THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CONFESSION STATEMENTS AND THEIR ADMISSIBILITY IN CRIMINAL PROCEEDINGS

(TOPIC 8)

TERMS OF REFERENCE

WHEREAS :

On 15 January 1980, His Excellency the Governor of Hong Kong Sir Murray MacLehose, GBE, KCMG, KCVO in Council directed the establishment of the Law Reform Commission of Hong Kong and appointed it to report on such of the laws of Hong Kong as might be referred to it for consideration by the Attorney General or the Chief Justice;

On 11 November 1981 the Honourable Attorney General and the Honourable Chief Justice referred to this Commission for consideration a topic in the following terms :-

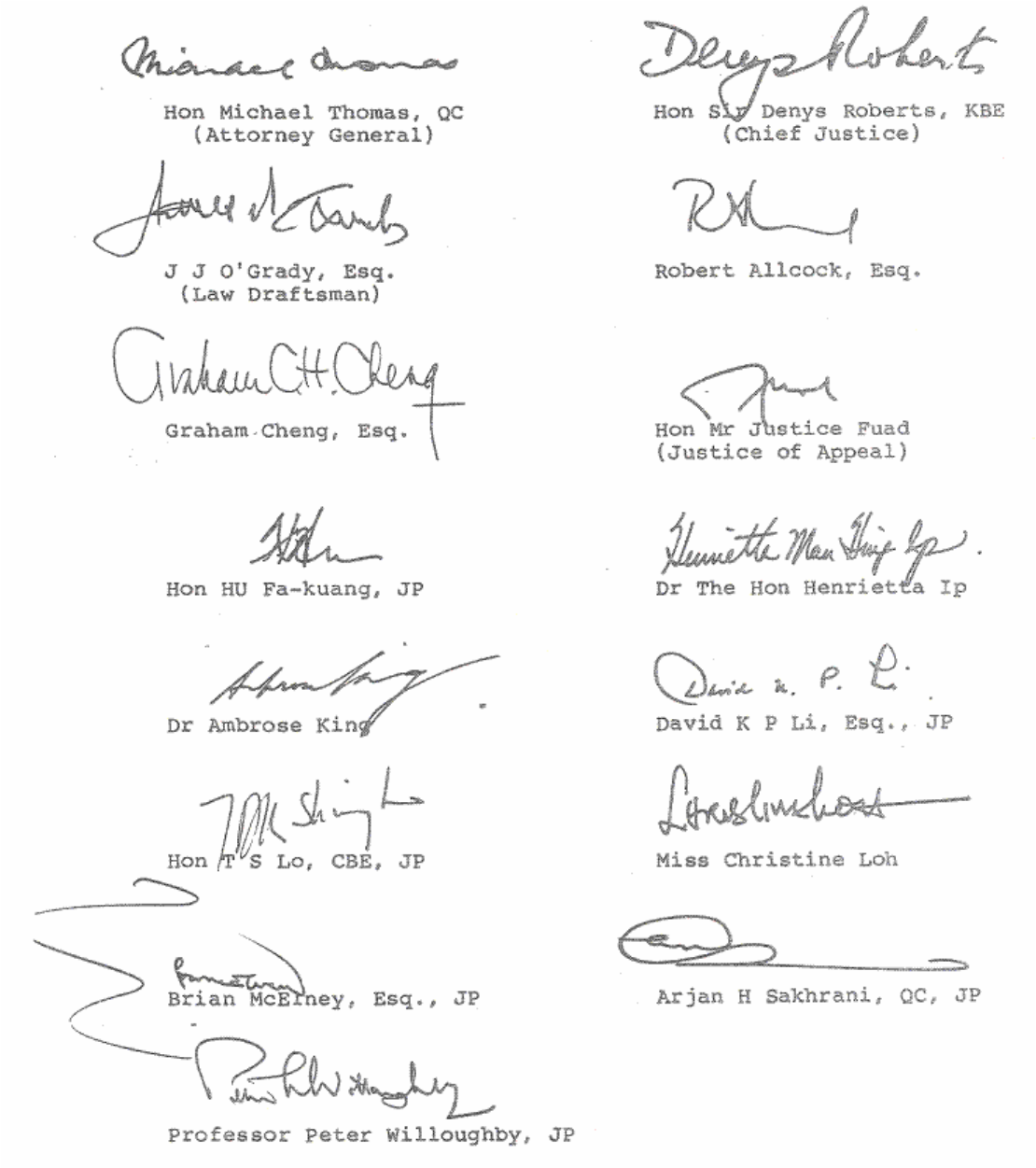
> *"Confession Statements and their Admissibility in Criminal Proceedings*
>
> *(1) To what extent are current laws and procedures on the above matters as applied in Hong Kong suited to the best interests of the community, including those of the individual.*
>
> *(2) What changes, if any, in law or procedure are necessary or desirable?"*

At its Seventh Meeting on 13 November 1981 the Commission appointed a sub-committee to research, consider and advise on this topic.

At its Twenty-second Meeting on 28 October 1983 the Commission received and considered the report of the sub-committee.

We have made in our report recommendations which will meet the problems described therein.

NOW THEREFORE DO WE THE UNDERSIGNED MEMBERS OF THE LAW REFORM COMMISSION OF HONG KONG PRESENT OUR REPORT ON CONFESSION STATEMENTS AND THEIR ADMISSIBILITY IN CRIMINAL PROCEEDINGS, INCLUDING A MINORITY REPORT



Hon Michael Thomas, QC
(Attorney General)

Hon Sir Denys Roberts, KBE
(Chief Justice)

J J O'Grady, Esq.
(Law Draftsman)

Robert Allcock, Esq.

Graham Cheng, Esq.

Hon Mr Justice Fuad
(Justice of Appeal)

Hon HU Fa-kuang, JP

Dr The Hon Henrietta Ip

Dr Ambrose King

David K P Li, Esq., JP

Hon T S Lo, CBE, JP

Miss Christine Loh

Brian McElney, Esq., JP

Arjan H Sakhrani, QC, JP

Professor Peter Willoughby, JP

Dated this 14th day of December 1984.

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

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CONTENTS

Page

Annexures

INTRODUCTION

Appointment of sub-committee

1. On 13 November 1981 the Commission appointed a sub-committee to research, consider and then advise it upon aspects of confession statements and their admissibility in criminal proceedings. The members of the sub-committee were :

Hon T.S. Lo (Chairman)	Commission Member
Dr Ambrose King	Commission Member
Dr Philip Kwok	Commission Member
Mr K. Bokhary, QC	Barrister
Mr R.K. Brown	Director of Management & Inspection Services Royal Hong Kong Police
Mr Adrian Keane (retired in August 1982)	School of Law, University of Hong Kong
Mr Martin C.M. Lee, Q.C.	Barrister
Mr W.R. Marshall	Assistant to the Attorney General
Mr R.E. Moore	Solicitor, Executive Director of Jardine, Matheson & Co. Ltd.
Mr P.R. Moss	Assistant Principal Legal Aid Counsel, Legal Aid Department
Hon Mr Justice Penlington	Justice of the High Court
Mr Roderick B. Woo	Solicitor F. Zimmern & Co.

2. The Secretaries of the sub-committee were :

Davis Hui	Crown Counsel
S.M.I. Stoker	Senior Crown Counsel
Colin White (retired in March 1983)	Senior Crown Counsel

In addition, David Lyons, Senior Crown Counsel, was largely responsible for drafting the sub-committee report while S.H. Cotsen, Senior Crown Counsel, prepared the preliminary background paper.

Method of Working

3. The sub-committee began its deliberations with a consideration of an introductory paper prepared by Mr. Costen. The first formal meeting of the sub-committee was held on 8th January 1982 at which it was decided that a press release should be issued inviting submissions from members of the public. A release was given to the press on 28th January 1982 and appeared in 3 Chinese evening papers, 11 Chinese daily papers and 2 English papers. Letters were sent to a number of persons and bodies concerned in the administration or teaching of the law and to others who were likely to be able to assist the sub-committee in their task, seeking their views on the matters within the terms of reference.

4. A working party was formed to define the areas which the sub-committee should examine. It reported back to the sub-committee in February 1982, having isolated the issues to be discussed.

5. Over the succeeding 14 months, the sub-committee met a total of 30 times. Papers on particular aspects of the subject of Confessions were prepared by sub-committee members. Mr Keane prepared a paper on Hong Kong Law which forms the basis of Annexure 1. In addition, a paper endeavouring to cost the present voir dire system was prepared by the Secretaries (Annexure 4).

6. As a pre-requisite of any realistic examination of the subject, it was felt that the members of the sub-committee should familiarise themselves with police procedures and practice and a number of activities were organised to achieve this end. The sub-committee viewed documentary programmes on police operations and a number of visits to police stations in both Hong Kong and Kowloon were organised, thanks to the assistance of the Commissioner of Police and Chief Superintendent J.C. Clemence.

7. The sub-committee met officers from Lai Chi Kok Reception Centre and questioned them regarding admission procedures and the ways in which complaints by inmates of improper police conduct are handled. Over the period of the sub-committee's deliberations, a variety of materials from a number of jurisdictions was circulated to members. The materials to which the sub-committee was referred are listed at Annexure 6. Statistics relating to voir dire proceedings in courts in Hong Kong were collated and an analysis made with the help of staff of the Government Census and Statistics Department. These figures and the explanatory flow charts are shown at Annexure 2.

8. The mass of information which the sub-committee accumulated in the course of its deliberations led in due course to a clarification of the issues involved and discussion centred on a paper prepared by the Secretaries which, taking account of materials and submissions received by the sub-committee, presented a series of proposals for change. This paper was discussed at length and amended proposals were unanimously agreed by the sub-committee on 19th April 1983.

9. The sub-committee's report was considered at length by the Commission at regular meetings held between October 1983 and December 1984. Comments and views of those with special interest or expertise in the subject were elicited by the Commission. This report has been produced after long and detailed study by both the sub-committee and the Commission. The proposals which are the result of that study and form the essence of the report are to be found at Chapter 6.

10. In an area of the law which is as controversial as this, we recognize that unanimity of view is unlikely to be achieved. Some members of the Commission expressed reservations as to certain aspects of the Report and we have found ourselves unable to reconcile these differences of opinion. Accordingly, we include at Chapter 9 the view of that minority in respect of some of the recommendations of the Commission's Report.

Acknowledgements

11. We express our gratitude to all those who have assisted in the completion of the Report either by expressing views or supplying us with the facts and figures which have formed the foundation for our proposals. A list of those who have assisted us appears at Annexure 5. We record a particular debt of gratitude to the staff of the Law Reform Commission secretariat for their assistance in the lengthy task of compiling this Report.

Chapter 1

Scope of the report

1.01 After examining those areas of law relevant to the matters within our terms of reference we are of the view that the current laws and procedures relating to confession statements and their admissibility in criminal proceedings as applied in Hong Kong could be improved to better suit the interests of the community and the individual.

1.02 We have identified ten particular areas of concern where we believe the current laws and procedures to be deficient:-

(i) The law determining the admissibility of confession statements is in many respects uncertain;

(ii) It is inconsistently applied;

(iii) In some cases, excessively technical criteria are applied which are remote from the realities of life;

(iv) The current law sometimes results in the exclusion from evidence of confession statements made by arrested persons which should, in the interests of ascertaining the truth, be admissible;

(v) The laws and established procedures regulating the interrogation of suspects by law enforcement officers are confused;

(vi) They are inappropriate for Hong Kong;

(vii) They are unnecessarily complex, and not understood by many law enforcement officers;

(viii) They are often, either intentionally or unintentionally, not observed;

(ix) These laws and established procedures may not prove sufficient protection for a suspect in custody;

(x) A disproportionate amount of Court time and both public and private money is expended on determining the admissibility of confession statements in criminal trials.

1.03 The entire system of police investigation, the cautioning of suspects and the taking of statements are affected by the laws relating to the right to silence and the criteria for admissibility of statements made. We have, therefore, endeavoured to draft a "composite system" which raises these issues and which contains a series of proposals to cover not only all of the aspects of an investigation where law enforcement officers have interview contact with a suspect but also relevant proposals of principle relating to law enforcement officers' powers generally on questioning suspects, the suspect's rights, court procedures, test of admissibility of evidence and general proposals for the better administration of justice as are relevant to the topic.

1.04 We favour a system whereby, if a suspect in custody makes a statement or admission or fails to answer questions which are put and such statement, admission or failure to answer may be adduced in evidence by the prosecution, then as soon as possible after the admissions are made or the questions put and the suspect is charged, the suspect should be brought before a member of a specially appointed panel who would make enquiries of the suspect to determine whether or not the suspect acknowledges that he made the statements or admissions attributed to him or that he failed to answer questions and what, if any, complaints the suspect has of his treatment whilst in custody. It was also felt that the member of the specially appointed panel should, if the suspect requests, be able to arrange for the suspect to be transferred forthwith from Police to gaol custody pending his being brought before a Magistrate.

1.05 In Chapter 5 we have outlined the objectives of our proposals and in Chapter 6 we have stated the proposals together with some of the considerations we consider relevant to each proposal. Our proposals recommend changes to the law and the establishment of a uniform code of conduct for law enforcement agencies established under the authority of general Standing Orders issued by the Commanding Officers of the various agencies to replace the Judges' Rules. The uniform code of conduct will be approved by the Governor in Council and will be published in the Hong Kong Government Gazette. These proposals necessarily involve a conflict between the interests of the State, which require that those who breach the laws of the State be apprehended and convicted for their crimes, and the interests of the individual, which require that the individual should not be subjected to unnecessary interference with his liberties.

Chapter 2

A layman's introduction to the admissibility of confession statements

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2.01 To the reader who is not a lawyer a word of explanation of the background to this Report may be helpful.

2.02 When, in the course of an investigation into a criminal offence, a suspect has made a statement to the police tending to show that he has committed that offence, the statement is known as a confession. If the suspect is subsequently charged with committing the offence, the prosecution may wish to use that statement as evidence in support of its case against the defendant. However, before the prosecution can use that statement as evidence against a defendent who objects to it being put in evidence, the trial judge has to decide whether to allow the prosecution to do so, or, as lawyers would say, the trial judge has to rule whether the statement is admissible in evidence. In order to be able to rule that the confession is admissible, the judge has to be satisfied that the confession was made by the defendant voluntarily. He decides that question after hearing evidence from witnesses about the circumstances in which the defendant made the confession. If, after hearing that evidence, the judge is not entirely satisfied that the confession was made voluntarily, he has to rule that the confession is inadmissible in evidence. The prosecution cannot use it as evidence against the defendant, and what may be a very important part of its case against him is lost.

2.03 Where a criminal trial is being conducted before a jury and the judge has to decide whether a confession is admissible, he hears evidence on the matter and makes his ruling normally in the absence of the jury. When that question is about to arise in the course of the trial, the judge, at the request or with the consent of the defence, asks the jury to withdraw and to remain out of court until he has made his ruling. If, after hearing the evidence on the matter, the judge rules that the confession is admissible, the jury is asked to return to court and the confession is put before them for their consideration as part of the evidence against the defendant. If on the other hand the judge rules that the confession is inadmissible, the jury, on their return to court, is not told anything about a confession having been made by the defendant. The judge has ruled that the confession cannot be used in evidence so the jury cannot be allowed to consider it or even know that a confession was made. Lawyers call that part of the proceedings when the jury is out of court "a trial within a trial" or "a voir dire". The historical justification for excluding the jury from the court while the judge is deciding whether or not to admit the confession in evidence is simple. If members of the jury remained in court, they would learn that the defendant had made a confession and perhaps also what he had said in it. If the judge then ruled that

the confession was inadmissible, he would have to tell them to ignore the confession when they came to decide whether the defendant was guilty or not. The jury would find it extremely difficult to put out of their minds the fact that the defendant had confessed. Even if each one of them did manage to put that fact out of his mind, there would always remain the lurking suspicion that the jury had taken into account against the defendant a matter which was not allowed to form part of the prosecution's case against him.

2.04 To be admissible a confession must have been made voluntarily. Over the years "voluntarily" has acquired a special meaning. 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. Policemen, teachers, parents and employers are all persons in authority. In addition, a statement is inadmissible if it was obtained by oppression. The word imports something which has sapped that free will which must exist before a confession is voluntary. Whether or not there is oppression in an individual case depends upon many elements. They include such things as the length of time intervening between periods of questioning, whether the defendant 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 someone inexperienced in the ways of the world may turn out not to be oppressive when one finds that the defendant is of tough character and an experienced man of the world.

2.05 Let us continue the sequence of events at trial. If the judge rules that the confession was voluntary and is therefore admissible, the jury on their return to court hears evidence from the prosecution witnesses that the defendant made a confession to them. The statement itself is put before the jury. The defence may contend that the defendant did not say what it is alleged he said in that statement (in other words that the police have made it up) or that, although he did make the statement, what he said in it is untrue. He made an untrue statement because he was induced to do so by their promises, threats or mistreatment. If the defence adopts such a line, and it often does, much of the evidence that has been given before the judge when he was deciding whether or not the statement was made voluntarily is given again before the Jury. It is for the jury to decide whether the confession was made by the defendant himself or was fabricated by the police, or whether the defendant's confession was true or false.

2.06 Brief reference should be made to the Judges' Rules. These rules are not rules of law but rules of practice drawn up for the guidance of police officers. They set out what a police officer may and may not do when he is interrogating a suspect. It is unnecessary in this explanation to go into the details of the rules but it is important to realise that a confession obtained in breach of the rules is not automatically inadmissible. The test of admissibility is whether the statement was voluntary. Nevertheless, although made voluntarily, the statement may be excluded at the discretion of the judge if he thinks that it was obtained in breach of the rules. Because the judge has

that discretion, the defence will explore with the witnesses the question of whether the rules were observed, with the object of persuading the judge that, in the light of any breach that may have occurred, he ought, in the exercise of his discretion, to exclude the confession.

2.07 The voir dire procedure is not unique to Hong Kong. It is in use in many countries that have as their legal foundation the Common Law of England. What has happened in Hong Kong is that the procedure has come to be used very frequently, much more frequently than in England. Why that has happened in Hong Kong is impossible to say. A number of reasons have been suggested at various times. Some say it is the fault of the judges, others say it is the fault of the police and yet others say that the defence lawyers are to blame. The fact is that in Hong Kong the procedure is used almost as frequently in trials in the District Court, where the judge sits without a jury and performs the function of both judge and jury, as it is in the High Court.

2.08 The figures, set out in greater detail in Annexure 2 of this Report, show that in High Court trials before a judge and jury in which the prosecution seeks to rely on a confession as part of its case, the voir dire procedure is used in 90% of them. In the District Court the equivalent figure is 88%.

2.09 Since the procedure is initiated by the defence, it is fair to assume that the frequency of its use is a result of its rate of success in achieving the object of excluding the confession. There would be little point in initiating and pursuing the procedure unless it achieved its object. The assumption seems to be borne out by the figures, particularly in the District Court. In the High Court the voir dire procedure succeeds in 18.5% of the cases in which it is initiated. In the District Court the equivalent figure is 43%.

2.10 An approximate comparison can be made with recent, though limited, figures in England. There, in Crown Court trials, which always take place before a judge and a jury, the voir dire is used in only 10.5% of cases in which the prosecution wants to put in evidence the defendant's confession. Of those cases the success rate is 14%. Fuller comparative statistics appear at Annexure 3.

2.11 The difference between the Hong Kong and English figures is startling, even allowing for the fact that an accurate comparison cannot be made from the figures available. In England, of those cases where the prosecution seeks to rely on a confession, the defence succeeds in having the confession excluded in 1.5% of them. In Hong Kong the equivalent figure is at least 25% and possibly as high as 34.0%.

2.12 Apart from the time and expense consumed by the voir dire procedure, the number of successful challenges to the admissibility of confessions has three serious effects. Firstly, public confidence in the integrity and competence of the police is undermined. Secondly, the suspicion grows that a considerable number of defendants would not have been acquitted if their confessions had been admitted in evidence. Thirdly,

and most importantly, public concern is increased that the accused is not receiving fair treatment at the hands of the police. It is with the task of minimising those effects that this Report deals.

Chapter 3

A brief summary of the Hong Kong law and practice relating to the admissibility of confession statements

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3.01 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. The principle embodied in that sentence has been consistently applied in the Courts of Hong Kong. An exhaustive catalogue of types of prejudice and advantage is impossible, but the two expressions include such varied things as a threat of serious personal violence or continued violence, an indication that the prison sentence will be but short, a threat to charge a near relative, a promise of bail and many more.

3.02 In addition, any oppressive treatment, particularly overbearing or prolonged questioning, which would cause the suspect to speak when he would not have spoken but for that oppressive treatment, will also render a statement so obtained inadmissible.

3.03 The issue of voluntariness is determined by the judge alone in the absence of the jury, if there is one. If he is satisfied beyond reasonable doubt that the statement was made voluntarily, then (subject to the judge's discretion, comparatively rarely exercised, to exclude even a voluntary statement if its admission would operate unfairly against the accused), the statement may be put before the jury as evidence of the accused's guilt. If he is not so satisfied, the statement is excluded and the jury never hear of it. The purpose of excluding the jury while the issue of voluntariness is tried is to obviate the risk of the jury using the confession against the accused even though it has been ruled inadmissible.

3.04 In District and Magistrates courts, where there is no jury, a slightly shorter procedure is often adopted. Under it, the judge or magistrate hears all the evidence for the Crown. If that contains a confession to which the defence object, he then hears defence evidence only as to the admissibility of the confession. He then rules on the admissibility by the same test as above. Thereafter he proceeds to hear the defence evidence on the general issue.

3.05 The question is complicated by the existence of the Judges' Rules. Broadly speaking there are two sets, those of 1912 and those of 1964. They were issued by the judges in England for the guidance of police officers

when interviewing suspects (the text of the Rules is at Annexure 7). Their purpose is to regulate the procedure for questioning suspects, in particular by reminding the suspect at various stages of his dealings with the police that he need not speak about the matter in hand unless he wishes to do so. The basic difference between the two sets is that the 1964 rules permit questioning of suspects arrested but not yet charged, whereas those of 1912 did not. The rules are not rules of law but merely administrative guidance for the police.

3.06 The two complications are these: first, do the rules apply to Hong Kong at all? Secondly, what is the effect upon the admissibility of a statement of a breach of the rules?

3.07 As to the first, there is no doubt that the 1964 rules have never been formally adopted here. It was, until doubt was cast on the question by the Full Court in a case in 1969, long thought that the 1912 rules did apply. The question of their formal adoption is perhaps of limited importance since successive generations of Hong Kong judges have consistently attached importance to them, and in particular have evinced a greater willingness to tolerate questioning of suspects in the years since 1964.

3.08 What effect does a breach of the rules have? Does it, if serious enough, in itself render the confession inadmissible, or is its importance confined to the indications it may give on the question of voluntariness? There has not, historically speaking, been any consistent approach to this question. All that can be said is that the older attitude, both in England and Hong Kong, was that any serious breach of the rules per se rendered the statement inadmissible. The more modern approach, in both jurisdictions, is that breaches of the rules are of importance only as they affect the decision on the central issue of voluntariness. A breach of the rules does not necessarily result in exclusion of the confession if the confession is held to have been made voluntarily. On the other hand, even where the confession has been made voluntarily it could be excluded by the judge in the exercise of his discretion referred to in paragraph 3.03 on the ground that the rules have not been observed.

3.09 Why are involuntary confessions excluded? Several justifications can be given. First, reliability: obviously, a confession proved to be voluntary is more likely to be true than an involuntary confession; second, disciplinary: that is, the discouragement of improper methods of obtaining confessions by the police; third, non-incrimination: English law has for centuries disapproved of the idea that a person should be put under pressure to incriminate himself; it is morally repugnant to any decent society that evidence obtained by torture, violence, threats or promises of advantage, or by oppression, should be used as a means of convicting and imposing penalties on a citizen, whatever be his crimes or alleged crimes.

3.10 The application of the law at present appears to be uncertain, to provide insufficient protection to suspects, and to cost a great deal of time and money.

3.11 A more extensive outline of the law in Hong Kong is to be found at Annexure 1.

Chapter 4

The right to silence

4.01 We referred in paragraph 1.03 to the accused's right to silence and its relation to confession statements and their admissibility. We turn now to consider what is meant by the right to silence and the arguments advanced in support of it.

4.02 Subject to certain statutory exceptions (see paragraph 6.01), nobody need answer any questions about his possible involvement in the commission of a crime, no matter who asks them. He may choose to remain silent - he has the "right" to remain silent. It is a right in the sense that he commits no legal wrong, no offence, by remaining silent. Whether before or after arrest, or before or after charge, no one need answer the questions of a police officer. He may choose to remain silent in exercise of his "right".

4.03 At trial the accused has to answer if he chooses to give evidence. But he has the "right" (in the same sense as above) not to give evidence at all, that is not to go into the witness box.

4.04 What are the consequences at trial of a person exercising his "right"

(a) in the face of questioning or accusation by an ordinary citizen;
(b) in the face of interrogation by the police or other law enforcement agency;
(c) at trial?

(a) A statement made in the presence of a defendant, accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part.

(b) Silence in the face of police questioning after arrest but before the defendant is cautioned that he need not say anything has the same effect as in (a) above. After caution however the present law is that no inference whether of guilt or anything else

adverse to the accused may be drawn from the defendant's silence. That rule of the common law stems from, and is a consequence of, the Judges' Rules originally framed in 1912, which introduced the requirement that a suspect be cautioned that he need not say anything.

(c) Before 1898 a defendant was not allowed to give evidence at his trial. From 1898 by virtue of section 1 of the Criminal Evidence Act 1898 he has been allowed, but not obliged, to do so. The significance of that change in the law is often overlooked in academic debate on the right to silence. For the past 84 years juries have been faced with this situation : the prosecution adduces against a defendant evidence which calls for an explanation from him. If he exercises his right not to give it, the jury will make of his refusal to give evidence whatever they will. It is for them to decide whether the defendant's refusal to give evidence is an acknowledgement by him of the truth of the case against him. It has to be assumed that jurors are reasonable and fair minded people. Whether they conclude that the refusal is an acknowledgement or whether they conclude that it is not must depend on the circumstances of the particular case. That his refusal may count against him is recognised in practice. It is rare for a lawyer to advise his client not to go into the witness box unless the case against him is weak.

4.05 The judge, in directing the jury, may comment on the defendant's refusal to give evidence just as he may comment on any of the evidence presented or on the way the defence is conducted. The numerous reported cases on the point are illustrations of the obvious principle that the judge's summing up must be fair. That means only this : that the judge's comment must be justified in the circumstances of the particular case. In those cases where the appeal was allowed, the comment was felt by the appellate court to be unjustified; where the appeal was refused, the comment was felt to be justified.

4.06 It is important to realise that, when he exercises at trial his "right to silence", the defendant runs the risk that the jury may take that refusal to be an acknowledgement of the truth of the case against him. The defendant runs the same risk when he exercises his right to silence before the case gets to court. The jury will be able to ask itself : "Why, when taxed with this matter, did the defendant not make any reply?" There is nothing to prevent the jury concluding that, in the light of the particular circumstances, his silence was an acknowledgement by him that what was being put to him was true.

4.07 The jury will have been reminded that the defendant was not obliged to answer questions or accusations. As reasonable and fair minded people, they will not hold the defendant's silence against him unless they conclude that in the circumstances they are justified in attaching significance to his silence.

4.08 In England the Royal Commission on Criminal Procedure considered the theoretical basis of the "right to silence". It said that the right derives from two factors.

4.09 The first is the nature of the accusatorial system of trial itself. In that system of trial the prosecution sets out its case first.

4.10 The Royal Commission said (at paragraph 4.35) : "It is not enough to say merely 'I accuse'. The prosecution must prove that the defendant is guilty of a specific offence. If it appears that the prosecution has failed to prove an essential element of the offence, or if its evidence has been discredited in cross-examination, there is no case to answer and the defence does not respond. There is no need for it to do so. To require it to rebut unspecific and unsubstantiated allegation, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty. Accordingly, 'it is the duty of the prosecution to prove the prisoner's guilt', which is, in Lord Sankey's words, the 'golden thread' running through English criminal justice" (Emphasis supplied).

4.11 With great respect to the Royal Commission, the premise upon which is founded the assertion that the onus of proof would be reversed at trial is unconvincing. The defendant would not be expected to give evidence in answer to the charges unless they were specific and were substantiated by evidence adduced by the prosecution. Until the prosecution had established a prima facie case, that is a case supported by evidence upon which, without more, the jury would be entitled to convict, no reply by the defendant could or would be expected. Still less would he be expected to reply to a mere accusation, although it should be noted in passing that under the existing law he is required to plead to the charge at the outset of the trial. No objection is taken that the defendant is condemning himself when he pleads guilty to a charge as yet unsubstantiated.

4.12 The second factor is "that no one should be compelled to betray himself." The Royal Commission illustrated that statement with the following :

> *"It is not only that those extreme means of attempting to extort confessions, for example the rack and thumb-screw, which have sometimes disfigured the system of criminal justice in this country, are abhorrent to any civilised society, but that they and other less awful, though not necessarily less potent, means of applying pressure to an accused person to speak do not necessarily produce speech or the truth. This is reflected in the rule that statements by the accused to be admissible must have been made voluntarily ….. "*

4.13 We entirely agree with the statement that no one should be compelled to betray himself if what is meant is that no confession should be extracted by unacceptable methods. But we do not accept that that statement has any relevance on whether or not the defendant gives evidence at his trial. How can it be said that the choice facing a defendant at court of whether or not to go into the witness box is influenced by such pressure to speak that it

will "not necessarily produce ... the truth?" Ever since the defendant has had the right to give evidence, he has been on risk of "betraying himself". The Royal Commission did not suggest that the right to give evidence should be withdrawn.

4.14 We are not persuaded by the Royal Commission's two justifications for the so called right to silence at trial. The defendant's right of silence at trial means only this : that the defendant, in refusing to give evidence, commits no offence. It does not mean that the jury may not draw an adverse inference against him.

4.15 We turn now to consider the consequences of silence in the face of questioning by the police. The Royal Commission felt the justifications of the right to silence at trial have no less force at earlier stages because the trial conditions the way in which investigations are conducted and the prosecution's case is developed. "An attempt could be made to compel reply by, for example, the threat to use a suspect's refusal to answer police questions as evidence of his guilt at the trial. But because this would require the suspect to answer questions in relation to a suspicion that might as yet be unsubstantiated and unspecified, such an attempt would in effect be subverting that principle of the accusatorial system itself …. "

4.16 For the reason already given in relation to the refusal to give evidence at trial, we do not accept that using the suspect's refusal to answer police questions as evidence of his guilt at trial would in any way subvert the accusatorial system of trial. If the suspicion is unsubstantiated and unspecified the refusal to answer would be no evidence against the defendant. We recognise that telling the suspect that his refusal to answer may give rise to the court drawing an inference adverse to him would put additional pressure on him to speak. We do not regard that as improper pressure. We think it right that the suspect should be informed in plain terms what may in fact be the present consequences of his refusal to speak. It is in our view wrong to withhold that information from him.

4.17 A police officer is permitted to question a citizen, but the citizen is under no duty to reply. The Royal Commission itself, however, set out the consequences of refusing to reply. "Yet the absence of any legally enforceable duty on citizens, particularly those suspected or accused of an offence, to assist in the investigative and prosecutorial process does not eliminate the possibility that consequences disadvantageous to the suspect or the accused may result from a failure to put his case. However innocent a person may be, if he is found in suspicious circumstances by a police officer and then refuses to explain himself, he will inevitably attract increased suspicion and may find himself being arrested. A person who when arrested refuses to identify himself may find that he is held in custody for a longer period while his identity is verified. A refusal to answer questions or the evasion of such questions before the caution is administered may also have consequences at any subsequent trial."

4.18 It went on to point out that, when a person has been cautioned by the police that he need not say anything, "if the jury or the magistrates are aware that a person refused to answer questions under caution or was evasive, that may have some effect upon the way they interpret the evidence before them. Accordingly, although the law may give a person the right to say at all stages of the process 'Ask me no questions, I shall answer none', in relying upon this right, he would be wise to have regard to how people are likely to interpret his conduct."

4.19 It then said that "decisions of the Court of Appeal have clearly recognised that juries may well draw inferences from an apparently unjustified refusal to offer an explanation or answer questions".

4.20 We recognise that there is a strong body of opinion which holds to the principle that permitting such inferences from silence, before a specific charge has been formulated and the accused understands what it is, runs counter to the presumption of innocence and the requirement that the prosecution bears the burden of proof. The right of silence is seen by those who take this position as an essential safeguard for the weak, the immature and the inadequate, since its removal could increase the risk of false confessions by those unable to withstand police interrogation.

4.21 Research in England by the Royal Commission on Criminal Procedure shows however that what is regarded by this body of opinion as an essential safeguard is not much of a safeguard in practice. Only 4% of those interviewed refused to answer all questions. Those suspects with a criminal record appeared to be more likely to exercise their right to silence and less likely to make a confession or admission when questioned. Although we are not aware of any such research in Hong Kong, we have no reason to suppose that a broadly similar picture would not emerge here.

4.22 We recognise also, as did the Royal Commission, that the mere fact of being questioned by a police officer at a police station exerts considerable psychological pressure on a suspect to speak.

4.23 It seems to us that for the weak, the immature and the inadequate the right to refuse to answer police questions, if regarded as a "safeguard", is almost totally inadequate. It is just such people who will almost always speak, despite being told they do not have to. If such a person does not speak, his safeguard lies not in preventing any comment from being made about his silence, but in the trust we place in the jury not to hold his silence against him unless in all the circumstances an adverse inference is warranted.

Chapter 5

An introduction to our proposals

5.01 In formulating our proposals set out in Chapter 6 we have sought to devise a scheme of remedial measures that counters the deficiencies of the existing system referred to in the two preceding chapters. In particular, we have set out to achieve two objectives:- firstly, we have sought to suggest amendments to the current law and procedures governing confession statements and their admissibility in criminal proceedings, which we feel would better suit the interests of the community and the individual in Hong Kong; secondly we have endeavoured to devise a scheme that assists law enforcement officers to ascertain the truth in the investigation of criminal offences while at the same time providing proper protection for civil rights and liberties of the individual.

Preliminary Considerations

5.02 our proposals are based upon a number of conclusions which were reached during the course of our deliberations. Some of the more important of these are :-

(1) That any legal constraint imposed upon a law enforcement officer which impedes or prevents him ascertaining the truth in an investigation is undesirable unless it can be justified.

(2) That the law should assist law enforcement officers in their efforts to determine whether or not a reported, alleged or suspected criminal breach of the law has in fact been committed and by whom; in other words, to separate the fictitious malicious or mistaken complaint from the genuine complaint, and to distinguish the innocent suspect from the actual culprit.

(3) That the law should assist law enforcement officers in their efforts to acquire evidence concerning the commission of an offence and the identity of the offender, and to locate and apprehend suspects when identified.

(4) That a suspect should be given the opportunity to bring any matter to the attention of law enforcement officers which might remove him from suspicion or establish his innocence. A suspect should be at liberty to comment freely on allegations made against him and evidence implicating him in the

commission of a crime. He should be afforded all reasonable facilities to seek assistance in his defence.

(5) The law should encourage the guilty to admit their guilt and not to conceal it.

(6) The law should be realistic and practical so that a law enforcement officer has the authority honestly, diligently and fully to pursue an investigation within clearly defined constraints. Such constraints should safeguard a suspect against abuse of power. If the system of law is clearly defined it will enhance public and judicial confidence in the law enforcement agencies and promote morale. It is detrimental to public and judicial confidence in the law enforcement agencies and to the morale of law enforcement officers if they are compelled to operate under rules and regulations which do not recognise the realities of life. Some of us believe this to be the case under the present system while others believe that there are certain features of the present system which encourage malpractice.

(7) The law and attendant procedure should be simple and clearly stated so that even the most inexperienced law enforcement officer is capable of understanding the requirements with which he must comply.

(8) The law should encourage all persons to provide whatever information and assistance they can to the law enforcement agencies. Generally, however, the law should not require any person to provide self-incriminatory information against his will, except where specific statutory exception is made.

(9) The law should ensure that all arrested persons are made aware of their rights.

(10) The law should provide procedures whereby a suspect in custody has an early opportunity to register, with some person independent of the investigation, any complaint he may wish to make concerning his treatment in custody.

(11) The law should not exclude from evidence any matter which is relevant to the facts in issue and which may assist the court in determining those facts unless that evidence is of such an unreliable nature that its admission into evidence may lead to a wrong verdict.

(12) An admission of guilt by an accused which has been extracted by coercion oppression or inducement may be unreliable.

(13) An admission of guilt by an accused will not be unreliable if the coercion oppression or inducement is of such a nature that it

has not acted upon the mind of the accused so as to cause him to make an untrue admission of guilt.

(14) The purpose of a criminal trial is to determine whether or not the accused is guilty of the offence charged. A criminal trial is not designed to determine the propriety of the conduct of those law enforcement officers participating in the preceding investigation. An admission of guilt by an accused should not be excluded from evidence in order to punish law enforcement officers for some impropriety or to deter law enforcement officers from future impropriety. An admission which is rendered unreliable by reason of the circumstances causing it to be made should be excluded because of that unreliability. Law enforcement officers who behave improperly should be punished either through prosecution in the courts or by means of internal disciplinary proceedings as appropriate.

5.03 In arriving at our proposals we have sought to keep these conclusions in mind and have devised a scheme which we believe comes as close as possible to meeting these objectives.

The Panelist Scheme

5.04 The central proposal in the scheme we recommend is the introduction of an additional stage in the prosecution process in those cases where the prosecution may seek to lead evidence at trial of a confession by, or questioning of, the accused. In such cases, when an arrested person has been charged he is to be brought before an independent panelist and is to be given the opportunity to raise any complaint he may have about his treatment by the law enforcement agency. We envisage that the panelist would be a lay person who would be wholly independent of the investigating process and would be generally perceived as such. The panelist would have power to order medical examination of the accused or to transfer the accused from police to prison custody if he considered it appropriate. We have considered the title which should be given to those who serve as panelists and we believe it should adequately reflect the importance of the duties entailed and the service to the community which the holder performs. In our view the success of this scheme depends upon the calibre, independence and status of the person appointed as panelist. We have given the matter careful thought and have concluded that the only people who could properly fill this role in sufficient numbers are Justices of Peace. We realise that their present number would need to be substantially increased but we fully expect that people with the necessary qualities for appointment as Justices of the Peace can be found. We consider that existing Justices of the Peace should be invited to undertake duties under this scheme.

5.05 We believe that the introduction of the panelist system will achieve a number of major objectives :-

(i) It will provide a means of monitoring the activities of law enforcement agencies. Furthermore, if an arresting or interrogating officer is aware that within 24 hours the accused will have the opportunity to raise complaints about his treatment before a panelist, we think that the officer will be more likely to behave properly.

(ii) It will reduce the number of voir dire proceedings and hence cut court costs and time. If complaint is not made to the panelist, there will be no voir dire and any subsequent complaint will be heard as part of the general issue. Where complaint is made to the panelist, we believe that the prosecution will consider carefully whether or not to attempt to lead the disputed statement. In such cases, the prosecution may decide to dispense with the statement and avoid the need for a voir dire.

(iii) It will tend to discourage false allegations by an accused. We think it unlikely that an accused will make an untrue allegation of police impropriety to a panelist within 24 hours of being charged. Investigation of any allegation will still be relatively easy and medical examination of the accused will be likely to yield persuasive evidence one way or the other. In the circumstances, we consider that few accused would seek to make a false allegation which might reflect on their credibility in general. Conversely, since a later allegation will not lead to a voir dire, we believe that there will be a reduction in the number of objections raised at trial.

(iv) There will be an enhancement of the public image of the police and of their morale. If there is seen to be an effective system for monitoring police procedure and if there are reduced challenges in court, we believe both morale and public image will improve.

Appointment of Panelists

5.06 If the proposals contained in our report are to be adopted then it is necessary to provide some indication of the number of panelists which would be needed to operate the new procedure. Proposal 8 requires that where the prosecution may seek to adduce in evidence at the accused's trial statements made by him, "the accused shall be brought ..... before a Justice of the Peace" whose duty is to enquire whether the accused has any complaints concerning his treatment in custody and whether or not the accused acknowledges having made the statements being attributed to him.

5.07 In order to quantify the number of panelists required to operate such a scheme, we have assumed that the prosecution will only seek to adduce evidence of statements made by the accused in more serious offences. We have therefore limited our consideration to cases in which the police take fingerprints and a list of these offences appears at Annexure 10.

At best, any calculation must be tentative since there are a number of factors which are impossible to quantify, such as the number of those arrested who will raise allegations of mistreatment before the panelist. Furthermore, in making the following estimate we have considered only those arrested by the police and have not included those detained by other law enforcement agencies, such as ICAC. The vast majority of cases are, however, handled by the police and the fact that other law enforcement agencies have not been included does not detract significantly from the value of the calculation. Taking these limitations into account, we have tried to provide some indication of the number of panelists required. We calculate first the number of Justices of the Peace who would be required as panelists and thereafter the number of Magistrates that would be needed if it were decided to use Magistrates instead of Justices of the Peace as panelists.

Justices of the Peace

5.08 In September 1983, 5558 persons were arrested for the offences listed in Annexure 10. This represents an average of 185 persons per day. A random sampling of statements given to the police by accused persons shows that the average length of such statements was 4 pages. Proposal 8 requires that the statements the accused is alleged to have made be read to him, together with a series of standard questions designed to elicit the manner in which the statement was obtained. For the purposes of this calculation it is assumed that the procedure outlined in Proposal 8 (including the reading of the accused's statement to him) will take approximately 30 minutes in respect of each accused.

5.09 The average number of persons arrested per day is approximately 185(5558/30). This represents 92.5 hours of time spent on the the Proposal 8 procedure (185 x 30 minutes). If it is assumed that each panelist will work for 3 to 4 hours per day, there will need to be 31(92.5/3) panelists available each day. It seems unrealistic to hope that panelists will be prepared to devote more than one day per month to the work of interviewing accused persons. There will therefore be a requirement for 961 (31 x 31 days per month) panelists to operate the Proposal 8 Scheme.

5.10 It is envisaged that the panelist will carry out his questioning in the police station or other place of detention. There are some 45 police stations in Hong Kong where arrested persons may be detained in custody (see Annexure 11) and it would be impractical to assign a panelist to each police station, especially since the number of arrested persons will vary from station to station. It is proposed that panelists should therefore be stationed only at the larger stations and be called on as and when required to the smaller stations where arrests are few and irregular.

Magistrates

5.11 As an alternative to the use of Justices of the Peace it has been suggested that the task of interviewing accused persons might be undertaken by Magistrates. If it is assumed that a Magistrate works 38 hours each week (7 hours from Monday to Friday and 3 hours on Saturday) and that the total time spent on the panelist procedure each week will be 647.5 hours (7 days x 92.5 hours), then the total number of Magistrates who would be needed to administer the scheme can be calculated by dividing 647.5 by 38. This indicates that approximately 18 additional Magistrates would be required.

5.12 It has been assumed in the course of drafting our proposals that the panelist interview should, as far as possible, be conducted in the interviewee's own language and it seems reasonable to assume that the 18 additional Magistrates required would need to be native Cantonese speakers. To avoid Magistrates being permanently assigned to this duty it would be necessary to find perhaps a further 18 Cantonese speaking Magistrates to provide a rota system. It may be, however, that the initial assumption might be changed and that the panelist interview would be conducted by way of interpreters.

5.13 The advantages of using Magistrates include the following :-

a) the interview would be conducted by those well versed in interviewing techniques;

b) there already exists an established support system to provide services such as typing and translation; and

c) procedure would be simplified by requiring appearance only before a Magistrate.

5.14 Arguments against using Magistrates include :-

a) the difficulty of finding sufficient Cantonese speaking Magistrates;

b) the greater cost of using Magistrates instead of unpaid volunteers; and

c) the danger that the Magistrate might not be seen as wholly independent from the judiciary and sentencing process.

5.15 Any calculations such as those above must of necessity be little more than guesswork and may be inaccurate and misleading. Interviewing accused persons may take substantially longer than 30 minutes; Justices of the Peace may not be prepared to work as long as 3 hours at a time or as frequently as once a month; and Magistrates might be unable to devote 38 hours per week to the scheme.

Tape Recording

5.16 In reaching our conclusions, we have been conscious that any recommendations we make as to reforms in the procedures for determining the admissibility of confession statements should seek not only to protect the rights of the individual citizen but also reduce the disproportionate amount of court time which is spent at present in voir dire proceedings. It has been suggested that the tape recording of police interviews with suspects would do much to achieve these ends by militating against improper police conduct during interrogation and, at the same time, making it more difficult falsely to allege police impropriety when matters come to trial. We have considered whether to recommend the use of tape recorders during police interviews and have studied reports by, inter alia, the Royal Commission on Criminal Procedure and the Criminal Law Revision Committee in England in formulating our conclusions. We have concluded that different considerations operate in relation to the taping of police interrogations and the interview by the panelist which forms a central part of our proposals.

5.17 To consider first the tape recording of the interview of a suspect by the police, a number of arguments may be advanced for and against such a course. The principal arguments in favour of tape recording include :-

(i) A written record may not always fully reflect the meaning intended by the speaker. A tape-recording records the precise words used and reveals nuances of tone and emphasis.

(ii) By ensuring a full record of each interview, tape-recording would deter the police from acting improperly. Conversely, it would minimise the risk of unfair allegations being made against the police officers conducting the interview.

(iii) By providing a means of resolving disputes as to what actually took place during the interview, tape recording could be expected to result in a reduction of the time spent in voir dire proceedings.

(iv) A police officer may note what he considers to be the gist of an interview rather than its full content. This may not necessarily accurately reflect the suspect's intended meaning. The provision of a tape recording might eliminate this difficulty.

(v) Conflict may arise between police and suspect over the length and time of an interview. The use of time coded tape recordings might reduce this.

5.18 The contrary arguments include the following :-

(i) Suspects might prove less willing to respond to police questioning when their answers were to be tape-recorded. In particular, a suspect might refrain from incriminating others.

(ii) If the use of tape-recorders became standard, it is possible that the contents of an interview which had not been tape recorded, albeit for legitimate reasons, might be treated as of less evidential weight.

(iii) It is not uncommon for a suspect to reveal matter in an interview which must subsequently be edited out, such as his previous criminal record or references to his co-accused. Such editing might be more noticeable where a tape recording was involved and might lead a jury to speculate adversely as to the content of the unplayed sections.

(iv) It would be possible for police to tamper with a tape, just as it is possible for them to fabricate the contents of a written statement. Tape recording would therefore do little to deter the determined unscrupulous officer.

5.19 The arguments advanced above are those which may be applied to the general issue of tape-recording but take no account of what may be special circumstances in Hong Kong. Of particular relevance here is the fact that while the majority of statements given to the police in Hong Kong will be in Chinese, all evidence must be translated into English for the purposes of court proceedings. If police interviews were to be tape recorded it would be necessary to transcribe them and translate the transcription into English. Such a procedure would negate some of the advantages which might be expected to accrue in jurisdictions where only one language is in common usage, such as the ability of a court to appreciate the tone or emphasis which a suspect had given to a particular passage.

5.20 The question of tape-recording was considered in England by the Criminal Law Revision Committee in its 11th Report and the Committee concluded that experiments should be carried out to test the usefulness of tape recording police interviews. The Committee thought that "careful consideration should be given by the police, in conjunction with the Home Office, to the possibilities of a wider use of tape recorders than at present" (paragraph 51). Subsequently, the Royal Commission on Criminal Procedure in 1980 produced a report on tape recording in relation to police interrogation ("Police interrogation - Tape Recording" Research Study No. 6, HMSO). The Commission found "that a routine system of the recording of police interrogations can provide the means of strengthening police interrogation evidence whilst helping to ensure that the rights of suspects are safeguarded" (paragraph 6.21). The Commission's Report was the result of a detailed examination of the feasibility of implementing tape recording of police interviews and the associated costs of such a scheme.

5.21 Following the publication of the Royal Commission's findings, the United Kingdom Government decided to undertake a number of field trials to test the practicability and economic viability of a system of tape recording. These field trials were established in 1983 in 6 English police areas and "are expected to last for about 2 years; the results have to be evaluated by the steering committee and then the Government. A national scheme is unlikely to be implemented until after 1987; its existence and character will depend on and reflect the experience gained during the field trials" (Law Society's Gazette, 26 October 1983, pages 2664-2665).

5.22 The procedure foreseen under the current feasibility studies in England is that, rather than make a full transcription of the tape (which the Royal Commission found took police officers 8 minutes for each 1 minute of interview time), the interviewer should confine himself to recording in his notebook those parts of the interview which he considers of direct evidential relevance. A statement of his evidence is subsequently served on the defence who may raise objections to its accuracy at that time. In the event of disagreement, the tape is referred to and the defence are in any case allowed free access to the tape, subject only to exercising this right in a reasonable way.

5.23 The advantages which might be expected to arise from tape recording of police interviews in Hong Kong are not necessarily as clear-cut as those in the United Kingdom and the effects which the use of dual languages might have on the efficacy of such a scheme are uncertain. The Hong Kong Commission did not have the resources available to conduct its own feasibility study but we consider it sensible to await the results of the extensive field studies now being carried out in England before any decision is made in Hong Kong to proceed with independent local research, at least insofar as the taping of the police interview is concerned.

5.24 The second point in the processing procedure of accused persons at which tape recording might be introduced is at the interview conducted by the panelist under Proposal 8. It is intended that the panelist should not be a competent or compellable witness at the trial and that the record of the interview made by the panelist should be admissible as evidence of its contents (see paragraph 6.49). The situation is therefore rather different from that where an interviewing police officer is concerned, for while the accuracy of the panelists record of interview may be challenged at court, the panelist will not himself be present to give evidence. If it were otherwise, panelists might be required to spend considerable time in court giving evidence.

5.25 In these circumstances, we think that there is much to be said for tape recording the interview by the panelist, for the record of that interview is to be given considerable evidential weight without a corresponding right of direct challenge in court of the writer of that record. Our attention has been directed to the system of judicial examination which was revitalised in Scotland by the Criminal Justice (Scotland) Act 1980 and we see features of that approach which commend themselves to us as regards the use of tape

recorders. The nature of the judicial examination is in some respects akin to the procedure we envisage under Proposal 8, though the Scottish procedure is more wide-ranging.

5.26 Under section 20B of the Criminal Procedure (Scotland) Act 1975 (as amended by the Criminal Justice (Scotland) Act 1980), the prosecutor must provide a verbatim record by a shorthand writer of the judicial examination. The High Court of Justiciary Act of Adjournal (S.I. 1981 No. 1786) details the procedure to be adopted at a judicial examination and provides by paragraph 2(4) that the examination shall be tape recorded unless a recognised court shorthand writer is employed. In practice, this means that most examinations are tape recorded. Two tapes are used simultaneously, one of which is subsequently delivered to the prosecutor and the other retained by the clerk of court. A full transcription of the examination is made by the shorthand writer and the prosecutor must serve a copy of this on the accused and his solicitor within 14 days of the examination. It is open to either accused or prosecutor to dispute the accuracy of the transcript and if this is done a hearing will be held before the Sheriff. At this hearing, the clerk of court's copy of the tape will be available and the Sheriff will authorise rectification of the transcript if appropriate. The transcript is thereafter deemed to be a complete and accurate record.

5.27 There is, however, a right given to either prosecution or defence to challenge the admissibility of any part of that record at the subsequent trial where, for instance, the prosecutor had asked improper questions at the examination. Notice is served on the other party under section 76(1B) of the Criminal Procedure (Scotland) Act 1975, specifying the point or grounds of submission to which it relates. The Court may then order a preliminary hearing on the matter, although it is open to the Court to allow the trial judge to decide the issue.

5.28 The procedure we foresee under Proposal 8 is not as elaborate or far-reaching as that adopted in Scotland but we nevertheless consider that tape-recording of the panelist's interview is desirable. In the absence of complaint as to the propriety of police conduct by the accused at this initial stage, an alleged confession will automatically go before the jury at the trial, though it will remain open to the accused to challenge the confession in the presence of the jury. The accuracy of recording of the panelist interview is therefore of considerable importance, affecting as it may do the subsequent admissibility of a statement by the accused.

5.29 We do not believe it would be practicable to supply shorthand writers for every interview and it is our intention that the panelist should make his own full notes of the interview. The purpose of the tape recording is to enable the panelist to correct his notes where necessary to ensure that they are wholly accurate and to enable the trial judge if necessary to check the accuracy of the record of interview by listening to the tape in court. We believe that the panelist should lodge the tape in court immediately after the record of interview has been completed, where it will remain until the conclusion of any subsequent court proceedings.

5.30 We are conscious that we are recommending the use of tape recording at one stage of the prosecution process (the panelist interview) but not at another (the police interrogation of the accused) but we believe that the two stages are distinguishable. While the recorder of the police interview may be subject to cross-examination in court the panelist will not be available as a witness. The tape will ensure that the court has available an accurate account of what took place at the panelist's interview.

5.31 The practical problems associated with taping the police interview are greater than those where the panelist interview is concerned. There is a perceived danger that the tape may be amended by the police, just as there is public concern at present that written statements may be falsified; pressure could be brought to bear on the accused by the police before the taped interview commences; and police interviews are likely to be far more extensive than those conducted by the panelist. The introduction of tape recording of panelist interviews will necessitate the provision of a limited number of rooms and necessary equipment. To introduce tape recording of the police interview would clearly involve considerably greater outlay.

5.32 We accept that there are strong arguments for initiating the tape recording of all police interviews but we consider it prudent to await the results of the extensive research which is currently being conducted in England. Hong Kong may have its own particular problems in this area which will require local study but we take the view that such a study would best be undertaken in the light of whatever findings may be made in England. In the circumstances, we recommend that the question of tape recording of police interviews be considered fully at a later date but that this should not delay the immediate implementation of the tape recording of the panelist interview.

5.33 While the preceding paragraphs are concerned with audio recording, similar arguments to those in paragraphs 5.17 and 5.18 may be advanced in respect of video recordings. The expense and technical difficulties associated with video recordings are, however, considerately greater and we consider that it would be impractical at present to introduce video recording of either the police or panelist interview.

The Proposals

5.34 WE CANNOT STRESS TOO HIGHLY THAT OUR PROPOSALS WHICH ARE CONTAINED IN THE FOLLOWING CHAPTER ARE TO BE READ AS A WHOLE. THE SYSTEM WE HAVE DEVISED IS A COMPOSITE ONE AND THE PROPOSALS ARE DESIGNED TO DOVETAIL ONE INTO ANOTHER.

5.35 Chinese translations of the Oral Warning, Formal Warning and Record of Interview contained in Proposals 5, 7 and 8 appear at Annexure 9.

Chapter 6

Proposals

Proposal 1

There should be a clear statement of law to the effect that law enforcement officers are legally entitled to question any person whom they feel may be able to provide information in connection with the investigation of any offence or suspected offence provided always that this does not extend in any way the powers of arrest or entry. This authority should exist at all stages of an investigation but after charge only in special circumstances, for example when new evidence has been acquired, or to prevent or minimize serious harm to some other person, to property or to the public.

6.01 The first phase of an enquiry by a law enforcement officer has been described as belonging solely to the administrative process and as such not to be subject to any form of judicial restraint (P. Devlin "The Criminal Prosecution in England", Oxford University Press 1960 Page 26). During this initial stage of an investigation a law enforcement officer can freely ask anybody any questions he chooses although there is of course no obligation upon the person questioned to reply, save in those rare instances where he is under a statutory duty to do so*.

6.02 If while questioning a person during the first phase of an enquiry a law enforcement officer has reasonable grounds for suspecting that the person being questioned has committed an offence, the officer (if a police officer) has the right to arrest that person without warrant under section 50(1) of the Police Force Ordinance, Chapter 232, which provides that :

> *"It shall be lawful for any police officer to apprehend any person who may be charged with or whom he may reasonably suspect of being guilty of any offence without any warrant for that purpose and whether he has seen such offence committed or not and also any person whom he may reasonably suspect of being liable to deportation from the colony."*

We recommend that when a person becomes liable to arrest by a law enforcement officer and the officer desires to put questions or further

*See for example -

(i) The Official Secrets Act 1960, section 6. The Official Secrets Acts, 1911-1939 apply in Hong Kong by virtue of section 10 of the Official Secrets Act, 1911 - see L.N. 23 of 1963 in Legal Supplement No.2 to the Hong Kong Government Gazette 1 March 1963.
(ii) Road Traffic Ordinance Cap. 374, section 63.
(iii) Prevention of Bribery Ordinance, Cap. 201, section 14.
(iv) Inland Revenue Ordinance, Cap. 112, sections 51, 51A, 52(1) and (2), and 64.

questions to that person he should first warn him in the terms specified in Part B of the oral warning contained in Proposal 5. The effect of the warning is to inform the person that he need not answer questions but that if he chooses not to answer them an unfavourable inference could be drawn against him in any subsequent court proceedings.

6.03 When a person has been arrested by a law enforcement officer and after he has been given the oral warning set out in Proposal 5, our first proposal envisages that the law enforcement agency will be free to continue to ask any further questions they wish up until such time as the arrested person is charged.

6.04 It will only be in special circumstances, such as where there is serious danger to life or substantial loss of property, that further questioning will be permitted after a person has been charged, and again any such questioning must be prefaced by an oral warning in the terms specified in Part B of Proposal 5.

Proposal 2

There should be a clear statement of law to the effect that a suspect in the custody of a law enforcement officer should have the right to make an oral or written statement concerning the offence for which he has been arrested and that the opportunity and facilities to exercise this right should be freely available to him.

6.05 It is in the interest of a suspect, and for his protection, that he be entitled at any stage of an investigation to make any statement he wishes professing either his guilt or his innocence. He must be able to bring to the attention of those conducting the investigation any matter he wishes that may tend to establish his innocence or that may mitigate his guilt, minimise his participation in the offence or assist in the investigation.

6.06 Questions asked by a law enforcement officer may not give the suspect an adequate opportunity of professing his innocence and he should therefore have the right to make his own statement in his own words if he so wishes. He should be informed of this right and asked after every occasion on which he is interviewed by a law enforcement officer whether or not he wishes to make any further statement concerning the matters being investigated.

Proposal 3

The courts should treat an admission as a material factor in mitigation.

6.07 The law should encourage the guilty to admit their guilt. An early admission of guilt coupled with a plea of guilty causes a considerable

saving of time and money both to the law enforcement agencies and the courts and we believe that it is in the public interest for an accused person to be given credit for this (see for example R v. de Hann (1968) 52 Cr. App R.25). It is generally accepted sentencing practice in Hong Kong to treat more leniently an accused who admits his guilt at an early stage in the investigation, assists the law enforcement officers with their investigation and pleads guilty at his trial. It is recommended that a suspect be informed of this fact at an early stage in the investigation so that he can then make a decision on the course of action he should take when being questioned by a law enforcement officer.

6.08 The extent to which an admission of guilt is a mitigating factor must depend on the facts of each case. It cannot be powerful mitigation where the case against the accused was overwhelming and he had little option but to plead guilty.

6.09 An accused may plead not guilty at trial despite having made significant admissions. For example, an accused may admit that he was holding the knife that wounded the complainant, but at trial run the defence of accident. If such a defence is rejected and the accused is convicted we are of the view that if the effect of the admission has been to limit the issues at trial, resulting in a saving of court time, then this should still be regarded as a mitigating factor and be reflected in the length of sentence accordingly.

6.10 In murder cases and other cases where the sentence is fixed by law, the fact that an accused has made an admission obviously cannot be treated as a mitigating factor and Proposal 3 has to be read subject to such exceptions.

Proposal 4

No conviction should rest solely upon the accused's silence or the making by the accused of a false statement. Nevertheless, provided there has been compliance with proposal 8, a jury should be entitled at law to draw an adverse inference against an accused who, after having been so warned, either refuses to answer or gives untrue answers to relevant questions put to him by a law enforcement officer in the course of an investigation if the jury consider that to be a reasonable and proper inference to draw after consideration of all relevant circumstances, including explanations, if any, offered by the accused either to the interviewing law enforcement officer, the Justice of the Peace provided for in Proposal 8, or the court. Further, any answer given by the suspect or his refusal to answer may be the subject of comment by the trial judge, defence counsel and the prosecution.

6.11 Generally speaking, under the present law a defendant is not placed under any substantial disadvantage if he fails or refuses to answer questions put to him by a law enforcement officer during the investigation of the offence of which he stands accused. In recent years there has been an extensive public debate about whether this "right" (as it has come to be called)

to remain silent should continue. We have considered the many arguments advanced on the issue and have arrived at the recommendation contained in Proposal 4 by parity of reasoning with that of the Criminal Law Revision Committee which made a similar recommendation in their eleventh report (Cmnd 4991, June 1972). At the core of the CLRC report were the linked recommendations :-

a. that the court or jury should be permitted to draw an adverse inference if a defendant relies in the course of his defence on a fact which he has not mentioned earlier when being interrogated by the police; and

b. that the present cautions should be abolished in favour of a written notice on the following lines :-

> *"You have been charged with [informed that you may be prosecuted for] .... If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done".*

This notice would be handed to the accused person when charged, or when informed that he might be prosecuted.

6.12 In recommending these changes in the law and procedure the Committee said :-

> *"In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defence which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice" (paragraph 30).*

6.13 The Committee considered two arguments in favour of preserving the present rule : first, that it might be thought unfair that pressure should be brought to bear on a criminal to reveal his case before the trial - and perhaps to choose between telling a lie and incriminating himself; and, secondly, that it might be argued that the proposed change would endanger the innocent because it would enable the police to suppress the fact that the accused did mention to them the story he told in court. On the first point, the

Committee argued that there was nothing wrong in principle in allowing an adverse inference to be drawn against a person if he delayed mentioning his story until the trial without good reason, and suggested that Jeremy Bentham's comment on the rule that suspects could not be interrogated judicially applied equally strongly to the 'right of silence' at the police station. He wrote :

> *"If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence".*
> *('Treatise on Evidence', p.241)*

On the second, the Committee pointed out that it was already permissible to draw an adverse inference from the fact that the suspect told a lie to the police or tried to run away, and that silence could already be taken into account in assessing the value of the defendant's story in court. It was not considered a fatal objection in such cases that the police might say falsely that the accused told the lie or tried to run away or that he failed to tell his story at an earlier stage. The Committee went on to argue that, if the proposal to allow an inference to be drawn from silence were accepted, it followed logically that the present cautions advising the accused that he was not obliged to speak should be abolished or replaced by different kinds of warnings or intimations.

6.14 A minority of members of the Royal Commission on Criminal Procedure (Cmnd 8092, January 1981) favoured the approach of the CLRC. The differing views of the Royal Commission are set out in their report -

> *"... any attempt, whether as proposed by the Criminal Law Revision Committee or otherwise, to use a suspect's silence as evidence against him seems to run counter to a central element in the accusatorial system at trial. There is an inconsistency of principle in requiring the onus of proof at trial to be upon the prosecution and to be discharged without any assistance from the accused and yet in enabling the prosecution to use the accused's silence in the face of police questioning under caution as any part of their case against him at trial. A minority of us considers that that inconsistency is more apparent than real since it is at present possible in certain circumstances to use an accused's silence as part of the prosecution's case if he was silent in the face of questions put to him by anyone before he was cautioned. And they think that it is right for a person to be expected to answer reasonable questions during an investigation, that is before charge, and that the caution in its present form introduces an artificial barrier into the investigatory process, which can be tolerated by a system which stresses the importance of police questioning only because the right of silence is so rarely exercised. In their view any provision to*

protect the suspect and ensure the reliability of any statement should be more firmly based than informing the suspect of a right which research suggests is virtually impossible for him to exercise. What is required to protect the suspect at this stage are the various safeguards to ensure the reliability of the suspect's statements ..... The majority of us does not accept that this would not unfairly prejudice the suspect. Quite apart from the psychological pressures that such a change would place upon some suspects it would, in their view, amount to requiring a person during investigation to answer questions based upon possibly unsubstantiated and unspecific allegations or suspicion, even though he is not required to do that at the trial. Such a change could be regarded as acceptable only if, at a minimum, the suspect were to be provided at all stages of the investigation with full knowledge of his rights, complete information about the evidence available to the police at the time, and an exact understanding of the consequences of silence. But that could be done only if the critical phase of investigation, that is the phase at which silence could be used adversely to the accused, was to become more structured and formal than it is now; in effect responsibility for and conduct of this phase of the investigation, close to charge, would have to become a quasi-judicial rather than a police function. That would seem to those of us who take this view to have radical consequences for the trial. If an investigation were to be conducted in what would, in effect, be an inquisitorial mode, they do not think that the present accusatorial system could remain. And there are further difficulties. They relate to the problem of proving at a subsequent trial that a defence relied on at trial had not been mentioned to the police, or that a person had not in fact answered questions. This would place upon the police the burden of proving a negative. Even if it were possible to tape-record all exchanges between the police and the suspect (and this, in our view, is impracticable), it would still be necessary to prove that there were no other exchanges. Secondly, if silence had to be proved to the satisfaction of the court, then the record of whole interviews (admissible and inadmissible material alike) might have to go to the magistrates and the jury. In the Crown Court it might be made a matter for the judge to decide whether the accused had failed to mention his defence earlier, but we are looking for ways of shortening not prolonging trials, and this would not solve the problem for the magistrates.

We recognise the strength of feeling behind the call for a modification to the right of silence during investigation. And some of us are sympathetic towards the position taken by the Criminal Law Revision Committee. Nonetheless in the light of the preceding arguments the majority of us has concluded that the present law on the right of silence in the face of police

questioning after cautioning should not be altered" (Royal Commission on Criminal Procedure, paragraphs 4.51 - 4.53).

6.15 The sub-committee unanimously discounted the view Of the majority of the Royal Commission only after the fullest consideration since they believed that the approach of the CLRC was more appropriate to Hong Kong, in particular in the light of their composite proposals which form the basis of this Report. The majority of us agree with the sub-committee's reasoning and conclusions and we are firmly of the view that this proposal should be adopted as an integral part of our composite scheme. On this issue, however, a minority of us took a contrary view which is to be found in Chapter 9.

Proposal 5

The law should require that every person arrested by a law enforcement officer should be orally warned by him as soon as practicable after arrest in the following terms :-

Oral warning

A *"(1) I am [Name, Rank and service number of arresting officer].*
(2) I arrest you.
(3) You may be charged with ….. [statement of offence and general particulars thereof]."

and if the arresting officer wishes to question the suspect :-

B *"I wish to ask you about .....*
You may answer or refuse to answer.
If you are subsequently taken to court, your answers or your refusal to answer will be made known to the court.
If you don't answer, the court may draw an unfavourable inference against you."

6.16 The first part of the oral warning informs a person that he is under arrest and puts him on notice that he may be charged with a particular offence. When the suspect becomes liable to arrest, even if he is not then arrested, the unrestricted right of the law enforcement officer to ask questions, as enshrined in Proposal 1, comes to an end and any question or further questioning must be prefaced by the second part of the oral warning. Even if on arrest the arresting officer does not wish to ask any questions, the arrested person should be informed of his rights under Proposal 2 by the duty officer in charge of the police station to which the arrested person is taken following arrest. Under the procedure outlined in Proposal 6 the arresting officer will, pursuant to the relevant standing orders, compile a written record containing details of the oral warning given. In the light of the minority view referred to at

paragraph 6.15 it follows that the minority do not support the inclusion of the last 2 sentences of part B of the oral warning.

Proposal 6

The Standing Orders of the various law enforcement agencies should require that

(i) a law enforcement officer should make a written record of all statements and questions relevant to the matter being investigated put to an arrested person and of the arrested person's verbal responses thereto whether occurring before or after arrest;

(ii) upon completion of the written record it should be offered to the arrested person to read or be read to him at his election after which a copy of this record should be supplied to the arrested person as soon as practicable;

(iii) the arrested person should be invited to record or have recorded for him any comment he wishes to make as to the accuracy of the record and the arrested person should also be given the opportunity to add anything further that he may wish to the record;

(iv) the arrested person should be invited at the conclusion of the interview to acknowledge the accuracy of the record by appending his signature thereto;

(v) the record should contain details of (a) the oral warning given (b) the time, date and place of the interview (c) the details of the persons present during the interview and (d) if the arrested person refused to sign, a certificate that he so refused and the reasons for such refusal; and

(vi) except where there is serious danger to life or property, or it is in the interest of the public, no suspect should be interviewed continuously for more than 2 hours, a suspect should be given at least 15 minutes rest between interviews and no suspect should be interviewed for more than 12 hours in any 24 hour period.

6.17 We recommend that in addition to changes in the law relating to confession statements and their admissibility into evidence, the details of direction, guidance, supervision and control for law enforcement agencies be contained in Standing Orders issued by the appropriate commanding officers of the various agencies. We recommend that legislation be enacted to establish a uniform code of conduct to be applied to the various law enforcement agencies for general application on matters pertaining to

detention and interrogation. The code should be subject to periodical review by the Governor in Council. This would be preferable to reliance on the Judges' Rules because the code would have statutory authority and would enable the various agencies to control their officers and to take appropriate action for breaches of it. At present the sanction against a law enforcement officer for a breach of the Judges' Rules is the possibility that a suspect's cautioned statement may be excluded from evidence, perhaps resulting in the failure of the prosecution. We believe that the proper sanction should be internal disciplinary action to punish an officer directly for acts or omissions of a non-criminal nature which are contrary to this code of conduct.

6.18 We are of the view that a court should not concern itself with breaches of a law enforcement agency's Standing Orders when considering the admissibility into evidence of a statement allegedly made by an accused, unless these result in the statement being inadmissible under the proposed amendments to the law. Allegations of such breaches should be the concern of a disciplinary board. A court should only be concerned with the matters contained in Proposal 9. This is not to say that the court should not of its own motion refer appropriate cases to the Complaints Against Police Office (CAPO) or other responsible authority for inquiry regarding breaches of standing orders. We believe that a system for monitoring all referrals should be devised along the lines of the UMELCO Police Group which examines CAPO investigations.

6.19 Arrests frequently take place away from a police station and in circumstances that make it impractical for the arresting officer to make a contemporaneous record of his conversation with the arrested person. Whilst the Standing Orders should encourage an officer to make a contemporaneous record of any conversation he has with an arrested person on the basis that such a record is more likely to be accurate than a record subsequently prepared from memory, it would seem impractical to insist that only contemporaneously prepared records be admissible.

6.20 We believe that Proposal 8 provides a reliable procedure to test the accuracy of all records made of conversations between suspects and law enforcement officers whether or not such conversations were recorded at the time.

6.21 Proposal 6 does not require that a verbatim transcript be made of all conversations between the suspect and a law enforcement officer. Such a requirement would be a practical impossibility and also unnecessary. The proposal does require that the questions relevant to the matter being investigated be recorded with the suspect's answers.

Proposal 7

The law should require that every person under arrest by a law enforcement officer be brought as soon as practicable to the officer in charge

of the appropriate law enforcement office, whereupon such officer shall inform the arrested person both orally and in writing of the following matters :-

Formal warning

"(1) You have been arrested for suspicion of .....
You may be detained for no more than 48 hours.

(2) You may be charged with …… [statement of offences and general particulars thereof].

(3) If you wish, a family member, friend or lawyer of your choosing will be notified by me of your presence in this station [This right may be withdrawn if an officer of the rank of Inspector or above decides that it is necessary in the interests of the continuing investigation, in which case he shall record the arrested person's request and reasons for withdrawal].

(4) You may be questioned about the alleged offence and other offences. You are not obliged to answer these questions. If you choose to answer, the questions and your answers will be recorded in writing and may be given in evidence. If you decline to answer all or any of the questions put to you, or if you give false answers, your failure to answer or answer truthfully may be brought to the attention of the court should you be subsequently charged and the court may draw inferences adverse to you. If you consider that you are not guilty of the offences alleged against you, it is in your interests to inform the investigating officer of any matter which may tend to establish your innocence. If you are guilty of the alleged offence you may be treated more leniently by the court should you readily admit your guilt and endeavour to assist in the investigation.

(5) You are entitled to make any statement you wish in connection with the alleged offence. You may make this statement in writing yourself or it will be recorded for you and this statement may also be given in evidence.

(6) Do you wish to make any complaint about any matter concerning the circumstances of your arrest or any treatment you have received since your arrest? [Record any complaint made]

(7) Do you have any requests to make? In particular do you wish to see a doctor? [Record any requests made]

(8) I .... [name, rank and service number] certify that at [time, date and place] I brought the above matters to the attention of [name of arrested person] both orally and by serving upon him a copy of this notice and I am satisfied that he understood the matters addressed to him.

Signed *Time and Date*
Duty officer

(9) I ..... [name of arrested person] acknowledge that the above matters have been brought to my attention, that I fully understand the contents and that I have received a copy of this formal warning.

Signed
arrested person"

6.22 The proposal, whilst requiring all arrested persons to be brought directly to a police station (customs & excise or I.C.A.C. office as the case may be), does allow for urgent matters of the investigation (such as premises search, efforts to locate witnesses, or other suspects and matters where delay may impede the investigation) to be pursued before the arrested person is brought to the police station.

6.23 In the past, complaints have been made by accused persons at their trial that they were not cautioned on their arrest. This Proposal, combined with the procedures in Proposal 5, will at least ensure that all persons who are arrested and brought to a police station are informed of their rights, the fact that they are under arrest and that they understand the caution which has been given to them so that they can decide on the course of action they wish to adopt. It is envisaged that the Duty Officer would not simply read the formal warning to the arrested person but explain it so that the arrested person understands his position.

6.24 It is recommended that the duty officer be charged with the responsibility of delivering this formal warning because of his rank, often Inspector, at least Sergeant, and because he is independent of the investigation and therefore more likely to adopt an objective attitude towards the arrested person. The criticism can still be made that he is part of the police team but we are unable to make any more practical recommendation as to how an arrested person is to be given the requisite information by a person independent of the investigation.

6.25 It is recommended that the formal warning be a printed form with serialised numbers contained in and detachable from a book. It is recommended that the Duty Officer complete the details on the form from information provided by the arresting officer. One copy of the form should be given to the arrested person, one copy should be retained for record purposes and the original should be kept for use in court.

6.26 This proposal is designed not only to ensure that the arrested person is informed of his true position, his rights and the factors relevant to his deciding how he should act, but also to give the arrested person the opportunity of registering at an early stage any complaints that he may have concerning his treatment by a law enforcement officer.

6.27 It is expected that the risk of an arrested person making a complaint about mistreatment will act as a deterrent to any law enforcement officer inclined to abuse his position and therefore be a further safeguard to the rights of the individual.

6.28 It would not be correct to regard a complaint made as corroboration of the alleged mistreatment, however, it could be regarded as evidence of consistency of conduct similar to the law relating to recent complaint in sexual offence cases.

6.29 Whilst early complaint can lend credibility to the complaint, failure to complain at this first opportunity coupled with a subsequent complaint can detract from the credibility of the complaint. The accused would in these circumstances however have the opportunity to explain to the court his reasons for declining to make a complaint to the Duty Officer.

6.30 Any complaint received by a Duty Officer should be referred by him immediately to CAPO or the appropriate body for investigation. It is hoped that early investigation would assist to establish the veracity of the complaint.

6.31 It is appreciated that the arrested person may be intimidated by the fact that he is still in police custody and therefore fear the consequences of making a complaint but no practical solution can be envisaged to remove the possibility of the arrested person feeling inhibited in this way.

6.32 It is a proper protection of the liberty of a citizen that he be able to obtain advice and assistance whether that advice be to co-operate or not with the law enforcement officers in the investigation. In addition, an arrested person may wish to recruit assistance to help establish his innocence. This right should be jealously guarded unless its exercise will materially impede the investigation on matters such as apprehension of suspected persons still at large, recovery of property, prevention of further loss or injury to an individual or the public. With these exceptions, all arrested persons in custody should be at liberty to communicate privately with a family member, friend or lawyer.

6.33 We would recommend that the original of the formal warning signed and retained by the Duty Officer be admissible into evidence without further proof in the same way as Government Chemists Certificates and certificates as to photographic process are admitted in evidence under Sections 25 and 26 of the Evidence Ordinance, Cap. 8.

6.34 Section 52(1) of the Police Force Ordinance, Cap. 232 deals with detention of suspects in police custody. It states : "….. where such

person is detained in custody he shall be brought before a Magistrate as soon as practicable, unless within 48 hours of his apprehension a warrant for his arrest and detention under any law relating to deportation is applied for, in which case he may be detained for a period not exceeding 72 hours from the time of such apprehension." This oblique statement of the law seems to authorize the police to detain in their custody any arrested person for no more than 48 hours. We recommend that this aspect of the law be clarified and amended along the lines of section 10A(6) of the Independent Commission Against Corruption Ordinance, Cap. 204 which requires that I.C.A.C. bring an arrested person "before a Magistrate as soon as practicable and in any event within 48 hours after his arrest ….. ".

6.35 We suggest that legislation be introduced similar to the Independent Commission Against Corruption (Treatment of Detained Persons) Order, Cap. 204 to regulate the detention of persons in police custody. We consider that the greater the protection provided for the suspect in custody against abuse by persons in authority the more readily will a court be prepared to admit into evidence and act upon statements made by the suspect while he was in custody.

6.36 In the light of the minority view referred to at paragraph 6.15 it follows that the minority do not support the inclusion of the fourth sentence in paragraph 4 of the formal warning.

Proposal 8

The law should require that when a person has been charged with a criminal offence, and when the prosecution may seek to adduce in evidence at the accused's trial evidence of :-

(a) statements made by the accused to a law enforcement officer; or

(b) answers made by the accused to questions put by a law enforcement officer; or

(c) the accused's failure to answer questions put by a law enforcement officer,

the accused shall be brought, within 24 hours of being charged, before a Justice of the Peace (hereinafter called "the panelist") who shall inform and inquire of the arrested person in the following terms:-

"RECORD OF INTERVIEW

(1) I am a Justice of the Peace. My name is _____ .

(2) I wish to ask you some questions about your arrest and custody, communications between yourself and the

[police or other enforcement agency] and the manner in which you have been treated by the [police or other enforcement agency] since your arrest.

(3) Before I ask these questions, I wish to make the following matters very clear to you. Please listen carefully as these matters are of considerable importance to you :

(i) I am completely independent from and impartial to any [police or other enforcement agency] investigation concerning your alleged involvement in any criminal offence. I have no connection with the [police force or other enforcement agency] nor any association with any [police or other officer] involved in any investigation concerning you.

(ii) You are not obliged to answer my questions but a written and taped record will be made of my questions and any answers you choose to make and the written record will be made available at your trial.

(iii) You may answer my questions in whatever terms you wish without fear of any reprisals from anybody.

(iv) If there is good reason, I have the power to release you immediately from [police or other enforcement agency] custody and you will be detained instead in the custody of the Correctional Services Department which is totally independent of the [police or other enforcement agency].

(v) I must inform you that if you consider that you have been mistreated by the [police or other enforcement agency] in any way you should inform me of this and any failure on your part to report your complaint to me may result in any subsequent complaint made by you being disbelieved because you have not availed yourself of this early opportunity to register your complaint.

Q1 Do you understand fully what I have said to you?
A1 [record answer]

Q2 Is your name ……?
A2

Q3 Do you acknowledge that this is your signature on the formal warning?
A3

Q4 *Were you arrested at [time & place]?*
A4 *[If no, clarify].*

Q5 *Were you charged at [time] with this offence [Read to the accused the offence charged]?*
A5

Q6 *The documents I will now read to you are alleged to be the records made of interviews conducted with you [Read the records of interview to the accused]. Are those documents an accurate record of the questions asked of you and your replies, if any? [Where the accused has failed to answer a question by a law enforcement officer the panelist should ask the accused for an explanation for his silence.]*
A6

Q7 *The documents I will now read to you are alleged to be written statements made by you [Read the statements to the accused]. Did you make those written statements?*
A7

Q8 *The documents I will now read to you are alleged to be the records of oral statements made by you [Read the record of oral statements to the accused]. Did you make those statements?*
A8

Q9 *It is my duty to inform you that if you consider that you are not guilty of the offence charged then it may be very much to your advantage to state to me your denial of the offence and anything which may assist in establishing your innocence. I also inform you that if you are guilty of the offence charged you may be treated more leniently by the court if you admit your guilt and try to assist the [police or other enforcement agency] with their investigation. Bearing these matters in mind, is there anything further you wish to say concerning the offence charged?*
A9

Q10 *Do you have any complaint about the way you have been treated by the [police or other enforcement agency], either physically or in any other way, since your arrest?*
A10

Q11 *[If there is a complaint made of physical mistreatment] Are you prepared to submit to a medical examination to support your complaint? [If yes, panelist to arrange].*
A11

Q12 *Do you wish me to order that you be transferred immediately into the custody of the Correctional Services Department? [If yes, there is no need to ask for reasons UNLESS they are not obvious].*
A12

(4) I [name] certify that at [time, date and place] I brought the above matters to the attention of [name of accused], I have satisfied myself that he understood what was said to him, and I have recorded what the arrested person wished me to record.

Signed
Justice of the Peace

If the prosecution seeks to adduce evidence of a statement made by, or of questioning of, the arrested person after he has been charged, he shall again be brought before the Justice of the Peace within 24 hours of the statement or questioning and interviewed in like terms.

We recommend that the interview by the panelist be tape recorded.

6.37 It is recommended that a panel of panelists be established in sufficient numbers to ensure that a panelist will be available to attend a police station as and when required. We have indicated at paragraph 5.09 the number of panelists which we believe will be necessary to operate such a scheme.

6.38 In appointing panelists to the panel, there are two crucial factors to be borne in mind. First, all those appointed should be able to speak English and Cantonese or another Chinese dialect and be able to read and write both English and Chinese. Since the purpose of the panelist interview is to encourage the accused to speak up where he has good cause, we consider it desirable that the accused should be put at his ease by avoiding the use of interpreters wherever possible. Second, panelists should be seen to be independent of both the police, judiciary, and the prosecution process. It is essential that the accused should have confidence in the impartiality of the panelist and for that reason no civil servant connected with the police, judiciary or the prosecution process should be considered for appointment to this duty.

6.39 It could not be expected that many of those appointed will have legal experience and we consider that all panelists should be required to attend an induction course which will familiarise them with their duties and their place in the prosecution process.

6.40 The panelist would, on arrival at the police station, be supplied with the factual details relating to the suspect's case and copies of all records of interview and statements made by him. The panelist would then interview the suspect in terms of Proposal 8. This interview would be tape recorded in full by the panelist.

6.41 It is recommended that the panelist have the authority to direct that the suspect be transferred immediately from police to gaol custody and that the transport be provided by the Director of Correctional Services.

6.42 Should any complaint be made to the panelist he should refer that complaint directly to CAPO for investigation. Because the complaint would, upon receipt, be expeditiously investigated it is suggested that the likelihood of the truth of the allegation being discovered would be greatly enhanced.

6.43 We consider that this Proposal will provide extensive protection from mistreatment to all persons in custody for the reason that a person totally independent of the investigation will inquire of the suspect and satisfy himself first, whether the suspect has any complaints concerning his treatment in custody and second, whether the suspect acknowledges having made the statements attributed to him. It is submitted that a law enforcement officer would be unlikely to mistreat a suspect or fabricate a confession knowing that the suspect was to be interviewed immediately after being charged by a person independent of the investigation.

6.44 No system short of having all interviews conducted in the presence of an independent witness can preclude the possibility of improper treatment of a suspect in custody and even in the case of an independent witness threats could be made prior to interview. We have concluded that it would be impractical in the Hong Kong context to have some person, independent of the investigation, present during every occasion a suspect in custody was interviewed by a law enforcement officer.

6.45 We considered whether this proposal would encourage suspects in custody to make groundless complaints against law enforcement officers.

6.46 We note that most fictitious allegations of impropriety alleging physical mistreatment or fabrication of admissions are made only after the suspect has spent time ruminating on his position and the prospect of conviction. He then regrets having made any admissions. Upon advice, or in the light of his own previous experiences, he seeks to cause his admissions to be excluded from evidence by making allegations of impropriety against the law enforcement officers involved in taking his confession.

6.47 We consider that the early interview by the panelist, preferably immediately after the suspect is charged, will eliminate many of the allegations made at present. The proposal is designed to provide as far as is practically possible a system that prevents the possibility of mistreatment because of the high probability that mistreatment will be discovered and consequently punished. It is designed to reduce the temptation to make groundless allegations. For instance, an allegation of violence may be tested by medical examination ordered by the panelist. An allegation made for the first time at trial will be less likely to be believed because it was not made when opportunity was given at an earlier stage.

6.48 As with the formal warning of the Duty Officer, it is recommended that the record of interview of the panelist, should be admissible into evidence as prima facie evidence of its contents. If the accused alleges that he did make a complaint of mistreatment which does not appear on the panelist's written record the judge may listen to the tape recording of the panelist interview to determine whether any such allegation was in fact made to the panelist.

6.49 An accused at his trial could still make allegations of impropriety and either explain why he chose not to make any earlier complaint or, assuming that the Duty Officer and panelist recorded no complaint as having been made, allege that he made a complaint which was not recorded in writing by the panelist in which case the tape recording made by the panelist would be admissible in evidence as conclusive proof of its contents. We are of the view that the panelist should not be a competent witness for the Crown or the defence. If the position were otherwise, the practical problems presented would make the scheme unworkable.

6.50 If a complaint is made by an arrested person to either the Duty Officer or panelist, the complaint would be investigated by CAPO and the Crown Prosecutor would be in a position to decide whether or not to proceed with the case against the accused. If he decides to proceed, the Crown Prosecutor would be able to decide whether or not to endeavour to lead as part of the prosecution evidence the statements attributed to the accused.

Proposal 9

The law should be amended to provide for the following :-

1. In any criminal proceedings :-

(A) Any statement made by an accused to a law enforcement officer and any record of interview between an accused and a law enforcement officer shall be admissible in evidence where :

(i) the procedures required by Proposal 8 have been complied with and, in the opinion of the judge, it appears from the record of such procedures signed by a panelist in accordance with the requirements of Proposal 8 that the statement or record sought to be admitted in evidence was not :

(a) obtained by means which involved actual or threatened violence, force or other form of physical compulsion to the accused; or

(b) obtained by means or in circumstances likely to cause any material part of such statement to be untrue or such record to be misleading;

or, (ii) the procedures required by Proposal 8 have not been complied with but the defence does not object to the admission of the statement or record.

(B) The judge shall not admit a statement or record in evidence where he is of the opinion that it appears from the record of the procedures referred to in sub-paragraph (i) of paragraph A of this Proposal that the statement or record was obtained by means, or in circumstances, which involved violence, force or some other form of physical compulsion unless he is satisfied beyond reasonable doubt, after due inquiry, that the statement or record sought to be admitted in evidence was not so obtained.

(C) The judge shall not admit a statement or record in evidence where he is of the opinion that it appears from the record of the procedures referred to in sub-paragraph (i) of paragraph A of this Proposal that the statement or record was obtained by means or in circumstances (other than those referred to in paragraph B of this Proposal) likely to cause any material part of such statement to be untrue or such record to be misleading unless he is satisfied on the balance of probabilities, after due inquiry, that the statement or record sought to be admitted in evidence was not so obtained.

(D) In every trial before a judge and jury, any question to be determined by the judge under paragraph A, B or C of this Proposal shall be determined by him in the absence of the jury.

(E) No statement made by an accused to a law enforcement officer and no record of any interview between an accused and a law enforcement officer shall be admissible in evidence where the requirements of Proposal 8 have not been complied with unless

(i) the defence does not object to the admission of the statement or record; or

(ii) the judge is satisfied that there were special circumstances beyond the control of the law enforcement officer which rendered it impracticable to so comply.

(F) In every trial before a judge and jury, the question whether there were special circumstances referred to in Paragraph E of this Proposal shall be determined by the judge in the absence of the jury.

2. Nothing in this Proposal shall prevent an accused from challenging, or in any way limit or restrict the right of an accused to challenge, the truth or accuracy of any statement made or alleged to have been made by him or of any record of an interview between himself and a law enforcement officer or the weight to be given to any such statement or record, but in a trial before a judge and jury, such challenge shall be made in the course of the trial and in the presence of the jury.

3. For the purposes of this Proposal, "statement" or "record" includes any part of a statement or record and a part of a statement or record shall not be excluded from evidence by reason only that some other part of such statement or record is excluded from evidence.

6.51 When an accused has made an allegation of mistreatment to a panelist under the procedure outlined in Proposal 8, the judge will have to evaluate the complaint in the absence of the jury. Where the complaint is that the confession was obtained as a result of violence or some other form of physical compulsion the judge will exclude the confession unless the prosecution adduce such evidence as will satisfy the judge beyond reasonable doubt that the confession was not so obtained. Where the complaint is that the confession was obtained as a result of a promise or threat or some other inducement, the judge will only exclude the statement if satisfied on a balance of probabilities that the resulting confession is therefore likely to be untrue or misleading. This approach is derived from that contained in the 1908 Evidence Act, New Zealand, Section 20 as substituted by Section 3 of the Evidence Amendment Act 1950 which provides that "a confession tendered in evidence in 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

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."

6.52 The effect of Proposal 9 is that if a confession is made after violence, threat or inducement the first question that a court must ask is : Did the violence, threat or inducement cause the confession to be made? In this connection a material factor will be whether or not there has been an interval of time or intervening event between the conduct complained of and the making of the confession which enables the court to say that the making of the confession could not have resulted from the violence, threat or inducement. If the violence, threat or inducement did not cause the confession to be made then the reliability of the confession is not affected. If it did, however, the confession is inherently unreliable. It may happen to be true; but the danger that it is not is considerable. This is especially so when violence has been used with a view to extracting the confession. Even in the absence of such interval of time or intervening event as mentioned above, it may be that the particular inducement, threat or act of violence would not have induced the accused to make an admission that was not true. This involves, however, a very difficult inquiry - especially when violence is involved. We have attempted in our recommendations to strike an acceptable balance between these conflicting considerations.

6.53 The prosecution will only be able to adduce in evidence a confession statement made by an accused which has not been before a panelist in accordance with the procedure outlined in Proposal 8 if the judge is satisfied that there were special circumstances which rendered it impracticable to do so or if the defence does not object to the failure to comply with the Proposal 8 procedure. Where the police have interviewed an accused after charge in circumstances where it was proper to do so in accordance with Proposal 1 it is envisaged that any resulting confession would have to be put before a panelist even if this meant that the accused had to be brought before a panelist on two occasions; before and after charge.

6.54 If an accused has made no allegation of mistreatment to a panelist under the procedure outlined in Proposal 8, he may still make such allegations at trial where they will be dealt with in the presence of the jury who will determine in the light of those allegations what weight if any to attach to the accused's statement.

Proposal 10

The law should be clarified so that the fact that a statement or record of interview is wholly or partly excluded by virtue of any of the foregoing proposals shall not affect the admissibility in evidence :-

(a) of any facts discovered as a result of the statement or record of interview; or

(b) as regards any fact so discovered, of the fact that it was discovered as a result of a statement made by the accused; or

(c) where the statement or record of interview is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the statement or record of interview as is necessary to show that he does so.

6.55 In making the recommendations contained in Proposal 10 we have followed closely the reasoning of the Criminal Law Revision Committee in their eleventh report on evidence (Command 4991).

6.56 Proposal 10(a) is a restatement of the present law which stems from the old case of Warwickshall (1783) I Leach 263 and which has been approved in modern times in the Privy Council (Kuruma, Son of Kaniu v R [1955] AC 197 and King v R [1969], AC 304). We agree with the Criminal Law Revision Committee that it is in the interests of the detection of crime that the rule be preserved. "It would be too great an interference with justice to prevent the police from using any 'leads' obtained from an inadmissible confession. For example, this would mean that, if the police have been led to arrest other persons involved in the crime who were named in the confession, no evidence could be given against these other persons, even though perhaps the police would eventually have discovered their guilt by other means. This would be too severe a restriction on the prosecution." (CLRC paragraph 68).

6.57 Proposal 10(b) seeks to clarify a point on which the case law is inconsistent and upon which the text book writers give little assistance. We are of the view that it is reasonable to permit the prosecution to lead evidence to the effect that the discovery of the fact in question was made "as a result of" a statement made by the accused, even though this statement is inadmissible. This would mean overruling R v Berriman (1854) 6 Cox 388 which seems to hold to the contrary. Although the minority of the Criminal Law Revision Committee thought it wrong that the jury should be informed indirectly of a fact which in the interests of justice they should not learn directly, we are of the view that, as a matter of policy, it is expedient to allow this.

6.58 Proposal 10(c) is a restatement of the present law which perhaps finds its clearest expression in Voisin [1918] 1 KB 531 where the accused was identified as the culprit by a peculiarity of his spelling. Voisin was convicted of the murder of a woman, part of whose body had been found in a parcel in which there was also a piece of paper with the words "Bladie Belgiam". The accused had been asked by a police officer if he had any objection to writing down the two words "Bloody Belgian" and had said "Not at all" and written down "Bladie Belgiam". The accused appealed unsuccessfully against his conviction on the ground, among others, that this writing ought to have been rejected as he had not been cautioned before being asked to write the words down. Here there was no question of an involuntary confession; but if in a case of this kind the words had been written in an inadmissible

confession, it seems to us right that this part of the confession should be admissible for the purpose mentioned. The court would naturally ensure that no more was admitted than was necessary and that it was understood that the part admitted was admitted only for the purpose of identification and not as evidence of the truth of what was said in it.

Chapter 7

Summary of recommendations in English

7.01 We recommend that the question of tape recording of police interviews of the accused should be considered fully once the results of current studies in England are known (paragraph 5.32).

7.02 There should be a clear statement of law to the effect that law enforcement officers are legally entitled to question any person whom they feel may be able to provide information in connection with the investigation of any offence or suspected offence provided always that this does not extend in any way the powers of arrest or entry. This authority should exist at all stages of an investigation but after charge only in special circumstances, for example when new evidence has been acquired, or to prevent or minimise serious harm or loss to some other person, to property or to the public (Proposal 1).

7.03 We recommend that when a person becomes liable to arrest by a law enforcement officer and the officer desires to put questions or further questions to a person he should first give him an oral warning in the terms specified in Part B of Proposal 5 (paragraph 6.02).

7.04 Following arrest and oral warning by the law enforcement officer, the officer should be free to continue questioning until such time as the arrested person is charged (paragraph 6.03). Only in special circumstances will questioning after charge be permitted and such questioning must again be prefaced by an oral warning in the terms specified in Part B of Proposal 5 (paragraph 6.04).

7.05 There should be a clear statement of law to the effect that a suspect in the custody of a law enforcement officer should have the right to make an oral or written statement concerning the offence for which he has been arrested. The opportunity and facilities to exercise this right should be freely available to the suspect (Proposal 2). An arrested person should be asked after every occasion on which he is interviewed by a law enforcement officer whether or not he wishes to make any statement concerning the matters being investigated (paragraph 6.06).

7.06 The Courts should treat an admission as a material factor in mitigation (Proposal 3).

7.07 No conviction should rest solely upon the accused's silence or the making by the accused of a false statement. Nevertheless, provided there has been compliance with Proposal 8, a jury should be entitled at law to draw an adverse inference against an accused who, after having been so warned,

either refuses to answer or gives untrue answers to relevant questions put to him by a law enforcement officer in the course of an investigation if the jury consider that to be a reasonable and proper inference to draw after consideration of all relevant circumstances, including explanations, if any, offered by the accused either to the interviewing officer, the Justice of the Peace provided for in Proposal 8, or the court. Further, any answer given by the suspect or his refusal to answer may be the subject of comment by the trial judge, defence counsel and the prosecution (Proposal 4).

7.08 The law should require that every person arrested by a law enforcement officer should be orally warned by him as soon as practicable after arrest in the terms specified in Part A of the oral warning contained in Proposal 5. If the arresting officer thereafter wishes to question the suspect, the suspect should be orally warned in the terms specified in Part B of the oral warning contained in Proposal 5. Even if on arrest the arresting officer does not wish to ask any questions, the arrested person should be informed of his rights under Proposal 2 by the duty officer in charge of the police station to which the arrested person is taken following arrest (paragraph 6.16).

7.09 The Standing Orders of the various law enforcement agencies should require that :-

(i) a law enforcement officer should make a written record of all statements and questions relevant to the matter being investigated put to an arrested person and of the arrested person's verbal responses thereto whether occurring before or after arrest;

(ii) upon completion of the written record it should be offered to the arrested person to read or be read to him at his election after which a copy of this record should be supplied to the arrested person as soon as practicable;

(iii) the arrested person should be invited to record or have recorded for him any comment he wishes to make as to the accuracy of the record and the arrested person should also be given the opportunity to add anything further that he may wish to the record;

(iv) the arrested person should be invited at the conclusion of the interview to acknowledge the accuracy of the record by appending his signature thereto;

(v) the record should contain details of (a) the oral warning given; (b) the time, date and place of the interview; (c) the details of the persons present during the interview; and (d) if the arrested person refused to sign, a certificate that he so refused and the reasons for such refusal; and

(vi) except where there is serious danger to life or property, or it is in the interest of the public, no suspect should be interviewed continuously for more than 2 hours, a suspect should be given at least 15 minutes rest between interviews and no suspect should be interviewed for more than 12 hours in any 24 hour period (Proposal 6).

7.10 We recommend that legislation be enacted to establish a uniform code of conduct to be applied to the various law enforcement agencies for general application on matters pertaining to detention and interrogation. The code should be subject to periodical review by the Governor in Council. Internal disciplinary action should be taken to punish an officer for acts or omissions of a non-criminal nature which are contrary to this code of conduct (paragraph 6.17).

7.11 The court should not concern itself with breaches of a law enforcement agency's standing orders when considering the admissibility into evidence of a statement allegedly made by an accused, unless these result in the statement being inadmissible under the proposed amendments to the law. The court should be able to refer appropriate cases to CAPO or other responsible authority for inquiry regarding breaches of standing orders. We believe that a system for monitoring all referrals should be devised along the lines of the UMELCO Police Group which examines CAPO investigations (paragraph 6.18).

7.12 The law should require that every person under arrest by a law enforcement officer be brought as soon as practicable to the officer in charge of the appropriate law enforcement office, whereupon the officer shall administer both orally and in writing the formal warning contained in Proposal 7. This explains to the arrested person that he is under no obligation to answer questions but that an adverse inference may be drawn by the court from a failure to answer. The formal warning also advises the arrested person that he is entitled to make any statement he wishes in connection with the alleged offence and specifically asks if he has any complaint concerning the circumstances of his arrest or any treatment he has received since his arrest (Proposal 7). It is envisaged that the Duty Officer should not simply read this formal warning to the arrested person but should explain it so that the arrested person understands his position (paragraph 6.23).

7.13 We recommend that the formal warning should be a printed form with serialised numbers contained in and detachable from a book. The Duty Officer should complete the details on the form from information provided by the arresting officer. One copy of the form should be given to the arrested person, one copy should be retained for record purposes and the original should be kept for use in court (paragraph 6.25).

7.14 Any complaint received by a Duty Officer should be referred by him immediately to CAPO or the appropriate body for investigation (paragraph 6.30).

7.15 All arrested persons in custody should be at liberty to communicate privately with a family member, friend or lawyer unless this would materially impede the investigation (paragraph 6.32).

7.16 The original of the formal warning retained by the Duty Officer should be admissible into evidence without further proof (paragraph 6.33).

7.17 The law should be clarified and amended to provide that an arrested person should be brought before a Magistrate as soon as practicable and in any event within 48 hours after his arrest (paragraph 6.34). Legislation should be introduced similar to the Independent Commission Against Corruption (Treatment of Detained Persons) Order, Cap. 204 to regulate the detention of persons in police custody (paragraph 6.35).

7.18 The law should require that when a person has been charged with a criminal offence, and when the prosecution may seek to adduce in evidence at the accused's trial evidence of :-

(a) statements made by the accused to a law enforcement officer; or

(b) answers made by the accused to questions put by a law enforcement officer; or

(c) the accused's failure to answer questions put by a law enforcement officer,

the accused shall be brought within 24 hours of being charged before a Justice of the Peace who shall inform and inquire of the arrested person in the terms of the record of interview set out at Proposal 8. This interview is designed to give the accused the opportunity to raise any complaint as to his treatment since arrest. If the prosecution seeks to adduce evidence of a statement made by, or of questioning of, the arrested person after he has been charged, he shall again be brought before the justice of the Peace and interviewed in like terms. (Proposal 8).

7.19 We recommend that a panel of Justices of the Peace be established to ensure that a panelist will be available to attend a police station as and when required (paragraph 6.37). We recommend that those conducting the interview under the procedure outlined at Proposal 8 be appointed as Justices of the Peace (paragraph 5.04). All those appointed should be able to speak English and Cantonese or another Chinese dialect and be able to read and write both English and Chinese. Panelists should be seen to be independent of the police, judiciary and the prosecution process (paragraph 6.38). All panelists should be required to attend an induction course to familiarise them with their duties (paragraph 6.39).

7.20 We recommend that the interview by the panelist should be tape recorded (Proposal 8). We recommend that the panelist should have the authority to direct that the suspect be transferred immediately from police to

gaol custody and that the transport be provided by the Director of Correctional Services (paragraph 6.41). Any complaint made to the panelist should be referred directly to CAPO for investigation (paragraph 6.42).

7.21 We recommend that the record of interview by the panelist should be admissible as evidence of its contents. Where there is a dispute as to the accuracy of the panelist's record, the trial judge would be able to listen to the tape to check the accuracy of the record (Paragraph 6.48). The panelist should not be a competent witness for the Crown or the defence (paragraph 6.49).

7.22 In Proposal 9 we propose that the law should be amended to provide for the following :-

In any criminal proceedings :-

(A) Any statement made by an accused to a law enforcement officer and any record of interview between an accused and a law enforcement officer shall be admissible in evidence where :

(i) the procedures required by Proposal 8 have been complied with and, in the opinion of the judge, it appears from the record of such procedures signed by a panelist in accordance with the requirements of Proposal 8 that the statement or record sought to be admitted in evidence was not:

(a) obtained by means which involved actual or threatened violence, force or other form of physical compulsion to the accused; or

(b) obtained by means or in circumstances likely to cause any material part of such statement to be untrue or such record to be misleading;

or, (ii) the procedures required by Proposal 8 have not been complied with but the defence does not object to the admission of the statement or record.

(B) The judge shall not admit a statement or record in evidence where he is of the opinion that it appears from the record of the procedures referred to in sub-paragraph (i) of paragraph A of this Proposal that the statement or record was obtained by means, or in circumstances, which involved violence, force or some other form of physical compulsion unless he is satisfied beyond reasonable doubt, after due enquiry, that the statement or record sought to be admitted in evidence was not so obtained.

(C) The judge shall not admit a statement or record in evidence where he is of the opinion that it appears from the record of the

procedures referred to in sub-paragraph (i) of paragraph A of this Proposal that the statement or record was obtained by means or in circumstances (other than those referred to in paragraph B of this Proposal) likely to cause any material part of such statement to be untrue or such record to be misleading unless he is satisfied on the balance of probabilities, after due enquiry, that the statement or record sought to be admitted in evidence was not so obtained.

(D) In every trial before a judge and jury, any question to be determined by the judge under paragraph A, B or C of this Proposal shall be determined by him in the absence of the jury.

(E) No statement made by an accused to a law enforcement officer and no record of any interview between an accused and a law enforcement officer shall be admissible in evidence where the requirements of Proposal 8 have not been complied with unless

(i) the defence does not object to the admission of the statement or record; or

(ii) the judge is satisfied that there were special circumstances beyond the control of the law enforcement officer which rendered it impracticable to so comply.

(F) In every trial before a judge and jury, the question whether there were special circumstances referred to in Paragraph E of this Proposal shall be determined by the judge in the absence of the jury.

Nothing in this Proposal shall prevent an accused from challenging, or in any way limit or restrict the right of an accused to challenge, the truth or accuracy of any statement made or alleged to have been made by him or of any record of an interview between himself and a law enforcement officer or the weight to be given to any such statement or record but in a trial before a judge and jury, such challenge shall be made in the course of the trial and in the presence of the jury.

For the purposes of this Proposal, "statement" or "record" includes any part of a statement or record and a part of a statement or record shall not be excluded from evidence by reason only that some other part of such statement or record is excluded from evidence. (Proposal 9)

7.23 The law should be clarified so that the fact that a statement or record of interview is wholly or partly excluded by virtue of any of the foregoing proposals shall not affect the admissibility in evidence :-

(a) of any facts discovered as a result of the statement or record of interview; or

(b) as regards any fact so discovered, of the fact that it was discovered as a result of a statement made by the accused; or

(c) where the statement or record of interview is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the statement or record of interview as is necessary to show that he does so (Proposal 10).

第七章 建議概要

7.01 關於把警方會見被告人的過程錄音的問題，英國現正進行研究，本委員會建議，一俟研究有結果，本港應立刻徹底考慮該問題（第 5.32 段）。

7.02 法例應當清楚闡明，執法人員擁有合法權力，可訊問其認爲能提供資料的任何人士，以協助調查任何違法事件或懷疑違法事件；但無論如何，該等人員的拘捕或進入樓宇的權力不得因此而擴大。執法人員在進行調查的各階段均可運用此項權力，但若在起訴被捕人後，則只限在特殊情況下，例如：獲得新證據；或爲避免或減輕對其他人、財產或公眾人士造成嚴重傷害或損失，方可行使該項權力（第一項建議）。

7.03 本委員會建議，如執法人員行將拘捕某人，並欲訊問或進一步訊問該人，則應使用第五項建議乙部所規定的方式，先行口頭上警戒該人（第 6.02 段）。

7.04 執法人員將該人拘捕，並給予口頭上警戒後，可以在直至被捕人遭起訴爲止的期間內，自由繼續訊問被捕人（第 6.03 段）。在進行起訴手續後，只限在特殊情況下，方可再行訊問被捕人；但在訊問之前，必須再次使用第五項建議乙部所規定的方式，先行口頭上警戒被告人（第 6.04 段）。

7.05 法例應當清楚闡明，因違法事件被捕並由執法人員羈押的嫌疑犯，應有權作出關於該違法事件的口頭或書面供詞。嫌疑犯應隨時獲得運用此項權利的機會和所需的措施（第二項建議）。執法人員在每次會見被捕人之後，均應詢問被捕人是否擬就有關受調查事項作任何供詞（第 6.06 段）。

7.06 法庭應把被告人承認事實之行爲，當作一項考慮輕判之重要因素（第三項建議）。

7.07 法庭不得僅因被告人保持緘默，或僅因被告人作出虛僞供詞，而將其定罪。在查詢過程中，如一切均遵照第八項建議進行，但被告經正式警戒後，拒絕回答執法人員的問題、或對有關問題給予不真實的答案，而陪審團經考慮一切有關的情況之後，括被告人可能曾經向會見人員、或第八項建議所述的太平紳士、或法庭所提出的解釋，認爲作出不利於被告人的推斷是合理而正確的，則陪審團在法律上有權作出此項推斷。此外，嫌疑犯所給予

的任何答案、或對問題拒絕作答，均可作爲主審法官、辯方律師及控方對案情評論的主題（第四項建議）。

7.08　法例應當規定，執法人員在拘捕任何人士後，在可行之情況下應盡快用第五項建議所載的口頭警戒詞甲部，口頭上警戒被捕人。如執行拘捕人員其後擬訊問嫌疑犯，應使用第五項建議所載的口頭警戒詞乙部，口頭上警戒嫌疑犯。即使在執行拘捕後，負責該項拘捕的人員不擬訊問被捕人，但當被捕人被帶到警署後，警署的值日官應將第二項建議所規定的權利，告知被捕人（第 6.16 段）。

7.09　執法機構的常務訓令須規定：

(i) 執法人員須將其在執行拘捕前或後向被捕人所提出的任何涉及受調查案件的陳述和問題，以及被捕人的答話予以筆錄；

(ii) 完成筆錄後，執法人員須按照被捕人的選擇，將紀錄交給被捕人親自閱讀，或向被捕人讀出；並在可行的情況下，盡快將一份紀錄副本交給被捕人保存；

(iii) 有關人員須請被捕人將其本人對紀錄的準確性所擬表達的意見，自行記錄在紀錄上，或由別人代爲記錄。被捕人亦應有機會依其意願在紀錄上補加任何供詞；

(iv) 在結束會見時，有關人員須請被捕人在紀錄上簽署，以表示被捕人同意有關紀錄的準確性；

(v) 紀錄內容須包括下開詳情：（a）口頭警戒詞；（b）會見的日期、時間和地點；（c）進行會見時在場人士的詳細資料；及（d）若被捕人拒絕在紀錄上簽署，則須在紀錄上附有被捕人拒絕簽署及其拒簽理由的證明；及

(vi) 除非人命或財產受到嚴重威脅，或爲公眾利益起見，否則與嫌疑犯的會見不應持續超逾兩小時。在每兩次會見之間，嫌犯最少應有十五分鐘時間休息。在每二十四小時內，與嫌疑犯會見不得超過十二小時（第六項建議）。

7.10　本委員會建議立法制訂一套劃一的操作守則，供執法機構在處理有關拘留及訊問等事情時作一般的應用。港督會同行政局得定期檢討這套守則，遇有人員的行爲違反或忽略操作守則的規定，而所犯過失不屬刑事罪者，則應對有關人員採取內部紀律處分（第 6.17 段）。

7.11　法庭在研究據稱爲被告人所作的供詞能否接納爲呈堂證據時，毋須考慮到有關人員觸犯執法機構的常務訓令的問題，除非根據有關法例的建議修訂，這問題可令供詞變成不能被法庭接納，則屬例外。就有關違反常務訓令事宜，法庭得將有關個案轉介投訴警察科或其他負責的組織查訊。本委員會認爲應按照兩局非官守議員警方投訴事宜常務小組監察投訴警察科的模式，設立一個制度，以監察所有轉介的個案（第 6.18 段）。

7.12　法例應規定執法人員在可行的情況下，須盡快將被捕人帶返執法機構辦事處向主管人員報告。主管人員須按照第七項建議內的正式警戒詞向被捕人出口頭及書面警戒，向他解釋他並非必須就所提出的問題作出答覆，但法庭可能會因他不答覆問題而作出對他不利的推斷。該份正式警戒詞亦告知被捕人他有權就指控的罪項作出任何供詞，以及特別詢問被捕人是否對被捕的情況與被捕後所遭受的對待有任何投訴（第七項建議）。本委員會認爲值日官不只須向被捕人讀出正式警戒詞，還須向他解釋，使被捕人明白其所處的情況（第 6.23 段）。

7.13　本委員會建議正式警戒詞應印成表格，每份本身附有編號，用時可逐份自簿冊撕下。值日官須將執行拘捕人員所提供的資料填在表格內；並將一份副本交被捕人保存，一份作存案紀錄，正本則留備呈交法庭作證用（第 6.25 段）。

7.14　值日官倘若接到任何投訴，應立即向投訴警察科或適當的機構報告，以便進行調查（第 6.30 段）。

7.15　所有受羈押的被捕人，應有權私下與一名家人、朋友或律師通訊，除非此舉實質上會妨礙調查工作的進行（第 6.32 段）。

7.16　由值日官保管的正式警戒詞正本，應不須進一步證明便可由法庭接納爲呈堂證據（第 6.33 段）。

7.17　有關法例應獲闡釋及修訂，以規定在可行情況下，盡快將被捕人解往裁判司面前應訊；無論如何，此項行動亦要在其被捕後四十八小時內執行（第 6.34 段）。當局應參照香港法例第二 O 四章總督特派廉政專員公署（對待受拘留人士之辦法）令的規定，立例管制有關受警方羈押人士的拘留辦法（第 6.35 段）。

7.18　當執法機構以刑事罪名起訴某人，或控方有意在被告人的審訊過程中援引下列名項證據：—

(a)　被告人向執法人員所作的供詞；或

(b) 被告人對執法人員的訊問所作的回答；或

(c) 被告人未能回答執法人員的訊問，

法律應規定有關方面須在對被告人提出起訴二十四小時內，安排被告人會見一位太平紳士，該位太平紳士應依照第八項建議所載有關會見紀錄的措辭，告知及詢問被告人。這項會見的目的，在給予被告人機會，就其被捕後所受到的待遇，提出任何投訴。倘若控方有意援引被捕人在起訴後所作的供詞或執法人員對他的訊問作爲證據，則有關方面應再次安排該名被捕人會見一位太平紳士，會見將依照同樣方式進行（第八項建議）。

7.19 本委員會建議成立一個以太平紳士爲成員的專責小組，確保在有需要時，該小組一位成員能前往警署，會見被告人（第 6.37 段）。本委員會建議那些根據第八項建議所列的程序主持會見的人士應獲委任爲太平紳士（第 5.04 段）。所有獲委任的人士應能說英語及粵語或另一種中國方言，並能閱讀及書寫英文和中文。該小組之成員應有獨立地位，與警方、司法部和控訴程序沒有關連（第 6.38 段）。爲了使該小組之成員熟悉其責任，當局應規定所有成員須參加一個熟習職責的課程（第 6.39 段）。

7.20 本委員會建議用錄音帶將該小組成員主持會見的過程記錄下來（第八項建議）。本委員會建議該小組之成員應有權下令立即將嫌疑犯由警方轉交監房羈押；交通工具則由懲教署署長提供（第 6.41 段）。該小組之成員應將所接獲的投訴，直接提交投訴警察科，以便進行調查（第 6.42 段）。

7.21 本委員會建議該小組成員會見被告的過程紀錄，可接納爲會見內容的證據。倘若對該小組成員的會見紀錄的準確性出現爭論，主審法官可以聆聽錄音帶，以查證紀錄的準確性（第 6.48 段）。該小組成員不得出任爲控方或辯方具法定資格證人（第 6.49 段）。

7.22 本委員會在九項建議提出修訂法例，目的在對下列事項作出規定：—

在任何刑事訴訟中：—

(甲) 被告人向執法人員提供的任何供詞，以及被告人與執法人員之間的任何會見紀錄，均可由法庭接納爲呈堂證據，但以符合下開情況爲限：

(i) 該等供詞及會見紀錄必須依照第八項建議所規定的程序錄取；而且法官認爲，從該項由一名專責小組成員根據第八

項建議的規定而簽署的程序紀錄看來，擬作呈堂證據的供詞或會見紀錄，並非是：—

(a) 向被告人使用手段，包括實際施用或恐嚇施用暴力、武力或其他方式的體力壓迫而獲得；或

(b) 採用手段或在某種情況下獲得，而該種手段或情況可令被告人供詞之任何重要部分與事實不符，或使有關之會見紀錄有誤導別人之處；

或(ii) 該等供詞及會見紀錄雖未有依照第八項建議所規定的程序錄取，但辯方並不反對法庭接納其爲呈堂證據。

(乙) 倘法官認爲，從本項建議甲段（i）節所指的程序紀錄看來，被告人的供詞或會見紀錄是在採用某種手段或在某種情況下獲得，而該等手段或情況涉及暴力、武力或其他方式的體力壓迫，則不應接納其爲呈堂證據。除非法官在作出適當的查訊後，認爲並無疑點，相信擬作呈堂證據的供詞或會見紀錄並非如此獲得，則作別論。

(丙) 倘法官認爲，從本項建議甲段（i）節所指的程序紀錄看來，被告人的供詞或會見紀錄是因採用某種手段或在某種情況（並非本項建議乙段所指者）下而獲得，而該種手段或情況可導致該項供詞的任何重要部分與事實不符，或該項會見紀錄有誤導別人之處，則不應接納其爲呈堂證據。除非法官在作出適當的查訊及衡量各種可能性後，認爲並無疑點，相信擬作呈堂證據的供詞及會見紀錄並非是如此獲得，則作別論。

(丁) 在有法官及陪審團的審訊程序中，如有本建議第甲、乙或丙段所述的任何由法官決定的問題，陪審團應退席，由法官自己決定。

(戊) 倘未有遵照第八項建議所規定的程序辦理，則被告人向執法人員所作的供詞及被告人與執法人員會見的紀錄，均不應被採納爲呈堂證據。除非遇有下列情況，則作別論：

(i) 辯方不反對接納該供詞或紀錄爲呈堂證據；或

(ii) 法官相信確有執法人員無法控制的特殊情況存在，以致執法人員不能遵照有關規定辦理。

(己) 在有法官及陪審團的審訊程序中，是否有第九項建議（戊）段所指的特殊情況存在，則應在陪審團退席後由法官決定。

本建議的任何部分，不應妨礙被告人對任何其所作的供詞或被指稱爲其所作的供詞、或其與執法人員的任何會見紀錄的真實或準確性表示異議，亦不應妨礙被告人對該供詞或會見紀錄的受重視程度表示異議；同時，亦不應在上述任何方面限制或約束被告人表示異議的權利。在有法官及陪審團的審訊程序中，任何異議應在審訊期及有陪團出席時提出。

就本建議而言，「供詞」或「紀錄」包括供詞或紀錄的任何部分；亦不應只因該供詞或紀錄的其他某些部分不被接納爲呈堂證據，而拒絕接納其中一部分爲呈堂證據（第九項建議）。

7.23 有關法例應闡明，縱使因任何上述建議而致供詞或會見紀錄的全部或部分不被接納爲呈堂證據，亦不應影響下述各項獲法庭接納爲呈堂證據：

(a) 因供詞或會見紀錄而引致發現的任何事實；或

(b) 就如此發現的任何事實而言，因被告人所作的供詞而引致發現的事實；或

(c) 當供詞或會見紀錄顯示被告人以某種特別方式說話、書寫或表達自己時，則該供詞或會見紀錄中足以顯示被告人如此說話、書寫或表達自己的有關部分（第十項建議）。

Chapter 9

Minority Report

9.01 The issues discussed in this Report are notoriously controversial and it is perhaps not surprising that members of the Commission were unable to agree on all of them. As a result, this minority report expresses the views of those members who do not support certain of the recommendations which have been made.

9.02 The recommendations not endorsed by the minority are Proposal 4 which would enable the judge, defence counsel and prosecution to comment on an accused's refusal to answer questions put to him by a law enforcement officer and would entitle the jury to draw an adverse inference against the accused because of such refusal and the parts of Proposals 5B and 7(4) which entail a warning of these consequences being given to a person before he is questioned and after he is charged. The reasons why the minority does not support these proposals are set out below.

The existing law

9.03 The existing law concerning police questioning of suspects and the consequences of a suspect's remaining silent have been set out fully earlier in this Report. The main features of the present law are as follows -

(a) as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence the officer must caution the suspect in the following terms -

> *"you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence";*

(b) during the trial of the accused, no adverse inference may be drawn from his silence in the face of police questioning.

Whether these principles can be correctly labelled "a right to silence" is not, in our view, in issue. What is important is that these principles have been recognised under English and Hong Kong Law for over half a century and are regarded by many people as fundamental safeguards. Any proposal for the abolition of these rules must therefore be supported by most cogent reasoning.

Arguments for changing the existing law

9.04 The reasons put forward for these proposed changes to the present law may be summarised as follows -

(i) the present rules are no real safeguard for suspects since the right of silence is only rarely exercised (para. 4.21);

(ii) juries may at present be drawing an adverse inference from the accused's silence (para. 4.19) and so a suspect should be informed of what may in reality be the consequences of his refusal to speak (para 4.16);

(iii) juries should be trusted to draw an adverse inference only where this is warranted (para 4.23);

(iv) the views of the English Criminal Law Revision Committee are "more appropriate to Hong Kong" than the majority view of the Royal Commission on Criminal Procedure (para 6.15).

Our views on these arguments are set out below.

9.05 The fact that few suspects may exercise their right to be silent is not, in our view, any reason for altering the consequences for those who do remain silent. If the right is beneficial it should be maintained and members of the community educated as to its existence.

9.06 It is said that juries may, in fact, draw adverse inferences from silence. Even if this may sometimes be the case, the fact remains that neither the prosecuting counsel nor the judge may invite the jury to draw such an inference, and defence counsel may remind the jury that the accused was perfectly entitled to remain silent. We do not believe that the proposed changes are for the benefit of the accused. If the law is amended, so that the jury can be instructed by the judge that they may take into account the accused's silence in deciding whether to convict, this must inevitably benefit the prosecution.

9.07 It is further argued that the proposed changes in the law will protect a suspect from being wrongly convicted because the jury can be trusted not to hold his silence against him unless in all the circumstances an adverse inference is warranted. This argument was put dramatically by Sir Rupert Cross (see [1973] Crim. L.R. 335) when he said that if we cannot trust jurors and magistrates to empathise "we must consider the possibilities of alternative modes of trial." In considering this argument it must be remembered that there are many rules of law which prevent the jury being trusted to evaluate evidence fairly. For example juries are normally prevented from listening to hearsay evidence and to evidence of the accused's past convictions. Many of these exclusionary rules are based on the belief that the prejudicial effect of the evidence outweighs its probative value. The argument that juries must be trusted to evaluate the accused's silence overlooks the

possibility that this type of evidence, if commented on by the prosecution and judge, may be unduly prejudicial. We return to this point later when considering the arguments against the proposals.

9.08 The majority report has referred to the conflicting views held on this topic by the English Criminal Law Revision Committee (CLRC) and the Royal Commission on Criminal Procedure. It is suggested that the views of the CLRC are "more appropriate to Hong Kong" than those of the Royal Commission. This point is a bald assertion with no supporting reasoning. The CLRC report suggested that "hardened criminals often take advantage of the present rule to refuse to answer any questions at all". No evidence has been produced to show that such a problem exists in Hong Kong. On the contrary, a representative of JUSTICE has denied that such a problem exists. The experience of members of JUSTICE practising regularly in the criminal courts is that it is very unusual for a suspect in Hong Kong to refuse to answer questions. People in Hong Kong are still relatively less educated than those in the U.K., are not so well aware of their rights, and have a fear of the police. This makes them more vulnerable to pressure from the police and indeed the experience of members of JUSTICE has been that suspects will often give untruthful answers because they think that a truthful answer may not be believed.

9.09 It is important to note that Proposals 4, 5B and 7(4) are in any event considerably wider than the proposals of the CLRC. The CLRC recommendation was that -

> *"if the accused has failed, when being interrogated by anyone charged with the duty of investigating offences or charging offenders, to mention a fact which he afterwards relies on at the committal proceedings or the trial, the court or jury may draw such inferences as appear proper in determining the question before them". (para 32)*

Examples of the kind of facts which might be raised by way of defence were given -

> *"an alibi, belief that the stolen goods were not stolen, ... the defence to a charge of robbery that the accused was resisting an indecent assault by the prosecutor, consent ... , and innocent association ..." (para 33)*

The Royal Commission emphasised that the proposed new rule would only apply in a very small minority of cases (para 4.48). In contrast to these English proposals, Proposal 4 would allow an adverse inference to be drawn from the mere fact of silence, irrespective of whether the accused raises any specific type of defence at the trial. For example, an adverse inference might be drawn simply because the accused may have refused to give his name and address to the police. Since an accused is likely to fail to answer one or two questions put to him, the court or jury may be asked to draw an adverse inference in virtually all defended cases. This is quite different from the CLRC

proposal. The consequences of implementing such a recommendation are discussed in more detail below.

Arguments against the proposed changes

9.10 We have argued above that the case for a change in the law has not been made out. Our opposition to the recommendations in fact goes further than this. We believe that Proposals 4, 5B and 7(4), if implemented, would create undesirable consequences. We will consider these consequences at the different stages of a criminal investigation and prosecution.

Police questioning

9.11 Under the present law, as soon as the police have reasonable grounds for suspecting a person has committed an offence they must inform him that he is not obliged to say anything. Under the new proposals the police will not be required to give such a caution but may instead warn a person being interviewed that if he refuses to answer any question or gives an untrue answer an adverse inference may be drawn against him if he is prosecuted. Such a warning will undoubtedly put pressure on the person being interviewed. It is argued, however, that only the guilty need fear this proposal. We do not agree.

9.12 Any member of the community may face police questioning, and this can be a very disturbing experience. However innocent a person may be, he will be in an alien and intimidating environment. He may not be told what kind of offence is under investigation and the questioning may relate to a wide range of matters or events over a number of years. The police can already bring considerable psychological pressure to bear on people they are interviewing, and it must be remembered that the majority of these people are never charged with any offence. In our view it would be wrong to subject members of the community to the additional pressure which the proposed warning would create, for two reasons. First, we agree with the Royal Commission's view that it might increase the risk of innocent people making damaging statements. This view is supported by the submissions made to us by JUSTICE. Secondly, we believe that innocent people might feel a justifiable sense of resentment at receiving such a warning, which could be repeated constantly, and this could lead to a souring of relations between the police and the community.

9.13 There is another aspect of the proposal which causes us concern. There is no requirement that the police must have reasonable grounds for suspecting that a person has committed any offence before giving the proposed warning. The police could select any one for questioning and give him or her the warning. There is therefore a possibility that the police could use the proposed new procedures to stop and question people at

random. We consider that such a development would be an unacceptable invasion of people's civil liberties.

9.14 Returning to the contention that only the guilty suspect needs fear the new proposals, we think it is misleading to categorise all suspects as "guilty", or "innocent". It is easy to think of criminal investigations in simple, black and white, terms: a robbery has taken place - did this person do it? If he is guilty he should be pressured into confession whilst if he is innocent he has nothing to fear. The truth is far more complex. Whether any offence has been committed at all may be uncertain. The facts may be unclear (eg, is the complainant telling the truth?) or a difficult point of law or accountancy involved (eg, is the membership of a club "property" within the anti-corruption legislation?). Even if an offence has been committed, the question whether any particular person is criminally responsible may also be a matter of legal niceties. A person being interviewed in such cases does not know whether he has done anything illegal. Furthermore he may not be allowed to see a solicitor before answering the police questioning. Those in favour of the proposals might say that he should simply co-operate with the police and answer all questions truthfully. If this in fact results in his incriminating himself justice will be done. This leads us to one of our major objections to the proposals.

9.15 Under our system of law, every man is presumed innocent until proven guilty beyond reasonable doubt. It is for the prosecution to prove its case. It is not enough for the prosecution to say "I accuse". The accused has no need to answer questions by a law enforcement officer and he is free to exercise his established right of silence. If the proposals are implemented these fundamental principles would be undermined. A person who refuses to answer police questioning and says "you prove your case" faces the risk of being convicted partly because of his silence. The alternative is for him to strive to defend himself against police allegations which may be unsubstantiated and unspecified, in most cases without the aid of a lawyer. We do not believe that members of the community should be faced with this dilemma. A person should be entitled to remain silent under police questioning without the possibility of adverse inferences being drawn.

The accuracy of the record of silence

9.16 Under the proposals the fact that the accused remained silent under police questioning may have serious consequences for the accused. It is therefore vital that there should be an accurate record of the questions and answers. The police will normally prepare this record and ask the accused to sign it as his statement. However conscientiously this job is done by the police a written record can never adequately capture the tone and timing of the interview and the atmosphere in which it was conducted. The jury nevertheless will be asked to judge the accused on the basis of this record, not simply on account of what was said but on account of what was not said. We do not believe it is safe to do this.

9.17 Another difficulty to be faced in using silence as evidence is that in order to establish that the accused never mentioned a certain matter it will be necessary for the police to prepare a complete record of all exchanges. Without the aid of tape-recorded interviews we do not see how this will be possible. The police will have to prove a negative assertion - that a certain fact was not mentioned - and this is always difficult to do. If only an edited statement is prepared the jury can never be satisfied that the accused did not mention the matter relied upon by the prosecution.

The panelist system

9.18 It may be argued that the panelist system is designed to ensure that the record is accurate. Proposal 4 states that a jury, in deciding whether to draw an adverse inference from an accused's silence, should take into account any explanation given to the panelist who interviewed the accused. Proposal 8 sets out the series of questions which the panelist is to ask the accused. None of these questions calls for any explanation by the accused as to why he was silent and it is most unlikely that the accused will volunteer such information. There is no guarantee that the accused will have seen a lawyer before the interview and so in the vast majority of cases he will not realise the importance of explaining his silence. Instead of protecting an accused against unfair treatment the panelist system may well create unfairness, since a failure to explain the silence may strengthen the adverse inference which may be drawn by the jury.

The trial

9.19 Assuming that a statement is admitted in evidence which records the accused's failure to answer questions, the accuracy of that statement will still be open to challenge by the defence. Since adverse inferences may be drawn from such a failure it is likely that challenges will commonly be made. There will also be argument as to why the accused was silent. Trials will therefore be prolonged over a matter which we consider has little probative value and considerable prejudicial effect.

Conclusion

9.20 We conclude that the case for changing the present law has not been made out and that the proposals are in any event objectionable for the following reasons :-

(i) they would lead to unacceptable pressure on persons being interviewed by the police, which might sour police/community relations or cause innocent people to incriminate themselves;

(ii) they could lead to abuse by the police and interference with the civil liberties of members of the community;

(iii) they are contrary to the accusatorial system of criminal justice; and

(iv) the records of alleged silences would be unreliable and their prejudicial effect would outweigh their probative value.

The following members of the Law Reform Commission endorse the views expressed in the Minority Report :-

Mr. Robert Allcock
Mr. Graham Cheng
Dr. the Hon Henrietta Ip
Mr. David K.P. Li, JP
Mr. Brian McElney, JP
Mr. James O'Grady
Mr. Arjan Sakhrani QC, JP

Annexure 1

AN OUTLINE OF HONG KONG LAW AND PRACTICE RELATING TO THE ADMISSIBILITY OF CONFESSION STATEMENTS

THE PRINCIPLE

Evidence of a statement made by an accused person before trial, if given as evidence of its truth, is prima facie inadmissible as hearsay evidence. But, like other admissions, a confession is admissible under an exception to the hearsay rule. The reason for this exception is that what a person says against himself is likely to be true. However, evidence of such a statement cannot be tendered by the prosecution in criminal proceedings unless it was made "voluntarily", and it is the prosecution which bears the burden of proving that the confession was made voluntarily.

The classic formulation of the principle appears in Lord Sumner's speech in Ibrahim v. R [1914] AC 599, 609 : ... "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". This statement has been expressly approved by the House of Lords in 1967 and again in 1975 (Customs & Excise Commissioners v. Harz [1967] AC 760, and DPP v. Ping Lin [1975] 3 All ER 175) and has been consistently applied in the Hong Kong courts.

In applying this test, the intention of the interrogator is quite immaterial. In Ping Lin, the House of Lords were clear that it was not a relevant matter that the intentions of the interrogator(s) were honourable, nor that there had been no "impropriety" by the interrogator(s).

The inducement usually relates to the charge against the defendant. A simple Hong Kong example is provided in YAN Sum-cheuk v. R [1966] HKLR 288, where the court held that a confession should have been excluded because the prosecutor agreed that he had asked the defendant to plead guilty, and asked him not to be afraid as he would be given a very short term of imprisonment. The court held that this was an "obvious inducement". But inducements in relation to matters other than the charge itself may render the statement inadmissible (see, in English law, Harz and R v. Middleton [1975] QB 191 (CA)).

Express or implied inducements suffice. The promise or threat may be implied from the conduct of the person in authority, the declarations of the defendant, or the circumstances of the case (see, in English law, Gillis 11 Cox 69 and Zaveckas (1970) 54 Cr. App. R 202 (CA).).

Self-induced confessions are not excluded. If the person in authority makes it clear that he cannot offer anything in exchange for the confession, it will be admissible (see Ping Lin and Houghton & Franciosy [1979] 68 Cr. App. R 197. A good Hong Kong example is John Simon Wilson Cr. App. No. 918 of 1977 (CA)).

In English law, the weakest of inducements have been held to suffice, but the decisions are as different as the judges and defendants, even where the inducements seem to be the same. In R v. Cleary (1963) 48 Cr. App. R 116 (CA), the court excluded a confession because the accused's father said to the accused in the presence of police officers, "Put your cards on the table and tell them the lot". An effective contrast is R v. Bentley (1963) QWD 10, where the confession was admitted. There the interrogator had said, "If you do not tell the truth, you will get yourself into a tangle".

If the impression caused by the promise or threat is clearly shown by the prosecution to have been removed, e.g., by lapse of time or by any intervening caution given by some person of superior, but not of equal or inferior, authority to the person holding out the inducement, a confession subsequently made will be admissible. A Hong Kong example is CHENG Pak-hei, Cr. App. No. 42 of 1973, where Huggins J. held that a confession should not have been admitted on the grounds that an admittedly "slight" inducement might have survived for more than 20 minutes. Where the possibility of an inducement in the recent past has not been negatived, the prosecution must show that the effect of any inducement there may have been has been dissipated.

One addition to Lord Sumner's formulation in Ibrahim are the words ….. "or by oppression". In England, these words were added by principle (e) in the introduction to the Judges' Rules of 1964, and were recognized as a proper addition by some of the Law Lords in Ping Lin. In Hong Kong, the meaning of oppression given by Edmond Davies L.J. in R v. Prager [1972] 1 All ER 1114, and by Sachs J. in R v. Priestly [1965] 51 Cr. App. Rep. 1, has been accepted. The words import something which tends to sap and has sapped that free will which must exist before a confession is held to be voluntary. Oppressive questioning is that which by its nature, duration, and other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release), or fears, or so affects the mind of the suspect that his will crumbles, and he speaks when otherwise he would have remained silent. Not only are all the circumstances important, but also their actual effect upon the defendant has to be considered (see LI Wai-fat & Ors v. R [1977] HKLR 531).

The test of oppression was referred to in LI Wai-ming & Anor v. R [1965] HKLR 631 and in LAM Tuk-yu v. R, Cr. App. No. 111 of 1968, and was expressly adopted by Silke J.A. in CHENG Ho-shing v. R, Crim. App. No. 356 of 1981. In Lo Sun-wa Cr. App. No. 538 of 1979, the Court of Appeal held that answers to questions put to a person in custody are not admissible if the questions are asked in circumstances which amount to pressure of such a nature as to sap the will and make the subject talk. The court was unable to

say that long interrogation necessarily saps the will of the defendant. Whether it does or not depends upon the circumstances of each individual case; some defendants are overborne very easily, others never. But the court emphasised that admissions obtained from long interrogations will be viewed with suspicion by the courts.

The trial judge must rule on the admissibility of the confession and satisfy himself that it was voluntary before admitting it into evidence. This is done in the voir dire or as it is sometimes called the "trial within a trial", in the absence of the jury. If admitted, the jury decides what weight and value to give to the confession. The jury's view will be affected by the evidence of the circumstances in which the statement was obtained, and defence counsel is perfectly entitled to, and invariably does, cross-examine again the police witnesses who gave evidence in the voir dire.

It seems that the judge can reconsider his decision to admit the confession in the light of further evidence in the trial on the main issue but it will be rare: CHAN Chun-ming v.R Cr. App. No.452 of 1980 (Liu J.) following R v. Watson [1980] 2 All ER 293 (CA). CHAN seems in conflict, however, with the earlier case, not referred to in CHAN, of LI Kam Ming & Anor [1967] HKLR 513, where McMullin J. held that once a confession is admitted, it forms part of the total evidence adduced, and it is not open to the judge to reverse his ruling and hold it inadmissible because of evidence subsequently adduced; the effect of such evidence would only go to the weight of the confession statement.

Where the defendant intends to challenge the admissibility of the confession, he should inform the prosecution before the trial begins of his intention, and must, in fair detail, say what his allegations will be : LI Ming-kwan [1973] HKLR 275. Clearly, the prosecutor should not refer to the confession in his opening remarks to the jury when the prosecution case is outlined. When the police witness is called who is to tender the confession, defence counsel will request a voir dire to test admissibility.

In LAM Tuk-yu v. R, Cr. App. No. 111 of 1968, Blair-Kerr, Huggins, and Pickering JJ disapproved strongly of the "back-door" practices of prosecuting counsel, designed to avoid the rules as to proof of voluntariness. They held that "if the accused has made an incriminating statement and it has not been proved that this statement was voluntary and admissible, the courts must ever be on guard to ensure that the contents of such a statement are not in effect introduced into evidence against an accused person by the back door under the guise of cross-examination as to credit" (P.9). On the facts, Crown Counsel did not inform the jury expressly that he was cross-examining from a document not proved to be admissible in evidence, but the jury may well have concluded that counsel was basing his question on some statement made previously by the appellant.

Whenever a confession is admissible, it is by itself sufficient to support a conviction : LUI Chik-wah [1975] HKLR 359, 361. O'Connor J in R v. TO Kai-sui (supra) held that where the only evidence supporting the

conviction is a confession statement "these matters call for a particularly careful scrutiny and evaluation of the evidence by the trial judge" (P.445). It should also be noted that it is no bar to the admission of a confession that it is wholly oral, and a conviction based upon an oral confession alone may be upheld by an appeal court. A Hong Kong example is WONG Hing-chung [1973] HKLR 625. (See also R v. Mallinson [1977] Crim. LR 161 and R v. Pattinson (1973) 58 Cr. App. Rep. 417, 424).

WHY ARE INVOLUNTARY CONFESSIONS EXCLUDED?

The rationale of the principle upon which admissibility is based is complex, confused, and embedded in history. In order to judge the efficacy of the principles of admissibility, however, it is essential to know what purpose or purposes those principles are designed to serve. At least three separate strands are identifiable. These justifications will be referred to as the Reliability Principle, The Disciplinary Principle, and The Principle of Non-Incrimination.

The justification of the Reliability Principle is that a confession not made voluntarily may not be reliable, or that a confession proved to be voluntary is more likely to be reliable than an involuntary one. This was the view of the Criminal Law Revision Committee in their 11th Report on Evidence (Cmnd. 4991): "We have no doubt it is the reliability principle which historically underlies the law" (Para. 56).

That the Reliability Principle is not 'water-tight' may be readily demonstrated by 2 obvious anomalies. First, if a confession not made voluntarily may be unreliable, it does not necessarily follow, that all involuntary confessions are unreliable (and consequently inadmissible). The answer to the objection might well be to accept that some "rejected", or inadmissible, confessions could indeed be reliable, but to acknowledge, at the same time, the difficulty in finding a better sifting process than the present test of voluntariness.

The second objection, in reality a variation of the first, is that under the present law an involuntary confession remains inadmissible even though it may be true. In CHAN Wai-keung v. R [1966] HKLR 837, the Privy Council held that the truth of the confession is not directly relevant at the voir dire (although, of course, it is a crucial question for the jury if the judge admits it). More consistent with the Reliability Principle was the reaction of Huggins J. in LI Ming-kwan & Anor v. R [1973] HKLR 275, that if a statement is admitted to be true it would be absurd for a judge to reject it even if it was involuntary. However much that sentiment may be respected, nevertheless it must be recognised that unless the defendant himself volunteers the information as to the truth of the confession, which will be rare, the prosecution are forbidden from tackling the issue of the truth of the confession on the voir dire (see Wong Kam-ming, infra). The answer to this second objection is the same as the reply to the first.

The justification of the Disciplinary Principle is in terms of discouraging improper police methods of obtaining confessions.

The Disciplinary Principle gives rise to many anomalies and questions, some of which follow :

(i) a police officer may render a statement involuntary by answering truthfully a question put to him by a suspect, e.g., "If I confess, am I likely to get more lenient treatment from the judge?". Answer :"Yes";

(ii) there is no proof that the principle is, in effect, a deterrent to improper police procedures;

(iii) is the law of evidence an appropriate method of regulating police methods of law enforcement? Would this not be better left to police supervisory and disciplinary procedures?;

(iv) it appears inconsistent to exclude involuntary confessions with a view to deterring undesirable police practices and at the same time to admit evidence of facts discovered because of a "lead" obtained in the course of that confession (see R v. Warwickshall (1783) 1 Leach 263);

(v) there is a larger question of inconsistency because it is now clear, after R v. Sang [1980] AC 402, 437, that a judge has no discretion to refuse to admit otherwise admissible evidence on the grounds that it was obtained by improper or unfair means "save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence".

The justification of the Principle of Non-Incrimination is that a person should not be put under pressure to incriminate himself.

If any one or more of these three justifications for the principle are accepted (along with their limitations), these must be set against the drawbacks of the present state of the law and procedure that if the statement is admitted, the whole issue of voluntariness may and usually will be repeated before the jury; witnesses who give their evidence twice on the same issue, with the advantage of a "rehearsal", may be less spontaneous; and the objections of time and cost consumption.

In England, the Criminal Law Revision Committee clearly espoused the Reliability Principle, and this was reflected in their recommendations. Reviewing the principle, they took the view that the law should be preserved in general but with a relaxation of the strict rule that any threat or inducement makes a confession inadmissible. They proposed to preserve the rule that threats, inducements, or oppression make a resulting confession inadmissible, but provided that this should not apply to all threats

or inducements but only to those likely to produce an unreliable confession. Inadmissibility on account of oppression was to remain. A threat or inducement should render a resulting confession inadmissible only if "of a sort, likely in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof". Equally, in reliance upon the Reliability Principle, they proposed no change to the burden and standard of proof, the voir dire procedure generally, or to the process of post voir dire cross-examination of prosecution witnesses about the way in which the confession was obtained (with a view to the issue of weight which the jury attach to the confession).

PERSONS IN AUTHORITY

It is only admissions to persons in authority which are required to be proved to be voluntary; incriminating admissions to persons not in authority do not have to be proved to be voluntary before they may be admitted into evidence.

A person in authority has been defined as anyone who has authority or control over the accused or over the proceedings or the prosecution against him (approved by Viscount Dilhorne in Deokinanan v. R [1969] 1 AC 20). Normally, the person in authority will be a person engaged in the arrest, detention, examination, or prosecution of the defendant. In MA Wai-fun v. R [1962] HKLR 61, it was held that a Government psychiatric specialist, to whom a confession was made, was not a person in authority, and that the admissions made by the appellant to him in the course of a clinical interview were admissible in evidence.

The Privy Council has doubted the justification for this rule but considers it well-established. An obvious question which arises is why there is no similar risk that a confession may not be true if induced by a threat or promise held out by a person not in authority, e.g. a bribe is offered in return for a confession.

The Criminal Law Revision Committee recommended that the existing distinction should be abolished (Para. 58) : "Apart from the fact that the concept of a 'person in authority' seems to us an unnecessary complication of the law, we regard as decisive the point mentioned by Viscount Dilhorne ….. in Deokinanan v. R, that the risk that an inducement will result in an untrue confession is similar whether or not the inducement comes from a person in authority. The abolition of this distinction will, as far as it goes, be a relaxation of the law in favour of the defence".

JUDICIAL DISCRETION

A confession may be excluded by a judge, even if he is satisfied that it was made voluntarily, pursuant to the inherent judicial discretion to exclude any evidence which might operate unfairly against the accused, or

(possibly) if it was obtained in circumstances amounting to a breach of the Judges' Rules.

However, a decision whether a statement is voluntary and admissible in law is in no way dependent upon any discretionary power of the trial judge. If it is voluntary, it is admissible. It is only after it has been held voluntary and admissible that any discretionary power to exclude it from evidence can arise. There is no discretion to admit into evidence a statement which is not voluntary (inter alia, per O'Connor J in TO Kai-sui & Ors v. R Cr. App. No. 1189 of 1979 (CA).

There is confusion whether breach of the Judges' Rules activates a discretion to exclude for that breach simpliciter. In LO Sun-wa & Ors v. R Cr. App. No. 538 of 1979 (CA), although in this case there was a caution, and no evidence of pressure, threats, or inducements, the court proceeded to consider the "reliability" of the recorded confession. It was held that on this basis a confession may be excluded despite its voluntary nature in exercise of the overriding discretion. This appears to be what Downey DJ did in R v. NG Wing-hung Case No. 324 of 1981 (District Court), where he concluded that some statements were not voluntary, but went on to say that even if they were, he would have excluded them on the basis that they were obtained unfairly and in clear breach of the spirit of the Judges' Rules.

These cases must be contrasted with a stricter view exemplified by Huggins J. in R v. LEUNG Lai-por & Ors [1978] HKLR 202 at 208, where it was held that if a voluntary statement is to be excluded in the exercise of the judge's discretion, the basis for such exclusion must be, or at least include, something other than a failure to follow the advice given by the judges to the police. Failure to observe the Judges' Rules was not "irrelevant"; such conduct may tend to show that the confession was not "voluntary".

Reported Hang Kong examples of the exercise of the discretion are rare. In CHENG Pak-chang v. R Case No. 61 of 1979, the discretion was not exercised on the facts, but Roberts C.J. approved the test of the English Court of Appeal in R v. Isequilla [1975] 1 WLR 716, that a confession made by someone of low mental capacity might be excluded if it were thought it would be of such unreliability that it would be unfair to admit it, even if the statement was otherwise admissible in law.

THE BURDEN AND STANDARD OF PROOF

The burden of proving the voluntariness of the confession lies on the prosecution, and the standard required is proof beyond reasonable doubt (POON Chi-ming [1973] HKLR 414, R v. Sartovi (1961) Crim. LR 397 (CCA) and DPP v. Ping Lin, supra).

The Hong Kong cases show that this test of "reasonable doubt", criticised by some as too great a prosecution burden, has been one of the most effective tools in excluding confessions. An example of failure to satisfy

the burden of proof of voluntariness arose in respect of the third appellant in LEUNG Lai-por & Ors [1978] HKLR 202 (at 211). In that case there was the unexplained fact that the first 21 questions put to the appellant were identical as to the order put and as to the language in which they were couched, to the first 21 questions previously asked of the second appellant. The court recognised that there could be a perfectly innocent explanation; but none was given. This failure to explain the coincidence left it uncertain how the confession of the third appellant was obtained, and that uncertainty made it impossible to say that the burden of proof on voluntariness was discharged.

Similarly and more dramatically in CHAN Hung v. R [1961] HKLR 721, the court held that it would strike anyone reading a number of confession statements that the appellant should have been able to remember in such detail not only the time and exact place at which he committed each theft, but also the details of the number and type of tools stolen on each occasion. He also confessed to the theft of tools on dates when it was clearly established that he was in prison. The court refused to believe that the confessions were free and voluntary. The court found irresistible the inference that the confession was prepared by someone on the basis of information derived from the respective owners of the stolen property. The court expressed its disquiet at the large number of cases that came before it in which retracted admissions or confessions were involved. The court was reminded of the words of Cave J. in R v. Thompson [1893] 2 QB 12: "It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice".

Another example is provided by LI Kar-wah & Anor v. R [1970] HKLR 572. Three defendants made three separate statements, to three police officers, in which admissions were made. There were striking similarities between these statements. In further confession statements, the similarity was equally striking. The defendants alleged that the statements were made under duress, and that they had been told to copy the contents of pieces of paper into officers' notebooks and that other statements had been dictated to them. All three officers alleged that the statements were voluntary and spontaneous, and that none of the defendants was prompted or questioned in any way. Rigby C.J. held that it was beyond the bounds of possibility that this was mere coincidence, and this was sufficient to raise reasonable doubts as to the voluntary nature of the statements.

However, the mere similarity of the contents of respective statements made by co-defendants will not necessarily render them inadmissible. Where the first co-defendant gave the police the relevant details, and they then questioned the second co-defendant as to the crime in question, the similarity was satisfactorily explained and the confessions were not invalidated: CHIU Pui-chai & Anor v. R Cr. App. No. 308 of 1977 (CA).

A completely different example of failure to satisfy the standard of "beyond reasonable doubt" arose in CHAN Chi-loi v. R Cr. App. No. 691 of 1981 (CA) where the court held it would be wrong to accept a confession statement in the following circumstances. The appellant was taken into custody in the very early hours and the confessions were made late on the following night. Another person, X, had also confessed to the offence, as co-defendant, but proceedings against him were later discontinued; X, having confessed, was later shown in fact to have been in prison at the time of the alleged offence. Asking why, therefore, X confessed, the court recognised that it could be for the same reason the appellant alleged he confessed, that he was under duress. The court ordered a new trial.

THE PROOF OF VOLUNTARINESS

Although the police must prove voluntariness, confessions will not be excluded for lack of affirmative proof of their voluntary nature where there is some evidence on which the judge is able to find that the confession is voluntary, and the maker does not object to its admission in evidence. In such circumstances, the defendant cannot appeal on the grounds that the confession was not admissible. Where the defendant expressly states that he does not object to admission, the court requires only a scintilla of evidence to satisfy itself that the confession was voluntary. If the defendant does object, but his story is disbelieved, and there is nothing on the record, other than the rejected story of the defendant, to show that the confession is not voluntary, the judge is entitled to act upon the slightest evidence (see Huggins J. in R v. LEE Fat [1969] HKLR 349 and in LEUNG Lai-por & Ors [1978] HKLR 202, 210-211).

However, in KWOK Kwan-ho & Anor v. R [1973] HKLR 231, Huggins J. held that an assertion by a prosecution witness that a statement was free and voluntary was an expression of mere opinion. Witnesses should not be asked the question : "was the statement voluntary?". Instead, there should be elicited from the witness an account of the factual situation in which the statement came to be given (applying WAT Kwok-leung v. R, Cr. App. No. 880 of 1972). The court would not assume that all police officers knew what the law meant by "voluntary". This was the very question for the court itself to decide.

The prosecution do not have an onus to show that for the whole period between arrest and the making of the statement no improper threats, inducements, etc. were applied to the defendant, in order to establish its voluntary nature (LO Wing-cheong v. R [1979] HKLR 550), unless the allegations of pressure relate to some time before the taking of the statement, but are not precise as to when the pressure occurred, i.e. the prosecution evidence is not required to cover non-existent allegations, but only the allegations of impropriety made by the defendant.

If the prosecution fail to call a necessary witness, even if that witness is unavailable through no fault of the prosecution, they will also fail to

discharge the burden. In NG Tat-shing & Anor v. R Cr. App. No. 56 of 1979 (CA), an ICAC officer was alleged to have made a threat. The evidence was not clear when the threat was made, nor whether it was delivered by the officer when he and the defendant were alone, or when another officer, Lee, was also present. Lee gave evidence that no-one delivered threats in his presence. The other officer was not called. The Chief Justice held that where particulars of the threat are given, the Crown could only discharge the obligation on voluntariness by calling evidence from the officers allegedly responsible. The other officer should have been called. The confession statement was wrongly admitted.

Similarly in LUNG Wing-kei v. R Cr. App. No. 386 Of 1980, where four officers had conducted a raid, one officer gave evidence that he approached the appellant and cautioned him. He sought to produce a note-book containing an admission. An objection was raised that the appellant had been threatened by another member of the police party. Roberts C.J. held that where the defendant alleges impropriety on the part of a police officer sufficiently identified, the Crown must establish, by calling that oficer, that the allegations are unjustified, and that the statement is voluntary. Since the proper officer was not called, the appeal was allowed.

However, it has been made clear by the vice-president recently that it is open to the prosecution to call one officer only to cover the allegations, without calling all officers alleged to have been involved, where on the facts the officer called was present at the time and place of the alleged threats of another officer (LEUNG Wing-ning Cr. App. No. 656 of 1980 (CA). Similarly in AU YEUNG Choi-ling v. R Cr. App. No. 615 of 1980, where the appellant argued that all officers allegedly responsibile for the threats should be called, Zimmern J. held that it was open for the prosecution to call one officer to cover the allegation, without calling all officers alleged to have been involved, because the officer called was present at the relevant time and place.

THE ALTERNATIVE PROCEDURE

This procedure, approved in HO Yiu-fai & Ors. v. R [1970] HKLR 415, can apply in the Magistrates' and District Courts, and enables the judge or magistrate to record any objection to the admission of the confession statement when the prosecution seek to produce it, and then to proceed to hear evidence on this aspect of the case as well as the general issue. The witnesses are then cross-examined by the Defence about the statements and the general issue. The defendant and his witnesses then give evidence as to the admissibility of the statement only and are cross-examined upon this issue. After submission as to admissibility the judge or magistrate will rule on the question. After closure of the prosecution case the defendant and his witnesses may give evidence again on the general issue and the trial will continue in the normal way.

In HO Yiu-fai, the court was careful to impose safeguards to this procedure. The court stressed that where the judge is sitting alone, without a jury, he must ensure -

(i) that the defendant is not left with the impression that the right of cross-examination is limited to the issue of admissibility;

(ii) that the defendant is heard on the issue of admissibility if he so wishes; and

(iii) that a ruling on admissibility is made at or before the close of the case for the prosecution.

The Chief Justice's Working Party on voir dire proceedings and Judges' Rules suggested the abolition of the voir dire proceedings in non-jury trials on the basis that :-

(a) there is no jury to protect from the evidence given in the voir dire and consequently no risk of them being prejudiced by what might eventually be ruled inadmissible; and

(b) the judge or magistrate alone is trained to exclude inadmissible evidence from his subsequent considerations.

However, they thought that in suitable cases, the tribunal should retain the right not to hear any evidence on the general issue before determining any question of admissibility.

USE OF VOIR DIRE EVIDENCE IN THE TRIAL

The Privy Council has decided that evidence given by the defendant in the voir dire is not available for the prosecution on the general issue, whether or not the confession has been admitted : WONG Kam-ming v. R [1980] AC 247. However, if the confession is admitted, then subject to the judge's discretion, the prosecution can cross-examine the defendant on any discrepancies between his evidence at the trial of the general issue, and his evidence on the voir dire.

In the same case, the Privy Council also decided that the defendant should not be asked questions in cross-examination on the voir dire, with a view to establishing the truth, as distinct from the voluntariness, of a confession. Previously it was common practice for Crown Counsel to question the accused as to the truth of the statement. This part of the judgment has been criticised. The two principal reservations have been as follows. First, that it is open to the accused to give evidence under Section 54 of the Criminal Procedure Ordinance, but that subject to the limitations of that section, and to the limitations of any other general rules of evidence (e.g., the hearsay rules), the only general limitation on what may be asked is the test of relevance, a matter for the judge. Secondly, that the truth or falsity of the

alleged confession can be relevant to the question at issue on the voir dire, namely the voluntariness of the confession. (For a fuller discussion, see the dissenting judgment of Lord Hailsham in Wong Kam-ming).

Since Wong Kam-ming (decided in 1978) there has been some degree of inconsistency in its application in Hong Kong. In CHUNG Wing-wah v. R Cr. App. No. 1222 of 1978 (CA), prosecuting counsel had asked the defendant on the voir dire whether his confession statement was true. Roberts C.J. acknowledged that this was a material irregularity, but applied FUNG Chi-Keung v. R (Cr. App. No.2 of 1979) where Huggins J.A. had held that if the defendant denies the truth of the statement, the damage done is slight, and held that cross-examination in breach of the principle was not enough by itself to ground an appeal. However, in LEUNG Kwok-on & Anor v. R Cr. App. No. 951 of 1978 (CA), where the trial judge allowed cross-examination of the defendant, giving evidence on the voir dire, as to the truth of the confession statement (held to be a of "substantial irregularity" by the Privy Council), and the confession was subsequently ruled admissible, Trainor J. held that it was impossible to say that the judge would necessarily have come to the same conclusion had those questions not been asked. If the questions had not been asked, the judge might well have rejected the statement of the defendant.

THE UNREPRESENTED DEFENDANT

The common law in Hong Kong has developed its own safeguards in respect of the unrepresented defendant and the voir dire procedure. In CHAN Wai v. R Cr. App. No.320 of 1980, Power J. held that it is the usual and desirable practice, when a person is not represented, to explain fully to him that if he says he did not give the statement freely or voluntarily, he has a right to object to it, and to give evidence in support of that objection. It is insufficient for the court to merely ask whether the defendant has any objections to the admission of the statement, as the defendant might well not understand.

CHAN Wai is in line with the earlier authority of LAM Yuet-ching v. R [1968] HKLR 579, where it was held that where a confession is tendered in evidence, and a defendant is not professionally represented, there is a duty on the judge to explain the procedure to be followed in deciding the issue of voluntariness, and then to ask whether the defendant objects to its admissibility.

THE JUDGES' RULES

The English law relating to the admissibility of confession statements has been explained as relying on two systems of criteria. One set of standards - focusing on the concept of voluntariness - is maintained through application of a strict exclusionary rule. The other requirements - the Judges' Rules - merely set forth an exemplary standard and the

consequences of a violation depend upon the facts of a particular case (See 'Developments in the Law - Confessions' 79 Harvard Law Review 935 at 1095).

The English judges found during the nineteenth century that the common law requirement that a confession must be voluntary was not sufficient to protect the accused against what they regarded as unfair practices by the police. They accordingly made known their view that the police, when investigating offences, should observe certain standards of behavior. These standards eventually became embodied in the Judges' Rules, drawn up by the Judges of the King's Bench Division in 1912, added to in 1918 and clarified in a Home Office circular in 1930, and supplemented in two further circulars in 1947 and 1948.

The status of the Rules was explained by the Court of Criminal Appeal in 1918 :-

> *"These Rules have not the force of law, they are administrative directions, the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these Rules may be rejected as evidence by the judge presiding at trial."*
> (R -v- Voisin (1918) 13 Cr. App. R.89)

Devlin summarizes the old Rules as follows :-

> *First, the statement must always be volunteered. That does not mean that the prisoner cannot be asked if he wishes to make a statement so long as it has been made clear to him that he is under no obligation to do so and so long as he is not pressed to make one. For example, once he has refused to make a statement or, having made a statement, has said all that he desires to say, he must not be asked again to make a statement unless some fresh material is discovered, which it is thought that he may wish to explain.*
>
> *Secondly, the caution to be administered to the prisoner when he is charged should be in the folowing words : 'Do you wish to say anything in answer to the charge? You are not obliged to say anything in answer to the charge. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.' The old form of caution ended with the words 'in evidence against you'. The Rules discountenance the use of the words 'against you' so as to avoid the suggestion that a prisoner's answers can only be used in evidence against him, as this might prevent an innocent person making a statement which might assist to clear him of the charge. The caution is to be used not merely on the making*

of the charge but whenever a statement is volunteered. If a prisoner begins a statement before there is time to caution him, what he says can be recorded, but he should be stopped and cautioned as soon as possible.

Thirdly, a prisoner's statement should, whenever possible, be taken down in writing and signed by him after it has been read over to him and he has been invited to make any corrections that he may wish. The statement should be written down as nearly as possible in the actual words used, provided that they are intelligible. A prisoner should be encouraged to write out his own statement.

Fourthly, a prisoner should never be cross-examined - that is, while he is telling his story he must be asked only such questions as are necessary to remove ambiguities or to clear up obscurities.

Fifthly, a record must be kept of the times at which the statement started and finished, the importance of this requirement being that the police have to show how the time was employed.

Sixthly, although there is no express rule that a prisoner who wishes to have a friend or lawyer present while he is making a statement is to be allowed to have him, it is clear that a request of that sort would have to be granted; for if the prisoner were to say that he was prepared to make a statement only on those terms, any pressure upon him to make it otherwise would be equivalent to pressing him to make a statement after he had refused to do so."
('The Criminal Prosecution in England' P. Devlin Oxford University Press 1960 pages 33-35)

The purpose of the old Rules was two-fold: first, to give the suspect greater protection than was afforded by the strict common law, and secondly, to eliminate the need to inquire into whether or not there was in fact undue influence by not allowing any interrogation of suspects who could be subjected to police pressure. However, the total prohibition on the questioning of persons in custody was found unnecessarily restrictive in practice and the old Rules were revised in 1964 so as to allow, subject to a number of safeguards, the questioning of suspects who had been arrested but not yet charged. These 'New Rules" are set out as part of Annex 7.

The new Rules were formally sent to Hong Kong after their adoption in England and on 7 March 1964 the Governor informed the Secretary of State for the Colonies:-

"It is not intended that the new Judges' Rules should be adopted in this Colony at the present time since at a recent conference of

the Judges of the Supreme Court the following resolution was passed :-

> *'That the new Judges' Rules, introduced in England and Wales with effect from January 27, 1964 dealing with the admissibility in evidence, at the trial of any person, of answers and statements made by him to police officers, shall not apply in this Colony until further consideration. The existing Judges' Rules will accordingly remain in force and continue to be applicable in the Courts of the Colony.'*

The Judges in reaching this decision took into account the fact that no comments on the new Rules in legal publications have yet reached the Colony. It was felt by their Lordships that it would be unwise to introduce the new Rules until these comments had been received and studied. It is proposed that they should re-examine the position again shortly. If it is eventually decided that the new Rules should be introduced, I will inform you and in doing so shall refer to any necessary change in legislation."
((26) in AGC 1/1775/55C)

In October 1964 the Judges gave the matter further consideration and concluded that it was desirable to introduce the new Rules as they stood on 1 January 1965 contingent on the police being in a position to work and apply the rules as from that date. The Commissioner of Police indicated that the necessary re-education of the force, revision of charge procedures and forms and translations of the rules could not be completed by 1 January 1965 and so the new Rules were not introduced on that date. The Attorney General then requested that the new Rules not be adopted until it had been decided in principle as to what administrative rules would best suit local conditions in Hong Kong. While such a course resulted in useful discussions about the various alternatives available there is no doubt that the lack of any official pronouncement caused confusion among some members of the judiciary, the legal profession and the police as to the status of the new Rules.

The applicability of the Judges' Rules in Hong Kong was considered by the Full Court in LI Wai-Leung [1969] HKLR 642. The matter was accurately summarised by Bernard Downey. with whose conclusion we agree, in (1971) HKLJ 131-141 at 133 :-

> *"Until 1969, there was never any doubt that the Rules, at least in their pre-1964 form, applied in Hong Kong. They were frequently referred to in judgments of the courts, and are discussed at considerable length in the General Duties Manual of the Royal Hong Kong Police Force. A long shadow of doubt was, however, cast over this area by the judgments of the Full*

Court in Li Wai-leung. One member of the Court apparently thought that they had, or should have, no place in the administration of criminal justice in Hong Kong. Another member of the Court appeared to be sympathetically inclined to agree with this view, although he was unable 'to break faith with the police' and to rely on the fact that they have never been formally 'adopted' in Hong Kong. He felt that the pre-1964 Rules must now be honoured by the Hong Kong courts until they indicate that in future they will not be guided by them. Sir Michael Hogan C.J. however seemed to be of the opinion that the original Rules, and the "spirit" of the revision in 1964, should be observed by police officers and judges in Hong Kong. Despite these differences of judicial opinion the decision appears to establish that the Rules, as they are currently applied in England, do not apply automatically in Hong Kong by virtue of section 9 of the Criminal Procedure Ordinance.

[That] section ... provides that the practice and procedure in all criminal cases in Hong Kong 'shall be, as nearly as possible, the same as the practice and procedure from time to time and for the time being in force for similar cases in England'. Since it is not impossible to apply the 1964 version of the Rules in Hong Kong, it is submitted that they must be applied in the local courts if they form part of rules of practice and procedure in England. As they are clearly not rules of law, it is difficult to see how they can be described as other than rules of practice and procedure."

The question of whether the new rules applied to Hong Kong was further discussed by the Full Court in LEUNG Lai-por [1978] HKLR 202 where Huggins J said (at page 207):

"Because 'the Judges' Rules' have never been embodied in a statute in Hong Kong, either directly or indirectly, they have never become part of the law of Hong Kong. We know of no resolution by the judges in the Colony that they would give to the Hong Kong Police (now the Royal Hong Kong Police) the same advice as was given in England in 1912, but it has long been assumed that the advice given to the police in England should be regarded as having been given to and accepted by the police in Hong Kong and we have acted accordingly. It is, however, certain that the advice given by the English judges in 1964 and now known there as 'the new Judges' Rules' has, after due deliberation, not been repeated in Hong Kong and that when the possibility of such advice being given came under discussion the Commissioner of Police indicated that that he would not then have been disposed to act upon such advice. Whatever effect 'the Judges' Rules' may have in Hong Kong it is abundantly clear that 'the new Judges' Rules' of England have no effect at all in Hong Kong. "

Despite this clear ruling there is, we believe, still some unevenness of approach by the courts in that while lip service is paid to the old rules and the new rules are not mentioned explicitly, there is a tendency to apply de facto the new rules.

The fact that the rules were "made for the guidance of the police and not for the circumscription of the judicial power" (Devlin, loc cit page 39) has often been lost sight of. Two factors have contributed to this : the very title "Judges' Rules" is a misnomer which has created an impression that the sanction of the judges has somehow elevated the rules from mere administrative directions to a definitive text. The second factor, which has compounded the first, is that the courts have tended to analyse the Rules in the same way as a legislative provision and the case law abounds with discussions on the construction of individual words and phrases found in the Rules. This has influenced the way in which the police have come to regard the Rules in that they "have sometimes seemed to treat the Judges' Rules as if they were a drill manual and to be unwilling to admit the slightest deviation from the text". (Devlin, loc cit page 39). This is certainly true of Hong Kong where it is common, in circumstances where it is apparent that a long, fluent narrative confession statement has been elicited by way of questioning after caution, for police officers to deny that this has happened.

Since it is clear that the Judges' Rules are relevant to the question of admissibility, as evidence which may tend to show voluntariness or not (and probably also as relevant evidence in relation to the discretion to exclude) it is undesirable that there is some confusion as to whether the old or new Rules apply in Hong Kong. Clearly the matter should be put beyond doubt so that the courts are consistently looking at the same Rules, be they the old or the new Rules, or any new formulation that is devised.

It has long been argued that a set of new, practical, and comprehensible guidelines to law enforcement officers as to the conduct of the interrogation of suspects and the taking of statements which is cognizant of local conditions should be introduced in Hong Kong. Huggins J. in LEUNG Lai-por (Infra) (@ pp.212-3) highlighted the danger of applying Judges' Rules made in one territory to another where conditions were not identical. He gave an example. In England, a person in lawful custody must have been charged with a crime. In Hong Kong, however, the police have the power to detain on suspicion without laying a charge. In the example, the nature of the country may be material in deciding whether a caution ought to be administered before questions are put. Again, in TO Kai-sui & Ors v. R Cr. App. No. 1189 of 1979 (CA), O'Connor J. made a plea for a formulation of the Judges' Rules having regard to the conditions in the country in which the police officers are operating.

This viewpoint has been echoed in other quarters. In a report by a special committee of the Bar Association relating to confessions to police officers which was approved and adopted by the Bar Committee in December 1970 a recommendation was made that administrative Rules "similar to those introduced in England in 1964, should be adopted in Hong Kong with

appropriate modifications", and a revised set of Rules was annexed to their report. In July 1980 in the report of the Chief Justice's Working Party on Voir Dire Proceedings and Judges' Rules the majority of the working party were in favour of the adoption of a new set of Judges' Rules for Hong Kong which they drafted.

Turning to the relevance of the Judges' Rules to the admissibility of confessions, it is clear that the strict view, dating back to at least 1930, was that any serious infringement of the Judges' Rules would normally, by itself, be sufficient to exclude a confession. However, by the 1970s that approach was modified. The principle is now that infringements of the Judges' Rules are only one element to be considered in deciding the central question, whether or not the Crown has proved voluntariness.

In LI Wai-leung, the court was of the opinion that the Judges' Rules were not rules of law. The only question for the court was whether D made the statement voluntarily. Similarly in LI Ming-kwan & Anor v. R [1973] HKLR 275, it was held that the Judges' Rules were merely guidance to the police - whether they were breached or not, the court's primary concern was the voluntariness of the statement tendered. Again in LI Wing-loi v. R [1974] HKLR 440, it was held that in deciding voluntariness, one matter which the judge could take into account was whether or not there had been a breach of the Judges' Rules. Briggs C.J. held that the Rules were neither rules of law nor practice binding on the courts, and that they should not be referred to in the presence of the jury by either the judge or counsel.

The matter of exclusion, based upon breach of the Judges' Rules, as a part of the judge's inherent discretion, has already been broached under the topic of Judicial Discretion. We saw there that the position is far from clear. The cases show that the approach of the courts varies considerably when the statement is not involuntary but there has been a clear breach of the Rules. Some cases do display a judicial willingness to exercise the exclusionary discretion here, as the following 2 cases show.

LO Sun-wa (supra) was approved in the recent case of CHENG Ho-shing v. R, Cr. App. No.356 of 1981, where Silke J.A. dealt with the question of whether the mere asking of questions of a man in custody itself suffices to make his answers inadmissible, even if they were not obtained by threat or inducement. The learned judge acknowledged that the strict view of CHEUNG Kun-sun & Ors v. R [1962] HKLR 13, that breach of the Judges' Rules was of itself sufficient to render the record of the interview inadmissible, had been modified. Silke J.A. continued by saying that now, the asking of questions is permissible provided that the interrogation does not amount to pressure of such a nature as to sap the will, and provided that there is no oppression or gross impropriety, and provided that the interrogation is not of undue length or persisted in after a clear indication from defendant that he does not wish to answer further questions or make a statement.

In HUI Lam-wing v. R Cr. App. No. 1212 of 1979, the court expressed its strong objection to the procedure of the administration of a

caution, which is then followed immediately by a series of questions throwing that "constitutional right" out of the window.

Some take the view that the Judges' Rules would serve a better purpose if the automatic consequence of their breach was the exclusion of all evidence obtained. They argue that such automatic exclusion would compel the law enforcement agency to comply strictly with the Rules (the Disciplinary Principle). Since the law enforcement agency might well lose cases as a direct consequence of non-compliance, it will be deterred from acting in the same way in the future.

The Royal Commission on Criminal Procedure, 1981, spent some time considering the automatic exclusion of evidence which was obtained in breach of the Judges' Rules. They did not favour such an application of the Disciplinary Principle but adhered to the Reliability Principle and the test of voluntariness. Chief among their objections were the following:

(i) the judiciary do not regard their function as the control of improper police behaviour; they were more concerned with the reliability of the evidence (in Hong Kong, see O'Connor J. in TO Kai-sui & Ors v. R Cr. App. No. 1189 of 1979 (CA): the Rules are for the guidance of the police officers and are the responsibility of the Commissioner of Police, not of the judges);

(ii) as a disciplinary device, it can operate to secure the rights of only a very small number of those against whom police power has been exercised. It ignores those stopped and searched or arrested but not prosecuted. It ignores the many who are prosecuted but plead guilty. Even of those who plead guilty, not all challenge police conduct;

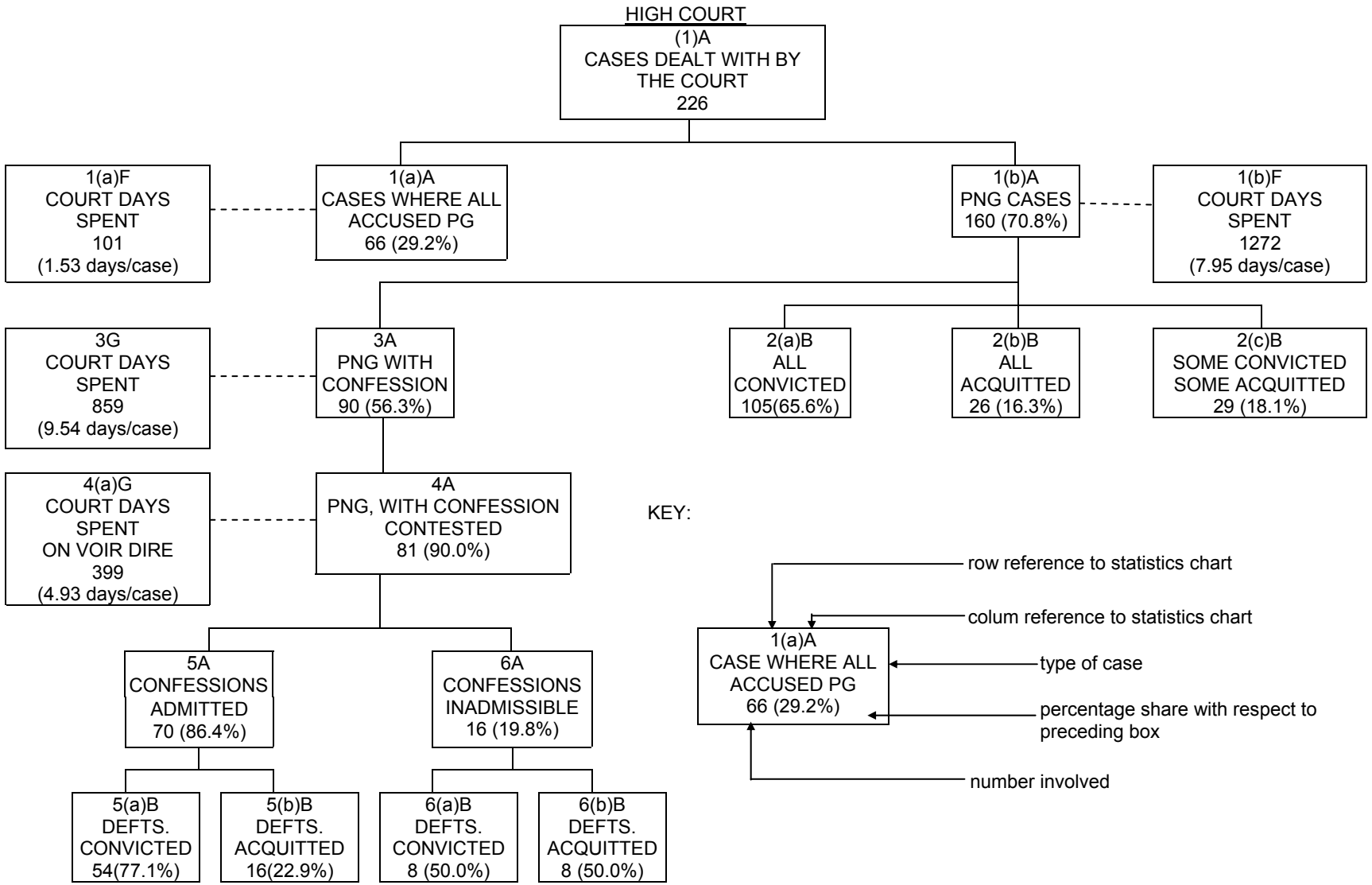
(iii) an automatic exclusionary rule would give rise to an increase in the number of disputes about the admissibility of evidence and lead to a further increase in court time on matters not directly concerned with the innocence or guilt of the defendant;

(iv) the U.S. experience showed that it can and does lead to the patently guilty going free because of some minor procedural technicality in which the police have blundered.

The majority of the Royal Commission concluded that the U.S. experience did not offer an encouraging prospect of an automatic exclusionary rule achieving the objectives which its proponents set for it. The majority favoured a solution, so far as the Disciplinary Principle was concerned, in terms of police supervisory and disciplinary procedures.

Annexure 2

COURT STATISTICS ON VOIR DIRE PROCEEDINGS



HIGH COURT	CASES					DAYS SPENT				
	No.		%			No.		%		
1. Cases dealt with by the Court	226		100.0			1373		100.0		
(a) Guilty Pleas		66	29.2				101	7.4		
(b) Not Guilty Pleas		160	70.8				1272	92.6		
2. Not Guilty Pleas	160			100.0		1272			100.0	
(a) All Defendants Convicted		105	46.5	65.6						
(b) All Defendants Acquitted		26	11.5	16.3						
(c) Some Convicted, Some Acquitted		29	12.8	18.1						
3. Not Guilty Pleas with Confession by Accused	90		39.8	56.3	100.0		859		67.5	100.0
4. Not Guilty Pleas where Confession Contested	81		35.8	50.6	90.0		-			
(a) Days Spent on Voir Dire	-		-	-	-		399	29.1	31.4	46.4
5. Confession Admitted into Evidence	70			43.8	77.8					
(a) Defendants Convicted		54		33.8	60.0					
(b) Defendants Acquitted		16		10.0	17.8					
6. Confession Ruled Inadmissible	16			10.0	17.8					
(a) Defendants Convicted		8		5.0	8.9					
(b) Defendants Acquitted		8		5.0	8.9					
	A	B	C	D	E	F	G	H	I	J

Notes
(High Court)

1. The sum of the figures at 5A and 6A would normally be expected to equal the figure at 4A. This is not the case here as some of the returns giving rise to the figures at 5A and 6A relate to the number of confessions rather than the number of cases. One case may have contained more than one contested confession.

2. No returns were obtained for the number of days spent on trials where there was a contested confession but only for the number of days spent on the voir dire itself.

3. In the light of 1. above, 2 separate formulae can be used to obtain the average number of days spent on the voir dire in each trial where there was a contested confession. The first is :-

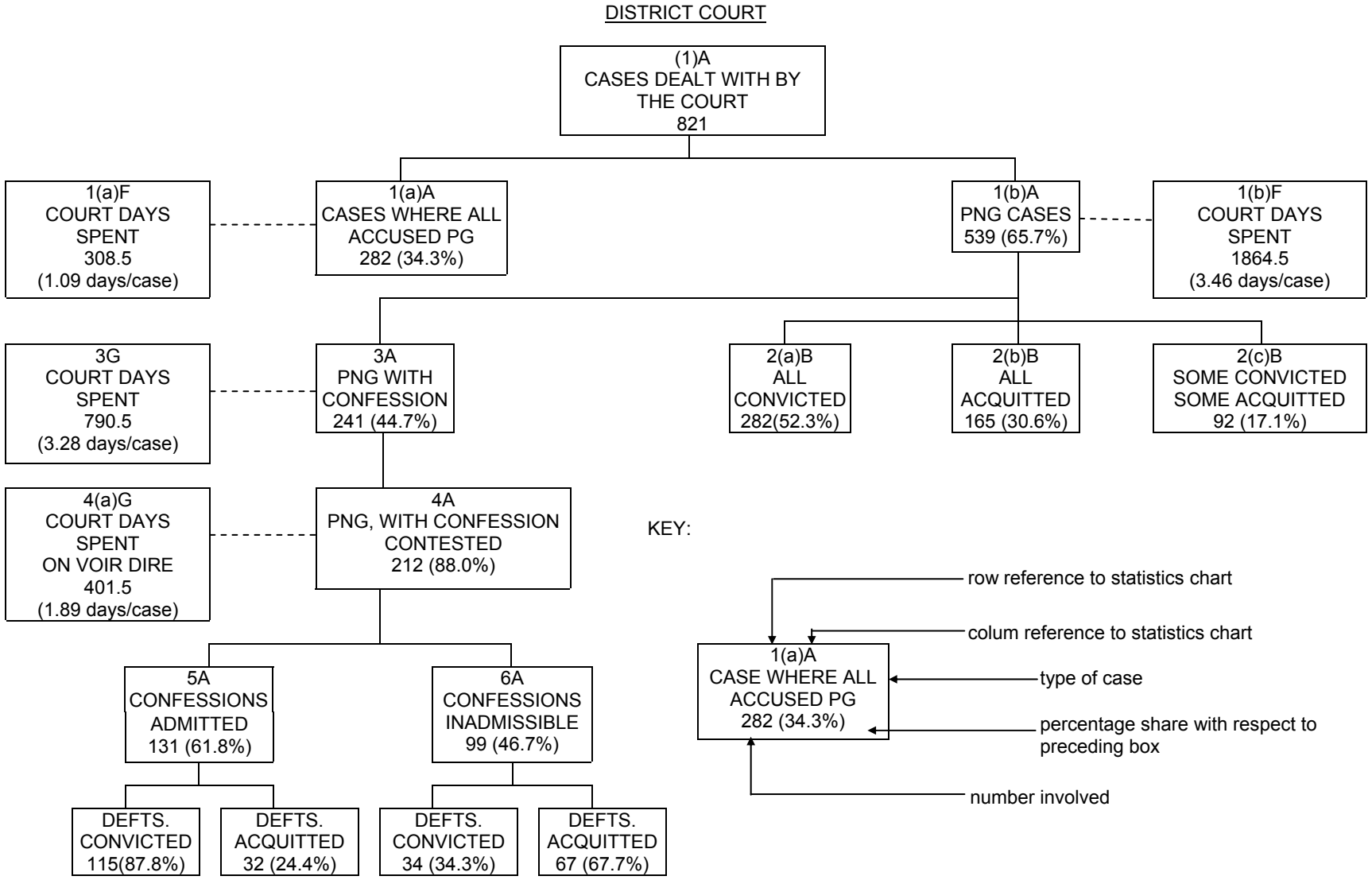
$$\frac{4(a)G}{5(a)B + 5(b)B + 6(a)B + 6(b)B} = \frac{399}{54 + 16 + 8 + 8} = 4.64 \text{ days/case}$$

The second is :-

$$\frac{4(a)G}{4A} = \frac{399}{81} = 4.93 \text{ days/case}$$

4. The average number of days spent on each case where there was a confession by the accused is obtained by the formula :-

$$\frac{3G}{3A} = \frac{859}{90} = 9.54 \text{ days/case}$$


DISTRICT COURT
(1)A
CASES DEALT WITH BY
THE COURT
821
1(a)F
COURT DAYS
SPENT
308.5
(1.09 days/case)
1(a)A
CASES WHERE ALL
ACCUSED PG
282 (34.3%)
1(b)A
PNG CASES
539 (65.7%)
1(b)F
COURT DAYS
SPENT
1864.5
(3.46 days/case)
3G
COURT DAYS
SPENT
790.5
(3.28 days/case)
3A
PNG WITH
CONFESSION
241 (44.7%)
2(a)B
ALL
CONVICTED
282(52.3%)
2(b)B
ALL
ACQUITTED
165 (30.6%)
2(c)B
SOME CONVICTED
SOME ACQUITTED
92 (17.1%)
4(a)G
COURT DAYS
SPENT
ON VOIR DIRE
401.5
(1.89 days/case)
4A
PNG, WITH CONFESSION
CONTESTED
212 (88.0%)
KEY:
row reference to statistics chart
colum reference to statistics chart
1(a)A
CASE WHERE ALL
ACCUSED PG
282 (34.3%)
type of case
percentage share with respect to
preceding box
number involved
5A
CONFESSIONS
ADMITTED
131 (61.8%)
6A
CONFESSIONS
INADMISSIBLE
99 (46.7%)
DEFTS.
CONVICTED
115(87.8%)
DEFTS.
ACQUITTED
32 (24.4%)
DEFTS.
CONVICTED
34 (34.3%)
DEFTS.
ACQUITTED
67 (67.7%)

DISTRICT COURT	CASES				DAYS SPENT					
	No.		%		No.			%		
1. Cases dealt with by the Court	821		100.0			2173.0		100.0		
(a) Guilty Pleas		282	34.3				308.5	14.2		
(b) No Guilty eas		539	65.7				1864.5	85.8		
2. Not Guilty Pleas	539			100.0		1864.5			100.0	
(a) All Defendants Convicted		282	34.3	52.3						
(b) All Defendants Acquitted		165	20.1	30.6						
(c) Some Convicted, Some Acquitted		92	11.2	17.1						
3. Not Guilty Pleas with Confession by Accused	241		29.4	44.7	100.0		790.5		42.4	100.0
4. Not Guilty Pleas where Confession Contested	212		25.8	39.3	88.0		-	-	-	
(a) Days Spent on Voir Dire	-		-	-	-		401.5	18.5	21.5	50.8
5. Confession Admitted into Evidence	131			24.3	54.4					
(a) Defendants Convicted		115		21.3	47.7					
(b) Defendants Acquitted		32		5.9	13.3					
6. Confession Ruled Inadmissible	99			18.4	41.1					
(a) Defendants Convicted		34		6.3	14.1					
(b) Defendants Acquitted		67		12.4	27.8					
	A	B	C	D	E	F	G	H	I	J

Notes
(District Court)

1. The sum of the figures at 5A and 6A would normally be expected to equal the figure at 4A. This is not the case here as some of the returns giving rise to the figures at 5A and 6A relate to the number of confessions rather than the number of cases. One case may have contained more than one contested confession. Similarly, the figures at 5B and 6B do not necessary equal the totals at 5A and 6A since 6A refer to confessions and 5B and 6B refer to defendants.

2. No returns were obtained for the number of days spent on trials where there was a contested confession but only for the number of days spent on the voir dire itself.

3. In the light of 1. above, 2 separate formulae can be used to obtain the average number of days spent on the voir dire in each trial where there was a contested confession. The first is :-

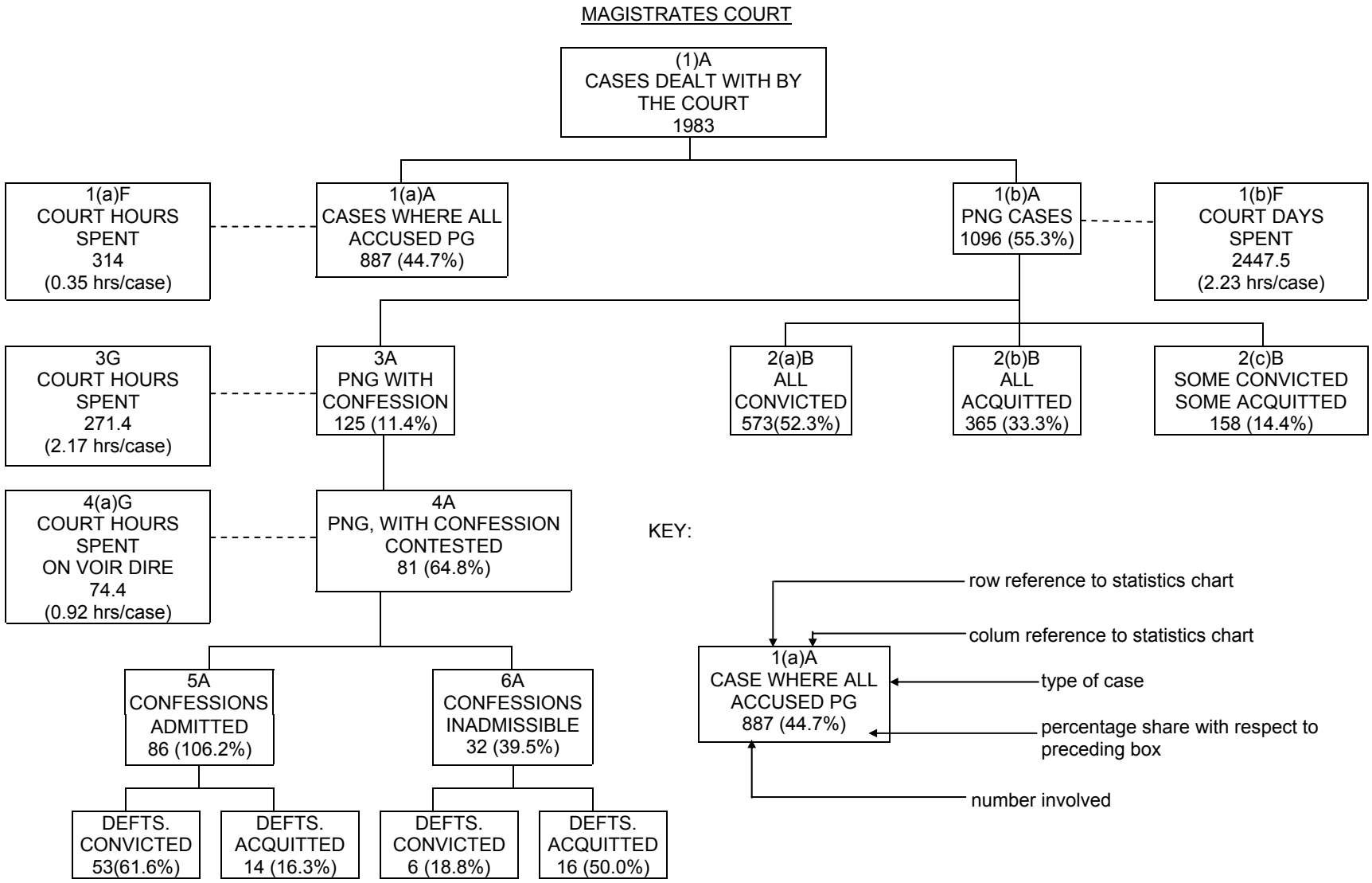
$$\frac{4(a)G}{5(a)B + 5(b)B + 6(a)B + 6(b)B} = \frac{401.5}{115 + 32 + 34 + 67} = 1.62 \text{ days/case}$$

The second is :-

$$\frac{4(a)G}{4A} = \frac{401.5}{212} = 1.89 \text{ days/case}$$

4. The average number of days spent on each case where there was a confession by the accused is obtained by the formula :-

$$\frac{3G}{3A} = \frac{790.5}{241} = 3.28 \text{ days/case}$$


MAGISTRATES COURT
(1)A
CASES DEALT WITH BY
THE COURT
1983
1(a)F
COURT HOURS
SPENT
314
(0.35 hrs/case)
1(a)A
CASES WHERE ALL
ACCUSED PG
887 (44.7%)
1(b)A
PNG CASES
1096 (55.3%)
1(b)F
COURT DAYS
SPENT
2447.5
(2.23 hrs/case)
3G
COURT HOURS
SPENT
271.4
(2.17 hrs/case)
3A
PNG WITH
CONFESSION
125 (11.4%)
2(a)B
ALL
CONVICTED
573(52.3%)
2(b)B
ALL
ACQUITTED
365 (33.3%)
2(c)B
SOME CONVICTED
SOME ACQUITTED
158 (14.4%)
4(a)G
COURT HOURS
SPENT
ON VOIR DIRE
74.4
(0.92 hrs/case)
4A
PNG, WITH CONFESSION
CONTESTED
81 (64.8%)
KEY:
row reference to statistics chart
colum reference to statistics chart
1(a)A
CASE WHERE ALL
ACCUSED PG
887 (44.7%)
type of case
percentage share with respect to
preceding box
number involved
5A
CONFESSIONS
ADMITTED
86 (106.2%)
6A
CONFESSIONS
INADMISSIBLE
32 (39.5%)
DEFTS.
CONVICTED
53(61.6%)
DEFTS.
ACQUITTED
14 (16.3%)
DEFTS.
CONVICTED
6 (18.8%)
DEFTS.
ACQUITTED
16 (50.0%)

MAGISTRATES COURT	CASES				HOURS SPENT					
	No.		%		No.			%		
1. Cases dealt with by the Court	1983		100.0			2761.5		100.0		
(a) Guilty Pleas		887	44.7				314.0	11.4		
(b) Not Guilty Pleas		1096	55.3				2447.5	88.6		
2. Not Guilty Pleas	1096			100.00		2447.5			100.0	
(a) All Defendants Convicted		573	28.9	52.3						
(b) All Defendants Acquitted		365	18.4	33.3						
(c) Same Convicted, Some Acquitted		158	8.0	14.4						
3. Not Guilty Pleas with Confession by Accused	125		6.3	11.4	100.0		271.4		11.1	100.0
4. Not Guilty Pleas where Confession Contested	81		4.1	7.4	64.8		-	-	-	
(a) Days Spent on Voir Dire	-		-	-	-		74.4	2.7	3.0	27.4
5. Confession Admitted into Evidence	86			7.8	68.8					
(a) Defendants Convicted		53		4.8	42.4					
(b) Defendants Acquitted		14		1.3	11.2					
6. Confession Ruled Inadmissible	32			2.9	26.6					
(a) Defendants Convicted		6		0.5	4.8					
(b) Defendants Acquitted		16		1.5	12.8					
	A	B	C	D	E	F	G	H	I	J

Notes
(Magistrates Court)

1. The sum of the figures at 5A and 6A would normally be expected to equal the figure at 4A. This is not the case here as some of the returns giving rise to the figures at 5A and 6A relate to the number of confessions rather than the number of cases. One case may have contained more than one contested confession. Similarly, the figures at 5B and 6B do not necessary equal the totals at 5A and 6A since 5A and 6A refer to confessions and 5B and 6B refer to defendants.

2. No returns were obtained for the number of hours spent on trials where there was a contested confession but only for the number of hours spent on the voir dire itself.

3. In the light of 1. above, 2 separate formulae can be used to obtain the average number of hours spent on the voir dire in each trial where there was a contested confession. The first is :-

$$\frac{4(a)G}{5(a)B + 5(b)B + 6(a)B + 6(b)B} = \frac{74.4}{53 + 14 + 6 + 16} = 0.84 \text{ hr./case}$$

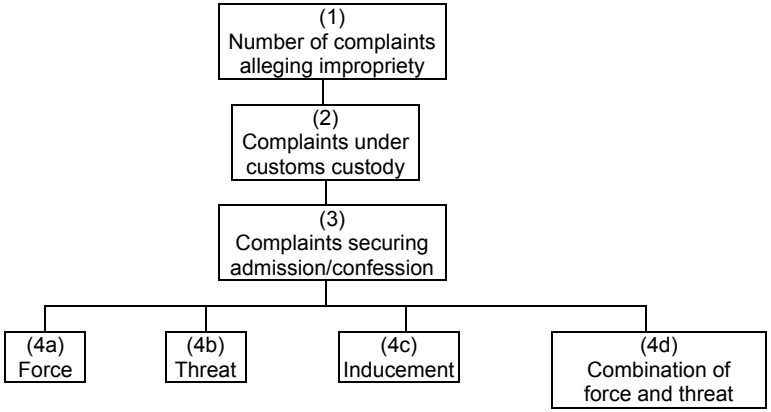
The second is :-

$$\frac{4(a)G}{4A} = \frac{74.4}{81} = 0.92 \text{ hr./case}$$

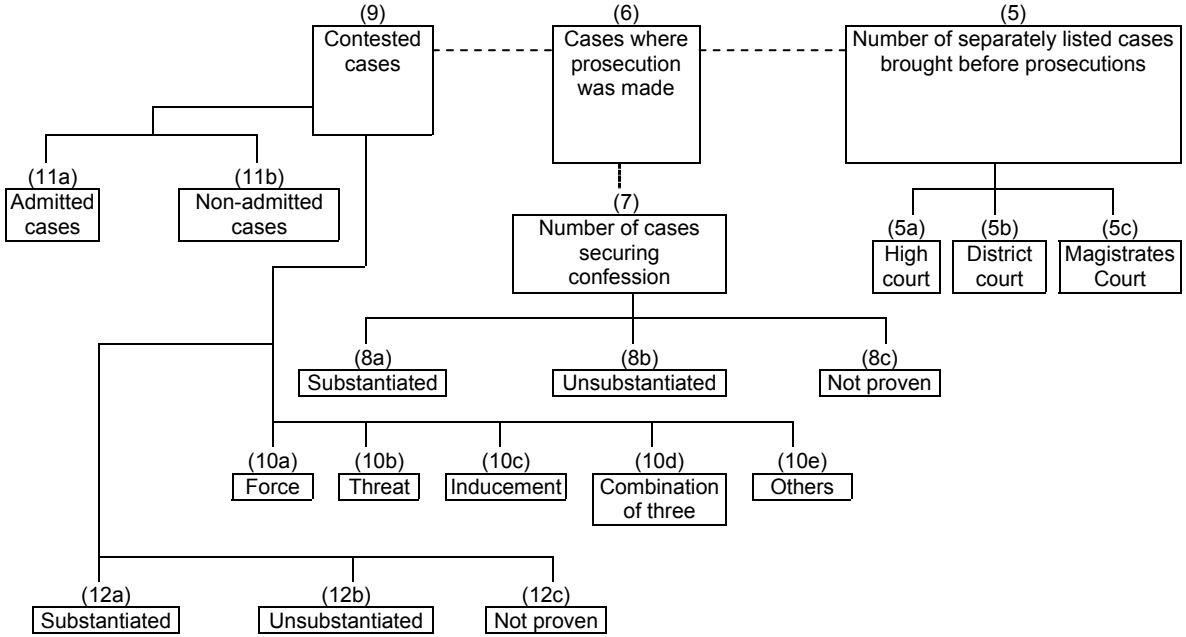
4. The average number of days spent on each case where there was a confession by the accused is obtained by the formula :-

$$\frac{3G}{3A} = \frac{271.4}{125} = 2.17 \text{ hrs/case}$$

I. Flow Chart for Total Number of Complaints of Customs and Excise Service



II. Flow Chart for Separately Listed Cases of Criminal Jurisdictions where Prosecutions were Brought as a Result of Customs Investigation



Statistics from the Customs and Excise Service for the period 1979-1981

		Cases						
		No.	%					
(1)	Number of complaints alleging impropriety	77	100.0					
(2)	Number of complaints under customs custody	20	26.0	100.0				
(3)	Number of complaints alleging impropriety in securing admission or confession	5		25.0	100.0			
(4)	Number of complaints in securing admission/ confession alleging							
	force	3			60.0			
	threat	0			0.0			
	inducement	1			20.0			
	combination of force and threat	1			20.0			
(5)	Number of separately listed cases brought before prosecutions	199				100.0		
	(a) High Court	54				27.1		
	(b) District Court	66				33.2		
	(c) Magistrates Court (Smuggling)	79				39.7		
(6)	Number of prosecution cases where confession was made to a customs officer	142				71.4	100.0	

		Cases						
		No.	%					
(7)	Number of cases in (6) where complaints had been lodged	2					1.4	100.0
(8)	Number of cases in (7) where the complaints were							
	substantiated	0						0.0
	unsubstantiated	2						100.0
	not proven	0						0.0
(9)	Number of prosecution cases where confession was contested	17					12.0	100.0
(10)	Number of contested cases alleging							
	(a) force	7						41.2
	(b) threat	2						11.8
	(c) inducement	4						23.5
	(d) combination of (a) to (c)	4						23.5
	(e) others	2						11.8
(11)	(a) Number of contested confessions admitted into evidence	11						64.7
	(b) Number of contested confessions not admitted into evidence	9						52.9
(12)	Number of contested cases where the complaints were							
	(a) substantiated	0						
	(b) unsubstantiated	1						5.9
	(c) not proven	0						

Statistics from the Police for the period 1979-1981

		Cases			
		No.	%		
(1)	Number of complaints alleging impropriety	7823	100.0		
(2)	Number of complaints under Police custody	1428	18.3	100.0	
	(a) Complaints with criminal record	271		19.0	
	(b) Complaints with no criminal record	89		6.2	
	(c) Complaints with unknown record	1068		74.8	
(3)	Number of complaints alleging impropriety in securing admission or confession	285		20.0	100.0
(4)	Number of complaints in securing admission/ confession alleging				
	force	208			73.0
	threat	44			15.4
	inducement	17			6.0
	combination of two	16			5.6
(5)	Number of cases in (4) where the complaints were				
	substantiated	248			87.0
	unsubstantiated	9			3.2
	withdrawn	12			4.2
	pending	15			5.3

Statistics from the I.C.A.C. for the period 1978-1981

		Cases			
		No.	%		
(1)	Number of complaints alleging impropriety	62	100.0		
(2)	Number of complaints under ICAC custody	29	46.8	100.0	
(3)	Number of complaints alleging impropriety in securing admission or confession	16		55.2	100.0
(4)	Number of complaints in securing admission/ confession alleging				
	force	3			18.6
	threat	8			50.0
	inducement	2			12.5
	combination of threat & inducement	2			12.5
	combination of three	1			6.2

Annexure 3

COMPARATIVE STATISTICS ON VOIR DIRE PROCEEDINGS IN ENGLAND AND HONG KONG

The figures given for England were compiled by the Home Office Research and Planning Unit and relate to 3 Crown Court Centres and 3 Magistrates Courts between February and July 1982. The sample was confined to wounding/assault; shoplifting and other theft/handling.

The figures for Hong Kong were compiled by the Judiciary and relate to all offences handled by each particular court over the sample period. The full Hong Kong statistics and explanatory flow charts and notes appear at Annexure 2.

Any comparison between the English and Hong Kong statistics must be made under the caveat that the English study was more limited both as to the courts and the offences examined. Furthermore, the unit of analysis is sometimes different. The English study adopts the "charge" as its unit throughout while the Hong Kong figures sometimes relate to the number of "cases" and at other times to the number of "defendants" and at still others to the number of "confessions". For this reason, it has not always been possible to calculate percentages and to draw a direct correlation.

A further difficulty is that the Home Office Study does not always clearly differentiate between voir dire proceedings and challenges within the trial proper to the admissibility of a confession statement. In particular, it is not immediately apparent how the time which the study attributes to "'trials within trials' and challenges brought within the trial proper" is apportioned.

Nevertheless, even if substantial allowance is made for discrepancies in the sampling methods used in England and Hong Kong, there remains a significant variation in the extent of the voir dire's use in the two jurisdictions. 10.5% of cases with a confession statement lead to a voir dire in England. In Hong Kong, the equivalent figures are 90% in the High Court and 88% in the District Court. Even more dramatic is the fact that in England, of those cases where the prosecution seek to rely on a confession, the defence succeeds in having the confession excluded in 1.5% of them. The equivalent figure in Hong Kong is at least 25% and possibly as high as 34.0%. The figure of 34.0% is calculated on the basis that the cases set out in line 3 of Table 1 below involved only one statement in each case. The figure of 25% is arrived at by assuming that the number of statements involved in line 3 was greater than the number of cases by 50%.

TABLE 1	NUMBERS			
	ENGLAND	HONG KONG		
		HIGH COURT	DISTRICT COURT	MAGISTRATES' COURT
1) Not guilty pleas	319	160	539	1096
2) Cases without incriminating statement	115	70	298	971
3) Cases with incriminating statement	204	90	241	125
4) Cases where statement challenged and voir dire held	22	81	211	81
a) Statement admitted	19	70	131	86
b) Statement not admitted	3	16	99	32
	A	B	C	D

The total given at 4B, 4C and 4D would normally be expected to equal the sum of the figures given for statements admitted and statements not admitted (shown at 4(a)B and 4(b)B; 4(a)C and 4(b)C; and 4(a)D and 4(b)D respectively). The figures do not tally because the figures given under 4B, 4C and 4D relate to the number of <u>cases</u> while the figures at lines 4(a) and 4(b) relate to the number of <u>confessions.</u>

TABLE 2 - PERCENTAGES RELATING TO NOT GUILTY PLEAS

	ENGLAND	HONG KONG		
		HIGH COURT	DISTRICT COURT	MAGISTRATES' COURT
No incriminating statement	36%	43.7%	55.3%	88.6%
Incriminating statement	64%	56.3%	44.7%	11.4%
Statement challenged and voir dire held	7%	50.6%	39.3%	7.4%

TABLE 3 - PERCENTAGES RELATING TO CASES WITH INCRIMINATING STATEMENTS

	ENGLAND	HONG KONG		
		HIGH COURT	DISTRICT COURT	MAGISTRATES' COURT
Cases where statement challenged and voir dire held	10.5%	90%	88%	65%

TABLE 4 - PERCENTAGES RELATING TO VOIR DIRES HELD

	ENGLAND	HONGKONG		
		HIGH COURT	DISTRICT COURT	MAGISTRATES' COURT
Statement admitted	86%	81%	57%	73%
Statement not admitted	14%	19%	43%	27%

The percentages in Table 4 are calculated by referring only to the figures given in lines 4(a) and 4(b) of Table 1 and the total which those figures make, ignoring the figures given in line 4.

Annexure 4

THE "VOIR DIRE" - A COSTING EXERCISE

A) INTRODUCTION

As a result of the statistics obtained for a 12 month period from 1981 to 1982, it is possible to calculate the likely cost of the present system of determining the admissibility of confession statements by the voir dire procedure. Any such calculation is, however, fraught with imponderables and should be regarded warily. Some of the major difficulties are listed at paragraph D.

The total cost of the "Voir Dire" procedure consists of the cost of court personnel and the accommodation costs of the court room. It is calculated by aggregating the monthly costs of all items involved and then multiplying that sum by the total number of court months spent in the fiscal year. It has been assumed that there are 22 working court days each month. The number of court months is therefore obtained by dividing the number of court days spent by 22.

B) SOURCES

The number of days spent on the voir dire procedure in each of the High Court, District Court, and Magistrates' Court is obtained from the statistics supplied to the Sub-committee by the Courts themselves and appears in the revised table of statistics under 4(a)G.

The figures in the table of statistics for the Magistrates' Court relate to a 2 month rather than a 12 month period and have therefore been adjusted accordingly.

The cost of Government staff is obtained from the Treasury Management Accounts Branch Staff Cost Ready Reckoner (No. 4 - May 1982). The figures include the basic salary of each of the individuals engaged, plus an additional sum in respect of other costs to Government such as pension, gratuities, educational allowance, housing, etc. It should be noted that the figure for High Court judges is lower than that for District Court judges. This may be explained by the fact that a larger number of expatriates are employed in the District Court ranks.

The cost of a barrister in the High Court figures is obtained by adopting an average figure paid by the Legal Aid Department to a barrister of less than 6 years standing in cases other than homicide lasting less than 10 days involving 1 accused. If a barrister of more than 6 years experience were instructed, if the case was homicide, if cases lasted more than 10 days or if

there were more than 1 accused, the cost element for the barrister would be higher. The figure assumes 3 cases per month with a brief fee of $4,000 each and refreshers of $2,000 per day.

The cost of a solicitor in the District Court figures is obtained by adopting an average figure paid by the Legal Aid Department to a solicitor in a case lasting less than 10 days involving 1 accused. If the case lasted more than 10 days or involved more than 1 accused, the cost element for the solicitor would be higher. The figure assumes 4 cases per month with a brief fee of $2,800 and refreshers of $1,500 per day.

The cost of accommodation represents the cost of utilities for one courtroom for 1 month. The figures were supplied by the Registrar of the Supreme Court and take no account of rent since the criminal courts are housed in Government owned buildings. The accommodation cost for a courtroom in the Sun Hung Kai Centre (which is exclusively civil) would be $47,370 since it includes an element for rent.

Throughout, the figures adopted have been the lowest that it is realistic to assume. Costs might very well be substantially higher, as is pointed out at paragraph D below.

C) ESTIMATED COST FOR "VOIR DIRE" PROCEEDINGS FOR THE FISCAL YEAR 1981

(1) HIGH COURT

(a) Time spent on Voir Dire - 399 days

(b) Monthly Cost of Staff Required

1 High Court Judge	$50,917
1 Senior Judicial Clerk	14,429
1 Personal Secretary	8,429
1 Stenographer in Court	4,845
1 Court Interpreter(Senior)	15,594
2 Officers (Correctional Services)	10,304
1 Police Inspector	15,368
1 Sergeant	7,884
1 Senior Crown Counsel	34,808
1 Barrister	50,000
1 Instructing Law Clerk (Legal Aid Department)	7,960
Total per month:	$220,538

(c) Monthly Accommodation Cost of Court Room - $3,000

(d) Calculation

Total monthly cost -	$220,538
	3,000
	$223,538

Total annual cost of voir dire proceedings
= total monthly cost x no. of court months spent on voir dire

$$= \$223,538 \times \frac{399}{22}$$

$$= \underline{\underline{\$4,054,166}}$$

(2) DISTRICT COURT

(a) Time Spent on Voir Dire - 401.5 days

(b) Monthly Cost of Staff Required

1 District Court Judge	$51,635
1 Judicial Clerk	8,646
1 Personal Secretary	8,429
1 Stenographer in Court	4,845
1 Court Interpreter	8,990
2 Prison Officers	10,304
1 Police Inspector	15,368
1 Crown Counsel	24,857
1 Solicitor	38,200
Total per month:	$171,274

(c) Monthly Accommodation Cost of Court Room - $3,000

(d) Calculation

Total monthly cost -	$171,274
	3,000
	$174,274

Total annual cost of voir dire proceedings
= total monthly cost x no. of court months spent on voir dire

$$= 174,274 \times \frac{401.5}{22}$$

$$= \underline{\underline{\$3,180,500.5}}$$

(3) MAGISTRATES' COURT

(a) Time Spent on Voir Dire - 6 x 74.4 = 446.4 days

(b) Monthly Cost of Staff Required

1 Magistrate		$41,614
1 Judicial Clerk		8,646
1 Stenographer in Court		4,845
1 Court Interpreter		8,990
1 Court Prosecutor		8,979
	Total per month:	$73,074

(c) Monthly Accommodation Cost of Court Room - $3,000

(d) Calculation

Total monthly cost -	$73,074
	3,000
	$76,074

Total annual cost of voir dire proceedings
= total monthly cost x no. of court months spent on voir dire

$$= \$76{,}074 \times \frac{446.4}{22}$$

$$= \underline{\underline{\$1{,}543{,}610.5}}$$

D) NOTES TO CALCULATIONS

The costs of the voir dire procedure calculated above should be treated with some caution for the following reasons :-

(i) It is impossile to arrive at a general assessment of staff required in each court. Not all District Court cases are custody cases and there is therefore not always a requirement for prison officers. Conversely, counsel may appear rather than a solicitor for the defendant and, in the Magistrates' Court, there are occasions when Crown Counsel appear for the prosecution opposed by a barrister or solicitor. Similarly, Queen's Counsel are often instructed in High Court cases;

(ii) An abolition of the present voir dire procedure does not necessarily mean that the costs given above will be saved. The procedure replacing it may, for instance, require evidence at present heard in separate voir dire proceedings to be heard before the jury or it may require the provision of special sittings to enable defendants to lodge complaints of ill-treatment. The extent to which either of these developments would reduce present costs is a matter of speculation;

(iii) The calculations above have not included any cost element for the police officers detained at court to give evidence in the voir dire proceedings. No mean figure can be calculated but it seems reasonable to suppose that the regular requirement for police officers to spend substantial periods of time at court must inevitably lead to a higher rate of recruitment to the police force than would otherwise be necessary;

(iv) It is not possible to obtain an accurate figure for the cost of a barrister or solicitor. The average figure paid by the Legal Aid Department when instructing has therefore been adopted but it can be assumed that the fees charged by barristers or solicitors instructed directly by clients would be considerably higher.

Annexure 5

ORGANISATIONS AND INDIVIDUALS CONSULTED FOR INFORMATION, VIEWS AND ASSISTANCE

Hon. Mr. Justice Baber
Bar Association
Hon. Mr. Justice Bewley
R.G.M. Bridge, Director of Immigration
J.D. Campbell, Magistrate
Tan Sri Datuk Chang Min Tat, Commissioner for Law Revision, Malaysia
Complaints Against Police Office
Correctional Services Department
Department of Customs and Excise
P.J. Dale, Attorney General's Chambers, Hong Kong
D.A. Davies, District judge
Director of Public Prosecutions
Discharged Prisoners' Aid Society
Mrs. E. Elliott, Urban Councillor
S.S. Griffith, American Attorney, Washington
J.C. Griffiths, Magistrate
W. Haldane, Solicitor
Independent Commission Against Corruption
B.L. Jones, Former District Judge
Judiciary
"Justice"
Glenn J. Knight, Attorney General's Chambers, Singapore
J. O'Keeffe, Magistrate
J.D. Lowe, Crown Office, Edinburgh
Law Society
Law Society Legal Advice and Assistance Scheme
A.L. Leathlean, District Judge
Legal Aid Department
J.P. Leong, Barrister
Sir Donald Luddington, then Commissioner ICAC
Hon. Mr. Justice Penlington
C.J. Perrior, Magistrate
J.C. Prisk, Customs and Excise Department
Royal Hong Kong Police Force
School of Law, Hong Kong University
D.J. Rossouw, Attorney General, Cape Town
R.G. Turnbull, Attorney General's Chambers, Hong Kong
Professor D. Zeffertt, University of Witwatersrand, South Africa

Annexure 6

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Annexure 7

THE JUDGES' RULES AND ADMINISTRATIVE DIRECTIONS

THE JUDGES' RULES 1912 -1918

The following rules have been approved by Her Majesty's judges :-

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 that 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 the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

5. The caution to be administered to a prisoner when he is formally charged should therefore be in the following words : "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case be should be cautioned as soon as possible.

7. 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 ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in

some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

JUDGES' RULES AND ADMINISTRATIVE DIRECTIONS TO THE POLICE - HOME OFFICE CIRCULAR NO. 31/1964

Home Office,

Whitehall, S.W.I.

January, 1964.

SIR,

I am directed by the Secretary of State to inform you that new Rules have been made by Her Majesty's Judges of the Queen's Bench Division with regard to interrogation and the taking of statements by the police. These Rules supersede the Rules previously made by the Judges. They are reproduced in Appendix A to this circular.

2. The new Rules differ in certain important respects from the old. It will be observed, in particular, that two forms of caution are prescribed according to the stage which an investigation has reached. One is to be given when an officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence. After this caution questioning may continue, but a record must be kept of the time and place at which such questioning began and ended and of the persons present. The second form of caution is to be given as soon as a person in charged with or informed that he may be prosecuted for an offence. Thereafter questions relating to the offence can be put only in exceptional cases, where they are necessary for the purpose of preventing or minimising harm or loss to any person or to the public or for clearing up an ambiguity in a previous answer or statement.

3. As is made clear by the judges, the Rules are concerned with the admissibility in evidence against a person of answers, oral or written, given by that person to questions asked by police officers and of statements given by that person to questions asked by police officers and of statements made by that person. In giving evidence as to the circumstances in which any statement was made or taken down in writing, officers must be absolutely frank in describing to the court exactly what occurred, and it will then be for the Judge to decide whether or not the statement tendered should be admitted in evidence.

4. The Rules, which have been made by the Judges as a guide to police officers conducting investigations, should constantly be borne in mind, as should the general principles which the Judges have set out before the Rules. But in addition to complying with the Rules, interrogating officers should always try to be fair to the person who is being questioned, and scrupulously avoid any method which could be regarded as in any way unfair or oppressive.

5. In Appendix B there is a statement of guidance for interrogating officers about various procedural points which may arise in the course of interrogation and the taking of statements. This guidance has been drawn up with the approval of the Judges.

I am, Sir,
Your obedient Servant,
C. C. CUNNINGHAM.

The Chief Constable.

APPENDIX A
JUDGES' RULES
NOTE

The origin of the Judges' Rules is probably to be found in a letter dated October 26, 1906, which the then Lord Chief Justice, Lord Alverstone, wrote to the Chief Constable of Birmingham in answer to a request for advice in consequence of the fact that on the same Circuit one Judge had censured a member of his force for having cautioned a prisoner, whilst another Judge had censured a constable for having omitted to do so. The first four of the present Rules were formulated and approved by the Judges of the King's Bench Division in 1912; the remaining five in 1918. They have been much criticised, inter alia for alleged lack of clarity and of efficacy for the protection of persons who are questioned by police officers : on the other hand it has been maintained that their application unduly hampers the detection and punishment of crime. A Committee of Judges has devoted considerable time and attention to producing, after consideration of representative views, a new set of Rules which has been approved by a meeting of all the Queen's Bench Judges.

The Judges control the conduct of trials and the admission of evidence against persons on trial before them : they do not control or in any way initiate or supervise police activities or conduct. As stated in paragraph (c) of the introduction to the new Rules, it is the law that answers and statements made are only admissible in evidence if they have been voluntary in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. The new Rules do not purport, any more than the old Rules, to envisage or deal with the many varieties of conduct which might render answers and statements involuntary and therefore inadmissible. The Rules merely deal with particular aspects of the matter. Other matters such as affording reasonably comfortable conditions, adequate breaks for rest and refreshment, special procedures in the case of persons unfamiliar with the English language or of immature age or feeble understanding, are proper subjects for administrative directions to the police.

JUDGES' RULES

These Rules do not affect the principles

(a) That citizens have a duty to help a police officer to discover and apprehend offenders;

(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;

(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor.

This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of the investigation or the administration of justice by his doing so;

(d) That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;

(e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that if has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

RULES

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions relating to that offence.

The caution shall be in the following terms :-

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms :-

> *"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."*

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms :-

> *"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."*

Any questions put and answers given relating to the offence must be contemptoraneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner :-

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following :-

> *"I, ……..., wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."*

(b) Any person, writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself shall be asked to write out and sign before writing what he wants to say, the following :-

> *"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."*

(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.

(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement :-

> *"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."*

(f) If the person who has made a statement refuses to read it or to write the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been charged with or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply,

or starts to say something he shall at once be cautioned or further cautioned as prescribed by Rule III(a).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

APPENDIX B
ADMINISTRATIVE DIRECTIONS ON INTERROGATION AND THE TAKING OF STATEMENT

1. Procedure generally

(a) When possible statements of persons under caution should be written on the forms provided for the purpose. Police officers' notebooks should be used for taking statements only when no forms are available.

(b) When a person is being questioned or elects to make a statement, a record should be kept of the time or times at which during the questioning or making of a statement there were intervals or refreshment was taken. The nature of the refreshment should be noted. In no circumstances should alcoholic drink be given.

(c) In writing down a statement, the words used should not be translated into "official" vocabulary; this may give a misleading impression of the genuineness of the statement.

(d) Care should be taken to avoid any suggestion that the person's answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might help to clear him of the charge.

2. Record of interrogation

Rule II and Rule III(c) demand that a record should be kept of the following matters :-

(a) when, after being cautioned in accordance with Rule II, the person is being questioned or elects to make a statement - of the time and place at which any such questioning began and ended and of the persons present;

(b) when, after being cautioned in accordance with Rule III(a) or (b) a person is being questioned or elects to make a statement - of the time and place at which any questioning and statement began and ended and of the persons present.

In addition to the records required by these Rules full records of the following matters should additionally be kept :-

(a) of the time or times at which cautions were taken, and

(b) of the time when a charge was made and/or the person was arrested, and

(c) of the matters referred to in paragraph 1(b) above.

If two or more police officers are present when the questions are being put or the statement made, the records made should be countersigned by the other officers present.

3. Comfort and refreshment

Reasonable arrangements should be made for the comfort and refreshment of persons being questioned. Whenever practicable both the person being questioned or making a statement and the officers asking the questions or taking the statement should be seated.

4. Interrogation of children and young persons

As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child. A child or young person should not be arrested, nor even interviewed, at school if such action can possibly be avoided. Where it is found essential to conduct the interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee.

5. Interrogation of foreigners

In the case of a foreigner making a statement in his native language:

(a) The interpreter should take down the statement in the language in which it is made.

(b) An official English translation should be made in due course and be proved as an exhibit with the original statement.

(c) The foreigner should sign the statement at (a).

Apart from the question of apparent unfairness, to obtain the signature of a suspect to an English translation of what he said in a foreign language can have little or no value as evidence if the suspect disputes the accuracy of this record of his statement.

6. Supply to accused persons of written statement of charges

(a) The following procedure should be adopted whenever a charge is preferred against a person arrested without warrant for any offence :

> As soon as a charge has been accepted by the appropriate police officer the accused person should be given a written notice containing a copy of the entry in the charge sheet or book giving particulars of the offence with which he is charged. So far as possible the particulars of the charge should be stated in simple language so that the accused person may understand it, but they should also show clearly the precise offence in law with which he is charged. Where the offence charged is a statutory one, it should be sufficient for the latter purpose to quote the section of the statute which created the offence.
>
> The written notice should include some statement on the lines of the caution given orally to the accused person in accordance with the Judges' Rules after a charge has been preferred. It is suggested that the form of notice should begin with the following words :-
>
> > *"You are charged with the offence(s) shown below. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence".*

(b) Once the accused person has appeared before the court it is not necessary to serve him with a written notice of any further charges which may be preferred. If, however, the police decide, before he has appeared before a court, to modify the charge or to prefer further charges, it is desirable that the person concerned should be formally charged with the further offence and given a written copy of the charge as soon as it is possible to do so having regard to the particular circumstances of the case. If the accused person has then been released on bail, it may not always be practicable or reasonable to prefer the new charge at once, and in cases where he is due to surrender to his bail within forty-eight hours or in other cases of difficulty it will be sufficient for him to be formally charged with the further offence and served with a written notice of the charge after he has surrendered to his bail and before he appears before the court.

7. Facilities for defence

(a) A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so.

He should be supplied on request with writing materials and his letters should be sent by post or otherwise with the least possible delay. Additionally, telegrams should be sent at once, at his own expense.

(b) Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.

COMPARATIVE LAW

AUSTRALIA

Each of the six Australian States and both territories have their own criminal codes and justice systems. Generally, however, the principles governing the admissibility of confessions in each of these jurisdictions are the same. What follows is an outline of the law applicable in all states in this area, indicating where variations exist.

A. COMMON LAW APPLICABLE IN ALL STATES AND TERRITORIES

(a) The Rules

A confession of a crime is only admissible against the party making it if it was voluntary. In R. v. Lee (1950) 82 CLR 133 at 149, it was said that voluntary does not mean "volunteered" "but made in the exercise of a free choice to speak or be silent". (See also New South Wales decision of R. v. Attard (1969) 41 WN (NSW) 824.

The principle of voluntariness was fully outlined by Dixon J. in McDermott v. R. (1948) 76 CLR 501 (at 511):

> *"if he speaks because he is over-borne his confessional statement cannot be received in evidence and it does not matter by what means he has been over-borne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the Common Law that a confessional statement cannot be voluntary if it is preceeded by an inducement held out by a person in authority and the inducement has not been removed before the statement was made."*

The most frequent examples of the above rules in practice are where it is alleged the threat or pressure came from a person in authority.

(b) Analysis of the rule

(i) "Person in authority" : This is anyone whom a prisoner would regard as being able to influence the prosecutor. In R. v. McDermott (supra) the High Court thought the police, the prosecutor or "others concerned in preferring the charge" would

fall within the terminology "person in authority". It was said in Keefe v. Crown (1919) 21 WALR 88 that the wife of a constable, the prison chaplain, a doctor and a fellow servant would not fall within the term "person in authority". However a gaoler and the prosecuting solicitor would. A further example is seen in the South Australian case of R. v. S (1953) 53 SR (NSW) 460 where it was held that a Supreme Court Judge acting as a Royal Commissioner and giving advice to a witness was not a person in authority.

(ii) The "inducement" : Any matter which suggests to the person making the confession that there might be a beneficial result in connection with the prosecution, will result in the confession being excluded. In R. v. Woess [1945] VR 190 and in two later decisions, firstly in South Australia, in Maddofod v. Brown [1953] SASR 169 and secondly in New South Wales in R. v. Travers (1957) 74 WN (NSW) 484 it was held that the threat or inducement need not relate to the prosecution.

(iii) Threats and physical coercion : The meaning of physical coercion is self-explanatory. The use or threat of violence prevents a confession from being voluntary (See R. v. McDermott (supra)).

(iv) Mental coercion or oppression : A confession obtained as a result of mental coercion will be excluded. In R. v. Cornelius (supra at 254) the High Court of Australia said in relation to this matter :

> *"No doubt can be felt that interrogation may be made the means or occasion of imposing upon a suspected person such a mental and physical strain for so long that any statement that he is thus caused to make should be attributed not to his own will but to his inability further to endure the ordeal and his readiness to do anything to terminate it."*
>
> (See also R. v. LEE (1950) 82 CLR 133 at 146)

In this context the word "oppressive" is seen as something that tends to sap and has sapped the free will of the person making the confession. See R. v. Prager [1972] 1 WLR 260. It is important that all the circumstances that operated on the defendant's mind be ascertained, and that will include looking at his educational background, natural timidity, reaction to authority, intelligence and at any breaches of the judges' rules.

(c) Statutory enactments affecting Common Law Rules

(i) New South Wales and Queensland

S.410 of the NSW Crimes Act provides that a statement or admission following a threat or pressure by an untrue representation from a person in authority shall be deemed to have been induced trereby unless the contrary is shown. A similar provision is to be found in s.10 of Queensland's Criminal Law Amendment Act 1894.

These sections do not derogate from the common law rules governing admissibility of confessions see Attorney General for NSW V. Martin (1909) 9 CLR 173 and R. v. Mckay (1965) Qd R 240. Indeed in McDermott v. R. (supra) Dixon J. was of the view that the provision possibly extended the common law. (See also "Confessions to Police" by R.R. Kidston Vol. 33 AlJ P369 at 371.)

A prerequisite for the operation of the section is that a crime has already been committed see R. v. O (1974) in SWR 31). Further the representation must be wilfully untrue to the knowledge of the person making it and made with the object of extorting a confession (see R. v. Thompson (1962) SR NSW 135 and R. v. Mangin (1894) 6 QLJ).

(ii) Victoria

S. 149 of the Evidence Act 1958 provides that :-

"No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or presiding officer is of the opinion that the inducement was really calculated to cause an untrue admission of guilt to be made"....

The words "calculated to" were held to mean "likely to" in R. v. Cornelius (1936) 55 CLR 235. The section only applies where there are threats or promises. If any other form of inducement, such as physical force or mental coercion, is used against an accused in obtaining the confession, then the common law rules will apply and not s.149 in determining whether the confession is excluded.

(d) State of mind of accused

Related to this question is the issue of the accused's state of mind at the time the confession was made. A confession will be

inadmissible if obtained at a time when the accused's mind was so unbalanced as to render it wholly unsafe to act upon.

It is difficult to know when a court would reach such a conclusion. In R. v. Sinclair (1947) 73 CLR P316 Dixon J. compared the question to that of the competency of a witness whose sanity is challenged. In R. v. Burnett [1944] VLR 141 a confession was excluded of the person was at the material time labouring under the stress of a fainting fit.

However in R. v. Collis (1950) 31 ACR 255 where the four defendants were bush aborigines (the eldest was 18 years of age) it was argued that a murder re enactment was involuntary because of, inter alia, their ages and their lack of comprehension. The court held voluntariness was a question of degree in each case and ruled that the defendants' conduct was voluntary.

Perhaps the best statement of the position in relation to confessions and the prisoner's mental state is set out by Stoll J. in R. v. Buchanan [1966] VR 9 at 15 where he said,

> *"There may be cases where as a result of a head injury, evidence would show that the patient was not in a position to exercise such a judgement at all. No doubt in such a case the statement would be held not to be a voluntary statement. There may also be cases where the evidence shows that he made a statement when his will was capable of being easily overborne, or where it was extremely unlikely he would be able to exercise a proper judgement. In such a case, although the statement might be held to be voluntary, no doubt the exercise of the court's discretion would be likely to be exercised against admissibility. But it seems to me that the mere fact that a man's capacity to judge whether to answer or not is less than he would normally have, does not justify the conclusion that any statement he makes is involuntary in the legal sense."*

It is thought that the better view is, in relation to the question of the accused's state of mind, that the defence have an evidential burden to raise this issue (See R. v. Sinclair (1947) 73 CLR 316 at 340).

B. VOIR DIRE - APPLICATION IN ALL STATES AND TERRITORIES

The question of whether or not a statement is voluntary is decided by the trial judge and involves a voir dire hearing.

Generally the voir dire hearing will take place at the commencement of a trial in the absence of the jury, and prior to the prosecutor opening the Crown case. "On the voir dire hearing the prosecution

and defence can lead evidence (including the accused) bearing on the question of voluntariness" (See "The Exclusionary Rule and other Controls over the abuse of Police Power" by Elliot Johnson Q.C. Vol. 54 ALJ P466 at 467.)

(a) Onus of proof on voir dire - applicable in all states and territories

The burden of proof that a confession was voluntary rests on the prosecution (See R. v. LEE (supra) ; R. v. Batty [1963] V. R. 451 and Dixon v. McCathy [1975] 1 NSWLR 617). The standard of proof is not beyond reasonable doubt but on the balance of probabilities (See Windo v. R. (1963) 109 CLR 559 and R v. Hagon [1966] Qd R. 219 and R. v. Stafford (1976) 13 SASR 392).

(b) General

In relation to s.149 of the Victoria Evidence Act 1958 the prosecution has the onus of establishing on the balance of probabilities that the threat or promise alleged was not likely to cause an untrue representation (See Duff v. R. (1979) 28 ALR 663, a case based on a similar provision in the Australian Capital Territory).

The Crown does not have to raise the issue of voluntariness of a confession then negative it, where the circumstances surrounding a confession do not give rise to a suggestion that it has been obtained by any threat or inducement (See Attorney-General for NSW v. Martin (1909) 9CLR 713).

Despite the fact that the matter might not be raised by the defendant, a judge is still under a duty to satisfy himself that the confession was voluntary (See R. v. Death (1962) VR 650).

C. DISCRETION TO EXCLUDE - APPLICABLE IN ALL STATES AND TERRITORIES

(a) The Rule

A confession may be held to be voluntary and admissible in law but the trial judge still has a discretion to exclude the evidence if he finds that the circumstances in which it was made render it unfair to use it against the accused.

(b) Exception to rule - s.149 Victoria Evidence Act 1958

As mentioned previously, pursuant to s.149 of the Evidence Act 1958 the Victoria Courts must decide whether the threat or promise was likely to cause an untrue admission of guilt. If a court comes to the conclusion that the threat or promise was not likely to do so, then the confession must be admitted (See R. v. LEE (supra at P150). It is to

be remembered this only applies to confessions obtained as result of threat or promise).

(c) General

The existence of the discretion was recognised by the High Court of Australia in R. v. LEE (supra). In that case the court said that "improper or unfair means by police officers in interrogating suspected person or persons in custody" would be the basis upon which a court would exercise its discretion.

In this respect the Judges' Rules are particularly important.

Judges' Rules

The English Judges' Rules have almost identical equivalents in New South Wales (see Police Regulations) and Victoria (see Chief Commissioner's Standing Orders). In the states of Queensland and Tasmania, the English Judges' Rules have been adopted with certain modifications (see for Queensland R. v. Juenszko [1967] Qd R 128 and for Tasmania R. v. Deverell [1969] Tas SR 106.

In South Australia and Western Australia there are no equivalents of the Judges' Rules. In these States the courts apply the test outlined in R. v. LEE (supra at P154) which cited with approval the pronouncement of Street J. in R. v. Jefferies (1947) 47 SR (NSW) 284 at 312-3.

> *"it is a question of degree in each case, and it is for the presiding judge to determine in the light of all the circumstances, whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him ... The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interest of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigation must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admissions and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence …"*

The High Court, in LEE's case (at P154) warned against the approach of treating the rules as doing any more "than presenting in a general way a standard of propriety". The court went on to say (at P152-153) :

> *"With regard to the Chief Commissioner's Standing Orders, which correspond in Victoria to the Judges' Rules in England, they are not rules of law, and the mere fact that one or more of them have been broken does not of itself mean that the accused has been so treated that it would be unfair to admit his statement. Nor does proof of a breach throw any burden on the Crown of showing some affirmative reason why the statement in question should be admitted …. "*

In exercising his discretion, the trial judge is entitled to treat as relevant, but not decisive, the question whether the impropriety was likely to have produced an untrue confession (see R. v. LEE (supra) and R. v. Aspern (1964) JR 91 at 94). In the latter case O'Bryan J. outlined a number of matters such as health of the accused, which are relevant to the exercise of the discretion.

The trial judge has no obligation to direct the jury's attention as to whether an interview has been conducted in accordance with the Police Commissioners rules (See R. v. Robinson [1969] 1 NSWR 229).

(d) Discretion exercised in relation to confessions obtained from (i) aboriginals/migrants (ii) children.

(i) Aboriginals and Migrants

In R. v. Arung (1976) 11 ALR 412 Foster J. outlined guidelines for the interrogation of aboriginals and the majority of these were said to apply equally to migrants. A breach of the guidelines would lead to probable exclusion (see R. v. Williams (1976) 14 SASR 1). The guidelines were :-

(1) Interpreters should be present unless the suspect was "fluent in English";

(2) A prisoner's friend should be present. This is someone in whom the suspect has confidence and by whom he will feel supported;

(3) Care should be taken in administering the caution. It should be explained in simple terms, and the suspect should be asked to say, phrase by phrase what it means;

(4) Leading questions should not be employed;

(5) Even after a confession is obtained the police should continue to seek other evidence of the offence;

(6) An ill, drunk or tired suspect should not be interrogated. Interrogation should not last an unduly long time;

(7) if legal assistance is sought, reasonable steps should be taken to obtain it. If a suspect says he does not wish to answer questions the interrogation should cease.

(ii) Children

The principle applicable in relation to confessions obtained from children was outlined in Dixon v. McCarthy [1975] 1 NSWLR 617 at 639-40. There the court was dealing with confessions obtained from children aged 13 and 14. The court thought that such confessions should be excluded because they were made in the absence of any serious attempt to procure the children's parents to be present after an 11 year old had been assaulted in their presence. (See also R. v. C [1976] Qd R 341).

The requirement of presence of a parent or guardian when a child is being interviewed has been given statutory recognition in New South Wales. The Child Welfare Act 1939 (NSW) s.18C states that a confession will be inadmissible unless either there is present a parent or guardian or legal practitioner, or (with the consent of a parent or guardian), another person who is not a member of the police force, or there is good reason for the absence of these persons and it is considered that the confession should be admitted.

(e) Onus of proof on exercising discretion

In R. v. Wendo (supra) it was said that the accused bears the onus of showing a case for the exercise of the judge's discretion to reject a confession voluntarily made (see also R. v. Batty (supra) and R. v. Collins (1976) 12 SASR 501).

D. STATEMENT ADMITTED - APPLICABLE IN ALL STATES

If the evidence is ruled admissible it is a matter for the jury to determine what weight to attach to it. In deciding this question the prosecution and defence can lead evidence including the evidence led on the voir dire as to the circumstances in which the statement was made and which may bear on the question of weight to be attached to it.

INDIA

A distinction is made between admissions and confessions under Indian Law. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact (Azimaddy and others v. Emp. 44 C.I.J. 253) while a confession is a direct admission or acknowledgement of guilt by a person who has committed a crime (Pakala Narayanaswami A.I.R. 1939 P.C. 47). In Pakala Narayanaswami the Privy Council observed that "No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession."

An admission to a police officer may be admissible under section 17 of the Indian Evidence Act but a confession made to a police officer is excluded by section 25 against a person accused of any offence. This rule is subject to the proviso under section 27 that when any fact is discovered as a result of information received from a person in custody, the information which relates directly to the facts discovered (even if it amounts to a confession) is admissible in evidence. Thus, in Emperor v. Chokhey ILR 1937 All. 710 where an accused in police custody stated that he had hidden a gun in a particular place and a gun was subsequently found there, the statement was admissible.

Subject to the exception of the provisions of section 27, a confession must be admitted or excluded in its entirety. Part of a confession cannot be admitted and used as a non-confessional statement.

Section 164 of the Criminal Procedure Code provides for the recording of the confession of an accused person by any presidency magistrate or magistrate. The actual words of the accused should be recorded. Before taking the confession, the magistrate must explain to the accused that he is not bound to make a confession and that if he does so it may be used in evidence against him. The magistrate must satisfy himself that the confession is voluntary and is required to give a certificate to that effect.

Once a confession has been duly recorded and certified by a magistrate under section 164 of the Criminal Procedure Code it is admissible in evidence unless otherwise excluded by provisions of the Indian Evidence Act. Section 24 is relevant here as it excludes any confession made by an accused person which "appears to the Court to have been caused by an inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against

him". A retracted confession may nevertheless form the basis for a conviction but it requires corroboration. In Emperor v. Biseswar 26 CWN 1010 it was said that "it can be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally made and the circumstances under which it was retracted including the reason given for the retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by creditable and independent evidence."

The term "person in authority" in section 24 is to be considered as a question of fact in each case (Pyare Lal Bhargava v. State of Rajasthan AIR 1963 SC 1094). A confession will not be admitted if it "appears" to the court to have been caused by an inducement threat or promise. The appropriate meaning of the words "appears" is "seems" and it imports a lesser degree of probability than proof. This does not mean mere surmise, however, (Pyare Lal Bhargava, supra). Various rules have been laid down by the States and Central Government of India regarding the production of the accused and the recording of his confession. Section 61 of the Criminal Procedure Code states that "no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a magistrate ……., exceed twenty-four hours." Rules made by the Government of India further state that it is "only in very exceptional circumstances" that the accused should thereafter be returned to police custody. These rules recommend that the magistrate record on taking a confession "the grounds on which he believes that the confession is genuine, the precautions which he took to remove the accused from the influence of the police, and the time (if any) given to him for reflection."

It was held in Nazir Ahmad v. Emperor (33) 40 CWN 1221 that a confession can only be recorded by a magistrate in the manner prescribed in sections 164 and 364 of the Criminal Procedure Code and that the confession can only be proved by such a document. In Nazir Ahmad the magistrate only took notes of the accused's statement rather than a verbatim record and the subsequent amplification of these notes was held inadmissible.

MALAYSIA

The main statutory provisions covering the admissibility of confessions are to be found in the Evidence Act and the Criminal Procedure Code, although other statutes make specific regulations within their own scheme of operations.

Section 113(1) of the Criminal Procedure Code states that:

"where any person is charged with any offence any statement, whether ….. oral or in writing, made at any time …… by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person, shall be admissible in evidence at his trial ..... "

By a proviso to the sub-section, no statement is admissible if it "appears to the Court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the Court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him" (s.113(1)(a)(1)). Furthermore, where a statement is made by a person after his arrest, it will be held inadmissible unless the court is satisfied that a caution was administered" in the following words or words to the like effect :

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'"(s. 113(1)(a)(2)).

Where there has been no time to caution the accused before he has made a statement, however, the statement will be admissible.

While s. 113 of the Criminal Procedure Code refers to any statement by a person charged, whether amounting to a confession or not, provision in relation to confessions is made in the Evidence Act. Section 24 provides that a confession "is irrelevant in any criminal proceeding" if it appears to the court to have been caused "by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him."

A confession is defined by section 17(2) of the Evidence Act as an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed the offence. In Anandagoda v. R. [1962] MLJ 289, the appellant had been charged with murder for running down the deceased with his car. The appellant had indicated he was the owner of the car but this did not amount to a confession as there had been no admission that he had been driving the car at the time the offence was committed. Lord Guest laid down the test to be applied : "The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed

the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt" (at page 291).

No confession made to a police officer below the rank of inspector is admissible (s.25(1) Evidence Act) and neither are confessions made while the person is in the custody of a police officer, unless made in the presence of a magistrate or a president of a Sessions Court (s.26(1)).

If a fact comes to light as a result of information obtained from an accused in police custody, "so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved "(s.27(1) Evidence Act). Thus, in Public Prosecutor v. Toh Ah Keat [1977] 2 MLJ 87 where the accused was charged with unlawful possession of a firearm and ammunition and stated to the police, "he told me that he was having a pistol and that it was an automatic pistol and he was also having 7 rounds of 22 ammunition and this pistol was hidden behind some houses in Pasir Pinji and that he would take me to that place", it was held that (the firearm and ammunition having been discovered as a result of the statement) the words "this pistol was hidden behind some houses in Pasir Pinji and that he would take me to the place" were admissible.

The provisions of section 113 of the Criminal Procedure Code and section 27 of the Evidence Act may be distinguished by saying that "what is protected under section 113 …… is the voluntariness of the statement whereas what really matters under section 27 …… is the guarantee or assurance of the possibility of the truth of the statement by the fact of discovery. (Public Prosecutor v. Toh Ah Keat, supra at 89). Voluntariness is not an issue as far as section 27 of the Evidence Act is concerned. It was argued that a confession under section 27 was not voluntary and should not be admitted in Public Prosecutor v. Er Ah Kiat [1966] 1 MLJ 9. Raja Azlan Shah J said: "In my opinion that is not a correct statement of the law. It would be sufficient for the present purpose to state a passage from the judgment of Park J. in the case of Thurtell v. Hunt where he said:-

> *"A confession obtained by saying to the party: 'you had better confess, or it will be the worse for you' ..... is not legal evidence. But though such a confession is not legal evidence, in every day practice if, in the course of such confession, the party states where stolen goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats which may have been held out to him."*

Section 112 of the Criminal Procedure Code requires any person to answer all questions put to him by a police officer, with the

exception that he need not answer any question which might incriminate him. No requirement for a caution is made as neither arrest nor charge have arisen.

Where a statement is to be taken from an arrested person, the caution must be administered and the interview undertaken, in a language he understands (Tan Too Kia v. Public Prosecutor [1980] 2 MLJ 189). Questioning amounting to cross-examination will make a statement inadmissible (Chang Seng Heng and Ors. v. Public Prosecutor [1949] MLJ 175). The statement when completed should be signed by the accused and it will be rejected if not so signed where there has been a reasonable explanation for the omission (Jayaraman and others v. P.P. [1982] 2 MLJ 312).

Apart from the Criminal Procedure Code, the admissibility of cautioned statements is also dealt with in the International Security Act, the Prevention of Corruption Act, the Kidnapping Act, the Dangerous Drugs Act and the Law Reform (Eradication of Illicit Samsu) Act 1976.

For a caution statement to be admissible, the statement must be voluntary. The question of voluntariness is a question of fact to be decided on the evidence tendered by both prosecution and defence (Yaacob v. Public Prosecutor [1966] 1 MLJ 67 F.C.). A statement is involuntary if it has been obtained "by any inducement threat or promise having reference to the charge proceeding from a person in authority" which is "sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature inreference to the proceeding against him" (Section 113(1)(a)(1) Criminal Procedure Code).

It was held in Public Prosecutor v. Law Seng Seck and Others [1971] MLJ 199 that for an act to amount to an inducement, threat or promise there were 3 requirements: it must be such that without it the person would not have made the statement; it must be such that the person would suppose that the advantage to be gained was of a temporal nature; and it should be sufficient in the opinion of the court to make the accused suppose that he would get the advantage. A statement is admissible if the inducement is not of a temporal nature. For instance, in R v. Sleeman (1853) 6 Cox 245 a confession was made after the accused was told "Do not run your soul into more sin but tell the truth." The confession was admitted.

The Courts have placed great reliance on the voluntariness of a statement or confession from an accused person. Even in a security trial under the Essential (Security Trials) Regulations 1975 where the Regulations are silent on the provision that a statement by the accused must not be obtained improperly, the Federal Court has nevertheless ruled that, before the statement can be accepted, it must be proved if a challenge is mounted that it was made, without inducement, threat or promise (Johnson Tan v. P.P. [1977] 2 MLJ 66 F.C.).

The admissibility of a caution statement or confession is dealt with at a trial within a trial. This should be considered as a separate

proceeding from the trial proper (Lim Seng Chuan v. Public Prosecutor [1977]1 MLJ 171 CCA). The sole issue is that of voluntariness and it is a matter for the judge in the absence of the jury to decide. Whenever the admissibility of a caution statement or confession is objected to and challenged by the accused, the court must hold a trial within a trial (Chan Wei Keung v. R [1967] 2 AC 160 P.C.). A failure to do so will render the statement inadmissible (Lee Weng Sang v. Public Prosecutor [1978] 1 MLJ 168). The trial within a trial must proceed according to standard procedure. In Sabli Bin Adin and Ors. v. Public Prosecutor [1978] 1 MLJ 210 FC the judge admitted a statement after accepting written submissions from prosecution and defence. It was held that the statement was inadmissible as no trial within a trial had been held.

If the accused does not object to the admissibility of a statement there is no need to hold a trial within a trial (Public Prosecutor v. Mohamed Noor bin Jantan [1979] 2 MLJ 289).

The onus lies on the prosecution at the trial within the trial to prove that the statement is voluntary. In Tan Too Kia v. Public Prosecutor [1980] 2 MLJ 189 it was held that "the voluntariness of the confession being in issue, it was up to the prosecution to prove beyond reasonable doubt that it was voluntary." In that case the prosecution failed to produce the Inspector against whom the allegation of violence had been made and it was held that this necessarily meant that the prosecution had not proved voluntariness beyond a reasonable doubt.

It is only necessary for the defence to produce evidence such that it "appears to the Court" that the statement is involuntary. It should be noted that the word used is "appears" rather than "proved" and clearly a lower standard of proof is required.

NEW ZEALAND

In New Zealand the law relating to confessions rests on both the common law and s.20 of the Evidence Act 1908. In its final form as substituted in 1950 s.20 reads:

> *"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."*

In R. v. Phillips [1949] N.Z.L.R. 316 the Court of Appeal held unanimously that s.20 was not the whole of the law, but that quite apart from the section, the voluntary nature of a confession must be proved before it

could be admitted in evidence. Before any question could arise under s.20 the voluntariness of the confession must first be established, and might be negatived, not only by proof of threat or promise, but on other grounds as well.

In R. v. Naniseni [1971] 269 the Court of Appeal had to consider how far the question of voluntariness may be negatived by factors outside those referred to in the classic statement of Lord Sumner in R. v. Ibrabim [1914] A.C. 599, 609. In Naniseni the Court was dealing with a situation where the accused was "tired and without sleep, and under emotional strain". The Court held that there are not "two separate exclusive rules" (i.e. one relating to promises and threats and one to other factors) but "two separate applications of the one rule" (i.e. the general rule requiring voluntariness). The Court said :

> *"But in our opinion the word 'voluntary', where used to describe the essential characteristic of an admissible confession, must be taken to signify that the will of the person making the confession has not been overborne by that of any other person. If the factor which is set up as rendering the confession not voluntary is something in the nature of threats, violence, force or other form of compulsion, to use the words of our own Evidence Act, or, to adopt the enumeration of Dixon J in R. v. McDermott, (1948) 76 CLR 501 duress, intimidation ….. or sustained or undue insistence or pressure, whatever is alleged as an inducement must have been brought to bear on the prisoner by some other person, and to have influenced him to make the confession. If what is set up is the more special classical ground of 'some fear of prejudice or hope of advantage exercised or held out to or upon him', not only must the inducement be held out by some other person, but that person must be shown to be a person in authority over him."*

The net result appears to be :

(1) that the grounds on which a confession may be held to be inadmissible are those referred to in s.20,

namely -

(a) the various forms of compulsion, and
(b) the various other forms of inducement;

(2) that it is no longer necessary to have recourse to the vague concept of voluntariness, the meaning of voluntary in this context being now that there was neither violence or force or other form of compulsion, nor promise or threat of any other form of inducement;

(3) that, as anything which could be relevant and does not amount to compulsion must necessarily be some form of inducement, s.20 applies in all cases where compulsion is absent;

(4) that compulsion must be by some other person, and, if it has induced the confession, necessarily renders it inadmissible; and

(5) that other forms of inducement must be by a person in authority, but, though "actual inducement" is presumed, rejection of the confession is prohibited by s.20 if the Judge is satisfied that the inducement was not in fact likely to cause an untrue admission of guilt.

It should be noted that s.20 is akin to s.149 of the Victorian Evidence Act 1958. It obviously has no application in cases of violence, force or other compulsion.

The question for the court is as to the likelihood of causing an untrue admission, not as to its actual truth or falsity.

The existence of a discretion to "reject a confession obtained by unfair means" was re-affirmed in Naniseni (supra), and it has been suggested that it is unsafe merely to rule a confession is admissible, the cautious course will be to add an express refusal to exercise the discretion (per North P. in R. v. Convery [1968] N.Z.L.R. 426). Nevertheless where s.20 applies and prohibits the rejection of a confession, it seems it is not permissible to disobey it by the purported exercise of a discretion (see Turner J in Convery at p.436).

The burden of satisfying the court that the statement was made voluntarily, and under s.20 that an untrue admission of guilt was not likely to be caused, rests on the Crown.

The standard of proof is beyond reasonable doubt. (R v. McLuin [1982] 1 N.Z.L.R. 13)

PEOPLE'S REPUBLIC OF CHINA

Criminal procedure is governed by the "Law of Criminal Procedure of the People's Republic of China" which was adopted by the 2nd Session of the 5th National People's Congress on July 1st 1979.

Article 31 provides that all facts that prove the truth of a case are evidence. Evidence is divided into 6 categories, of which one is the statement and explanation of the defendant. The use of torture or duress to extort confessions and the collection of evidence by threat, enticement, deceit and other illegal means is strictly forbidden under Article 32.

No defendant may be convicted on the evidence of his confession alone and, conversely, a confession is not necessary for a conviction (Article 35).

After detaining a person, his family or work unit must be notified of his place of detention and the reasons for his detention within 24 hours except where notification would hinder investigation (Article 43). Interrogation of the detainee must be carried out within 24 hours (Article 44).

During an interrogation there must be at least 2 investigators present (Article 62). The interrogation may take place at a designated place or at the defendant's residence or work unit. The interrogation must commence with a question as to whether or not the defendant is guilty of the crime. "The defendant shall answer the investigator's questions strictly according to the facts, but he has the right to refuse to answer questions irrelevant to the case" (Article 64).

The interrogation is recorded and this record is checked by the defendant who signs if he acknowledges its accuracy (Article 66). It is open to the defendant to write his own statement if he wishes to do so.

Criminal cases (except the most minor ones) are heard by a bench of 1 to 3 judges and 2 to 4 people's assessors. Decisions are by a majority but the minority view must be recorded. The indictment is read by the public prosecutor and proceedings begin with the defendant being questioned by the bench. He is further questioned by the public prosecutor, the victim and the plaintiff if there are incidental civil proceedings. Evidence is led and the public prosecutor and victim are allowed to make submissions before a final statement is made by the defendant.

It is thought that the test for admissibility of a confession statement by the defendant is its truth and the fact that a confession was extorted by violence will not exclude it from consideration by the court. If violence is alleged, the allegation will be investigated and the law enforcement agent concerned will be prosecuted but this will have no bearing on the admissibility of the statement wrongfully obtained. It is, however, open to the accused to show that the statement was untrue and should not therefore be admitted.

SINGAPORE

Section 120 of the Criminal Procedure Code, Cap. 113, states that :-

> *"(1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.*

(2) Such person shall be bound to state truly the facts and circumstances with which he is acquainted concerning the case save only that he may decline to make with regard to any fact or circumstance a statement which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.".

Any statement by a person charged with an offence which is made to or in the hearing of a police officer of or above the rank of sergeant is admissible (section 121(5)). However, such a statement shall be excluded if the statement "appears to the court" to have been made because of "any inducement, threat or promise having reference to the charge against such person". It would seem, therefore, that an inducement or threat unconnected with the charge would not render a resultant confession inadmissible. Further, the inducement, threat or promise must proceed "from a person in authority, and [be] sufficient, in the opinion of the court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him" (section 121(5)). The question of whether or not inducements or threats relative to the accused's spiritual well-being would render a statement inadmissible has not been judicially tested. A broad approach has been adopted by the Courts in interpreting section 121 and there have been cases where statements have been rejected when the inducement, threat or promise held out to an accused did not come from a person in authority or was not related to the charge. The Courts have adopted the test of voluntariness established by the English Courts and that includes the concept of "oppressiveness" which has been accepted as grounds for rejecting a statement.

It has been held that the use of words such as "You better tell the truth" imply a threat or promise (Public Prosecutor v. Nailan [1961] MLJ 14). However, to merely call attention to a duty at law with which the accused must comply is not a threat. In Chua Beow Muat v. Public Prosecutor [1970] 2 MLJ 29, it was said (at p.34) that, "if there is an obligation under the law to tell the truth, the performance alone of such an obligation cannot be equated to a threat unless in the manner and mode of questioning a threat could be reasonably inferred having regard to all the surrounding circumstances".

It is for the prosecution to prove that a confession has been made voluntarily. S. Chandra Mohan suggests that this is to "a higher standard of proof than the reasonable doubt test required by English law" (Malayan Law Journal, June 1977, page XXXvi). The question of admissibility is dealt with at a "trial within a trial" if the accused challenges the voluntary nature of an alleged confession. Only evidence which is relevant to the issue of voluntariness is led and it may be that "evidence may be given which would be inadmissible evidence on the charge against the accused but may be relevant on the issue to be decided at the trial within a trial". (Lim Seng Chuan v. Public Prosecutor [1977] MLJ 171).

When any person is charged or officially informed that he may be prosecuted for an offence, he must be served with a notice in writing, advising him that a failure to mention facts relevant to his defence may have an adverse effect on the subsequent credibility of his evidence. The notice in writing must be explained to the accused (section 121(6)). This provision was introduced by the Criminal Procedure (Amendment) Act 1976. It should be stressed that this procedure relates only to the obtaining of an accused's defence and is not used to question an accused.

Related to the amended style of caution or warning is the power given to the court under section 122 to draw inferences from an accused's failure to mention relevant facts. The section reads :

> *"(1) Where in any criminal proceedings ... evidence is given that the accused, on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so charged or informed, ... the court, in determining whether to commit the accused for trial or whether there is a case to answer, and …. in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper".*

This failure, and the resultant inference, may amount to corroboration of other prosecution evidence. Section 122 adopts the arguments of the United Kingdom Criminal Law Revision Committee's Report in its approach to the right to silence of an accused. It should be noted that the section does not imply that an adverse inference shall be drawn from the accused's silence but that "proper" inference "may" be drawn. The circumstances of each particular case will be of relevance in determining what, if any, inference to draw.

The effect of sections 121 and 122 is that the emphasis has shifted from the earlier caution to an accused that he was not obliged to say anything to the present warning that a failure to reveal relevant information may have an adverse effect on his case. Concern has been expressed at these reforms introduced by the Criminal Procedure (Amendment) Act 1976 but attempts to have the relevant provisions declared unconstitutional failed (Sundram Jaykumal v. Public Prosecutor [1981] 2 MLJ 297; Haw Tua Tau v. Public Prosecutor [1981] 2 MLJ 49).

It has been suggested that the reforms have resulted in no significant increase in the number of statements made by accused persons and that the power to draw inferences has not been exercised but the study in question was limited and of doubtful value ([1983] 2 MLJ XXXiii). Criticisms that Singapore had adopted an approach which had been rejected in the United Kingdom were countered by the Minister for Law, Mr. E.W. Barker, in Parliament when he said :

"The recommendation to restrict the right of silence and to abolish the Judges' Rules attracted the most severe criticism [in England]. Some of the comments contained in the Memoranda of the Law Society and the Bar Council [of England and Wales] have been found to be not relevant in the Singapore context. In this context, I must say that we have no jury in Singapore and we have to assume that our magistrates and judges can empathise. It is relevant to note here that whereas a very high proportion of the criminal cases heard in the Magistrates' courts in England and Wales are tried by lay justices, all the magistrates in Singapore are today legally trained."

(Singapore Parliamentary Debates (1975), Vol. 34, Col. 1219).

SOUTH AFRICA

A distinction is drawn under the Criminal Procedure Act 1977 between a "confession" and an "admission" and different procedures are adopted in relation to each.

(A) CONFESSIONS

S.217(1) of the Criminal Procedure Act 1977 states that :

"Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such an offence".

The Sub-section is subject to the proviso that :

"(a) ……. a confession made to a peace officer, other than a magistrate or justice …… shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and

(b) ……. where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall .....

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to

that of such person; and be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto."

The definition of a "peace officer" is contained in S.1(XV) of the Criminal Procedure Act 1977, and "includes any magistrate, justice, police official, member of the prisons service as defined in S.1 of the Prisons Act 1959 and in relation to any area, offence, class of offence or power referred to in a notice issued under s.334(1), any person who is a peace officer under that section". Section 334(1) gives the Minister of Justice power to declare certain persons to be peace officers for certain specified purposes.

Despite the use of the word "includes" in the definition of peace officer in S.1, it was held in R. v. Debele 1956(4) SA 570A (in dealing with the definition in an earlier Act) that the list of categories was exhaustive. It is for the accused to show that the person to whom he confessed is a peace officer.

The confession must be made directly to the peace officer, either orally or in writing, and not to a third party in the peace officer's presence or through his offices as interpreter (R. v. Hans Veren 1918 TPD 218).

The accused in general cannot either expressly or impliedly consent to the admission of a confession rendered inadmissible by S.217(1) but this is subject to 2 qualifications. First, while the prosecution may be precluded from leading evidence of an inadmissible confession, there is no such limitation on the defence eliciting such evidence. Second, S.217(3) of the Criminal Procedure Act 1977 provides that a confession which is inadmissible by virtue of subsection (1) shall become admissible against the accused:

"(a) If he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and

(b) if such evidence is, in the opinion of the judge or the judicial officers presiding at such proceedings, favourable to such person."

This means that the prosecution must first obtain a ruling from the court that the portion of the statement adduced by the accused was favourable to him before leading evidence of the remaining parts of the statement.

The meaning of a Confession

Broadly speaking, Section 217(1) reproduces the common law rules but the proviso to which we have referred is a statutory creation. In R. v. Becker 1929 AD. 167 it was held (at page 171) that a confession was "an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law." Since a conviction was competent on the evidence of a confession alone, it was argued that a "confession" must be "unequivocal". This requirement has led on occasion to strained decisions, such as that in S. v. Motra 1963(2) SA 579T where an Indian was charged with occupying a house in an area designated for occupation by white people. A police officer asked the accused where he lived, whereupon the accused pointed to the house in question. It was held that this was not a "confession". To be unequivocally a confession the accused should have said (per Ludorf J) : "I am an Indian who, despite lawful proclamation and despite proper and lawful notice after a proper and lawful determination by the Minister, has failed to vacate premises in an area for the occupation of the White Group and have no permit to remain here."

In general, a statement will not be held to be a confession if it is not totally inconsistent with a defence. Thus, where an accused admitted taking money from a sleeping man it was held that this was not a confession since it was still open to the accused to raise the defence that he had merely taken it for safe-keeping or because he thought it belonged to a third person (R. v. Deacon 1930 TPD 233).

It is clear that only the most clear-cut indications of guilt will constitute a confession for the purposes of s.217. If there is a possibility that the statement by the accused is not inconsistent with a defence, the statement is not a confession and it matters not that the possible defence is beyond the bounds of likelihood. "The fact that such defences would be hopeless in the light of the circumstance to which the police would testify does not provide the missing elements in the statement so as to make it a confession" (R. v. Xulu 1956 (2) SA 288(A) at 294).

Where the accused makes a statement intended to be in exculpation but in fact incriminating, it is thought that this cannot be a confession (R. v. Hanger 1928 AD 459). Similarly, accordingly to some decisions a statement intended to exculpate of one offence which in fact incriminates on another cannot be treated as a confession (S v. F 1967 (4) SA 639 (W)). But there are cases to the contrary. If S. v. F. is correct, it would seem that quite apart from the accused being unequivocal in his confession, he must also intend his statement to be a confession to the particular offence charged.

The accused must be "in his sound and sober senses" when making the confession, but a confession made by an accused while affected by intoxicating liquor is admissible if the evidence shows that he was aware of what he was saying at the time of the confession (R. v. Ramsamy 1954 (2) SA

491 (AD)). The confession must be "freely and voluntarily made" and the accused must not have been "unduly influenced". Undue influence means any pressure which "negatives freedom of volition" ("South African Law of Evidence", L.H. Hoffmann and D.T. Zeffertt, 3rd Ed. page 184).

The onus is on the prosecution to prove beyond a reasonable doubt that a confession was freely and voluntarily made by the accused without his having been unduly influenced thereto (R. v. Gumede and Another 1942 A.D. 398). The onus shifts, however, if the confession is made to a magistrate and reduced to writing by him, or if it is confirmed and reduced to writing in the presence of a magistrate. It then becomes admissible on mere production if it appears ex facie that the confession was made by a person whose name corresponds to that of the accused and that the confession was made freely and voluntarily by the accused whilst in his sound and sober senses and without having been unduly influenced thereto. It is then for the accused to prove that the confession was not freely and voluntarily made by him in his sound and sober senses and that undue influence was brought to bear (s.217(1)(b) Criminal Procedure Act 1977). The case of S. v. Mkanzi 1979 (2) SA 757(T) indicates that the accused may discharge this onus on the balance of probabilities.

While a magistrate may readily judge for himself whether or not an accused is "in his sound and sober senses" when a previous confession is "confirmed" before him under S.217(1)(b), it is less easy to ascertain to what extent an earlier inducement may continue to operate on the accused's mind. This difficulty was commented on in R. v. Gumede (supra) where it was pointed out that earlier inducement "may not come to light owing to the dropping of a veil between the previous interrogations by the police and the subsequent appearance of the interrogated person before the magistrate".

Hoffmann and Zeffertt in their "South African Law of Evidence" refer at page 188 to directions issued to magistrates by the Department of Justice which identify the points which should be investigated before taking a confession. These include "whether the accused has previously made a statement to the police; whether he complains of having been assaulted and whether he is able to exhibit any corroborative marks or bruises. There is also a form of questionnaire containing a series of questions designed to elicit as much information as possible about the events leading up to the accused's appearance before a magistrate". It should be noted, however, that the magistrate is not bound to ask such questions.

There is no jury in the South African judicial system but instead in serious cases the judge sits with two "assessors" who are persons "learned in the law". Questions of fact are decided on a majority basis but questions of law are for the judge alone. Originally, the admissibility of a confession was a matter for the judge sitting in the absence of the assessors but by a 1982 amendment to Section 145(4) of the Criminal Procedure Act the "trial within a trial" now takes place in the presence of the assessors unless the presiding judge is of the opinion that this would not be "in the interests of the administration of justice". If the court holds the confession admissible at the

"trial within the trial", the evidence is then repeated (in the presence of the assessors if they have been excluded hitherto) and it remains open to the accused to repeat his earlier evidence and endeavour to persuade the court that little weight should be attached to the confession in view of the circumstances in which it was made.

(B) ADMISSIONS

S.219A of the Criminal Procedure Act provides :

"(1) "Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained -

(a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

(b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).".

S. v. Yolelo 1981 (1) SA 1002 (A) indicates that the provisions under s.219A of the Criminal Procedure Act which relate to the admissibility of "admissions" by the accused (as opposed to the narrowly defined "confessions", governed by s.217) are intended to be a codification of the pre-

existing common law rules. The section states that an admission shall be admissible if it is proved "to have been voluntarily made". There is no reference to the "person in authority" of R. v. Barlin 1929 A.D. 459 where Innes C.J. said "The common law allows no statement made by an accused person to be given in evidence against him unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any threat or promise proceeding from a person in authority". However, It was held in S. v. Mpetha and others (2) 1983 (1) SA 576 (C) that an admission will not be received if it has been induced by a person in authority. The court held that the phrase "freely and voluntarily" in section 217 and the word "voluntary in section 219A conveyed essentially the same idea and that both reflected the common law requirement that the inducement had to emanate from a person in authority.

The procedure for ascertaining the admissibility of an admission is the same as that for a confession and a "trial within the trial" is held. Even where an admission or confession is ruled inadmissible, facts discovered as a result of that inadmissible statement may nevertheless be led in evidence, as may evidence of a physical pointing out by the accused (section 218).

It remains undecided whether South African Law accepts the notion of a judicial discretion to exclude evidence "unfairly" obtained even though it otherwise conforms to the requirements for admissibility. The provincial case of Forbes 1970(2) 594(c) at page 600 appears to favour the existence of such a discretion but the authorities are not clear and appear stronger in the case of admission than confessions.

SECTION 115 OF THE CRIMINAL PROCEDURE ACT: THE ACCUSED'S EXPLANATION OF PLEA

A feature of the criminal process in South Africa is that under S.115(1) of the Criminal Procedure Act 1977 where an accused at a summary trial pleads not guilty, the presiding judicial officer may ask him whether he wishes to make a statement indicating the basis of his defence. The Section reads :-

> *"1. Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.*
>
> *2(a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.*

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection and shall enquire from the accused whether an allegation which is not placed in issued by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents such admission shall be recorded and shall be deemed to be an admission under section 220.

3. Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not".

The purpose of the section is identify at an early stage precisely which trial issues are common cause and which remain in dispute. A case in Bophutaswana (S. v. M. 1979 (4) SA 1044(B)) suggests that in certain circumstances an unfavourable inference might be drawn from the accused's failure to indicate the basis of his defence but this approach has not been followed elsewhere in South Africa.

There is a duty on the presiding officer to warn the accused that he is not bound to make any statement at all. If he is prepared to make any admissions in terms of S.115(2) read with S. 220 of the Criminal Procedure Act he must first be warned of the binding consequences before he consents to the recording of such an admission (Daniels 1983 (3) SA 275 (A)).

SOUTH KOREA

English translations of the relevant provisions under Korean law were kindly supplied to us by the Ministry of Justice in Seoul. Article 11(6) of the Constitution states :-

"In case a confession is determined to have been made against a defendant's will by means of torture, violence, intimidation. unduly prolonged arrest, deceit or etc., or in case a confession is the only evidence against a defendant, such a confession shall not be admitted as evidence toward a conviction nor shall punishment be meted out on the basis of such a confession".

Provision is also made under the Code of Criminal Process. Thus:

"Article 309 (Probative Value of Confession caused by Duress, etc.). Confession of an accused extracted by torture, violence, threat or after prolonged arrest or detention, or which is suspected to have been made involuntarily, shall not be admitted as evidence of guilt.

Article 310 (Evidence Against the Accused). When the confession of an accused is the only evidence against him the confession cannot be taken as evidence of guilt.".

Under the Martial Law provisions :

"Article 352 …… Confession of an accused extracted by torture, violence, threat, after prolonged arrest or detention or deception and other means, or which is suspected to have been made involuntarily, shall not be admitted as evidence of guilt.

Article 353 …… When the confession of an accused is the only evidence against him, the confession cannot be taken as evidence of guilt.".

UNITED KINGDOM

A. ENGLAND AND WALES

Present Practice

The 1912-18 Judges' Rules in England and Wales were substituted by the 1964 Judges' Rules. Both sets of rules are set out in Annexure 7. Under the 1964 Judges' Rules interrogation is entrusted to the police as a tool in the investigation of crime as the police officer "is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained" (Rule 1). The decision in R. v Collier and Stenning 49 Cr. App. R. 344 established that interrogation could take place while an arested person was in custody at the police station before any charge was laid. R. v Buchan 48 Cr. App. R. 126 decided that a person arrested on a minor charge may be questioned about other more serious crimes he may have committed (This practice is sometimes described as questioning while on a "holding" charge).

Police practice is that all reasonable avenues of interrogation are pursued before an arrested person is charged. The law complements the Judges' Rules. For example, s.38(4) of the Magistrates' Courts Act 1952 provides that a person arrested without a warrant shall be brought before a Magistrates Court as soon as practicable, and it is open to an aggrieved detained suspect to issue proceedings for Habeas Corpus in the High Court.

What has become known as the right of silence is not directly affected by the duty of the police to interrogate suspects and by Rule IV of the Judges' Rules which provide for the taking of statements. Lord Diplock clearly described the right of silence in Hall v R. 55 Cr. App. R. 108 when he said -

"It is a clear and widely known principle of the common law ….. that a person is entitled to refrain from answering a question put

to him for the purpose of discovering whether he has committed a criminal offence ….. The caution merely serves to remind the accused of a right which he already possesses at common law.".

In practice while the right of silence exists and is explained to the arrested person in the caution (Rule II of the Judges' Rules), the police interrogate in the hope that the suspect may answer their questions. Indeed he may be eager to do so. The suspect may incriminate himself but if he does so it is despite a caution that he is "not obliged to say anything". It is possible that the weak may incriminate themselves whereas the strong may refuse to answer any questions. The right of silence does not just apply when suspects are being interrogated. It applies at trial too as the accused may refrain from giving evidence and the prosecution may not comment on his decision not to do so.

If a suspect decides to answer questions because he is innocent, a quick release is the likely consequence. It is wrong to assume that all suspects who answer questions are charged by police who automatically disbelieve them. Research for the Royal Commission on Criminal Procedure showed that a substantial minority of suspects who were arrested (about 20%) were released without proceedings being brought against them.

In the introductory paragraph to the Judges' Rules it is stated for the avoidance of doubt that -

"it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression".

The English courts have interpreted oppression in R. v Prager (1971) 56 Cr. App. R. 151 where the court described oppression in its judgment when it said -

"They include such things as the length of time of any individual periods of questioning; whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement".

Oppression does add something to the notion of voluntariness because it requires analysis of the interrogation of, and the legitimate pressures upon, the accused. In most cases, however, where oppression is present, there will be sufficient material for a finding of involuntariness. There is a danger that "oppression" being a vague concept may be applied to cause the inevitably coercive processes of arrest, detention and interrogation to be unacceptable as a tool to investigate crime.

A line of cases including R. v Westlake (1979) Crim. L.R. 625 and R. v Dodd and Pack and Others (1982) 74 Cr. App. R. 50 examine the practical meaning of oppression. Custody of about four days with up to twelve questioning sessions totalling about seven hours with access to a solicitor denied will not be considered oppressive in cases of serious crime where the suspects are experienced criminals. On the other hand, where the police interrogate a mentally handicapped suspect for twenty-six hours over five days with access to a solicitor denied any resulting confession will be likely to be deemed to be the consequence of oppression. The broad permissible practice is that the coercive nature of custody and interrogation is acceptable up to the point that the suspect is pressured into admitting the truth, but not where he is so pressured to the extent that the resulting confession is likely to be unreliable.

Related to "oppression" but distinct from it is the judicial discretion described by Lawton L.J. in R. v Houghton (1979) 68 Cr. App. R. 197 where he said :-

> *"Judges in criminal cases have a discretion to disallow evidence, even if in law it is relevant and admissible, if admissibility would operate unfairly against an accused ……".*

Proposed reforms in England and Wales

There have been two major reports in recent years. The Eleventh Report of the Criminal Law Revision Committee and the Report of the Royal Commission on Criminal Procedure (the Philips' Report) were published in 1972 and 1981 respectively.

The most significant change proposed by the Eleventh Report related to the right of silence. At paragraph 28 the Report said -

> *"We propose to restrict greatly the so-called 'Right of Silence' enjoyed by suspects when interrogated by the police or by anyone charged with the duty of investigation of offences or charging offenders. By the right of silence in this convention we mean the rule that, if the suspect, when being interrogated, omits to mention some fact that would exculpate him but keeps this back till the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue. Under our proposal it will be permissible to draw this inference if the circumstances justify it".*

Some detailed research was carried out to assist the preparation of the Philips Report. It was found that three-quarters of suspects were dealt with in six hours or under and about 95% within twenty-four hours. But for the serious cases there were 212 cases during a three month period in 1979 where persons were held for 72 hours or more. 20% of suspects established their innocence during questioning. It was found that a large number of detections, between 25% and 40% in different studies, followed interviews of

a suspect following his arrest for another offence. A large group of arrests followed interrogation of accomplices. The number of not guilty pleas, which would otherwise occupy the courts at enormous expense, would have been substantially greater were it not for evidence arising from interrogation.

Some of the major recommendations of the Philips Report included -

(a) arrest may be necessary in order to obtain evidence from the suspect by questioning him;

(b) there should be a limit on detention following arrest to 24 hours except for grave offences to be established;

(c) the test of voluntariness should be replaced by a test of reliability left to the tribunal;

(d) the "right of silence" should be preserved;

(e) access to a lawyer should be made available during detention;

(f) access to a lawyer should be restricted, inter alia, where -

(i) the time taken to arrange for legal advice would involve risk to persons or property; and

(ii) giving access to a lawyer may lead to one or more of the following :-

a) interference with evidence;
b) threats or harm to witnesses;
c) suspects alerted; or
d) recovery of proceeds of crime impeded.

Many commentators were disappointed by the majority decision of the Commissioners who produced the Philips Report to resist changing the rules on the right of silence.

Police and Criminal Evidence Act 1984

The Act, which is expected to come into force in 1985, provides statutory rights for an arrested suspect to have some person informed and to consult a solicitor. Delay in the granting of such rights is permissible for a serious offence and under the authority of a senior police officer but even then such delay may be for a maximum of 36 hours from arrival at the police station. The discretion to authorize delay may be exercised only if there are reasonable grounds for believing that telling the named person of the arrest or consulting the solicitor :-

(a) will lead to interference or harm to evidence or persons;

(b) will alert other suspects; or

(c) will hinder recovery of property obtained as a result of the offence.

Section 76 of the Act dealing with confessions provides as follows :-

"(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained :-

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence -

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf."

Where a confession has been made by a mentally handicapped person and was not made in the presence of an independent person the judge is obliged to warn the jury that there is a special need for caution before convicting the accused in reliance on the confession.

The court is given a statutory right to exclude evidence where to admit it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The Secretary of State is given a duty to issue a code of practice in connection with the tape recording of interviews of suspected persons.

The common law right of silence is not affected by this statute.

B. SCOTLAND

The Scottish system of criminal justice has moved from being largely inquisitorial to accusatorial with inquisitorial elements.

Concentrating on the issues of detention for questioning, right of silence and admissibility of confessions the history of Scottish law since the middle of the nineteenth century indicates historical trends strongly away from judicial and police interrogation to a high point in the case of Chalmers in 1954, where the right of silence probably reached its purest form as a protection of the accused in any jurisdiction, and a subsequent reversion to legal police questioning and limited judicial questioning. The wheel almost comes full circle.

In the mid-nineteenth century the position in Scottish criminal law and procedure was that the suspect, who could not be a witness in his own defence at trial, would be examined in court by the sheriff who had a duty to investigate crime by examining witnesses and accused persons. This stage in procedure called judicial examination, gave an opportunity to the suspect to put his account of events before a judge and though he would be questioned he was not compelled to answer specific questions. Appropriate inferences could be drawn from a failure to answer specific questions. A number of developments caused this system to wither away. By 1887 the Procurator Fiscal (public prosecutor) had taken over from the Sheriff the role of interrogator and in that year in the case of Brims (1887) 1 White 462 the appeal judges disapproved the practice of interrogating after the prisoner had stated that he did not wish to answer questions. In the same year the accused was given a statutory right to see his solicitor before judicial examination and the right to have his solicitor present at the examination.

The solicitors almost always advised the prisoner to remain silent. In these circumstances, as the appellate courts soon acknowledged, no inferences could be drawn from this general silence or reserving one's defence. This reduced the last vestiges of usefulness of the procedure of judicial examination to nothing for now the prisoner did not need to take the opportunity of judicial examination to put his side of the story.

In the same way as the police took the initiative in England towards the end of the nineteenth century, the police in Scotland in the same period and into the twentieth century tried very hard to fill the vacuum left by the absence of any meaningful judicial examination. But where in England and Wales the judges tacitly encouraged the policy by bending, or not enforcing, the old Judges' Rules, in Scotland there was increasing hostility from the Bench towards police attempts to use interrogation of any kind to solve and detect criminal cases. Having absorbed the doctrine of right of silence the Scottish judges seemed determined to apply it with pure logic and consistency so that offences would have to be proved without the assistance of the fruits of pre-trial interrogation. This was coupled with an unimpeachable right of silence at trial itself.

The zenith of this process was the appeal case of Chalmers v Her Majesty's Advocate. A youth fatally injured a man in the course of a robbery. After some general screening of all those in the vicinity during which he made an exculpatory statement, the police found that there was doubt about some parts of his alibi. He voluntarily accompanied police to the police station where he was interrogated by being asked questions. He confessed and took the police to a corn-field where he pointed to a spot at which was found the deceased's wallet. The trial judge allowed the evidence concerning the finding of the wallet. Chalmers was convicted and appealed. The Lord Justice General, Lord Cooper, had no hesitation in quashing the conviction. While he stressed that the facts of each case must be looked at separately he went on to say :

> *"It is not the function of the police when investigating a crime to direct their endeavours to obtaining a confession from the suspect to be used as evidence against him at the trial. In some legal systems the inquisitorial method of investigation is allowed in different degrees and subject to various safeguards; but by our law self-incriminating statements, when tendered in evidence at a criminal trial, are always jealously examined from the standpoint of being assured as to their spontaneity; and if, on a review of all the proved circumstances, that test is not satisfied, evidence of such statements will usually be excluded altogether. The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if*

carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded."

and later at p. 79 :

"The police have, of course, the right and the duty to produce all the incriminating evidence they can lay their hands on, from whatever source they may legitimately derive the clue which leads to its discovery, so long as any admission or confession by the accused is not elicited before the jury as an element in proof of guilt. The matter may be put in another way. The accused cannot be compelled to give evidence at his trial and to submit to cross-examination. If it were competent for the police at their own hand to subject the accused to interrogation and cross-examination and to adduce evidence of what he said, the prosecution would in effect be making the accused a compelled witness, and laying before the jury, at second hand, evidence which could not be adduced at first hand, even subject to all the precautions which are available for the protection of the accused at a criminal trial."

Whatever else may be said about Lord Cooper's judgment, it is fair to credit him in the same judgment with a realistic view of the psychological pressures present on the accused during interrogation at a police station. The Scottish police, deprived of any powers of interrogation after arrest, had adopted the practice of inviting the suspect to voluntarily accompany them to the police station to assist with their enquiries. About this Lord Cooper said :

"In the eyes of every ordinary citizen the venue is a sinister one. When he stands alone in such a place confronted by several police officers, usually some of high rank, the dice are loaded against him ..... "

When one compares the facts of Chalmers with facts of such cases in England as Priestley and Peters (cited above) - let alone more recent cases such as R v Dodd and Pack and Others (1982) 74 Cr. App. R. 50 - it is clear that the difference in philosophy and approach is huge. In making the right of silence effective in the way he did Lord Cooper, in the view of many commentators, failed to take sufficient cognisance of the need to protect society from serious crime. It is little wonder therefore that the Scottish cases in the 1960's and 1970's demonstrate a solid "retreat from Chalmers".

In explaining Chalmers Lord Wheatley in Miln v Cullen 1967 JC 21 stressed the rights of the community as against the rights of the accused when he said :

"I deem it important to stress that in the variety of circumstances which might attend cases in each of these categories the basic

and ultimate test is fairness. While the law of Scotland has always very properly regarded fairness to an accused person as being an integral part of the administration of justice, fairness is not a unilateral consideration. Fairness to the public is also a legitimate consideration, and in so far as police officers in the exercise of their duties are prosecuting and protecting the public interest, it is the function of the Court to seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the police in their investigation of crime with a series of academic vetoes which ignore the realities and practicalities of the situation and discount completely the public interest."

The same judge (Lord Wheatley) went on to say in Jones v Milne 1975 SLT :

"The mere fact that a suspected person is asked a question or questions by a police officer, before or after being cautioned, is not in itself unfairness, and if answers are to be excluded they must be seen to have been extracted by unfair means which place cross-examination, pressure and deception in close company."

The result of these and other cases is that the law has now developed to the point (as illustrated by Hartley v Her Majesty's Advocate 1979 SLT 26) where a 17 year old youth had a confession statement admitted against him in the following circumstances. He had given a preliminary exculpatory statement to police and then had been invited to meet the police and had failed to keep the appointment; he was then taken to the locus of the drowning of the boy victim and to the police station where he gave a second statement; he was voluntarily with the police for a further 12 hours after which while going over his second statement with the police at 2.40 a.m. and having in the meantime been shown a photograph of the dead boy he broke down and made the confession in terms: "It was me" followed by some other detail. In addition the term "cross-examination" has been refined by the subsequent cases into a legal doctrine so that it is barely recognisable as the same process discussed in Chalmers.

Concurrent with a trend towards change in the law through the interpretation of the courts was a move towards change in the law through legislation. In 1962 in discussing Chalmers and the difficulties in the way of police Professor T B Smith in his work "Scotland The Development of Its Laws and Constitution" at p.216 said :

"The remedy might well be to revive judicial examination as a compulsory aspect of pre-trial or even of trial - procedure, while permitting refusal to answer particular questions."

A committee under the chairmanship of Lord Thomson was set up to report on reform of Scottish Criminal Procedure and of its three reports the second one published in 1975 (Command 6218/1975) set the scene for legislative reform

to bring this about. It recommended not only that judicial review should be revived but that some step should be taken to regulate the police practice of "inviting" suspects to the police station for periods of questioning. The need of the police for this practice comes from the rule in Scots criminal law that you cannot arrest until you have enough evidence to charge so that arrest comes at the end rather than close to the beginning of the investigation into the crime. If attendance is voluntary the suspect can in theory walk away. In Scotland that did not happen. The Thomson report stressed both the law enforcement need for police questioning and the insecure base of Scottish police practice when it said :

> *"We believe the police at present are able to carry out their functions only because some persons whom they detain without warrants fail, through ignorance or fear of authority, to exercise their rights."*
>
> (Thomson II para 3.11)

It also perceived that it was necessary to absorb and legitimise police practice when it said :

> *"We are convinced that it will continue if the law remains unchanged and that it can be controlled only by being recognised and made subject to clearly defined limits."*
>
> (Thomson II para 3.14)

The legislation consequential to the Thomson Report II is the Criminal Justice (Scotland) Act 1980. S.2 provides a power of detention for questioning for six hours at a police station and while the suspect has a right of having a relative or friend informed of his detention he is not entitled to consult a solicitor or have one present. S.6 introduces the new process of judicial examination and provides that the prosecution may opt for this at their discretion. The object of the new process is to allow questions at an early stage which are aimed at disclosing defences with some particularity and to probing what the accused may have to say about oral or written statements allegedly made by him to the police. While the accused need not answer specific questions the failure to do so can be raised and commented upon as relevant at the subsequent trial.

UNITED STATES OF AMERICA

In the United States, the admissibility of confessions is governed by federal consitutional principles. While various theories have been used in excluding coerced confessions, it is the "voluntariness" of a confession which is determinative of its admissibility. Voluntariness is determined both by the traditional standards of force, threat, inducement, etc., and by the principles enunciated in the landmark case of Miranda v. Arizona, 384 U.S. 436 (1966).

Traditional tests of voluntariness

A voluntary confession is admissible and highly probitive. Federal courts have ruled that the "totality of the circumstances" must be examined in determining whether a confession is voluntary (Haynes v. Washington, 373 U.S. 503; 27 L.Ed. 524; 18 U.S.C. s.3501). Indications of actual coercion as well as factors relevant to a setting in which coercion might occur, such as the suspect's age, health, etc. must both be analysed. Thus, a confession obtained by violence or threats of violence is inadmissible, regardless of its truth or falsity (Sims v. Georgia, 389 U.S. 404 (1967)). Indirect coercion, such as a threat to arrest the suspect's wife, or cut off financial aid to his children will also result in the exclusion of a confession (Rogers v. Richmond, 365 U.S. 534 (1961)). Psychological coercion in the form of promises or inducements will render a confession involuntary (Beecher v. Alabama, 389 U.S. 535 (1967). Thus a police promise to dismiss the case or bring a lesser charge would render the confession inadmissible. But a confession is not invalid merely because it is prompted by the hope that cooperation might achieve a lenient sentence (United States v. Springer, 460 F.2d. 1344 (1972)).

Confessions obtained by trickery or deceit are however generally admissible if the method used is not likely to procure an untrue statement. Thus statements tape recorded without the suspect's knowledge during conversations with third parties, even in jail, are admissible. Voluntary statements to an undercover agent whom the suspect believes to be a colleague are also admissible. A confession is also voluntary when police falsely tell the suspect that his associate has confessed (Frazier v. Cupp, 394 U.S. 731 (1970); See generally, Admissibility of Pre-trial Confessions in Criminal Cases, 22 L.Ed. 2d. 872 (and supplement)).

As well as the possible elements of coercion noted above, the setting and circumstances in which the confession was made are also vital to a determination of its voluntariness. Continuous and persistent interrogation, coupled with the denial of access to friends or relatives or the refusal of medical care, will make a confession involuntary (Garrity v. New Jersey, 385 U.S. 493). Many other factors bear on the issue of voluntariness. While none are conclusive, their presence alone or in combination have justified the exclusion of confessions in a number of cases. Neither illiteracy nor youth alone will make a confession involuntary but both must be closely examined. Confessions will not be received if they are made without a full knowledge and understanding of the facts. (Orfield, Criminal Procedure under the Federal Rules, Vol. 26, s.642). The defendant must be capable of understanding what he said and did. Thus drunkenness, severe lack of sleep or food, drug influence, mental incapacity, and state of health may all render a confession inadmissible (Garrity, supra; Annotation, Admissibility of Pre-trial Confession in Criminal Cases, 22 L.Ed. 2d. 872).

Miranda

The above standards are basically the same as those used in the English system. The American law however goes beyond the English requirement of a caution in the application of the principles of the right to counsel and the right against self-incrimination enunciated in Miranda v. Arizona. In 1966, the Supreme Court, dissatisfied with the case-by-case analysis required by earlier tests of voluntariness, created this additional standard of voluntariness of confessions. Miranda sets out specific requirements which must be met if a confession is to be admitted. When a defendant has been arrested or indicted, or an investigation has begun to focus on the defendant as the suspect, or after he has been taken into custody or deprived of his freedom in any significant way, the defendant must be advised prior to any interrogation in clear and unequivocal terms that :-

(1) he has a right to remain silent;

(2) that any statement he makes may be used against him;

(3) that he has the right to consult an attorney and to have one present during interrogation; and

(4) that if he cannot afford one, the Government will appoint one.

No confession can be used in the absence of such a warning, even if under traditional tests the statement was voluntary. A suspect who wishes to consult with counsel or indicates that he does not wish to be questioned cannot be interrogated until counsel is provided. But a suspect who chooses to remain silent can be interrogated at a later time if he is given new warnings and his right to cut off questioning is honoured (Michigan v. Mosley, 423 U.S. 96 (1975)). These rigid procedural guidelines are viewed as necessary to secure the constitutional rights to counsel and protection against self-incrimination. The theory is that no confession can be truly voluntary if the accused is not fully aware of and understands these rights.

A number of points must be noted. The safeguards prescribed in Miranda are only applicable during "custodial interrogation". If a person is arrested, even in his home or in custody for an unrelated offence, or deprived of his freedom of action in any significant way,any police questioning thereafter will be deemed to be custodial interrogation. Also, "interrogation" includes not only specific questioning but also any attempt to get the accused to confess (Rhode Island v. Innis, 446 U.S. 291 (1981)). But if a person enters a police station and volunteers information, his confession is admissible even if no Miranda warnings were given. Spontaneous admissions by a suspect in custody are likewise admissible. (Amass v. United States, 413 F.2d. 272 (1970)). Likewise, confessions made during the initial investigation of a crime, such as general on-the-scene questioning, or ones made at a time when there was no reason to believe that a crime had been committed are admissible even though no Miranda warnings have been given. (United States v. Holmes, 387 F. 2d. 781 (1967)).

Second, a defendant may waive his rights, and the resulting confession, even if incriminating and made in the absence of counsel, is admissible. The Government bears a heavy affirmative burden of showing that the waiver was voluntary and "knowingly and intelligently" made (Miranda, supra). The waiver need not be in writing, and can be implied if warranted by the facts of the case (North Carolina v. Butler, 441 U.S. 369 (1980). The Court's inquiry into the validity of the waiver is distinct from the overall issue of the voluntariness of the resulting confession (Edwards v. Arizona, 451 U.S. 477 (1981)). Thus, adequate Miranda warnings are invalidly waived if the waiver was made without full knowledge of its consequence.

Third, the Supreme Court did not prescribe an exact format to be used in advising a suspect of his rights. In resolving questions of the adequacy of a warning, courts give precedence to substance over form. Uncertainty is avoided if police read out the rights from a printed card and obtain the suspect's written acknowledgement, but this is not required (California v. Prysock, 453 U.S. 355 (1980).

Fourth, empirical studies have shown that the rate of confessions has not changed significantly since the Miranda requirements were implemented. Thus, police fears that the requirements would hamper their investigations have not been borne out (See Lewis, Constitutional Rights of the Accused (1979)).

Finally, a confession taken in violation of either Miranda or the traditional tests of voluntariness discussed above cannot be used in any criminal proceeding against a defendant. This strict exclusionary rule applies to any statement, be it a full confession or an admission of a statement which was exculpatory at the time of its making. In addition, all other evidence obtained either as a direct or indirect consequence of the statement is also inadmissible. But a confession obtained in breach of Miranda is not excluded for all purposes. For example, a confession inadmissible in a prosecutor's case-in-chief can be used in cross-examination to impeach an accused's credibility (Harris v. New York, 401 U.S. 222 (1971)). In this light, it must be noted that the Supreme Court has shown signs of cutting back on Miranda and the exclusion of illegally obtained evidence generally. It is impossible to predict how far changes will be made.

A federal statute regulating the admissibility of confessions in federal courts incorporates both the Miranda requirements and the additional tests of voluntariness outlined above. The statute declares that a confession is admissible if it is "voluntarily given" and requires the trial judge to "take into consideration all of the circumstances surrounding the giving of the confession ..." (18 U.S.C. ss.3501 (b)). These factors include :-

> *"… (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment; (2) whether such defendant knew the nature of the offence with which he*

was charged or of which he was suspected at the time of making the confession; (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him; (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the abovementioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. ...

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offence or any self-incriminating statement made or given orally or in writing."

Procedure

The procedure for determining whether a confession is voluntary and placing it before the jury is very similar to that used in Hong Kong. The trial judge must determine that a challenged confession is voluntary before permitting it to go to the jury (Jackson v. Denno, 378 U.S. 368 (1964)). A separate hearing is held usually in the absence of the jury, though this is not always constitutionally required. A separate hearing must still be held if the trial is to the court without a jury.

The defendant may testify at the voir dire without relinquishing his right to remain silent at the trial. (Howell v. United States, 442 F.2d. 265 (1971)). The judge need not make formal findings of fact or write an opinion but his conclusion that the confession is admissible must appear clearly on the record (Jackson, supra). The prosecution need only prove by a preponderance of the evidence that the confession was voluntary (Lego v. Twomey, 30 L.Ed. 2d. 618 (1971)). Some states, however, including New York, require proof beyond a reasonable doubt. If clear warning signals are present that a confession may be involuntary, it may be error for the trial judge to fail to raise the issue of voluntariness sua sponte (Hizel v. Sigler, 430 F.2d. 1398 (1970)). (Confession taken from illiterate, brain damaged suspect who was drunk when questioned).

Once the judge rules the confession admissible, it is placed before the jury. The defendant is still free to introduce evidence to show the involuntary nature of the confession and any other evidence bearing on its weight or credibility (Lego, supra). A confession that is unsigned or merely oral is not inadmissible but should be received with care by the jury (Criminal Procedure, supra, Vol. 26 s.656).

The federal statute governing the factors to be considered when determining the voluntariness of a confession also modifies the above procedures for its admission. The statute provides :-

> *"S. 3501. Admissibility of Confessions*
>
> *(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made, it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.".*
> (18 U.S.C. s. 3501 (1976)).

Annexure 9

Chinese Translation of Statements in Proposals 5, 7 and 8

Proposal 5

口頭警誡

“甲.（一） 我是〔執行拘捕行動人員姓名、職階及編號〕。

（二） 我現在拘捕你。

（三） 你可能會被控……罪〔罪名陳述及罪狀概要〕。”

乙. 如果執行拘捕行動的人員欲查詢疑犯：

“我想問你有關……〔事〕。

你可以回答我的問題，亦可以拒絕回答。

如果你日後被解往法庭受審，你的答話或你拒絕回答問題這一事實，都會告知法庭。

如果你拒絕回答問題，法庭可能會對你作出不利的推斷。”

Proposal 7

正式警誡書

“（一） 你涉嫌……，現已被拘捕，你可能被扣留不超過四十八小時。

（二） 你可能被控……罪〔罪名及罪狀概要〕。

（三） 如果你要求通知你的家人、朋友或者你指定的律師，說你現時身在這警署，我可以代你通知。〔如果督察級或更高職階人員認爲此舉有碍繼續進行調查，則可撤回這項權利，但必須將被捕者的要求以及撤回該項權利的理由，記錄在案〕。

（四） 你可能會被查詢有關所犯罪名以及其他罪名。你並沒有責任要回答這些問題，但假如你選擇回答問題的話，則所有問題和你的回答，將會用筆記錄下來，並可能會在法庭用作證供。如果你拒絕回答人員向你提出的全部或任何問題，或作失實回答，則將來你如果被檢控，控方會告知法庭，說你曾拒絕回答問題，或對問題作失實回答，屆時法庭可能會對你作出不利的推斷。如果你認爲自己沒有觸犯所指控的罪名，則應該爲你本身利益設想而通知執行調查本案人一切足以證明你清白的事物。如果你確有觸犯被指控的罪名，你應該爽快地承認所犯罪行，並盡力協助辦案人員的調查工作，法庭可能會因而對你從寬發落。

（五） 關於你被指控的罪名，你有權作出答辯。你可以自行作出書面陳詞，或請別人代你用筆記錄下來；同時，這項陳詞可能呈交法庭，作爲證供。

（六） 對於你被捕的經過、被捕後所受到的待遇，你有無任何投訴？〔如有任何投訴，均須記錄在案。〕

（七） 你現在有甚麼要求？尤其你是否希望看醫生？〔如有要求，均須記錄在案。〕

（八） 我是……〔姓名、職階及編號〕現證明我本人經於〔日期、時間〕在〔地點〕口頭促請〔被捕者姓名〕注意上述各點，並將本通知書副本一份發給被捕者。我相信被捕者已明白所有向其述說的事項。

簽署 日期、時間

當值警務人員

（九） 本人……〔被捕者姓名〕承認上述各點均已向我解釋清楚，並完全明白其內容，又收到本「正式警誡書」副本一份。

簽署

被捕者”

Proposal 8

“太平紳士查詢紀錄

（一） 我是太平紳士；我的姓名是……。

（二） 我想問你幾個問題，關於你被捕和被扣留的情形、你和〔警方或其他執法機構人員之間〕的談話內容，以及你被捕後所受〔警方或其他執法機構〕的待遇。

（三） 在未問你以下的問題之前，我想向你清楚解釋下列各項事情，請你留意聽着，因爲這些事情對你非常重要：

(i) 關於你被指涉嫌捲入一宗刑事案，而受〔警方或其他執法機構〕調查一事，我本人採取完全獨立立場，並且絕不會偏袒任何一方。我與〔警方或其他執法機構〕並沒有任何關係，而且與負責調查你的〔警方或其他人員〕亦素無交往。

(ii) 對於我所提出的問題，你沒有回答的必要，但我所提出的任何問題及你的任何回答，都會用筆記錄下來，而這項書面紀錄，將會在你受審時呈交法庭審閱。

(iii) 你可以任意回答我的問題而無須恐懼任何人會向你報復。

(iv) 如果有充份理由，我可以運用我的權力，立即將你從〔警方或其他執法機構〕釋放而轉送懲教署看管；該署是完全不受〔警方或其他執法機構〕管轄的。

(v) 我必須告訴你，如果〔警方或其他執法機構〕曾虐待你，不論其方式爲何，你應該從實向我訴說；如果你現在不向我提出有關投訴，則日後你想提出投訴時，就難令人相信，原因是你並未及早利用機會提出你的投訴以便有關方面備案。

問（一） 你是否完全明白我剛才所說的一切？
答（一） 〔請記錄答話〕

問（二） 你的姓名是……？
答（二）

問（三） 你是否承認這是你在「正式警誡書」上的簽名？
答（三）

問（四） 你是否於〔時間〕在〔地點〕被捕？
答（四） 〔如答案屬否，請予澄清〕

問（五）　你是否於〔時間〕遭警方落案控告以下罪名〔請向被告讀出控罪〕？

答（五）

問（六）　我現在讀給你聽的文件，據說是警方與你會晤時問答的紀錄〔請向被告讀出該紀錄〕。這些文件是否準確記錄了警方向你提出的問題以及你的回答？

答（六）

問（七）　我現在向你讀出文件，據說是你作出的書面陳詞〔請向被告讀出該等陳詞〕。你有否作出上述書面陳詞？

答（七）

問（八）　我現在向你讀出的文件，據說是你口頭陳詞的書面紀錄〔請向被告讀出該口頭陳詞紀錄〕。你有否作出所述的口頭陳詞？

答（八）

問（九）　我有責任告訴你，假如你認爲並無觸犯被控罪名，而又向我說明你否認控罪，並能提出任何有助於證明你是無辜的證據，這將對你十分有利。我同時亦要告訴你，如果你確有觸犯被控罪名，你肯認罪並努力協助〔警方或其他執法機構〕執行調查工作，法庭或會對你從寬發落。你考慮過上述事項後，是否願意就警方所控告的罪名作任何補充？

答（九）

問（十）　你自從被捕以來，你對〔警方或其他執法機構〕對待你的方式，無論身體上或其他方面，你有無任何投訴？

答（十）

問（十一）〔如被告人投訴身體曾受虐待〕你是否願意接受身體檢驗以證明你的投訴是實情？〔如被告人答「是」，則請太平紳士作出安排〕。

答（十一）

問（十二）你是否想我下命令將你立即送交懲教署扣押？〔如果被告答「是」，無須問明理由，除非無明顯的根據。〕

答（十二）

（四） 我〔姓名〕茲證明我本人經於〔日期、時間〕在〔地點〕提請〔被告人姓名〕注意上述事項，我相信被告明白我對他所說的一切事情，而我亦錄下被捕者所希望錄下的一切事項。

簽署

太平紳士”

Annexure 10

List of offences for which fingerprints are taken

Any person arrested for or on suspicion of having committed or attempting to commit any of the following crimes and offences will be fingerprinted and a Pol 539 completed :-

Abduction;
Abortion
Abstracting electricity;
Affray;
ARSON AND THREATS TO COMMIT ARSON;
Asking for alms in a threatening manner;
ASSAULT;
Begging;
Bigamy;
Blackmail and possession of instrument for blackmail;
Blackmarketing (including ticket scalping);
"Breach of Banning Letter under Regulation 4(1A) of the Hong Kong Airport Regulations'
Breach of deportation order;
Bribery and corrupt practices;
Brothels - keeping (at Common Law);
BURGLARY, AGGRAVATED BURGLARY AND ALL ATTEMPTS TO BURGLE;
Coinage;
Concealing an offence;
Conspiracy;
Contraventions of the Money Lenders Ordinance 1980;
CRIMINAL DAMAGE;
Criminal intimidation;
Cruelty to children;
Dangerous drugs - all offences;
Dangerous driving causing death;
Disorderly house-keeping or assisting in the management thereof;
Escape;
False accounting;
False statement by company officer;
Fighting in a public place;
Firearms and imitation firearms;
Firework offences (other than discharging);
Forgery and possession of forged documents, seals and dies;
FOUND IN ENCLOSED PREMISES;
HANDLING STOLEN GOODS;
Impersonation (of Police or others);

Incest;
Indecency between males;
INDECENT ASSAULTS;
Indecency in public;
Indecent exhibitions;
Infanticide;
Intercourse with girl under 13;
Intercourse with girl under 16;
Illegal importation/exportation (smuggling);
Immigration (serious offences only);
Interfering with parking meter;
Kai Tak Airport-entering restricted area without authority;
Keeping an unlicensed automatic machine establishment;
KIDNAPPING;
MANSLAUGHTER;
Managing or assisting in management of a vice establishment or an unlicensed massage establishment;
MURDER;
Obtaining property by deception;
Obtaining pecuniary advantage by deception;
Offering services within the airport without permission from the Director of Civil Aviation;
Official secrets;
Perjury-false declaration etc.;
Possession of dutiable commodities (serious offences only);
Possession of dangerous goods (serious offences only);
POSSESSION OF OFFENSIVE WEAPON;
Possession of a bomb or simulated bomb;
Printing, procuring etc., obscene or indecent prints, book etc.;
Riots;
ROBBERY AND ASSAULT WITH INTENT TO ROB;
Riot;
Soliciting for an immoral purpose;
SUSPECTED PERSON FOUND LOTTERING;
TAKING CONVEYANCE WITHOUT AUTHORITY;
Theft - all kinds;
Threats to murder;
Triad offences;
Unlawful assembly;
Unlawful pawning;
UNLAWFUL POSSESSION;
Unnatural offences;
WOUNDING

Annexure 11

Police Stations where Arrested Persons may be detained in Custody

HONG KONG ISLAND

Central, Upper Levels, Peak, Waterfront, Causeway Bay, Chai Wan, North Point, Shaukiwan, Wanchai, Happy Valley, Western, Aberdeen, Stanley.

KOWLOON

Kowloon City, Ho Man Tin, Kwun Tong, Rennies' Mill, Ngau Tau Kok, Mongkok, Shamshuipo, Cheung Sha Wan, Shek Kip Mei, Wong Tai Sin, Sai Kung, Tsz Wan Shan, Yau Ma Tei, Tsimshatsui, Airport.

NEW TERRITORIES

Frontier, Lok Ma Chau, Sha Tau Kok, Sheung Shui, Ta Ku Ling, Kwai Chung, Sheung Kwai Chung, Shatin, Tai Po, Tsuen Wan, Tuen Mun, Yuen Long, Lau Fau Shan, Pat Heung.

MARINE

Cheung Chau, Mui Wo, Tai O.

There are also custodial wards at Queen Mary and Queen Elizabeth Hospitals.

In addition to the above, the Commissioner of Police under S.51 of the Police Force Ordinance Cap 232 may issue authorisations enabling a named officer to detain prisoners. Such authorisations are currently held by officers of the Organised and Serious Crime Group (Police Headquarters, Wong Tai Sin and Victoria Barracks), Narcotics Bureau (Police Headquarters) , Commercial Crime Bureau (Victoria Barracks) and Interpol (Police Headquarters).