TABLE OF AUTHORITIES

APPLICATIONS TO EXCLUDE FORMAL RECORDED POLICE INTERVIEWS (ERISPs)

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Introduction

Have you ever encountered a formal recorded police interview that did not sit right with you, but you were not quite sure whether there was a proper basis to object to it? Was your client intoxicated or exhausted? Were their attempts to exercise their right to silence ignored? Were they lawfully arrested and were their rights protected while in custody during the investigation period? Were the interviewing police overbearing, asking inappropriate or unfair questions, or was it the *way* they were asking questions that troubled you? Where is the line drawn in terms of admissibility? Have you ever wondered where you can easily find relevant authorities dealing with applications to exclude formal recorded police interviews? And, better still, where the pithy parts of those authorities are? We certainly have. So we decided to compile this table of relevant authorities. It is a guide only, containing some limited paraphrasing, shortening of quotes, ellipses have been omitted, and some emphasis has been added. Individual cases should be read if they are to be relied upon. The focus is on formal recorded police interviews (ERISPs) and therefore other types of admissions and confessions are generally excluded from its ambit. In the table proper, in the left-hand column you will see the case name, offence type and key words relating to the objections taken; and in the right-hand column you will see a précis, the relevant *ratio* and final orders. We have endeavoured to include all the juicy quotes that will assist in your own applications. We hope that this resource serves as a useful quick point of reference for those practitioners looking to have all or part of their client's ERISP excluded. Please note that the cover page image was sourced from shutterstock.com.

PRELIMINARY **ESSENTIAL LEGISLATIVE PROVISIONS**
Section 281 ***Criminal Procedure Act 1986*** **(NSW) ("CPA")** provides, *inter alia*, that evidence of an admission to which the section applies is not admissible unless there is a tape-recorded interview of the admission being made or there is a reasonable excuse for its absence.
Part 9 ***Law Enforcement (Powers and Responsibilities) Act 2002*** **(NSW) ("LEPRA")** provides the legislative basis for investigation following detention, including the conducting of, *inter alia,* Electronically Recorded Interviews with Suspected Persons **("ERISPs")**.
Specific protections for detainees, especially those who are classified as vulnerable, are prescribed under the ***Law Enforcement (Powers and Responsibilities) Regulations 2006*** **(NSW) ("LERPR")**.
Applicable exclusionary provisions of the ***Evidence Act 1995*** **(NSW) ("EA")** are ss 84, 85, 90, 135, 137, 138 and 139; and s 189 covers the *voir dire*.
Section 13 ***Children's (Criminal Proceedings) Act 1987*** **(NSW) ("CCPA")** provides that admissions made by juvenile defendants to police are not admissible unless made in the presence of a responsible person, or other prescribed persons, subject to limited exceptions.
PRELIMINARY **SEMINAL CASES**
In ***Nguyen v The Queen*** **[2020] HCA 23**, Kiefel CJ, Bell, Gageler, Keane and Gordon JJ stated the following, in relation to mixed inculpatory and exculpatory statements by an accused to police: [41] There may be circumstances where it would be unfair to an accused to tender a record of interview, for example where the accused has refused to comment. In such a circumstance the omission of that evidence is justified. But where an accused provides both inculpatory and exculpatory statements to investigating police officers, it is to be expected that the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met. [45] A prosecutor acting in accordance with the responsibilities of their office is not to be expected to be detached or disinterested in the trial process. A prosecutor is to be expected to act to high professional standards and therefore to be concerned about the presentation of evidence to the jury. It is to be expected that some forensic decisions may need to be made. It is not to be expected that they will be tactical decisions which advance the Crown case and disadvantage the accused. Whilst the creation of a tactical advantage might be permissible in civil cases, in criminal cases it may not accord with traditional notions of a prosecutor's function … the observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. It will be obvious that a decision by a prosecutor to refuse to tender a mixed statement so that the accused is forced to give evidence falls into this category.

Arrest for the purposes of investigation is unlawful at common law: ***Williams v R*** **[1986] HCA 88** and ***NSW v Robinson*** **[2019] HCA 46***.*

In ***Robinson v Woolworths Ltd trading as Woolworths Plus Petrol Werrington*** **[2005] NSWCCA 426**, Basten JA stated the following, in respect of dealing with impropriety under s 138 EA, at [23]:

> It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards.

In ***R v Plevac*** **(1995) 84 A Crim R 570 (NSWCCA)**, the Court (Badgery-Parker, Dunford and Simpson JJ) set out the following general principles in respect of police interrogations, at 579-581:

> 1. Police may, in the course of investigation, interrogate a suspect who is willing to answer their questions, and that interrogation may include putting to the suspect the facts as the police know, or believe, or suspect them to be, in order to ascertain what, if anything, the suspect will say about them: ***Grills*** **(1910) 11 CLR 400**; ***O'Neill*** **(1988) 48 SASR 51** at 56.
>
> 2. Such questioning must be fair and must not amount to "intimidation, persistent importunity or sustained or undue insistence or pressure": ***McDermott*** **(1948) 76 CLR 501** at 511; ***Lee*** **(1950) 82 CLR 133** at 144; ***Van der Meer*** **(1988) 35 A Crim R 232** at 258–259, but questioning is not to be regarded as unfair merely because it is persistent: ***Taylor*** (**unreported, Court of Criminal Appeal, NSW, 18 April 1995**).
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> 3. Police should not persist with such an interrogation after the suspect has indicated that he or she does not wish to answer further questions: ***Ireland*** **(1970) 126 CLR 321** at 331–332; although merely because a suspect says he does not wish to answer, or will not answer, any further questions does not render inadmissible answers to further questions which the suspect does answer provided the questions are fair and proper and the answers are otherwise admissible.
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> 4. The answers given by the suspect are admissible in evidence (so are the questions) if they are relevant; but not otherwise: ***Grills*** at 413, 419; ***Taylor*** at p 9.
>
> 5. An answer (and the question to which it is given) is relevant if it is an admission, or is capable of being regarded as an admission, of guilt or of a fact relevant to the proof of guilt: ***Astill*** (**unreported, Court of Criminal Appeal, NSW, 17 July 1992**) at pp 8–13.
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> 6. If an answer is not unequivocally an admission but is capable of being regarded as such, it is a question for the jury whether it is such. Subject to the exercise of the judge's discretion, the question and answer are admissible but it is necessary that the jury be clearly and fully directed that it is a question for them as to whether the answer does or does not amount to a relevant admission: ***Astill*** at pp 11–15.
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> 7. An answer which is not capable of being regarded as an admission is on the face of it irrelevant and therefore inadmissible: ***Grills*** at 413; ***Taylor*** at p 9.

8. However, answers of that sort may yet be admissible if they form part of an interrogation in the course of which some answers do amount to admissions or are capable of being so regarded, where the question and answers which do not themselves contain admissions are relevant to set the other questions and answers in context, and/or to show that there was no impropriety on the part of the police in the conduct of their interrogation: ***Taylor*** at pp 9–10; ***Barca*** **(1975) 133 CLR 82** at 107; ***Grills*** at 418–419; ***Towers*** (**unreported, Court of Criminal Appeal, NSW, 7 June 1993**) at pp 10–11.

9. In such circumstances, the trial judge must always carefully consider whether questions and answers which are not capable of amounting to relevant admissions should be excluded because they are prejudicial: ***Grills*** at 419–420; ***Ireland*** at 332; ***Taylor; Astill***.

10. Where the questions and answers under consideration, although having in themselves no probative value but forming part of an interview and prima facie admissible as part of the context of that interview, do no more than already been established by other evidence or which clearly will be established by other evidence intended to be led by the Crown, their prejudicial effect will be minimal and would not ordinarily justify their exclusion: ***Taylor*** at 10.

11. Where, however, a question is asked, which contains a hearsay assertion of matter which the Crown is not in a position to prove, or which is inadmissible in evidence, and where the answer is not capable of amounting to an admission of the matter asserted by the questioner, there may be, depending on the nature of the matter stated and its relevance to the issues in the trial, very great prejudice, which may lead to the exclusion of the evidence, even if that means (because, in the context, the inadmissible material is inextricably interwoven with the admissible) that the Crown is deprived of some probative and admissible evidence: ***Ireland*** at 332; ***Grills*** at 419; but cf ***Harriman*** at pp 603–604; 231.

In ***R v Parker*** **(1990) 47 A Crim R 281 (NSWCCA)**, Gleeson CJ (Hunt and Loveday JJ agreeing) set out the following principles regarding the admissibility of confessions made by persons suffering from mental disability or psychiatric disorder, at 286-287:

1. The fact that an accused person who has allegedly confessed to committing a crime, was at the time of the alleged confession, suffering from some form of unsoundness of mind or psychiatric disorder may, depending upon the circumstances, be of importance in considering the evidentiary value of the confession, and may in some circumstances deprive it of all evidentiary value: ***Jackson v R*** **(1962) 108 CLR 591**. It does not, however, necessarily make evidence of the confession inadmissible: ***Sinclair v R*** **(1946) 73 CLR 316** and ***R v Starecki*** **[1960] VR 141.** As Dixon J observed in ***Sinclair***, an insane person is not necessarily an incompetent witness. Persons who are intellectually handicapped or who suffer from disease or disorder of the mind are by no means necessarily incapable of telling, or admitting, the truth.

2. Even if such evidence is admissible, a consideration of the quality of the evidence may, in a given case, result in a conclusion that a verdict founded upon it is unsafe and unsatisfactory: ***Morris v R*** **(1987) 163 CLR 454**.

3. The intellectual capacity of the accused, or the existence of some disease or disorder of the mind, may go to the issue of whether the confession was voluntarily and may in that respect bear upon the admissibility of the evidence. It may be relevant to the question whether the confession was made in the exercise of free choice, as for example, where an accused is incapable of making such a free choice, or of understanding his right to choose between speaking and remaining silent. Depending on the circumstances, it may have an important bearing upon whether the statement

was made as a result of duress, intimidation or undue insistence or pressure. The circumstances in which such a fact may be relevant to an issue as to the voluntariness of a confession are multifarious: cf ***Lee*** **(1950) 82 CLR 133** and ***Van Der Meer*** **(1988) 35 A Crim R 232**.

4. Further, even if the confessional evidence is admissible, the intellectual or mental state of the accused may, in a number of possible ways, go to the exercise of a trial judge's discretion to reject the evidence: cf ***McDermott*** **(1948) 76 CLR 501.** It may, for example, touch upon the propriety of the means by which the confessional statement was obtained, the reliability of the statement itself, and the fairness involved in permitting the statement to be used against the accused.

5. A person's vocabulary and standard of comprehension may also be relevant in determining an issue as to whether such a person in fact made the statement or intended the admissions attributed to him: ***Murphy v R*** **(1989) 167 CLR 94.**

6. If a Crown case is based upon the whole or in part upon the confession of a person suffering from some mental disability which may affect the reliability of the confession then a trial judge in his summing up should use appropriate means to bring to the attention of the jury the possible danger of basing a conviction on such evidence unless it is confirmed by other evidence: ***Bromley*** **(1986) 161 CLR 315.**

In ***Kilby v The Queen*** **(1973) 129 CLR 460**, Barwick CJ said the following (McTiernan, Menzies, Stephen and Mason JJ agreeing), at 473, in respect of only relevant and admissible evidence being tendered:

> Of course, if the document contains inadmissible or irrelevant matter, that matter should not be admitted, but should be excised from the document and not placed before the jury… No doubt counsel for an accused and the trial judge will both scan such a record of interview with scrupulous care to ensure that only so much of it is admitted as is relevant and admissible to the extent I have indicated.

TABLE OF NSW AUTHORITIES

CASE, OFFENCE TYPE AND BASES FOR APPLICATION TO EXCLUDE	**PRÉCIS, REASONS AND ORDERS**
Taleb **[2019] NSWSC 241** ***Terrorism*** ***Repeated attempts to exercise right to silence were ignored***	The accused was arrested, interviewed and charged with Commonwealth terrorism offences following a substantial police investigation. The defence objected to the lengthy ERISP under s 138 EA, principally on the basis that the accused's right to silence had been ignored by police. Hamill J held: [127] While no automatic consequence flows from a failure to issue a caution, or from a failure to respect a suspect's clear statement that they wish to remain silent, there seems little point in requiring police to ensure the person knows their right, if their decision to exercise that right is ignored or side-stepped.

	[128] The questioning in the present case was impermissibly persistent. Mr Taleb indicated he wished to remain silent from the outset of the interview. He repeated this desire on at least six occasions over the following 17 pages of transcript. It is true that he gave answers to some questions while saying "no comment" to others as the interview went on. It is also true that he was asking the police why they were charging him and what evidence they had. However, until Mr Taleb spoke with his solicitor three hours later, there was no occasion where the officers appeared to be prepared to stop questioning him when he said he wished to remain silent. On each occasion, the police told him they would complete the "process" or simply stated their intention to do certain things – to read the allegations, to ask him questions, to play him recordings. Mr Taleb must have been given the impression that there was a "process" involved that had to be recorded by video. This is not correct. The obvious alternative, and one not referred to or contemplated until the solicitor became involved, was to terminate the interview. **There was no legal requirement to put the allegations to the accused while on tape and no established "process" that had to be completed** (emphasis added)**.** Nothing in the interview suggests that Mr Taleb would have known that one option was that the interview could simply be terminated. [129] Because of the persistent questioning, and the failure to terminate the interview when the accused sought to exercise his right to silence, the evidence contained in the ERISP was improperly obtained. Mr Taleb's repeated assertion that he wished to exercise his right to silence was ignored. [131] The impropriety is quite grave. The fact that, almost fifty years after *Ireland*, a senior and apparently hardworking detective could – I believe honestly – see nothing wrong with the process is troubling. [132] Having taken all of those matters into account, and also taking into account the importance of the maintenance of the right against self-incrimination and the desirability that interviews such as this be terminated once it is clear that a suspect has expressed a clear desire not to answer questions, I am not satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that was obtained in this way. **Orders:** ERISP excluded under s 138 EA.

R v Mercury* [2019] NSWSC 81** ***Murder ***Juvenile with no support person; no legal advice; mental illness; and below average intelligence***	A vulnerable 17-year-old confessed to the murder of a child in 1971. The ERISP was conducted in the absence of a parent, guardian, adult or lawyer. Objections were made under s 13 CCPA and ss 85 and 90 EA. R A Hulme J held: [96] It is not only the manner of the interview itself that is concerning. It is necessary to have regard to the fact that this interview took place in the absence of any independent adult, and was conducted in a juvenile detention facility where the accused was being compulsorily detained against his will. Then there are of course the personal attributes of the accused. They included the following: • Below average intelligence • Very disturbed upbringing • Very disturbed mental state which might be explained as a conduct disorder, a personality disorder with antisocial and borderline type features, or psychosis • Immaturity [97] In addition to these personal attributes, the accused did not have the benefit of any legal advice as to the ramifications of answering police questions as opposed to exercising his right to silence. There was also no contemporaneous psychiatric or psychological assessment as to whether he was in a fit state to understand a caution and be interviewed. [98] The consistent theme within the concurrent evidence of the psychiatrists was that the accused was more vulnerable than an average 17 year old. In my view, he did not have the protection in respect of his disadvantageous position that the legislation is directed to. **Orders:** ERISP excluded under s 13 CCPA and s 90 EA.
R v Sumpton* [2014] NSWSC 1432** ***Murder ***Unlawful detention; extensive improper questioning throughout protracted ERISP; and oppression***	The accused was arrested in relation to the murder of a woman and was subjected to protracted inappropriate questioning in an ERISP during which he made several partial admissions. The accused was later interviewed in his cell and confessed to the murder while being filmed with a handheld camera. In objecting to the later confession, "the impugned interview", the defence contended that the overall conduct of the police, particularly during the ERISP, was oppressive within the meaning of s 84 EA. Hamill J held: [48] I find that at the time of the impugned interview, the accused was subject of unlawful detention.

	[49] He was not taken before an authorised officer to be dealt with according to law "as soon as [was] reasonably practicable" after he was charged: cf s 99 *LEPRA* and compare the somewhat different circumstances in *Regina v Dungay* [2001] NSWCCA 443; 126 A Crim R 216. [53] On the basis of all of the evidence, I have concluded that compliance with the requirements of the law (and the possibility that the accused was unlawfully detained) was a matter of some indifference to the police charged with the responsibility of the investigation and the custody management of the accused. [70] It is well established that police are not required to accept the first answer that a suspect provides them with and are entitled to press the suspect with persistence: ***R v Clarke* (1997) 97 A Crim R 414** at 419-420. A certain degree of "cross-examination" is permissible and police officers are not "prevented from asking the suspect to answer what has been alleged against him by others": ***R v Taylor* (Court of Criminal Appeal (NSW), 18 April 1995, unrep**); ***McDermott v The King* [1948] HCA 23; (1948) 76 CLR 501** at 517 (Williams J). However, as Hunt CJ at CL said in ***R v Taylor***: > "What is not permitted is questioning which is oppressive, overbearing or unfair; or questioning which is aggressive or overbearing or questioning in which the police officer repeatedly and scornfully expresses disbelief of the suspects denials." [72] Nevertheless, my review of the latter part of the interview establishes questioning that was repetitive, scornful, ridiculing, overbearing and unfair. The proposition (at Q 2489) that the accused was terminating the interview because "you have murdered this lady" was particularly egregious but it is the cumulative effect of the questioning which causes greater concern. [119] I have concluded that the same material that might give rise to a discretion to exclude evidence because it is unlawfully and improperly obtained can (and should) also be considered in determining whether the cumulative impact of those matters constitutes oppressive conduct for the purpose of s 84. [132] In accordance with the provision in s 189(3) I have disregarded the issue of whether the admission was true. [135] Several hours of unlawful detention; unfair and improper questions that assumed guilt and ridiculed and belittled answers; implicit suggestion that termination of interview would indicate guilt; denied access to a lawyer despite requests for same; sleep deprivation; told the offence ‘effectively

	carried life'; told account didn't add up; asked to provide further information after repeatedly seeking to exercise right to silence during > 2,000 question interview; psychological and emotional pressure to change version of events; small confined space; and no meaningful involvement of custody manager. **Orders:** "Impugned interview" excluded under s 84 EA having regard to, *inter alia*, the earlier ERISP.
R v FE* [2013] NSWSC 1692** ***Murder ***Juvenile with inadequate support person; no caution; no Part 9 rights; not told of Youth Hotline; not introduced to Custody Manager; and right to silence not respected***	A vulnerable 15-year-old girl presented to Paramatta Police Station on 12 July 2012, in relation to a murder investigation, and was formally interviewed before being allowed to leave. Police then arrested her on 2 August 2012 and conducted an ERISP before charging her with murder and affray. The defence objected to both interviews on a number of bases, principally that she had been deprived of her right to silence. Adamson J held: **ERISP 1:** [64] The exercise of the right to silence ought be respected and not undermined, as it was in the present case, in the expectation that its holder will be unaware of its parameters and will, as a result, be dissuaded from continuing to insist upon it. [112] The accused was not cautioned prior to, or during, questioning. She did not know that she did not have to say anything or take part in the interview. She was not taken to the custody manager who was obliged, since she was a vulnerable person, to assist her to exercise her legal rights. Her rights under Part 9 of LEPRA were neither read out, nor explained to her. She was not advised of the free Legal Aid Youth Hotline service. Her mother, although regard by police as a "support person", did not appreciate what her role was and was not taken through the "Role of a Support Person" document. She was, in any event, not capable of fulfilling the role in any substantial way because of the limitations of her English vocabulary. [113] I regard these improprieties as very grave. The accused's right to remain silent and not be compelled to answer questions that might tend to incriminate her in the commission of the crime of murder have been described as a "fundamental … bulwark of liberty", which is not merely a rule of evidence but a basic and substantive common law right: ***Reid v Howard* (1995) 184 CLR 1** at 11. [118] To adopt the language of the plurality in ***The King v Lee* [1950] HCA 25** at 159, a 15-year-old-girl, whose command of English is not sophisticated and who is suspected of a serious criminal offence, may be practically helpless in the hands of an over-zealous police officer whose position of superiority

	is so great and so overpowering that admissions may be made which, if the girl knew her legal rights, would not be made. [125] Although the admissions the accused made may well be reliable I consider the price of their admission to be too high to be worth paying since they were obtained by failing to comply with the laws and procedures referred to above and disregarding the rights of a 15-year-old girl who was unable to look after her own interests. In the present case the ends, in my view, fall far short of justifying the means. **ERISP 2:** [129] I regard Detective Gibson's characterisation of the proposed interview of the accused as providing an "opportunity" to the accused to provide a version of events as inapposite, if not disingenuous. He knew that the accused's participation in an interview would provide the police were an opportunity to prove the Crown case out of the accused's own mouth. He also knew that the accused had accepted legal advice not to answer requestions or participate in an interview. [134] The accused declined, through Ms Hopgood, to participate in an interview and also declined to have her refusal to answer requestions filmed. This unequivocal communication of her intention was disregarded. She was led into the interviewing room in utter derogation of her right to silence. [135] I regard the contravention of the accused's rights by Detective Gibson as very grave. **Orders:** Both ERISPs excluded under s 138 EA.
R v Pitts (No 1)* [2012] NSWSC 1652** ***Murder ***Caution undermined; and derogation of privilege against self-incrimination***	Police suspected that the accused had committed murder and conducted an initial recorded interview and a subsequent ERISP, both on 2 August 2011. The defence objected to both, contending that the "Initial Interview" was obtained in contravention of s 139 EA and the ERISP was obtained in derogation of his privilege against self-incrimination. Adamson J held: **Initial Interview** Two cautions were given before the initial interview was conducted, however, the interviewing officer then erroneously relied on s 11 LEPRA, warning the accused that he needed to comply with *"some*

	conditions" and that failure to do so might constitute a criminal offence. The officer then proceeded to question the accused and elicit admissions. [24] Although the contravention was unintentional, it was nonetheless grave. The privilege against self-incrimination is a fundamental right accorded to an accused. The giving of a caution is an important mechanism for the protection of the right. I consider that the effect of the caution was substantially undermined by the reference to compliance with conditions. The circumstances that there were no applicable conditions and that the condition which was thought to apply, did not in fact apply, makes it worse, not better. I do not consider the fact of a previous caution having been given to make the reference to conditions less egregious. **ERISP** Later that same afternoon, police conducted an ERISP with the accused during which the accused repeatedly tried to exercise his right to silence to no avail. [38] I do not consider the questioning of the accused to be fair. He declined to answer questions at the outset but then was encouraged to give his mobile phone number, having been told that he would be asked one question. On several occasions he declined to answer questions, said he did not want to answer questions or reiterated his advice, which was not to answer questions, but the police persisted in asking him questions. [39] Further, the expression of sympathy for his plight was offered as a way of encouraging him to answer further questions about what had occurred. I have also taken into account that the interview took place on the same day as the incident, in the course of which the accused's head and hand had been injured. These injuries were obvious to police. There was still blood on the accused's hand and a mark on his forehead. The accused's capacity to withstand the various techniques that were adopted by the police to get him to answer questions was evidently diminished. [40] Although he was not threatened and the statements made to him do not amount to an inducement, I have come to the conclusion that, in all the circumstances, the accused's answers were not given voluntarily and the questioning of him was not fair. **Orders:** Initial Interview excluded under s 138 EA; and ERISP excluded under ss 85 and 90 EA.

R v MEYN (No 1)* [2012] NSWSC 1441** ***Murder ***ERISP conducted while accused was recovering from drunkenness and was fatigued***	The accused was arrested in relation to murder and the police conducted an ERISP with him. The defence challenged the ERISP under s 138 EA, contending that the police should not have interviewed the accused while he was fatigued and recovering from intoxication. Beech-Jones J held: [58] The accused had consumed a **significant amount of alcohol** but not the amount he claimed and not so much that he presented any obvious signs of intoxication during the ERISP. The accused was **fatigued** and probably emotionally drained but not to such a significant degree that it affected his competency in the ERISP. [65] The approach stated by Basten JA in ***Robinson*** is not satisfied by merely pointing out, with the benefit of hindsight, that some steps that were not taken would have been more fair to the accused than the course that was adopted. In this case, the other aspects of the police conduct that night do not justify a conclusion that overall there was any impropriety. The accused was repeatedly cautioned, and bona fide assessments of his physical and mental competence to undertake the interview were made. The accused was given the opportunity to sleep. Whenever a doubt was raised by him as to his ability or willingness to continue with the interview, the interview was suspended. The questioning did not proceed in the face of any manifest deficiency in the accused affecting his ability to participate. **Orders:** ERISP admitted.
Habib v Nationwide News Pty Ltd* [2010] NSWCA 34** ***Defamation ***Torture in Pakistan and Guantanamo Bay***	Mr Habib brought defamation proceedings against Nationwide News in relation to articles containing the imputation that he had made some false claims. A jury found that those articles contained a defamatory imputation, but the judge found that they were substantially true and its publication was in the public interest. At trial the defendant (Nationwide News) relied on purported lies told by Mr Habib in interviews recorded while Mr Habib was detained at facilities in Pakistan and Guantanamo Bay. Mr Habib claimed that his admissions in those interviews were the product of torture and were therefore inadmissible. On appeal, Mr Habib sought the exclusion of the interviews pursuant to ss 84 and 135 EA. In a joint judgment of Hodgson JA, Tobias JA and McColl JA, the Court reviewed the authorities on s 84 and held: [234] We would conclude from the language of s 84, the statutory context and legislative history and the common law position when s 84 was enacted that in order to raise a s 84 issue, that there must be some evidence that indicates through legitimate reasoning that there is a reasonable possibility an admission or its making were influenced by proscribed conduct (cf ***Colosimo v Director of Public Prosecutions (NSW)* [2006] NSWCA 293** (at [19](1) per Hodgson JA, Handley and Ipp JJA agreeing).

	However it is not necessary that that evidence prove as a fact that an admission or its making were so influenced (emphasis added). [235] Here, in our view, there was plainly evidence of oppressive conduct of the nature s 84 contemplates … from which it was open to the primary judge to conclude as a reasonable possibility that the admissions the respondent sought to tender were so influenced. **Orders:** Recorded interviews excluded under s 84 EA.
R v Powell; Steven* [2010] NSWDC 84** ***Aggravated break and enter ***Unlawful arrest of accused in custody, pursuant to a Local Leave Order, for the purposes of investigation; inadequate caution; and improper questioning***	The vulnerable Aboriginal accused was already in custody at the Wellington Correctional Centre when police obtained a Local Leave Order, under s 25 *Crimes (Administration of Sentence) Act 1999* (NSW), allowing the transportation of the accused into police custody for the purposes of assisting with *"the administration of justice"*. The grounds for the application included, *"Police would like the opportunity to offer the accused a chance to participate in an interview in relation to the allegations, in order to identify the second offender and to establish Powell's exact involvement in this incident".* An ERISP was conducted. The defence objected to the ERISP under s 138 EA. Nicholson SC DCJ held: [66] It is not without significance that, in this relatively short record of interview, there are some twelve areas where police appear to try to take advantage of an accused in questionable or unfair ways. [67] Putting to one side whether the caution was adequate, or given so that it was understood, none of the other areas I have criticised would necessarily result in the interview being rejected. But the overall quality of sensitivity to the need to make appropriate effort to avoid exploiting an arrestee's vulnerability is a factor I am entitled to consider. [68] This should be taken into account when exercising discretions excited by s 138 and judgment assessments required by s 90 of the ***Evidence Act 1995***. There seems a recklessness about the whole approach to the interview from the moment it was determined to make an application, to the final stages of questioning- a recklessness that is best expressed as "well let's give it a go. If some questions get knocked out so be it. If they don't we're ahead". [80] The arrest by police was also unlawful upon the basis that it was to provide police with an opportunity to offer the accused an opportunity to participate in an interview in relation to allegations being made by police, in order to identify a second defendant and to establish Powell's exact involvement in the break enter and steal and the steal motor vehicle charges then before the courts.

	There was nothing in s 99 providing a statutory fiat for arresting a suspect for questioning. This was not some oversight by Parliament; it represented a deliberate curtailment of police powers. [81] The arrest affected at 12.35 by Detective Senior Constable Smith was for the purpose of interviewing the accused. That arrest was unlawful. [92] In fairness, I cannot be satisfied her conduct was undertaken knowing it was a serious breach of the power to arrest, but if it was unknowing then her ignorance was inexcusable and dangerous; dangerous because the liberty of citizens and residents should be secure from mistakes based upon ignorance of a power daily used by this officer. [94] For any Court to readily or easily excuse an unlawful arrest in such circumstances - mid-sized country town, close knit police community, large Aboriginal population and frequent advice from Aboriginal Legal Services not to say anything - would signal to police that if Aboriginal or other suspects refused on the occasion of their original arrest to participate in an ERISP, a second arrest for the purposes of questioning would be likely to be excused and permitted by a Court in the face of defence objection. **Orders:** ERISP excluded under ss 90 and 138 EA.
Regina (C'Wealth) v Baladjam & Ors [No 46]* [2008] NSWSC 1465** ***Terrorism ***Irregularities with application seeking an extension of the investigation period***	The accused was arrested, along with several others, in relation to terrorism offences and an ERISP was conducted. The defence objected to the ERISP under s 138 EA, contending that the police had: provided false information to the magistrate when seeking an extension of the investigation period; not informed the accused of his right to make representations to the magistrate about the application for an extension of time; and committed other breaches of s 23E(4) and (5) *Crimes Act 1914* (Cth). Whealy J held: [28] Both Detective Liddiard and Senior Constable Hackett (who gave evidence on the voir dire) were cross-examined in an endeavour to ascertain whether investigative steps had been taken by police who were moving around the house during the suspension period. Cross-examination did not raise any doubts that the position was as it appears to be from the evidence above. It seems clear to me that there was no investigation during the period. **It could hardly be expected that the police would behave as if they were statues, or remain in some type of state of administrative petrification during the suspension period** (emphasis added)**.** There is not the slightest evidence, however, to suggest that any investigation continued during this period of time.

	[46] I infer from all of the circumstances, and the totality of the evidence I have described, including the documentary material, that the accused was told that he might make representations to the magistrate about the application. He declined to do so. In my view, subject to the next matter I will discuss, that was sufficient compliance with s 23E(2) of the ***Crimes Act 1914***. [48] In my view, the better view of the section is that the person under arrest should be told of his entitlement before the "lodgement" of the application, whether by way of telephone, telex, fax or other electronic means. In that sense, it seems to me, there was a technical breach of s 23E, although I am perfectly satisfied that the "entitlement" was conveyed to the accused at some stage prior to Ms Albu dealing with the application. Just how close this was to the determination period, I am unable to say. [53] In the present matter, the paperwork is somewhat incomplete and is certainly rather untidy. This is hardly surprising, given the period of time that has elapsed since the process was undertaken, and the additional fact that at the time there was a considerable amount of work for both the judicial officer and the police to undertake in that regard, not only in relation to the present accused, but to the other persons as well whose names appear on the documentation. Indeed, given the scope of the police operation on that morning in the western suburbs of Sydney, it is remarkable that the paperwork is as fulsome as it appears to be. [56] The procedures followed by the applicant for extension and the Registrar, were clearly unorthodox but they did not, in my opinion, bring about a situation where the extension of time was rendered invalid. Nevertheless, there was an irregularity. This finding will make it necessary for me to consider, once again, the provisions of s 138 of the ***Evidence Act 1995***. I will now turn to consider those provisions in the light of the two irregularities I have found to exist. [67] I do not consider that the breach here was, in any sense, deliberate or reckless. As I have explained the police operation on this morning was a massive one, and the logistics of making, for example, extensions of time were quite difficult. It was likely that the police would have realised that the application for extension of time could not be dealt with until later in the morning and the failure to tell the accused of his entitlements before the telephone application was made is quite understandable. [68] I turn now to consider the breach under s 27E(4). Once again, I do not consider that the irregularity involved here was deliberate or reckless (***DPP v Leonard*** **[2001] 53 NSWLR 227** at 248 per James J). There can be no suggestion that the police were manipulating the system deliberately or wilfully condoning an impropriety. The mistake in procedure arose, I infer, from a simple lack of understanding

	of the strict requirements of the section, coupled with the need to make multiple applications for extension of time as a matter of urgency. **Orders:** ERISP admitted.
Campbell v DPP* [2008] NSWSC 1284** ***Affray ***ALS not notified of arrest in breach of cl 33 LEPRR***	Summary convictions for affray for four of the five plaintiffs were entirely based on ERISPs. The plaintiffs were all Aboriginal and, prior to their interviews, the ALS was not informed of their arrests pursuant to cl 33 LEPRR (now cl 37). The Magistrate found illegality but admitted the evidence over objection pursuant to s 138 EA. They appealed to the Supreme Court seeking that their convictions be set aside. Hidden J held: [20] The fact remains that the plaintiffs were interviewed at a time when cl33 had not been complied with and when, to the knowledge of the police, there could not have been effective compliance. No explanation was forthcoming on the evidence on the voir dire for the interviews being conducted at the time they were, rather than at another time when the requirements of cl33 could have been met. As the evidence stood, the failure to comply with the clause was deliberate, a relevant matter by virtue of s138(3)(e) of the *Evidence Act*. [21] However, a crucial matter in the balancing exercise to be undertaken under s138 is the gravity of the contravention of the law which brought the section into play: subs 3(d). An important matter bearing upon the gravity of the contravention in the present case was not taken into account by his Honour. Accordingly, I am satisfied that the exercise of his discretion miscarried. [22] I should observe, in passing, that the obligation under cl33 is twofold: not only to notify the ALS that an Aboriginal person is in detention, but also to inform that person that the ALS will be notified. That additional requirement is itself an important safeguard, ensuring that the suspect is aware of the availability of legal assistance through that organisation. **Orders:** ERISPs inadmissible. Convictions set aside *without* remitting to the Local Court for further hearing.

R v Higgins v R* [2007] NSWCCA 56** ***Fraud ***Misleading caution and oppressive conduct***	The appellant was found guilty by a jury of fraudulently failing to account. He appealed on the basis that the trial judge erroneously admitted two records of interviews into evidence over objections per ss 84, 90 and 138 EA. He contended that the first interview, conducted by bank investigators: contained a misleading caution that *"whatever you say will be recorded and could be used in the bank's deliberations"*; that he was not interviewed freely; and the conduct of the interview was oppressive. He further contended that the subsequent ERISP ought be excluded because the prior bank interview was adopted in it. Hoeben J (as his Honour then was; Sully and Bell JJ agreeing) held: [37] Even if the appellant was misled by the caution (which his Honour did not accept) this is relevant to the exercise of the discretion under s90 but is not determinative of it. As is clear from the terms of the section itself the fundamental question is whether it would be unfair to the appellant to use the evidence at his trial. There was nothing said during the interview by the investigators to encourage such an incorrect understanding of the caution in the appellant. Even if no caution had been administered, I can see no reason why evidence of the bank interview could not have been led. It would have been admissible in the same way as an unguarded incriminating statement to a relative or a friend would have been. [41] It was submitted that the police interview should have been excluded pursuant to s138 of the *Evidence Act* to the extent that the bank interview was adopted (ie those portions of the police interview obtained in consequence of the bank interview should have been excluded). [42] There was no impropriety or unlawful conduct by the investigating police. The appellant under caution adopted the bank interview. I have already indicated why there was no oppressive conduct or unfairness associated with the bank interview being used in the criminal proceedings against the appellant. It follows that the precondition for the operation of s138 of the *Evidence Act* has not been made out. **Orders:** Records of interview properly admitted. Appeal dismissed.
R v Ul-Haque* [2007] NSWSC 1251** ***Terrorism ***Unlawful ASIO conduct; improper AFP conduct; and oppression***	Throughout the course of a terrorism investigation, the accused was interviewed extensively by the AFP on three occasions on 7 and 12 November 2003 and 9 January 2004. This followed an extensive investigation conducted by ASIO which the defence argued was characterised by unlawful conduct on the part of ASIO. All three interviews were objected to by the defence. Adams J held:

	[31] The very mode of questioning was intimidating. He was not told what was being investigated except in the most general terms. He was told, in effect, that he knew what he had done was wrong. **This is reminiscent of Kafka** (emphasis added). It is scarcely surprising that he hung his head. [35] The only reasonable conclusion is that the accused was in fact detained by the officers although they knew that they had no legal right to hinder him. Their language was designed to ensure, if possible, that there would be no need to do so. I am satisfied that when he said that he believed he was under arrest and that if he did not comply with what the officers asked him that they would either use physical violence or take him to a more sinister place for interrogation or otherwise do something else to his family or him the accused was telling the truth. Furthermore, I think that this state of mind was intentionally instilled. This analysis of the situation is strengthened by the approach taken during the interrogation by the officers. The statement to the accused, "What we now require from you is your full cooperation with ASIO in resolving the matter by being honest with us" was completely inconsistent with any suggestion that he was free not to answer their questions or that he could go: "full cooperation" that was "required" necessarily involved both accompanying the officers and answering their questions. The officer pointed out to him that he had two choices, "the difficult path or a less difficult path". The difficult path comprised "stand[ing] here putting these questions to you like this, having you tell us things which we know to be untrue…[or] we can take a less difficult path which would involve you co-operating and providing truthful answers to our questions and assisting us in resolving our concerns". Again, these were the only two choices available to the accused. Both involved compliance with the officers' directions. At the end of the conversation, the officer, to use his own words, said, "What I propose to do now is to take you to your home where an ASIO search under warrant is being conducted". He was told what the officer would do. This was inconsistent with any suggestion that he had a choice in the matter. In law, as the officers well knew, he was not obliged to go to his home or anywhere else, let alone accompany the officers. This was particularly intimidating since it meant that the accused's younger brother was left at the car park. In short, the accused remained in detention. [44] To my mind, to conduct an extensive interview with the accused, keeping him incommunicado, under colour of the warrant, was a gross breach of the powers given to the officers under the warrant. The courts have, for over two hundred years, been jealous and rightly jealous, of the use which might be made of search warrants to interfere with the liberty of the citizen and the right of the citizen to his or her own privacy and to maintain the integrity of their personal possessions including, of course, their home. The words of the great Sir Edward Coke, from his *Third Institute*, "for a man's house is his castle" have become an ironic commentary on lost liberty. Whether it is or not, the warrant issued under the hand of the Attorney General in this case did not authorise the conduct of B15 and B16.

	[46] Acceptance under compulsion of the truth of facts put in these circumstances is plainly fraught and necessarily raises the question whether he was saying what was true or what he believed his questioners wanted to hear. Put another way, the accused was told that he must tell the truth; he believed that some unspecified but possibly dire consequences might flow if he did not tell the truth; the ASIO officers told him when they thought he was not telling the truth and told him, or suggested, what the truth was; the inducement to say that what the ASIO officers told him was the truth, perhaps with some elaboration, was a powerful one. That is, of course, why police who question a suspect will not use this method. It is calculated to obtain what the suspect believes the interrogator wants to hear. [61] In this case there was no warrant of any kind justifying the officers, under colour of their office, to detain the accused. Furthermore, they did not do so under any mistaken view about the matter. They were aware that what they were doing was unlawful. They were perfectly well aware that they were not entitled to detain. Nor was there any suggestion of emergency that might have provided some mitigation for their conduct. Yet, B15, in the presence of B16 who assisted him, clearly gave the accused to understand that he was legally obliged to obey their instructions. The suggestion, in the circumstances, that the accused had a choice to disobey them is fanciful. It existed in point of law but not in reality. This conclusion is not undermined by the consideration that, had he indeed decided to ignore the officers, they may not have actually physically restrained him. [62] I do not have to be satisfied beyond reasonable doubt that the ASIO officers committed the offences that I have mentioned. Nevertheless, an adverse finding that they did so should not be made without carefully examining the evidence, bearing in mind that the issue to which it is directed is the commission of a criminal offence or conduct involving significant moral turpitude. Bearing in mind this caution, I am satisfied that that B15 and B16 committed the criminal offences of false imprisonment and kidnapping at common law and also an offence under s86 of the Crimes Act 1900. It follows, *a fortiori,* that they committed the tort of false imprisonment. Their conduct was grossly improper and constituted an unjustified and unlawful interference with the personal liberty of the accused. So far as their conduct in his parents' home is concerned, it also constituted an unlawful trespass against the occupants, since they gained admittance under colour of the warrant which did not authorise what they did: keeping the accused incommunicado in a bedroom, let alone subjecting him to compulsory questioning. [70] Nothing was done either by ASIO or, as it happened, Mr Gordge or other members of the AFP, to remove the effect of what had been said to the accused by the ASIO officers. I find it very difficult to accept that this was accidental. Mr Gordge certainly must have been aware of the necessity to ensure

	that anything said by the accused was voluntarily communicated, even if (as seems to be the case) the ASIO officers were not – a reflection of their incompetence, if nothing more sinister. **Interviews on 7 and 12 November 2003** ***Section 84 EA*** [98] The evidence of the ASIO conduct, considered alone, would be sufficient to establish oppressive conduct within the section. But the oppression was continued, in my view, by the conduct of the AFP. Mr Gordge's presence at the interviews was a clear signal to the accused of the inextricable link between ASIO and the AFP and an implicit reminder that he should not depart from anything already said. The conversations with him at the end of the interview on 7 November and when he came to AFP headquarters on 10 November continued the thrust of the message communicated by ASIO at the first meeting: co-operate or else. [99] The Crown has not been able to persuade me that these two interviews were not influenced by the oppressive conduct. I accept the accused's evidence that they were. Even if I were uncertain as to whether the accused was telling the truth or not, I would not be persuaded by the evidence called by the prosecution that the accused was not so influenced. ***Section 85 EA*** [102] I have already described the course of the ASIO questioning of the accused and B15's evidence about what was comprehended by the description of that questioning as "robust discussion and considerable prompting". Questioning of that kind is calculated to extract what the person being questioned believes the questioner wants to hear. It is inevitable that the truth of what is said is likely – if not certainly – to be adversely affected. The prosecution's ability to establish, as it must, that this is *not* the case is made doubly difficult by the fact that there is no record made by ASIO of the course of questioning, though there is a narrative of the results. [103] The interviews by the AFP are infected with the same problem: although, considered alone, they do not raise the problem of truthfulness, they must be considered in the context of the questioning of the accused as a whole. I am not satisfied that, having regard to those circumstances, the admissions

	sought to be tendered were made in circumstances that their truthfulness was not likely to be adversely affected. Accordingly, the interviews are not admissible upon this ground also. ***Section 138 EA*** [105] The impropriety of B15 and B16 was intentional and calculated to produce the very admissions that were made. It was grave. There is no suggestion that the officers acted contrary to ASIO protocols and good reason for thinking that they did not. There are a number of ways by which the evidence might have been obtained, including the use of detention warrants, which were not sought. **Interview on 9 January 2004** [118] Even if it were not for the conversation of 28 November I would have concluded that the Crown had not established that the third interview was not influenced by the oppressive conduct of ASIO. [119] Accepting the substance of evidence of the accused about the meeting of 28 November 2003, it follows that the record of interview of 9 January 2004 must have been affected not only by the threats of 6 and 7 November 2003 by the ASIO officers but also by threats made by Mr Pegg and Mr Gawel on 28 November 2003. **Orders:** All three interviews excluded pursuant to ss 84, 85 and 138 EA.
R v APCR; R v CP* [2006] NSWDC 12** ***Robbery ***Inadequate custodial conditions for juveniles; inadequate support persons; inadequate custody management recording; and inappropriate interview questioning***	The two juvenile Aboriginal accused were arrested in relation to a robbery and both participated in ERISPs. Both accused objected to the tender of their ERISPs at trial on multiple bases related to their custodial conditions, support persons and the nature of the interviews themselves. Nicholson SC DCJ held: **ERISP with APCR** [51] The seminal cases setting out the law and discretionary principles I apply are ***R v Phung and Huynh* [2001] NSWSC 115 and *R v Helmhout* [2001] NSWCCA 372.** From those cases I distil the following principles:

	• It may be accepted that the purpose of the legislative regime that applies to the interviewing of children, and particularly those in custody following arrest, is to protect them from any disadvantage inherent in their age as well as to protect them from any form of police impropriety. As to the former, what is required is compliance with procedure laid down, so as to prevent the young, or vulnerable, accused from being overawed by the occasion of being interviewed at a police station by detectives, who are likely to be considerably older and more experienced than they are. • It is important that police officers appreciate that the regime now established is designed to secure ethical and fair investigations, as well as the protection of individual rights of some significance which attach in particular to children. Those rights obviously are of great importance, when a child is facing a charge as serious as murder or armed robbery. • The provisions (relating to questioning and arrest) need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequence of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of any investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law. • There is a positive obligation under the legislation to ensure that the child or vulnerable person can understand what is being said. For example see Regulation 29 *Crimes (Detention after Arrest) Act*. That makes sense of satisfying themselves. Regulation 29 may well relate to interpreting but nonetheless for young people it still stands. Some of the formal questioning may need explanation. The regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights, see Regulation 20. • The role of a support person is to act as a check on possible unfair or oppressive behaviour, to assist a child, particularly one who is timid, inarticulate, immature or inexperienced in matters of law enforcement, who appears to be out of his or her depth or in need of advice, and to provide that comfort which accompanies knowledge that there is an independent person present during the interview.

	• The custody manager is required to explain to the support person that his or her role is not confined to acting merely as an observer, but also extends to doing the other things specified. • Some human beings are more vulnerable in facing police interrogation than others. Many factors bear upon an individual's vulnerability. Age, education, personality and general experience of life are some that are relevant to an individual's capacity to deal with police questioning. Plainly that capacity varies from individual to individual. That means a contravention of any of the obligations, including the obligation to notify a representative of the ALS may have different consequences, depending upon the particular characteristics of the individual who is being interviewed by the police. • The consequences in question <u>may</u> make it unfair for the evidence to be admitted. [52] I am satisfied that there have been a number of irregularities in complying with the statutory regime and guidelines put in place to ensure fairness to vulnerable persons. These include the failure to house the accused overnight with a support person and in a secure place other than a police cell; the failure to notify a representative of the Taree ALS; the failure to provide the accused access to Mr O'Brien and the failure to formulate appropriate questions as the front part of the interview on the offence itself commenced. [53] I am satisfied there was no thorough investigation of whether the accused understood his rights and I am also satisfied that he did not understand them. I have not been satisfied that the support person was properly instructed by the custody manager. [54] I am satisfied the interview proceeded because an unfair and unethical advantage was taken by Detective Elkins. **Orders:** ERISP with APCR excluded under s 138 EA. **ERISP with CP** [77] Detective Elkins claimed he stopped the charging process because he felt s 13(1) *Children (Criminal Proceedings) Act 1987* set up a hierarchy of support persons and that the mother took

	precedence over the lawyer. I have already indicated my attitude to that claim. In my view Detective Elkins, when told the mother was on her way saw a potential advantage to his investigation. He recognised immediately she was not a trained solicitor, that there was a strong likelihood she would be more malleable than a trained criminal lawyer, possibly take a different view about the accused participating in an interview. I am satisfied it was because he saw a potential advantage to his investigation that he stopped the charging process. [85] I am satisfied Detective Elkins had seen the video footage by the time he was ready to interview the accused. I am satisfied the accused was at some stage hiding in the bushes. I am satisfied Detective Elkins saw the arrival of MT at the police station as a potential advantage to his investigation. I am satisfied he saw that advantage as bearing upon the potential for her son to take part in an interview. I am satisfied his conduct had the consequence of putting pressure on the accused through the medium of the accused's mother. I am satisfied that pressure was applied to circumvent the advice given by Mr North and intended that the accused would follow the urgings of his mother. I am satisfied the accused determined to follow the advice of his mother and that his will was overborne by his mother's importuning. [86] In this sense I am not satisfied the interview was voluntary. I would exclude it upon that basis. **Orders:** ERISP of CP excluded under ss 90 and 138 EA.
Regina v Quach* [2002] NSWCCA 519** ***Supply large commercial quantity of heroin ***ERISP 1 persisted despite solicitor not being present and attempts to exercise right to silence*** ***Caution not administered until halfway through ERISP 2***	The appellant was arrested and charged in respect of the supply of a large commercial quantity of heroin. He was subjected to two ERISPs by investigating police. Both were admitted over objection at trial and this formed part of the grounds of his conviction appeal. Sully J (Spigelman CJ and James J agreeing) held: **ERISP 1** [86] The gravamen of the appellant's case on this ground of appeal is that he *"was denied the opportunity to have his solicitor present and advise him as to his rights before questioning… To justify the reception of the interview as evidence against the appellant it is no answer to find that the truth of the answers was not affected. Otherwise the right to silence becomes meaningless. … The appellant could not reasonably be regarded as a willing participant in the interview. This is not only a case of unfair pressure being placed on the appellant by interviewing police placing him at an unfair*

disadvantage, but a disregard by the investigating police of the legal advice tendered to an interviewee not to answer questions. … The right is fundamental and its breach in this case was … flagrant."
[100]-[101] The principles in ***R v Plevac*** **(1995) 84 A Crim R 570** and ***R v Clarke*** **(1997) A Crim R 414** were then discussed at length.

[103] The learned trial Judge, in ruling upon the objections to the admissibility of evidence of this particular interview with the appellant, adverted to sections 85, 90 and 138 of the ***Evidence Act*** and concluded:

> "In the circumstances in which these admissions were obtained, I am not satisfied that it would be unfair to the accused to use that evidence (section 90), and I am not satisfied that there was impropriety which would outweigh the desirability of admitting the evidence. I am not satisfied of any impropriety or unfairness such that it was likely that the truth of the admissions was adversely affected."

[104] When the principles which I have previously extracted from the decisions in ***Plevac*** and in ***Clarke*** are applied fairly to the whole of the relevant circumstances as I have previously canvassed them, then, in my opinion, it was well open to the trial Judge to reach the conclusions which I have quoted from his Honour's relevant ruling.

ERISP 2

[107] It is convenient to begin by quoting the relevant ruling of the trial Judge:

> "The accused was interviewed at the Balmain Police Station on 13 July 2000 … . Objection is taken to its admission on the basis that it was not obtained in the exercise of a free will to speak or remain silent. That objection is based on the following:
>
> > Q.46 Just, um, we've just realised because of the confusion of the allegation when we started the interview, I didn't give you your official caution, and I must give that. So in relation to the questions I ask you, you're not obliged to say anything unless you wish to do so, but whatever you say or do will be recorded on this device and may later be used in evidence. Do you understand that?
> >
> > A. Yes, that's correct. I had to tell you from the beginning to the end what has happened.

	The accused agreed that he had previously been cautioned in the interview of 2 May 2000, and he was advised that because he had been asked questions prior to the caution at question 46, and it was put to him if those questions could be re-asked now that he had been cautioned, and he said that he had answered those questions and he understood that they could be used in court. The accused was subsequently cautioned throughout the interview. At the end of the interview he declined to answer anymore questions. He acknowledged that the answers were given of his own free will and he said that the two police officers were very kind and very gentle. I think that the absence of a caution at the beginning of the record of interview was remedied by what transpired at question 46 and the answer thereafter, that is, that the caution was given and the offer made to go through the earlier questions again, which the accused declined to do. I do not think that this interview was unfairly obtained (section 90); I do not find any circumstances which would suggest that there was any conduct such as to make it likely that the truth of the admissions was adversely affected (section 85). I think the questions asked about the money located at his house were relevant, as were the questions in relation to various phone calls. I think that that is relevant evidence which should properly go to the jury." [108] The conclusions which I have reached upon [ERISP 2] mirror the conclusions earlier reached in connection with [ERISP 1]. In my opinion Ground 4, like Ground 3, has not been established. **Orders:** ERISPs properly admitted. Appeal dismissed.
Regina v Dungay* [2001] NSWCCA 443** ***Sexual assault ***Unlawful arrest for the purposes of investigation; and evidence misrepresented by police***	The appellant was arrested on suspicion of his involvement in a sexual assault in company. The complainant's statement exculpated him. The sole evidence inculpating him was an ERISP in which he made partial admissions. He was arrested *"so that we could detain [him] for the purpose of investigation".* Prior to his ERISP he was falsely told that the complainant said he sexually assaulted her. The ERISP was admitted over defence objection at trial and was the critical issue on the conviction appeal. Ipp AJA (Studdert and James JJ agreeing) held: [28] The trial judge did not bear in mind that it is a requisite for a valid arrest that the arrest be for the purpose of taking the arrested person before a judicial officer to be dealt with according to law as soon as is reasonably practicable. As the arrest of the appellant was solely for investigative purposes, it was unlawful.

	[41] Section 356C(1) of the *Crimes Act* makes it clear that Pt 10A does not confer any power upon the police to detain a person who has not been lawfully arrested. The common law has always jealously guarded citizens against arbitrary arrest: ***Williams v R***. The duty to bring an arrested person before a judicial officer as soon as is reasonably possible is one of the foundations of a democratic society. Our law recognises that no person should be arrested merely for the purposes of investigating whether he or she has committed a crime. Part 10A does not detract from this fundamental principle. In my opinion, the illegality involved in the appellant's arrest has to be regarded as being serious indeed. [44] The statement by Detective Gilmour that he had received an allegation that the appellant had sexually assaulted the complainant was false. No such allegation had been made by the complainant. Detective Gilmour made the statement as a result of a misunderstanding on his part that I accept may have been reasonable. That, however, is not a satisfactory answer to the point. The fact is that, prior to the interview, the appellant was falsely told that the complainant had asserted that he had sexually assaulted her. This was unfair. [48] Ms Woodburne drew attention to the test for unfairness laid down in ***R v Lee*** (1950) 82 CLR 133. I accept that that is the test that should be applied. The High Court said there (at 154) that the requisite question is, "[W]hether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused." Their Honours stated that they knew of no better exposition of the whole matter than that which is to be found in the judgment of Street J in ***R v Jeffries*** **(1946) 47 SR (NSW) 284** at 311-14. Street J said, relevantly: > "It is a question of degree in each case, and it is for the presiding Judge to determine, in the light of all the circumstances whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him." [49] In applying that test it is also salutary to bear in mind what was said in ***R v Lee*** at 159 and repeated in ***R v Foster*** at 555, namely: > "The uneducated – perhaps semi-illiterate – man who has a record and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer. The latter may be honest and sincere, but his position of superiority is so great and so over-powering that a 'statement' may be 'taken' which seems very damning but which is really very unreliable. The case against an accused person in such a case sometimes depends entirely on the 'statement' made to the police. In such a case it may well be that his statement, if admitted, would prejudice him very unfairly. Such persons stand often in grave need of that protection which only an extremely vigilant court can give them."

	[50] In my opinion, the force of the nature of the illegality, the false statement by Detective Gilmour, the omission to tell the appellant of the complainant's statement exculpating him, the nature of her evidence generally and the other statements made by the appellant in the interview, outweigh the factors relied on by Ms Woodburne who, in a cogent argument, said everything that could possibly have been said on behalf of the Crown. [51] In all the circumstances I consider that it would be unfair to the appellant to admit the evidence of the interview. **Orders:** ERISP unfair and inadmissible pursuant to s 138 EA. Appeal allowed. Verdict of acquittal entered.
R v Helmhout* [2001] NSWCCA 372** ***Murder ***Police did not notify the Aboriginal Legal Service that the accused was in custody before ERISP undertaken***	The vulnerable Aboriginal appellant was convicted of murder and a critical piece of evidence at his trial was his ERISP which was admitted over objection. The appellant argued that the ERISP should have been excluded in the exercise of the discretion under s 138 EA on the basis that the Aboriginal Legal Service was not notified that the appellant was in custody before he participated in the ERISP. The appeal was dismissed by Hulme J, from [25] to [53], with Ipp AJA agreeing with additional reasons from [1] to [24], and Sperling J agreeing with additional comments from [54] to [63]: [4] The appellant is an Aborigine. Hence the police, in whose custody the appellant was at the time of his arrest, were required to comply with cl 28. However, they did not. The admissions the appellant made therefore constituted evidence obtained in contravention of an Australian law and s 138 of the *Evidence Act* became applicable. [9] In my view, the argument advanced by the Crown overlooks the fact that some human beings are more vulnerable in facing police interrogation than others. Many factors bear upon an individual's vulnerability. Age, education, personality, and general experience of life are some that are relevant to an individual's capacity to deal with police questioning. Plainly, that capacity varies from individual to individual. This means that a contravention of cl 28 must have different consequences depending upon the particular characteristics of the individual who is interviewed by the police. [10] In my view, the consequences to the particular individual of a contravention of cl 28 are highly relevant to a determination under s 138(1). This was accepted in principle in ***R v Phung & Huynh* [2001] NSWSC 115** where Wood CJ at CL was required to make a determination under s 138(1) in regard to a police interview which had involved contraventions of various statutes, including

	the Regulation (although, not cl 28). In holding that the interview should not be admitted, his Honour said: *"I take into account the fact that [the accused person] had a background of drug addiction, that he was separated from his parents, and that he had a limited education and capacity to read English. I also take into account the fact, it would seem, that he had used drugs within the 24 hours preceding the interview, a period during which he had allegedly been involved in two separate instances of serious criminality, and which was likely as a consequence, to have been a somewhat turbulent period for him".* [11] Put in another way, the consequences in question may make it unfair for the evidence to be admitted. In my view, considerations of fairness are to be taken into account in making a determination under s 138(1). I appreciate that s 90 of the Act deals specifically with evidence that should not be admitted because its use may be unfair, but that is no reason to exclude considerations of fairness from s 138. The use of particular evidence may not be so unfair as to warrant refusal under s 90, but when taken with other matters may be refused under s 138. The two sections address different categories of circumstances and the considerations relevant to each are not mutually exclusive. See in this regard ***R v Phung & Huynh*** where Wood CJ at CL applied considerations of fairness in deciding under s 138 to refuse to admit evidence of a police interview different to that referred to above. As his Honour put it: *" I would exclude the evidence, since I am of the view that the apparent failure of those concerned to secure compliance with the regime gives rise to an unfairness, and outweighs the probative value of the admissions obtained, powerful as they might have been".* [40] There can be no doubt that in at least many cases any consideration of the gravity of the impropriety of contravention to which s138 requires attention will involve a consideration of the particular accused's personal characteristics. Demonstrably a breach of clause 28 in the case of an uneducated and ignorant Aboriginal would be a graver contravention than in the case of one who was in fact a practicing criminal lawyer. Thus I disagree with the submissions advanced on behalf of the Crown to the effect that, as all Aboriginal persons are regarded by the *Crimes (Detention after Arrest) Regulation* as "vulnerable", there is no occasion to consider their situation individually. A fortiori, is this so as the expression "vulnerable person" is defined to include not only aboriginals but also children (necessarily of a wide variety of ages) and persons with impaired intellectual functioning (whose degrees of impairment are also likely to extend over a wide range).

	[41] Thus as a general proposition a judge should, when considering s138 and in particular the requirements of s138(3)(d), direct attention to the Appellant's personal characteristics. [52] Even without her Honour's decision that it was not unfair under s90 to admit the document, once one accepts her findings – unchallenged by the Appellant in the appeal – as to the probative value of the evidence - "very high", as to the importance of the evidence – "critical", as to the nature of the offence – murder, that it had not been suggested that the contravention was contrary to or inconsistent with a right recognised by the International Covenant on Civil and Political Rights, together with the conclusion that the contravention was not deliberate or reckless, and her view of the Appellant's circumstances at the time of the interview, her Honour's decision under s138 was clearly correct. **Orders:** Admission of ERISP under s 138 EA was appropriate. Conviction appeal dismissed.
R v Phan* [2001] NSWCCA 29** ***Murder ***Police proceeded with ERISP in the face of reluctance***	The appellant was convicted of murder. He appealed on several bases including that the trial judge erred in admitting his ERISP when he had indicated he did not want to participate in the interview. Wood CJ (McClellan J agreeing and Smart AJ agreeing with additional reasons) held: [48] In ***Ireland* 126 CLR 321** at 333, Barwick CJ noted that: > It was improper for police investigating the commission of a crime to persist in questioning a suspect after an indication that he did not wish to answer any more questions. [54] There is no absolute rule that an interview conducted in the face of an objection by a suspect, or continued in the face of an indication that he or she does not wish to participate any further in it, should be rejected if tendered in evidence. This was made clear in ***Kerrie-Anne Clarke* NSWCCA 31 October 1997**, when Hunt CJ at CL said: > "It should be kept in mind that a police officer is under a duty to ascertain the facts which bear upon the commission of a crime, whether from the suspect or not, and the officer is not bound to accept the first answer given; questioning is not to be regarded as unfair merely because it is persistent. [19] It is a question of degree as to whether persistence has crossed the line so as to render it unfair to use the answers in evidence. [20] No doubt the evidence will inevitably be excluded if there is any suggestion of intimidation, persistent importunity or sustained or undue insistence or pressure. [21]"

	[55] Smart J similarly observed: "It is not uncommon for an accused to intimate that he does not wish to answer any questions and then to decide to answer some questions or to make a statement or explanation. There may be something in a police statement or summary of the situation which the accused regards as wrong and needs correction or something which needs explanation. There are many possibilities. It would be unwise to hold that every time an accused states that he does not want to answer questions, some further questions are put and answers are given or explanations or statements made such answers, statements or explanations are inadmissible. Everything depends on the circumstances." [56] In an appropriate case, it may well be that despite some initial reluctance, the person interviewed may elect to continue with the interview, and even see an advantage in providing further information with a view to dispelling doubts, or answering matters which may give rise to suspicion. Any apparent impropriety in continuing to question a suspect may turn out, in those circumstances, to be of such little weight as not to justify exclusion of the ERISP as evidence. Each case must be determined upon its own facts, and in particular by reference to the extent to which there is any unfair pressure placed upon the person being interviewed, or unfair advantage taken of his position, for example because of his age, vulnerability, lack of familiarity with the English language and so on. Moreover, in any weighing exercise the probative value of the evidence needs to be taken into account. [58] In the light of its limited probative value, and the appellant's acknowledgment that he had told lies to the police, and in the light of the way that the interview was down-played in the summing up, **I am of the view that it would have been preferable, with the advantage of hindsight for it to have been excluded**. **Orders:** ERISP ought to have been excluded but no miscarriage of justice. Conviction quashed and re-trial ordered for unrelated reasons.
Regina v Munce* [2001] NSWSC 1072** ***Murder ***ERISP conducted with an accused with psychiatric issues who had***	The accused was tried for murder and the prosecution sought to adduce an ERISP undertaken by police in New Zealand regarding the relevant events that had occurred on a merchant ship docked in Newcastle. The defence objected to the ERISP under ss 85, 90, 135 and 137 EA. McClellan J held: [23] It is plain that the ERISP was obtained in the course of official questioning. Accordingly, as the proceedings are of a criminal nature and the relevant evidence an admission under s 85 must be considered. Subsection (2) provides that the evidence cannot be admitted unless the circumstances make it unlikely that the truth of the admission was adversely affected. Subsection (3) invites

consumed alcohol and drugs earlier in the day	consideration of any condition or characteristic of the person who makes the admission including personality, mental or intellectual disability. The court must also have regard to the nature of the questions and the manner in which they were put during the interview. [25] Section 85(2) was authoritatively considered by the Court of Criminal Appeal in ***R v Rooke*****, unreported, CCANSW, 2 September 1997** where Barr J said: *I think that the expression 'the circumstances in which the admission was made' as used as in subs (2) is intended to mean the circumstances of and surrounding the making of the admissions, not the general circumstances of the events said to form part of the offence to which the admissions are relevant. That is because, first, it is the plain meaning of the words. Secondly, it follows because subs (1) intends the section to have effect only where there is official questioning (or an act of the kind relevant under para (1)(b)). So far as the present appeal is concerned, the section may be said to be intended to require courts to inquire, where appropriate, into the process by which official questioning produces evidence tendered at trial. If the circumstances of the official questioning are such as to produce untruthful or unreliable evidence of admissions - adversely to affect their truth - the evidence is inadmissible. But the section is only concerned with the truth or reliability of evidence of admissions in this limited way. It has generally no part to play in the admissibility of evidence of admissions which may be untrue or unreliable for other reasons. Untruthfulness or unreliability in those circumstances is not a question for the trial judge at all, but for the jury.* [27] In the present case the accused's questioning arose from his voluntary presentation at the Auckland police station where he agreed to a formal interview. There is no suggestion that that interview was other than scrupulously fair. Although the accused had consumed significant alcohol and cannabis during the course of the day, it is not suggested that he was intoxicated or unable to understand and respond to the questions he was asked. No doubt his long-term abuse of both substances gave him a tolerance beyond that of an ordinary person. [28] Although, by reason of his undoubted psychiatric problems there may be real doubt as to whether the accused was giving an accurate account of the events, there is nothing arising from the objective circumstances of the interview which would impact upon the truth of the admission. [35] Although a circumstance may arise where evidence is so unreliable that no account should be taken of it, neither mental illness nor intoxication dictate its exclusion. (see ***Sinclair v The King*****, [1946] 73 CLR 316**). It remains for the jury, appropriately instructed, to determine the weight, if any, which should be given to the admissions.

	[44] It will be apparent that I have identified in these reasons the considerable difficulties in the Crown case if it depends (as I understand to be the position) almost entirely on the admission made by the accused in the ERISP. However, the weight to be given to the ERISP is a matter for the jury. **Orders:** ERISP admitted.
R v Phung and Huynh* [2001] NSWSC 115** ***Murder and armed robbery ***Two ERISPs conducted with a 17-year-old accused; inadequate support persons; intoxication and fatigue; inadequate custody management records; and inadequate communication of rights***	The 17-year-old accused was arrested and charged with armed robbery and murder. Police conducted an initial ERISP following arrest and a later ERISP while the accused was bail refused at a juvenile detention centre. Both ERISPs were beset by contraventions of s 13 *Children (Criminal Proceedings) Act* and s 10A *Crimes Act* (now repealed) including that there was: no support person while a forensic procedure was undertaken; no choice in support person; inappropriate support persons contacted; no lawyer offered; evidence of extreme fatigue and drug intoxication; and inadequate custody management records. Wood CJ at CL held: [34] It may be accepted that the purpose of the legislative regime, that now applies to the interview of children, and particularly those in custody following arrest, is to protect them from any disadvantage inherent in their age, as well as to protect them from any form of police impropriety. As to the former, what is required is compliance with the procedure laid down so as to prevent the young or vulnerable accused from being overawed by the occasion of being interviewed, at a police station, by detectives who are likely to be considerably older and more experienced than they are. [36] The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights. [39] The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. **The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP** (emphasis added), or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law.

	ERISP 1 [48] Although the balancing exercise which remains is not easy, I am of the view that, in combination, there were sufficient circumstances involving non-compliance with the statutory regime, so as to give rise to serious concern as to whether the accused, a 17 year old with a somewhat disturbed background, had been sufficiently advised as to his rights, and as to whether those rights were adequately protected, to require exclusion of the evidence under section 90, and also section 138, of the *Evidence Act*. **ERISP 2** [53] Had legal assistance been provided, it is almost certain that the accused would have had drawn to his attention the undesirability of participating in any further interview, that might implicate himself not only for the new offences, but might, also by reason of their interconnection with the remaining offences, significantly enhance the prosecution case in relation to those charges. [54] In this regard I observe that the undesirability of police re-interviewing persons already charged with an offence, for the purpose of gaining further information concerning that offence, remains unchanged. It was previously a matter taken up in the police instructions. The reasons for the undesirability of any such post charge interview are obvious, save of course for the important exception in a case where an accused voluntarily approaches police with a view to supplying fresh information, particularly if that is intended to be exculpatory or explanatory of anything which might have been obtained from a prior interview. [63] Additionally, I observe that police should not automatically assume that their obligations under the legislation, can be met by a rote reading of the requisite cautions and advice, or by the handing over of printed forms for an accused to read for himself or herself. Nor should they assume that compliance can be proved by the securing of a simple signature or initial on the custody management report. There is a positive obligation, under the legislation, to ensure that a child or vulnerable person can understand what is being said - for example see regulation 29. That may extend to satisfying themselves that he or she can speak English or can read. Moreover, the regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights - see regulation 20. **Orders:** Both ERISPs excluded under ss 90 and 138 EA.

R v Douglas* [2000] NSWCCA 275** ***Armed robberies, weapons offences and malicious infliction of actual bodily harm ***Entrapment; inducement; abrogation of right to silence; not allowing contact with 3rd parties; and unfairness***	The appellant was convicted of several armed robberies and various weapons and violence offences. He had participated in three ERISPs that were admitted over objection at trial. His subsequent conviction appeal asserted that the admissions he made in the first two ERISPs conducted following his arrest ought not have been admitted. At trial, the appellant had argued that: he had been entrapped by the police in criminal conduct; his right to silence had been abrogated; he was induced to make admissions by promises that his wife and her friend would not be charged if he cooperated; and the overall conduct of police was unfair. On appeal, a different argument was raised, effectively stating that the appellant had been denied the opportunity to speak with a solicitor. Mason P (Sully and Sperling JJ agreeing) held: [56] In this Court, the appellant submits that the primary judge erred in not dealing with the issue presented to him by the evidence that the appellant was told that he could not contact anyone prior to execution of the search warrant. It was common ground that Detective Banfield had said this, whatever he may have intended. The appellant said that he took this to include forbidding him the right to contact a solicitor. No finding was made as to whether the appellant was to be believed that those words were used or in this perception of what he was told. We do know that he did not ask to contact a solicitor before the ERISPs at Penrith or the later ERISP at Maroubra (he was brought there from gaol). Whether his failure to seek legal assistance at Penrith was influenced by his perception of what Banfield told him is not the subject of any finding. This is quite understandable, given the way the issue was fought at trial and the fact that the only reason given by the appellant for making the admissions was the so-called deal involving his wife and the other girl staying with them. [60] This was not a situation where the will of an accused in custody was broken down by improper pressure or unfair conduct. The revelation that Bannerman had cooperated with the police, that evidence had been collected through the use of listening devices and that the appellant's wife would be questioned was no doubt the reason why the appellant switched in his resolve and yielded up his right of silence. But I would not characterise the conduct of Detective Banfield in disclosing these matters as *"oppressive, inhuman and degrading"*. [64] Section 85 of the Evidence Act offers even less assistance to the appellant. Not only does the appellant face the problems relating to the *"influence"* of the incommunicado conversation that I have discussed above, but everything points to the unlikelihood that the truth of the admissions was adversely affected and that is the crux of s85.

	Orders: Both ERISPs properly admitted. Appeals dismissed.
R v Moffat* [2000] NSWCCA 174** ***Murder ***Intoxication***	The appellant was convicted of murder. His ERISP was admitted over objection. He appealed, asserting, *inter alia*, that his ERISP should have been excluded due to his high level of intoxication (his blood alcohol reading was estimated have been between 0.2 and 0.245 grams per 100ml at the time of the interview) per ss 85, 90, 135, 137 EA. Wood CJ at CL (Foster AJA and Adams J agreeing) held: [55] I can see no error in the approach taken by his Honour in relation to this evidence, or to the assessment that, although the blood alcohol level of the appellant was high, his tolerance was such as to minimise its effects. The expert evidence in fact was all one way in this regard, and was supplemented by the absence of any clear indication of underlying brain damage. Moreover, the circumstance that the appellant had his wits sufficiently about him to try the pulse and breathing of the deceased to see if he was still alive, was a powerful indication that he was not significantly affected by alcohol, and that his cognitive powers were unimpaired. **Orders:** ERISP properly admitted. Appeal dismissed.
R v Ye Zhang* [2000] NSWSC 1099** ***Murder ***Oppression; unfairness; promises of witness protection in return for cooperation; cooperate or be charged with murder; threat of violence; and time limit on option to assist***	The accused was charged with two counts of murder. Throughout the course of their investigation, the police conducted two separate interviews with the accused, initially as a witness. Once the accused confessed to the murders in the second interview, he then participated in an ERISP and a recorded *walkaround* of the crime scene. The accused objected to the admissibility of all recorded admissions under ss 84, 85, 90 and 138 EA. Simpson J held: [40] In this case, the accused was not merely offered witness protection; he was not merely offered witness protection in return for co-operation (which it is also difficult to construe as oppression); he was offered witness protection in exchange for co-operation in the context of being confronted with two alternatives only: to co-operate with police or be charged with murder. He was offered those alternatives at the same time as being told that he could expect a reduced (or no) sentence in return for his co-operation. There was a threat of some kind, of physical violence (when Detective Goodwin told him he would like to hit his face); and, finally and importantly, he was told that once Detective Goodwin had left the room he would have no further opportunity to co-operate with police. This last was calculated to apply pressure to the accused.

	[41] I am satisfied that the conduct of the police as whole was designed to and did in fact oppress the accused. [44] Section 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible. [51] Generally speaking, s 85 is directed to the circumstances in which an admission is made and any impact those circumstances may have on the reliability or otherwise of the admission. The section is not directed to the truth or falsity of the content of the admission: see ***R v Rooke*** (**unreported, Court of Criminal Appeal, NSW, 2 September 1997** per Barr J) but that position is not absolute. S 189 governs the conduct of voir dire proceedings. [52] The combined effect of s 189(1) and (3) is that where the voir dire determination concerns the admission of evidence of an admission in a criminal case, the truth or falsity of the admission is to be disregarded unless that issue is introduced by the accused. It seems to me that sub s (3) is designed to obviate a "bootstraps" argument in the determination of the admission of the evidence. That is, evidence of an admission will not be admitted because the admission can be shown, by other evidence, to be truthful. The attention of the court is to be directed to the circumstances in which the admission was made, excluding evidence that would substantiate or contradict the admission. The legislation delineates the circumstances in which the admission was made from its independently verifiable (or otherwise) content. An exception to that position, provided in s 189(3), is made where the accused introduces the question of truth or falsity of the admission. Where the accused takes that course, neither the Crown or the court is precluded from embarking on an examination of the proof of the admission, although it may be that the extent to which that will be considered is limited: ***R v Donnelly*** **(1997) 96 A Crim R 432** at 438 per Hidden J. [62] The suggestion that the accused fabricated his confession cannot be seen in isolation from the fact that he has now been diagnosed as suffering from schizophrenia. But Dr Wong, who has examined the accused on at least three occasions, has also viewed the video tapes of the records of interview, and saw in them no evidence of psychiatric disorder at the time they were made. No evidence was adduced to suggest that, at the time the accused answered the questions put to him by police, he was psychiatrically disturbed. I do not think that the consideration of the veracity of the admissions, so far

	as that is relevant to the s 85 determination, should be based upon doubt emanating from the later diagnosis of schizophrenia. [63] I was asked to watch the whole of the video tape of the "walkaround" and did so in Chambers. It shows the accused willingly answering police questions, identifying relevant parts of the apartment, demonstrating what he said had taken place. It was, as the Crown submitted, a compelling piece of evidence. [64] I am satisfied that, notwithstanding the circumstances in which the admissions were made, and my conclusion that they were deprived of the necessary quality of voluntariness that would permit their admission into evidence, the reliability of the circumstances in which they were made is unaffected. I would not, on the basis of s 85, reject this admission. The veracity or accuracy of the content of the admissions would, if they were otherwise admissible, be a matter for jury determination. [67] There is, for present purposes, a real distinction between s 84 and s 90. S 84 requires exclusion of the evidence if the Crown fails to negative influence as the result of oppressive conduct. S 90 permits rejection of the evidence if it is shown that the circumstances would render its admission unfair. A finding that the Crown has failed to negative influence for the purposes of s 84 does not necessarily carry the corollary, that is, that the admission is in fact made as a result of the oppressive conduct. However, my conclusions above do, in effect, in this case have that consequence. I would exercise the s 90 discretion to exclude the evidence. **Orders:** Recorded interviews excluded under ss 84 and 90 EA.
R v Helmhout* [2000] NSWSC 208** ***Murder ***Aboriginal Legal Service not notified that accused was in custody; and intoxication***	The accused was arrested, interviewed and charged with murder. The ERISP was challenged on the following two bases: firstly, that the Aboriginal Legal Service was not contacted per cl 28 *Crimes (Detention after Arrest) Regulation 1998* (which preceded LEPRR); and secondly, that due to his level of intoxication at the time of the interview it would be unfair to admit the evidence. Bell J held (see above for the dismissal of the subsequent conviction appeal to the CCA): [19] I consider that the failure to conform with the requirements a statutory scheme designed to provide special protections for vulnerable persons to be a serious matter. I do not consider that Sergeant Dagwell's neglect was either deliberate or reckless.

	[21] The onus is upon the Crown to satisfy me that the desirability of admitting the evidence outweighs the undesirability of so doing. On the balance I am satisfied that this onus has been discharged. My finding that Sergeant Dagwell's behaviour was neither reckless nor deliberate is important to this conclusion. [28] The only authority to which I was referred which touches on the question of intoxication as it may relate to the admissibility of admissions under the provisions of the *Evidence Act* is ***Regina v Donnelly*** **(1997) 96 A Crim R 432**. In that case there was some evidence that the accused was affected by prescribed drugs in combination with a condition of severe depression. Hidden J in the context of reviewing the considerations set out in s 85(3) of the Act observed (at p.441): *"The common law relating to the admissibility of confessions by persons suffering a mental disorder or disability was summarised by Gleeson CJ in* ***R v Parker (1989) 19 NSWLR 177*** *at 183-4, and what his Honour there said, is applicable mutatis mutandis, to the relevant provision of the Evidence Act . As his Honour observed, 'Persons who are intellectually handicapped or who suffer from disease or disorder of the mind are by no means necessarily incapable of telling, or admitting the truth'."* [39] The fact that the accused may have made admissions (using the term in the way in which it is defined for the purposes of the *Evidence Act*) in part because his tongue was loosened by the effects of alcohol and drugs does not, in my view, make it unfair to admit the interview for the reasons given in ***Ostojic***. [41] Having regard to the opening passages in the interview, I accept that the accused was not so affected by alcohol or drugs as to not understand that he had a right to refuse to answer questions. Further, I accept he was informed that he had a right to make contact with a lawyer and that he chose not to do so. In these circumstances, I am not of the view that it would be unfair to the accused to allow the evidence to be given. **Orders:** ERISP admitted.
Graham v R **[1998] HCA 61** ***Sexual Offences*** ***Only denials in ERISP, coupled with peripheral answers that were***	The appellant was convicted of sexual offences, and appealed asserting, *inter alia*, his record of interview should not have been admitted at trial. Callinan J (Gleeson CJ, Gaudron, Gummow and Hayne JJ agreeing) held: [39] The first objection was that the whole of the record of interview should be excluded because the appellant's answers were, in substance, a denial of the allegations made by the complainant. The trial

not admissions but gave rise to damaging cross-examination	judge appears to have accepted this view but admitted the evidence on the basis that the interview "allowed the accused at the earliest opportunity to put his version". [40] The denials of the appellant were not capable of being regarded by the jury as admissions. They were otherwise irrelevant. The record of interview, once it was admitted, became the source of material for a cross-examination of the appellant on peripheral or irrelevant issues and caused the introduction into evidence of matters which had a real potential for prejudice to him. [45] The challenge to the admissibility of the record of interview was correctly made. It should certainly not have been admitted in its entirety, if at all. Even if it had been otherwise admissible this would have been an appropriate case for its discretionary exclusion pursuant to s 137 of the *Evidence Act*. **Orders:** ERISP ought to have been excluded under s 137 EA. Appeal upheld for unrelated reasons – convictions quashed, and new trial ordered.
R v Donnelly* (1997) A Crim R 432 (NSWSC)** ***Murder ***Severe depression and possible false confession***	The defendant was charged with murder. A psychiatrist opined the accused's severe depression may have affected his ability to decide whether to speak to police and he may have made a "false confession" during his ERISP. The defence objected to the ERISP (and earlier admissions) pursuant to ss 85 and 90 EA. Hidden J held: 441: [T]aking into account the matters set out in s 85(3) of the *Evidence Act*. I am mindful of Dr Westmore's evidence that the accused's depression could have led him to make a false confession. Dr Westmore expressed this as a possibility and did not attempt to assess its likelihood. The common law relating to the admissibility of confessions by persons suffering a mental disorder or disability was summarised by Gleeson CJ in ***Parker* (1990) 19 NSWCR 177** at 183-184, and what his Honour said is applicable, mutatis mutandis, to the relevant provisions of the *Evidence Act.* As his Honour observed, "Persons who are intellectually handicapped or who suffer from disease or disorder of the mind are by no means necessarily incapable of telling, or admitting, the truth". The possibility that the accused falsely implicated himself in the death of his wife is, again, a matter properly to be considered in the trial but does not render the evidence inadmissible. 442: The accused's admissions are not, on their face, unreliable. Despite his undoubtedly depressed state, he appears to have given an intelligible account of relevant events to his cousin and to the interviewing detectives. In the recorded interview there is nothing to suggest that he is unable to deal with the situation in which he found himself, and he seems able to understand what is asked of him

	and to respond appropriately. When speaking to his cousin and to the interviewing detectives it appears that he appreciated his right to silence, but had decided to waive it. Apart from the question of arranging a psychiatric assessment, to which I referred earlier, no criticism has been levelled against the manner in which he was treated by any of the police: no could it be. **Orders:** ERISP admitted.
R v Clarke* (1997) 97 A Crim R 414 (NSWCCA)** ***Armed robbery ***ERISP continued notwithstanding efforts to exercise right to silence – persistent police questioning***	The appellant was convicted of armed robbery and appealed her conviction arguing, *inter alia*, the police were impermissibly persistent and the resulting ERISP ought to have been excluded pursuant to ss 85, 90 and 138 EA. Hunt CJ at CL (Smart J agreeing with additional comments and Howie AJ agreeing) held: 419-420: It should be kept in mind that a police officer is under a duty to ascertain the facts which bear upon the commission of a crime, whether from the suspect or not, and the officer is not bound to accept the first answer given; questioning is not to be regarded as unfair merely because it is persistent. It is a question of degree as to whether persistence has crossed the line so as to render it unfair to use the answers in evidence. No doubt the evidence will inevitably be excluded if there is any suggestion of intimidation, persistent importunity or sustained or undue insistence of pressure. **Orders:** ERISP properly admitted. Conviction appeal allowed on unrelated grounds.
SELECT INTERSTATE CASES	
CASE, OFFENCE TYPE AND BASES FOR APPLICATION TO EXCLUDE	**PRÉCIS, REASONS AND ORDERS**
Director of Public Prosecutions (Vic) v Natale* [2018] VSC 339** ***Incitement to murder; extortion with threat to kill; and threatening to kill	The unfit and elderly Italian-speaking accused was interviewed by police without an Italian interpreter present. The defence objected to the interview on several grounds including ss 90, 137 and 138 EA (Vic) and pursuant to the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Bell J held: [51] In summary, the discretion in s 90 of the *Evidence Act* is available to exclude evidence of an admission obtained by police when interviewing a person who speaks poor English without an interpreter being present. The focus of the assessment is upon whether it would be unfair to allow the evidence to be admitted at trial having regard to the circumstances in which it was obtained, not upon

Poor English; no interpreter; and unfit accused	whether the means used where improper or unlawful. It is relevant but not conclusive to take into account that, by reason of those circumstances, including that the interview was not substantively voluntary, the evidence is unreliable. The personal condition and characteristics of the accused, including a lack of proficiency with the English language, must be considered. Age can exacerbate that lack of proficiency. The discretion may be exercised where admitting the evidence would produce unfair forensic disadvantage in the conduct of the defence, as where the accused did not appreciate the right to remain silent and other relevant human rights, did not comprehend the questions, did not properly communicate the answers and, to rebut and explain the admission, would be faced with electing to give evidence and enduring a potentially credit-destroying cross-examination. **Orders:** Interview excluded under ss 90 and 138 EA (Vic).
Kelly v Western Australia **[2017] WASCA 221** ***Drug Supply*** ***Incredulous and persistent police interrogator***	The appellant was convicted in the District Court of WA of possessing a prohibited drug for the purpose of supply. He appealed on the basis that his ERISP/EROI was conducted in an improper manner and should have been excluded at first instance. The Court (Buss P, Beech JA and Hall H) held: [51] [T]he assertions by Senior Constable Cleal that the appellant was a liar, he did not believe the appellant's version of events and the appellant was, in essence, guilty of the alleged offence did not, in the context of the interview as a whole, constitute improper conduct by a police officer whose duty is to enforce the law and for that purpose to interrogate with persistence, if reasonably appropriate, and on occasions with incredulity, if reasonably appropriate. The police officers' persistent questioning of the appellant was appropriate and proper. Also, based on the information known to the police officers, Senior Constable Cleal's occasional expression of disbelief as to the appellant's version of events and belief as to his guilt was not inappropriate or improper. **Orders:** ERISP/EROI properly admitted. Appeal dismissed.
R v BL **[2015] NTSC 85** ***Sexual assault*** ***Juvenile indigenous accused not proficient in English; no interpreter; inappropriate support***	The 17-year-old indigenous accused was arrested and interviewed in relation to sexual assault. He declined to answer questions in his first interview but made relevant admissions in a later interview. The defence objected to the interview on several bases including: the accused was not proficient in English; no interpreter was provided; the caution was administered after the interview; there was an inappropriate support person; allegations were not put; and various breaches of the *Anunga Guidelines*. Blokland J held:

person; and inappropriate police questioning and conduct	[56] The *Anunga* Guidelines suggest police ask a suspect to explain the caution in their own words as a mechanism for ensuring comprehension when a person is not a fluent English speaker. This a widely accepted form of language testing in respect of whether a person understands their rights. If the suspect cannot explain the caution in their own words, that may indicate an interpreter or other measures will be required. [63] Questions that are suggestive of an answer are not ideal in legal contexts even if asked of persons whose first language is English. The problems of suggestibility and gratuitous concurrence are significantly magnified for a person whose first language is not English and they are in a situation of dealing with a person in authority. This is well recognised in the *Anunga* Guidelines. In my opinion, given BL's age and his lack of English language proficiency, his answers to questions of a leading nature on important subjects cannot be relied on. [71] In the circumstances, I do not think it can be said that reasonable steps were taken to locate an appropriate support person. [72] The support person from the Register did not offer any of the support that might be expected, save that she was present. There was clearly ambiguity about BL's response to and comprehension of the caution. In the first record of interview by comparison, GR checked BL's response. There were no interventions by BS to ensure ambiguities present in BL's answers were clarified. Nothing was explained by BS when BL indicated he did not know an answer or how to say something. Nothing was said or done by BS to assist BL, save from speaking with him about general social or biographical matters during a break in questioning. [78] In my opinion the fact this was the second interview, the language issues already dealt with and the lack of any demonstrated understanding of the caution, lead to the conclusion that BL did not in any real sense understand the caution. This is evident from his poor explanation of most parts of it in the record of conversation itself. **Orders:** Interview excluded under s 90 *Evidence (National Uniform Legislation) Act 2011* (NT).

R v Thomas* [2006] VSCA 165** ***Terrorism ***Interview conducted overseas without legal advice and following solitary confinement; inducements; threats; and involuntary admissions***	The appellant was convicted in the Supreme Court of possessing a falsified passport and receiving funds from a terrorist organisation. The prosecution led evidence of inculpatory statements made by him during an interview conducted in Pakistan by the Australian Federal Police. That interview took place in the absence of legal advice and after solitary confinement. The Court (Maxwell P, Buchanan and Vincent JJA) held: [92] Obviously, the fact and circumstances of his detention, the various inducements held out and threats made to him, and the prospect that he would remain detained indefinitely, can be seen to have operated upon the mind of the applicant when he decided to participate in the 8 March interview. Whilst nothing occurred in the interview itself that could be seen to overbear the will of the applicant, there can be little doubt he was, at that time, subject to externally-imposed pressure of a kind calculated to overbear his will and thereby restrict, in a practical sense, his available choices and the manner of their exercise. His endeavours to persuade the interviewers of his good faith and the extent of his co-operation up to that point indicate that he was, as the trial judge found, seriously concerned about what would befall him if he failed to do so. [94] Admissions made in the circumstances we have described could not, in our view, be held to be voluntary. It follows that the evidence of the interview of 8 March 2003 should not have been admitted. This application should be allowed and the convictions set aside. **Orders:** Interview inadmissible. Appeal allowed. Convictions set aside.
R v Medcalfe* [2002] ACTSC 83** ***Armed robbery; assault; and stealing a taxi ***Intellectual deficit; unfit; and gratuitous concurrence***	The unfit accused was arrested and charged with armed robbery in relation to a taxi. Throughout the course of the police investigation, two formal recorded interviews were conducted. Both were objected to by the defence on the bases that the intellectual deficits of the accused were such that he lacked understanding and engaged in gratuitous concurrence. Higgins J held: [23] The accused, clearly to my mind, was not capable of deciding whether or not to answer questions nor to make any reasonable judgment as to whether it was advisable to speak or not. He was not capable of assessing the consequences. He clearly wished to impress on questioning police that he was quite normal and capable of answering questions as they wished them answered. [24] In the result I was not satisfied that the accused understood the caution. Indeed, I formed the view that he was responding in a manner that would, he thought, please the interviewer. That is not to say that it might not have been the truth. That is not to the point (see s 189 *Evidence Act 1995* (Cth)). That

	impression was consistent with his intellectual disability. Thus the records of interview were excluded as I was satisfied that it would have been unfair to use the evidence (see s 90 *Evidence Act 1995* (Cth)). Given the accused's mental incapacity it also seems to me that s 137 would also have required their exclusion. **Orders:** Both records of interview excluded under ss 90 and 137 EA (Cth).
R v McNiven* [2011] VSC 397** ***Murder	At trial for murder, the accused sought the exclusion of admissions she had made to police. The accused was a cognitively impaired woman who was intoxicated at the time of the offence and interview and did not receive proper legal advice. Objection was taken pursuant to s 85 EA (Vic). Lasry J held: [71] The accused is a person with cognitive abilities broadly within the mildly impaired to borderline range. As I said earlier, I accept the evidence of Mr Delaney. The accused has a full scale IQ of 68 albeit with a broad error band. The accused is an alcoholic and on 18 November 2009 she had consumed a large amount of alcohol. She may have suffered from memory blackouts as a result of heavy alcohol consumption. She was intoxicated when the incident occurred in the late afternoon of 18 November 2009. Her long-standing cognitive weakness, as diagnosed by Mr Delaney, was exacerbated by her alcoholism. [73] I am also of the opinion that in the later interview at 10.35 pm there is a significant chance that she was still affected by alcohol. In addition to that possibility, she appears to me to be tired and somewhat overwrought by the circumstances. Further, during the interview, she was not asked at any time by the police to describe in detail the means by which she ignited the fuel on Garry Stewart, and she did not volunteer a detailed explanation or attempt to demonstrate what happened so as to indicate that what she was saying was a product of her actual memory. In my view there is a significant prospect that the somewhat generalised answers she gave about what she did are not the product of her memory. [74] The Crown have not satisfied me on the balance of probabilities that the circumstances in which the admissions were made by the accused, were such as to make it unlikely that the truth of the admissions was adversely affected. **Orders:** Record of interview excluded under s 85 EA (Vic).

Tan Seng Kiah v The Queen* [2001] NTCCA 1** ***Drug Importation ***No legal or consular assistance provided despite request; and no extension of investigation time sought from magistrate***	The applicant was convicted of importing a commercial quantity of heroin into Australia. After his arrest he had sought consular and legal assistance, though inexplicably withdrew those requests 24 hours later. Neither were obtained in any event. He was interviewed two days after his arrest in circumstances where no application was made to a magistrate to extend the investigation period. He appealed asserting, *inter alia,* that his formal recorded interview with police ought to have been excluded. The Court (Martin CJ, Angel and Riley JJ) held: [48] The right to communicate with or to attempt to communicate with the consular office is contained in s 23P of the *Crimes Act* (Cth). There is an obligation imposed upon the investigating official to give the person arrested reasonable facilities to communicate with the consular office. In this case nothing was done. [49] Contacting the consular office by a detained foreign national provides an opportunity to report his or her circumstances, seek advice and assistance, provides a means of informing relatives and friends of his or her situation and all this in his or her native language. One need only contemplate the predicament of an Australian national held in custody in a foreign non-English speaking country without access to an Australian consular office to appreciate the importance of the right contained in s23P of the *Crimes Act*. [50] Similarly with regard to the request of the applicant to contact or attempt to contact a legal practitioner. By virtue of s 23G the investigating official is required as soon as practicable, to give the person reasonable facilities to enable the person to communicate with a legal practitioner. Again this did not occur. [67] The circumstances of the matter were such that the investigating authorities could easily have complied with the law. In relation to the contact with the Consulate nothing was done. In relation to contact with a legal practitioner only desultory efforts were made. In relation to the expiry of the investigation period it would not have been a difficult matter to make application for an extension of time. Even without an interpreter the applicant was able to communicate in English to some extent. Had the investigating authorities undertaken any one of those steps the applicant is likely to have obtained advice and it may well have been the case that the applicant would have declined to be interviewed or the interview and the resulting record would have assumed a different form. [72] It was therefore necessary for this Court to consider whether the proper exercise of the discretion would have led to the exclusion of the evidence. We have reviewed the relevant matters discussed

	above. Although the participation of the applicant in the interview was voluntary and the information obtained was reliable (in the relevant sense) there was unfairness to the applicant. That unfairness arose from the effective denial to him for a significant period of the rights created by the *Crimes Act* and, importantly, the advice that was available from the sources to which he sought access. He was detained for a lengthy period in breach of the requirements of the Act and without any effort being made to bring him before a Magistrate. To use the statement obtained in those circumstances against him was unfair. The proper exercise of the discretion would lead to the exclusion of the evidence. **Orders:** Record of interview inadmissible. Appeal allowed. Conviction quashed. New trial to be had.
R v Garth* (1994) 73 A Crim R 215 (SACCA)** ***Murder ***Intoxication***	The appellant was convicted of murder and appealed against his conviction on the basis that, *inter alia,* his electronically recorded interview with police ought not to have been admitted due to his level of intoxication. Olsson J (Prior J agreeing) held: 233-234: The video ran for well in excess of an hour and there was ample opportunity to study the appellant and his responses to questions. As I see the position, given the known blood alcohol concentration of the appellant at the time and the fact that, on occasions, his responses were somewhat studied, these points must be recorded: • In general it is obvious that the appellant understood what was being asked of him. What he said was generally coherent and responsive to the questions asked. At times his answers were actually rapid and spontaneous. • When asked to read three pages of the detective's hand written notes he did so without apparent difficulty and even identified errors in them related to the spelling of his name. He chuckled at the reference to his malodorous socks. He had no difficulty in signing each page. • During the interview he made many gestures with his arms and body and appropriately turned around to excuse language used to a female police officer present. His motor functions were at all times co-ordinated, controlled and appropriate to the circumstances. • Throughout the interview he exhibited a remarkable memory for various details of events of the day. Having viewed the video I entertain not the slightest doubt that, in the course of the interview, the appellant fully appreciated his situation, agreed to answer questions, understood what was asked of

	him and gave rational responses, the accuracy of a number of which were independently verified by other objective evidence. **Orders:** Electronically recorded interview properly admitted. Appeal dismissed.
R v Li* (1993) 2 VR 80 (VSC)** ***Murder ***Poor education; poor English; involuntariness; and compulsion***	The accused was arrested, interviewed and charged with murder. He objected to his formal recorded interview being admitted at trial, principally on the basis that it was not voluntary because his poor education and lack of knowledge of English made him feel compelled to participate in the interview process. Coldrey J held: 86: Having regard to the background of the accused (including his age, his level of English, and his lack of any prior contact with the police) and further, having regard to the circumstances preceding the interview on 23 September 1991 and the sequence of questions and answers in the interview itself, and finally having regard to the evidence of the accused about these questions and answers, I have concluded that the probabilities are that the accused did not understand the caution and associated rights detailed to him by the investigating police. 87: I am further of the view that the accused believed he had to answer the police questions. In reaching that conclusion I specifically make no adverse finding in relation to the bona fides of the interviewing police. The interview does not exhibit evidence of a deliberate disregard of the accused's rights or of any endeavour to intimidate, albeit there was some cross examination. As I indicated previously, it is easy to be wise in hindsight. What then are the legal implications of this finding? The breadth of the concept of voluntariness is often misunderstood. In my view it extends to and encompasses the situation where answers are given by an accused person who lacks understanding that such questions need not be answered, and, as a result, feels compelled to participate in the interview process. In such circumstances the interview will be non voluntary. **Orders:** Recorded interview excluded.

R v Pritchard* [1991] 1 VR 84 (VCCA)** ***Murder ***Inappropriate cross-examination by police in recorded interview***	The appellant was convicted of murder. He appealed on the basis that, *inter alia,* the trial judge erred by admitting his formal recorded interview during which police cross-examined him with a tone of ridicule and derision. He contended that it would be unfair to use the answers having regard to that impropriety. The Court (Crockett, McGarvie and Beach JJ) held: 92: **This reference by the judge to the modern practice of video recording interviews of suspects in relation to serious crimes is of real importance. It adds a new dimension to the matters to which regard must be had when a discretion is to be exercised** (emphasis added)**.** We, too, have viewed the video tape. We find no ground for criticism of the findings made by his Honour. The questioner's style was not aggressive. Nor did the manner of the interrogation result in the applicant's making incriminating answers. These considerations are relevant to the discretion: see Van der Meer. But they cannot be decisive. Obviously, a polite but clever cross examination may operate insidiously to induce unfairly the giving of incriminating answers. All these matters are part of the circumstances to which regard must be had in order to rule whether or not it would be unfair to use the accused's answers against him. He, of course, carries the burden of establishing that it would be. 93: The harm to him was that by the form of his questions the police officer was able to convey to the viewer of the tape the undisguised ridicule and derision he entertained about the answers of the applicant given in an endeavour to extricate himself from what obviously were real difficulties. The police would not at the trial have been permitted to express their incredulity or total disbelief in the applicant's answers. Why should they be allowed to do so by the form of questions chosen to be put to the applicant which can be, as they were, so vividly reproduced before the jury at trial? Cross-examination as such, though forbidden by the Chief Commissioner's Standing Orders, may often not lead to the exclusion of the answers it produces. But cross-examining questions that carry scornful overtones of disbelief are altogether another matter." **Orders:** The judge's discretion to admit the interview miscarried, however, appeal dismissed as appellant not deprived of opportunity of acquittal.

R v Bankowski* (1971) 18 FLR 179 (ACTSC)** ***Larceny ***Improper interrogation designed to extract confession; and scornful and forceful rejection of account of accused***	The accused was taken into custody and interrogated about the theft of a wallet. The constable cautioned the accused but proceeded to question him in a manner which made it clear to the accused that the constable was trying to extract a confession and the accused would not be released until he so confessed. The accused made relevant admissions and objected to his interview at trial. Smithers J held: 182: It is quite improper to cross-examine an accused person in custody. If the statements of the accused are flung back in his teeth with expressions of disbelief that is an improper form of cross-examination: see Williams J in ***Smith v The Queen* (1957) 97 CLR 100** at 130. If his statements are refuted by an intimation that some witness had stated to the contrary, this is an improper form of cross-examination. Whether or not it be regarded as cross-examination the statement to the accused that such and such witnesses say this or that against the accused in a material particular is an independent impropriety: see ***Smith v The Queen*** (at 129) per Williams J; see also ***R v Brown* (1931) 23 Cr App R 56**. If it is done to induce a confession, as it obviously was in this case, it amounts to pressure on the part of a person in authority and is calculated to deprive any supervening confession of the quality of voluntariness. 183: But it should be understood that in the context that an accused person's body is largely in the disposition of the examining constable and that this fact is inevitably much to the fore in the mind of any accused person, the confrontation method of questioning in which the accused's own statements are scornfully and forcefully rejected and evidence of alleged witnesses as to their falsity invoked, there is a grave danger that a supervening confession cannot be shown to be voluntary. **Orders:** Confession excluded.
R v Ireland* [1970] HCA 21** ***Murder ***Interrogation persisted in the face of repeated attempts to exercise right to silence***	The South Australian Attorney-General sought special leave to the High Court to appeal against a decision of the South Australian Court of Criminal Appeal setting aside the conviction of the respondent for murder and ordering a new trial of the charge against him. Part of the evidence relied upon by the Crown to convict the respondent of murder at trial were admissions made during a formal recorded interview where police persisted in questioning despite the respondent attempting to exercise his right to silence. Barwick CJ (McTiernan, Windeyer, Owen and Walsh JJ agreeing) held: [23] In ***Reg. v. Evans* (1962) SASR 303** referred to in the judgment delivered in the Supreme Court, the Supreme Court of South Australia in conformity with its earlier decisions in ***Lenthall v. Curran* (1933) SASR 248** and ***Bailey v. The Queen* (1958) SASR 301** decided that it was improper

	for police investigating the commission of a crime to persist in questioning a suspect after an indication that he did not wish to answer any more questions. In those cases, police questioning had so persisted but no statement or admission by the suspect had resulted. None the less the Court condemned the further questioning and excluded evidence of it in the exercise of what is now a clearly established judicial discretion to exclude evidence otherwise admissible because of the unlawfulness or unfairness of the manner of its discovery or creation. [24] In these cases a rule of practice for the conduct of police officers was laid down. I agree with them in so far as they do so. I also agree that the evidence of the questioning in those cases was rightly excluded but for the reason that it was irrelevant. But evidence of relevant statements or admissions obtained by conduct in breach of that rule will not for that reason become irrelevant and inadmissible. The breach of the rule will afford a ground for considering the exercise of a judicial discretion to exclude such evidence. **Orders:** Special leave refused with costs.
R v Amad **[1962] VR 545 (VSC)** ***Murder*** ***Involuntary admissions; inappropriate cross-examination by investigating police; and improper pressure placed on support person***	The accused was arrested and charged with murder. Throughout the investigation the police interrogated him four times and the defence objected to all of those interviews on the bases that the admissions were involuntary and it would be unfair to admit the evidence in circumstances where the police had improperly cross-examined the accused in those interviews. Smith J held: 547: From the account that I have given it is plain, in my view, that the first interrogation and the second were both conducted in a gravely improper manner and in clear contravention of the standing orders. Amad, as already stated, was a person in custody and consequently, even if he had been cautioned at the outset, it would have been improper and contrary to the standing orders to cross-examine him. To cross-examine him without a caution and in the style in which he was in fact cross-examined was, in my opinion, an impropriety of a grave character… Even if the questioner is concerned only to find out the truth and has no preconceptions and no desires as to where it will be found to lie, and even if he refrains from putting any words at all into the accused's mouth, he is nevertheless cross-examining in the sense relevant to the matters here in question when he proceeds, as in this present case, to submit the person in custody to a searching questioning in which disbelief is repeatedly expressed in his denials of complicity, his account of his movements is challenged and checked, he is confronted with evidence of its falsity, he is accused explicitly of lying, and his refusal of further information is met with a statement that there are questions which the interrogator must ask him. A person in custody is, by that fact, ordinarily under great stress, and for that reason the law for his protection holds it to be

	improper to subject him, even after caution, to any form of cross-examination the tendency of which is in fact to extort admissions or to overcome his mental resistance to making admissions. There is no exception from this principle in favour of an interrogator whose desire is solely to find out the truth and not to obtain evidence for use against the accused. It is what the interrogator does and not his state of mind that is decisive. 548: One of the dangers inseparable from such improper interrogations is that the accused, unless he is a person of wisdom and firm character, will be likely to try to escape from the pressures and anxieties of his position by resort to false denials and inventions; these in due time are proved to be untrue, and the resulting impairment of his credit is likely to cause the jury to reject truthful evidence given by him in his own defence. 549: In addition there was an independent impropriety of a grave character, which was a cause of the making of the admissions obtained in the third and fourth interrogations. When Amad's sister came to see him at the watchhouse after he had been charged with murder, the sergeant in charge of the watchhouse told her that her brother had been so charged, that he had not made a statement to the police, and that it would be better if he did do so. That this occurred has been sworn to by the sister, and it is uncontradicted and not disputed. The sister then told Amad that it would be best for him to make a statement to the police and tell them the truth of everything that had happened. Amad without demur agreed to do so. The sergeant in question was told, he rang for the interrogating officers, and the third and fourth interrogations followed. It seems obvious that the officer who advised the sister intended to influence Amad through her in the way in which Amad was in fact influenced, and the officer's conduct in that regard was a grave impropriety. **Orders:** Interviews excluded on a discretionary basis.

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