EVIDENCE LAW REFORM COMMITTEE

REPORT

ON

CONFESSIONS

February 1987

Wellington

New Zealand

Inset 1

Index Paragraph

LIST OF RECOMMENDATIONS:

		Paragraph
1	The feasibility of audio/video-taping of police interviews should receive early consideration.	3
2	The existence in all cases of a general judicial discretion to exclude evidence which has been unfairly obtained should be confirmed.	24
3	The rationales of the voluntariness rule should not be set out in a legislative provision.	49
4	All statements, whether inculpatory or exculpatory, made by the accused should be proved by the Crown to have been made voluntarily in order to be admissible.	57
5	Section 20 of the Evidence Act 1908 should be amended to make it clear that incriminating admissions falling short of full confessions should also be subject to that section.	61

6 The words 'or other form of compulsion' should be omitted from s.20 and a general discretion to exclude, based on unfairness, should be recognised. 66

7 The judge should be satisfied beyond reasonable doubt that any promise, threat or other inducement made was not likely to cause an untrue admission of guilt to be made or an untrue admission of incriminating facts. 68

8 No changes should be made to the existing law with respect to the drawing of inferences from silence in the face of police questioning. Silence before caution should continue to be unable to constitute proof of guilt but it should continue to be able to be taken into account in assessing the evidence. Silence after caution should continue not to be able to be relied upon in any way. 81

9 The Committee's view that the principles established in Wong Kam-ming v The Queen should continue to be applied by the courts in New Zealand should be noted in the course of any proposed codification of the law. 101

10 The rule that a promise, threat or any other inducement must be held out by a person in authority before the confession can be found to be involuntary should be abolished. 106

11 The rule established in R v Naniseni that if some factor is relied on as having overborne, or as apt to overbear, the accused's will it must be found in the will of some other person before the resulting confession can be found to be involuntary, should be reversed by statute. 122

12 The term 'oppression' should not be added to the categories of conduct resulting in automatic exclusion contained in s.20 134

To: The Minister of Justice

PREFACE

1 In 1982 the Minister of Justice established the Evidence Law Reform Committee to examine the desirability of a gradual codification of the law of evidence and also to review specific areas of the law of evidence which are in need of reform.

2 This is the second report prepared by the Committee. In it we consider the law and practice relating to confessions and, where we have considered it appropriate, make recommendations for legislative reform.

3 In a future report the Committee were intending to consider the application of the Judges' Rules and the desirability of audio/video taping of police interviews in the context of the general topic 'the questioning of suspects'. However, the creation of the Law Commission and the subsequent disestablishment of the standing Law Reform Committees has precluded the production of this further report. We recommend that this area of the law should receive early consideration so that the feasibility of audio/video-taping of police interviews with suspects can be established. In our view such

a regime has the potential to remove many of the problems in this area which must currently be resolved by the time consuming voir dire procedure.[1]

4 This point was forcefully made in a number of submissions we received in response to a working paper which we distributed for comment.

5 In a joint submission the High Court judges at Auckland stated:

> "Whilst the matters raised in the Report are interesting and significant, at least when considering the principles applicable to the admissibility of confessions, these matters do not deal with the real practical day to day problems that judges strike when confronted with a challenged admission.
>
> "In practice, the frequently very difficult determination of the admissibility of a confession turns on the practical problem of determining on the evidence given at the voir dire what did occur during the obtaining of the confession, and whether there has been a breach of the Judges' Rules and if so, whether the confession should thereby be excluded. If any real progress is to be made in dealing with the problems that

arise in practice, it is crucial that these two issues be faced. Indeed, we consider there is little point in under-taking any review of the law relating to confessions without, as part of that review, dealing with the Judges' Rules and the video-taping or at least taping, of confessions.

"But a real and significant improvement will only occur when there is incontrovertible evidence of what occurred during the taking of the confession, and that will only be available when confessions are, as a matter of routine, video-taped or as a second best alternative, taped."

6 In his submission to the committee The Honourable Mr Justice Thorp stated:

"Certainly the inadequate evidentiary basis for the determination of admissibility of confessions is overwhelmingly the greatest problem facing Judges ..."

1 THE CURRENT LAW

(i) The voluntariness requirement

7 A confession is not admissible in evidence in a criminal trial if it has not been proved by the Crown that it was 'voluntary'.

8 The classic formulation of the rule is that of Lord Sumner in Ibrahim v R[2]:

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

9 In McDermott v R[3] Dixon J stated a broader principle. The decision of the accused to make a statement must have been made in the exercise of a free choice:

> "If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary."

10 The Crown must prove voluntariness beyond reasonable doubt.[4]

11 The above requirements concerning the admissibility of confessions are confined to cases in which the statement is tendered on behalf of the prosecution. In all other cases, the method by which the statement was obtained affects its weight rather than its admissibility.

(ii) Section 20 of the Evidence Act 1908

12 The common law rules stated above apply in New Zealand subject to the modification created by s.20 of the Evidence Act 1908.

13 That section provides:

> "A confession tendered in evidence in any criminal proceedings shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made."

14 The courts have held that a promise, threat or any other inducement must be held out by a person in authority before the confession can be found to be involuntary under the section.[5]

15 McGechan[6] summarises the effect of s.20 as follows:

"(a) If the inducement alleged is one in the nature of a threat or violence then:

(i) If it amounts to "the exercise of violence or other form of compulsion", then the case is outside s.20, and a confession is always inadmissible.

(ii) If it is less than this, then s.20 may be invoked, and the admissibility of the confession becomes a matter for the Judge to decide.

(iii) It is immaterial whether the inducement was offered by a person in authority or by some other person.

(b) If the inducement alleged is one in the nature of a promise, or persuasion, then:

(i) If the promise or persuasion was offered by a person not in authority then it is ineffective to support an argument on admissibility, and the statement is always admissible.

(ii) If it is offered by a person in authority then s.20 may be invoked and the admissibility of the confession becomes a matter for the Judge."

16 The present s.20 was enacted by the Evidence Amendment Act 1950 to overcome part of the judgment in R v Phillips[7] which decided that the former s.20 did not cover all the possible categories of inducement by a person in authority which may, at common law, render a statement involuntary. To achieve this the words 'or any other inducement' were added after the words 'promise or threat'. The words "(not being the exercise of violence or force or other form of compulsion)" were added immediately after the words set out above to make it clear that a confession obtained in such a manner could in no circumstances be 'saved' by the operation of the s.20 'likelihood of untruth' test.

17 The test of likelihood of untruth is whether or not an innocent person, in the position of the accused and in the circumstances in which he is placed, would be likely to confess to a crime which he had not committed. The court must restrict itself to the consideration of the tendency of the accused assuming him to be innocent to so confess.[8]

(iii) The judicial discretion to exclude evidence unfairly obtained

18 As stated earlier, to be admissible the accused's confession must be proved by the prosecution, beyond reasonable doubt, to have been voluntarily made or, if it is not voluntary, to be saved by s.20 of the Evidence Act 1908.

19 However, even if the confession is found to have been voluntarily made there is a judicial discretion to exclude the statement on the grounds that the method by which it was obtained was unfair to the accused:

> "Even if a confession is shown to be voluntary, on the other hand, evidence of it will not necessarily be allowed by the trial Judge to be produced at the trial. The discretion of the Court may at this stage be used to reject a confession obtained by unfair means."[9]

20 The judicial discretion to exclude evidence unfairly obtained is strictly separate from the rules relating to voluntariness. It is a residual discretion which runs through the whole of the law of evidence. Its exercise in the context of the rules relating to voluntariness is thus only one example of its possible application.

21 It is unclear whether the judicial discretion to exclude also applies to a confession held to be involuntary but which would otherwise be saved by the 'likelihood of untruth' test contained in s.20.

22 Mathieson[10] states:

> "Some doubt exists as to whether, if s.20 of the Evidence Act 1908 is properly applicable, a trial judge retains a discretion to reject the confession. In R v Phillips the existence of a judicial discretion was recognised, at least by O'Leary CJ, in respect of voluntary confessions. This cannot however, be taken as an authority on whether there is a discretion to exclude confessions under s.20, as it was held that the inducements offered in R v Phillips fell outside the scope of s.20 (as it then stood). Section 20 itself contains a discretionary element and may be thought impliedly to exclude a residuary discretion. The question has not been resolved by subsequent decisions of the Court of Appeal. In R v Convery Turner J referred to the existence of a discretion "at least in cases in which no ruling has been given in favour of the Crown under s.20" and in R v Naniseni the Court, in a judgment delivered by Turner J, referred to the discretion in terms which suggest that its availability is limited to cases to which s.20 has no application. In Victoria, when s.141 of the Evidence Act 1928 (Vict) applies, it leaves no room for the exercise of discretion."

23 Such uncertainty is undesirable and the section should be clarified. It is our view that in some circumstances it may still be appropriate to exclude a confession considered to be reliable in order to register curial disapproval of the method by which or circumstances in which, a confession was obtained even though these may fall short of violence or force.

24 We therefore recommend that the existence in all cases of a general judicial discretion to exclude evidence which has been unfairly obtained should be confirmed.

2 THE BASIS OF THE VOLUNTARINESS RULE IN NEW ZEALAND AND ELSEWHERE

25 A number of theories have been advanced as the basis of the voluntariness rule:

(a) Reliability

26 Voluntariness is seen as a guarantee of the probable truthfulness of the confession. It is on this basis that confessions are admitted in evidence as an exception to the hearsay rule i.e. people are not (for fear of probable consequences) likely to confess voluntarily to crimes that they have not committed.

27 The "likelihood of untruth" test set out in s.20 of the Evidence Act 1908 is a statutory expression of this principle.

28 The question arises as to whether this is the only principle which should be applied in New Zealand, or are all, or only some, of the other principles to be applied? If the other principles are applicable what is the relative weight to be assigned to them?

(b) Deterrence

29 It has been suggested that the courts should discourage improper police methods by refusing to admit confessions obtained in such a manner. The Judges have increasingly recognised this principle.[11]

(c) Protection

30 This principle recognises the responsibility of the courts to hold a just balance between the rights of the State in bringing offenders to justice and the rights of the individual to be treated fairly and according to due process of law. If a citizen's rights are infringed then he or she should not be disadvantaged by the infringement.

31 This seems to be a general principle of which (b) above is a sub-category.

(d) Privilege against self-incrimination

32 It is sometimes said that an involuntary confession involves an infringement of the privilege against self-incrimination and the right to silence. There is no general privilege against self-incrimination. There is a so-called right to silence which is in fact simply a rule that no adverse use can be made of a failure to speak in certain circumstances.

(i) The New Zealand position

33 The rationales of the confession rule were recently considered by the Court of Appeal in R v McCuin[12]. Cooke, Richardson and Holland JJ, in a combined judgment, referred to recent Privy Council (Wong Kam-ming v R [1980] AC 247) and House of Lords (R v Brophy [1981] 2 ALL ER 705) decisions and stated:

> "... confessions obtained by improper methods are excluded, not only because of their potential unreliability, 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. In New Zealand in s.20 of the Evidence Act 1908 Parliament has left this principle in full force as regards violence, force or other form of compulsion".

And continued:

> "In short, Parliament and the Courts have regarded third degree as so obnoxious that confessions obtained thereby are to be ruled out, no matter whether or not they may be true..."

34 McMullin, J in his judgment did not refer to the rationales, but Somers J concurred with the above statement and, in addition, made the following observations:

> "The commonly expressed justification is the trustworthiness of an induced confession - the risk that it is false ... Historically the rules about voluntary confessions have a different origin from those relating to the privilege against self incrimination ... But as the principles about voluntary confessions have developed the two matters have tended to become linked."

35 In light of the McCuin decision, it appears that all four rationales have been accepted as guiding principles of the confessions rule in New Zealand.

(ii) The position overseas[13]

England

36 Judicial authority recognises a broad basis in policy underlying the confessions rule which is not limited to the reliability principle. In R v Sang[14] Lord Diplock expressed the view that though the rationale of the confessions rule may originally have been reliability it is now the right to silence. Lord Diplock recognised the interrelationship of the various rationales when he referred to the rule as an exceptional instance where a judge, for historical reasons, imposes sanctions for improper police conduct. In some decisions confessions have been excluded by applying the voluntariness rule even though in the circumstances they could be considered reliable.

37 In DPP v Ping Lin[15] the House of Lords directed the lower courts to apply the voluntariness rule in a simple, common-sense manner.

38 The problem with the Ping Lin direction is that it provides no guidance in hard cases where recourse must be had to fundamental principle to guide the court's decision.

Canada

39 In recent years, the Supreme Court of Canada has limited the voluntariness rule by the doctrine of reliability or trustworthiness. In R v Wray[16] the majority held that a part of an otherwise inadmissible confession, which is confirmed by real evidence discovered as a result of the same confession, is admissible; the reason being that the unreliability of that part has been removed. Also, the majority in Alward and Mooney v The Queen[17] approved the voluntariness rule in the following terms:

> "The true test, therefore, is did the evidence adduced by the Crown establish that nothing said or done by any person in authority, could have induced the accused to make a statement which was or might be untrue because thereof"

40 It appears that the Canadian Supreme Court has now entirely replaced the voluntariness rule with the reliability rationale alone.

Australia (excluding Victoria)

41 The following quotation of Neasey J in R v Toomey[18] summarises the general position in Australia:

"Unreliability of enforced or induced confessions cannot in my opinion now be said to be the only policy reason behind the voluntary confession rule. A perusal of the history of the development of the Judges' Rules as an adjunct to the voluntary confession rule, and the broad interpretation of that rule in Cornelius v R., McDermott v R and R v Lee, will show, I think, that the privilege against self incrimination and control by the courts of improper police practices are at least as much involved in reasons behind the rule as the questions of unreliability."

42 It is clear that controlling police behaviour and protection of individual rights and liberties are not alien to the common law tradition and are in accord with the policy basis underlying the voluntariness rule.

Victoria

43 The voluntary confession rule is modified in the state of Victoria by section 149 of the Evidence Act 1958. This section prevents exclusion of a confession made in response to a threat or promise where the inducement was not "calculated to cause an untrue admission of guilt to be made". This

section explicitly adopts the reliability principle but judicial decisions have narrowly construed its effect. The common law rule still applies to statements other than those confessions induced by a threat or promise. Also, the common law discretion to exclude an otherwise admissible confession exists; this discretion being based on considerations of fairness to the accused.

44 Despite the existence of section 149, the Victorian Courts are not limited to the application of the reliability principle. Other considerations, namely fairness to the suspect, can be considered by the courts when exercising their common law discretion.

45 However, it should be noted that in R v Lee [19] the High Court of Australia held that no confession saved from inadmissibility by s.149 can be excluded by the exercise of the judicial discretion.

(iii) Is it important to identify the principles which underlie the voluntariness rule?

46 This question was discussed by Adrian Zuckerman[20] in the course of a discussion of the English Court of Appeal's decision in R v Rennie[21]:

"It is doubtful whether it was ever possible to ascertain the 'spirit' of the voluntariness rule, but the task is certainly rendered much more onerous, for appellate and trial judges alike, by D.P.P. v Ping Lin [1975] 3 All ER 175. For there the House of Lords stated that the voluntariness rule was so clear that there was no need to dwell upon its rationale. Lord Morris saw 'no necessity to re-examine or to consider the reasons which have been assigned as its justification or its basis...' (p.178). Lord Salmon dismissed such investigation as being 'an important philosophical question but for the present purposes... only of academic interest' (p.188). And Lord Hailsham regarded voluntariness as an artificial rule which had been designed to protect the accused against dangers which no longer obtained. No rule of law, except the most technical one, can be found workable without an understanding of its rationale, or 'spirit', as the Court of Appeal [in Rennie] prefers to call it. When the purpose of a rule is unclear then its scope is going to be unclear too. Should impropriety on the part of the person in authority matter? Should it matter that the inducement formed only part of the suspect's reason for confessing? Who should be regarded as a person in authority? Does it matter that the admission was in

fact true? Questions such as these could receive a satisfactory answer only if we have a principle as well as a rule, and only if we know the purpose of the rule, its policy and its place in our system of criminal justice. None of these last matters has ever been clarified and it is this uncertainty which has produced the highly technical and artificial body of decisions prior to Ping Lin. For the only alternative to principle is strict technicality.

"The indeterminacy of the voluntariness rule has deep roots for which the courts cannot be blamed. There is a profound tension between, on the one hand, the right of silence and on the other hand, the need to convict the guilty and protect the community. If the right of silence is to be fully respected, then nothing should be allowed which undermines the accused's freedom to exercise it. Suspects should be effectively informed of their right, and not merely formally; they should be given easy access to solicitors; and the Judges' Rules should be enforced as a matter of law and not merely as a matter of discretion which is almost never exercised in favour of an accused. But of course such measures would make it very difficult to obtain confessions from and convictions of, the guilty. Instead police interrogation practices are designed to ensure, as the

> Royal Commission on Criminal Procedure has recently found, that suspects do not exercise their right of silence, with the result that the vast majority of suspects make statements when it is in their interest to keep silent. As long as we are not prepared to face this conflict, and revise our attitudes to the right of silence, as long as we refrain from open consideration of what are and what are not acceptable interrogation practices, the voluntariness rule will remain indeterminate and difficult in practice..."

47 The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence also considered that identification of the principle(s) behind the rule was crucial to provide a consistent basis for later decisions.[22]

48 We have considered the benefits of setting out in legislative form the various rationales which we have identified. In our view there is little to be gained by attempting to legislatively prescribe a rigid heirarchy of rationales which, in any event, are already well-known. Any such provision would be difficult to draft and to apply in practice.

49 Accordingly we recommend that the rationales of the voluntariness rule not be set out in a legislative provision. We prefer the status quo which leaves room for further case by case development so that flexibility is retained to apply the rule in changing social conditions where the relative emphasis of each rationale may be adjusted to suit the individual circumstances of each case and the wider policy objectives which the law seeks to achieve.

3 SPECIFIC PROBLEM AREAS

(A) Statements subject to the rule

(i) At common law

50 No distinction is drawn, for the purposes of admissibility of voluntary statements, between a confession and an admission falling short of a full confession.[23]

51 Where a statement contains some inculpatory and some exculpatory material, the prosecution must put in the whole statement, or none at all. Where such a statement is admitted the inclusion of the self serving parts is regarded as being necessary for the proper understanding of the inculpatory part.

52 A wholly exculpatory statement is not a confession and would not be adduced by the prosecution as proof of its contents. The accused cannot adduce such a statement for to do so is contrary to the rule against self serving statements.

53 However, the situation may arise where the prosecution wishes to produce an exculpatory statement i.e. where the accused makes signficant departures from the statement when giving testimony in court and the Crown wish to lead the evidence to show that a previous inconsistent statement has been made. The accused may wish to object to the admissibility of the statement on the grounds that it was not voluntary. The question is whether the confession rule applies to exculpatory statements? On this point, there is seemingly no English or New Zealand authority. The matter was raised in Piche v. The Queen[24] where the majority of the Canadian Supreme Court ruled inadmissible a previous inconsistent but exculpatory statement which was found to be involuntary.

54 As stated earlier, inculpatory statements are admitted in evidence as an exception to the hearsay rule because of the belief that a statement against interest is, upon proof of its voluntariness, likely to be reliable.

55 A previous exculpatory statement on the other hand, is not led to prove the truth of its contents but rather to show inconsistency and thus attack the credit of the witness. The truth of the statement led is not relied upon, merely the fact that it was made.

56 If the applicability of the suggested bases of control of police procedure, protection, and the rights of the citizen not to be forced to give evidence against himself are accepted then the requirement of voluntariness may still be seen as an appropriate safeguard requirement.

57 Accordingly, we recommend that all statements, whether inculpatory or exculpatory, made by the accused should be proved by the Crown to have been made voluntarily in order to be admissible.

(ii) Section 20 of the Evidence Act 1908

58 In our view s.20 is necessary to mitigate the rigorous exclusion of relevant evidence which would result from a strict application of the common law rules relating to voluntariness.

59 Mathieson[25] submits that section 20 applies only to full confessions and not to mere incriminating admissions, although there is an absence of New Zealand authority on the subject. If this is the case, then full confessions are subject to the section 20 "likelihood of untruth" saving proviso, yet incriminating admissions falling short of full confessions are not.

60 We agree with Mathieson's view that such an interpretation has the effect of "driving an artificial wedge between full confessions of the crime charged and mere admissions of incriminating facts ... The most satisfactory solution would be a rewording of s.20 which subjected all statements made by an accused which had an incriminating tendency ... to the same criterion of admissibility".[25]

61 We recommend that s.20 be amended to make it clear that incriminating admissions falling short of full confessions should also be subject to that section.

62 More generally, we consider that s.20 has achieved a reasonable compromise between the automatic exclusion of involuntary confessions in some circumstances and the necessity to admit confessions into evidence where the circumstances in which the confession was obtained were not likely to cause an untrue admission of guilt to be made.

63 Or, as Mathieson puts it:[26]

> "The basic idea underlying s.20 is plain enough: there comes a point at which the dislike of self-incrimination and the desirability of discouraging improper police methods prevail over the objective of arriving at the truth, and that point is reached when violence or force are used on a suspected person. Whether this rationale also serves when an "other form of compulsion" has been used must remain doubtful so long as it is uncertain what amounts to an "other form of compulsion.""

64 We believe that violence or force should continue, on the grounds of public policy, to result in the automatic exclusion of any confession obtained. The phrase "other form of compulsion" is extremely vague but has been clarified to some extent by the Courts treating this ground as synonymous with the concept of oppression. Though oppression itself is an uncertain concept it is at least clear that what is to be looked at is the entirety of the situation in which the accused finds himself.

65 This uncertainty causes problems in practice in that it encourages lengthy arguments of a semantic nature in an endeavour to establish an absolute right to exclusion on the grounds of alleged oppression. Such cases are in our view better dealt with under a general discretion.

66 We therefore recommend the omission of the words "or other form of compulsion" from s.20 and the express recognition of a general discretion to exclude based on unfairness.

67 The Court of Appeal decision in R v McCuin,[27] held that the standard of proof to which the Crown must prove voluntariness is beyond reasonable doubt. We believe that consistency demands that the same standard should be applied to the likelihood of untruth test under s.20. Confessional evidence is often of decisive importance. To label the question of admissibility of confession evidence as an incidental matter of fact, and apply the civil standard of balance of probabilities, is in our view inappropriate.

68 We recommend that the judge must be satisfied beyond reasonable doubt that the promise, threat or other inducement was not likely to cause an untrue admission of guilt to be made or an untrue admission of incriminating facts.

(B) Conduct and silence of the accused

69 The silence of the accused when charged is not evidence of guilt and neither is his election to say nothing when cautioned.

70 However under existing law when a suspect chooses to say nothing in answer to police questions his silence may in some circumstances be incriminating.

71 A distinction is drawn between the possible effect of silence before and after a caution has been given. Silence before caution cannot of itself constitute proof of guilt but it may form part of the circumstances which can be taken into account when assessing the evidence.

72 After caution no inferences can be drawn from silence. To hold otherwise would render the caution a nonsense because, on the one hand, the caution advises the accused of his or her right to remain silent but if adverse or incriminating inferences could be drawn from that silence the caution would be more a trap than a protection.

73 The effect of silence before caution needs further discussion. The caution does no more than remind the accused of his or her common law right. The exercise of the right to remain silent, as of any other right, does not prevent evidence being given of that fact where it is relevant. The circumstances may well be such that a sensible fact finder

would ask "why wasn't this said at the time?". Once a caution has been given, however, it provides a sufficient explanation for any subsequent silence and the caution would be misleading if adverse inferences could be drawn. The normal rule is that the prosecution should not tender evidence of questions put to an accused after caution which he or she fails or refuses to answer.

74 Where however in subsequent evidence an affirmative account is offered by or on behalf of the accused, cross-examination or subsequent comment as to previous responses is permissible as relevant to credibility.

75 For the purposes of the confessions rule the question of the inferences to be drawn from conduct or silence will generally arise where the police, or any other person acting under statutory authority to conduct investigations on behalf of the State, are present.

76 The English Criminal Law Revision Committee in its Eleventh Report on Evidence[28] recommended that in circumstances where the suspect failed to mention any fact which he later relied upon for his defence, the Court should be able to draw an adverse inference in appropriate cases. The Court of Criminal Appeal had pointed out that if the jury could be invited to

draw adverse inferences from silence after caution, the caution would be a trap. In the Law Revision Committee's view, however, the rule against drawing an inference of guilt from silence existed independently of any caution. They referred to Lord Diplock's statement in delivering the judgment of the Privy Council in Hall v R[29]:-

> "The caution merely serves to remind the accused of a right which he already possesses at common law."

77 The Law Revision Committee considered that it was contrary to commonsense not to permit a jury or Court to draw whatever inferences were reasonable from the failure of the accused when interrogated to mention a defence which he or she puts forward at the trial. It gave an unnecessary advantage to the guilty without helping the innocent. It prevented the Judge from saying to the jury something which, if they had any commonsense at all, they must have been saying to themselves: Sullivan v R[30].

78 The Law Revision Committee's recommendation received a hostile reception and was criticised and rejected by the English Royal Commission on Criminal Procedure[31] which, by a majority, favoured the retention of the so called right to silence. The Commission pointed out that while there may be a moral or

social duty on a citizen to answer to questions put by a constable or other person in authority, there is no legal duty to do so. This does not eliminate the possibility of consequences disadvantageous to the suspect. Failure to answer cannot constitute proof of guilt, but it may form part of the circumstances which the Court can take into account when assessing the evidence.

79 The Commission drew a distinction between the right to silence before and after arrest. In its view, the duty to assist the police should remain as a social one and not be legally enforceable. Someone who is suspected of an offence upon reasonable grounds who exercises his or her right not to answer reasonable police questions should do so at his or her own risk. The Commission concluded by a majority that the present law and the right of silence in the face of police questioning after cautioning should not be altered.

80 We were at one stage attracted to the view that no distinction should be made between the position before and after caution. After all, the caution merely reminds a suspect of his or her rights. On this basis, one would not expect the exercise of those rights to have different consequences before and after the caution. On the other hand, the exclusion of any adverse inference from silence prior to caution could lead to a quite

artificial situation at trial. It could make evidence even of the questions asked no longer admissible, and leave the jury with the impression that no opportunity for explanation had been given. As a matter of commonsense, the jury will regard the accused's response to questioning as being of some relevance. The mere fact that a suspect is not legally obliged to answer questions does not deprive his or her silence in particular circumstances of possible evidentiary value. This may be equally true after caution, but the situation then is different because the accused has either been arrested or is aware of the imminence of arrest. He or she is no longer free to walk away. At that stage a caution is properly given that he or she is not obliged to say anything and if that caution is not to be a mere trap, then it must be respected.

81 We therefore recommend no change to the existing law with respect to the drawing of inferences from silence in the face of police questioning. Silence before caution is not proof of guilt, but it can be taken into account in assessing the evidence. Silence after caution may not be relied upon in any way.

(C) The voir dire:

(i) The decision to hold a voir dire

82 The admissibility of a confession is determined on a voir dire in the absence of the jury. In a judge alone trial the judge must decide on the voluntariness of the confession and then, if this is proven, assess the weight to be attributed to it.

83 Generally a voir dire will only be required when an objection to admissibility is raised by the defence. It now appears that the judge may be under a duty to hold a voir dire when any question of voluntariness arises, whether or not the defence wish to take the point.

84 In Matheson v R[32] the High Court of Australia decided that a trial judge has the power and, where necessary, the duty to hold a voir dire of his own volition to determine a question of admissibility.

85 However, there remains some doubt about the course a trial Judge should take when counsel for the accused (if represented) does not ask for a voir dire. In Ajodha v The State[33] the Privy Council has stated that, irrespective of any challenge to the evidence by the defence, a trial judge should rule on the admissibility of a confession if its voluntariness is in doubt.

86 If an accused is unrepresented the trial judge has a duty to inform him of his rights with respect to the admission of evidence, including the 'right' to a voir dire to determine the admissibility of an alleged confession.

87 In R v Erven[34] the Supreme Court of Canada held that a voir dire should always be held to determine the admissibility of a statement made to a person in authority, even if the statement is ex facie voluntary. The possibility of an accused being able to waive his right to a voir dire was left open.

88 If, after a determination has been made at the voir dire, further evidence relating to voluntariness surfaces during the trial the judge may reconsider his voir dire determination.[35]

89 In New Zealand the courts adopt the approach of testing the admissibility of a statement (usually) when the objection is taken, although the judge may call for a voir dire on his own initiative when the circumstances require it.

90 Our view is that this is a better approach than that set out in Erven. The Canadian approach does not provide for the flexibility inherent in the English, Australian and New Zealand jurisdictions.

91 A further issue which arises is whether a judge should be able to order a voir dire on his own initiative in the face of an objection by the defence.

92 If an accused is unrepresented then it may well be appropriate for a judge to hold a voir dire to protect the rights of the accused. However where counsel is retained we can see no justification for a rule which would allow a trial judge to apply his view of what is best for the accused in preference to the contrary view of counsel.

(ii) Evidence adduced at the voir dire

93 There has been some controversy about whether, on a voir dire, the prosecution in cross-examination, are entitled to ask the accused whether the challenged statement is in fact true. In R v Hammond[36] the Court of Criminal Appeal held that such a question was not improper as it was relevant to the accused's credibility. The truth of the statement was relevant to the issue of how he came to make it.

94 The Privy Council, on appeal from Hong Kong, in Wong Kam-ming v The Queen[37] disagreed with Hammond and, by a majority, made the following rulings:

(i) On a voir dire, the prosecution are not entitled to cross-examine the accused as to the truth of the statement, for the sole issue of the voir dire is whether the statement has been made voluntarily, and whether it is true is not relevant to that issue.

(ii) Whether the accused statement is excluded or admitted on the voir dire, the Crown is not entitled as part of its case on the general issue to adduce evidence of testimony given by the accused on the voir dire.

(iii) Per curiam, that where a statement is admitted as voluntary on the voir dire and the accused testifying on the general issue gives evidence about the reliability of the admissions in the statement, and in so doing departs materially from his testimony on the voir dire, cross-examination on the discrepancies between his testimony on the voir dire and his evidence on the general issue is permissible.

95 Where the accused does not give evidence at the substantive trial the House of Lords in R v Brophy[38] has unequivocally held that evidence given by the accused in the course of the voir dire is inadmissible in the substantive trial:

"The right of the accused to give evidence at the voir dire without affecting his right to remain silent at the substantive trial is in my opinion absolute and is not to be made conditional on an exercise of judicial discretion".

96 In Canada, the Supreme Court in De Clerq v The Queen[39] by a majority, followed the Hammond decision, holding that the truth or falsity of the statement may be relevant to that inquiry as going to the credibility of the accused's voir dire testimony. The question has not been reconsidered by the Supreme Court of Canada since Hammond was overruled in Wong Kam-ming.

97 The situation in Australia differs between states.

98 New Zealand Courts have adopted the restrictions on the prosecution set out in Wong Kam-ming v R. Casey J in Grootjans v Patuawa[40] stated, obiter, that Wong Kam-ming establishes for New Zealand that the prosecution cannot cross-examine the defendant about the truth of the confession, nor can it call as part of its case evidence given by the defendant during that procedure. Also, if the statement is excluded, then he cannot be cross-examined on its contents or on his evidence given during the voir dire.

99 In our view the Wong Kam-ming principles should continue to be applied by the courts in New Zealand.

100 We advance three main reasons in support of this view:

(1) It is hard to see the relevance of truth to the issue of voluntariness. Their Lordships in Wong Kam-ming pointed out that if the accused denies the truth of the confession, the truth or falsity of his denial cannot be determined until the jury has given its verdict on his guilt. They considered that asking such a question would undermine the purpose of the voir dire because confirmation of the truth of the confession by the accused would inevitably lead to its admission, regardless of credible evidence of police violence.

(2) If the truth of the confession can be raised, many accused will be discouraged from testifying on the voir dire.

(3) The prejudicial effect of an admission on a voir dire is increased where the trial is before a judge alone. Even where a statement has been ruled inadmissible, an admission of truth may influence the finding on the ultimate issue of guilt.

101 Accordingly we recommend that our view that the principles established in Wong Kam-ming should continue to be applied by the courts in New Zealand be noted in the course of any proposed codification of the law.

(D) The 'person in authority' requirement

102 The confessions rule requires that a promise, threat or any other inducement must be held out by a person in authority before the confession can be found to be involuntary.[41] 'Person in authority' has been widely defined as someone who has authority or control over the accused or over the proceedings or prosecution against him.[42]

103 It seems quite clear to us that an inducement from any source is equally capable of causing an untrue confession.

104 The only Commonwealth jurisdiction in which the 'person in authority' requirement has been abandoned is New South Wales. In R v Attard[43] the Court of Criminal Appeal reasoned that the exclusion of involuntary statements induced by persons in authority is only a particular (and typical) instance of a general rule.

105 The English Criminal Law Revision Committee in its 11th Report[44] recommended the abolition of the requirement.

106 Accordingly we recommend that the requirement should be abolished. This would remove an area of unnecessary technicality from the law and would recognise that an inducement from any source can cause an untrue confession.

107 We also note that a confession obtained by an inducement held out to the accused is still subject to the 'likelihood of untruth' test contained in s.20. If the 'person in authority' requirement is abolished the 'reliability principle' would thus be applied uniformly to all inducements. We see this as a far more logical approach.

(E) The relevance of the accused's state of mind - the rule in Naniseni

108 In R v Naniseni[45] the Court of Appeal held that if some factor is relied on as having overborne, or as apt to overbear, the accused's will, it must be found in the will of some other person, though not necessarily of a person in authority:

> "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 comsuption of alcohol, cannot be efficacious to deprive a confession of its quality of voluntariness, except 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."

109 After considering general descriptions of the voluntariness rule the Australian Law Reform Commission stated in its research paper on "Admissions":[46]

> "It is not certain what 'free choice' means in this context. In particular the authorities have not made it clear whether the accused must appreciate that he or she possesses a right to speak or remain silent and actually consider that choice before confessing. Where factors influence the accused to confess, it is unclear whether they must destroy his ability to choose altogether or whether it is enough that he would not have chosen to confess in the absence of a particular influence. It is not clear whether the courts should consider the capacity of the accused to come to a considered decision as to whether or not to speak, and what to say. A related question is whether a finding of involuntariness is justified by the accused's condition irrespective of how the condition arises. If the accused is unable to exercise a 'free choice to speak or be silent' it would seem irrelevant whether or not such inability was caused by external factors. This appears to be the view of a number of decisions dealing with accused persons suffering from reduced levels of consciousness (eg mental illness, drunkeness).

> "Nevertheless, the weight of authority appears to require a causal connection between some external factor and the accused's confession. The accused is assumed to have acted from a conscious choice unless that choice is 'overborne'. Voluntariness is defined negatively - if a confession is not the product of external factors it is regarded as voluntary." (Emphasis added)

110 In our view the question in all cases should be "was the statement <u>in fact</u> voluntary?" We consider it to be contrary to both common sense and principle that certain factors are considered incapable in law of ever producing a state of involuntariness unless the will of another person is also operating.

111 One should be clear what is meant by 'involuntary' in this context. It may depend on the degree of interference with the mind's power of rational thought rather than the removal of normal inhibitions. A partially intoxicated person may well remember what he or she has done and speak because the normal restraint of caution has been temporarily lifted; or his or her conscience may have been worked on by a counsellor or religious adviser. In either case these are internal factors which have overborne normal unwillingness, but the statement is still the product of choice. At the other end of the spectrum will be cases of extreme mental exhaustion, hysteria or drug influence.

112 A statement may be made as a result of the effect of factors produced entirely from 'within', such as extreme fatigue, lack of sleep, emotional strain or the consumption of drugs or alcohol. Would such a statement necessarily be any less involuntary than if made where the will is overborne by that of another or when purely internal factors are aggravated by some act or omission of another in order to obtain a confessional statement? We think not.

113 The possibility of involuntariness through extreme exhaustion or intoxication or emotional distress or a combination of these factors produced from within, and without the actions of some other person is a possibility that must be acknowledged.

114 Many factors can render a confession involuntary. In the committee's view it is an unjustifiable limitation to provide that factors such as fatigue, lack of sleep, emotional strain or the consumption of drugs or alcohol must necessarily be disregarded in assessing voluntariness unless they have been produced or aggravated by the police to facilitate a confession.

115 We consider that the reliability rationale, supplemented by the judicial discretion to exclude for unfairness, should be applied to all confessional statements other than those

obtained by the exercise of violence or force. This would represent a consistent approach which recognises that involuntariness can be produced in many different ways and in a wide variety of circumstances.

116 A confession obtained as a result of a state of internally induced involuntariness would not be obtained by a 'promise, threat or other inducement' held out to or exercised upon the person confessing by another person. It follows that if the rule in Naniseni was reversed, so that in law such a confession could be held to be involuntary, s.20 would not be applicable. Such a confession therefore would not be subject to the likelihood of untruth test.

117 If the effect of Naniseni is to be reversed as we suggest, and reliability is to be the determinative consideration, then s.20 will have to be redrafted so that confessions obtained in these circumstances will be subject to the section. However it would be a relatively rare case in which a confession made in circumstances of extreme internally induced incapacity (such as to render the confession involuntary) would be saved by the likelihood of untruth test in s.20.

118 The result of Naniseni is that such confessions are voluntary and therefore admissible. The statement may however be excluded, even if found to be voluntary, by an exercise of the unfairness discretion. If the rule in Naniseni is reversed by statute, as we later recommend, the discretion to exclude would still apply in cases where the confession was found to have been made voluntarily or in circumstances where an involuntary confession would otherwise be saved by the likelihood of untruth test contained in a redrafted s.20.

119 In our view the conceptually correct route and the one which best accords with principle is that a statement made involuntarily because of purely internal factors should be categorised as such at law and that the s.20 'likelihood of untruth' test should be applied to assess its reliability.

120 Under our earlier recommendations even if the statement would otherwise be saved by the application of s.20 there should in all cases remain a residual discretion to exclude for unfairness.

121 We would stress that it will not be every instance of a person questioned when 'below par' which will result in a confession being rejected as involuntary. As the circumstances vary so much from case to case it is unwise to attempt a definition of the particular circumstances which may make a confession involuntary.

122 For the above reasons we consider that principle dictates that the rule in Naniseni be reversed by statute and we recommend accordingly.

(F) The 'oppression' concept

123 In England the test of voluntariness seems to be whether the prosecution have proved that the confession was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority, or by oppression.[47]

124 In R v Prager[48] the English Court of Appeal adopted the test of oppression stated by Sachs J in R v Priestly[49]:

> "Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may not be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

125 The concept of "oppression" appears to be directed to curbing the abuse of police power, promoting due process and reinforcing the so called right to silence. Although the House of Lords in D.P.P. v Ping Lin rejected the notion that impropriety on the part of a person in authority is essential before oppression can be said to exist, there seems to be a tendency for emphasis to be placed upon the impropriety of police behaviour.[50]

126 The New Zealand courts have excluded statements obtained by oppression although the courts do not appear to treat this ground as being distinct from the voluntariness rules or the Judges Rules.

127 We note that a similar view was taken by the Canadian Federal/ Provincial Task Force on Uniform Rules of Evidence:[51]

> "The Task Force unanimously agrees that oppression is not a separate concept but is one of the factors taken into account in determining whether the accused gave his statement voluntarily. Oppressive circumstances are part of the context in which the question of whether the statement was obtained without "fear of prejudice or hope of advantage exercised or held out by a person in

authority" has to be determined. This is the way in which the Ibrahim rule has been and should continue to be interpreted in Canada. Adding another test for determining the admissibility of a confession would not be helpful from anyone's standpoint."

128 In R v Gardiner[52] a youth aged 16, and described as feeble-minded, was woken in the middle of the night and taken, handcuffed on the way, to the police station where a written statement was obtained from him. The trial Judge rejected the statement because it was obtained by what he called 'a violent procedure' and was outside s.20 of the Evidence Act, as it stood then. The Court of Appeal in R v Phillips[53] approved of the lower court ruling in Gardiner, which led to the redrafting of s.20 making violence, force and other forms of compulsion specifically outside the scope of the section. It has been suggested that "other form of compulsion" probably covers the Gardiner type case.[54]

129 In R v Rodgers[55] the Court of Appeal stated that any "other form of compulsion", referred to in s.20, broadly corresponds to "oppression".

130 In R v Wilson a 17 year old youth under suspicion of murder, was subjected to a prolonged interrogation (spanning some nine hours), in a small, stuffy, dark painted room, and with the continuous attendance of one or more police officers. Although there was the occasional refreshment offered and no aspect of violence existed, the defendant was cross-examined at length from a previous statement even after the defendant had made it clear early on that he did not wish to answer their questions. The defendant's parents were not allowed access to him until after the confession was obtained. The Court of Appeal held that:

> "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. While not involving violence, the oppression had a physical character putting it in the category of "other form of compulsion" in s.20. Accordingly the oral and written statements were not admissible, no matter whether or not the means employed to induce them were likely to cause an untrue admission of guilt."[56]

131 Oppression is thus treated in New Zealand as coming within the 'other form of compulsion' limb in s.20.

132 Oppression is usually something more than a single threat or promise or a breach of the Judges Rules. Often the element of oppression is found in a whole course of conduct which amounts to serious misconduct on the part of the police and which is sufficient to have overborne the will of the accused. Thus the concept of oppression usually requires an overall assessment of the situation in which the accused was placed.

133 The result of characterising oppression as being akin to 'violence or force or other form of compulsion' is that a confession obtained as a result is automatically excluded by law and cannot be saved by the likelihood of untruth test in s.20.

134 In our view there is little to be gained by giving legislative recognition to it by adding to the categories of automatic exclusion in s.20 and we recommend accordingly.

135 A draft bill giving effect to the recommendations made in this report is attached as Appendix 1.

I L McKay

Chairman

February 1987

Members

Mr I L McKay (Chairman)

Mr RGF Barker

Mr C B Cato

Mr S C Ennor

Judge R J Gilbert

Mr J Haigh

Mr H Hoffmann

Mr G S MacAskill

Dr D L Mathieson

Sir Graham Speight

Mr M C Carruthers (Secretary)

FOOTNOTES

1 See C B Cato The Privilege Against Self-Incrimination and Reform of the Law And Practice of Police Interrogation, Legal Research Foundation Inc Seminar, University of Auckland, 1 November 1985 and collected references therein.

2 [1914] AC 599, at 609.

3 (1948) 76 CLR 501, at 511. See also R v Lee (1950) 82 CLR 133, at 149.

4 R v McCuin [1982] 1 NZLR 13 (CA).

5 R v Naniseni [1971] NZLR 269.

6 R A McGechan Garrow and McGechan's Principles of the Law of Evidence, 7th Ed, Butterworths, Wellington, 1984 at page 96.

7 [1949] NZLR 316 (CA).

8 R v Hammond [1965] NZLR 257, at 258.

9 R v Naniseni [1971] NZLR 269, at 271, see also R v Convery [1968] NZLR 426, R v Hartley [1978] 2NZLR 199, at 218-219, R v Rodgers [1979] 1NZLR 307 at 312-316 R v Wilson [1981] 1NZLR 316, R v Horsfall [1981] 1NZLR 116,at 121-122.

10 Cross on Evidence 3rd NZ Edition 1979, Ed. D L Mathieson, at p.524.

11 See R v Hartley [1978] 2 NZLR 199, 218. R v McCuin [1982] 1 NZLR 13.

12 Ibid at p.15.

13 In researching the position in overseas jurisdictions we have been greatly assisted by the recent article by Mark Schrager entitled 'Recent Developments in the Law of Confessions' 26 McGill Law Journal 1981, 435.

14 [1980] AC 407, at 436.

15 [1976] AC 574.

16 [1971] SCR 272.

17 [1978] 1SCR 559.

18 [1969] TAS SR 99 (SC), at 104.

19 [1950] 82 CLR 133.

20 AAS Zuckerman, All England Law Reports - Annual Review 1982; Evidence; 126 at 136.

21 [1982] 1 All ER 385.

22 Report on Evidence 1982, Carswell, at 173-175.

23 Customs and Excise Commissioners v Harz [1967] 1All ER 177.

24 [1971] SCR 23.

25 Op.cit. n.10, at p 510.

26 Idem at p 523.

27 See supra n.4.

28 1972 Cmnd 4991.

29 (1970) 55 Cr.App.R. 108, at 112.

30 (1967) 51 Cr.App.R. 102, Per Salmon L J at 105.

31 Report dated January 1981; Cmnd 8092.

32 (1981) 55 ALJR 594 at 598, 607.

33 [1981] 2 All ER 193 at 201-203 (PC).

34 [1979] 1 SCR 926.

35 R v Watson CA 246/80, Unreported judgment 30 July 1981.

36 R v Hammond [1941] 3 All ER 318 (CCA).

37 [1979] 1 All ER 939.

38 [1981] 2 All ER 705, per Lord Fraser at 710.

39 [1968] SCR 902.

40 HC M98/80 Unreported judgment, Dunedin registry 1981.

41 DPP v Ping Lin [1976] AC 574.

42 Deokinanan v R [1969] 1AC 20 at 33 (PC).

43 [1970] NSWR 750.

44 Op.cit n.28, p.38 para 58.

45 [1971] NZLR 269.

46 ALRC Evidence Research Paper No 15, Admissions, at pp 30,31.

47 See Callis v Gunn 1964 1 QB 445, DPP v Ping Lin [1976] AC 574. Also, paragraph (e) of the preamble to the Judge's Rules 1964.

48 [1972] 1 All ER 1114.

49 (1965) 51 Cr.App.R.1.

50 See ALRC, Common Law of Evidence : Areas fo Disagreement and Uncertainty Research paper 2, December 1981 at p.90.

51 Op.cit n.22 at pp 180-181.

52 [1932] NZLR 1648.

53 [1949] NZLR 316.

54 R v Wilson [1981] 1 NZLR 316 at 323.

55 [1979] 1 NZLR 307.

56 Supra n.54 at 324.

APPENDIX 1

Draft Bill

00. **Three new sections (relating to statements of or silence by accused) substituted** - The principal Act is hereby amended by repealing section 20, and substituting the following sections:

"20. **Confessions** - (1) In this section 'a confession', in relation to any offence, means a statement made by the accused that tends to implicate the accused in the commission of the offence, whether or not it also includes material of an exculpatory character.

"(2) No confession shall be admissible against the accused if it was induced by the exercise of violence or force.

"(3) No confession shall be admissible against the accused if it was induced by any promise, threat, or other inducement made or held out to the accused (whether by any person in authority or not), unless the Judge or other presiding officer is satisfied that the promise, threat, or other inducement was not in fact likely to cause an untrue statement to be made.

"(4) In determining whether a confession was or was not made voluntarily the Judge or other presiding officer shall have regard to the circumstances leading up to the making of the statement and those in which it was made, including the physical, mental, and psychological condition of the accused at any material time, whether or not that condition was induced or aggravated by or known to any other person.

"(5) Nothing in the preceding provisions of this section shall limit or affect the discretion of the Judge or other presiding officer to exclude any confession on the ground that it would be unfair to admit it.

"(6) It shall be for the prosecution to prove beyond reasonable doubt the admissibility of a confession against the accused.

"20A. Prior inconsistent statement by accused - Where it is sought to admit against the accused any statement made by the accused on the ground that it is inconsistent with any statement subsequently made by the accused, the admissibility of the earlier statement shall be determined in accordance with section 20 of this Act as if it were a confession.

"20B. **No adverse inference to be drawn from accused's silence in presence of law enforcement officer** - (1) No inference adverse to the accused in any criminal proceedings shall be drawn from the fact that, at any time before the proceedings but after the accused had been cautioned, the accused remained silent when any relevant matter was put to the accused by or in the presence of any law enforcement officer acting in the course of his or her official duties.

"(2) In subsection (1) of this section, 'law enforcement office' means -

"(a) Any member of the Police, any traffic officer, or any officer of Customs; and

"(b) Any other person having, in relation to any offence or suspected offence, any statutory powers of investigation, search, seizure, arrest, or detention."

00. **Consequential repeal** - Section 3 of the Evidence Amendment Act 1950 is hereby consequentially repealed.

V. R. WARD, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1987

68196H—87PT