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***Principle, Public Policy and
Unfairness -
Exclusion of Evidence on
Discretionary Grounds***

by

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**PRINCIPLE, PUBLIC POLICY AND UNFAIRNESS -
EXCLUSION OF EVIDENCE ON DISCRETIONARY GROUNDS**

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The process by which the common law is developed and changed involves reasoning by analogy. However, as Justice Kirby has commented, in order to derive any guidance from analogies, it is "necessary to have some concept of the principle by which the analogy is to be discovered".²

A good example of this process can be seen in the development of the common law discretions that may be exercised by a trial Judge to exclude evidence. The purpose of this paper is to analyse that development both in relation to confessional and "real"³ evidence. The principles upon which those discretions are based will also be analysed. The result of that analysis will then be applied in a consideration of the proper role and function of the discretions and in a consideration of the High Court's decision in *R v Swaffield*.⁴

Unfairness Discretion

A trial Judge always has an overriding duty to secure a fair trial. The law insists "upon the pre-eminence of the need to ensure that the innocent are protected from wrongful conviction"⁵. As it was put by Justice Deane in *Jago v District Court (NSW)*⁶, "The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law." For the purposes of this paper this principle is described as the "fairness principle".

¹ I acknowledge the assistance of Peter Psaltis of the South Australian Crown Solicitor's Office in assisting with the research of this paper and of Tom Pauling QC, S-G (NT) and Matthew Goode of the Attorney General's Office for their comments. The views are, of course, entirely my own.

² *Pyrenees Shire Council v Day* (1998) 151 ALR 147, 198[189]. See also at 213[240] and J Farrar, "Reasoning by Analogy in the Law" (1997) 9 Bond Law Review 149

³ For the purposes of this paper "real" evidence means physical evidence. It is to be distinguished from confessional evidence and circumstantial evidence.

⁴ (1997) 192 CLR 159

⁵ *Van der Meer v R* (1988) 62 ALJR 656, 669

⁶ (1989) 168 CLR 23, 56. See also Gaudron J at 77-78.

At common law this fundamental principle of the criminal law is reflected in a judicial discretion in a trial Judge to exclude evidence which would otherwise be admissible⁷. The relationship between the principle and the discretion is explained by Gaudron J in *Dietrich v The Queen*⁸:

"The expression "fair trial according to law" is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness!

.....Speaking generally, the notion of "fairness" is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus, in some cases, the requirement results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury. In other cases, the procedures may be modified, for example, to allow evidence to be given through an interpreter, or to allow for special directions to counteract the effect of pre-trial publicity or even something said or done in the trial itself. Sometimes the venue may be changed to counteract some perceived difficulty in obtaining a fair trial in the area in which the offence was committed; in other cases proceedings may be adjourned, for example, to enable evidence to be checked or to allow for pre-trial publicity to abate. The examples are not exhaustive. They are, however, sufficient to show that the requirement of fairness is, and, in various different contexts, has been recognized as, independent from and additional to the requirement that a trial be conducted in accordance with law."

For the purpose of this paper that discretion is described as "the unfairness discretion". The common law discretion is reflected in sections 135-137 of the *Evidence Act, 1995 (Cth)*⁹. The role and function of the unfairness discretion is to remove the risk of conviction upon evidence which is unfair to use¹⁰.

The discretion was first separately identified in the context of confessional evidence, particularly where the confession had been improperly obtained e.g. in breach of the Judges Rules¹¹. The discretion was explained by Gibbs J in *Driscoll v The Queen*¹² as follows:

⁷ *R v Sang* [1980] AC 402, 444-445; *Myers v DPP* [1965] AC 1001, 1024; *Driscoll v R* (1977) 137 CLR 517, 541; *Duke v The Queen* (1989) 180 CLR 508, 526.

⁸ (1992) 177 CLR 292, 362-363

⁹ These reflect the common law discretion: see *Stanoevski v R* (2001) 177 ALR 285, 293 [39]. In the Northern Territory the common law discretion as it relates to police cautions seems to have been replaced by section 143 of the *Police Administration Act (NT)*. Northern Territory cases also seem to treat the statutory discretion as being the same as the common law discretion: see e.g. *Dumoo v Garner* (1998) 143 FLR 245. However, it seems at least arguable that the section 143 changes the onus.

¹⁰ See *Collins v R* (1980) 31 ALR 257, 313

¹¹ See *McDermott v The Queen* (1948) 76 CLR 501; *R v Lee* (1950) 82 CLR 133. The history of the development of the discretion has been traced by Kearney J in *Dumoo v Garner* (1998) 143 FLR 245 at 261. Although the unfairness discretion was first separately identified in these cases, it may be that other evidentiary rules are also based upon the unfairness principle.

"Although as a matter of law a [confession] is admissible against an accused person who [made] it, that does not seem to me to be the end of the matter. It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused. The exercise of this discretion is particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused: see, e.g., *R. v. Christie* [1914] AC 545 at 560; *Noor Mohamed v. The King* [1949] AC 182 at 192 ; *Harris v. Director of Public Prosecutions* [1952] AC 694 at 707 and *Kuruma v. The Queen* [1955] AC 197 at 204. "

Although the discretion was first identified in relation to police impropriety particularly when questioning a suspect, it seems now to be well accepted that the impropriety is not the basis for the exercise of the discretion. Rather, the unfairness relates to the position of the accused. As it was put by the majority in *Van der Meer v The Queen*¹³

"In considering whether a confessional statement should be excluded, the question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused 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."

It is also now well accepted that fairness is not limited to questions of reliability. Of course, the use of unreliable evidence, particularly if it is unduly prejudicial, is necessarily unfair. But as Brennan J noted in *Duke v The Queen*¹⁴ the evidence should be excluded if "it is unfair to admit the evidence of the confession, whether because of the unreliability of the confession... or for any other reason..."

Clearly, once unfairness to the accused, rather than unreliability, becomes the touchstone of the discretion then there is considerable potential for overlap with the other exclusionary discretions discussed later in this paper. In *R v Swaffield*¹⁵ Justices Toohey, Gaudron and Gummow commented that

"Unfairness then relates to the right of an accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted. And once considerations other than unreliability are introduced, the line between fairness and policy may become blurred."

¹² (1977) 137 CLR 517, 541.

¹³ (1988) 62 ALJR 656, 666

¹⁴ (1989) 180 CLR 508, 513. See also *Van Der Meer* (1988) 62 ALJR 656, 662. It is now clear that the unfairness discretion also applies where there is impropriety or a trick without which there would not have been a confession in the first place: see *R v Swaffield* (1998) 192 CLR 159, 175, 189; *R v Pfizner* (1996) 66 SASR 161, 180; *R v Lobban* (2000) 77 SASR 24, 37-38; T Carmody *Recent and Proposed Statutory Reforms to the Common Law Exclusionary Discretions* (1997) 71 ALJR 119, 120-121

¹⁵ (1998) 192 CLR 159, 189-190 [54]

The reality, of course, is that once the discretion is based upon no other principle than "fairness" it is difficult to be prescriptive about its application. "It involves an evaluation of circumstances"¹⁶. Kirby J has remarked that "the concept of fairness has been criticised by commentators, fairly, for its vagueness"¹⁷ and that the concept is "broad enough to adapt to changing circumstances as well as evolving community values."¹⁸ Of course, this is not surprising. The unfairness discretion reflects the principle upon which it is based - a principle of fairness. The principle also lacks precision.

What is clear is that the unfairness discretion will arise for consideration where, for example, police and others have disregarded laws or directions intended to protect the rights of the accused (which are not limited to his or her rights to a fair trial). It will also need to be considered when the evidence is unreliable. But it is not limited to these cases.

As we have seen the unfairness discretion originally developed in relation to confessional evidence. The question naturally arose as to whether the discretion was also applicable to real evidence. There were some logical difficulties in applying it to real evidence, particularly when fairness was thought to be directed only to the issue of reliability. It was hard to conceive that real evidence could be unreliable. A good example is *R v Ireland*¹⁹. In that case the police failed to comply with statutory preconditions before doing a physical search of the accused in circumstances where the accused had not consented to the search. The issue in the case was whether there was a discretion to exclude the real evidence obtained as a result of that examination. As we shall see in the later discussion, the High Court held that there was a discretion to exclude the evidence. However, it was not on the basis that the evidence was unreliable. There was no reason to doubt its reliability. The statutory preconditions were designed to secure the rights of privacy of the accused not to ensure that evidence used against the accused was reliable. If the discretion was based upon the fairness principle and if it was applicable in the circumstances then it necessarily followed that the principle was not limited to reliability. However, the Court ignored this question in *Ireland*. It was ultimately resolved in *Bunning v Cross*²⁰ which identified the separate and distinct public policy discretion. We will return to this subject later in the paper.

The question of whether the principle of fairness is limited to the issue of reliability was and is a real and important issue. Once it is determined that the principle is not so limited then there is no obvious reason why the principle, and consequently the unfairness discretion which is based upon it, should not have application to real evidence. The High Court has not yet gone that far, although there have been a number of comments by High Court Judges that have suggested that the discretion also applies to other evidence including real evidence. First the discretion was applied to exclude the cross-examination of an accused who had put

¹⁶ Ibid at 189 [53]

¹⁷ Ibid at 211 [129]. See also *Jago v District Court (NSW)* (1989) 168 CLR 23, 57

¹⁸ Ibid at [131]

¹⁹ [1970] SASR 416, 444-448. See *Bunning v Cross* (1978) 141 CLR 54, 73

²⁰ (1978) 141 CLR 54

character in issue²¹. Then in *Alexander v The Queen* Gibbs CJ was prepared to apply the unfairness discretion to identification evidence²². In *Harriman v The Queen*²³ Brennan J accepted the possibility that the unfairness discretion would apply broadly to all evidence. In light of these comments it seemed inevitable that the High Court would apply the unfairness discretion to real evidence. However in *Foster v The Queen*²⁴ the majority of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ identified the unfairness discretion as being "part of a cohesive body of principles and rules on the special subject of evidence of confessional statements" and distinguished it from the public policy discretion which applied both to confessional and real evidence.

A number of the Courts of Criminal Appeal of the States have also expressed views on the question whether the unfairness discretion applies to real evidence. The New South Wales, Victorian and Queensland Courts of Criminal Appeal have each held that it does²⁵. The South Australian Court of Criminal Appeal seems to have reached a similar result, although by a circuitous route. In *Police v Jervis*²⁶ Doyle CJ noted the New South Wales and Victorian decisions and saw the force of the reasoning in them, but observed that, "the thrust of High Court statements appears to confine the operation of the fairness discretion to the realm of confessional statements. At least it leaves a question mark over the applicability of the discretion to non-confessional material."²⁷ Subsequently, in *R v Lobban*²⁸ Martin J, with whom Doyle CJ and Bleby J agreed, held that the *Swaffield*²⁹ discretion did not apply to real evidence. From this he seems to have assumed that the unfairness discretion as it was understood pre-*Swaffield* also did not apply to real evidence. However, he held that in addition to that unfairness discretion there was another one, which he described as the "general unfairness discretion" which applied to all evidence including real evidence. he

²¹ See *Philips v The Queen* (1985) 159 CLR 45. See also *Stanoevski v R* (2001) 177 ALR 285 which refers to "fairness" in section 192(2) *Evidence Act, 1995 (Cth)*, but the concept reflects the common law: see at 293[39]. Character evidence can probably be treated as "real evidence" for this purpose: see *Melbourne v R* (1999) 198 CLR 1

²² (1981) 145 CLR 395, 402

²³ (1989) 167 CLR 590, 594-595

²⁴ (1993) 67 ALJR 550, 554 (quoted with apparent approval by Brennan CJ in *Swaffield* (1998) 192 CLR 159, 179-180)

²⁵ *R v Edelsten* (1990) 21 NSWLR 542, 553-554; *R v Tillott* (1995) 38 NSWLR 1, 7; *R v McLean ex p AG* [1991] 1 Qd R 231, 236, 239; *Rozenes v Beljajev* [1995] 1 VR 533, 548-549

²⁶ (1998) 70 SASR 429

²⁷ *Ibid* at 442

²⁸ (2000) 77 SASR 24, 39-50. Special leave to appeal was refused on 1 June, 2001, but only on the basis that the case was not an appropriate vehicle for resolving the issues of principle. The High Court accepted that the issues were ones of general importance. The case is discussed in more detail later in the paper

²⁹ *Swaffield* (1998) 192 CLR 159 is discussed in more detail later in the paper

distinguished the "general unfairness discretion" from the specific unfairness discretion applicable to confessions which had been considered in *Swaffield*. Apart from attempting to justify the approach that had been previously taken in *Police v Jervis* this creation of another species of unfairness discretion seems an unnecessary complication. This is particularly so when the new general unfairness discretion would seem to be indistinguishable from that as it applied to confessional evidence prior to the decision in *R v Swaffield*.

The better view is that there is but one unfairness discretion. However, it is a flexible discretion. Its application will depend upon the circumstances. Consequently the application of that discretion to confessions may, in some circumstances, involve some different considerations from its application to (say) scientific evidence³⁰.

Save for this qualification it would seem that the Courts of Criminal Appeal of the States are correct in applying the unfairness discretion to real evidence. Although the unfairness discretion developed in the context of confessional evidence, there is no reason why it should be restricted to it. Once it is accepted that the discretion flows from the inherent requirement that criminal trials be fair, supported as it is by the power of an appeal court to set aside a trial that is unfair, then it necessarily follows that the discretion must apply to all evidence and to procedure. This issue is discussed in more detail in the consideration of the High Court's decision in *R v Swaffield* later in the paper.

The Public Policy Discretion

(a) The basis for the discretion

The public policy discretion is now a well accepted aspect of the Australian common law. Section 138 of the *Evidence Act, 1995 (Cth)* reflects the Australian common law position.

The discretion was originally applied in Australia in the judgment of Justice Zelling of the South Australian Supreme Court in *R v Ireland*³¹. The case concerned a breach by the police of the statutory preconditions upon the power of the police to search a suspect without his consent. The question was whether there was a discretion to exclude the real evidence obtained as a result of that examination. There were a number of issues that logically arose³². The one with which the judgments are concerned is whether the fairness principle applied to real evidence. The South Australian Full Court held that the evidence should be excluded. Zelling J delivered the main judgment. He adopted Irish authority in preference to English

³⁰ As an example of its application to scientific evidence, see *Humphrey* (1999) 103 A Crim R 434, 444 [44]

³¹ [1970] SASR 416, 444-448. See *Bunning v Cross* (1978) 141 CLR 54, 73

³² Another issue (already referred to) in *Ireland's Case* was whether the fairness principle applied where the evidence was reliable. Where the evidence was confessional evidence police impropriety could affect the reliability of the confession. But where the evidence was real evidence there was no reason to think that the police impropriety should necessarily result in the evidence being unreliable. Neither the Irish authority relied upon by Zelling J, nor the South Australian Full Court nor the High Court explored the question of whether the fairness principle was only concerned with reliability. They all seemed to assume that it was not.

authority. That Irish authority was based upon issues of fairness and upon analogies with the principles applicable in respect of confessions.³³ Chief Justice Barwick adopted the same approach when the case was heard on appeal³⁴. Consequently the discretion that became the public policy discretion was originally conceived as an application of the fairness principle into the area of real evidence. In effect the fairness principle was the basis for the unfairness discretion in relation to confessions and for the public policy discretion in relation to real evidence.

The next major case was *Bunning v Cross*³⁵. In that case the evidence of a breathanalysis reading had been excluded because the police officer had not complied with a precondition to its use. The primary judgment is that of Justices Stephen and Aickin³⁶. Their joint reasons contain a somewhat different emphasis to that taken in *Ireland*:

“What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.it is by reference to large matters of public policy rather than solely to considerations of fairness to the accused that the discretion here in question is to be exercised ...”(emphasis added)

Although its significance may not have been obvious at the time, at least with hindsight it can be seen that the emphasis had moved from a concentration upon fairness, to one concentrating on “the undesirable effect of curial approval” of the unlawful act.

Both *Ireland* and *Bunning v Cross* concerned real evidence. Following the change in emphasis in *Bunning v Cross* there were suggestions that the public policy discretion should also apply in relation to confessional evidence. This necessarily involved a consideration of whether the public policy discretion was based upon the fairness principle (in which case there was no obvious reason why it should apply to confessional evidence) or some other principle (in which case there was no obvious reason why it would not apply). A good example of the different views can be seen in the South Australian case of *Queen v Barker*³⁷. In that case police had arrested the accused 50 metres on the South Australian side of the Western Australian border. They transported him to Eucla which is 13 km on the Western Australian side of the border where the accused was held overnight and, the next day, they

³³ See *The People v O'Brien* [1965] IR 142, 159-161

³⁴ (1970) 126 CLR 321, 334-335

³⁵ (1978) 141 CLR 54

³⁶ *Ibid* at 74-77

³⁷ *R v Barker* (1978) 19 SASR 448, 451 (Mitchell J) and 455-457 (Wells J)

transported him to the nearest police station in South Australia which was some 500 kilometres away where he made admissions. The detention in Western Australia was unlawful. Was there a discretion to exclude the confession subsequently made at the South Australian police station? The Court held that there was not because the accused was lawfully in custody when he made the confession. However, in the course of her reasons Mitchell J suggested that the *Bunning v Cross* discretion could apply to confessional evidence. Wells J disagreed. He limited the *Bunning v Cross* discretion to real evidence, leaving the unfairness discretion as a special rule about confessions.

The High Court considered the issue in *Cleland v The Queen*³⁸ where it held that the *Bunning v Cross* discretion was applicable to confessions. In the course of his consideration of the issue, Justice Deane discussed the principle behind the public policy discretion³⁹ and confirmed that the discretion was based upon the effect of receipt of the evidence in suggesting "judicial approval". In his view, the public policy discretion in respect of unlawful acts by the police was based upon the need for the courts to avoid giving curial approval to police impropriety - a different principle to that which supported the fairness discretion. Consequently, both discretions could apply to confessional evidence.

Justice Deane returned to the question of the what was the appropriate principle behind the public policy discretion some 10 years later in *Pollard v R*⁴⁰:

"... the principal considerations of "high public policy" which favour exclusion of evidence procured by unlawful conduct on the part of investigating police transcend any question of unfairness to the particular accused. In their forefront is the threat which calculated disregard of the law by those empowered to enforce it represents to the legal structure of our society and the integrity of the administration of criminal justice. It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process."

Again this shows a subtle, but important change. Previously the principle had been derived from the "effect" of the court's approval, presumably upon the police or the public. In *Pollard* we find the first reference to the need to protect institutions: "the legal structure of our society and the integrity of the administration of criminal justice". It is in this sense that the discretion can properly be described as the "public policy" discretion. It exists in aid of the public policy of protecting the integrity of the judicial institution.

³⁸ (1982) 151 CLR 1. The case concerned the failure of the police to comply with the statutory obligation to bring the accused before a Magistrate "forthwith". Instead the accused was questioned at length during which he made admissions.

³⁹ Ibid at 20

⁴⁰ (1992) 176 CLR 177, 202-203. *Pollard* involved the failure to properly caution the suspect and to comply with other statutory safeguards before interviewing him.

The identification of the principle behind the public policy discretion was again revisited in *Ridgeway v The Queen*⁴¹. In this case undercover police officers had set up a "sting" operation. They had illegally imported drugs which were handed over to the accused. The accused was then charged with being unlawfully in possession of a prohibited import. At trial and on appeal the accused argued that the public policy discretion should apply, by analogy, to a case where the actual evidence had not been improperly obtained, but the crime itself was the result of the unlawful activity of undercover police officers. Again there was a need to consider the relevant principle behind the discretion so as to determine if the situations were truly analogous. Chief Justice Mason and Justices Deane and Dawson adopted the "institutional" approach that had been suggested by Justice Deane in *Pollard*⁴² and applied the discretion to the circumstance where the offence, and not just the evidence of it, was the result of the unlawful or improper activity of the police. Indeed, the interesting question about *Ridgeway* was not whether the actions of the police could constitute an abuse of process, but rather whether the appropriate response to such an abuse was an exclusion of evidence or a stay of the prosecution case⁴³.

The "institutional" basis of the discretion was confirmed in the judgments of the High Court in *Nicholas v The Queen*.⁴⁴ Following the decision in *Ridgeway* the Commonwealth Parliament enacted Part 1 AB of the Crimes Act, 1914 (Cth) which authorised undercover police operations and which required courts to receive evidence arising from such authorised operations. Given that the public policy discretion was apparently based upon the integrity of the courts, it was not surprising that the validity of the statutory provision was challenged on the basis that it constituted an improper interference with the separation of the judicial power under Chapter III of the Constitution. Although the challenge was unsuccessful, a majority of the Court did accept the institutional basis of the discretion⁴⁵. For example, Justice McHugh, after referring to the reasons in previous judgments, concluded, "...the discretion exists, inter alia, because it is necessary to protect the processes of the courts of law in administering the

⁴¹ (1995) 184 CLR 19

⁴² Ibid at 31-33. See also Toohey J at 60-61 who also saw the discretion as being based upon an abuse of the court. This is to be contrasted with McHugh J at 86 who argued that there needed to be a more "comprehensive conceptual framework" for identifying cases of abuse and cases that were not an abuse.

⁴³ As usually occurs, for example, where the accused is brought into the jurisdiction as a result of police impropriety: see Aughterson, *Pursuing Fugitives Across National Boundaries: State Sanctioned Abduction and the Rule of Law* [2000/2001] Lawasia J 155, 163-167; *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42. Where jurisdiction or the offence arises from an improper act (such as abduction by police or a "sting operation") the most appropriate response may be the stay of the proceedings, rather than the exclusion of evidence.

⁴⁴ (1998) 193 CLR 173. It was also confirmed in *Foster v The Queen* (1993) 67 ALJR 550, 554; *R v Swaffield* (1998) 192 CLR 159, 175-180, 190-191, 212. *Swaffield* is discussed in more detail later in the paper.

⁴⁵ *Nicholas v The Queen* (1998) 193 CLR 173, 201 [52] (Toohey J), 215-218 [98]-[[105] (McHugh J), 257-258, 264-265 [212] (Kirby J), 275 [242] (Hayne J). Gaudron J is probably to the same effect at 209-210 [76]-[77] (although she doubts that the other Justices are to the same effect). Brennan CJ would seem to describe the principle differently: see at 196-197 [34]-[36] referring back to the "curial approval" principle first stated in *Bunning v Cross*.

criminal justice system. For that reason it is 'an incident of the judicial powers vested in the courts in relation to criminal matters'.⁴⁶

This review of the cases shows that the development by the High Court of the public policy discretion was based upon its developing understanding of the relevant principle upon which the discretion was based⁴⁷. Before turning in more detail to a consideration of that principle it may be useful to summarise the discussion thus far in relation to that development. The discretion was first applied to real evidence by analogy with the unfairness discretion applying to confessions. However, in due course the basis of the discretion changed. A new principle was identified, namely the effect upon third parties (presumably the police or the public) of judicial approval of the unlawful acts. Given that that principle was different from the unfairness principle there was no reason why the discretion should not apply to confessional evidence. On the other hand, that principle may not have justified an extension of the discretion, by analogy, to the case where the crime is the result of a crime by the police. When that issue arose for consideration a different principle was identified as the basis for the discretion, namely the need to protect the integrity of the judicial process in circumstances where the reception of the evidence would be an abuse of the processes of the court.

(b) Abuse of Process

The principle thus identified is one that has received a growing emphasis by the courts in recent times. It is clear that superior courts possess an inherent jurisdiction to prevent the abuse of the processes of their court and, indeed, of inferior courts within the system⁴⁸. The range of remedies available to prevent abuses of process is as extensive as the court thinks necessary⁴⁹. It certainly includes stays (absolute or conditional), summary dismissal, striking out pleadings, issuing injunctions, making orders for costs, granting adjournments, removal of documents from court files and, of course, the exercise of the court's contempt powers.⁵⁰ The recent developments in the use of the power to stay criminal proceedings is merely one example of the broader jurisdiction.

The principle relating to "abuse of process" was initially closely related to the fairness principle and was probably considered to be merely an aspect of it⁵¹. It was perceived to be

⁴⁶ Ibid at 217-218 [104]

⁴⁷ For a discussion of possible principles that have or could be used to support the discretion, and for criticisms of them, see J Allan *To Exclude or Not to Exclude Improperly Obtained Evidence: Is the Humean Approach More Helpful* (1999) 18 University Tas LR 263

⁴⁸ See *Metropolitan Bank v Pooley* (1885) 10 App Cas 210, 220-221.

⁴⁹ *Jago v District Court (NSW)* (1989) 168 CLR 23, 46-48, 56-58

⁵⁰ See Mason, "The Inherent Jurisdiction of the Court" (1983) 57 ALJ 449, 453-456

⁵¹ See Weinberg, "Criminal Procedure and the Fair Trial Principle" in Finn (ed), "Essays on Law and Government Vol 2" (1996) at 159 - 187. See also discussion by Toohey J in *Jago v District Court (NSW)* (1989) 168 CLR 23, 71

an abuse of the Court's process to have a trial that was not a fair trial. However, over time the High Court realised that the two principles were distinct, even though they often overlapped. That growing realisation can be seen in *Jago v District Court of NSW*. In that case the majority of the Judges treated the principles of abuse and fairness as being distinct⁵². As it was put by Deane J⁵³:

"Once a court is seised of criminal proceedings, it has control of them. In the absence of applicable express statutory provision, that control includes the power - either inherent or implied - to ensure that the court's process is not abused.... The appropriate relief in such a case will vary according to circumstances. It may be an order that the matter be adjourned for a period within which the prosecution is required to supply particulars and become ready for trial. If the accused is in custody, it may be an order that he be released on bail. It may be an order that the trial be brought on for hearing. There could be circumstances in which the effect of unreasonable delay is that any subsequent trial of the accused will necessarily be an unfair one....a court which possesses jurisdiction to prevent abuse of its process, possesses jurisdiction... to stay the proceedings pursuant to that power."

That distinction has now been confirmed in *Nicholas*⁵⁴ in relation to the unfairness and public policy discretions as discussed above.

The difference between the fairness principle and the abuse principle was explained by Brennan J in *Jago*⁵⁵ as follows:

"A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of the trial to avoid or minimize prejudice to either party.... Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.

More radical remedies may be needed to prevent an abuse of process. An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.... When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose."

⁵² (1989) 168 CLR 23, 30 (Mason CJ), 46-53 (Brennan J), 58 (Deane J), 71-72 (Toohey J). The issue is nicely summarised by Gaudron J in *Ridgeway v The Queen* (1995) 184 CLR 19, 75-76.

⁵³ *Ibid* at 56-58

⁵⁴ (1998) 193 CLR 173, 210-202 [52], 218 [105], 259 [201], 270 [227]. See also the discussion by the NSW Court of Criminal Appeal in *R v Stringer* [2000] NSWCCA 293 [100]

⁵⁵ (1989) 168 CLR 23, 47-48. The other members of the majority would not necessarily agree with Brennan J that that the duty to ensure a fair trial could not justify a permanent stay.

The breadth of the concept of an "abuse of process" means that it also has a broad application⁵⁶. For example, in *Walton v Gardiner*⁵⁷ Chief Justice Mason and Justices Deane and Dawson said that the "inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness." Literally applied, it would mean that the inherent jurisdiction is available in any instance of real or potential injustice or unfairness. It has been so applied. For example, where the loss or destruction of evidence, particularly when in police custody, has the effect that there could not be a fair trial, the courts have stayed the proceedings on the basis that for them to proceed would be an abuse of process⁵⁸.

However, it is clear that not all improprieties constitute an abuse of the processes of the court. In the United Kingdom it is only where the relevant act or omission "offends the court's sense of justice and propriety" that the court can exercise its power to stay a prosecution.⁵⁹ This test has the obvious difficulty that it would appear to be entirely subjective. In Australia a different test has been developed. The act must be one which diminishes public confidence in the court as an institution.⁶⁰ Gaudron J explained the position as follows⁶¹:

"The inherent powers of superior courts to prevent an abuse of process exist to protect the courts and their proceedings, and to maintain public confidence in the administration of justice. And the maintenance of public confidence in that regard depends on ensuring that judicial proceedings serve the ends of justice, not injustice.

The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose, as well as proceedings that are "frivolous, vexatious or

⁵⁶ For examples of where the discretion has been applied, see T Carmody, "Recent and Proposed Statutory Reforms to the Common Law Exclusionary Discretions" (1997) 71 ALJ 119, 121

⁵⁷ (1993) 177 CLR 378, 392-393

⁵⁸ See e.g. *Duncombe - Wall v Police* (1998) 197 LSJS 398, 408-409

⁵⁹ *R v Horseferry Road Magistrates Court ex p Bennett* [1994] 1 AC 42, 74

⁶⁰ *Ridgeway v R* (1995) 184 CLR 19, 60, 62-63, 74. The issue of "public confidence" in the courts has become an increasingly important aspect of the High Court's jurisprudence, including in constitutional cases. See *Grollo v Palmer* (1995) 184 CLR 348, 365, 377, 380, 395; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 14, 22-26, 46-47; *Kable v DPP (NSW)* (1996) 189 CLR 51, 98, 116-119, 133-134, and *Nicholas v R* (1998) 193 CLR 173, 193-197, 256-257, 266. The basis of the "public confidence" test would seem to be that public confidence is an essential prerequisite for "judicial strength" and, consequently, for the maintenance of judicial independence and that public confidence can thus be seen as a pre-condition to the rule of law. See Brennan CJ "Why be a Judge" (1996) 14 Australian Bar Review 89, 94-96; "The Third Branch and the Fourth Estate" (1997) 16 Australian Bar Review 2-9 and "The State of the Judicature" (1998) 72 ALJ 33, 39-42. There are obvious difficulties with the use of the concept in this way, some of which are similar to those discussed in the context of "contemporary community standards" later in this paper: see Campbell, "Rules of Evidence and the Constitution" (2000) 26 Monash University LR 312, 330-331.

⁶¹ *Ridgeway v The Queen* (1995) 184 CLR 19, 74-75

oppressive". This notwithstanding, there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard. That is necessarily so. Abuse of process cannot be restricted to "defined and closed categories", because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case. That is not to say that the concept of "abuse of process" is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improper purpose and it is clear that it extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging", or "productive of serious and unjustified trouble and harassment".

To summarise, the public policy discretion, at least as it is understood in Australia⁶², is based upon the need to protect the processes of the courts and to maintain public confidence in the administration of justice.

These judicial developments both in the public policy discretion and in the identification of the principle upon which it is based have practical consequences. This can best be seen by looking at some South Australian cases. The first is *French v Scarman*⁶³. The South Australian Road Traffic Act, 1961 contains the usual provisions to assist in proof that a person was driving whilst affected by alcohol. These include provisions requiring the driver to submit to an alcotest or a breath analysis and provisions aiding proof of a positive result of the alcotest or breath analysis. Under section 47F of that Act a person who has had a positive alcotest or breath analysis is entitled to request that a sample of blood be taken. At the relevant time the subsection provided that a member of the police force had a duty to facilitate that request. In *French v Scarman* the South Australian Full Court had to consider the evidentiary consequences of the failure of the police to discharge that duty. The Full Court held that the evidence should be excluded under the *Bunning v Cross* discretion. King CJ analysed the High Court cases and identified that the public policy discretion was based upon the principle of fairness⁶⁴. He then went on to hold that it would be unfair if the police were not required to comply with the relevant statutory duty to facilitate the taking of a blood sample and they having failed to do so he ruled that the evidence of the prior breath analysis should be rejected⁶⁵. The result was that the public policy discretion was applied to evidence

⁶² Based as it is on the need to protect the courts as institutions from the abuse of their processes the public policy discretion is a uniquely Australian development. Similar discretions in Ireland, Scotland and New Zealand are based upon fairness, see *Bunning v Cross* (1978) 141 CLR 54, 73; *Cleland v The Queen* (1982) 151 CLR 1, 8; *Nicholas v The Queen* (1998) (1998) 193 CLR 173, 218 [105], 274-275 [240]; T Carmody, "Recent and Proposed Statutory Reforms to the Common Law Exclusionary Discretions" (1997) 71 ALJ 119, 123-126.

⁶³ (1979) 20 SASR 333

⁶⁴ *Ibid* at 338-339, 341. The evidence was excluded because it would be unfair to the accused to permit the evidence to be given when the police illegality or impropriety had reduced the protections that Parliament had given. The basis of the discretion was unfairness, not abuse. At the time this was probably a correct approach given that on the then High Court in *Bunning v Cross* was generally thought to have based the discretion upon the fairness principle.

⁶⁵ *Ibid* at 337-341. *French v Scarman* in applying the public policy discretion to cases of unfairness was followed by later Full Courts in South Australia: see *Ujvary v Medwell* (1985) 39 SASR 418, 420. Cases in other jurisdictions also based the public policy discretion upon principles of fairness. See e.g. *Thompson v Lill* (1989) 17 NSWLR 142, 147; *R v Pierce* [1992] 1 VR 273, 274; *Winkler v DPP* (1990) 94 ALR 361,

that had been lawfully obtained, but in respect of which the police had subsequently failed to discharge their statutory obligations.

This approach taken in *French v Scarman* is to be contrasted with that taken in the later case of *Question of Law Reserved (No 1 of 1998)*⁶⁶. In that case the Trial Judge found that various documents had been lawfully obtained by the police either because they were taken with the consent of the person holding them or pursuant to a warrant. The Trial Judge then found that the person in possession of the documents and the police who procured the documents conspired together to lie to the Court (apparently for the purpose of protecting the witness) as to the manner in which the documents were obtained, notwithstanding that, on either view, the documents were lawfully obtained. Given the conspiracy to lie to the Court the Trial Judge held that the evidence of the documents could be excluded by reason of public policy discretion. A case was stated to the Court of Criminal Appeal. Doyle CJ held that the discretion applied to prevent a party obtaining a curial advantage from illegally obtained evidence⁶⁷ and that consequently the discretion only applied where the relevant unlawful behaviour was causative of the relevant evidence or of the offence in relation to which the evidence would be given. As the conspiracy had occurred after the documents had been obtained, there was no relevant causation and no basis for the application of the public policy discretion.⁶⁸

It is clear that in *French v Scarman* the unfairness discretion needed to be considered. But what of the public policy discretion? On the face of it the decision in *Question of Law Reserved (No 1 of 1998)* raised significant doubts about the correctness of the reasoning in *French v Scarman*⁶⁹ in relation to the public policy discretion. The Court of Criminal Appeal dealt with those doubts in *R v Lobban*⁷⁰. In that case the police had destroyed seized cannabis plants prior to trial, but without complying with statutory requirements for the destruction. The accused argued that the destruction of the plants had resulted in unfairness in the preparation of his defence. As discussed above, that argument was clearly open to him, but he needed to establish what unfairness or prejudice he would suffer. He was unable to do that. He also argued that, even absent any proof of unfairness, the illegal action of the police

375-377, 402; *King v R* (1996) 24 MVR 543, 547-549. Similarly, cases in other jurisdictions also apply the public policy discretion in circumstances where the illegality occurred after the evidence was obtained by the police: see e.g. *R v Bryan* [1999] TASSC 155.

⁶⁶ (1998) 70 SASR 281. Leave to appeal to the High Court was sought but refused, but on the basis that the proceedings were still at an interlocutory stage.

⁶⁷ *Ibid* at 287-288

⁶⁸ See also *Ridgeway v The Queen* (1995) 184 CLR 19, 37; *R v Plunkett* (1997) 69 SASR 452, 468-470; *R v Gonclaves* (1997) 99 A Crim R 193, 206-207 (WA Full Court).

⁶⁹ *French v Scarman* was confirmed in *Police v Jervis* (1998) 70 SASR 429, 439. Notwithstanding that confirmation, some aspects of the reasoning in *Police v Jervis* (see 445-446) are also consistent with *Question of Law Reserved (No 1 of 1998)*. See also *Police v Fountaine* (1999) 74 SASR 26, 54 which was decided after *Question of Law Reserved (No 1 of 1998)* and seems to have overlooked it.

⁷⁰ (2000) 77 SASR 24.

gave rise to a *Bunning v Cross* discretion. This was rejected by the Trial Judge and by the Court of Criminal Appeal. The latter Court affirmed the correctness of *Question of Law Reserved (No 1 of 1998)* and rejected the approach to the public policy discretion in *French v Scarman*⁷¹. The public policy discretion did not apply because the relevant "real" evidence was not the result of illegality or impropriety; nor was it evidence of an offence which was caused by illegality or impropriety. The police illegality had not "tainted" the evidence so as to make it an abuse of the court's processes for the court to receive it⁷².

The change in the approach of the South Australian Supreme Court was a direct result of the identification of the relevant principle upon which the public policy discretion was based. Once it was accepted that the principle rested upon the effect upon the courts of the illegality or impropriety of the police or the prosecution authorities then, at least in the view of the Full Court, it necessarily followed that the public policy discretion was not applicable where there was subsequent illegal action by the police which did not cause the offence or affect the evidence produced to the Court. The courts were not brought into disrepute merely by receiving it. If the evidence was to be excluded it would not be because of the effect upon the Court; rather it would be a reaction to police misbehaviour. As it was put by Doyle CJ⁷³, "the foundation of the discretion, and its object, do not give the courts a roving commission to search for illegality or impropriety by those responsible for the enforcement of the law... [The] exclusion of evidence is not the means by which wrongdoing is to be punished by the courts."

This is not to say that actions by the police or the prosecution subsequent to their obtaining evidence may not involve an abuse of process. Obviously it could. However, if *R v Lobban* is right the appropriate response to such abuse will not be the exclusion of evidence under the public policy discretion. In an appropriate case it might be a stay of proceedings.

The High Court refused special leave to appeal in *R v Lobban* on 1 June, 2001. The Court made it clear that it was of the view that the analysis by the Full Court of the public policy discretion raised important issues of general importance. Special leave was refused because that case, on its facts, was not an appropriate case for dealing with the issues.

Until the High Court has the opportunity to consider these matters for itself, the law in South Australia is that the public policy discretion does not arise merely upon some breach by the police or prosecution of some duty upon them, unless that breach of duty would diminish the public confidence of the public in the courts by involving the courts in the illegality or the impropriety. If the accused wants evidence to be excluded on the basis of more general impropriety then it will be necessary for him or her to establish unfairness.

⁷¹ Ibid at 33-35

⁷² Even where the evidence had been illegally obtained, not every receipt of such evidence would inevitably harm the courts. It would only do so after the relevant illegality had been balanced against the public interest in the trial proceeding upon the basis that all relevant evidence should be considered: see *Nicholas v The Queen* (1998) 193 CLR 173, 274 [238].

⁷³ *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, 288

Prejudicial Evidence

Although it is not intended to deal with it in any detail, it is necessary at least to refer to the discretion in a trial judge to exclude evidence on the basis that its probative value is outweighed by its prejudicial effect. Initially that discretion was treated as an aspect of the unfairness discretion and many of the cases discussed above dealing with the unfairness discretion so treat it. However, in *R v Swaffield*⁷⁴ Brennan CJ treated it as a separate and distinct discretion⁷⁵ and the majority of Toohey, Gaudron & Gummow JJ not only treated it as separate and distinct, but also identified a distinct "fairness" principle, namely the fairness of the trial rather than fairness to the accused⁷⁶. It is unnecessary to explore these issues any further in the current context except to note that, if the discretion to exclude evidence on the basis that its probative value is outweighed by its prejudicial effect is not based upon a distinct and separate principle from the fairness principle then the history of the separate development of the fairness and public policy discretions is likely to be replicated with the prejudicial evidence discretion.

Swaffield

The discussion thus far has concentrated on the unfairness discretion which is based upon the principle that a criminal trial should be fair to the accused, and the public policy discretion which is now based upon the principle that the processes of the court should not be abused. As already noted, the two discretions will often overlap. However, once it is accepted that the discretions are based upon separate principles, there is no reason why the discretions should be mutually exclusive. If either of them is applicable, then the trial Judge has a discretion to exclude the relevant evidence.

As a matter of practicality it will often be more convenient to deal with one discretion first and then only deal with the other if it is necessary to do so. In various cases Justices of the High Court have suggested that the fairness discretion should be applied first, at least in relation to confessions, with the issue of whether the public policy discretion also applies being treated as a residual question which would only need to be considered in a "very exceptional case".⁷⁷ This seems to have been simply on the basis that it would usually be more convenient to start with the fairness discretion, given its breadth.

At a more fundamental level there seems to have been some judicial concern that the extent of the overlap between the two discretions raised some doubt about their continued

⁷⁴ (1997) 192 CLR 159

⁷⁵ Ibid at 183-184 [29]-[30]

⁷⁶ Ibid at 191-193 [62]-[65]

⁷⁷ See *Collins v R* (1980) 31 ALR 257, 317; *Cleland v The Queen* (1982) 151 CLR 1, 23-24, 34-35; *Williams v Queen* (1986) 161 CLR 278, 286; *Foster v R* (1993) 67 ALJR 550, 554

correctness. The issue arose in the two cases of *R v Swaffield* and *Pavic v The Queen*⁷⁸ which were heard together by a High Court bench of 5 Justices. In *Swaffield* the accused, having declined to answer questions in a formal police interview, subsequently made admissions to an undercover police officer who did not give any warning. In *Pavic* the accused had refused to attend the police interview, but had made admissions to a friend who had taped them on behalf of the police. The issue in each case was whether there was a discretion to exclude the evidence and whether it should be exercised. During argument Brennan CJ asked counsel for *Pavic*, "whether the present formulation of the rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of the question of admissibility as turning first on the question of voluntariness, then on exclusion based upon notions of reliability, and finally on an overall discretion taking account of all the circumstances to decide whether the confession was obtained at too high a price by community standards?"⁷⁹

Counsel both for *Pavic* and for the Crown accepted the proposed "formulation" although counsel for *Swaffield* argued against it. It would appear from the transcript that counsel treated the proposed new test as a re-formulation of the current approach, rather than a new test. Certainly if what was proposed was a new test the question of how the new test interacted with the existing principles was not fully argued. In particular, there was no argument about what effect the proposed new test would have in relation to real evidence.

Notwithstanding his invitation for the test to be reconsidered, Brennan CJ did not himself take it. After noting the overlap and the common sense way of dealing with it⁸⁰, he applied both discretions⁸¹. In the case of *Swaffield* he held that the confession had been improperly obtained because the police officer had not given a warning. Therefore it should be excluded under the public policy discretion. In *Pavic* he was alone in holding that no discretion was applicable. He held that there had been no police impropriety and that therefore the public policy discretion did not apply. Although he accepted that the unfairness discretion was not based on unreliability, he nevertheless seems to have concluded that the unfairness discretion did not apply because there was no basis for any finding that the confession was unreliable. With respect, that analysis seems at least questionable. There is no reason why "trickery" should not enliven the unfairness discretion⁸². As the judgment of the majority shows, the standard application of the unfairness discretion would have enabled the confession made by *Pavic* to be excluded.

⁷⁸ Decided together and reported at (1998) 192 CLR 159. There is a detailed discussion of the case by A. Palmer *Police Deception, The Right to Silence and the Discretionary Exclusion of Confessions* (1998) 22 Crim Law Journal 325

⁷⁹ Ibid at 164

⁸⁰ Ibid at 178-183 [23]-[28]

⁸¹ Ibid at 184-186 [31]-[36]

⁸² On the other hand, the analysis by Brennan CJ is broadly consistent with that of the Western Australian Court of Criminal Appeal in *Gonclaves v R* (1997) 99 A Crim R 193. See, in particular Wheeler J at 206-212

Kirby J agreed with the majority as to the result, although his reasoning differed from theirs and he proposed a different new test. He held that the suggestion by Brennan CJ during argument should be adopted, but with the qualification that the overall discretion should be exercised on public policy grounds, and include consideration of a number of factors including whether the receipt of the evidence would abuse the processes of the court and "whether the conduct would be contrary to, or inconsistent with, a right of an individual which should be regarded as fundamental"⁸³. The test proposed by Kirby J would seem to be broader than both of the previous discretions. Kirby J held that the rights of both Swaffield and Pavic had been breached in a number of ways and that the confessions should have been excluded.

The majority of Toohey, Gaudron and Gummow JJ, relying on Canadian and Queensland authority, concluded that "unfairness" would include obtaining a confession through trickery after the accused had exercised his or her right to silence⁸⁴. Consequently, the majority, applying existing authority, would have held that the confessions should have been excluded in any event. However, they did not stop there. They also referred to the overlapping nature of the discretions as if that were a matter of concern⁸⁵, although they do not explain why. Apparently as a result of those concerns the majority concluded⁸⁶:

"When the Court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.

Putting to one side the question of voluntariness, the approach which the Court invited counsel to consider with respect to the common law in Australia is reflected in the sections of the Evidence Acts to which reference has been made, when those sections are taken in combination. The question which arises immediately is whether the adoption of such a broad principle is an appropriate evolution of the common law or whether its adoption is more truly a matter for legislative action. Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions, support the view that the approach suggested by the Chief Justice in argument already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material. The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained."

Although the issue does not seem to have been expressly analysed it would nevertheless seem that various Courts of Appeal have taken quite different views as to what was intended by the

⁸³ *R v Swaffield* (1997) 192 CLR 159 at 212-213 [135]

⁸⁴ *Ibid* at 198-202 [80]-[92]

⁸⁵ *Ibid* at 196-198 [74]-[79]

⁸⁶ *Ibid* at 194-195 [69]-[70]

majority judgment. One is that the new rule is merely a restatement of the previous distinct discretions which continue to be applicable. There are several decisions of State Courts of Appeal where this seems to be the unstated premise of the reasoning⁸⁷. If this view is correct then *Swaffield* is merely an example of the application of the previous discretions to the situation where a confession is obtained by a trick.

Another view is that the majority approach in *Swaffield* is not a new discretion but a further development of the distinct discretions as they had been previously identified⁸⁸. On this approach *Swaffield* is something more than an application of the previous discretions to a confession obtained by a trick, but it is still of limited significance.

Finally there is the view that *Swaffield* has replaced the previous distinct discretions with a new overall discretion in relation to confessional evidence based upon "contemporary community standards."⁸⁹ In its own terms this certainly seems to be what the majority itself intended, although it is not clear from the transcript of argument that this is what Brennan CJ intended when he first raised the issue.

Assuming that *Swaffield* does create a new test for the discretionary exclusion of confessional evidence, then there are a number of objections that can be made. First it can be argued that the apparent extension to the unfairness discretion was unnecessary. It was already clear that that discretion applied even where the evidence was reliable. It was no very great step to conclude that obtaining a confession by a trick from a person who has already refused to make a confession could be viewed as unfair. The majority was able to take that step in *Swaffield* without the need to establish a new test. In these circumstances there was no need to create a new test.

Another objection is that the new test seems to have no application to real evidence. In the subsequent case of *Nicholas v R*⁹⁰, which concerned real evidence, the High Court treated the public policy discretion as a distinct and separate discretion. In *R v Lobban*⁹¹ the South Australian Court of Criminal Appeal treated the new test in *Swaffield* as being restricted to confessional evidence. The problem then is that, once the relevant principles have been identified, what is there to distinguish confessional from real evidence so as to justify different tests for them?

⁸⁷ See *Kiah v The Queen* [2001] NTCCA 1 [54]-[65]; *R v Bondareff, Usachaov and McCabe* (1999) 74 SASR 353, 372-376; *R v Sahin* [2000] VSCA 145; *R v Frugtniet* [1999] VSCA 58 [41]; *R v Burt* [2000] 1 Qd R 28; *R v B* [2000] QCAR [61]

⁸⁸ See *R v Heavey & Walsh* [1998] 4 VR 636, 644; *Vale v The Queen* [2001] WASCA 21 [48]-[52]

⁸⁹ See *R v Spencer* (2000) 113 A Crim R 252, 261-262; *R v Suckling* [1999] NSWCCA 36; *R v Lobban* (2000) 77 SASR 24; *R v Lewis* [2000] 1 VR 290, 312; *R v Carter* [2000] 1 VR 175, 187

⁹⁰ (1998) 193 CLR 173

⁹¹ (2000) 77 SASR 24, 38 [56]-[57]. However, contrast *Taylor v Younge* [2000] WASCA at [42] where the Court seems to accept that the *Swaffield* test can be applied to real evidence.

A further problem is that, whilst the majority commented that the new test reflected the provisions of the *Evidence Act, 1995 (Cth)* "taken in combination"⁹², it is not at all obvious that it does. Looking at sections 135, 136, 137 and 138 of the Act it is clear that they refer to and rely upon the previously identified common law unfairness, public policy and prejudicial discretions. There is nothing in those sections that refers to "community standards". On the assumption that the new test differs from those it replaced then it would seem likely that the discretion in a jurisdiction applying the *Evidence Act* differs from that in a jurisdiction applying the common law⁹³.

The most obvious objection to the new test is that it does not clarify or resolve the existing uncertainty; it may do the opposite. Clearly the Court assumed that "contemporary community standards" was both broader and more certain than the fairness or public policy discretions, but it is difficult to see why⁹⁴. It is difficult to imagine what is meant by "contemporary community standards". Although the qualification made by the majority that the new test should be qualified so as to protect against "forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained" may suggest that it is a factual test for which a minimum content needs to be specified, it is probably doubtful if "community standards" is meant in any factual sense. Take the facts of *Ridgeway* as an example. It will be recalled in that case the Court excluded the receipt of evidence of the offence of selling drugs under the public policy discretion because the police had caused or occasioned the offence by seeking to purchase drugs whilst acting undercover. One can understand that such behaviour by the police, without legislative endorsement, might be an abuse of the court's processes. But why should it be thought to transgress any contemporary community standards? Indeed, the reaction of "the community" (through its elected representatives) to the decision in *Ridgeway* was to legislate to permit undercover sting operations. This is the danger of using "the community" as part of a quasi factual test which can never be analysed or tested.

It is more likely that what the majority contemplated is that "contemporary community standards" involves the judge's perception of what community standards are or, perhaps, should be. As the New South Wales Court of Criminal Appeal commented in *R v Suckling*⁹⁵, "the reference by the High Court... to community standards in this respect is not to any notion of populist public opinion. Rather, this refers to community standards concerning the maintenance of the rule of law in a liberal democracy, the elements of the proper administration of justice and the due requirements of law enforcement." But if this is what

⁹² *R v Swaffield* (1998) 192 CLR 159, 194 [70]

⁹³ In *R v Helmout* (2000) 112 A Crim R 10 it would seem that Bell J of the NSW Supreme Court applied the unfairness discretion to the *Evidence Act*, rather than *Swaffield*, but there is no discussion why. The NSW Court of Appeal seems to have considered both the statutory discretion and the *Swaffield* discretion in *R v Smith* [2000] NSWCCA 202 at [107]-[110]; *R v Walker* [2000] NSWCCA 130 [27]-[32] and *R v Douglas* [2000] NSWCCA 275 [58]-[64], but again without stating what the relationship between them might be.

⁹⁴ Kearney J in *Dumoo v Garner* (1998) 143 FLR 245, 265 seems to suggest that the new test may be narrower than the previous discretions in that the fairness discretion seems to be restricted only to issues of reliability.

⁹⁵ [1999] NSWCCA 36 at [40]

was meant by the High Court it is difficult to imagine why it did not say so, particularly as the explanation by the Court of Criminal Appeal seems to be getting very close to the rationale for abuse of process discussed earlier. The apparent imprecision of the new test has the potential to be "an uncontrolled and uncontrollable power of judicial veto"⁹⁶ over the admissibility of relevant evidence.

The question whether particular evidence should be viewed as "unfair" is not a matter for "community standards", however they might be determined. Similarly the question whether the receipt of particular evidence involves an abuse of the court's processes is not a matter for "community standards". In each case it is a matter for judicial judgment, having regard to the principles accepted and applied by the common law and subject always, of course, to any relevant legislation on the topic. The new test of "contemporary community standards" is not so constrained. Its meaning is unclear and its application is uncertain.

CONCLUSION

Prior to the High Court decision in *Swaffield* the development of the common law relating to the discretionary exclusion of evidence in criminal trials had proceeded in a logical and appropriate fashion, having regard to common law principles. The position had been reached where the unfairness discretion applied to both confessional and real evidence. The public policy discretion also applied to both real and confessional evidence, but the principle that supported that discretion had been identified as the need to protect the processes of the court from abuse. Whilst this justified the application of the public policy discretion to confessional evidence, it also has been held to have the effect of limiting the circumstances where the discretion might apply. In particular, the discretion does not apply for the purpose of ensuring that police comply with the law or act with propriety in circumstances where the processes of the court are not abused.

Swaffield may have replaced the previous separate common law discretions with a new common law discretion based upon "contemporary community standards". The new discretion would seem to be restricted to confessional evidence. Its meaning and application will have to await further judicial explanation.

4 June 2001

⁹⁶ To quote from Chief Justice Brennan in a different (but related) context: *Nicholas v The Queen* (1998) 193 CLR 173, 197[37]