



Victorian
Law Reform
Commission

COMMUNITY LAW REFORM

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**Supporting Young People
in Police Interviews**
Background Paper

Published by the Victorian Law Reform Commission

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COMMUNITY LAW REFORM

Supporting Young People
in Police Interviews
Background Paper 7

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Call for submissions

The Victorian Law Reform Commission invites your comments on this Background Paper.

WHAT IS A SUBMISSION?

Submissions are your ideas or opinions about the law being reviewed. Submissions can be anything from a personal story about how a law has affected you, to a research paper complete with footnotes and bibliography.

The commission wants to hear from anyone who has experience with a law under review. It does not matter if you only have one or two points to make, we still want to hear from you.

HOW IS MY SUBMISSION USED ?

Submissions help the commission understand different views and experiences about the law it is researching. Information in submissions, along with other research and comments from meetings, is used to help develop recommendations.

HOW DO I MAKE A SUBMISSION?

A submission can be made in several ways: by completing the form on our website; in writing via email, mail or fax; over the phone or face-to-face. There is no particular format you need to follow, however, it would assist us if you address the consultation questions listed at the end of the paper.

Submissions can be made by:

- Online form: www.lawreform.vic.gov.au
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- Face-to-face: We will be contacting individual interested people to arrange appointments with our research team. However, if you would like to make an appointment to add to a written submission or to discuss any of the issues please contact us at the email address above.

ASSISTANCE IN MAKING A SUBMISSION

If you require an interpreter or another kind of assistance to have your views heard, please telephone the commission on (03) 8619 8619, TTY 1300 666 557 or 1300 666 555.

If you would like a copy of this paper in an accessible format please contact the commission.

CONFIDENTIALITY

When you make a submission you must decide how you want your submission to be treated. Submissions are either public, anonymous or confidential.

- Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read. The names of people or organisations that make submissions will be listed in the appendices of the report.
- Anonymous submissions can be referred to in our reports and made available to the public but the identity of the author/s will not be revealed.
- Confidential submissions cannot be referred to in our reports or made available to the public.

Please let us know your preference along with your submission. Our website submission form includes a tick box you can use to indicate your preference. If you do not tell us you want your submission treated confidentially we will treat it as public.

MAILING LIST

If you make a submission, we will add your details to our mailing list so that you will be notified of developments in the project. If you would like to be added to the mailing list, but do not wish to make a submission, please email us.

SUBMISSION DEADLINE
1 SEPTEMBER 2009

Introduction

One of the functions of the commission is to examine any matter it considers raises relatively minor legal issues of general community concern.¹ The commission refers to these types of inquiries as 'community law reform projects'.

In 2008, the Youth Referral and Independent Persons Program (YRIPP), the Centre for Multicultural Youth Issues (CMYI) and the Youth Affairs Council of Victoria (YACVic)² asked the commission to review the role of independent persons in police interviews with young people. This Background Paper describes the current law and the way it works in practice. It also contains questions about clarifying and improving the law.

Victorian law requires the police to arrange for an independent person to be present when they question a person under the age of 18 who is in custody and a parent or guardian is unavailable. This requirement is set out in section 464E of the *Crimes Act 1958* (Vic) (Crimes Act) which is discussed in more detail below.

Unlike the law in some other places, the Crimes Act does not define 'independent person' and nor does it contain an explanation of the role of that person. This lack of detail creates uncertainty about who can be an independent person and what the person should do when they attend a police interview of a young person.³

We seek your comments and views about how the independent persons scheme should operate. To allow time for the commission to consider your views before publishing a final report, please provide your submission by 1 September 2009.

ORIGINS OF THIS PROJECT

YRIPP, CMYI and YACVic suggested that the role, responsibilities and rights of independent persons in police interviews with young people should be clarified. The suggestion followed the publication in 2007 of a Churchill Fellowship report by YRIPP manager Sally Reid, titled *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews*. That report examined the system concerning independent persons in the United Kingdom and made recommendations for reform of Victorian law.⁴

In October 2008 the Attorney-General announced a major review of the Crimes Act in *Justice Statement 2*. In the 2009 Statement of Government Intentions it was stated that the Department of Justice would review 'the investigation powers contained in [that] Act to ensure that they are better organised, easier to understand, modern, coherent and more effective'.⁵ The commission anticipates that any recommendations for change arising from this project will be considered as part of the review of investigation powers.

OUR PROCESS

The commission has conducted preliminary research and consultation to identify some current problems in the operation of the independent persons scheme. We have also looked at relevant laws in other parts of Australia and overseas.

As well as encouraging submissions in response to this Background Paper, the commission will meet people with an interest in this issue. Meetings will be held with existing volunteers, young people, their parents and guardians, government agencies, community sector organisations and parallel volunteer programs such as Honorary Justices and Independent Third Persons⁶ to obtain views on the issues discussed in this paper.

After completing our consultations we will prepare a report to the Attorney-General which will be tabled in Parliament.

OUR AIMS

The commission has the following aims in this project:

- to identify and clarify the policy reasons for requiring the police to arrange for an independent person to be present when they are questioning a young person in custody and a parent or guardian is unavailable
- to examine whether the law in Victoria clearly implements this policy
- to consider whether the relevant law in any other places more clearly implements this policy
- to devise recommendations for improving the law in Victoria.

OVERVIEW

This Background Paper describes the current law in Victoria concerning the presence of independent persons in police interviews with young people. It outlines the relevant section in the Crimes Act, the instructions in the Victoria Police Manual and the legal rules concerning the admissibility of confessions.

In particular, it examines the responsibilities of police officers and the role of a parent, guardian or independent person who attends police questioning of a young person. Areas of uncertainty are highlighted.

The paper also briefly describes current practice in Victoria for independent persons in police interviews with young people. It outlines the YRIPP pilot scheme operating in some police stations and the alternatives to this program. It also identifies aspects of the current scheme where clarification is required.

- 1 *Victorian Law Reform Commission Act 2000* (Vic) s 5(1)(b).
- 2 The Youth Referral and Independent Persons Program (YRIPP) is a partnership between community organisations and Victoria Police which trains and supports independent persons. The Centre for Multicultural Youth (CMY) is a community-based organisation that advocates for the needs of young people from refugee and migrant backgrounds. The Youth Affairs Council of Victoria Inc (YACVic) is a body that deals with young people's issues in Victoria. It is an independent, not-for-profit organisation that derives its core funding from the Victorian Government Office for Youth.
- 3 'Young Person' refers in this report to persons under the age of 18 years of age. This replaces the more common reference in statute to a person under 18 as a 'child'. The *Children, Youth and Families Act 2005* (Vic) section 3 (1) states that a child is 'a person who is alleged to have committed an offence, a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court'.
- 4 The report is available at: <<http://www.cmy.net.au/Assets/1155/1/Churchillreportfinal.pdf>>.
- 5 See *Annual Statement of Government Intentions* (2009) 65 and *Attorney-General's Justice Statement 2: The next chapter* (2008) 13.
- 6 An independent third person (ITP), also referred to as a trained independent third person (TITP) in the Victoria Police Manual, is a volunteer trained to help people with a cognitive disability or mental illness when they are interacting with police as a victim, witness or alleged offender. Cognitive disability includes intellectual disability, acquired brain injury and dementia.

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THE CURRENT LAW

THE CRIMES ACT 1958 (VIC)

1. In 1988 the Crimes Act was changed to include a provision relating to police interviews with young people—section 464E.⁷ The 1988 reforms followed a report of the Consultative Committee on Police Powers of Investigation on Custody and Investigation (the Coldrey Committee). That report recommended changing the Crimes Act to give greater flexibility to police investigations and to introduce a system of checks and balances to ensure that the rights of individuals were recognised and safeguarded.⁸ The report acknowledged that in any investigative process the groups of people who are most vulnerable are those with language problems, those who may be intellectually impaired and those who are young.⁹
2. The reason for including section 464E in the Crimes Act was to clarify the rights of young people in police custody and to ensure compliance with common law rules concerning the admissibility of confessional evidence. Prior to this, the obligations which police faced when questioning a young person in custody were drawn from two places: the common law rules concerning the admissibility of evidence and from instructions in the Standing Orders (now Victoria Police Manual) issued by the Chief Commissioner of Police.¹⁰ Section 464E sought to give statutory force to some of these requirements.
3. Section 464E of the Crimes Act says:
 - (1) *If a person in custody is under the age of 18 years, an investigating official must not, subject to subsection (2), question or carry out an investigation under section 464A(2) unless—*
 - (a) *a parent or guardian of the person in custody or, if a parent or guardian is not available, an independent person is present; and*
 - (b) *before the commencement of any questioning or investigation, the investigating official has allowed the person in custody to communicate with his or her parent or guardian or the independent person in circumstances in which as far as practicable the communication will not be overheard.*
 - (2) *Subsection (1) does not apply if the investigating official believes on reasonable grounds that—*
 - (a) *the communication necessary to give effect to subsection (1)(a) would result in the escape of an accomplice or the fabrication or destruction of evidence; or*
 - (b) *the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed.*¹¹
4. In effect, section 464E(1) says the police must not question a person under 18 years of age who is in custody, or carry out an investigation in which the young person participates,¹² unless the person's parent or guardian is present, or if a parent or guardian is unavailable, an independent person is present. This section also says that a young person in police custody must be given the opportunity to communicate privately with the parent, guardian or independent person before the questioning or investigation begins.
5. Section 464E(2) says that these rules do not apply when the police believe on reasonable grounds that following these procedures would lead to the escape of an accomplice or the fabrication or destruction of evidence, or that delaying questioning would endanger other people.¹³
6. Section 464E does not deal with important matters such as the identity and role of the independent person and the circumstances in which the police should arrange for the presence of an independent person because a parent or guardian is not available.
7. Section 464E directs police officers¹⁴ not to question or investigate a person under the age of 18 years who is in custody unless a parent or guardian (or if not available, 'an independent person') is present.

8. The Crimes Act itself does not explain what happens if the police do not comply with section 464E. Legal rules concerning the admissibility of evidence contain the major sanction.¹⁵ A court *may* decide that an admission of guilt made by a young person cannot be used as evidence if the procedure set out in s 464E was not followed.
9. While the rules concerning the admissibility of evidence¹⁶ provide some additional detail about the identity and role of an independent person, they do not deal with a number of important issues.
10. In some circumstances police officers who do not follow the requirements of section 464E may also face disciplinary charges.¹⁷ Even though this is an important way of encouraging police officers to comply with section 464E, disciplinary proceedings do not assist our understanding of the identity and role of an independent person.

VICTORIA POLICE MANUAL

11. The Victoria Police Manual provides police officers with information about a range of matters, including how they should interview people suspected of having committed an offence. The Manual contains requirements for conducting interviews with specific groups of people, such as children and young people. Much of the relevant information is set out in directions from the Chief Commissioner which are referred to as 'Instructions'. While Instructions in the Victoria Police Manual are not part of the law, a court may look at whether these instructions were followed when deciding whether a confession should become evidence in a case.¹⁸
12. The current Victoria Police Manual contains an Instruction about interviewing people in police custody.¹⁹ It provides guidance about procedural matters and information about relevant laws. It states that 'the object of this Instruction is to ensure any admission or confession is voluntary, and that this is clear to any court'.²⁰
13. The Instruction deals specifically with interviews of young people. It contains directions about when to arrange for the presence an independent person during an interview. It says that this step should occur when 'the parent/guardian does not want to attend and does not nominate another person to attend for them' or when 'it is undesirable for a parent/guardian to be present'.
14. Interestingly, this instruction differs from section 464E in three respects. First, the instruction refers to the parent or guardian nominating another person to attend on their behalf. Section 464E does not contain any reference to a nominee of the parent or guardian.
15. Secondly, the instruction refers to circumstances when the parent or guardian 'does not want to attend'. Section 464E refers to the parent or guardian being 'not available' which seems to include a broader range of circumstances than not wanting to attend.
16. Thirdly, the instruction refers to arranging for an independent person when 'it is undesirable for a parent/guardian to be present'. Section 464E does not refer to the undesirability of the presence of a parent or guardian.
17. It is not clear what would happen if a police officer chose to follow the Instruction rather than section 464E if the admissibility of a confession by a young person was challenged in court.
18. Like the Crimes Act, the Instruction does not contain any information about the identity of the independent person. Unlike the Crimes Act, it does say something about the role of a parent, guardian or independent person who attends a police interview with a young person. The Instruction says that:

the presence of the parent/guardian or independent person is required to:

 - *provide emotional support to the child*
 - *ensure the child's evidence is accurately recorded*
 - *be able to present an independent account of the interview at any court proceedings (in the case of an independent person, a person who may be considered to have a real or perceived conflict of interest should generally not be used, such as a parent of a co-accused).*²¹

- 7 Section 464E was added to the Crimes Act in 1988 by the *Crimes (Custody and Investigation) Act 1988*.
- 8 Custody and Investigation, Report of the Consultative Committee on Police Powers of Investigation (Victorian Government Printer, 1986, [6.2].
- 9 Ibid.
- 10 See Neil Rees, 'The rules governing police interrogation of children' in J Basten et al (eds), *The Criminal Injustice System* (1982), 68.
- 11 Section 464E contains two other sub-sections which we have not quoted because it is unnecessary to do so for the purposes of this paper. Section 464E(3) extends the obligation to arrange for the presence of a parent, guardian or independent person to circumstances where a court makes an order concerning questioning of a young person who is already in custody for some other reason. Section 464E(4) provides that it is not necessary for the police to arrange for the presence of a parent, guardian or independent person when they are investigating or questioning a young person in relation to any offence under section 49(1) of the *Road Safety Act 1986*. Those offences involve driving a motor vehicle under the influence of alcohol or drugs.
- 12 An example is a re-enactment of an event which is recorded.
- 13 *Crimes Act 1958* (Vic) s 464E(2).
- 14 The term 'investigating official' is defined in section 460 of the Crimes Act to mean members of the police force and other officials who have statutory powers to prevent or investigate offences.
- 15 These rules are discussed briefly below at 19 onwards.
- 16 See 19.
- 17 s 69(1)(b) and s71(1) of the *Police Regulation Act 1958* (Vic).
- 18 We discuss this at 20.
- 19 Victoria Police Manual Instruction 112-3 section 1. (Originally issued 11 July 2003, last updated 7 July 2008).
- 20 Ibid.
- 21 Ibid, section 6.1.3.

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ADMISSIBILITY OF CONFESSIONS

19. As we have said, legal rules concerning the admissibility of evidence provide some additional detail about the identity and role of an independent person. The decision by Justice Bell concerning the operation of those rules in a case involving section 464E of the Crimes Act, *DPP v Toomalatai*,²² is particularly useful.
20. The common law says that only voluntary confessions may be admitted as evidence.²³ This rule is designed to ensure that any confessional evidence is reliable and to protect the privilege against self-incrimination.²⁴ The language used in an important High Court case concerning this common law rule helps define when a confession made by a young person is 'voluntary'. Justice Dixon said that a confession is not voluntary when the person who made it was 'overborne'.²⁵ This may occur as 'the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'.²⁶
21. As the prosecution must satisfy the court that any confession is voluntary,²⁷ the presence of a parent, guardian or third party during police questioning may assist a court to conclude that a young person's confession was not made as a result of being overborne, and was made in the exercise of a free choice to speak or remain silent without any threat or promise from a person in authority.²⁸
22. In *Toomalatai* Bell J clearly identified some of the policy reasons for having special statutory rules when the police question young people in custody:

[43] Special rules for the interrogation of young persons, such as those we now have here, can be found elsewhere in Australia and in many places overseas, including the United Kingdom, New Zealand and Canada. They all have as a common feature the requirement for the young person to have access to a parent or guardian, independent person, support person, appropriate adult or interview friend – the names may vary but the concept is essentially the same.

[44] The reason for this requirement, as identified by the Australian Law Reform Commission (ALRC), is to compensate for the inherent disadvantage experienced by young people when being interviewed by the police. The ALRC referred to a number of factors that contributed to this disadvantage, including a young person's vulnerability to pressure, socialisation to agree with adult authority figures, lack of verbal fluency and tendency to make false confessions under expert or hostile questioning.²⁹

23. The common law also gives the courts a discretionary power to exclude a voluntary confession in some circumstances. These are when the judge is satisfied, because of the circumstances of the case, that it would be unfair to the accused person to admit the confession, or when public policy considerations, such as the fact that the confession was illegally or improperly obtained, require its rejection.³⁰ Police failure to comply with special rules concerning the presence of a parent, guardian or independent person when a young person is questioned may cause a court to reject a voluntary confession on unfairness or public policy grounds.³¹

RESPONSIBILITIES OF AN 'INVESTIGATING OFFICIAL'

24. Section 464E of the Crimes Act requires an 'investigating official' to arrange for the presence of a parent, guardian or independent person when police wish to question³² a young person in custody. That person is defined in the Act as being 'a member of the police force or a person appointed by or under an Act (other than a member or person who is engaged in covert investigations under the orders of a superior) whose functions or duties include functions or duties in respect of the prevention or investigation of offence'.³³
25. In most instances the 'investigating official' will be the most senior police officer in any team which wishes to question a young person in custody. Two recent Victorian Supreme Court cases dealing with the admissibility of confessions made by a young person provide some information about what investigating officials must do in these circumstances.³⁴

26. Section 464E requires an investigating official to attempt to locate a parent or guardian of a young person in police custody before any questioning begins. If a parent or guardian is not available, the investigating official is obliged to find an independent person who, by implication, is supposed to act as a substitute for the parent or guardian.
27. The cases provide little information about the nature of the inquiries the investigating official must undertake and about how long he or she must wait before determining that a parent or guardian is 'not available'. In *R v JPD* Justice Vincent said that 'the availability of a parent or guardian is essentially a question of fact but it does involve the assessment of the practicability of arranging attendance in the particular circumstances having regard to the situation of the young person and the investigation'.³⁵

WHO IS AN INDEPENDENT PERSON?

28. Although the Crimes Act requires the police to arrange for the presence of an independent person, it says nothing about the identity of that person. There does not appear to be any fixed meaning of the term 'independent person'. The word 'independent' suggests the person should not be a police officer or other government official investigating the young person in custody.
29. The law requires an 'independent person' or 'support person' to be present at a number of different events. These references to an independent or support person in other laws may provide some guidance about the identity of the person who should be present when police interview a young person in custody and a parent or guardian is unavailable. For example, in some Australian jurisdictions support persons must be present when the police interview an Indigenous person or a person with an intellectual disability.³⁶
30. The presence of independent persons is also required in circumstances other than police interviews. In Victoria, for example, legislation requires an independent person to be present in the following circumstances:
- bail decisions by police officers concerning young people³⁷
 - the taking of fingerprints
 - the taking of forensic samples;
 - the registration of sex offenders
 - investigations under the *Major Crime (Investigative Powers) Act 2004* (Vic)
 - investigations under the *Whistleblowers Protection Act 2001* (Vic)
 - examinations under the *Police Integrity Act 2008* (Vic)
 - the administration of the *Disability Act 2006* (Vic).
31. At the federal level, the *Migration Act 1958* (Cth) requires the presence of independent persons in a number of migration related circumstances. The Commonwealth *Crimes Act 1914* (Cth) requires the presence of an 'interview friend' in police interviews with a young person.
32. There are no reported cases in which a court has sought to provide a detailed description of who can and who cannot be an independent person. In *Toomalatai* Bell J said that 'someone who starts out being independent can, by their conduct, become someone who is not'.³⁸ An example given of the circumstances in which this could occur is when the 'independent' person fails to intervene in response to inappropriate police behaviour.³⁹
33. While the identity of an 'independent person' was not considered in any detail in *Toomalatai*, Bell J concluded that a Justice of the Peace who had received no training about his role and who performed it poorly was an independent person for the purposes of section 464E. He also found that the independent person in this case was a 'person in authority' for the purposes of the rules concerned with the admissibility of confessions.⁴⁰

22 [2006] VSC 256.

23 *McDermott v R* (1948) 76 CLR 501.

24 See Andrew Ligertwood, *Australian Evidence* (4th ed, 2004) 638–9.

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

26 *Ibid.*

27 This common law rule is now found in s 464J(b) of the *Crimes Act 1958* (Vic).

28 See *Collins v R* (1980) 31 ALR 257 at 307; *R v Warrell* [1993] 1 VR 671 at 679–82.

29 [2006] VSC 256, [43]–[44] (citations omitted).

30 *R v Lee* (1950) 82 CLR 133 at 154.

31 See eg, *R v Pratt* (1965) 83 WN (NSW) 358.

32 As we have noted, the section also deals with investigations in which the young person participates, such as re-enactments. For ease of discussion, we refer only to 'questioning' in the text.

33 *Crimes Act 1958* (Vic), s 464. Other types of situations whereby an 'official' could question a young person with regards to a suspected offence includes an official under the *Fisheries Act 1995* (Vic).

34 *R v JPD* [2001] VSC 202; *DPP v Toomalatai* [2006] VSC 256.

35 [2001] VSC 202 at [12].

36 See eg, *Police Powers and Responsibilities Act 2000* (Qld) ss 420 and 422.

37 Section 346(8) of the *Children, Youth and Families Act 2005* (Vic), requires police to ensure a parent, guardian or an independent person is present when deciding whether to grant bail to a young person.

38 [2006] VSC 256 at [56].

39 [2006] VSC 256 at [56].

40 [2006] VSC 256 at [36].

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WHAT IS THE ROLE OF AN INDEPENDENT PERSON?

34. The Crimes Act does not explain the role of an independent person during police questioning of a young person in custody. Because section 464E(1)(b) of the Crimes Act requires the police to permit a young person to communicate with their parent, guardian or the independent person in circumstances where they will not be overheard *before the commencement of any questioning*, it is highly likely that one role of this adult is to permit the young person to seek and receive advice about what he or she should do in the face of police questioning.

35. Cases concerning the admissibility of confessional evidence provide some guidance about the role of an independent person. When dealing with this issue in *Toomalatai*,⁴¹ Bell J quoted with approval the following statement from a New South Wales (NSW) case⁴²:

*The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of police. That protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice ... Further, within appropriate limits, the adult might assist a timid or inarticulate child to frame his or her answer to the allegation. For example, the child might be reminded of circumstances within the knowledge of both the child and the adult which bear upon the matter.*⁴³

36. Bell J also supported the following comments made by Justice Wood in another NSW case dealing with the same statutory provision:

*That role [of the independent person] 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.*⁴⁴

37. In *Toomalatai* Bell J concluded that a confession made by a young person should be rejected on the discretionary ground of unfairness to the accused because the independent person had not properly fulfilled his role. This step was taken even though Bell J found the police had not behaved improperly during the interview.⁴⁵ Bell J referred to two major failings by the independent person:

- the occasion 'required the independent person to be positive and active in assisting, protecting and supporting' the young person yet the independent person was 'judgemental and admonishing before the interview, which is active in entirely the wrong way'.⁴⁶
- the independent person 'was passive in the interview itself, when his active support was most needed'⁴⁷; 'the role of this person is intended to be positive and active, not that of a silent observer'.⁴⁸

CHANGES UNDER THE NEW EVIDENCE ACT

38. While these statements about the admissibility of confessions help define the role of an independent person, their usefulness is unclear because the law in this area is about to change.

39. The *Evidence Act 2008* (Vic) will shortly replace most of the common law rules of evidence. The parts of the Evidence Act concerning admissibility of confessional evidence are not precisely the same as the common law rules. This means that courts may have to consider some different matters when determining whether section 464E of the Crimes Act has been complied with and whether any confessional evidence should be rejected because of non-compliance with the requirements of section 464E.

40. Section 84 of the Evidence Act says that an admission⁴⁹ cannot be used as evidence unless the court is satisfied it was not influenced by oppressive conduct. Also, section 85(2) says an admission cannot be used as evidence unless the circumstances in which it was made make it unlikely that the truth of the admission was adversely affected. In deciding that question the court must take into account the age of the person who made the admission.⁵⁰ A failure to comply with the obligations in section 464E of the Crimes Act may make an admission inadmissible under these rules.
41. Section 90 of the Evidence Act gives a court a broad discretion to exclude admissions on the basis of unfairness. Also, section 138 permits a court to exclude any evidence which has been improperly or illegally obtained. The failure of an investigating official to comply with section 464E of the Crimes Act, or the failure of an independent person to properly fulfil his or her role may cause an admission to be excluded for unfairness, or because it was improperly or illegally obtained.

WHAT IS THE ROLE OF A PARENT OR GUARDIAN?

42. It seems likely that an independent person who is present when police interview a young person in custody is supposed to play a role similar to a parent or guardian because he or she is a substitute for that person. There is, however, no statutory explanation of the role of a parent or guardian in these circumstances and the past cases do not provide any useful guidance.
43. Many difficult questions arise when considering the role of a parent or guardian:
- Does the parent or guardian have the same role as the independent person?
 - Does section 464E of the Crimes Act (or some other law) permit a parent or guardian to nominate another person to attend the police interview on their behalf as the Victoria Police Manual suggests?
 - Does that nominated person have the same role as the independent person?
 - Would a confession be inadmissible if a parent or guardian (or a nominated person) behaved in the same way as the independent person in *Toomalatai*, who was passive and critical of the young person?
44. Many parents and guardians may be unaware of the role which they are expected to play if asked to be present during police questioning of their child. For example, it has been noted that ‘the presence of a parent or guardian, whilst ensuring that a child is not physically abused or threatened does not necessarily ensure the child is effectively informed of his or her rights’.⁵¹
45. In some instances a parent or guardian, like the independent person in *Toomalatai*, may be critical of the young person or remain passive during the interview. In others, the parent or guardian may themselves feel overborne by the interview, or place pressure on the young person to confess to something he or she may or may not have done.

41 [2006] VSC 256 at [61].

42 *Children (Criminal Proceedings) Act 1987* (NSW) s 13.

43 *R v H (A Child)* (1996) 85 A Crim R 481, 486.

44 *R v Phung and Huynh* [2001] NSWSC 115, [36].

45 [2006] VSC 256 at [89].

46 [2006] VSC 256 at [78].

47 [2006] VSC 256 at [78].

48 [2006] VSC 256 at [86].

49 The *Evidence Act 2008* (Vic) uses the term ‘admission’ to include what is referred to at common law as a ‘confession’.

50 *Evidence Act 2008* (Vic) s 85(3)(a).

51 Rees, above n 9, 69.

Supporting young people in police interviews



THE CURRENT PRACTICE

46. At present there are two quite separate schemes for arranging the presence of an independent person during police questioning of a young person: those police stations involved with the YRIPP pilot and those which are not.
47. The YRIPP pilot provides volunteers to 107 police stations in Victoria; 96 stations are currently using the scheme with the remainder set to start in late 2009. Those stations not covered by the YRIPP pilot use known members of the community who are willing to act as independent persons. YRIPP only covers approximately one third of Victoria's police stations. There is no statutory obligation on police to use YRIPP.
48. Non-YRIPP volunteers include volunteers from the community, officers from the Central After Hours and Bail Placement Service (CAHABPS)⁵² and 'trained independent third person' volunteers (TITPs) from the Office of the Public Advocate in the case of persons with cognitive impairments.⁵³ Independent persons are reimbursed 'out of pocket' expenses for travel but do not receive any payment for attending interviews.

BACKGROUND TO YRIPP

49. YRIPP was originally established to address issues concerning the overrepresentation of young people in the criminal justice system. It was established as a partnership program of CMYI, YACVic, the Federation of Community Legal Centres, the (then) Crime Prevention Victoria (Department of Justice), the (then) Department of Immigration and Multicultural and Indigenous Affairs, the Victorian Aboriginal Legal Service and Victoria Police.
50. The YRIPP pilot program commenced in 2004 to operate in nine, later 15, police stations as an 18 month pilot. In July 2007 the Victorian Government provided further funding for two years to expand the YRIPP pilot to 103 police stations across Victoria. Funding for the program has been extended until June 2010.⁵⁴
51. The YRIPP program, which has about 300 volunteers, aims to work with and improve the independent person service provided to young people in custody and to divert young people—including refugee, newly arrived and Indigenous young people—from progression to higher levels of the criminal justice system by referring them to appropriate community support services to address the risk factors associated with offending.
52. During the five month period between July and November 2008 YRIPP volunteers undertook 714 interviews. The program has expanded significantly since July 2008 and in the first 6 months of 2009, it is estimated that the program provided support in approximately 1000 interviews.

TRAINING AND GUIDELINES

53. YRIPP volunteers undertake 25 hours of training and assessment divided into seven modules which consist of written work, face to face learning and self-directed activities.⁵⁵ Volunteers working outside YRIPP do not receive any formal training.
54. A key difference in the roles between YRIPP and non-YRIPP stations is the referrals provided by YRIPP independent persons which aim to introduce young people to support networks and services.
55. YRIPP independent persons are provided with a manual and follow-up refresher training and support groups. These are based on YRIPP regions of which there are three in rural Victoria and five in metropolitan locations.⁵⁶
56. YRIPP asks all volunteers to sign a voluntary code of conduct. The YRIPP regional coordinators collect police feedback forms which record police satisfaction with the independent person's timeliness and conduct. If there are any issues flagged by the police in the feedback form the YRIPP will follow this up with both parties.

57. If, following investigation, YRIPP believe the independent person has behaved improperly further training may be offered and the independent person's performance monitored. If additional training does not remedy the problem the independent person may be asked to resign. YRIPP do not currently collect feedback information on the independent person's performance from the young person.

PROCESS FOR ALLOCATING AN INDEPENDENT PERSON

58. If a young person is brought to a station within the YRIPP pilot area the police phone the general 1300 YRIPP number and request an independent person.⁵⁷
59. The 1300 YRIPP line then takes basic details and provides a triage support allocating either an independent person, or in the case of a young person with a cognitive impairment, an independent third person (ITP).⁵⁸ The YRIPP independent person will be allocated based on a roster of availability which is coordinated by the YRIPP regional coordinator. The YRIPP line also asks how many young people are to be interviewed and whether the young person has requested legal advice or whether legal advice has been offered to them. If legal advice is sought the YRIPP line will contact Victoria Legal Aid's youth telephone advice line.
60. At this stage the police will also need to determine if an interpreter is required or if the young person is a foreign national, in which case they will be required to make arrangements to communicate with a consular office.⁵⁹ The police are also required to speak with the Victorian Aboriginal Legal Service if the young person identifies as having Indigenous heritage.⁶⁰
61. Once it has been established that there is no conflict of interest between the YRIPP volunteer and the young person,⁶¹ the independent person will contact the police informant and give an approximate time of arrival at the station. The YRIPP independent person then attends the station, speaks with the young person prior to interview and supports the young person during the interview.
62. If the station is not within the YRIPP pilot area the 'interviewing officer' or staff at the station can call upon a list of local people who are available to act as independent persons.

ISSUES WITH THE CURRENT SCHEME

63. As we have already noted, the law does not define an 'independent person' and nor does it provide much guidance about the role of an independent person. This has led to uncertainty about who can be an independent person and what that person should and should not do when they attend police interviews. While the cases we have discussed provide some assistance, many questions remain unanswered.
64. Some aspects of the current scheme where clarification is desirable include:
- the circumstances in which police should seek an independent person rather than a parent or guardian
 - the pool from which independent persons should be chosen
 - the positive obligations of an independent person (eg, when they must do something like informing a young person about rights, or advising a young person about how to exercise those rights)
 - the negative obligations of independent person (eg, when they cannot do something like express an opinion about the alleged conduct)
 - the role of an independent person as compared to that of the actual parent or guardian
 - whether a lawyer can also act as an independent person.

- 52 CAHABPS is administered by the Department of Human Services.
- 53 In addition, when a young Indigenous person is brought in for interview at a police station the police must enter this data on e-Justice that automatically informs the Victorian Aboriginal Legal Service (VALS), in addition a phone from the Record Services Division notifies VALS. In these instances a Client Service Officer (CSO) would speak with the young person over the phone, if the CSO is able to attend the interview then an independent person would not be called (either YRIPP or other). In these cases the presence of the CSO would satisfy the requirement for an independent person. If the CSO were unable to attend then an independent person should be called (either through YRIPP or other).
- 54 Information provided in email from Justice Policy, Department of Justice, 14 July 2009.
- 55 Centre for Multicultural Youth Issues, *YRIPP Independent Person Procedure Manual* (2008).
- 56 The four rural regions are Northern Victoria, Western Victoria, Eastern Victoria and the five metro regions are SouthEast, Inner City and Bayside, Western, Northern and Eastern.
- 57 At present there are no sanctions imposed if the station chose not to use the YRIPP system.
- 58 If the young person has a cognitive impairment they are diverted to the independent third persons program (ITP) run by the Office of the Public Advocate. This program refers ITPs to young people and adults with cognitive impairments. The scope of this program is broader in that ITPs are provided to those accused of an offence as well as victims and witnesses.
- 59 Victorian Police Manual Instruction 112-1 section 6.5.1 states: 'in the case of children an interpreter must be provided where the parent/guardian or independent person cannot speak or understand English'. 6.5.2 pertains to the rights of foreign nationals.
- 60 Ibid, 113-1 section 4.3.5.
- 61 When YRIPP contacts the police informant they ask for the young person's name, in addition to estimating their time of arrival. This ensures their attendance is in line with the YRIPP conflict of interest policy. This is defined in section 16.8 of the YRIPP manual as 'a situation where a person has a personal interest in a matter, the subject of a decision or duty of the person' or 'a situation where interest, principal, right, advantage or position of one individual or business entity, whether directly or in begin represented by another, comes into discord, challenge, dispute or harm with those of another'. This conflict can be 'actual or perceived, direct or indirect, financial or personal'. Centre for Multicultural Youth Issues, above n 55, 78.

Supporting young people in police interviews



SCHEMES IN OTHER JURISDICTIONS

65. All Australian jurisdictions have laws dealing with the presence of independent persons during police questioning of young people in custody. These laws are considered briefly in the Appendix, as are the schemes in a number of other countries.

HUMAN RIGHTS ISSUES

66. Various human rights instruments refer to the fact that young people are particularly vulnerable when in the criminal justice system and require additional measures for their own protection.
67. In the Appendix we also briefly consider relevant parts of the Victorian Charter of Human Rights and Responsibilities, the Convention of the Rights of the Child and the International Covenant on Civil and Political Rights.

WHERE TO FROM HERE?

68. The commission will use submissions, information obtained from consultations, and research to write a final report with recommendations. The report will be provided to the Attorney-General by the end of 2009 and it will become a public document when it is tabled. It is then up to government to decide how it wants to proceed.

Appendix

THE LAW IN OTHER JURISDICTIONS

NEW SOUTH WALES

1. The New South Wales scheme differs from Victoria in a number of aspects including clear sanctions for non-compliance within the legislation. There is a statutory presumption in favour of any confession not being admissible in evidence whenever the police do not comply with the requirement that a parent or other suitable person be present during police questioning of a young person. Unlike Victoria the role of this person is described in legislation and the police are required to provide the parent or other suitable person with information about their role and of the rights of the young person being questioned.
2. The *Children (Criminal Proceedings) Act 1987* (NSW) requires a 'person responsible' for a child, such as a parent, or an independent adult, to be present at a police interview with a child.¹ If such a person is not present, any admission made by the child is not admissible, unless there was a proper and sufficient reason for their absence from the interview and the court decides in the exercise of a discretionary power to admit it.²
3. *The Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) states that any detained person who is a 'vulnerable person' is entitled to have a 'support person' present during any investigative procedure.³ 'Vulnerable person' includes a child⁴ who is defined as a person under the age of 18 years.⁵
4. In the case of a child, 'support person' is defined as a parent or guardian, a person who has the lawful custody of the child, a person who is responsible for the care of the child, or an adult other than a police officer who has the consent of the child's parent or guardian.⁶ If the child is aged 14 years or over, a 'support person' may be an adult (other than a police officer) who has the consent of the child or a legal practitioner of the child's choosing.⁷ A child cannot waive their right to a support person.⁸
5. The *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) also sets out the role of the 'support person'. The police must inform the support person that they are not merely restricted to acting as an observer during an interview and may, among other things, assist and support the detained person, observe whether or not the interview is being conducted properly and fairly, and identify communication problems with the detained person.⁹ In addition, the police must give the support person a summary of the detained person's rights¹⁰ under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).¹¹

QUEENSLAND

6. The Queensland scheme is similar to Victoria; however, the police are required by legislation to provide an explanation of the role to the child's 'support person' prior to interview.
7. The *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer must not interview an Aboriginal or Torres Strait Islander, a child or a 'person with impaired capacity'¹² unless the person or child has been allowed to speak to a 'support person' and the support person is present during the interview.¹³
8. A 'support person' is defined as a parent or guardian, a lawyer, a person acting for the child who is employed by an agency whose purpose is to provide legal services, or an adult, relative or friend of the child who is acceptable to the child.¹⁴ If the child is an Aboriginal or a Torres Strait Islander and none of the above persons are available, a 'support person' may be a person whose name is included in the list of support persons and interpreters, or, if no such person is available, a justice of the peace other than a police officer.¹⁵
9. Before a police officer questions a young person in the presence of a support person, the police officer must give the support person information in an approved form about the role of support persons and ensure that the person understands the nature of the support person's role.¹⁶ That information must include, among other things, a summary of section 428 of the *Police Powers and Responsibilities Act 2000* (QLD)¹⁷ and a statement that the support person must act in the best interests of the relevant person.¹⁸ The information must also include a statement that, unless the support person is a lawyer, the support person must not provide legal advice to the relevant person but may ask the relevant person questions to ensure the relevant person understands:

- that the person may ask for a lawyer to be present
- that the person is not obliged to say anything during questioning
- that anything the relevant person says during questioning may be used in evidence
- what is said by a police officer during questioning.¹⁹

SOUTH AUSTRALIA

10. The *Young Offenders Act 1993* (SA) provides that if a child is arrested and is to be interviewed, all reasonable steps must be taken to notify the guardian of the child and to invite the guardian to be present at the interview.²⁰ If a guardian is not available, an adult nominated by the child who has had a close association with the child or has been counselling, advising or aiding the child must be notified and invited to be present at the interview.²¹
11. In addition, under the *Summary Offence Act 1953* (SA), where a child has been apprehended and does not nominate a solicitor, relative or friend to be present during an interrogation or investigation, or where such as person is unavailable or unwilling to attend, the child must not be subjected to an interrogation or investigation until the police have secured the presence of:
- a person nominated by the Chief Executive Officer within the meaning of the *Family and Community Services Act 1972* (SA) to represent the interests of children subject to criminal investigation
 - where no such person is available, some other person (not being a minor, a police officer or an employee of the Police Department) who, in the opinion of the police officer, is a suitable person to represent the interests of the child.²²

WESTERN AUSTRALIA

12. The *Young Offenders Act 1994* (WA) provides that before a child may be questioned, the police must ensure a 'responsible adult' has received notice of the intention to question the child.²³ 'Responsible adult' is defined as a parent, guardian, or other person having responsibility for the day-to-day care of the child.²⁴

NORTHERN TERRITORY

13. The *Youth Justice Act* (NT) provides that when a child is arrested, a police officer must not interview the child in respect of the offence, or cause the child to do anything in connection with the investigation of the offence, unless a 'support person' is present.²⁵ 'Support person' is defined as a responsible adult in respect of the youth, a person nominated by the youth or a legal practitioner acting for the youth.²⁶ Unless acting in his or her capacity as a responsible adult in respect of the

- 1 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a).
- 2 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1); The Commissioner of Police may arrange for the maintenance of lists of adults who are willing to be present in these circumstances, *Children (Criminal Proceedings) Regulation* (NSW) r 5.
- 3 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 27(1).
- 4 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 24(1).
- 5 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 23.
- 6 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 26(a).
- 7 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 26(a).
- 8 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 29.
- 9 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 30(1).
- 10 These include the maximum detention period, the right to remain silent, the right to communicate with a friend, relative, guardian, independent person or legal practitioner and the right to medical attention.
- 11 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 30(2).
- 12 'Person with impaired capacity' means a person whose capacity to look after or manage his or her own interests is impaired because of either of the following— (a) an obvious loss or partial loss of the person's mental functions; (b) an obvious disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour; *Police Powers and Responsibilities Act 2000* (Qld) sch 6.
- 13 *Police Powers and Responsibilities Act 2000* (Qld) ss 420, 421 and 422.
- 14 *Police Powers and Responsibilities Act 2000* (Qld) sch 6.
- 15 *Police Powers and Responsibilities Act 2000* (Qld) sch 6.
- 16 *Police Powers and Responsibilities Regulation 2000* (Qld) cl 44A(1).
- 17 Section 428 of the *Police Powers and Responsibilities Act 2000* (Qld) sets out circumstances in which a person may be unable to properly perform the role of a support person. Those circumstances are: (a) the person's ability to perform the role is substantially impaired by the effect of something the person has ingested, for example, alcohol, a drug or a potentially harmful thing, to the extent that the person is unable to act in the best interests of the relevant person; (b) the person is a person with an

- impaired capacity and the person's impairment prevents the person from acting in the best interests of the relevant person; (c) the person is, or appears to a police officer to be, unwilling to perform the role of a support person because of illness, injury, pain, tiredness or a similar cause; (d) the person has an affiliation, association or other relationship with a police officer questioning the relevant person; (e) the person has a relationship of authority with the relevant person that may prevent the person from acting in the best interests of the relevant person; (f) the person is a victim of the offence for which the relevant person is being questioned or a friend of the victim; (g) the person witnessed the commission of the offence for which the relevant person is being questioned.
- 18 *Police Powers and Responsibilities Regulation 2000* (QLD) cl 44A(2).
 - 19 *Police Powers and Responsibilities Regulation 2000* (QLD) cl 44A(2).
 - 20 *Young Offenders Act 1993* (SA) s 14.
 - 21 *Young Offenders Act 1993* (SA) s 14.
 - 22 *Summary Offence Act 1953* (SA) s 79A(1a).
 - 23 *Young Offenders Act 1994* (WA) s 20(1).
 - 24 *Young Offenders Act 1994* (WA) s 3.
 - 25 *Youth Justice Act* (NT) s 18(2).
 - 26 *Youth Justice Act* (NT) s 35(1).

Appendix

youth, a police officer, a probation officer or a person employed at a detention centre cannot be a support person.²⁷ If it is not practicable for any of the above persons to be present within two hours, the police officer may call upon a person from the register of support persons.²⁸

AUSTRALIAN CAPITAL TERRITORY

14. The *Crimes Act 1900* (ACT) provides that a police officer must not interview a child about an offence, or cause the child to do anything in relation to the investigation of an offence, unless an adult in one of the following categories is present:
- a parent
 - someone else who has daily care responsibility for the child
 - a family member who is acceptable to the child
 - a lawyer acting for the child
 - or another suitable person who is acceptable to the child.²⁹
15. The *Crimes Act 1900* (ACT) states that an example of ‘another suitable person’ is a person trained by the public advocate to attend interviews of children and young people.³⁰ If none of the above persons is available, someone else who is not a police officer and has not been involved with the investigation of the offence must be present.³¹

TASMANIA

16. The *Criminal Law (Detention and Interrogation) Act 1995* (Tas) provides that every person taken into custody may be detained by a police officer for a reasonable time for the purposes of questioning the person, or carrying out investigations in order to determine his or her involvement in relation to an offence.³² In determining what constitutes a reasonable time, consideration must be given to the time during which questioning is deferred to allow the person to communicate with a legal practitioner, friend, relative, parent, guardian or independent person or, in the case of a child, a person called by the police officer conducting the investigation to accompany the child.³³

COMMONWEALTH

17. The *Crimes Act 1914* (Cth) provides that if an investigating official interviews a person for a Commonwealth offence and believes on reasonable grounds that the person is under 18, the official must not question the person unless an ‘interview friend’ is present, and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which the communication will not be overheard.³⁴ ‘Interview friend’ in the case of a child is defined as a parent, guardian, or legal practitioner, and if none of those persons are available, a relative or friend of the child who is acceptable to the child.³⁵ If none of the above persons is available, an ‘interview friend’ must be an independent person.³⁶

INTERNATIONAL COMPARISONS

UNITED KINGDOM

Legislation

18. The *Police and Criminal Evidence Act 1984* (UK) establishes a legislative framework which introduces Codes of Practice regulating police powers and safeguards around stop and search, arrest, detention, investigation, identification and interview.³⁷ *Code of Practice – Code C Detention, treatment and questioning of persons by police officers* (Code C), provides a formal role for an ‘appropriate adult’ as an independent third party brought in to provide special assistance to certain ‘vulnerable’ suspects. These suspects may be:
- juveniles under the age of 17³⁸
 - adults believed to be ‘mentally disordered’³⁹ or ‘mentally vulnerable’.⁴⁰

19. The Notes for Guidance (Guidance)⁴¹ to Code C explains that people falling within these categories, although ‘often capable of providing reliable evidence’, may be ‘particularly prone’ to provide information which may be ‘unreliable, misleading or self-incriminating’.⁴² The Guidance observes:

*special care must be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person’s age, mental state or capacity.*⁴³

20. When any vulnerable suspect is detained, the police must inform the appropriate adult about the grounds for detention ‘as soon as practicable’ and ask them to come to the police station to see the detainee.⁴⁴ Where a juvenile is detained, the police must also notify a person responsible for their welfare (who may or may not also be acting as the appropriate adult), inform them where and why they have been arrested, and ask them to come see the detainee.⁴⁵ The right to have an appropriate adult present is separate to, and operates in conjunction with, the right to speak to a lawyer.

21. A vulnerable suspect must not be interviewed or make a statement about involvement or suspected involvement in a criminal offence in the absence of an appropriate adult except in certain limited circumstances and where the interview ‘would not significantly harm the person’s physical or mental state’.⁴⁶ Prior to interview, procedures involving cautioning or informing a suspect of his or her rights must take place, or be repeated, in the presence of the appropriate adult. These procedures include:

- informing the suspect of the right to have someone informed of their arrest
- informing the suspect of the right to consult privately with a solicitor and the availability of free independent legal advice
- informing the suspect of the right to consult the Codes of Practice
- recording the reasons for arrest.

22. The suspect must also be advised that the duties of the appropriate adult include giving advice and assistance, and that they can consult privately with the appropriate adult at any time.⁴⁷

Who can be an appropriate adult?

23. Code C sets out who may be an appropriate adult. In the case of a ‘juvenile’, an appropriate adult can be a parent, guardian, or social worker, or otherwise ‘some other responsible adult’ who is not a police officer (or employed by the police).⁴⁸

27 *Youth Justice Act* (NT) s 35(4).

28 *Youth Justice Act* (NT) s 35(5). Section 14 of the *Youth Justice Act* (NT) provides that: ‘(1) The Youth Justice Advisory Committee must establish and maintain a register of persons appropriate to be support persons. (2) The register must include persons who are suitable to be support persons for Aboriginal youth. (3) The register must not include youths, police officers, probation officers or persons who are employed at a detention centre.’

29 *Crimes Act 1900* (ACT) s 252G(2)(a).

30 *Crimes Act 1900* (ACT) s 252G.

31 *Crimes Act 1900* (ACT) s 252G(2)(b).

32 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 2(a).

33 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(f).

34 *Crimes Act 1914* (Cth) s 23K(1).

35 *Crimes Act 1914* (Cth) s 23K(3).

36 *Crimes Act 1914* (Cth) s 23K(3).

37 Although these Codes of Practice are issued by the Home Secretary pursuant to *Police and Criminal Evidence Act 1984* (UK) (PACE) ss 60, 66, 67, a draft must be laid before each House of Parliament.

38 This is contrary to the treatment of 17 year olds as children for the purposes of the *Children’s Act 1989* (UK).

39 Defined in the *Mental Health Act 1983* (UK) s 1(2) as ‘mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability’.

40 ‘Mentally vulnerable’ applies to any detainee who, because of their mental state or capacity may not understand the significance of what is said, questions or replies: Notes for guidance 1G.

41 Note that although they ‘amplify’ the Codes, and are made available with them at police stations, the legal status of the ‘Notes for guidance’ is unclear: see M. Zander, *The Police and Criminal Evidence Act 1984* (3rd Ed, 1995) 173. The Codes state that they are not technically part of the Code.

42 Although *Code of Practice – Code C Detention, treatment and questioning of persons by police officers* (‘Code C’) also contains provisions relating to other ‘vulnerable suspects’, including persons who do not speak English, persons with a hearing disability, or persons who are unable to appreciate the significance of questions and answers (for eg, because of intoxication or illness), an appropriate adult is not required in these circumstances, unless the person is also a juvenile or mentally disordered/vulnerable.

43 Notes for Guidance to Code C, 11C.

44 Code C, [3.15].

45 Code C, [3.13].

46 The circumstances arise where the consequences of a delay in interviewing the suspect would be likely to lead to interference/harm to evidence connected with the offence, people, or damage to property, or where it could alert other people suspected of committing an offence, or hinder the recovery of property: Code C, [11.11], [11.15].

47 Code C, [3.18].

48 Code C, [1.7(a)].

Appendix

24. In the case of a person who is ‘mentally disordered’ or ‘vulnerable’, an appropriate adult can be a relative, guardian or other person responsible for their care or custody, a person experienced in dealing with mentally disordered/vulnerable people or ‘some other responsible adult’ who is not a police officer (or employed by the police).⁴⁹
25. The Guidance provides some indication of persons who may not be ‘appropriate’ adults, including: someone suspected of involvement in the offence or investigation, someone who is a victim or witness, or someone who has received admissions.⁵⁰ The Guidance also notes that parents who are estranged from the juvenile should not be asked to act as the appropriate adult when the juvenile expressly objects to their presence.⁵¹ These rules reflect English cases where an adult has not been considered ‘appropriate’, resulting in evidence obtained during an interview being inadmissible.⁵²
26. The *Crime and Disorder Act 1998* (UK) places a statutory duty on local authorities to provide youth justice services appropriate for their area, including provision of ‘persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers’.⁵³ This is implemented through ‘Youth Offending Teams’⁵⁴ (comprised of representatives from the police, probative, social, health, and other welfare services) who are responsible for putting in place local appropriate adult schemes.⁵⁵ Increasingly, ‘professional’ appropriate adults fulfil this role, on a volunteer basis.
27. The Home Office has recently gone further and proposed that the role of the appropriate adult should be expressly limited to those who have received adequate training. Although parents, guardians or other relatives or friends of the suspect should be encouraged to attend the police station, the Home Office has proposed that their attendance should be in addition to a suitably trained appropriate adult.⁵⁶
28. There is no equivalent statutory provision for any agency to provide the service for vulnerable adults, only young persons.

Role of the appropriate adult

29. The role of the appropriate adult is not a passive one under the UK framework. Code C provides for certain rights and duties in relation to this role. When an appropriate adult is present at a police interview they must be informed that their role is not to act only as an observer but to:
 - advise the person being interviewed
 - observe whether the interview is being conducted properly and fairly
 - facilitate communication with the person being interviewed.⁵⁷
30. ‘Advising’ does not include legal advice. The appropriate adult is required, however, to advise the young person about obtaining legal advice.⁵⁸ The appropriate adult also has the right to ask for a solicitor to advise the young person, even though a juvenile indicates they do not want legal advice, if it would be in the young person’s best interests to obtain legal advice.⁵⁹
31. The Guidance states that a person should have the opportunity to consult privately with a lawyer without the appropriate adult being present.⁶⁰ Unlike discussions with a lawyer, communications with the appropriate adult are not subject to legal privilege.

Sanctions

32. Failure to comply with a Code may lead to disciplinary proceedings.⁶¹ The Codes are admissible in evidence, and the court may consider them when determining any question where they are relevant.⁶²
33. In a criminal trial, a judge may refuse to admit evidence where a Code has been breached if it appears that the breach may adversely affect the fairness of the trial.⁶³ The failure to provide a young person with an appropriate adult has been considered a ‘significant and substantial breach’ sufficient to justify the exclusion of evidence.⁶⁴ Evidence has also been excluded where the appropriate adult has been found to be incapable of giving advice, even where they may have ‘empathy’ with the defendant.⁶⁵

NEW ZEALAND

Legislation

34. In New Zealand, the *Children, Young Persons and Their Families Act 1989* (NZ) governs the conduct of police interviews with young people. Before conducting an interview, the police must inform a child of their rights, including the right to nominate a person to assist them.⁶⁶
35. The police have a responsibility to explain the young person's rights 'in a manner and language appropriate to the age and level of understanding' of the young person.⁶⁷ This includes informing a child of the people he or she can nominate to assist them.⁶⁸
36. The young person must be allowed to consult with their lawyer and the nominated person before a statement is taken. Evidence of communications during these consultations is not admissible.⁶⁹ The young person also has the right to have either (or both) the nominated person and lawyer present during the interview.
37. In New Zealand, the scheme for appointing a 'nominated person' gives a degree of autonomy to the child in the legal process, in accordance with article 12 of the *Convention on the Rights of the Child*, which protects the right of children and young people to express their opinions, and participate in decisions affecting them. New Zealand courts have read the provisions as giving the child the right to understand the role of the nominated person and to decide who would best perform that role.⁷⁰
38. In New Zealand, a nominated person can be a parent, guardian, adult family group member,⁷¹ or 'any other adult selected by the child or young person'. If the child does not nominate a person, the police may nominate another adult for this purpose (but not a police officer).⁷² If they are not already the nominated person, a parent, guardian or other person having care of the young person must be informed that the police propose to question the young person.⁷³

The role of the nominated person

39. The role of the nominated person is set out in the legislation. They must take reasonable steps to ensure the child understands the rights explained to them by the police.⁷⁴ They must also support the child or young person, both before and during any questioning. The courts have explained this part of the role as giving the child the sense of security of having someone look after their interests before they decide to answer questions and during the interview process.⁷⁵ The role of a nominated person is not a passive one, and is seen as providing 'more than just a record of the interview'.⁷⁶

49 Code C, [1.7(b)].

50 Notes for Guidance to Code C, 1B.

51 Notes for Guidance to Code C, 1B.

52 Eg, *DPP v Blake* [1989] 1 WLR 432.

53 *Crime and Disorder Act 1998* (UK) s 38 (4)(a).

54 *Crime and Disorder Act 1998* (UK) s 39(7)(a).

55 Sally Reid, *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews* (2007)10; Home Office, Government proposals in response to the Review of the Police and Criminal Evidence Act 1984 (2008) Chapter 13 <<http://www.homeoffice.gov.uk/documents/cons-2008-pace-review/cons-2008-pace-review-word?view=Binary>> at 18 June 2009.

56 Home Office, Government proposals in response to the Review of the Police and Criminal Evidence Act 1984 (2008) [13.5] <<http://www.homeoffice.gov.uk/documents/cons-2008-pace-review/cons-2008-pace-review-word?view=Binary>> at 18 June 2009.

57 Code C, [11.17].

58 Code C, [6.5A].

59 Code C, [6.5A].

60 Notes for Guidance to Code C, 11.

61 *Police and Criminal Evidence Act 1984* (UK) s 67(8).

62 *Police and Criminal Evidence Act 1984* (UK) s 67(11).

63 *Police and Criminal Evidence Act 1984* (UK) s 78.

64 *R v Weekes* (1993) 97 Cr App R 222.

65 *R v Morse & Ors* [1991] Crim LR 195.

66 *Children, Young Persons and Their Families Act 1989* (NZ) s 215(1)(c), (s), (e).

67 *Children, Young Persons and Their Families Act 1989* (NZ) s 218.

68 *Children, Young Persons and Their Families Act 1989* (NZ) s 218.

69 *Children, Young Persons and Their Families Act 1989* (NZ) s 226.

70 *S v Police* (2006) 25 FRNZ 817, [77].

71 To include different cultural understandings of family, such as *whanau* for Maori.

72 *Children, Young Persons and Their Families Act 1989* (NZ) s 222(1).

73 *Children, Young Persons and Their Families Act 1989* (NZ) s 229.

74 *Children, Young Persons and Their Families Act 1989* (NZ) s 224(4).

75 *S v Police* (2006) 25 FRNZ 817, [79].

76 *R v Tepere* [1997] 1 NZLR 341; *Police v Turipa* (District Court of New Zealand, Tauranga, 3 February 1994) 6 (Callander J).

Appendix

40. Courts have observed that the Act does not require the nominated person to give legal advice, or explain the child's rights.⁷⁷ However, it requires they be present before, and during, the interview process to advise the child when making the decision about whether to seek legal advice.⁷⁸ Reviews of this scheme have suggested that training be given to people who accept the role of a nominated person to better highlight the role of actively supporting the child.⁷⁹

Sanctions

41. A confession may be inadmissible when there has not been 'reasonable compliance' with the Act.⁸⁰ If an officer has not had a reasonable opportunity to comply with the Act, a statement made by the child 'spontaneously' may be admissible as evidence.⁸¹

CANADA

Legislation

42. The *Youth Criminal Justice Act 2002* (Can) requires the presence of an 'appropriate adult' before a child makes a statement to police.⁸² The Act says that before a young person makes a statement to police or a 'person in authority', it must be clearly explained to them in language appropriate to their age and understanding that:
- they are under no obligation to make a statement but that any statement made may be used in evidence against them
 - they have a right to consult a lawyer and a parent or other appropriate adult
 - the statement must be made in the presence of a lawyer and a parent or other appropriate adult, unless the young person desires otherwise.⁸³
43. The young person must be given a reasonable opportunity to consult with a lawyer, the parent or other appropriate adult, and to make any statement in their presence.⁸⁴

Who can be an appropriate adult?

44. The Act requires the young person to be given the opportunity to consult a parent, or if no parent is available, another adult relative. In the absence of a parent or other adult relative, the child may choose 'any other appropriate adult'.⁸⁵ Statements made to an appropriate adult may be admissible in evidence.⁸⁶

Sanctions

45. A statement is inadmissible unless it is made voluntarily and in compliance with the statutory requirements concerning the presence of a lawyer and a parent or other appropriate adult. Where a 'spontaneous' voluntary statement is made by a young person in circumstances where the police have not had an opportunity to comply with these rules the statutory requirements do not apply.⁸⁷ The young person may also waive their right to consult with a lawyer and a parent/other adult.⁸⁸

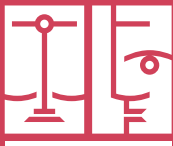
HUMAN RIGHTS ISSUES

46. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) places a duty on public authorities, including the police, and any person exercising a public function, to act compatibly with the human rights it contains. The Charter contains a number of general and specific rights concerning children.
47. Children charged with a criminal offence are entitled to the same guarantees and protections as those given to adults under the Charter. In addition, section 17(2) gives every child the right, without discrimination, to such protection as is in his or her best interests and is needed due to being a child. Section 25(3) recognises the need for special procedures in the criminal justice system for children who are vulnerable because of their age.⁸⁹ Under this section, children charged with a criminal offence are entitled to additional special protection, so that they are dealt with in appropriate ways that take account of age, maturity, and intellectual and emotional capacities.⁹⁰

48. A child also has a right to a fair hearing of criminal charges against them under section 24. The ‘fairness’ of such a hearing is considered as a whole. Evidence against a young person which has been obtained by unfair or oppressive means may cause any hearing to be unfair unless excluded.
49. Although there have not been any Victorian cases about these Charter rights in the context of police interviews with children, the Charter permits consideration of relevant international and foreign case law when interpreting human rights.
50. The *Convention on the Rights of the Child*⁹¹ (CRC) sets out key principles in relation to the rights of all people below the age of 18. Together with other international agreements which affirm its key provisions,⁹² the CRC represents international consensus about minimum standards in relation to the treatment of children. A fundamental principle of the CRC is that in all actions concerning children, the ‘best interests’ of the child should be an important consideration. An assessment of the best interest of a child must be considered giving appropriate weight to the needs and views expressed by them, in accordance with their age and maturity, and in light of other key principles and rights, through every stage of the process of juvenile justice.⁹³
51. Article 40(1) states that a child must be afforded a fair trial, and requires that every child who has infringed the penal law is entitled to treatment ‘in a manner consistent with the promotion of the child’s sense of dignity and worth’. This includes ensuring that child’s right not to be compelled to confess guilt, and to fully understand their rights when faced with charges against them, including the right to express or not express their views about an allegation. In addition, article 37 provides that a child who is detained has the right to ‘prompt access to legal and other appropriate assistance’. The Committee on the Rights of the Child has expressed the view that
52. The child being questioned must have access to a legal or other appropriate representative and must be able to request the presence of his or her parent(s) during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable.
53. The UN Human Rights Committee has interpreted the equivalent ICCPR article to section 17 of the Victorian Charter as requiring countries to adopt special measures to protect children.⁹⁴ Such measures are ‘intended primarily to ensure that children fully enjoy’ their other human rights.
54. Victoria has implemented international principles in relation to proceedings and decisions involving children in the *Children, Youth and Families Act 2005* (Vic). Under the Act the best interests of children is a paramount consideration.⁹⁵ These principles do not apply, however, to those parts of the Act concerned with children in criminal proceedings.⁹⁶
55. The right to additional protection means that special procedures should be in place for child defendants at the investigation stage of the criminal justice system. These procedures may include steps such as ensuring that the child receives an age-appropriate explanation about the nature of the charge and conducting interviews with appropriate support and in a manner that is sensitive to the child’s age, level of maturity and emotional state.
- 77 See, eg *R v NV* (High Court of New Zealand, Hamilton, 30 September 2008) [88].
- 78 *R v A* (High Court of New Zealand, Auckland, 2004)
- 79 See S Porteous, ‘Young People and Police Questioning: How Effective is the Nominated Person?’ (2000) 46 *Youth Law Review*.
- 80 *Children, Young Persons and Their Families Act 1989* (NZ) s 224.
- 81 *Children, Young Persons and Their Families Act 1989* (NZ) s 223.
- 82 *Youth Criminal Justice Act 2002* (Can) s146.
- 83 *Youth Criminal Justice Act 2002* (Can) s 146(2)(b)(iv).
- 84 *Youth Criminal Justice Act 2002* (Can) s 146(2)(c)-(d).
- 85 *Youth Criminal Justice Act 2002* (Can) s 146(2)(b)(iii).
- 86 *R v DDT* [2008] ABQB 387.
- 87 *Youth Criminal Justice Act 2002* (Can) s 146(3).
- 88 *Youth Criminal Justice Act 2002* (Can) s 146(4)-(5).
- 89 A child is defined as being a person under 18 years of age: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3.
- 90 *T v United Kingdom* (1999) 7 BHRC 659.
- 91 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990). See particularly articles 3, 37 and 40.
- 92 Other international agreements affirming the key provisions in this treaty, include: the Universal Declaration of Human Rights, GA Res.217A(III) 10 December 1948; the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, GA Res. 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52 (entry into force 23 March 1976), UN Doc A/6316 (1966), International Covenant on Economic, Social and Cultural Rights; opened for signature 16 December 1966, GA Res. 2200A (XXI) (entered into force 3 January 1976) and the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, GA Res. 34/180 (entry into force 3 September 1981). Also see United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’) G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53), UN Doc. A/40/53 (1985) which deal with fundamental aspects for procedures and conduct of police and other law enforcement officials, where a young person is suspected of an offence.
- 93 See CRC/C/GH/10 [12].
- 94 Article 24.
- 95 *Children, Youth and Families Act 2005* (Vic) Part 1.2.
- 96 *Children, Youth and Families Act 2005* (Vic) s 8(4).

Questions

1. What should be the role of an independent person who is present when the police are questioning a young person in custody whose parents or guardian are not available?
2. Should the role of the independent person be any different to the role which the parents or guardian should play if they were available?
3. Should certain people be prohibited from acting as an independent person?
4. Is 'independent person' an appropriate title, or would another title be better?
5. Should the role of an independent person be set out in legislation?
6. If the role of an independent person is set out in legislation should it include any of the following things?
 - a. to act in the best interests of the young person
 - b. to provide emotional support to the young person
 - c. to provide assistance to the young person
 - d. to observe whether the interview is being conducted fairly and to intervene if it is not
 - e. to identify any communication problems with the young person and help them to understand what is said by the police
 - f. to ensure the young person understands their basic legal rights, such as:
 - i. that the person is not obliged to say anything during questioning;
 - ii. that anything the relevant person says during questioning may be used in evidence;
 - iii. that the person may request legal advice
 - g. to assist the young person to exercise any of those rights.
7. Are there any circumstances in which the police should be required to arrange for an independent person to be present even when a parent or guardian is available?
8. What should happen if the police question a young person in custody without a parent, guardian or independent person present?
9. Should the police be required to provide an independent person (or a parent or guardian) with a written summary of the detained young person's rights?
10. Should independent persons be trained? If so, what should the training involve?
11. Should the independent person be able to arrange legal representation on behalf of the young person without express permission if they believe it is in the best interest of the young person?
12. Does the YRIPP system work efficiently? How could it work better?
13. Is there anything else you would like to tell us?



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