

Victorian  
Law Reform  
Commission

# COMMUNITY LAW REFORM

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## SUPPORTING YOUNG PEOPLE IN POLICE INTERVIEWS

### Final Report 21

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# Preface

One of the Victorian Law Reform Commission's functions is to examine and make recommendations about matters that are of general community concern but involve relatively minor legal change.

The Commission performs this function through its community law reform program. Members of the community are encouraged to tell the Commission about legal issues that concern them and may have a relatively straightforward solution.

In 2008, members of the Youth Referral and Independent Person Program (YRIPP), the Centre for Multicultural Youth (CMY) and the Youth Affairs Council of Victoria (YACVic) suggested a project concerning the role of independent persons in police interviews with young people. YRIPP was established in 2003 as a pilot program to train and provide volunteers for this challenging role. The Commission accepted the community law reform suggestion and this report now completes the project.

I wish to thank the many people who generously gave their time and expertise to assist the Commission. I also acknowledge the important assistance of the YRIPP management agencies—CMY and YACVic—Youthlaw, the Justice Policy Unit of the Department of Justice and Victoria Police in providing significant amounts of information about current practices.

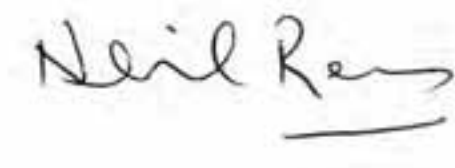
The Division members of the Commission who worked with me on this reference—Judge Felicity Hampel and Hugh de Kretser—made important contributions.

The community law reform team, led by Myra White, produced this comprehensive report. Simone Marrocco and Myra White were responsible for consultations and contributed to research and writing.

Mia Hollick and Alexandra Krummel played major roles in writing the final report. Lara Rabiee also worked on this document.

Carlie Jennings was responsible for editing and production. Both our previous CEO, Padma Raman, and our current CEO, Merrin Mason, supported the project. Vicki Christou and Failelei Siatua provided administrative assistance. I thank them all for the skill and energy they brought to this work.

The Commission welcomes the opportunity to contribute to this area of law by offering recommendations for reform.

A handwritten signature in black ink, reading "Neil Rees". The signature is written in a cursive, flowing style. Below the name, there is a horizontal line that extends to the right, underlining the signature.

Professor Neil Rees

Chairperson

5 November 2010

# Executive Summary

## INTRODUCTION

This report describes and recommends reforms to processes for supporting young people in custody during police interviews.

One of the Commission's functions is to examine and make recommendations about matters that are of general community concern but involve relatively minor legal issues. This is the final report of the Commission's community law reform project concerning the role of independent persons in police interviews with young people<sup>1</sup> in Victoria. It follows publication of a background paper in July 2009<sup>2</sup> and a period of public consultation.

## BACKGROUND

In 2008, members of the Youth Referral and Independent Person Program (YRIPP), the Centre for Multicultural Youth (CMY) and the Youth Affairs Council of Victoria (YACVic) suggested a community law reform project on reviewing the role of independent persons in police interviews with young people.

The organisations argued that lack of clarity in the law has led to differing opinions about the independent person's role and that, as a result, the rights of young people in custody are not adequately supported during police interviews. The organisations suggested that the role and responsibilities of independent persons in police interviews with young people be clarified.

## CONSULTATIVE PROCESS

The Commission received 24 written submissions in response to the background paper.

The Commission also conducted 33 consultation meetings in metropolitan, rural and regional Victoria, including Hume, Gippsland, Barwon and Mallee, and outer suburban metropolitan areas such as Dandenong and Frankston. Participants at these meetings included police, young people, YRIPP coordinators and volunteers, honorary justices, youth workers and lawyers. The Commission also met relevant government departments and Victoria Police.

## CURRENT LAW AND PRACTICE

Section 464E of the *Crimes Act 1958* (Vic) (Crimes Act) directs police in Victoria to only interview a person in custody who is under the age of 18 years if his or her parent or guardian is present, or if the parent or guardian is unavailable, with an 'independent person' present.

The purpose of this requirement is to compensate for the inherent disadvantage faced by young people—such as their vulnerability to pressure—during police interviews and to assist them to exercise their legal rights.

The Crimes Act does not define 'independent person', nor does it specify an independent person's role. In Victoria, volunteers from the community, such as teachers and priests, have served as independent persons for many years, as have bail justices and justices of the peace. Many police stations now rely on trained YRIPP volunteers.<sup>3</sup>

While the presence of volunteers from the community during police interviews has made formal compliance with the Crimes Act possible, the lack of clarity surrounding the independent person's role raises doubts about whether young people are receiving effective assistance during their time in police custody. There is a risk that the independent person, or the police, may view the role as one of an 'independent witness' rather than as a support for the young person.

## STRUCTURE OF THE REPORT

Chapters 1 and 2 provide an introduction, background and overview of the current law in Victoria and in other jurisdictions.

Chapter 3 sets out current practice in Victoria, including details of how and when independent persons are used. This chapter also discusses responses received in submissions and consultations, and identifies some areas of concern.

Chapter 4 compares Victorian law and practice with other relevant Australian and overseas jurisdictions. Chapter 5 contains recommendations for legislative reform.

Chapter 6 discusses a framework for the proposed statewide scheme, including how it could be administered and how support persons could be trained and accredited.

Finally, Chapter 7 examines the role of the support person in the bail process and the overlap with a scheme designed to support young people in applying for bail.

## RECOMMENDATIONS

The report recommends that the Victorian Parliament build upon the successful YRIPP pilot program and establish a statewide scheme responsible for providing an independent supporter for young people in police custody when a parent or carer is unavailable. The Commission recommends that the legislation clearly describe the role of this independent person—better described as a ‘support person’—so that it is in keeping with the spirit of Victoria’s human rights obligations and developments elsewhere.<sup>4</sup>

The Commission also recommends legislation that:

- establishes a statewide scheme responsible for providing a pool of trained ‘support persons’ that police must call to be present at interviews with young people in custody when a parent or carer cannot attend
- describes the role of a support person, with functions that include informing young people about their legal rights and supporting them when they choose to exercise those rights
- clearly indicates the consequences of failing to comply with the requirement that a young person be supported by the presence of a parent, carer or support person during police questioning.

There are 24 recommendations in this report.

- 1 The term ‘young people’ is used throughout this report to mean people under the age of 18. It also reflects the fact that most ‘children’ involved in police investigations are teenagers.
- 2 Victorian Law Reform Commission, *Supporting Young People in Police Interviews Community Law Reform: Background Paper No 7* (2009). The paper is available on the Commission’s website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au).
- 3 See Chapter 3 for a description of the program.
- 4 See Chapters 2 and 4 for a discussion of the relevant law.

# Glossary

## ABBREVIATIONS

<b>ALRC</b>	Australian Law Reform Commission
<b>CAHABPS</b>	Central After Hours Assessment and Bail Placement Service
<b>Charter</b>	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
<b>CMY</b>	Centre for Multicultural Youth
<b>Code C</b>	Code of practice in relation to the detention, treatment and questioning of persons by police officer (UK)
<b>CRC</b>	United Nations Committee on the Rights of the Child
<b>Crimes Act</b>	<i>Crimes Act 1958</i> (Vic)
<b>CROC</b>	<i>United Nations Convention on the Rights of the Child</i>
<b>CYF Act</b>	<i>Children, Youth and Families Act 2005</i> (Vic)
<b>DHS</b>	Department of Human Services
<b>Evidence Act</b>	<i>Evidence Act 2008</i> (Vic)
<b>FCLC</b>	Federation of Community Legal Centres
<b>HREOC</b>	Human Rights and Equal Opportunity Commission
<b>ICCPR</b>	<i>International Covenant on Civil and Political Rights</i>
<b>NAAN</b>	National Appropriate Adult Network (UK)
<b>Notes</b>	Provide guidance under Code C (UK)
<b>PACE</b>	<i>Police and Criminal Evidence Act 1984</i> (UK)
<b>SOCA Unit</b>	Sexual Offences and Child Abuse Unit of Victoria Police
<b>UNHRC</b>	United Nations Human Rights Committee
<b>VALS</b>	Victorian Aboriginal Legal Service Co-operative Ltd
<b>YACVic</b>	Youth Affairs Council of Victoria
<b>YRIPP</b>	Youth Referral and Independent Person Program



## TERMINOLOGY

<b>Aboriginal</b>	In this report the word 'Aboriginal' is used as a generic term to refer to both Aboriginal and Torres Strait Islander people, unless otherwise specified.
<b>Attendance module</b>	The program used by police when recording the details of people in police care or custody. Initial data entry into the attendance module should be made prior to any interview or related procedures taking place. Details to be included in the attendance module include risk assessment, welfare checks, apparent injuries or mental impairment and details of any other persons present.
<b>Bail justices</b>	Volunteers appointed to make 'after hours' bail decisions when courts are closed.
<b>Cause of action</b>	A right to sue another person for wrongful conduct.
<b>Cognitive impairment</b>	Impaired understanding due to a range of matters including intellectual disability, mental illness, dementia and acquired brain injury.
<b>Honorary justices</b>	A collective group of volunteers who have demonstrated an active commitment to providing justice services for the community; includes justices of the peace and bail justices.
<b>Justices of the peace</b>	Volunteers who have performed different roles in the justice system over time. Nowadays, justices of the peace perform an administrative role involving witnessing of some documents.
<b>Police check</b>	A service provided by Victoria Police to Victorians who wish to obtain a National Police Certificate for employment, voluntary work and occupation-related licensing or registration.
<b>Standing orders</b>	The Chief Commissioner of Police issues standing orders for the general administration of the police force. The Victoria Police Manual is issued under the Chief Commissioner's power to issue standing orders and give instructions.
<b>Substantive right</b>	A substantive right is a legal right of substance that can be enforced in the courts.
<b>Working with Children Check</b>	Process under part 2 of the <i>Working with Children Act 2005</i> (Vic) for assessing or re-assessing the suitability of a person to work with children.

# Recommendations

## REQUIREMENT FOR SUPPORT PERSON TO BE PRESENT

1. Section 464E of the *Crimes Act 1958* (Vic) should be repealed and replaced by new provisions that deal with the matters set out in Recommendations 2–15.
2. The legislation should provide that an investigating official may only question or carry out an investigation concerning a person under the age of 18 years who is in custody if a parent, carer or support person is present during the questioning or investigation.
3. The legislation should provide that an investigating official is not obliged to arrange for the presence of a parent or carer during the questioning or investigation of a young person in custody if:
  - a. notification to a parent or carer may result in escape of an accomplice or fabrication 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.However, the investigating official must arrange for the presence of a support person in either circumstance.
4. The legislation should provide that an investigating official who proposes to question or carry out an investigation concerning a young person in custody must:
  - a. make reasonable attempts to contact a parent or carer and invite that person to be present during the questioning or investigation, unless it is unsuitable for that particular parent or carer to be present
  - b. if the parent or carer is able to attend, inform them that they may request a support person to be present, as well as themselves, during the questioning or investigation
  - c. arrange for a support person to be present during the questioning or investigation if:
    - i) the parent or carer does not wish to attend
    - ii) the parent or carer is unable to attend the place identified by the investigating official within a reasonable period of time
    - iii) the parent or carer requests that a support person be present, or
    - iv) it is unsuitable for a particular parent or carer to be present.
5. The legislation should provide that when an investigating official who proposes to question or carry out an investigation concerning a young person in custody has reasonable grounds for believing that a parent or carer who proposes to attend the questioning or investigation is likely to experience difficulties in understanding any statements made because of that person's lack of proficiency with English, or for any other reason, the investigating official must arrange for a support person to be present during the questioning or investigation of the young person.

## PROCESS FOR SECURING THE PRESENCE OF A SUPPORT PERSON

6. The legislation should provide that if it is necessary for an investigating official to arrange for a support person to be present during the questioning or investigation of a young person in custody, the investigating official should be required to draw, without preference, from a pool of trained support persons.
7. The legislation should provide that if it is necessary for an investigating official to arrange for a support person to be present during the questioning or investigation of a young person in custody, he or she must do so by complying with the procedures devised jointly by the Child Safety Commissioner and the Chief Commissioner of Police, unless exceptional circumstances render it impossible to comply with those procedures.

8. Those procedures should be published by the Chief Commissioner of Police in the Victoria Police Manual and by the Department of Justice and the Child Safety Commissioner on their websites.

### **CONSEQUENCES OF FAILING TO PROVIDE A SUPPORT PERSON**

9. The legislation should provide that if an investigating official questions or carries out an investigation concerning a young person in custody without a parent, carer, or support person present, any admission made, or other evidence adverse to the young person's interests gathered, must not be admitted into evidence unless the court is satisfied that:
  - a. there were exceptional circumstances that justified the investigating official proceeding in the absence of a parent, carer or support person; and
  - b. it would not be unfair to the young person to admit the evidence.
10. This provision concerning the exclusion of evidence should prevail over the terms of the *Evidence Act 2008* (Vic) concerning the admissibility of evidence.

### **ROLE OF PARENT, CARER OR SUPPORT PERSON**

11. The legislation should provide that the role of a parent, carer or support person who is present during the questioning or investigation of a young person in custody is to:
  - a. provide support to the young person generally and in relation to the specific matters that follow, and that in doing so the parent, carer or support person is permitted to speak during any questioning or investigation
  - b. inform the young person about and assist them to understand the following matters:
    - i) the right to seek legal advice before answering any questions or participating in any investigation
    - ii) the right to not say anything during police questioning and to not participate in investigations, and that anything said or done may be used in evidence
  - c. support the young person to exercise these rights, if they wish to do so
  - d. assist the young person to understand any question that is asked
  - e. advise the investigating official whenever the parent, carer or support person believes that the young person may need a break or some form of assistance.
12. The legislation should provide that before questioning or investigating a young person in custody, the investigating official must provide the young person and the parent, carer or support person with a document in English or other appropriate community language that clearly and simply explains the role of the parent, carer or support person. This document should be devised jointly by the Chief Commissioner of Police and the Child Safety Commissioner.
13. The legislation should provide that before questioning or investigating a young person in custody, the investigating official must make reasonable efforts to explain the role of the parent, carer or support person to the young person.
14. The legislation should provide that before questioning or investigating a young person in custody, an investigating official must allow a young person in custody to communicate privately with his or her parent, carer or support person in circumstances where, as far as is practicable, their conversation cannot be overheard.
15. If an investigating official prevents the parent, carer or support person from performing the role described in Recommendation 11, or if the support person fails to perform that role, the legislation should provide that any evidence obtained during the questioning or investigation is presumed to have been obtained improperly or illegally for the purposes of section 138 of the *Evidence Act 2008* (Vic).

# Recommendations

## DEVELOPING A FRAMEWORK FOR THE SCHEME

16. The Child Safety Commissioner should have the following functions:
  - a. The Child Safety Commissioner should work with the Chief Commissioner of Police to prepare procedures for the attendance of support persons during police questioning or investigation of young persons (as provided for in Recommendation 7).
  - b. The Child Safety Commissioner should monitor the operations of the scheme and provide an annual report to the Attorney-General.

## ADMINISTRATION OF THE SCHEME

17. The Secretary of the Department of Justice should be responsible for administering a statewide scheme of trained volunteers to act as support persons during police questioning or investigation of young persons in custody.
18. The Secretary of the Department of Justice should devise and conduct training programs for support persons.
19. The Secretary of the Department of Justice should accredit people who have successfully completed a training program for support persons.
20. The Secretary of the Department of Justice should devise minimum standards for the selection and accreditation of the volunteer support person, which should include a Working with Children Check.
21. The Secretary of the Department of Justice should liaise with the Public Advocate to devise procedures to support young people in custody with a cognitive impairment as a result of a disability during police questioning and investigation.

## REPORTING MISCONDUCT AND A CODE OF CONDUCT FOR SUPPORT PERSONS

22. The Child Safety Commissioner, in consultation with the Chief Commissioner of Police and the Office of Police Integrity, should:
  - a. devise a protocol for reporting allegations made by young people to support persons or made by support persons of police misconduct during questioning or investigation of a young person
  - b. periodically review and refine this protocol with a view to improving the scheme.
23. The Child Safety Commissioner, in consultation with the Chief Commissioner of Police, should devise a Code of Conduct for support persons and a protocol for reporting alleged misconduct by support persons.

## OTHER MATTERS

24. The role of independent persons under section 346 of the *Children, Youth and Families Act 2005* (Vic) should be considered by the Secretary of the Department of Justice as part of the Bail Implementation Project.

# Chapter 1 Introduction

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- 14 Background
- 15 Origins of this report
- 15 Our process
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### BACKGROUND

- 1.1 One of the Commission's functions is to examine and make recommendations about matters that are of general community concern but involve relatively minor legal issues.<sup>1</sup>
- 1.2 In undertaking community law reform projects the Commission seeks to promote access for people and groups not traditionally involved in law reform. The Commission also aims to recommend workable solutions to gaps and deficiencies in the law so that reform delivers real benefits to the community.
- 1.3 This is the final report of the Commission's community law reform project concerning the role of independent persons in police interviews with young people<sup>2</sup> in Victoria. It follows publication of a background paper in July 2009<sup>3</sup> and a period of public consultation.
- 1.4 Section 464E of the *Crimes Act 1958* (Vic) (Crimes Act) directs Victorian police officers not to interview a person in custody who is under the age of 18 years unless that person's parent or guardian is present, or if the parent or guardian is not available, without an 'independent person' being present.<sup>4</sup> The purpose of this requirement is to compensate for the inherent disadvantage young people in custody face when interviewed by the police.<sup>5</sup>
- 1.5 The Crimes Act does not define 'independent person', nor does it specify an independent person's role. Volunteers from the community, such as teachers and priests, have served as independent persons for many years, as have bail justices and justices of the peace. Many police stations also now rely on trained volunteers as part of a scheme called the Youth Referral and Independent Person Program (YRIPP).<sup>6</sup>
- 1.6 While the presence of volunteers from the community during police interviews has made formal compliance with the Crimes Act possible, the lack of clarity surrounding the independent person's role raises doubts about whether young people are receiving effective assistance during their time in police custody. There is a risk that the independent person, or the police, may view the role as one of an 'independent witness' rather than as a support for the young person.<sup>7</sup> There is also a risk that the young person may view the independent person as another authority figure rather than someone to support them.
- 1.7 In this report, the Commission recommends that the Victorian government build upon the successful YRIPP pilot and establish an on-going statewide scheme responsible for providing an independent supporter for young people in police custody when a parent or carer is unavailable.<sup>8</sup> The Commission also recommends that the role of this independent person—better described as a 'support person'—be clearly explained in legislation.<sup>9</sup>
- 1.8 The Commission recommends legislation that:
  - establishes a mechanism which is responsible for providing a pool of trained 'support persons' that police must call to be present at interviews with young people in custody when a parent or carer cannot attend
  - describes the role of a support person, with functions that include informing young people about their legal rights and supporting them when they choose to exercise those rights
  - clearly indicates the consequences of failing to comply with the requirement that a young person be supported by the presence of a parent, carer or support person during police questioning.

## ORIGINS OF THIS REPORT

- 1.9 In 2008, the agencies that manage YRIPP—the Centre for Multicultural Youth (CMY) and the Youth Affairs Council of Victoria (YACVic)<sup>10</sup>—suggested that the Commission undertake a community law reform project about the role of independent persons in police interviews with young people.
- 1.10 The organisations argued that lack of clarity in the law has led to differing opinions about the role of the independent person, and that, as a result, young people in custody are not receiving adequate support for their rights in police interviews. A 2007 Churchill Fellowship report prepared by YRIPP manager Sally Reid concluded that the problem was due to:
- the use of the term ‘independent person’ in the legislation and its interpretation
  - the lack of clear legislation and guidelines around the role of the independent person
  - the lack of legislation giving responsibility to any particular agency to provide independent persons and to particular individuals to perform the independent person role.<sup>11</sup>
- 1.11 The organisations suggested that the role, responsibilities and rights of independent persons in police interviews with young people be clarified.

## OUR PROCESS

### BACKGROUND PAPER

- 1.12 The Commission published a background paper on the role of independent persons in police interviews with young people in July 2009. The paper identified issues around the use of independent persons at police interviews with young people and invited submissions from the public.

### SUBMISSIONS AND CONSULTATIONS

- 1.13 The Commission received 24 written submissions in response to the background paper—see Appendix A for a list of all submissions. Fourteen submissions were from individuals and 10 were from organisations. Notably, two submissions included results from survey research:
- YRIPP’s survey of their own volunteers
  - Youthlaw’s survey of a sample of their young clients and their clients’ parents.
- 1.14 During August and September 2009, the Commission conducted 33 consultation meetings in metropolitan, rural and regional Victoria, including Hume, Gippsland, Barwon and Mallee, and outer suburban metropolitan areas such as Dandenong and Frankston. Participants at these meetings included police, young people, YRIPP coordinators and volunteers, honorary justices, youth workers and lawyers. Appendix B contains a list of the consultation meetings.
- 1.15 Youthlaw assisted the Commission in arranging and facilitating consultations with young people and parents. This included facilitating two consultations with young people: one at the Braybrook Youth Centre and another with participants of the Whetlion Post Release Youth Program. Youthlaw also assisted the Commission in identifying and speaking with a parent of a young person who had been in police custody.
- 1.16 Finally, the Commission met with relevant government departments, also listed in Appendix B.

- 1 Victorian Law Reform Commission Act 2000 (Vic) s 5(1)(b).
- 2 The term ‘young people’ is used throughout this report when referring to people under the age of 18. It is used instead of the term ‘children’ because most young people involved in police investigations are teenagers.
- 3 Victorian Law Reform Commission, *Supporting Young People in Police Interviews Community Law Reform: Background Paper No 7* (2009). The paper is available on the Commission’s website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au).
- 4 There are some exceptions to this requirement set out in the *Crimes Act 1958* (Vic) s 464E(2), which are discussed in Chapter 2.
- 5 See eg, *Department of Public Prosecutions v Toomalatai* (2006) 13 VR 319, 327 [44]; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.103].
- 6 See Chapter 3 for a description of the program.
- 7 Sally Reid, *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews* (2007) 21; Neil Rees, ‘The Rules Governing Police Interrogation of Children’ in J Basten et al (ed), *The Criminal Justice System* (1982) 68–9.
- 8 This report is limited to support for young people in police custody suspected of having committed an offence. While the Commission received suggestions during consultations that any new support scheme be extended to young people who are victims of and/or witnesses to an offence, this step is of such magnitude that it would fall outside the scope of this community law reform reference. Support for witnesses and victims is discussed in Chapter 3.
- 9 See Chapters 2 and 4 for a discussion of the relevant law.
- 10 We describe YRIPP in Chapter 3. CMY is a community-based organisation that advocates for the needs of young people from refugee and migrant backgrounds. YACVic is the leading body on 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. Together, these agencies manage YRIPP.
- 11 Sally Reid, *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews* (2007) 12.

### STRUCTURE OF THE REPORT

- 1.17 Chapter 2 describes the current law in Victoria and in other jurisdictions. It includes a discussion of the statutory requirement that an independent person be present during police interviews with young people in Victoria when a parent or guardian is unavailable, and the consequences of non-compliance with that requirement.
- 1.18 Chapter 3 sets out current practice in Victoria, including details of how and when independent persons are used. At present, YRIPP scheme volunteers are used in approximately one third of police stations, with the use of non-YRIPP volunteers in the remaining two thirds.<sup>12</sup> We discuss responses received in submissions and consultations and identify some areas of concern.
- 1.19 Chapter 4 compares Victorian law and practice with other relevant Australian and overseas jurisdictions. Further comparative detail is provided in Appendix C.
- 1.20 Chapter 5 contains recommendations for legislative reform. A major recommendation is the extension of the YRIPP pilot to the entire state. Chapter 6 discusses a framework for the proposed statewide scheme, including how it could be administered and how support persons could be trained and accredited.
- 1.21 Finally, Chapter 7 examines the role of the support person in the bail process and the overlap with other schemes designed to support young people in applying for bail.

<sup>12</sup> While YRIPP provides services to 33 per cent of police stations (108 of the 327 police stations in Victoria), in practice it covers most potential demand for an independent person because it services all 24-hour stations and a number of 16-hour stations.



## Chapter 2

# Current Law

### CONTENTS

- 18 Introduction
- 18 Background
- 19 The legislative requirement for support for young people in police interviews
- 24 Interpretation and application of the legislative requirement
- 31 Related requirements for police questioning
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### INTRODUCTION

- 2.1 In 1988, the Victorian Parliament enacted legislation to protect the interests of young people when being questioned by police officers about their alleged involvement in criminal conduct. The legislation responded to concerns that young people are vulnerable and experience particular disadvantage when in police custody.<sup>1</sup>
- 2.2 Section 464E of the *Crimes Act 1958* (Vic) (Crimes Act) requires the police to arrange for a parent or guardian of a young person to be present when they question a young person in police custody who is suspected of having committed an offence.<sup>2</sup> If a parent or guardian is unavailable, the police must arrange for an ‘independent person’ to be present during any questioning.<sup>3</sup>
- 2.3 Although section 464E<sup>4</sup> was an important development, it does not provide a comprehensive statement of young people’s rights and police officers’ obligations during police questioning. The Crimes Act also does not indicate who may be an independent person and what that person’s role is, nor does it explain the consequences of failing to comply with the requirements of section 464E.<sup>5</sup>
- 2.4 Case law provides only limited assistance with these issues. This chapter describes the legal effect of section 464E<sup>6</sup> and identifies areas of uncertainty. The interaction between human rights and support for young persons in police interviews is also considered.

### BACKGROUND

- 2.5 The Victorian Parliament’s 1988 amendment to the Crimes Act to include section 464E<sup>7</sup> was part of a larger package of reforms about police interrogations.<sup>8</sup> The *Crimes (Custody and Investigation) Act 1988* (Vic) also introduced provisions that required police to inform suspects of their right to remain silent,<sup>9</sup> and of their right to communicate with a friend or relative and legal practitioner.<sup>10</sup>
- 2.6 The reforms implemented recommendations made in 1986 by the Victorian Consultative Committee on Police Powers of Investigation (the Coldrey Committee).<sup>11</sup> The Coldrey Committee recommended changes to the Crimes Act to give police greater flexibility in investigations, but also proposed a corresponding system of checks and balances that would recognise and safeguard individuals’ rights.<sup>12</sup>
- 2.7 While the Coldrey Committee did not recommend the presence of independent observers in police interviews,<sup>13</sup> it did acknowledge the vulnerability of young people in the investigative process:

*In any investigatory process the classes of people who are most vulnerable, are those with language problems, those who may be intellectually impaired, those who are young, those who are of low intelligence, those who while not guilty of the offence of which they are suspected may nonetheless have matters to hide such as illicit [sic] affairs or past convictions which they have lived down.*<sup>14</sup>

- 2.8 More recently, young people’s vulnerability in police interviews was highlighted by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) in their report *Seen and Heard: Priority for Children in the Legal Process*.<sup>15</sup> The commissions note that ‘the presence of the interview friend is an important means of compensating for the disadvantage experienced by young people when being interviewed by police’.<sup>16</sup> This disadvantage is due to factors such as ‘vulnerability to pressure, socialisation to agree with adult authority figures, lack of verbal fluency and a tendency to make false confessions under expert or hostile questioning’.<sup>17</sup>

2.9 Before the inclusion of section 464E in the Crimes Act,<sup>18</sup> police were governed by common law rules of general application and instructions in the Victoria Police Standing Orders (now the Victoria Police Manual) when they questioned a young person in custody. Now, police officers' responsibilities and a young person's rights in relation to police interviews are drawn from a combination of sources that comprise:

- section 464E of the Crimes Act<sup>19</sup>
- other relevant provisions in the Crimes Act<sup>20</sup>
- the *Evidence Act 2008* (Vic)<sup>21</sup>
- court decisions about the meaning of these various statutory provisions<sup>22</sup>
- the *Victoria Police Manual*.<sup>23</sup>

2.10 The content of this combined body of law is uncertain in many respects. Issues requiring clarification include:

- the identity of an independent person
- the role of an independent person before, during and after the interview
- the differences, if any, between the role of an independent person and that of a parent or guardian
- the range of obligations imposed upon the police by section 464E<sup>24</sup>
- the obligations imposed upon the police, if any, to ensure that an independent person understands their role and performs it properly
- the sanctions for non-compliance with section 464E.<sup>25</sup>

## THE LEGISLATIVE REQUIREMENT FOR SUPPORT FOR YOUNG PEOPLE IN POLICE INTERVIEWS

2.11 Section 464E of the Crimes Act<sup>26</sup> states:

(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.*

(3) *This section also applies to any questioning or investigation in accordance with an order made under section 464B(5).*

(4) *This section does not apply to questioning or investigation in connection with an offence under section 49(1) of the Road Safety Act 1986.*<sup>27</sup>

- 1 See Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997), 500–503; *Director of Public Prosecutions v Toomalatai* (2006) 13 VR 319, 327 [45] ('Toomalatai').
- 2 *Crimes Act 1958* (Vic) ss 464E(1), 464A(2)(b).
- 3 *Ibid* ss 464E, 464A(2).
- 4 *Ibid* s 464E.
- 5 *Ibid*.
- 6 *Ibid*.
- 7 *Ibid*.
- 8 See *Toomalatai* (2006) 13 VR 319, 326–327 [41]–[45] for discussion.
- 9 *Crimes Act 1958* (Vic) s 464A(3).
- 10 *Ibid* s 464C(1).
- 11 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 October 1987, 1369 (Race Mathews, Minister for the Arts).
- 12 Consultative Committee on Police Powers of Investigation (Victoria), *Custody and Investigation: Report of the Consultative Committee on Police Powers of Investigation* (1986) [6.1].
- 13 *Ibid* [6.16].
- 14 *Ibid* [6.2].
- 15 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) ('*Seen and Heard*').
- 16 *Ibid* [18.103].
- 17 *Ibid*, citing Robert Ludbrook, *Police Questioning of Young People: The Role of the Independent Adult—Discussion Paper* (1994) 3.
- 18 *Crimes Act 1958* (Vic) s 464E.
- 19 *Ibid*.
- 20 *Ibid* s 464A.
- 21 See, eg, *Evidence Act 2008* (Vic).
- 22 *Toomalatai* (2006) 13 VR 319; *R v JPD* [2001] VSC 202.
- 23 Victoria Police, *Victoria Police Manual*, from CD-ROM current at 30 August 2010.
- 24 *Crimes Act 1958* (Vic) s 464E.
- 25 *Ibid*.
- 26 *Ibid*.
- 27 *Ibid*.

- 2.12 The effect of this section is that police must only question a young person who is in custody or carry out an investigation in which the young person participates if the person's parent or guardian is present.<sup>28</sup> If a parent or guardian is unavailable, an independent person must be present.<sup>29</sup> It appears to be the legislatively preferred position that the young person's parent or guardian attends the interview if possible; an independent person should be relied upon only when a parent or guardian is unavailable. The section also states that police must give a young person in custody the opportunity to communicate privately with the parent, guardian or independent person before the questioning or investigation begins.<sup>30</sup>

### PROCEDURAL MANUALS

- 2.13 Although they do not have the force of law, manuals used by both Victoria Police<sup>31</sup> and the Youth Referral and Independent Person Program (YRIPP)<sup>32</sup> provide some guidance about how section 464E of the Crimes Act<sup>33</sup> operates in practice. Both are referred to throughout this report to illustrate how aspects of section 464E<sup>34</sup> have been applied. Where these manuals differ from or go beyond the Crimes Act<sup>35</sup> they illustrate the law's uncertainty.

#### Victoria Police Manual

- 2.14 The Victoria Police Manual is issued by the Chief Commissioner of Police under the power to make standing orders for the general administration of the force and give instructions for the effective and efficient conduct of its operations.<sup>36</sup>
- 2.15 The manual provides police officers with guidance on complying with legislative and policy requirements, including those relating to conducting interviews with people suspected of having committed an offence.<sup>37</sup> While the manual itself is not law, it may be considered in court, and breach of its policy rules and procedures may result in disciplinary action for police officers.<sup>38</sup>
- 2.16 The High Court has emphasised that standing orders, such as the Victoria Police Manual, 'are not rules of law'.<sup>39</sup> The Federal Court has held that a court can consider departure from standing orders when deciding whether to use discretionary powers to exclude an accused's confessional evidence.<sup>40</sup> The question for determination, however, is whether an accused has been treated unfairly, not whether a police officer has contravened procedural guidelines and should be sanctioned.<sup>41</sup>

#### YRIPP Independent Person Procedure Manual

- 2.17 The manual for YRIPP independent persons (YRIPP Manual) provides some guidance about how section 464E of the Crimes Act operates in practice.<sup>42</sup> It covers matters such as who is eligible to be a YRIPP independent person and the role of the independent person.<sup>43</sup> The YRIPP Manual, like the Victoria Police Manual, attempts to clarify some of the uncertainty in section 464E of the Crimes Act.<sup>44</sup> The YRIPP Manual is considered in more detail in Chapter 3.

### RELEVANT TERMINOLOGY

- 2.18 Only some of the terms used within section 464E of the Crimes Act<sup>45</sup> are defined in the statute. The section provides that an 'investigating official' is not to 'question' or 'carry out an investigation under section 464A(2)' if a person 'in custody' is under 18 unless a 'parent', 'guardian' or independent person' is present.<sup>46</sup>

### **‘Investigating official’**

2.19 The Crimes Act defines ‘investigating official’ as

*a member of the police force or a person appointed by or under an Act ... whose functions or duties include functions or duties in respect of the prevention or investigation of offences.*<sup>47</sup>

In most instances, the investigating official will be the most senior police officer in any team that wishes to question a young person in custody.

### **‘Parent’, ‘guardian’ or ‘independent person’**

2.20 Section 464E requires that a ‘parent’, ‘guardian’ or ‘independent person’ be present before certain questioning or investigative procedures take place.<sup>48</sup> None of these terms is defined in the Crimes Act.<sup>49</sup>

### **‘In custody’**

2.21 A parent, guardian or independent person must only be present when the person under 18 is ‘in custody’. For the purposes of section 464E,<sup>50</sup> a young person is considered to be ‘in custody’ if he or she is ‘under arrest’, meaning:

- being under lawful arrest by warrant
- being arrested without warrant by any person when caught committing an offence or escaping legal custody
- being arrested by a police officer when it is believed that the person has committed an indictable offence.<sup>51</sup>

2.22 A young person is also considered to be ‘in custody’ if he or she is

*in the company of an investigating official and is—*

- (i) being questioned; or*
- (ii) to be questioned; or*
- (iii) otherwise being investigated—*

*to determine his or her involvement in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.*<sup>52</sup>

### **‘Question’ or ‘carry out an investigation under section 464A(2)’**

2.23 ‘Questioning’ is not defined in the Crimes Act.<sup>53</sup> However, it appears to require something more substantial than police requesting a person’s name and address.<sup>54</sup> If police questioning extends beyond such a request, they must inform the person in custody that they do not have to say or do anything, but that anything they say or do may be given in evidence.<sup>55</sup>

2.24 To ‘carry out an investigation under section 464A(2)’ means dealing with a person who is suspected of having committed an offence and is in custody for that offence.<sup>56</sup> Under this section, police may inform the person of the circumstances of the offence and question the person or carry out investigations in which the person participates in order to determine the person’s involvement (if any) in that offence.<sup>57</sup>

## **RELATED INVESTIGATIVE PROCEDURES**

2.25 The requirements of section 464E<sup>58</sup> are not limited to police questioning. As indicated, they also extend to ‘investigations in which the person participates’ conducted according to section 464A(2).<sup>59</sup> This includes matters such as filmed re-enactments of events. Processes for fingerprinting and taking forensic samples from young people are covered by separate sections of the Crimes Act.<sup>60</sup>

28 Ibid ss 464E(1), 464A(2).

29 Ibid s 464E(1)(a).

30 Ibid s 464E(1)(b).

31 Victoria Police Manual, above n 23.

32 Centre for Multicultural Youth, Youth Referral and Independent Person Program: Independent Person Procedure Manual (2010).

33 Crimes Act 1958 (Vic) s 464E.

34 Ibid.

35 Ibid.

36 Police Regulation Act 1958 (Vic) s 17.

37 Victoria Police, Victoria Police Manual: Chief Commissioner’s Foreword, from CD-ROM current at 30 August 2010.

38 Ibid; see also Police Regulation Act 1958 (Vic) s 69(b).

39 R v Lee (1950) 82 CLR 133, 154.

40 Collins v R (1980) 31 ALR 257, 313–14.

41 Ibid.

42 Crimes Act 1958 (Vic) s 464E.

43 Centre for Multicultural Youth, above n 32.

44 Crimes Act 1958 (Vic) s 464E.

45 Ibid.

46 Ibid.

47 Ibid s 464(2) (definition of ‘investigating official’).

48 Ibid s 464E(1)(a).

49 Crimes Act 1958 (Vic).

50 Ibid s 464E.

51 Ibid ss 464(1)(a)–(b), 458–9.

52 Ibid s 464(1)(c).

53 Crimes Act 1958 (Vic).

54 Ibid s 464A(3).

55 Ibid s 464A(3).

56 Ibid s 464A(2).

57 Ibid s 464A(2).

58 Ibid s 464E.

59 Ibid s 464A(2)(b).

60 Ibid ss 464K–464L, 464U.

### Fingerprinting

- 2.26 In order for the police to fingerprint anyone aged between 10 and 18 years, the person must:
- be believed on reasonable grounds to have committed an indictable offence
  - have been charged with an indictable offence, or
  - have been summonsed to answer a charge for an indictable offence.<sup>61</sup>
- 2.27 In order to fingerprint a child aged between 10 and 14 years,<sup>62</sup> both the child and the child's parent or guardian must consent to the fingerprinting.<sup>63</sup> The child's parent or guardian must be present when police request fingerprints, give information to the child and take fingerprints.<sup>64</sup> There is no provision for an independent person to be present in the absence of the child's parent or guardian.
- 2.28 To fingerprint a person aged 15 to 17 years, a parent or guardian, or, if a parent or guardian cannot be located, an independent person, must be present when police request fingerprints, give information to the young person and take fingerprints.<sup>65</sup> Whereas section 464E of the Crimes Act stipulates that an independent person should be present when a parent or guardian 'is not available',<sup>66</sup> section 464K requires the presence of an independent person when a parent or guardian 'cannot be located'.<sup>67</sup>

### Taking forensic samples

- 2.29 In order for police to have a 'forensic procedure'<sup>68</sup> or 'compulsory procedure'<sup>69</sup> performed on someone who is over the age of 10 but under the age of 18, the person must be suspected of having committed an offence, charged with an offence or summonsed to answer a charge for an offence.<sup>70</sup>
- 2.30 Police cannot request that a child under the age of 10 undergo a forensic procedure.<sup>71</sup> For young people over the age of 10 but under 18, police may only request that a forensic procedure be conducted on the person if the Children's Court has made an order to that effect.<sup>72</sup> If the Children's Court makes the order, the child's parent or guardian, or, if a parent or guardian cannot be located, an independent person of the same sex as the child (if practicable), must be present during the procedure.<sup>73</sup>

### EXCEPTIONS TO THE LEGISLATIVE REQUIREMENT

#### Express exceptions in section 464E<sup>74</sup>

- 2.31 The requirement that a parent, guardian or independent person be present does not apply when police believe on reasonable grounds that following these procedures would lead to the escape of an accomplice, the fabrication or destruction of evidence,<sup>75</sup> or that delaying questioning would endanger other people.<sup>76</sup> In addition, section 464E(4) provides that the requirements for the presence of a parent, guardian or independent person do not apply when a young person is being questioned or investigated about driving while intoxicated.<sup>77</sup>



2.32 The exceptions in the Victorian legislation are similar to those in some other Australian jurisdictions.<sup>78</sup> Under the Commonwealth Crimes Act,<sup>79</sup> for example, the relevant exceptions have been applied in cases of importing border-controlled drugs,<sup>80</sup> and receiving funds from a terrorist organisation and possessing a falsified Australian passport.<sup>81</sup> In *R v Raymundo Antonio Orellana (No 3)*, the accused was not allowed to immediately telephone his friend, as the Federal Police suspected that friend may have been involved in the alleged offence.<sup>82</sup> The delay in the accused being allowed to contact his friend was held to be reasonable.<sup>83</sup>

2.33 The Commission is unaware of case law that has applied or interpreted the Victorian Crimes Act exceptions to the requirement to have a parent, guardian or independent person present during police questioning of a young person in custody.<sup>84</sup>

#### When the young person is not 'in custody'

2.34 The obligations imposed upon police by section 464E arise only when a young person is 'in custody'. The Victoria Police Manual<sup>85</sup> states that legislation does not require an independent person 'when the accused is not in custody and immediate action is being taken to investigate an alleged offence'.<sup>86</sup> The manual advises, however, that investigating members should comply with the independent person requirement 'whenever possible' to ensure any admissions 'are not excluded at court as unfairly obtained'.<sup>87</sup>

2.35 The issue of when a young person is 'in custody' for the purpose of section 464E is dealt with in section 464(1) of the Crimes Act.<sup>88</sup> The definition of 'in custody' is complex because it encompasses circumstances other than arrest and sometimes requires judgment about the amount of information the police possess. A person being questioned is 'in custody' if the questioning is in connection with that person's involvement in the commission of an offence, and the police have sufficient information to justify the person's arrest.<sup>89</sup>

61 Ibid ss 464L(2), 464K(1). Note that there are also some summary offences for which police can take fingerprints: sch 7.

62 Children under the age of 10 cannot be fingerprinted: *Crimes Act 1958* (Vic) s 464L(1).

63 *Crimes Act 1958* (Vic) s 464L(2).

64 Ibid s 464L(4).

65 Ibid s 464K(8).

66 Ibid s 464E(1)(a).

67 Ibid s 464K(8).

68 'Forensic procedure' means the taking of a sample from any part of the body, whether intimate or non-intimate, or the conduct of any procedure on or physical examination of the body, but excludes the taking of fingerprints: *Crimes Act 1958* (Vic) s 464(2) (definition of 'forensic procedure').

69 'Compulsory procedure' means the taking of an intimate or non-intimate sample or the conduct of a physical examination: *Crimes Act 1958* (Vic) s 464(2) (definition of 'compulsory procedure').

70 *Crimes Act 1958* (Vic) s 464U(1).

71 Ibid s 464U(2).

72 Ibid.

73 Ibid s 464ZA.

74 Ibid s 464E.

75 Ibid s 464E(2)(a).

76 Ibid s 464E(2)(b).

77 Ibid s 464E(4); *Road Safety Act 1986* (Vic) s 49(1).

78 See, eg, *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27(7); *Police Powers and Responsibilities Act 2000* (Qld) s 441; *Crimes Act 1914* (Cth) s 23L(1).

79 *Crimes Act 1914* (Cth) s 23L(1). For a complete summary of the *Crimes Act 1914* (Cth) scheme in relation to interviewing young people, please see Appendix C.

80 See, eg, *R v Raymundo Antonio Orellana (No 3)* (Unreported, District Court of New South Wales, Cogwell SC DCJ, 20 July 2009) ('*Orellana*').

81 See, eg, *R v Thomas* (2006) 14 VR 475.

82 *Orellana* (Unreported, District Court of New South Wales, Cogwell SC DCJ, 20 July 2009) [21]. However, it should be noted that this case was not interpreting the exceptions in relation to a young person's right to have an interview friend present, but rather an accused's right to contact a friend or relative under *Crimes Act 1914* (Cth) s 23G. The exceptions under the *Crimes Act 1914* (Cth) apply more broadly than to the provision of an interview friend for a young person: see s 23L(1).

83 *Orellana* (Unreported, District Court of New South Wales, Cogwell SC DCJ, 20 July 2009) [21].

84 *Crimes Act 1958* (Vic) s 464E(2).

85 The legal status of the manual is discussed above, see [2.14]–[2.16]. The manual is a set of instructions from the Chief Commissioner of Police to police officers for 'the effective and efficient conduct of the force's operations': *Police Regulation Act 1958* (Vic) s 17(b). Statements in the manual about the meaning of relevant provisions in the Crimes Act are the opinion of the Chief Commissioner.

86 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Interviewing Specific Categories of Person', from CD-ROM current at 30 August 2010, 2–3.

87 Ibid 2.

88 This definition is provided at [2.21]–[2.22].

89 *Crimes Act 1958* (Vic) s 464(1).

- 2.36 This means that although the requirement to have a parent, guardian or independent person present during questioning does not apply if the young person is a victim or witness, it does apply as soon as the police have sufficient information to justify an arrest, regardless of whether they actually take that step.

### When the young person is questioned at school

- 2.37 The Victoria Police Manual provides that interviews of students at school can only take place if a parent, guardian or independent person is present 'unless the principal believes that the interview may assist to avert a possible physical injury to any person or further damage to property'.<sup>90</sup> Not only would the decision to proceed without a parent, guardian or independent person effectively be made by the school principal and not Victoria Police, but the manual allows the requirement to be waived where there is risk of 'further damage to property'.<sup>91</sup> This contrasts with the exceptions set out in section 464E of the Crimes Act, which refer only to the escape of an accomplice,<sup>92</sup> the fabrication or destruction of evidence<sup>93</sup> and the safety of other people.<sup>94</sup>
- 2.38 The only justification for such a divergence from section 464E<sup>95</sup> would be that the young person is not considered to be 'in custody' when interviewed at school.<sup>96</sup> However, the young person would clearly be 'in custody' if he or she is in the company of an investigating official at school being questioned to determine his or her involvement in the commission of an offence and the police officer has sufficient information to justify the arrest of the young person.<sup>97</sup> The Victoria Police Manual is not entirely consistent with the requirements of the Crimes Act<sup>98</sup> in this respect.

### INTERPRETATION AND APPLICATION OF THE LEGISLATIVE REQUIREMENT

- 2.39 Two cases provide guidance about the operation of section 464E of the Crimes Act, in particular the role of an independent person and the consequences of not complying with the requirements of the section.<sup>99</sup>

### KEY CASES

#### *Director of Public Prosecutions v Toomalatai*

- 2.40 The leading case is *Director of Public Prosecutions v Toomalatai*.<sup>100</sup> In this case, the accused person—Mr Toomalatai—was 16 years old. He was arrested by police following a fight in which one person died from his wounds and two others were injured. Mr Toomalatai was charged with manslaughter.<sup>101</sup>
- 2.41 In compliance with section 464E of the Crimes Act,<sup>102</sup> the police first contacted Mr Toomalatai's father and asked him to come to the police station.<sup>103</sup> The father and son were estranged, however, and the father met his son in the interview room for only a couple of minutes, telling his son he was not happy with him.<sup>104</sup> The father then told police that he had a church service to conduct and could not attend the interview.<sup>105</sup>
- 2.42 Police then arranged for a justice of the peace to attend.<sup>106</sup> The justice of the peace was left alone with Mr Toomalatai for 20 minutes before the police interview, during which time he admonished Mr Toomalatai for his behaviour and encouraged him to speak to the police when they asked him questions.<sup>107</sup> According to Mr Toomalatai, the justice of the peace did not explain to him that he did not have to answer questions or that he had other rights.<sup>108</sup>
- 2.43 At trial, Justice Bell found that during the police interview the justice of the peace 'sat passively by, even when Mr Toomalatai displayed obvious confusion at some points'.<sup>109</sup> Notably, the justice of the peace acknowledged that he had received no training for his role, which Justice Bell found 'lamentable'.<sup>110</sup>



2.44 *Toomalatai*<sup>111</sup> is discussed below in relation to:

- the obligations of police interviewing young people
- the role of an independent person
- consequences for non-compliance with the legislative requirement.

### *R v JPD*

2.45 The case of *R v JPD*<sup>112</sup> concerned the efforts an investigating official must make to secure the attendance of a parent or guardian at an interview before contacting an independent person.

2.46 In this case, police made some attempt to secure the attendance of the young person's parent, but formed the impression that 'this was unlikely to be arranged'.<sup>113</sup> Police then arranged for an independent person to attend.

### THE ROLE OF A PARENT OR GUARDIAN

2.47 Section 464E of the Crimes Act<sup>114</sup> does not describe the role a parent or guardian should play during police questioning of a young person in custody. Issues requiring clarification include:

- the functions of a parent or guardian during a police interview
- whether the parent or guardian has the same role as the independent person
- whether a parent or guardian can nominate another person to attend the police interview on their behalf, as the Victoria Police Manual suggests
- whether that nominated person has the same role as the parent, guardian or independent person
- the legal consequences if a parent or guardian, or a nominated person, fails to perform the required role.

2.48 Many parents and guardians may be unaware of the role they are expected to play if asked to be present during police questioning of their child. 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.*<sup>115</sup>

2.49 In some instances, a parent or guardian, like the young person's father in *Toomalatai*,<sup>116</sup> may be critical of the young person or remain passive during the interview. In other instances, the parent or guardian may feel overwhelmed by the interview and, as a result, be unable to provide the young person with any meaningful support.

### WHEN IS A PARENT OR GUARDIAN 'NOT AVAILABLE'?

2.50 Although section 464E of the Crimes Act states that an independent person must be present if a young person's parent or guardian is 'not available',<sup>117</sup> the Act does not provide guidance about when a parent or guardian will be considered 'not available'. This limitation means that section 464E<sup>118</sup> provides the police with no guidance about the circumstances in which they should abandon a search for a parent or guardian and arrange to have an independent person present during questioning of a young person.

90 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 3.

91 Ibid.

92 *Crimes Act 1958* (Vic) s 464E(2)(a).

93 Ibid.

94 Ibid s 464E(2)(b).

95 Ibid s 464E.

96 The requirement for an independent person to be present when a young person is questioned or interviewed by police only applies if the young person is in custody and suspected of having committed an offence: *Crimes Act 1958* (Vic) ss 464E(1), 464A(2).

97 *Crimes Act 1958* (Vic) s 464(1)(c), discussed at [2.16].

98 *Crimes Act 1958* (Vic).

99 Ibid s 464E.

100 *Toomalatai* (2006) 13 VR 319.

101 Ibid 319–20 [1], [3].

102 *Crimes Act 1958* (Vic) s 464E(1).

103 *Toomalatai* (2006) 13 VR 319, 320 [7].

104 Ibid.

105 Ibid.

106 Ibid [3].

107 Ibid 321 [13].

108 Ibid 320–1 [10].

109 Ibid 322 [15].

110 Ibid 321 [12].

111 (2006) 13 VR 319.

112 *R v JPD* [2001] VSC 202.

113 Ibid [12].

114 *Crimes Act 1958* (Vic) s 464E.

115 Neil Rees, 'The Rules Governing Police Interrogation of Children' in J Basten et al (eds) *The Criminal Justice System* (1982) 69.

116 *Toomalatai* (2006) 13 VR 319, 320 [7].

117 *Crimes Act 1958* (Vic) s 464E(1)(a).

118 Ibid s 464E.

2.51 The Victoria Police Manual identifies two situations in which police should arrange the attendance of an independent person:

- when the parent or guardian ‘does not want to attend and does not nominate another person to attend for them’
- when ‘it is undesirable for a parent/guardian to be present’.<sup>119</sup>

2.52 Section 464E of the Crimes Act<sup>120</sup> does not refer to parents or guardians being able to nominate a person to attend on their behalf, nor does it make general provision for circumstances in which attendance of a parent or guardian might be ‘undesirable’. Section 464E(2) deals with three specific situations in which the police can question a young person in custody without the presence of a parent, guardian or independent person:

- when notification may lead to escape of an accomplice
- when notification may lead to interference with evidence
- when police must proceed with urgency because of a threat to the safety of others.<sup>121</sup>

The Victoria Police Manual implies, however, that police have a discretionary power to use an independent person even where a parent or guardian is available.

### DEFINITION OF ‘INDEPENDENT PERSON’

2.53 As noted previously, the Crimes Act<sup>122</sup> does not define ‘independent person’ or explain who can act in this role. The use of the word ‘independent’ suggests, however, that the person should not be a police officer or other government official investigating the young person in custody. The Victoria Police Manual also suggests that an independent person should not be someone with a real or perceived conflict of interest, such as the parent of a co-accused.<sup>123</sup>

2.54 In *Toomalatai*,<sup>124</sup> counsel for the young person submitted that by his actions the justice of the peace had ceased to be an independent person for the purposes of the Crimes Act.<sup>125</sup> Justice Bell disagreed on the facts of the case but noted that ‘[n]o doubt someone who starts out being independent can, by their conduct, become someone who is not’.<sup>126</sup>

2.55 The decision in *Toomalatai*<sup>127</sup> suggests that the behaviour of a person while in the role of an independent person is relevant, and that a person who fails to intervene when he or she sees police behaving inappropriately towards a youth may cease to be an ‘independent person’ under the Crimes Act.<sup>128</sup>

2.56 Beyond the use of the term ‘independent’, the legislation contains no guidance about the necessary qualities and qualifications of a person acting as an independent person.<sup>129</sup>

### THE ROLE OF AN INDEPENDENT PERSON

2.57 It is clear from section 464E of the Crimes Act that the independent person must be present during the police interview when a parent or guardian is unavailable.<sup>130</sup> That section also provides that the independent person, like a parent or guardian when available, has a role in communicating with the young person in private prior to the interview commencing.<sup>131</sup> Beyond this, section 464E<sup>132</sup> does not define or describe the role of the independent person. The independent person is clearly intended to be the substitute for the unavailable parent or guardian, but the Crimes Act<sup>133</sup> does not define the role of the parent or guardian either.

2.58 In *Director of Public Prosecutions v Toomalatai*,<sup>134</sup> Justice Bell commented on the role of the independent person under section 464E of the Crimes Act.<sup>135</sup> He stated that he drew guidance from cases in New South Wales<sup>136</sup> and the United Kingdom<sup>137</sup> due to the similarities between the law in those jurisdictions and Victoria.<sup>138</sup>

2.59 Justice Bell held that the role of the independent person includes:

- acting as a check and protesting against any perceived unfairness or oppressive behaviour
- advising the child of his or her rights, which could include a reminder of the right to silence or an admonition against further participation in the interview in the absence of legal advice
- within appropriate limits, assisting a timid or inarticulate child to frame his or her answer to the allegation.<sup>139</sup>

2.60 Justice Bell concluded that the justice of the peace in *Toomalatai*<sup>140</sup> failed to perform his duty as an independent person properly. He identified two significant shortcomings:

- the independent person should have been 'positive and active in assisting, protecting and supporting Mr Toomalatai', but instead he was 'judgmental and admonishing'<sup>141</sup>
- the independent person 'was passive in the interview itself, when his active support was most needed'.<sup>142</sup> Justice Bell said that 'the role of this person is intended to be positive and active, not that of a silent observer'.<sup>143</sup>

Justice Bell noted that the justice of the peace had mistakenly thought his role was to sit in the middle and keep both the young person and the police officers 'happy'.<sup>144</sup>

### Differences between the case law and the Victoria Police Manual

2.61 The Victoria Police Manual contains a different description of the role of an independent person. It states that the presence of the independent person, or the parent or guardian, 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*.<sup>145</sup>

2.62 The manual does not refer to the active roles of protesting against unfair or oppressive behaviour and advising the child of his or her rights. In *Toomalatai*, Justice Bell described the independent person's role as being active and involved,<sup>146</sup> whereas the Victoria Police Manual characterises the role in observational, evidentiary terms.<sup>147</sup>

### RESPONSIBILITIES OF AN 'INVESTIGATING OFFICIAL'

2.63 The Crimes Act does not clearly describe the responsibilities of a police officer who wishes to question a young person in custody beyond stipulating that this activity should not occur unless a parent, guardian or independent person is present.<sup>148</sup> The legislation does not deal with the following issues:

- how much effort the police officer must make, and for how long, to secure the presence of a parent or guardian
- how the police officer finds an independent person
- what role, if any, the police officer must play in instructing an independent person about his or her role and ensuring that it is properly performed.

119 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 2. Procedures and guidelines provide police officers with information and examples on how to apply and interpret the policy rules, which, unlike the procedures and guidelines, are mandatory requirements: Victoria Police, *Chief Commissioner's Foreword*, above n 37.

120 *Crimes Act 1958* (Vic) s 464E.

121 *Ibid* s 464E(2).

122 *Crimes Act 1958* (Vic).

123 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 2–3.

124 *Toomalatai* (2006) 13 VR 319.

125 *Crimes Act 1958* (Vic) s 464E.

126 *Toomalatai* (2006) 13 VR 319, 331 [56].

127 *Toomalatai* (2006) 13 VR 319.

128 *Ibid* 331 [56].

129 See Chapter 3 discussion of YRIPP and non-YRIPP stations and how they have dealt with this gap in the law.

130 *Crimes Act 1958* (Vic) s 464E(1)(a).

131 *Ibid* s 464E(1)(b).

132 *Ibid* s 464E.

133 *Crimes Act 1958* (Vic).

134 *Toomalatai* (2006) 13 VR 319.

135 *Crimes Act 1958* (Vic) s 464E.

136 *R v Phung and Huynh* [2005] NSWSC 115 (Wood J) ('Phung'); *R v H (A Child)* (1996) 85 A Crim R 481, 486 (Hidden J) in *Toomalatai* (2006) 13 VR 319, 331–2 [61]–[62].

137 *DPP v Blake* (1989) Cr App R 179, 185 (Auld J) in *Toomalatai* (2006) 13 VR 319, 332 [63].

138 *Toomalatai* (2006) 13 VR 319, 332 [63].

139 *Ibid* 331 [61]–[62] citing with approval two New South Wales Supreme Court cases that have determined the role of the independent person in that state based on the equivalent provision in the *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1): *Phung* [2005] NSWSC 115, [36] and *R v H (A Child)* (1996) 85 A Crim R 481, 486.

140 *Toomalatai* (2006) 13 VR 319, 334 [78].

141 *Ibid*.

142 *Ibid*.

143 *Ibid* 336 [86].

144 *Ibid* 321 [12].

145 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 2.

146 *Toomalatai* (2006) 13 VR 319, 336 [86].

147 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 2.

148 *Crimes Act 1958* (Vic) s 464E. As noted, this 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.

- 2.64 When dealing with the first matter—the effort required in securing the attendance of a parent or guardian—Justice Vincent suggested in *R v JPD* that practicability and timing are relevant considerations.<sup>149</sup> He stated 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.*<sup>150</sup>
- 2.65 Justice Vincent also concluded that the police officers had acted reasonably and had complied with section 464E of the Crimes Act<sup>151</sup> by contacting ‘a clearly independent person’ when it appeared that the presence of a parent could not be secured, ‘at least for some time’.<sup>152</sup>
- 2.66 In *Toomalatai*,<sup>153</sup> Justice Bell concluded that police had made sufficient efforts to secure the presence of a parent or guardian.<sup>154</sup> Specifically, Justice Bell rejected a submission that police breached section 464E of the Crimes Act<sup>155</sup> by failing to request that the young person’s mother attend.<sup>156</sup> According to Justice Bell, police were entitled to assume that she would not attend after her husband refused to remain at the police station for the interview.<sup>157</sup>
- 2.67 Case law is silent as to how the police officer finds an independent person and the role a police officer must play in instructing an independent person.

### CONSEQUENCES FOR NON-COMPLIANCE WITH SECTION 464E OF THE CRIMES ACT

- 2.68 The Crimes Act does not prescribe the consequences of non-compliance with section 464E.<sup>158</sup> The major practical sanction for non-compliance is, however, a finding by a judicial officer that confessional evidence obtained in circumstances that contravene the section is inadmissible. This might occur either when a young person has not had a parent, guardian or independent person present during police questioning, or when that person has failed to fulfil their role adequately.<sup>159</sup>
- 2.69 While the leading Victorian case of *Toomalatai*<sup>160</sup> deals with the admissibility of confessional evidence obtained in circumstances that contravene section 464E,<sup>161</sup> the precise effect of that decision has become unclear because the law of evidence has changed since that case was decided.

### Inadmissibility of confessional evidence or admissions

#### *Evidence Act 2008 (Vic)*

- 2.70 The *Evidence Act 2008 (Vic)* (Evidence Act), which came into effect on 1 January 2010, now governs the admissibility into evidence of confessions, or admissions as they are referred to under that Act.<sup>162</sup> The Evidence Act provides that in certain circumstances, evidence of an admission by a defendant may not be admissible in criminal proceedings.<sup>163</sup> ‘Admission’ is defined as any previous statement or other representation that is adverse to the interests of the person who made the statement if that person becomes a party to proceedings.<sup>164</sup> This definition clearly includes statements made during police interviews.
- 2.71 An admission is inadmissible if:
- it was influenced by violent, oppressive, inhuman or degrading conduct, or a threat of such conduct<sup>165</sup>
  - the court decides, in its discretion, that it would be unfair to the defendant to use the evidence, having regard to the circumstances in which the admission was made<sup>166</sup>

- it was obtained improperly, unlawfully or in contravention of an Australian law, and the desirability of admitting the evidence does not outweigh the undesirability of admitting the evidence, given the way in which it was obtained<sup>167</sup>
- it was made to or in the presence of an investigating official who was performing functions in connection with the commission of an offence,<sup>168</sup> unless the circumstances in which the admission was made 'make it unlikely that the truth of the admission was adversely affected'<sup>169</sup>
- it was made as a result of an act of another person who was, and who the accused knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the accused should be brought or continued,<sup>170</sup> unless the circumstances in which the admission was made 'make it unlikely that the truth of the admission was adversely affected'.<sup>171</sup>

## Common law

2.72 While the Evidence Act replaces common law rules of evidence in some circumstances,<sup>172</sup> the common law rules may assist interpretation of some parts of the Evidence Act.<sup>173</sup> The relevant common law rules of evidence concerning the admissibility of evidence of a confession are:

- A court may only admit evidence of a confession if it is satisfied that the confession was voluntary, and, in particular, that it was not due to the will of the suspect being overborne.<sup>174</sup>
- A court may only admit evidence of a confession if it is satisfied that the confession was voluntary and, in particular, that it was not preceded by an inducement from a person in authority.<sup>175</sup>
- A court has a discretion to exclude an otherwise admissible, voluntary confession if its reception into evidence would be unfair to the accused—the 'unfairness discretion'.<sup>176</sup>
- A court has the discretion to exclude confessional evidence where police have acted unlawfully or grossly unfairly—the exclusion on the ground of public policy.<sup>177</sup>

2.73 In *Toomalatai*,<sup>178</sup> counsel for the young person challenged the admissibility of admissions made during a police interview conducted in the presence of an independent person on two grounds:

- they were made involuntarily, either because Mr Toomalatai's will was overborne or because the admissions were induced by a threat or promise from a person in authority, and were therefore inadmissible<sup>179</sup>
- it would be unfair to allow the admissions to be used against Mr Toomalatai and the Court should exercise its discretion to exclude them.<sup>180</sup>

2.74 Justice Bell concluded that the young person's will was not overborne,<sup>181</sup> even though he accepted that Mr Toomalatai was in an inherently vulnerable position, both by virtue of his age and because the independent person had admonished him and advised him before the interview to speak to police.<sup>182</sup> Justice Bell was nevertheless satisfied that the young person understood he did not have to answer questions.<sup>183</sup>

149 *R v JPD* [2001] VSC 202 [12].

150 *Ibid.*

151 *Crimes Act 1958* (Vic) s 464E.

152 *R v JPD* [2001] VSC 202, [12].

153 *Toomalatai* (2006) 13 VR 319.

154 *Ibid* 330 [55].

155 *Crimes Act 1958* (Vic) s 464E.

156 *Toomalatai* (2006) 13 VR 319, 330 [55].

157 *Ibid.*

158 *Crimes Act 1958* (Vic) s 464E.

159 *Toomalatai* (2006) 13 VR 319, 331 [64].

160 *Toomalatai* (2006) 13 VR 319.

161 *Crimes Act 1958* (Vic) s 464E.

162 *Evidence Act 2008* (Vic) s 2(3).

163 See, eg, *ibid* ss 84, 90, 138, 85.

164 *Evidence Act 2008* (Vic) Dictionary pt 1 (definitions of 'admission' and 'previous representation').

165 *Ibid* s 84.

166 *Ibid* s 90.

167 *Ibid* s 138.

168 *Ibid* s 85(1)(a).

169 *Ibid* s 85(2). Note that for the purposes of s 85(2) of the *Evidence Act 2008* (Vic), a court must take into account the age of the person who made the admission, among other attributes: s 85(3)(a).

170 *Evidence Act 2008* (Vic) s 85(1)(b).

171 *Ibid* s 85(2). As noted above, for the purposes of s 85(2) of the *Evidence Act 2008* (Vic), a court must take into account the age of the person who made the admission, among other attributes: s 85(3)(a).

172 See, eg, *Evidence Act 2008* (Vic) s 9(1).

173 Christopher Corns and Steven Tudor, *Criminal Investigation and Procedure: The Law in Victoria* (2009) [8.150].

174 See, eg, *McDermott v R* (1948) 76 CLR 501, 511; *Collins v R* (1980) 31 ALR 257, 307. This rule is replaced by *Evidence Act 2008* (Vic) s 84. For further discussion, see Corns and Tudor, above n 173, 272 [8.270], 273 [8.280].

175 *Ibrahim v R* [1914] AC 599, 609, accepted in *R v Lee* (1950) 82 CLR 133, 147. This rule is largely replaced by *Evidence Act 2008* (Vic) s 85(1)(b). For further discussion, see Corns and Tudor, above n 173, 274 [8.290], 277 [8.300].

176 *McDermott v R* (1948) 76 CLR 501, 506–7 (Latham CJ), 513 (Dixon J). This rule is replaced by *Evidence Act 2008* (Vic) s 90. For further discussion, see Corns and Tudor, above n 173, 279 [8.320], 282 [8.330].

177 *R v Cleland* (1982) 151 CLR 1, 8–9 (Gibbs CJ), 23 (Deane J), 34 (Dawson J). This rule is replaced by *Evidence Act 2008* (Vic) s 138. For further discussion, see Corns and Tudor, above n 173, 283 [8.340], 283 [8.350].

178 *Toomalatai* (2006) 13 VR 319. It should be noted that this decision was handed down before the *Evidence Act 2008* (Vic) came into force.

179 *Toomalatai* (2006) 13 VR 319, 324 [24]–[29].

180 *Ibid* 328 [46].

181 *Ibid* 323 [24].

182 *Ibid.*

183 *Ibid* [25].

- 2.75 Although Justice Bell accepted that the independent person's pre-interview remarks amounted to an inducement of sorts, he did not exclude the admission on this basis.<sup>184</sup> He stated:

*[The JP] made remarks in the pre-interview discussion that made Mr Toomalatai think it would be in his interests to speak to the police when they asked him questions. This seems to me to be an inducement that he would be treated more favourably by the police if he told them what he knew. His remarks about Mr Toomalatai's father also strongly implied that answering questions would gain the favour, and stave off the disfavour, of his father.*<sup>185</sup>

Despite these remarks, Justice Bell found that the submissions to this effect 'were not sufficiently developed or answered'<sup>186</sup> and therefore declined to find against the prosecution on this point.<sup>187</sup>

- 2.76 Justice Bell ruled the statements made by the young person during the police interview inadmissible by applying the unfairness discretion.<sup>188</sup> It was held that the failure of the independent person to properly fulfil that role should result in the discretionary exclusion of the confession.<sup>189</sup> According to Justice Bell, the justice of the peace did not perform the role required of an independent person by section 464E,<sup>190</sup> because

*[i]nstead of bringing balance to the situation as an adult on Mr Toomalatai's side, he became another adult before whom Mr Toomalatai was being held to account for his alleged conduct.*<sup>191</sup>

- 2.77 Justice Bell found that because

*the failings of the independent person were so serious, the disadvantages faced by the young person in the interview were so great and the admissions made in the police interview are so unreliable that it would be unfair to allow the admissions to be used against the young person in the trial.*<sup>192</sup>

- 2.78 While Justice Bell's decision in *Toomalatai*<sup>193</sup> continues to provide guidance about the nature of the obligations placed upon police and independent persons by section 464E of the Crimes Act,<sup>194</sup> the consequences of any failure to comply with those obligations is now governed by the Evidence Act,<sup>195</sup> not common law rules. Consequently, the current effect of the *Toomalatai*<sup>196</sup> decision is uncertain.

### Disciplinary action

- 2.79 In addition to a court excluding confessional evidence, police officers may face disciplinary action if they fail to follow the requirements of section 464E of the Crimes Act.<sup>197</sup>
- 2.80 The Victoria Police Manual states that a failure to comply with the policy rules could lead to 'management or disciplinary action'.<sup>198</sup> The policy rules, which are mandatory requirements, compel police officers to have regard to procedures and guidelines on interviewing children.<sup>199</sup> Those procedures and guidelines contain instructions about when the presence of an independent person should be arranged and the role that person is to play during the interview.<sup>200</sup>
- 2.81 The *Police Regulation Act 1958* (Vic) provides for a range of sanctions if, following an inquiry,<sup>201</sup> a breach of discipline is proved.<sup>202</sup> A breach of discipline includes a breach of the Victoria Police Manual, which constitutes a contravention of standing orders or instructions issued by the Chief Commissioner.<sup>203</sup>



2.82 One or more of the following sanctions may be imposed on a police officer for such a breach:

- a reprimand<sup>204</sup>
- an adjournment of the hearing of the inquiry into the charge on the condition that the member be of good behaviour for a period not exceeding 12 months or on any other condition specified in the determination<sup>205</sup>
- a fine of up to 40 penalty units<sup>206</sup>
- the imposition of a period, not exceeding two years, during which the member will not be eligible for promotion or transfer to other duties<sup>207</sup>
- a reduction in rank or seniority of the member<sup>208</sup>
- a reduction in the remuneration of the member<sup>209</sup>
- the transfer of the member to other duties<sup>210</sup>
- the dismissal of the member<sup>211</sup>
- a requirement that the member make any restitution or pay any compensation costs appropriate.<sup>212</sup>

## RELATED REQUIREMENTS FOR POLICE QUESTIONING

2.83 This part considers related requirements for people with particular needs during police questioning. Some of these related requirements are dealt with by legislation, while others are matters of practice governed by arrangements between the police and other agencies.<sup>213</sup>

### PEOPLE WHO REQUIRE INTERPRETERS

2.84 The Crimes Act requires that police arrange for an interpreter to attend when questioning a person in custody who is suspected of having committed an offence and does not have sufficient knowledge of English to be able to understand questioning.<sup>214</sup> Questioning must be deferred until the interpreter is present.<sup>215</sup>

2.85 This requirement does not extend to a young person's parent, guardian or independent person where they have insufficient knowledge of English. The Victoria Police Manual states, however, that police are to provide an interpreter where, in the case of children, 'the parent/guardian or independent person cannot speak or understand English'.<sup>216</sup>

### PEOPLE WITH AN IMPAIRED MENTAL STATE

2.86 Although the Crimes Act provides no mandatory safeguards for police interviews of people with an impaired mental state, the Victoria Police Manual provides for the presence of an 'independent third person' when interviewing a person with 'an impaired mental state or capacity who is fit to be interviewed'.<sup>217</sup> The manual provides that this person 'will either be a relative or close friend, or a trained volunteer from the Office of the Public Advocate'.<sup>218</sup>

2.87 This matter has been considered in several cases in relation to the admissibility of confessional evidence,<sup>219</sup> particularly the voluntariness of any admission and the fairness of admitting evidence. In *R v Warrell*,<sup>220</sup> it was held that while the Victoria Police Manual does not have the force of law, it provides standards for the level of care necessary to maintain the integrity of the system.<sup>221</sup> In that case, police had arrested and interviewed a man with an intellectual disability.<sup>222</sup> The man had not been allowed to speak privately with his independent third person prior to the interview.<sup>223</sup> It was held that his disability disadvantaged him, and that he had been denied the assistance necessary to address that disadvantage.<sup>224</sup>

184 Ibid 326 [39].

185 Ibid 326 [37].

186 Ibid [39].

187 Ibid.

188 Ibid 335 [83].

189 Ibid 331 [64].

190 *Crimes Act 1958* (Vic) s 464E.

191 *Toomalatai* (2006) 13 VR 319, 334 [79].

192 Ibid 335 [83].

193 *Toomalatai* (2006) 13 VR 319.

194 *Crimes Act 1958* (Vic) s 464E.

195 *Evidence Act 2008* (Vic).

196 *Toomalatai* (2006) 13 VR 319.

197 *Crimes Act 1958* (Vic) s 464E.

198 Victoria Police, *Chief Commissioner's Foreword*, above n 37.

199 Victoria Police, *Victoria Police Manual: Policy Rules*, 'Interviews and Statements', from CD-ROM current at 30 August 2010, 4.

200 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 2–3.

201 *Police Regulation Act 1958* (Vic) ss 70–5.

202 Ibid s 76.

203 Ibid s 69(1)(b). The Chief Commissioner has power under the *Police Regulation Act 1958* (Vic) to issue standing orders and 'instructions for the effective and efficient conduct of the force's operations': s 17. The Victoria Police Manual is issued under this power: Victoria Police, *Chief Commissioner's Foreword*, above n 37.

204 *Police Regulation Act 1958* (Vic) s 76(1)(a).

205 Ibid s 76(1)(b).

206 Ibid s 76(1)(c).

207 Ibid s 76(1)(ca).

208 Ibid s 76(1)(d).

209 Ibid s 76(1)(e).

210 Ibid s 76(1)(f).

211 Ibid s 76(1)(g).

212 Ibid s 76(2).

213 See Chapter 3 for discussion of 'Aboriginal young people', 'Young people with impaired mental state', and 'Young people as witnesses and victims'.

214 *Crimes Act 1958* (Vic) ss 464D(1), 464A(2).

215 Ibid s 464D(1).

216 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 6.

217 Ibid 3.

218 Ibid. Practice surrounding the provision of independent third persons is discussed further in Chapter 3 under the heading 'Young people with impaired mental state', [3.61]–[3.63].

219 See, eg, *R v Warrell* [1993] 1 VR 671; *R v Tupper* (Unreported, Victorian Court of Appeal, Phillips CJ, Crockett and Southwell JJ, 31 June 1994).

220 *R v Warrell* [1993] 1 VR 671, 681.

221 Ibid.

222 Ibid.

223 Ibid 682.

224 Ibid.

- 2.88 When a person interviewed by police is a young person with an impaired mental state, the requirements of section 464E of the Crimes Act<sup>225</sup> and the Victoria Police Manual are not the same. The manual requires the presence of a relative, close friend, or trained volunteer when the person in custody has an impaired mental state,<sup>226</sup> while the Crimes Act, although silent about the provision of independent third persons, requires the presence of a parent, guardian or independent person when the person in custody is a young person.<sup>227</sup>

### HUMAN RIGHTS CONSIDERATIONS

- 2.89 Human rights instruments provide particular safeguards for young people when questioned in relation to their involvement in offences. It is necessary to consider human rights implications when applying and interpreting section 464E of the Crimes Act.<sup>228</sup>

### CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)

#### Operation of the Charter

- 2.90 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) contains various human rights relevant to interviews of young people in police custody. In force since 1 January 2008,<sup>229</sup> the Charter gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights* (ICCPR).<sup>230</sup> Children enjoy almost all of these rights as 'persons' for the purposes of the Charter,<sup>231</sup> and there are several rights that apply specifically to children and to the criminal process.<sup>232</sup>
- 2.91 Public authorities, including Victoria Police,<sup>233</sup> must act compatibly with the human rights in the Charter.<sup>234</sup> It is unlawful for a public authority to 'act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.<sup>235</sup>
- 2.92 A public authority which acts in a way that is incompatible with a Charter right, or fails to properly consider a Charter right when making a decision, cannot be sued for that conduct alone.<sup>236</sup> However, the breach of the Charter may be used as an additional ground in a non-Charter cause of action relating to other unlawful conduct of the public authority.<sup>237</sup>
- 2.93 International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right can also play an important role in interpreting rights under the Charter.<sup>238</sup> One matter to be considered when the Charter is reviewed<sup>239</sup> is whether it should be amended to include the rights in the *United Nations Convention on the Rights of the Child* (CROC).<sup>240</sup>

#### Charter rights relevant to young people in police interviews

- 2.94 While the Charter contains no provisions that deal specifically with young people in police interviews, it does contain a number of rights that emphasise the vulnerability of young people, particularly in the criminal process.

#### General protection as is in a child's best interests and needed by reason of being a child

- 2.95 Section 17(2) of the Charter provides that every child has 'the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.<sup>241</sup> This right is derived from article 24(1) of the ICCPR.<sup>242</sup> In the context of the ICCPR, the United Nations Human Rights Committee (UNHRC) has said: 'The right to special measures of protection belongs to every child because of his status as a minor.'<sup>243</sup>



2.96 The right clearly extends to questioning of a young person in police custody when suspected of having committed an offence, and reinforces the requirement in section 464E of the Crimes Act that a parent, guardian or independent person is present to support a young person at this time.<sup>244</sup>

### Children in the criminal process: detention, trial and treatment if convicted

2.97 The particular vulnerability of children in the criminal process is emphasised in section 23 of the Charter.<sup>245</sup> This section provides that children are to be treated in an age-appropriate manner at various stages of the criminal process.<sup>246</sup>

### Procedure taking account of the child's age once the child is charged

2.98 Section 25(3) of the Charter, which applies to children charged with a criminal offence, provides the right to 'a procedure that takes account of [the child's] age and the desirability of promoting the child's rehabilitation'.<sup>247</sup> This right is derived from article 14(4) of the ICCPR.<sup>248</sup> The UNHRC has stated, in relation to article 14(4), that 'juveniles need special protection'<sup>249</sup> and that measures should be taken to ensure they 'are treated in a manner commensurate with their age'.<sup>250</sup>

2.99 According to *Guidelines for Legislative and Policy Officers in Victoria* (the Guidelines) prepared by the Department of Justice, section 25(3) of the Charter provides that children charged with a criminal offence are entitled not only to the same guarantees and protections afforded to adults, but also to additional special protections.<sup>251</sup> The Guidelines state, with reference to section 464E of the Crimes Act,<sup>252</sup> that these special protections mean

*[i]Interviews should be conducted in the presence of a parent or guardian or other support person in a manner that is sensitive to the child's age, level of maturity and emotional state.*<sup>253</sup>

2.100 The Guidelines state that this right to additional protection applies from the investigation stage onwards.<sup>254</sup> This is despite the fact that questioning will often take place after the young person has been arrested, but before the young person has been charged with an offence.

225 *Crimes Act 1958* (Vic) s 464E.

226 Victoria Police, 'Interviewing Specific Categories of Person', above n 86, 3–4.

227 *Crimes Act 1958* (Vic) s 464E(1)(a).

228 *Ibid* s 464E.

229 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

230 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1.

231 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 6(1), 3(1) (definition of 'person').

232 See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 17(2), 25(3), 21(4), 22(3).

233 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(d).

234 *Ibid* s 38(1).

235 *Ibid*.

236 *Ibid* s 39(3); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

237 *Charter of Human Rights and Responsibilities Act 2006* (Vic) 39(1); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

238 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

239 *Ibid* s 44(1).

240 *Ibid* s 44(2)(a)(ii). CROC rights related to young people in police interviews are discussed in the section below.

241 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

242 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 14.

243 Human Rights Committee, *General Comment No 17: Rights of the Child* (Art 24), 35th sess, UN Doc HRI/GEN/1/Rev 6 (7 April 1989) [4].

244 *Crimes Act 1958* (Vic) s 464E.

245 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 23.

246 *Ibid*.

247 *Ibid* s 25(3).

248 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 18–19; ICCPR, above n 230, art 14(4).

249 Human Rights Committee, *General Comment No 32: Article 14 Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 13 [42].

250 *Ibid* [43].

251 Department of Justice (Victoria), Human Rights Unit, *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (2008) 175.

252 *Crimes Act 1958* (Vic) s 464E.

253 Department of Justice (Victoria), above n 252, 175.

254 *Ibid*. It should also be noted that these guidelines state that the right in section 25(3) applies 'at all stages of the proceedings, from the time of the charge, to the trial, to the determination of a final appeal': at 174. This could be read as excluding the initial arrest and investigation phase, unless the child has been charged.

### The right not to be compelled to testify against oneself or to confess guilt

- 2.101 Section 25(2)(k) of the Charter provides that a person charged with a criminal offence is not to be compelled to testify against himself or herself or to confess guilt.<sup>255</sup> As noted by the United Nations Committee on the Rights of the Child (CRC)—the independent body that monitors implementation of CROC<sup>256</sup>—in relation to the analogous CROC right,<sup>257</sup> ‘compelled’ is to be interpreted broadly in the case of children.<sup>258</sup> Factors beyond physical force, such as the child’s age or fear of unknown consequences, may lead him or her to confess something untrue.<sup>259</sup>
- 2.102 Like section 25(3),<sup>260</sup> the Charter states that section 25(2)(k)<sup>261</sup> applies only to persons *charged* with a criminal offence. However, in a recent Victorian Supreme Court case, Chief Justice Warren held that use of this provision ‘should not be limited simply to persons who have already been charged’.<sup>262</sup> Chief Justice Warren held that very little turned on whether a person was accused or merely suspected of having committed a crime in the application of section 25(2)(k).<sup>263</sup>
- 2.103 It is uncertain what impact, if any, this decision will have for the application of other Charter sections that are only engaged once a person has been charged with an offence, such as section 25(3).<sup>264</sup> Regardless of whether section 25(2)(k) of the Charter can be seen to apply to young people questioned by police without charge, there remains a right to silence at common law<sup>265</sup> that is enshrined in the Crimes Act.<sup>266</sup>

### Deprivation of liberty

- 2.104 As well as the Charter rights which emphasise the vulnerability of children in the criminal process, the rights relating to deprivation of liberty<sup>267</sup> are relevant from the time a child or young person is taken into police custody for questioning. Section 21(3) of the Charter—based on article 9(1) of the ICCPR<sup>268</sup>—provides that a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.<sup>269</sup> This means that when a child or young person is deprived of liberty by being questioned in police custody, the procedure provided for in section 464E of the Crimes Act<sup>270</sup> must be adhered to.
- 2.105 If a parent, guardian or independent person is not present for the young person’s police interview, or the young person has not been allowed to speak privately with the parent, guardian or independent person prior to the interview—as required by the Crimes Act<sup>271</sup>—it is likely that the deprivation of the young person’s liberty will not have been in accordance with procedures established by law.<sup>272</sup>

### UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

#### Status and application of the *United Nations Convention on the Rights of the Child* in Australian domestic law

- 2.106 CROC sets out internationally accepted principles for promoting and protecting the fundamental human rights of children.<sup>273</sup> Australia became a signatory to CROC on 22 August 1990, ratified it on 17 December 1990,<sup>274</sup> and has entered only one reservation to its operation.<sup>275</sup> Ratification of CROC indicates not only that Australia is committed to the human rights principles protected and promoted within it, but that it also consents to the legal obligations that flow from CROC.
- 2.107 Under international rights instruments, Australia accepts an obligation in good faith to enable enjoyment of the rights within domestic law.<sup>276</sup> Australia, as a state party to CROC, is obliged to report to the CRC on steps it is taking to give effect to the rights of children enshrined in CROC.<sup>277</sup> The CRC then evaluates Australia’s performance and makes recommendations.<sup>278</sup>

## Relevant provisions of the *United Nations Convention on the Rights of the Child*

2.108 CROC states that every child alleged as or accused of having infringed the criminal law has, among other things, a right

*[t]o have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.*<sup>279</sup>

CROC further provides that a child alleged as or accused of having infringed the criminal law is 'not to be compelled to give testimony or confess guilt'.<sup>280</sup>

2.109 According to the CRC,

*[t]he child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning.*<sup>281</sup>

2.110 The CRC terms this 'freedom from compulsory self-incrimination' and notes that the relevant provisions prohibit not only torture and cruel, inhuman or degrading treatment to coerce a child to confess, but also less violent means.<sup>282</sup> As noted above,<sup>283</sup> the CRC states that 'compelled' should be interpreted broadly and not limited to physical force or other specific rights violations.<sup>284</sup> The CRC has said that various factors such as the child's age, fear of unknown consequences or a suggested possibility of imprisonment may lead him or her to confess something untrue.<sup>285</sup> The CRC lists factors that the court or other judicial body may take into account when assessing the voluntary nature and reliability of an admission or confession, including:

- the child's age
- the length of custody and interrogation
- the presence of legal counsel, parents or independent representatives of the child.<sup>286</sup>

255 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(k).

256 Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, <<http://www2.ohchr.org/english/bodies/crc/>> at 2 June 2010.

257 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(b)(iv) ('CROC'). This right is discussed below from [2.108].

258 Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, CRC/C/GC/10 (25 April 2005) [57] ('General Comment No 10').

259 Ibid.

260 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(3).

261 Ibid s 25(2)(k).

262 *Re an Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [162].

263 Ibid [161]–[163].

264 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(3).

265 See, eg, *Weissensteiner v R* (1993) 178 CLR 217.

266 See, eg, *Crimes Act 1958* (Vic) ss 464A(3), 464J.

267 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21.

268 Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 16; ICCPR, above n 230, art 9(1).

269 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3).

270 *Crimes Act 1958* (Vic) s 464E.

271 Ibid s 464E(1).

272 Unless any of the express exceptions discussed at [2.31] apply.

273 *Convention on the Rights of the Child*.

274 United Nations, *Chapter IV Human Rights: 11 Convention on the Rights of the Child* (12 August 2010), United Nations Treaty Collection <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)>.

275 Ibid. This reservation relates to the separation of children from adults in prison: CROC, above n 257, art 37(c).

276 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

277 See, eg, Committee on the Rights of the Child, *Concluding Observations on Australia*, 40th sess, CRC/C/15/Add 268 (20 October 2005).

278 Ibid.

279 CROC, above n 257, art 40(2)(b)(iii).

280 Ibid art 40(2)(b)(iv).

281 *General Comment No 10*, 44th sess, CRC/C/GC/10 (25 April 2007) [58].

282 Ibid [56]–[57].

283 At [2.101].

284 *General Comment No 10*, 44th sess, CRC/C/GC/10 (25 April 2005) [57].

285 Ibid.

286 Ibid [58].

## Chapter 2

## Current Law

2.111 The CRC states that the provision of legal or other appropriate assistance is not limited to trial before a court, but applies to all stages of the process, from the police interview onwards.<sup>287</sup>

2.112 More generally, a fundamental principle of CROC is that in all actions concerning children, the 'best interests' of the child should be a primary consideration.<sup>288</sup> This is analogous to the right in section 17(2) of the Charter,<sup>289</sup> discussed above.<sup>290</sup> The CRC has emphasised that a child's best interests must be considered in relation to 'all decisions taken within the context of the administration of juvenile justice'.<sup>291</sup> The CRC states that the differences between children and adults in terms of physical and psychological development necessitate different criminal justice procedures for children and adults.<sup>292</sup> Recognition of children's special status in the criminal justice system reinforces the need for procedural safeguards, including the presence of parents, guardians or independent persons for young people in police interviews.

287 Ibid [52].

288 CROC, above n 257, art 3.

289 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

290 At [2.95]–[2.96].

291 *General Comment No 10*, 44th sess, CRC/C/GC/10 (25 April 2007) [10].

292 Ibid.

## Chapter 3

# Current Practice

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### INTRODUCTION

- 3.1 Under section 464E of the *Crimes Act 1958* (Vic) (Crimes Act), an independent person must be present during a police interview with a young person in custody if a parent or guardian is unavailable. This chapter describes the current practice in Victoria for securing the presence of an independent person at a police station.
- 3.2 In a number of consultations with both Victoria Police and young people, the Commission learned that in most cases, police successfully secure the presence of a parent or guardian when questioning a young person in custody.<sup>1</sup> Accurate statewide data on the frequency with which police use a young person's parent or guardian rather than an independent person is not available.
- 3.3 Currently the system for securing the presence of an independent person operates in one of two ways:
  - One third of police stations in Victoria (108 stations)<sup>2</sup> are currently served by a pilot program called the Youth Referral and Independent Person Program (YRIPP). Police at these stations can request a trained YRIPP volunteer to act in the role of independent person.
  - In all other police stations, officers make their own arrangement for securing the attendance of an independent person when required.<sup>3</sup>
- 3.4 This chapter discusses the practices followed in YRIPP and non-YRIPP police stations. This includes practice requirements when Aboriginal young people and young people with an impaired mental state are in police custody and when young people are witnesses to crime or victims. This chapter also considers the difficulties with, and criticisms of, the current practice as highlighted in consultations and submissions.

### BACKGROUND

- 3.5 Prior to 2003, there were no consistent mechanisms for providing and training independent persons in Victoria.<sup>4</sup> While some local programs did emerge to monitor the provision of the service, they were limited in scope and funding.<sup>5</sup> In practice, there were wide 'variations in the service and support provided to young people in police custody'.<sup>6</sup>

### ESTABLISHMENT AND OPERATION OF YRIPP

- 3.6 In 2003, YRIPP was established as a partnership program between government and non-government agencies.<sup>7</sup> Agencies involved in the establishment of YRIPP included the Centre for Multicultural Youth (CMY),<sup>8</sup> the Youth Affairs Council of Victoria (YACVic), the Federation of Community Legal Centres (FCLC), the then Department of Immigration and Multicultural and Indigenous Affairs, the Victorian Aboriginal Legal Service (VALS) and Victoria Police.<sup>9</sup>
- 3.7 A young person's first interview with police is a critical event.<sup>10</sup> YRIPP was originally established to work with and improve the ad hoc system of supporting young people at this critical juncture, and in so doing to address issues concerning the over-representation of young people in the criminal justice system in Victoria.<sup>11</sup>
- 3.8 The program was initially funded to operate in nine police stations as an 18-month pilot under the Safer Streets and Homes, Victoria's Crime and Violence Prevention Strategy 2002–05.<sup>12</sup> In July 2007, the Victorian Government provided an additional one million dollars per year for two years to fund the expansion of the YRIPP pilot to 103 police stations across Victoria.<sup>13</sup>



- 3.9 The current operation of YRIPP is 'a unique partnership between community agencies and the Victoria Police'.<sup>14</sup> The Victorian Government funds YRIPP.<sup>15</sup> Central YRIPP staff are based at CMY in Carlton.<sup>16</sup> The eight regional coordinators are hosted in agencies including community legal centres in metropolitan Melbourne and UnitingCare offices in regional Victoria.<sup>17</sup> YRIPP is managed by CMY in partnership with YACVic. An external advisory group, which includes a diverse range of people with an interest in youth and crime prevention issues, guides YRIPP.<sup>18</sup>
- 3.10 As at June 2010, YRIPP had 350 active volunteers, with a further 102 undertaking training.<sup>19</sup> In the 2009–10 financial year, YRIPP volunteers supported young people in more than 2900 interviews across Victoria.<sup>20</sup>

## YRIPP POLICE STATIONS

### YRIPP AIMS AND OBJECTIVES

- 3.11 YRIPP aims to work with and improve the existing system for providing an independent person service 'to young people in custody who are at the initial point of processing as potential defendants in criminal matters'.<sup>21</sup> YRIPP provides culturally appropriate early intervention and diversion support efforts to young people, including refugee, migrant and Indigenous young people. In doing so, YRIPP aims to divert young people from progressing in the criminal justice system.<sup>22</sup>
- 3.12 YRIPP's objectives are to:
- provide trained, including culturally trained, volunteer independent persons to attend police interviews of young people under 18 years of age
  - strengthen existing independent person networks and establish new networks in local areas if required
  - establish the infrastructure to enable simple and reliable centralised allocation of independent persons to attend police stations for interviews across Victoria
  - expand telephone legal advice services to ensure the availability of free telephone legal advice at all times to young people interviewed by police
  - provide multilingual information for parents or guardians that outlines their role at police interviews, as well as the role of an independent person and the availability of YRIPP volunteers
  - develop an evidence base for successful processes in assisting young people in contact with police and the legal system and reducing their progression to higher levels of the justice system.<sup>23</sup>

### SELECTION CRITERIA, PROCESS AND TRAINING

- 3.13 The YRIPP central and regional staff work collaboratively to identify the needs of and opportunities for volunteers.<sup>24</sup> YRIPP encourages existing volunteer independent persons to apply to join the program. It also advertises widely and utilises community networks.<sup>25</sup> YRIPP applies the principles of equal opportunity to the process of volunteer recruitment and selection.<sup>26</sup>

- 1 Consultations 4 (Victoria Police Hume 2), 11 (Victoria Police Metro East), 16 (Victoria Police Gippsland), 28 (Victoria Police Flemington). The Commission's consultation with four young people who were participating in the Whitelion 'Young Lion' program also demonstrated this point, as all four young people had been supported by their parents during an interview with police. On a separate occasion, one young person was supported by an independent person: consultation 23 (Whitelion).
- 2 See Appendix D.
- 3 While YRIPP provides services to 33 per cent of police stations (108 of the 327 police stations in Victoria), in practice it covers most potential demand for an independent person because it services all 24-hour stations and a number of 16-hour stations.
- 4 Sally Reid, *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews* (2007) 7.
- 5 Ibid.
- 6 Ibid.
- 7 Ibid.
- 8 The Centre for Multicultural Youth was previously called the Centre for Multicultural Youth Issues.
- 9 Reid, above n 4, 44.
- 10 Centre for Multicultural Youth, *Youth Referral and Independent Person Program: Volunteer Application Kit* (2010) 7 (YRIPP Volunteer Application Kit).
- 11 Ibid.
- 12 Reid, above n 4, 44.
- 13 Ibid.
- 14 YRIPP: *Volunteer Application Kit*, above n 10, 7.
- 15 Ibid.
- 16 Centre for Multicultural Youth, *Youth Referral and Independent Person Program: Independent Person Procedure Manual* (2010) 4 (YRIPP Manual).
- 17 Ibid.
- 18 Ibid.
- 19 Email from Vivianne Dias, YRIPP Statewide Coordinator, 24 August 2010.
- 20 Ibid.
- 21 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 4.
- 22 Ibid.
- 23 Ibid 4–5.
- 24 Centre for Multicultural Youth Issues, *Youth Referral and Independent Person Program: Competency Based Training and Assessment Program for YRIPP Volunteers—Units and Elements of Competency* (2008) 6 (YRIPP Competency Training and Assessment).
- 25 Ibid.
- 26 Ibid; Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 6.





3.14 The criteria for selection are that the person must:

- be over 18 years of age
- reside close to a YRIPP police station
- be reliable and possess highly developed communication and assertiveness skills
- demonstrate an even-handed and fair approach to police and young people
- have a current Victorian driver licence and ready access to private transport
- have access to a telephone (mobile or landline) for the duration of a shift
- be available and prepared to attend local police stations at short notice during a shift
- possess the ability to cope with stressful situations
- commit to volunteer for a 12-month period
- undergo a Police Check and a Working with Children Check
- commit to the aims of the program.<sup>27</sup>

3.15 A serving police officer or currently practising lawyer cannot become a YRIPP volunteer.<sup>28</sup> Although people working in a voluntary or personal capacity within the criminal or youth justice system are not precluded from volunteering, YRIPP staff discuss possible conflicts with potential applicants and assess whether participation is appropriate.<sup>29</sup>

3.16 The selection process has four steps:

1. An applicant completes and submits a written application form.<sup>30</sup>
2. Applicants attend an information session in their area.<sup>31</sup>
3. YRIPP holds a pre-training interview, which is generally conducted over the telephone.<sup>32</sup>
4. YRIPP invites successful applicants to attend the YRIPP volunteer training and assessment program.<sup>33</sup>

3.17 The YRIPP volunteer training and assessment program is 28 hours in total and involves a range of written work, face-to-face classes and self-directed activities with assessment throughout.<sup>34</sup> As part of the program, applicants receive the YRIPP Independent Person Procedure Manual (YRIPP Manual), tour a local police station and hear expert presentations from Victoria Police, Youthlaw and VALS.<sup>35</sup>

3.18 The program consists of seven distinct modules:

- Module 1—YRIPP information, processes and protocols.
- Module 2—Independent person role: The legal perspective.
- Module 3—Independent person role: Police processes.
- Module 4—Working with young people in police custody.
- Module 5—Working with refugee and migrant young people.
- Module 6—Working with Indigenous young people.<sup>36</sup>
- Module 7—Referral and review.<sup>37</sup>

- 3.19 After completing the training and assessment program, applicants undertake a final interview.<sup>38</sup> Referees may also be contacted at this point.<sup>39</sup> The training and assessment program, which is free, is not currently accredited but successful volunteers do receive a certificate of completion.<sup>40</sup> Successful applicants are required to undergo a Police Check and Working with Children Check.<sup>41</sup> While prior convictions do not necessarily preclude involvement, 'YRIPP retains the right to exclude applicants on the basis of relevant prior convictions'.<sup>42</sup>
- 3.20 YRIPP provides volunteers with ongoing training and support.<sup>43</sup> YRIPP staff are available during working hours to debrief volunteers who wish to discuss their experience as an independent person.<sup>44</sup> YRIPP hosts meetings and social occasions for all independent person volunteers to enable networking and foster mutual support between volunteers.<sup>45</sup> Volunteers and staff can also identify and receive further training, professional development and materials.<sup>46</sup>
- The YRIPP Manual includes the YRIPP volunteer policies,<sup>47</sup> which cover YRIPP volunteer rights, leave of absence and retirement, termination processes and insurance coverage.<sup>48</sup> The YRIPP Manual also outlines privacy and confidentiality requirements,<sup>49</sup> health and safety protocols<sup>50</sup> and grievance procedures.<sup>51</sup>
  - YRIPP asks all volunteers to sign a YRIPP Volunteer Agreement. By signing this agreement, YRIPP volunteers agree to comply with all YRIPP policies and procedures and to follow the directions given by the YRIPP regional coordinator and program manager.<sup>52</sup>

## YRIPP CALL-OUT PROCEDURE

- 3.21 Police at YRIPP stations are advised internally to utilise YRIPP, 'but there is nothing in either standing orders nor in the legislation that stipulates' that police must do so.<sup>53</sup> In some circumstances, such as when there is a perceived delay in securing a YRIPP volunteer, police will contact non-YRIPP individuals to act in the independent person role.<sup>54</sup>

- 27 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 2.
- 28 Ibid 3—a retired or former police officer in some circumstances may apply to volunteer 'where YRIPP believes that no conflict is present'.
- 29 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 3.
- 30 Ibid 4—application forms are included in the YRIPP Application Kit and can be downloaded from the YRIPP website at <<http://www.cmy.net.au/YRIPP/VolunteerWithUs>>.
- 31 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 4—information sessions enable applicants 'to find out more about being an independent person, what it's like to volunteer for YRIPP and what the training will cover'.
- 32 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 4.
- 33 Ibid 4–5; Centre for Multicultural Youth Issues, *YRIPP Competency Training and Assessment*, above n 24, 7.
- 34 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 5–6.
- 35 Ibid 5.
- 36 Submission 17 (VALS)—details involvement in training of volunteers and the training content.
- 37 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 5.
- 38 Ibid; Centre for Multicultural Youth Issues, *YRIPP Competency Training and Assessment*, above n 24, 6–7.
- 39 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 5; Centre for Multicultural Youth Issues, *YRIPP Competency Training and Assessment*, above n 24, 6–7.
- 40 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 5.
- 41 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 6.
- 42 Ibid.
- 43 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 64.
- 44 Ibid.
- 45 Ibid.
- 46 Ibid.
- 47 Ibid 63–5.
- 48 Ibid. 'YRIPP's volunteer rights are based upon those recommended as best practice by Volunteering Australia and in accordance with *The National Standards for Involving Volunteers in Not for Profit Organisations*': at 63.
- 49 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 66–70.
- 50 Ibid 71–2.
- 51 Ibid 76–7.
- 52 Centre for Multicultural Youth, *Youth Referral and Independent Person Program: YRIPP Volunteer Agreement (2008) (YRIPP Volunteer Agreement)*. Note that YRIPP volunteers in Western and Northern Victoria sign the same agreement but with the relevant UnitingCare agency. See Appendix E—YRIPP Volunteer Agreement form.
- 53 Submission 20 (CMY and YACVic).
- 54 Consultation 28 (Victoria Police Flemington).

- 3.22 As at August 2010, YRIPP had received an average of 210 calls from Victoria Police for independent persons per month.<sup>55</sup> Between December 2009 and May 2010, 74 per cent of YRIPP call-outs were from metropolitan police stations and 26 per cent were from rural police stations.<sup>56</sup>

### Police procedure

- 3.23 Police at the YRIPP stations can request a YRIPP volunteer 24 hours a day, seven days a week, by calling the YRIPP call centre.<sup>57</sup> The YRIPP operator will ask some screening questions to establish:
- whether the young person is a potential defendant in a criminal matter (as opposed to a victim or witness)
  - whether the young person might have an intellectual disability, mental illness, acquired brain injury or dementia and would require an independent *third* person instead
  - how many young people are to be interviewed.<sup>58</sup>
- 3.24 Following these screening questions, the YRIPP operator ascertains the location of the interview and the police informant's details.<sup>59</sup> The operator then calls the first rostered volunteer for that police station and shift.<sup>60</sup> If the first rostered volunteer is unable to attend, the operator proceeds down the list of volunteers to find one who is able to attend.<sup>61</sup>

### YRIPP volunteer procedure

- 3.25 YRIPP volunteers must always have their mobile phone on or be accessible by landline when on the YRIPP roster.<sup>62</sup> When called by the operator, the YRIPP volunteer is to record and confirm basic details of the call-out.<sup>63</sup> Upon accepting the call-out, the YRIPP volunteer is to immediately contact the police informant and follow the steps outlined in the YRIPP Manual. Key steps are to:
- ask for the name of the young person, in order to establish if there is any conflict of interest as per YRIPP policy<sup>64</sup>
  - request the police officer to call for more YRIPP volunteers if there is more than one young person to be interviewed<sup>65</sup>
  - clarify the purpose of the interview. If it is for a caution, the volunteer is to first ask for the caution to be rescheduled so that a parent or guardian can be present<sup>66</sup>
  - provide the police officer with an estimated time of arrival. This is to be 'as soon as possible and safe and within 20 minutes'.<sup>67</sup>
- 3.26 A person cannot act as a YRIPP volunteer where a conflict of interest exists:<sup>68</sup>
- YRIPP acknowledges that a conflict of interest can be actual or perceived, direct or indirect, financial or personal, and defines a conflict of interest 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 the interest, principal [sic], right, advantage or position of one individual or business entity, whether directly or in being represented by another, comes into discord, challenge, dispute or harm with those of another.*<sup>69</sup>

- 3.27 The onus is on the individual YRIPP volunteer to notify the YRIPP coordinator responsible or police station if a 'potential, perceived or actual conflict of interest arises'.<sup>70</sup> The YRIPP Manual identifies that there is potential for conflict if the independent person has encountered the young person previously during justice system work, youth and community work or personally.<sup>71</sup> All YRIPP volunteers who work with young people under 18 years of age in other capacities, such as a youth support worker, are to record the names of young people with whom they have worked.<sup>72</sup> The YRIPP Manual stipulates the procedures to follow when a potential conflict of interest arises.<sup>73</sup>

### YRIPP's provision of independent third persons

- 3.28 As noted in Chapter 2, the Victoria Police Manual requires police officers to secure the presence of an independent third person when they interview an alleged offender with an impaired mental state, regardless of age.<sup>74</sup>
- 3.29 The Office of the Public Advocate is the coordinator of the independent third person program. It trains and registers volunteers.<sup>75</sup> Only people who are trained and registered by the Office of the Public Advocate may act as an independent third person.<sup>76</sup> In a 2010 YRIPP volunteer survey, approximately 15 per cent of YRIPP volunteers indicated they have also trained to act as an independent third person.<sup>77</sup>
- 3.30 Police at YRIPP stations are able to request an independent third person by using the YRIPP 1300 number<sup>78</sup> or the Office of the Public Advocate 24-hour emergency service number.<sup>79</sup>

### Views on the YRIPP call-out procedure

- 3.31 Some police officers who participated in consultations with the Commission reported that the YRIPP call-out procedure, in particular the central 1300 number, was working well.<sup>80</sup> According to one police officer, the advantage of YRIPP is the central number.<sup>81</sup> Other police officers expressed doubts about the YRIPP call-out procedure. For example, some police reported that the central number has been problematic since its inception, as you don't know who the independent person is until they arrive at the station.
- 3.32 In contrast, the FCLC highlighted the importance of the random allocation of independent persons, as it ensures independence from police:

*The random allocation of trained volunteers has significantly improved the situation from one where police controlled the person who attended the interview from their own lists.*<sup>82</sup>

### ROLES AND RESPONSIBILITIES OF A YRIPP VOLUNTEER

- 3.33 According to the YRIPP Manual, a YRIPP volunteer has a 'positive and important role to play' in supporting a young person in police custody and 'should not expect to be simply an observer of what happens at the police station'.<sup>83</sup> Rather, a YRIPP volunteer is 'there to protect the person from the disadvantage inherent in their age and to ensure that he or she understands what is happening to them and why'.<sup>84</sup>

55 Email from Vivianne Dias, YRIPP Statewide Coordinator, 24 August 2010.

56 Ibid.

57 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 11. The phone number is 1300 79 11 89.

58 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 11 (emphasis in original). If more than one young person, the police officer is to request the operator to organise an independent person for each young person to attend if possible.

59 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 11.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid 12—step three. The YRIPP policy on conflict of interest is in the YRIPP Manual 73–5.

65 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 12—step four.

66 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 12—step five. The manual states that 'If the caution interview cannot be rescheduled, then the IP may choose to attend at the station'—step six: at 12.

67 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 12.

68 Ibid 73.

69 Ibid, citing Peter E Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (1997) 246.

70 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 73.

71 Ibid, 74.

72 Ibid.

73 Ibid, 74–5.

74 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Interviewing Specific Categories of Person', from CD-ROM current at 30 August 2010, 3. Note that this requirement also applies when interviewing victims and witnesses with a cognitive disability or mental illness: Office of the Public Advocate, *Independent Third Person Program: Brochure* (2009).

75 Office of the Public Advocate, *Independent Third Person Program: Brochure* (2009); submission 15 (OPA).

76 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 18.

77 Email from Vivianne Dias, YRIPP Statewide Coordinator, 24 August 2010.

78 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 17; submission 15 (OPA).

79 Office of the Public Advocate, *Contact Us* (22 February 2010) < <http://www.publicadvocate.vic.gov.au/about-us/189/>>.

80 Consultations 4 (Victoria Police Hume Region 2), 9 (Victoria Police Geelong), 16 (Victoria Police Gippsland), 31 (Victoria Police Centre).

81 Consultation 9 (Victoria Police Geelong).

82 Submission 21 (FCLC).

83 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 6.

84 Ibid 6.

### Before the interview

- 3.34 In line with the Crimes Act,<sup>85</sup> the YRIPP volunteer is directed to speak to the young person privately prior to the start of the interview.<sup>86</sup> The YRIPP volunteer is to begin by introducing themselves and their role as a YRIPP independent person and determine whether the young person has any immediate personal needs or complaints.<sup>87</sup> During this time, the volunteer is to ensure that the relevant services have been contacted, such as VALS for young people identifying as Aboriginal or Torres Strait Islander. If relevant services have not been contacted, the volunteer must draw the matter to the attention of the police.<sup>88</sup>
- 3.35 One of the volunteer's key responsibilities is to inform the young person of what he or she can expect during the interview process and explain the rights that the police will read to him or her.<sup>89</sup>
- 3.36 YRIPP volunteers 'have a role in ensuring that the young person is able to contact a lawyer and a friend or relative and have that conversation in a private place' but are not to provide legal advice themselves.<sup>90</sup> The YRIPP call centre facilitates a free telephone legal advice service by Victoria Legal Aid.<sup>91</sup> The police are able to call this number on behalf of the young person and request the duty solicitor to return the call and speak with the young person.<sup>92</sup>

### During the interview

- 3.37 The YRIPP volunteer attends the interview with the young person as the independent person when a parent or guardian is unavailable.<sup>93</sup> The primary role of the YRIPP volunteer

*is to observe whether the police are acting properly, fairly and with respect for the rights of the detained person and to take appropriate action (based on ... observations and the young person's wishes) if it appears they are not.*<sup>94</sup>

- 3.38 The YRIPP Manual includes procedures for both recorded interviews<sup>95</sup> and digital evidence capture.<sup>96</sup> YRIPP volunteers are advised that generally they should not 'interfere with the interview process'.<sup>97</sup> The manual stipulates that

*During the interview the independent person should remain silent unless:*

1. *[they] ... think that the young person does not understand a caution right or question, or*
2. *is becoming visibly distressed or upset, or*
3. *is no longer fit to be interviewed.*<sup>98</sup>

- 3.39 According to the YRIPP Manual, if the YRIPP volunteer believes that any of these events are occurring, the volunteer must inform the interviewing officer during the interview, if appropriate, or request a short break.<sup>99</sup> At no time is the volunteer to 'ask the young person a question or re-phrase a police question unless specifically asked to by the police officer'.<sup>100</sup>
- 3.40 As part of the interview process, YRIPP volunteers fill in the YRIPP interview report sheet, noting observations or concerns about the young person and the police interview process.<sup>101</sup> YRIPP volunteers complete the report as the interview progresses and utilise it as a prompt to ask certain questions or take action, as long as it does not intimidate the young person.<sup>102</sup> Privacy and confidentiality is to be maintained in accordance with YRIPP policies.<sup>103</sup> Accurate, reliable and objective notes are valuable if the YRIPP volunteer is requested to attend or give evidence at court proceedings.<sup>104</sup>

## After the interview

3.41 Depending on further police action, a YRIPP volunteer is directed to:

- be present during requests for fingerprints of young people aged between 15 and 17 years old when a parent or guardian cannot be located. Police give information to the young person about the process during the taking of fingerprints<sup>105</sup>
- be present while the young person discusses their satisfaction or concerns about how the interview was conducted and how they were treated in custody. This discussion is held with a sergeant or another police member not involved in the interview.<sup>106</sup> The volunteer will also be asked to give feedback; if the volunteer has concerns this is their opportunity to raise them<sup>107</sup>
- ensure that the local Department of Human Services (DHS) Justice Unit or the Central After Hours Assessment and Bail Placement Service (CAHABPS) has been notified of any police decision to oppose bail for the young person<sup>108</sup>
- follow referral processes as outlined in the YRIPP Manual.<sup>109</sup>

## Bail or remand process

3.42 When a DHS Justice Unit or CAHABPS representative is not present during a young person's bail hearing, an independent person has a role in this process.<sup>110</sup> The YRIPP Manual includes a step-by-step guide to the YRIPP procedure for volunteers in the bail or remand process.<sup>111</sup> The independent person's role in the bail or remand process is discussed in Chapter 7.

- 85 *Crimes Act 1958* (Vic) s 464E(1)(b).
- 86 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 7. See Chapter 2 for a discussion of this requirement.
- 87 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 7, 13–14. Immediate personal needs include medical attention, food, water or the toilet: at 7. Appendix D of the YRIPP Manual is the 'IP Prompt Card' to assist volunteers with what to say in pre-interview discussions: at 100–1.
- 88 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 9, 13.
- 89 Ibid 7. Section six of the YRIPP Manual details young people's rights and police powers for YRIPP volunteers: at 19–33.
- 90 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 24.
- 91 Ibid.
- 92 Ibid.
- 93 Ibid 7, 35.
- 94 Ibid 53.
- 95 Ibid 34–5. Police, in most situations, must audio/video record interviews with people charged with indictable offences if they want to use the information gathered in interview in court: at 34. Sections 464G, 464H of the *Crimes Act 1958* (Vic) apply.
- 96 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 36. Digital evidence capture (DEC) is a new police method for recording interviews with suspects. DEC upgrades 'Victoria Police's analogue audio-only recording equipment to digital audiovisual recording equipment to facilitate the recording of interviews with suspects in indictable matters': Victoria, *Parliamentary Debates*, Legislative Council, 12 November 2009, 5395–7 (Martin Pakula, Minister for Industry and Trade). Amendments to the *Crimes Act* relating to DEC are yet to come into force, if operation is not proclaimed before 1 November 2010, sections 3–5 will come into operation on that day: *Justice Legislation Miscellaneous Amendments Act 2009* (Vic) s 2(5).
- 97 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 7.
- 98 Ibid 35.
- 99 Ibid.
- 100 Ibid.
- 101 Ibid 38.
- 102 Ibid 37–8.
- 103 Ibid 37–9. See pages 66–70 for YRIPP's privacy and confidentiality policies and protocols.
- 104 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 38. Interview sheets 'may be subpoenaed as evidence in later court proceedings': at 37.
- 105 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 28; *Crimes Act 1958* (Vic) s 464K(8). See Chapter 2 for a detailed discussion of fingerprinting and the *Crimes Act* requirements.
- 106 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 7, 43.
- 107 Ibid 43.
- 108 Ibid 7, 46–52.
- 109 Ibid 7, 56–60.
- 110 *Children, Youth and Families Act 2006* (Vic) s 346(7), (8).
- 111 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 51–2.



### YRIPP'S REFERRAL SERVICE

- 3.43 YRIPP volunteers are trained to refer the young people they assist in interviews to support services.<sup>112</sup> The YRIPP Manual has referral procedures and includes a referral process flow chart for volunteers.<sup>113</sup> When the police interview is over, the volunteer requests private time with the young person to discuss referral issues and explain that the aim of the referral process 'is to help prevent the young person coming back in contact with police in the future'.<sup>114</sup>
- 3.44 YRIPP referral services assist with:
- employment
  - drug and alcohol counselling
  - legal help
  - migrant, refugee and settlement assistance
  - youth counselling or health issues
  - accommodation
  - Aboriginal issues.<sup>115</sup>
- 3.45 In 2009–10, YRIPP volunteers referred over 1000 young people to support services—500 young people were directly referred and an additional 565 were provided with information for later self-referral.<sup>116</sup>

### YRIPP PROCESS FOR COMPLAINTS AGAINST POLICE

- 3.46 The YRIPP volunteer's role in the police complaints process is described as 'a difficult one'.<sup>117</sup> The volunteer should only raise allegations of police misconduct if witnessed directly or if the young person has given the volunteer express permission to do so.<sup>118</sup> The volunteer should treat allegations seriously and not make assumptions about the truth of the allegations.<sup>119</sup>
- 3.47 The YRIPP Manual details how volunteers should handle allegations of police misconduct or assault.<sup>120</sup> If a volunteer is told by a young person or has reason to believe that the young person has been assaulted by the police, or experienced some other form of police misconduct, he or she should:
- secure medical assistance, if required
  - ensure that the young person is fit to be interviewed and if not, inform the police
  - record details about observations, conversations and interview processes on the YRIPP interview report sheet
  - suggest strongly 'that the young person speak to a solicitor to decide the best course of action'<sup>121</sup>
  - provide the young person with an information card, 'Knowing My Rights—Treatment By Police', which includes information about possible avenues for redress<sup>122</sup>
  - speak to the young person to establish what he or she wants to do. The volunteer should only report the allegation to the sergeant if the young person does so or asks the volunteer to do so
  - contact the regional coordinator after an allegation of assault.<sup>123</sup>

The Commission understands that additional complaint processes are still being negotiated and may be included in any contract arrangements between YRIPP, the Department of Justice and Victoria Police.



## GRIEVANCE PROCEDURES

3.48 The YRIPP Manual stipulates grievance procedures for those involved with YRIPP:

- Complaints by the interviewing police officer about a YRIPP volunteer are to be made in writing to the district inspector, while a YRIPP volunteer is to lodge his or her complaint with the YRIPP statewide coordinator.<sup>124</sup>
- YRIPP volunteers are to inform young people they support in police interviews about their right to complain about them to the YRIPP regional coordinator. Conversely, volunteers may also lodge complaints about the young person with the regional coordinator.<sup>125</sup>
- If a volunteer believes that 'a circumstance imposed on them or instruction issued to them is unfair', he or she should inform the regional coordinator, who is to take responsible action to resolve the situation.<sup>126</sup>
- If YRIPP administration is not satisfied with a volunteer's performance, YRIPP may try to resolve the matter through discussions recommending appropriate action, such as further training.<sup>127</sup>
- If there is dissatisfaction between local police and YRIPP administrators, a meeting is to be convened between the police district inspector, YRIPP statewide coordinator and the YRIPP management committee.<sup>128</sup>

3.49 In all situations, if agreement is not reached, then any party to a grievance may request that an expert be appointed to deal with the dispute.<sup>129</sup> 'Principles of reasonableness, fairness and natural justice are to apply to resolution of [any] grievance.'<sup>130</sup>

## NON-YRIPP POLICE STATIONS

3.50 Through consultations, submissions and research, the Commission learned about the various informal practices followed by police officers at non-YRIPP stations when securing the presence of an independent person to support a young person in police custody during questioning.

## CALL-OUT PROCEDURE

- 3.51 A common practice appears to be that police at non-YRIPP stations secure the presence of an independent person by relying on station lists, which contain names of individuals who have agreed to come to the station when needed to sit in on one or more interviews.<sup>131</sup>
- 3.52 The Commission understands that the people contacted by police are usually volunteers from the community, such as teachers, ministers of religion, bail justices or justices of the peace.<sup>132</sup> Alternatively, police use other family members of the young person, such as a grandparent, brother or sister.<sup>133</sup>
- 3.53 In *DPP v Toomalatai*,<sup>134</sup> discussed in Chapter 2, the police referred to a station list to secure the presence of an independent person to support a young person.<sup>135</sup> In that case, the independent person was a justice of the peace.<sup>136</sup>

## TRAINING

3.54 At present, anybody may perform the role of independent person, regardless of training, if they satisfy the broad requirement of being 'independent'.<sup>137</sup> It is the Commission's understanding that the people on station lists generally have not received any comprehensive and on-going training for the role.

112 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 5.

113 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 56–60. The process may vary regionally.

114 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 56.

115 This list is based on the YRIPP Manual's tips for getting a young person to consider a referral service—*ibid*, 58–9.

116 Email from Vivianne Dias, YRIPP Statewide Coordinator, 25 August 2010.

117 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 53.

118 *Ibid*.

119 *Ibid*.

120 *Ibid* 54–5.

121 To speak to a solicitor, the young person can call the YRIPP 1300 call centre and be directed to a free telephone legal advice service provided by VLA.

122 Avenues for redress identified by YRIPP are: Ethical Standards Department of Victoria Police; Office of Police Integrity; any police station through the Officer in Charge; and the Australian Human Rights Commission.

123 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 54–5.

124 *Ibid* 76.

125 *Ibid*.

126 *Ibid*.

127 *Ibid*.

128 *Ibid* 77.

129 *Ibid* 76–7.

130 *Ibid*.

131 Consultations 3 (Victoria Police Hume 1), 33 (Victoria Police Dandenong).

132 Consultation 3 (Victoria Police Hume 1).

133 Consultations 32 (Victoria Police Mallee), 3 (Victoria Police Hume 1), 33 (Victoria Police Dandenong).

134 *Director of Public Prosecutions v Toomalatai* (2006) 13 VR 319 ('*Toomalatai*'). See Chapter 2.

135 *Toomalatai* (2006) 13 VR 319, 320.

136 *Ibid*.

137 See Chapter 2.



- 3.55 In consultation with the Commission, some honorary justices reported that they had undertaken training with the Department of Justice<sup>138</sup> or the Royal Victorian Association of Honorary Justices.<sup>139</sup> One person said that their understanding of the independent person role was expanded through listening to guest speakers and talking to experienced peers in their local honorary justices group.<sup>140</sup>

### Justices of the peace

- 3.56 In 2009, the Department of Justice reviewed the justices of the peace program in Victoria and the Attorney-General announced reforms to the Honorary Justice Office in late February 2010.<sup>141</sup> Those reforms include ‘a training package for JPs [justices of the peace] that includes training as part of the appointment and reappointment processes, and a professional development program’.<sup>142</sup> The Honorary Justice Office has engaged the services of an external consulting group to design and develop a training program for justices of the peace.<sup>143</sup> Training for supporting young people in police interviews is not included in the proposed content for the program at this stage.<sup>144</sup>

### RELATED PRACTICE REQUIREMENTS

- 3.57 The Victoria Police Manual and YRIPP Manual include practice requirements about young people in police interviews that extend beyond the requirements of the Crimes Act.<sup>145</sup> In this section, we consider the practice requirements in the Victoria Police Manual concerning Aboriginal young people, young people with an impaired mental state and interviews of young people who are victims or witnesses.

### ABORIGINAL YOUNG PEOPLE

- 3.58 The Victoria Police Manual directs police to complete the attendance module for persons identifying as being of Aboriginal or Torres Strait Islander descent when they are taken into police care or custody.<sup>146</sup> The attendance module should be completed ‘within 60 minutes of arrival at a police station.’<sup>147</sup> Once the attendance module is completed, an automatic notification is sent to VALS.<sup>148</sup> If there are exceptional circumstances or the police officer does not return to the police station with the suspect, they are to contact the record services division who will contact VALS.<sup>149</sup>
- 3.59 Police officers are also directed to contact the local Aboriginal Community Justice Panel if operational in the area.<sup>150</sup> Amongst other responsibilities, Aboriginal Community Justice Panel members are to notify relatives or friends, converse with the person in custody and assist with welfare matters.<sup>151</sup>
- 3.60 The process stipulated in the Victoria Police Manual is to be followed regardless of age and does not affect an Aboriginal young person’s rights under section 464E of the Crimes Act.<sup>152</sup> In its submission to the Commission, VALS expressed concern about the treatment of young people in police custody prior to the arrival of a client services officer or independent person.<sup>153</sup> VALS recommended that the Victoria Police Manual be amended to stipulate timeframes within which police must notify VALS and an independent person that an Aboriginal young person is in custody, and that notification must occur before the interview commences.<sup>154</sup>

### YOUNG PEOPLE WITH IMPAIRED MENTAL STATE

- 3.61 As discussed in Chapter 2, police are directed by the Victoria Police Manual to secure the presence of an ‘independent third person’ when interviewing any person, regardless of age, with ‘an impaired mental state or capacity who is fit to be interviewed’.<sup>155</sup> The manual states that this person ‘will either be a relative or close friend, or a trained volunteer from the Office of the Public Advocate’.<sup>156</sup>

3.62 In considering whether to use a relative or close friend, whether with or without a trained volunteer, the Victoria Police Manual states that police must consider whether the relative or close friend can be objective.<sup>157</sup>

3.63 However, police must use a trained volunteer from the Office of the Public Advocate where:

- the relative or close friend cannot be contacted
- the relative or close friend is unsuitable
- the presence of the relative or close friend may impede the interview process.<sup>158</sup>

## YOUNG PEOPLE AS WITNESSES AND VICTIMS

3.64 The Victoria Police Manual also provides for the presence of a parent, guardian or independent person when police interview a young person because he or she has witnessed or been a victim of crime.<sup>159</sup> The manual also requires the presence of an independent third person if the witness or victim has a mental incapacity, regardless of age.<sup>160</sup> However, there are no requirements within the Crimes Act<sup>161</sup> to this effect.

3.65 Currently, YRIPP volunteers do not support witnesses and victims.<sup>162</sup> Police at YRIPP stations must therefore revert to the traditional informal method of securing an independent person from a station list. Some consultation participants were concerned about young sexual assault victims being interviewed by the Sexual Offences and Child Abuse Unit of Victoria Police (SOCA Unit) without a skilled independent person to support them.<sup>163</sup>

3.66 Many people in consultations and submissions, including CMY and YACVic, supported the extension of YRIPP services to witnesses and victims.<sup>164</sup> A YRIPP volunteer in Bairnsdale informed the Commission that she had decided to remain available to support victims independent from YRIPP, as it is 'total discrimination' not to do so.<sup>165</sup>

## DIFFICULTIES AND CRITICISMS OF CURRENT PRACTICE

3.67 The Commission's consultations and submissions revealed different views about the current systems in place across Victoria's police stations for securing the presence of independent persons when required.<sup>166</sup>

138 Submission 16 (Anonymous).

139 Submissions 4 (Stephen Harris), 10 (Fran Frost), 11 (Anonymous), 24 (Anonymous).

140 Submission 11 (Anonymous).

141 Honorary Justice Office, *Review of Justices of the Peace* (7 June 2010) Department of Justice (Victoria) <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/the+justice+system/justices+of+the+peace/justice+-+review+of+justices+of+the+peace>>.

142 Ibid.

143 Ibid.

144 CLE Consulting Australia, *Development of Training for Justices of the Peace* <<http://www.cleconsulting.com.au/hjo.htm>>. The survey was available until 5pm Wednesday 11 August 2010.

145 See Chapter 2.

146 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Attendance and Custody Modules', from CD-ROM current at 30 August 2010, 5. The attendance module is the program used by police when recording the details of people in police care or custody.

147 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Attendance and Custody Modules', from CD-ROM current at 30 August 2010, 5.

148 Ibid; Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 15.

149 Victoria Police, 'Attendance and Custody Modules', above n 147.

150 Ibid. Operational areas are Geelong, Shepparton, Mildura, Bendigo, Swan Hill, Echuca, Robinvale, Ballarat, Colac, Horsham, Lake Tyers, Central Gippsland, Warrnambool, Heywood.

151 Victoria Police, 'Attendance and Custody Modules', above n 147.

152 *Crimes Act 1958* (Vic) s 464E.

153 Submission 17 (VALS).

154 Ibid.

155 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Interviewing Specific Categories of Person', from CD-ROM current at 30 August 2010, 3.

156 Ibid.

157 Ibid 3–4.

158 Ibid 3.

159 Ibid 2.

160 Ibid 2–4.

161 *Crimes Act 1958* (Vic).

162 Submission 20 (CMY and YACVic).

163 Consultations 12 (Victoria Police Bairnsdale), 30 (OPA).

164 Consultations 14 (Maria Van Der Burgt and John Fox), 22 (YRIPP Metro North); submissions 15 (OPA), 18 (Maria Van Der Burgt), 20 (CMY and YACVic).

165 Submission 18 (Maria Van Der Burgt).

166 See Appendix A; Appendix B.

### RECRUITING AND RETAINING VOLUNTEERS

- 3.68 A common issue for YRIPP and non-YRIPP police stations is the difficulty in recruiting and retaining volunteers.<sup>167</sup> The Office of the Public Advocate emphasised that these issues are not confined to the provision of independent persons to support young people, but are issues around volunteering within the justice system generally.<sup>168</sup>
- 3.69 The recruitment process has been a challenge for YRIPP, as there has been a natural attrition of volunteers.<sup>169</sup> YRIPP reported that insecure funding has affected its ability to retain staff members and volunteers.<sup>170</sup>
- 3.70 The Commission heard that there is a need to recruit more volunteers.<sup>171</sup> Some police officers suggested that more volunteers could be recruited at universities, Rotary and Lions Club.<sup>172</sup> Another suggestion was that the pool of volunteers could be expanded by allowing retired police officers to act as an independent person.<sup>173</sup>

### Lack of remuneration

- 3.71 YRIPP volunteers and volunteers secured independently by police stations do not receive remuneration for their role as an independent person.<sup>174</sup> However, YRIPP volunteers receive \$10 reimbursement per interview, for 'out-of-pocket' expenses such as travel and phone usage.<sup>175</sup>
- 3.72 Different views were expressed about the topics of remuneration and reimbursement of expenses. In consultations, some participants supported remuneration as a means of quality control,<sup>176</sup> accountability<sup>177</sup> and ensuring that volunteers attend interviews at all times of the night.<sup>178</sup> Other participants in consultations argued that the lack of remuneration causes volunteer fatigue.<sup>179</sup> On the other hand, many existing volunteers supported the role remaining a voluntary one.<sup>180</sup> As one participant said, 'volunteers undertake such a role for the satisfaction of the work they do rather than for money'.<sup>181</sup>

### DELAYS

- 3.73 In some consultations, participants raised concerns about the length of time it takes independent persons to arrive at police interviews.<sup>182</sup> A delay in the arrival of an independent person extends the length of time that a young person is held in custody.<sup>183</sup>
- 3.74 A few police officers expressed frustration about the length of time it takes for a YRIPP volunteer to arrive at a police station.<sup>184</sup> Police at one police station informed the Commission that, rather than contact a YRIPP volunteer, they often contact a community volunteer from the station list who lives close by and will attend promptly.<sup>185</sup>
- 3.75 The YRIPP call-out procedure requires the volunteer to provide the police station with an estimated time of arrival when agreeing to attend an interview—it is to be as soon as possible and within 20 minutes.<sup>186</sup> It is unclear from discussions whether the delays were because YRIPP volunteers were not following the call-out procedure or because the call-out centre had difficulty in securing a volunteer to attend the interview.

### REGIONAL AND RURAL AREAS

- 3.76 In our discussions with people throughout Victoria, the Commission learnt about the difficulties in securing the attendance of an independent person to support a young person in custody in regional areas.<sup>187</sup> Limited resources and funding were identified as significant barriers to recruiting and retaining volunteers in rural areas.<sup>188</sup>

- 3.77 Long delays in securing a volunteer are a particular problem in regional and rural areas where there are fewer volunteers and the distance for travel is greatest.<sup>189</sup> Participants in rural areas expressed concern that long distances for travel in rural areas are not being taken into account in rostering YRIPP volunteers.<sup>190</sup>
- 3.78 Police are generally eager to secure the presence of an independent person quickly, as they do not want the young person to remain in custody for longer than necessary. Police in regional areas therefore often make efforts to expedite the interview process, including offering to pick up a volunteer and drive them to an interview, or having a volunteer sit in on more than one interview once they are at the station.<sup>191</sup>
- 3.79 It can be difficult to ascertain regional needs, as demand for independent persons can fluctuate markedly. This is the case in Victoria's alpine regions, where many young people pass through during the ski season.<sup>192</sup> There is also a greater need for independent persons in rural areas where seasonal work is prevalent because parents, guardians and other family members will generally be absent.<sup>193</sup> In one consultation, participants called for flexibility and adaptability for regional and rural independent person programs.<sup>194</sup>

## TRAINING

- 3.80 As discussed previously, YRIPP volunteers undertake specialist training,<sup>195</sup> while non-YRIPP volunteers participate in training on a voluntary basis. According to an internal volunteer survey, most YRIPP volunteers reported they felt very well equipped to undertake the independent person role after completing YRIPP training.<sup>196</sup> Some volunteers were, however, critical of YRIPP training. A couple of honorary justices viewed it as too long and as including irrelevant information.<sup>197</sup> Further, one submission described the value of YRIPP training for those who had previously acted as an independent person as 'absolutely questionable'.<sup>198</sup>

- 167 Consultations 8 (Judge Grant and Magistrate Power—Children's Court of Victoria), 9 (Victoria Police Geelong), 13 (Jim Barritt—YRIPP), 30 (OPA), 24 (YRIPP, YACVic and CMY), 32 (Victoria Police Mallee).
- 168 Consultation 30 (OPA).
- 169 Consultation 13 (Jim Barritt—YRIPP).
- 170 Consultation 24 (YRIPP, YACVic and CMY).
- 171 Consultation 9 (Victoria Police Geelong).
- 172 Consultation 16 (Victoria Police Gippsland).
- 173 Consultation 33 (Victoria Police Dandenong).
- 174 Submission 4 (Stephen Harris); consultations 17 (Ricky Morris—RAJAC Gippsland), 20 (CAHABPS and Youth Justice Unit).
- 175 Consultations 1 (YRIPP Metro South East), 24 (YRIPP, YACVic and CMY). YRIPP volunteers have the right 'to be reimbursed for out of pocket expenses incurred on behalf of YRIPP': Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 63.
- 176 Consultations 16 (Victoria Police Gippsland), 20 (CAHABPS and Youth Justice Unit).
- 177 Consultation 20 (CAHABPS and Youth Justice Unit).
- 178 Consultations 28 (Victoria Police Flemington), 33 (Victoria Police Dandenong).
- 179 Consultations 16 (Victoria Police Gippsland), 17 (Ricky Morris—RAJAC Gippsland).
- 180 Consultations 1 (YRIPP Metro South East), 7 (YRIPP Shepparton), 12 (Victoria Police Gippsland), 29 (Youthlaw); submission 11 (Anonymous).
- 181 Consultation 1 (YRIPP Metro South East).
- 182 Consultations 9 (Victoria Police Geelong), 28 (Victoria Police Flemington), 32 (Victoria Police Mallee), 33 (Victoria Police Dandenong). However, the Commission understands that in the time since consultation, the vast majority of police who responded to YRIPP surveys were pleased with the timely response of volunteers. The Commission also understands that YRIPP has resolved issues with the call centre that were resulting in delays.
- 183 Consultation 28 (Victoria Police Flemington).
- 184 Consultations 28 (Victoria Police Flemington), 32 (Victoria Police Mallee).
- 185 Consultation 28 (Victoria Police Flemington).
- 186 Centre for Multicultural Youth, *YRIPP Manual*, above n 16, 13.
- 187 See Appendix B—Consultations. Regional consultations included: consultations 3 (Victoria Police Hume 1), 4 (Victoria Police Hume 2), 5 (Brad Boon—VALS), 7 (YRIPP Shepparton), 9 (Victoria Police Geelong), 12 (Victoria Police Bairnsdale), 13 (Jim Barritt—YRIPP), 16 (Victoria Police Gippsland), 17 (Ricky Morris—RAJAC Gippsland).
- 188 Consultations 3 (Victoria Police Hume 1), 4 (Victoria Police Hume 2), 24 (YRIPP, YACVic and CMY), 32 (Victoria Police Mallee).
- 189 Consultations 3 (Victoria Police Hume 1), 4 (Victoria Police Hume 2), 24 (YRIPP, YACVic and CMY), 32 (Victoria Police Mallee).
- 190 Consultation 3 (Victoria Police Hume 1).
- 191 Ibid.
- 192 Ibid.
- 193 Consultation 32 (Victoria Police Mallee).
- 194 Consultation 3 (Victoria Police Hume 1).
- 195 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 5. See above under the heading 'Selection criteria, process and training'.
- 196 Submission 20 (CMY and YACVic).
- 197 Consultation 21 (Honorary Justices). Similar sentiments were expressed in submission 24 (Anonymous).
- 198 Submission 11 (Anonymous).



### The role of the independent person in practice

- 3.81 A few participants in consultations and submissions were critical of how volunteers perform the role of independent person in practice. The Commission heard from police participants that some volunteers had interrupted interviews unnecessarily.<sup>199</sup> However, one police officer argued that often it is preferable to have a trained independent person rather than a parent present during police questioning, as they interrupt less often.<sup>200</sup> Others expressed concern that volunteers can overstep the role of independent person and advocate for the young person.<sup>201</sup>

### SECURING AN INDEPENDENT PERSON FOR ABORIGINAL YOUNG PEOPLE

- 3.82 Aboriginal young people are widely considered particularly vulnerable at all stages of the criminal justice system. In comparison to other young people, Aboriginal young people are vastly over-represented in the justice system.<sup>202</sup>
- 3.83 In consultations with rural police officers, the Commission heard that police sometimes struggle to contact family members, guardians or relatives when an Aboriginal young person suspected of having committed an offence is in police custody and is to be questioned.<sup>203</sup> When a parent or guardian is unavailable to attend the police station and support the young person to be interviewed, police try to secure an independent person of Aboriginal descent, such as:
- an elder in the community<sup>204</sup>
  - a VALS client service officer<sup>205</sup>
  - an Aboriginal Community Justice Panel member<sup>206</sup>
  - an Aboriginal police liaison officer.<sup>207</sup>
- 3.84 The Commission heard that VALS client service officers do not usually attend police interviews.<sup>208</sup> This is partly due to a lack of resources,<sup>209</sup> but also because the police sometimes do not contact the local client service officer when a young Aboriginal person is in custody.<sup>210</sup> A number of participants in consultations stated that VALS's advice to Aboriginal young people is generally to a give a 'no comment' interview.<sup>211</sup>

### SECURING AN INDEPENDENT PERSON FOR YOUNG PEOPLE IN OUT-OF-HOME CARE

- 3.85 It is sometimes difficult to determine who should be invited to attend a police interview when the young person in custody is subject to a protection order under the *Children, Youth and Families Act 2005* (Vic).<sup>212</sup> Two orders are of particular concern:
- Custody to Secretary order: the Secretary of DHS is granted custody of the young person<sup>213</sup> and therefore determines where the young person lives, often in foster care or community care. Responsibility for guardianship of the young person is not affected by an order of this nature,<sup>214</sup> so their day-to-day carer will be a person who is not their parent or guardian.
  - Guardianship to Secretary order: the Secretary of DHS is granted custody and guardianship of the young person to the exclusion of all other persons.<sup>215</sup> In these circumstances, parents and day-to-day carers will have no guardianship responsibilities.
- 3.86 In consultations with the Commission, police reported that finding an appropriate guardian is difficult when a young person is in state care.<sup>216</sup> According to the Victoria Police Manual, police are to contact DHS 'who will supply or verify details of the lawful guardian'.<sup>217</sup> However, police argued that DHS should be responsible for informing parents when a young person in state care is in police custody for questioning.<sup>218</sup>



3.87 Members of the Children’s Court of Victoria noted that determining guardianship of young people in residential care is sometimes difficult at short notice and after hours.<sup>219</sup> They argued that the definition of guardianship in the context of section 464E of the Crimes Act requires clarity.<sup>220</sup>

3.88 In consultation with representatives from Berry Street—a key provider of residential and non-residential care to vulnerable young people—the Commission learnt that Berry Street residential care staff do not attend police interviews as an independent person.<sup>221</sup> Staff can, however, sit outside the interview room and support the young person.<sup>222</sup> In cases where police interview young people about assaulting residential care staff, it is routine practice for an independent person to be present.<sup>223</sup>

### SECURING AN INDEPENDENT PERSON FOR YOUNG PEOPLE FROM CULTURAL AND LINGUISTICALLY DIVERSE BACKGROUNDS

3.89 As discussed in Chapter 2, police are required by section 464D of the Crimes Act to arrange an interpreter to assist a person, including a young person, in custody whose comprehension of English is insufficient to understand police questioning.<sup>224</sup> If an interpreter is required, police either organise an interpreter<sup>225</sup> or arrange for a relative to assist.<sup>226</sup>

3.90 Participants in consultations reported that it is common to find parents or guardians who do not understand or speak English well present during police questioning of a young person in custody.<sup>227</sup> In these circumstances, the Victoria Police Manual directs the police to provide an interpreter.<sup>228</sup> The manual also directs police to secure an interpreter for an independent person who ‘cannot speak or understand English’.<sup>229</sup>

3.91 Some YRIPP volunteers told the Commission that in their experience, police did not always call an interpreter for the parents and in such situations often turned to an independent person to support the young person.<sup>230</sup> CMY and YACVic argue that an ‘independent person should never be used in place of an interpreter for a parent as this only serves to further marginalise refugee and migrant parents from the justice process’.<sup>231</sup>

199 Consultations 9 (Victoria Police Geelong), 28 (Victoria Police Flemington).

200 Consultation 33 (Victoria Police Dandenong).

201 Consultation 4 (Victoria Hume 2).

202 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [4.59].

203 Consultations 12 (Victoria Police Bairnsdale), 32 (Victoria Police Mallee).

204 Consultation 9 (Victoria Police Geelong).

205 Consultation 5 (Brad Boon—VALS).

206 Consultations 9 (Victoria Police Geelong), 32 (Victoria Police Mallee).

207 Consultation 16 (Victoria Police Gippsland).

208 Consultations 1 (YRIPP Metro South East), 3 (Victoria Police Hume 1), 32 (Victoria Police Mallee).

209 Consultation 16 (Victoria Police Gippsland).

210 Consultation 5 (Brad Boon—VALS).

211 Consultations 5 (Brad Boon—VALS), 8 (Judge Grant and Magistrate Power), 32 (Victoria Police Mallee). According to Brad Boon from VALS, advising a young person to provide a ‘no comment’ interview is in line with VALS policy on interviewing young people in police custody.

212 *Children, Youth and Families Act 2005* (Vic) s 275. Types of protection orders include: a supervision order, a custody to third party order, a supervised custody order, a custody to Secretary order, a guardianship to Secretary order, a long-term guardianship to Secretary order and an interim protection order.

213 *Children, Youth and Families Act 2005* (Vic) s 287.

214 Ibid s 287(1)(b).

215 Ibid s 289(1)(a).

216 Consultations 9 (Victoria Police Geelong), 11 (Victoria Police Metro East),.

217 Victoria Police, ‘Interviewing Specific Categories of Person’, above n 155, 2.

218 Consultation 11 (Victoria Police Metro East).

219 Consultation 8 (Judge Grant and Magistrate Power—Children’s Court of Victoria).

220 Ibid.

221 Consultation 6 (Berry Street Hume).

222 Ibid.

223 Ibid.

224 *Crimes Act 1958* (Vic) s 464D.

225 Consultations 4 (Victoria Police Hume 2), 19 (YRIPP Metro West).

226 Consultations 3 (Victoria Police Hume 1), 28 (Victoria Police Flemington).

227 Consultations 19 (YRIPP Metro West), 8 (Judge Grant and Magistrate Power—Children’s Court of Victoria), 26 (YRIPP Inner City and Bayside), 28 (Victoria Police Flemington).

228 Victoria Police, ‘Interviewing Specific Categories of Person’, above n 155, 6.

229 Ibid.

230 Consultation 19 (YRIPP Metro West).

231 Submission 20 (CMY and YACVic).





3.92 The Springvale Monash Legal Service reported to the FCLC that '[e]ven with an interpreter present, language barriers can still be problematic ... there are Australian legal words that have no direct equivalent in another language'.<sup>232</sup> Furthermore, young people from culturally and linguistically diverse communities experience 'a range of additional vulnerabilities at the police station which are likely to impact on communication' during the interview.<sup>233</sup> At all YRIPP police stations there are multilingual information sheets for parents or guardians to assist with supporting their child through the interview.<sup>234</sup>

<sup>232</sup> Submission 21 (FCLC). See also submission 20 (CMY and YACVic).

<sup>233</sup> Submission 20 (CMY and YACVic). Additional vulnerabilities include: experience of past trauma, difficulties in understanding the Victorian legal system, feeling disempowered by lack of knowledge and bad experience of police in one's country of origin.

<sup>234</sup> Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 10, 7.

A faint, repeating background image of a group of people, including children and adults, walking together in a line. The image is overlaid with a semi-transparent red filter. The text 'SUPPORTING YOUNG PEOPLE IN POLICE INTERVIEWS' is repeated in a light red font across the background.

## Chapter 4

# Current Law and Practice in Other Jurisdictions

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## Current Law and Practice in Other Jurisdictions

### INTRODUCTION

- 4.1 Chapter 2 of this report deals with the legislative requirement for a parent, guardian or independent person to be present when a person under the age of 18 is questioned in police custody.<sup>1</sup> Chapter 2 also contains discussion of the various matters that are unclear about the operation of this statutory provision.
- 4.2 The law in some other jurisdictions contains clearer statements about who may act as an independent person, their role and the consequences of conducting a police interview without them. This chapter considers some of those jurisdictions, both in Australia and overseas.

### OTHER AUSTRALIAN JURISDICTIONS

- 4.3 This section deals with the current legislative schemes in New South Wales and Queensland, as they are the most comprehensive in Australia. A complete summary of the relevant current law and practice in other Australian jurisdictions is included at Appendix C.

### NEW SOUTH WALES

- 4.4 The New South Wales legislative scheme is far more comprehensive than section 464E of Victoria's Crimes Act.<sup>2</sup> The *Children (Criminal Proceedings) Act 1987* (NSW) provides that a person under the age of 18 is entitled to have a 'support person' present when interviewed by police and it stipulates the consequences of failing to comply with this requirement.<sup>3</sup> The *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) describes the procedures that police must follow when a vulnerable person, which includes a child, is in police custody.<sup>4</sup>
- 4.5 Unlike Victoria, the role of the support person is described in legislation, and the police are required to provide the parent, guardian or other suitable person with information about their role and the rights of the young person being questioned.<sup>5</sup>
- 4.6 There is a statutory presumption in New South Wales that a confession will be inadmissible 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.<sup>6</sup>

### Legislative requirement for a support person to be present

- 4.7 Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) deals with investigation and questioning by police and applies to all persons who are under arrest for an offence, including those under the age of 18 years.<sup>7</sup> It provides that the detained person is allowed to communicate privately with a friend, relative, guardian or independent person prior to their interview.<sup>8</sup>
- 4.8 The *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW)<sup>9</sup> takes these requirements further and states that any detained person who is a 'vulnerable person' is entitled to have a 'support person' present during any investigative procedure.<sup>10</sup> 'Vulnerable person' includes a child,<sup>11</sup> defined as a person under the age of 18 years.<sup>12</sup> A child cannot waive the right to a support person.<sup>13</sup>
- 4.9 The *Children (Criminal Proceedings) Act 1987* (NSW) deals with the evidentiary consequences of not providing a support person, and operates together with the *Law Enforcement (Powers and Responsibilities Act 2002* (NSW) and *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) to govern the law of support persons in New South Wales. The same definition for who can act in the support person role is utilised in each legislative instrument.<sup>14</sup>

- 4.10 The requirement to have a support person present when someone under 18 is interviewed by police is reinforced by the New South Wales Police *Code of Practice for CRIME*, which states ‘Do not question a child you suspect of committing an offence unless a support person is present. Do not use a NSW Police employee for this.’<sup>15</sup>

### Exceptions to the legislative requirement

- 4.11 Although a person under the age of 18 is entitled to have a support person present when interviewed by police,<sup>16</sup> the custody manager is not required to defer the interview for more than two hours to wait for the support person to arrive.<sup>17</sup>
- 4.12 The requirement that a support person be present does not need to be complied with if the custody manager believes:
- an accomplice of the detained person would be likely to escape arrest
  - evidence would be likely to be concealed, fabricated, destroyed or lost
  - it would be likely to hinder the recovery of any person or property associated with the investigation
  - it would be likely to result in bodily injury to another person
  - the safety of other persons requires that the investigative procedure be carried out as a matter of urgency.<sup>18</sup>

### Definition of ‘support person’

- 4.13 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
  - an adult other than a police officer who has the consent of the child’s parent or guardian
  - if the child is aged 14 years or older, an adult other than a police officer who has the consent of the child
  - a legal practitioner of the child’s choosing.<sup>19</sup>
- 4.14 The detained young person has either a right to consult with a friend, relative, guardian or independent person<sup>20</sup> or a right to a support person,<sup>21</sup> but not both.<sup>22</sup> However, this does not prevent a friend, relative, guardian or independent person who has attended the place of detention from acting as support person during the interview if the detained person requests it.<sup>23</sup>
- 4.15 The Commission understands that there is no formal scheme in New South Wales for providing support persons. It seems that in practice, police call upon Salvation Army officials or justices of the peace.<sup>24</sup> Training and remuneration are not provided for people who fulfil this role.<sup>25</sup>
- 4.16 Each local area police command is responsible for having a list of appropriate support persons for circumstances in which a parent, guardian or other person proposed by the young person is unable to fulfil the role. The Commission understands that at the time of writing, guidelines were being drafted to require the local area command youth liaison officer or custody manager to update this list every 12 months.

- 1 *Crimes Act 1958* (Vic) s 464E. See Chapter 2.
- 2 *Crimes Act 1958* (Vic) s 464E.
- 3 *Children (Criminal Proceedings) Act 1987* s 13.
- 4 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27(1).
- 5 *Ibid* reg 30(1).
- 6 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a).
- 7 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 111(1).
- 8 *Ibid* s 123(1)–(2).
- 9 Provided for under *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 132.
- 10 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27(1).
- 11 *Ibid* reg 24(1). ‘Vulnerable person’ also includes people with impaired physical or intellectual functioning, people who are Aboriginal or Torres Strait Islanders and people from a non-English speaking background: reg 24(1).
- 12 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 23.
- 13 *Ibid* reg 29.
- 14 *Ibid* reg 26(a); *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a). In relation to the requirement to have a support person present, it should be noted that the relevant provisions in s 111 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) apply only to persons who have been arrested, while reg 27 in the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) applies to ‘detained persons’ who participate in investigative procedures. The requirement in s 13 of the *Children (Criminal Proceedings) Act 1987* (NSW) applies more broadly to ‘any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings’. The Commission understands that these differences are negligible in practice.
- 15 New South Wales Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, current at August 2010, 84.
- 16 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27(1).
- 17 *Ibid* reg 27(6).
- 18 *Ibid* reg 27(7). Similar exceptions apply under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 125, in relation to the right to communicate privately with particular persons prior to a police interview.
- 19 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 26(a).
- 20 Under *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 123(4).
- 21 Under *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27.
- 22 *Ibid* reg 28(1).
- 23 *Ibid* reg 28(2).
- 24 Telephone conversation with Jane Sanders, New South Wales Shopfront Youth Legal Centre, 6 September 2010.
- 25 *Ibid*.

## Current Law and Practice in Other Jurisdictions

- 4.17 While there is no formal scheme for the provision of support persons, the Commission understands that there are currently plans to pilot a more coordinated program in Blacktown. This pilot would require all support persons on the list to have a Working with Children Check.

### Role of the support person and the investigating official

- 4.18 The *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) deals with the role of the support person. The police must inform the support person that they are not restricted to acting as a mere observer during the interview<sup>26</sup> and that they may, among other things:

- assist and support the detained person
- observe whether or not the interview is being conducted properly and fairly
- identify communication problems with the detained person.<sup>27</sup>

- 4.19 Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides that the police must give the support person a summary of the detained person's rights.<sup>28</sup> In addition to this information, police must give both the detained person and the support person a form outlining the support person's role.<sup>29</sup> This form, provided at Appendix G, states:

*The support person is not restricted to acting merely as an observer at an interview and may, among other things:*

- (a) assist and support the person being interviewed, and*
- (b) observe whether or not the interview is being conducted properly and fairly;*
- (c) identify communication problems with the person being interviewed.<sup>30</sup>*

- 4.20 The role of the support person has been considered in some reported cases.<sup>31</sup> In *R v Phung*, Justice Wood held that the support person is to act as a check on unfair or oppressive behaviour, to give appropriate advice and assist the child, and to provide comfort.<sup>32</sup> In *R v H (A Child)*, the role was described as 'protecting children from the disadvantaged position inherent in their age', as well as advising children of their rights and objecting to perceived unfairness.<sup>33</sup>

### Exclusion of the support person

- 4.21 A support person can be excluded from the investigative procedure if he or she unreasonably interferes with the procedure.<sup>34</sup> In this instance, the young person is entitled to have another support person present.<sup>35</sup>

### Consequences if a support person is not present

- 4.22 The *Children (Criminal Proceedings) Act 1987* (NSW) contains a presumption in favour of excluding evidence of an admission made in the absence of a support person.<sup>36</sup> If a support person is not present, any admission made by the child is inadmissible unless there was a 'proper and sufficient reason'<sup>37</sup> for the support person's absence from the interview and the court considers that, in the circumstances of the case, the admission should be admitted into evidence.<sup>38</sup> The effect of the presumption, which operates in addition to the exclusionary rules in the *Evidence Act 1995* (NSW),<sup>39</sup> is that the onus of proving admissibility rests on the prosecution when there has been a failure to comply with the statutory requirement that a support person be present when a young person in custody is questioned by the police.<sup>40</sup>

- 4.23 In *McKellar v Smith*,<sup>41</sup> it was held that in order to excuse the absence of a support person and allow evidence of the child's admission, a judge must be satisfied that there was proper and sufficient reason why *none* of the persons listed could be present.<sup>42</sup>
- 4.24 The meaning of 'proper and sufficient reason'<sup>43</sup> was considered in *R v Duncan*.<sup>44</sup> In that case, it was held that there was proper and sufficient reason for the support person to be absent from the immediate vicinity when police officers and the appellant were walking through a small house and conversing briefly in a room barely large enough to contain them.<sup>45</sup>
- 4.25 'Proper and sufficient reason' probably also includes the exceptions in the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW).<sup>46</sup> For example, it seems likely that if the safety of other people requires the young person's investigative procedure to be carried out as a matter of urgency,<sup>47</sup> this would be considered a 'proper and sufficient reason' for a support person to be absent from the young person's interview.<sup>48</sup> In these circumstances, a judicial officer may then exercise their discretion to allow an admission into evidence even if a support person was not provided for the young person.<sup>49</sup>

## QUEENSLAND

- 4.26 Although the Queensland legislative scheme is broadly similar to that in Victoria, the *Police Powers and Responsibilities Act 2000* (Qld) defines who can perform the role of 'support person'<sup>50</sup> and police are required by law to provide that person with an explanation of their role prior to the interview.<sup>51</sup>

### Legislative requirement for a support person to be present

- 4.27 The *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer must not interview a child in relation to an indictable offence<sup>52</sup> unless the child has been allowed to speak to a 'support person' and that person is present during the interview.<sup>53</sup> A child is defined as someone who has not yet turned 17 years old.<sup>54</sup>

- 26 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 30(1).
- 27 Ibid.
- 28 Ibid reg 30(2). These rights 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: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 122(1)(b), pt 9.
- 29 New South Wales Police Force, *Specialist Youth Officer Course Participant Manual*, 'Form P692: Role of Support Person', current at March 2010, 192.
- 30 Ibid.
- 31 See, eg, *R v Phung and Huynh* [2001] NSWSC 115 ('Phung'); *R v H (A Child)* (1996) 85 A Crim R 481 ('R v H').
- 32 *Phung* [2001] NSWSC 115, [36].
- 33 *R v H* (1996) 85 A Crim R 481, 486.
- 34 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 31(1).
- 35 Ibid reg 31(2).
- 36 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a).
- 37 Ibid s 13(1)(b)(i).
- 38 Ibid s 13(1)(b)(ii). 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 2005* (NSW) reg 5.
- 39 This Act contains similar provisions to the *Evidence Act 2008* (Vic) ss 84–5, 90, 138, in Chapter 2 in relation to inadmissibility of admissions.
- 40 See, eg, *R v Duncan* [2004] NSWCCA 431, [265] ('Duncan').

- 41 *McKellar v Smith* [1982] 2 NSWLR 950.
- 42 Ibid 957, discussed in *R v Cotton* (1990) 19 NSWLR 593.
- 43 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(b)(i).
- 44 *Duncan* [2004] NSWCCA 431.
- 45 *Duncan* [2004] NSWCCA 431, [265].
- 46 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27(7). These exceptions are set out above at [4.12].
- 47 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 27(7).
- 48 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(b).
- 49 Ibid.
- 50 *Police Powers and Responsibilities Act 2000* (Qld) sch 6 (definition of 'support person' para (b)). Note that the Queensland Legal Aid website also refers to this person as an 'interview friend': Legal Aid Queensland, *Do I Have to Talk to the Police?* (27 July 2010) <<http://www.legalaid.qld.gov.au/legalinformation/thelawjusticesystem/Dealingswithpolice/Pages/Dolhavetotalktothepolice.aspx>>.
- 51 *Police Powers and Responsibilities Act 2000* (Qld) sch 6.
- 52 Ibid s 414.
- 53 Ibid s 421. Note that the same requirement for a support person applies for Aboriginal or Torres Strait Islander people and people 'with impaired capacity': ss 420, 422, sch 6 (definition of 'person with impaired capacity').
- 54 *Police Powers and Responsibilities Act 2000* (Qld) sch 6 (definition of 'child'); *Youth Justice Act 1992* (Qld) sch 4 (definition of 'child').



## Current Law and Practice in Other Jurisdictions

### Exceptions to the legislative requirement

4.28 While a person under the age of 17 is usually entitled to have a support person present when interviewed by police about their involvement in an offence, this entitlement does not apply if police reasonably suspect it would lead to:

- an accomplice or accessory of the person taking steps to avoid apprehension
- an accomplice or accessory of the person being present during questioning
- evidence being concealed, fabricated or destroyed
- a witness being intimidated.<sup>55</sup>

4.29 Additionally, a police officer can proceed with questioning if he or she reasonably suspects a threat to another person's safety and believes that questioning is so urgent that it should not be delayed.<sup>56</sup>

### Definition of 'support person'

4.30 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
- an adult, relative or friend of the child who is acceptable to the child.<sup>57</sup>

4.31 Queensland does not have a formal system for the provision of support persons, relying instead on individual stations to develop and maintain lists of suitable persons. The commissioner of the police service must keep a list of support persons and interpreters, and revise it from time to time.<sup>58</sup> If the child is Aboriginal or a Torres Strait Islander and none of the support persons listed above is available, a support person may be a person whose name is included in the list of support persons and interpreters.<sup>59</sup>

4.32 If no other support person is available, a justice of the peace other than a police officer may be the support person.<sup>60</sup> The Commission understands that while justices of the peace perform a variety of functions, their general training does not include specific training to act as a support person.<sup>61</sup> A representative from Queensland Legal Aid or a community legal centre—such as the Youth Advocacy Centre—will sometimes attend the interview with the young person, although they may not be contacted until after the interview has taken place.<sup>62</sup>

4.33 The support person must be independent in the sense that they are not the person against whom the crime was allegedly committed by the young person.<sup>63</sup>

### Role of the support person and the investigating official

4.34 Before a police officer questions a young person<sup>64</sup> in the presence of a support person, the police officer must give the support person information in an approved form about their role and ensure that the person understands the nature of their role.<sup>65</sup>

4.35 Although the support person generally must not provide legal advice to the young person, he or she may ask the young 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 person says during questioning may be used in evidence
- what is said by a police officer during questioning.<sup>66</sup>

4.36 The support person will be provided with information that includes, among other things:

- a statement that the support person must act in the best interests of the relevant person
- a statement that, unless the support person is a lawyer, the support person must not provide legal advice to the young person.<sup>67</sup>

4.37 The form given to support persons with this information is set out at Appendix F. This form describes the role of the support person exactly as it is set out in the *Police Powers and Responsibilities Regulation 2000* (Qld)<sup>68</sup> and the *Police Powers and Responsibilities Act 2000* (Qld).<sup>69</sup>

### Exclusion of the support person

4.38 If the support person is unreasonably interfering with the questioning of the young person, the police officer may exclude the support person from the interview.<sup>70</sup> Unreasonable interference includes conduct that disrupts questioning, answering questions on behalf of the young person, or providing written replies during the questioning for the young person to quote.<sup>71</sup> It is not unreasonable interference for the support person to seek clarification of a question, to challenge an improper question or to challenge the way a question was put.<sup>72</sup>

4.39 Different standards apply to lawyers who act as support persons.<sup>73</sup> For a lawyer, it is not unreasonable interference to advise a young person not to answer a question or to say that he or she wishes to give the young person further advice.<sup>74</sup>

### Circumstances in which a support person is unable to perform the role

4.40 The *Police Powers and Responsibilities Act 2000* (Qld) also sets out situations in which a support person may be unable to perform their role.<sup>75</sup> This is in contrast to the *Crimes Act 1958* (Vic), which says nothing about this matter.

4.41 A person may be unable to perform the role of support person properly if he or she:

- is affected by drugs or alcohol and is unable to act in the best interests of the young person
- has impaired capacity and is unable to act in the best interests of the young person
- is, or appears to be, unwilling to perform the role because of illness, injury, pain or tiredness
- has an association with the questioning police officer
- has a relationship of authority with the young person that may prevent them from acting in the best interests of the young person
- is a victim of the offence or a friend of the victim of the offence in relation to which the young person is being questioned
- witnessed the commission of the offence for which the young person is being questioned.<sup>76</sup>

55 *Police Powers and Responsibilities Act 2000* (Qld) s 441(1).

56 Ibid s 441(2).

57 Ibid sch 6 (definition of 'support person' paras (i)–(iv)).

58 Ibid s 440(1)–(2), sch 6 (definition of 'commissioner'). The Queensland Operational Procedures Manual provides that this list is to be revised every six months and include the languages spoken by those on the list: Queensland Police Service, *Operational Procedures Manual: Issue 37, 'General Policy'*, current at June 2010, [6.3.4] 4.

59 *Police Powers and Responsibilities Act 2000* (Qld) sch 6 (definition of 'support person' para (b)(vi)).

60 Ibid sch 6 (definition of 'support person' para (b)(vi)).

61 Telephone conversation with Department of Justice (Queensland), Justice of the Peace Branch, 1 September 2010. Note that Queensland has both justices of the peace and commissioners for declarations, with justices of the peace performing more duties: Queensland Government, *Justices of the Peace* < <http://www.justice.qld.gov.au/justice-services/justices-of-the-peace>>; telephone conversation with Department of Justice (Queensland), Justice of the Peace Branch, 1 September 2010.

62 Telephone conversation with Noeline Straker, Case Work Solicitor, Queensland Youth Advocacy Centre, 30 August 2010.

63 *Police Powers and Responsibilities Act 2000* (Qld) s 421(3).

64 Note that the wording of the legislation is 'relevant person', encompassing not just children but also Aboriginal and Torres Strait Islander people and people with impaired capacity: ibid ss 415, 420–422.

65 *Police Powers and Responsibilities Regulation 2000* (Qld) reg 44A(1).

66 Ibid reg 44A(2).

67 Ibid.

68 Ibid reg 44A.

69 See *Police Powers and Responsibilities Act 2000* (Qld) s 424.

70 Ibid s 421(4).

71 Ibid s 424(1). To promote good practice, what constitutes reasonable and unreasonable interference is described in the form that police provide to support persons regarding their role: Queensland Police Service, *Information for Support Persons about their Role*, current at 1 July 2010. This form is provided at Appendix F of this report.

72 *Police Powers and Responsibilities Act 2000* (Qld) s 424(2). Note that different rules apply for lawyers during the interview: s 424(2)(d).

73 *Police Powers and Responsibilities Act 2000* (Qld) s 424(2)(d).

74 Ibid.

75 Ibid s 428(3).

76 *Police Powers and Responsibilities Act 2000* (Qld) s 428(3).

## Current Law and Practice in Other Jurisdictions

### Consequences if a support person is not present or does not fulfil their role

- 4.42 The *Youth Justice Act 1992* (Qld) provides that in order for a statement made by a child defendant to police to be admissible in court, there must have been a support person present at the time the statement was made.<sup>77</sup> As in New South Wales, this presumption does not apply if the prosecution satisfies the court that there was a proper and sufficient reason for the absence of a support person at the time the statement was made.<sup>78</sup>
- 4.43 Examples given in the legislation of ‘proper and sufficient reason’ include when there is reasonable suspicion that allowing a support person to be present would allow an accomplice or accessory to avoid apprehension, or where the support person is excluded under the *Police Powers and Responsibilities Act 2000* (Qld).<sup>79</sup> The court has a discretionary power to admit the statement into evidence in these circumstances.<sup>80</sup>

### OVERSEAS JURISDICTIONS

#### UNITED KINGDOM

##### Legislative requirement for an appropriate adult to be present

- 4.44 In the United Kingdom, as in Victoria, an ‘appropriate adult’ who is independent of the investigative procedure must be present when a person under the age of 17 is interviewed by police about their involvement or suspected involvement in a criminal offence, or makes a statement to the police.<sup>81</sup>
- 4.45 While the presence of an appropriate adult during police interviews of young people is not explicitly required by the *Police and Criminal Evidence Act 1984* (UK) (PACE), it provides that the Secretary of State ‘shall issue codes of practice in connection with ... the detention, treatment, questioning and identification of persons by police officers’.<sup>82</sup> PACE also provides that it is the duty of the custody officer of a police station to ensure that detained persons are treated in accordance with the Act and with any relevant codes of practice.<sup>83</sup> *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Code C) is relevant to police interviews of young people.<sup>84</sup>
- 4.46 Code C contains Notes for Guidance (Notes), which amplify the code but do not form part of its provisions.<sup>85</sup> While the Notes are technically less authoritative than Code C, ‘they contain much of importance and in practice the distinction between the rules in the Codes and the principles in the Notes for Guidance is not of much significance’.<sup>86</sup>
- 4.47 Code C provides that if a detainee<sup>87</sup> is a ‘juvenile’,<sup>88</sup> an appropriate adult must, as soon as practicable:
- be informed of the grounds for the young person’s detention and their whereabouts
  - be asked to come to the police station to see the detainee.<sup>89</sup>

These requirements apply for a person who appears to be under the age of 17 in the absence of clear evidence that they are older.<sup>90</sup>

- 4.48 The same requirement applies for detainees who are mentally disordered or otherwise mentally vulnerable.<sup>91</sup> The right to have an appropriate adult present is in addition to the right to legal advice for young people and detainees who are mentally disordered or otherwise mentally vulnerable.<sup>92</sup>

4.49 When a young person 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, and inform that person that the young person has been arrested, why they have been arrested and where they are being held.<sup>93</sup>

4.50 The need for an appropriate adult to be present is explained in the Notes, which state that while young people<sup>94</sup> are 'often capable of providing reliable evidence, they may ... be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating'.<sup>95</sup> The Notes observe that

*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.*<sup>96</sup>

#### Exceptions to the legislative requirement

4.51 A young person must not be interviewed about their involvement, or suspected involvement, in a criminal offence or make a statement in the absence of an appropriate adult.<sup>97</sup> There are exceptions when a police officer<sup>98</sup> considers delay will lead to:

- interference with evidence
- physical harm to other people
- serious loss of or damage to property
- alerting other people suspected of committing an offence but not yet arrested
- hindering the recovery of property obtained through commission of an offence.<sup>99</sup>

4.52 If an interview is to proceed without an appropriate adult present in any of these circumstances, the police officer must also be satisfied that the interview 'would not significantly harm the person's physical or mental state'.<sup>100</sup>

77 Youth Justice Act 1992 (Qld) s 29(1).

78 Ibid s 29(2)(a).

79 Ibid. Exclusion under the Police Powers and Responsibilities Act 2000 (Qld) is discussed above at [4.38].

80 Youth Justice Act 1992 (Qld) s 29(2)(b).

81 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [11.15].

82 Police and Criminal Evidence Act 1984 (UK) c 60, s 66(b).

83 Ibid s 39.

84 Although these codes of practice are issued by the Secretary of State pursuant to the Police and Criminal Evidence Act 1984 (UK) ss 66–7, a draft must be approved by a resolution of each house of parliament: s 67(7). Before issuing a code of practice, the Secretary of State must consult with various stakeholders, including the Association of Police Authorities: s 67(4).

85 Code C states that the Notes for Guidance are not included as part of the provisions of Code C: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [1.3].

86 Michael Zander, *The Police and Criminal Evidence Act 1984* (Sweet and Maxwell, 5th ed, 2005) 280.

87 That is, a person in custody at a police station, regardless whether or not they have been arrested or charged: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [1.10], [16.1].

88 'Juvenile' is the language used in Code C: ibid [1.5]. However, 'young person' is used throughout this part to mean the same thing.

89 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [3.15].

90 Code C states that if anyone appears to be under the age of 17, they will be treated as a juvenile in the absence of clear evidence that they are older: ibid [1.5].

91 Ibid [3.15]. '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: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 'Notes for Guidance', 1G.

92 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [6.5A].

93 Ibid [3.13].

94 As well as persons who are mentally disordered or otherwise mentally vulnerable: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 'Notes for Guidance', 11C.

95 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 'Notes for Guidance', 11C.

96 Ibid.

97 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [11.15].

98 Of superintendent rank or above: ibid [11.18].

99 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, [11.15], [11.1], [11.18].

100 Ibid [11.18].

## Current Law and Practice in Other Jurisdictions

### Definition of 'appropriate adult'

- 4.53 Code C sets out who can be an appropriate adult.<sup>101</sup> In the case of a young person, an appropriate adult can be:
- a parent or guardian<sup>102</sup>
  - if the young person is in out-of-home care, a person representing the organisation that cares for them<sup>103</sup>
  - a social worker of a local authority<sup>104</sup>
  - failing these, 'some other responsible adult aged 18 or over who is not a police officer or employed by the police'.<sup>105</sup>
- 4.54 The Notes state that people should not act as appropriate adults if they:
- are suspected of involvement in the offence or investigation
  - are the victim
  - are a witness
  - are involved in the investigation
  - have received admissions.<sup>106</sup>
- 4.55 The Notes also state that parents who are estranged from the young person should not be asked to act as the appropriate adult when the young person 'expressly and specifically objects to their presence'.<sup>107</sup> The rule in relation to estranged parents reflects the decision in *DPP v Blake*,<sup>108</sup> where the 17-year-old defendant 'adamantly objected' to her estranged father being present as the appropriate adult.<sup>109</sup> The defendant's father was not considered to be an appropriate adult and confessions made by the defendant were therefore held to be inadmissible.<sup>110</sup>
- 4.56 The *Crime and Disorder Act 1998* (UK) places a statutory duty on local authorities to provide youth justice services 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'.<sup>111</sup> This requirement is met by youth offending teams,<sup>112</sup> comprised of representatives from the police, probation services, and social, health, and other welfare services.<sup>113</sup> They are responsible for putting in place local appropriate adult schemes.<sup>114</sup>
- 4.57 The National Appropriate Adult Network (NAAN) is the peak body for organisations running appropriate adult services<sup>115</sup> funded by the Home Office and the Department of Health.<sup>116</sup> It operates to 'support the development and maintenance of effective services throughout England and Wales'.<sup>117</sup> NAAN has published national standards for England and Wales, which cover recruitment and retention of appropriate adults, training for appropriate adults and service delivery.<sup>118</sup> *National Standard 3 on Training* provides that in order to be competent to fulfil the role set out in Code C,<sup>119</sup> both paid and volunteer appropriate adults should be required to undertake at least 18 hours training.<sup>120</sup> NAAN has developed a training pack and DVD for this purpose.<sup>121</sup>
- 4.58 While NAAN's national standards are instructive as to best practice for appropriate adults, they are not legislatively binding. It appears that the provision of appropriate adults and the processes relating to recruitment, remuneration and training vary across geographical areas at present. NAAN aims, among other things, to improve coverage of appropriate adult services in all police authority areas in England and Wales.<sup>122</sup> It has been suggested that while a multi-agency approach works well in some areas,

*there appears to be no effective mechanism for ensuring that the [local authority] does meet its statutory duty for AA services for juveniles and there is still no statutory responsibility for AA services for vulnerable adults.*<sup>123</sup>

## Role of the appropriate adult

4.59 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.<sup>124</sup> The procedures for which the appropriate adult must be present include:

- cautioning the young person that they do not have to say anything, that it may harm their defence if they do not mention when questioned something they later rely on in court, and that anything they do say may be given in evidence<sup>125</sup>
- informing the young person of the right to have someone informed of their arrest<sup>126</sup>
- informing the young person of the right to consult privately with a solicitor and of the availability of free independent legal advice<sup>127</sup>
- informing the young person of the right to consult the codes of practice<sup>128</sup>
- recording the reasons for arrest.<sup>129</sup>

4.60 The role of the appropriate adult is not merely a passive one. The young person must 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.<sup>130</sup> An appropriate adult must be informed that their role is not simply to act 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.<sup>131</sup>

4.61 'Advising' does not include giving legal advice, but the appropriate adult is required to consider whether legal advice from a solicitor is required for the young person.<sup>132</sup> The appropriate adult also has the right to ask for a solicitor to attend if it would be in the young person's best interests, even if the young person indicates they do not want legal advice.<sup>133</sup> It is the custody officer's responsibility to remind the young person and appropriate adult about the right to legal advice.<sup>134</sup>

4.62 Evidence has been excluded in cases where the appropriate adult was found to be incapable of giving advice, even though they may have had 'empathy' with the defendant.<sup>135</sup>

4.63 The Notes state that a person should have the opportunity to consult privately with a lawyer without the appropriate adult being present.<sup>136</sup> Unlike discussions with a lawyer, communications with the appropriate adult are not privileged.<sup>137</sup>

- 101 Although this report is primarily concerned with appropriate adults for young people, Code C also sets out who can be an appropriate adult for someone who is 'mentally disordered or otherwise mentally vulnerable': *ibid* [1.7(b)].
- 102 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, [1.7(a)(i)].
- 103 *Ibid*.
- 104 *Ibid* [1.7(a)(ii)].
- 105 *Ibid* [1.7(a)(iii)].
- 106 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, 'Notes for Guidance', 1B.
- 107 *Ibid*.
- 108 *DPP v Blake* [1989] 1 WLR 432.
- 109 *Ibid* 432.
- 110 *Ibid* 439–40 (Auld J).
- 111 *Crime and Disorder Act 1998* (UK) c 37, s 38(4)(a).
- 112 *Ibid* s 39(7)(a).
- 113 *Ibid* s 39(5).
- 114 Sally Reid, *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews* (2007) 10.
- 115 National Appropriate Adult Network, *About Us* <<http://www.appropriateadult.org.uk/about-us>>.
- 116 *Ibid*.
- 117 *Ibid*.
- 118 National Appropriate Adult Network, *National Standards* <<http://www.appropriateadult.org.uk/national-standards>>.
- 119 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*.
- 120 National Appropriate Adult Network, *National Standard 3 on Training* (2005).
- 121 National Appropriate Adult Network, *Training* <<http://www.appropriateadult.org.uk/training>>.
- 122 National Appropriate Adult Network, *Strategic Plan 2010–13* (2010).
- 123 Email from Lis Pritchard, Chief Executive of NAAN, 7 October 2009; Email from Lis Pritchard, Chief Executive of NAAN, 8 September 2010.
- 124 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, [3.17].
- 125 *Ibid* [10.12].
- 126 *Ibid* [3.1].
- 127 *Ibid*.
- 128 *Ibid*.
- 129 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, [3.4].
- 130 *Ibid* [3.18].
- 131 *Ibid* [11.17].
- 132 *Ibid* [6.5A].
- 133 *Ibid*.
- 134 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, 'Notes for Guidance', 11.
- 135 *R v Morse & Ors* [1991] Crim LR 195.
- 136 *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, 'Notes for Guidance', 1E.
- 137 *Ibid*.

## Current Law and Practice in Other Jurisdictions

### Consequences if an appropriate adult is not present

- 4.64 The codes are admissible in evidence in all civil or criminal proceedings, and a court may consider them when determining any question where they are relevant.<sup>138</sup>
- 4.65 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.<sup>139</sup> The failure to provide a young person with an appropriate adult has been considered a breach sufficient to justify the exclusion of evidence of admissions.<sup>140</sup>

### NEW ZEALAND

#### Legislative requirement for a nominated person to be present

- 4.66 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 or young person of their rights, including the right to nominate a person to consult and in the presence of whom they can make a statement.<sup>141</sup> The provisions apply to young people under the age of 17, but do not include those who have been married or are in a civil union.<sup>142</sup>
- 4.67 The police must explain the young person's rights 'in a manner and language appropriate to the age and level of understanding' of the young person.<sup>143</sup> This includes informing a young person of who he or she can nominate to consult and to be present in the interview.<sup>144</sup>
- 4.68 The police must allow a young person to consult their lawyer and the nominated person before taking a statement.<sup>145</sup> The prosecution cannot seek to use evidence of communications during these consultations in any proceedings against the child or young person for any offence.<sup>146</sup>

#### Definition of 'nominated person'<sup>147</sup>

- 4.69 In New Zealand, a nominated person can be:
- a parent or guardian of the child or young person<sup>148</sup>
  - an adult family group member<sup>149</sup>
  - 'any other adult selected by the child or young person'.<sup>150</sup>

If the young person does not nominate a person, the police may nominate another adult for this purpose, other than a police officer.<sup>151</sup>

- 4.70 The police may refuse to allow the young person to consult their nominated person<sup>152</sup> if they believe, on reasonable grounds, that the nominated person:
- would attempt, or is likely to attempt, to pervert the course of justice if permitted to consult with the child<sup>153</sup>
  - cannot with reasonable diligence be located<sup>154</sup>
  - will not be available within a period of time that is reasonable in the circumstances<sup>155</sup>

In this instance, the young person can nominate another person.<sup>156</sup>

- 4.71 If the young person's parent, guardian or other person who has care of them is not already the nominated person, they must be informed that the police propose to question the young person.<sup>157</sup>



4.72 In practice, the system for training, qualifications and appointment of nominated persons in New Zealand appears to be largely ad hoc.<sup>158</sup> The Commission understands that police call people from a list—usually justices of the peace<sup>159</sup>—to fulfil the role of a nominated person.<sup>160</sup> Additionally, online training for youth workers includes some information about acting as a nominated person.<sup>161</sup>

### Role of the nominated person

4.73 The common law characterises the role of the nominated person as

*to give the child the sense of security of having someone looking after his or her interests both prior to the decision to answer questions and during the questioning process and the making of any statement.*<sup>162</sup>

The role of a nominated person is not a passive one—it seen as providing ‘more than just a record of the interview’.<sup>163</sup>

4.74 Unlike in Victoria, the role of the nominated person in New Zealand is set out in the legislation. The nominated person must take reasonable steps to ensure the young person understands the rights explained to them by the police.<sup>164</sup> They must also support the young person, both before and during any questioning.<sup>165</sup> If the child or young person agrees to give any statement, the nominated person must support them while they give their statement.<sup>166</sup>

4.75 Judicial decisions have held that the *Children, Young Persons and Their Families Act 1989* (NZ) does not require the nominated person to give legal advice or explain the child’s rights.<sup>167</sup> However, it requires the nominated person to be present before and during the interview process to advise the child when making a decision about whether to seek legal advice.<sup>168</sup> It is also required that a parent, guardian or nominated person is present when police caution the young person.<sup>169</sup> Reviews of the New Zealand nominated person 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.<sup>170</sup>

4.76 In practice, police are required to give the nominated person a document that explains their role.<sup>171</sup> The nominated person signs this document, called a ‘youth justice checklist’ in the New Zealand Police Manual, at the time of interview.<sup>172</sup>

### Consequences if a nominated person is not present

4.77 A confession may be inadmissible when there has not been ‘reasonable compliance’ with the Act.<sup>173</sup> If an officer has not had a reasonable opportunity to comply with the Act, however, a statement made by the child ‘spontaneously’ may be admissible as evidence.<sup>174</sup>

## CANADA

### Legislative requirement for an appropriate adult to be present

4.78 The *Youth Criminal Justice Act 2002* (Can) requires an appropriate adult to be present before a child makes a statement to police.<sup>175</sup> The Act says that before a young person makes a statement to police or a person in authority, they must be told 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.<sup>176</sup>

138 *Police and Criminal Evidence Act 1984* (UK) c 60, s 67(11).

139 *Ibid* s 78.

140 *R v Weekes* (1993) 97 Cr App R 222, 228. The judgment emphasises that for evidence to be inadmissible in this way, not only must there have been a breach of a code, but the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it: at 227.

141 *Children, Young Persons and Their Families Act 1989* (NZ) s 215(1)(f).

142 *Ibid* s 2 (definition of ‘young person’).

143 *Ibid* s 218.

144 *Ibid*.

145 *Ibid* ss 221(2)(b)–(c), 227.

146 *Ibid* s 226.

147 Also referred to as the ‘independent nominated person’ or ‘INP’.

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

149 *Ibid* s 222(1)(b). This section refers to the whānau of the child or young person—the Maori understanding of extended family.

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

151 *Ibid* s 222(1)(d).

152 *Ibid* s 222(2).

153 *Ibid* s 222(2)(a).

154 *Ibid* s 222(2)(b).

155 *Ibid*.

156 *Ibid* s 222(3).

157 *Ibid* s 229.

158 Email from John Hancock, Principal Solicitor, Youthlaw New Zealand, 24 September 2010.

159 *Ibid*.

160 *Ibid*.

161 Youthlaw New Zealand, *Education and Advocacy Support for Youthworkers* <<http://www.easy.org.nz>>.

162 *S v Police* (2006) 25 FRNZ 817 [78].

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

164 *Children, Young Persons and Their Families Act 1989* (NZ) s 222(4)(a).

165 *Ibid* s 222(4)(b)(i).

166 *Ibid* s 222(4)(b)(ii).

167 See, eg, *R v MV* (High Court of New Zealand, Hamilton, 30 September 2008) [88].

168 *R v A* (High Court of New Zealand, Auckland, 2004).

169 *Children, Young Persons and Their Families Act 1989* (NZ) s 221(2)(c).

170 S Porteous, ‘Young People and Police Questioning: How Effective is the Nominated Person?’ (2000) 46 *Youth Law Review*.

171 Email from John Hancock, Principal Solicitor, Youthlaw New Zealand, 24 September 2010.

172 *Ibid*.

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

174 *Ibid* s 223.

175 *Youth Criminal Justice Act 2002* (Can) s 146.

176 *Ibid* s 146(2)(b)(iv).



## Current Law and Practice in Other Jurisdictions

4.79 The young person must be given a reasonable opportunity to consult with a lawyer and parent, adult relative or other appropriate adult, and to make any statement in their presence.<sup>177</sup>

4.80 The requirement to have a parent, adult relative or other appropriate adult present relates only to the admissibility of statements made to police by the young person. The legislation does not specify whether a parent, adult relative or appropriate adult needs to be present if the young person is being questioned by police and does not intend to make a statement.

### Definition of ‘appropriate adult’

4.81 Before a statement is made, the *Youth Criminal Justice Act 2002* (Can) requires the young person to be given the opportunity to consult a parent, or if no parent is available, another adult relative.<sup>178</sup> In the absence of a parent or other adult relative, the child may choose ‘any other appropriate adult’.<sup>179</sup> The parent, adult relative or appropriate adult chosen by the young person must not be a co-accused or under investigation for the same offence.<sup>180</sup> Statements made to an appropriate adult may be admissible in evidence.<sup>181</sup>

### Role of the appropriate adult

4.82 The *Youth Criminal Justice Act 2002* (Can) does not set out the role of the parent, guardian or appropriate adult.

### Consequences if an appropriate adult is not present

4.83 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.<sup>182</sup> The statutory requirements do not apply where a young person makes a ‘spontaneous’ voluntary statement in circumstances where the police have not had an opportunity to comply with these rules.<sup>183</sup> The young person may waive their right to consult with a lawyer and a parent or other adult.<sup>184</sup>

177 Ibid s 146(2)(c)–(d).

178 Ibid s 146(2)(c)(ii).

179 Ibid s 146(2)(b)(iii).

180 Ibid s 146(2)(c)(ii).

181 *R v DDT* [2008] ABQB 387.

182 *Youth Criminal Justice Act 2002* (Can) s 146(2)(b)(iii)–(iv).

183 Ibid s 146(3).

184 Ibid s 146(4)–(5).

## Chapter 5

# Legislative Reform

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### INTRODUCTION

- 5.1 As discussed in Chapter 2, the *Crimes Act 1958* (Vic) (Crimes Act) was amended in 1988<sup>1</sup> in order to overcome the ‘inherent disadvantage’<sup>2</sup> young people experience when in police custody. Section 464E of the Crimes Act<sup>3</sup> directs police officers to only question<sup>4</sup> a young person under 18 years of age who is in custody if the person’s parent or guardian, or an independent person, is present.
- 5.2 After more than 20 years operation, it is clear that this legislative provision is deficient, primarily because it fails to outline the identity and role of the independent person whose presence is required when a parent or guardian is unavailable. In addition, the Crimes Act does not stipulate the consequences of failing to comply with section 464E.<sup>5</sup>
- 5.3 This chapter contains recommendations for legislative reform. In formulating these recommendations, the Commission has:
  - evaluated the operations of the existing law
  - examined the views expressed in consultations and submissions
  - assessed the relevant law in other jurisdictions
  - considered those parts of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) that have a direct bearing upon the rights of young people in police custody.

### THE CONTENT OF NEW LEGISLATION

- 5.4 The Commission believes that legislation should deal with the following matters:
  - the circumstances in which it is necessary for a supportive adult<sup>6</sup> to be present when a young person is questioned by the police
  - the identity of those people who may be a support person<sup>7</sup>
  - the means of securing the presence of a support person
  - the consequences of failing to provide a supportive adult
  - the role of a supportive adult
  - the consequences of a supportive adult not performing their role.
- 5.5 Proper administrative systems are also needed to ensure that young people receive assistance from an appropriately trained and independent support person when police interview them in the absence of a parent or guardian. We consider this matter in Chapter 6.

### CONSULTATIONS AND SUBMISSIONS

- 5.6 Consultations and submissions revealed strong support for clarifying the law and for establishing a statewide scheme to ensure that an appropriate pool of trained people is available when a young person in custody is questioned by the police in the absence of a parent or guardian. While there is broad support for reform that would produce greater clarity, opinions differ about the details of any new laws.
- 5.7 The Office of Public Prosecutions Victoria said:

*The role and responsibilities should be set out in legislation. The applicable criteria should also set out who is eligible to act as an Independent Person ... Legislation should also provide guidance as to what an independent person should not do—for example, offer legal advice.<sup>8</sup>*

5.8 Victoria Police said:

*Victoria Police supports the establishment of a clear role for Independent Persons either in legislation or guidelines. Such an explanation should not be overly complicated, aim to clarify what is expected of the person performing the role and also include what the Independent Person is limited from doing.<sup>9</sup>*

5.9 The Victorian Aboriginal Legal Service (VALS) stated:

*Clear definitions of the role and extent of involvement in the interview process would be highly beneficial and could eliminate the Independent Person's hesitation and reluctance to perform certain acts in the interest of the young person in and around police interviews.<sup>10</sup>*

5.10 The Centre for Multicultural Youth (CMY) and Youth Affairs Council of Victoria (YACVic) stated in their submission:

*CMY and YACVic believe that the rights of, duties afforded to and role of the Independent Person in the justice process should be defined by statute and that this role should be defined as an interventionist one.<sup>11</sup>*

5.11 The Federation of Community Legal Centres (FCLC) stated:

*The Federation strongly supports the role of a trained support person and of a parent being set out in legislation. The current situation results in police largely determining how the role is performed ...*

*Legislation should clarify that this role is interventionist and more than that of an observer but distinct from that of a lawyer providing legal advice to a young person. Legislation should also provide clear direction about the consequences when another adult is not present during a police interview or does not fulfil their role appropriately.<sup>12</sup>*

5.12 The Office of the Public Advocate (OPA) observed:

*Despite its relatively widespread use, the term 'Independent Person' is not legislatively defined, nor is the role of an Independent Person particularly clear. It is not apparent what exactly is required for someone to qualify to be an Independent Person. In relation to police questioning, it is also unclear whether the Independent Person should play the role of advocate, or merely be a witness ... OPA submits that the role of Independent Persons should be clearly defined in legislation.<sup>13</sup>*

5.13 As the discussion in Chapter 2 reveals, there are numerous uncertainties surrounding the operation of section 464E of the Crimes Act<sup>14</sup> that have been compounded by the introduction of new evidence laws.<sup>15</sup> Failure to comply with the obligations in section 464E<sup>16</sup> may render evidence inadmissible. While previous rulings concerning the admissibility of confessions made by young persons have provided useful guidance about the operation of section 464E,<sup>17</sup> the continuing effect of those decisions is uncertain because of the changes to evidence laws. For these reasons, the Commission believes that it is time to repeal section 464E<sup>18</sup> of the Crimes Act and to enact new legislation that deals with the many deficiencies in the current law.

- 1 The amending legislation was the *Crimes (Custody and Investigation) Act 1988* (Vic).
- 2 This was the description used by Justice Bell in *Director of Public Prosecutions v Toomalatai* (2006) 13 VR 319, 327 [44] ('Toomalatai').
- 3 *Crimes Act 1958* (Vic) s 464E.
- 4 Section 464E of the *Crimes Act 1958* (Vic) directs that a parent, guardian or independent person must be present when police 'question' a young person in custody who is under the age of 18 years and 'carry out an investigation pursuant to section 464A'. For ease of discussion, the text in the chapter refers only to police 'questioning' when section 464E is being considered.
- 5 *Crimes Act 1958* (Vic) s 464E.
- 6 For ease of discussion, this generic term is used throughout this chapter to include a parent, guardian (or carer) or independent person (or support person).
- 7 For reasons discussed at [5.34] the Commission recommends that the term 'independent person' be replaced by 'support person'.
- 8 Submission 12 (OPP).
- 9 Submission 19 (Victoria Police Centre).
- 10 Submission 17 (VALS).
- 11 Submission 20 (CMY and YACVic).
- 12 Submission 21 (FCLC).
- 13 Submission 15 (OPA).
- 14 *Crimes Act 1958* (Vic) s 464E.
- 15 The *Evidence Act 2008* (Vic) commenced operation on 1 January 2010. The relevant changes to the law are discussed in Chapter 2.
- 16 *Crimes Act 1958* (Vic) s 464E.
- 17 *Ibid.*
- 18 *Ibid.*

## RECOMMENDATION

1. Section 464E of the *Crimes Act 1958* (Vic) should be repealed and replaced by new provisions that deal with the matters set out in Recommendations 2–15.

# 5

## Chapter 5

## Legislative Reform

### THE PRESENCE OF A SUPPORT PERSON

#### CURRENT LAW

- 5.14 Although the law concerning the circumstances in which the police must arrange for the presence of an independent person when a young person is in custody is reasonably clear, some additional details and extensions to the existing requirements are desirable. At present, an independent person must be present when:
- a person under the age of 18 years is ‘in custody’<sup>19</sup>
  - the police propose to ‘question’ the young person or seek his or her participation in ‘an investigation’<sup>20</sup>
  - a parent or guardian of the young person is ‘not available’.<sup>21</sup>
- 5.15 There are two statutory exceptions to the requirement that a supportive adult be present during police questioning or investigation of a young person. The police are not required to arrange for the presence of a supportive adult when they believe on reasonable grounds that:
- communicating with a parent or guardian might ‘result in the escape of an accomplice or the fabrication or destruction of evidence’,<sup>22</sup> or
  - ‘the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed’.<sup>23</sup>

The legislation’s wording suggests that the police are not required to arrange for the presence of an independent person as a substitute for a parent or guardian in either of these circumstances.<sup>24</sup>

- 5.16 As discussed in Chapter 2, there are some differences between the provisions of section 464E of the Crimes Act<sup>25</sup> and the Victoria Police Manual concerning the circumstances in which police must arrange for the presence of an independent person. This divergence between the requirements of the Crimes Act and the directions given to police officers in the Victoria Police Manual is undesirable and should be remedied by clear legislation.

#### CONSULTATIONS AND SUBMISSIONS

##### Changing the title ‘independent person’

- 5.17 The term ‘independent person’ was discussed during consultation and considered in numerous submissions. While there were mixed views regarding this title,<sup>26</sup> some consultation participants and submissions argued that the term creates confusion for some police officers<sup>27</sup> and alienates young people.<sup>28</sup> The similarity between the terms ‘independent person’ and ‘independent third person’—the person provided by the Office of the Public Advocate to assist people with cognitive impairment as a result of disability during police interviews—is a recipe for confusion. The Commission heard that confusion is also caused by use of the word ‘independent’. People question whether it means independent of the police, independent of the investigation, independent of the young person or separate from the young person’s family.<sup>29</sup>
- 5.18 There was widespread support for devising a new title in order to clarify this person’s role.<sup>30</sup> The title ‘support person’ was endorsed by many,<sup>31</sup> while ‘interview friend’ was rejected as being patronising<sup>32</sup> or inaccurately limiting the role to be performed during interview.<sup>33</sup> It was suggested that ‘advocate’ should be avoided, as it may cause confusion with legal advocacy.<sup>34</sup>

## Obligation on police to locate young person's parent or guardian

5.19 In the consultation with honorary justices, it was suggested that if a parent is unable to attend the place of interview within 'a reasonable time', a support person should be called.<sup>35</sup>

## When a young person's parent or guardian may be an inappropriate support person

5.20 In submissions and consultations, it was suggested that a young person's parent or guardian may not always be the most appropriate person to describe rights and explain the interview process to the young person.<sup>36</sup> Many people suggested that parents may be distressed or emotional about the situation, while a support person would not.<sup>37</sup> Youthlaw noted in consultation that 'it is difficult to be an independent parent'.<sup>38</sup>

5.21 It was also suggested that because the young person's parent or guardian may know little about the process and lack confidence, they may be intimidated in the police interview.<sup>39</sup> The Commission also heard that in some instances, the young person may object to their parent or guardian being present<sup>40</sup>—there were mixed views from police about what they should do in this instance.<sup>41</sup> It was also noted that parents may have an aversion to police,<sup>42</sup> may be a co-offender<sup>43</sup> or may be estranged from the young person.<sup>44</sup>

5.22 In its submission, Victoria Police stated that it may be undesirable for a parent or guardian to be in a young person's interview if he or she:

- is implicated in the offence
- is overly coercive
- is verbally abusive to the young person
- has language or cognitive barriers that would inhibit their support of the young person.<sup>45</sup>

5.23 However, the important role played by parents or family members in providing emotional and psychological support was also emphasised.<sup>46</sup> While some support persons may be able to build a rapport with the young person prior to the interview, it was argued that a parent or family member will often be able to provide greater emotional support to the young person.<sup>47</sup>

19 The term 'in custody' is relevantly defined in section 464(1) of the *Crimes Act 1958* (Vic). See discussion in Chapter 2.

20 The term 'question' is not defined in the *Crimes Act 1958* (Vic). Section 464E(1) of the *Crimes Act 1958* (Vic) also refers to 'an investigation under section 464A'. The meaning of an investigation under section 464A is discussed in Chapter 2.

21 The term 'not available' is not defined in the *Crimes Act 1958* (Vic).

22 *Crimes Act 1958* (Vic) s 464E(2)(a).

23 *Ibid* s 464E(2)(b).

24 Section 464E(2) of the *Crimes Act 1958* (Vic) stipulates that 'sub-section (1) does not apply' if the investigating official reasonably believes that either of the exceptions applies. Consequently, this exception to the obligation imposed upon police officers by section 464E(1) appears to remove the requirement to arrange for the presence of an independent person as well as a parent or guardian.

25 *Crimes Act 1958* (Vic) s 464E.

26 See, eg, consultations 1 (YRIPP Metro South East), 6 (Berry Street Hume), 10 (YRIPP Metro East), 11 (Victoria Police Metro East).

27 Consultations 1 (YRIPP Metro South East), 2 (YEH), 7 (YRIPP Shepparton), 16 (Victoria Police Gippsland), 19 (YRIPP Metro West), 21 (Honorary Justices), 22 (YRIPP Metro North), 26 (YRIPP Inner City and Bayside); submissions 7 (John Fox), 10 (Fran Frost), 17 (VALS), 18 (Maria Van Der Burgt), 21 (FCLC).

28 Consultation 2 (YEH).

29 See, eg, consultations 1 (YRIPP Metro South East), 16 (Victoria Police Gippsland), 23 (Whitelion), 24 (YRIPP, YACVic and CMY), 26 (YRIPP Inner City and Bayside); submissions 19 (Victoria Police Centre), 20 (CMY and YACVic).

30 See, eg, submissions 20 (CMY and YACVic), 21 (FCLC).

31 Consultations 19 (YRIPP Metro West), 29 (Youthlaw); submissions 20 (CMY and YACVic), 21 (FCLC).

32 Consultations 26 (YRIPP Inner City and Bayside), 29 (Youthlaw).

33 Submission 21 (FCLC).

34 Consultation 16 (Victoria Police Gippsland).

35 Consultation 21 (Honorary Justices).

36 See, eg, consultations 1 (YRIPP Metro South East), 2 (YEH), 4 (Victoria Police Hume 2), 10 (YRIPP Metro East), 11 (Victoria Police Metro East), 16 (Victoria Police Gippsland), 19 (YRIPP Metro West), 20 (CAHABPS and Youth Justice Unit), 22 (YRIPP Metro North), 24 (YRIPP, YACVic and CMY), 25 (VLA), 27 (Sivvy Orr); submissions 20 (CMY and YACVic), 21 (FCLC).

37 Consultations 1 (YRIPP Metro South East), 4 (Victoria Police Hume 2), 6 (Berry Street Hume), 10 (YRIPP Metro East), 11 (Victoria Police Metro East), 19 (YRIPP Metro West), 22 (YRIPP Metro North), 25 (VLA), 26 (YRIPP Inner City and Bayside); submission 10 (Fran Frost).

38 Consultation 29 (Youthlaw).

39 Consultations 16 (Victoria Police Gippsland), 17 (Ricky Morris—RAJAC Gippsland), 24 (YRIPP, YACVic and CMY), 27 (Sivvy Orr); submissions 20 (CMY and YACVic), 21 (FCLC).

40 Consultations 2 (YEH), 3 (Victoria Police Hume 1), 9 (Victoria Police Geelong), 10 (YRIPP Metro East), 11 (Victoria Police Metro East), 22 (YRIPP Metro North), 23 (Whitelion) 31 (Victoria Police Centre).

41 Consultations 9 (Victoria Police Geelong), 11 (Victoria Police Metro East), 31 (Victoria Police Centre).

42 Consultation 9 (Victoria Police Geelong).

43 Consultation 4 (Victoria Police Hume 2).

44 *Ibid*.

45 Submission 19 (Victoria Police Centre).

46 Consultations 2 (YEH), 7 (YRIPP Shepparton), 23 (Whitelion); submissions 20 (CMY and YACVic), 21 (FCLC).

47 Submission 21 (FCLC).



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## Legislative Reform

### Presence of both a parent or guardian and another support person

- 5.24 A number of consultation participants and submissions considered whether it is appropriate in some circumstances to have both a parent and an independent person present.<sup>48</sup> While some respondents thought this might be problematic,<sup>49</sup> others supported the idea.<sup>50</sup>
- 5.25 Some people suggested that it might be difficult to always have an independent person present, as many more volunteer independent persons would be needed.<sup>51</sup> CMY and YACVic recommended that both a parent or guardian and an independent person should be present in all police interviews.<sup>52</sup> However, they stated that if resource constraints rendered this impractical, both parent or guardian and independent person should at least be present where the parent or guardian has ‘additional vulnerabilities’, such as language or cultural issues.<sup>53</sup> Victoria Police suggested that the option of having an independent person present could be offered to parents or guardians if they did not feel confident with the process.<sup>54</sup>
- 5.26 Some police officers were opposed to including too many parties in the interview process,<sup>55</sup> while others thought that having both a parent or guardian of the young person and an independent person present would be acceptable if it was at the discretion of the police.<sup>56</sup>
- 5.27 VALS suggested in its submission that having both a parent or guardian and an independent person present for the interview could be useful if:
- a ‘family issue’ hinders the interview or distresses the young person
  - the parent or guardian experiences language difficulties
  - the parent or guardian does not understand the young person’s rights
  - the parent or guardian is disruptive of the interview process.<sup>57</sup>

### Using the term ‘carer’ rather than ‘parent or guardian’

- 5.28 It was noted in consultation that it is often difficult to ascertain the identity of a young person’s guardian, as this person may not be the provider of day-to-day care.<sup>58</sup>

### COMMISSION’S VIEWS

- 5.29 The Commission believes that while there is no need to alter the general rule in section 464E(1) of the Crimes Act<sup>59</sup> concerning the circumstances in which a young person in custody should have a supportive adult present during police questioning, legislation should clarify the circumstances in which a person other than a parental figure<sup>60</sup> can fulfil this role. The Commission also believes that the description of the parental figure whose presence is required should be changed in order to better reflect both the realities of modern life and the reasons for this person’s attendance.
- 5.30 The police should be required to arrange for the presence of a support person<sup>61</sup> at the parental figure’s request or when the police have reasonable grounds for believing that the parental figure might be unable to understand the process. It is also desirable to change the description of the support person whose presence is required instead of, or in addition to, a parental figure. Finally, the exceptions should be refined in order to ensure that a support person is present even when there are good reasons for proceeding in the absence of a parental figure.



- 5.31 The Commission believes that the police should be required to seek the presence of a parent or *carer*, rather than a parent or *guardian*, when proposing to question<sup>62</sup> a young person in custody. A guardian is a person with the power to make legal decisions on behalf of a child.<sup>63</sup> Not only can it be challenging for police to determine who has the legal status of ‘guardian’ if a parent is unavailable, but the guardian may not necessarily be close to the young person, or well placed to provide the comfort and support required by a young person in custody when questioned about their suspected involvement in criminal behaviour.
- 5.32 Support of this nature is more likely to be provided by a person who is involved in the day-to-day care of a child. The term *carer* should be defined in the legislation to mean a person who has day-to-day responsibility for caring for a young person.<sup>64</sup> In the case of an Indigenous young person, carer should include an elder of that young person’s community or a family member with supervisory responsibilities.
- 5.33 This change would broaden the pool of people eligible to attend police questioning and make it easier for the police to arrange the presence of an appropriate parental figure, as it would no longer be necessary to undertake the challenging task of determining who may be a young person’s ‘guardian’ if a parent is not available.
- 5.34 In accordance with views expressed in many consultations and submissions,<sup>65</sup> the Commission considers that it is preferable to use the term ‘support person’ rather than ‘independent person’ to describe the supportive adult whose presence is required if a parental figure is unavailable. ‘Support person’ more accurately describes the role of the person who acts as a substitute for a parent or carer during police questioning. It is no longer appropriate, if ever it was, to characterise the role of this person as that of an independent witness whose primary task is to ensure that there is no police impropriety during questioning and who is available to give evidence to that effect if the admissibility of any evidence of admissions is challenged.<sup>66</sup> The primary role of this person should be to provide a young person with the kind of support and assistance he or she would receive from a reasonably well-informed parent or carer if that person were available.<sup>67</sup>
- 5.35 At present, the law does not stipulate when the police should stop searching for a parental figure and arrange for the attendance of a support person, and neither does it expressly allow for the attendance of both a parental figure and a support person during police questioning. The police should be given clear legislative guidance about the extent of their obligation to arrange for the attendance of a suitable parental figure and the circumstances in which it is acceptable for them to arrange for the presence of a support person.
- 5.36 It is in keeping with modern legislative practices to require the police to make *reasonable* efforts to arrange for the presence of an appropriate parental figure. This approach is consistent with the Victorian Supreme Court decision in *R v JPD*, where Justice Vincent held that police officers had acted reasonably and had complied with section 464E of the Crimes Act<sup>68</sup> by contacting ‘a clearly independent person’ when it appeared that the presence of a parent could not be secured, ‘at least for some time’.<sup>69</sup> While the courts should continue to have a role in determining whether reasonable efforts have been made in the circumstances of each case, the legislation should clearly stipulate when steps should be taken to secure the attendance of a support person as a substitute for a parental figure.

- 48 Consultations 1 (YRIPP Metro South East), 2 (YEH), 3 (Victoria Police Hume 1), 4 (Victoria Police Hume 2), 7 (YRIPP Shepparton), 8 (Judge Grant and Magistrate Power—Children’s Court of Victoria), 10 (Fran Frost), 11 (Victoria Police Metro East), 13 (Jim Barritt—YRIPP), 14 (Maria Van Der Burgt and John Fox), 16 (Victoria Police Gippsland), 17 (Ricky Morris—RAJAC Gippsland), 20 (CAHABPS and Youth Justice Unit), 21 (Honorary Justices), 22 (YRIPP Metro North), 24 (YRIPP, YACVic and CMY), 26 (YRIPP Inner City and Bayside), 29 (Youthlaw), 32 (Victoria Police Mallee), 33 (Victoria Police Dandenong); submissions 17 (VALS), 19 (Victoria Police Centre), 20 (CMY and YACVic), 21 (FCLC).
- 49 Consultation 4 (Victoria Police Hume 2).
- 50 Consultations 1 (YRIPP Metro South East), 10 (YRIPP Metro East), 20 (CAHABPS and Youth Justice Unit), 24 (YRIPP, YACVic and CMY), 26 (YRIPP Inner City and Bayside), 29 (Youthlaw), 32 (Victoria Police Mallee), 33 (Victoria Police Dandenong); submissions 10 (Fran Frost), 20 (CMY and YACVic), 21 (FCLC).
- 51 Consultations 11 (Victoria Police Metro East), 13 (Jim Barritt—YRIPP), 16 (Victoria Police Gippsland), 26 (YRIPP Inner City and Bayside); submission 20 (CMY and YACVic).
- 52 Submission 20 (CMY and YACVic).
- 53 Ibid.
- 54 Consultations 4 (Victoria Police Hume 2), 31 (Victoria Police Centre).
- 55 Ibid.
- 56 Ibid.
- 57 Submission 17 (VALS).
- 58 Consultation 3 (Victoria Police Hume 1).
- 59 *Crimes Act 1958* (Vic) s 464E(1).
- 60 This term is used to include a parent and guardian or carer.
- 61 The Commission believes that the term ‘independent person’ should be replaced by ‘support person’ because it better describes the role this person should play.
- 62 These requirements should also extend to those circumstances in which the police propose to conduct an investigation. For ease of communication, references in the text are limited to questioning only.
- 63 ‘Guardian’ was originally a common law term that is no longer used in the *Family Law Act 1975* (Cth) to describe a relationship between a child and an adult. The term is used in Victorian child protection legislation to refer to a person who has ‘responsibility for the long-term welfare of the child’ but does not have ‘the right to have the daily care and control of the child’: *Children, Youth and Families Act 2005* (Vic) s 4.
- 64 See *Children, Youth and Families Act 2005* (Vic) s 3 (definition of ‘care’).
- 65 Discussed above at [5.17]–[5.18].
- 66 The relevant section of the Victoria Police Manual provides that one of the functions of the independent person is to ‘be able to present an independent account of the interview at any court proceedings’: Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, ‘Interviewing Specific Categories of Person’, from CD-ROM current at 30 August 2010, 2–3.
- 67 The role of the ‘support person’ is discussed in more detail from [5.79].
- 68 *Crimes Act 1958* (Vic) s 464E.
- 69 *R v JPD* [2001] VSC 202 [12].

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- 5.37 If the police are unable to secure the presence of a parental figure after making reasonable attempts to do so, including when the parental figure is unwilling or unable to attend within a reasonable time, the legislation should provide that the police are required to arrange for the presence of a support person when a young person in custody is questioned about his or her involvement in criminal behaviour.
- 5.38 In some circumstances, it is appropriate that a young person in custody have the assistance of both a parental figure and a support person.<sup>70</sup> Even when a parental figure is able to attend a police station within a reasonable period, many parents will be unaware of the role expected of them when the police question their child, and some will be unable to follow what is said because English is not their first language.<sup>71</sup> Other parental figures may experience similar difficulties for different reasons, such as cognitive impairment. As noted above, Victoria Police acknowledged that there are 'some circumstances where it is desirable to have a parent/guardian *and* an independent person present in the interview'.<sup>72</sup>
- 5.39 In order that young people receive meaningful support when questioned by the police in custody, it should be possible for a parent or carer to request that a support person be present in addition to, and not only as a substitute for, themselves. This outcome can be achieved by including a provision within the legislation that requires the police to inform a parent or carer that they can request the presence of a support person during the questioning of their child and that the police will arrange for the attendance of this person when requested.
- 5.40 The Commission recommends an additional reform in this area to deal with situations where the parent or carer chooses not to request the presence of a support person but the young person is likely to be disadvantaged by their failure to do so. When the police have reasonable grounds for believing that a parent or carer who chooses to be present during questioning of their child will find it difficult to understand what is occurring, the police should be required to arrange for the presence of a support person in addition to the parent or carer, even when the parent or carer does not make this request. Examples include cases in which the parent or carer has insufficient English and a professional interpreter is not available, and those where the parent or carer is cognitively impaired.
- 5.41 Victoria Police requested that police be given a discretionary power 'to have a parent/guardian *and/or* an independent person present in the interview'.<sup>73</sup> While the Commission clearly supports this outcome in some cases, it is appropriate to require the police to arrange for the presence of an additional support person when the police have reasonable grounds for believing that the parent or carer of a young person in custody might have trouble understanding what occurs during questioning.
- 5.42 The existing exceptions to the requirement in section 464E of the Crimes Act<sup>74</sup> that the police must arrange for the presence of a parental figure when questioning a young person in custody are reasonable because there will always be circumstances in which alerting that parental figure may lead to the escape of an accomplice, tampering with evidence, or unacceptable delay. Other circumstances in which it would be reasonable for police questioning to proceed in the absence of a parental figure include when that person is an alleged co-offender or victim, or when the parent or carer is clearly affected by alcohol or drugs. This matter is best dealt with by giving the police a *guided* discretionary power to determine when it would be 'unsuitable' to invite a parent or carer to attend questioning of a young person. Direction about the circumstances in which this discretionary power should be exercised could be provided in guidelines developed by the Child Safety Commissioner and the Chief Commissioner of Police.

5.43 It is unnecessary and undesirable, however, that any of these exceptions to the general requirement that a parental figure should be invited to be present when the police question a young person in custody should also apply to the presence of a support person. Because young people are at an inherent disadvantage when police question them, they should receive appropriate adult support in all but the most exceptional circumstances.<sup>75</sup> If there is a proper statewide scheme of appropriately trained support persons, arranging for the presence of a support person should neither lead to the escape of an accomplice nor tampering with evidence. Similarly, a properly conducted statewide scheme should ensure that there are no cases in which the delay in waiting for the attendance of a support person is unacceptable, or in which the support person might be unsuitable because of some possible connection with the offending behaviour in question.

### A young person's views

- 5.44 One challenging issue that arose during consultation was the young person's right to request the exclusion of a parent, guardian or carer. Consultation participants also considered whether another member of the young person's family could attend instead of a parent or guardian<sup>76</sup> and whether a young person could or should be entitled to nominate another person to attend instead of their parent or guardian.<sup>77</sup>
- 5.45 In New South Wales, the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) sets an age threshold at which a young person may nominate who will be permitted to attend his or her interview with the police in the role of support person. 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.<sup>78</sup> While a young person cannot waive their right to a support person, they can effectively exclude a parent or carer by nominating another person.<sup>79</sup>
- 5.46 In New Zealand, the scheme for appointing a 'nominated person' gives a degree of autonomy to the child in the legal process. This is in accordance with article 12 of the *United Nations Convention on the Rights of the Child* (CROC), which protects the right of children and young people to express their opinions and participate in decisions affecting them.<sup>80</sup> 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.<sup>81</sup> It was held in one case that the best way to ensure the young person has confidence in the nominated person is for him or her to be free to make an informed choice.<sup>82</sup>
- 5.47 In New Zealand, a nominated person can be a parent, guardian, adult family group member,<sup>83</sup> or 'any other adult selected by the child or young person'.<sup>84</sup> If the child does not nominate a person, the police may nominate an adult other than a police officer for this purpose.<sup>85</sup> 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.<sup>86</sup>
- 5.48 In its submission, FCLC cited a recommendation from the 1997 joint report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*.<sup>87</sup> The report recommended that a child suspect should have the right to choose his or her 'interview friend', providing that the interview friend is not also a suspect.<sup>88</sup> FCLC expressed concern about this, stating 'The young person may feel pressured to choose who the police want or who their parents want rather than the person who will act in their best interests'.<sup>89</sup> FCLC notes that certain safeguards would need to be in place to avoid coercion of this kind.<sup>90</sup> Introducing a system under which young people could choose their own support person would also have operational implications for Victoria Police that would need to be considered in detail.

70 Consultations and submissions on this point are discussed above at [5.24]–[5.27].

71 In Australia's most recent census, 162 260 people in Victoria aged five years and older stated that they did not speak English well or at all. This represented approximately 3.5 per cent of the Victorian population aged five and older at the time: Australian Bureau of Statistics, *2006 Census of Population and Housing: 2006 Census Tables*, 'Proficiency in Spoken English/Language by Age by Sex' (2006).

72 Submission 19 (Victoria Police Centre).

73 Ibid.

74 *Crimes Act 1958* (Vic) s 464E.

75 Recommendation 9, discussed below, caters for this problem by allowing a court to admit evidence of an admission made in the absence of a supportive adult in exceptional circumstances.

76 Consultations 3 (Victoria Police Hume 1), 26 (YRIPP Inner City and Bayside), 32 (Victoria Police Mallee).

77 Consultations 23 (Whitelion), 26 (YRIPP Inner City and Bayside).

78 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 26(a)(iv).

79 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 29.

80 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

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

82 Ibid [79].

83 This includes different cultural understandings of family, such as those particular to Maori culture.

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

85 Ibid.

86 Ibid s 229.

87 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

88 Ibid 513; Recommendation 212.

89 Submission 21 (FCLC).

90 Ibid.

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5.49 The Commission believes that the question of whether a young person should be permitted to choose the supportive adult who is present during police questioning, and thereby effectively exclude a parent or carer from the process, is an important, but complex, legal issue. In light of divergent views, the Commission considers that this matter should be reviewed at a later date. An appropriate time to undertake this review might be after the Attorney-General has reported to Parliament about whether the human rights in CROC should be included in the Charter.<sup>91</sup>

### RECOMMENDATIONS

2. The legislation should provide that an investigating official may only question or carry out an investigation concerning a person under the age of 18 years who is in custody if a parent, carer or support person is present during the questioning or investigation.
3. The legislation should provide that an investigating official is not obliged to arrange for the presence of a parent or carer during the questioning or investigation of a young person in custody if:
  - a. notification to a parent or carer may result in escape of an accomplice or fabrication 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.

However, the investigating official must arrange for the presence of a support person in either circumstance.

4. The legislation should provide that an investigating official who proposes to question or carry out an investigation concerning a young person in custody must:
  - a. make reasonable attempts to contact a parent or carer and invite that person to be present during the questioning or investigation, unless it is unsuitable for that particular parent or carer to be present
  - b. if the parent or carer is able to attend, inform them that they may request a support person to be present, as well as themselves, during the questioning or investigation
  - c. arrange for a support person to be present during the questioning or investigation if:
    - i) the parent or carer does not wish to attend
    - ii) the parent or carer is unable to attend the place identified by the investigating official within a reasonable period of time
    - iii) the parent or carer requests that a support person be present, or
    - iv) it is unsuitable for a particular parent or carer to be present.
5. The legislation should provide that when an investigating official who proposes to question or carry out an investigation concerning a young person in custody has reasonable grounds for believing that a parent or carer who proposes to attend the questioning or investigation is likely to experience difficulties in understanding any statements made because of that person's lack of proficiency with English, or for any other reason, the investigating official must arrange for a support person to be present during the questioning or investigation of the young person.

## THE IDENTITY OF A SUPPORT PERSON

### CURRENT LAW AND PRACTICE

- 5.50 Section 464E of the Crimes Act<sup>92</sup> does not say anything about the identity of the person who should be present during police questioning of a young person in custody when a parent or guardian is unavailable, other than it should be an 'independent person'. There is nothing in case law or in the legislative history that assists when seeking to describe the identity or attributes of this independent person.
- 5.51 In practice, the task of identifying and arranging for the presence of an independent person has fallen to the police officers at each station. As discussed in Chapter 3, informal arrangements persisted until 2003. Senior officers at each police station often compiled lists of justices of the peace, bail justices and other members of the community who were prepared to act as independent persons. These people received no comprehensive and on-going training for this role.
- 5.52 In 2003, the Youth Referral and Independent Person Program (YRIPP) was established. YRIPP has grown over the past seven years and now provides trained volunteers to act as independent persons to 108 police stations across Victoria, effectively dealing with about 80 per cent of demand.<sup>93</sup> While Victoria Police has actively supported the development of YRIPP, section 464E of the Crimes Act<sup>94</sup> does not legally oblige police officers to call upon the services of a YRIPP volunteer when the presence of an independent person is required. The arrangements between Victoria Police and YRIPP to provide trained volunteer independent persons at nominated police stations are purely administrative.

### CONSULTATIONS AND SUBMISSIONS

#### Exclusion from being a support person

- 5.53 The Commission heard some views about people who should not be support persons. The following people were identified as those who should not be able to be support persons:
- police officers<sup>95</sup>
  - former police officers,<sup>96</sup> although some consultation participants did not think this would be problematic<sup>97</sup>
  - co-offenders<sup>98</sup>
  - Department of Human Services employees<sup>99</sup> or, more broadly, government employees<sup>100</sup>
  - judicial officers and other officers of the court<sup>101</sup>
  - bail justices<sup>102</sup>
  - people with a criminal history<sup>103</sup>
  - people suffering from an impairment at the time of interview, such as being affected by alcohol<sup>104</sup>
  - people who have a 'conflict of interest',<sup>105</sup> such as case workers for at-risk young people who are the victim of the offence,<sup>106</sup> people connected to the police<sup>107</sup> or people involved in the investigation in some way (including victims and witnesses).<sup>108</sup>

- 91 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44 requires this report to be submitted before 1 October 2011.
- 92 *Crimes Act 1958* (Vic) s 464E.
- 93 The history and current operations of YRIPP are examined at some length in Chapter 3.
- 94 *Crimes Act 1958* (Vic) s 464E.
- 95 Consultations 2 (YEH), 5 (Anonymous), 6 (Berry Street Hume), 7 (YRIPP Shepparton), 9 (Knox Honorary Justices), 10 (YRIPP Metro South East), 14 (Maria Van Der Burgt and John Fox), 19 (YRIPP Metro West), 21 (Honorary Justices); submissions 7 (John Fox), 10 (Fran Frost), 16 (Anonymous), 18 (Maria Van Der Burgt), 20 (CMY and YACVic), 21 (FCLC), 24 (Anonymous).
- 96 Consultations 10 (YRIPP Metro South East), 14 (Maria Van Der Burgt and John Fox).
- 97 Consultation 7 (YRIPP Shepparton).
- 98 Consultation 28 (Victoria Police Flemington); submissions 7 (John Fox), 8 (Dandenong Group of Honorary Justices), 10 (Fran Frost).
- 99 Consultation 10 (YRIPP Metro South East); submissions 8 (Dandenong Group of Honorary Justices) 21 (FCLC).
- 100 Submission 19 (Victoria Police Centre).
- 101 Consultations 21 (Honorary Justices), 26 (YRIPP Inner City and Bayside).
- 102 Consultation 10 (YRIPP Metro South East), 14 (Maria Van Der Burgt and John Fox); submissions 20 (CMY and YACVic), 21 (FCLC).
- 103 Consultations 10 (YRIPP Metro South East), 11 (Victoria Police Metro East), 12 (Victoria Police Bairnsdale), 14 (Maria Van Der Burgt and John Fox), 21 (Honorary Justices), 28 (Victoria Police Flemington); submission 10 (Fran Frost).
- 104 Consultation 11 (Victoria Police Metro East).
- 105 Consultations 6 (Berry Street Hume), 7 (YRIPP Shepparton), 14 (Maria Van Der Burgt and John Fox), 17 (Ricky Morris—RAJAC Gippsland), 19 (YRIPP Metro West); submission 19 (Victoria Police Centre).
- 106 Consultation 16 (Victoria Police Gippsland).
- 107 Consultations 5 (Brad Boon—VALS), 19 (YRIPP Metro West).
- 108 Consultation 21 (Honorary Justices); submissions 7 (John Fox), 10 (Fran Frost).



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- 5.54 Some police suggested that the exclusions that apply to potential jurors should also apply to support persons.<sup>109</sup> It was noted that people can ‘wear a number of hats’—such as lawyer, bail justice, support person—but that they should not fulfil multiple functions at the same time.<sup>110</sup> In relation to people with a criminal history, some police noted that this could assist the support person to understand the process, providing that any conviction was minor and from a long time ago.<sup>111</sup> Some people suggested that a Working with Children Check should be mandatory.<sup>112</sup>

### The need for support persons to be trained

- 5.55 In consultation, Youthlaw focused on the positive attributes that support persons should possess, rather than the factors that should exclude people from becoming support persons.<sup>113</sup> There was widespread acceptance in consultations and submissions that support persons for police interviews of young people need to be trained.<sup>114</sup> Some YRIPP volunteers argued that without minimum training requirements, enshrining the support person’s role in legislation would be pointless and that they could not see ‘how anyone can perform the role without being trained’.<sup>115</sup>
- 5.56 The issue of training is discussed in detail in Chapter 6.

### COMMISSION’S VIEWS

- 5.57 It is no longer appropriate to rely upon the services of well-meaning but untrained members of the community selected by the police to perform the role of a support person for a young person in police custody. The circumstances of the recent Supreme Court decision in *Toomalatai*<sup>116</sup> clearly illustrate the problems that can arise when the support person is drawn from a group of this nature arranged by the police.
- 5.58 Justice Bell found that the independent person performed his role unsatisfactorily because he admonished the young person before the police interviewed him, encouraged the young person to answer the questions asked by the police, and failed to intervene during police questioning when it would have been reasonable to do so because the young person displayed confusion.<sup>117</sup> There was no suggestion that the police directed the independent person to act as he did, or chose him in the knowledge that he would act in a particular way. Even so, the case starkly illustrates the difficulties that can arise when police officers are given the incongruous function of choosing an independent person to be present when they question someone with a view to obtaining an admission of criminal behaviour, because fairness dictates that a vulnerable young person should be supported by someone ‘independent’ of the police.
- 5.59 Justice Bell was critical of many things done by the independent person, which he attributed to ‘no training for his role, which I think is lamentable’.<sup>118</sup> The assistance a support person is able to provide to a young person in custody is likely to be limited if the support person is untrained. The supposed independence of this role is illusory if the investigating police officers are free to choose that person.
- 5.60 The Commission believes legislation should provide that police must draw, without preference, from a pool of trained people when a support person is required.

### RECOMMENDATION

6. The legislation should provide that if it is necessary for an investigating official to arrange for a support person to be present during the questioning or investigation of a young person in custody, the investigating official should be required to draw, without preference, from a pool of trained support persons.

## THE MEANS OF SECURING THE PRESENCE OF A SUPPORT PERSON

### CURRENT LAW AND PRACTICE

- 5.61 Neither the Crimes Act nor the Victoria Police Manual refers to any means by which police officers can arrange for the presence of an independent person at a police station when they wish to question a young person and a parent or guardian is unavailable. As described in Chapter 3, informal arrangements existed throughout the state until 2003, when YRIPP was established with the support of Victoria Police. YRIPP now deals with four out of every five requests for an independent person.

### COMMISSION'S VIEWS

- 5.62 The Commission believes that the successful YRIPP pilot scheme should evolve to become a permanent means by which the police may secure the presence of a trained support person when required. The administrative arrangements required to produce this outcome are discussed in Chapter 6.
- 5.63 There is also a need to establish a formal, but practical, mechanism by which police can draw, without preference, from this pool of trained support persons when necessary. A mechanism of this nature is best established by the Chief Commissioner of Police working in conjunction with an independent statutory officer with responsibility for children. Together, they should devise protocols or procedures that must be followed when a trained support person is required. A joint arrangement of this nature should ensure that the mechanism is both workable for Victoria Police and has the integrity to command community support. The procedures themselves should not be included in legislation at this stage because a reasonable degree of flexibility will be required in the early years of operation to ensure that there are appropriate arrangements in place for the scheme to operate throughout the state at all times.
- 5.64 The Child Safety Commissioner is a statutory officer, created in 2005,<sup>119</sup> with a range of functions concerning the safety and wellbeing of children.<sup>120</sup> The Child Safety Commissioner has the necessary expertise, standing and independence to work with the Chief Commissioner of Police to devise procedures for securing the presence of a trained support person when required.
- 5.65 In order to promote community confidence in their integrity, the procedures should be available to members of the public as well as to police officers. The procedures should be included in the Victoria Police Manual as a directive by the Chief Commissioner to members of the police force. It would also be appropriate for both the Child Safety Commissioner and the Department of Justice to publish the procedures on their websites.

### RECOMMENDATIONS

7. The legislation should provide that if it is necessary for an investigating official to arrange for a support person to be present during the questioning or investigation of a young person in custody, he or she must do so by complying with the procedures devised jointly by the Child Safety Commissioner and the Chief Commissioner of Police, unless exceptional circumstances render it impossible to comply with those procedures.
8. Those procedures should be published by the Chief Commissioner of Police in the Victoria Police Manual and by the Department of Justice and the Child Safety Commissioner on their websites.

- 109 Consultations 9 (Victoria Police Geelong), 12 (Victoria Police Bairnsdale).
- 110 Consultations 6 (Berry Street Hume), 28 (Victoria Police Flemington).
- 111 Consultation 32 (Victoria Police Mallee).
- 112 Consultations 9 (Victoria Police Geelong), 10 (YRIPP Metro East), 28 (Victoria Police Flemington), 33 (Victoria Police Dandenong); submission 19 (Victoria Police Centre).
- 113 Consultation 29 (Youthlaw).
- 114 Consultations 1 (YRIPP Metro South East), 4 (Victoria Police Hume 2), 5 (Brad Boon—VALS), 6 (Berry Street Hume), 7 (YRIPP Shepparton), 8 (Judge Grant and Magistrate Power—Children's Court of Victoria), 9 (Victoria Police Geelong), 12 (Victoria Police Bairnsdale), 16 (Victoria Police Gippsland), 17 (Ricky Morris—RAJAC Gippsland), 20 (CAHABPS and Youth Justice Unit), 23 (Whitellion), 24 (YRIPP, YACVic and CMY), 26 (YRIPP Inner City and Bayside), 29 (Youthlaw), 32 (Victoria Police Mallee); submissions 10 (Fran Frost), 15 (OPA), 17 (VALS), 19 (Victoria Police Centre), 20 (CMY and YACVic), 21 (FCLC).
- 115 Consultation 26 (YRIPP Inner City and Bayside).
- 116 *Toomalatai* (2006) 13 VR 319. This case is discussed at length in Chapter 2.
- 117 *Toomalatai* (2006) 13 VR 319, 320–321 [10]–[13].
- 118 *Ibid* 321 [12].
- 119 *Child Wellbeing and Safety Act 2005* (Vic) s 18.
- 120 *Ibid* s 19.



### THE CONSEQUENCES OF QUESTIONING A YOUNG PERSON IN THE ABSENCE OF A SUPPORTIVE ADULT

#### CURRENT LAW

- 5.66 The Crimes Act does not stipulate the consequences of failing to comply with the requirement in section 464E<sup>121</sup> that a parent, guardian or independent person be present when police question a young person in custody. As discussed in Chapter 2, the most significant sanction for failing to comply with section 464E<sup>122</sup> is the *possibility* that evidence of an admission will be rendered inadmissible by operation of the law of evidence. Under the former common law regime, evidentiary rules concerning both the voluntariness of confessional evidence and the trial judge's discretionary power to exclude evidence obtained unfairly or improperly could be used to reject confessional evidence obtained in contravention of section 464E of the Crimes Act.<sup>123</sup>
- 5.67 The *Evidence Act 2008* (Vic) (Evidence Act) now governs the admissibility of evidence of an admission. A number of provisions are relevant. Section 84 of the Evidence Act says that an admission cannot be used as evidence unless the court is satisfied that it was not influenced by oppressive conduct.<sup>124</sup> Section 85(2) provides that an admission cannot be used as evidence unless the circumstances in which it was made were unlikely to affect the truth of the admission.<sup>125</sup> The court must take account of the age of the person who made the admission when considering this issue.<sup>126</sup> Section 90 gives a court a broad discretionary power to exclude admissions on the basis of unfairness to the accused,<sup>127</sup> while section 138 permits a court to exclude any evidence that has been improperly or illegally obtained.<sup>128</sup> All of these sections may be relevant whenever a young person is questioned by police in circumstances that contravene section 464E.<sup>129</sup> None of these provisions directly or indirectly provides that evidence of an admission must be rejected if a young person in custody is questioned in the absence of a parent, guardian or independent person.

#### CONSULTATIONS AND SUBMISSIONS

- 5.68 In the background paper, the Commission asked what should happen if the police question a young person in custody without a parent, guardian or independent person present.
- 5.69 We received a variety of responses to this question from a number of different people and organisations. Some argued that evidence of an admission made in the absence of a supportive adult should be inadmissible unless the circumstances were exceptional.<sup>130</sup> FCLC stated:

*The Federation strongly supports evidence obtained from such interviews as inadmissible unless it is exculpatory or there are exceptional circumstances. This would include where a parent insists their child makes full admissions.*<sup>131</sup>

- 5.70 This view reflects the current law in New South Wales, where section 13(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) requires that a 'person responsible' for a child be present at a police interview with that child. If this person is absent, evidence of any admission made by the child is inadmissible unless there are good reasons for their absence and the court exercises its discretionary power to admit the evidence. Others expressed different views. Some felt that there was no need for change.<sup>132</sup> Victoria Police stated:

*Victoria Police do not support the inclusion of a sanction that provides that an interview is inadmissible if an Independent Person is not used in accordance with the legislation ... Victoria Police submits that there are currently sufficient protections in Victorian legislation to not warrant the creation of any further legislative provisions in this regard.*<sup>133</sup>

## COMMISSION'S VIEWS

- 5.71 Currently, the consequences of the police questioning a young person in custody without a supportive adult present only become known if the admissibility of evidence of any admissions is later challenged in court. The outcome of any challenge to admissibility is determined by the operation of a range of complex evidentiary rules that implement public policies concerning the reliability of admissions, fairness to accused persons and the need to discipline police officers who behave unfairly.<sup>134</sup>
- 5.72 Further, in most instances, the decision whether to reject evidence of an admission made in the absence of a supportive adult is made following the application of a number of discretionary considerations. Consequently, despite the mandatory nature of the language used in section 464E of the Crimes Act,<sup>135</sup> police are not obliged to comply with the section by securing the presence of a supportive adult before questioning a young person in custody because there is no automatic sanction for breach. Section 464E<sup>136</sup> creates a 'procedural rule'<sup>137</sup> that ought to be followed rather than a substantive right that is capable of strict enforcement.
- 5.73 The Commission believes that the consequences of failing to comply with the statutory requirement concerning the presence of a supportive adult during police questioning should be both explicit and mandatory. The law should make it clear to all interested people—the police, the young person and his or her family—that the presence of a supportive adult during police questioning is mandatory unless there are exceptional circumstances that excuse non-compliance. This rule should be enforced by a legislative direction that evidence gathered in contravention of it cannot be used, other than in exceptional circumstances. Without this reform, it is impossible to say that young people in custody have a *right* to support when questioned by the police.
- 5.74 The course proposed by the Commission reflects the current position in New South Wales. As discussed in Chapter 4, the *Children (Criminal Proceedings) Act 1987* (NSW) contains a presumption in favour of excluding evidence of an admission made in the absence of a support person.<sup>138</sup> If such a person is absent, any admission made by the child is inadmissible unless there was a 'proper and sufficient reason'<sup>139</sup> for the support person's absence from the interview and the court considers that, in the circumstances of the case, the admission should be admitted into evidence.<sup>140</sup> The effect of the presumption, which operates in addition to the exclusionary rules in the *Evidence Act 1995* (NSW),<sup>141</sup> is that the onus of proving admissibility rests on the prosecution when there has been a failure to comply with the statutory requirement that a support person be present when a young person in custody is questioned by the police.<sup>142</sup>
- 5.75 The Commission believes there should be a clear statutory presumption in favour of the presence of a supportive adult, but acknowledges that there will be exceptional circumstances when departure from the rule should be excused if it would not be unfair to the young person to admit the evidence.

121 *Crimes Act 1958* (Vic) s 464E.

122 *Ibid.*

123 In *Toomalatai* (2006) 13 VR 319, Justice Bell clearly indicated that both the voluntariness rule and the trial judge's discretionary power could be engaged by failure to comply with section 464E of the *Crimes Act 1958* (Vic).

124 *Evidence Act 2008* (Vic) s 84.

125 *Ibid* s 85(2).

126 *Ibid* s 85(3)(a).

127 *Ibid* s 90.

128 *Ibid* s 138.

129 *Crimes Act 1958* (Vic) s 464E.

130 Consultations 24 (YRIPP, YACVic and CMY), 29 (Youthlaw).

131 Submission 21 (FCLC).

132 Consultation 8 (Judge Grant and Magistrate Power—Children's Court of Victoria).

133 Submission 19 (Victoria Police Centre).

134 C Robert Williams, 'An Analysis of Discretionary Rejection in Relation to Confessions' (2008) 32 *Melbourne University Law Review* 302.

135 *Crimes Act 1958* (Vic) s 464E.

136 *Ibid.*

137 This is the description used by Justice Bell in *Toomalatai* (2006) 13 VR 319, 331 [64].

138 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a).

139 *Ibid* s 13(1)(b)(i).

140 *Ibid* s 13(1)(b)(ii). 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 2005* (NSW) reg 5.

141 This Act contains similar provisions to the *Evidence Act 2008* (Vic) ss 84–5, 90, 138, and is discussed in Chapter 4 in relation to inadmissibility of admissions at [4.22].

142 See, eg, *R v Duncan* [2004] NSWCCA 431, [265].

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- 5.76 Consultation participants did not specifically consider what could constitute an exceptional circumstance. Some felt that the term should be left undefined.<sup>143</sup> The Commission believes that this matter should be left to the courts to determine on a case-by-case basis, as it is impossible to predict all of the circumstances that might be deemed 'exceptional'. An obvious example, however, might be when the police interview a young person without a supportive adult present in the false but reasonable belief that the young person is an adult.
- 5.77 In order to overcome any doubt about the relationship between the specific statutory provision recommended by the Commission and the general body of law concerning the admissibility of evidence, legislation should declare that the provision concerning the consequences of questioning a young person in custody in the absence of a supportive adult prevails over the relevant parts of the Evidence Act.

### RECOMMENDATIONS

9. The legislation should provide that if an investigating official questions or carries out an investigation concerning a young person in custody without a parent, carer, or support person present, any admission made, or other evidence adverse to the young person's interests gathered, must not be admitted into evidence unless the court is satisfied that:
  - a. there were exceptional circumstances that justified the investigating official proceeding in the absence of a parent, carer or support person; and
  - b. it would not be unfair to the young person to admit the evidence.
10. This provision concerning the exclusion of evidence should prevail over the terms of the *Evidence Act 2008* (Vic) concerning the admissibility of evidence.

### THE ROLE OF THE SUPPORTIVE ADULT

#### CURRENT LAW AND PRACTICE

- 5.78 The Crimes Act contains no information about the role of an independent person—or that of a parent or guardian—during police questioning of a young person in custody. Case law provides some guidance,<sup>144</sup> and inferences may be drawn from a related provision in the Crimes Act.<sup>145</sup> The Victoria Police Manual also contains statements about the role of the supportive adult, but these are of questionable accuracy because they are inconsistent with the case law.
- 5.79 Section 464E(1)(b) of the Crimes Act<sup>146</sup> provides that an investigating official must allow the young person in custody to communicate privately with a parent, guardian or independent person before the questioning or investigation begins. This requirement suggests a statutory intention that the young person should be able to seek, and receive, advice and support before participating in any evidence gathering exercises.
- 5.80 The relevant entry in the Victoria Police Manual suggests a role for the supportive adult which is essentially that of a passive observer with potential to corroborate police evidence if there are any later suggestions of impropriety or unfairness.<sup>147</sup>

- 5.81 In *Toomalatai*,<sup>148</sup> however, Justice Bell was critical of the independent person for being passive during the police interview and for failing to advise the young person of his right to remain silent before police questioning commenced. Drawing on cases from New South Wales<sup>149</sup> and the United Kingdom,<sup>150</sup> Justice Bell concluded that the support person's role should be 'active, not simply that of an observer'.<sup>151</sup> The continuing inconsistency between the directions given to police officers in the Victoria Police Manual and Justice Bell's decision in *Toomalatai*<sup>152</sup> highlights the need for legislative clarification of the support person's role.
- 5.82 In addition, no cases have considered the issue of whether the role of a parent or guardian who attends police questioning differs in any way from the role of a support person. This matter also requires clarification.

## CONSULTATIONS AND SUBMISSIONS

### A broad range of views

- 5.83 There is widespread support for clearly describing the role of the supportive adult in legislation. People and organisations with an interest in the matter provided the Commission with a broad range of views about the role. These views were largely grouped into those who saw the role as active, interventionist and at times advocacy oriented,<sup>153</sup> and those who saw the role as passive, similar to that of a witness.<sup>154</sup> One person stated that an 'independent person' is meant to be 'purely' independent of all parties.<sup>155</sup> Most views were limited to the independent person's role and did not consider whether this role differed in any way from that of a parental figure.
- 5.84 The police and some volunteers who worked with them suggested that the independent person's role was to be an impartial witness to proceedings to ensure that there was no impropriety on behalf of the police.<sup>156</sup>
- 5.85 It was suggested that by aligning themselves too closely with the young person, the independent person's 'independence' could be jeopardised, undermining the integrity of the role. One consultation participant from YRIPP said 'Most kids know the system, they want you [the independent person] to sit down, shut up and hurry up'.<sup>157</sup>
- 5.86 Others focused more on impartiality, suggesting that, like an umpire, the independent person's role is 'to know that everything is above board and all parties concerned know the rules of the game'.<sup>158</sup>

### Communication aide

- 5.87 The Office of the Public Advocate described the role as an 'aide to communication'. This characterisation has particular application to the needs of their client group, who may require considerable assistance due to cognitive impairment.<sup>159</sup>
- 5.88 Other consultation participants said that the independent person's role was to act as a vehicle by which the young person communicates with the police.<sup>160</sup>

### Welfare

- 5.89 One person suggested that the independent person was there to provide a 'health and wellbeing check',<sup>161</sup> including calling for a forensic medical officer if they felt the young person was incapacitated and incapable of continuing with the interview.
- 5.90 Others felt that the role had multiple layers, including a social welfare element.<sup>162</sup> They felt the role was to 'support the young person during the interview and follow up afterwards if they need mentoring or support'.<sup>163</sup>

143 Consultation 29 (Youthlaw).

144 Most notably by *Toomalatai* (2006) 13 VR 319 and the cases from other jurisdictions referred to in the judgment.

145 *Crimes Act 1958* (Vic) s 464E(1)(b).

146 Ibid.

147 See Chapter 2.

148 *Toomalatai* (2006) 13 VR 319, 320–2 [10]–[16].

149 *R v Phung and Huynh* [2001] NSWSC 115, [36]; *R v H (A Child)* (1996) 85 A Crim R 481, 486.

150 Justice Bell referred to *Director of Public Prosecutions v Blake* (1989) Cr App R 179 at 185.

151 *Toomalatai* (2006) 13 VR 319, 331 [63].

152 *Toomalatai* (2006) 13 VR 319.

153 Submission 20 (CMY and YACVic).

154 Submission 19 (Victoria Police Centre).

155 Consultation 3 (Victoria Police Hume 1).

156 Consultations 1 (YRIPP Metro South East), 10 (YRIPP Metro East).

157 Consultation 10 (YRIPP Metro East).

158 Consultation 22 (YRIPP Metro North).

159 Consultation 30 (OPA).

160 Consultation 8 (Judge Grant and Magistrate Power—Children's Court of Victoria).

161 Consultation 14 (Maria Van Der Burgt and John Fox).

162 One participant stated 'you can be tempted to become personally involved': consultation 10 (YRIPP Metro East).

163 Consultation 17 (Ricky Morris—RAJAC Gippsland).

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- 5.91 The welfare-based view appears to stem largely from an acknowledgement that young people are vulnerable within the criminal justice system. A Youthlaw survey conducted as part of the consultation revealed that young people who were asked about their own interactions with police reported feeling 'nervous, intimidated, pressured, tricked, confused and stressed'.<sup>164</sup>

### Rights enhancement

- 5.92 Another group saw the independent person's role as one of 'rights enhancement'. This group viewed the key element of the role as assisting the young person to understand their rights and then exercise these rights throughout their time at the police station.
- 5.93 In their submission, CMY and YACVic suggested that the role of the independent person be seen from a human rights perspective, noting it was essential that any discussion of the independent person's role should start with children's vulnerability.<sup>165</sup> It was argued that the role is to assist a young person 'to understand and exercise their legal rights'.<sup>166</sup>
- 5.94 This view was also articulated by some young people who wanted the independent person to

*Explain rights like the right to silence and explain it in layman's terms not 'big words' ... they [the independent person] should explain the 'cop talk' and the rights about fingerprinting and photos ... they should also let the young person know what they are 'up against'.*<sup>167</sup>

### Advocacy

- 5.95 Some people viewed the role as being closely aligned to that of an advocate. This group felt that the independent person should support the young person to assert their rights at interview. One person said that the independent person was:

*More than just a rubber stamp for the police. They are there to uphold and advocate on behalf of the young person ... the independent person needs to assert themselves in the interview.*<sup>168</sup>

- 5.96 Some young people suggested that the role was:

*To stick up for you, advocate. To be really supportive, to support the young person to figure a way out of situations, to make sure the young person's rights are not violated.*<sup>169</sup>

### Legal advice and the role of the independent person

- 5.97 The issue of whether the independent person should assist a young person in custody to obtain legal advice is contentious. Views on this topic ranged widely from the 'bare minimum' approach, which might involve the provision of a phone book to the young person to enable them to attempt to contact a solicitor, to the independent person contacting Victoria Legal Aid (or a private solicitor) with or without the young person's consent.
- 5.98 Some police were concerned that independent persons could attempt to provide legal advice to the young person, either before or during the police interview. Some felt that this was not the independent person's role and that this practice could interfere with a particular line of police questioning.<sup>170</sup>
- 5.99 Some independent persons noted that in order to set boundaries and to let the young person know that they could not assist with legal advice, they routinely stated prior to the pre-interview: 'Don't tell me what happened, I don't want to know'.<sup>171</sup> This practice was endorsed by some police, who stated that the independent person did not need to know about the facts of the case in order to support a young person during an interview.<sup>172</sup>

- 5.100 A number of people pointed out that young people do not request legal advice, and if offered will often refuse. Reasons cited included the young person's fear that speaking to a lawyer may 'escalate' the situation. Many people felt that young people want to get out of the station as quickly as possible and will say or do almost anything to achieve this outcome.<sup>173</sup>
- 5.101 One person noted that a young person might change their mind about whether to seek legal advice after the initial talk with the independent person. The opportunity to speak with the young person in private prior to the police interview was felt to be vital. During this time, the independent person can explain to the young person their right to seek legal advice and their right to remain silent, as well as enquire about the young person's welfare.<sup>174</sup>
- 5.102 A common theme in consultations was that the independent person's role is to encourage the young person to access legal advice but not to override the young person's wishes.<sup>175</sup>
- 5.103 It was widely acknowledged that the independent person's role is delicate and challenging. Some volunteers expressed great frustration at not being able to intervene in order to assist a young person 'trapping' themselves in a particular line of police questioning.<sup>176</sup>

#### **Practical advice about the role: an explanatory document**

- 5.104 Many people raised the issue of the lack of guidance provided to supportive adults at the police station about their role.
- 5.105 One parent said that the police neglected to tell her anything about why her son was at the station or her role in the interview. She felt that parents and guardians should be better informed and that police should explain their role in the interview.<sup>177</sup>
- 5.106 The Commission received suggestions about a range of possible requirements, including that the police should:
- read through the roles of the support person, parent and/or carer at the outset of the interview in conjunction with the caution<sup>178</sup>
  - play a short video or audio tape to explain the role<sup>179</sup>
  - facilitate access to a phone service with pre-recorded information about the role<sup>180</sup>
  - give the young person or supportive adult a written statement that outlines, in plain English, the process and role.

#### **COMMISSION'S VIEWS**

- 5.107 The Commission believes that the role of the supportive adult who must be present when the police question a young person in custody should be set out in legislation. The Commission also believes that the roles of both the parental figure and the support person should be the same, even though most parents and carers will be unfamiliar with the role. Recommendations 4 and 5 deal with circumstances in which a parental figure might be unable to play the role envisaged,<sup>181</sup> and Recommendation 12 seeks to provide assistance to a parental figure who has the capacity to play the role of a supportive adult during police questioning of their child but who is unaware of what is required.

164 Submission 21 (FCLC).

165 Submission 20 (CMY and YACVic).

166 Ibid.

167 Consultation 23 (Whitelion).

168 Consultation 15 (John Wadsley—VLA).

169 Consultation 2 (YEH).

170 Consultation 31 (Victoria Police Centre).

171 Consultation 10 (YRIPP Metro East).

172 Consultation 16 (Victoria Police Gippsland).

173 Consultation 7 (YRIPP Shepparton).

174 Consultation 14 (Maria Van Der Burgt and John Fox).

175 Consultations 5 (Brad Boon—VALS), 23 (Whitelion), 25 (VLA).

176 Consultation 7 (YRIPP Shepparton).

177 Consultation 27 (Sivvy Orr).

178 Submission 20 (CMY and YACVic).

179 Consultation 33 (Victoria Police Dandenong).

180 Consultation 24 (YRIPP, YACVic and CMY).

181 See Recommendations 4 and 5, which enable a parental figure to request that a support person be present.



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5.108 It is no longer desirable to rely upon an accumulation of case law concerned with the admissibility of evidence to provide the details of a supportive adult's role. The process of developing a clear description of the role through case law is slow and places an unfair law-making responsibility upon judicial officers who are unable to call for submissions from all interested people and consider a range of different scenarios when deciding a particular case. In addition, the relevant law is not easily accessible because it is necessary to read and interpret a range of cases in order to understand the supportive adult's role during police questioning of a young person in custody.

5.109 The Commission believes that the supportive adult's role is multi-faceted. The supportive adult should provide a young person with comfort and information about his or her rights, as well as active assistance when required. While the role has been described well by Justice Bell in *Toomalatai*,<sup>182</sup> the judgment is expressed in terms and is available in a location not easily accessible by people other than legal practitioners.

5.110 The rights to legal advice and to silence, which are recognised in the Charter,<sup>183</sup> other legislation<sup>184</sup> and common law,<sup>185</sup> are fundamental rights that the supportive adult should explain to a young person. The supportive adult should also assist the young person to exercise those rights if he or she chooses to assert them. In order to remove any doubt about the extent of the role, legislation should make it clear that the supportive adult is entitled to speak during any police questioning of the young person. The supportive adult's role, however, is not to offer legal advice; only legal practitioners are qualified to do this.

5.111 The Commission believes that the supportive adult should be entitled to intervene during questioning to:

- help a young person understand the questions asked
- advise the police when the young person might need a break or some other assistance, such as food or drink
- assist a young person to exercise his or her legal rights.

In practice, this will often be a difficult role because it is different from that of a legal practitioner, who is qualified and able to give legal advice to a client before and during a police interview. The challenges associated with the role illustrate the need for it to be filled by appropriately trained people whenever possible.

5.112 As Justice Bell pointed out in *Toomalatai*,<sup>186</sup> the role is an active one and certainly not that of a mere passive observer who can be a witness if required.<sup>187</sup> The relevant New South Wales regulations provide that 'the support person is not restricted to acting merely as an observer'<sup>188</sup> during police questioning. The Commission recommends that there be a similar provision, expressed in positive terms, in Victorian legislation.

5.113 In both New South Wales and Queensland, the police are required to provide the supportive adult with a document that explains their role.<sup>189</sup> The Commission recommends a similar statutory requirement in Victoria. The document would serve two important purposes:

- It would provide important information to a parent or carer who is unaware of what is expected or allowed of them during police questioning of their child.
- While the document would be an important educative tool for both police officers and trained support persons, it would also be an important reference point whenever there is dispute about the support person's role.



The document should be as clear and accessible as possible, and be available in major community languages. The Chief Commissioner of Police and the Child Safety Commissioner should devise the document jointly. The existing YRIPP document which police may choose to give to a parent or guardian could be a useful starting point.

- 5.114 Whenever both a parental figure and a support person are present during police questioning of a young person in custody, the support person should play the role described in Recommendation 11.
- 5.115 The police should also be required to explain the role of the supportive adult to the young person in custody. In some instances, it might be appropriate to give the young person a copy of the document designed for the supportive adult. In others, it might be unrealistic to expect a young person in custody to read and comprehend a document of this nature. In these circumstances, the police should be required to make reasonable efforts to explain the role of the supportive adult to the young person. The explanation of the role of the supportive adult should be recorded. This requirement should be added to section 464G of the Crimes Act.
- 5.116 Section 464E(1)(b) of the Crimes Act<sup>190</sup> requires the police to allow a young person in custody to privately communicate with the supportive adult prior to questioning. This important provision should be retained.

## RECOMMENDATIONS

11. The legislation should provide that the role of a parent, carer or support person who is present during the questioning or investigation of a young person in custody is to:
  - a. provide support to the young person generally and in relation to the specific matters that follow, and that in doing so the parent, carer or support person is permitted to speak during any questioning or investigation
  - b. inform the young person about and assist them to understand the following matters:
    - i) the right to seek legal advice before answering any questions or participating in any investigation
    - ii) the right to not say or do anything during police questioning and to not participate in investigations, and that anything said or done may be used in evidence
  - c. support the young person to exercise these rights, if they wish to do so
  - d. assist the young person to understand any question that is asked
  - e. advise the investigating official whenever the parent, carer or support person believes that the young person may need a break or some form of assistance.
12. The legislation should provide that before questioning or investigating a young person in custody, the investigating official must provide the young person and the parent, carer or support person with a document in English or other appropriate community language that clearly and simply explains the role of the parent, carer or support person. This document should be devised jointly by the Chief Commissioner of Police and the Child Safety Commissioner.
13. The legislation should provide that before questioning or investigating a young person in custody, the investigating official must make reasonable efforts to explain the role of the parent, carer or support person to the young person.

182 *Toomalatai* (2006) 13 VR 319.

183 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 25(2)(b)—right to legal advice, 25(2)(k)—right to silence.

184 *Crimes Act 1958* (Vic) ss 464A(3)—right to silence, 464C(1)(b)—right to legal advice, 464J—right to silence; *Evidence Act 2008* (Vic) s 139(2)(c)—right to silence.

185 *Sorby v Commonwealth* (1983) 152 CLR 281, 294–5—right to silence.

186 *Toomalatai* (2006) 13 VR 319.

187 *Ibid*, 331 [63], 336 [86].

188 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) reg 30. A similar approach is taken under Code C of the *Police and Criminal Evidence Act 1984* in the United Kingdom.

189 These documents are reproduced as Appendices F and G.

190 *Crimes Act 1958* (Vic) s 464E(1)(b).

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14. The legislation should provide that before questioning or investigating a young person in custody, an investigating official must allow a young person in custody to communicate privately with his or her parent, carer or support person in circumstances where, as far as is practicable, their conversation cannot be overheard.

### THE CONSEQUENCES OF A SUPPORTIVE ADULT FAILING TO PERFORM THEIR ROLE

#### CURRENT LAW

- 5.117 The Crimes Act does not stipulate what happens if a supportive adult fails to perform their role under section 464E of the Crimes Act.<sup>191</sup> This is what happened in *Toomalatai*.<sup>192</sup>
- 5.118 The most significant consequence when a supportive adult fails to perform their role is the same sanction as when the police question a young person in custody without a supportive adult present. In both instances, it is *possible* that evidence of an admission will be rendered inadmissible by operation of the law of evidence. In *Toomalatai*<sup>193</sup>—which concerned the application of common law rules of evidence—Justice Bell concluded that it was possible to exclude a confession when the supportive adult failed to perform their role both because the confession was involuntary, and on the discretionary ground that it would be unfair to the accused person to allow evidence of the confession.<sup>194</sup>
- 5.119 As discussed earlier, the Evidence Act now governs the admissibility of evidence of an admission. A number of provisions are relevant. Section 84 of the Evidence Act says that an admission can only be used as evidence if the court is satisfied that it was not influenced by oppressive conduct.<sup>195</sup> Section 85(2) provides that an admission can only be used as evidence if the circumstances in which it was made were unlikely to affect the truth of the admission.<sup>196</sup> When considering this issue, the court must take account of the age of the person who made the admission.<sup>197</sup> Section 90 gives a court a broad discretionary power to exclude admissions based on unfairness to the accused,<sup>198</sup> while section 138 permits a court to exclude any evidence that has been improperly or illegally obtained.<sup>199</sup> All of these provisions may be relevant when a supportive adult fails to perform their role under section 464E of the Crimes Act.<sup>200</sup>
- 5.120 In *Toomalatai*, Justice Bell concluded that the independent person had failed to perform his role because he was
 

*judgmental and admonishing before the interview, which is active in entirely the wrong way; he was passive in the interview itself, when his active support was most needed ...*

*Instead of bringing balance to the situation as an adult on Mr Toomalatai's side, he became another adult before whom Mr Toomalatai was being held to account for his alleged conduct. His presence, which was intended to make things better for Mr Toomalatai, in fact made things worse.*<sup>201</sup>
- 5.121 Justice Bell excluded evidence of the confession because it would be unfair to the young person to allow it to be used against him.<sup>202</sup> He chose this course after observing that the 'police did not behave improperly in any way'.<sup>203</sup> It is unclear from the decision in *Toomalatai*,<sup>204</sup> or from any other case law, whether evidence of an admission would have been excluded if a parent or guardian had acted in the same way as the independent person. Logically, it is difficult to appreciate why a parental figure's failure to provide a young person in custody with appropriate support should produce a different result, except in those circumstances where the parental behaviour might have been designed to influence the admissibility of any evidence obtained during police questioning.

## COMMISSION'S VIEWS

- 5.122 The Commission believes that the consequences of a supportive adult failing to perform their role should be set out in legislation. A distinction should be drawn between instances of police impropriety or inaction and those cases in which it is difficult for the police to counter parental inability to perform the role properly. It is also desirable to seek to blend the consequences of the supportive adult failing to perform their role with the new comprehensive regime dealing with evidence of admissions in the Evidence Act.
- 5.123 If the police actively prevent the supportive adult from performing their role, or if the police fail to intervene to ensure the supportive adult performs their role, it is highly likely that the evidence would fall within either or both limbs of section 138(1) of the Evidence Act.<sup>205</sup> Those limbs are that the evidence was obtained:
- (a) *improperly or in contravention of an Australian law; or*
  - (b) *in consequence of an impropriety or of a contravention of an Australian law.*<sup>206</sup>
- 5.124 While evidence of an admission obtained in circumstances where the police prevented a supportive adult from performing their role—by, for instance, directing the supportive adult to remain silent during police questioning—is highly likely to be characterised as evidence obtained ‘improperly’, ‘in consequence of an impropriety’ and ‘in contravention of an Australian law’, it is important that this matter be expressly dealt with by legislation so that the consequences of this kind of conduct are clear. Legislation should deem evidence obtained in these circumstances to have been obtained improperly or unlawfully for the purposes of section 138 of the Evidence Act.<sup>207</sup> This step would make it unnecessary for the young person to establish that the evidence was in fact obtained improperly or unlawfully and it would overcome the need for a court to consider any of the evidentiary matters in section 138(2) before making this finding.<sup>208</sup>
- 5.125 This legislative provision should also apply when the support person fails to perform their role. The effect of this provision—which would, in effect, replicate the position at common law since *Toomalatai*<sup>209</sup>—would be to place the police under a positive obligation to ensure that there is an appropriate pool of trained support persons and that these people perform their task properly when called upon to be present during police questioning of a young person in custody.
- 5.126 A deeming provision of this nature would not automatically cause evidence of an admission to be excluded when the police prevented the supportive adult from performing their task or when the support person failed to perform their role properly. It would move the court’s inquiry immediately to the balancing aspect of section 138 of the Evidence Act.<sup>210</sup> Section 138 contains a rebuttable presumption that a court should only admit evidence obtained improperly or unlawfully if ‘the desirability of admitting the evidence outweighs the undesirability of admitting [the] evidence’.<sup>211</sup> When undertaking this balancing exercise, a court is required to consider a range of matters set out in section 138(3),<sup>212</sup> including the probative value of the evidence and the gravity of the improper or unlawful conduct. The Commission believes that this is the most effective legal means of dealing with evidence of an admission obtained in circumstances where the police prevent a supportive adult from performing their role, or where the support person fails to perform their role.

191 *Crimes Act 1958* (Vic) s 464E.

192 *Toomalatai* (2006) 13 VR 319.

193 *Ibid.*

194 *Ibid.*, Justice Bell clearly indicated that both the voluntariness rule and the trial judge’s discretionary power could be engaged by failure to comply with section 464E of the *Crimes Act 1958* (Vic).

195 *Evidence Act 2008* (Vic) s 84.

196 *Ibid* s 85(2).

197 *Ibid* s 85(3)(a).

198 *Ibid* s 90.

199 *Ibid* s 138.

200 *Crimes Act 1958* (Vic) s 464E.

201 *Toomalatai* (2006) 13 VR 319, 334 [78]–[79].

202 *Ibid* 335 [83].

203 *Ibid* [82].

204 *Toomalatai* (2006) 13 VR 319.

205 *Evidence Act 2008* (Vic) s 138(1).

206 *Ibid* s 138(1)(a)–(b).

207 *Ibid* s 138.

208 *Ibid* s 138(2).

209 *Toomalatai* (2006) 13 VR 319.

210 *Evidence Act 2008* (Vic) s 138.

211 *Ibid* s 138(1).

212 *Ibid* s 138(3).

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5.127 This recommendation does not deal expressly with the consequences of a parent or carer failing to perform their role when there has been no fault on the part of the police. For example, when a parent or carer admonishes a young person during the private conversation before the police interview and instructs the young person to make admission to the police. The Commission believes that in these circumstances, the various relevant provisions in the Evidence Act—sections 84, 85, 90 and 138<sup>213</sup>—should be applied without elaboration or amendment in order to determine whether the evidence is admissible.

213 Ibid ss 84–5, 90, 138.

### RECOMMENDATION

15. If an investigating official prevents the parent, carer or support person from performing the role described in Recommendation 11, or if the support person fails to perform that role, the legislation should provide that any evidence obtained during the questioning or investigation is presumed to have been obtained improperly or illegally for the purposes of section 138 of the *Evidence Act 2008* (Vic).

## Chapter 6

# Developing and Administering the Scheme

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## Developing and Administering the Scheme

### INTRODUCTION

- 6.1 Chapter 5 contains recommendations designed to clarify rights and responsibilities when the police question a young person in custody about his or her involvement in an offence. One of those recommendations calls for the police to arrange for a support person to attend a police station when required by drawing, without preference, from a pool of trained support persons.
- 6.2 The Commission proposes that the Child Safety Commissioner and the Chief Commissioner of Police work together to devise procedures for ensuring the attendance of trained support persons at police stations throughout Victoria when required.<sup>1</sup> The Child Safety Commissioner and Chief Commissioner should also jointly devise a code of conduct for support persons and, in consultation with the Office of Police Integrity, establish protocols for reporting allegations of police misconduct. The Commission believes that the Secretary of the Department of Justice should be responsible for establishing and administering a pool of trained support persons.
- 6.3 This chapter discusses how a scheme to provide a pool of trained support persons might be developed and administered. Important issues to consider when establishing a support person scheme include:
  - assigning responsibility for overseeing, developing and administering the scheme
  - establishing protocols and procedures for securing a support person
  - monitoring and reviewing the scheme
  - training, accreditation and minimum standards for support people
  - developing protocols for responding to allegations of misconduct by a support person or police.
- 6.4 The proposals in this chapter draw heavily upon the practices and procedures of the Youth Referral and Independent Person Program (YRIPP) pilot program discussed in Chapter 3.

### ORGANISATIONS AND BODIES RELEVANT TO THE SUPPORT PERSON SCHEME

- 6.5 It is useful to briefly consider the role, functions and powers of the principal agencies discussed in this chapter:
  - the Office of the Child Safety Commissioner
  - the Office of Police Integrity
  - the Chief Commissioner of Victoria Police
  - the Ethical Standards Department of Victoria Police.

### OFFICE OF THE CHILD SAFETY COMMISSIONER

- 6.6 The Child Safety Commissioner is established by the *Child Wellbeing and Safety Act 2005* (Vic).<sup>2</sup>
- 6.7 The Child Safety Commissioner has an important role in the care and support of young people within Victoria. The Commissioner is responsible for promoting continuous improvement and innovation in child safety and out-of-home care services.<sup>3</sup> The functions of the Commissioner are to:



- provide advice and recommendations to the minister about child safety issues, at the request of the minister<sup>4</sup>
- promote child-friendly and child-safe practices in the Victorian community<sup>5</sup>
- annually review the administration of the *Working with Children Check Act 2005* (Vic) and educate and inform the community about the Act<sup>6</sup>
- monitor out-of-home care services<sup>7</sup>
- conduct inquiries into deaths of children who have been child protection clients<sup>8</sup>
- conduct inquiries into child safety as directed by the minister<sup>9</sup>
- any other function conferred on the Child Safety Commissioner by any Act.<sup>10</sup>

6.8 The *Children, Youth and Families Act 2005* (Vic) was amended in 2009 to add an inquiry function relating to child safety.<sup>11</sup> The Child Safety Commissioner is appointed by the Premier for a specified period and can be removed from office by the Premier.<sup>12</sup> The current Commissioner was initially appointed for three years in 2005 and this appointment was extended for another five years in May 2008.

## OFFICE OF POLICE INTEGRITY

6.9 The Office of Police Integrity was established in 2004 by amendments to the *Police Regulation Act 1958* (Vic).<sup>13</sup> A key function of the Office of Police Integrity is to undertake 'investigations into police corruption and serious misconduct'.<sup>14</sup> Serious misconduct includes:

- (a) conduct which constitutes an offence punishable by imprisonment; or
- (b) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
- (c) disgraceful or improper conduct (whether in the member's official capacity or otherwise).<sup>15</sup>

A complaint about a police officer's conduct may be made to another member of the police force,<sup>16</sup> or to the Director of the Office of Police Integrity.<sup>17</sup>

## VICTORIA POLICE

### Chief Commissioner of Victoria Police

6.10 The Chief Commissioner is responsible for 'the superintendence and control' of the police force, subject to the directions of the Governor in Council.<sup>18</sup> Section 17 of the *Police Regulation Act 1958* (Vic) empowers the Chief Commissioner to

*issue, revoke or amend—*

- (a) orders, to be known as standing orders, for the general administration of the force;
- (b) instructions for the effective and efficient conduct of the force's operations.<sup>19</sup>

As discussed in Chapter 2, the Victoria Police Manual is issued by the Chief Commissioner under this power.<sup>20</sup>

- 1 This matter is dealt with in Recommendations 8 and 9, discussed in Chapter 5. If the Child Safety Commissioner is unable to fulfil this function it could be performed by another statutory officer with expertise in providing assistance to children and young people, especially in relation to their involvement with the criminal justice system. This matter is further discussed at [6.24].
- 2 *Child Wellbeing and Safety Act 2005* (Vic) s 18.
- 3 *ibid* s 17.
- 4 *Ibid* s 19(a).
- 5 *Ibid* s 19(b).
- 6 *Ibid* s 19(c); see also ss 24–8.
- 7 *Ibid* s 19(d); see also ss 29–32.
- 8 *Ibid* s 19(e); see also s 33.
- 9 *Ibid* s 19(e); see also s 33A.
- 10 *Ibid* s 19(f).
- 11 *Children Legislation Amendment Act 2009* (Vic) s 12. This additional inquiry function allows the minister to recommend that an inquiry be conducted in relation to 'a child protection client' if the minister believes a review will help improve child protection practices and enhance child safety.
- 12 Under s 12(2) of the *Public Administration Act 2004* (Vic), the premier, on behalf of the Crown, may employ a person as a department head or administrative office head.
- 13 Amending legislation: *Major Crime Legislation (Office of Police Integrity) Act 2004* (Vic). Note the Office of Police Integrity was re-established under the *Police Integrity Act 2008* (Vic) pt 2.
- 14 *Police Integrity Act 2008* (Vic) s 6(2)(a). See also Office of Police Integrity, *The Office of Police Integrity: The First Five Years, November 2004–November 2009* (2009).
- 15 *Police Integrity Act 2008* (Vic) s 3 (definition of 'serious misconduct').
- 16 *Police Regulation Act 1958* (Vic) s 86L(1)(a).
- 17 *Ibid* s 86L(1)(b). Complaints to the Director of the Office of Police Integrity are investigated under *Police Integrity Act 2008* (Vic) pt 3.
- 18 *Police Regulation Act 1958* (Vic) s 5(1).
- 19 *Ibid* s 17.
- 20 See Chapter 2 under the heading 'Victoria Police Manual', [2.14]–[2.16]; Victoria Police, *Victoria Police Manual*, from CD-ROM current at 30 August 2010.

# Developing and Administering the Scheme

## Ethical Standards Department of Victoria Police

- 6.11 The Ethical Standards Department is a department within Victoria Police that is 'dedicated to receiving and investigating complaints of unethical behaviour and misconduct committed by Victoria Police employees'.<sup>21</sup> The Ethical Standards Department is committed to the values of Victoria Police and aims to increase community satisfaction with Victoria Police.<sup>22</sup> Investigations by the Ethical Standards Department are to be 'professional, transparent and impartial'.<sup>23</sup>

## Ethical Standards Department and the Office of Police Integrity

- 6.12 The Ethical Standards Department is responsible for informing the Office of Police Integrity about complaints to Victoria Police and ensuring that matters referred to it by the Office of Police Integrity are investigated.<sup>24</sup> The Office of Police Integrity monitors and reviews investigations referred to the Ethical Standards Department and may make recommendations to improve investigations.<sup>25</sup> Sometimes staff from the Office of Police Integrity and the Ethical Standards Department work collaboratively on investigations.<sup>26</sup>

## YRIPP PILOT PROGRAM

- 6.13 Chapter 3 contains details of the establishment, operation and practice of YRIPP.<sup>27</sup> Since its establishment in 2003, the YRIPP scheme has expanded from servicing nine to 108 police stations throughout Victoria.<sup>28</sup> The Victorian Government has extended funding for the YRIPP program until 30 June 2011.

## Expanding YRIPP—the considerations

- 6.14 A significant amount of work will be required in order to expand YRIPP services to all Victorian police stations. As the Centre for Multicultural Youth (CMY) and Youth Affairs Council of Victoria (YACVic) pointed out, funding arrangements and allocation of responsibility for administering YRIPP might affect its independence and utility.<sup>29</sup> The CMY and YACVic submission noted that assigning Victoria Police responsibility for administering YRIPP, as was the case at the time of the submission, 'represents a very real conflict of interest, which compromises the independence and integrity of the program and undermines its intent'.<sup>30</sup>
- 6.15 Their submission also noted some of the particular issues associated with delivering a service across Victoria:

*[W]hilst YRIPP supports expansion and acknowledges that infrastructure is in place for the program to increase its scope and size, this would have considerable resourcing implications. Significantly, operational costs in rural areas are larger despite the lower number of interviews in comparison to metropolitan police stations. Therefore a balancing is required between the number of independent persons necessary to operate the program in a rural area versus the low number of interviews undertaken.*<sup>31</sup>

- 6.16 The Commission believes that different service delivery models should be considered for regional and rural areas,<sup>32</sup> including a period of transition to a new statewide scheme to allow for regional capacity issues and service expansion. For example, mixed methods of service delivery using a phased approach of trained and untrained support persons may be appropriate for a limited period to enable ready access to support persons in rural or very remote police stations. Police could be required to record why a trained support person (or other supportive adult) was absent and what steps had been taken to secure an appropriate alternative.

## PROGRAMS IN OTHER JURISDICTIONS

- 6.17 The Commission sought guidance from the operations of support person schemes in other jurisdictions.<sup>33</sup> The approach across other Australian jurisdictions is inconsistent, with justice, human service and health portfolios accepting responsibility for support person schemes in different places.
- 6.18 In most Australian states and territories, a government department is responsible for administering the scheme. The South Australian Department for Families and Communities operates a police call-out scheme of workers who attend police interviews with young people when their parents are unable to attend.<sup>34</sup> The Northern Territory operates a roster-based scheme of volunteers through the Youth Justice Advisory Committee;<sup>35</sup> the Northern Territory Department of Health and Families provides administrative and secretariat support to the committee.<sup>36</sup>
- 6.19 In the Australian Capital Territory (ACT) the Public Advocate is responsible for the ACT After Hours Interview Friends Program.<sup>37</sup> Anglicare's Youth in the City Program coordinates the Daytime Interview Friends Program, and the Public Advocate monitors the operation of the daytime program and is involved in training.<sup>38</sup>
- 6.20 As discussed in Chapter 4, United Kingdom legislation requires local authorities to provide youth justice services for their area, including the provision of 'persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers'.<sup>39</sup> The peak body for organisations offering appropriate adult services is the National Appropriate Adult Network (NAAN), which is funded by the Home Office and the Department of Health.<sup>40</sup>

## DEVELOPING A FRAMEWORK FOR THE SUPPORT PERSON SCHEME

### RESPONSIBILITY FOR THE SUPPORT PERSON SCHEME

- 6.21 The Commission believes that an independent body with responsibility for children and young people should play a role, together with other public officials, in developing a framework for the proposed support person scheme. The Child Safety Commissioner is well placed to undertake this role in order to generate confidence in the integrity of the scheme. As discussed earlier, the Child Safety Commissioner has a range of statutory functions concerned with the wellbeing of children.<sup>41</sup> Existing legislation suggests that the Child Safety Commissioner might receive additional functions over time.<sup>42</sup>

### DEVELOPING PROTOCOLS AND PROCEDURES FOR SECURING SUPPORT PERSONS

- 6.22 A scheme for securing the presence of a support person at a police station when needed requires clear protocols and procedures in order to operate effectively and efficiently. The existing framework established by YRIPP includes good examples of protocols and procedures and should guide the development of a support person scheme.<sup>43</sup> It should not be an onerous task to adapt the existing framework so that it operates on a statewide basis.

- 21 Victoria Police, Ethical Standards Department, *Community Service Charter* (2008) 2.
- 22 Ibid.
- 23 Ibid.
- 24 Office of Police Integrity, *Frequently Asked Questions* <<http://www.opi.vic.gov.au/index.php?i=66&m=47&t=1>>; Victoria Police, *Community Service Charter*, above n 21, 4.
- 25 Office of Police Integrity, *Frequently Asked Questions* <<http://www.opi.vic.gov.au/index.php?i=66&m=47&t=1>>.
- 26 Ibid.
- 27 See Chapter 3 under the heading 'YRIPP police stations', [3.11]–[3.49].
- 28 See Appendix D (list of YRIPP stations).
- 29 Submission 20 (CMY and YACVic).
- 30 Ibid.
- 31 Ibid.
- 32 For discussion of current practice in rural and regional areas, see Chapter 3 under the heading 'Regional and rural areas', [3.76]–[3.79].
- 33 See Appendix C (jurisdictions table) and Chapter 4.
- 34 Telephone conversation with Mark Stratton, Manager of Integrated Youth Services, Department for Families and Communities (SA), 13 September 2010.
- 35 *Youth Justice Act 2005* (NT) pt 13.
- 36 Email from Deborah Moore, Youth Justice Advisory Committee Secretariat, Department of Health and Families (NT), 24 September 2010.
- 37 Telephone conversation with Patricia Mackey, Principal Advocate, Public Advocate of the Australian Capital Territory, 20 August 2010.
- 38 Ibid.
- 39 *Crime and Disorder Act 1998* (UK) c 37, s 38(4)(a).
- 40 National Appropriate Adult Network, *About Us* <<http://www.appropriateadult.org.uk/about-us>>.
- 41 *Child Wellbeing and Safety Act 2005* (Vic) pt 6.
- 42 Ibid s 19(f).
- 43 See Chapter 3 under the heading 'YRIPP call-out procedure', [3.21]–[3.32] for a discussion of YRIPP protocols and procedures.

# 6

## Chapter 6

# Developing and Administering the Scheme



- 6.23 The framework for securing the attendance of a support person to assist a young person during police questioning or investigations should include:
- call-out procedures for police and volunteer support persons
  - guidelines for resolving potential, perceived or actual situations when a conflict of interest arises to ensure independence and impartiality
  - procedures for securing the presence of an appropriate person to support a young person with a cognitive impairment
  - processes for ensuring support for each young person in custody when there are a number of young people to be interviewed by police
  - protocols for supporting young people from culturally and linguistically diverse communities and Aboriginal young people in police interviews and investigations.
- 6.24 Input from a number of different perspectives is required in order to develop appropriate protocols and procedures. The Chief Commissioner of Police is an essential participant. The proposed administering agency, the Department of Justice, should also contribute to the development of protocols and procedures for securing the presence of a support person at a police station when required.<sup>44</sup> The Department of Justice is, however, the government department responsible for Victoria Police. A third and independent perspective—one which is seen to represent the interests of young persons—is also required. The Commission believes that the Child Safety Commissioner could play this role. If the Child Safety Commissioner is unable to fulfil this function, the Managing Director of Victoria Legal Aid could perform this establishment role.<sup>45</sup>
- 6.25 As proposed in Recommendation 10, the protocols and procedures should be widely circulated and published on the websites of all three agencies—the Office of the Child Safety Commissioner, Victoria Police and the Department of Justice. The Commission also believes that the protocols and procedures, or a summary of them, should be included in the Victoria Police Manual, as the Manual is a primary source of the Chief Commissioner’s directives to members of the police force.

### MONITORING AND REVIEWING THE SUPPORT PERSON SCHEME

- 6.26 YRIPP has developed grievance and complaints procedures<sup>46</sup> that could be refined and extended.
- 6.27 The Office of the Child Safety Commissioner is skilled in reviewing and monitoring activities concerning child safety. The Commissioner is responsible for reviewing and reporting on the *Working with Children Act 2005* (Vic),<sup>47</sup> monitoring out-of-home care services<sup>48</sup> and conducting inquiries into the death of a child who was a child protection client at the time of death or within 12 months of his or her death.<sup>49</sup>
- 6.28 Any new scheme for securing the attendance of trained support persons at police stations throughout the state requires an independent monitor who reports directly to the Attorney-General about the performance of the scheme and compliance with the relevant legislation. The Child Safety Commissioner should fulfil this role. The Commission suggests that Victoria Police review its data entry system in this area in order to ensure that the Child Safety Commissioner has access to appropriate data when undertaking the proposed monitoring function.

## RECOMMENDATION

16. The Child Safety Commissioner should have the following functions:
- The Child Safety Commissioner should work with the Chief Commissioner of Police to prepare procedures for the attendance of support persons during police questioning or investigation of young persons (as provided for in Recommendation 7).
  - The Child Safety Commissioner should monitor the operations of the scheme and provide an annual report to the Attorney-General.

## ADMINISTRATION OF THE SCHEME

### RESPONSIBILITY FOR ADMINISTERING THE SCHEME

- 6.29 An appropriate agency should be responsible for establishing and administering the proposed support person scheme. The agency would:
- recruit volunteers to act as support persons
  - provide or manage training programs for volunteers
  - develop resources for parents, carers and support persons that explain their role
  - liaise with local communities and police stations
  - promote and monitor protocols and procedures for support persons and police stations
  - coordinate a roster system
  - maintain a database of volunteers.
- 6.30 The Commission believes that at present, the Secretary of the Department of Justice is the best-placed public official to administer the support person scheme. In time, it may be possible to transfer responsibility to an appropriate statutory agency. While the Secretary of the Department of Justice should have formal responsibility for the day-to-day administration of the scheme, she or he could arrange to outsource the delivery of the service in a way similar to the current YRIPP arrangements.<sup>50</sup> It would certainly be advisable, in the Commission's view, to draw upon the expertise of YRIPP when developing the support person scheme.
- 6.31 The Commission is confident that the Office of the Child Safety Commissioner, Victoria Police and the Department of Justice are able to work collaboratively to design and administer the proposed scheme. The Secretary of the Department of Justice will require appropriate resources to establish and operate the program.

## RECOMMENDATION

17. The Secretary of the Department of Justice should be responsible for administering a statewide scheme of trained volunteers to act as support persons during police questioning or investigation of young persons in custody.

- 44 See discussion below under the heading 'Administration of the scheme'.
- 45 The Managing Director is the chief executive officer of the independent statutory body, Victoria Legal Aid (*Legal Aid Act 1978* (Vic) ss 3, 12A. Victoria Legal Aid provides legal services to young people through the Youth Legal Service.
- 46 See Chapter 3 under the heading 'Grievance procedures' [3.48]–[3.49] for a discussion of YRIPP grievance and complaints procedures.
- 47 *Child Wellbeing and Safety Act 2005* (Vic) ss 24(a), 25. Division 2, containing ss 24(a) and 25, specifies the relevant functions, requirements of the review and powers of the Child Safety Commissioner.
- 48 *Child Wellbeing and Safety Act 2005* (Vic) s 29. Division 3, containing s 29, specifies the relevant functions and powers of the Child Safety Commissioner.
- 49 *Child Wellbeing and Safety Act 2005* (Vic) s 33.
- 50 See Chapter 3 under the heading 'YRIPP police stations', [3.11]–[3.49] for a detailed discussion of the operation and practices of YRIPP.

# 6

## Chapter 6

# Developing and Administering the Scheme

## TRAINING FOR SUPPORT PERSONS

6.32 Justice Bell highlighted the importance of training in *DPP v Toomalatai*.<sup>51</sup> He described the support person's lack of training in that case as lamentable.<sup>52</sup> In their report, *Seen and Heard*, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission also emphasised that volunteer community members who act as an 'interview friend' or support person receive regular training about their responsibilities.<sup>53</sup>

6.33 Many people and organisations strongly supported training for support persons,<sup>54</sup> and recognised the importance of refresher training.<sup>55</sup> In a survey undertaken with volunteers, YRIPP found that 93 per cent of respondents thought that support persons should be required to complete a minimum amount of training to perform the role.<sup>56</sup> Many commended YRIPP's training program. The Victorian Aboriginal Legal Service (VALS) told the Commission:

*VALS applauds the current practice of the YRIPP Independent Person training program which involves periodical updates to both personal training and the training manual. It is crucial that cultural awareness training to obtain an appropriate level of cultural competency amongst Independent Persons is provided.*<sup>57</sup>

6.34 Many people made suggestions for the content of training, including:

- the role of the support person, including the limitations<sup>58</sup>
- legal terminology and the criminal justice system<sup>59</sup>
- the rights of young people<sup>60</sup>
- information about culturally appropriate support for Indigenous young people and young people from culturally and linguistically diverse communities<sup>61</sup>
- conflict management<sup>62</sup>
- police processes, including recording information<sup>63</sup>
- communicating effectively with young people and police.<sup>64</sup>

6.35 Some people felt that formal training alone was insufficient and that there should also be a practical component to fully equip volunteers for the role.<sup>65</sup> Some police officers were of the view that a checklist outlining the role would be sufficient.<sup>66</sup>

6.36 Victoria Police noted the significant resource implications that an expanded and fully trained service might require:

*Victoria Police supports the training of independent persons provided that there are sufficient resources available to meet the demand across the state; it would be problematic to legislate such a requirement without this assurance.*<sup>67</sup>

6.37 The Commission believes that training for support persons is fundamentally important. Appropriate training should assist all parties involved—young people in custody, their parents and carers, police officers and support persons—to understand the nature and extent of the support a young person in custody is entitled to receive when questioned by the police. The Department of Justice should be responsible for training support persons.

## Recruitment, reimbursement and retention of support persons

6.38 In consultations and submissions, the Commission heard that the recruitment and retention of volunteers is a common problem that is particularly acute in regional and rural areas.<sup>68</sup>



- 6.39 As a support person is a volunteer, police officers were mindful that there is potential to overwork and overuse volunteers.<sup>69</sup> The Commission heard that there is a need to recruit more volunteers.<sup>70</sup> Some police officers suggested that more volunteers could be recruited at universities, Rotary and Lions Clubs.<sup>71</sup> Another suggestion was that the pool of volunteers could be expanded by allowing retired police officers to act as a support person.<sup>72</sup>
- 6.40 The Commission received a range of responses to the issues of remuneration and reimbursement for support persons. Some people suggested that remuneration was a means of attracting and retaining volunteers.<sup>73</sup> Others supported remuneration as a means of quality control,<sup>74</sup> accountability<sup>75</sup> and ensuring that volunteers attend interviews at all times of the night.<sup>76</sup> Some people argued that the lack of remuneration leads to volunteer fatigue.<sup>77</sup> On the other hand, many existing volunteers supported the role remaining a voluntary one.<sup>78</sup> As one participant said, ‘volunteers undertake such a role for the satisfaction of the work they do rather than for money’.<sup>79</sup>
- 6.41 The Office of the Public Advocate independent third person program operates on an honorarium system determined by the number of interviews attended by the volunteer over a 12-month period.<sup>80</sup> The Commission also understands that some Community Justice Panel programs have a call-out fee for panel members to attend police stations to support Aboriginal young people in custody in police interviews.<sup>81</sup>
- 6.42 In the Commission’s view, reimbursement of expenses or an honorarium should be considered in order to attract new volunteers and retain existing volunteers in the proposed support person scheme. Reimbursement or an honorarium would recognise that support persons contribute more than time to the role, such as financial costs of transport to and from police stations. As with the Office of the Public Advocate scheme, only active volunteers should receive any form of payment for expenses.

## RECOMMENDATION

18. The Secretary of the Department of Justice should devise and conduct training programs for support persons.

- 51 *Department of Public Prosecutions v Toomalatai* (2006) 13 VR 319 (‘Toomalatai’).
- 52 Ibid 321 [12].
- 53 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 503, Recommendation 212.
- 54 Consultations 1 (YRIPP Metro South East), 4 (Victoria Police Hume), 5 (Brad Boon—VALS), 6 (Berry Street Hume), 7 (YRIPP Shepparton), 8 (Judge Grant and Magistrate Power—Children’s Court of Victoria), 9 (Victoria Police Geelong), 10 (YRIPP Metro East), 11 (Victoria Police Metro East), 12 (Victoria Police Bairnsdale), 13 (Jim Barritt—YRIPP), 14 (Maria Van Der Burgt and John Fox), 15 (John Wadsley—VLA), 16 (Victoria Police Gippsland), 17 (Ricky Morris—RAJAC Gippsland), 19 (YRIPP Metro West), 20 (CAHABPS and Youth Justice Unit), 22 (YRIPP Metro North), 23 (Whitelion), 24 (YRIPP, YACVic and CMY), 25 (VLA), 31 (Victoria Police Centre), 32 (Victoria Police Mallee); submissions 5 (Anonymous), 6 (Daniel Taylor), 7 (John A Fox), 8 (Dandenong Group of Honorary Justices), 9 (Knox Honorary Justices), 11 (Anonymous), 12 (OPP), 15 (OPA), 16 (Anonymous), 17 (VALS), 18 (Maria Van Der Burgt), 20 (CMY and YACVic), 21 (FCLC), 24 (Anonymous).
- 55 Consultations 19 (YRIPP Metro West), 20 (CAHABPS and Youth Justice Unit); submission 18 (Maria Van Der Burgt).
- 56 Submission 20 (CMY and YACVic).
- 57 Submission 17 (VALS).
- 58 Submissions 6 (Daniel Taylor), 19 (Victoria Police Centre), 20 (CMY and YACVic), 21 (FCLC).
- 59 Consultation 1 (YRIPP Metro South East).
- 60 Consultation 2 (YEH).
- 61 Consultation 6 (Berry Street Hume); submission 17 (VALS).
- 62 Submission 15 (OPA).
- 63 Ibid.
- 64 Ibid.
- 65 Consultation 1 (YRIPP Metro South East); submissions 9 (Knox Honorary Justices); 18 (Marie Van Der Burgt).
- 66 Consultation 32 (Victoria Police Mallee).
- 67 Submission 19 (Victoria Police Centre).
- 68 See Chapter 3 under the heading ‘Regional and rural areas’, [3.76]–[3.79].
- 69 Consultation 28 (Victoria Police Flemington).
- 70 Consultation 9 (Victoria Police Geelong).
- 71 Consultation 16 (Victoria Police Gippsland).
- 72 Consultation 33 (Victoria Police Dandenong).
- 73 Consultations 4 (Victoria Police Hume 2), 9 (Victoria Police Geelong), 12 (Victoria Police Bairnsdale), 16 (Victoria Police Gippsland).
- 74 Consultations 16 (Victoria Police Gippsland), 20 (CAHABPS and Youth Justice Unit).
- 75 Consultation 20 (CAHABPS and Youth Justice Unit).
- 76 Consultations 28 (Victoria Police Flemington), 33 (Victoria Police Dandenong).
- 77 Consultations 17 (Ricky Morris—RAJAC Gippsland), 16 (Victoria Police Gippsland).
- 78 Consultations 1 (YRIPP Metro South East), 7 (YRIPP Shepparton), 12 (Victoria Police Gippsland), 29 (Youthlaw); submission 11 (Anonymous).
- 79 Consultation 1 (YRIPP Metro South East).
- 80 Consultation 30 (OPA); submission 15 (OPA).
- 81 Consultation 17 (Ricky Morris—RAJAC Gippsland).

# 6

## Chapter 6

# Developing and Administering the Scheme

### ACCREDITATION FOR VOLUNTEERS

- 6.43 There is no formal accreditation for volunteers who currently support young people in police interviews. However, YRIPP volunteers who successfully complete training receive a certificate of completion.<sup>82</sup>
- 6.44 Many volunteers favoured accreditation.<sup>83</sup> Others did not support a compulsory accreditation program, and felt an 'opt-in', non-mandatory scheme would be preferable.<sup>84</sup> YRIPP volunteers in Shepparton were of the view that more accountability comes with accreditation.<sup>85</sup>
- 6.45 The Commission believes that support persons should be trained. Those people who successfully complete the training program should be accredited. As the circumstances that arose in *Toomalatai*<sup>86</sup> illustrate, the issues at stake when the police question a young person in custody can be so significant that it is no longer appropriate to rely upon the services of well-meaning, but untrained, people. Accreditation would ensure that only trained volunteers are included in the pool of support persons as proposed in Recommendation 6.

### RECOMMENDATION

- 19. The Secretary of the Department of Justice should accredit people who have successfully completed a training program for support persons.

### MINIMUM STANDARDS

- 6.46 YRIPP requires new volunteers to undertake police checks and Working with Children Checks.<sup>87</sup> There are no minimum standards for volunteers servicing non-YRIPP stations, or YRIPP stations who choose to select a volunteer outside of the YRIPP program. Many in consultations were supportive of minimum standards for support persons, such as a Working with Children Check.<sup>88</sup>
- 6.47 The *Working with Children Act 2005* (Vic) implemented a new process for determining whether a person is suitable to undertake child-related work.<sup>89</sup> Child-related work includes work engaged in as a volunteer that usually involves regular contact with a child in connection with a service, body, place or activity listed in section 9(3).<sup>90</sup> While the service of supporting young people in police interviews is not expressly referred to in section 9(3), it can be argued that it does fall within the broad category of 'counselling or other support services for children'.<sup>91</sup>
- 6.48 The Commission understands that a pilot scheme requiring all support persons on a station list to have a Working with Children Check is currently underway.
- 6.49 The Commission believes that under the proposed new scheme, there should be minimum standards required of support persons, such as a Working with Children Check, in order to ensure that volunteers are suitable people to support young people in police interviews. When devising minimum standards for the selection and accreditation of support persons, the Secretary of the Department of Justice should consider the selection criteria and training process developed by YRIPP.<sup>92</sup>

## RECOMMENDATION

20. The Secretary of the Department of Justice should devise minimum standards for the selection and accreditation of the volunteer support person, which should include a Working with Children Check.

## YOUNG PEOPLE WITH A COGNITIVE IMPAIRMENT

- 6.50 In Chapter 3, the Commission described the independent third person program coordinated by the Office of the Public Advocate and the relevant entries in the Victoria Police Manual.<sup>93</sup> The Office of the Public Advocate trains, registers and coordinates volunteers to assist whenever police are interviewing a person who has an impaired mental state, regardless of age.<sup>94</sup>
- 6.51 A number of people raised the issue of supporting young people with cognitive impairments in police interviews.<sup>95</sup> Some police told the Commission that police try to avoid conducting an interview until a young person with a cognitive impairment understands the process and his or her rights.<sup>96</sup> Consultation participants and submissions also highlighted the differences between the skills, roles and responsibilities of independent third persons and support persons.<sup>97</sup>
- 6.52 The Office of the Public Advocate identified gaps in the current system for providing support persons for young people with and without cognitive impairments, and made a number of recommendations for reform.<sup>98</sup> The Public Advocate submitted that

*the skills required to perform the role of assisting people with cognitive disabilities or mental illness to communicate with police (while being cognisant of the person's rights), are quite specialised, and are not necessarily possessed in the care of young people even by their guardians or parents. OPA therefore submits that the presence of an independent third person should be mandatory where a person with a cognitive disability or a mental illness is being interviewed by police. This should be so regardless of whether a parent or guardian is also present.*<sup>99</sup>
- 6.53 The Commission believes that consideration should be given to the special needs of young people with cognitive disabilities and with a mental illness when they are questioned in police custody. Young people with an impaired mental state are particularly vulnerable and disadvantaged when taken into police custody.
- 6.54 The Secretary of the Department of Justice and the Office of the Public Advocate are well placed to devise appropriate procedures to safeguard the interests of this group of young people.

## RECOMMENDATION

21. The Secretary of the Department of Justice should liaise with the Public Advocate to devise procedures to support young people in custody with a cognitive impairment as a result of a disability during police questioning and investigation.

- 82 Centre for Multicultural Youth, *Youth Referral and Independent Person Program: Volunteer Application Kit* (2010) 5 ('YRIPP Volunteer Application Kit').
- 83 Consultations 20 (CAHABPS and Youth Justice Unit), 24 (YRIPP, YACVic and CMY), 26 (YRIPP Inner City and Bayside).
- 84 Consultation 24 (YRIPP, YACVic and CMY).
- 85 Consultation 7 (YRIPP Shepparton).
- 86 *Toomalatai* (2006) 13 VR 319.
- 87 Centre for Multicultural Youth, *YRIPP Volunteer Application Kit*, above n 82, 5–6.
- 88 Consultations 7 (YRIPP Shepparton), 6 (Berry Street Hume), 9 (Victoria Police Geelong), 10 (YRIPP Eastern Metropolitan), 20 (CAHABPS and Youth Justice Unit), 26 (YRIPP Inner City and Bayside), 28 (Victoria Police Flemington), 33 (Victoria Police Dandenong).
- 89 *Working with Children Act 2005* (Vic) ss 1(1), 8(1).
- 90 *Ibid* s 9(1)(c).
- 91 See, eg, *ibid* s 9(3)(n)—counselling or other support services for children.
- 92 See Chapter 3 under the heading 'Selection criteria, process and training', [3.13]–[3.20].
- 93 See Chapter 3 under the heading 'Young people with impaired mental state' [3.61]–[3.63]; Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Interviewing Specific Categories of Person', from CD-ROM current at 30 August 2010, 3.
- 94 Office of the Public Advocate, *Independent Third Person Program: Brochure* (2009); submission 15 (OPA).
- 95 Submissions 5 (Anonymous), 15 (OPA), 19 (Victoria Police Centre), 20 (CMY and YACVic), 21 (FCLC); consultations 3 (Victoria Police Hume 1), 8 (Judge Grant and Magistrate Power—Children's Court of Victoria), 22 (YRIPP Metro North), 29 (Youthlaw), 30 (OPA), 32 (Victoria Police Mallee), 33 (Victoria Police Dandenong).
- 96 Consultation 3 (Victoria Police Hume 1).
- 97 Submission 15 (OPA); consultations 24 (YRIPP, YACVic and CMY), 33 (Victoria Police Dandenong).
- 98 Submission 15 (OPA).
- 99 *Ibid*.

# 6

## Chapter 6

# Developing and Administering the Scheme

## PROTOCOLS FOR REPORTING POLICE MISCONDUCT

- 6.55 Young people, like all other Victorians, are entitled to make a complaint about the misconduct of a member of Victoria Police.
- 6.56 At present, there are a number of different ways of making a complaint about police misconduct associated with questioning of a young person in custody:
- The Victoria Police Manual directs that at the completion of a police interview, a supervisor should ask the young person whether he or she was satisfied with the way that they were treated.<sup>100</sup> The support person should also be asked the same question.<sup>101</sup>
  - A person may lodge a complaint at a local police station after the interview in person, by telephone, or in writing.<sup>102</sup>
  - The Victoria Police website includes an online compliments and complaints form in regards to the action or behaviour of a member of Victoria Police.<sup>103</sup> Individuals may complete the form anonymously or identify themselves.<sup>104</sup>
  - The Police Conduct Unit (Complaints and Compliments) of the Ethical Standards Department receives complaints about police conduct and actions.<sup>105</sup>
  - The Office of Police Integrity receives complaints about serious misconduct by Victoria Police members via all communication methods, but not in person.<sup>106</sup> In most cases, complaints must be in writing.<sup>107</sup>
- 6.57 A young person's decision about when and how to make a complaint may depend on 'a number of factors, including the seriousness of the allegations and the young person's personal circumstances'.<sup>108</sup> Young people consulted at the Youth Enterprise Hub had different views about whether they should make complaints themselves or request a support person to do so on their behalf.<sup>109</sup> A young person participating in the Whitelion consultation reported they had previously made a complaint about police misconduct and found the process intimidating.<sup>110</sup>
- 6.58 A young person may not always wish to make a complaint about police misconduct because of fear of reprisals. In particular, in rural or regional areas, the identity of the complainant may become apparent following a complaint and the young person may fear retribution. VALS submitted that, 'it needs to be recognised that young people must be afforded support in pursuing complaints against police'.<sup>111</sup> VALS stated:

*The reluctance of a young person to make a complaint against a police member(s) is a big problem. There is a fear that doing so will attract more trouble for the young person and that their claims will not be believed against the word of a police officer. This issue is further complicated by the act of police requiring the young person who has been in custody to sign the attendance register upon leaving the station to state that they were satisfied with their treatment.*

*Young people leaving the custody of police are inclined to be cooperative at this point in order to not further delay their release from the station. They may also be inclined to sign that they were satisfied with their treatment while in the care of police, even if this was not the case, due to fear of ramifications either at the time, or fear of being targeted by the police in the future. Furthermore, if a young person signs the attendance register to say that they were satisfied with their treatment while in police care to fulfil the above mentioned objective, this can seriously reduce the young person's chances of filing a successful complaint against police at a later time.<sup>112</sup>*

- 6.59 The role of a support person who witnesses or is aware of police misconduct was one of the most contentious issues raised with the Commission.<sup>113</sup> According to CMY and YACVic, a requirement to report allegations regardless of the young person's wishes could result in a breakdown of trust between the support person and the young person.<sup>114</sup> YRIPP volunteers disagreed about whether support persons should be legally required to report police misconduct against the wishes of a young person.<sup>115</sup>
- 6.60 CMY and YACVic recommended 'that there should be a clear statement in statute relating to the duty of a support person in cases of alleged police misconduct'.<sup>116</sup> The Commission believes that the three key agencies—the Office of the Child Safety Commissioner, Chief Commissioner of Police and the Office of Police Integrity—should first devise protocols for reporting allegations of police misconduct associated with police questioning of a young person in custody before this complex and sensitive issue is dealt with in legislation.
- 6.61 The protocols should clarify the responsibilities of a support person who becomes aware of police misconduct during an interview with a young person, and provide guidance about what should happen when the young person does not wish to make a formal complaint. It will also be necessary to determine how any new processes would fit with existing complaint handling mechanisms within Victoria Police, the Ethical Standards Department and the Office of Police Integrity.

## RECOMMENDATION

22. The Child Safety Commissioner, in consultation with the Chief Commissioner of Police and the Office of Police Integrity, should:
- devise a protocol for reporting allegations made by young people to support persons or made by support persons of police misconduct during questioning or investigation of a young person
  - periodically review and refine this protocol with a view to improving the scheme.

## A CODE OF CONDUCT FOR SUPPORT PERSONS

- 6.62 Support persons, like police officers, should be required to behave appropriately when the police are questioning a young person in custody. The standards of behaviour expected of support persons should be easily accessible by all interested people. It should also be possible to make a complaint to a responsible agency when an interested person believes that a support person has behaved inappropriately.
- 6.63 YRIPP currently deals with informal complaints about the performance of a volunteer. YRIPP administrators may seek to resolve the matter by discussion and recommend appropriate action for the volunteer, such as reading or additional training.<sup>117</sup> The YRIPP statewide coordinator and management team may terminate a volunteer's involvement 'in the program on the basis of a belief that the individual has not fulfilled, or is likely not to fulfil, their role appropriately'.<sup>118</sup>
- 6.64 At present, there is no mechanism for monitoring and reviewing the conduct of a non-YRIPP support person. If the police are dissatisfied with the conduct of a non-YRIPP support person, they might decide not to call YRIPP again.

100 Victoria Police, *Victoria Police Manual: Policy Rules*, 'Persons in Police Care or Custody', from CD-ROM current at 30 August 2010, 11; Centre for Multicultural Youth, *Youth Referral and Independent Person Program: Independent Person Procedure Manual* (2010) 43.

101 Ibid.

102 Victoria Police, *Community Service Charter*, above n 21, 3.

103 Victoria Police *Compliments and Complaints* (18 November 2008) <[http://www.police.vic.gov.au/content.asp?Document\\_ID=11933](http://www.police.vic.gov.au/content.asp?Document_ID=11933)>.

104 Ibid.

105 Victoria Police, *Community Service Charter*, above n 21, 2. The Ethical Standards Department is discussed above at [6.11].

106 Office of Police Integrity, *How to Make a Complaint*, <<http://www.opi.vic.gov.au/index.php?i=46&m=28&t=1>>. The Office of Police Integrity is discussed above at [6.9] and [6.12].

107 Office of Police Integrity, *How to Make a Complaint*, <<http://www.opi.vic.gov.au/index.php?i=46&m=28&t=1>>.

108 Centre for Multicultural Youth, *Youth Referral and Independent Person Program: Independent Person Procedure Manual* (2010) 43, 53 ('YRIPP Manual').

109 Consultation 2 (YEH).

110 Consultation 23 (Whitelion).

111 Submission 17 (VALS).

112 Ibid.

113 Submissions 17 (VALS), 20 (CMY and YACVic); consultations 11 (Victoria Police Metro East), 23 (Whitelion), 24 (YRIPP, YACVic and CMY).

114 Consultation 24 (YRIPP, YACVic and CMY); submission 20 (CMY and YACVic).

115 Submission 20 (CMY and YACVic). The survey found that 35.3 per cent supported independent persons being legally required to report allegations of police misconduct by young persons in police stations even if it is against the young person's wishes, 51.5 per cent supported independent persons being legally required to maintain the young person's confidentiality in such circumstances and 13.2 per cent were unsure.

116 Submission 20 (CMY and YACVic).

117 Centre for Multicultural Youth, *YRIPP Manual*, above n 108, 76.

118 Ibid 65.

# Developing and Administering the Scheme

- 6.65 As discussed in Chapter 2 and recommended in this report, the courts can exclude evidence obtained during a police interview if a support person fails to perform his or her role appropriately.<sup>119</sup> This is clearly, however, an accountability measure of last resort. Additional safeguards are necessary to ensure that support persons conduct themselves appropriately.
- 6.66 The Commission believes that a code of conduct for support persons is necessary. The code should include a protocol for dealing with instances of alleged misconduct. The Child Safety Commissioner should be responsible for devising the code in consultation with the Chief Commissioner of Police.

### RECOMMENDATION

23. The Child Safety Commissioner, in consultation with the Chief Commissioner of Police, should devise a Code of Conduct for support persons and a protocol for reporting alleged misconduct by support persons.

<sup>119</sup> See, eg, *Toomalatai* (2006) 13 VR 319. This case is discussed at length in Chapter 2.



## Chapter 7

# Support for Young People in the Bail Process

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- 115 Commission's views

## Supporting Young People in the Bail Process

### INTRODUCTION

- 7.1 This chapter considers the interaction between two statutory provisions designed to assist young people in custody at different stages of the criminal justice process. As discussed in earlier chapters, section 464E of the *Crimes Act 1958* (Vic) (Crimes Act) deals with support for young people in custody during police investigation.<sup>1</sup> Section 346 of the *Children, Youth and Families Act 2005* (Vic) (CYF Act) contains provisions designed to support a young person charged with an offence during the bail process.<sup>2</sup> The responsibilities of the two separate agencies that provide support to young people at these different times are also examined.
- 7.2 As discussed in earlier chapters, the Youth Referral and Independent Person Program (YRIPP) is responsible for providing independent persons to support a young person in custody during police questioning when a parent or guardian is unavailable.
- 7.3 If a young person in custody is charged with an offence after being questioned by the police, the question of bail will arise. In recognition of the fact that vulnerable young people also need support at this time, the CYF Act requires that a parent or guardian of the young person in custody, or an independent person, be present during some bail procedures.<sup>3</sup>
- 7.4 The Central After Hours and Bail Placement Service (CAHABPS), operated by the Department of Human Services (DHS), is responsible for providing independent persons to support a young person in custody during the bail process when a parent or guardian is unavailable.
- 7.5 The support that an independent person might be able to offer a young person during the bail process is very different to the role of an independent person during police questioning. Some difficulties have arisen in practice, however, because of the lack of clarity surrounding these two different roles. Independent persons who attend police stations to support a young person in custody during police questioning are sometimes asked to assist a young person in custody to obtain bail and to act as a surety, or give an undertaking that the young person will answer bail, when there is no other person who will accept this responsibility.

### CURRENT LAW: INDEPENDENT PERSONS AND THE BAIL PROCESS

- 7.6 It is useful to consider the relevant stages of the criminal investigation process in order to understand how the roles of an independent person present during police questioning and during the bail process differ. While the provisions in the Crimes Act concerning police investigation powers apply to young people, the CYF Act also deals with custody and investigation of young people, as well as some aspects of bail.<sup>4</sup>

### QUESTIONING A PERSON IN CUSTODY

- 7.7 The police are required to take one of three steps within a reasonable time<sup>5</sup> of taking a person into custody for an offence. Those steps are to:
  - release the person unconditionally
  - release the person on bail
  - take the person before a bail justice of the Magistrates' Court for the purposes of a bail determination.<sup>6</sup>
- 7.8 Prior to taking one of these steps, the police may question a person 'in custody'<sup>7</sup> during the reasonable time that elapses before the person must be released unconditionally or a bail determination is made.<sup>8</sup> A parent, guardian or independent person must be present during any police questioning of a person under 18 years of age.<sup>9</sup>

## A CHARGE

7.9 Criminal proceedings commence when a person is charged with an offence. A charge is a formal allegation that a person has committed a crime. That allegation is written in a 'charge sheet', which is filed in the Magistrates' Court<sup>10</sup> or, in the case of people under the age of 18, the Children's Court.<sup>11</sup> The police have a discretionary power to charge a person by summons<sup>12</sup> or to arrest them and lay a charge.

## BAIL

7.10 If police decide not to proceed by way of summons, and a young person is arrested and charged, a decision must be made about bail. The young person must be either released on bail pending trial, or kept in custody until a court appearance—known as being 'remanded in custody'.<sup>13</sup>

7.11 In the vast majority of cases, the police make bail decisions for both children and adults.<sup>14</sup> However, police only have the power to *grant* bail for children—decisions to remand a child in custody can only be made by the Children's Court or a bail justice.<sup>15</sup> If bail is granted, an accused person must agree in writing to appear at the next court hearing. This is called an 'undertaking'.<sup>16</sup> In some cases there will be additional conditions. They include:

- release on the accused's own undertaking that he or she will appear at the next court hearing, with a deposit of monetary or other security of stated value
- release of the accused on another person (a 'surety')<sup>17</sup> entering into an undertaking that the accused will appear at the next court hearing and promising to pay a nominated amount of money if the accused does not appear at their next court hearing. No deposit is required
- release of the accused on both an undertaking with a surety and a deposit.<sup>18</sup>

1 *Crimes Act 1958* (Vic) s 464E.

2 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8), (10). The *Bail Act 1977* (Vic) is also relevant, and takes precedence over the *Children, Youth and Families Act 2005* (Vic) where there is an inconsistency between the two: *Children, Youth and Families Act 2005* (Vic) 346(6). However, the *Bail Act 1977* (Vic) does not make any special provisions for children with respect to the granting of bail—this is done by the *Children, Youth and Families Act 2005* (Vic). For further discussion of the interaction between the *Bail Act 1977* (Vic) and the *Children, Youth and Families Act 2005* (Vic), see Victorian Law Reform Commission, *Review of the Bail Act: Final Report*, Report No 13 (2007) 155.

3 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).

4 The *Children, Youth and Families Act 2005* (Vic) provides that, subject to the operation of s 346(1) of the *Children, Youth and Families Act 2005* (Vic), certain provisions of the *Crimes Act 1958* (Vic) apply to the custody and investigation of a child: *Children, Youth and Families Act 2005* (Vic) s 346(1). The applicable *Crimes Act* provisions include s 464(1), which provides a definition of 'in custody' for the purposes of criminal procedure: *Crimes Act 1958* (Vic) s 464(1); *Children, Youth and Families Act 2005* (Vic) s 346(1).

5 This term is not defined in the legislation.

6 *Crimes Act 1958* (Vic), s 464A(1). Essentially the same requirements are imposed by s 346(2) of the CYF Act with the additional proviso that a reasonable time cannot exceed 24 hours.

7 The term 'in custody' is defined in s 464(1) of the *Crimes Act*. It includes being under arrest and being in the company of an investigating official to be questioned about involvement in the commission of an offence if there is sufficient evidence to justify arrest. See Chapter 2 for further discussion.

8 *Crimes Act 1958* (Vic), s 464A(2).

9 *Ibid* s 464E.

10 Christopher Corns and Steven Tudor, *Criminal Investigation and Procedure: The Law in Victoria* (Lawbook, 2009) [2.350].

11 *Children, Youth and Families Act 2005* (Vic) s 345–6.

12 A summons is a formal document which directs the accused person to appear at the Magistrates' Court on a specified date, at a specified time, to answer the charge: *Criminal Procedure Act 2009* (Vic) s 15.

13 Corns and Tudor, above n 10, [3.10].

14 Victorian Law Reform Commission, *Review of the Bail Act: Final Report*, Report No 13 (2007) 150.

15 *Children, Youth and Families Act 2005* (Vic) s 346(3)–(4).

16 *Bail Act 1977* (Vic) s 3 (definition of 'undertaking').

17 A person acting as a surety for an accused to be granted bail must be at least 18 years old and have real and/or personal property worth at least the amount of the bail: *Bail Act 1977* (Vic) s 9. The role of the surety is discussed further below, at [7.17]–[7.20] and [7.38]–[7.44].

18 *Bail Act 1977* (Vic) s 5(1). The *Bail Act 1977* (Vic) applies to the bail and remand of children and young people to the extent that it is not inconsistent with the *Children, Youth and Families Act 2005* (Vic): *Children, Youth and Families Act 2005* (Vic) s 346(6).

## Supporting Young People in the Bail Process

- 7.12 'Special' conditions may also be imposed on bail to ensure that an accused: surrenders him- or herself into custody, does not commit an offence while on bail, does not endanger members of the public and does not interfere with witnesses or otherwise obstruct the course of justice.<sup>19</sup> These conditions might include where the accused person must live or restrictions upon where that person may go.
- 7.13 The *Bail Amendment Act 2010* (Vic) will commence no later than 1 January 2011.<sup>20</sup> The Act repeals and replaces section 5 of the *Bail Act 1977* (Vic),<sup>21</sup> which currently governs the imposition of bail conditions. In addition to other changes, the Act alters the order in which conditions must be considered.<sup>22</sup> A court must now consider the conditions for release of an accused person on bail in the following order:
- on his or her own undertaking without any other condition
  - on his or her own undertaking with conditions about conduct
  - with a surety or deposit, with or without conditions about conduct.<sup>23</sup>

### Presence and role of an independent person during the bail process

- 7.14 In most circumstances, section 10 of the *Bail Act 1977* (Vic) empowers a senior member of the police force to grant bail to a person who has been arrested and charged with a criminal offence. When exercising that power in relation to a young person, the senior member of the police force must also comply with section 346(7) and (8) of the CYF Act which provide that:
- (7) If a member of the police force inquires into a case under section 10 of the Bail Act 1977, a parent or guardian of the child in custody or an independent person must be present.*
- (8) An independent person present in accordance with sub-section (7) may take steps to facilitate the granting of bail, for example, by arranging accommodation.<sup>24</sup>*
- 7.15 Like section 464E of the Crimes Act,<sup>25</sup> the CYF Act does not describe the role of the parent, guardian or independent person in the bail hearing. This lack of clarity affects both the process of granting bail under section 346(7) and (8) of the CYF Act,<sup>26</sup> and acting as the 'other person' in signing bail forms at the police station under section 346(10) of the CYF Act.<sup>27</sup>
- 7.16 In an earlier report,<sup>28</sup> the Commission considered the obligations imposed by section 346(7) of the CYF Act,<sup>29</sup> noting that an independent person is required only when *police* are making the bail decision and not for hearings before a bail justice.<sup>30</sup> In its earlier report, the Commission recommended that section 346(7) and (8) of the CYF Act be amended so that the requirements also apply to hearings before bail justices.<sup>31</sup> A young person charged with a criminal offence must be brought before the Children's Court, or a bail justice, within 24 hours of being taken into custody if not released within this period unconditionally or by a senior member of the police force acting pursuant to section 10 of the Bail Act.<sup>32</sup>
- 7.17 Section 346(10) of the CYF Act is also relevant. It states:
- If, in the opinion of the Court or bail justice or member of the police force, the child does not have the capacity or understanding to enter into an undertaking within the meaning of the Bail Act 1977, the child may be released on bail if the child's parent or **some other person** enters into an undertaking, in any amount which the Court or bail justice or member of the police force thinks fit, to produce the child at the venue of the Court to which the charge is adjourned or the court to which the child is committed for trial.<sup>33</sup>*

- 7.18 Under section 346(10) of the CYF Act,<sup>34</sup> the role of the young person's parent or 'some other person' is to act as surety for the accused young person if the Children's Court, bail justice or police officer believes that the young person is incapable of entering into an undertaking on their own. This person must be able to produce the child to a court on a nominated date.<sup>35</sup>
- 7.19 Entering into an undertaking in these circumstances means providing a guarantee in writing as a surety that the accused will appear before court at the next hearing and agreeing to forfeit a sum of money if the accused fails to do so.<sup>36</sup>
- 7.20 The reference in section 346(10)<sup>37</sup> to 'some other person' is not defined in the CYF Act and has created some confusion about whether the independent person who was present for the police interview should act as this 'other person'. While any person may take on this responsibility, it is inappropriate that the independent person present during a young person's police interview should be expected to risk the consequences of acting as surety if the young person does not answer bail.

## CURRENT PRACTICE: INDEPENDENT PERSONS AND THE BAIL PROCESS

### FACILITATING THE GRANTING OF BAIL

#### Central After Hours and Bail Placement Service

- 7.21 DHS operates a scheme for facilitating the granting of bail for young people under section 346(7) and (8) of the CYF Act.<sup>38</sup> Within DHS, youth justice units and CAHABPS provide support for young people who are subject to bail processes. Staffed by after-hours DHS employees,<sup>39</sup> CAHABPS provides a single point of contact for police in matters where police and a bail justice are considering remand of a young person or where bail accommodation is required outside business hours.<sup>40</sup> CAHABPS is integrated with the Streetwork Outreach Program, and each night someone is allocated to the role.<sup>41</sup> During business hours, police contact the regional youth justice unit within DHS.<sup>42</sup> This process is provided for in the Victoria Police Manual.<sup>43</sup>

- 19 *Bail Act 1977* (Vic) s 5(2).
- 20 *Bail Amendment Act 2010* (Vic) s 2.
- 21 *Ibid* s 8.
- 22 *Bail Act 1977* (Vic) s 5, as amended by *Bail Amendment Act 2010* (Vic) s 8.
- 23 *Ibid*.
- 24 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).
- 25 Which requires that a parent, guardian or independent person is present for police interviews of young people: *Crimes Act 1958* (Vic) s 464E.
- 26 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).
- 27 *Ibid* s 346(10).
- 28 *Review of the Bail Act: Final Report*, above n 14.
- 29 *Children, Youth and Families Act 2005* (Vic) s 346(7).
- 30 *Review of the Bail Act: Final Report*, above n 14, 151.
- 31 *Ibid*.
- 32 *Children, Youth and Families Act 2005* (Vic) s 346(2).
- 33 *Ibid* s 346(10) (emphasis added).
- 34 *Children, Youth and Families Act 2005* (Vic) s 346(10).
- 35 *Ibid*.
- 36 *Bail Act 1977* (Vic) s 3 (definition of 'undertaking').
- 37 *Children, Youth and Families Act 2005* (Vic) s 346(10).
- 38 *Ibid* s 346(7)–(8). These sections are set out at [7.14].
- 39 CAHABPS previously used some volunteers in regional areas, but the Commission understands that this has been phased out in favour of a telephone service.
- 40 Department of Human Services (Victoria), *Central After Hours and Bail Placement Service (CAHABPS)* (March 26 2010) <<http://www.cyf.vic.gov.au/youth-justice/library/fact-sheets/cahabps>> ('CAHABPS').
- 41 This person is available from 4 pm until 2 am, with another worker available to respond between 6 pm and 4 am: email from Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 20 September 2010.
- 42 Department of Human Services (Victoria), *CAHABPS*, above n 40. During business hours, there is a court advice worker at the Children's Court providing bail support. The daytime workers provide a similar assessment service to CAHABPS. An intensive bail support program is currently being piloted at the Melbourne Children's Court: telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.
- 43 Victoria Police, *Victoria Police Manual: Procedures and Guidelines*, 'Bail and Remand', from CD-ROM current at 30 August 2010, 11.

## Supporting Young People in the Bail Process

- 7.22 CAHABPS is a service that young people aged between 10 and 18 years may voluntarily access when subject to bail processes.<sup>44</sup> The Victoria Police Manual requires police to notify CAHABPS whenever remand of a young person is being considered and the young person is not legally represented before a bail justice.<sup>45</sup> In 2009, CAHABPS responded to 550 callouts—an average of 46 per month.<sup>46</sup>
- 7.23 The Victoria Police Manual provides that where a CAHABPS representative is to be present, that representative must be allowed access to the young person prior to the bail hearing.<sup>47</sup> In metropolitan areas, CAHABPS workers will attend the police station in person within CAHABPS service times.<sup>48</sup> CAHABPS is available over the phone in rural areas.<sup>49</sup>
- 7.24 CAHABPS representatives conduct an assessment of the young person's suitability for bail placement.<sup>50</sup> If placement is appropriate, the CAHABPS worker will place the young person in suitable accommodation.<sup>51</sup> The CAHABPS worker will inform the young person about the nature of the proceedings, their rights and responsibilities, and what they can expect if placement in the community is considered suitable.<sup>52</sup> CAHABPS can also refer the young person to youth and family referral services.<sup>53</sup>
- 7.25 The service operates not only in relation to hearings before a bail justice, but extends to locating appropriate accommodation for young people where police are not considering remand and are prepared to release the young person on bail, but the young person has no access to suitable accommodation.<sup>54</sup>
- 7.26 The CYF Act does not stipulate who can be an independent person for bail purposes.<sup>55</sup> Both the independent person present during the young person's police interview and the independent person present during the bail process provide support in the absence of a young person's parent or guardian. However, the two roles are quite different, requiring different skills. Despite this, the distinction between the interview and bail support roles is sometimes blurred in practice.<sup>56</sup>
- 7.27 Views expressed during consultations were that the independent person's role under section 346 of the CYF Act<sup>57</sup> is one for CAHABPS workers, rather than interview support persons, because of the function of finding appropriate accommodation for young people.<sup>58</sup>

### Restrictions on CAHABPS's service provision

#### Limitations on operating hours

- 7.28 CAHABPS provides a service that takes new referrals from 5 pm until 3 am on weekdays and 9.30 am to 3 am on weekends and public holidays.<sup>59</sup> During consultation, the Commission heard that difficulties sometimes arise in the hours outside of CAHABPS's service times. However, CAHABPS notes that there are very few young people subject to bail hearings outside of its service times.<sup>60</sup> The Commission was told that in these circumstances, police sometimes hold the young person until court opens at 9 am rather than proceeding with a bail justice hearing.<sup>61</sup>
- 7.29 If a young person is arrested outside of CAHABPS's service times, someone other than a CAHABPS worker may be asked to fill this 'gap', such as the independent person present for police questioning of a young person under section 464E of the Crimes Act.<sup>62</sup> A non-CAHABPS independent person is placed in a challenging position when required to facilitate bail without the clear guidelines or access to statutory services that a CAHABPS worker has access to. CAHABPS notes that independent persons who are present in interviews do not have the necessary qualifications to facilitate bail or find bail accommodation.<sup>63</sup> A number of non-CAHABPS independent persons also expressed concerns about facilitating bail under section 346(8) of the CYF Act.<sup>64</sup> Specific concerns are discussed below.<sup>65</sup>



7.30 In consultations, the Commission heard that volunteer independent persons encounter difficulties when CAHABPS is either unable to be contacted during nominated service hours or where CAHABPS can be contacted, but a representative does not attend the bail hearing.<sup>66</sup> This was described as particularly problematic in regional areas, where CAHABPS provide a telephone service only.<sup>67</sup>

### Optional nature of the service

7.31 As noted above, CAHABPS is an optional service that young people subject to the bail process may choose not to use.<sup>68</sup> Its operation relies on police officers to contact the service when a young person in custody is going to be subject to the bail process.<sup>69</sup>

7.32 At present, bail justices are under no obligation to call CAHABPS and may not always wait for the worker to arrive even when called.<sup>70</sup> This problem should have been remedied by the adoption of the bail justice roster, which provides that a bail justice should only be contacted once CAHABPS has been contacted and commenced an assessment.<sup>71</sup> However, CAHABPS notes that this requirement is not always complied with.<sup>72</sup> The Commission understands that there may also be a shortage of bail justices in some areas, resulting in young people being held overnight in police stations when no bail justice is able to attend.<sup>73</sup>

### Youth Referral and Independent Person Program

7.33 YRIPP currently provides training to volunteers in meeting the requirements of section 346(8) of the CYF Act<sup>74</sup> in relation to facilitating bail. However, the role of the independent person in the bail process appears to vary in practice. As noted by YRIPP's management agencies, CMY and YACVic:

*It is unclear whether DHS/CAHABPS is actually the Independent Person for the purposes of the bail hearing (as required by the legislation). CAHABPS/DHS are essentially part of the youth justice system and as such, make recommendations as to whether or not a person should receive bail or be remanded in custody. This differs from the notion of the Independent Person role which does not put forward views on appropriate actions and is intended as a support role for young people (in a similar manner to the support of a parent or guardian, albeit providing more information).<sup>75</sup>*

44 Department of Human Services (Victoria), CAHABPS, above n 40.

45 Victoria Police, 'Bail and Remand', above n 43, 11.

46 Email from Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 20 September 2010.

47 Victoria Police, 'Bail and Remand', above n 43, 11.

48 Department of Human Services (Victoria), CAHABPS, above n 40; telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.

49 Ibid.

50 Department of Human Services (Victoria), CAHABPS, above n 40.

51 Ibid.

52 Ibid.

53 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.

54 Department of Human Services (Victoria), CAHABPS, above n 40.

55 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).

56 Reasons for this are discussed below under the heading 'Restrictions on CAHABPS's service provision'.

57 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).

58 Consultation 20 (CAHABPS and Youth Justice Unit); meeting with Department of Human Services (Victoria), Youth Justice Unit, 10 November 2009.

59 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010. Note that while 3 am is the cut-off point for new referrals, the service operates until 4 am.

60 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010. According to CAHABPS, their busiest times are from about 5 pm until 8 pm.

61 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.

62 *Crimes Act 1958* (Vic) s 464E(1); Consultations 3 (Jim Barritt—YRIPP), 16 (Victoria Police Gippsland), 24 (YRIPP, YACVic and CMY).

63 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.

64 *Children, Youth and Families Act 2005* (Vic) s 346(8).

65 See below under the heading 'Commission's views'.

66 Consultations 3 (Victoria Police Hume 1), 13 (Jim Barritt—YRIPP).

67 Consultation 4 (Victoria Police Hume 2).

68 Department of Human Services (Victoria), CAHABPS, above n 40.

69 Victoria Police, 'Bail and Remand', above n 43, 11.

70 *Children, Youth and Families Act 2005* (Vic) s 346(7); consultation 20 (CAHABPS and Youth Justice Unit).

71 *Review of the Bail Act: Final Report*, above n 14, 155.

72 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.

73 Ibid.

74 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).

75 Submission 20 (CMY and YACVic).

## Supporting Young People in the Bail Process



- 7.34 The YRIPP Independent Person Procedure Manual (YRIPP Manual) provides that if CAHABPS is in attendance, the YRIPP volunteer is not required to stay for the bail hearing and 'will have fulfilled the [independent person] role at this time'.<sup>76</sup> The manual notes that YRIPP volunteers may stay if they are asked to by the young person, but may only do this if the CAHABPS representative agrees.<sup>77</sup> The Commission heard in consultation that sometimes CAHABPS asks the interview independent person to leave, but that bail justices are sometimes adamant that they stay.<sup>78</sup>
- 7.35 The YRIPP Manual also states that the YRIPP independent person should ask the police if they have contacted CAHABPS when they plan to contact a bail justice and have the young person remanded in custody.<sup>79</sup> If police do not contact CAHABPS, CAHABPS will accept a referral directly from the YRIPP independent person.<sup>80</sup>
- 7.36 The YRIPP Manual also provides that the YRIPP independent person has a role during the bail hearing outside CAHABPS's operating hours or where CAHABPS carries out an assessment over the phone in rural areas.<sup>81</sup> Where no CAHABPS representative is present, the YRIPP independent person should explain the bail and remand process to the young person.<sup>82</sup>
- 7.37 The YRIPP Manual provides that the YRIPP independent person must state that they are not there to advocate for the young person or provide an opinion on the granting of bail, but to assist the young person to understand the process.<sup>83</sup> Where a CAHABPS representative is absent, the YRIPP Manual states that the independent person can assist in arranging accommodation by making a referral to accommodation services.<sup>84</sup> The Commission understands that this intersection of the roles of CAHABPS and YRIPP is sometimes highly problematic in practice.<sup>85</sup>

### SIGNING BAIL CONDITION FORMS

- 7.38 When the police or a bail justice grant a young person bail, a number of documents must be completed, including an undertaking to answer bail.<sup>86</sup> If a police officer, bail justice or the Children's Court is not satisfied that the young person has sufficient capacity or understanding to enter into an undertaking on their own, their parent or 'some other person' must sign the bail undertaking.<sup>87</sup>
- 7.39 The documents that are required, who may sign them and where they are to be signed are matters of considerable confusion, as highlighted in the Commission's earlier report on the review of the *Bail Act 1977* (Vic).<sup>88</sup> Police involved in consultation for this report expressed different views about whether an independent person who was present for the interview could sign bail forms.<sup>89</sup>
- 7.40 As discussed, being a surety for bail involves significant responsibilities and obligations. For example, a surety may have to sign an undertaking that the accused will appear at the next court hearing and not breach the conditions of their bail, as well as agreeing to forfeit a nominated amount of money if the accused person fails to answer bail.<sup>90</sup> While a parent may be willing and able to make such promises on behalf of a young person, an independent person is ill equipped to so.<sup>91</sup>
- 7.41 YRIPP trains its volunteers not to sign any bail forms under section 346(10) of the CYF Act.<sup>92</sup> The YRIPP manual states that 'Under no circumstances should a YRIPP Independent Person sign [the] undertaking of bail. This would make you responsible for ensuring the young person's attendance at court'.<sup>93</sup>

- 7.42 During consultations, there was considerable confusion as to who could sign the form in the absence of a parent or guardian. Some YRIPP independent persons were uncertain about what was required of them in these circumstances.<sup>94</sup> Some stated that they had signed bail forms in the past when asked to do so and then arranged for transport for the young person to get home.<sup>95</sup> Others felt this was entirely inappropriate, as the YRIPP independent person would be unable to ensure that the young person would appear before court when required.<sup>96</sup>
- 7.43 It is CAHABPS's policy that their workers do not sign bail forms.<sup>97</sup> CAHABPS notes that when a young person is in out-of-home care, it would most likely be the placement coordinator or someone not affiliated with CAHABPS who signs.<sup>98</sup>
- 7.44 A number of YRIPP independent persons stated in consultations that they had signed bail forms as a witness only, and had clearly noted on the form that they were signing only as a witness and not in the capacity of the young person's parent.<sup>99</sup> Police confirmed this practice, with participants in one police consultation stating that there should be a place on the bail form for the independent person to sign as a witness and confirm that the young person understood what was happening.<sup>100</sup>

## COMMISSION'S VIEWS

- 7.45 There is significant uncertainty surrounding the role of an independent person who is present when a bail decision is being made in relation to a young person in custody. This uncertainty is directly attributable to the lack of clarity in the relevant parts of section 346 of the CYF Act.<sup>101</sup>
- 7.46 In practice, some independent persons who attend police stations to assist a young person in custody during police questioning are asked to play the role of the independent person during the bail process. Some of these people have not been trained to assist with the bail process and do not have access to information about emergency accommodation facilities that may be an important consideration when bail decisions are made. In addition, some people are unfairly asked to act as a surety for a young person or give an undertaking on their behalf.
- 7.47 It is apparent that while the hours of the CAHABPS's service are restricted, gaps will continue to exist when no appropriate person is available to facilitate bail for young people. Some of the current difficulties could be overcome by extending the CAHABPS service.<sup>102</sup> In addition, changing the name of the supportive adult who must be present if a young person is questioned by the police when a parent or carer is unavailable from 'independent person' to 'support person', as recommended in Chapter 5,<sup>103</sup> might provide clearer delineation between the role of support persons in police interviews under the Crimes Act<sup>104</sup> and independent persons in facilitating bail under the CYF Act.<sup>105</sup>
- 7.48 Greater clarity is also required in relation to who should act as 'some other person' for the signing of bail forms in the absence of a young person's parent or guardian.<sup>106</sup> YRIPP and CAHABPS workers should not be expected to take on the responsibility of guaranteeing that a young person will appear before court to answer bail.

- 76 Centre for Multicultural Youth, *Youth Referral and Independent Person Procedure Manual* (2010) 47 (YRIPP Manual).
- 77 Ibid.
- 78 Consultation 10 (YRIPP Metro East).
- 79 Centre for Multicultural Youth, *YRIPP Manual*, above n 76, 48.
- 80 Ibid.
- 81 Ibid 49.
- 82 Ibid.
- 83 Ibid 50.
- 84 Ibid.
- 85 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.
- 86 *Bail Act 1977* (Vic), ss5(1)(a) and 6.
- 87 *Children, Youth and Families Act 2005* (Vic) s 346(10).
- 88 *Review of the Bail Act: Final Report*, above n 14.
- 89 Consultation 11 (Victoria Police Metro East).
- 90 *Bail Act 1977* (Vic) s 5(1).
- 91 For further information on bail undertakings by parents and 'other persons' under the *Children, Youth and Families Act 2005* (Vic) s 346(10), see *Review of the Bail Act: Final Report*, above n 14, 161–2.
- 92 *Children, Youth and Families Act 2005* (Vic) s 346(10); Centre for Multicultural Youth, *YRIPP Manual*, above n 76 50.
- 93 Centre for Multicultural Youth, *YRIPP Manual*, above n 76, 50.
- 94 Consultations 7 (YRIPP Shepparton), 10 (YRIPP Metro East), 11 (Victoria Police Metro East).
- 95 Consultation 7 (YRIPP Shepparton).
- 96 Ibid.
- 97 Telephone conversation with Angela Kambouris, Manager, Central After Hours and Bail Placement Service, 14 September 2010.
- 98 Ibid.
- 99 Consultations 7 (YRIPP Shepparton), 10 (YRIPP Metro East).
- 100 Consultation 11 (Victoria Police Metro East).
- 101 *Children, Youth and Families Act 2005* (Vic) s 346.
- 102 This is discussed above under the heading 'Limitations on operating hours', [7.28]–[7.30].
- 103 See Chapter 5 discussion at [5.34].
- 104 *Crimes Act 1958* (Vic) s 464E.
- 105 *Children, Youth and Families Act 2005* (Vic) s 346(7)–(8).
- 106 Ibid s 346(10).

## Supporting Young People in the Bail Process

7.49 The independent person's role under section 346(7) and (8) of the CYF Act<sup>107</sup> requires further consideration. The requirement in section 346(10)<sup>108</sup> that 'some other person' give an undertaking that a young person will answer bail when the young person does not have the capacity to give the undertaking, and there is no parent or guardian available to do so, also needs to be clarified. The Commission recommends that the Secretary of the Department of Justice undertake these tasks as part of the Bail Implementation Project.

<sup>107</sup> Ibid s 346(7)–(8).

<sup>108</sup> Ibid s 346(10).

### RECOMMENDATION

24. The role of independent persons under section 346 of the *Children, Youth and Families Act 2005* (Vic) should be considered by the Secretary of the Department of Justice as part of the Bail Implementation Project.

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## Appendix A SUBMISSIONS

SUBMISSIONS	
1	Confidential
2	Confidential
3	Confidential
4	Stephen Harris—justice of the peace and bail justice
5	Anonymous
6	Daniel Taylor
7	John Fox—justice of the peace and bail justice
8	Dandenong Group of Honorary Justices
9	Knox Honorary Justices
10	Fran Frost—justice of the peace
11	Anonymous
12	Office of Public Prosecutions Victoria
13	Anonymous
14	Anonymous
15	Office of the Public Advocate
16	Anonymous
17	Victorian Aboriginal Legal Service Co-operative Limited
18	Maria Van Der Burgt—justice of the peace
19	Victoria Police Centre
20	Centre for Multicultural Youth and Youth Affairs Council of Victoria
21	Federation of Community Legal Centres (Vic) Inc
22	Uniting Care Cutting Edge
23	Confidential
24	Anonymous



## Appendix B CONSULTATIONS

CONSULTATIONS	
1	YRIPP South Eastern Metropolitan
2	Youth Enterprise Hub
3	Victoria Police Hume region (Bright, Wodonga, Myrtleford, Wangaratta)
4	Victoria Police Hume region (Shepparton, Mooroopna, Yarrawonga)
5	Brad Boon—Client Service Officer, Victorian Aboriginal Legal Service
6	Berry Street (Hume)
7	YRIPP Shepparton
8	Judge Paul Grant and Magistrate Peter Power—Children’s Court of Victoria
9	Victoria Police Geelong
10	YRIPP Eastern Metropolitan
11	Victoria Police Eastern Metropolitan region (Box Hill, Glen Waverley, Boroondara)
12	Victoria Police Bairnsdale
13	Jim Barritt—YRIPP Regional Coordinator Eastern Victoria
14	Maria Van Der Burgt (independent person and independent third person) and John Fox (justice of the peace and bail justice)
15	John Wadsley—Victoria Legal Aid (Gippsland)
16	Victoria Police Gippsland region (Traralgon, Bairnsdale)
17	Ricky Morris—Regional Aboriginal Justice Advisory Committee (Gippsland)
18	Confidential
19	YRIPP Western Metropolitan
20	Department of Human Services Central After Hours Bail and Placement Service and Youth Justice Unit
21	Honorary Justices roundtable
22	YRIPP Northern Metropolitan
23	Whitelion
24	YRIPP, Youth Affairs Council of Victoria and Centre for Multicultural Youth
25	Victoria Legal Aid
26	YRIPP Inner City and Bayside
27	Sivvy Orr
28	Victoria Police Flemington
29	Youthlaw
30	Office of the Public Advocate
31	Victoria Police Centre
32	Victoria Police Mallee region (Mildura, Robinvale and Ouyen)
33	Victoria Police Dandenong

# Appendix C

## CURRENT LAW IN OTHER AUSTRALIAN JURISDICTIONS

	VICTORIA	NEW SOUTH WALES	QUEENSLAND	SOUTH AUSTRALIA
<b>Legislation</b>	<i>Crimes Act 1958</i> (Vic)	<i>Children (Criminal Proceedings) Act 1987</i> (NSW)  <i>Law Enforcement (Powers and Responsibilities) Regulation 2005</i> (NSW)	<i>Police Powers and Responsibilities Act 2000</i> (Qld)  <i>Police Powers and Responsibilities Regulation 2000</i> (Qld)	<i>Young Offenders Act 1993</i> (SA)
<b>Terminology in legislation</b>	'independent person'	'support person'	'support person'	'adult nominated by the child'
<b>Requirement for support person<sup>1</sup></b>	if a person is in custody suspected of having committed an offence and is under the age of 18, an investigating official must not question that young person or carry out an investigation unless a parent or guardian, or independent person is present and the young person has been allowed to speak with their parent, guardian or independent person before questioning commences in circumstances in which, as far as practicable, the communication will not be overheard: ss 464E(1), 464A(2)	detained person who is under the age of 18 entitled to have a support person present during any investigative procedure: regs 27(1), 23	police officer must not interview a child unless he or she has allowed the child to speak to a support person chosen by the child in circumstances that may not be overheard, and that support person is present during questioning: s 421(2) applies when a child is in the company of a police officer for the purpose of being questioned as a suspect about involvement in an indictable offence: s 415	if a person over the age of 10 but under the age of 18 is arrested, the officer responsible for the custody and arrest of the youth must 'take all reasonable steps' to inform the youth's guardian or a person selected by the youth of the arrest, and invite him or her to be present during any interrogation or investigation: ss 4 (definition of 'youth'), 14
<b>Exceptions to requirement</b>	would lead to escape of accomplice or fabrication/destruction of evidence: s 464E(2)(a)  driving while intoxicated: s 464E(4)  young person not 'in custody': ss 464E(1), 464A(2)	accomplice would escape arrest  evidence would be concealed/ fabricated/ destroyed/ lost  would hinder recovery of person or property  would result in bodily injury to another person  safety of other people requires investigative procedure to be carried out urgently: reg 27(7)	accomplice or accessory would take steps to avoid apprehension  accomplice or accessory would be present during questioning  evidence would be concealed/ fabricated/ destroyed  witness would be intimidated  safety of other people means questioning so urgent that it should not be delayed: s 441	not in Act

WESTERN AUSTRALIA	TASMANIA	NORTHERN TERRITORY	AUSTRALIAN CAPITAL TERRITORY	COMMONWEALTH
<i>Young Offenders Act 1994 (WA)</i>	<i>Criminal Law (Detention and Interrogation) Act 1995 (Tas)</i>	<i>Youth Justice Act 2005 (NT)</i>	<i>Crimes Act 1900 (ACT)</i>	<i>Crimes Act 1914 (Cth)</i>
'responsible adult'	no terminology in legislation, but called 'responsible adult' and 'independent person' interchangeably in Tasmanian Police Manual	'support person'	no terminology in legislation, but called 'interview friend' in practice	'interview friend'
before a member of the police force questions a young person who has been apprehended about the commission of an offence, the member of the police force is to ensure that a responsible adult has received notice of the intention to question the young person: s 20(1)	although there is no explicit legislative requirement, what constitutes being detained for a 'reasonable time' takes into account the time taken to allow the child to communicate with a person called by the police officer accompanying the child and the time it takes that person to arrive at the place where the questioning will take place: s 4(4)(f)–(g)  the process for having an independent person present during police interviews of young people is provided by the Tasmanian Police Manual	if a police officer believes on reasonable grounds that a person under 18 years of age has committed or is implicated in the commission of an offence, the officer must not interview the person unless a support person is present: ss 6, 18(1)–(2)	if a police officer suspects on reasonable grounds that a person under 18 years of age may have committed an offence or is holding the child or young person under restraint, a police officer must not interview the child or young person about the offence unless one of the listed persons is present: s 252G(1)–(2); <i>Legislation Act 2001 (ACT)</i> Dictionary pt 1 (definition of 'adult')	if an investigating official interviews a person as a suspect, whether under arrest or not, 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 the investigating official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard: s 23K(1)
after reasonable inquiry, neither the whereabouts nor the address of a responsible adult can be ascertained  in the circumstances it would be inappropriate to give a responsible adult notice: s 20(5)	not in Act	police can still require youth to give name and address: s 18(3)  some exceptions under the <i>Traffic Act 1987 (NT)</i> where youth can be dealt with as if an adult: s 18(4)	police officer suspects on reasonable grounds that it is necessary to interview the child or young person without delay to avoid—  a risk of death or serious injury of a person  serious damage to property: s 252H(b)	accomplice would take steps to avoid apprehension  evidence would be concealed/ fabricated/ destroyed  witness would be intimidated  safety of other people means questioning so urgent that it should not be delayed by compliance with the requirement: s 23L(1)

1. For simplicity, 'support person' is used as a generic term here, although this person is also called 'independent person', 'interview friend' and 'responsible adult' in other jurisdictions.

# Appendix C

## CURRENT LAW IN OTHER AUSTRALIAN JURISDICTIONS

	VICTORIA	NEW SOUTH WALES	QUEENSLAND	SOUTH AUSTRALIA
<b>Applicable to indictable offences / summary offences</b>	'offence' is not defined in s 464E, but is defined broadly elsewhere in the Crimes Act as encompassing both summary and indictable offences, both at common law and under statute: see, eg, s 458(1)–(2)	any investigative procedure: reg 27(1)	indictable offences only: s 414–15	indictable offences under the <i>Young Offenders Act 1993</i> (SA)  summary offences covered under the <i>Summary Offences Act 1953</i> (SA) s 79A
<b>Definition of support person</b>	not in Act	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 an adult other than a police officer who has the consent of the child's parent or guardian if the child is aged 14 years or older, an adult other than a police officer who has the consent of the child a legal practitioner of the child's choosing: reg 26(a)	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 an adult, relative or friend of the child who is acceptable to the child: sch 6 (definition of 'support person' paras (i)–(iv))	a guardian an adult person nominated by the youth who has had a close association with the youth or has been counselling, advising or aiding the youth: s 14(2)(c)(ii)
<b>When support person used instead of parent or carer</b>	when parent or guardian is 'not available': s 464(1)(a)	not clear from the regulations, other than to say that a child over 14 may choose their support person: reg 26(a)(iv)	n/a—support person is of the child's choosing: s 421	guardian is 'not available': s 14
<b>Role of support person prior to interview</b>	investigating official must allow the independent person to communicate with the child in circumstances which will not be overheard: s 464E(1)(b)	not in regulations	officer must, if practicable, allow the child to speak to the support person in circumstances in which the conversation will not be overheard: s 421(2)(a)	not in Act

WESTERN AUSTRALIA	TASMANIA	NORTHERN TERRITORY	AUSTRALIAN CAPITAL TERRITORY	COMMONWEALTH
not in Act	not in Act	applies to offences that, if committed by an adult, would be punishable by at least 12 months imprisonment: s 18(1)	both summary and indictable offences—the <i>Crimes Act 1900</i> (ACT) applies to all types of offences: s 2	both summary and indictable offences—the <i>Crimes Act 1914</i> (Cth) applies to both: ss 4G, 4H
a parent or guardian another person having day to day care of the young person: s 3 (definition of ‘responsible adult’)	someone called by the police officer to accompany the child: s 4(4)(f)–(g)	a responsible adult in respect of the youth a person nominated by the youth a legal practitioner acting for the youth if it is not practicable for any of the above to be present within 2 hours, a person on a register called upon by police: s 35(1), (5) the register is to be maintained by the Youth Justice Advisory Committee and cannot include youths, police officers, probation officers or persons employed at a detention centre: s 14 the interviewee may also have another youth present: s 35(4), (6)	a parent someone who has daily responsibility or long-term responsibility for the child or young person a family member who is acceptable to the child or young person a lawyer acting for the child or young person another suitable person who is acceptable to the child or young person (such as a person trained by the Public Advocate to attend interviews of young people) if it is not practicable for any of the above to be present within 2 hours, someone else who is not a police officer and has not been involved with the investigation of the offence: s 252G(2)	a parent or guardian a legal practitioner acting for the young person if none of the above are available, a relative or friend of the young person who is acceptable to the young person if the young person is an Aboriginal person or Torres Strait Islander, and none of the above are available, a person from the relevant list if none of the above are available, an independent person: s 23K(3)
n/a	not in Act	not in Act	not in Act	when parent or guardian not available: s 23K(3)(a)–(b)
n/a— Act only requires that responsible adult must be <i>notified</i>	not in Act	not in Act	not in Act	investigating official must allow the young person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard: s 23K(1)

# Appendix C

## CURRENT LAW IN OTHER AUSTRALIAN JURISDICTIONS

	VICTORIA	NEW SOUTH WALES	QUEENSLAND	SOUTH AUSTRALIA
<b>Role of support person during interview</b>	not in Act	assist and support the detained person  observe whether or not the interview is being conducted properly and fairly  identify communication problems with the detained person: reg 30(1)	act in the best interests of the young person  not provide legal advice unless a lawyer  ensure that the young person understands they may have a lawyer present, they are not obliged to say anything, anything they do say may be given in evidence, and understands what is said by the police officer during questioning: reg 44A(2)	not in Act
<b>Obligations of investigating official in relation to support person fulfilling role</b>	not in Act	police must give the support person a summary of the detained person's rights: reg 30(2)  can exclude if not fulfilling role (see below)	police must give support person information about their role, ensure the support person understands the role, explain anything relevant to the role to the support person if they ask: reg 44A.	not in Act
<b>Consequences if no support person</b>	not in Act  possible inadmissibility of evidence under evidence law  possible disciplinary action against police under Victoria Police Manual	statutory presumption that any information given to police, including confessional evidence, without support person present will be inadmissible: s 13(1)(a)	the <i>Youth Justice Act 1992</i> (Qld) provides that a child's statement is generally inadmissible unless a support person was present at the time the statement was made: s 29	not in Act
<b>Consequences if support person present but does not fulfil role</b>	not in Act	possible exclusion of support person if 'unreasonably interferes': reg 31(1)	possible exclusion of support person if 'unreasonably interferes': s 421(4)	not in Act
<b>Formalised scheme for support persons</b>	yes, although not statewide	no, although plans are currently underway to pilot a more coordinated scheme in Blacktown	no	yes, the Police Call Out Program



WESTERN AUSTRALIA	TASMANIA	NORTHERN TERRITORY	AUSTRALIAN CAPITAL TERRITORY	COMMONWEALTH
n/a—Act only requires that responsible adult must be <i>notified</i>	not in Act	not in Act	not in Act	not in Act
n/a	not in Act	not in Act	not in Act	not in Act
n/a	not in Act	not in Act	not in Act	not in Act
n/a	not in Act	not in Act	not in Act	possible exclusion of interview friend if 'unreasonably interferes': s 23K(2)
while not required by legislation that a responsible adult be present for police interview of a young person, responsible adult attends in practice  currently no formalised, statewide scheme	no	yes, the Register of Appropriate Support Persons	yes, the ACT After Hours Interview Friends Program, the Daytime Interview Friends Program and the Aboriginal Interview Friends Program	the Commission is not aware of any formal or informal interview friend scheme operating federally

# Appendix C

## CURRENT LAW IN OTHER AUSTRALIAN JURISDICTIONS



	VICTORIA	NEW SOUTH WALES	QUEENSLAND	SOUTH AUSTRALIA
<b>Responsible agency or organisation</b>	YRIPP	n/a	n/a	Department of Families and Community Services
<b>If no formalised scheme, who fulfils role</b>	non-YRIPP police stations have a list of community members who may fulfil the role; these include teachers, ministers of religion or honorary justices	justices of the peace, youth workers, church workers, Salvation Army officials on lists maintained by each local area command	justices of the peace and other persons on lists maintained by individual police stations	n/a
<b>Volunteers or remunerated employees</b>	volunteers	volunteers	volunteers	remunerated casual employees of the Department of Families and Community Services
<b>Training provided</b>	yes, YRIPP requires 28 hours of training and assessment	no, but support person must be given form outlining their role at police station	no, but support person must be given form outlining their role at police station	mandatory notifier training in relation to child abuse, as well as following in-house guidelines provided by Families SA
<b>Points of note in relation to practice</b>	YRIPP services one third of Victorian police stations	currently piloting a system of requiring all support persons on a list to have current Working with Children Check		in regional areas, a duty social worker fulfils the same role as a member of the Police Call Out team workers carry 'Police Call Out' business cards to identify themselves interviews are recorded on a record callout sheet

WESTERN AUSTRALIA	TASMANIA	NORTHERN TERRITORY	AUSTRALIAN CAPITAL TERRITORY	COMMONWEALTH
n/a	n/a	<p>the Youth Justice Advisory Committee (YJAC) is responsible for the establishment and maintenance of the register</p> <p>the Northern Territory Department of Health and Families provides administrative and secretariat support to YJAC</p> <p>in practice, responsibility is contracted out to a provider, who is funded to maintain a territory-wide register</p> <p>the last contract was with CatholicCare NT</p>	<p>the Public Advocate of the ACT is responsible for the After Hours Interview Friends Program and monitors the operation of the Daytime Interview Friends Program, coordinated by Anglicare's Youth in the City Program</p> <p>the Aboriginal Justice Centre runs the Aboriginal Interview Friends Program</p>	n/a
Youth Legal Service previously ran a formalised scheme, police may call the legal service for advice on who should attend  sometimes justices of the peace fulfil the role in regional areas	often justices of the peace attend, but an responsible adult is interpreted widely to include a lawyer, youth worker or parent	n/a	n/a	n/a
volunteers	volunteers	volunteers remunerated on a case-by-case basis	volunteers	n/a
<p>Youth Legal Service still trains some youth workers, teachers, school chaplains and social workers for the role</p> <p>Police Commissioner's orders require that support person must be given form outlining their role at police station</p>	n/a	no, but informal training is provided by local police in the regions	yes, the Public Advocate recruits, trains and supports volunteers in the After Hours Interview Friends Program and is involved in training for the Daytime Interview Friends Program	n/a
Police Commissioner's Orders are clear that using a justice of the peace as a responsible adult should only be a last resort to protect their independent judicial status	according to the Tasmanian Police Manual the initial inquiry for securing support for an Aboriginal young person is to start with the Aboriginal Legal Service	most volunteers outside the Darwin metropolitan area are Aboriginal elders in local communities	there are approximately 30 interview friend volunteers in the After Hours Interview Friends program	

## Appendix D YRIPP POLICE STATIONS

Altona North	Croydon	Lilydale	Reservoir
Ararat	Dandenong	Malvern	Richmond
Avondale Heights	Doncaster	Maryborough	Ringwood
Bacchus Marsh	Echuca	Melbourne West	Robinvale
Bairnsdale	Eltham	Melbourne East	Rosebud
Ballarat	Endeavour Hills	Melton	Sale
Belgrave	Epping	Mildura	Sandringham
Benalla	Fawkner	Mill Park	Seymour
Bendigo	Fitzroy	Moe	Shepparton
Boronia	Flemington	Moonee Ponds	South Melbourne
Boroondara	Footscray	Moorabbin	Springvale
Box Hill	Frankston	Mooroolbark	St Arnaud
Brighton	Geelong	Mooroopna	St Kilda
Broadmeadows	Gisborne	Mordialloc	St Kilda Road
Camberwell	Glen Waverley	Mornington	Stawell
Caroline Springs	Greensborough	Morwell	Sunbury
Carlton	Hamilton	Narre Warren	Sunshine
Castlemaine	Hastings	Northcote	Swan Hill
Caulfield	Heidelberg	Nunawading	Traralgon
Chelsea	Horsham	Oakleigh	Wangaratta
Cheltenham	Keilor Downs	Orbost	Warragul
Cobram	Knox	Pakenham	Warrnambool
Colac	Kyabram	Portland	Werribee
Collingwood	Kyneton	Prahran	Williamstown
Corio	Lakes Entrance	Preston	Wodonga
Craigieburn	Laverton	Preston East	Wonthaggi
Cranbourne	Leongatha	Red Cliffs	

# Appendix E YRIPP VOLUNTEER AGREEMENT FORM



**YRIPP Volunteer Agreement**

Volunteer's name \_\_\_\_\_

Address \_\_\_\_\_

Tel (business hours) \_\_\_\_\_

Tel (after hours) \_\_\_\_\_

Tel (mobile) \_\_\_\_\_

Email \_\_\_\_\_

ADN 28 007 071 169  
304 Drummond Street  
Carlton 3053 Victoria Australia  
T 03 9340 3777 F 03 9349 3766  
[admin@yripp.org.au](mailto:admin@yripp.org.au)

In consideration of being appointed as an Independent Person for YRIPP with the Centre for Multicultural Youth, I agree to:

- complete and return all forms (including Interview Report Sheets and referral documents) within the timeframe required by YRIPP;
- redirect through the YRIPP callout number (1300 79 11 89) any telephone calls that I receive direct from the police for an Independent Person for a young suspect in any YRIPP police station<sup>1</sup>;
- comply with all directions given by the YRIPP Regional Co-ordinator and Program Manager;
- comply with all YRIPP policies and procedures as outlined in the Independent Person Procedure Manual and YRIPP training program and as amended from time to time;
- comply with confidentiality and privacy policies concerning young people and internal processes of YRIPP;
- CMY having access to my personal information and sharing it with partners involved in YRIPP only as required to facilitate the implementation of the program;
- CMY sharing my personal information with Police or Officers of the court where requests are made for the purposes of a service of a subpoena<sup>2</sup>, court proceedings and/or police investigations.

Please sign below to indicate your agreement to the above terms and conditions.

Signed by the volunteer: \_\_\_\_\_


Date: \_\_\_\_\_

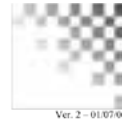
<sup>1</sup> This agreement does not apply to police interviews with young people with cognitive disabilities and is not intended to interfere in any way with the Independent Third Person Program run by the Office of the Public Advocate.

<sup>2</sup> A subpoena is an order from a court, tribunal or similar body requiring the attendance before it of a person named in the subpoena to produce a document or documents, give evidence or to produce evidence. Courts and Tribunals and similar bodies have the power to issue subpoenas.

setting the agenda on multicultural youth issues

CMY IS SUPPORTED BY THE AUSTRALIAN MULTICULTURAL FOUNDATION



**Form 36****QUEENSLAND***Police Powers and Responsibilities Regulation 2000*

Ver. 2 - 01/07/06

**INFORMATION FOR SUPPORT PERSONS ABOUT THEIR ROLE**

Your role as a support person during the questioning of a person includes ensuring that as far as possible the person is questioned in a way that avoids any situation or circumstances which may give rise to a suggestion of oppression, unfairness, fear or dominance by a police officer, or to any other injustice. Your role also includes ensuring that as far as possible the person is questioned in a way that avoids any situation or circumstance whereby he or she may be overborne, oppressed or otherwise unfairly or unjustly treated. In your role as a support person you must act in the best interests of the person.

The police officer must ensure that as far as practicable you understand the nature of your role as a support person. If you ask, the police officer must give you an explanation of anything relevant to your role as a support person.

The police officer will inform you of the identity of the person and why he or she is going to be questioned.

You should inform the police officer if any of the following circumstances exist:

- you have an affiliation, association or other relationship with the police officer questioning the person;
- you have a relationship of authority with the person that may prevent you from acting in the best interests of the person (an example would be if you were the teacher who recently excluded the person from a school);
- you are a victim, or a friend of the victim, of the offence, for which the person is being questioned.
- you are a witness to the commission of the offence for which the person is being questioned.

However, the above circumstances do not limit the circumstances in which a person may be unable to properly perform the role of support person.

The police officer has to consider if you are able to properly perform the role of a support person. Circumstances the police officer might consider include the following:

- you are substantially impaired by the effect of something you have ingested, for example, alcohol, a drug or a potentially harmful thing, to the extent that you are unable to act in the best interests of the person;
- you have impaired capacity and your impairment prevents you from acting in the best interests of the person;
- you are, or appear to be, unwilling to perform the role because of illness, injury, pain, tiredness or a similar cause.

Any one of the above is a circumstance that might make you unable to properly perform the role of a support person and it is likely the police officer will not allow you to be a support person.

In your role as a support person, unless you are a lawyer, you must not provide legal advice to the relevant person but you may ask the person questions to ensure that he or she understands the following:

- that at any time before questioning ends they may ask for a lawyer to be present during questioning;
- that they are not obliged to say anything during questioning;
- that anything they say during questioning may be used in evidence in a court;
- what is said by a police officer during questioning.



The police officer has to consider excluding you from being present during the questioning if he or she considers you are unreasonably interfering with the questioning. The following may be considered unreasonable interference:

- conduct that prevents or unreasonably obstructs proper questions being put to the person or the responses being recorded;
- answering questions on behalf of the person;
- providing written replies during the questioning for the person to quote.

However, it is not unreasonable interference to reasonably do any of the following:

- seek clarification of a question;
- challenge an improper question;
- challenge the way in which a question is put.

For a lawyer it is not unreasonable interference to reasonably do any of the following:

- to advise the person not to answer any question or any further question;
- to say that you (the lawyer) wish to give the person further legal advice.

If, during the interview, a police officer considers you are unable to properly perform the role of support person, you will be excluded from the interview. You will be given an explanation of the reason for the exclusion which will be either in writing or electronically recorded.

If you are excluded from the interview, the police officer will advise the person being interviewed of the reasons for the exclusion.

**Role of Support Person**

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**NSW Police**

It is important you understand your role as a “support person”. The law allows a “vulnerable person” to have a “support person” with them to provide assistance during any investigative procedure in which they are involved. For example, the person may be timid, immature, appear to be out of their depth, or be inexperienced in legal matters and, therefore, need your advice. Your presence can also act as a check on possible unfair treatment of the person. You may intervene if any situation of apparent unfairness arises or if it appears the person needs help in understanding their rights.

The law requires that I inform you that as a support person you are not restricted to acting merely as an observer at the interview and you may, among other things:

- assist and support the person being interviewed, and
- observe whether or not the interview is being conducted properly and fairly, and
- identify communication problems with the person being interviewed.

You may not, however, unreasonably interfere with the interview. If you do, you may be excluded from the interview, but, in this situation the person is entitled to have another support person present.

At the end of an interview at which you are present you will be given an opportunity to read and sign the interview record.

As the custody manager, I am also obliged to give you a copy of a summary of Part 9 of the *Law Enforcement (Powers & Responsibilities) Act 2002* (LEPRA). This summary is titled “Caution and Summary of Part 9 of LEPRA”. The form will also be read out and explained to you. The form details the rights of the person in custody. If you do not understand any part of it, or if you have any questions, please ask me and I will assist you where possible. Please note, however, that I cannot take over the role of a legal representative.

**Acknowledgement**

Name of Vulnerable Person .....

At ..... am/pm on the ..... I informed the support person of the information contained in this form and gave him/her a copy of this form and a copy of the form entitled “Caution and Summary Of Part 9 of LEPRA”.

Signature of custody manager .....

Name ..... Rank .....

Time and date .....

- 1) I acknowledge having been informed of the information contained in this form, and having received a copy of this form and a copy of the form titled “Caution and Summary of Part 9 of LEPRA”.
- 2) I understand the information contained in the form titled “Caution and Summary of Part 9 of LEPRA”

Name of support person .....

\*Signature of support person .....

Time and date .....

(\* Note: there is no obligation on the support person to sign this acknowledgement)

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