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***SECTION 13 CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987***

***A PRACTICAL APPROACH***

**I. INTRODUCTION**

All the disadvantages that a person faces in police custody are amplified when that person is a child.<sup>1</sup> Aboriginal children, intellectually disabled children, children who have never been in trouble with the police before, and children from backgrounds where English is not the first language are particularly vulnerable.

Many children make admissions and/ or unhelpful comments to police. These admissions and/ or comments can be made at the time of arrest, at the scene of an offence, during the execution of a search warrant and in an ERISP with police. Sometimes these admissions are the strongest or only evidence in the prosecution case.

This article paper endeavors to provide an outline of the legislation and case law and how these are applied in practice.

**II. THE LAW RELATING TO THE ADMISSIBILITY OF CHILDREN'S STATEMENTS TO POLICE**

These following provisions are the usual and obvious provisions that relate to the admissibility of a child's interview with police:

- Section 13 *Children (Criminal Proceedings) Act*.
- The *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Law Enforcement (Powers and Responsibilities) Regulation 2005*, and in particular regs 23, 24, 25, 27, 29, 30, 33, 34.
- The *Evidence Act 1995* and in particular, sections 84, 85, 90, 138 and 139.

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<sup>1</sup> H Blagg and M Wilkie *Young People and Police Powers* The Australian Youth Foundation, Sydney, 1995, 115.

### III. SECTION 13 CHILDREN (CRIMINAL PROCEEDINGS) ACT

Section 13 *Children (Criminal Proceedings) Act 1987* (NSW) ("section 13") is the specific legislative provision relating to statements made by children to police<sup>2</sup> and states that:

- (1) 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 shall not be admitted in evidence in those proceedings unless:
- (a) there was present at the place where, and throughout the period of time during which, it was made or given:
    - (i) a person responsible for the child,
    - (ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,
    - (iii) in the case of a child who is of or above the age of 14 years-an adult (other than a member of the police force) who was present with the consent of the child, or
    - (iv) an Australian legal practitioner of the child's own choosing,
  - or
  - (b) the person acting judicially in those proceedings:
    - (i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given, and
    - (ii) considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.
- (2) In this section:
- (a) a reference to a person acting judicially includes a reference to a person making a determination as to the admissibility of evidence in committal proceedings, and
  - (b) a reference to criminal proceedings is a reference to any criminal proceedings in which a person is alleged to have committed an offence while a child or which arise out of any other criminal proceedings in which a person is alleged to have committed an offence while a child, and
  - (c) a reference to a person responsible for a child does not include a member of the police force (unless he or she has parental responsibility for the child).
- (3) Nothing in this section limits or affects the admissibility in evidence in any criminal proceedings against a child of any statement or information that the child is required to make or give by virtue of the provisions of any Act or law.

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<sup>2</sup> For a brief history of the legislation see John Boersig "The Duty of 'A Responsible Person' Under Section 13 of the *Children (Criminal Proceedings) Act 1987* (NSW)" (2002) 2(2) *Queensland University of Technology Law Journal* 244.

There are a few notable aspects of the section:

- It deals with *all information* given by a child who is a party to criminal proceedings.
- It only relates to information given to a member of the police force.
- Children 14 years and over must consent to the adult who is nominated as the support person.
- There remains a discretion to admit evidence if not obtained in compliance with the section.

#### IV. THE PURPOSES OF SECTION 13

Section 13 establishes the requirement of a responsible adult as a condition of the admissibility of a child's statement to police, but unfortunately it does not outline the role and function of the responsible adult.

The role and function of the responsible adult can be seen from an examination of the case law regarding section 13 and its purposes. These purposes include the following.

1. Recognising children's vulnerability in police custody

There are pressures on children which are intrinsic to being detained by police.<sup>3</sup> All children are vulnerable because they tend to lack the maturity, verbal skills and experience to stand up to the questioning process, they have limited confidence and may fail to understand the meaning of questions. Children are more likely to panic, to have a limited ability to foresee the consequences of their actions, and may be more susceptible to psychological pressure.<sup>4</sup>

As observed (and seemingly accepted) by the court in *DPP v Toomalata*<sup>5</sup>, the Australian Law Reform Commission noted the disadvantage young people face when dealing with the police due 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>6</sup>.

Another concern is that of police impropriety in their dealings with children. Intimidation (either purposeful or otherwise) is unfortunately a frequent feature of police conduct towards young people. There are also subtle means by which police

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<sup>3</sup> H Blagg and M Wilkie *Young People and Police Powers* The Australian Youth Foundation, Sydney, 1995, 115.

<sup>4</sup> Raymond Chao "Mirandizing Kids: Not as Simple as A-B-C" (2000) 21 *Whittier Law Review* 519, 525.

<sup>5</sup> [2006] VSC 256 (15 May 2006).

<sup>6</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997), 18, 103.

can get confessions, such as: pointing out contradictions between suspects and witnesses accounts and pointing out contradictions in the suspect's own account.

Section 13 addresses these issues. This is clear from *Dunn*<sup>7</sup> where Carruthers J stated that:

It goes with out saying, of course, that the presence of an adult in these circumstances is required to ensure that there is no unfairness or unconscionable conduct in the interview so far as the child is concerned.

## 2. Protecting children from self incrimination

In *R v Williams* Roden J said the following of the precursor to section 13, s 81C *Child Welfare Act 1939* (NSW):

It is based, I believe, upon a proposition that children and young persons require special protection, and by that I mean protection from themselves rather than from any impropriety on the part of the police . . . The *Child Welfare Act* provision, as I understand it, recognises what could be described as a rebuttable presumption that, within the context of the interview by adult police officers in a police station, a child or young person would be likely to be overawed and to feel at a considerable disadvantage.<sup>8</sup>

Similarly, in *R v Cotton*<sup>9</sup> the construction of section 13 was based on the protection of the accused. Section 13, according to Hunt J, was fundamentally aimed at protecting a child from self-incrimination or damage to themselves, which may arise from the provision of information to the police.

## 3. Recognising children's immaturity

A number of cases have referred to the disadvantages inherent in a child's age and maturity as being relevant as to whether a statement made to police is admissible.<sup>10</sup> One of these cases is *R v Warren*<sup>11</sup> where Lee J stated that:

No doubt the basis upon which the section was introduced into the Act was that, because a person under eighteen years of age could well be or feel to be at a considerable disadvantage alone in a police station being questioned by mature men, it was desirable that an adult person be present.

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<sup>7</sup> Unreported, Court of Criminal Appeal, 15 April 2002.

<sup>8</sup> Unreported, Supreme Court of New South Wales, Roden J, 9 August 1982, 7 - 8.

<sup>9</sup> John Boersig "The Duty of 'A Responsible Person' Under Section 13 of the *Children (Criminal Proceedings) Act 1987* (NSW)" (2002) 2(2) *Queensland University of Technology Law Journal* 244, 249.

<sup>10</sup> See *R v Warren* [1982] 2 NSWLR 360; *R v Williams* Unreported, Supreme Court of New South Wales, Roden J, 9 August 1982; *R v Briar and Jones* Unreported, Supreme Court of New South Wales, Finlay J, 8 March 1990; *R v Cotton* (1990) 19 NSWLR 593; *R v Dunn* Unreported, New South Wales Court of Criminal Appeal, 15 April 1992; and *R v H (A Child)* (1996) 85 A Crim R 481.

<sup>11</sup> [1982] 2 NSWLR 360, 367.

## V. THE MERE PRESENCE OF A RESPONSIBLE ADULT AT A CHILD'S INTERVIEW IS NOT SUFFICIENT

A number of earlier cases where section 13 has been interpreted focused on the procedural compliance of having an adult present. In these earlier decisions in relation to section 13, it was the presence of the responsible adult, rather than the practical effect of the responsible adult's presence, which was the focus. This view is evident from the following extract from *R v Warren*:

... [B]ut the terms in which the section is expressed are clear and they show that the legislature is only intending to bring about the exclusion from evidence of those statements (using the word in the general sense) of an accused which are not made in the presence of an adult as the section requires.<sup>12</sup>

Since the decision in *R v H (A Child)*<sup>13</sup> the role of the responsible adult has been seen in terms of that person being both a rights adviser to a child and as a person who will assist a child in enforcing those rights.

In *R v H (A Child)* Hidden J made rulings during the course of a Supreme Court trial about the admissibility of admissions made by a child. Hidden J said:

The primary aim of such a section is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice. No-one could suggest that a barrister or solicitor, whose presence is envisaged by section 13(1)(a)(iv), could be restrained from tendering advice. Nor should any other adult. Further, within appropriate limits, the adult might assist a timid or inarticulate child to frame his or her answer to the allegation. For example, the child might be reminded of circumstances within the knowledge of both the child and the adult, which bear on the matter.<sup>14</sup>

This was reinforced in *R v Huynh* where Hunt CJ at CL said:

The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the

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<sup>12</sup> *R v Warren* [1982] 2 NSWLR 360, 367.

<sup>13</sup> (1996) 85 A Crim R 481.

<sup>14</sup> *Id* at 486.

support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights.<sup>15</sup>

## **VI. THE LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 AND REGULATION 2005**

The following is a summary of the important provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (“LEPRA”) and *Law Enforcement (Powers and Responsibilities) Regulation 2005* (“LEPRR”).

I have noted the equivalent provisions that were formerly in the *Crimes (Detention After Arrest) Act* (“CDAA”) and *Crimes (Detention after Arrest) Regulation* (“CDAR”) because the former provisions are often referred to throughout the relevant case law.

- A child is a “vulnerable person”: Reg 23 and 24 LEPRR [cf CDAR, cl 5].
- The custody manager *must* assist (as far as practicable) a child to exercise his or her rights, including calling a lawyer or support person: Reg 25 LEPRR [cf CDAR, cl 20].
- A child may have a support person present during any investigative procedure in which the person is to participate: Reg 27 LEPRR [cf CDAR, cl 21].
- A child cannot waive the entitlement to have a support person present: Reg 29 LEPRR [cf CDAR, cl 23].
- The custody manager is to inform the support person that he/ she is not restricted to acting merely as an observer but is to play an active role and may (among other things):
  - assist and support the child;
  - observe whether or not the interview is being conducted properly and fairly;
  - identify communication problems.

The custody manager is to give a copy of a summary of the provisions relating to extension of the maximum investigation period and how same may be extended to the support person: Reg 30 LEPRR [cf CDAR, cl 26].

- If the child is an Aboriginal person or Torres Strait Islander, the police must immediately inform ALS that the child is being detained and the place where the child is being detained: Reg 33 LEPRR [cf CDAR, cl 28].

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<sup>15</sup> [2001] NSWSC 115 at paragraph 36.

- The custody manager must take appropriate steps to ensure that the child understands any caution: Reg 34 LRPRR [cf CDAR cl 29].
- If the child was cautioned in the absence of the support person the custody manager must repeat the caution in the presence of the support person: Reg 34 LEPRR [cf CDAR, CI 29].
- Schedule 2 of the LEPRR provides a “Guideline” for custody managers and contains interesting (and perhaps infrequently complied with) provisions in respect to placement of children in police cells.

The requirement for an informed and appropriate support person to be present should be strictly applied:

the provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law<sup>16</sup>.

Furthermore, the obligations on the custody manager must also be strictly applied. This is particularly so in respect to the obligation to make known to the young person the services offered by the Legal Aid Youth Hotline:

The whole intention of the hotline is that young people would know that it is free, that it is available, and would be able to obtain advice there and then. Failure to make it available is a clear breach of the Act and regulations but, more importantly, in clear breach of the requirement of fairness to the young person<sup>17</sup>.

## **VII. RELEVANT PROVISIONS OF THE *EVIDENCE ACT AND CRIMINAL PROCEDURE ACT***

In addition to section 13, various provisions in the *Evidence Act 1995* and *Criminal Procedure Act 1986* are likely to be relevant in relation to an argument as to any admission/ confession/ statement and the role of the responsible adult. These include (but certainly are not limited to):

- Section 90 *Evidence Act* (as to unfairness) which states:
  - In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
    - (a) the evidence is adduced by the prosecution, and
    - (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

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<sup>16</sup> Wood CJ, *R v Phung and Huynh* (2001) NSWSC 115.

<sup>17</sup> Dowd J, *R v ME, R v LT and R v CE* (Unreported, Supreme Court Common Law Division, 3 October 2002).

- Section 85 *Evidence Act*<sup>18</sup> (as to the reliability of any admission) which states:
  - 5 Criminal proceedings: reliability of admissions by defendants
  - (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
    - (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or
    - (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
 Note: Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216 .
  - (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
  - (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
    - (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and
    - (b) if the admission was made in response to questioning:
      - (i) the nature of the questions and the manner in which they were put, and
      - (ii) the nature of any threat, promise or other inducement made to the person questioned.
- Section 138 *Evidence Act* (as to evidence obtained improperly etc) which states:
  - 138 Exclusion of improperly or illegally obtained evidence
  - (1) Evidence that 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,
 is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
  - (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

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<sup>18</sup> This section was considered in detail in *DPP v Toomalatai* [2006] VSC 256 (15 May 2006)



- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

- (a) the probative value of the evidence, and
- (b) the importance of the evidence in the proceeding, and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
- (d) the gravity of the impropriety or contravention, and
- (e) whether the impropriety or contravention was deliberate or reckless, and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights , and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

- Section 281 *Criminal Procedure Act 1986*<sup>19</sup> (as to recording admissions) which states:

281 Admissions by suspects

(1) This section applies to an admission:

- (a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and
- (b) that was made in the course of official questioning, and
- (c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.

(2) Evidence of an admission to which this section applies is not admissible unless:

- (a) there is available to the court:
  - (i) a tape recording made by an investigating official of the interview in the course of which the admission was

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<sup>19</sup> This section was considered on *R v G* [2005]NSWCA 291 (25 August 2005).

made, or

(ii) if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or

(b) the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.

(3) The hearsay rule and the opinion rule (within the meaning of the Evidence Act 1995 ) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).

(4) In this section:

"investigating official" means:

(a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or

(b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences prescribed by the regulations.

"official questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

"reasonable excuse" includes:

(a) a mechanical failure, or

(b) the refusal of a person being questioned to have the questioning electronically recorded, or

(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

"tape recording" includes:

(a) audio recording, or

(b) video recording, or

(c) a video recording accompanied by a separately but contemporaneously recorded audio recording.

- Section 139 *Evidence Act* (as to the cautioning of persons) that states:

139 Cautioning of persons

(1) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the person was under arrest for an offence at the time, and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the questioning was conducted by an investigating official who did not have the power to arrest the person, and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence, and

(c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or

(b) the official would not allow the person to leave if the person wished to do so, or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth, or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

## VIII. COMBINED EFFECT OF NON-COMPLIANCE WITH VARIOUS PROVISIONS

It is important to note that whilst a single and isolated problem (for the prosecution) with the admission/ confession/ statement may not be sufficient to exclude the admission/ confession/ statement, numerous problems or cumulative shortcomings in respect to the evidence may be sufficient to exclude the admission/ confession/ statement when considered as a whole. This was the case in *DPP v Toomalatai*<sup>20</sup>. The admissions in that case were excluded 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 evidence of the admissions to be used against the young person in the trial. I therefore exercise my judicial discretion to exclude evidence of Mr Toomalatai's interview in the trial.

## IX. DISCRETION TO ADMIT EVIDENCE OBTAINED IN NON-COMPLIANCE WITH SECTION 13

Section 13(1)(b) provides the court with a discretion to admit evidence that was obtained in non-compliance with section 13(1)(a) if satisfied that there was proper and sufficient reason for the absence of the adult **and** in the circumstances of the case the statement/ confession/ admission/ information should be admitted. The requirements in section 13(1)(b) are cumulative. There must be some concurrence of the circumstances before the court admits the evidence.

Importantly, once non-compliance with section 13(1)(a) is established (that is, that there was no adult present), there is no onus on the defence to establish or convince the court as to why the evidence should be excluded. As noted by Finley J in *Briar and Jones*<sup>21</sup> there is a requirement that the Crown discharge an onus of satisfying the Court that it is a proper case for the Court to include the material.

## X. PRACTICAL APPLICATION

An objection to an admission/ confession/ statement made in non-compliance with section 13 can be made either:

- During the actual trial or summary hearing; or
- This issue could be raised on a voir dire.

The determination as to when to raise the objection will be a tactical decision that will vary from case to case. If there is no other evidence to establish guilt than the alleged admission, it may be fruitful to have a voir dire (in the hope that if the evidence is excluded at that point that the prosecution will offer no evidence and the matter will be quickly resolved)

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<sup>20</sup> [2006] VSC 256 (15 May 2006).

<sup>21</sup> (8 March 1996, unreported).

Following is a checklist of matters that may be worth considering when preparing a section 13 argument (or evidence to support the argument):

- Do I wish to exclude an admission/ confession/ statement? Or does it in fact assist my case? Or does it not affect my case (and am I just wasting time)?
- Was the statement/ confession/ admission made to a member of the police force?
- Was the adult present with the consent of ‘responsible person’ (if the child is <14 years) or the consent of the child (if the child is 14 or >)?
- Was there any efforts made by the police to inquire as to the consent / wishes of the child or responsible person? If so, what efforts were made?
- Is the adult an “independent person”?
- Was the adult informed (by the custody manager) of their role and what that role required?
- Did the adult understand that role?
- Was the adult advised of the nature of the allegation/ offence for which the child was to be interviewed? Did the adult appreciate the seriousness of the allegation?
- Was the child cautioned? Was the child re-cautioned in the presence of the adult?
- What was the level of maturity and experience of the adult?
- Does the adult speak English?
- Is there anything that would prevent the adult from understanding and performing their role (for example, they are so upset at the behaviour of the child that they are unable to fulfil the role)?
- Does the adult have any conflict of interest (for example the adult is the mother of the alleged victim and the alleged offender)?
- Is the adult someone to whom the child can relate, trust and feel supported by (criticism was made of retired head master)?
- Was the adult allowed to the child to speak in private? And, in any language of preference? And for a sufficient time?
- Did the adult understand the child’s right to silence?
- Did the adult understand that they could intervene during the interview? That they could object? That they could assist a child to articulate a response to questions? That they could clarify any confusion?
- Did the adult explain their role to the child?
- Did the child receive legal advice?
- Did the child telephone the Legal Aid Youth Hotline? Was the adult allowed to speak to the hotline solicitor (often the police call the hotline prior to the arrival of the adult)?
- Did the child appear affected by drugs/ alcohol?
- What was the manner/ tone/ demeanour of the police in dealing with the young person?
- Was any admission/ confession/ statement voluntary?
- Was there anything that would affect the reliability of the admission/ confession/ statement?

- Did the child know the nature of the allegations and the seriousness of any offence?
- What evidence will I call (if any) to support my objection?
- Do I know if the child called the Legal Aid Youth Hotline? Do I know what advice was given? Do I know whether the hotline solicitor spoke to the adult? Do I know whether the hotline solicitor spoke to the OIC or custody manager (and if so, what was said)?
- Do I have all of the documents that I need to effectively cross-examine (for example, Do I have/ need the Custody Management Records? Do I have the advice given by the hotline solicitor?)
- Have I considered the cumulative effect of any short comings in the evidence/ compliance with legislation?
- Keep in mind that if there is non-compliance with section 13(1)(a), the prosecution must discharge the onus of satisfying the court why the admission/ confession/ statement should not be excluded.

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**ANNEXURE A**  
**CASE STUDY 1**

***R v Phung and Huynh* [2001] NSWSC 115**

This case involved a trial in the Supreme Court before Wood CJ at CL. Phung was charged with murder and a number of counts of robbery. He made admissions in two records of interview with police. The admissibility of each of these interviews was challenged.

1. The first interview

Phung was arrested with another accused shortly after the murder. Phung was detained for a short time and then taken to a police station. He was spoken to by a detective at the time of his arrest, informed that police were investigating a fatal shooting earlier that night, and then cautioned. When Phung told the detective that he was 17 years old, the detective informed him that he would not speak to him further until they had an adult present.

Phung's parents were overseas. His aunt and her 21 year old son, Phung's cousin (who was also Phung's employer), went to the police station. When his aunt and cousin arrived at the police station, they were seated in the interview room, separated from Phung, who was still in the dock. They had no opportunity to speak to Phung at this stage. No evidence was led as to whether the custody manager spoke to either of Phung's aunt and cousin or whether the custody manager provided the information required by the *Crimes (Detention After Arrest) Regulation*.

Phung was interviewed by police, initially in the presence of his aunt and cousin. However, from immediately after the interview began, Phung was interviewed in the presence of his cousin alone, as his aunt became ill and left the interview. Phung's cousin was allowed to speak to Phung very briefly in the presence of the police, initially in his own language but later, at the request of police, in English. During the interview, Phung made significant admissions as to his involvement in the murder and robbery.

On the voir dire at trial, Phung gave evidence that he had taken a number of Rohypnol tablets, and had smoked some heroin on the day of the alleged offences, and suggested that he was stoned at the time of the interview. He had been given medication by a medical practitioner who did not examine him prior to prescribing the medication. There was also an issue in the case about whether Phung was given the opportunity of having a lawyer present.

2. The admissibility of the first interview

Hunt CJ at CL examined a number of concerning aspects in relation to the first interview, including:

- That the police selected Phung's aunt and cousin without the custody manager enquiring about Phung's wishes as to who he wanted contacted.
- The custody manager not enquiring about the suitability of Phung's aunt and cousin to perform the important role expected of them.
- The relative immaturity and inexperience of Phung's cousin.
- The absence of any evidence that the custody manager advised Phung's cousin of the role that he was expected to play, as was required by *Crimes (Detention After Arrest) Regulation 1998* reg 26(1).
- No lawyer was contacted, and no encouragement was given to Phung to contact a lawyer, even though Phung was facing a charge as serious as murder.
- The failure of the detectives to allow Phung to speak privately with his cousin, which is an entitlement which is foreshadowed in section 356N(4) *Crimes Act*. The conversation that did take place between Phung and his cousin took between one and two minutes, and was required to be held in English in the presence of the detectives.

Hunt CJ at CL held that these matters, as well as various other matters he identified, may not have been enough individually to require exclusion of the first ERISP. However, in combination, there were sufficient circumstances involving non compliance with the statutory regime to give rise to serious concern as to whether Phung, a 17 year old with a somewhat disturbed background, had been sufficiently advised as to his rights, and as to whether those rights were adequately protected. For these reasons, Hunt CJ at CL excluded the interview pursuant to sections 90 and 138 *Evidence Act*.

### 3. The second interview

A few days after Phung's arrest and charging, police obtained a search warrant and searched Phung's cell at Kariong. Police found a mobile telephone which was said to be a portion of the property from one of the robberies.

Phung was taken to a part of Kariong and spoken to by police in the presence of the Governor. He was placed under arrest in relation to armed robbery.

Phung was then taken to a Police Station. He was asked by police if he had any objection to a Salvation Army officer being present while he was interviewed. Phung said that he did not. A Salvation Army officer attended the police station.

The Salvation Army officer did not have any conversation with Phung before the interview. There was no evidence as to whether the Salvation Army officer was given the information which the legislation requires to be given to a support person. The evidence was also silent as to whether Phung was asked whether he wanted a



relative or anyone else to be present. Further, there was no evidence as to whether Phung wanted to get legal advice or whether any request was made in that regard. Phung made a number of significant admissions in the second interview.

#### 4. The admissibility of the second interview

Hunt CJ at CL indicated the following as matters of specific concern in relation to the second interview:

- That Phung was already in custody in relation to other offences at the time of his second interview.
- None of Phung's relatives were contacted when he was taken to the Police Station from Kariong, and Phung was not given an opportunity to nominate or to contact a support person of his own choosing, as the Salvation Army Officer (who was quite unknown to Phung and who was unfamiliar with the case) was suggested by investigating police.
- There was no affirmative evidence whether Phung was properly advised as to his rights to contact a support person or a legal adviser.
- There was no evidence as to whether the Salvation Army Officer was given the information required by reg 26, or whether he was informed of the nature and seriousness of the matters that Phung was under investigation for.
- The Salvation Army Officer was not given any opportunity to speak privately with Phung, or to investigate whether Phung needed any further assistance or advice.
- The investigation followed upon the earlier ERISP, at a time when Phung could only have assumed, if he had been properly advised, that there was at least some risk of any further admissions being used against him in relation to the charge of murder, which he was already in custody for.
- No effort was made to identify or contact the solicitor who had previously acted for Phung, or a duty solicitor, even though it may be assumed that one would have been on hand.
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Taking into account the provisions of sections 90 and 138 *Evidence Act*, the evidence was excluded, as Hunt CJ at CL was of the view that the apparent failure of those concerned to secure compliance with the regime gave rise to an unfairness which outweighed the probative value of the admissions obtained.

#### 5. Obligations of custody managers

Hunt CJ at CL set out some of the obligations that custody managers have in ensuring the admissibility of evidence at paragraphs 60 - 64 of the judgment. These obligations are important and advocates should acquaint themselves with what is set out in the judgment.

**ANNEXURE B**  
**CASE STUDY 2**

***R v ME and LT Unreported, Supreme Court, 3 October 2002***

In this case, Dowd J considered an application by LT and ME, who were both aged 17 at the time of arrest and interview, for exclusion of their records of interview. They stood trial in the Supreme Court, together with a number of co-accused, for murder.

In each of the cases of ME and LT, there were a number of records of interview which were taken by way of ERISP at a Police station. Both ME and LT were told that they were not under arrest and were free to leave the police station.

1. The case against ME

The requirements of Part 10A were not complied with. Police did not comply with the requirements as they said that ME was not under arrest at the time he was at the police station.

Dowd J examined whether ME was in fact under arrest. If he was under arrest, the police should have had to comply with Part 10A *Crimes Act*.

ME had been told he was free to leave at any time and that he was not under arrest. However, that was not the end of the matter. There was no suggestion that the police officer gave reasonable grounds to ME to believe that he was not allowed to leave and there was no evidence that the police officer would arrest ME if he attempted to leave.

Dowd J found that there had been deemed arrest of ME and that the provisions of Part 10A *Crimes Act* applied and the Regulation applied.

Dowd J found that there had been a breach of the provisions set out to protect children. Section 356M *Crimes Act* meant that the custody manager had to give a caution and a summary of the Part of the Act to the detained person. The Custody manager should have informed the person as to the right to communicate with friends and relatives and make certain communications. Dowd J went through the applicable regulations, which were regs 20, 21, 22, 23, 25, and 26.

2. The interviews involving ME

ME had no criminal record and he had participated in an ERISP and walk around video with two of the detectives involved in this case. He was then put into the police custody system, although he was not formally held under part 10A.

Dowd J found that ME had difficulty understanding important matters. ME's counsel submitted that he was not aware that he was in fact suspected of murder. ME had a fight and had assaulted a number of people during that fight. The purpose of the

interviews held by police was to establish whether ME had contemplated there was a possibility of someone suffering grievous bodily harm during this fight.

Police, in accordance with section 13 *Children's (Criminal Proceedings) Act* had an independent person sit in with ME in his interview. This independent person was a recently retired head master, a Mr Harwin.

Dowd J found that what took place with Mr Harwin was this:

- There was a very short space of time that Mr Harwin and ME were allowed together before the interview.
- Mr Harwin was not told of the seriousness of the investigation. Dowd J found that it was difficult to see how Mr Harwin could have possibly advised ME without knowing the risk that ME was under.
- Mr Harwin did not appreciate the full extent of his role, meaning that neither he nor ME had been properly advised and therefore Mr Harwin could not have properly advised ME as to the seriousness of his position.
- It became obvious during the course of the interview that ME was a suspect in the murder investigation from the type of questions that were being asked, but that Mr Harwin did not advise ME of his rights or remind ME of his right to silence.

Dowd J said there was no point in having an acceptable person present when a young person is likely to be subjected to questioning, which may lead to a very serious criminal charge, in particular murder, unless the acceptable person understands the nature of the risk. There was no possibility that Mr Harwin could protect ME from unfairness or advise him of his rights.

Dowd J held at paragraph 12 that:

He [Mr Harwin] demonstrated in my view a lamentable lack of understanding of the significance of the interview and did not seem to appreciate the full extent of the proper role of an acceptable person ... A total stranger to a 17 year old young person, who is a retired head master, is not the sort of image that immediately leaps up as someone to whom a young person could relate, and particularly where the support person is such that he is not given time to relate, as he was not here, to the young person, and where he did not seem to understand as a person *in loco parentis* that he might intervene to warn someone who may be making the most damning admissions.

Dowd J went on to say at paragraph 13 that:

The compliance of the police service with the intention of the legislature in this respect is in my view extremely important. You do not need to know a lot

about the law to know when a young person is about to make damning admissions. You do not have to know a lot about the law the people have a right to remain silent, but nevertheless, young people do not necessarily know those entitlements as, indeed, do a lot of adults and the intention is to arm the young person with some protection.

Dowd J found that it was unfair to admit the ERISP against ME pursuant to section 90 *Evidence Act*. Dowd J held that, even if part 10A *Crimes Act* did not in fact apply, the circumstances of the taping the record of interview breached the substance of the substantive effect of the *Children (Criminal Proceedings) Act*. ME was not afforded the protection the legislature intended.

Dowd J held that the evidence at issue was in breach of Section 138 *Evidence Act*, as it was improperly obtained. Although the evidence was important, it did not outweigh the undesirability of admitting evidence that had been obtained in the way in which the evidence was obtained in this case.

For these reasons, Dowd J excluded the evidence of the ERISP against ME.

### 3. The case against LT

Although there were a number of other records of interview involving him, there was only one record of interview which was sought to be tendered against LT.

The Crown submitted that LT was not under arrest at any stage and that he was also aware that he was free to leave the police station. LT had gone to the police station on his own. He was aware of his rights to obtain a solicitor and that he had various support people available to him.

The defence submitted that LT was in fact under arrest by section 355(2)(a) *Crimes Act* as the informant believed that there was sufficient evidence that LT had committed an offence of assault or affray.

Dowd J found that it would have been difficult for LT not to believe that he was not under the control of the police. Dowd J found that LT was deemed to be under arrest. For these reasons, the provisions of part 10A *Crimes Act* and the Regulation applied.

### 4. The responsible adult and LT's interview

Once again, in relation to the acceptable persons who sat in on the interview, there was not sufficient time allowed between LT and the responsible person, there was no evidence that the responsible person understood her duty to explain and protect the interests of LT.

A responsible adult, a Ms Tesoriero, had various roles in relation to victims and persons interviewed prior to her use as a responsible adult with MT. She did not understand what her obligations were in relation to LT. In particular, she thought that LT was in fact being interviewed as a witness. Dowd J held that this underlied the

unfairness of the position in which she was placed, and the difficulty which LT suffered of not having someone available to protect his interests.

Dowd J applied the decisions of *Phung and Huynh* and *R v H (A Child)* and considered that in each interview LT had not been given proper advice as it should have been available to him.

Dowd J applied section 90 *Evidence Act* and held that it would be unfair to admit the evidence of the record of interview. Dowd J held that the failure to comply with the *Children's (Criminal Proceedings) Act* and the *Crimes (Detention After Arrest) Regulation* meant that the evidence obtained was improperly obtained.

Notwithstanding its probative value, Dowd J held that the desirability of admitting the evidence did not outweigh the undesirability of the evidence that had been obtained in the way that it was. The clear intention of the legislature was to protect young people and that this intention had been frustrated by the procedures adopted by the police.

#### 5. The Legal Aid Commission's Youth Hotline

Dowd J made a number of important comments in relation to ME not being given the benefit of access to the Legal Aid Commission's Youth Hotline service. The case is worth reading on this aspect.