Department of the Attorney General & of Justice NSW Bureau of Crime Statistics & Research

Research Report 9

A STUDY OF EVIDENCE PRESENTED TO THE DISTRICT COURT IN NEW SOUTH WALES

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by Nina Stevenson

PREFACE

The research contained in this report was conducted by Nina Stevenson, an honours student in law at the University of New South Wales. She was supervised in her research by John Basten, Senior Lecturer in Law at the University and by myself, as the Director of the Bureau of Crime Statistics and Research. The thesis written by Ms. Stevenson for the University is reproduced in this report with only minor editing. It is therefore longer than the normal Bureau report, does not contain any recommendations and has perhaps a rather more academic flavour. Nevertheless it concerns an important topic; the nature of the evidence presented in a sample of cases appearing at the District court of New South Wales. The information in the report is of considerable value to all those concerned about the incidence and nature of the confessional evidence accepted by the court. It is not a large enough sample to give a correct estimate of the full incidence of all types of confessional evidence used, but in analysing the cases Ms. Stevenson has been able to draw some valuable conclusions regarding the methods which might be used to deal with any procedures necessary for controlling or handling questions of civil liberties and the administration of the court concerning the admission of confessional evidence. I have supervised and assisted in the supervision of many post graduate students. And it was a pleasure and no burden to assist Ms. Stevenson in her work. She is greatly self motitivated. She organised all of the data collection herself, analysed it and completed the report. We were glad in the Bureau to help her gain access to the material she used. The document has been read by a number of Bureau staff and comments have been made, but unlike other reports it is solely the responsibility of Ms. Stevenson.

I hope that it will be possible to publish the results of future research by students working in the various disciplines which are associated with studies in the criminal justice system. It is a further advantage to be able to publish such work in the form of the thesis in which it was presented to the University. I hope that that will be an encouragement to students in the future to seek out the Bureau as an avenue, not only for the obtaining of data but as a source of advice and support in the stimulation of research on the criminal justice system.

A J Sutton
Director

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A. INTRODUCTION - A PILOT STUDY

The potential uses of empirical research into the criminal justice process have been more fully realised in this State since the establishment of the N.S.W. Bureau of Crime Statistics and Research. One particular source of information, however, which has only been used for the compilation of "basic" court statistics is the court files held at the Office of the Clerk of the Peace. Although the pilot nature of this research meant that there could be few firm expectations as to what information it would be both feasible and of value to retrieve, the broad aim of reading the files, documenting all defendants who appear in the District Criminal Court, was to obtain a clearer picture of the nature of the evidence relied upon by the Crown and, where a plea of not guilty is entered, the accused. It was hoped that systematic data collection, indicating the frequency and relative importance of various types of evidence, would not only be of general interest but would also reveal some meaningful correlations relating to the ultimate disposition of cases. In the past research has tended to focus on one specific aspect of the criminal process with little regard to the relevance of the other stages of the process.[2] Aside from examining the "in court" treatment of particular types of evidence, the present study examines the initial and subsequent police-defendant encounters, as recorded in the files, and attempts to assess the importance of the interrogation process upon the later stages of the cases.

It has been asserted that what occurs while a person is in police custody has an important, often decisive, effect on the ultimate outcome of the case.[3] Whilst the dynamics of the process cannot be recreated from the court records containing the police account and, in some instances, the accused's account of the

encounter, nevertheless the frequency with which confessional evidence is relied upon by the Crown can be ascertained. Furthermore, data revealing a possible relationship between the incidence of confessions and, for example, the various indictable offence categories or the age or prior criminal history of the accused, can be correlated. Finally, the files also contained information relating to other factors, including the administering of cautions by the police and the role of lawyers, which might have a bearing on the "success" of an interrogation.

Because of the allegations of verballing and police impropriety, police-defendant encounters are a sensitive topic of discussion. However, it is felt that the issues raised by the controversy about confessional evidence are not merely matters of conflicting value judgments in which empirical data is of little relevance or consequence. Nevertheless, because of the emotional level at which the debate is frequently pitched, it is recognised by the present writer that the results of this research will not be regarded as documenting "neutral" information. Therefore, whilst it is hoped that the results will inject some empirical data into a debate characterised by speculation and pontification, it should be stressed at the outset that this is a pilot study. The conclusions can only be regarded as tentative and are subject to review by subsequent research encompassing a larger sample and utilizing supplementary research techniques. In particular it is felt that it would be useful to do follow up field work, including interviews with the lawyers, defendants, police officers and court officials who participated in the various cases.

With reports such as the Beach Report [4] and the Lucas Report, [5] police credibility has suffered in recent years; it cannot be denied that police improprieties have occurred during

the interrogation of some suspects and that the police have felt the need to fabricate incriminating evidence. The nature of the material relied upon for this study does not permit any firm conclusions to be made as to the incidence of "verballing" or police violence which is said to occur behind the closed doors of the interrogation rooms. Whilst occasionally there seemed to be inexplicable gaps or inconsistencies in the police statements or evidence given at the trial, generally the police version of the interrogation appeared plausible. At the same time, however, where an accused challenged the account, his or her version often appeared equally plausible. Rather than attempting to make a subjective assessment of the veracity of the evidence of a confession, this study is more concerned with revealing the frequency with which this type of evidence is challenged by an accused. The cases are also relied upon as illustrations of a number of legal and practical problems associated with the present rules relating to the admissibility of confessional evidence.

Irrespective of whether one rejects the allegation that "the police verbal is as common as gobblers on a turkey farm",[6] if a great deal of trial time is spent contesting confessional evidence, either on a voir dire hearing or in the examination and cross-examination of witnesses, a review of the present police procedures and relevant legal rules would seem appropriate.[7] In recent years judges have indicated their dismay as to the amount of time devoted to proving and challenging such evidence. For example, in R v Turner[8] the English Court of Appeal felt that it was necessary to make some general comments about the length of the trial of the appellants. After observing that defence counsels' cross-examination of the police witnesses, regarding alleged confessional statements, accounted for 30 to 40 per cent of the time during which witnesses gave evidence the Court said:

> "We find these facts disturbing.... (We want) to invite the attention of both judges and counsel to the need to keep trials as short as is consistent with the proper administration of justice. Trials as long and as complicated as this one was are a burden upon judges, jurors and accused which they should not be asked to bear. The public has an interest too.... In our judgment something should be done, and as quickly as possible, to make evidence about oral statements difficult either to challenge or concoct." 9

In view of the results of the present study it is not surprising that the N.S.W. Court of Criminal Appeal has expressed similar sentiments.[10] In the study cases nearly 50% of the trial time in which witnesses were giving evidence was related to determining the admissibility or veracity of confessional evidence:[11] voir dire hearings in relation to the admissibility of such evidence took up approximately 19% of trial time[12] and the cross-examination in front of the jury of police witnesses, regarding the alleged confessional material and/or their conduct during the interrogation of the accused at the police station or elsewhere, accounted for a further 29% of trial time. In addition, the accused frequently gave his or her account of the interrogation, by the making of an unsworn statement from the dock or by entering the witness box and giving sworn evidence, and on rare occasions the defence called witnesses corroborating the accused's version. 13

In view of the fact that the files had to be read in their entirety, a secondary purpose of the study was to compile information relating to the "timetable" for the disposition of cases, including the recording of the number of court appearances made by an accused and the frequency with which adjournments,

and other factors causing delay, occurred. Unfortunately it was rarely possible to ascertain the reasons for adjournments.

Finally, this study is designed to provide an indication of the range of information contained in the court files and the feasibility of conducting a more extensive survey of this nature. A brief description of the methodology employed is therefore included below. Whilst certain difficulties associated with studying the written records could be anticipated, some additional unforeseen problems which were encountered are also noted. It is hoped that the limitations of this research will not merely be regarded as a negative aspect, but will assist and encourage further empirical research and the use of supplementary research techniques.

B. SAMPLE AND METHODOLOGY

1. Obtaining the Sample

Relying on the District Court daily lists, the sample covered all persons charged with indictable offences who had their cases finally dealt with by the Sydney District Court[14] in the six week period 9th November - 14th December, 1979. It was felt that a four to six week period would yield a sufficiently large sample for the purposes of this pilot study, although it was recognised that there would be limitations following from this selection. These difficulties are discussed further below. It was originally planned to follow through all cases which commenced in this period. The procedure employed by the Clerk of the Peace for the keeping of court records, however, meant that it would have required an enormous amount of work to discover which cases fell within this category. It was also initially envisaged that a more recent six week period

would be used, but it was discovered that a large proportion of the files of cases finalised in a six week period in early 1980 had not reached the storage shelves at the time the research project commenced. Although the six week period finally chosen was close to the beginning of the annual court recess the research officer with the Clerk of the Peace considered that there would be no reason to suppose that the cases in this period would be atypical.

The daily court list for each judge gives the names of all the defendants which are to appear before him on that day, together with a file number for each case and the relevant charge or charges. Subsequently inserted beneath each defendant's name is the nature of the action taken on that day with respect to that defendant: for example, "mention only", "stood over", "no appearance of accused", "plea and sentence", "trial date fixed", "trial continuing", "trial - verdict" (indicating guilty or not guilty). It was therefore possible to ascertain the names and file numbers of those persons who had their cases finalised in the six week period. Accordingly, the sample of cases selected for study was all defendants, excluding those appearing for breach of recognizance, who were sentenced or found 'not guilty'. The sample therefore does not include part-heard trials or cases in which the accused had pleaded guilty or had been found guilty by a jury but had not been sentenced within the relevant dates. Furthermore, the lists only indicated one case in which the Attorney-General had directed that there be a "no bill" with respect to the particular charge or charges and this case has been excluded from the sample.[15] In this case a warrant had been issued for the defendant's arrest in 1960, but he was not arrested until July, 1978. He was charged with larceny of two rings, valued at £350. In the light of the delay and the lack of evidence corroborating the complainant's version of the

incident it was considered appropriate that there be no further proceedings.

Those persons in the sample who appeared for sentence were convicted pursuant to one of three possible procedures. Approximately 65% of the defendants had pleaded guilty at the committal hearing in accordance with the procedure laid down in s.51A of the Justices Act 1902, (N.S.W.) and were committed for sentence to the District Court. In approximately 24% of the cases the defendant entered a plea of guilty in the District Court, subsequent to being committed for trial at the committal hearing. The remaining 11% of persons convicted had pleaded not guilty and had a verdict of guilty returned by the jury at the trial. These cases where there was a jury verdict of guilty included cases where the accused changed his or her plea to guilty part-way through the trial.

2. Information Contained in the Files

After a preliminary examination of some of the files a revised questionnaire was drafted[16] which covered a number of specific aspects relating to the proceedings leading to a conviction or acquittal, personal details of the accused and questions relating to bail, sentencing and the nature of the evidence against the accused. Additional information was sought where the accused was convicted subsequent to a trial. Aside from this structural recording method, notes were taken where interesting information falling outside the scope of the questionnaire was contained in the file.

The documents in a file varied according to whether the defendant had pleaded guilty pursuant to s.51A of the Justices Act ("51A cases"), or had entered a plea of guilty ("plea-guilty

cases") or a plea of not guilty ("trial cases") subsequent to a preliminary hearing. Nevertheless, generally all the files contained the statements of the police officers involved in the case; statements from witnesses, if any, and the complainant; any written statements made by the accused; any record of interview, whether signed or unsigned, conducted between the accused and the police; photos; and other relevant documents. The statements made by the police officers generally gave a fairly complete picture of the police version of the events preceeding the accused's first appearance in court, including the time and place the accused was apprehended and/or questioned, when the accused was cautioned, whether any incriminating objects or substances were found in the accused's possession, whether any verbal admissions were made, and finally, the circumstances under which any record of interview was conducted. Whilst the accused may have disputed this account at the committal proceedings or the trial, the police statements at least gave "the version of the investigation that the police are prepared to reveal to the outside world."[17]

Once a defendant has been committed for trial a Crown Prosecutor reads the depositions taken at the committal hearing and reviews all the evidence in order to determine whether the case should go to trial, and if so, the offence or offences for which the accused should be tried. In some of the sample cases the accused was indicted for offences slightly different to those in respect of which he or she was committed.[18] In all the trial cases and in a substantial proportion of the plea-guilty cases the files contained the Crown Prosecutor's reasons for "finding a bill" and for the form of indictment.[19] If the case is to proceed to trial a "brief to prosecute" is prepared and this brief was usually also in the file. The brief contained the

depositions, witness statements, notes as to the nature of further inquiries which were to be conducted prior to the hearing and, on occasions, observations as to the possible weaknesses in the Crown case.

3. Methodological Limitations

Aside from the potential sources of error inherent in relying on the sampling method,[20] there are some specific limitations relating to the nature of the research which should be noted at the outset.

(i) Information Not Contained in the Files: The files did not always contain all details of the criminal investigation process. In the first place, it was frequently not possible to ascertain whether the accused, when at the police station prior to being charged, was under formal arrest or had "voluntarily" accompanied the police to the station for the purpose of answering questions.

Secondly, it was often difficult to ascertain why the accused was first suspected by the police. In some cases it was obvious: where, for example there was an eyewitness who knew the name of the accused or who had taken down the registration number of the motor vehicle owned by the accused and used in the commission of the crime. Sometimes the accused had been apprehended prior to leaving the scene of the crime as, for instance, where the police had been notified of a possible break and enter by a neighbour and arrived prior to the accused's leaving the premises. Finally, in a small proportion of cases the accused voluntarily presented himself or herself at the police station. Nevertheless, there still remained a number of cases in which there was no clear explanation of why the police sought to interview the accused.

In such cases the police statement merely said that they went to interview the accused "as a result of information received". Whilst it is generally assumed that a number of arrests for drug related crimes are made pursuant to "tip offs" by informants the files gave no clue as to how frequent an occurrence this is. The one exception to this was a trial case in which the Crown successfully claimed privilege in respect of documents, the contents of which "could give the defendant or anyone in the business of organising crime a pretty shrewd idea of where the police information was obtained or what the source of police information was."[21] In non-drug related cases, particularly in a number of 51A cases involving charges of break, enter and steal, it was even more difficult to imagine why the accused was first suspected by the police. Furthermore, even when the reason was apparent, the police statements rarely indicated what other information they had in their possession prior to questioning the accused. However, where confessional evidence was contested at the committal hearing or the trial, the extent of police knowledge at the relevant time sometimes emerged during cross-examination of the police witnesses.

Finally, in 51A cases and plea-guilty cases it is possible that there was additional evidence against the accused, which was not contained in the "hand-up brief" or adduced at the committal hearing, which the police had or had access to and could have used if the case had gone to trial. For example, in one 51A case, subsequent to the accused making a statement to the police in relation to a break and enter, the police informed him that his fingerprints had been located at those premises. Aside from this, however, there was no other indication that such fingerprint evidence had been obtained. It is therefore possible that in other cases this type of

evidence was not mentioned in the hand-up brief. If, on the other hand, the police in the above case did not in fact find the accused's fingerprints at the scene it would appear that the accused was induced by a false representation to make a full confession to a second break, enter and steal.[22]

(ii) Missing Files: The list of 51A cases and plea-guilty cases compiled for the six week period contained 132 file references. All but 19 of these files were located and read. Seven files were simply missing without explanation; 11 files had been removed because the person had been called up for breach of recognizance; and in one case an appeal, presumably against the severity of the sentence imposed, had been lodged. This means that the actual sample may contain a slight under-representation of cases in which bonds or relatively short custodial sentences had been imposed. During the research period a number of the other files which were originally missing were subsequently returned to the filing system. It is therefore likely, if the time available for the reading of files was extended beyond a four month period to, for example, 6 to 8 months, that nearly all the files would be available for reading at some stage.

TABLE 1. ACTUAL SAMPLE - DISTINCT DEFENDANTS DEALT WITH X PRINCIPAL OFFENCE

Actual Sample-Outcome	Forge, Utter, False Pret., Untrue Rep.	Larceny, Receiving	Larceny (M.V.)	B.E.S.	Assault, Malicious Wounding	Malicious Damage to Property	Drug: Supply, Import	Robbery, Armed Robbery	Escape	Driving Offences	Other	Total
Plea Guilty	13	13	13	25	16	1	13	13	3	3	6	119
Trial-Guilty	1	1	-	2	2	1	3	3	-	-	1	14
Total Convicted	14	14	13	27	18	2	16	16	3	3	7	133
Trial - Not Guilty	1	-	2	3	2	-	1	-	-	1	-	10
Trial-Hung/ Mis-trial	-	-	-	-	2	-	-	-	-	1	1	4
TOTAL # DEFENDANTS	15	14	13	30	22	2	17	16	3	5	8	147
%	10.2	9.5	10.2	20.4	15.0	1.4	11.6	10.9	2.0	3.4	5.4	100%

TABLE 1a. OFFENCE CATEGORIES - COMPARATIVE DATA

Source	Forge, Utter, False Pret., Untrue Rep.	All Larceny, Receiving, B.E.S.	Assault, Malicious Wounding	Malicious Damage to Property	Drug: Supply, Import	Robbery, Armed Robbery	Escape	Driving Offences	Other	Total
Intended Sample %	10.8	36.1	17.7	2.3	11.4	10.8	1.7	4	5.2	100
Actual Sample %	10.2	40.1	15.0	1.4	11.6	10.9	2.0	3.4	5.4	100
A.B.S - Higher Courts %	11.9	36.0	18.2	3.4	6.1	10.6	4.3	7.1	2.4	100

Note: * For a more detailed breakdown and explanation of terms used see Table A (Appendix)

Some indication of the validity of the sample may be revealed by a comparison with the information provided by the Australian Bureau of Statistics for Higher Criminal Courts in N.S.W. in 1979. Table 1a reveals that the frequencies of the offence categories in the actual sample are similar to those recorded by the A.B.S. The table includes all defendants dealt with, whether they pleaded guilty or not guilty and, in relation to those pleading not guilty, irrespective of whether they were convicted or acquitted. Although the table suggests that the sample is a reasonably accurate reflection of the total number of cases dealt with in the District Court, it does not reveal the full extent of the difficulties caused because of missing files relating to trial cases. The proportion of such files not available for reading was unfortunately higher than was anticipated: files for 9 of the 37 trial cases were missing, 4 involving cases in which the accused was convicted, 3 involving accused who were acquitted and 2 cases where there was a mistrial or a hung jury. For 3 files it was not possible to ascertain the reasons for their absence from the storage system; in 2 cases, where the accused had been convicted, the files had been sent to the Appeals Section, the accused having lodged grounds for appeal against their conviction or sentence; a further 3 files were being reviewed by the Under Secretary of Justice; and in the final case the defendant had been called up for breach of recognizance.

The following tables indicate that the overall statistics which the actual sample yielded are generally in conformity with the pattern revealed by the A.B.S. statistics. Nevertheless, the relatively small size of the actual sample of trial cases, being less than 30, means that with regard to many matters generalizations cannot confidently be made. In relation to some points, however, the results are so overwhelming[23] that it is

felt that the cases are likely to be indicative of general trends or patterns. Nevertheless, the size of the sample should be borne in mind when reading the tables set out immediately below and any subsequent tables which relate to trial cases.

TABLE 2. ALL DISTINCT DEFENDANTS X PLEA

Source	Plea: Guilty		Plea: Not Guilty		Total Defts	
	#	%	#	%	#	%
Intended Sample	138	78.9	37	21.1	175	100
Actual Sample	119	81.0	28	19.0	147	100
A.B.S. Statistics[24]	2989	81.4	684	18.6	3673	100

Table 3. TRIALS - VERDICT GUILTY OR NOT GUILTY

Source	Guilty		Not Guilty		Total Defts	
	#	%	#	%	#	%
Intended Sample	18	58.1	13	41.9	31	100
Actual Sample	14	58.3	10	41.7	24	100
A.B.S. Statistics	(Not Available)					

Note:

* There were, in addition, 6 "Hung" (intended sample) and 4 "Hung" (actual sample) trial cases.
* "Guilty"- all trials in which accused found guilty of one or more offences. "Not Guilty" - not guilty to all charges.

For a more detailed breakdown of jury verdicts see Table 12.

TABLE 4. ALL DISTINCT DEFENDANTS X CONVICTION RATE

Source	% of all defendants convicted
Intended Sample	92.3
Actual Sample	93.0
A.B.S. Statistics [25]	91.3

Note: * Excludes Mistrials/Hung Trials.

(iii) Specific Problems Relating to the Trial Cases: Aside from the problem of missing files which was encountered with respect to both the trial cases and, to a lesser extent, the cases where the accused pleaded guilty, there remain two further methodological difficulties associated with the trial cases. The first problem also relates to missing data, whilst the second concerns difficulties in systematically presenting the data in summarised tabulations which are both useful and not misleading.

This first difficulty arose because of the absence of all or most of the court transcripts for 11 of the 28 trials. In some further files the transcripts did not include the last day of the trial. The Court Reporting Branch does not usually transcribe the last day unless the case goes on appeal or is required for subsequent proceedings, such as where the victim seeks compensation. The absence of transcripts for the last day did not present significant problems in the cases where it was clear that both the evidence for the Crown and the defence had been presented and only the judges' summing-up remained to be given on the last day. In some of the cases, however, at the conclusion of the second last day it appeared that the case for the defence had not closed. This meant that the sample,

already 25% smaller than the intended sample, did not provide full details of the evidence relied upon by the defendant. Although the general impression gained from reading the trials where there were complete transcripts was that the number of witnesses called by the Crown greatly outnumbered the number of defence witnesses[26], it is unfortunately not possible to give numerical data which could be regarded as representative of all District Court trials. Nor is it felt that any meaningful guidance would be obtained by presenting a categorisation of the defence witnesses for those trials where there were complete transcripts. It was originally intended that the number of prosecution and defence witnesses for all the trials would be compared and that the witnesses for the defence would be classified according to whether they were a character witness, an alibi witness, an expert, an accomplice or an eyewitness.

The unavailability of court transcripts for 11 trials was even more worrying. Four of these trials resulted in a guilty verdict and in the remainder the accused was acquitted of all the charges against him or her. Because of staff shortages and associated problems, the Court Reporting Branch does not usually transcribe the proceedings of "short trials" generally not lasting longer than 2 days, unless counsel so requests.

The files for such "short trials" contained the depositions and the prosecutor's trial brief, which usually indicated the nature of the evidence which would be relied upon by the Crown and the witnesses which were likely to be called. However, it was more difficult to ascertain what the defence case would be. Rarely did the depositions give more than a general indication although in one case, in which the accused was subsequently acquitted, a notice of alibi had been filed. Fortunately, however, where the accused had made a statement from the dock a copy of this was usually included in the file. Furthermore,

there was a list of the exhibits tendered at the trial and so it was at least possible to know the nature of the physical evidence relied upon by the Crown or the defence. In particular the list revealed what, if any, written confessional material was admitted. Whether the Crown possessed such written material was ascertained by reading the prosecutor's brief, which also contained a copy of any such document. In only one of these cases, however, is it known whether the documentary evidence was tendered without objection or was admitted subsequent to a voir dire hearing. In this one case additional information was obtained from the instructing solicitor for the accused because it was apparent, from reading the file, that the case was of particular interest with respect to a number of issues relating to the admissibility of confessional evidence. Whilst the Court Reporting Branch may have anticipated that this case would be a "short trial" it is surprising, once it emerged that the trial would run for several days, that no part of the trial was transcribed. The trial lasted 6 days and no doubt would have continued for several more days if the accused had not changed his plea to guilty. This case, Trial (6) is discussed further in Section D.26a

Even where the files were complete, a second methodological problem emerged. Although a reading of the Court transcripts revealed the nature of the evidence relied upon by the Crown and the defence it is not possible to recapture the atmosphere of the trial, or to make a meaningful assessment of the credibility of the various witnesses in the absence of blatant inconsistencies, unless the witness admits under cross-examination to lying. Neither of these circumstances occurred in any of the trials read. This limitation was recognised at the outset and, accordingly, it was not intended that a particular jury verdict or a ruling made by the trial judge would

be evaluated by reference to whether it appeared perverse or justifiable on the evidence presented.[27] It was nevertheless felt that it would be useful to examine the nature of the evidence relied upon by the Crown and the accused, the respective weaknesses of each party's case and the "in court" treatment of any confessional evidence. For example, where confessional evidence was challenged by the defence observations were made of the strength of the Crown case apart from such evidence. However, unless the confessional material was the only evidence against the accused, it was not possible to give a definite answer to the question whether the Crown would have failed if such confessional evidence had not been before the jury. Nor would the classification of evidence simply by reference to categories (such as fingerprint evidence, identification evidence, forensic evidence, circumstantial evidence, confessional evidence or evidence as to possession or ownership of an incriminating object) greatly assist. Such quantitive analysis not only fails to consider the qualitative dimension but also the extent to which such evidence was relevant and/or inconsistent with the case for the defence. For example, in a malicious wounding case the witnesses for the Crown included the complainant, a medical practitioner, three police officers, persons who had witnessed an earlier verbal disagreement between the accused and the complainant and one witness who saw the two men "scuffle". There was evidence as to the nature of the complainant's injuries and the likely way they were caused, circumstantial evidence, confessional evidence and identification evidence. However, the accused did not challenge the medical evidence nor that he and the complainant scuffled on the ground. The accused's version was that the complainant had the knife and the first thing he knew of the complainant's injuries was when, during the scuffle, he observed that the complainant was bleeding; the inference being that the latter accidently stabbed himself or fell on the knife during the scuffle. The statements

made to the police were not inconsistent with this version of the incident. Indeed, the only Crown evidence inconsistent with the accused's account was the evidence of the complainant who stated that the accused produced the knife and perpetrated the stabbing. The difficulties of classifying and presenting this information in table-form are obvious.

Nevertheless, appellate courts are regularly required to consider and assess, by reference to the court transcripts, the weight to be attached to particular items of evidence and the relative strength of the Crown case. Whilst, therefore, it is not possible to present empirical data to support some general observations relating to the trial cases which are made in the following discussion, it is felt that such comments are not lacking a factual basis. Furthermore, the trial cases are relied upon for providing concrete examples which support or contradict the conclusions of those who are critical of the present rules of evidence and trial procedures generally. Whether a sufficiently large proportion of cases tending to support a particular viewpoint, and therefore providing an indication as to the appropriateness of various reform proposals, would be revealed in a more extensive survey cannot be predicted. Nevertheless, where recurring themes emerged it would be reasonable to expect that these patterns would also emerge in a larger study. Furthermore, in so far as some of the results of the study lend support to the critics, this fact certainly indicates that a more extensive study would be justified.

(iv) Six Week Period: Because the study was restricted to a six week period and because of the method for allocating criminal business amongst the various District Court judges, not all of the judges were "represented" in the sample cases and the workload, as between the judges who did sit on finalised

cases, was not evenly distributed. In so far as a particular judge may influence conviction rates and sentencing patterns,[28] there may therefore be a bias in some of the results of the present study. For example, the willingness of a judge to direct that the jury acquit the accused will have a bearing on the conviction rate. Similarly, the rulings of the trial judge as to the admissibility of particular evidence and his or her summing up will also generally influence the jury. Finally, it has been suggested that the general level of competence displayed by the judge in handling the trial may also be a relevant factor.[29]

Nevertheless, in so far as the conviction rate for the sample was similar to that recorded by the A.B.S. (Table 4), the bias is not likely to be significant. If a larger sample was undertaken it would be possible to ascertain the extent, if any, to which particular judges influence the statistics, and, in particular, the frequency with which confessional evidence is rejected, the directed-acquittal rate, the conviction rate and general sentencing patterns.

(v) Definitional Problems: The value of the empirical data presented in the tables is largely dependent upon the adequacy of the classifications and definitions. The notes which are included with the various tables hopefully are adequate to explain the terms used and the manner in which particular cases were categorized. Nevertheless, as with all rigid classification schemes, on occasions there were cases which did not obviously fall within any of the categories or which appeared almost equally appropriate for classification under two heads. Fortunately, these "borderline cases" were relatively rare.

Throughout this paper reference will be made to "confessions" and "admissions" made by the accused to the police.

No attempt is made to draw a qualitative or quantitative distinction between the two terms and for the purposes of this study they are treated as synonymous. [30]Some studies have regarded all statements made to the police as "confessions".[31] However in the present study only potentially damaging statements are treated as admissions or confessions. Although the substantial proportion of confessions in the study cases did involve a direct admission of guilt, a number of statements of a less incriminating nature and perhaps capable of being construed in a manner consistent with innocence, were also regarded as amounting to admissions. For example, the following were treated as damaging admissions: where the defendant made inconsistent statements as to his or her whereabouts on the day in question; where he or she, whilst blaming another person or giving a version which, if true, would provide a good defence or otherwise purporting to exonerate himself or herself, gave the police specific details of the circumstances relating to the alleged offence. Therefore, in the malicious wounding case discussed previously,[32] the record of interview signed by the accused was regarded as confessional material because in it he gave details of the scuffle between himself and the complainant and in a number of ways limited the manner in which the Crown evidence could be challenged. It would have been difficult, for example, for him to have relied on the defence of self-defence at the trial. Furthermore, in cases of this nature, the defendant's explanation may subsequently be shown to be inconsistent with certain "indisputable" facts. If, for example, the accused when interviewed had claimed that at no stage had he touched the knife and it was subsequently revealed that a number of the accused's fingerprints were found on the knife, the accused's version would require further explanation. In the absence of a convincing explanation a jury would be likely to conclude that the accused had lied to the police in order to hide his guilt.

Mere denials were not treated as confessions. Once again, however, a suspect may make a damaging statement in the course of denying any knowledge of, or involvement in, the relevant offence. This occurred in one 51A case in which the accused, in the course of denying that she knew anything about a sum of money taken from a hotel room said, "I didn't take the $900". The police evidence was that at no stage during the interview had they told the accused how much money had been stolen.

4. Characteristics of the Sample

The following tables provide a general overview of the characteristics of the cases and defendants which were included in the actual sample. In some instances a more detailed table is included in the Appendix. Aside from the general statistics there is an analysis of the trial cases and the relationship between the decision to plead guilty and specific defendant characteristics.

TABLE 5. DISTINCT DEFENDANTS DEALT WITH

Outcome	Intended Sample	Actual Sample
Plea of Guilty	138	119
Trial-Guilty	18	14
Trial-Not Guilty	13	10
Trial-Hung/Mistrial	6	4
Total Defendants	175	147

Note: * Defendants who pleaded guilty (actual sample):

87 - 51A Cases

24 - Plea Guilty to "Full" Indictment

8 - Plea Guilty to Lesser Offence(s) - accepted in full discharge of indictment.

* Hereafter all tables will relate to actual sample unless otherwise stated.

TABLE 6. PLEA X TOTAL NUMBER OF OFFENCES CONVICTED OF

Actual-Sample Outcome	Forge, Utter False Pret., Untrue Rep.	Larceny, Receiving	Larceny (M.V.)	B.E.S.	Assault, Malicious Wounding	Malicious Damages to Property	Drug: Supply Import, Possess	Robbery Armed Robbery	Escape	Driving Offences	Other	Total
Plea of Guilty	51	20	26	61	22	2	19	14	5	7	10	237
Trial-Guilty	2	1	-	6	2	4	4	4	-	-	1	24
Total Convictions	53	21	26	67	24	6	23	18	5	7	11	261

Note: * A number of defendants were convicted of multiple offences; 133 distinct defendants were convicted of 261 offences: 119 defendants pleaded "guilty" to a total of 237 offences and 14 defendants who pleaded "not guilty" were found guilty of 24 offences.

* Table 7 provides a more detailed analysis of the number of offences of which distinct defendants who pleaded guilty were convicted.

(i) Plea Guilty of 51A Cases

The 113 files retrieved dealt with 119 defendants who pleaded guilty and had their cases finalised in the relevant period;[33] in 6 files the documents relating to 2 distinct defendants were included; in 1 file 3 distinct defendants were dealt with; and in 2 cases there were 2 files with respect to the same defendant which related to the same incident and relied on substantially the same evidence. The sample covered a broad range of indictable offences and over 40% of defendants (48 distinct defendants) were convicted of more than one offence (Table 7). The sentences imposed ranged from the least severe, such as a bond or a bond and a fine, through to lengthy custodial sentences including one in excess of 10 years imprisonment. More specifically, 54% of these defendants received a bond or a bond and a fine; 4% were ordered to serve periodic detention; 42% received custodial sentences[34], over half being sentenced to a term of imprisonment of 2-5 years.[35]

TABLE 7. 51A AND PLEA-GUILTY DEFENDANTS X NO. OF OFFENCES (Convictions)

	Defendants	
# Offences Convicted of	#	%
1	71	59.6
2	23	19.3
3	4	3.4
4	12	10.1
5	4	3.4
6	2	1.7
7	-	-
8	1	.8
9	-	1.7
10	2	1.7
Total Defts Convicted	119	100.0
Total Offences of Which Convicted	237	

(ii) Characteristics of the Defendants and the Decision to Plead Guilty

There are a number of possible factors which may influence the plea-guilty to plea-not guilty rates. The following tables give both the general information relating to bail and the age, sex and criminal history of all the defendants in the sample as well as attempting to determine whether any of these factors may be relevant to the frequency of guilty and not guilty pleas. It has already been seen that the overwhelming proportion of defendants (81%) plead guilty (Table 2). Although the following statistics, for example, suggest that young defendants and defendants over 60 years of age were more likely to plead guilty[36], overall none of these factors appeared to make an appreciable difference. Indeed some of the results suggest the contrary to what one would expect: 21% of defendants

committed in custody pleaded not guilty whereas only 17.6% of those on bail elected for trial.[37] It is therefore possible that the sample is not representative of all defendants appearing in the District Court and once again it is necessary to stress that these figures should be approached with caution, particularly in view of the fact that in some sub-categories there were only a very small number of defendants. A larger survey could not only more accurately determine whether there is a causal link between any of these factors and the decision to plead, but also whether there was any further correlation between 51A and other plea-guilty cases. Finally, the following results are to be contrasted with those in Table 19,[38] where the nature of the confessional evidence against the accused is compared with the frequency of defendants pleading guilty or contesting the case. In the sample, whilst there may be a host of complex factors operating,[39] it therefore appears that the single most important factor was the type of confession or admissions allegedly made by the defendant to the police prior to being charged.

TABLE 8. AGE X PLEA

Age Category	Total		Pleaded Guilty	Pleaded Not Guilty	Proportion of Age Category Pleading Guilty -%
	#	% of all Defts	#	#	
less than 18 years	5	3.6	5	0	100.0
18-21 years	44	31.4	38	6	86.4
22-29 years	47	33.6	38	9	80.8
30-39 years	27	19.3	23	4	85.2
40-49 years	11	7.8	9	2	81.8
50-59 years	5	3.6	4	1	80.0
60 years and over	1	.7	1	0	100.0
Total	140	100.0	118	22	84.3
Not on File	7	-	1	6	-
All Defendants	147	-	119	28	81.0

TABLE 9. SEX X PLEA

Sex	Total #	Total % of all Defts	Pleaded Guilty #	Pleaded Not Guilty #	Proportion of Male/Female Pleading Guilty -%
Male	135	91.8	109	26	80.7
Female	12	8.2	10	2	83.3
All Defendants	147	100.0	119	28	81.0

TABLE 10. PREVIOUS CONVICTIONS X PLEA

Previous Convictions	Total #	Total % of all Defts	Pleaded Guilty #	Pleaded Not Guilty #	Proportion of Category Pleading Guilty -%
None	40	28.2	35	5	87.5
One (no gaol)	9	6.3	6	3	66.6
One (gaol)	-	-	-	-	-
1-5 (no gaol)	25	17.6	20	5	80.0
Greater than 5 (no gaol)	18	12.7	17	1	94.4
1-5 (some gaol)	6	4.2	3	3	50.0
Greater than 5 (some gaol)	44	31.0	37	7	84.1
Total	142	100.0	118	24	83.1
Not on file	5	-	1	4	-
All Defendants	147	-	119	28	81.0

TABLE 11. BAIL X PLEA

Bail/In Custody	Total		Pleaded Guilty	Pleaded Not Guilty	Proportion of Category Pleading Guilty -%	
	#	% of all Defts.	#	#		
Bail for entire period	77	52.4	62	15	80.5	82.4
Bail prior to plea	8	5.4	8	-	100.0	
Gaol for entire period	57	38.8	45	12	78.9	79.0
Gaol prior to plea	5	3.4	4	1	80.0	
All Defendants	147	100.0	119	28	81.0	

Note:

* "Bail prior to plea" - where the defendant was granted bail but, after having pleaded, his or her bail was revoked and thereafter was remanded in custody.
* "Gaol prior to plea" - in 5 cases the defendant was granted bail after entering a plea.
* In 47.6% of cases the defendant was remanded in custody for some or all of the period of case disposition. This excludes cases where the defendant spent 1-2 nights in the cells prior to his or her first appearance in court.

(iii) Trial Cases

Of the 28 defendants in the actual sample who pleaded not guilty, 14 were convicted of one or more offences and 10 were acquitted of all the charges against them. Although, strictly speaking, defendants in trials in which the jury was unable to agree or was otherwise discharged prior to reaching a verdict did not have their cases "finalized", 4 such cases are included in the sample. The sentences imposed on the defendants convicted following a plea of not guilty are to be contrasted with the cases in which the defendant pleaded guilty. Only 3 of the 14 persons who were convicted subsequent to a verdict of guilty received a bond or a bond and a fine; the remainder received custodial sentences ranging between 9 months and 15 years. A brief summary of the facts, the evidence relied upon at the trial and the outcome for selected trial cases is included in the Appendix. The following table provides a more detailed analysis of the nature of the outcome of the trial cases.

(a) Outcome

TABLE 12 TRIAL CASES - DEFTS X OUTCOME

Outcome	Actual Sample		Intended Sample	
	#	%	#	%
Convicted	14	50.0	18	48.6
Guilty as Charged	7			
Guilty of Lesser Offence	2			
Mixed Verdict	2			
Changed Plea to Guilty	3			
Acquitted of All Offences	10	35.7	13	35.1
Not Guilty by Jury	5			
Not Guilty by Direction	5			
Aborted Trials	4	14.3	6	16.2
Hung	3			
Mis-trial	1			
Total	28	100.0	37	100.0

Note:[40]

* "Guilty as Charged" - where defendant was found guilty of all the charges in the indictment; includes cases where indictment included two offences "in the alternative" and defendant found guilty of the more serious offence.
* "Guilty of Lesser Offence" - where the conviction related to a lesser charge, whether included in indictment "in the alternative" or otherwise.
* "Mixed Verdict" - where defendant was found guilty of some of the offences as charged and acquitted of others.
* "Changed Plea to Guilty" - where the trial did not run its full course because during the trial the defendant changed his/her plea to guilty and jury subsequently returned a verdict of guilty.[41]
* "Not Guilty by Jury" - where trial ran its full course and jury returned a verdict of not guilty to all charges.
* "Not Guilty by Direction" - where the trial judge directed the jury to return a verdict of not guilty to all charges. The reasons why this occurred included the failure of vital Crown witnesses to appear or where otherwise the evidence of the Crown was "tenuous."[42]
* "Hung" - where the jury were unable to agree, that is, reach a unanimous verdict.[43] In one case the defendant was subsequently retried and convicted and in 2 cases no further proceedings were taken.
* "Mistrial"[44]- the one trial which aborted was due to a Crown witness making a gesture in court (seeking to write address rather than state orally) suggesting he was afraid of the defendant. At the retrial the defendant was found not guilty.

(b) The Crown Case

Sample: Note that the following discussion and tables are based on information from 15 trial cases only. There are a variety of reasons why the data from other trials is not included; for example, where the accused changed his or her plea, or the trial was aborted, prior to the close of the Crown case. However, the major reason is missing data caused by an absence of all or part of the transcripts.[45] This problem was more significant when it came to analyzing the number of witnesses and the nature of the evidence relied upon by the defence. The general picture appeared to be that the defence called far fewer witnesses and, indeed, frequently the entire defence case was based on the evidence given by the accused, or his or her statement from the dock.[46] Occasionally such evidence or statement was supplemented by character witnesses. It appears that in only one case was there an alibi witness. It is not, however, possible to present a detailed analysis of each defence case. Although the above observations appear to be consistent with some U.S. statistics,[47] a larger survey may prove them to be inaccurate.

The average number of witnesses testifying for the Crown was 7.6. Naturally, however, there was a wide degree of variation, the number of witnesses ranging between 4 and 12. The kinds of witnesses who gave evidence is summarised in the following table:

TABLE 13. TRIALS X TYPE OF CROWN WITNESS[48]

Type of Witness	% of All Trials
Police	100.0
Victim - eyewitness	53.3
Victim - not eyewitness	26.7
Other eyewitness	40.0
Expert	53.3
Accomplice	-
Other	46.7

Note: * In most trials there was more than one type of Crown witness and, hence, the figures in the second column add up to more than 100%.[49]

* In only one case was the evidence of the expert "contentious".

* The evidence of an eyewitness did not necessarily amount to "identification" evidence. Nor was his or her evidence necessarily inconsistent with the defence case.

The Crown therefore most frequently relied upon the existence of police witnesses: Table 13 reveals that in all the sample cases there was police evidence. Furthermore, nearly 80% of all police witnesses gave evidence of alleged admissions made by the accused; the remainder giving evidence of, for example, arrest, motor vehicle examination, or a breath analysis test. The following table underscores the importance of police evidence: 64.4% of all Crown witnesses were police officers.

TABLE 14. FREQUENCY OF TYPE OF CROWN WITNESS

Type of Witness	% of all Witnesses	
Police - evidence of confession	49.6	64.4
Police - other	14.8	
Victim - eyewitness	6.9	
Victim - not eyewitness	3.5	
Other eyewitness	8.7	
Expert	6.9	
Accomplice	-	
Other	9.6	
Total	100.0	

(c) Did the Accused Give Evidence?

The accused is a competent but not compellable witness for the defence.[50] The accused has three options open to him or her: to say nothing;[51] to make an unsworn statement from the dock[52]; or to enter the witness box and give sworn evidence and thereby be subject to cross-examination.[53] In its Eleventh Report, the Criminal Law Revision Committee was critical of both the right to silence and the right to make an unsworn statement.[54] In the sample trial cases no accused exercised this former right, although a substantial proportion did elect to make an unsworn statement.

TABLE 15. ACCUSED AS WITNESS

Option	Defendants	
	#	%
Silence	-	-
Gave Evidence	3	10.7
Unsworn Statement	14	50.0
Not Relevant		
- Directed Acquittal	4	28.6
- Changed Plea	3	
- Mistrial	1	
Not on File	3	10.7
Total	28	100.0

(d) Bail

The frequency with which defendants pleading not guilty were granted bail is dealt with in Table 11. Several studies suggest that the likelihood of acquittal and the sentences imposed upon conviction are influenced by whether the defendant was granted bail prior to trial.[55] Whilst the present study does not attempt to analyse patterns of sentencing, the following table is consistent with the first of these two propositions.

TABLE 16. BAIL X OUTCOME

Immediately Prior To Trial	Total		Convicted	Acquitted	Hung	Proportion of Group Convicted - %
	#	%	#	#	#	%
Bail	14	51.9	4	7	3	28.6
Gaol	13	48.1	10	3	-	76.0
All Defendants	27	100.0	14	10	3	51.9

Note: * Excludes 1 mistrial where defendant was on bail.

C. CONFESSIONAL EVIDENCE - LEGAL RULES

1. The Importance of Confessional Evidence

In the following discussion of the legal rules associated with confessional evidence there are several references made to particular study cases. In a subsequent section[56] a more systematic and general analysis of the incidence and nature of confessional evidence in the study cases is presented. For present purposes it is sufficient to note that the police were remarkably successful in obtaining confessional material: in over 96% of the cases there was evidence of oral, written or oral and written admissions. In most of the cases where the defendant pleaded guilty the confessional material was not the only evidence relied upon by the Crown. Nevertheless in some plea cases and in a high proportion of trial cases there was little or no other independent corroborative evidence or such evidence was weak, either because of its inherent ambiguity or unreliability. In particular, in several of the 51A and plea-guilty cases where the defendant was charged with multiple counts of break, enter and steal and/or larceny of a motor vehicle the Crown may have had a relatively strong case on one count but with respect to the remaining counts the confessional evidence was the only evidence against the defendant.

An examination of the law in this area illustrates the potential importance of such evidence. The admissibility of confessional material, being an exception to the hearsay rule, is based on the assumption that "when a confession is well proved it is the best evidence that can be produced."[57] Accordingly evidence of self-incriminatory statements, whether written or oral,[58] is sufficient to support a conviction.[59] Furthermore, there is no rule of law or practice which requires a trial judge

to warn a jury of the dangers of relying on evidence of confessional statements which are not supported by independent corroborative evidence[60]:

> "It is for the jury to determine whether the confession when admitted in evidence is in fact a confession of the particular offence charged. If a confession is subsequently repudiated it is for the jury to decide what degree of credit should be given to the original confession and the subsequent repudiation, respectively." [61]

Nor should the trial judge instruct the jury that before they give the confession any weight at all they should consider whether it is voluntary and admissible.[62] However, as occurred in two of the trial cases[63], where the only significant evidence against the accused is confessional evidence which is equivocal or ambiguous the trial judge may direct that the jury return a verdict of not guilty on the basis that the evidence is so tenuous that it would be unsafe or unsatisfactory to go to the jury. [64]

If an accused is convicted in such circumstances an appellate court may, because of the "quality" of the confession, regard it as dangerous in the administration of justice to allow the verdict of guilty to stand.[65] In R v Pattinson [66], for example, in quashing the conviction against the appellant, the English Court of Appeal reminded itself of the reservations expressed by Cave J in R v Thompson. [67] The court then went on to make the following caustic observations as to the police version of the facts in the case before it, concluding with the comment that it did "not like this kind of evidence"[68]:

> "This man (the appellant) had already been charged. He was due to come up before the magistrates. He had made no admissions of any kind.... There was ample

> suspicion, but not enough evidence to justify a committal for trial. In these very unusual circumstances luck seems to have been on the side of the prosecution because they were suddenly presented with evidence which, if true and reliable, amounted to a confession of guilt.
>
> This is not the first time in the history of the administration of justice in this country that police officers have arrested a man and then shortly before he was due to appear in court he has of his own volition supplied the evidence which was singularly lacking against him until that moment." 69

More recently, the N.S.W. Court of Criminal Appeal, in R v Smith allowed an appeal and quashed a conviction of wounding with intent to murder on the basis that it would in all the circumstances be unsafe or dangerous to allow the verdict of guilty to stand. The evidence against the appellant was, first, oral admissions allegedly made to the police at the time of his arrest and secondly, identification evidence given by the victim-policeman. Although finding no error on the part of the trial judge, in not withdrawing this confessional and identification evidence from the jury, the Court nevertheless regarded the evidence as "too flimsy"[71] to justify the conviction. Apart from the few short answers which constituted the alleged oral admission, the appellant's attitude on all other occasions, "plainly and vigorously demonstrated"[72], was that he would not answer any questions or make a written statement nor consent to an identification parade. In the course of examining the nature of the confessional evidence, Lee J stated:

> "(T)he alleged brief acknowledgement by the appellant to the arresting police officers of his participation

> in the shooting, followed by his refusal to make any statement or sign any statement is, particularly when advanced against a man whom the police regard as a member of the criminal class, clearly within that class of evidence which has been regarded over many years by judges as evidence having little compelling force. Its nature is such that when it is challenged it calls for support from other evidence before too much weight is to be given to it, and this irrespective of any view one may be inclined to hold as to the credibility of the police giving the evidence." [73]

The sentiments expressed in this passage have, however, not been repeated in subsequent decisions of the Court of Criminal Appeal and generally speaking the court has been reluctant to interfere with the jury's verdict, notwithstanding the fact that the conviction rests on uncorroborated confessional evidence. This has been so where the police knew, prior to the alleged confession, all the facts which were contained in the alleged confession.[74] The suggestion that such police evidence is too dangerous a basis upon which to support a conviction was regarded by Street CJ in R v Burke [75] as "unpalatable and wholly unacceptable."

2. The Exclusionary Rules

When considering whether an alleged confession should be admitted into evidence it is necessary to bear in mind two separate[76], although frequently overlapping, questions: first, whether the evidence fails to satisfy the common law requirements of voluntariness or falls within the terms of s.410 of the Crimes Act, 1900 (N.S.W.); secondly, whether the trial judge should, in the exercise of his or her discretion exclude the evidence of the confessional statement because, although voluntarily made

and therefore legally admissible, it was improperly obtained or otherwise obtained in circumstances which would render its reception into evidence unfair to the accused. The two questions, forming the basis of the "voluntariness rule" and the "discretionary rule", appear to assume that the accused did in fact make the confession. Strictly speaking, therefore, where the accused asserts that the self-incriminatory evidence is fabricated there is no possible scope for the application of these rules. The role of the trial judge where fabrication is relied upon as an alternative to involuntariness and/or discretionary exclusion is, however, less clear. This "alternative pleading" approach adopted by the defence in the course of challenging the confessional evidence is discussed in greater detail in a later section.[77]

In most of the study cases in which the admissibility of the confessional evidence was challenged, in the committal hearing and/or at the trial, the defence relied upon the same circumstances to support submissions of involuntariness and unfairness. Notwithstanding this substantial degree of overlap, the burden of proof differs, at least in law, for the two rules. In every case in which the Crown seeks to adduce evidence of a confession made by an accused it is incumbent upon the Crown to prove, on the balance of probabilities, that the confession was voluntarily made.[78] On the other hand, there is no requirement that the Crown prove that the confession was fairly obtained and if the defence seeks to have the evidence excluded in the exercise of the trial judge's discretion, the submission will fail unless the defence adduces evidence of unfairness or impropriety or unless material which raises such issues appears on the face of the depositions.[79]

In some of the study cases examined, although the defence did not seek to have the confessional evidence excluded, the

defence sought to show, during the cross-examination of the Crown witnesses or, less frequently, by calling their own witnesses that the confession was unfairly obtained or otherwise of dubious probative value. Specific allegations included the following: the accused was questioned immediately after a motor vehicle accident and whilst still in a state of shock; that the accused was withdrawing from heroin at the time of the interrogation; that the police had handcuffed him to a chair for several hours whilst they conducted the interview; that several police punched and slapped the accused and continued to do so until he agreed to participate in a "record of interview".[80]

Similarly, if at the conclusion of the voir dire hearing the trial judge rules that the evidence is admissible the defence can, and usually did in the study cases, lead before the jury the same evidence as was relied upon on the voir dire, or adduce any other evidence relating to the circumstances in which the confession was made. Such facts are relevant to the weight to be attached to the confessional evidence, a question to be considered by the jury.[81] In rare cases, following a consideration of such additional evidence, and notwithstanding the fact that the trial judge had earlier ruled that the confessional evidence was admissible, the judge could subsequently determine to withdraw the confessional evidence from the jury's consideration.[82] This did not occur in any of the study cases.

3. Rationales for the Rules

It is important to try to understand the reasons for the existence of the confessional exclusionary rules. Although perhaps not expressly acknowledged by a trial judge, the ultimate ruling as to the admissibility of the confessional

evidence will reflect his or her view as to the rationale for the rules.

There are at least three possible reasons for excluding evidence of confessions involuntarily given or unfairly obtained. First, although legally relevant, the reliability of such evidence is suspect because improper interrogations are likely to produce untrue admissions.[83] Secondly, it is necessary to ensure, where possible, that the police do not adopt an attitude which is aptly described by the aphorism "conviction at any price" and "the end justifies the means". Accordingly, rules should be developed which impose sanctions upon improper police conduct. Thirdly, the criminal justice system and, in particular, the rules of evidence should not derogate from the principles of the right to silence and the privilege against self-incrimination.[84] A fourth suggested rationale is said to be that the judiciary, desirous of preserving its judicial integrity, will decline to be a "party" to improper or unfair tactics by excluding evidence so obtained.[85] There is, however, little support for this last suggested rationale and, furthermore, its likely impact is difficult to assess.

In applying the exclusionary rules it appears that the dominant concern of judges has been truth and reliability and, more generally, the likely effect of the interrogation on the state of mind of the accused at the time he or she made the confession. Thus, the second and third rationales become irrelevant,[86] or at least assume secondary importance. In some instances there can be little disagreement with this: for example, where the issue of voluntariness arises it is not sufficient for the Crown to prove that the person in authority had not acted improperly nor intended to extract a confession.[87] This, however, is not necessarily inconsistent with there

being an alternative rationale for exclusion which in other circumstances, for example where there has been improper police conduct, assumes prime importance. In other words, the voluntariness rule could consist of various sub-rules based upon different rationales. Nevertheless, with the exception of some recent South Australian decisions[88], it appears that the courts have been preoccupied with the question of reliability, in applying both the voluntariness and the discretionary rules.

Following the decision in R v Hammond [89] the unsatisfactory practice developed of asking the accused during cross-examination on the voir dire whether the confession was true. While the cases did not go so far as to suggest that the confession must be admitted where its truth is revealed in cross-examination of the accused, it is claimed that the question is relevant to assessing whether the accused's version of the interrogation is accurate.[90] The practice appears to again reflect the courts' emphasis on arriving at the truth.

Some recent cases do, however, indicate a shift in attitude. In the recent Privy Council decision in Wong Kam-Ming v R [91] it was expressly held that an accused may not be questioned during cross-examination on the voir dire as to the truth or otherwise of the out of court statement made by him or her. In two of the trial cases the prosecution sought to ask the accused giving evidence on the voir dire whether specific answers given in the respective records of interview were true. In the first case, in conformity with the Wong Kam-Ming decision, the trial judge refused to allow the prosecution to pursue such a line of questioning. In the second case,[92] however, the questioning was permitted notwithstanding the objection by defence counsel. Although His Honour agreed that in many cases such questions would not be allowed he regarded it as permissible in the case before him because of the nature of the challenge

to the admissibility of the record of interview. One of the several grounds relied upon by the defence on the voir dire was that at the time the record of interview was conducted the accused did not understand what he was saying or doing. The judge reasoned that, by virtue of this challenge based on lack of understanding, "if the answer is a true answer... that affects the very onus."

The weight which is accorded to the various rationales becomes increasingly important when considering whether, in a particular case, the discretionary rule justifies exclusion. The judiciary has failed, however, to formulate any clear guidelines as to when the discretion should be exercised. Although few difficulties arise where, on the facts of the particular case, the same conclusion would be reached irrespective of which of the three rationales was relied on, such cases are rare. Difficulties therefore arise where, as is more often the case, the conclusion will differ according to which rationale is given priority by the trial judge. This in part explains why many of the authorities appear irreconcilable.

For example, suppose the police have been guilty of gross misconduct towards the accused but, nevertheless, there is little doubt that the subsequent confession is reliable. To what extent, if at all, should the trial judge have regard to this latter factor when considering whether the circumstances require the exercise of his or her discretion in favour of exclusion? Bray CJ in R v Wright [93] suggests that truth of the confession is of little significance:

> "(T)he situation with regard to impropriety or unfairness must be judged as it existed at the instant of time before the confession was made. Objectionable police methods do not become unobjectionable if they turn out to have been successful in eliciting the truth." [94]

Similarly, in Amad's Case [95] a confession which the accused admitted on the voir dire to be true was excluded because of the improper actions of the police in conducting the interrogation. On the other hand, the High Court in R v Lee[96] accepted that where the impropriety was not likely to result in the making of an untrue confession, this provided a "good reason" for allowing the evidence to be given.[97] Although the High Court stated that the likelihood of truth was not necessarily conclusive, this factor will assume greater significance if, as has been concluded by some judges,[98] the second rationale, repressing improper police conduct, is rejected. In such circumstances improper police practices are only relevant in so far as such conduct affected the state of mind of the accused at the time he or she confessed. Where, for example, the confession is made out of a sense of remorse rather than as a result of the unduly long detention and interrogation, the conclusion would be that no unfairness to the accused would occur by admitting the confessional evidence.[99] However, ascertaining the effect, or likely effect, of the improper conduct on the accused is a difficult task and indeed in some circumstances it may be impossible to evaluate.

An alternative approach, which avoids this difficulty and is not inconsistent with the view that it is not the function of the judge to impose sanctions for improper police conduct,

would be to exclude all confessional evidence which was obtained in breach of the right to silence and the privilege against self-incrimination. A number of recent South Australian decisions[100] indicate that this principle will be rigorously applied in order to ensure that an accused has a "fair trial". The difficulties associated with the "causation test" and the question whether the confession is likely to be true become irrelevant. Adopting this approach, confessional evidence is liable to be excluded, for example, if the accused had been held in custody for the purpose of interrogation for an unreasonable length of time[101] ; if the accused was detained for questioning without being formally arrested[102] ; if the police officer failed to administer a caution at the time when he or she "must have decided" to arrest the accused[103] ; if the interrogation continued after the accused had indicated that he or she did not wish to answer questions[104]; or if after refusing the accused's request to contact a lawyer, the interrogation continued. [105]

4. The Voluntariness Rule.

The classic exposition of the common law voluntariness rule is given by Dixon J in McDermott v The King:[106]

> "If (the accused) speaks because he is overborne his confessional statement cannot be received in evidence, and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out

by a person in authority and the inducement has not been removed before the statement is made." [107]

In addition, and not derogating from the common law rule, [108] s.410(1) of the Crimes Act, 1900 (N.S.W.) provides:

"No confession, admission, or statement shall be received in evidence against an accused person if it has been induced -

(a) by any untrue representation made to him by the prosecutor, or some person in authority; or

(b) by any threat or promise, held out to him by the prosecutor, or some person in authority."

In all the study cases in which the confessional material was challenged on the basis of involuntariness it was argued that the police, directly or impliedly, induced the confession. It is therefore not necessary to embark upon an inquiry as to the precise scope of the phrase "person in authority"; at a minimum it includes "someone engaged in the arrest, detention, examination or prosecution of the defendant." [109]

In determining whether a confession was made voluntarily it appears that both subjective and objective factors may become relevant. A confession may be inadmissible notwithstanding the fact that a reasonable person would not have been induced by the statements or conduct of the person in authority:

"(i)t is true that many of the so-called inducements have have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men and women: they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side."[110]

Nevertheless, the more "unreasonable" the response the more difficult it will be to establish that the confession was made involuntarily. Furthermore, it appears that certain factors will never be regarded as sufficient to render any resulting statement as involuntary. For example, to merely inform a suspect to "tell the truth" is not regarded as a threat even when said by a person in authority.[111] Nor is the use of moral exportation, such as where a police officer says, "Don't run your soul into more sin", sufficient.[112] Nevertheless, if such statements are accompanied by threats, or refer to some temporal benefit or if the manner in which the statement is made suggests that detrimental consequences will follow if the suspect fails to adhere to the "advice", then the conduct will no longer be innocuous and any consequential confession would be rendered inadmissable.[113]

Clearly there is no finite list of statements or actions which will render a confession involuntary and the primary question therefore becomes one of causation, that is, ascertaining the impact of the conduct of the person in authority on the accused's state of mind. Lord Morris' formulation of the test in D.P.P. v Ping Lin [114] emphasizes this need to establish a causal link between the conduct of the person in authority and the confession:

> "(W)as it as a result of something said or done by a person in authority that an accused was caused or led to make a statement? Did he make it because he was caused to fear that he would be prejudiced if he did not or because he was caused to hope that he would have an advantage if he did? The prosecution must show that the statement did not owe its origin to such a cause." [115]

It appears that the s.410(2) presumption, that "(e)very confession, admission or statement made after such representation or threat or promise shall be deemed to have been induced thereby", does not significantly alter the common law position. The sub-section expressly provides that this presumption may be rebutted by the contrary being proven, presumably on the balance of probabilities. In giving judgment on the admissibility of the signed record of interview in Trial (1) Judge Barbour commented, "It is true of course that there is an initial presumption which is written into the section but in the long run, when all the evidence is in, I must make a finding as to whether the causal connection is established." Therefore the Crown could discharge its statutory onus, and similarly its common law onus, by proving that the threat or inducement had been removed or otherwise rendered ineffective by subsequent conduct,[116] some other intervening cause,[117] or through the lapse of time.[118]

The N.S.W. statutory provision does, however, extend the common law rule in so far as untrue representations are capable of rendering a confession inadmissible.[119] This would cover the situation where, for example, the police falsely asserted in the defendant's presence that an accomplice had made a statement which implicated him or her in the crime.[120] This basis of exclusion was relied upon in only two of the study cases, one plea-guilty case at the committal hearing and one trial case on the voir dire hearing. In each case the submission made by the defence was rejected. In the plea-guilty case the solicitor representing the defendant sought to have the signed record of interview, or at least parts of it, excluded. The defendant had been charged with the indecent assault of a female less than sixteen years and common assault. During the

record of interview the defendant was given a copy of the statement made by the complainant, a fourteen year old girl, whereupon the defendant said, "It's all true what she said." During cross-examination the complainant was questioned about the contents of "the" statement and the wording used to describe the incident. Aside from making a number of statements under cross-examination which were inconsistent both with the written statement and her earlier evidence, it emerged that the police had given the complainant considerable "assistance" in writing the statement. The defence submitted that such assistance was not merely limited to paraphrasing, but that the police actually made suggestions to the complainant as to the nature of the event, the subject of the charge. Accordingly, it was asserted that the statement was not the "complainant's statement" and the defendant had been induced to confess by the untrue representation, viz, that the statement had been made by the girl. The magistrate, without giving reasons, rejected this submission and subsequently committed the defendant for trial. Although the complainant's evidence relating to the identification of the defendant, including a detailed description of what he was wearing at the time of the alleged offence, appeared unshakeable, she was a weak witness when it came to describing the assault. She made a number of inconsistent statements and was unclear as to the chronology of the events. The defendant nevertheless pleaded guilty to common assault in the District Court and received a bond. Whilst it is of course speculation, in so far as this plea of guilty to common assault was accepted in full discharge of the indictment it may well be that the plea was "negotiated" with the Crown. As was seen in Table 5 there were 8 plea-guilty cases in which the defendant pleaded guilty to a lesser offence or to some but not all of the charges and this was accepted in full discharge of the indictment. A substantial proportion of these cases, as

well as some of the other plea-guilty cases, may have been the result of plea bargaining.

Prior to leaving the discussion of this plea-guilty case, it is worth noting that, irrespective of whether the representation was untrue, it would appear that the defence could have argued that the procedure adopted by the police during the interview was improper and that, under the discretionary rule, the record of interview should have been excluded. In R v Boyson ; R v Gray, [121] Justice Hunt stated that whilst it was not improper for a suspect to be shown a record of interview made by an accomplice, the correct method of interrogation was to take the suspect through each relevant question and answer step by step rather than seeking his or her comments on the entire record of interview. Presumably this requirement would equally apply to written statements, whether made by a co-accused, the complainant or an eye-witness. In no study case was the procedure envisaged by Justice Hunt adopted. However, although all the cases were "finalized" after R v Boyson ; R v Gray was decided, the actual interrogations occurred prior to this decision. A sample covering more recent cases would reveal whether the practice has since changed.

In the second study case involving an untrue representation [122] defence counsel submitted that the accused had been induced to confess by a false representation made in the presence of, and impliedly adopted by, the police officers.[123] The two police officers had arrived at WHOS Fellowship at Cronulla and "asked" the accused to accompany them back to Bondi Police Station. After the accused indicated that he did not wish to go with them, a director of the Fellowship told the accused that it was in his best interests to go "because the police had a job to do". He later told the accused that he was required to go with the

police. Although Judge Barbour found that these statements incorrectly represented the accused's legal position, and notwithstanding the fact that "the police officers undoubtedly were content to accept the benefit of the accused's wrong impression of his rights without disabusing him of his error", His Honour concluded that the record of interview was not inadmissible on this ground. The necessary requirements had not been established under s.410(1)(a) because "the causal relationships between the making of the representation and the later making of the record of interview is too tenuous to establish the necessary connection." On the evidence the initial presumption in s.410(2) had been rebutted. This untrue representation was, however, one of the considerations which the judge regarded as relevant to the issue whether the evidence should be excluded in the exercise of his discretion. This alternative submission relied upon by the defence is discussed in a later section.[124]

Finally, in addition to the specific categories enumerated in s.410(1), namely threats, promises and untrue representations, a confession is liable to be excluded if it was otherwise obtained in an oppressive manner.[125] As to what constitutes oppression in a particular case will involve a consideration of such factors as the duration of the interrogation, the circumstances of the detention, the provision or otherwise of refreshments and breaks, and the personal characteristics of the person making the statement including a consideration of his or her age, intelligence and "worldly experience".[126] These factors are also relevant to the discretionary rule.

5. The Discretion to Exclude

A trial judge will review the whole of the evidence presented on the voir dire when determining whether facts have been established, on the balance of probabilities, which are of such a nature to warrant the exercise of his or her discretion in the accused's favour. There are many possible matters which will be taken into consideration including the mental and physical health of the accused at the time of the interrogation, whether there has been compliance with the "Judges' Rules",[127] the matters listed immediately above and any other matters "which bear upon the question as to the fairness or unfairness of the interrogation".[128]

It has already been stated that the judiciary has been reluctant to lay down any precise formula for determining when the discretion should be exercised. Nevertheless, it once again emerges that a primary focus of the inquiry will be the state of mind of the particular accused at the time he or she made the confession:

> "It is the mental condition of the accused, when answering, that is the determining factor in deciding upon the admissibility of such evidence. Even without threats or promises on the part of police, if by his confinement or from other circumstances, for example, exhaustion or lack of comprehension, it appears to the presiding judge that he has been subjected to such a degree of moral suasion on the part of the police in whose power he then was that his answers could not fairly be regarded as reliable , then the judge should exclude the evidence. But the mere fact that in answer to questions he makes admissions that operate to his own prejudice does not make such answers inadmissible.

> It is a question of degree in each case, and it is for the presiding judge to determine, in the light of all the circumstances, whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him."[129]

It also appears that the court will have regard to the broad public interest in offenders being brought to trial;[130] but, as Bray CJ noted in Walker v Marklew, [131] "the community also has an interest in the safeguarding of the legal rights and liberties of the citizen". Aside from stating these broad propositions, there is no fixed rule which will be applied when determining whether the evidence was obtained under circumstances of which the Crown ought not to take advantage. Although perhaps a greater understanding of the rule could be achieved by compiling a list of cases in which the question has arisen, it is felt that sufficient analysis is provided by a review of the relevant study cases.[132]

The admissibility of confessional evidence (records of interview) was objected to in 8 trials. In all 7 cases in which a voir dire was held the defence submitted that the record of interview had been given involuntarily, or alternatively, even if voluntary the trial judge should nevertheless exercise his exclusionary discretion. Usually a number of factors were relied upon to support these submissions including alleged police violence, threats or inducements, psychological pressure which brought about an "overbearing of the will" or the accused's ill state of health at the relevant time. In Trial (1) the only case in which the record of interview was rejected, the defence relied on four factors, some of which are discussed elsewhere. It was submitted first, that there was no adoption of the record

of interview as the accused was induced to sign it because of a promise made by the police to give him a gram of heroin. The trial judge rejected the accused's evidence on this point, preferring the evidence of the two police witnesses. The second ground, the making of an untrue representation, has already been discussed. The third ground, which the trial judge also rejected, was that the Crown had failed to discharge its onus of proving voluntariness. The fourth ground, that the circumstances of the case warranted the exercise of the judicial discretion, succeeded. The accused was a heroin addict and on the day the police interviewed him he had been staying at WHOS Fellowship. During his stay there the accused was "physically debilitated" and under heavy medication. The medical practitioner called by the defence on the voir dire stated that the amount of sedatives taken would have meant that at the time the interview commenced the accused would certainly have had a "very markedly clouded consciousness." The trial judge found that the accused had exhibited signs of drowsiness and confusion and that a medical examination should therefore have been given prior to conducting the interview. On this point His Honour said:

> "I do not subscribe to the view that it is unreasonable to expect the police in a situation like the one that presented itself on that day to have a suspect medically examined by a competent medical practitioner before proceeding to the interview stage.... In the sort of situation which prevailed here I am of the opinion that prudence and fairness alike dictated that there should have been an examination of the accused by a medical practitioner.... I am of the opinion that the police have taken an unfair advantage of the situation in which they stood in relation to the accused."

The charge with which the accused had been indicted alleged that he stole jewellery and money from a flat. The entire case against the accused was based on admissions in the record of interview. Accordingly, following the voir dire examination and the rejection of the record of interview the trial judge directed the jury to acquit the accused.

6. Fabrication

In discussing the "in court" treatment of allegedly fabricated confessional evidence it is necessary to distinguish between two different approaches which may be adopted by the defence. The first situation is where the sole ground relied upon, in challenging the evidence of the alleged confession, is that the accused never made such a confession and the police version, together with any documents such as a record of interview,is a fabrication. In the second situation the accused asserts that, in any event, the circumstances of the interrogation and/or the conduct of the police were such that any confessional evidence is rendered inadmissible, it being involuntarily made or falling within the scope of the discretionary rule. Whilst the following discussion treats these two situations separately it is submitted that, in the final analysis, the maintenance of this distinction leads to confusion, semantic difficulties and anomalies.

(i) Fabrication as the Sole Basis of Challenge

In 2 trial cases[133] fabrication was the sole basis relied upon for challenging the confessional evidence. In both cases the confessional evidence consisted of oral admissions allegedly made to the police. As fabrication or verballing is regarded

as raising issues relating to the value or weight of the evidence, a matter exclusively within the province of the jury, the confessional evidence in the trial cases was admitted without objection. Defence counsel, in cross-examination of the police witnesses, before the jury, then sought to show that the police were lying and that no admissions were in fact made by the accused. In such circumstances the defence is not entitled to have a voir dire hearing for the purpose of determining the issue of admissibility or whether the trial judge should, in the exercise of his or her discretion, exclude the confessional evidence.[134] The N.S.W. Court of Criminal Appeal has rejected the following propositions: first, that where the police have prior knowledge of all the relevant material contained in the confessional statement it ought, as a matter of law or in the exercise of the judicial discretion, to be excluded[135]; secondly, and following a fortioria rejection of the first proposition, that the defence is entitled to a voir dire hearing for the purpose of cross-examining police witnesses as to whether they had prior knowledge of the information given in the confession[136]; thirdly, evidence of oral admissions allegedly recorded in the police officer's notebook ought to be rejected where the police fail to provide the accused or his legal advisers with a copy of the notation.[137]

Whilst it is conceded that the voluntariness rule and the confessional discretionary rule as presently formulated and interpreted cannot operate where the sole basis for challenge is fabrication, is there not still scope for the application of the judge's inherent discretionary power which is designed to ensure that an accused has a fair trial? This broad discretionary power is to be distinguished from the specific discretionary power to exclude unfairly obtained confessional evidence. It is submitted that a trial judge could, in the

appropriate circumstances and relying on this inherent power, reject allegedly fabricated evidence on the ground that its admissibility would operate unfairly against the accused,[138] in that its prejudicial influence would outweigh its probative value.[139] Although a number of subsidiary tests have been developed by the courts which to some extent narrow the scope of this broad exclusionary discretion,[140] the English House of Lords in Selvey's Case[141] emphasised that the categories were not closed and that the ultimate criterion is "fairness".[142] Whilst there appears to be little judicial agreement as to the precise method of ascertaining the "prejudicial value" and the "probative value" of evidence,[143] it is submitted that where a trial judge is satisfied, on the balance of probabilities, that the confessional evidence was fabricated, and therefore unreliable, its probative value would be low.[144]

Similar considerations may form part of the basis of the reasoning in White's Case [145] where the South Australian Supreme Court held that the trial judge failed to direct his attention to the relevant question raised on the voir dire. The court rejected the conclusion reached by the Queensland Court of Criminal Appeal in R v Gleeson[146] that "the discretion cannot arise unless a confession has been made, and so the appellant's denial of the making of any confession leaves no occasion for the use of the discretion."[147] In holding that the trial judge "did not really direct his attention to the question whether facts had been proved which would justify the exercise of his discretion to exclude the evidence of the interrogation", the South Australian Court went on to explain that the trial judge failed to consider such cases as Selvey v D.P.P.[148] and Callis v Gunn [149].[150] The reference to these two cases tends to suggest that the discretion to which they were referring was the broad discretion to exclude prejudicial evidence rather than

the specific discretion to exclude confessional evidence. But other passages in the judgment suggest that the decision is confined to the latter discretion only and, in particular, the court stated that the issues raised on the voir dire would not have involved an enquiry into the value and weight of the alleged confession.[151] In so far as the appellant asserted, irrespective of his allegation of "verballing", that the unfairness flowed from the fact that the police persisted in their interrogation in spite of his requests to have a solicitor present, the decision could therefore be explained as relating to the "alternative pleading" approach discussed immediately below. Furthermore, the general attitude exhibited by the courts in relation to the broad judicial discretion "has been against the exclusion of relevant evidence for reasons founded on the supposition that the medium of proof is untrustworthy."[152] Furthermore, the N.S.W. Court of Criminal Appeal has consistently rejected suggestions that one should approach uncorroborated confessional evidence given by police witnesses with suspicion. Such suggestions have been regarded as denigrating "absolutely unjustly and unjustifiably, the police force of this State."[153]

(ii) Fabrication "in the Alternative"

In R v Hinton[154] the Court of Criminal Appeal held that an accused person is entitled, as of right, to contest the issue of voluntariness on a voir dire hearing and to have a concluded decision by the trial judge on the point notwithstanding the fact that he or she also asserts that the confessional evidence is fabricated. At the trial the accused had sought, and been refused, a voir dire hearing for the purposes of determining the admissibility of, first, the unsigned (but initialled) record of interview and secondly, the admissions allegedly made by him

and contained in the record of interview. Whilst some of the remarks contained in Chief Justice Street's judgment suggest that he was primarily concerned with the first of these two questions, that is, the question of adoption and the admissibility of the written document embodying the alleged admissions, a reading of the entire judgment indicates that his analysis applies with equal force when considering the second question. Accordingly, the decision is applicable irrespective of whether the confession is an oral confession or embodied in a signed or unsigned document.[155] At Hinton's retrial Judge Roden[156] ruled that the record of interview and the alleged oral confessional material, contained in the record of interview, were inadmissible:

> "By reason of the unlawful restraint to which the accused was subjected, and the form which it took, in particular the use of handcuffs, I am not satisfied on the balance of probabilities that in participating in the interview by Detective Burke, and in giving the answers he is alleged to have given, if he did in fact give them, the accused was exercising his free will. Being thus not satisfied that the alleged confession, if made, was made voluntarily, I rule that it is inadmissible."[157]

Judge Roden also indicated that a trial judge would similarly be entitled to exclude such evidence in the exercise of their discretion in the appropriate circumstances, notwithstanding the fact that the accused also denied ever making the alleged admissions. The Court of Criminal Appeal's decision in Hinton and the "alternative pleading" approach was more fully discussed by Roden J in Askar's Case,[158] heard the week preceding Hinton's retrial. Because of the importance of these issues and the rarity with which clear judicial expositions have been given, the sections in Judge Roden's judgement in

Askar's Case dealing with the admissibility of the record of interview merits close reading.[159]

In the context of the "alternative pleading" approach, the Queensland decision in R v Gleeson has not been followed in N.S.W. Indeed, in the subsequent Queensland decision of R v Borsellino[160] Justice Dunn, after quoting from Justice Gibb's judgment in Driscoll [161], concluded that the decision in Gleeson should not be regarded as "a possible obstacle" to making a determination as to whether the evidence should be admitted. However, he noted one obstacle, not relevant to the case before him, which could preclude an accused from relying on the "alternative pleading" of inadmissibility and fabrication:

> "There will be cases in which the question of whether a confession was made at all is so bound up with a dispute as to the circumstances in which it is made that it would not be proper for a judge to endeavour to determine what those circumstances were, and the linked question - what was said and what were the circumstances - must both go to the jury."[162]

A denial of a voir dire hearing in such circumstances is one of the several anomalies which flow from recognizing the possibility of making an "alternative pleading", whilst at the same time persisting with the view that the question of fabrication raises issues exclusively within the jury's domain.

Furthermore, the recognition of the "alternative pleading" approach makes it more difficult to maintain that, in applying the confessional rules, the primary focus of attention should be on subjective factors including, in particular, the effect of the improper conduct or inducement on the accused's state

of mind. How can such a test be applied when it is also alleged that no confession was made?[163]

Finally, the difficulties which confront defence counsel in formulating the "alternative pleading" and delineating the matters which relate to the question of admissibility rather than fabrication are revealed in the following extract taken from Trial (3)

> DEFENCE COUNSEL: The substance of the objection is certain portions of the record of interview were "forcefed" to the defendant; that the answers were put in the mouth of the defendant.
>
> HIS HONOUR: When you said "Put in the mouth", do you mean to say he did not really say it or it was wrongly recorded?
>
> DEFENCE COUNSEL: A little bit of both. Answers were repeated by him on occasions and other occasions put up to him for adoption. Whilst it might be said what I am really saying is a fabrication, I would submit also it is relevant to voluntariness or otherwise appropriate for the voir dire.
>
> HIS HONOUR: Do I understand you to say in respect of those answers, that they were suggested to him?
>
> DEFENCE COUNSEL: Suggested to him and then established with him after some form of persuasion, influence and overbearing of will.
>
> HIS HONOUR: You are not alleging he did not say these things?
>
> DEFENCE COUNSEL: I am saying they did not initiate from him and if they were said at all by him it was only by way of repetition after being suggested to him. Substantially I am saying they were not said by him. At the most they were agreed to by him after the use of persuasion and

overbearing of his will at a time when he was in a highly emotional state.

HIS HONOUR: The reason I ask you about that - some of these matters would not give rise to a voir dire at all but in respect to matters where you say there was some form of undue influence or overbearing of his will those matters do give rise to a challenge on the voir dire with a view to those questions and answers being excluded at least on the overriding powers of the judge on the question of unfairness. Do you put it higher than that?

DEFENCE COUNSEL: Yes, I think it goes to the basic ingredient of voluntariness.

The trial judge subsequently allowed the voir dire but, at its conclusion, ruled that the signed record of interview was admissible.

Accordingly, it is submitted that the courts will have to examine more closely the rationale for the confessional exclusionary rules and reconsider the situation where the sole basis advanced in opposition to the confessional evidence is fabrication.

7. Practical Problems

The foregoing discussion reveals that the legal exclusionary rules,as presently interpreted and applied, produce anomalous results, particularly where the accused alleges that he or she was verballed. Furthermore, there has not been uniformity in the judicial approach to determining whether a confession was voluntarily made. Moreover, the absence of clear guidelines as to the circumstances which are likely to give rise to the exercise of the exclusionary discretion produces uncertainty. There is but a thin line between unfair police interrogation practices and acceptable interrogation techniques.

In the United States "police manuals" devote several chapters to instructing police in the "fair" methods, usually relying on psychological weapons for extracting a confession.[164] These techniques have also been described in some Australian literature.[165] Whilst the courts regard the use of physical violence as abhorrent, psychological techniques which involve no untrue representations are generally accepted as being justifiable, indeed necessary, measures for "solving crime".[166]

Aside, however, from the vagueness of what constitutes unfair police practices and the other legal problems discussed in the previous section, there are a number of practical problems which confront an accused seeking to have confessional evidence excluded. The study cases illustrate these obstacles. In none of the cases did the trial judge find that the confession was made involuntarily and in only one case, where there was independent evidence corroborating the accused and it was shown that the police testimony was clearly unreliable, was the confession excluded in the exercise of the judicial discretion.[167] Although the burden of proof differs with respect to the two exclusionary rules, it appears that an accused is unlikely to receive a favourable ruling at the conclusion of the voir dire on either basis where, as is usually the case, the factual question of inducement or impropriety is reduced to a "swearing contest"[168] between the police and the accused. Such a contest will generally arise when the accused alleges, for example, that the police persisted in the interrogation notwithstanding a clear indication that he or she did not wish to answer questions; secondly, that the police refused his or her request to contact a lawyer; or thirdly, that he or she was not cautioned. Indeed, in Trial (2) ,where the accused alleged that the police inflicted physical injury and where the police admitted under cross-examination on the voir dire that the accused was spitting blood at the conclusion of the interrogation, it was held that the

confession was neither involuntary nor improperly obtained. The fact that the accused was spitting blood was "not inconsistent" with the police version, their explanation being that the accused told them that he had earlier been involved in a fight. Judge Loveday in conclusion, stated:

> "The evidence, however, is not such that I think I could find that there was such interference with the will of the accused that he did not make the statement. There has been no supporting evidence, apart from this admission by the police officer, and, after hesitation, I do not think I should exclude the record of interview merely by reason of some concession by the police that there was some indication of injury to the accused, a conclusion which I think, putting it fairly to the police, the police officer says was explained by reference to a fight."

It should be noted that His Honour found that the confession was voluntary only "after hesitation". This uncertainty, also expressed in a second trial case suggests that had the Crown's burden of proof been higher than the balance of probabilities the Crown may well have failed to discharge its onus. It seems that these judges felt obliged to rule that the confessional material was legally admissible although they entertained at least a reasonable doubt as to its voluntariness, a prospect which "appalled" another District Court judge. [169]

Once it is accepted that the evidence given by police officers is not to be approached with suspicion or special caution[170] the Crown's task of proving voluntariness on the balance of probabilities can usually be performed with mechanical efficiency. The police possess a number of "credibility" advantages over the accused in the ensuing swearing contest.

They are usually experienced court witnesses, experienced both in giving their evidence and answering questions under cross-examination in a detached manner. Whilst judges are generally also experienced in evaluating the credibility of witnesses, judges themselves have on occasions conceded that their task is frequently a difficult one when police officers are witnesses:

> "(T)he evidence-giving process is so routine with police officers, and they necessarily rely so heavily on their prepared statements, that it is not unusual for their manner of giving evidence to reflect nothing that is of assistance to the court one way or the other; and experienced police officers are so accustomed to being the object of allegations of impropriety, that it is no surprise, and certainly no indicator of the truth or falsehood of those allegations, when they appear ... quite unmoved by the most gross and at times almost grotesque allegations of impropriety put to them."[171]

The difficulties of assessing the demeanour of witnesses is even more acute when the jury, usually lacking the understanding exhibited in the previous passage, has the task of determining where the truth lies. Further, the presentation of police evidence is to be contrasted with the possible impression given by an accused who elects to give evidence on the voir dire or before the jury. Whilst of course, it may be that the evidence of the accused is regarded as unsatisfactory because he or she is deliberately lying, there are other possible reasons why that evidence may appear unconvincing notwithstanding the fact that he or she is telling the truth. The accused has much more "at stake" than the police and will generally be frightened, or at least, nervous at the prospect of giving evidence. Furthermore, consistent with my results, various court

statistics reveal that the accused is likely to have received a poor or low education.[172] These factors, coupled with the fact that he or she will be less familiar with court procedures, may cause an accused to fail to do justice to his or her version of the facts.

Whilst of course, the above profiles of the police and the accused are generalisations, nevertheless it is submitted that where the versions given by both types of witnesses are plausible, and irrespective of the legal burdens of proof, an accused will usually have considerable difficulty in persuading a judge or jury to rule against the evidence given by the police.[173]

D. THE RECORD OF INTERVIEW[174]

1. Admissibility and Probative Value

Where the police allege that the accused made a confession or admission during police interviewing the relevant police officers may give parole evidence of these verbal statements providing such statements were voluntarily made. However, it is generally believed that the jury will be inclined to attach greater weight to a written document embodying a confession than a mere oral account given by the police witnesses.[175] Accordingly, the police have developed procedures designed to ensure that both the evidence of the confession and the document containing the confession are admissible. The Police therefore seek to obtain the accused's written verification of the adoption of the confessional document. In addition, measures are taken which are thought to reduce the likelihood of an accused successfully challenging the authenticity of this document, usually a record of interview.

At the beginning of the typewritten record of interview there generally appears the name of the police officer conducting the interview, the name of the person being interviewed, the place (usually a police station) where the interview is being conducted, the date, the name of the police officer typing the record of interview, the names of any other persons present (for example, other police officers or the suspect's lawyer), and the time the interview commenced. The remainder of the document is in "question and answer" form. Following the introductory "questions" including the usual caution,[176] a brief statement as to the subject-matter of the investigation and a statement informing the suspect that he or she will be given an

opportunity to read the record of interview at its conclusion and to sign it,[177] the police officer will ask some general questions relating to the suspect's place of residence, place of work and other personal details. The suspect will then be asked questions relating to the alleged offence in order to ascertain the extent of his or her involvement. If the interview is suspended, the time and reason is usually noted as also is the time the interview recommences. Where documents or other articles are shown to the suspect this is also stated in the record of interview.

2. Admissibility and Proper Police Conduct

At the conclusion of the record of interview the following questions are inserted:

Q: Were the answers you have given as recorded in this record of interview made of your own free will?

A: .....

Q: Has any inducement, threat or promise been held out to you to make the answers as recorded in this record of interview?

A: .....

In all the study cases which included a record of interview, these questions were asked and in all cases, including the trial cases where the accused alleged that the police had committed improprieties and that the confession was involuntary, the answers"yes" and "no" respectively were recorded as being given by the accused to these concluding questions.

As an additional precaution an "independent police officer", preferably a senior police officer not involved in the investigation, is called in to ask the suspect a number of questions. These questions, together with the answers, may be recorded in a separate typed document which the suspect is then

asked to sign, or, more usually, the officer will initial the record of interview and note the time and date and thereafter make a personal record of his or her observations. He or she will inquire of the suspect whether the statements contained in the record of interview were given freely and voluntarily and whether the suspect has any complaints. The failure to follow this procedure was a factor considered to be relevant by the trial judge in Trial (1) ,where the record of interview was excluded in the exercise of the judicial discretion:

> "In my opinion the record of interview in the present case could have been and should have been authenticated by another officer and this notwithstanding the fact that no senior officer was then available. The authentication by an independent officer in a situation like this would have gone a long way to remove the atmosphere of suspicion, which I regret to say remains, about the way in which the interview was obtained."

Nevertheless, the appearance of a senior police officer's initial at the foot of the record of interview does not guarantee that the suspect will not subsequently challenge the voluntariness of the confession. However, the study cases indicate that the difficulties confronting the accused are immense. In the trial cases where the accused sought to impugn the probative value of the evidence of the independent police officer, it was asserted, for example, that he had in fact told the officer of the maltreatment;[178] that he had explained to the officer that the reason why he had not signed the record of interview was because he had not been asked to read or sign it;[179] that he had never been questioned by an independent police officer. In this latter case, at the committal hearing, the officer denied the allegation put to him in cross-examination that the first time he had ever seen the accused was in court that day. However, when asked to identify the person whom he

questioned at the police station prior to countersigning the record of interview, he identified the co-accused by mistake. The co-accused had allegedly been seen by a different "independent" police officer. In the remaining two cases the accused did not deny that he had told the independent police officer that he had no complaints but he explained this by claiming that, in the first case, he felt that it would be "pointless" to complain to another police officer and, in the second case, he was afraid he would be hit if he did not "agree". Consider the extract, included in the Appendix, from the statement made by the accused charged with carnal knowledge in Trial (8). [180] If the accused's version, that physical violence was inflicted and threats were made when the record of interview began is to be believed, is it any wonder that he regarded it as "pointless" to complain? Furthermore, irrespective of whether the accused's version is accepted, it illustrates the unsatisfactory nature of the procedure. The similar Victorian procedure was regarded in the Beach Report with dismay: "the present procedure in so far as it relates to complaints is worthless in practice and may well cause grave injustice to an accused person at his trial".[181]

In reading the records of interview in the files of the study cases it was observed that whilst most showed the initials and notations made by a senior police officer, frequently the time noted was between 30 minutes and 2 hours after the interview had concluded. Although there was usually no explanation for such delay, some cases would have presumably been because a senior police officer was not immediately available. Irrespective of whether this was the reason, such delay does arouse suspicion.[182]

3. Adoption of Record of Interview - Signing/Oral

The typed record of interview itself is inadmissible unless the accused has adopted it and if only part of it is adopted that part only is admissible.[183] Accordingly, at the conclusion of the record of interview the following questions are recorded:[1]

Q: Are you prepared to read this record of our conversation?

A: .....

Record of interview handed to (interviewee) who reads same aloud/appears to read the same.

Q: Have you read this record of interview?

A: ...;....

Q: Is it a correct record of our conversation?

A: .....

The questions relating to voluntariness are then asked and the suspect is then asked if he or she is prepared to sign the record of interview (usually each page) and thereby acknowledge that it is a true record of their conversation. Where the suspect does sign it the independent police officer will subsequently ask the person to identify his or her signature on the record of interview.

The Study Cases

The above procedures appear to be effective in so far as they generally ensure the admissibility of the confessional evidence at the accused's trial: in the trial cases, of the 20 records of interview which the Crown sought to tender (relating to 16 defendants), 17 were admitted into evidence[185] (relating to 11 defendants) and in a further two instances, where the records of interview were unsigned, oral evidence of the interview was given by the police witnesses (relating to 2

additional defendants). On the other hand, such procedures did not ensure that the defence would not challenge the evidence nor seek to have the issue of its admissibility determined on the voir dire.[186] The following table summarizes these results:-

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TABLE 17. RECORD OF INTERVIEW - IN COURT TREATMENT

Trials #	Objections	Use of Document/ Evidence		
		Rejected	Tendered	Read/Refresh
12	Signed R/I:			
6	Objected to Admissibility of Document and Contents	1	5	-
3	No Objections to Tendering of Document	-	3	-
3	Not on file		3	
4	Unsigned R/I:			
2	Objected to Admissibility of Documents and Contents	-	1	
1	Objected to Tendering of Document Only	-	-	1
1	No objections to Tendering	-	1	-
16	TOTAL	1	13	2

(i) Signed Record of Interview: In the 6 trials involving signed records of interview where there was a voir dire, the defence submitted that both the signed record of interview and the admissions alleged against the accused which were contained in the document were inadmissible. Whilst therefore the objections in relation to the adoption, by signing, of the record of interview were closely related to the general question of voluntariness, the defence in each case also made specific allegations in relation to the circumstances under which the signature was obtained. These allegations, all of which were rejected, included:

(1) that the accused was in such an emotional state that he could not read the record of interview. After attempting to read the first few lines he stopped and then signed the document. The police denied this and claimed that he read the entire record of interview aloud prior to signing.[187]

(2) That the accused, a drug addict suffering from withdrawal, was offered a gram of heroin if he agreed to sign the document. The heroin had been placed on the table by one of the police officers at the commencement of the interview and after signing the document he injected himself with the heroin.[188]

(3) That the accused did not sign the record of interview and that the signature which appeared on it was a fabrication.[189]

(4) That the police asked the accused to sign the record of interview for the purpose of acknowledging the receipt of a copy. The trial judge however, observed that the accused had signed each page of the record of interview and concluded that this was inconsistent with merely signing as a receipt.[190]

(5) That the records of interview contained words which the accused, an aborigine, could not read or understand. Accordingly, the accused had not read (or made)[191] the records of interview, nor could he, and he involuntarily signed them. The defence called a psychologist who had given the accused the "Vernor Word Reading Test". He concluded that the accused's reading age was equivalent to that of a 7 1/2 year old child and that it was "most unlikely he could read the records of interview aloud or to himself". In reply, the Crown called the Headmaster of the Glebe Primary School who gave evidence of the accused's exam results. These results suggested that the accused's reading and comprehension would have been certainly superior to that of a 7 or 8 year old.[192]

(ii) Unsigned Record of Interview: The position where there is merely police evidence of oral adoption of an unsigned record of interview was fully discussed in Driscoll, where it was said:

> "The mere existence of a record is no safeguard against perjury. If the police officers are prepared to give false testimony as to what the accused said, it may be expected that they will not shrink from compiling a false document as well. The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight. For these reasons, it would appear to me that, in all cases in which an unsigned record of interview is tendered, the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded."[193]

Although subsequent decisions suggest that Driscoll should not be regarded as precluding a trial judge from admitting an unsigned record of interview,[194] in two of the trial cases where the tendering of the record of interview was objected to by the defence the trial judge ruled that the document was inadmissible.[195] In one case the record of interview was tendered without objection.[196] In the final case,[197] however, where there was an objection the trial judge ruled that the document was admissible. Without making reference to Driscoll's Case, Judge Barbour concluded that the record of interview complied with the requirements for admissibility "in point of strict law" and that there were no circumstances which would justify a discretionary judgment against admissibility.[198]

In the two trials where the unsigned records of interview were rejected, the police witnesses thereupon gave oral evidence of the interview, relying on the documents for the purpose of refreshing their memories. Where the record of interview is so used the Court of Criminal Appeal has stated that the witness should not merely read the record of interview verbatim; the witnesses should exhaust his or her memory first and thereafter only refer to the document for the purpose of "refreshing".[199] The dangers of permitting a witness to merely read from the document were described by Travers J in Hetherington v Brooks:[200]

> "To be permitted to read out a statement instead of giving evidence in the ordinary way is no doubt a considerable aid and comfort to a witness, whether he be a truthful witness or an untruthful one. If truthful, it gives him more confidence in the completeness of his narrative. If untruthful, it relieves him of the burden of having to call upon his imagination, or upon his recollection of the fabricated story he intends to tell.

> More important still, to a large extent, it saves him from the scrutiny of the Court, directed to an evaluation of his demeanour."

In both the trial cases, however, the record of interview was read verbatim by the police witnesses; both accused alleged that the documents were not accurate records of their conversations with the police.

4. Adoption of Record of Interview - Initialling

Aside from signing the document or oral adoption there is a third possible way in which an accused can "adopt" a record of interview, viz, where an accused has initialled typing errors. This may occur even though his or her signature does not appear at the conclusion of the document and notwithstanding the fact that the police did not inform the accused of the evidentiary significance of initialling the typing errors. The following explanation of this legal principle, given by Chief Justice Street in R v Hinton, does little to dispel the writer's reservations regarding the logic of the result:

> "The affixing of the initials to the typing errors might technically be regarded as no more than identifying changes in the typing, but from a realistic point of view the initialling of the pages that went to make up the records of interview undoubtedly give the hallmark of authenticity.
>
> The initials themselves, in my view, amounted to an affirmation of the confession said to have been recorded in the written document in that they could have been regarded as authenticating the correctness of what was being typed."[201]

Numerous typing errors, usually initialled, were observed in the records of interview contained in the sample files[202] and

one cannot help suspecting that intentional errors are made. Indeed, one U.S. "Police Manual" states that "it is a good practice to purposely arrange for the presence, on each page of the confession, of one or two errors....which will be subject to later correction by the confessor when the document is read by or to him".[203]

5. Precluding Allegations of Fabrication

Aside from the above procedures the police also adopt a number of additional measures which are designed to meet allegations of verballing and fabrication of written evidence.

(i) Provide Copy Forthwith

In Driscoll's Case Gibbs J stated that the failure to give a copy of the record of interview to the accused as soon as practicable "may give rise to the suspicion that the record has been altered" and indeed he suggested that such a failure "might be a ground for the judge to reject the confession in the exercise of his discretion if he regarded it as unfair to allow it to be used."[204] Accordingly, it is now common practice to have the suspect endorse in his or her own writing at the bottom of the record of interview, "Received from Detective .... a copy of this record of interview." Occasionally this is typed in and the person merely signs alongside.

Reference has already been made to the trial case in which it was ruled that the unsigned record of interview was admissible.[205] In the same case, His Honour also refused to allow a voir dire for the purpose of determining, inter alia, whether a copy of the record of interview was given to the accused "forthwith" after the interview had concluded. Whilst the accused did not deny that a record of interview took place he

asserted that the police had partly fabricated the record, that he had not been given an opportunity to read it nor invited to sign it, and that he was not given a copy. There was no endorsement acknowledging receipt of a copy. The police claimed that the accused had refused to sign the record of interview until he spoke to a solicitor. Furthermore, the police asserted that the document, which contained full admissions to the offence with which the accused was subsequently charged (assault occasioning actual bodily harm), accurately recorded their conversation and that the accused orally adopted the document and was thereupon given a copy. In refusing to grant a voir dire Judge Barbour held that "(e)ven on the view of the facts most favourable to the accused I am of the opinion that there would be no case shown here to the exercise of my discretion adversely to the admission of the document". No reference was made to Justice Gibbs' comments in Driscoll's Case.

(ii) Use of the Suspect's Language

The police usually recognize the importance of recording the exact words used by the person supplying the answers contained in the record of interview. As is pointed out in the American manual by Inbau and Reid, "a judge or jury may be reluctant to believe that a defendant whose education may have ended at third grade spoke the language of a college graduate".[306] The suspicions aroused in such circumstances are perhaps well illustrated by the following extract taken from a record of interview contained in a 51A handup brief. The accused was charged with two counts of break, enter and steal and the Corrective Services Report described him as being of "below average intelligence". In the record of interview the accused is recorded as saying:

"On the night you have mentioned, I, in the company

with another man, broke and entered into the Yerong Creek Hotel for the purpose of stealing a safe, which I believed contained a sum of money."207

In another case, which ended with a plea of guilty, the defence queried the use of police language, or at least the use of language different to that which the defendant would be likely to use. At the committal hearing it emerged that the defendant's first language was not English and, whilst able to understand and speak it, his English grammar was poor. During cross-examination the police witnesses were asked, somewhat rhetorically, to explain how it was that the answers allegedly given by the accused in the record of interview were in the form of grammatically correct, smooth-flowing sentences.

(iii) Obtaining Personal Details

It has already been noted that a number of early questions in the record of interview relate to personal details not generally relevant to the investigation but possibly not known to the police prior to commencing the record of interview. This technique is partly designed to preclude an accused from subsequently asserting that he or she exercised his or her right to silence from the outset of police questioning (unless, of course, it can be asserted that the police obtained the information from another source prior to the interview). However, the inclusion of such information would be perfectly consistent with the assertion that the accused participated in the interview and did give answers to personal history questions, but thereafter the answers recorded in the record of interview were not a true representation of what was said. Similarly, on occasions where the accused has asserted that no interview at all took place and that the record of interview is a complete

fabrication, the personal history details included in the record of interview were allegedly obtained by the police during "casual" conversation with the accused.

Notwithstanding such possibilities which are consistent with fabrication the police continue to include such questions and answers in the record of interview and there is little doubt that a jury would tend to regard such material as providing a "ring of authenticity" to the document.

(iv) Form of Questioning

A fourth procedure adopted by the police relates to the form in which the police ask the questions. It is generally recognized that it is more convincing to a jury to have the details of the offence recorded in response to non-leading questions: "(a) confession in which the interrogator has done most of the talking, and the subject has confessed largely through 'yes' or 'no' answers, is not nearly so convincing and effective as one in which the interrogator plays the minor part and the suspect plays the leading role of both informer and confessor".[208] It was therefore surprising to read a number of records of interview in which the police used leading questions. The following extract, which illustrates this point, is taken from a record of interview relating to a 51A case in which the accused was convicted of demanding money with menaces:

"Q11: Martin and I have been told that at about 4.15 p.m. this date you went to a mixed business shop and there you walked behind the serving counter, is that correct?

A: Yes.

Q12: I have also been told that at that time there was a woman standing behind the counter, is that correct?

A: Yes.

Q13: I have also been told that at the time you walked behind the counter you had clutched in both your hands and in front of your body this carving knife, is that correct?

Shown 'Sturdee' brand serated edge orange handle carving knife.

A: Yes.

Q14: I have also been told that at some time you pointed it towards the woman, is that correct?

A: Yes.

Q15: I have also been told that at some time you said to the woman 'give me your money or else', is that correct?

A: That's right.

Q16: I have also been informed that this woman and yourself struggled for a short period, is that correct?

A: Yes."

(v) Other Details "Not Known" to the Police

During interrogation the police will also seek to elicit full particulars of the modus operandi of the offence and any possible motive the defendant may have had for committing the offence, whether such facts are known to them or not. In Burns v The Queen,[209] however, Justice Murphy indicated the dangers of relying on evidence tending to prove the truth of such statements as, in turn, tending to prove that the accused made the alleged confession:

"Nothing is more common in a concocted story than the inclusion of as much truth as possible. One can expect that, if a confession is concocted against an accused, it

may include matters which are true as well as the admission of guilt. Merely proving the truth of those matters does not tend logically to prove that they were said by the accused."[210]

Furthermore, in a joint judgment of Chief Justice Barwick and Justices Mason and Gibbs the role of the trial judge in such situations was described, somewhat cryptically, in the following terms:

"Where ..... the accused by his confession admits only facts already known to his interrogators the probative value of the truth of what is admitted on the issue whether the confession was in fact made is less cogent and it should, in general, be excluded from the jury's consideration of that issue in fairness to the accused because its prejudicial effect in the minds of the jury may well outweigh any probative value it has."[211]

However, other passages from their judgment and subsequent decisions narrow the potential ambit of this statement. In the first place, the evidence which is likely to be excluded is not the confessional evidence but evidence tending to prove the truth of statements contained in the confession. The N.S.W. Court of Criminal Appeal in R v Burke[212] stressed that exclusion of a record of interview will never be justified merely because the police had prior knowledge of all the facts contained in it. Nevertheless, one of the grounds relied upon by the defence on the voir dire hearing in Trial (2) was that the record of interview was of little probative value since the police had already known all the facts contained in it and could therefore have easily concocted it. The trial judge rejected this submission, not on the basis of Burke's Case, but on the basis that he did not accept that the record of interview only contained matters known to the police. Although he did not state

what matters were not previously known to the police, it would seem that His Honour was referring to the personal details given at the beginning of the record of interview.

The second qualification is that evidence proving the truth of information, already known to the police, contained in the confession may be relevant and, therefore, admissible in relation to another issue at the trial.[213] In such circumstances it is unlikely that its prejudicial value will be regarded as outweighing its probative value.

Thirdly, Chief Justice Barwick and Justices Gibbs and Mason in Burns' Case state that if such evidence points to the guilt of the accused it is relevant to the issue whether the confession was made.[214] In so concluding the judges relied on the reasoning in R v Hammond.[215] However, in that case the question was whether the confession was voluntary, not whether it was made at all. Furthermore, it is submitted that in both situations the conclusion, that such facts tend to prove voluntariness or authenticity, is based on fallacious reasoning.[216]

Finally, such evidence may become relevant to the issue whether the confession was in fact made because of the nature of the accused's account of his or her encounter with the police. Therefore, the evidence in Burns' Case which was claimed to be objectionable, viz, evidence of newly acquired wealth, was held to be relevant to the issue whether the accused was truthful when he said that he had not been questioned at all by the police. The Court thought that it would be reasonable to conclude that the police would have been suspicious of this newly acquired wealth and would have, at the very least, questioned the accused about the source of this money.[217] It therefore appears that evidence as to the truth of facts contained in the record of interview will only be excluded if first, such facts

were known to the police prior to the interview, secondly, its sole relevance is to the issue of fabrication, and thirdly, the accused's version of the events does not otherwise make it relevant.

Study Cases - Plea-Guilty and 51A Cases: The records of interview of "51A" and "plea-guilty" defendants frequently contained information which appeared to lend a ring of authenticity to the confession. For example, in theft cases in response to the question, "What have you done with the money/goods?", answers such as the following were given:

A1: I used the money to live on and to pay off my car.

A2: I paid some bills and I had a bit of a bet on the horses, about $20 to $30 a week.

A3: I sold the stuff around the hotels.

A4: I opened an account and deposited the money I was taking from work there each week.

Similarly, when asked why he or she had committed the offence the following types of answers were recorded:

A5: I needed money. I didn't care what happened, most of my friends are back at Silverwater (a N.S.W gaol).

A6: I was in a desperate situation and I took matters into my own hands and I entered her premises unbeknown to her and stole a variety of goods.

A7: I was in debt. You mightn't think it's a lot of money but it was to me.

Several of these responses are so vague that it would be difficult for the Crown to prove that they were in fact true. It would, however, be equally difficult for the defence to prove that they were inaccurate. The answers may nevertheless be regarded by a jury as tending to show that the document is authentic.

Suppose, however, that the Crown did seek to prove the truth of the facts contained in responses such as A2 and A4. Could the accused, relying on Burns' Case, argue that such evidence should be excluded in the exercise of the trial judge's discretion? Before the "Burns' rule" could come into operation the accused would have to overcome two difficulties, one of fact and one of law. In the first place he or she would have to prove that the police already knew of such facts. If they did not the evidence would clearly be relevant to the issue of fabrication: "(w)here an accused by his confession admits facts not then known to his interrogators which are subsequently found to be true, this circumstance affords strong evidence that the confession was in fact made".[218] Whilst the police might have obtained the information from another source or indeed from the accused himself or herself in the course of an innocuous conversation not appearing in the record of interview, it may be difficult for the accused to challenge the police if they denied that they had obtained the information in such a way. Secondly, even if the accused succeeded in proving that the police had "prior knowledge" of the facts, the evidence might nevertheless be relevant and admissible by virtue of one of the bases discussed above which qualify the "Burns' rule".

Study Cases - Trial Cases: In the trial cases in which fabrication was alleged, the defence generally sought to show that all the information contained in the record of interview was known by the police at the relevant time. In some cases the police, whilst denying that the confession was fabricated, agreed that most of the facts were known to them. In two cases, however, the police asserted that the first occasion on which they had heard of the matters was during the course of the confession made by the accused. Although the alleged confession in the first case was not embodied in a record of interview, it is convenient to deal with it at this stage.

*Trial (14) : The accused was charged with being an accessory after the fact, to break, enter and steal. An alternative charge of receiving was included in the indictment. A number of oral admissions were allegedly made by the accused:

> "Well, Jimmy told me last week that he was going to do a big job over the weekend and to ring him at the shop on Monday afternoon. When I rang him he told me that it had been a good job and to come down on Tuesday and we would have a good time and I just came down and that is when yous came in.....All I done was help him count and roll the money after tea and we were going to sort out the grog this morning. Look, he gave me the cigarettes and the lighter you got out of my bag. I wasn't in the bust with him..... He was going to give me some money. He was going to pay for a water bed that I bought at Lismore on the way down. He told me to buy something nice."

The accused's version was that no admissions were made by her. It was claimed that certain facts contained in the "verbal", for example, the date of her arival in Sydney, were voluntarily supplied when she was first questioned; she denied that such information was given in the course of admitting any knowledge or involvement in the break, enter and steal. During cross-examination of the police witnesses the defence sought to explain the reference to the waterbed and to show that the statement was factually inaccurate, in so far as the negotiations to purchase the waterbed had been finalized at a date prior to the break, enter and steal. It was suggested to the police that they had found a letter sent by the accused to "Jimmy" when they had searched the premises and taken possession of the stolen goods. The police denied that they found any letters which made reference to the accused's intention to purchase a waterbed. It did emerge, however, that they had made inquiries, prior to

the trial, as to the date the waterbed was purchased and had spoken to the salesman who had sold her the waterbed. Yet, as the defence pointed out, the Crown had not sought to lead such evidence at the trial; the inference intended by the defence would have revealed that the information contained in the "verbal" was inaccurate.[219]

The difficulties confronting an accused in such situations are immense. The defence runs the risk of confusing the jury by raising subsidiary issues which are intended to reveal that details in the confession are inaccurate or that the police had an opportunity to concoct the confession. Whilst the admissions may have been accurately narrated by the police in the course of giving their evidence, if they are untrue the defence case may be severely prejudiced. The difficulty is the lack of objective verification of the verbal statements: "(t)here is no sure way of determining their veracity yet there are very severe difficulties in confirming or refuting them in court."[220] The following case, where the admissions were embodied in an unsigned record of interview, also illustrate this point.

*Trial (7): During the course of conducting a record of interview the following conversation was recorded:

"Q6: Do you recall Saturday the 4th June, 1977 being at Peakhurst Inn with your brother Graham, when an incident arose over your brother throwing a bar stool?

A: Yes I remember. It was my brother's birthday and he got pissed and was mucking around with the stool.

Q7: Do you remember what he did with the stool?

A: Graham was just mucking around, make sure you spell his name with an "e" on the end otherwise you'll get him cranky, he just threw it but he didn't throw it very hard."

The Crown relied on the reference to the fact that Grahame was spelt with an "e" as an indication that the confession was a genuine one. The accused asserted that it was "a bit of smooth work on the part of the police" to lend an air of authenticity to what was really a fabricated document. Once again the issue of fact was reduced to a "swearing contest" between the police and the accused.

How could the accused rebut this? Should he have attempted to prove that the police had access to an earlier statement made by Grahame which would have shown how his name was spelt? Should he have attempted to adduce evidence tending to prove that Grahame did not get upset if his name was misspelt? If so, would the testimony of Grahame, the accused's brother, be sufficient? There would be several risks associated with such defences. Not only would the accused be in danger of trivializing the issues and angering the court, such evidence would also be likely to divert the jury's attention from the real issues. Furthermore, such attempts might lead the jury to think that if they concluded that Grahame "did get cranky" they would be entitled to also conclude that the accused did make the confession and was in fact guilty as charged. Accordingly, at the trial the accused simply asserted, without going further, that it was "a bit of smooth work on the part of the police" to lend an air of authenticity to what was a fabricated document.

The dilemma which confronted this accused is not unique. Although, therefore, all the techniques discussed above are designed to minimize the likelihood of an accused challenging the confessional evidence, they often merely serve to reduce the issue of fact to a "swearing contest" between the police and the accused about subsidiary issues.

E. CONFESSIONS - EMPIRICAL DATA

1. Types of Confessions and Plea

In over 96% of all cases in the sample there was confessional evidence, being oral, written or both. In the vast majority of cases (78.2%) the defendant had, inter alia, signed a document embodying a confession or made a handwritten statement[221] and in approximately three-quarters of these cases the defendant had allegedly also made oral admissions.[222] Thus, in nearly 60% of all cases the defendant had provided oral and written confessional evidence. However, whilst this was the most frequent confession "category" where the defendant pleaded guilty (66.4%), in less than a third of the cases where the defendant pleaded not guilty was this "two tiered" form of confessional evidence present (28.6%). In 50% of the trial cases there was only evidence of oral admissions.

TABLE 18. FREQUENCY OF TYPES OF CONFESSIONS

	PLEADED GUILTY		PLEADED NOT GUILTY		ALL DEFENDANTS	
NATURE OF CONFESSION	#	% of those pleading guilty	#	% of those pleading not guilty	#	% of all defendants
Oral Only	13	10.9	14	50.0	27	18.4
Written Only	23	19.3	5	17.8	28	19.0
Oral and Written	79	66.4	8	28.6	87	59.2
All Confessions	115	96.6	27	96.4	142	96.6
No Confession	4	3.4	1	3.6	5	3.4
All Defendants	119	100.0	28	100.0	147	100.0

Note: * Unsigned records of interview treated as "oral."

Although the presence of confessional evidence per se does not appear to have affected the decision to plead guilty or not guilty (confessional evidence being present in over 96% of cases in both trial and plea guilty cases), the size of the sample in which there was no confessional evidence (5 defendants) is clearly too small to allow any definite conclusions to be made. However, the following table clearly reveals that there is a relationship between the "quality" of the confessional evidence and the frequency of guilty and not guilty pleas.

TABLE 19 TYPE OF CONFESSION X PLEA

	PLEADED GUILTY			PLEADED NOT GUILTY		
TYPE OF CONFESSION	# of Defts.	% Proportion of Relevant Confession Type		# of Defts.	% Proportion of Relevant Confession Type	
Oral only	13	48.1		14	51.9	
Written only	23	82.1	88.7	5	17.9	11.3
Oral and Written	79	90.8		8	9.2	
All Confessions	115	81.0		27	19.0	

There does appear to be a clear relationship between the type of confessional evidence and the decision to plead: in 52% of cases where there was oral confessional evidence only, the defendant elected for trial whereas the defendant pleaded not guilty in only 11.3% of cases where there was written or oral and written confessional evidence. Defendants were least likely to plead not guilty where there was both oral and written confessional evidence. Whilst recognizing that the decision to plead not guilty is dependant upon a list of complex and interrelated factors, the above results tend to substantiate the claim that "what happens immediately after a suspect is arrested dominates subsequent decisions that are taken....by the defendant.[223] "Furthermore the type of confession made to the police during questioning appears to be of far greater

significance than the personal characteristics of the defendant examined in Tables 8-11. [224]

2. Incidence of Confessions

The following tables provide a more detailed analysis of the types of written confessional material obtained in the sampl cases as well as revealing the frequency of confessions. A more detailed analysis of the number of confessions obtained from each defendant is given in Table B (Appendix).

TABLE 20a. TOTAL No. OF CONFESSIONS X PLEA

# Defts	# of Confessions X D's Plea	ORAL	DOCUMENT				OTHER	TOTAL CONFESSIONS
			RECORD OF INTERVIEW		STATEMENT			
			Signed	Unsigned	Signed	Handwritten		
115	Guilty - No. #	146	128	2	8	30	3	317
	% of all confessions in plea guilty cases -	46.0	40.4	0.6	2.5	9.5	1.0	100.0
27	Not Guilty - No. #	30	16	4	-	2	-	52
	% of all confessions in trial cases -	57.7	30.8	7.7	-	3.8	-	100.0
142	Total - No. #	176	144	6	32	8	3	369
100.0	% -	47.7	39.0	1.7	2.2	8.7	0.8	100.0

Table 20b. SUMMARY

Type of Confession	PLEADED GUILTY		PLEADED NOT GUILTY		TOTAL	
	#	%	#	%	#	%
Oral (Including Unsigned R/I)	148	46.7	34	65.4	182	49.3
Written	169	53.3	18	34.6	187	50.7
Total	317	100.0	52	100.0	369	100.0

Note: * As to the categorization of separate confessions cf notes to Table 21.

* "Other" Written - included 1 case where defendant signed police notebook; 1 case where defendant drew picture of knife used in robbery; and 1 case where defendant signed back of photograph of himself taken at scene of bank robbery.

From these two tables it emerges that the total of 147 defendants gave a total of 369 oral or written confessions; 317 of these confessions were given by defendants who pleaded guilty and 52 given by trial defendants. The actual number of confessions made by each defendant is analysed in the next table, Table 21. Oral confessions were more significant in the trial cases: 57.7% of all confessions in trial cases were oral whereas such confessions only accounted for 46% of the total confessions in cases where the defendant pleaded guilty (Table 20a). Furthermore, if unsigned records of interview are included with oral confessions the position remains virtually unchanged in relation to defendants pleading guilty (46.7%), whilst the frequency of oral confessions in trial cases would be increased from 57.7% to 65.4%. (Table 20b).

3. The Number of Times A Defendant Confessed

In the trial cases the maximum number of confessions made by any defendant was 5 (1 oral and 4 signed records of interview); in approximately 10% of the plea cases the defendant made more than 5 confessions and in fact there were two defendants, each giving 11 confessions, who between them account for 6 signed records of interview, 5 written statements and 11 oral confessions. Nevertheless, in both the plea guilty and trial cases the majority of defendants made only one or two confessions (often 1 oral confession and 1 record of interview in cases where the defendant pleaded guilty). Because of the small number of defendants, however, who gave in excess of 5 confessions the average number of confessions made by each defendant in the sample is 2.5; the average was slightly higher in the plea guilty and 51A cases (2.7); defendants pleading not guilty averaged less than 2 confessions per defendant.

TABLE 21. DEFENDANTS CLASSIFIED BY No. OF CONFESSIONS

# of Confessions Made	DEFENDANTS # Pleading Guilty	# Pleading Not Guilty	Total Ds.
1	28	11	39
2	44	11	55
3	21	2	23
4	8	2	10
5	1	1	2
6	3	-	3
7	4	-	4
8	3	-	3
9	1	-	1
10	-	-	-
11	2	-	2
None	4	1	5
TOTAL DEFTS	119	28	147
TOTAL CONFESSIONS	317	52	369
AVERAGE D	2.7	1.8	2.5

Note: * Confessions were treated as separate to subsequent confessions made by the defendant where there had been some break or gap, by time or other circumstances, between them. For example, any oral admissions at the time of arrest would be treated as confessions distinct from subsequent oral or written confessions made at the police station.

* See Table B (Appendix).

4. Relationship Between Type of Confession and Outcome

(i) Trial Cases

Defendants who only had "oral only" confessional evidence against them were less frequently convicted than where there was oral and written confessional evidence. On the other hand, a higher proportion of defendants were acquitted in the "written only" category than the "oral only" category. Whilst the following table presents the results of the sample, it is included more as guide for future research than for the conclusions one may draw from it. If there were a substantially larger number of trial cases in a subsequent research project it is possible that meaningful patterns would emerge.

TABLE 22. NATURE OF CONFESSION X OUTCOME - TRIAL CASES

	ORAL ONLY		WRITTEN ONLY		ORAL AND WRITTEN		TOTAL	
Verdict	#	%	#	%	#	%	#	%
Verdict Guilty	5	38.5	2	40.0	6	75.0	13	50.0
Verdict N/Guilty	6	46.2	3	60.0	1	12.5	10	38.5
Hung	2	15.3	-	-	1	12.5	3	11.5
Total	13	100.0	5	100.0	8	100.0	26	100.0

Note: * The defendant was convicted in the 1 trial where there was no confessional evidence; the 1 mistrial is also excluded from the above calculations.

* Unsigned records of interview treated as "oral".

* In a larger survey it would be more instructive to further analyse the data according to the nature of the "guilty" or "not guilty" verdict (e.g. whether not guilty by direction).

(ii) All Cases

When plea guilty and 51A cases are taken into consideration there appears a marked correlation between outcome and the cogency of the type of confessional evidence.

TABLE 23 NATURE OF CONFESSION X OUTCOME - ALL CASES.

Outcome	ORAL ONLY		WRITTEN ONLY		ORAL AND WRITTEN		TOTAL CONFESSING	
	#	%	#	%	#	%	#	%
Plea - Guilty	13		23		79		115	
Trial - Guilty	5		2		6		13	
Total Guilty	18	69.2	25	89.3	85	97.7	128	90.8
Trial - Not Guilty	6	23.1	3	10.7	1	1.15	10	7.1
Trial - Hung	2	7.7	-	-	1	1.15	3	2.1
Total	26	100.0	28	100.0	87	100.0	141	100.0

Note: * In the 5 cases where there was no confessional evidence, 4 defendants pleaded guilty and 1 defendant was found guilty by the jury.

* Excludes 1 mistrial.

* Therefore: 97.7% of defendants where there was oral and written confessional evidence were convicted, whereas only 69.2% of defendants where there was oral confessions only were convicted.

5. Who Confesses?

Are some types of people better able to resist "the social and psychological rigours of interrogation"? It is generally thought that there is a correlation between the inability to withstand police questioning, and therefore the likelihood of making damaging admissions, and various characteristics of the

person being questioned. Accordingly, with a view of determining whether there is some such relationship, the following table categorizes the defendants in the sample by reference to their age, sex, extent of prior contact with the police and the criminal justice system, and the nature of the offence with which he or she is charged. However, because of the small number of cases (5 defendants) in which there was no oral or written confessional evidence, it is not possible to determine the sorts of people least likely to confess. Nevertheless it is felt that the types of confessions allegedly made by the defendant is indicative of the extent to which a person feels obliged to co-operate with the police. The probative value of a written confession is generally higher than mere oral admissions and the police therefore usually seek to obtain signed confessional material: Do certain types of defendants more frequently accede to the police requests for such written evidence?

Notes to Table 24 (infra):

* Aside from the difficulties in drawing inferences from the figures relating to those defendants who did not confess, in some of the sub-categories of the selected defendant characteristics there were 5 or less defendants. In such sub-categories it was felt that the sample was too small; hence the notation "t.s." denoting "too small".
* In approximately 4% of cases the relevant data for one or other of the selected characteristics was not given; hence the size of the sample in each group was approximately 142 defendants.
* Refer to Table 18 for numbers of defendants.
* Unsigned records of interview treated as "oral".

TABLE 24. CHARACTERISTICS OF DEFENDANTS X TYPE OF CONFESSION

SELECTED CHARACTERISTICS	%of defendants in relevant sub-category making: No Confession	Oral Only	Written Only	Oral & Written	TOTAL
(Table 18) ALL DEFENDANTS	3.4	18.4	19.0	59.2	100.0
AGE					
18 years (t.s.)	-	(2 defts)	(3 defts)		
18 - 21 years	6.1	20.4	16.3	57.2	100.0
22 - 29 years	1.9	26.9	15.4	55.8	100.0
30 - 39 years	3.7	22.2	25.9	48.2	100.0
40 - 49 years	-	18.2	18.2	63.6	100.0
50 - 59 years (t.s.)		(2 defts)		(3 defts)	
60 years and over (t.s.)				(1 deft)	
SEX					
Male	2.3	18.0	18.8	59.4	100.0
Female	-	23.1	15.4	61.5	100.0
FORM					
None	-	12.5	27.5	60.0	100.0
One (no gaol)	11.1	22.2	11.1	55.6	100.0
One (gaol)	-	-	-	-	-
1 - 5 (no gaol)	-	20.8	16.7	62.5	100.0
1 - 5 (some gaol)	16.6	50.0	16.6	16.6	100.0
5 (no gaol)	11.8	5.9	11.8	70.5	100.0
5 (some gaol)	2.3	20.4	15.9	61.4	100.0

TABLE 24. CHARACTERISTICS OF DEFENDANTS X TYPE OF CONFESSION (Cont'd)

SELECTED CHARACTERISTICS	%of defendants in relevant sub-category making: No Confession	Oral Only	Written Only	Oral & Written	TOTAL
(Table 18) ALL DEFENDANTS	3.4	18.4	19.0	59.2	100.0
OFFENCE					
Forge, Utter etc	13.3	-	46.7	40.0	100.0
Larceny, B.E.S.	1.8	27.8	3.7	66.7	100.0
Assault	8.7	21.7	30.5	39.1	100.0
Malicious - Property t.s.					
Drug	-	17.6	11.8	70.6	100.0
Robbery	-	6.7	-	93.3	100.0
Escape t.s.					
Driving t.s.					
Other t.s.					

"t.s.": Too small.

(i) Age of Defendants

In deciding whether confessional evidence should be excluded in the exercise of their discretion judges have generally regarded the age of defendant as an important factor.[225] The fact that the defendant is a child may also be relevant to determining whether the confession was voluntarily made. This concern in relation to young persons is reflected in the Police Instructions, which lay down special procedures for the interrogation of juveniles. Furthermore, s.81C of the Child Welfare Act, 1939 (N.S.W.) renders confessions made by young persons inadmissible unless a parent, lawyer or some other "civilian" of the parents' choosing was present at the time the confession was made. The judge does, however, have a discretion to admit the evidence notwithstanding non-compliance with the above procedure if there was a "proper and sufficient reason."[226]

Two U.S. studies, however, have concluded that older suspects confess at about the same rate as younger suspects[227] and that there is no clear correlation between age and a suspect's response to police interrogation. The results in Table 24 are consistent with this: there is little or no indication that younger defendants are more likely to make "written" or "oral and written" confessions. Although 3 of the 5 defendants who did not confess were aged between 18 and 21 years, the sample is of course too small to allow one to conclude that younger defendants are indeed less likely to confess.

(ii) Prior Criminal Record

The data in the above-mentioned U.S. studies confirmed the hypothesis that suspects with a prior criminal record were "more likely to resist police pressures to confess." [228] One would expect that such suspects, being more familiar with police

procedures and tactics, would be better equipped to withstand police questioning and would realize the significance of making oral admissions. Yet, the present results (aside from the "1-5 (some gaol)" category where there was only 6 defendants) suggest that defendants with a prior criminal record were not less likely to provide "oral and written" confessions. Indeed, the figures in the " 5 (no gaol)" category reveal that such defendants were more likely to provide "oral and written" confessions: 59.2% of all cases' confessions were of this type, whereas 70.5% of defendants who had received non-custodial sentences for more than 5 previous convictions allegedly gave both oral and written confessions. There is no obvious reason why the results should so markedly differ from the U.S. studies and a larger study, including interviews with defendants, may well provide some explanation.

(iii) Offence Categories.

Few defendants charged with robbery or armed robbery gave "oral only" confessions and in the overwhelming majority of cases (93.3%) the defendant made oral and written confessions. This is to be contrasted with the position of defendants included in the "Larceny, B.E.S." category. Whilst 18.4% of all defendants gave "oral only" confessions, 27.8% of "Larceny, B.E.S." defendants and only 6.7% of "Robbery" defendants gave such confessions. Why did "Larceny, B.E.S." defendants more often, and "Robbery" defendants less often, give "oral only" confessions? Why in 93.3% of "Robbery" cases were defendants willing to make both oral and written confessions? It seems difficult to explain why the officers in the Armed Holdup Squad were more effective in obtaining written confessions from persons suspected of these more serious offences, than their counterparts investigating break, enter and steal and other theft

offences. The results appear to be inconsistent with the results obtained in other studies. For example, in the U.S. Prairie City Study [229] 57% of suspects accused of property offences confessed whilst only 32% of persons suspected of crimes against the person confessed (robbery being placed in this latter category).[230] Whilst there may be a number of reasons why the position is different in the United States it nevertheless indicates that additional research is required to determine whether the results in the sample are accurate, and if they are, to explain this strange phenomenon whereby the more serious offenders exhibit greater "co-operation" with the police than the petty thief.

6. Period "in Custody" Prior to Confessing.

Not only do most defendants apparently confess, but they also do so within a relatively short period of their first contact with the police.

TABLE 25. TIME OF FIRST CONFESSION (1*)

Period "in custody" prior to confession made. (2*)	Ds where first confession oral	Ds where first confession written	First confession for all defendants	
	#	#	#	%
Outset - 10 mins	52	1	53	40.1 6*
11 - 30 mins	19	2	21	15.9)
31 mins - 1 hour	12	3	15	11.4) 39%
1+ hr - 2 hrs	8	7	15	11.4)
2+ hrs - 3 hrs	4	7	11	8.5
3+ hrs - 6 hrs	3	6	9	6.8
6+ hrs - 10 hrs	-	-	-	-
10+ hrs - 18 hrs (3*)	2	-	2	1.5
18+ hrs - 24 hrs (3*)	1	1	2	1.5
24+ hrs - 36 hrs (3*)	2	-	2	1.5
36+ hrs - 1 week (4*)	1	-	1	.8
>1 week (4*)	-	1 (5*)	1	.8
Total	104	28	132	100.0
Not on File	8	2	10	-
All Defendants	112	30	142	-

Note: 1* In some cases the precise time could not be given. However, if the information in the file allowed a fairly accurate estimation to be made then the case was included in the table; all other cases were included under heading "Not on File".

2* There was little difference in the plea-guilty, 51A and the trial cases and accordingly there is no such sub-categorization.

3* In a substantial proportion of these cases the questioning which led to the confession was after the defendant had spent the night in "the cells" at the police station.

4* In these cases the defendant had been released on bail or, as more often the case, remanded in custody.

5* In this case the defendant was being held in custody in relation to other offences.

6* The frequency is slightly higher than in Zander's study which revealed that 35% of confessions were made immediately and 38% were made within the first 2 hours.[231]

7. Where Were Confessions Made?

It has often been asserted that it would not be practicable to tape-record many vital police conversations with suspects because many admissions are made outside the police station at, for example, the point of arrest. However, as the following tables indicate, the substantial proportion of confessions in

the study cases were made, or at least repeated, at the police station. Therefore, although nearly half the defendants made their first confession or admission outside the police station (see Table 25A) in less than 4% of cases (5 defendants) confessions were made outside the police station and not repeated at the police station. The case for the prosecution in the overwhelming majority of cases, therefore, would not have been greatly impeded if evidence of conversations which took place outside the police station were excluded.

TABLE 25A. STAGE AT WHICH FIRST CONFESSION MADE (VERBAL OR WRITTEN)

STAGE/PLACE	# of Defts	% of all Defts
When Apprehended (eg. house, scene of crime)	59	41.6
En Route to Police Station	4	2.8
At Police Station	71	50.0
Other (eg. Cells, Court)	4	2.8
Other (eg. Hospital)	1	.7
Not coded	3	2.1
Cotal Defendants Confessing	142	100.0

TABLE 25B STAGE AT WHICH ALL CONFESSIONS MADE (VERBAL OR WRITTEN)

STAGE/PLACE	# of confessions	% of all confessions
When Apprehended (eg house, scene of crime)	59	16.0
En Route to Police Station	6	1.6
At Police Station	280	75.9
Other (eg. cells, court)	17	4.6
Other (eg. hospital)	1	.3
Not coded	6	1.6
Total Confessions	369	100.0

8. Trial Cases - Voir Dire

In one trial case there was no confessional evidence and in another case the trial aborted prior to the Crown leading any confessional evidence. Of the remaining 26 trials, due to missing transcripts, it could not be ascertained whether there was a voir dire hearing to determine the admissibility of the confessional evidence in 10 cases. In 9 of the remaining 16 trials there was no voir dire hearing. In one case the defence sought to have a voir dire but the trial judge ruled that the issues raised by the defence did not raise matters appropriate to be dealt with on the voir dire. In only 1 of the 7 cases where there was a voir dire did the judge reject the evidence. In 5 of the 7 cases the accused gave evidence on the voir dire and in only 1 case did the accused also give evidence in front of the jury; in two other cases the accused made a statement from the dock; in the fourth case the judge directed that the jury return a verdict of not guilty at the close of the Crown case; and in the fifth case the accused changed his plea to guilty. With respect to the two cases where the accused did not give evidence on the voir dire, in one the accused changed his plea immediately the trial judge ruled that the confessional evidence was admissible and in the other case the accused made a statement.

Further details relating to the trial cases have already been discussed in the previous section.

F. THE RIGHT TO SILENCE AND LEGAL ADVICE

1. Introduction

> "(W)e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.... As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.... (I)t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.... If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."
>
> - Miranda v Arizona[232]

One of the dissenting Justices in the Miranda decision, Justice White, warned that the rules would weaken the ability of the criminal law to perform its tasks adequately. He regarded the decision of the majority as "a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials".[233] However, the following analysis, which is consistent with the results of a number of recent U.S. studies, suggests that there is little correlation between the administering of a caution and the behaviour of the suspect or the success of the interrogation. In Australia, there is no obligation to inform the suspect of the right to legal advice. Furthermore, in the next section, in which some assessment is made of the impact of lawyers on

the interrogation process, the conclusion reached is that at present lawyers play an insignificant role. Attention is also given to the question whether the requirement to inform a suspect of his or her right to legal advice, an obligation imposed in the United States by the Miranda decision, would alter the present relationship between the police, the dominant party, and the suspect. There appears to be little reason to conclude that the position would be markedly different from the results obtained in the U.S. studies of the interrogation process post-Miranda. These studies suggest, first, that "Miranda will rarely bring lawyers to the stationhouse",[234] and secondly, that "(s)uspects apparently often mistrust their lawyers, and fail to take their advice".[235]

2. Cautioning and the Right to Silence [236]

In the study cases few defendants exercised their right to remain silent at any stage during the interrogation and an even fewer number exercised their right at the outset and continued their silence for the duration of the entire period of interrogation; some defendants exercised their right only after they had made damaging admissions[237]; in other cases the defendant, although initially refusing to answer questions, subsequently capitulated. The following conversation between the police and a defendant, who subsequently pleaded guilty to common assault, illustrates the inability of some people to resist police questioning:

> The complainant and her boyfriend stated that as they were walking along Oxford Street they saw the defendant lying on the footpath; as they walked past him he doubled his belt and flicked the woman in the eye. The woman's friend then hit the defendant. When interviewed by the police the

defendant gave his name and address. The following conversation then took place:

D: I have nothing to say. I haven't done anything.

P-O: What can you tell me about the belt?

D: That's mine.

P-O: .....

D: Nothing. I didn't hit anybody.

P-O: How did you receive that injury above your eye?

D: A bloke in Bourke Street give it to me this arvo.

P-O: What bloke?

D: That girlfriends.

P-O: What girl?

D: I don't know. I don't know. Leave me alone. Charge me if you're going to, but leave me alone.

The following tables indicate that the right to silence, albeit supplemented by the requirement to caution a suspect, fails to regulate, in any meaningful way, the relationship between the suspect and the police during an interrogation. Lord Devlin's observation that the law does "nothing to urge him to take advantage of" his right to silence[238] appears to be an understatement; the standard police procedures and interrogation methods, and the legal rules which purport to regulate them, at times operate to negate the right.[239] This may be illustrated in a number of ways.

A person who comes into contact with the police may be ignorant of his or her right to silence. The police, however, will not necessarily inform the person of this right prior to asking questions. In the study cases the files indicated that 41% of the defendants made admissions prior to being informed of their rights. After excluding those cases where the defendant

apparently "blurted out" the damaging statement prior to any police questioning beyond very general enquiries, there remained 44 cases (31.6%) in which a caution did not precede the police questioning which produced the self-incriminatory responses.[240] In one trial case a police officer was asked why he had not cautioned the accused when he "requested" the accused to accompany him to the police station. The police officer's reply was: "At that stage he had made no admissions. I didn't think it was necessary to caution him." Such attitudes, together with the figures in Table 27, indicate that for a large proportion of persons who find themselves being questioned by the police the law does not recognize the right to be informed of the right to silence.

The absence of a caution in such cases is partly explicable because of the vagueness of the Police Instructions which, in effect, only require a caution to be administered when the person is arrested or "to be charged".[241] The police are therefore generally allowed to ask a suspect a number of probing questions prior to the obligation to caution arising. At the very least, the Instructions make it difficult to determine the precise point in time at which the obligation arises. Indeed, in certain circumstances it would seem possible for the police to delay making a "formal" arrest in order to continue "non-custodial" interrogation without the need to caution.[242] The scope of this right to question prior to cautioning has been criticized by numerous commentators. For example, in an article entitled "The Criminal Suspect's Illusory Right to Silence in the British Commonwealth", the authors stated:

> "The Commonwealth countries have placed their faith in a caution as the protective device for the suspected person once the accusatorial process begins. But the

> protection provided by the caution is inadequate, since it comes too late in the investigation. The point at which the caution is given is determined by the quantum of evidence possessed by the police, and not by how long questioning may have taken place in 'the compelling atmosphere of ...in-custody interrogation'. Such questioning will frequently take place when a person, upon request, accompanies a police officer to the police station. It is rather ingenuous to maintain that, provided a suspect is not commanded to come, he is not being detained illegally for questioning, but is willingly co-operating. The public-spiritedness of the average citizen, the desire of both the innocent and the guilty to convince the police of their innocence, and the ignorance of the average citizen 'that the police have no compulsive power' conspire to cause an individual to place himself in a position where a caution is vital."[243]

The second point which emerges from Table 27 is that a large number of defendants waived their right to silence. According to the information in the files, 82 of the defendants who made oral or written admissions (59%) were cautioned prior to making any incriminating statements. Moreover, it was rare that a person who had made earlier oral admissions refused, after being cautioned, to answer further questions. Nor did confessions appear to decrease as the number of warnings increased. The files indicated that the police frequently cautioned the defendant on more than one occasion: a total number of 351 cautions were administered to the 143 defendants (Table 26). Two defendants were each cautioned 11 times. Even if one regards these figures as being "open to question"[244] and some allowance is made for a possible over-estimation in the frequency of cautioning or confessing, it would nevertheless appear that a

substantial proportion of defendants waive their right to remain silent when confronted by police interrogation.[245]

TABLE 26. DEFENDANTS CONFESSING CLASSIFIED BY NO. OF CAUTIONS

No. of Times Defendant Cautioned	Defendants Pleading Guilty	Defendants Pleading Not Guilty	All Defendants
NONE	3 *1	-	3
1	33	13	46
2	40	10	50
3	17	3	20
4	7	1	8
5	2	-	2
6	3	-	3
7	5	-	5
8	1	-	1
9	-	-	-
10	1	1	2
11	2	-	2
No Details	1	-	1
Total Defts	115	28	143
Total Cautions	295	56	351
Average per D	2.6	2.0	2.4

Note: (*1) In these three cases the police statement did not disclose any statement that he/she had cautioned the defendant at time of arrest or at any subsequent time.

TABLE 27. STAGE AT WHICH CAUTIONED & FIRST CONFESSION

When was first confession made?	Pleaded Guilty		Pleaded Not Guilty		Total	
	#	%	#	%	#	%
1. PRIOR TO CAUTION but D "blurted out" admissions prior to opportunity to caution.	10	8.9	3	11.1	13	9.4
2. PRIOR TO CAUTION and after police had asked some questions suggesting that they suspected D	33	29.5	8	29.6	41	29.5
3. AFTER CAUTION	66	58.9	16	59.3	82	59.0
4. NO CAUTION	3	2.7	-	-	3	2.1
TOTAL	112	100.0	27	100.0	139	100.0
Not on file	3	-	1	-	4	-
ALL DEFENDANTS	115	-	28	-	143	-

Note: * In a number of cases in categories 1 and 2 further confessions were made after caution given.

* Thus, in 41% of all cases the defendant confessed before he or she had been cautioned.

EXAMPLES IN THE STUDY CASES

(i) Lapse of Time

Where the defendant confessed subsequent to being cautioned, generally the confession and the caution were closely related in point of time. There were a few cases, however, which revealed that the possible beneficial effects of the caution were likely to have been removed by lapse of time as may be illustrated by the following case:

The morning following the defendant's arrest the police went down to the cells at the police station and asked the defendant what he could tell them regarding the clothes and gun which had been found in the boot of his car. Both items had green dye on them, apparently from a "scorpion device" used by some banks. Although the defendant was cautioned at the time of arrest, 10 hours before, he was not cautioned prior to this conversation relating to the clothes and the gun:

D: It looks like I am in a lot of trouble. I should have got rid of that.

P-O: What do you mean?

D: You said you are from the hold-up squad. You must know what trouble I am in.

P-O: Has that weapon been used in any armed robberies?

D: Yes, the dye is from a hold-up at Newtown.

The defendant was then cautioned and taken to the C.I.B. Office, where a record of interview was conducted.

(ii) "Blurting Out"

Without attempting to explain the psychological and sociological pressures to confess operating on an accused,[246] to the layperson the various psychological theories seem inadequate for explaining the relatively high proportion of defendants (9.4%), who may have escaped police suspicion for several months and who "blurted out" a damaging admission or full confession prior to any police questioning and prior to the police giving any indication of the nature of the evidence they had against him or her. The difficulty of explaining this phenomenon led Judge Roden in Hinton's Case to doubt the police version of the events giving rise to the alleged confession.[247] The police said that after they had told the accused of the offence that they were investigating, and suggested to him that they believed he was involved in this offence, the accused agreed

that he "was in it". The admissions in the following four examples, all 51A cases, arose in similar circumstances although the first two statements do purport to provide some explanation for the decision to confess.

(i) The police informed the defendant that they were investigating an armed holdup by two stocking-masked men that had occurred in December, 1974. After being told by the police that they believed he had been one of these two men the defendant said:

> "What happened? Has Phillip and Jennifer (accomplice and wife) had an argument? Did she tell you that? .....I've waited for this day. After 4 1/2 years I thought we were right, but when you came I knew what you wanted. It's a fair cop, yes I did it."

(ii) The police arrived at a house where the defendant was visiting at the time. When asked general questions as to who he was and why he was there the defendant replied:

> "You're here so you must know what's going on. I use heroin and I've been doing a few busts. The gear in the Holden (parked outside) came from a couple on the North Shore today and a lot of the gear here ..... came from others I've done. I've been getting rid of some of it to Tony, he's the guy who lives in this flat."

(iii) Late one evening the police arrived at the defendant's flat and informed him they were making enquiries regarding a robbery. The defendant said:[248]

> "Yes, I was there but I didn't get any money."

Similarly a friend staying at the house said to the police:

> "Yes it was me .....This afternoon we done over an old man."

(iv) The defendant was charged with assault (of a policeman) occasioning actual bodily harm. When being charged in relation to matters not connected with the above offence at Kempsey Police Station the defendant said:

"I know you coppers. You couldn't get me in Sydney."

When the police officer asked him what he meant by this statement, he replied:

"I done for two coppers in Sydney. Flanders, Sammy Davis and me give them a hiding."

(iii) Caution-Induced Confessions?

Perhaps even more difficult to explain are the cases where the defendant made admissions immediately after being cautioned. Is the form of the caution, paradoxically, itself interpreted as inviting or requiring some explanation to be given by the defendant?

(i) The defendant and two other persons stole a car. They were pursued by the police and, after a high speed chase, crashed the vehicle. The driver, the defendant, decamped before the police arrived but his two passengers were arrested. Four months later the police went to the defendant's flat and after being asked his name he was cautioned. In response to the final words of the caution, "do you understand that?", the defendant said, "Yeah, I suppose you've got me then, eh." Prior to this the police had not suggested to him that he had been identified as the driver, nor that his co-defendants had named him as the driver. Indeed, in the handup brief presented on a guilty plea the only evidence against him was this oral admission and a handwritten statement.

(ii) On being questioned at his home as to a bank robbery which had occurred that day and immediately after being cautioned, the defendant said:

> "Yes, there's no point in telling lies, you know it was me, but I didn't have a gun when I did it. I didn't have anything and that's gospel."

(iii) The defendant pleaded guilty to armed robbery. After being asked if he understood "the caution" he said, "Yes, but I can't deny it can I, I'm caught cold."

(iv) Similarly, in response to the same question a defendant, subsequently convicted of break, enter and steal, said, "Yes, but I'll tell you the truth about the lot of it."

(iv) Volunteering Confessions Relating to Other Offences

Furthermore, some defendants were observed to have confessed to the offence the subject of the police inquiries and shortly thereafter volunteer confessions relating to other offences. During the interrogation it had not appeared that the police had, in relation to these other matters, suspected the defendant. This usually occurred in cases where the police were interviewing the defendant in relation to a stealing offence. The following cases are illustrative:

(i) The police were questioning the defendant about the larceny of a motor vehicle. During the course of the interview it was said:

> P-O: Can you tell us about that vehicle?
>
> D: No bullshit, I knocked it off, but I've driven a few other hot cars too. I'm gonna go to gaol anyway so I might as well fix the lot up.

P-O: Do you know the registration numbers of these other cars?

D: No but I reckon I can remember them all.

The defendant was subsequently charged with four counts of larceny of a motor vehicle, pleaded guilty under the s.51A procedure and was sentenced to 2 years' imprisonment on the first count and 12 months' on each other count, to be served concurrently with the first count. In sentencing the defendant 5 matters in the "Ninth Schedule" were also taken into account.[249]

(ii) After admitting to having broken into the house, at Hurstville, the defendant said:

"I may as well tell you about the other busts we did so I can clear them up."

(iii) The defendant was being questioned about two armed robberies. After admitting to having been involved in both the defendant said:

"I may as well come clean. I have been in three, altogether, we also done the A.N.Z. Bank at Northbridge last Christmas."

(iv) The defendant was observed by two police officers on patrol. He was standing in a car park looking at some jewellery. One of the policeman went up to the defendant:

P-O: Can you tell me where you got that jewellery from that you put in your pocket as we approached?

D: Seems this isn't my day. I did a couple of busts.

The jewellery, however, had all been stolen from one house. After making further oral and written admissions the defendant was charged with 4 counts of break, enter and steal and two counts of larceny of a motor vehicle.

(v) Other Cases - Negating Effects

Finally, and perhaps relevant to many of the remaining cases where the defendant waived the right to silence and made damaging admissions subsequent to being cautioned, the following observations suggest that the interrogation process assists to negate the impact of the caution:

> "When a constable cautions his prisoner that he is not bound to say anything to incriminate himself, but that what he shall say may be used in evidence against him on his trial, then, if the constable says nothing for the purpose of eliciting a disclosure, the prisoner is left to the voluntary agency of his own mind. But if the constable puts a series of searching interrogatories, he virtually, and, I think, actually and in effect, abandons the caution, and announces, by the very course of interrogation which he applies, that it is better for the prisoner to answer than to be silent. The process of questioning impresses, on the greater part of mankind, the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in some way, deprives the prisoner of his free agency; and impells him to answer, from the fear of the consequences of declining to do so."[250]

3. The Right to Obtain Legal Advice

(i) The Scope of the Right

Although some recent decisions indicate that the courts are growing more willing to exclude confessional evidence obtained in contravention of the suspect's right to see a lawyer during police interrogation[251] the right is often claimed to be hollow and to serve "no meaningful function as a safeguard to

the suspect in the Commonwealth countries".[252] Before discussing the conclusions suggested by the present research, it is worth noting the reasons which are generally relied upon to support such assertions. The arguments frequently do not rest on the results of empirical studies, there being a dearth of such research,[253] nor simply on personal experience; rather, the conclusion that the right is illusory is regarded as being the logical consequence of the application of the legal rules which purport to safeguard this right.

The N.S.W. Police Instructions state that, before arrest, "legal advisers may be consulted at the request of the person being questioned if suitable opportunity offers" and "police should afford a person arrested or charged reasonable facilities to obtain legal advice, if circumstances permit". Furthermore, questioning and interviewing should generally be deferred for a "short"[254] or "reasonable period"[255] to enable legal advice to be obtained, when so requested. It thus emerges that this declaration of the right to obtain legal advice contains a number of qualifications. In the first place, the police are not obliged to inform a suspect of his or her right to contact a lawyer or to have questioning deferred for such a purpose. Even if a suspect is aware of these rights he or she may be reluctant to initiate the discussion of such matters, fearing rebuff and rebuke or that it might appear inconsistent with innoncence.

In the second place, in ascertaining whether there has been a "request" the courts appear to have adopted an unduly narrow and pedantic approach by drawing dubious distinctions between the phraseology used by the suspect. In one of the trial cases, in answer to the final question contained in the record of interview, "Are you prepared to sign this record of interview?", the accused allegedly replied, "Not until I see my solicitor". In relation to the matters sought to be relied

upon on the voir dire relating to the admissibility of the record of interview, the trial judge regarded the accused's response when asked to sign and the subsequent failure of the police to provide him with the facilities to consult a solicitor as being of "little significance"; these facts neither destroyed the voluntary nature of the admissions nor provided a basis for exercising his discretion against admitting the document. In the course of giving his ruling His Honour said:

> "This is not a case where the evidence discloses that the accused has asked for a solicitor to be available to him before he is interviewed or to be made available during the taking of a record of interview and that request is then refused or frustrated in some way.... (A)lthough much has been made of the point that the police officers could have volunteered to him an opportunity to obtain the services of a solicitor, I do not think that the requirements of fairness or justice, nor the requirements of compliance with the Police Instructions would place such a stringent and rigid obligation upon interrogating police officers.
>
> In my opinion there was no obligation upon the interrogating officers to volunteer to make available the services of a solicitor, prior to embarking upon the interview. Furthermore, I am of the opinion that the mere intimation that he would not sign it without obtaining legal advice did not operate retrospectively, as it were, to destroy the voluntary character of what went on before. In those circumstances I see no danger in admitting the document...."

Similarly, where a suspect states that he or she does not wish to answer questions until after contacting a lawyer this is

generally not interpreted by the police or the courts as a "request".

Thirdly, even if the person does express the desire to obtain legal advice in the form of a "request", the police are only obliged to accede to such a request if "suitable opportunity offers" (prior to arrest) or if "circumstances permit" (post-arrest). Furthermore, questioning prior to arrest need only be suspended for a "short period" and an interview between the police and an arrested person may proceed once a "reasonable period" to enable lawyer-contact has elapsed. These are vague terms and the police must ultimately make the decision. Providing the police allowed the suspect to make some endeavours to contact his or her lawyer it is unlikely that subsequent questioning by the police would be regarded by the courts as "unfair", irrespective of whether the accused had succeeded in obtaining the desired legal advice.[256] Furthermore, the "reasonable period" permitted to contact a lawyer does not appear to have been regarded as a flexible concept, dependant upon whether the police seek to interview the suspect at a "reasonable" or "unreasonable" hour of the day or night. There are obvious difficulties in contacting a lawyer outside "normal" working hours. These problems will be even more acute where the person is arrested and interviewed very late at night or in the early hours of the morning. As the following table illustrates, a substantial proportion of the defendants in the study may well have found it difficult to obtain legal advice even if he or she requested, and was granted, the opportunity to contact a lawyer: 47% of the defendants were "taken into custody" outside the hours of 9 a.m. - 6 p.m., and if a lawyer's working hours are treated as 9 a.m. - 5 p.m., 55.1% of the defendants are outside this period. Furthermore, the lateness of the hour may have influenced some defendants to decide not to request to see a lawyer.[257] For example, they may have felt

reluctant to disturb a lawyer outside working hours or they may have felt that a lawyer would not attend the police station until the morning.[258]

TABLE 28. TIME APPREHENDED

Time of Contact With Police	All Defendants	
	#	%
9 am - 6 pm	72	53.0
6 pm - 11 pm	24	17.6)
11 pm - 6 am	26	19.1) 47%
6 am - 9 am	14	10.3)
TOTAL	136	100.0
Not on file	11	-
All defendants	147	-

Note:* This table has not been divided into 4 periods of equal duration, but rather according to the time periods when it would be the least difficult (9 a.m. - 6 p.m.), difficult (6 p.m. - 11 p.m.) and extremely difficult (11 p.m. - 6 a.m.) to obtain legal advice. Whilst it would also generally be difficult to obtain legal advice in the 3 hour period of 6 a.m. - 9 a.m., it might be "reasonable" for the police to defer the interview until later in the day, when the suspect has had the opportunity to contact a lawyer at his or her office.

The fourth qualification relates to the application of the relevant legal rules where there has been a denial of the right, as defined by the Police Instructions, that is, where an actual request has been made which has been unreasonably refused by the police. Whether the evidence of any confession obtained subsequent to such a refusal will be excluded lies solely within the discretion of the trial judge. It is important to stress

that neither the police directions nor the Judges rules have the force of law and their non-observance does not automatically render a confession involuntary or as being unfairly obtained.[259] Although reference has been made to the fact that some judges have more recently shown a willingness to exclude confessional evidence where the police denied the accused his or her right to contact a lawyer, it is certainly not yet an established practice to exclude evidence of confessions made in such circumstances.[260]

Finally, even assuming that the trial judge is prepared to exclude confessional evidence where an accused has been wrongly denied access to legal advice, the particular accused must prove, on the balance of probabilities, that he or she did in fact make such a request and that the police unreasonbly refused to provide the facilities to enable him or her to contact a lawyer. In the four study cases where the issue arose, 2 plea-guilty cases and 2 trial cases, the police denied that such a request had ever been made. While the file relating to Trial (21) does not indicate whether this point was raised on a voir dire or merely during cross-examination before the jury in Trial (3), where the defence relied on this ground together with other alleged police improprieties on the voir dire, the trial judge accepted the evidence of the police officers in preference to the evidence given by the accused and admitted the confessional evidence.

(ii) Study Cases - Frequency of Lawyer Contact

Although the overwhelming majority of defendants had legal representation at court,[261] in only 10 of the 147 study cases did the files contain any mention of a lawyer being contacted during or prior to police interrogation.[262] If the conclusion is correct, that the conduct of the defendant during police

interrogation is one of the most important factors in determining the course of the subsequent disposition of the case,[263] it would appear that the lawyer will generally be presented, at his or her first meeting with the client, with a fait accompli. Indeed in the 10 study cases where there was "lawyer contact", all of the defendants subsequently pleading guilty, it appears that the contact was often "too late" to have a substantial influence on the outcome of the particular case.

In 4 of the cases there was no lawyer contact during the actual police interview although the accused had obtained legal advice at some stage prior to the interview. Lawyer contact in the remaining cases was established by telephone communication in one case and by the lawyer being present at the police station[264] during all or part of the interrogation in the other 5 cases. In addition to these 10 cases there were the 4 cases discussed above in which it was contentious whether there had been a request and in 3 further cases the defendant's comments were insufficient to amount to a "request". Table 29 summarizes the position:

TABLE 29. ALL DEFENDANTS X LAWYER CONTACT

PLEA	NO MENTION IN FILE	REQUEST - CONTENTIOUS	NO ACTUAL "REQUEST"	SOME LAWYER CONTACT
Pleaded Guilty	106	2	1	10
Pleaded Not Guilty	24	2	2	-

Note: * In the 2 plea-guilty cases where it was contentious whether the defendant requested to contact a lawyer and was refused, the issue was raised at the committal hearing.

(iii) The Role of the Lawyer in the Interrogation Process.

The previous discussion assumes that lawyers can offer some protection or assistance to persons being interrogated. Whether lawyers do in fact perform a beneficial role, so far as defendants are concerned, cannot be evaluated merely by comparing the conviction rates of those who received some legal advice with those who did not. Indeed, if one were to confine the evaluation within such limits the present study would suggest that the conviction rate of those receiving legal advice (100%) is higher than those not receiving legal advice! The involvement of a lawyer may also influence, for example, the plea bargaining process, the granting or refusal of bail and patterns of sentencing. However, it is felt that the size of the sample obtained for the present study precludes an adequate assessment of the influence on these matters.

Nevertheless, it does not necessarily follow that a defendant will exercise his or her right to silence and refuse to answer questions subsequent to lawyer contact. The results of the present study indicate that the protection offered by having access to a lawyer may be severely restricted or diminished in at least two ways.

The first negating factor, revealed in Table 30, arises from the fact that in 7 of the 10 cases it was alleged that the defendant had made damaging admissions prior to him obtaining legal advice. It is therefore less surprising that these defendants were subsequently convicted or that they indeed pleaded guilty to the offences with which they were charged.

TABLE 30. LAWYER CONTACT (Selected Cases)

Case No.	Alleged Confessions Pre-Lawyer Contact?	Nature of Lawyer Contact	Alleged Confessions Post-Lawyer Contact	Lawyer at Interview
(1)	No	Telephone	No - Exercised right to silence	No
(2)	Yes -oral D challenged earlier oral admissions at committal (involuntary or discretion)	Accompanied D to police station	No - Exercised right to silence	Yes
(3)	No	Accompanied D to police station; D voluntarily "gave himself up" and went to police station	Yes - Full confession; signed record of interview	Yes
(4)	Yes - oral	Police Officer telephoned lawyer's office - told lawyer not available - commenced record of interview - lawyer arrived part way through interview	Yes - Confession: signed record of interview	Yes (part)
(5)	Yes -oral & record of interview	Accompanied D to police station	No - Exercised right to silence	Yes
(6)	Yes -oral	Advice pre-interview	Yes - Signed statement- "self-serving"	No
(7)	Yes -oral & record of interview	Accompanied D to police station	Yes - Signed record of interview	Yes
(8)	Yes -oral & record of interview	Advice pre-interview; D told police he did not want solicitor present	Yes - Signed statement	No
(9)	No	Accompanied D to police station; D voluntarily went to police station. Did not want lawyer present during interview Advice pre-signing	Yes - Signed record interview	No
(10)	Yes -oral	Advice pre-interview	Yes - Signed record of interview	No D willing to have interview go ahead without solicitor present.

Secondly, in 3 of the 8 cases in which the lawyer was actually present at the police station (Cases (8),(9),(10)), it appears that the defendant "threw away the safeguard" at the crucial time by not wishing his or her lawyer to be present during the formal interrogation. For example, in Case (9) the defendant was accompanied by her barrister when she went to the Special Breaking Squad Office at C.I.B. During a conversation with the Senior Detective in the absence of her barrister, absent at her request, the defendant said, "I know what you want to see me about, that is why I have come in." After cautioning the defendant she continued to speak, saying, "I want to clear it all up .... I would rather you take my statement without my barrister as I have nothing to hide and I want to tell you the whole story." The barrister, upon being informed of his client's wishes, accepted these instructions but indicated that it was contrary to the advice he had given to her. The defendant did subsequently request that her barrister be shown a copy of the record of interview. After he read it he had a short conversation with his client (no details) and again left the office. The defendant then signed each page of the record of interview, embodying a full confession to the offence with which she was thereupon charged (accessory before the fact of larceny of a motor vehicle).

The facts of Case (10) are interesting not only because the defendant was willing to have the interview proceed without his lawyer present, but also because of the inconsistent behaviour apparently exhibited by the defendant. When questioned by the police he allegedly said, "Well I know I did the wrong thing, but I was in a lot of financial trouble." Yet, when the police subsequently informed him that they intended to conduct a record of interview and asked if he understood he allegedly replied, "Yes, but the public solicitor saw me in the cells this morning and told me not to say anything unless he was present."

The police then contacted the public solicitor and after he had spoken to the defendant and left the office the police asked the defendant if he wished the public solicitor to be present. The defendant indicated that he was willing to have the interview proceed in the absence of the solicitor as he wanted "to get the whole thing sorted out".

It therefore appears that people may not regard legal advice or the presence of a lawyer as necessary or beneficial if they intend to confess to the police as to their criminal involvement in a particular incident. Similarly, an English study conducted by Baldwin and McConville[265] found that a number of the sample defendants who were aware of their right to contact a lawyer did not do so because "they were innocent,... their conscience was clear and they thought no charges would be preferred against them."[266] Yet, in both situations, where the person intends to confess or where he or she is innocent, a lawyer may be of assistance. The interviewee may be extremely nervous or may possess limited verbal skills; a person may be able to give a "good" or a "bad" account of the truth and a lawyer will generally be able to aid in ensuring that the police hear the former version.[267] Furthermore, the lawyer can help to clarify the questions or the answers where there is the possibility of an ambiguity which may produce a misleading impression. The record of the conversation will then, hopefully, exactly reflect what was said and what the defendant wished to be understood as saying.[268] Furthermore, the lawyer present during the interrogation will be able to provide an account of what occurred during that period. If the police give a different version, the lawyer will be able to corroborate the evidence of the accused.

G. CONCLUSION

The purpose of this study was not so much to provide a statistical analysis of cases heard in the New South Wales District court, but rather, to examine the feasibility and value of extracting empirical data and other information from the court files held at the Office of the Clerk of the Peace. The writer has no hesitation in stating that this form of research yields important insights into the criminal process and can provide a more reliable base for the discussion of possible reform strategies than has hitherto been available in New South Wales.

The feasibility of retrieving valuable empirical data and the tentative conclusions which emerged from the present research means that it is no longer satisfactory for commentators to make unqualified statements based on intuition, educated guesses or general 'experience' on such matters as the role of confessional evidence. For example, it is submitted that the present findings at least cast doubt on the general assumption that those suspects with prior experience of the criminal process are 'tougher nuts to crack' and less likely to confess their guilt. For whatever reason the police in the study cases obtained confessional evidence against such individuals at approximately the same rate as was obtained against their less-experienced counterparts. Similarly, the importance of the right to silence as it is presently perceived and the role of the lawyer at the police station and during police interrogation may have to be revised in the light of the present findings.

The following summary outlines the more important findings which emerged:

1. The vast majority of defendants (96.6%) made confessions or damaging statements when interviewed by the police. The frequency of such confessional evidence is much higher than has been reported by any overseas study.

2. The single most important factor affecting the decision to plead guilty was the nature of the confessional evidence against the accused.

3. Although written confessions were less common than verbal confessions, in nearly 80% of cases there was evidence of "written" or "oral and written" confessions.

4. In relation to the question "Who confesses?" the most significant factor appeared to be the nature of the offence. It is somewhat surprising that those charged with the more serious offences more frequently supplied incriminating confessional material.

5. The defendants generally confessed within a relatively short period after initial police contact.

6. The type of confessional evidence (oral, written, oral and written) presented at trial bore a correlation to the overall rates of guilty and not-guilty verdicts. Defendants who allegedly made verbal confessions only were more frequently acquitted.

7. In all the trial cases the Crown relied on police witnesses and in the overwhelming majority of cases the police witnesses gave evidence of alleged admissions made by the accused.

8. A substantial proportion of trial time was spent contesting confessional evidence.

9. In only one trial case in which a voir dire was held to determine the admissibility of the confessional evidence did the accused succeed in having the evidence excluded.

10. In 50% of the trial cases the accused made an unsworn statement from the dock and in only 10% of cases did the accused go into the witness box.

11. The giving of a caution, at least as presently worded and administered, seemed to be of little or no significance in regulating the relationship between the suspect and the police during interrogation. Many defendants volunteered or 'blurted out' damaging admissions and most defendants apparently waived their right to silence even after being cautioned.

12. Few defendants obtained legal advice prior to or during the police interrogation. Furthermore in seven of the ten cases in which the defendant did obtain legal advice it was alleged that the defendant had made damaging admissions at some time prior to the obtaining of legal assistance. The role of the lawyer in these ten cases is also worthy of note.

Whatever else may be said of the foregoing analysis, there can be little doubt that of critical impact on the decision to plead guilty and the subsequent disposition of the defendant's case is the questioning of the suspect at the police station and the Crown evidence of the encounter. Nevertheless, neither this statement nor the more detailed picture presented by the

foregoing summary provide a sufficient basis for evaluating reform strategies. Whilst the present study provides some insights, the following statement is still apposite in Australia:

> "The importance of confession evidence in criminal cases has been the subject of rash and uninformed speculation for a good many years. Dogmatic assertion based upon partial observation and narrow experience has held sway in the absence of detailed knowledge. The research evidence (almost wholly American) is so fragmentary and limited as to render generalisation immediately suspect."*

It is hoped that this study will serve as a reminder to those concerned with the criminal process that the need for further research is unquestionable. Important and valuable data is retrievable, and hopefully the necessary resources to fund and assemble a full-scale empirical study of these matters relating to the criminal process will soon be forthcoming.

H. POSTSCRIPT-THE U.K. ROYAL COMMISSION ON CRIMINAL PROCEDURE

Since conducting the research and writing for this paper a number of the papers and studies conducted or funded by the United Kingdom Royal Commission on Criminal Procedure have become available in Australia. The following reports are of particular importance in the context of the present discussion:

1. B. Irving and L. Hilgendorf, Police Interrogation: The Psychological Approach (Research Study No. 1);

* J. Baldwin and M. McConville, Confessions in Crown Court Trails (U.K. Royal Commission on Criminal Procedure - Research Study No. 5 - 1980), page 1.

2. B. Irving, Police Interrogation: A Cast Study of Current Practice (Research Study No. 2);
3. P. Morris, Police Interrogation: Review of Literature (Research Study No. 3);
4. P. Softley, Police Interrogation: An Observational Study in Four Police Stations (Research Study No. 4);
5. J. Baldwin and M. McConville, Confessions in Crown Court Trails (Research Study No.5);
6. J. Vennard, Contested Trials in Magistrates' Courts (Research Study No. 6).

A number of interesting points emerged from these studies, particularly the study conducted by Baldwin and McConville (see 5 above). The findings which were reported in this fifth research study serve to reinforce a number of observations made in the present study. Nevertheless it would be misleading to suggest that their findings exactly corresponded with all those reported here. Indeed, this is not surprising. For comparative purposes it is worthy to note the following points made in the Baldwin and McConville study:

1. The frequency of confessional evidence was not as high in their study (pages 13-15).

2. Unlike the present study, the authors found a strong relationship between the age of the suspect and the tendency to confess (pages 22-23) and a consistent pattern between the frequency of confessions (or types of confessions) and offence categories was not present (page 25). However, they also found that recidivists were not less likely to confess (pages 23-24).

3. Eighty per cent of confessions were made at the police station (pages 20-21).

4. One-third of defendants made full written confessions (pages 13-14).

5. The commentators noted the importance of police evidence (pages 17-18).

6. There was a high degree of correspondence between the probability of conviction (by plea or trial) and the existence of a written confession (page 19).

Irrespective of the results of Baldwin and McConville's study and its significance in the Australian context the research serves to once more illustrate the potential value of empirical data on matters related to the role of confessional evidence in criminal cases.

APPENDIX

TABLE A DISTINCT PERSONS DEALT WITH X PRINCIPAL OFFENCE (Actual/Intended)

OFFENCE	SAMPLE: A/I	DEFENDANTS					TOTAL DEFTS	
		Guilty: Plea	Guilty: Trial	Total Defts Guilty	Trial: Not Guilty	Trial: Mistrial/ Hung	#	%
Forge, Utter, False, Prets, Untrue Reps.	A	13	1	14	1	-	15	10.2
	I	16	2	18	1	-	19	10.8
Larceny, Receiving	A	13	1	14	-	-	14	9.5
	I	14	1	15	-	-	15	8.6
Larceny (M.V.)	A	13	-	13	2	-	15	10.2
	I	13	-	13	2	-	15	8.6
B.E.S.	A	25	2	27	3	-	30	20.4
	I	28	2	30	3	-	33	18.9
Assault, Malicious Wounding	A	16	2	18	2	2	21	15.0
	I	21	4	25	4	2	31	17.7
Malicious Damage to Property	A	1	1	2	-	-	2	1.4
	I	3	1	4	-	-	4	2.3
Drug: Supply, Import	A	13	3	16	1	-	17	11.6
	I	14	4	18	1	1	20	11.4
Rob, Armed Rob, Demand Money with Menances.	A	13	3	16	-	-	16	10.9
	I	16	3	19	-	-	19	10.8
Escape	A	3	-	3	-	-	3	2.0
	I	3	-	3	-	-	3	1.7
Driving: Injury or Death	A	3	-	3	1	1	5	3.4
	I	4	-	4	2	1	7	4.0
Other	A	6	1	7	-	1	8	5.4
	I	6	1	7	-	2	9	5.2
TOTAL DEFTS	A	119	14	133	10	4	147	100.0
	I	138	18	156	13	6	175	100.0

Note: A : Number of defendants in actual sample.
I : Number of defendants in intended sample.

NOTES TO TABLE A

Offence Categories:

* Attempt or Accessory or Conspiracy classified by "principal" offence categories above.
* "Other" included Infanticide, Enter Dwelling with Intent to Commit Misdemeanour, Send Threatening Letter, Possession/Use Firearm, and Carnal Knowledge (1 Trial defendant).
* Where charges in indictment in the alternative, classified above by reference to charge convicted of.

"Not Guilty":

* Not Guilty to all charges - for complete breakdown see A.B.S. Statistics: Adapted from Table 7 Australian Bureau of Statistics, Higher Criminal Courts in N.S.W. - 1979.

* The comparison is not as accurate as one would wish, as A.B.S. statistics do not distinguish between District Court and Supreme Court cases, nor between Sydney and country cases. However, the "most serious" cases (murder, rape etc) appearing in the A.B.S. figures were excluded in making above calculations, as such cases would have been dealt with by the Supreme Court. I was informed by the A.B.S. that a more detailed breakdown is not available.

* The inclusion of Sydney and country cases

in A.B.S. statistics may explain part of disparity in figures as compared with sample. e.g. it is possible that there is a regional bias in sample in relation to drug offences.

* Finally, there may be slightly different classification method employed by A.B.S. to that employed in sample.

TABLE B NUMBER OF TIMES EACH DEFENDANT CONFESSED

# of times D confessed	# of Defts	ORAL	WRITTEN					TOTAL # of CONFNS
			RECORD/INTERVIEW		STATEMENT-signed		OTHER	
			Signed	Unsigned	H'Written	Typed		
DEFENDANTS PLEADING GUILTY								
NONE	4	-	-	-	-	-	-	-
1	28	9	19	-	-	-	-	28
2	44	40	43	1	2	1	1	88
3	21	37	23	1	-	2	-	63
4	8	13	10	-	7	-	2	32
5	1	2	-	-	3	-	-	5
6	3	5	8	-	5	-	-	18
7	4	12	11	-	4	1	-	28
8	3	12	8	-	4	-	-	24
9	1	5	-	-	4	-	-	9
10	-	-	-	-	-	-	-	-
11	2	11	6	-	1	4	-	22
TOTAL	119	146	128	2	30	8	3	317
As % of all confns	-	46%	40.4%	.6%	9.5%	2.5%	1.0%	100.0%
Ave # of confns per defendant	2.7							
DEFENDANTS PLEADING NOT GUILTY								
NONE	1	-	-	-	-	-	-	-
1	11	6	4	1	-	-	-	11
2	11	14	6	2	-	-	-	22
3	2	3	1	-	2	-	-	6
4	2	6	1	1	-	-	-	8
5	1	1	4	-	-	-	-	5
TOTAL	28	30	16	4	2	-	-	52
As % of all confns	-	57.5%	30.8%	7.7%	3.8%	-	-	100.0%
Ave # of confns per defendant	1.8							
ALL DEFENDANTS								
NONE	5	-	-	-	-	-	-	-
1	39	15	23	1	-	-	-	39
2	55	54	49	3	2	1	1	110
3	23	40	24	1	2	2	-	69
4	10	19	11	1	7	-	2	40
5	2	3	4	-	3	-	-	10
6	3	5	8	-	5	-	-	18
7	4	12	11	-	4	1	-	28
8	3	12	8	-	4	-	-	24
9	1	5	-	-	4	-	-	9
10	-	-	-	-	-	-	-	-
11	2	11	6	-	1	4	-	22
TOTAL	147	117	144	6	32	8	3	369
%	-	47.7%	39.0%	1.7%	8.7%	2.2%	.8%	100.0%
Ave # of confns per defendant	2.5							

DETAILS OF SELECTED TRIAL CASES

* TRIAL (1): Steal in a Dwelling House.

Verdict: Not Guilty by Direction.

Confession? Signed Record of Interview - Rejected.

The record of interview was the only evidence against the accused. Upon ruling that the record of interview would be excluded, in the exercise of his discretion, the trial judge directed that the jury return a verdict of not guilty.

Discussed: pages - 50, 52-53, 55-57, 71-72, 73, 149.

* TRIAL (2): Shoot with Intent to Murder (alt. Shoot with Intent to do G.B.H.).
Being Armed, Assault with Intent to Rob.

Verdict: Guilty to Both Counts.

Confession? 2 Oral, Signed Record of Interview - Tendered subsequent to voir dire.

Case against accused depended on confessional evidence and evidence of victim and eyewitness, both security guards at the Boulevard Hotel. It was alleged by the defence that the victim and the police officer who conducted the record of interview were friends and that the latter told the accused, "He (the victim) is my mate. You took a shot at him. We will get you." At the committal hearing the police officer said his only previous contact with the victim was on "police business" and that they had never lunched together. The victim, however,

admitted that they had had lunch together prior to the incident. The defence alleged that the document was in part a fabrication noting, inter alia, that police knew all information contained in R/I prior to commencement of interview (other than personal details). Also alleged physical violence (spitting blood). Whilst it was not denied that the accused was at scene and had a gun, it was said that the gun went off accidentally when the accused's hand hit a closing door.

Discussed: pages - 65, 72, 76, 84.

* TRIAL (3): Assault with Intent to Murder (alt. Assault Occasioning Actual Body Harm).

Verdict: Guilty to Alternative Charge.

Confession: Oral, Signed Record of Interview - Tendered subsequent to voir dire.

The Crown case was that the complainant, whilst a passenger in the accused's car, was hit with a mallet by the accused. The accused then accelerated the vehicle into the rear of a truck so that the passenger's side of the car hit a truck. The accused subsequently took the police to the place where he had thrown the mallet. The accused stated in the record of interview that the complainant's wife had paid him $500 to kill her husband.

The defence asserted that record of interview was made involuntarily whilst the accused was handcuffed to a chair: "forcefed".

Discussed: pages - 44-45, 63-64, 76.

* TRIAL (4): Being Knowingly Concerned in the Importation of Prohibited Drugs (Cannabis).

Verdict Guilty.

Confession: Oral, Signed Record of Interview - Tendered subsequent to voir dire.

The defence asserted that oral admissions were never made and that the record of interview incorrectly recorded the conversation. Also that the police had threatened the accused. This confessional evidence was the only evidence against the accused.

Discussed: page 76.

* TRIAL (6): Break, Enter and Steal (2 counts).

Verdict: Guilty - accused changed plea to guilty after confessional evidence admitted.

Confession? 2 Signed Records of Interview - Tendered subsequent to voir dire.

The facts of the case are given in main paper. The confessional evidence was the sole evidence against the accused.

Discussed: pages - 18, 76-77.

* TRIAL (7): Assault Occasioning Actual Bodily Harm.

Verdict: Hung Jury.
Subsequently convicted at retrial.

Confession: Oral, Unsigned Record of Interview - Tendered; voir dire refused.

The defence was that of justification: that the accused feared for his brother who was in danger of injury and that he acted reasonably in defence of his brother, without excessive force. The evidence inconsistent with this was an admission in the record of interview that he had kicked the victim. Two eye-witnesses (friends of the victim) also gave evidence that the accused kicked the victim. The defence alleged that the record of interview was partly fabricated, noting that it was unsigned, and alleging that the accused was not given a copy "forthwith".

Discussed: pages - 78, 80-81, 89-90.

* TRIAL (8): Carnal Knowledge.

Verdict: Hung Jury.
No further proceedings.

Confession? Oral, Unsigned Record of Interview - Read/Refresh.

The complainant's evidence was somewhat inconsistent and the medical evidence did not prove that intercourse had occurred on the night in question. During cross-examination of the police witnesses the defence sought to show that physical violence was inflicted and threats of further violence were made at the commencement of the record of interview. The accused vividly described the nature of the alleged violence used by the police in his statement from the dock; after denying that he had "touched the girl" he maintained that the following sequence of events occured:

"He then slapped me across the face with a good backhander. I overbalanced in the chair but didn't fall off. He said 'I am going to ask you again' and he did and the reply was the same and this time he gave me another backhander which knocked me clean out of the chair. He then asked me again. He said 'Make it easy upon yourself'. I again refused to do what he said so then he said 'Come out over here in this room here'. I walked out there and there was (three police officers) that was the man that brought me before and some other chap, I am not sure who it was .... and they pushed me around and between themselves in a little circle and as they pushed me into one another they introduced themselves with a fist 'Hi' - smash. 'I'm Det. (X)'. 'Hi' - smash: 'I'm (C)', 'you'll get to know me real well' they were saying, and they were taunting me saying that the girl said that I was lousy in bed and I said to them 'How come I have got two children', or one child at a time it might been, I am not sure. And they just laughed and said 'She reckons you only last three minutes'. I said, 'Come on, give me some credit' and they hit me to the ground again and several times I went to the ground, they said 'Get up'. As soon as I got up I was down on the floor again reading the carpet.

One time I stayed down a bit too long so Mr. F. stood over me, his legs over my shoulders or just behind my shoulders, and I just lay there covering my face so I would not get a broken nose or something like that, and he went with his right in the side of my head and left into the side of my head and kept doing this until it was his decision to stop.

He was not hurting me so I was quite willing to stay there all the time. It didn't affect me at all but then he let me up and Det. C said 'This is just the start of it, things will get a lot rougher now if you don't co-operate'.

Then one of the detectives was standing behind me, pushed me towards Mr. C and punched me in the lower part of the diaphragm in the part of the stomach and wounded me severely. I went down on my knees and normally it would not affect me to that extent, but I just, the weekend before or a couple of weekends before I had played B-grade football with my brother and I received a football injury and I didn't go to a doctor to check it up, I thought I might have cracked my ribs or bruised the ribs and this added to the pain and I went down the ground and they said 'Come on, admit to it'. So I did, got up off the floor and I said 'All right, I done her'. From then on I was too scared not to co-operate."

Discussed: pages - 73, 78, 170.

SIMILARITY BETWEEN RECORDS OF INTERVIEW OF CO-ACCUSEDS.

(i) Plea - Guilty Case.

Extracts + Record of Interview of Co-D * 1:

"Paul and Nick were pushing and pulling at the man".

"There was a struggle between him and the other two blokes".

+ Record of Interview of Co-D * 2:

"No he wasn't punched he was pushed and pulled during the struggle ".

(ii) Plea - Guilty Case.

Extracts + Record of Interview of Co-D * 1:

"We went back the next night and got the rest of the stuff that you mentioned to me".

+ Record of Interview of Co-D * 2:

"Well I went there on two separate nights and each time we took a fair bit of stuff and included the paintings and the other stuff you mentioned ".

+ Record of Interview of Co-D * 3:

"I didn't know the stuff was that valuable".

+ Oral Admissions of Co-D * 1:

"Yes I might as well tell you now Sergeant, I did the break and enter ..."

+ Oral Admissions of Co-D * 2":

"I might as well tell you , and get it all cleared up. I went with them to that place and broke in".

TABLE C. TIME "APPREHENDED"

TIME	# DEFTS	TIME	# DEFTS
9-10 am	6	9-10 pm	6
10-11 am	19	10-11 pm	3
11-12 m/d	7	11-12 m/d	4
12/1 pm	8	12-1 am	7
1-2 pm	2	1-2 am	3
2-3 pm	5	2-3 am	1
3-4 pm	8	3-4 am	4
4-5 pm	6	4-5 am	1
5-6 pm	11	5-6 am	6
6-7 pm	3	6-7 am	5
7-8 pm	8	7-8 am	4
8-9 pm	4	8-9 am	5
NOF	11		

LEGAL REPRESENTATION

In only 2 of the 147 cases was the defendant unrepresented in both the lower court and the District Court. In a further 8 cases the defendant was not represented in one of the two court proceedings. The following table summarizes the position. Table E shows the frequency of solicitor and barrister appearances.

TABLE D. LEGAL REPRESENTATION

LEGAL REP.	Pleaded Guilty #	Trial #	Total Defendants #	Total Defendants %
NONE	2	-	2	1.4
PETTY SESSIONS ONLY	1	-	1	0.7
DISTRICT COURT ONLY	5	2	7	4.7
DISTRICT COURT (P/S unknown)	2	-	2	1.4
PETTY SESSIONS AND DISTRICT COURT	109	26	135	91.8
TOTAL	119	28	147	100.0

TABLE E. FREQUENCY OF BARRISTERS AND SOLICITORS

SOL/BAR REP	PLEADED GUILTY #	PLEADED GUILTY %	TRIAL #	TRIAL %	TOTAL DEFENDANTS #	TOTAL DEFENDANTS %
Sol (P/S); Bar (D/CT)	48	40.3	10	35.7	58	39.5
Sol (P/S); Sol (D/CT)	39	32.8	6	21.4	45	30.6
Bar (P/S); Bar (D/CT)	19	16.0	10	35.7	29	19.7
Bar (P/S); Sol (D/CT)	3	2.5	-	-	3	2.0
Bar (Single Rep)	3	2.5	2	7.2	5	3.4
Sol (Single Rep)	5	4.2	-	-	2	3.4
None	2	1.7	-	-	2	1.4
TOTAL	119	100.0	28	100.0	147	100.0

TIME TAKEN TO PROCESS CASES .

The files generally gave few reasons for adjournments or delays. The most frequently appearing reasons where such were given were: non-availability of prosecution witnesses (at committals); non-appearance of accused; case stood over until other matters which related to the accused were determined (District Court for sentence). In one case the proceeding commenced in 1967, but the defendant failed to appear and case not "recommended" until 1979. In a number of the drug offence cases, where the defendant was a drug addict, the determination of the sentence was delayed whilst the defendant underwent treatment.

TABLE F. TIME BETWEEN CHARGE AND DISPOSITION

Time Taken	Pleaded Guilty #	Trial #	Total Defendants #	Total Defendants %
1 mth (or less)	2	-	2	1.6
1-2 mths	2	-	2	1.6
2-3 mths	13	-	13	10.5
3-4 mths	12	1	13	10.5
4-5 mths	14	-	14	11.3
5-6 mths	15	-	15	12.1
6-9 mths	18	3	21	16.9
9-12 mths	4	5	9	7.3
1 yr - 1 1/2 yrs	11	7	18	14.5
more than 1 1/2 yrs	10	7	17	13.7
Total	101	23	124	100.0
Not on File	18	1	19	-
ALL DEFENDANTS	119	24	113	-

Note: * Hung/Mistrial Trial Cases Excluded (4 defendants).

* Some of missing data due to my own collection error.

TABLE G. TOTAL NO. OF COURT APPEARANCES (P/S AND D/CT)

No. of Times D Appeared	Pleaded Guilty #	Trial #	Total Defendants #	Total Defendants %
3	12	1	13	10.0
4	14	-	14	10.8
5	20	-	20	15.4
6-8	43	10	53	40.8
9-11	11	6	17	13.1
12-14	2	6	8	6.2
15-17	1	2	3	2.3
18-20	-	1	1	0.7
21-21	-	1	1	0.7
No. Defts	103	27	130	100.0
Not on File	16	1	17	-
TOTAL DEFTS.	119	28	147	-

Notes: * It is possible files did not contain a note of all appearances.

* The total number of appearances for the 130 defendants was 912; the average number of appearances for all defendants was 7: (6.1 in plea-guilty/5IA cases; 10.4 in trial cases).

TABLE H.

PERIOD BETWEEN DATE OF OFFENCE AND DATE DEFT. "APPREHENDED"

PERIOD	PLEADED GUILTY #	TRIAL #	TOTAL DEFENDANTS #	TOTAL DEFENDANTS %
24 hrs	39	14	53	40.8
1-2 days	8	5	13	10.0
2-7 days	16	6	22	16.9
7-14 days	10	-	10	7.7
14-30 days	5	1	6	4.6
1-2 mths	7	-	7	5.4
2-6 mths	11	-	11	8.4
6+ mths-1 yr	3	1	4	3.1
1 yr	4	-	4	3.1
No. Defts.	103	27	130	100.0
Not on File	16	1	17	-
TOTAL DEFTS.	119	28	147	-

Notes: * Where D convicted of multiple offences, date of last offence used.

* Some of missing data due to my own collection error.

DEFENDANT: #:

PRINCIPAL OFFENCE:

OTHER OFFENCES:

s 51A COMMITTAL/PLEA G/PLEA N-G (to principal offence).

C/A:

FACTS:

COMMITTAL (General):

Court:

Magistrate:

Prosecutor:

Legally Represented?

D's Solicitor:

of:

D's Barrister:

Plea (s 51A, No. Plea, change of Plea to)Principal Offence:

Other Offences:

Duration (if >1 day):

Defence Case (if any):

TRIAL/s 51A COMMITTAL/PLEA G (General):

Court: Sydney District Court

Judge:

Crown:

Legally Represented?

D's Solicitor (as above?):

of:

D's Barrister (as above?):

Plea-Principal Offence:

Other Offences:

Duration (if trial):

Outcome (if trial):

Defence Case (briefly):

SENTENCE (date):

PERSONAL DETAILS

Age/Date of Birth:

Sex:

Marital Status:

Employed at Date of Offence?

as:

Employed at Date of Trial?

as:

English Speaking (second language- good, average, poor, none):

Highest Level of Schooling: Tertiary, HSC, SC, tech, some h.s., primary.

PREVIOUS CRIMINAL HISTORY

Previous Criminal Convictions:

Nature of Last PCC:

Date of Last PCC:

Previous Gaol Sentences:

Previous Most Serious Offence:

PCC in-Children's Court:

-Petty Sessions:

-Higher Court:

PCC in Same Category as Present Offence:

Offence Categories:

1. Murder/Manslaughter
2. Rape
3. Armed Robbery
4. Other Sexual Offences
5. Other Physical Violence
6. Theft, Burglary, Handling
7. Forgery, Fraud, Embezzlement
8. Driving (incl. death caused by)
9. Drug Law Violations
10. Victimless Crimes/Summary Offences
11. Miscellaneous

BAIL

D Was: remanded in custody, released on bail, bail allowed but not met, bail not required, not known.

Revoked? At what stage?

Varied?

OUTCOME

Principal Offence: 51A, pleaded guilty at trial, verdict G, verdict N-G, verdict N-G by direction, mistrial, hung jury, verdict G to lesser offence (state).

Sentence: bond, fine, bond & fine, imprisonment (length):

(non-parole period):

Compensation:

Other Offences: 51A, pleaded guilty at trial (and accepted in full discharge of indictment), verdict G, verdict N-G, verdict N-G by direction, mistrial, hung jury, verdict G to lesser offence (state).

Sentence: bond, fine, bond & fine, imprisonment (length):

Cumulative/Concurrent:

TOTAL non-parole period:

	#	Details	G General ID Implicating D IDB " But Capable of Innocent Explan"	Challenged By D?	Additional Notes
CROWN CASE:					
Witnesses					
Police			G ID IDB		
Victim (eyewitness)			G ID IDB		
Victim (not eyewitness)			G ID IDB		
Other Eyewitness			G ID IDB		
Expert			G ID IDB		
Accomplice			G ID IDB		
Other (state)			G ID IDB		
Nature of Evidence					
Fingerprint Evidence			G ID IDB		
Identification Evidence			G ID IDB		
Other Forensic Evidence (State) eg blood, hair			G ID IDB		
Ownership/Possession of Incriminating Object/Substance (state) eg gun, drugs, goods State whether given up voluntarily			G ID IDB		
Circumstantial Evidence eg opportunity, motive			G ID IDB		
Statements by D			G ID IDB		
DEFENCE CASE:					G=General ID=Implicating D IDB=Implicating D but "explained"
Witnesses					
D Gave Evidence/Statement from Dock (Back page for details)					

STATEMENTS MADE BY D

#	#	TYPE	MADE TO	WHERE	ADDITIONAL POINTS
		Handwirtten/signed Statement	F R N A S P		
		Unsigned Statement	F R N A S P		
		Signed R/I	Police	P/Station	
		Unsigned R/I	Police	P/Station	
		Oral-notes in note-book or other con-temporaneous record	Police		
		Other Oral-to police	Police		
		Other-written	F R N A S P		
		Other-oral	F R N A S P		
		Denied all Charges	Police		
		Exercised Right to Silence	Police		
		Not Known			

NAMES:

F friend
R relative
N neighbour
A acquaintance
S stranger
P police

eg at home
scene of crime
at police station
car

IF MADE TO POLICE:	#1	#2	#3
Place			
Period in police company/ custody prior to making			
Time			
Duration of R/I			
Cautioned? At what point?	1 2 3 4	1 2 3 4	1 2 3 4
'Friend' of D present? Who?	1 2 3 4 5 6 7	1 2 3 4 5 6 7	1 2 3 4 5 6 7
Lawyer present?	1 2 3 4 5 6 7	1 2 3 4 5 6 7	1 2 3 4 5 6 7
Telephone call?	1 2 3 4 5 6	1 2 3 4 5 6	1 2 3 4 5 6
Asked std questions?	Yes No	Yes No	Yes No
Indept. police officer?	Yes No	Yes No	Yes No
Given copy?	Yes No	Yes No	Yes No

1 Yes
2 No
3 Contentious
4 Not Known
5 Offered but not wanted
6 Requested but not allowed
7 Offered/allowed but not available

In-Court Treatment - Committal (Omit if s 51A procedure)

Admissibility Objected to by Defence?

Ground for Objection: Involuntary, Discretion, Fabrication.
Details:

Voir Dire?

Duration of Voir Dire:

Did D Give Evidence on Voir Dire?

Ruling:

Use of Written Document (refresh, tendered (objections?)):

Otherwise Challenged by D (in X-X, called witnesses, D):

#Crown Witnesses (re confession):

#Crown Witnesses (total):

In-Court Treatment - Trial (omit if s 51A procedure or guilty plea)
(State 'As Above' where appropriate)

Admissibility Objected to by Defence?

Ground for Objection: Involuntary, Discretion, Fabrication.
Details:

Voir Dire?

Duration of Voir Dire:

Did D give Evidence on Voir Dire?

Ruling:

Use of Written Document (refresh, tendered (objections?)):

Otherwise Challenged by D (in X-X, called witnesses, called D, etc.):

Basis of Challenge:

Crown Witnesses (re confession):

#Crown Witnesses (total):

ADDITIONAL NOTES

A. INTRODUCTION - A PILOT STUDY

B. SAMPLE AND METHODOLOGY

1. I would like to record my gratitute to all those who assisted me with this project, in particular Dr. A.J. Sutton of the N.S.W. Bureau of Crime Statistics and Research, Mr. Col Schooler, Research Officer with the Clerk of the Peace, and John Basten, Law Faculty of Univ. of N.S.W.

2. cf J. Baldwin and A.K. Bottomley (eds), Criminal Justice - Selected Readings (U.K., 1978), 73.

3. See, for example, Baldwin and McConville, "Police Interrogation and the Right to See a Solicitor" 1979 Crim. L.R. 145; Baldwin and Bottomley, note 2 supra, 73.

4. Vic., Nov. 1976 (3 vols).

5. Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland (April 1977), para 28:

> "In most criminal offences the person charged acknowledges his guilt with little or no demur. Many, but not all, ultimately plead guilty. No suggestion of 'verballing' enters into this area. Then there are those matters, much fewer in number than in the former situation, where the accused persons do not concede their guilt. It is in this area that fabrication can occur, particularly where the other evidence is not sufficient to procure a conviction. How often does it occur in this area? It depends upon the police officer involved. Some, we are sure, would not 'verbal', in any circumstances; some would, but only as the result of considerable provocation and

with an absolute conviction that the person is guilty; but some do 'verbal' persistently and without conscience."

6. Spokesperson for the Redfern Legal Centre.

7. For example, the Report of the Law Reform Commission - Australia, Criminal Investigation (Interim Report No. 2, 1975), 70-71, succinctly made this point:

"A large proportion of the time of the criminal courts, time which is enormously expensive to the public purse, as well as to the pocket of the accused, is spent in resolving these disputed factual issues. If these facts could be placed beyond dispute a large number of trials would not take place - either because the prosecution, unable to rely upon the confession, would have no other sufficient evidence or because the defence, fixed with an unassailable confession, would decline the trial contest. The frequent serious conflicts between police and accused as to confessions tend to sap the confidence of the public and the courts in the integrity of the police. The court sometimes suspects that the real process of determining guilt occurs in the police station. If the court is informed of the events of the investigation by evidence which is not open to dispute or which is less open to dispute, criminal trial procedures will be improved, the reputation of the police force will be enhanced and the court will feel more confident in reaching its decision."

8. (1975) 61 Cr.App.R. 67.

9. Id., at 76-77.

10. See, for example, R v Lattouf; R v Carr (C.C.A. - unrep., 13-3-80).

11. This was calculated by reference to pages of court transcripts of 14 trials. Although it is difficult to precisely determine the amount of trial time spent dealing with a particular matter it is felt that the number of pages of court transcript devoted to these issues, expressed as a percentage of the total number of transcript pages, at the least provides a general indication.

12. In one case the voir dire hearing took up 5 1/2 of the 6 days of the trial. The judge subsequently directed a verdict of 'not guilty' (Trial (1)). Similarly, in another case, at the conclusion of the voir dire, which had occupied 80% of the total court time, the accused changed his plea to 'guilty' (Trial (5)).

13. The defence case relating to the confessional material accounted for a further 4% of the court time.

14. The sample does not include cases finalized during sittings of the District Court held at country centres. The time available for the present research meant that the inclusion of country cases was outside the realm of practicability. The daily court lists for country cases are retained at the country office and there is also a considerable delay in the forwarding of finalized cases to the Clerk of the Peace in Sydney.

15. In relation to filing a no bill see Bates, Buddin and Meure, The System of Criminal Law (1979), 119; Willis and Sallmann, "Criminal Statistics in the Victorian Higher Courts" (1979) 51 Law Inst. J. 498, 517-519.

16. A copy of the questionnaire is included in the Appendix.

17. Zander, "The Investigation of Crime: A Study of Cases Tried at the Old Bailey" (1979) Crim. L.R. 203.

18. See generally, Bates, Buddin and Meure, The System of Criminal Law (1979), 117-118.

19. See generally, McKimm, Criminal Procedure and Practice in N.S.W. (2nd ed., 1972), 29.

20. A full discussion of the problems is given in H. Kalven and H. Zeisel, The American Jury (U.S., 1966), 34 ff.

21. Crown submission regarding the objection to disclosure (Trial (15)).

22. The accused made this confession in response to the following statement made by the police officer:

> "There have been a number of house robberies in this area and your fingerprints were located at the Tomkins Street premises. This is your opportunity of telling us whether you have been involved in anything further."

The admissibility of confessional evidence obtained as a result of an untrue representation is discussed infra p. 50-51.

23. For example, in 96.6% of the sample cases there was confessional evidence against the defendant (Table 18, infra p. 91).

24. cf A.B.S., Statistics of Higher Criminal Courts, New South Wales, 1979 (not yet published), Table 3.

25. Id., Table 6.

26. This impression is consistent with the results obtained by Kalven and Zeisel, note 20 supra., 136.

26a. See text accompanying note 194 infra.

27. cf Greenawalt, "Perspectives on the Right to Silence" in Baldwin and Bottomley, note 2 supra, 55 at 57.

28. It is also not unknown for an accused, who has entered a plea of guilty pursuant to s.51A of the Justices Act, 1902 (N.S.W.), to subsequently revoke the plea when he/she comes before a particular judge for sentence, such judge having a reputation for being harsh on persons convicted of the type of offence for which the accused is charged.

29. Willis and Sallmann, note 15 supra, 509.

30. An "admission" generally means where only some of the facts in the case are given whereas a "confession" means "inculpatory material of such a nature as to prove, if accepted by the jury, the whole of the case against the accused": McClemens, "The Admissibility of Self-Incriminatory Evidence" (1971) 45 A.L.J. 57, 58.

31. For example, Neubauer, "Confessions in Praire City : Some Causes and Effects" (1974) 65 J. of Crim. Law and Crim. 103, 104-105.

32. Supra p.19-20.

33. Co-defendants included in the file who were sentenced outside the 6 week period were excluded.

34. ie excluding periodic detention sentences.

35. Five defendants were sentenced to terms of imprisonment in excess of 5 years. Note that in calculating the term of imprisonment, where the defendant was convicted of more than one offence, the separate sentences were not added together unless they were cumulative.

36. This is consistent with the results obtained in the study by A. Bottoms and J. McClean, Defendants in the Criminal Process (U.K., 1976), 110.

37. Contrast the results given in Bottomley, "Bail and the Judicial Process" in Baldwin and Bottomley, note 2 supra, 76 at 77. See also Ares, Rankin and Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole" in J. Klonoski and R. Mendelsohn (eds), The Politics of Local Justice (U.S., 1970), 78 at 90-93.

38. Infra p.93.

39. cf Baldwin and Bottomley, note 2 supra, 73.

40. cf Bottoms and McClean, note 36 supra, 109. As to the difficulties of classifying the outcomes of trial cases see Baldwin and McConville, "The New Home Office Figures on Pleas and Acquittals - What Sense do they Make?" (1978) Crim. L.R. 196.

41. Note the possibility of plea bargaining.

42. Specific cases are discussed infra. See generally, Willis and Sallmann, note 15 supra, 44-48.

43. See generally, id., at 516-517.

44. See generally, id., at 514-516.

45. This is discussed supra p.16-18.

46. cf Table 15, infra. p.36.

47. For example, Kalven and Zeisel, note 20 supra, 136-138.

48. Adapted from Kaven and Zeisel, note 20 supra, Table 34 at p. 137.

49. Ibid.

50. s. 407 Crimes Act, 1900 (N.S.W.).

51. s.407(2) Crimes Act, 1900 (N.S.W.).

52. s.405 Crimes Act, 1900 (N.S.W.).

53. See generally, M. Aronson, N. Reaburn and M. Weinberg, Litigation: Evidence and Procedure (2nd ed., 1979), 741-745; J. Gobbo, D. Byrne and J. Heydon, Cross on Evidence (2nd Aust. ed., 1979), 388-393 (hereinafter cited as "Cross on Evidence").

54. For a general discussion and criticisms of the recommendations see: Greenawalt, note 27 supra, 61; Cross on Evidence, 393-394; Williams, "The Authentication of Statements to the Police" (1979) Crim.L.R. 6.

55. See, for example, Rankin, "The Effect of Pre-trial Detention" (1964) 39 N.Y.U.L. Rev. 641; Bottomley, note 37 supra; Ares, Rankin and Sturz, note 37 supra, 90-93.

C. CONFESSIONAL EVIDENCE - THE LEGAL RULES.

56. infra p.92 ff (Section E).

57. R v Baldry (1852) 2 Den. 430 (Erle J) and cf the civil case of Slattery v Pooley (1840) 6 M & W (Parke B).

58. R v Pattison (1977) Crim.L.R. 161.

59. R v Burke (C.C.A.-unrep., 17-11-78); R v Gibbons (1971) V.R. 79; R v Sullivan (1887) 16 Cox 347; R v Sykes (1913) 8 Cr.App.R. 233. See generally, Archbold (40th ed. 1980) §1377e.

60. McClemens, "The Admissibility of Self-Incriminating Evidence" (1971) 45 A.L.J. 57, 63 citing Ross v The King (1922) 30 C.L.R. 246, 255, McKay v The King (1935) 54 C.L.R. 1, 7 (Latham CJ). See also R v Shepherd (C.C.A. - unrep., 19-7-79); Burns v R (1975) 132 C.L.R. 258, 261 (Barwick CJ, Gibbs J, Mason J).

61. McKay v The King (1935) 54 C.L.R. 1, 7 (Latham CJ).

62. R v Bodsworth (1968) 87 W.N. (Pt.1) (N.S.W.) 290, 296; Basto v R (1954) 91 C.L.R. 628, 640-641; Chan Wei Keung v R (1967) 2 A.C. 160.

63. Trial (14) and Trial (18).

64. Note that this discretion to direct a verdict of not guilty is not limited to cases involving "tenuous" confessional evidence.

65. cf s.6(1) Criminal Appeal Act, 1912 (N.S.W.) and see R v Smith (1979) 2 N.S.W.L.R. 304; Hayes v The Queen (1973) 47 A.L.J.R. 603, 604-605 (Barwick CJ).

66. (1974) 58 Cr.App.R. 417.

67. (1893) 2 Q.B. 12, 18:

> "I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is a very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice."

68. (1974) 58 Cr.App.R. 417, 426.

69. Id., at 424.

70. (1979) 2 N.S.W.L.R. 304.

71. Id., at 310 (Street CJ).

72. Id., at 308.

73. Id., at 310 (Emphasis Added).

74. See, for example, R v Burke (C.C.A.-unrep., 30-11-78), on appeal to the High Court.

75. Ibid. For a criticism of the approach taken by the N.S.W. Court of Criminal Appeal see: Byrne, "Disputed Evidence of Confessional Statements" (1979) 2 Briefnotes 86, 91-92 (Prepared by the N.S.W. Public Solicitor's Office).

76. As to the importance of considering these two questions separately see: Dixon v McCarthy (1975) 1 N.S.W.L.R. 635, 637-638 (Yeldham J).

77. Discussed infra p.60-64

78. Wendo v The Queen (1963) 109 C.L.R. 559, 562 (Dixon CJ), 572 (Taylor J and Owen J); R v Buchanan (1966) V.R. 9, 15; R v Stafford (1976) 13 S.A.S.R. 392. Note the dissatisfaction expressed by Roden J in R v Hinton (D.Ct.) (1978) 4 Petty Sessions Rev. 1724, 1726 as to the standard of proof, and contrast the English position, requiring proof beyond reasonable doubt: R v McLintock (1962) Crim.L.R. 549; DPP v Pin Ling (1976) 62 Cr.App. R. 14, 20 (Lord Hailsham).

79. Gowan J in R v Smith (1964) V.R. 95 expressly stated that it was for the accused to bring himself or herself within the discretionary rule. See also: R v Buckskin (1974) 19 S.A.S.R. 1; R v Lee (1950) 82 C.L.R. 133, 153; Johnston, "The Exclusionary and Other Controls Over the Abuse of Police Power" (1980) 54 A.L.J. 466, 467; McClemens, note 60 supra, 62.

80. See discussion of Trial (8) in Appendix.

81. R v Bodsworth (1968) 87 W.N. (Pt.1) (N.S.W.) 290, 296; R v Murray (1951) 1 K.B. 391; Basto v The Queen (1954) 91 C.L.R. 628, 639.

82. For example, R v Pratt (1965) 83 W.N. (Pt. 1) (N.S.W.) 358. See generally: Cornelius v The King (1936) 55 C.L.R. 235, 249; Sinclair v The King (1946) 73 C.L.R. 316; McClemens, note 60 supra, 62-63.

83. R v Thomas (1836) 7 Car. & P. 345.

84. In R v Sang (1979) 2 All E.R. 1222, 1230, Lord Diplock said:

> "The underlying rationale of this branch of the criminal law, though it may have originally been based on ensuring the reliability of confessions, is, in my view, now to be found in the maxim, nemo debet prodere se ipsum, no one can be required to be his own betrayer, or in its popular English mistranslation 'the right to silence'."

85. See generally: Bennett, "Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule" (1973) 20 U.C.L.A.L.Rev. 1129; Weinberg, "The Judicial Discretion to Exclude Relevant Evidence" (1975) 21 McGill L.Rev. 1, 26.

86. See, for example, s.149 Evidence Act, 1958 (Vic.) which provides:

> "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of the opinion

that the inducement was really calculated to cause an untrue admission of guilty to be made...."

87. DDP v Ping Lin (1976) A.C. 574.

88. See Johnston, note 79 supra, 469 and infra p.47

89. (1941) 3 All E.R. 318. See also, Burns v R (1975) 132 C.L.R. 258, 263; R v Twomey (1969) Tas.S.R. 99. For criticisms of this practice see: Neasey, "Cross-Examination of the Accused on the Voir Dire" (1960) 34 A.L.J. 110.

90. R v Hammond (1941) 3 All E.R. 318, 321.

91. (1979) 2 W.L.R. 81. The decision is criticized by Murphy, "Truth on the Voire Dire: A Challenge to Wong Kam-Ming" (1979) Crim.L.R. 364.

92. Trial (3).

93. (1969) S.A.S.R. 256.

94. Id., at 262.

95. R v Amad (1962) V.R. 545.

96. (1950) 82 C.L.R. 133.

97. Id., at 133.

98. For example, in R v Wright (1969) S.A.S.R. 256, 271 Chamberlain J stated:

"The purpose of a criminal trial is to try the guilt or otherwise of the defendant, not to investigate the

> conduct of the police, except of course in so far as it affects the admissibility of evidence. It is not, in my view, correct to say that the policy of this branch of the law of evidence is designed to repress improper police practices; that is a matter for those in control of the police force."

See also Cornelius v R (1936) 55 C.L.R. 235, 251; R v Sang (1979) 2 All E.R. 1222, 1230 (Lord Diplock). See generally, Weinberg, note 85 supra, 26-30.

99. cf R v Banner (1970) V.R. 240.

100. See also the judgments of Roden J, when sitting in the District Court, in R v Hinton (1978) 4 P.S.Rev. 1724 and R v Askar (1978) 4 P.S. Rev. 1745.

101. R v Byers (1977) 16 S.A.S.R. 226.

102. Ibid.

103. R v Williams (1976) 14 S.A.S.R. 1.

104. R v Harris and Daly (No.2) (1975) 12 S.A.S.R. 270.

105. R v Stafford (1976) 13 S.A.S.R. 292; R v Borsellino (1978) Qd.R. 507. And see generally, Johnston, note 79 supra, 468.

106. (1948) 76 C.L.R. 501.

107. Id., at 511.

108. R v Bodsworth (1968) 87 W.N. (Pt.1) (N.S.W.) 290, 297; McDermott v The King (1948) 76 C.L.R. 501.

109. Archbold § 1381. See generally McDermott v The King (1948) 76 C.L.R. 501, 511 (Dixon J); Cross on Evidence, 525; McClemens, note 60 supra, 62.
Query whether a confession, at common law, can be involuntary if the person who induced the confession was not a person in authority. For a discussion of this point see McClemens, note 60 supra, 61.

110. Commissioner of Customs and Excise v Harz and Power (1967) I A.C. 760, 820 (Lord Reid).

111. R v Court (1836) 7 C & P 486; R v Holmes (1843) 1 Cox 9; R v Stanton (1911) 6 Cr.App.R. 198. See generally, Archbold § 1382b; Cross on Evidence, 526.

112. R v Sleeman (1853) 7 Cox C.C. 245; R v Wild (1835) 1 Mood 542.

113. For example, R v Fennell (1881) 8 Q.B.D. 147 ("You had better tell the truth"); R v Rose (1898) 18 Cox 717.

114. (1976) A.C. 574.

115. Id.,

116. R v Richards (1832) 5C & P 318; R v Doherty (1874) 13 Cox 23.

117. cf R v Banner (1970) V.R. 240 (motivated by guilty conscience).

118. R v Smith (1959) 2 Q.B. 35, 41.

119. McDermott v R (1948) 76 C.L.R. 501.

120. Cross on Evidence, 528; Glasbeek and Prentice (1968) 53 Cornell L. Rev. 473, 491 citing the Candian case, R v McLean 126 Can. Crim. Cas. 395 (1957).

121. C.C.A. - unrep., 28-9-79.

122. Trial (1).

123. As to police adoption cf Archbold § 1381.

124. Discussed infra p.55-57, 71-72.

125. Callis v Gunn (1964) 1 Q.B. 495.

126. R v Priestley (1967) 51 Cr.App.R. 1.

127. In N.S.W. the English equivalents to the Judges' Rules are embodied in instructions by the Commissioner of Police. For a discussion of the interpretation of these "rules" see Teh, "An Examination of the Judges' Rules in Australia" (1972) 46 A.L.J. 489.

128. R v Van Aspen (1964) V.R. 91, 93-94 (O'Bryan J).

129. R v Jeffries (1946) 47 S.R. (N.S.W.) 284, 312 (Street J).

130. The Queen v Ajax and Davey (1977) 17 S.A.S.R. 88, 92 (White AJ).

131. (1976) 14 S.A.S.R. 463, 468.

132. And see text accompanying notes 100-105 supra. The trial cases are also discussed in later sections of the paper.

133. Trial (14), Trial (17).

134. R v Gleeson (1975) Qd.R. 399; The Queen v Matheson (1969) S.A.S.R. 53; R v Hinton (C.C.A.) (1978) 4 P.S.Rev. 1719, 1721.

135. R v Burke (C.C.A. - unrep., 17-11-78).

136. R v Lattouf; R v Carr (C.C.A.- unrep., 13-3-80).

137. R v Scott (C.C.A. - unrep., 6-6-80).

138. As to the nature of this discretion see generally, Callis v Gunn (1964) 1 Q.B. 495, esp. 501 (Lord Parker); Selvey v DPP (1968) 2 All E.R. 497.

139. See generally Perkins v Jeffery (1915) 2 K.B. 702, 708-709; Burns v R (1975) 132 C.L.R. 258; R v Tait (1963) V.R. 520.

140. For a discussion of these sub-categories see Weinberg, note 85 supra, 32-36.

141. Selvey v DDP (1968) 2 All E.R. 497.

142. For example, (1968) 2 All E.R. 497, 526 (Lord Pearce). But note that the House of Lords in R v Sang (1979) 2 All E.R. 1222 indicates a tendency to closely delimit the potential scope of this discretion.

143. See generally, Weinberg, note 85 supra, 33-34.

144. Similarly, it is submitted that such confessional evidence is "prejudicial" and that this concept is not confined to the situations where the evidence is likely to lead the jury to draw incorrect conclusions on the basis of irrelevant considerations - but see R v Wray (1970) 11 D.L.R. (3d) 673, 689 (Marland J), discussed in Weinburg, note 85 supra, 34. Alternatively it could be argued that such fabricated evidence is prejudicial because it is "likely to distract the mind of the jury from determining the vital questions of fact" (R v Crawford (1965) V.R. 586, 589).

145. (1976) 13 S.A.S.R. 276.

146. (1975) Qd.R. 399.

147. Id., at 402.

148. (1970) A.C. 304.

149. (1964) 1 Q.B. 495.

150. (1976) 13 S.A.S.R. 276, 281.

151. Id., at 280.

152. Sinclair v R (1947) 73 C.L.R. 316 (Dixon J) and see Weinberg, note 85 supra, 39.

153. R v Burke, note 59 supra (Street CJ).

154. (1978) 4 P.S.Rev. 1719.

155. Indeed, Street CJ seems to suggest that involuntary signing of a confessional document can, as it were, operate retrospectively and destroy the voluntary character of previous statements made by the accused. If this were not so, and if his remarks were only referable to the former issue, the police-witnesses would not be precluded from giving an oral account of the record of interview and using the written document to refresh their memories.

156. Then a judge of the District Court.

157. (1978) 4 P.S.Rev. 1724, 1727-1728 (Emphasis Added).

158. (1978) 4 P.S.Rev. 1745.

159. Esp. Id., at 1745-1746.

160. (1977) Qd.R. 507.

161. Driscoll v R (1977) 51 A.L.J.R. 731, 741:

> "However, neither a failure to allow the solicitor to be present nor a failure to make a record of interview immediately available to the applicant would, of itself, render evidence of the interrogation inadmissible although it might be a ground for the judge to reject the confession in the exercise of his discretion if he regarded it as unfair to allow it to be used." (Emphasis Added).

162. (1977) Qd.R. 507, 509.

163. In R v Matheson (1969) S.A.S.R. 53, 55 (which was distinguished in R v White (1976) 13 S.A.S.R. 276, 280) Bray CJ was of the opinion that this difficulty precluded the accused from being entitled to have the evidence excluded:

> "If the evidence of the detectives is accepted there is really nothing to render their story of the confession inadmissible. If the evidence of the accused.....is accepted there was indeed the making of improper threats and blandishments but no inducement in fact because the threats and blandishments induced nothing and no confession was made. There was also no caution but the absence of the caution was ineffective because nothing compromising was said."

But note that this conclusion appears to be inconsistent with Roden J's reasoning in Hinton's Case discussed supra.

164. See for example, A. Aubry and R. Caputo, Criminal Interrogation, (U.S.); F. Inbau and J. Reid, Criminal Interrogation and Confessions (U.S., 1962) and for a general discussion of these manuals see Miranda v Arizona (1966) 384 U.S. 436, 449 and Wald et al, "Interrogations in New Haven: The Impact of Miranda" (1967) 76 Yale L.J. 1519, 1542-1548.

The tactical ploys described in Inbau and Reid include:

- sympathising with the suspect by telling him or her that many others might well have done the same thing in similar cirucmstances (p.34);
- reducing the suspect's possible guilt feeling by minimizing the moral seriousness of the offence (p.36);
- suggesting a more morally acceptable motivation for the offence (p.39);

- appealing to the suspect's pride by well selected flattery or by a challenge to his or her honour (p.60);
- playing one co-offender off against the other (p.81).

165. For example, Crowley, "The Interrogation of Suspects" in D. Chappell and P. Wilson (eds), The Australian Criminal Justice System (1972), 419.

166. But note the concerns expressed by the U.S. Supreme Court in Miranda v Arizona (1966) 284 U.S. 436, 449.

167. Futhermore, in such cases as R v Stafford (1976) 13 S.A.S.R. 392 and R v Borsellino (1977) Qd.R. 507, where the evidence was not admitted, there was strong corroborative evidence. For example, in the latter case, where the accused alleged that the police had refused his requests to have a solicitor present and had continued the interrogation notwithstanding his objections to participating, there was evidence that the accused had been warned by his legal advisers on at least four occasions, shortly before going to the police station, of the urgency of obtaining a witness and of not making any statement. Indeed he was told that it would be unwise to co-operate with the police, and one police officer in particular whom he was told was "a lying verballing bastard" and had a "bad reputation as a verballer"! Furthermore the accused was well-educated and articulate.

168. Glasbeek and Prentice, note 120 supra, 490. See also Baldwin and McConville, note 3 supra, 152.

169. R v Hinton (D.Ct.) (1978) 4 P.S.Rev. 1714, 1717 (Roden J).

170. Wright v R (1977) 15 A.L.R. 305, 307-308 (Barwick CJ); and see the comments by Street CJ in text accompanying notes 75, 153 supra. But note the observations of Cave J in R v Thompson, quoted note 67 supra.

171. R v Hinton (D.Ct.) (1978) 4 P.S.Rev. 1724, 1727.

172.

173. For a discussion of the difficulties in the U.S. see Schwartz, "Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office" (1970) U. Penn L. Rev. 1023.

174. See generally, Detective Clyne, "The Right to Silence. A Police Viewpoint" in Univ. of Sydney Proceedings of the Institute of Criminology, The Right to Silence. (No. 17, 1973), 57.

D. THE RECORD OF INTERVIEW

175. Driscoll v R (1979) 15 A.L.R. 47, 68 (Gibbs J), quoted in text accompanying note 195 infra.

176. In the Police Instructions (N.S.W.) the form of caution is:

> "I am going to ask you certain questions. You are not obliged to answer unless you wish to do so, but whatever you say may be used in evidence. Do you understand that?"

Note that the form of caution which uses the word "as" instead of "but", used in only a small proportion of the study cases, was criticized by Roden J in R v Hinton (D.Ct) (1978) 4 P.S.Rev. 1724, 1728.

177. In several of the study cases the accused was also told that he or she would be given a copy of the record of interview.

178. Trial (2).

179. Trial (17).

180. Infra p. 135.

181. Beach Report (Vol 1), 103.

182. Trial (1) (quoted supra).

183. R v Harris (1970) 91 W.N. (N.S.W.) 720.

184. cf Police Instructions (N.S.W.).

185. 15:signed; 2:unsigned.

186. But it may have influenced some defendants who pleaded guilty.

187. Trial (3).

188. Trial (1). Cf Trial (6) (under influence of drugs) and Trial (4) (withdrawing from heroin).

189. Trial (5), Trial (1).

190. Trial (2).

191. Strictly speaking not a voir dire matter.

192. Trial (6).

193. (1977) 15 A.L.R. 47, 68.

194. R v Mead (Tas) and R v Davis (Vic) cited in Aronson et al, note 53 supra, 364. See also R v Boyson;R v Gray (C.C.A. - unrep., 28-9-79).

195. Trial (8), Trial (10). Note that in the latter trial the trial judge emphasized that his ruling was not to be interpreted as a criticism of the police.

196. Trial (9).

197. Trial (7).

198. His Honour also refused to allow a voir dire:discussed infra p. 79.

199. R v Jones (C.C.A. - unrep., 18-5-79).

200. (1963) S.A.S.R. 321.

201. (1974) 4 P.S.Rev. 1719, 1723.

202. In one trial case the unsigned record of interview had the accused's initials beside a correction made to the time started. The judge, however, treated it as "unsigned" in so far as the Crown was not permitted to tender the document (Trial (8)).

203. Inbau and Reid, note 164 supra, 128-129. See also Aubry and Caputo, note 164 supra, 196.

204. (1977) 15 A.L.R. 47, 66 (Gibbs J).

205. Trial (7). See text accompanying note 200 supra.

206. Inbau and Reid, note 164 supra, 128.

207. There may be, in such cases, potential for the use of expert linguistic analysis or "cluster" analysis, designed to show that various phrases in the record of interview or statement do not represent the language of the accused. See: Niblett and Boreham, "Cluster Analysis in Court" (1976) Crim.L.R. 175; Williams, note 54 supra, 9.

208. Inbau and Reid, note 164 supra, 126-127.

209. (1975) 132 C.L.R. 258.

210. Id., at 267.

211. Id., at 264.

212. C.C.A. - unrep., 17-11-78.

213. cf Burns v The Queen (1975) 132 C.L.R. 258, 263; R v Burke (C.C.A. - unrep., 17-11-78), and R v Lattouf;R v Carr (C.C.A. - unrep., 13-3-80) (per Moffitt J).

214. (1975) 132 C.L.R. 258, 263.

215. (1941) 3 All E.R. 318.

216. cf discussion supra p.44 regarding Hammond's Case and contrast the Privy Council decision in Wong Kam-Ming V.R. (1979) 2 W.L.R. 81.

217. (1975) 132 C.L.R. 258, 264 (Barwick CJ, Gibbs and Mason JJ).

218. Ibid.

219. This is partly based on the evidence given by the accused at the committal hearing.
Furthermore, the defence contrasted the thorough investigation which the police had conducted in an attempt to authenticate the facts contained in the confession with the absence of any follow-up investigation as to the whereabouts of the proceeds from the break, enter and steal, which had still not been recovered at the date of the trial. The police witnesses admitted that they had not even checked whether any large deposits had been made in either the accused's or "Jimmy's" bank accounts.

220. Baldwin and McConville, note 3 supra, 152 (Emphasis Added).

E. CONFESSIONS - EMPIRICAL DATA.

221. 115 defendants.

222. 87 defendants.

223. Baldwin and Bottomley, note 2 supra, 73.

224. Supra p.28-30.

225. Dixon v McCarthy (1975) 1 N.S.W.L.R. 617, 639-640; Walker v Marklew (1976) 14 S.A.S.R. 463.

226. See generally, Cross on Evidence, 537; Aronson et al, note 53 supra, 357.

227. Wald et al, note 164 supra.1645-1646; Neubauer, note 31 supra, 107.

228. Wald et al, note 164 supra, 1644; Neubauer, note 31 supra, 106-107. See also, Zander, "The Investigation of Crime: A Study of Cases Tried at the Old Bailey" (1979) Crim.L.R. 203, 213-214.

229. Neubauer, note 31 supra.

230. Id., at 105-106. In Kalven and Zeisel's study, note 20 supra, they found a lower frequency of confessional evidence relied upon by the prosecution in trials for drunken driving, narcotics and assaults compared with homicides, rapes and burglaries (at 143).

231. Ander, note 230 supra, 214-215.

F. THE RIGHT TO SILENCE/LEGAL ADVICE.

232. (1966) 384 U.S. 436, 473-474.

233. Id., at 541.

Note that in a number of recent U.S. decisions there appears to be a growing trend to limit the application of Miranda. See generally, Note, "Fifth Amendment - Confessions and the Right to Counsel" (1977) 68 J. of Crim. Law & Crim. 517.

234. Wald et al, note 164 supra, 1600.

235. Id, at 1605. See also Neubauer, note 31 supra; Witt, "Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality" (1973) 64 J. of Crim. Law & Crim. 320, esp. 326, 331-332.

236. Note that the following discussion assumes that the confession and caution information in the files is accurate.

237. cf Table 30 infra.

238. P. Devlin, The Criminal Prosecution in England (1958), 59-60 quoted in Glasbeek and Prentice, note 120 supra, 476.

239. Purnell, "The Right of Silence: A Public Defender's Viewpoint" in Univ. of Sydney Proceedings of the Institute of Criminology, The Right to Silence (No. 17, 1973), 38 at 51.

240. See Table 27. It would of course be pure conjecture to attempt to estimate how many would have given the same answers even if cautioned. But note infra discussion.

241. Note also the need to caution prior to conducting a record of interview or making a written statement.

242. cf Williams, "Questioning by the Police: Some Practical Considerations" (1960) Crim.L.R. 325, 327.

243. Glasbeek and Prentice, note 120 supra, 478-479. See also, Teh, "The Criminal Suspect's Right to Silence: A Hallowed Shibboleth?" (1973) 4 Univ. of Tas. L. Rev. 113.

244. cf Zander, note 230 supra, 211.

245. Consistent with the findings in Wald et al, note 164 supra, 1563.

246. For discussion see Glasbeek and Prentice, note 120 supra, 480; Teh, note 245 supra, 115.

247. (D.Ct.) (1978) 4 P.S.Rev. 1724, 1726.

248. See also similarity of co-accused's record of interview: Appendix.

249. s. 447B and Ninth Sch. Crimes Act, 1900 (N.S.W.).

250. (1864) 15 Ir.C.L.R. 60, 122 (Pigot CB) quoted in Glasbeek and Prentice, note 120 supra, 481.

251. Discussed supra p.48.

252. Baldwin and McConville, note 3 supra, 147-148.

253. For English studies see Zander, "Informing the Suspect of His Rights in a Police Station" (1972) 69 L.S.Gaz. 1238; Bottoms and McClean, note 36 supra; Baldwin and McConville, note 3 supra.

254. Pre-arrest situations.

255. Post-arrest situations.

256. cf Glasbeek and Prentice, note 120 supra, 483-487.

257. cf Baldwin and McConville, note 3 supra, 149.

258. Ibid.

259. R v Lee (1950) 82 C.L.R. 133, 154. See generally Teh, "An Examination of the Judges' Rules in Australia" (1972) 46 A.L.J. 489, 491-492.

260. See generally, Teh, note 261 supra, 507; McClemens, note 60 supra; Williams, note 244 supra.

261. Table D (Appendix).

262. Consistent with the results in Zander, note 230 supra, 215.

263. cf discussion to Tables 20a, 20b, 22, 23, supra.

264. But note that this does not mean the lawyer was present during the interview.

265. Note 3 supra.

266. Id., at 149.
Note that research using similar techniques to Baldwin and McConville would provide a greater understanding of these issues.

267. See generally, Purnell, note 241 supra, 54; Wald et al, note 164 supra, 1603; Greenawalt, "Perspectives on the Right to Silence" in Baldwin and Bottomley (eds), note 2 supra, 55 at 57.

268. See generally, Williams, note 54 supra, 7-8; Miller, "Silence and Confessions - What are they Worth?" (1973) Crim L.R. 343; and for an example of these and other problems see Kellam, "A Convincing False Confession" (1980) New L.J. 29.

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