Legal Research Foundation Inc.
Seminar

THE PRIVILEGE AGAINST SELF-INCRIMINATION
AND REFORM OF THE LAW AND PRACTICE
OF POLICE INTERROGATION

by

C.B. Cato LL.B.(Hons.) B.C.L.(Oxon.)
Barrister, Auckland

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FOREWORD

by
Mr P. T. Finnigan, Barrister
Director, Legal Research Foundation Inc.

The privilege against self-incrimination is one of the cornerstones of Anglo-American criminal jurisprudence. One sees its application daily in the Courts. In recent times the appropriateness of this privilege has been under question and review from law reformers in the United Kingdom, Canada, Australia and the United States. In particular, questions such as, should the law of silence in the face of police interrogation be reformed to permit inferences adverse to the accused to be drawn in appropriate circumstances? Or, what effect would audio or video electronic recording of police interviews have on the police detection and conviction rates?

Charles Cato, who is both a practising Barrister and a Senior Lecturer at the Auckland University Law School responsible for teaching the law of Evidence for some years, has written an invaluable, scholarly and practical paper on the topic:

'The Privilege Against Self-Incrimination and Reform of the Law and Practice of Police Interrogation.'

The Legal Research Foundation was able to make a modest financial contribution to Mr Cato's research both overseas and in New Zealand. So it is of particular gratification that Mr Cato has offered his paper for publication by the Foundation and presentation to a seminar held at the University of Auckland on 1 November 1985.

The Legal Research Foundation is pleased to conduct and promote this seminar in conjunction with the Criminal Bar Association of New Zealand.

P. T. Finnigan

1 October 1985
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INTRODUCTION

Authentication of police interrogations by audio-recording first attracted the writer's attention when it was discussed briefly by the late Professor, Sir Rupert Cross, in lectures delivered by him in Evidence at the University of Oxford in 1975. Three members of the Criminal Law Review Committee, of which Sir Rupert Cross was a member, proposed in 1972 in their controversial eleventh report on Evidence, that tape-recording of police interrogations should occur. This suggestion was in the context of a further proposal that the existing law on silence in the face of police questioning be reformed to permit inferences adverse to the accused to be drawn in appropriate circumstances. Although this proposal was not given legislative recognition and the privilege against self-incrimination has survived, the issue of electronic recording, by audio or video-tape, has since attracted considerable attention, not only in the United Kingdom but in other jurisdictions as well.

Since 1972, modern technology has developed to the extent that machines specially designed for police work exist. Scepticism voiced in the early seventies about the dangers and difficulties associated with audio-recording has largely been overcome. There is an increasing awareness that electronic recording of police interrogations is likely to become a reality in some jurisdictions in the near future.

Not only, therefore, may we be witnessing an exciting development in relation to the authentication of extra-judicial confessions, but it is possible that as a result of any attempt to introduce mandatory recording of entire interrogations there will be other important developments, in the administration of criminal justice. It is even possible that the privilege against self-incrimination may come under attack once more. This might be so, for example, if electronic recording
seriously reduced the effectiveness of the police, in terms of detection or conviction rates. Such a possibility is considered in this paper.

This paper, however, is not to be read as a general attack on the integrity of the police, in this country. It is acknowledged, particularly in a world of rapid social, economic, and technological change, that policing is difficult. Further, it is accepted that Society has an interest in the prosecution and conviction of those who transgress and the police in the public interest must be given sufficient powers to ensure that they are adequately able to cope with crime. Having said this, however, in a society which values individual liberty, we must remain vigilant to ensure that police powers are not abused, or exceeded, even though this may ostensibly be for the purpose of protecting the public.

Police interrogations generally take place in the confines of the station. Inevitably, this means that the police are open to complaints that confessions have been obtained by improper means. Regrettably, on some occasions, complaints have been true; but in the absence of an effective monitor, it is difficult, if not in most cases, impossible to substantiate complaints. Documented cases of improper police practice in Canada have led one Canadian academic, Professor Ratushny, to advocate the complete elimination of extra-judicial interrogation by the police. Such a radical proposal is not advocated here; instead, however, the case is argued for mandatory electronic recording of entire interrogations to better ensure their authenticity, even if this does not altogether eliminate improper practices.

Central to a discussion of extra-judicial confessions is the privilege against self-incrimination. For what is the worth of the privilege against self-incrimination at trial, if it is circumvented by a confession improperly obtained? In the words of Estey J. in the Supreme Court of Canada in Rothman v the Queen.
"It surely follows that if our law continues to recognise the right of an accused not to enter the witness box under compulsion, his indirect testimony in the form of out-of-Court statements to a person in authority should not be admissible on a basis which, following his invocation of the right to silence, undermines or defeats the right not to testify."

The relationship between the privilege against self-incrimination and the law and practice relating to extra-judicial confessions is uneasy. It is, accordingly, necessary to consider the origins of the privilege and its place in society today, together with the difficulties encountered in the law and practice relating to confessions in order to better appraise the case for reform.

In the first section of this paper, the origins of the privilege in Anglo-American jurisprudence will be considered; in the second, the origins and rationales of extra-judicial confessions in Anglo-American law. In the third section, the concept of voluntariness will be examined. The fourth section concerns the particular plight of those who through age, illiteracy, or other infirmity, are ignorant of their rights in regard to interrogation. A case is made for requiring the police, prior to interrogation, not only to advise a suspect of the right to silence, but also that a lawyer may be consulted. This is consistent with current practice in the United States. Finally, the case for electronic monitoring of interrogations will be argued. It will be seen that although it is impossible to predict with any certainty what effect electronic recording will have on law enforcement, a strong case for the mandatory introduction of electronic recording of entire interrogations can be made.

In the writing of this paper sources of reference have included the reports of law reform agencies, published articles and various studies of facets of the interrogation process. As well, where relevant, reference has been made to precedent. I would also acknowledge the considerable assistance given to me by interested parties, both in
New Zealand and overseas. In particular, acknowledgement is given to the former Attorney-General of Australia, Senator Gareth Evans, and Mr Justice Kirby, formerly the Australian Law Reform Commissioner, for providing insight into law reform in this area in Australia. Further, the provision of the latest working paper by the Law Reform Commission of Canada, "Questioning Suspects", was very useful. In the United States, my understanding of criminal law and practice in the area was furthered by discussions with the County Attorney for Lincoln, Nebraska, Mr Michael Heavican and his deputy, Mr Gary Lacey. Also of importance were discussions with Public Defenders, Mr Dennis Keefe, and Mr Scott Helvie. Special thanks also to the various police officers who discussed the use of audio-recording devices, video-tape, and interrogation techniques with me, and to Professor Roger Kirst of the Law School, University of Nebraska, for his assistance in furthering research in the United States on this subject. The John Jay College of Criminal Justice in New York also assisted me to meet with and discuss the issue of electronic recording of police interrogations with the Manhattan District Attorney's Office. Of importance were discussions with Mr Patrick Duggan, Assistant District Attorney for Manhattan, and Mr Robert Gattullo, Video Consultant, who discussed their experience of audio and video-recording of homicide cases in that State. In the United Kingdom, Mr Peter Wright of the Home Office discussed the English experience with tape-recording and in particular, the field trials currently being conducted by the Home Office in six police areas. Also of assistance was Detective Ray Bloxham of Scotland Yard who was working closely with the Home Office on the tape-recording equipment. In Scotland, I wish to thank Mr Ed Wozniak of the Scottish Home and Health Department for his frank account of difficulties encountered with the experiment conducted into tape recording in that jurisdiction. His account of Scots law on interrogations and judicial examination were extremely useful as indeed was a consideration of the recommendations of the Thomson Committee on Criminal Procedure in Scotland to which he directed me.
In New Zealand, I wish to record my acknowledgement to the former Minister of Justice, the Honourable Mr J. K. McLay for assisting me to meet Home Office personnel for discussions in the United Kingdom; also to Mrs A. Hercus, Minister of Police, for providing information on policing in New Zealand. Most importantly, however, I would like to thank the Legal Research Foundation for financially assisting me to travel to further this research. Also my thanks to Roger MacLaren, Barrister of Auckland, Associate Professor Bernard Brown of the Faculty of Law, University of Auckland, and other persons both overseas and in New Zealand, who have taken an interest in this subject.
1. THE PRIVILEGE AGAINST SELF-INCRIMINATION

The origins of the privilege against self-incrimination are described by Wigmore as having "two distinct and parallel lines of development". The first is the history which relates "to the opposition to the 'ex-officio' oath of the ecclesiastical courts"; the second is the history of the opposition to the incriminating question in the common law courts, i.e., "the present privilege in its modern shape".

In the thirteenth century, as a result of papal influence, trial by ordeal and compurgation was superseded by the development of the inquisitorial or interrogating (ex-officio) oath in ecclesiastical causes. There was some controversy over the extent to which the ecclesiastical courts could administer such an oath and require a person to answer without some form of accusation or charge of bad repute; yet despite criticism of the procedure heretics were prosecuted in this way up to the reign of Elizabeth I.

Elizabeth restricted the general jurisdiction of the ordinary church courts to 'matrimonial and testamentary causes', creating however, a new court, the Court of High Commission in Causes Ecclesiastical, giving it jurisdiction over heresy. Wigmore asserts that in 1583, the Court of High Commission was practising inquisition on oath widely in order to suppress heresy, and this practice excited great concern. As well, that branch of the Privy Council known as the Star Chamber, which had been created by statute in 1487, had jurisdiction so broad that it also considered matters involving heresy and engaged in inquisitions on oath.

Sir Edward Coke, as Chief Justice of the Common Pleas in the early seventeenth century, considered that ecclesiastical courts, including the Court of High Commission, had no jurisdiction to proceed by ex-officio oath in a penal matter as opposed to a testamentary or matrimonial cause. However, this view did not affect Star Chamber for "its conceded jurisdiction was ample enough to fine and imprison for almost any offence it chose to pursue". Further,
its enabling act of 1487 vested in it authority to examine the accused on oath in criminal cases. The common law was therefore powerless to control the worst excesses of inquisition on oath in the Star Chamber, the use of which became common under James I.

The demise of inquisitions in the Star Chamber however was hastened by the bold spirit of John Lilburne who, on a trial for importing heretical and seditious books, declined to answer on oath questions that were put to him. To the Council, he said:

"I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matters out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more."

For his trouble, the Council ordered Lilburn to be pilloried and whipped. The sentence was considered appropriate because refusal to take a legal oath might mean many offences might go unpunished.

In 1641, Lilburn had his revenge. A bill was introduced to abolish the Star Chamber as well as the Court of High Commission for Ecclesiastical Causes. Further legislation was passed to forbid any ecclesiastical court administering an oath requiring answer in penal matters.

However, the common law in non-jury matters also employed the procedure of inquisition on oath. Accused felons were required to be examined by justices of the peace, and their examination preserved for the Judges at the trial. Wigmore states that "not a murmur was heard against this process until the middle of the seventeenth century". Unlike the oath administered in the ecclesiastical courts or in the Star Chamber, interrogation at common law would not take place until a charge had been laid. It was not until well after Lilburn's agitation and into the time of
Charles II however that the common law courts recognised the privilege as we know it today; namely, a privilege designed to protect suspects from self-incrimination prior to formal charge.

Of relevance also to the modern concept of the privilege and the rejection of an inquisitorial procedure was the demise of torture as an acceptable institution. Professor Lowell\textsuperscript{15}, in an article in the Harvard Law Review, "The Judicial Use of Torture" advanced the thesis that the reason for the common man's reluctance to accept an inquisitorial procedure based on torture, which had become popular on the Continent after the Middle Ages, was that by this time England had centralised its system of justice and supported a judicial system strong enough to resist the influences of Roman law. Of importance also was the development of the jury system. Torture could not easily take place in the presence of the jury, many of whom would be neighbours of the accused. However, although illegal at common law, torture could be employed under special warrant from the King and Privy Council\textsuperscript{16}. Its growth was closely connected with the growth of the royal prerogative. Like the procedure of inquisition, the use of torture was a feature of Star Chamber and more occasionally was also used by the King's Bench. Its use, understandably, did not increase the popularity of these courts.

With the abolition of the Star Chamber in 1640, and reform of the procedure of the King's Bench, torture, however, was effectively eliminated altogether in England. The demise of torture and the gradual development of a privilege against self-incrimination date from a similar period. Both were a reaction to despotic power. Thus, Professor Lowell says of the gradual development of the modern privilege:\textsuperscript{17}

"The Star Chamber was abolished in 1640, and statutes enacted in 1641 and 1662 forbade the administering of any oaths whereby a person 'may be charged or compelled to confess any criminal matters'. The objectionable oath, therefore,
was at an end; but the maxim had acquired a wider meaning which covered all attempts to draw evidence from the person against himself, whether he was forced to take an oath or not, a principle which was the more popular because it was diametrically opposed to the use of torture then prevailing on the Continent and in Scotland.

Therefore, although initially the privilege was confined to objections to the form of the oath in judicial proceedings, the common law came gradually to recognise that a person should not be compelled to incriminate himself in the face of an extra-judicial interrogation. The recognition of a privilege against self-incrimination and the demise of torture meant that in England, the adversary system of trial came to develop; whereas the Continent proceeded to prefer an inquisitorial approach.

The privilege against self-incrimination in its modern form was adopted in Article 5 of the Constitution of the United States with the result that it, together with the presumption of innocence, became central to the administration of criminal justice in the United States. There are some who have criticised the modern concept of the privilege. For example, Professor McCormick argues that the modern privilege goes beyond the objections of Lilburn and Coke. Professor McCormick points out that their objection was that nobody should be compelled to be his first accuser, that is, to answer without charge. Writing in the United States, Professor McCormick said of the privilege:

"It goes beyond the demands of ordinary morality, which sees nothing wrong in asking a man for adequate reason, about particular misdeeds of which he has been suspected and charged. Safeguards for official interrogation are needed of course."

In the opinion of Professor McCormick, "to say he shall be free of questioning altogether about his crimes goes too far".

A similar sentiment was advanced in the United Kingdom by a majority of the Criminal Law Review Committee in 1972.
in their eleventh report on Evidence. A majority of the Committee was critical of the extent to which the privilege operated to inhibit police interrogation and protected the guilty from revealing information about their crimes. As a result, a majority recommended that the jury should be able to draw appropriate inferences from the suspect's silence in the face of police interrogation and any failure to make reasonable explanation. A similar proposal was advanced in 1973 by the Law Reform Commission of Canada in its working paper "Compellability of the Accused and the Admissibility of his Statements". The Law Reform Commission, however, considered that the interrogation should be conducted before an independent third party. Neither proposal gained popular support or legislative approval. More recently, the Royal Commission on Criminal Procedure chaired by Sir Cyril Philips, although sympathetic to the sentiments expressed by the Criminal Law Review Committee in its eleventh report, recognised that the proposal advanced there represented a fundamental break with the adversarial tradition and declined to recommend such a change. Nor does the Law Reform Commission of Canada in its most recent working paper, "Questioning Suspects" repeat its earlier proposal for reform.

In Scotland, however, the Thomson Committee on "Criminal Procedure in Scotland", in its second report, recommended that the process of judicial examination of suspects be revived. Criminal investigation in Scotland developed separately from England and was of a quasi-inquisitorial nature. Moreover, judicial examination had fallen into disuse around the turn of the century. The reasons for this were that the practice had developed whereby the suspect was entitled simply to decline to answer questions whereupon the examination was terminated. It was not permissible to put specific questions thereafter and to record specific refusals to answer. Further the Criminal Procedure (Scotland) Act, 1887 gave the accused the right to a private interview with his solicitor before examination. Judicial examination as a result became nothing much more than a formality at which the accused gave his name and said nothing further.
Finally, the Criminal Evidence Act, 1898, in permitting the accused to give evidence at trial, diminished the need for the accused to make a statement. Despite however the failings of judicial examination and the criticism advanced by some witnesses before the Committee that it was to reintroduce "continental" system into Scottish procedure, the Thomson Committee recommended a return to judicial examination. Further the jury were to be entitled to take into account silence as a factor affecting the weight of any evidence led at trial. The Committee, however, emphasised that the right to take into account silence pertained only to judicial examination and not police interrogations. These recommendations were subsequently embodied in the Criminal Procedure (Scotland) Act, 1975. There does not, however, appear to have been very great use made of this procedure in Scotland.

In conclusion, therefore, although the privilege appears to have developed beyond what Lilburn or Coke conceived it to be, there does not seem any clear consensus for reform. Nor, it is submitted, is there ever likely to be a consensus in the absence of overwhelmingly reliable evidence that the privilege reduces police effectiveness. Today, it would appear, the privilege is seen as a symbol of individual freedom and protection from state harassment. Further, it may be argued that if the accused is protected from having to give evidence at trial, then to deny the privilege in extra-judicial questioning will, in the words of Estey J. in the Supreme Court of Canada in Rotham v The Queen be to "undermine or defeat the right not to testify". Although there has been criticism of the right not to testify at trial, and the Criminal Law Revision Committee in its eleventh report in 1972 further recommended that inferences could be drawn from an accused's failure to testify this proposal also met with opposition and has not found legislative favour, either.

It is important, however, to appreciate that the privilege against self-incrimination lies at the very heart of the interrogation process. It would be wrong to consider
either reform of the rules relating to interrogations or the introduction of new techniques of electronic recording such as tape or video-recording, without at least anticipating that if they are demonstrated to lead to a significant reduction in detection and conviction rates, calls might be renewed for reform of the privilege. As the former Attorney-General of Australia, Senator Gareth Evans, has recently said, "this policy dilemma is as alive and well in 1984 as it was ten years ago".

2. THE ORIGINS AND RATIONALES OF EXTRA-JUDICIAL CONFESSIONS

The development of the privilege against self-incrimination and the development of the exclusionary rules relating to extra-judicial confessions were entirely separate. Until the eighteenth century, there were no rules requiring the exclusion of confessions. Nor was there any apparent concern with their admission. Indeed, the practice of justices questioning felons before committing them to gaol or permitting them bail was not questioned.

However, in the late eighteenth and nineteenth centuries, Judges commenced to express concern to ensure that confessions were properly obtained. In 1784, for example in Warwickshall's case, Nares J. had this to say about the rationale and practice for excluding confessions:

"It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore, it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope,
or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

In the nineteenth century, confessions appear to have been excluded for the slightest reasons. Wigmore gave several reasons for this. The first is that many of the crimes coming before the courts involved property matters of a petty kind. Many of the accused were people employed in menial, subservient positions and the courts distrusted statements made to their employers. Further, it was an age of increasing enlightenment and the criminal law was gradually emerging from the dark days where inhumane and harsh treatment of felons was tolerated. Many crimes carried a capital penalty. One way of avoiding the awful consequences of conviction was to exclude a confession. Also, there was no right of appeal in criminal cases and the accused faced considerable difficulty in adequately defending himself at trial. Until 1836, he was generally permitted counsel only for the purpose of cross-examination. It was not until 1898 that in England he was permitted to give evidence himself. In view of these restrictions, Wigmore says that it was entirely natural that the judges should employ the only makeweight which existed for mitigating this unfairness and returning to balance, namely, the doctrine of confessions."

Although the passage cited above from Warwickshall's case would suggest that reliability was a principal concern of Judges it is clear that for reasons given above, from the earliest times, confessions were excluded for other reasons. This moved Baron Parke in 1881 in R v Baldry to express the view that he could not look at the decisions "without some shame". In his opinion, "justice and common sense have, too frequently, been sacrificed at the shrine of mercy". Wigmore considered the approach to be "sentimental."

A further important factor in the development of the law of confessions, however, was the establishment in England,
in the nineteenth century, of an organised police force which, until then, had existed only on the Continent.\textsuperscript{39} Some Judges distrusted this and were increasingly concerned to ensure that persons were interrogated fairly. Eventually this concern for fairness in the administration of justice moved Lord Sumner, in the Privy Council, in the leading case of \textit{R v Ibrahim}\textsuperscript{40} in 1914, to say:

"It is not that the law presumes such statements to be untrue but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice."

As an added precaution and also because there was some difference in the practice of individual Judges, administrative directives were promulgated in 1912 with the support of the Judges of Queen's Bench. These directives are known as the Judges' Rules.\textsuperscript{41} Supplementary Rules on the Procedure of taking statements were promulgated in 1947. In England, in 1964\textsuperscript{42}, a new set of Rules governing police practice in interrogations were promulgated.

In New Zealand, however, it is the Judges Rules of 1912 which govern police practice, and, although there is no case in which the Supplementary Rules\textsuperscript{43} have been adopted it is submitted that the Police should pay regard to them.

Of central importance here, are the following rules applicable in New Zealand today.

1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.
4. If a person wishes to volunteer any statement the usual caution should be administered.

Of considerable importance also is Rule 7, which states that:

"A prisoner making a voluntary statement must not be cross examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he has already said."

It can be seen that the cornerstone of the Rules is the right to silence. A truly voluntary waiver of the right to silence dictates that a suspect's will must not be overborne by questioning designed to coerce a confession. The problem in practice is that there is every temptation for a policeman to proceed to interrogate by cross-examining a suspect who may be reluctant to volunteer a statement. Courts today are likely to tolerate all but gross breaches of the Rules. The Rules are said to be guidelines only:44 they do not have the force of statute. It is only when interrogation can be plainly said to be "oppressive"45 that the Courts in New Zealand are likely to exclude confessions for failure to comply with the Judges' Rules. This is a corollary of the fact that today, Judges place far greater confidence in the integrity of the Police than did Judges in the nineteenth century.

However, in saying this, Judges have emphasised consistently with Ibrahim that the rules relating to confessions are present not merely to better ensure reliability but also to enhance the integrity and fairness of the administration of criminal justice. Thus in Wong Kam Ming v The Queen46 Lord Hailsham said, in the Privy Council:

"I have stated elsewhere (Director of Public Prosecutions v Ping Lin ...)47 that the rule common to the law of Hong Kong and that of England, relating to the admissibility of extra-judicial
Confessions is in many ways unsatisfactory, but any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society, it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobed and was therefore in the truest sense voluntary."

In *R v Wilson*[^48] the New Zealand Court of Appeal adopted this statement. *Wilson* is a very important case because it is one of the comparatively few cases where a statement has been excluded on the grounds that it has been made involuntarily. It also illustrates how the Police, in this country, in the interrogation techniques they use are unlikely to differ greatly from the interrogation practices adopted in other jurisdictions.

Wilson was a 17 year old Maori who was suspected of the murder of an old lady. Over several hours the Police questioned him in a manner which secured a confession against his will. In ruling that the confession was improperly admitted, Cooke J., in the Court of Appeal, said:[^49]

> "Whether questioning amounts to cross examination can be a matter of degree, and again the restriction is not to be strictly applied to the extent of handicapping the Police unreasonably in their inquiries. But here one is driven to regard the whole interview from 2.45 pm when the statement made by the suspect in custody was first challenged and continuing after caution at about 4.45, 5 and 5.30 pm until 8.11 pm when he confessed as in truth and in substance a cross-examination .... The irregularities went beyond mere breaches of the Judges' Rules. In our opinion, the prolonged interrogation in the confinement of a small room has to be treated in all the circumstances, as unfair and oppressive."
It is appropriate here to briefly consider the law relating to confessions in the United States. Prior to Bram v United States in 1897, Courts in the United States were preoccupied with the reliability theory and whether confessions had been the product of improper inducements. In Bram, however, the Supreme Court emphasised that the rules relating to the exclusion of confessions and the privilege against self-incrimination were interdependent. The Court said:

"In criminal trials, in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Wigmore was critical of this reasoning arguing that the privilege against self-incrimination had no historical connection with the confession rule. In his opinion it was wrong to say, as the Bram case had, that the privilege was but a crystallisation of the doctrine relative to confessions. The importance of Bram was that it extended the scope of judicial review from what, in the United States was regarded as the common law inducement rule, to enable the courts to exclude confessions obtained by other techniques which violated the privilege against self-incrimination. Thus in Bram, a confession was ruled inadmissible where a murder suspect was first stripped and then questioned. Other cases followed which also rejected the common law approach. In Ziang Sun Wan v United States for example in 1924, the voluntariness test was firmly established as including Police conduct that was oppressive. Of the inducement test, Brandeis J. said:

"... in the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat."

In that case the Petitioner had been kept incommunicado and questioned for a week whilst seriously ill. Further, in Brown v Mississippi the Supreme Court in 1926 excluded
a confession where a Negro was beaten before making his statement. And in 1959, in Spano v New York the Supreme Court emphasised that the justification for excluding confessions went beyond the reliability rationale. Warren CJ. said of a confession improperly obtained after an illegal detention:

"The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent trustworthiness. It also turns on the deep rooted feeling that the Police must obey the law whilst enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

In two further important decisions in the nineteen sixties, the Supreme Court emphasised that it was anxious to ensure that overly zealous law enforcement officers did not adopt coercive factors to circumvent the privilege against self incrimination. In the first, Escobedo v Illinois, the accused had been denied counsel after he had requested legal advice. He had been kept handcuffed and standing during interrogation and had not been cautioned. Although present at the station, his lawyer was denied access to his client. In ruling by a majority of five to four that his confession to murder should have been excluded, the Court stressed that police interrogation was a stage because if the defendant "confessed" then "conviction" was "already assured". Further, the Court said that the defendant should be entitled to counsel lest the trial became "no more than an appeal from the interrogation, with the right to legal advice at trial no more than "a very hollow thing". In Escobedo, the Court emphasised that trial in the United States was adversarial, and declared that a person was constitutionally entitled to a lawyer's advice during an interrogation. Although admitting recognition of a right to counsel at the interrogation stage might reduce the number of confessions obtained, the court said that "a system of law enforcement which comes to depend on 'the confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skilful investigation".
The privilege against self-incrimination was further entrenched in American criminal jurisprudence by the Warren Court in the famous case of *Miranda v Arizona.* In that case, the Supreme Court ruled that the police not only had an obligation to warn a suspect of his right to remain silent, but also were obliged to warn the suspect that he had a right to legal advice before deciding whether to submit to interrogation. The Court required that a suspect be further advised that a lawyer could be provided for him; at the expense of the State if he could not afford one.

These rulings were motivated principally by two considerations. First, a majority of the Court were concerned that the interrogation process took place largely in secret. In this regard, resort to the available police manuals on techniques of interrogation suggested that some methods used were improper in that they were coercive. A second concern of the Warren Court was to redress what a Court perceived to be imbalance or discrimination in favour of the educated and affluent citizen who knew his rights and was able to afford legal advice, and those who either did not know what their rights were or who were too poor to be able to afford to consult a lawyer prior to interrogation. In the opinion of Warren CJ.: 64

"Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v Wainwright*".

The rationale for the privilege against self-incrimination and its modern application was described by Warren CJ. thus: 65

"As a noble principle often transcends its origins the privilege has come rightfully to be recognised in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life'."

*Miranda* provoked a strong minority dissent. Harlan J. argued that it was an unjustifiable extension of the Constitution
to require the Police to give such advice. In his opinion, the case represented \(^{66}\) "poor constitutional law and entails harmful consequences for the country at large". The fear of law enforcement was that **Miranda** would inhibit effective policing. Harlan J. said; \(^{67}\) "The social costs of crime are too great to call the new rules anything but a hazardous experimentation". White J., also in dissent, \(^{68}\) observed that:

"The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations to reduce the incidence of confessions and pleas of guilty and to increase the number of trials".

The issue of the right to access to a lawyer prior to interrogation raises similar considerations in New Zealand today and this issue will be examined later in this paper. Suffice it to say here, however, that there is some evidence \(^{69}\) which would suggest that in practice the fears expressed in the opinions of Harlan J. and White J. have not been realised. The police have been able to work effectively, it would seem, within the confines of **Miranda**. However, it may be that the studies that support this thesis do not tell the full story. In the absence of an effective monitor of interrogations, one has to trust police assurances that **Miranda** warnings are given and that improper techniques of interrogation are not used to secure a waiver. As the Philips Commission in the United Kingdom also noted, \(^{70}\) when considering United States experience since **Miranda**, the studies emphasise also "the difficulties in ensuring that suspects fully grasp the significance of warnings and are in a position to assess the consequences of waiving their rights".

Whatever the position be, it is clear that Anglo-American criminal jurisprudence recognises that the courts exclude confessions not only because of distrust of the reliability of those that are the product of inducement or coercion, but also because they are anxious to ensure fairness and
integrity in the administration of justice.71 The courts have acknowledged the importance of the privilege against self-incrimination and its place in the law of confessions. However, courts in the United States have moved more robustly to emphasise the privilege and curtail improper interrogation techniques by requiring the Police to advise a suspect that he has the right to consult a lawyer before submitting to interrogation. Only after such a warning has been given is any statement obtained regarded as voluntary.

3. THE CONCEPT OF VOLUNTARINESS

In recent years, the legal definition of what constitutes a voluntary statement has been the subject of criticism. A confession will not be regarded as involuntary in New Zealand unless the will of the suspect has been overborne by those in authority responsible for his interrogation. This was not, however, always the law in New Zealand, although it is the view which has prevailed consistently in other jurisdictions. A different test was propounded by Hardie Boys J. in R v Williams72 in 1959.

There, a seaman who had stabbed and killed a man who was having an affair with his girlfriend was interrogated by the Police in hospital. The accused had been taken to hospital and stomach pumped after consuming a large number of pills and apparently attempting to drown himself. Hardie Boys J., in ruling the confession inadmissible, said: 73

"Anything in a criminal case which purports to be a confession is a solemn statement or document to which a clear and not a distorted or disordered mind should be brought; the very choice or decision to make it must be voluntary. It is essential that the judgment is not so clouded or the mind overwrought, although mere remorse and a desire to repent do not make it inadmissible. It must be the conscious reconstruction of the detail of the events and not a reconstruction put together while the body is exhausted and the mind in a
condition to be overborne so that any instinct would be to have it finished as shortly as possible and as simply as possible".

The width of this dictum was considerably narrowed by the Court of Appeal in *R v Naniseni*. Naniseni, a Pacific Islander, had made a confession of murder whilst in a state of mind affected by liquor, stress, and fatigue so that the confession, it was argued on appeal, should have been excluded as involuntary. The Court of Appeal in upholding the conviction however, rejected the test propounded by Hardie Boys J. in *Williams*. Turner J. said:

"What must appear, if a confession is held to be voluntary, is in our opinion no more and no less than that it has been made by the prisoner, his will in making it not being overborne by the will of some other person...."

Further, it was said:

"The will of some other person is essential; the involuntariness cannot be produced from within. Such considerations as fatigue, lack of sleep, emotional strain or the consumption of alcohol, cannot be efficacious to deprive a confession of its quality of voluntariness except, perhaps, in so far as any of these may have been brought about or aggravated by some act or omission of other persons to the end that a confession should be made".

The Court did, however, recognise that a trial Judge had a discretion to exclude a confession in other circumstances where it would be unfair to admit it. However, *Naniseni*, was not a case of this kind.

It has, however, been increasingly well recognised that the legal definition of what constituted a voluntary confession and the psychological concept of voluntariness are different concepts. Thus, although the Police may not use tactics which are overtly coercive in order to obtain confessions, station-house interrogation is inherently coercive. In
a leading paper on the psychology of coercion, "Confessions and the Social Psychology of Coercion", Professor Driver, in the United States, has said:78

"Even before interrogation, men tend to talk when talk is to their detriment, for the imbalance between the State of the accused begins with arrest and detention.".

Of this urge to talk Professor Driver said, further:79

"Whatever its deep roots may be, the urge to talk is almost certainly intensified by the host of fears generated by the situation and procedures of arrest and detention".

The psychological pressure of custodial interrogation was recognised also by the Philips Commission on Criminal Procedure in the United Kingdom. The Commission commented that:80 "our research suggests ... that in psychological terms custody in itself and questioning in custody develop forces upon many suspects which ... so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent". It is acknowledged that,81 "legal and psychological 'voluntariness' do not match". The Commission considered that "because of their familiarity with the conditions of custody the Police may not understand the effect that custody has upon suspects". The view was further expressed perhaps, with respect, rather optimistically that82 "police training in interviewing should be developed in ways which will not only improve the interview technique, but also bring home to them the powerful psychological forces that were at play upon the suspect and the dangers that are attendant upon these".

A study of the techniques of interview employed by Police in the United States, such as those contained in Inbau and Reids', "Criminal Interrogation and Confessions",83 caused concern amongst the majority members of the Warren Court in Miranda who recognised that84 "the modern practice of in-custody interrogation was psychologically rather than physically oriented". It was the opinion of the writers,
Inbau and Reid, that some of these techniques,\textsuperscript{85} "could well be classified as 'unethical', if one is to evaluate them in ordinary everyday social behaviour". Today, however, academic literature in the United States is just as concerned with techniques of doubtful ethical value used to secure waiver of \textit{Miranda} rights prior to interrogation,\textsuperscript{86} as with more overt coercive means.

The kinds of techniques which Inbau and Reid advocate as being effective are well documented by Dr W. C. Hodge in his \textit{Criminal Procedure in New Zealand}.\textsuperscript{87} They assume dominance on the part of the interrogator. He is advised to: \textsuperscript{88}

A. Display an air of confidence in the suspect's guilt.

B. Point out some, but by no means all of the circumstantial evidence indicative of guilt.

C. Call attention to the subject's physiological and psychological symptoms of guilt.

D. Be sympathetic with the subject by telling him that anyone else under similar conditions or circumstances might have done the same thing.

E. Reduce the subject's feeling by minimising the moral seriousness of the offence.

F. Suggest a less revolting and more morally acceptable motivation or reason for the offence than that which is known or presumed.

G. Be sympathetic with the subject by (1) condemning his victim, (2) condemning his accomplice, or (3) condemning anyone else upon whom some degree of moral responsibility might conceivably be played for the commission of the crime in question.

H. Utilise displays of understanding and sympathy in urging the suspect to tell the truth.

I. Point out the possibility of exaggeration on the part of the accuser or victim or exaggerate the nature and seriousness of the offence itself.

J. Have the subject place himself at the scene of the crime or in some sort of contact with the victim and the occurrence.
K. Seek an admission of lying about some incidental aspect of the occurrence.

L. Appeal to the subject's pride by well selected flattery or by a challenge to his honour.

M. Point out the futility of resistance to tell the truth.

N. Point out to the subject the grave consequences and futility of a continuation of his criminal behaviour.

O. Rather than seek a general admission of guilt, first ask the subject a question as to some defect of the offence or inquire as to the reason for its commission.

P. When co-offenders are being interrogated and the previously described techniques have been ineffective "Play one against the other".

In a study commissioned in the United Kingdom for the Philips Commission, "Police Interrogation, the Psychological Approach," researchers, Irving and Hilgendorf found that of the 60 persons they observed being interviewed at the Brighton Police station, nearly 50% of the suspects observed were in an abnormal state prior to being interviewed. In their opinion, in 25% of cases there was an identifiable mental abnormality - (Drug induced abnormality, mental handicap or mental illness). Further, a substantial group were frightened and some were intoxicated. Although the sample was not large, Irving and Hilgendorf were able to conclude, that:

"The results of our observations at Brighton confirm that the kinds of techniques which were predicted from a review of the psychological literature, are in fact used, and that there are many similarities between what is taught to American detectives and what happens in the interview rooms at Brighton Police force."

It would seem reasonable to assume that the Police in New Zealand resort to similar techniques to secure admissions.
A reading of the leading case of R v Wilson in the Court of Appeal illustrates various techniques consistent with the kind advocated by Inbau and Reid. Indeed, the importance of R v Wilson is that the Court of Appeal recognised the importance of psychological as well as physical pressure: "the real question is the psychological effect of the prolonged interrogation in all the circumstances".

In Wilson's case, it will be recalled the appellant, a seventeen year old Maori youth, had been interrogated about the murder of an old woman in Police custody from 2.45 pm until 8.11 pm when he confessed. The interview involved a mixture of some friendly and then robust methods to appeal to his conscience, despite repeated indications that he did not wish to tell the Police what happened. In the United States, this would be described as the "Mutt and Jeff" approach. Amongst the techniques used was the interrogation of the suspect by a Maori constable, who was also unsuccessful in securing admissions despite his appeal to Maori religion and mythology to attempt to influence the appellant to confess.

Eventually, a confession was obtained which the trial Judge ruled admissible. The Court of Appeal, however, ruled that the confession should not have been admitted. Cooke J. said:

"In our opinion the prolonged interrogation in the confinement of a small room has to be treated in all the circumstances as unfair and oppressive."

Wilson is a remarkable case because it is unusual to find such an open account of the process by which a confession has been obtained. Generally, the difficulty in challenging a confession is that there is no independent evidence available to corroborate the suspect's allegations as to interrogation techniques used. The value of an independent monitor such as electronic recording of an interrogation by way of contrast, is that it restricts at least the more objectionable techniques
used to circumvent the privilege. It must be conceded however that it is unlikely to eliminate entirely the use of unethical techniques since some, more unscrupulous, policemen may attempt to influence the suspect by intimidation, appeals to advantage or other unethical methods prior to the formal interview commencing.

Again, the issue here that is of central importance is the value of society today of the privilege against self-incrimination. Toleration of techniques designed to influence a suspect to waive the privilege is unacceptable if we truly value it today. It must be conceded, however, that if, as Irving and Hilgendorf suggest, "the effectiveness of interviewing depends on the skilled use of techniques", which are unethical, then electronic monitoring in so far as it reduces the ability of the Police to rely upon these practices, will reduce the number of convictions obtained. A corollary of being unable to rely on unethical interrogation techniques is, as Irving and Hilgendorf emphasise, that "additional police manpower" will be required to obtain other evidence if an attempt is to be made to sustain the detection and conviction rate. This issue will be considered later in this paper.

4. **IGNORANCE, YOUTH, AND THE PRIVILEGE AGAINST SELF-INCRIMINATION.**

Many people arrested today will have little, if any, idea of their right to resist police interrogation. In *Hall v Queen* Lord Diplock said of the privilege against self-incrimination:

"It is a clear and well known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he committed a criminal offence".

It is doubtful, however, today that we could with any degree of confidence, say that this is true in New Zealand if
indeed it ever was. Certainly, amongst many new immigrants from the Pacific Islands with little formal education, and amongst those with continental origins, there is likely to be general ignorance of the right to silence. In any case as the Warren Court in *Miranda*\(^97\) recognised, given that many offenders are indigent and poorly educated, there inevitably will be widespread ignorance of the privilege. Further, the problem is exacerbated if juvenile offenders, particularly those from underprivileged homes, are considered.

In the United States, as we have seen, considerations of this kind in *Escobedo v Illinois*\(^98\) and *Miranda v Arizona*, influenced the Warren Court by a majority to require the Police to advise a suspect prior to interrogation not only of his right to silence, but also that he had a right to consult a lawyer for advice. If he could not afford a lawyer, the Police were required to inform him that one would be provided at the State's expense.

Today, in the United States, what have come to be known as the *Miranda* warnings are often set out on a card or other document and appear in a variety of languages. If the privilege against self-incrimination is to be truly valued in New Zealand, then it is submitted, the reasoning that is to be found in the majority judgment is as appropriate in New Zealand today as it was in the United States in 1964. Warren CJ said first on the need to caution a suspect of the right to silence:\(^99\)

"At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere".

Further, it was said of the caution:\(^100\)
"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through any awareness of these consequences that there can be an assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest".

Of the more controversial warning of the right to legal advice, Warren CJ explained the rationale as:

"An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognised unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel".

On the issue of the provision of legal advice to an indigent and the State's responsibility to provide it, Warren CJ justified this on the basis that:

"The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self incrimination applies to all individuals. The need for counsel secured by constitution in order to protect the privilege exists for the indigent as well as the affluent.... The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice".

As we have seen, however, Miranda was the subject of two powerful dissenting judgments which expressed concern at the adverse effect the majority opinion would have on law enforcement in the United States.
In any argument, however, about Police effectiveness, it is important to consider the purpose of interrogation. The various fruits of interrogation were neatly summarised by the Law Reform Commission of Canada in their Working Paper on "Questioning Suspects" as:

"Interrogation is one of several means by which the Police collect information and evidence. Its importance is manifest in the number of cases where a statement made in response to questioning by the Police provides either the only positive evidence available to the Crown or evidence that will establish an otherwise weak case beyond reasonable doubt. Questioning can also dispel suspicions held against innocent persons. Interrogation in short, is essential to effective law enforcement."

On this view it is likely that if the Police's powers to interrogate were seriously curtailed, there would be an adverse effect for law enforcement. Although post Miranda experience in the United States would suggest that the Police have not been greatly inhibited from securing confessions there may, as the studies recognise, be several reasons for this. One is that in the custodial atmosphere of a Police station many people, faced with uncertainty over their predicament, will desire to co-operate in order to attempt to extricate themselves from their predicament. Others, for moral reasons associated with feelings of guilt, may confess. However, there are other explanations. One is that appropriate warnings may not always have been given. A further possibility, as the Philips Commission observed in commenting on these studies was, "the difficulties in ensuring that suspects fully grasp the significance of warnings and are in a position to assess the consequences of waiving their rights".

The issue of curtailing police effectiveness immediately raises the question of just how important interrogation and confessions are in the administration of justice. A study by Professor James Witt, "Non Coercive Interrogation and the Administration of Criminal Justice: the Impact
of Miranda on Police Effectuality", concluded that confessions were essential in about 25% of all cases. Literature on this predictably varies;\textsuperscript{107} but in a study for the Philips Commission, Baldwin and McConville concluded that\textsuperscript{108} "confession evidence was vital to the prosecution in about a fifth of all cases studied: if confession evidence was excluded from consideration about 20% of all cases would fail to reach the minimum level of sufficiency required by law". It is, therefore, not surprising that the Commission said:\textsuperscript{109}

"The evidence submitted to us, our knowledge of other countries and the results of our research all lead us to the conclusion that there can be no adequate substitute for police questioning in the investigation and ultimately in the prosecution of crime."

It was further recognised by Professor Witt that, although Miranda had not appeared to greatly reduce the number of confessions obtained, there was some evidence that it had an effect in other areas.\textsuperscript{110} "The Police were found to be implicating fewer accomplices, clearing fewer crimes, and recovering less property through interrogation and helping fewer suspects clear themselves". In an interesting study of four police stations for the Philips Commission, Paul Softley concluded that, although curtailing the power of the police to question would not necessarily cause a dramatic drop in the conviction rates since\textsuperscript{111} "in only eight percent of cases did the officers interviewed say they would have dropped the case", nevertheless in his opinion "the number of offenders who escape conviction would tend to increase and the detection rate would fall". In Softley's\textsuperscript{112} observational study of 218 suspects, interrogation produced information from two-thirds of suspects which helped to secure a conviction. A further 20% of suspects volunteered information about offences other than those for which they had been detained.

Interrogation, therefore, is important for the Police not only in relation to confessions but also in relation to securing evidence more generally about crime. There may
be very legitimate reasons why *Miranda* does not appear
to have seriously impeded the Police in the United States.
But there is also the very real possibility, in the absence
of an effective monitor of an interrogation, and in the
already coercive atmosphere of a police station, that there
is little difficulty in influencing suspects other than
the very strong-willed, to waive the right to silence.

If the Police in the United States do in fact generally
pursue legitimate means so that most confessions are secured
because of some overwhelming desire to talk, as Irving
and Hilgendorf in their study paper for the Philips Commission
suggest, then the Police should have little to fear from
reform of their present interrogation practice to incorporate
a *Miranda* warning on legal access. Unfortunately, in England
at least there is evidence to suggest that the Police often
do not respect the right to silence and deny a suspect
access to a solicitor prior to interrogation. In an article,"Access to a Solicitor in a Police Station" in 1972, Professor
Zander concluded that of 134 persons interviewed after
appeal to the Court of Criminal Appeal 57 asked for a solicitor
and 74% of those who did so were denied one. A more recent
study by Baldwin and McConville,115 "Police Interrogation
and the Right to See a Solicitor", concluded that of 500
persons interviewed after trials in 1975 and 1976 109 defendants
said they had made such a request and of those 84, or 77%,
claimed that this had been refused. Of those that did
not ask for a solicitor, many, within the group, had little
or no prior contact with the Police and were unaware of
their right to consult a solicitor. Baldwin and McConville
conclude:116

"Our finding that 77% of defendants who asked
to see a solicitor said that they had been refused
closely compared with Zander's corresponding
figure. Although our proportions cannot be regarded
as exact nearness, we would nonetheless claim
that they give a pretty good idea of what happens
at the Police Station."
In this regard, it is of importance to note that the Australian Law Reform Commission in 1975 recommended that there should "be statutory recognition of the suspect's right to silence, a statutory requirement that he be notified of that right and a statutory guarantee that he be afforded the opportunity to obtain such professional assistance as is necessary to enable him to exercise that right". Further, in a passage quoted by the former Attorney-General of Australia, Senator Gareth Evans, in his John Barry Memorial Lecture "Reforming the Law of Criminal Investigation" delivered at the University of Melbourne in October 1984, the Commission said:

"There can be no respect for a system of justice which pays lip service to certain rights and then does nothing to ensure that they will be enforced equally. If it is felt that the right to silence will, if enforced in practice have unacceptable results, then the rule to attack is the right to silence, not the right to a lawyer."

The Law Reform Commission of Canada in its most recent Working Paper has also recommended that, prior to interrogation, a person should be warned in the following terms:

"You have a right to remain silent. Anything you say may be introduced as evidence in court. If you agree to make a statement or answer a question, you are free to exercise your right to remain silent at any time. Before you make a statement or answer any questions you may contact a lawyer."

In the United Kingdom, the Philips Commission also appeared to move more towards providing better access to legal advice for those who at least requested it before interrogation. The Commission said of the need to alter legal aid and duty solicitor schemes to accommodate this:

"We attach great importance to securing the right to legal advice which is effective and consider that it warrants making the appropriate financial provisions a high priority."
Nor did the Commission regard as acceptable as an argument for withholding access, 121 "that a solicitor may advise his client not to speak; that is the suspect's right". The Commission wanted legal advice to be more effectively available and observed that 122 few forces take adequate steps to ensure that suspects are, as a matter of course made fully aware of their rights.

However, neither in the United Kingdom, nor in Australia have legislatures heeded this advice. The Thatcher Government in Section 56 of the Police and Criminal Evidence Act 1984 imposed an obligation on the Police to permit a suspect access to legal advice on request. The Police may however, decline the request 123 if there is a danger that evidence might be interfered with, witnesses intimidated, or the recovery of proceeds impeded. To similar effect in Australia was clause 21 of the Criminal Investigation Bill 1981 introduced by the Fraser Government, which was intended to regulate Commonwealth Police. This Bill, however, lapsed with the change in administration.

Before concluding this section of the paper it is appropriate to briefly consider the position of young offenders. Not surprisingly in evidence presented to the Philips Commission, Bottoms and McClintock 124 concluded in their study of "Confessions in Crown Courts" that "there was a strong association between the age of the defendant and the tendency to make a written or verbal confession. The younger the defendant, the more likely he was to confess".

Clearly, young offenders are even more likely to submit to the pressure of interrogation than adult offenders. Further, they are even less likely to be aware of any right to remain silent. There have been documented instances where young offenders have made false admissions on serious charges. One celebrated case in England was the Confait 125 case where a number of youths falsely confessed and were convicted of murder. This was the subject of an official inquiry. In New Zealand, a similar situation, which was
not however the subject of an official inquiry, occurred in the Buis homicide. There, a man was found murdered in an Auckland park. Subsequently, the Police obtained confessions from two youths. The boys were interviewed in the absence of their parents and each confessed to the crime. Although charges were laid, they were withdrawn subsequently after forensic evidence failed to establish that the boys were connected with the crime. We have already seen earlier that, in R v Wilson, the Police used a variety of techniques to coerce the accused, a 17 year old Maori, to confess, and in R v Tomkins, two youths aged 16 and 14 were interrogated without any adult being present for a number of hours before making statements implicating them in the murder of an Auckland taxi driver.

In the United Kingdom, the Philips Commission recommended that young offenders should not be interviewed without some adult friendly to the child being present. Similar recommendations were made in regard to people with special difficulties such as mental defectives, the deaf, or those who had difficulty speaking English. Only in exceptional circumstances, where there was a risk of harm to the person or property did the Commission consider the Police should be entitled to interrogation without an adult being present.

Recommendations of this kind are necessary in order to ensure the reliability of statements made by juvenile offenders. The Thatcher Government, however, does not appear to have heeded the recommendations of the Philips Commission, in this regard, in the latest Police and Criminal Evidence Act 1984. However, there is provision in Section 56 of the Act for the Police to inform the guardian or parent that the child or young person has been arrested, the reason for this and the locality of the child, as soon as is practicable. In Australia, clause 29 of the Criminal Investigation Bill 1981 went further and limited interrogation "unless a person
who was acceptable to the child, being a parent, relative or friend of the child or a lawyer or welfare officer is present while the child was being interviewed". There was, however, a discretion vested in the Police to depart from this practice if there were reasonable grounds for believing, "that delay might mean the death or serious injury to any person or serious damage to property". This Bill however, lapsed on the change of administration.

In New Zealand, in a recent Public Discussion Paper on Review of Children and Young Persons' Legislation, such a provision is mooted. The Working Party were of the opinion that the "particular vulnerability of young people and the right of their parents to advise and protect them should be recognised by placing statutory restrictions on the right of the Police to question a young person who is under restraint or who has been arrested". The proposal of the Working Party was that no confession of a young person would be admissible "unless it was established to the satisfaction of the Court that the young person made the confession or incriminating statement in the presence of a parent or guardian of the young person, or some other person with whom the young person could reasonably be held to have a trusting relationship, or the young person's lawyer or a lawyer instructed by someone (other than the Police) on the young persons behalf".

Whilst, however, this proposal is welcome in regard to juvenile offenders, it is submitted that at the very least adult offenders should be informed that they may consult a lawyer prior to interview.

In concluding this topic therefore, it is submitted that if the law is not to discriminate unfairly against the poorly educated, the indigent, the inarticulate or inexperienced offender legal access to a lawyer must include an obligation upon the Police to inform a suspect of his right to consult a lawyer before interrogation. If this should lead to a serious reduction in the effectiveness of the Police,
then consideration should be given to reform of the privilege as the Australian Law Reform Commission recognised. Whilst there may be some who will exercise their right and may as a result decline to co-operate with the Police, there are many who, for a variety of reasons, are likely still to co-operate. It would only be if it were mandatory that a suspect receive legal advice before interrogation that many suspects, ignorant of their rights and of the law, would be in a position to make a truly reasoned choice. Even, however, the Warren Court did not recommend this. For this reason, Miranda has been regarded by some as too conservative, "a palliative", rather than a cure. However, to go further, other than in the case of young offenders, would not only be likely to be very expensive, but it would certainly be seen by the Police as undermining any effective use of interrogation.

5. THE REASONS FOR MONITORING POLICE INTERROGATIONS

As has been emphasised, the problem with authenticating Police interrogations is that they take place generally in the absence of any independent witness. As a result, in the very great majority of cases, it is impossible for the accused to effectively challenge the Police's account of what happened. The Philips Commission on Criminal Procedure said:

"Questioning in custody takes place behind closed doors in the Police station. Generally, for adult suspects, the only witnesses are the Police themselves. And yet the product of questioning may be vital evidence against the suspect."

We have seen already the absence of reliable evidence on police interrogations makes it difficult to predict with any real degree of certainty what any reform of the interrogation process will mean. The Philips Commission said further:

"The recording of police interviews is very difficult to assess objectively. The methods generally
employed certainly militate against absolute accuracy."

There are three principal areas of difficulty. The first we have looked at already is the issue of voluntariness. The second area of concern is the "verbal" statement which a police officer attributes to the accused. Generally, this will take the form of an interview recorded by the policeman, in his notebook. The third area of concern is the accuracy of statements. Common to these three areas of concern, is the credibility at trial of the interrogating officer whose evidence as to what occurred or was said during the interrogation may be in conflict with the accused's account.

The Voluntariness of Statements

We have seen in our earlier discussion that the test of voluntariness assumes some conduct by the interrogating officer overbearing the will of the suspect. We have seen that the kind of conduct which excites concern, is not simply threats of actual physical violence, but techniques such as protracted questioning, trickery, or other unethical behaviour. To this end, we have seen also that the Judges' Rules 1912, were an attempt to proscribe a set of standards compatible with the right to silence. Unfortunately, as Professor Glanville Williams has said, "in practice, the Rules are neither observed by the Police nor enforced by the Judges". An independent monitor of an entire interrogation would make it much more difficult for the Police to subvert the privilege.

The Problem of "Verbals"

In 1960 in England, the Royal Commission on the Police expressed concern at the evidence they had heard about unscrupulous policemen who would stoop to giving perjured evidence attributing oral incriminatory admissions to accused persons. The Commission said, "there was a body of
evidence too substantial to disregard which in effect accused the police of stooping to the use of undesirable means of obtaining statements and of occasionally giving perjured evidence in a court of law'.

Much more recently, in 1975 in *R v Turner*, Lawton LJ said of "verbals":

"The existing practice followed by the police for putting this kind of evidence before courts almost inevitably leads to attacks on the credibility of police officers. If the evidence is true, as it usually is, the jury is greatly helped. It is a matter of human experience, which has long been recognised, that wrongdoers who are about to be revealed for what they are, often find relief from their inner tension by talking about what they have done. In our judgment and experience, this is a common explanation for oral admissions made at or about the time of arrest and later retracted. But if the evidence of such oral admissions is untrue, as regrettably it sometimes is, defendants are unjustly and unfairly put at risk. In our judgment, something should be done, and as quickly as possible to make evidence about oral statements difficult either to challenge or concoct."

Even if to some extent, the assumption is true that some people do confess when first confronted by the Police, in the absence of a subsequent written statement from the suspect, there must inevitably exist suspicion about the authenticity of an oral admission. Of course, there may be cases where a person recovers his wits sufficiently to decline a written statement. There may also be other cases where the suspect foolishly believes that they are talking off the record when making verbal statements. Indeed, in Scotland, an experiment conducted by the Scottish Home and Health Department on tape-recording of interrogations did find that "about 12% of suspects admitted their involvement in the offence off tape, but did not admit to their involvement when they were interviewed on tape". However, the fact that verbals are not subsequently authenticated by a written statement, or other independent record, does
excite suspicion. This is particularly true, if as Lawton LJ says, the reason for spontaneous utterances is a "relief from inner tensions". In the absence of an independent monitor the courts will inevitably again be faced with a credibility conflict, which in most cases, will be resolved in favour of the Police.

Further, the rules relating to cross-examination as to credit mean that it is extremely dangerous to challenge oral statements if the logical conclusion of the challenge is that the police evidence is concocted, when the accused has a criminal record.\(^{140}\) Tactics of this kind may mean that the accused loses his shield should he give evidence. The suspect with a record is, therefore, in a weaker position to challenge "verbals" successfully. A suspicion that certain police officers take advantage of this is contained in Baldwin and McConville's study of\(^{141}\) "Confessions in Crown Court Trials" for the Philips Commission. There, it was said that for London cases the somewhat surprising result occurred that\(^{142}\) "those with prior experience of the criminal system were more likely to make confessions (whether written or verbal) than those without such experience)."

As to verbal statements, Baldwin and McConville conclude:\(^{143}\)

"The findings relating to prior record and professionalism are open to differing explanations. On the one hand, it might be that recidivists, because of their close acquaintance with the Police, are more willing than those without a criminal record to talk, particularly in an informal, "off-the-record" setting about their participation in criminal activities. Equally, they may be less skilful than their professional counterparts in covering up their involvement. To accept this explanation, one must assume that the verbal admissions reported in the committal papers are accurate accounts of what actually happened when the suspect was interviewed by the Police. If this assumption is, at least in part, unfounded, then a second explanation is suggested: that police officers are more ready to attribute verbal admissions to those who are least able and least likely to challenge them. In the present state of knowledge, however, it must be conceded that these interpretations can only be speculative."
The Accuracy of the Record

The third problem concerns the accuracy of the record. In so far as "verbals" are concerned, this problem is acute. Most frequently, the gist of the conversation will be recorded in a notebook some time after the alleged conversation took place. The courts are generally indulgent in relation to records of this kind, and tolerate a policeman refreshing his memory from a record, which has been often compiled some time after the alleged conversation. Police officers tend to recite from their notebook in a way which suggests to the jury that the notebook is a verbatim account, whereas in fact at best it will represent only the salient points that the policeman can recall.

Another method of recording verbal statements is for one officer to interrogate and another to take notice. If the policemen are unscrupulous and some parts of the account are untrue, then as Professor Glanville Williams says, "the task of defence counsel is almost hopeless."

Different problems occur with written statements. In this country, most statements are recorded by the Police generally in more serious cases on a typewriter, although the supplementary directions to the Judges Rules suggest that, where possible, the suspect should be free to write out his own account. The account will then be authenticated by the suspect signing his signature below in acknowledgment that he has read the statement and it is true. In the absence of grounds for having the statement excluded, argument will turn on whether the statement is a fair account of what the suspect told the Police. A statement in which is recorded an explanation which is consistent with innocence may, of course, be of great assistance to the defence. Sometimes, however, the defence may assert that it is not a fair record, that essential matters of explanation have been omitted, that the statement is tilted in favour of the Police, or does not accurately encapsulate the suspect's version. A written statement
authenticated by the accused with each page initialled, will however be difficult to challenge for accuracy.

6. PROPOSALS FOR MONITORING POLICE INTERROGATIONS

(i) Judicial Examination as a Monitor of Police Interrogation

Concern over the secrecy that surrounds police interrogation and a desire to ensure integrity and accuracy of record so as to better ensure the fair administration of justice are sentiments which are not new. In India, under S.25 Indian Evidence Act, originally enacted in 1872, all confessions made by a person in the custody of a police officer are inadmissible unless made in the immediate presence of a magistrate. The magistrate is required to warn the accused that he is not required to make a statement and to conduct an inquiry to satisfy himself that the statement is voluntary. Although a legacy of colonial practice apparently as a result of a distrust of the local police, such a practice was never part of English law. Sir James Stephen said of the Indian Code of Criminal Procedure:

"Some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced Civil Officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence'.

However, we have seen that judicial examination was part of Scots law which had developed criminal procedures along more inquisitorial lines. The purpose of a judicial examination was to give the accused an opportunity to state his case and perhaps clear himself; whilst at the same time giving the authorities some opportunity to gain incriminating admissions. This practice for reasons set out earlier appears to have largely fallen into disuse by the turn of the century. However, having heard argument for and against judicial examination, the Thomson Committee on
Criminal Procedure recommended that the procedure be revived. This recommendation was subsequently incorporated into the Criminal Procedure (Scotland) Act, 1975. Questioning of a suspect by the Procurator Fiscal is however limited by s.20A(2) of the Criminal Justice Scotland Act, 1980, which provides:

"(a) the questions should not be designed to challenge the truth of anything said by the accused

(b) there should be no reiteration of a question which the accused has refused to answer at the examination

(c) there should be no leading questions"

The accused is entitled to have counsel present during the interrogation. The prosecution, the Judge presiding at the trial or any co-accused, is entitled to comment on any failure to answer questions should the accused at his trial " aver something which could have been stated appropriately in answer to that question". Apart from some use in Glasgow, judicial examination does not, however, appear to have been widely used in Scotland. This is, perhaps, not altogether surprising given the statutory limits upon the form of questioning.

A similar proposal was advanced by the Law Reform Commission of Canada in 1973. Like the Indian legislation, no statements made by a person to the Police would be admissible unless repeated before an independent person. The Commission did not decide who that person should be. Drawing on the recommendations of the Criminal Law Revision Committee in its eleventh report on Evidence, published the year before in the United Kingdom, it was considered that adverse inferences could be drawn from a failure to give a reasonable explanation.

However, such a proposal did not find favour in Canada,
and in its most recent Working Paper the Law Reform Commission of Canada made no reference to this proposal.\textsuperscript{153}

In England, judicial examination was advanced by some proponents before the Philips Commission on Civil Procedure.\textsuperscript{154} The Commission considered that, quite apart from the objection that an inquisitorial approach was inconsistent with the very nature of the accusatorial system, there were further objections of principle which arose from\textsuperscript{155} "the potential confusion between the investigative and judicial functions" if magistrates were to be involved in the investigative stage. If this were to occur the Commission considered there could be some loss of independence. The Commission,\textsuperscript{156} for similar reasons, and also because of the huge additional financial cost which would be incurred, rejected a proposal that solicitors should monitor interrogations.

(ii) Electronic Recording as a Monitor of Police Interrogations

Tape-recording was first seriously advanced as a method of authenticating interrogations by a minority of the members of the Criminal Law Revision Committee in the United Kingdom in their controversial eleventh report.\textsuperscript{157} Tape-recording, it will be recalled, was considered necessary by three members of the Committee if the proposal that adverse inferences from silence in the face of police questioning was to become law. Otherwise, there would inevitably be arguments over whether the record of interview accurately recorded the suspect's refusal to answer questions put to him.

In 1975, the Thompson Committee\textsuperscript{158} in its review of criminal procedure in Scotland, in addition to recommending judicial examination, proposed that tape-recording of all unwritten statements given in the police station should be a condition of admissibility. Further, the Committee considered that all station-house interrogations should be electronically recorded, although where a written statement had been obtained, such a statement could be admitted even though the tape recorder may have failed. The Committee indicated that it had carried out\textsuperscript{159} "a practical experiment with simulated interrogation of a suspect by police officers and found the result to be technically satisfactory."
In 1976, the Hyde Committee,\textsuperscript{160} constituted in the United Kingdom to cover the feasibility of an experiment in tape-recording, concluded in its report that "an experiment limited in scope to the recording of the taking and read-back of written statements would be feasible".

Subsequently, the Philips Commission on Criminal Procedure commissioned a paper by Barnes and Webster\textsuperscript{161} on the intricacies of a tape-recording proposal and concluded that\textsuperscript{162} "tape-recording of interviews at the station was feasible". It could produce at a not "exorbitant cost a more accurate record of important statement evidence". However, the Commission preferred a conservative proposal advocating tape-recording only of the ultimate summary of statement of interview in which the suspect would be given the opportunity to proffer on tape any additional comment or explanation. The Commission considered that tape-recording of whole interviews with all persons suspected of all kinds of offences\textsuperscript{163} "was not practicable or desirable on a cost and benefit basis".

Subsequently there was considerable criticism of the Commission's approach to audio-recording. As a result, Mr William Whitelaw, Secretary of State for the Home Department, in November 1982 ordered further field trials in six police districts in England and Wales. These field trials involved the recording of entire interviews. They commenced in late 1983 and are to last for a period of two years, with the results being carefully monitored. To date only one interim report has been published.

In 1975, the Australian Law Reform Commission\textsuperscript{165} in its interim report on Criminal Investigation, considered as one method of authentication that oral statements should be recorded electronically. Australian police forces, according to Senator Gareth Evans\textsuperscript{166} strongly resisted any proposal to require recording of entire police interviews on the grounds "that to obtain the co-operation of a suspect there must
be an initial period of discussion between the police officer and the suspect which the suspect can see to be unrecorded. The reason given was that, "without such a period, suspects, ... will in many cases refuse to talk further to the police or assist their inquiries". The provisions of clause 32 of the Criminal Investigation Bill 1981 introduced by the Fraser Government were intended to meet police objections. Tape-recording was however only one method of authentication. Other methods involved acknowledgment by the accused of a written record of interview or the authentication of a written record by sound recording or by independent witnesses. In the latter case, the procedure was to be the same as that eventually recommended by the Philips Commission, with the accused being given the opportunity to correct errors in the written record, his remarks being recorded on tape.

More recently, the Canadian Law Reform Commission, in its Working Paper No 32 strongly advocated electronic recording "where feasible". The Commission, however, did not advocate mandatory recording of entire interviews, either.

(a) THE MANDATORY RECORDING OF ENTIRE INTERVIEWS

This issue is of critical importance if electronic recording is to be an effective monitor of police interrogation practice.168 This was a point first made by Barnes and Webster in their study of tape-recording for the Philips Commission.169 Partial recording of the kind included in the Criminal Investigation Bill 1981 in Australia and recommended by the Philips Commission on Criminal Procedure,170 cannot effectively monitor the propriety of police practices in the period of interrogation leading up to the time of electronic record. Further, from the defence's aspect, electronic recording of this kind is objectionable because it will render it even more difficult to effectively challenge statements allegedly improperly obtained. Further, where alternative methods of recording statements are permitted, it is to be anticipated that,
in the case of the recalcitrant suspect, the more unscrupulous policeman will take care to avoid an electronic record.

American experience in relation to video-taping is useful here. In some states, particularly in more serious cases, usually homicide cases, video-taping of the formal process of taking a confession is not uncommon. The writer observed video-tape of two suspects confessing to murder, one in Nebraska and the other in New York. In neither case, however, was the entire process of interrogation leading up to the waiver of Miranda rights electronically recorded, so there was no guarantee that improper methods had not been employed to secure waiver of Miranda prior to the video-recording of the formal statement. In Nebraska, for example, a policeman conducted the interview, whereas in New York the District Attorney conducted the interview, after it had been established that the suspect had agreed to waive his *Miranda* rights. The method used in both States was for the suspect to be placed before the camera and a time coded tape of his confession taken. His *Miranda* rights were again read to him and the waiver was repeated. Refreshments were on hand, and in both cases the men had been given changes of clothing. The method of interview employed was to encourage the suspect to give his own account. In one of the cases, the suspect was asked to demonstrate how he had strangled his victim. Predictably, video-taped confessions taken in this way have been of immense value to the Police. The August 1983 edition of "Justice Assistance News" in the United States recorded that only 10 of 3000 people over an eight year period refused to be taped, with the result that 75% of those who made videotaped confessions pleaded guilty after their lawyer saw the tape.

In rejecting, however, a proposal for mandatory recording of entire statements, the Philips Commission in the United Kingdom were principally influenced by two considerations; first, that there would be a considerable need to edit statements to exclude irrelevant or prejudicial material, and secondly, the cost of transcription would be considerable. It is necessary to consider these objections.
(b) **THE EDITING OF STATEMENTS**

It is submitted, that editing of taped statements should not prove a major difficulty. Evidence before the Philips Commission in the form of an observational study of four police stations by Paul Softley concluded that for the most part interviews were short. Eighty percent of the 245 interviews observed were over within half an hour, whilst only 5% lasted more than 45 minutes. Whilst it is to be anticipated that in serious cases, interviews will be longer, careful interrogating practice and education of the Police in interrogation techniques using tape-recorders, should eliminate irrelevancies or prejudicial information, or at least keep information of this kind to a minimum.

In other cases, electronic recording can be expected to shorten the length of interrogations since there will be little point in persevering with the unco-operative suspect. This would in fact appear to be illustrated in the conclusions of the Scottish Home and Health Department in its interim report "The First 24 Months" on the tape-recording experiment in police stations at Falkirk and Dundee. In Dundee, the average length of time prior to tape-recording was 24.5 minutes; after, the average was 10 minutes. In Falkirk, the average prior to tape-recording was 39 minutes; after, it was 6 minutes. Whilst, to some extent, these statistics may reflect a measure of inexperience and hesitancy on the part of the police to interrogate on tape, electronically recorded interrogations can be expected to be shorter and more sharply focused than an unrecorded interrogation.

If this assumption is correct, then editing will not pose a great problem. Inevitably, however, some re-education of the Police in acceptable interrogation techniques will be necessary if mandatory recording of entire interrogations is to become normal practice.
In their study of tape-recording, Barnes and Webster concluded that, "the total system, costs and manpower requirements were critically dependent on the policy of transcription". Barnes and Webster listed five policy possibilities.

(a) Policy 1: full transcription by police officers of all recordings.

(b) Policy 2: full transcript by police officers of all recordings where proceedings are instituted.

(c) Policy 3: full transcript by suspects of all recordings where proceedings are instituted (the basic situation).

(d) Policy 4: full transcript by typists of all recordings where there is not a guilty plea.

(e) Policy 5: No transcript but normal police notes."

Barnes and Webster concluded that "any policy requiring the Police to make a full transcription is extremely expensive in both costs and manpower requirements. For the Police to make a full transcript of all recordings of persons who are proceeded against (Policy 2) would require an increase of approximately 8% in total CID manpower. Further, they concluded that transcription costs of the basic situation when compared with Policy 5 would account for 80% of total system costs. They also found that confining recordings to the talking and read-back of statements could eliminate the requirements for transcripts. On this basis the estimated average annual cost of such a policy would be 0.49 million which compared with a cost of 1.6 million for the same system as the transcripts."

These statistics obviously influenced the Philips Commission to recommend only that the taking and read-back of statements be recorded. For reasons given earlier, however, if tape-
recording is to be an effective monitor of police practice in interrogation, such a position is unacceptable. Appreciating the force of this argument, but recognising also that a full transcription policy would preclude electronic recording being feasible, the Home Office in its latest experiment consisting of field trials in six police areas, whilst requiring entire interrogations to be recorded, has concentrated upon limited transcription in so far as is possible.\textsuperscript{176}

This is achieved by first requiring the officer concerned to make a note in summary form of the conversation. This need not be verbatim but should contain those parts of the interview which the officer considers is directly relevant in evidential terms to the offence in question. The officer may refer to the salient points by reference to a time coding device. The instructions issued by the Home Office provide that a statement should be served on the defence informing the defence of the nature of the evidence and providing that the defence may on application to the police listen to the tape, at an appropriate time. It is envisaged that the prosecution and the defence in appropriate circumstances may confer on the way any statement of interview should be altered. It is not, however, envisaged that, in every case, the defence should feel obliged to listen to the tape. The Standing Committee on Criminal Law of the Law Society approved the following procedure:\textsuperscript{177}

"Whether or not a solicitor listens to a tape-recording of a police interview with a client is a matter which falls to be considered within the Solicitor's general duty of care in advising a client. The discharge of that duty of care in relation to tape-recorded interviews will depend inter alia on the instructions received by the solicitor about the events covered by the tape recording. There can therefore, be no requirement for a solicitor to listen to such a tape recording in every case."

The scheme envisaged that only where there is a dispute about an interview which cannot be resolved should a transcript be sought either by the prosecution or the defence. In
those cases, the Home Office rules require that in cases triable on indictment the prosecution should apply to the Judge for a transcript: in indictable cases, triable summarily, the prosecution has to apply to the Justice's Clerk. A legally-aided defendant should apply to the Legal Aid Committee and a non-legally aided defendant may apply initially in writing to the Judge for an indication of the reasonableness of the costs likely to be incurred. There are rules which require the prosecution to inform the defence that a transcript is being obtained to avoid duplication. The defence is not so obliged. It is, also, envisaged that only in cases of doubt should it be necessary to play the tape in Court, although the master tape should be produced as an exhibit.

Rules such as these could be readily adapted to New Zealand conditions. For example, an application for a transcript in indictable trials could be made to the Judge generally on callover, or in Chambers, in those cases where there was a disagreement between the Crown and the defence on the contents of the summary. These procedures, if adopted together with the probability that in most cases audio-recording will shorten interviews, are likely to significantly reduce the cost of mandatory recording of entire interrogations.

(d) **ELECTRONIC RECORDING DEVICES AND CAPITAL EXPENSE**

Of considerable significance, apart from transcripts, is the capital cost of audio or video-recording equipment. Video equipment is significantly more expensive and recording of entire conversations by this means in all but exceptional cases would not be feasible. Since the Barnes and Webster study, there has been a considerable amount of research and development on audio-recording equipment, both in the United Kingdom and in the United States. Concern earlier expressed that tapes could be concocted have been largely eliminated.

In England, two companies, DMW Associates (Electronics) Ltd, 6/8 Morris Road, Royal Oak Industrial Estate, Daventry,
Northants, NN 115 and Lee James Electronics Ltd, Unit 24, Royal Industrial Estate, Blackett Street, Jarrow, Tyne and Wear, have developed recording equipment of robust construction designed for police work. The latter company currently supplies recorders to police stations in Scotland. The cost of recorders produced by Lee James Electronics Ltd varies between £400 and £600. A more expensive recorder manufactured by DMW Electronics costs approximately £1120. The recorders developed by these companies are designed to secure an enhanced quality of audio-record and incorporate safety devices.

In the United States Traffic Control, Safety, and Security Systems (3M) which has subsidiary offices located in both Auckland and Christchurch, has been developing recording equipment suitable for police work. This Company expects equipment to be available on a market basis in August 1985, but as yet, the cost of such equipment is not available. Equipment that is being developed, however, includes a handheld recorder as well as a more sophisticated device for recording at the station. The recording devices include a microchip, which at the same time as audio conversation is being recorded, puts data in a digital form on the cassette tape. This, effectively, time codes the tape. Played back in a separate machine called a verifier, it can be determined whether the conversation on the cassette has been altered or attempted to be altered, in any way. Also being developed is a high speed duplicator so that the original microcassette which will be locked away for submission to the Court can be quickly copied. There are other safety devices incorporated into the cassettes, which run for 45 minutes each. Research has proceeded in consultation both with Scotland Yard and the FBI.

Until the precise cost of recording equipment, duplicators, verifier machines, and cassettes is finally known it is impossible to accurately assess capital cost of equipment. Also included in any consideration of cost will be the
provision of transcription facilities and additional staff. It is envisaged, however, that such equipment as verifiers, duplicators, and transcription facilities could be located on a district or regional rather than station basis. Costs will involve the provision of adequate play back facilities and equipment at Courts. It may also be necessary to enhance the acoustic quality of interview rooms, although the machines being designed today are aimed at achieving an enhanced audio record, and thus acoustic modification of interview rooms may be unnecessary.

At present, there are 261 police stations in New Zealand, including patrol bases. These range from District Headquarters in each of the 16 police districts to one-man stations in remote areas. Provisions of one high quality recorder worth $2000 at each station with an additional 40 spread through major stations would cost approximately $602,000. With the cost of additional equipment, tapes, duplicating, verification and transcription facilities (at least on a district basis) the initial outlay will be considerably more. Much will depend on the eventual cost of equipment and the method of organisation of facilities. It is possible that capital costs will be offset in savings by court time in reduction of voir dires and challenges to police statements. Further, if this is so then there is also likely to be a saving in police attendance at court. However, studies would tend to suggest that for the most part savings here would not be considerable. Barnes and Webster, 178 for example, concluded from a study of confessions in Crown Court trials, that much less time is spent on trials within trials than is commonly supposed. Less than 2% of total Crown Court trial time was spent on this activity. In the sample taken of 79 trials only 4% trial time spent on crossexamination was related to police interrogation.

Any such saving, if it is significant, is more likely to result from changes in plea. Barnes and Webster postulated
from their study of nine Crown Court cases, that Judges surveyed considered that in 12% of contested trials, tape-recording would have meant that the plea would have been likely to have been different. In a further 8% of cases, Judges considered that court time would be saved. If there was in fact a 12% change in plea, Barnes and Webster considered that this "would have a tremendous impact on the workload of the courts and on legal services". Their estimate was "that the total savings in court and legal services could be as much as two-thirds of the recording systems costs". As well, if there were changes in plea then a good deal of police time will be saved also.

Reliable statistics, however, are unlikely to be obtained until the system has been operating for some time. For example, it may be that mandatory recording of entire interrogations will diminish the number of confessions obtained. Whether this is so, in large part will depend on the extent to which the Police currently adopt improper or unethical techniques to secure apparently voluntary statements and whether they are able to adjust satisfactorily to audio-recording. The experiment currently being conducted by the Scottish Home and Health Department would suggest that as the experiment proceeded the Police became more aware of the advantages of tape-recording and became more cooperative. There is, of course, the possibility that some policemen and suspects will fee inhibited from speaking freely when the conversation is being recorded. The Scottish experiment observed that some policemen did express inhibition; however training and experience should assist the Police to surmount this problem. The Scottish experiment concluded also that only - 4% of suspects interviewed declined to talk on tape as a matter of principle. More disturbing, however, was the evidence that about 12% of suspects in Dundee and Falkirk refused to repeat incriminating admissions when they were interviewed on tape. This evidence of course assumes a truthful account on the part of the Police, and any reliance on these statistics must take into account the fact that the Police for some time were not particularly
willing participants in the experiment, reluctant as they were to see the introduction of tape recording in Scotland.

A further factor of importance is the question of legal advice. If the recommendation is accepted that a suspect should be informed of this prior to interrogation, then should any significant number of suspects take up the opportunity, there is likely to be a corresponding reduction in the number of confessions obtained. Inevitably, given that confessions may be important in 10-20% of cases, any reduction in confessions will have an effect on the conviction rate, unless other evidence sufficient to establish guilt is available. Also, any reduction in confessions is likely to reduce the number of guilty pleas with a resultant cost for both the Police and the Courts. Further, there may also be some diminution in the amount of intelligence obtained. However, information could still be obtained from those suspects who elected to talk off the record, as Professor Glanville Williams has observed. The results of the experimental field studies currently being conducted by the Home Office in six police areas in England should provide a more accurate answer to these questions. However, although the mandatory audio-recording of entire interrogations is required, the Police in the Home Office experiment do not have to advise the suspect prior to interrogation of anything other than that he has the right to silence. Such results as are obtained therefore, will not necessarily be a reliable guide in relation to a system where the Police have to advise a suspect also of the right to consult a lawyer, prior to interrogation. It is only after the results of audio-recording of interrogations under these conditions have taken place and been monitored carefully for some time that we are likely to obtain a reliable picture of whether police effectiveness has been seriously diminished, by electronic recording.
There is a body of opinion which takes the view that verbal statements attributable to the accused should not be excluded.\textsuperscript{184} There are however, as we have seen, obvious dangers in permitting such evidence to be admitted if unrecorded.

The experience in Dundee\textsuperscript{185} where police clearly attempted to frustrate the experiment conducted by the Scottish and Home and Health Department was disturbing. After tape-recording was introduced the incidence of statements made prior to arrival at the police station rose from 14\% before the introduction of tape-recording to 44 \% after. In any case, even in those cases where the subject has made admissions, there is the problem of accuracy of the record. The policeman's notebook and the rules relating to refreshing memory are amongst the most unsatisfactory aspects of the law of evidence.

In the absence of the suspect acknowledging the accuracy of the record, there is every reason for distrust. At the very least, it is an unsatisfactory basis for conviction.

Professor Glanville Williams\textsuperscript{186} suggests that verbal admissions should be excluded unless they are subsequently repeated by the suspect on tape. Such a recommendation will effectively eliminate the "verbal". In any case once the public appreciate that facilities exist for tape-recording, the weight attached to verbals which are not electronically recorded will inevitably be diminished, a point which was not lost on the Home Office in relation to the Field Trials experiment.

(f) \textbf{THE FIRST INTERIM REPORT OF THE HOME OFFICE IN RELATION TO FIELD TRIALS OF TAPE RECORDINGS OF POLICE INTERVIEWS WITH SUSPECTS}

The first Home Office research study "No 82" on the tape-recording of police interviews with suspects was published
and received in New Zealand after this paper was substantially completed in December 1984. The publication may be obtained by writing to HMSO Books (PC 13A/1) Publications Centre, P.O. Box 276 London SUF 5DT, reference X25.08.07.

Although information about the practice of tape-recording at the time of publication of the first interim report was not available from all of the field trial areas, information relating to before and after studies at Leicester and Wirral Police Forces was sufficiently plentiful to permit some investigation of the impact of the introduction of tape-recorded interviews on the criminal justice system. Results obtained, however, were expressly said to "hold true for the areas monitored and may not necessarily be valid more widely and the findings must be treated with some caution".

The immediate conclusions reached in the first interim report suggest first, that the Police are co-operating in the experiment. The preliminary results suggest "an absence of any evidence that the data collected are invalidated or made meaningless through the systematic avoidance of tape-recording by the Police". Other conclusions suggest that tape-recording produces shorter interviews and "slightly less frequent interviews". The researchers conclude that this supports the view that "tape-recording has required a greater discipline in interviewing suspects". Further, there was no evidence that "tape-recording inhibits suspects from confession or making damaging admissions; nor do the results suggest any decrease in the amount of information about other offences, obtained during the interview."

The report concluded that the data available did not enable conclusions to be drawn about the effect of tape-recording on the courts. It was anticipated that information "to allow unequivocal conclusions to be drawn" could not be drawn until "towards the end of the monitoring period" (i.e. late 1985).
CONCLUSIONS

The purpose of this paper has been to consider and evaluate electronic recording of police interrogations to better ensure their authenticity and assist to eliminate the suspicion and criticism which frequently surrounds the admission of an accuses's statement to the Police, whether this be verbal or written. Any consideration of reform, in this area, however, inevitably requires an examination of the privilege against self-incrimination and the law relating to confessions more generally.

The privilege against self-incrimination is central to the problem. Although the privilege developed largely in response to the excesses of the ecclesiastical courts and the Star Chamber, it, like the presumption of innocence, has come to be regarded as fundamental to our concept of democracy. After the demise of Star Chamber, the English eschewed inquisitorial practices, such as were favoured by Continental Courts, and gradually the adversary system of criminal justice was developed. The privilege against self-incrimination is now deeply entrenched in Anglo-American criminal jurisprudence.

The development of the modern police force, distrusted by some of the judiciary who saw it as a Continental creation, inevitably led to the development of law relating to the admissibility of confessions. Fundamental in the relationship between confessions and the privilege against self-incrimination is the voluntariness principle. Opinions differ on the rationale for the voluntariness rule; but it would appear that there is no one rationale. Judges were anxious to ensure that admissions were reliable and were not the product of coercion or inducement because it was quickly realised that confessions could play a crucial point in criminal trials. However, to limit the rationale to reliability as Wigmore did, is to take too narrow a view. From the earliest development of the confession rules and the rise
of the organised police force, the courts have scrutinised confessions to ensure that they have not been obtained in ways which would be regarded as unacceptable in a civilised democratic society.

Today, there is an increasing awareness that custodial interrogation is inherently coercive. This may explain why many people, even though aware of their right to silence, volunteer confessions. Concern today, however, is directed not only at obviously improper tactics such as physical intimidation, but also with oppressive techniques of questioning which are psychologically intended to make a suspect cooperate. Techniques of this kind, are to be found in police manuals in the United States; but that they are also adopted here is evidenced in R v Wilson. These techniques, directed at overbearing the suspect's will by subtle persuasion or trickery, are in principle as objectionable as physical intimidation, if the privilege against self-incrimination is indeed valued by society, today.

Associated with an increasing awareness of the inherently coercive ratio of custodial interrogation, is a greater concern for the plight of the youthful, inarticulate, illiterate or indigent suspect, who might be expected to more readily succumb to police questioning. This concern, it will be recalled was judicially articulated in the United States in the cases of Escobedo v Illinois and Miranda v Arizona. In Miranda, not only was a suspect required to be advised on arrest that he was entitled to remain silent, but also that he had a right to consult a lawyer. If he could not afford a lawyer, then the State was obliged to provide one. Miranda recognised that the adversary system, effectively, commenced on arrest and that a suspect without experience of the system was, in most cases, not in any position to make an intelligent, informed decision on whether to volunteer a statement. The law, as had been formerly practised in the United States, was seen to discriminate against the less privileged members of society.
In Commonwealth jurisdictions, the Courts have gone no further than to require the traditional caution. Some law reform bodies have, however, been more robust. Thus, the Australian Law Reform Commission has recommended that a suspect should be advised also on arrest of his right to legal advice. More recently, the Canadian Law Reform Commission has also recommended this.

The Thomson Committee on Criminal Procedure in Scotland was, however, more conservative. Provision of a solicitor on detention as opposed to arrest was to be in the discretion of the Police. The Philips Commission on Criminal Procedure would appear also to have preferred a more conservative approach. With the exception of juvenile suspects and others under special disability whom the Commission recognised ought not generally be interviewed in the absence of an adult, the view was expressed that the Police should permit a suspect to consult with his legal adviser on request unless there were exceptional circumstances to justify a denial. The Commission did, however, recognise the importance of legal assistance and considered that duty solicitors and legal aid schemes should make provisions for legal services of this kind. Further, the Commission did not consider it any answer for the Police to deny access to legal advice on the grounds that the suspect might be advised not to make a statement. To accede to this argument, the Commission recognised would be to deny the existence of the privilege.

Legislatures have been similarly conservative. In the United Kingdom Section 56 of the Police and Criminal Evidence Act 1984 provides that access should not be denied on request other than for exceptional statutorily defined reasons. A similar provision was also contained in the Criminal Investigation Bill introduced by the Fraser Government in Australia in 1981.

The reluctance to go further may, in part, be due to considerations of cost and administration, but it is more likely attributable
to a desire not to inhibit effective law enforcement. The experience of *Miranda*, however, in the United States suggests that the Police may not have been greatly inconvenienced. There may, of course, be quite legitimate reasons why this has been so. The fact of custodial interrogation alone may compel many suspects to cooperate, others may be looking for assistance or advantage from the Police or may hope to avoid further inquiry by advancing an explanation, alibi, or other excuse. Others may confess out of feelings of genuine guilt or remorse. However, there may be less acceptable reasons why *Miranda* has not impeded the Police. More unscrupulous officers may avoid *Miranda* simply by omitting to give the warnings or by giving them in a half-hearted way. Others may postpone the warnings until the cooperation of the suspect is assured; whilst some may resort to intimidatory or other unethical methods to induce suspects to waive their rights.

The problem with *Miranda* is that in the absence of an effective monitor of police practice, it is easy for the more unscrupulous policeman, if he so desires, to circumvent the rules. The only way in which effective monitoring can take place is if an independent observer is present throughout an interrogation, or the interrogation is recorded in its entirety. Even this, however, will not entirely prevent the more unscrupulous attempting to secure cooperation by resorting to improper means prior to a formal interrogation commencing. It will, however, at least reduce the opportunity for improper behaviour during the interview.

We have seen that interrogation before an independent person is the practice in some jurisdictions and has, on occasions, been advocated by law reform bodies. The Thomson Committee recommended the reintroduction of judicial examination in Scotland. Subsequently, legislation was passed to implement this recommendation in 1975; however, it would appear that little use has been made of this procedure. The Philips Commission considered such a proposal; but, did not recommend it. Unlike its predecessor in 1973, the Law Reform Commission
of Canada in 1984 in its most recent working paper on interrogation, made no mention of such a procedure.

Instead, it has been electronic recording which has been the focus of attention. Mandatory audio or video-recording of entire interrogations will better ensure, not only that suspects do receive cautions which should be recorded on tape to demonstrate compliance with the law; but also, in those cases where the suspect elects to cooperate, an accurate record of the conversation will be obtained. Electronic recording is likely to reduce the length of interrogations and minimise the use of unethical techniques designed to defeat the privilege and secure cooperation. As such, it will better ensure that statements made are truly voluntary. If the suggestion adopted here is accepted, the problem of the "verbal" will disappear. Only those statements which are made on tape will be admissible.

It must be acknowledged that electronic recording of entire police interrogations may reduce the effectiveness of the Police in terms of detection and conviction rates. It is not, however, possible to accurately assess what the cost will be in the absence of evidence of actual experience of electronic recording of entire interrogations. It is possible that any loss in effectiveness will at least partially be offset by an increase in guilty pleas and the conviction rate. On the other hand it is likely that there will be a reduction in guilty pleas if there are fewer confessions obtained. Much will depend upon how commonly the Police resort to intimidation and other unethical tactics to secure confessions today. Nor can we predict how many suspects would take up the offer of legal advice if the Police were required to warn them of such a right prior to interrogation. In the absence of accurate empirical evidence of police practice in such conditions, any conclusions advanced must necessarily remain speculative or, at best, tentative.

In this regard, the present Home Office experiment of electronic recording of entire interrogations in six police areas
in the United Kingdom is likely to provide a better basis for more accurately assessing the effect of electronic monitoring and the Police. Even then, any conclusions would not be entirely apposite for a system which required the Police to warn a suspect also of his right to legal advice, prior to interrogations as has been suggested should be the practice here.

Reform of the law of police interrogation, however does not depend entirely on arguments relating to police effectiveness. Rather, reform depends on an assessment of the value which we place today on the privilege against self-incrimination and our adversary system of criminal justice. If the reforms suggested here do seriously reduce the effectiveness of the Police, then there is likely to be a renewed claim to abolish or reform the privilege. This point was made by the former Attorney-General for Australia, Senator Gareth Evans recently, in his John Barry Memorial Lecture on "Reforming the Law of Criminal Investigation":

"I say no more for present purposes about the general right to silence issue, other than that this policy dilemma is as alive and well in 1984 as it was ten years ago, and that it simply cannot be fudged in any honest attempt to clarify and improve the present law."

In 1972, it will be recalled, a majority of the members of the Criminal Law Revision Committee in its eleventh report on Evidence in the United Kingdom in effect recommended the abolition of the privilege. Although sympathetic to the argument that inferences could be drawn from silence in the face of police questioning, the Philips Commission on Criminal Procedure in 1979, recognised that such a proposal represented a fundamental change in approach from an adversarial to an inquisitorial system of justice. No doubt, mindful of the controversy that its predecessor's proposals had generated, the Commission declined to recommend any change. It is interesting to observe, however, that the proposals of the Criminal Law Review Committee were adopted in
Singapore in 1976\textsuperscript{190} "without apparently materially assisting the Singapore police or prosecuting officers in their combat against crime".

One of the principal criticisms that was levied at the proposal of the Criminal Law Revision Committee to abolish the privilege was the absence of empirical evidence supporting its belief that the privilege was causing too many professional criminals to escape conviction. If there is to be reform of the law to abolish the privilege, then it is submitted this should only occur after the Police have been exposed to electronic recording for a sufficiently lengthy period to accurately assess the extent of any reduction in effectiveness, and resultant cost to the public.

In any debate on the privilege, the advice of the Canadian Committee on Corrections, "the Ouimet Committee", should be heeded. In rejecting an argument for compulsory examination of a suspect, the Ouimet Committee said:\textsuperscript{191}

"... it appears to the Committee that the privilege against self-incrimination is deeply involved in the feeling of justice or fairness with which contemporary Canadian society reacts to our criminal process. We are of the opinion that such a long respected privilege should not be disturbed except for the clearest and most compelling reasons".

In any move to abolish the privilege, even in the face of evidence that electronic recording was inhibiting the Police, it should not be overlooked that the privilege, together with the presumption of innocence, has been the cornerstone of our adversarial system of justice for several centuries. Such a "sacred cow\textsuperscript{192} ought not to be lightly sacrificed. As Wigmore has said:\textsuperscript{193}.

"Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources".
It may be no mere coincidence that in this century, those countries which have paid allegiance to the privilege and the adversary system have in large part resisted totalitarianism or tyranny. There can be no more important philosophical or jurisprudential debate than that relating to the abolition of the privilege. As the Supreme Court of the United States said in *Miranda*:

> As 'a noble principle often transcends its origins' the privilege has come rightfully to be recognised in part as an individual's substantive right, a right to a private enclave where he may lead a private life. That right is the hallmark of our democracy."

However, even if the utilitarian argument is upheld and the libertarian cause is eventually lost, electronic recordings of police interrogation in their entirety will be required. If a failure to respond to interrogation entitles a trier of fact to draw adverse inferences, then an accurate record of interview is required. In any case electronic recording will be necessary to ensure that interrogations are not oppressive. It is, therefore, submitted that electronic recording of police interrogations will be necessary to ensure accuracy and eliminate oppressive or unethical interrogation techniques, whatever view is ultimately taken of the value of the privilege against self-incrimination.

C. B. CATO
The Faculty of Law
University of Auckland
January 1985
FOOTNOTES


2 Ibid, para 52.


5 It is to be noted that Professor Ratushny's recommendations have not received widespread support in Canada. This was noted in a comment and dissent by Cassells QC in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Carswell, Toronto, 1982) Professor Ratushny's work was also referred to by the Law Reform Commission of Canada in its working paper 32 "Questioning Suspects" (Ottawa, 1984).


7 Wigmore, "Evidence", (McNaughton Revision), Vol 8, paras 2250-2253.

8 For further discussion on the history of the privilege see Holdsworth, "A History of English Law", Vols 4-5 (2nd ed, Methuen). Also for a useful shorter account, see Law Reform Commission of Canada's Study paper "Compellability of the Accused and the Admissibility of his statements" (Ottawa 1973) pp 2-5.

9 Supra., n 7; para 2250 at pp 279-286.

10 Ibid, at p 280.

11 Ibid, at p 281.

12 3 How St Tr 1315 (1637-45) Reproduced in Wigmore, ibid, at p 282.

13 See Wigmore, ibid, at p 283.

14 Ibid, at p 286.

Ibid, at 293-295.

Idem.


Idem.

Idem.

Supra, n 1, paras 43-47.

"Compellability of the Accused and the Admissibility of his Statements", Study Paper 5, supra, n 8.


Cmd 8092 (HMSO, London).

Ibid, paras 4.50 - 4.53.


Cmd 6218 (HMSO, Edinburgh 1975) paras 8.01 - 8.29.

See the discussion of the Thomson Committee, ibid, paras 8.03 - 8.05.

Supra, n 6.

Supra, n 1, paras 102-113.


(1783) 1 Leach Cr C 263, 264; 168 ER 234, 235. Also see, Rudd's Case (1775) 1 Leach Cr C 115; 168 ER. 160.

Supra, n 33, para 820.

Ibid, at p 300.

2 Den CC 430; 169 ER 568.

Supra, n 33 at pp 298-300.

This point is made by the Canadian Law Reform Commission in Study Paper no 5, supra, n 33, at p 5.

[1914] AC 599, at 611.


These are also set out in Adams, supra., n 41 at paras 3950-3957.


Supra, n 45 at p 321. For a further recent restatement of the privilege against self-incrimination in New Zealand see R v Coombs [1983] NZLR 748.
Indeed, this was the only rationale that Wigmore was prepared to accept for the confession rule. Wigmore, supra, n 33, para 822 at p 330.

Supra, n 50, at p 543.


168 US 523, at p 543 (1897).

266 US 1 (1924).


297 US 278 (1936).


Ibid, at pp 486-492.

Ibid, at pp 488-489.


Ibid, at pp 472-473.

Ibid, at p 460.

Ibid, at p 504.

Ibid, at p 517.

Ibid, at p 541.


Note a similar debate has taken place in the Supreme Court of Canada with apparently greater preference for the reliability principle; see Law Reform Commission of Canada, working paper 32, "Questioning Suspects", (Ottawa, 1984) at pp 18-38. See also the decisions of the Supreme Court of Canada, R v Wray [1971] SCR 902; Horvath v The Queen [1979] 2 SCR 376; Rothman v R [1981] 1 SCR 640. For a recent Australian consideration of the rationales for the confession rule and the judicial discretion to exclude illegally or improperly obtained evidence, R v Cleland (1982) 43 ALR 619.


Ibid, at p 506.


Ibid, at p 274.

Idem.

Ibid, at p 275.


Ibid, at p 57.

Supra, n 25 at p 94.

Idem.

Idem.

Inbau F.E. and Reid J. "Criminal Interrogation and Confessions" (2nd ed, Williams and Wilkins,

84 Supra, n 63 at pp 447-459.

85 Supra, n 83 at p 157. See further for criticism of the constitutionality of these methods, "Developments in the Law of Confessions" (1965-66) 79 Harv L Rev 938 at 939.


89 Supra, n 78.

90 Ibid, at p 150.

91 Supra, n 45.

92 Ibid, at p 318.

93 Ibid., at p 324.

94 Supra, n 78 at p 152.

95 Idem.

96 [1971] 1 All ER 322.

97 Supra n 63.

98 Supra n 60.

99 Supra n 63 at p 468.

100 Ibid, at p 469.

101 Ibid, at p 470.

102 Ibid, at p 472.

103 Supra, n 5 at p 5.

104 The principal studies on Miranda are set out above supra, n 69. And further, see discussion text to n 70 ante.

105 Supra, n 25 at p 98.


Supra, n 25 at p 70.

Supra, n 106 at p 332.

Research Study No 4 (HMSO, London 1980) at p 94.

Idem.


Ibid, at p 150.


Supra, n 32.

Supra, n 117, para 107.

Supra, n 5.

Supra, n 25, para 4.95.

Ibid, para 4.90.

Ibid, para 4.84.

Section 56(5), Police and Criminal Evidence Act, 1984 (UK).


Supra, n 45.
R v Tomkins is reported in the Court of Appeal, [1982] 2 NZLR 170.

Supra, n 25, paras 4.102-4.104.


See text to fn 119 ante.


Supra, n 25 at p 70. Also see Mitchell, "Confessions and Police - Interrogations of Suspects" [1938] Crim LR 597.

Ibid at p 71.


(1975) 61 Cr App R 67 at pp 76-77.


Ibid, at p 29.

This point is made by Professor Glanville Williams, supra., n 135 at p 13.


Idem.

Idem.

Supra., n 135 at p 13.


A review of Scots law may be found in the Thomson Committee's Report, supra, n 28, paras 7.06-7.12.
149 See text to fn 29 ante.
150 Supra, n 28, paras 8.09-8.29.
151 Supra, n 8.
152 Supra, n 1.
153 Supra, n 27.
154 Supra, n 25, paras 4.60-4.62.
155 Ibid, para 4.59.
156 Ibid, para 4.99.
157 Supra, n 1.
158 Supra, n 28, paras 7.21-7.23.
159 Ibid, at p 36.
162 Supra, n 25, para 4.26.
163 Ibid, para 4.27.
166 Supra, n 32.
167 Supra, n 27, Recommendation 10.
169 Supra, n 161, para 6.17.
172 Supra, n 138 at pp 14-15.
173 Supra, n 169, para 3.27.


177 Ibid, para 7.2.

178 Supra, n 161, para 6.13. See for a further study which concluded "that neither 'trials within trial', nor disputes in the trial proper over the reliability of incriminating statements occur with much frequency within criminal trials." Vennard, "Disputes within Trials Over the Admissibility and Accuracy of Incriminating Statements: Some Research Evidence", [1984] Crim LR 15. Cf the judicial observations of Lawton LJ in R v Turner (1975) 61 Cr App R 67 at 76-77.

179 Ibid., paras 3.6; 6.14.

180 Idem.

181 Supra, n 138 at pp 23-26.


183 Williams, supra, n 135 at pp 21-22.

184 See Philips Commission on Criminal Procedure, supra, n 25, para 4.30.

185 SHHD Report, supra n 28 at p 27. See further, McConville & Morrell "Recording the Interrogation: Have the Police Got it Taped?" [1983] Crim LR 158.

186 Supra, n 135 at pp 11-15.


188 Supra, n 25, para 7.16.

189 Supra, n 32.

Canadian Committee on Corrections (Ottawa, 1969).


Wigmore, "Evidence", (McNaughton) Vol 8, para 2251, at p 296, note 1.

Supra, n 63 at p 460 citing United States v Grunewald 233 F. 2d. 556, 579, 581-582. Also note Escobedo v Illinois text to n 62, ante.
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