THE EXCLUSION OF VOLUNTARY CONFESSIONS: A QUESTION OF FAIRNESS

JONATHAN CLOUGH*

I. INTRODUCTION

Confessions have been described as "the weakest, and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence."[1] It is therefore not surprising that the common law has adopted an extremely cautious approach to the admissibility of confessional evidence. Although the increased regulation of police interrogations has addressed some of these concerns, the high probative value of such evidence continues to provide an obvious temptation for police officers to obtain confessions by improper or unlawful means.

At common law there are three main grounds on which the reception of confessional[2] evidence may be challenged. First, there is the requirement of

---

* BSc LLB (Hons) (Mon) LLM (Cantab). Lecturer in Law, Monash University. I am grateful for the helpful comments of Professor CR Williams and Associate Professor B McNicol on an earlier draft of this article.

1 TM Cooley (ed), *Commentaries on the Laws of England by Sir William Blackstone, Book IV* (3rd ed, 1884) p 357.

2 In this article "confession" will be used to include both confessions and admissions. An admission may be defined as a statement by a party which is against his or her interests. A confession is an admission which involves full acknowledgment of guilt. See PK Waight and CR Williams, *Evidence Commentary and Materials*, Law Book Company (4th ed, 1995) p 756.

voluntariness; that is, the will of the suspect must not have been overborne by oppressive conduct or inducements. Secondly, evidence of a voluntary confession may be excluded if it would be 'unfair' to the accused for it to be admitted. This will be referred to as the 'fairness discretion'. Thirdly, such evidence may be excluded where its admission would be contrary to public policy. This will be referred to as the 'public policy discretion'.

The aim of this article is to consider the role of the fairness discretion within the modern law of evidence. This will involve an analysis of relevant High Court authority together with the history of the fairness and public policy discretions. The exercise of the fairness discretion is plagued by inconsistency and the lack of a clear rationale.[3] There is an obvious need for clarification of this area given the importance of the issue and the regularity with which it seems to arise. It is therefore unfortunate, given the number of relatively recent cases in which the High Court has considered this issue, that the precise scope of the discretion remains unclear.

II. THE MEANING OF 'FAIRNESS'

Inconsistencies in the exercise of the fairness discretion are largely a result of differing interpretations of the meaning of 'unfair' in this context. Although the notion of 'fairness' is of fundamental importance, particularly in criminal proceedings, in the abstract it is an inherently vague and subjective concept, its meaning being largely determined by its context.

In criminal proceedings fairness finds its primary expression in the right of an accused to a fair trial. Although the attributes of a fair trial are "impossible, in advance, to formulate exhaustively or even comprehensively",[4] it is submitted that the aim of securing a fair trial is to ensure that a miscarriage of justice does not arise through an accused being improperly convicted.[5] "A trial is not necessarily unfair because it is less than perfect, but it is unfair if it involves a risk of the accused being improperly convicted."[6]

Recent decisions of the High Court appear to reflect two approaches to the exercise of the fairness discretion. The first, which will be referred to as the 'narrow approach', looks solely at the question of whether the reception of the evidence is likely to preclude a fair trial in the sense outlined above. Evidence of a confession will only be excluded where there is a danger that the accused may be improperly convicted. This approach is therefore concerned only with those factors which may affect the outcome of the trial. The main example relied upon

---

3 For an extensive review of cases illustrating the exercise of the discretion see JD Heydon, *Cross on Evidence*, Butterworths (5th ed, 1996) at [33685]-[33755].

4 *Dietrich v R* (1992) 177 CLR 292 at 353, per Toohey J. Also see *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 57, per Deane J.

5 It has been held that a miscarriage of justice is the inevitable result where an accused is convicted without a fair trial. *Dietrich ibid* at 315, per Mason CJ and McHugh J and at 323, per Brennan J. Also see *Jago ibid* at 57, per Deane J.

6 *Dietrich* note 4 *supra* at 365, per Gaudron J.

in the judgments is where the police conduct affects the particular accused in such a way that the confession is potentially unreliable.

The second, or 'broad approach', includes but is not limited to such considerations. In addition, it takes into account factors which can have no impact on the outcome of the trial, but which are contrary to more general notions of fairness. For example, the fact that police misconduct is intentional does not make a miscarriage of justice any more likely than if it is accidental. Such factors have, however, been used to justify exclusion under the broad approach, presumably because it is considered to be particularly 'unfair' for police officers to intentionally abuse their position of power over an accused.

Unfortunately, proponents of the broad approach have made no attempt to define the meaning of 'fair' in this context. Although this may be advantageous in allowing a trial judge to respond to novel situations,[7] it also obscures the principles which lie behind the exercise of the discretion. Concepts such as fairness can only be understood in the light of such principles,[8] yet it remains uncertain to what extent the fairness discretion is concerned with reliability, protecting suspects' rights, deterring police misconduct or maintaining the integrity of the judicial process.[9] This leads to inconsistency and the appearance that the discretion is exercised without reference to any clear principle.

It will be argued that the narrow approach should be adopted as it provides a clear basis on which to exercise the discretion and an appropriate role for the fairness discretion within the general law relating to the admissibility of confessions. It will also be argued that the fairness discretion should be seen as but one example of the courts' general power to ensure a fair trial, and as such should not be limited to the exclusion of confessional evidence.

III. THE ADMISSIBILITY OF CONFESSIONS

As outlined above, there are three main grounds on which confessional evidence may be challenged at common law:[10]

(a) the requirement of voluntariness;
(b) the "fairness discretion"; and
(c) the "public policy discretion".

A. The Requirement of Voluntariness

To be admissible at common law, a confession must be proved to have been made voluntarily.[11] The burden of proving voluntariness lies on the prosecution,

---

7 MH Yeo, "The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches" (1981-82) 13 *MULR* 31 at 42-3.

8 A Ligertwood, *Australian Evidence*, Butterworths (2nd ed, 1993) p 492.

9 Australian Law Reform Commission Report No 26, *Evidence*, 1985 at 207. Also see SB McNicol, "Strategies for Reform of the Law Relating to Confessions" (1984) 33 *ICLQ* 265 at 287-8.

10 The common law has been modified by statute in some jurisdictions; for example s 149 of the *Evidence Act* 1958 (Vic) and s 85 of the *Evidence Act* 1995 (Cth).

11 *McDermott v R* (1948) 76 CLR 501 at 511.

the standard of proof being "on the balance of probabilities".[12] As this requirement is a rule of law, failure to satisfy the trial judge to the requisite standard will result in the mandatory exclusion of the confession.

A confession may be involuntary if it is made as a result of oppressive conduct or an inducement, the essential question being whether the will of the accused has been overborne.[13] Importantly, voluntariness is determined subjectively and requires "a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused".[14]

B. The Development of the Fairness Discretion

"The rule that a court is justified in excluding a confession where it is obtained by unfair or improper means is of comparatively modern growth."[15] The history of the discretion was considered by the Privy Council in *Ibrahim v R.*[16] The appellant, who had been convicted of murdering a fellow soldier, argued that certain confessional statements should have been excluded as having been made when the appellant was in custody, and in response to questions put to him by a person in authority, namely his commanding officer.

Lord Sumner, in delivering the judgment of the Judicial Committee, concluded that whether such conduct was sufficient to render the evidence inadmissible was "unsettled".[17] Nonetheless, it was acknowledged that many judges excluded such evidence in the exercise of a discretion which depends "largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case".[18]

The existence of such a discretion was subsequently confirmed by the English Court of Criminal Appeal in *R v Voisin.*[19] The Court held that although a statement made in answer to a question put by a police officer would not be inadmissible for that reason alone, it may be a ground for excluding the evidence in the exercise of the trial judge's discretion. That discretion should only be exercised if the trial judge is of the view that the statement was not voluntary "or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence".[20]

This discretion was subsequently recognised by the High Court in *McDermott v R*[21] where Justice Dixon referred to the comparatively recent practice which had arisen in England of excluding a confessional statement if, in all the circumstances, the trial judge considered that it had been obtained improperly. This practice, which could now be taken to represent the law in Australia, requires a trial judge to "form a judgment upon the propriety of the means by which the

12 *Wendo v R* (1963) 109 CLR 559.
13 Note 11 *supra.* Also see *Cornelius v R* (1936) 55 CLR 235.
14 *Collins v R* (1980) 31 ALR 257 at 307, per Brennan J.
15 *Smith v R* (1957) 97 CLR 100 at 127, per Williams J.
16 [1914] AC 599 at 611-14.
17 *Ibid* at 614.
18 *Ibid.*
19 [1918] 1 KB 531.
20 *Ibid* at 539.
21 Note 11 *supra.*

statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused".[22]

This view was affirmed in *R v Lee*[23] where it was held that a confession or other incriminating statement made by an accused may be excluded where, having regard to all the circumstances of the case including the propriety of the police conduct, it would be unfair to use it in evidence against the accused. What constitutes "impropriety" or "unfairness" will depend upon the circumstances of the particular case.[24] However, the function of the trial judge is not to impose sanctions on the police for engaging in improper conduct, that being a matter "entirely for the executive".[25]

C. The Development of the Public Policy Discretion

Following the decisions of the High Court in *McDermott* and *Lee,* the English and Australian courts both recognised the existence of a discretion whereby otherwise admissible confessional evidence could be excluded if it had been obtained improperly and where it would be unfair to admit it in evidence against an accused. This discretion was limited to confessional evidence and was centred on the notion of 'fairness' to an accused. The question then arose as to whether a trial judge could exclude improperly obtained evidence, not because its reception would be unfair to an accused, but in order to show disapproval of improper police conduct. In answering this question the Australian and English courts clearly diverged. Whereas the English courts took the view that the discretion to exclude otherwise admissible evidence on the grounds of unfairness is concerned solely with ensuring a fair trial and not with sanctioning improper or illegal police conduct,[26] the Australian courts clearly recognised a discretion to exclude evidence on the ground of public policy.

The existence of such a discretion was stated as a *fait accompli* in the decision of the High Court in *R v Ireland.*[27] The disputed evidence in this case consisted of photographs of the respondent's hand which had been taken unlawfully. The Court held that this evidence should have been excluded in the exercise of the trial judge's discretion because of the manner in which it was obtained. Chief Justice Barwick, with whom Justices McTiernan, Windeyer, Owen and Walsh agreed, described the exercise of this discretion as follows:

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible...On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring

22 *Ibid* at 513. Chief Justice Latham also accepted the existence of a discretion "to reject a confession or other incriminating statement made by the accused if...in all the circumstances it would be unfair to use it in evidence against him". *Ibid* at 506-7 citing *R v Jeffries* (1947) 47 SR (NSW) 284.

23 (1950) 82 CLR 133.

24 *Ibid* at 151.

25 *Ibid* at 154.

26 *Kuruma, Son of Kaniu v R* [1955] AC 197 and *R v Sang* [1980] AC 402. Now see s 78(1) of the *Police and Criminal Evidence Act* 1984 (Eng); *R v Mason* [1987] 3 All ER 481; *R v Christou* [1992] QB 979; and *R v Smurthwaite* [1994] 1 All ER 898.

27 (1970) 126 CLR 321. Affirmed in *Merchant v R* (1971) 126 CLR 414 at 417-18.

> the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence...In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.[28]

The ambit of this discretion as expressed by the Chief Justice was a clear departure from the established fairness discretion in two respects:

(a) it was not limited to evidence of a confessional or self-incriminatory nature; and
(b) it involved the balancing of competing public interests, rather than a consideration of fairness to an accused.

Unfortunately, his Honour did not cite any authority in support of such a discretion. Indeed, it would have been extremely difficult for him to do so given the paucity of authority at that time. Although there was some authority for a public policy discretion in Scotland and Ireland,[29] it had been expressly rejected by the Privy Council in *Kuruma v R*, and was clearly without precedent in Australia.[30] In fact, the High Court had earlier held that the imposing of sanctions in respect of police misconduct was a matter "entirely for the executive".[31]

Nonetheless, it enjoyed the unanimous support of the High Court and whilst this was a laudable development, it was not clear whether this decision merely extended the scope of the existing fairness discretion, or whether it created a new and independent discretion.

This question was answered by the High Court in *Bunning v Cross*[32] where it was held that the public policy discretion and the fairness discretion are independent grounds for exclusion. Justices Stephen and Aickin, with whom Barwick CJ agreed, held that the law in Australia was now different to the law in England. Whereas the English approach is to exclude otherwise admissible evidence when to admit it would be unfair to the accused, the public policy discretion is not primarily concerned with fairness to an accused, but rather with "broader questions of high public policy".[33]

The application of the public policy and fairness discretions to confessional evidence was subsequently considered by the High Court in *Cleland v R.*[34] Chief Justice Gibbs, with whom Wilson J agreed, held that the public policy discretion in

---

28 *Ibid* at 334-5.

29 *The People v O'Brien* [1965] IR 142 and *Lawrie v Muir* [1950] SC (J) 19. At that time Canadian courts recognised only the judicial discretion to reject a voluntary confession where the probative value of the evidence outweighs its prejudicial effect. See *R v Wray* [1971] SCR 272.

30 In *Wendo v R* note 12 *supra* at 562, Dixon CJ concluded that the issue had not "been put at rest by *Kuruma v The Queen*". In the hearing of *Ireland's* appeal before the Full Court of the Supreme Court of South Australia, Zelling J accepted the existence of such a discretion, quoting extensively from the judgment of Kingsmill Moore J in *The People v O'Brien*. See *R v Ireland* [1970] SASR 416 at 445-7.

31 Note 23 *supra* at 154.

32 (1978) 141 CLR 54.

33 *Ibid* at 74.

34 (1982) 151 CLR 1.

no way intruded upon the fairness discretion which was "designed to protect an accused person from being convicted on evidence which it would be unfair to use against him".[35] Although he did not elaborate upon the meaning of "unfair" in this context, he did state that the purpose of the public policy discretion is to "ensure the observance of the law rather than the fairness of the trial".[36] It could therefore be inferred that he favoured a narrow approach to the fairness discretion.[37]

Justice Deane stated that when considering the exercise of the fairness discretion, "the question is not whether the accused was treated unfairly; it is whether the reception of evidence of the confession would be unfair to him",[38] the rational basis for the discretion being "the requirement of public policy that an accused be protected against either procedural or substantive unfairness in the course of the administration of criminal justice in the courts".[39] It appears from these passages that his Honour was not suggesting that unfair treatment of an accused would, of itself, warrant the exercise of the fairness discretion. It would only be where such treatment might result in an unfair trial that the discretion could be invoked.

Such a view was most clearly articulated by Justice Dawson who held that the emergence of the discretion in *Bunning v Cross* made it necessary to draw a clear distinction between the fairness and public policy discretions. His Honour first considered the development of the fairness discretion in England where the need for such a discretion arose from the narrow scope which the English courts attributed to the notion of involuntariness. That is, to be excluded as involuntary a confession had to be obtained by threat of harm or promise of advantage. The Australian courts, however, did not take such a narrow view and accepted that oppressive conduct would, in appropriate cases, also render a confession involuntary.[40]

Although the rationale which lay behind it was peculiar to England, the existence of the discretion was accepted by Australian courts. As an extension of the voluntariness requirement, it was initially directed to the admission of evidence the admissibility of which would be unfair in the sense that it would preclude a fair trial, "and that could only have been because the evidence was in some way unreliable or untrustworthy".[41]

Subsequently, other considerations including the privilege against self-incrimination contributed to the development and justification of the discretion. Consequently, the discretion was no longer concerned solely with ensuring a fair trial and as a result was often expressed, "in terms which were more appropriate to the discouragement of improper or illegal methods of obtaining evidence than to

---

35 *Ibid* at 8.

36 *Ibid* at 9.

37 Justice Murphy held that evidence of a voluntary confession should generally not be excluded on the grounds of unfairness except where the prejudicial effect of the evidence outweighs its probative value. *Ibid* at 15-16.

38 *Ibid* at 18.

39 *Ibid* at 19.

40 As to the history of the voluntariness requirement in England and Australia, see note 3 *supra* at [33620]-[33625].

41 Note 34 *supra* at 30.

the unfairness of admitting evidence against an accused person which may be unreliable or unsatisfactory".[42] Such an approach was understandable at that time because "the principle first enunciated in *Ireland's Case*...is of recent origin in this country and finds no place in English Law".[43] However, with the emergence of the public policy discretion in Australia it became necessary to clearly differentiate between the two discretions:

> The distinction which can be usefully drawn is...a distinction between unfair, improper or illegal methods...of obtaining evidence and evidence which it would be unfair to use against the accused because its reliability has been affected by the unfair, improper or illegal methods used to procure it.[44]

It is submitted that this approach to the fairness discretion is consistent with the law relating to confessions as it has evolved in Australia. Where a voluntary confession is excluded in circumstances where its reception would not preclude a fair trial, its exclusion can only be justified on the basis of more general policy considerations.[45] Since the emergence of the public policy discretion, there is no longer any need for such considerations to be subsumed within the fairness discretion. To do so serves only to produce confusion and inconsistency in the exercise of both discretions, with no countervailing benefit.

Unfortunately, Justice Dawson's comments have not been heeded by a majority of the High Court, but nor have they been rejected. It is a curious feature of judgments in this area that a difference in approach does not necessarily produce a difference in result. It is therefore possible for judges of different views to reach the same conclusion, even to deliver a joint judgment. This makes it extremely difficult to ascertain majority support for either approach, as becomes apparent when one considers more recent decisions of the High Court.

IV. RECENT HIGH COURT DECISIONS

The narrow approach to the fairness discretion initially found favour with a majority of the High Court in *Van der Meer v R.*[46] This case involved an application for an extension of time in which to apply for special leave to appeal, the applicants having been convicted on various counts of rape and assault. The basis of the application was that certain statements made to police should have been excluded because of the circumstances in which they had been made. In particular, it was alleged that the applicants had been unlawfully detained for an excessive period of time, inadequately cautioned and subjected to intensive cross-examination.

---

42 *Ibid* at 31. For example see note 23 *supra* at 151 and note 11 *supra* at 513.

43 *Ibid* at 33.

44 *Ibid.*

45 Note 8 *supra*, p 500.

46 (1988) 82 ALR 10. The judgment of Justice Dawson in *Cleland* was also cited with approval by Gibbs CJ in *Williams v R* (1986) 161 CLR 278 at 286.

Justices Wilson, Dawson and Toohey, in a joint judgment, held that:

> the question is not whether the police have acted unfairly; the question is whether it would be unfair to use his statement against him...Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.[47]

Although acknowledging that the aggressive nature of the interrogation might have justified the exercise of the fairness discretion in other circumstances, in this case "nothing in substance of an incriminating kind resulted from the interrogations conducted in this way".[48]

Justice Deane also appeared to focus on the potential unreliability of the evidence when he referred to the guidelines which exist in Australia governing police interrogation of suspects. Compliance or non-compliance with such guidelines is a relevant factor in the exercise of the fairness discretion, the justification being that an accused may be:

> 'very unfairly' prejudiced by a statement obtained by the exercise of pressure while he is 'in the hands of an overzealous police officer'...a statement made as the result of such pressure may seem 'very damning' but be 'really very unreliable'.[49]

Consequently, the evidence should have been excluded in this case as the interrogation "involved a far-reaching failure to observe the minimum standards which any suspect is entitled to expect of law enforcement agencies in this country".[50] However, it is not clear from the judgment whether a failure to reach those minimum standards creates a presumption that it would be unfair to admit the evidence, or whether the additional step must be taken of considering whether the evidence is potentially unreliable in the particular circumstances.

Chief Justice Mason, however, seemed to focus on the circumstances in which the evidence was obtained as justifying its exclusion, rather than the use to be made of that evidence at trial. The Chief Justice held that the "police conduct of the interrogation was such as to make it unfair to use the...statements...against them".[51] The basis for this conclusion seems to have been that if the police investigation had been properly conducted "it might well have transpired that the statements would not have been made or would not have been made in the form in which they were made".[52] This approach seems to create a presumption that it will be unfair to admit a confession where there is a causal connection between the police misconduct and the making of the confession.[53]

A similar approach was adopted by Justice Brennan in *Duke v R.*[54] The applicant in this case had been convicted of armed robbery, the sole evidence against him being confessional statements allegedly made to police officers while he was unlawfully detained. In addition, the police did not tape-record the alleged confession or try to obtain independent evidence to confirm that it was made. It

---

47 *Ibid* at 26.
48 *Ibid.*
49 *Ibid* at 32 quoting from note 23 *supra* at 159.
50 *Ibid* at 39.
51 *Ibid* at 20.
52 *Ibid.*
53 SJ Odgers, "Police Interrogation: A Decade of Legal Development" (1990) 14 *Crim LJ* 220 at 232.
54 (1989) 83 ALR 650.

was therefore argued that the evidence should have been excluded in the exercise of the fairness discretion.

Justice Brennan considered this ground at some length.[55] He referred to the judgment of Dawson J in *Cleland* and, although agreeing that the object of the fairness discretion is fairness in the reception of evidence, held that it was:

> too confined a view to regard the unfairness discretion as applicable only to those cases where unreliability in the confession might have been produced by impropriety or unlawfulness on the part of the investigating police...The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted...[Consequently, police impropriety] may justify rejection of evidence of a confession if the impropriety has had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent.[56]

A number of comments may be made on this outline of the fairness discretion. First, it is submitted that it is correct to say that the reliability of a confession is not the sole criterion which may justify the exercise of the fairness discretion. For example, where the police misconduct does not affect the reliability of the confession but has the effect of depriving the accused of independent corroborative evidence, it may be said to be unfair to admit the evidence as the accused has been disadvantaged in the conduct of his or her defence.[57] However, it appears that Brennan J would not limit the exercise of the fairness discretion to this narrow concept of fairness at trial, as is indicated by his having cited *R v Lee* which "attributes a broader scope to that discretion".[58] Although the judgments in *Lee's* case would support such an approach, it is submitted that they should now be interpreted in the light of the public policy discretion.

Second, Brennan J seems to impose a significant limitation on the use of the discretion to exclude a voluntary and reliable confession when he refers to the impropriety having a "material effect" on the confessionalist. This presumably relates to his earlier comment that it may be unfair to admit a confession which would not have been made if it were not for the police misconduct. If what is meant is that the impropriety must have in some way caused the confession to be made, this would appear to be an unnecessary limitation. To use again the example where the police misconduct deprives an accused of independent corroborative evidence, such misconduct does not cause the confession to be made. Nonetheless, even though the confession is found to be voluntary and reliable, it could arguably be excluded on the ground of fairness as the accused has been deprived of the opportunity to challenge it effectively.

Third, by accepting that the fairness discretion is concerned with fairness in the reception of evidence, it would seem that Brennan J must also accept that evidence

---

55 Justices Wilson and Dawson rejected this ground of appeal as being without merit and based solely on questions of fact; *ibid* at 651.

56 *Ibid* at 653. Also see Justice Brennan's judgment in the earlier decision of the Federal Court in *Collins v R* (1980) 31 ALR 257.

57 Note 34 *supra* at 25-6, per Deane J. Also see *T v Waye* (1983) 35 SASR 247 at 251 and *R v Williams* (1992) 8 WAR 265 at 277.

58 Note 54 *supra* at 653.

should not be excluded merely because it was obtained unfairly. Nevertheless, he envisages that evidence of an apparently voluntary and reliable confession may be excluded where it would not have been made if the investigation had been properly conducted. Rather than considering whether the reception of the evidence is unfair, such an approach seems to involve a presumption that if the confession would not have been made but for the police impropriety then its admission is automatically unfair.

This is an extreme approach, the effect of which is to remove highly probative evidence from the consideration of the trier of fact. As Brennan J himself remarked in *Collins v R*,[59] it is generally desirable that all probative and admissible evidence should be put before the trier of fact. Consequently, legally admissible evidence should be excluded only where its reception would compromise some higher interest. To create a presumption that it is unfair to admit evidence of a voluntary and reliable confession where it would not have been made but for the police impropriety, of whatever degree, is contrary to this principle.

It is also inconsistent with the existence of the public policy discretion. Unless police misconduct can be shown to affect the fairness of an accused's trial, the admissibility of the evidence should be balanced against the significant community interest in ensuring that the guilty are convicted, particularly where the interests of an accused have already been safeguarded to a large extent by considerations of voluntariness and reliability. To reject the evidence because the police action can be regarded as having been 'unfair' in the circumstances, despite the fact that its reception would not preclude a fair trial, is to ignore that public interest.[60] While one may have cause to doubt the efficacy of internal police disciplinary proceedings and other alternative avenues of redress, it must be remembered that the disciplining of police officers is not the sole responsibility of the judiciary.

Justice Toohey also seemed to adopt the broad approach when he held that, "the methods by which a confession is obtained may themselves warrant a conclusion that it would be unfair to admit the material though there may be no room to doubt its reliability".[61] In *Duke*, the fact that the confession was obtained while the accused was in unlawful custody was a relevant factor in exercising the discretion.

Similarly, Deane J held that as the evidence in this case was obtained while the accused was unlawfully detained, it should rightly have been excluded because:

> it would be patently unfair to an accused that the wrong done to him by his unlawful detention should be compounded by being made the source of a perceptible risk of his being unfairly prejudiced by fabricated evidence on his trial. There is...no comparable countervailing element of unfairness to the prosecution in the rejection of uncorroborated police evidence obtained in such unlawful circumstances.[62]

Although the unlawfulness of the police conduct is clearly relevant to the exercise of the public policy discretion, it is submitted that it should not, of itself, be a relevant factor in the exercise of the fairness discretion. It can only be 'unfair' to admit evidence if the reception of that evidence is in some way likely to

---

59 Note 56 *supra* at 314.
60 Note 8 *supra*, p 501.
61 Note 54 *supra* at 663.
62 *Ibid* at 658.

endanger a fair trial; for example by affecting the reliability of the evidence or depriving the accused of independent corroborative evidence. Such consequences flow from the nature of the misconduct, not from its illegality.

For example, where the tape-recording of confessions is not mandatory, it may be unfair to admit evidence of a disputed confession which has not been tape-recorded despite taping facilities being available. In such a case the police conduct would not be unlawful, but to admit the confession may nonetheless be unfair.

Further, Justice Deane's reference to there being "no comparable countervailing element of unfairness to the prosecution" is, with respect, erroneous. The fairness discretion is not concerned with the balancing of the interests of the accused against those of the prosecution. In this context, there can be no comparable element of unfairness to the prosecution as they do not stand to be wrongfully convicted, however it should be stressed that the interests of the prosecution (in so far as these equate to the interests of the public) are more appropriately considered in the exercise of the public policy discretion.

The exercise of the fairness discretion was again considered by the High Court in *Pollard v R.*[63] The applicant had been taken to the Frankston police station to be questioned about an alleged rape. In contravention of ss 464A, 464C and 464H of the *Crimes Act* 1958 (Vic) he had not been cautioned or allowed to communicate with a lawyer, friend or relative and, despite taping facilities being available, the questioning was not tape-recorded. He was then taken to the St Kilda Road police station where, after being cautioned and informed of his rights, a tape-recorded interview took place in which he made several admissions. Although the application to the High Court was concerned primarily with the interpretation of s 464H, as there had also been breaches of ss 464A and 464C a number of the judges also considered the exercise of the fairness and public policy discretions.[64]

Justice Deane held that the evidence should have been excluded on the grounds of both fairness and public policy. The factors which supported the exercise of the fairness discretion were the failure to caution the accused and to tape-record the earlier interview. In particular, the procedure of, "selectively using parts of the unlawfully procured and inadmissible Frankston interview to the disadvantage of the applicant in the St Kilda Road interview was quite unfair to the applicant".[65]

Therefore, as in his judgment in *Duke*, Deane J seemed to focus on the unlawfulness of the police conduct rather than asking whether the reception of the evidence might endanger the fairness of the accused's trial. Chief Justice Mason, who agreed with Deane J on this point, went even further and held that, "the

---

63 (1992) 176 CLR 177.

64 Justices Brennan, Dawson and Gaudron did not consider the exercise of either discretion in detail as they held that the failure by the trial judge to appreciate the significance of the breaches of ss 464A and 464C meant that his exercise of either discretion must have miscarried; *ibid* at 197. Justice Toohey held that this application was, "an unsatisfactory vehicle for exploring the relationship between evidence obtained unfairly and evidence obtained illegally"; *ibid* at 224.

65 *Ibid* at 210.

magnitude or significance of the breach of duty may, in itself, have justified the exercise of the discretions".[66]

Whilst these factors are clearly relevant to the exercise of the public policy discretion, it is submitted that they are not in themselves relevant to the exercise of the fairness discretion. As outlined above, it is the nature of the police conduct and its effect on the fairness of the accused's trial that should determine whether reception of the evidence would be unfair to the accused. The unlawfulness of the conduct is irrelevant in this regard. Although increased regulation of police interrogations by statute means that it is more likely that police misconduct will be unlawful, that is not to say that the reception of evidence unlawfully obtained will necessarily be unfair. Focussing on the unlawfulness of the conduct and the magnitude of the breach detracts from the more fundamental question of whether the accused's right to a fair trial has been jeopardised.

Justice McHugh adopted a more extreme view and held that s 464C lays down rules which parliament requires must be followed if a confession is to be regarded as having been fairly obtained. Consequently, a confession obtained in breach of that section raises a *prima facie* case of unfairness to the accused which will ordinarily justify the rejection of the evidence unless the presumption is displaced; for example, by showing that, "the breach was insignificant or was irrelevant to the obtaining of the confession or admission".[67] He held that the presumption had not been displaced in this case, even though the trial judge had concluded that the accused's statements were reliable and their reception would not jeopardise the accused's right to a fair trial.

This approach, which will be referred to as the 'presumptive approach', makes explicit what was implicit in the judgments of Mason CJ in *Van der Meer* and Brennan J in *Duke*. For the reasons outlined above, it is submitted that such an approach should not be adopted. Although the breach of a statutory requirement designed to protect an accused is clearly relevant to the exercise of the fairness discretion, it is the effect of the breach on the fairness of the accused's trial which should ultimately determine the question of unfairness. To create such a presumption may foster the belief that it is the illegality of the conduct, rather than its effect which is important.

The most recent decision of the High Court on the exercise of the fairness discretion is, unfortunately, also one of the most ambiguous. In *Foster v R*,[68] the High Court quashed the conviction of a 21 year old Aborigine who had been convicted of arson in relation to a fire at the Narooma High School. Before being questioned the accused had denied any involvement with the arson, but after less than an hour he had signed the alleged confession which constituted the only prosecution evidence against him.

---

66 *Ibid* at 184.

67 *Ibid* at 236. The question of whether a breach of section 464C creates a "presumption" of unfairness was left open by the Victorian Court of Criminal Appeal in *R v Percerep* [1993] 2 VR 109.

68 (1993) 113 ALR 1. Although counsel for the appellant had invited the Court to clarify the principles relating to voluntariness and the exercise of the fairness and public policy discretions, the Court was apparently of the view that this case was "not a suitable vehicle for that purpose": at 14, per Brennan J.

The accused alleged that the 'confession' had been fabricated by police and that he had only signed it after police officers threatened that they would "bash" him and also charge his younger brother. The police officers maintained that the confession had been made after the accused had been shown confessional statements made by two alleged companions. The question on appeal was whether the Court of Criminal Appeal had been correct in upholding the trial judge's decision not to exclude the evidence in the exercise of the fairness discretion. The circumstances surrounding the arrest and the interrogation of the appellant were therefore of central importance.

The High Court found that the confession had been made whilst the accused was unlawfully detained and given no opportunity to contact a lawyer. In addition, taping facilities were either not available or, in any event, not used, and when his mother arrived at the police station she was told that she would have to wait until the interview was completed. Consequently, the appellant was deprived of the opportunity to corroborate his version of events.

In a joint judgment, Mason CJ and Deane, Dawson, Toohey and Gaudron JJ referred to the fairness and public policy discretions and held that although in many cases the factors relevant to the exercise of the two discretions will overlap, their focus is quite different:

> In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy'.[69]

In determining whether the police conduct in this case warranted the exclusion of the evidence, they first considered the unlawful detention of the accused and his having been denied the presence of non-police witnesses. In such a situation, "a 'statement' may be 'taken' which seems very damning but which is really very unreliable. In such a case it may well be that his statement, if admitted, would prejudice him very unfairly".[70]

In this case, particularly as the appellant was "semi-illiterate", they concluded that these considerations alone constituted substantial grounds upon which the evidence might have been excluded on the basis that its reception would have been unfair to the accused. In focusing on the potential unreliability of the evidence, they therefore appeared to adopt the narrow approach.

Their Honours then considered a number of additional factors which tended towards exclusion of the evidence. These were:

(a) that the police infringement had been both serious and reckless;
(b) that the police had arrested the appellant solely for the purpose of interrogating him; and
(c) that there was some doubt as to the voluntariness of the confession.

It was concluded that in the circumstances this was clearly a case in which the evidence should have been excluded in the exercise of both the public policy and fairness discretions. Although the majority were clearly correct in holding that the

---

69 *Ibid* at 7.

70 *Ibid* at 8 quoting from note 23 *supra* at 159.

evidence of the alleged confession should have been excluded, it is unfortunate that they did not delineate exactly which factors were relevant to the exercise of which discretion.[71]

The majority judgment is ambiguous by first defining the fairness discretion in terms of the effect of the police conduct on the particular accused and the reliability of any resulting confession, yet in applying the discretion taking into account factors which do not in themselves affect the accused nor the reliability of the evidence. For example, the seriousness or recklessness of the police misconduct which surrounded the making of the alleged confession could not be said to affect the fairness of admitting that evidence at trial. If the fairness discretion is concerned with the impact of the particular circumstances on the particular accused, it is the nature of the breach that is relevant, not the intention with which it is carried out. The effect of the police conduct on the accused will be the same whether it has been carried out intentionally or accidentally. However, this factor is clearly relevant to the exercise of the public policy discretion.

Similarly, the fact that the power of arrest was exercised unlawfully does not affect the fairness of admitting the evidence. The question of whether the conduct of the police affected the particular accused in such a way that it would be unfair to use the evidence at trial is in no way dependent upon the lawfulness or otherwise of the police conduct. There may be circumstances where the conduct of the police, although lawful, is such that it affects a particularly vulnerable suspect sufficiently to warrant the exercise of the discretion. Conversely, unlawful police conduct may have no impact on the particular accused and so it cannot be said that to admit the evidence at trial would be 'unfair'. The illegality of the police conduct is more appropriately considered in the context of the public policy discretion.

On the other hand, the fact that the voluntariness of the confession was doubtful is potentially relevant to the exercise of both discretions. It would be arguably unfair to use a potentially unreliable confession at trial, and the reliability (and hence probative value) of the confession would also be a relevant factor to be considered in the exercise of the public policy discretion.

Justice Brennan remained consistent and adhered to the views which he expressed in his earlier judgments in *Collins, Duke* and in the joint judgment in *Pollard.* Consequently, as the police conduct deprived the accused of any independent evidence, and there were no exigencies of the particular investigation which justified the police conduct, he held that it would be unfair to admit the evidence.

It is submitted that whilst the exigencies of the investigation are clearly relevant to the exercise of the public policy discretion, they are irrelevant to the exercise of the fairness discretion. The effect of police misconduct on a particular accused, and the consequent unfairness of admitting the evidence at trial, will be the same irrespective of whether the misconduct was justified in the circumstances. Surely

---

71 J Hunter, "Unreliable Memoirs and the Accused: Bending and Stretching Hearsay - Part One" (1994) 18 *Crim LJ* 8 at 19.

it could not be suggested that the reception of evidence is somehow 'less unfair' to an accused because of the exigencies of the particular investigation? "[T]he public interest in holding a trial does not warrant the holding of an unfair trial."[72]

Justice McHugh seemed to abandon the presumptive approach which he had adopted in *Pollard* and focussed instead on the potential unreliability of the confession. Consequently, he held that the fact that police conduct has affected the reliability of a confession would be a strong reason for excluding it, whereas the fact that the conduct has not affected the reliability of a confession would be a factor justifying a refusal to exercise the discretion. Although the factors justifying exclusion in this case were strong, his Honour held that the Court was unable to make a decision on this issue without having seen and heard the witnesses.

V. A PREFERABLE APPROACH

It is apparent that there is no majority support on the High Court for either approach to the fairness discretion. Although the narrow approach initially received support from Gibbs CJ and Wilson J, its strongest remaining advocate is Dawson J who, despite the equivocal joint judgment in *Foster,* has not expressly resiled from that position. Chief Justice Mason and Brennan and Deane JJ all seem to adopt the broad approach, while the judgments of Toohey, Gaudron and McHugh JJ have been too ambiguous to be regarded as supporting either approach.

Therefore, out of the current judges of the Court, only the views of Brennan CJ and Dawson J, both of whom take opposing view, can be predicted with any confidence. This problem is exacerbated by the fact that a difference in approach does not necessarily produce a difference in result. This may account for the apparent lack of recognition from the bench that there is any conflict at all. Those who take the broad approach are more likely to exclude the evidence on the basis of unfairness, while those who take a narrow approach may have recourse to the public policy discretion, the joint judgment in *Foster* being a good example.

For this reason, it may well be that even if the narrow approach were to be adopted there would be no change in the extent to which confessional evidence is excluded.[73] Nonetheless, it should not be thought that the difference in approach is of no importance. The exclusion of probative evidence from the consideration of the jury is a drastic step which should only be exercised on the basis of clear principle. If a discretion is exercised without a clear rationale, it may appear to be arbitrary rather than principled. It is submitted that for reasons of both principle and clarity, the narrow approach should be adopted.

A. Principle

The conflicting approaches to the fairness discretion reflect an apparent difference of opinion as to the rationale which lies behind its exercise. When the

72 *Jago* note 4 *supra* at 31, per Mason CJ.

73 Note 53 *supra* at 230.

fairness discretion was first recognised by the High Court in *McDermott,* Justice Dixon stated that it could be regarded as an extension of the voluntariness requirement, its rationale being the precept *nemo tenetur se ipsum accusare.*[74] This reflected the fact that the public policy discretion did not exist at that time. Consequently, it was necessary for various principles to be expressed by the voluntariness requirement or the fairness discretion. With the emergence of the public policy discretion, it is submitted that these principles may be expressed more clearly through the distinct requirements of voluntariness, fairness and public policy.[75]

In order to determine an appropriate role for the fairness discretion, it is necessary first to identify those principles which may justify its exercise. In this context, three basic rationales will be referred to:[76]

(a) the 'reliability principle' is concerned with ensuring that evidence which is likely to be unreliable is excluded from the consideration of the trier of fact;
(b) the 'disciplinary principle' seeks to exclude unlawfully or improperly obtained evidence in order to discourage police misconduct; and
(c) the 'protective principle' is based on the premise that citizens have a right to be treated in accordance with the standards which the legal system lays down for the conduct of police investigations. Consequently, evidence should be excluded where it is obtained as a result of an infringement of those principles.[77]

(i) The Reliability Principle

This principle provides at least a partial rationale for both the narrow and broad approaches to the fairness discretion. In both cases, evidence may be excluded as 'unfair' where the circumstances in which it was obtained have cast doubt upon its reliability. As this rationale is also one justification for the voluntariness requirement,[78] it may be thought that there is unnecessary duplication. However, it must be remembered that the standard of proof on the question of voluntariness is on the balance of probabilities. It is therefore possible for a trial judge to be satisfied to the requisite standard that the confession is voluntary, but to still retain grave doubts as to the reliability of the confession, thereby justifying its exclusion on the ground of unfairness. In this sense the exercise of the discretion may be said to have "buttressed the protection of the confessionalist".[79]

---

74 Note 11 *supra* at 513.
75 Note 8 *supra,* pp 493-4.
76 See CR Williams, "Judicial Discretion in Relation to Confessions" (1983) 3 *OJLS* 222 and McNicol note 9 *supra* at 284-8.
77 AJ Ashworth, "Excluding Evidence as Protecting Rights" (1977) *Crim LR* 723. Also see Williams *ibid* at 226.
78 Note 34 *supra* at 8, per Deane J. Also see Williams *ibid* at 224 and McNicol note 9 *supra* at 287.
79 *Collins* note 56 *supra* at 315, per Brennan J.

(ii) The Disciplinary Principle

As the broad approach may result in the exclusion of a voluntary and reliable confession in circumstances where the fairness of an accused's trial is not endangered, it is clear that its rationale is wider than the reliability principle. By focussing on the circumstances in which the evidence was obtained and the impropriety of the police conduct, this approach appears also to give effect to the disciplinary principle. However, this principle finds expression in the public policy discretion and the High Court has consistently stated that the two discretions are distinct, the fairness discretion being concerned only with the effect of the misconduct on the particular accused.[80] Further, the use of the fairness discretion to sanction police misconduct was expressly rejected by the High Court in *Lee*.[81]

(iii) The Protective Principle

In recent decisions of the High Court both the seriousness of the police impropriety and the intention with which it is carried out have been considered to be relevant factors in the exercise of the fairness discretion. This indicates that the discretion is concerned to some extent with ensuring the integrity of the criminal justice process, including pre-trial procedures. Such an approach would be justified under the 'qualified protective principle'.[82] This principle states that "evidence obtained by means of a departure from a declared standard or procedure should be liable to exclusion, unless the court is satisfied that the accused has suffered no disadvantage as a result of the breach".[83] A number of issues arise from this definition.

First, if the rationale behind the principle is the protection of individual rights, why should it be assumed that the exclusion of evidence is necessarily an appropriate response to the infringement of those rights? It may equally be assumed that the law should provide for disciplinary proceedings or alternative means of redress.[84]

Second, the word 'disadvantage' is obviously crucial and is given a wide interpretation. A citizen is said to be 'disadvantaged' if the evidence is used against him or her at trial.[85] Consequently, if a citizen is to be protected from disadvantage, the evidence must be excluded. However, such a definition would appear to be unworkable as the only situations in which it could be shown that the accused has not been 'disadvantaged' would be:

---

80 Note 68 *supra* at 7. The potential for duplication is exacerbated by the fact that the public policy discretion may extend to evidence which has been improperly, though not unlawfully, obtained. *Ridgeway v R* (1995) 129 ALR 41 at 52-3.

81 Note 23 *supra* at 154.

82 Ashworth note 77 *supra*. Support for this approach is found in A Palmer, "Confessions in the High Court" (1993) 18 *Alternative LJ* 203 at 205.

83 Ashworth *ibid* at 729.

84 Williams note 76 *supra* at 226.

85 Ashworth note 77 *supra* at 725.

(a) if the impropriety did not infringe the person's rights or had no effect in procuring the confession, in which case the protective principle need not be invoked; or
(b) if the evidence is of negligible probative value, in which case it should be excluded as being irrelevant.

It is therefore necessary to adopt a more workable meaning of 'disadvantage'. It is submitted that the only meaningful way in which it can be said that an accused has been 'disadvantaged' by improper police conduct is where that conduct endangers his or her right to a fair trial. This is a much clearer application of the protective principle as it seeks to protect an accused from tangible disadvantage. If such disadvantage is unlikely, then the evidence should be admitted unless the police misconduct warrants exclusion under the public policy discretion.

Third, the exclusion of evidence which would not produce tangible disadvantage to an accused would seem to be concerned more with protecting the integrity of the judicial process than the rights of an individual accused. However, the integrity of the judicial process is itself a matter of public interest and should be balanced against the public interest in the guilty being convicted:

> In determining the practical content of the requirement that a criminal trial be fair, regard must be had 'to the interests of the Crown acting on behalf of the community as well as the interests of the accused'.[86]

Yet the public interest in securing the conviction of offenders is not one which weighs heavily in the application of the protective principle.[87] In any event, it is submitted that the public interest in the integrity of the judicial process is adequately protected by the exercise of the public policy discretion. To introduce the same balancing process into the fairness discretion would be to produce duplication and confusion for no demonstrable benefit.

Finally, there is very limited High Court authority in support of a presumptive approach to the exercise of the discretion. Although McHugh J expressly adopted such an approach in *Pollard*,[88] his Honour appeared to resile from that position in *Foster*.

It is submitted that the exercise of the fairness discretion may be justified on the basis of both the reliability and the protective principles. However, the protective principle should be seen as protecting an accused from infringement of his or her rights only where that infringement produces tangible disadvantage. To adopt any other view is to substitute one nebulous concept for another and to introduce further uncertainty into an already clouded issue. If the infringement does not produce such disadvantage the issue becomes one of protecting the integrity of the judicial process. This is a matter of public interest and is more appropriately considered in the exercise of the public policy discretion.

---

86 *Dietrich* note 4 *supra* at 331-2, per Deane J, quoting from *Barton v R* (1980) 147 CLR 75 at 101. Also see *Jago* note 4 *supra* at 33, per Mason CJ at 54; per Brennan J; at 72, per Toohey J.

87 Ashworth note 77 *supra* at 732.

88 Such an approach appears also to have been impliedly adopted by Mason CJ in *Van der Meer* and by Brennan J in *Duke;* see text at footnotes 46 to 54 *supra.*

B. Clarity

Although the use of discretion in judicial proceedings must necessarily be flexible, it must also be principled. The failure by the courts to clearly define the crucial principle of fairness has led to inconsistency not only in decisions of the High Court, but also in the decisions of the lower courts.[89] In addition, the subjective nature of the fairness discretion makes it difficult for trial judges to provide clear reasons for their decisions, which in turn makes its difficult for appellate courts to determine whether there has been an omission or defect in the exercise of the discretion.[90] These problems were succinctly identified by the Australian Law Reform Commission when it stated that:

> ...'fairness' is a vague concept and the courts have failed to define precisely the principles behind it or considerations relevant to it. This maximises uncertainty and unpredictability...[and] makes satisfactory appellate review extremely difficult.[91]

It is submitted that the uniform adoption of the narrow approach would significantly, if not completely, address these problems as it presents the trial judge with a relatively straightforward question: "is the reception of this evidence likely to preclude a fair trial in the sense that there is a danger that the accused may be improperly convicted?". This provides a clear framework for the exercise of the discretion which should produce greater consistency and facilitate review by appellate courts.

VI. THE COMMONWEALTH EVIDENCE ACT

There is currently a move toward the enactment of uniform evidence legislation in all Australian jurisdictions to be modelled on the *Evidence Act* 1995 (Cth).[92] However, it appears that even if legislation based on the Commonwealth model is enacted, the inconsistency surrounding the exercise of the fairness discretion is likely to continue.

The Commonwealth Act contains a discretion which clearly reflects the common law fairness discretion. Section 90 of the Act states that in criminal proceedings the court may refuse to admit evidence of an admission if, having regard to the circumstances in which it was made, "it would be unfair to a defendant to use the evidence".

Although the Australian Law Reform Commission apparently envisaged a specific role for the discretion,[93] no attempt has been made to define or limit those circumstances in which the reception of confessional evidence might be said to be

---

89 Some recent decisions which appear to adopt the narrow approach include: *R v Ella* (1990) 100 FLR 442 at 445-6; *R v Weetra* (1993) 93 NTR 8 at 17 and *R v Williams* note 57 *supra* at 272-4. Those apparently adopting the broad approach include: *Seymour v Attorney-General (Cth)* (1984) 57 ALR 68 at 527 and *R v Percerep* note 68 *supra* at 120. Also see note 8 *supra*, pp 502-3.

90 Australian Law Reform Commission note 9 *supra* at 207.

91 *Ibid* at 539.

92 The *Evidence Act* 1995 (NSW) has already been enacted in essentially identical terms to the Commonwealth Act.

93 Australian Law Reform Commission Report 38, *Evidence*, 1987 at 90.

'unfair'. Consequently if, as seems likely,[94] the Act is not interpreted as being a code, the courts may look to the common law for guidance in exercising the discretion and will be faced with the conflicting approaches outlined above. In particular, in relation to confessional evidence, the potential for overlap between the fairness and public policy discretions[95] will remain.[96]

VII. A GENERAL DISCRETION?

Although the fairness discretion has evolved "as part of a cohesive body of principles and rules on the special subject of confessional statements",[97] it is submitted that at common law its exercise need not be restricted to evidence of confessions. Rather, it should properly be regarded as but one example of the courts' general power to ensure a fair trial.[98] The exercise of this power may take many forms, the most relevant being the power of a trial judge in all criminal proceedings to exclude otherwise admissible evidence where its admissibility would be unfair to an accused.[99] A common example where evidence will be excluded on this basis is where its probative value is outweighed by its prejudicial effect.[100]

A narrow approach to the fairness discretion is consistent with this general power as exclusion is dependent upon the fairness of the accused's trial being endangered. Although the majority of cases involving the exercise of the fairness discretion would continue to involve confessional evidence, there may be circumstances in which police misconduct disadvantages an accused in the conduct of his or her defence to such an extent that the reception of real evidence might preclude a fair trial. For example, under s 464ZC of the *Crimes Act* 1958 (Vic), a sample of forensic material must be provided to an accused for analysis if there is sufficient material available. A failure to provide such a sample might disadvantage the conduct of an accused's defence to such an extent that the reception of the evidence would be unfair.

Even where a broad approach is adopted, it may be argued that if a voluntary and reliable confession may be excluded because it has been obtained 'unfairly',

---

94 S Odgers, *Uniform Evidence Law*, Federation Press (2nd ed 1997) p xxi, note 3 *supra* at [1720]-[1745] and Attorney-General's Department, *Commonwealth Evidence Law and Commentary* (1995) p 1.

95 Section 138 *Evidence Act* 1995 (Cth) contains a discretion similar to the common law public policy discretion.

96 Odgers note 94 *supra*, p 152. Also see C O'Donnell, "The Admissibility of Confessional Evidence in New South Wales" (1996) 14 *Aust Bar Rev* 61.

97 Note 68 *supra* at 6.

98 Such a general power has been recognised by the High Court in: *Dietrich* note 4 *supra*; *Jago* note 4 *supra* and *Barton* note 86 *supra*.

99 *Driscoll v R* (1977) 137 CLR 517 at 541; *Dietrich* note 4 *supra* at 363; *Jago* note 4 *supra* at 71 and *Bunning* note 32 *supra* at 73-4. Section 11(1) of the *Evidence Act* 1995 (Cth) states that the power of a court to control the conduct of a proceeding is not affected except where the Act provides otherwise "expressly or by necessary intendment". Although it is therefore arguable that such a general discretion would continue to apply, situations in which its operation would not be inconsistent with the provisions of the Commonwealth Act would be limited. See in particular s 90 and ss 135-138.

100 *Driscoll ibid* and *Dietrich* note 4 *supra* at 363.

why should the same principle not apply to real evidence? The traditional justification for the fairness discretion not applying to real evidence was that the manner in which it was obtained would not generally affect the cogency of the evidence.[101] As this is no longer an essential consideration, it would seem that the fairness discretion should apply equally to real evidence. Certainly, if the protective principle is relied upon to justify the exercise of the discretion, there is no suggestion that this principle is applicable only to confessional evidence.[102]

Finally, although it is clear that the police conduct need not be unlawful to justify the exercise of the fairness discretion,[103] it is unclear whether it must at least be improper.[104] As a matter of principle it would seem that it need not, irrespective of whether a broad or narrow approach is taken.[105] Both would accept that the reception of unreliable evidence would be 'unfair', although proponents of the broad approach would not limit the exercise of the discretion to such a situation. For example, it is conceivable that the police may question a suspect in circumstances in which the questioning is both lawful and proper, but where the condition of the suspect casts such doubt upon the reliability of the confession that its reception would be unfair.

VIII. CONCLUSION

Both the common law and the *Evidence Act* (Cth) have adopted judicial discretion as an appropriate way of resolving the tension between the desirability of admitting probative evidence and the need to ensure that the judicial process is not tainted by improper or illegal police conduct. The ability of a trial judge to exclude legally admissible evidence should be exercised according to clearly defined principles, yet despite numerous opportunities in recent years, the High Court has failed to ensure that the fairness discretion is exercised in such a manner.

The existence of both the public policy and fairness discretions provides the High Court with an opportunity to develop a clear and logical approach to the discretionary exclusion of confessions.[106] It is submitted that this would most appropriately be done by limiting the exercise of the fairness discretion to those situations where the circumstances in which a confession was obtained are likely to preclude a fair trial. If a confession is both voluntary and its reception would not endanger a fair trial, then it should be only in the exercise of the public policy discretion that it should be excluded.

---

101 Note 32 *supra* at 75.

102 Ashworth note 77 *supra*.

103 Note 68 *supra* at 7.

104 In *McDermott* note 11 *supra* at 507, Latham CJ suggested that it may be unfair to admit a confession where the accused has failed to understand and appreciate the effect of questions and answers. Also see *Seymour* note 89 *supra* at 527.

105 Note 53 *supra* at 233 and note 9 *supra* at Appendix C [148].

106 Note 8 *supra*, p 494.

The public policy discretion has evolved specifically for the purpose of addressing the question of whether the public interest in the accused being tried is outweighed by the need to discourage improper police conduct. There is no need for that clear discretion to be diluted by a broad application of the fairness discretion. To exclude evidence on the basis that it has been obtained unfairly, despite their being no effect on the fairness of the accused's trial, is to subvert that interest and to place compliance with regulations in a paramount position.

Unfortunately, the current state of the law is unclear, with little acknowledgment from the courts that differences in approach exist. This produces inconsistency and gives the impression that the exercise of the discretion is without a clear rationale. It is to be hoped that the High Court will take the next opportunity which arises to rectify this situation, and provide a clear framework upon which the discretion may be exercised.