); *R v Donnelly* (1997) 96 A Crim R 432, 441–2 (Hidden J); *Stiles v The Queen* (1990) 50 A Crim R 13; *R v Collie* (1991) 56 SASR 302, 314 (King CJ); *R v Pfitzner* (1996) 66 SASR 161, 172, 177 (Doyle CJ). Similar principles apply in relation to accused persons who are intoxicated at the time of making a confession: *R v Ostojic* (1978) 18 SASR 188, 193–4 (White AJ); *Morris v The Queen* (1987) 163 CLR 454, 470–1 (Deane, Toohey and Gaudron JJ); *R v Smith* (1992) 58 SASR 491, 497–9 (Perry J); *R v Nelson* (2004) 41 MVR 10, 14 (Dowd J).

B Failure to Caution

A suspect must be warned as to their right to remain silent prior to any questioning.¹¹¹ In South Australia, a failure to caution normally leads to rejection of a confession. In *R v Dolan*, King CJ stated:

The questioning of a suspect who is under arrest or who is otherwise in custody, tends naturally to the conclusion that he is not acting in the exercise of free choice in answering the questions. In such circumstances the caution is virtually an indispensable condition of the admissibility of the answers. The need for the caution is almost as compelling where, although the arrest has not actually been made, the police officer has decided to make the arrest.¹¹²

The obligation to caution, however, is less strictly enforced than the statement of King CJ would suggest. In *Carr v Western Australia*, Gleeson CJ stated:

It is not a principle of the common law that evidence of an admission, or a confession, to a police officer is inadmissible unless a caution is first administered. ... The true position is that failure to administer a caution may enliven a judicial discretion as to whether to receive or reject the evidence.¹¹³

A failure to caution, taken in conjunction with other improprieties, may frequently lead to rejection of a confession.¹¹⁴ Other than in South Australia, however, it would seem that a decision of a trial judge to admit a confession is unlikely to be reversed on appeal when the sole impropriety established was the failure to give a required caution.¹¹⁵ In most cases, the caution serves only to remind accused persons of what is now generally known in the community and, accordingly, it is correct that a failure to caution alone should not generally lead to rejection. Where the particular accused may not be aware of their right to remain silent, however, a failure to caution will probably suffice to warrant rejection.¹¹⁶

C Failure to Allow Access to a Lawyer

A suspect is entitled to contact a lawyer and to have a lawyer present during an interrogation.¹¹⁷ In *Pollard v The Queen*, failure to inform the accused of his

¹¹¹ *Evidence Act 1995* (Cth) s 139; *Evidence Act 1995* (NSW) s 139; *Evidence Act 2001* (Tas) s 139; *Crimes Act 1958* (Vic) s 464A(3); *Police Powers and Responsibilities Act 2000* (Qld) s 431(1); *Summary Offences Act 1953* (SA) s 79A(3); *Criminal Investigation Act 2006* (WA) s 138(2)(b).

¹¹² (1992) 58 SASR 501, 505. See also *R v Tracey [No 5]* (2005) 93 SASR 101, 111 (Nyland J); *R v To* (2006) 96 SASR 1, 4 (Vanstone J).

¹¹³ (2007) 239 ALR 415, 416–17. See also the judgment of Gummow, Heydon and Crennan JJ: at 426.

¹¹⁴ See, eg, *Pollard v The Queen* (1992) 176 CLR 177; *R v Larson* [1984] VR 559; *R v Sharp* (2003) 143 A Crim R 344; *R v Bondareff* (1999) 74 SASR 353.

¹¹⁵ Cases in which a confession was held admissible despite the failure to give a required caution include: *Webb v Cain* [1965] VR 91; *R v Buckskin* (1974) 10 SASR 1; *Dansie v Kelly*; *Ex parte Dansie* [1981] Qd R 1; *Azar v The Queen* (1991) 56 A Crim R 414.

¹¹⁶ *R v Su* [1997] 1 VR 1, 54–5 (Winneke P, Hayne JA and Southwell AJA).

¹¹⁷ *Crimes Act 1914* (Cth) s 23G; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 123(1)(b); *Crimes Act 1958* (Vic) s 464C(1); *Summary Offences Act 1953* (SA) s 79A(1); *Police Powers and Responsibilities Act 2000* (Qld) s 418(1)(b); *Criminal Law (Detention and*

right to a lawyer, coupled with a failure to caution, resulted in a rejection of the confession.¹¹⁸ A denial of access to a lawyer will normally lead to rejection of a confession.¹¹⁹ The receipt of a confession made by an accused after they have been denied access to legal advice would constitute grave contraventions of principles of both fairness and policy.

D *Unlawful Detention*

At common law, neither the police nor any other authority has the right to detain a suspect for the purpose of interrogation.¹²⁰ The only power to detain is the power of arrest, and that power 'is exercisable only for the purpose of taking [the accused] before a magistrate to be dealt with according to law'.¹²¹ The detention of a suspect for the purposes of interrogation thus constitutes false imprisonment on the part of the police. Equally, if the accused is arrested but not taken before a magistrate within a reasonable time, the detention, while initially lawful, is rendered illegal and a false imprisonment.¹²²

The fact of unlawful detention may lead to the rejection of a confession on the ground of oppression.¹²³ Where this is not so, unlawful detention of a suspect may render a confession inadmissible following the exercise of discretion. Where the period of detention is not great and there has been no deliberate attempt to deprive a suspect of their rights, the courts are likely to receive the confession, proceeding on the basis that the normal rule is one of admissibility.¹²⁴ Where a more substantial impropriety is involved, however, the confession is likely to be held inadmissible.¹²⁵ In *R v Stafford*, the accused was placed in custody without being informed that he was being arrested and without being advised of the reason he was being held in custody.¹²⁶ The accused was then interrogated over a four hour period without being charged or taken before a magistrate. The Court held that the accused's detention was unlawful and

Interrogation Act 1995 (Tas) ss 6(1)(b), (2); *Criminal Investigation Act 2006* (WA) s 138(2)(c); *Police Administration Act 1978* (NT) s 140(a).

¹¹⁸ See also *Driscoll v The Queen* (1977) 137 CLR 517; *R v Hart* [1979] Qd R 8.

¹¹⁹ *R v Percerep* [1993] 2 VR 109.

¹²⁰ *Williams v The Queen* (1986) 161 CLR 278, 293–5 (Mason and Brennan JJ). Various statutory provisions now derogate from the common law position in significant fashion: see, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34D–34S; *Major Crime (Investigative Powers) Act 2004* (Vic).

¹²¹ *R v Banner* [1970] VR 240, 249 (Winneke CJ, Smith and Gowans JJ).

¹²² *Ibid* 250. See also *Drymalik v Feldman* [1966] SASR 227, 234 (Napier CJ, Bright and Mitchell JJ); *Cleland v The Queen* (1982) 151 CLR 1, 24–5 (Deane J).

¹²³ See generally *McDermott v The King* (1948) 76 CLR 501, 514–15 (Dixon J).

¹²⁴ See *R v Kelcey* [1985] VR 765, 777 (Beach J); *Merritt and Roso v The Queen* (1985) 19 A Crim R 360; *Kyriakou v The Queen* (1987) 29 A Crim R 50, 57 (Yeldham J); *Salihos v The Queen* (1987) 78 ALR 509, 521 (Kennedy J); *R v Heiss* (1990) 101 FLR 433, 456–8 (Nader J); *R v Ainsworth* (1991) 57 A Crim R 174, 185–8 (Hunt J); *Mackenzie v The Queen* (2004) 150 A Crim R 451, 464 (Wheeler J).

¹²⁵ See, eg, *McDermott v The King* (1948) 76 CLR 501, 515 (Dixon J); *Williams v The Queen* (1986) 161 CLR 278, 283 (Gibbs CJ). Cf *R v Banner* [1970] VR 240, which would now certainly be decided differently.

¹²⁶ (1976) 13 SASR 392.

rejected a confession made by him.¹²⁷ Bray CJ described the actions of the police as ‘an outrageous and unwarrantable exercise of arbitrary power’ and thought that ‘the courts should attach to this sort of conduct emphatic disapproval and effective sanctions.’¹²⁸

In *Cleland v The Queen*, the detention of the accused had initially been lawful but became impermissible through the passing of time.¹²⁹ The majority, while allowing the appeal on other grounds, declined to overturn the decision of the trial judge not to exclude the confession due to the detention of the accused becoming illegal.¹³⁰ In *Foster v The Queen*, however, the police had no evidence against the accused and his detention had been solely for the purpose of interrogating him.¹³¹ The High Court took a strong stance against evidence obtained in such circumstances, holding that it should have been excluded in the exercise of both the unfairness and public policy discretions.¹³² In a joint judgment, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ stated:

First, ... the police infringement of the appellant’s rights ... was both serious and reckless. The courts of this country have been at pains to stress that the right to personal liberty under the law is, in the words of Fullagar J, ‘the most elementary and important of all common law rights’. ... In circumstances where, at the time when the appellant was arrested, the police had neither the intention to charge him with an offence nor the evidence to justify such a charge, the gravity of the infringement of the appellant’s rights involved in his public arrest and subsequent detention in custody is apparent. ... Secondly, it was clear from the police evidence that the unlawful arrest and detention of the appellant had been for the purpose of questioning him in an environment from which he had no opportunity of withdrawing. ... When one has regard to the nature and the effects of the police infringement of the appellant’s rights and to the other circumstances and considerations to which reference has been made, it is plain that the case was one in which a proper exercise of the learned trial judge’s discretion required the exclusion of evidence of the confessional statement.¹³³

¹²⁷ Ibid 402 (Bray CJ), 407 (Hogarth J). Zelling J dissented: at 411.

¹²⁸ Ibid 401. See also *Walker v Marklew* (1976) 14 SASR 463, 484–5 (King J); *R v Eyres* (1977) 16 SASR 226, 231–2 (Walters J); *R v Killick* (1979) 21 SASR 321, 327–8 (Mitchell J); *Dungray v The Queen* (2001) 126 A Crim R 216, 221 (Ipp AJA); *DPP (NSW) v Carr* (2002) 127 A Crim R 151, 159–60 (Smart AJ).

¹²⁹ (1982) 151 CLR 1.

¹³⁰ Ibid 9–10 (Gibbs CJ), 35 (Dawson J). Murphy J dissented on this point: at 16–17. While Deane J refrained from concluding that the confession should have been excluded, his Honour indicated at 27 (citations omitted) that

where a confession has been procured while the accused was unlawfully imprisoned by the police, special circumstances, such as the illegality being slight, would commonly need to exist before the balancing of considerations of public policy would fail to favour the exclusion of evidence of the confession.

¹³¹ (1993) 113 ALR 1, 4 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

¹³² Ibid 10.

¹³³ Ibid 8–10 (citations omitted).

E Derogation of the Right to Remain Silent

If the accused, after being taken into custody, states that they do not wish to answer further questions, investigating authorities ought not to ask the accused further questions.¹³⁴ If they do, and the suspect remains silent or refuses to answer, then evidence of such questioning is inadmissible as being irrelevant.¹³⁵ If, however, the accused does answer and makes admissions, that evidence may be liable to exclusion in the exercise of discretion. In *R v Stafford*, Bray CJ stated:

the police should not persist in questioning a man who has signified his unwillingness to answer them and a fortiori when he has asked to see a solicitor before answering. If they do so the evidence should be rejected. ... The law confers the right of silence on suspected persons except in so far as any statute takes it away. That right must be respected by the police and enforced by the courts.¹³⁶

To harass a suspect after that suspect has indicated a wish to exercise the right to remain silent constitutes a serious impropriety which should lead to rejection in the exercise of both the unfairness and public policy discretions. In determining whether to exclude a confession, it is submitted that the extent to which such further questioning is carried should be regarded as crucial.¹³⁷ A number of further questions asked in the hope that the suspect will reconsider and answer should not be sufficient to render evidence of such answers inadmissible. If, however, the suspect is harassed and treated in a manner designed to overturn a settled decision to say no more, then such evidence should be excluded.

A suspect's right to silence may be infringed notwithstanding that the suspect is unaware that they are dealing with a police officer or other investigating official, or with someone acting on behalf of investigating authorities. In *Swaffield*, the conversation between Swaffield and the undercover police officer was rejected on the basis that the accused had demonstrated his wish to remain

¹³⁴ *Petty v The Queen* (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ). The common law right to pre-trial silence is restated in various statutory provisions: see, eg, *Crimes Act 1914* (Cth) s 23S(a); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 122(1)(a); *Police Administration Act 1978* (NT) s 140(a); *Police Powers and Responsibilities Act 2000* (Qld) s 191; *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 9; *Evidence Act 2001* (Tas) s 89; *Crimes Act 1958* (Vic) s 464J(a).

¹³⁵ *R v Ireland* (1970) 126 CLR 321, 333 (Barwick CJ); *Petty v The Queen* (1991) 173 CLR 95, 99, 102 (Mason CJ, Deane, Toohey and McHugh JJ). Evidence of the accused's refusal to answer questions is inadmissible in being used to draw an inference unfavourable to the accused: *Evidence Act 1995* (Cth) s 89; *Evidence Act 1995* (NSW) s 89; *Evidence Act 2001* (Tas) s 89.

¹³⁶ (1976) 13 SASR 392, 398–9. See also *Harris v Samuels* (1973) 5 SASR 439, 452 (Bray CJ), 464–5 (Zelling J); *R v Buckskin* (1974) 10 SASR 1, 5 (Walters J); *R v Collins* (1976) 12 SASR 501, 507 (Bray CJ); *Walker v Marklew* (1976) 14 SASR 463, 479–80 (King J); *R v Killick* (1979) 21 SASR 321, 330 (Mitchell J); *R v Watkins* (1989) 50 SASR 467, 469 (O'Loughlin J); *R v Harris* (1995) 64 SASR 85, 96 (Matheson J). Cf *R v Harris* (1995) 64 SASR 85, 106 (Millhouse J). A similar view has been adopted in Queensland: *R v Borsellino* [1978] Qd R 507, 513 (Dunn J); *R v Hart* [1979] Qd R 8, 13 (Connolly J). Cf *R v Wyatt* [1972] VR 902.

¹³⁷ *Clarke v The Queen* (1997) 97 A Crim R 414, 419 (Hunt CJ). See also *Phan v The Queen* (2001) 123 A Crim R 30, 42–3 (Wood CJ); *R v Fernando* [1999] NSWCCA 66 (Unreported, Newman, Studdert and James JJ, 14 April 1999) [32]–[34]; *MacKenzie v The Queen* (2004) 150 A Crim R 451, 466 (Wheeler J).

silent by refusing to answer any questions during a formal police interview. Brennan CJ stated that there 'is a public interest in ensuring that the police do not adopt tactics that are designed simply to avoid the limitations on their inquisitorial functions that the courts regard as appropriate in a free society.'¹³⁸ Admissions obtained through recording the conversations between Pavic and his friend, however, were regarded as 'quite legitimate' by his Honour, who considered that no public interest would be served by its rejection.¹³⁹ A similar distinction was drawn in the joint judgment of Toohey, Gaudron and Gummow JJ.¹⁴⁰ In such cases, it is suggested that no distinction is to be drawn between undercover operatives and civilians enlisted by investigating authorities. Rather, the crucial issue is the extent to which the accused has demonstrated a wish not to communicate with authorities concerning the crime in question and the length to which attempts are made to circumvent such expressed intent.

Where the suspect is willing to talk with investigating officials, however, the fact that they are only willing to do so in the absence of recording does not result in a covert recording of such conversation which would amount to an infringement of the right of the suspect to remain silent. This is what occurred in *Em*. Gleeson CJ and Heydon J stated:

The detectives kept secret from him the fact that the conversation was being recorded, and hence his freedom to speak was affected in the sense that a factor that was important to him was kept secret from him. But that is true of virtually all cases of lawfully authorised secret surveillance. Virtually all persons who are the subject of that type of surveillance have been deprived of the opportunity to make an informed choice about whether or not to exercise their right of silence.¹⁴¹

In *Em*, Kirby J stated in dissent that the decision of the majority could not be reconciled with the decision upholding the rejection of the evidence in *Swaffield*.¹⁴² The cases are, however, reconcilable in that the accused in *Em* was willing to talk with police, albeit subject to a condition that was not met.

F Forensic Disadvantage

One application of the unfairness discretion is to protect the accused against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.¹⁴³ In the case of a taped confession, the existence of the confession is not in dispute and thus forensic disadvantage is unlikely to be present as a consideration. However, in situations where a confession or admission which has not been taped is legally admissible, the danger of forensic disadvantage may warrant rejection on the ground of unfairness. Faced

¹³⁸ (1998) 192 CLR 159, 185. See also *R v Pfennig [No 1]* (1992) 57 SASR 507, 514 (Cox J).

¹³⁹ *Swaffield* (1998) 192 CLR 159, 185–6.

¹⁴⁰ *Ibid* 202–4.

¹⁴¹ *Em* (2007) 239 ALR 204, 227. See also *Carr v Western Australia* (2007) 239 ALR 415, 432 (Gummow, Heydon and Crennan JJ).

¹⁴² *Em* (2007) 239 ALR 204, 253, 258.

¹⁴³ *Swaffield* (1998) 192 CLR 159, 195 (Toohey, Gaudron and Gummow JJ).

with such evidence, the accused is put in a position of having to make allegations of fabrication against investigating officials in circumstances where there is unlikely to be evidence supporting such allegations and where a jury may be predisposed to believe the investigating officials. This disadvantage is compounded where no attempt has been made to have the alleged verbal confession or admission verified by taping. In such cases, the accused loses the opportunity of either making a timely repudiation of the alleged verbal admissions or of seeking to qualify or explain apparently incriminating statements. In *Nicholls v The Queen*, a majority of the High Court held that a disputed verbal confession was inadmissible because it failed to comply with the requirement of mandatory taping.¹⁴⁴ McHugh J took the view that, even if legally admissible, the alleged statement should have been rejected by the exercise of discretion. His Honour stated that

even if the off-camera statements constituted an ‘interview’ to whose recording [the accused] did not consent, the above circumstances made an overpowering case for the trial judge to exercise his general discretion concerning evidence unfairly obtained to exclude the evidence. ... Given the legislative policy of recording interviews of suspects wherever possible so that disputes concerning admissions can be reduced to a minimum, attempts to avoid the effect of that policy should be perceived as unfair attempts to obtain evidence and such evidence should be excluded.¹⁴⁵

In *R v Schaeffer*, an alleged verbal admission overheard by a police officer was held legally admissible on the basis that it had not been made to an investigating official but rather to the brother-in-law of the accused.¹⁴⁶ Accordingly, taping was not required as a matter of law.¹⁴⁷ The appeal of the accused was allowed and a retrial ordered on other grounds, but in relation to the admission Warren CJ stated:

The question was whether the discretion was wrongly exercised in the admission of the evidence because it was unfair. Plainly, it was. It was essential, as events transpired, that the applicant and his brother-in-law had the matters put to them during their respective interviews by the police. The deprivation of the opportunity to answer on an early and spontaneous basis was irreparably lost in the circumstances. Any denial or repudiation of the confession at trial by either the applicant or his brother-in-law was inevitably tainted.¹⁴⁸

It is submitted that the views of McHugh J and Warren CJ are correct. Where an investigating official seeks to give evidence of a verbal confession or admission that was not required to be taped, the courts should require that in the absence of a good reason for not doing so, it should be a precondition to admis-

¹⁴⁴ (2005) 219 CLR 196, 240–1 (McHugh J), 257–8 (Gummow and Callinan JJ), 276–8 (Kirby J).

¹⁴⁵ *Ibid* 242.

¹⁴⁶ (2005) 13 VR 337. See further Williams, ‘Issues of Verbal Confessions and Admissions’, above n 3, 176–8.

¹⁴⁷ See *Crimes Act 1958* (Vic) s 464H.

¹⁴⁸ *R v Schaeffer* (2005) 13 VR 337, 340. Eames and Ormiston JJA agreed and held that it was not necessary to reach a final conclusion on whether the discretion of the judge to admit the evidence of the admission was wrongly exercised: at 352.

sibility that the suspect was given the opportunity on tape of repudiating, or of explaining and elaborating, that admission.

G Trickery

There is nothing inherently objectionable in police adopting practices involving a measure of trickery. The use of undercover police operatives is a long established technique of investigation and law enforcement. In *Swaffield*, Brennan CJ stated:

The investigation of crime is not a game governed by a sportsman's code of fair play. Fairness to those suspected of crime is not the giving of a sporting opportunity to escape the consequences of any legitimate and proper investigation or the giving of a sufficient opportunity 'to invent plausible falsehoods'.¹⁴⁹

The issue for the court is whether the method used can be regarded as involving creative methods of investigation on the one hand, or significant infringement of a suspect's rights on the other. In *R v Suckling*, the NSW Court of Criminal Appeal regarded as admissible statements made to the accused's fellow prisoners, stating:

We are of the view that to admit the recorded conversations upon the ground that they derogated from the appellant's right to silence or privilege from self-incrimination would, in all the circumstances of this case, be very far from seriously offending prevailing community standards. In saying this, however, we wish to point out that the reference by the High Court, as by this Court, to community standards in this respect is not to any notion of populist public *opinion*. Rather, this refers to community *standards* concerning the maintenance of the rule of law in a liberal democracy, the elements of the proper administration of justice and the due requirements of law enforcement.¹⁵⁰

In *Tofilau*, the High Court considered the legitimacy of 'scenario evidence', the term given to a form of detailed undercover operation developed in Canada and designed to obtain confessional evidence in cold cases.¹⁵¹ Undercover police officers pose as members of a gang. They solicit the cooperation of a person whom they think has committed a serious crime and encourage that person to take part in scenarios involving what the person wrongly thinks is criminal conduct. Provided that the person informs the head of the gang of anything which might attract the adverse attention of the police, they offer the person two advantages: one is the opportunity of financial gain by joining the gang; the other is the certainty that the head of the gang can influence supposedly corrupt police officers to procure immunity from prosecution for the serious crime.

¹⁴⁹ (1998) 192 CLR 159, 185–6 (citations omitted). See also *R v Tofilau [No 2]* (2006) 13 VR 28, 60 (Vincent JA). See generally Andrew Ashworth, 'Should the Police Be Allowed to Use Deceptive Practices?' (1998) 114 *Law Quarterly Review* 108.

¹⁵⁰ [1999] NSWCCA 36 (Unreported, McInerney, Ireland and Adams JJ, 12 March 1999) [40] (emphasis in original).

¹⁵¹ (2007) 231 CLR 396.

In each of the four cases (each a murder trial), taped confessional evidence was received, the accused convicted,¹⁵² and his appeal dismissed by the Victorian Court of Appeal.¹⁵³ Of the four cases, it is convenient to focus on *Tofilau* as representative of the four cases as it is the case which received the closest attention in the Court of Appeal.

In *Tofilau*, the police believed that the accused had murdered a woman with whom he had been having a relationship. The deceased was killed by manual strangulation in 1999. The accused was interviewed on two occasions in connection with the killing, but little further progress was made in the investigation. In 2002, the accused was targeted in one of the scenario operations. The accused was offered financial rewards if accepted as a member of the gang, and was told that the gang had connections with corrupt police members who had sufficient influence to prevent a person being charged with a criminal offence as well as the ability to have any continuing police investigation curtailed. The accused was then led to believe that the investigation into his involvement in the death of the deceased was being reopened. The accused confided in a member of the gang and arrangements were made for the accused to meet with the 'boss' of the gang. The accused made admissions to the gang member and a meeting between the accused, the gang member and the boss was held. The gang member left the meeting and the accused confessed to the boss that he had strangled the deceased. The statements made to the boss by the accused demonstrated a detailed knowledge concerning the crime scene and circumstances surrounding the death of the deceased. The accused was arrested the next day. When informed that the gang member and the boss were in fact undercover police operatives and upon hearing a recording of his conversation with the boss, the accused claimed that he fabricated what he had told them, pretending that he had committed the murder so he could work in the gang.¹⁵⁴

At trial, evidence of the taped confessions was received over objection and the accused was convicted. On appeal to the Victorian Court of Appeal, it was argued that the confessions were involuntary and, in the alternative, should have been excluded in the exercise of discretion. The arguments were rejected and the conviction affirmed. On the issue of voluntariness, the Court held that although there had been inducements offered to the accused they had not proceeded from a person in authority.¹⁵⁵ A 'person in authority' here means a person viewed by the accused as possessing, by reason of some lawfully held or conferred status or relationship with the maker of the statement, the capacity to lawfully influence the course of the prosecution or the manner in which the accused is treated in

¹⁵² *R v Tofilau* (2003) 13 VR 1; *R v Marks* (2004) 150 A Crim R 212; *R v Hill* [2004] VSC 293 (Unreported, Bongiorno J, 18 August 2004); *R v Clarke* [2004] VSC 541 (Unreported, Kellam J, 31 December 2004).

¹⁵³ *R v Tofilau [No 2]* (2006) 13 VR 28; *R v Hill* [2006] VSCA 41 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Marks* [2006] VSCA 42 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Clarke* [2006] VSCA 43 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006).

¹⁵⁴ *R v Tofilau* (2003) 13 VR 1, 4–6 (Osborn J).

¹⁵⁵ *R v Tofilau [No 2]* (2006) 13 VR 28, 69 (Vincent JA).

respect of it.¹⁵⁶ On the issue of discretion, the Court held that the trial judge had approached the issue of the possible exclusion of the evidence by reference to public policy considerations. Moreover, the Court thought that the trial judge had specifically and carefully treated the possibility that there had been unfair derogation of the accused's right to silence, and had not fallen into error.¹⁵⁷ The accused had voluntarily participated in two interviews with police when the killing of the deceased was first investigated, which made it difficult to argue successfully that his right to remain silent had been compromised.

An issue of prejudice arose from the fact that the evidence of the confessions revealed to the jury the involvement of the accused in criminal activity. Callaway JA, with whom the other members of the Court agreed, held that scenario evidence amounted to propensity evidence and was to be dealt with as a matter of law rather than discretion by application of s 398A of the *Crimes Act 1958* (Vic).¹⁵⁸ His Honour held that such evidence will usually be admissible in order to show how the confession came to be made.¹⁵⁹ The jury should be directed as to why the evidence of other purported criminal activity is admitted and warned against using it in an impermissible fashion. In particular, the jury should be directed that the evidence of the accused's participation in other purported criminal activity, and the accused's attitude to that activity, is admitted solely to establish the context and setting in which the alleged confession came to be made.¹⁶⁰ The jury should be further directed that they must not reason that, because the accused was a willing participant in what they believed to be other criminal activity, the accused is the kind of person who is likely to have committed the crime charged.¹⁶¹

On appeal to the High Court, the majority held that the evidence had been properly received in each of the four cases. In relation to the inducement limb of admissibility, the majority held that 'a person to whom an accused has made admissions cannot be a person in authority at least unless that person is perceived by the accused, on reasonable grounds, to have the lawful authority of the state to investigate the circumstances.'¹⁶² Kirby J, dissenting, held that the 'person in authority' requirement is satisfied if the person is in fact one in authority and is believed by the accused to have power, whether legitimate or not, to influence the course of the prosecution against the accused.¹⁶³ The majority view of the 'person in authority' requirement would appear correct in principle. The origin of the requirement was the influence that the interrogator had over the accused due to the accused's perception of the interrogator's authority.¹⁶⁴ In respect of basal voluntariness, the majority held that in none of the four cases was the conduct of

¹⁵⁶ Ibid 66–7.

¹⁵⁷ Ibid 71.

¹⁵⁸ Ibid 31–2.

¹⁵⁹ Ibid 32.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² (2007) 231 CLR 396, 498 (Callinan, Heydon and Crennan JJ).

¹⁶³ Ibid 452–4.

¹⁶⁴ Ibid 493–5 (Callinan, Heydon and Crennan JJ).

the undercover operatives so persistent (or the pressure placed on the accused so sustained) as to overbear the will of the accused.¹⁶⁵ Kirby J dissented on this point also, finding that the police tactics had overborne the will of the accused.¹⁶⁶

Only in the case of one of the four appellants, Clarke, was it submitted that the discretion to exclude the confession should have been exercised. His case involved the murder of a six year old girl. Clarke had been pressed more strongly by the police than had the other appellants and had been confronted with a fabricated document purporting to be a confidential police report naming Clarke as the only suspect in the killing. The majority held that neither considerations of fairness nor public policy should lead to rejection of the evidence. In their joint judgment, Callinan, Heydon and Crennan JJ drew attention to the factors listed in *Bunning v Cross*,¹⁶⁷ noting that two factors in particular — the seriousness of the crime and the fact that the actions of the police did not lessen the cogency of the evidence — pointed to admissibility.¹⁶⁸ Their Honours concluded:

The police had failed — and their failure was not said to be culpable — to collect sufficient evidence against Clarke to charge him. The crime being investigated was very serious. It had remained unsolved for twenty years. The scenario technique was one which had been in use for a long time in Canada, and had been approved by the Canadian courts. It was not embarked on as an unthinking frolic by junior officers. It had been deliberately selected by the superiors of those involved in the light of Canadian experience. No alternative was available if the investigation was to continue. It was reasonable for the police to seek to employ this technique, new in Australia, in carrying out their important duty to investigate an old crime. The technique was employed in a discriminating way, with considerable care being taken to avoid illegality. No doubt psychological pressure was built up, but conventional police interrogation of the most proper kind naturally involves pressure. Counsel submitted that the process was ‘designed to circumvent the [appellant’s] right to silence’. Clarke was in fact an experienced criminal who understood that he did not have to answer anyone’s questions. ... The operatives stressed the need to tell the truth. The undercover officers did not prey upon any special characteristics of Clarke related to his gender, race, age, education or health. The means of elicitation were not so disproportionate to the problem confronting the police as to be inherently unfair or contrary to public policy.¹⁶⁹

It is submitted that the Victorian Court of Appeal and the High Court were correct in their decisions. Scenario evidence does present dangers, but the risks associated with obtaining evidence in the manner involved in *Tofilau* do not appear sufficient to warrant rejection. If the activities of undercover operatives are carried to the point of overbearing the will of the accused, then any confession will be legally inadmissible. Where legally admissible, evidence obtained in this manner involves a danger of prejudice to the accused in that it shows the

¹⁶⁵ Ibid 505–6.

¹⁶⁶ Ibid 461.

¹⁶⁷ (1977) 141 CLR 54.

¹⁶⁸ *Tofilau* (2007) 231 CLR 396, 527–8.

¹⁶⁹ Ibid 528–9 (citations omitted).

accused to be a person willing to engage in criminal activity and willing to consort with persons whom they believe to be criminals. This danger is, however, fully met by regarding the evidence as subject to the strict principles of admissibility that apply generally to propensity evidence. Possible unreliability may lead to discretionary rejection in some situations, but an argument that the accused may have exaggerated or even falsified their involvement in the crime under investigation is generally best left to the consideration of the jury as going to the weight that should be accorded to the evidence. An argument for rejection of the evidence on the ground of unfairness necessarily involves adoption of a view of discretionary rejection as designed to achieve adherence to a sporting code in the prosecution of criminals, a view which is plainly untenable. In terms of public policy, 'community standards concerning the maintenance of the rule of law in a liberal democracy' do not appear to be infringed by reception of the evidence.¹⁷⁰ Were a suspect who had demonstrated a clear wish not to communicate with police or others in respect of the crime under investigation to be pursued and cajoled, then the evidence might properly be rejected as involving infringement of the right to remain silent. In other than extreme cases, however, community standards are likely to support the practices involved in these cases.

V CONCLUSION

The legal rules governing admissibility of confessions and admissions find their primary justification in the principle of reliability — the fear that an involuntary confession may be untrue. The disciplinary principle and the principle of unfairness play a significant but subsidiary role in relation to legal admissibility. In the field of discretion, however, the disciplinary principle and the principle of fairness become the dominant considerations. What is involved in this context is a balancing of the desirable goals of admitting relevant evidence and bringing wrongdoers to conviction against the undesirable effect of giving curial approval or tacit encouragement of improper practices by police and other authorities (the disciplinary principle), or the conviction of an accused in a manner which is seen to involve substantial unfairness (the fairness principle). Even here, however, the trial judge's view of the likely reliability of the confession is a factor taken into account in the balancing process. A confession is less likely to be rejected if the judge forms the opinion that it is likely to be reliable.

It is usually only in cases of quite serious impropriety or significant unfairness that an appeal court will be prepared to overturn a trial judge's decision to admit a confession. Confessions obtained from an accused suffering from mental disorder or physical infirmity may be rejected in the exercise of discretion, but this is likely to occur only where the illness or infirmity is of considerable seriousness. Failure to caution an accused is, of itself, unlikely to result in a confession being held inadmissible. Denial of the right to a lawyer is, however, likely to lead to rejection. Similarly, unlawful detention of a suspect is likely to

¹⁷⁰ See above n 150 and accompanying text.

lead to rejection of a confession, but only where the period of detention is substantial or where there has been a deliberate attempt to deprive an accused of their rights. Covert taping of a suspect's questioning will not, without more, lead to rejection. Issues of forensic disadvantage are unlikely to arise now that confessions are required to be taped in almost all cases, but in the case of verbal confessions which are legally admissible, such considerations may result in rejection. Finally, trickery, unless seen as involving derogation of the right of the accused to remain silent, will not lead to rejection (even when carried to considerable lengths).

The approach taken by the courts would appear to reflect a consciousness that a confession which meets the requirements for legal admissibility is likely to be reliable, and that the step of excluding relevant and reliable evidence based on considerations of policy or fairness should be taken only in cases where the argument for exclusion is strong. Such a cautious approach would appear correct in principle. Determining when exclusion should occur for reasons of policy or fairness is better achieved through the cautious exercise of a principled and structured discretion, rather than by seeking to enshrine the operation of such considerations in precise rules. Discretionary rejection of confessions and admissions over the past 30 or so years has seen the development and refinement of principles and guidelines to be used by trial judges in the exercise of discretion. The result is a substantial body of law governing the use of discretion and considerable predictability in the outcome of particular cases.