

Acting as a support person at the police station

1 The role of a youth worker at the police station

If you work with young people, particularly those under 18 years of age, you may be asked to attend the police station as a support person or to sit in on a police interview.

This document is aimed at youth workers and other professionals (other than lawyers, who have a different role and are subject to different laws and professional obligations).

You should be clear about your role and about how to effectively advocate for the young person. Although it is not your role to provide legal advice, it is important for you to understand the law - otherwise you may unwittingly allow the young person to give up important rights and help the police to get evidence to use against them.

2 Rights of suspects at the police station

2.1 Suspects who are under arrest

A person who has been **lawfully arrested** on suspicion of having committed an offence may be **detained at a police station for a reasonable time**, for the purpose of investigating the alleged offence. **A person cannot be arrested just for the purpose of questioning**: police must have reasonable grounds to suspect the person has committed an offence, and they must have an intention to commence criminal proceedings.

Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* (commonly abbreviated to "LEPRA") and the *Law Enforcement (Powers and Responsibilities) Regulation* set out the rights of suspects and the rules police must follow.

Police are allowed to hold the person for up to four hours, although there are various periods which count as time out, and the four-hour limit can also be extended by applying for a "detention warrant".

A detained person has the right to contact a lawyer, as well as a friend, family member or other person. They also have a right to reasonable refreshments, toilet facilities, and medical attention if required.

A suspect who is a "vulnerable person" has additional rights, including the right to a support person. The police must assist a vulnerable person to assert their rights (for example, by calling a support person for them).

These procedures and rights only apply to people who are **arrested for fresh offences**, not those who are arrested for breach of bail or on court-issued warrants (for failure to appear etc). However, in these situations the police will often allow the person to contact a lawyer and a family member or support person anyway.

For more detailed information about powers of arrest, detention after arrest, and the rights of suspects at police stations, please see the separate document on *Police powers and your rights*.

2.2 Suspects who are not under arrest

Sometimes a suspect will attend the police station voluntarily. Depending on the situation and the attitude of the police, the person might be placed under arrest when they arrive.

In some situations (for example, if the police would arrest the person if they tried to leave) a suspect who is *not* under arrest has the same rights as a person who is under arrest.

2.3 The right to silence

In nearly all situations, a suspect does not have to participate in an interview or answer police questions. A suspect has the right to seek legal advice before deciding whether to answer police questions.

A suspect's right to silence is an important part of our legal system and it applies whether or not the suspect is under arrest. The police must tell the suspect that he or she is not obliged to say anything.

There are a few exceptions to this. For example, in the case of motor accidents or offences involving vehicles, the owner or driver of the vehicle must provide certain information on request. There are also some situations where a person may be required to provide their name and address. In these situations, the police must tell the person that they have a duty to provide information.

For more detailed information about the right to silence, see section 7 of this document. See also the separate document on *Police questioning and the right to silence*.

3 Special rules for children (aged under 18)

3.1 The right to a support person at the police station

A person under 18 is a "vulnerable person" according to Part 9 of LEPR, and is entitled to have a support person present during any investigative procedure.

A support person's role is not limited to sitting in on a police interview. It could also include other "investigative procedures" such as a search or forensic procedure.

A person under 18 cannot waive their right to a support person.

A support person must be over 18 and can be:

- a parent, guardian, or other person who has the lawful custody of the child, or
- a person responsible for the care of the child, or
- an adult (other than a police officer) with the consent of the parent, guardian or person responsible, or
- if the child is aged 14 years or over - an adult (other than a police officer) who has the child's consent to be their support person, or
- a lawyer of the child's own choosing.

Your role as a support person is discussed in more detail in sections 6 and 7 of this document.

3.2 Admissibility in court of statements made to police

Apart from a child's right to a support person when they are in police custody, there is another important reason why you may be called to the police station.

Section 13 of the *Children (Criminal Proceedings) Act* says that **a statement made to police by a person under 18 is not admissible as evidence in court unless an independent adult was present when the statement was made.**

This applies to police interviews no matter where they are conducted (for example, on the street or at the child's home) and whether or not the child is under arrest. It is separate to the requirement for a support person under Part 9 of LEPRA. However, in many cases the child will be under arrest at the police station when they are being interviewed, and the same person will fulfil both the roles of support person and independent adult.

Section 13 requires the independent adult to be:

- a parent or guardian; or
- another adult (not a police officer) present with the consent of the parent or guardian; or
- for a child aged 14 or over, an adult (not a police officer) present with the consent of the child; or
- a lawyer chosen by the child.

The purpose of section 13 is to protect children from their own immaturity, not just from police impropriety. Courts have said that the role of the adult is not confined to being a passive observer, but includes actively protecting the rights of the child.

The court has a discretion to allow in a statement if there was "proper and sufficient reason" why police couldn't get an appropriate adult there, and if the court considers that, in the particular circumstances of the case, the statement should be admitted in evidence. The courts apply this very strictly and it is rare for statements to be admitted as evidence if there was not an appropriate adult present.

For more information about the role of the independent adult in a police interview, see section 7 of this document.

3.3 Admissions for purpose of *Young Offenders Act*

Instead of taking a child to court, the police may instead caution them or refer them to a Youth Justice Conference under the *Young Offenders Act* (see separate document on *The Young Offenders Act*).

To be eligible for one of these options, **the child must admit their guilt in the presence of an appropriate adult.** The categories of adults who may be present are much the same as for section 13 of the *Children (Criminal Proceedings) Act*.

It may be in a child's interest to admit to the offence if a caution or a conference is a real possibility. However, they should get legal advice before deciding.

3.4 Legal advice

Anyone who is detained by police for the purpose of investigation has the right to contact a lawyer of their choice. The lawyer may attend the police station and sit in on any interview, although this is not very common. In practice, legal advice to people in police custody is usually given by phone.

If the detained person is a child, the police must help them to access legal advice. This will usually involve contacting the Legal Aid Hotline for under-18s or the Aboriginal Legal Service Custody Notification Service.

It is not enough for police to simply to tell a child that they may contact a lawyer if they wish (as one Supreme Court judge said, “Young people aged 17 rarely have a solicitor and rarely have a contact number for one available. It is as absurd as suggesting they might contact their architect or dietary advisor”).

Please see section 6 of this document for more information about how to help a client to obtain legal advice.

3.5 Forensic procedures

The *Crimes (Forensic Procedures) Act* sets out rules for conducting “forensic procedures”. Most commonly this involves taking DNA samples, but can also include things such as photographs, blood samples, dental impressions, etc.

Police may conduct a forensic procedure on an adult with their consent, but always require a court order to conduct a forensic procedure on a child.

If the court authorises a forensic procedure, the child is entitled to have an “interview friend” (support person) present when the forensic procedure is carried out, as long as this is reasonably practicable.

4 Rules applying to adults (aged 18 and over)

Unlike children, most adults do not have an automatic right to a support person at the police station, and there is no requirement to have an independent person sitting in on a police interview.

However, every suspect has a right to contact a lawyer and to have them attend the police station if they wish. Most suspects also have a right to contact a friend, relative or other person and have them attend the police station.

Some categories of adults are entitled to special protection.

4.1 The right to a support person for a vulnerable person

If an adult being detained by police is a “vulnerable person” he or she has a right to have a support person present during any “investigative procedure”, including an interview.

Under Part 9 of LEPR, a “vulnerable person” is someone who:

- is under 18 (see section 3.1 of this document), or
- is an Aboriginal person or Torres Strait Islander, or
- is from a non-English speaking background, or
- has a disability (whether physical, intellectual or otherwise).

A support person must be over 18 and may be:

- a guardian or any other person who is responsible for the care of the vulnerable person, or
- a relative, friend or any other person (other than a police officer) who has the consent of the vulnerable person to be their support person; or

- if no-one in the above categories is readily available - a person (other than a police officer) who has expertise in dealing with vulnerable persons of the category to which the detained person belongs.

Unlike a child, a vulnerable person who is 18 or over may waive the right to a support person. If the vulnerable person doesn't expressly waive their right to a support person, or the police don't ask, failure to have a support person might mean police can't use certain evidence (eg a record of interview) against the person in court.

4.2 Right to contact friend, relative, guardian or independent person

Anyone who is detained by police for the purpose of investigation has the right to contact a "friend, relative, guardian or independent person" (unless police believe this would result in the destruction of evidence, etc). This person may attend the police station and must be allowed to speak to the suspect in private.

So, even if an adult is not a vulnerable person, they are still entitled to have someone attend the police station and to speak to them in private. However, there is no automatic right to have this person present during an interview or other investigative procedure.

A vulnerable person is not entitled to *both* a "friend, relative, guardian or independent person" *and* a support person, but the same person can perform both roles.

4.3 Legal advice

Anyone who is detained by police for the purpose of investigation also has the right to contact a lawyer of their choice. The lawyer may also attend the police station and sit in on an interview, although this is not very common.

If the detained person is a vulnerable person, the police must help them to access legal advice if it is available. Although there is no Legal Aid hotline for over-18s, Legal Aid may be able to assist in some cases, especially if the matter is serious.

If the person being detained is Aboriginal or Torres Strait Islander, the police *must* contact the Aboriginal Legal Service Custody Notification Service and allow them to speak to the detained person (unless the person has already made arrangements to speak to another lawyer of their own choice).

Please see section 6 of this document for more information about how to help a client to obtain legal advice.

4.4 Forensic procedures

See Section 3.5 of this document for an explanation of forensic procedures.

Unlike a child, an adult can consent to a forensic procedure unless they are "an incapable person". This means someone who is incapable of understanding the nature and effect of the procedure, and would include some people with intellectual disabilities or mental health problems. Police require a court order to conduct a forensic procedure on an incapable person.

An incapable person is entitled to have an "interview friend" (support person) present, if reasonably practicable, when a forensic procedure is carried out.

There are also special rules for people who identify as Aboriginal or Torres Strait Islander. If reasonably practicable, there must be an interview friend present when the person is asked to consent to the forensic procedure, and also during the carrying out of any forensic procedure.

5 Should you go to the police station? What is your role?

5.1 Will your presence help the young person?

In most situations, a young person can only be helped by your presence at the police station. Police are more likely to treat the child fairly and respectfully if you are there.

If you do not agree to be a support person, there is a risk that the police will find someone less suitable. Some police stations have lists of people who are willing to act as support people or sit in on interviews with children. These people do not always have the appropriate skills and experience, and may not be in a good position to advocate for the young person.

Agreeing to sit in on a police interview is another matter. The pros and cons of this are discussed in section 7 of this document.

5.2 Your role at the police station

You have a number of important roles to play at the police station, or even before you arrive. These include:

- Helping the young person to get legal advice
- Assisting the young person to understand and assert their rights
- Assisting with any communication difficulties
- Alerting police if the young person has an intellectual disability or mental health problem
- Contacting a relative, friend, health professional or other appropriate person
- Helping arrange accommodation for the young person (police sometimes won't release a child on bail unless satisfied they have somewhere to go)
- If police are commencing court proceedings, encouraging them to grant bail and trying to ensure that the bail conditions are appropriate (or, better still, encouraging them to issue a court attendance notice with no bail conditions attached)
- Encouraging the police to use their options under the *Young Offenders Act* instead of proceeding to court, if the young person is under 18 and is willing to admit to the offence
- Keeping an independent record of what happened and what was said at the police station
- Helping the young person to complain about police actions if necessary

5.3 How can you help the young person without going to the police station?

If you can't get to the police station, there are still a number of things you can do to assist the young person.

These include speaking to the young person on the phone about their rights, helping them obtain legal advice, raising any concerns you have with the police, helping to find an appropriate support person who can attend the police station, and arranging accommodation or support services if necessary.

6 Tasks for the support person at the police station

6.1 Before you go

Firstly, make sure you understand the rights of young people in police custody and in police interviews.

If you can go to the police station, try to get there as quickly as possible.

In the meantime, try to speak to both the young person and the police on the phone, and let them know you are coming. Advise the young person not to say anything, and ask the police not to commence any interview, until you arrive.

Take a pen and paper (or a laptop or other device) with you so you can take notes.

6.2 Speak to the police on arrival

Introduce yourself to the police and explain your role.

If police have already started interviewing the young person, ask them to **suspend the interview**.

If you know the young person and have any particular **concerns** (for example, if they have an intellectual disability) it may be appropriate to mention this to the police at the outset. In other situations it would be more appropriate to check with the young person before you give out (potentially confidential) information about them.

You should **ask the police if the young person is under arrest** and, if so, what for. A person has a right to know why she or he is under arrest. If the young person is not under arrest, he or she is free to leave the police station (but be warned, this may prompt the police to arrest the child, if they have reasonable grounds to suspect that he or she has committed an offence).

6.3 Speak to the young person

Ask the police for some **time alone with the young person**. Police must allow you reasonable facilities and time to communicate in private. If you don't get time alone, you should still speak to the young person and try to make sure they understand their rights.

If you do not already know the young person, **introduce yourself**.

Check that the **young person is happy for you to be there** (they may not realise that they have a choice).

Ask the young person **how they have been treated**, and whether they have had any **legal advice**.

Explain your role. Importantly, explain that your role is different from that of a lawyer, and you cannot guarantee that everything a young person tells you is confidential.

Be very careful about discussing the alleged offence, and don't ask the young person for details of what happened. You could inadvertently become a witness against the young person (see *Tricks and traps* in section 8 of this document).

While it is not your role to give legal advice, you can **explain the young person's basic rights**, especially the right to silence. Check that the young person understands these rights, and ask if they want your help in exercising their rights.

6.4 Help the young person to get legal advice

Everyone has the right to legal advice before deciding whether to agree to an interview (or a procedure such as a line-up or forensic procedure).

Everyone also has the right to have a lawyer present in a police interview, although this is rare in practice. For children and other vulnerable people, the lawyer may fulfil the role of support person, or may be there in addition to a support person.

Legal advice is important. A lawyer can advise a young person whether it's a good idea to agree to an interview, or a line-up or forensic procedure, in a particular situation.

Sources of telephone legal advice include:

- The Legal Aid Hotline for Under 18s can be reached on 1800 10 18 10. It is a free and confidential service, staffed by specialist children's solicitors, and is open from 9am to midnight on weekdays and 24 hours on weekends and public holidays.
- Unfortunately there is no Legal Aid hotline for over-18s, but Legal Aid may be still able to assist in some cases, especially if the matter is serious.
- The Aboriginal Legal Service has a custody hotline. Although this number is not publicly available, the police have the number and must call it if they have an Aboriginal or Torres Strait Islander person in their custody.
- The Shopfront Youth Legal Centre may be able to provide telephone advice for children and adults aged 25 and under.
- The Intellectual Disability Rights Service has a roster of solicitors available to advise people with intellectual disabilities who are detained at police stations.
- Alternatively, the young person may contact a lawyer of their own choice.

If the young person is unable to access legal advice, it is appropriate and important to explain their right to silence. If you have a very good understanding of cautions, conferencing, bail and court procedure, you can give them some basic information about these procedures. However, remember that you are not qualified to provide legal advice!

6.5 Help the young person exercise their rights

For children and other vulnerable people, a support person is more than just an observer. Your role includes helping the young person to understand and exercise their rights. This is particularly important where the young person wants to assert their right to silence.

There is a difference between being a good advocate and unreasonably interfering. If a support person is interfering unreasonably, the police may require them to leave. In this situation the detained person is entitled to another support person.

See section 7 of this document for more information on supporting a client in a police interview and assisting a client to assert their right to silence.

6.6 If the young person is mistreated

If the young person is mistreated, keep a record of the police officers' names or badge numbers, and take notes of what happened.

If the young person has any injuries, ask the police to take them to hospital or to arrange for medical attention at the police station. If the injuries don't need urgent treatment, take the young person to see a doctor after release from the police station. Have photos taken as soon as possible.

You should then be prepared to help the young person to lodge a complaint. It is a good idea to seek legal advice before doing this, particularly if the young person is charged with criminal offences and the matter will be going to court.

7 Your role in a police interview

7.1 Should the young person agree to a police interview?

One of the most important rights is the **right to silence**. In nearly all situations, **a suspect does not have to participate in an interview or answer police questions**. It doesn't matter whether the suspect is an adult or a child, whether or not they are under arrest, whether a support person or a lawyer is present, or whether the interview is videotaped.

There are a few exceptions, the main ones being motor accidents or offences involving vehicles (where the owner or driver must provide certain information on request), and some situations where police are entitled to demand a person's name and address. In these situations, the police must tell the person that they have a duty to provide information.

It is generally a good idea for a suspect to tell the police their correct name and address, but it is not usually in their best interests to answer any other questions. There are some situations when it may be a good idea to agree to a police interview. For example:

- If there is a real possibility of a caution or conference under the *Young Offenders Act*, a child who has committed an offence may be well advised to admit it.
- A person who is not guilty may be able to avoid being charged by telling the police their side of the story.
- In some (rare) situations, an adult suspect who fails to answer police questions may have that used against them in court (see document on *Police questioning and the right to silence*) However, in most cases, a court is not allowed to draw an adverse inference from silence - meaning they cannot assume that the person is guilty just because they refused to answer questions.

This is a decision that should be made only after receiving legal advice. It is not appropriate for you to advise a young person whether or not to do an interview, except to advise them not to say anything until they have got legal advice.

7.2 If the young person does not wish to be interviewed

Sometimes your role will include telling the police that the child does not wish to be interviewed. If the young person tells you they do not wish to be interviewed, you should make this clear to the police and try to ensure that the police do not put pressure on the young person to change their mind.

Police will sometimes tell the child that they must go on audio and video (ERISP) saying they do not wish to answer any questions, but there is no legal basis for this. **A suspect cannot be forced to go on ERISP.** Sometimes there is no harm in doing so, as long as the young person has an assertive support person (you!) and the police don't use it as an opportunity to slip in a few inappropriate questions (see *Tricks and traps* in section 8 of this document).

Instead, the young person may sign a police officer's **notebook**, saying they do not wish to be interviewed. You may be asked to sign as a witness. This is fine, as long as you and the young person are clear about what you are signing.

If police attempt to interview the young person after being told they do not wish to be interviewed, a court may regard it as improper or unfair and refuse to allow the record of interview to be admitted as evidence. In the case of *FE* in 2013, the NSW Supreme Court excluded a record of interview in relation to a murder charge. The 15-year-old suspect and her Legal Aid hotline lawyer both told the police that she did not wish to be interviewed. The lawyer clearly told the police that the young person did not agree to go on ERISP but would sign a police notebook. Despite this, the police took the young person to an interview room, interviewed her by ERISP and asked her a series of questions. Although the lawyer had advised her about her right to silence, the young person thought she had no choice. Her support person (her mother) did not understand her rights either. The young person said “...I already told the copper that I didn't want to do the interview, so he told me I had to, so obviously I had to do what the police had to say.” The judge held that this was a very grave breach of her rights.

7.3 If the young person agrees to be interviewed, should you sit in?

You should be wary of agreeing to sit in on police interviews, but this does not mean you should never do it!

If the person being interviewed is under 18, your presence may allow the police to use the record of interview against the young person in court. However, if you decline to participate, the police may call in an adult who has no experience or interest in protecting the rights of children. Or, if police make reasonable efforts but cannot find an adult to attend, the magistrate may allow the record of interview to be used in court anyway.

Also, if a caution or conference is a real possibility, it may be helpful for you to be there so the child can admit the offence in a way that complies with the *Young Offenders Act*.

The police are also more likely to conduct the interview fairly, and in a way that is less intimidating for the young person, if there is an appropriate support person present.

If the young person is an adult, and is not a “vulnerable person”, there is no absolute right to have a support person sitting in on an interview. However, if the suspect agrees to an interview on the condition that a particular support person is present, the police will usually allow this.

You should only agree to sit in on an interview if you are sure that the young person's participation is truly voluntary. The court has discretion to exclude a statement that was not voluntary, or was obtained unfairly or illegally. However, it is much harder to get an interview excluded from evidence if there was a support person present.

7.4 The interview

In most cases, a police interview will be done by way of **ERISP** (Electronically Recorded Interview with Suspected Person) which means it is recorded on audio and video.

In some situations, however, there is no need for an ERISP and the young person can instead do a “**notebook interview**”. This involves the questions and answers being written in a police officer's notebook and the young person signing the notebook at the end. These situations include:

- Allegations of minor offences (eg drug possession, shoplifting);
- Admissions made for the purpose of the *Young Offenders Act*. To be eligible for a caution or a conference, the young person must admit the offence in the presence of an appropriate adult. The Act does not require the admission to be made in any particular form and certainly does not require the young person to go on ERISP; a notebook interview is sufficient.
- For the purpose of recording the young person's refusal to be interviewed.

7.5 Support people are more than just observers

A support person is not just an observer. The LEPRA Regulations make it clear that a support person's role in an interview includes assisting and supporting the detained person, observing whether the interview is being conducted properly and fairly, and identifying communication problems. The police custody manager must inform you of this role. The courts have also made it clear that an independent adult under section 13 of the *Children (Criminal Proceedings) Act* is not just a passive observer.

Assist with communication if necessary. You can point out any possible misunderstandings on either side, and ask the police to rephrase questions in a way that the young person can understand. Ask for an interpreter if the young person wants one or you believe they need one. You may also be able to give the police important information that might influence the way they deal with the young person (for example, they might not know that the person has an intellectual disability).

Where appropriate, feel free to intervene, for example, if you think the young person does not understand a question or is being pressured to answer questions which he or she does not wish to answer. Some police officers will try to stop you from talking at all - this is inappropriate and you should be prepared to stand up for yourself and the young person if this happens. Note, though, you are not allowed to answer questions for the young person or interfere unreasonably.

Police can exclude you from an interview if you unreasonably interfere with it, but if this happens, the young person can have another support person of their choice present. If the police ask you to leave the interview, or if you are unsure or unhappy with the way the interview is conducted, you should pass this information on to the person's lawyer.

Ask the police to take a break if necessary, for example, if the young person appears tired, distressed or in need of further legal advice.

The young person has the right to terminate the interview at any time. If you sense that the young person no longer wishes to answer questions, you may need to ask them if they want to continue. If the answer is "no" or "not really" then you should ask the police politely but firmly to terminate the interview.

Advocate on the young person's behalf to the police about any concerns you have about the interview or the young person's capacity to participate. At the end of an electronically-recorded interview, a senior officer at the station who is not connected to the investigation will ask the child some questions. These are to ensure that the interview was properly conducted. If you feel the police have made a threat, promise or inducement to influence the child to answer questions, it is important to speak now and to have your answer recorded.

7.6 After the interview

If the interview is electronically-recorded (ERISP), the young person will be given a copy of the audio CD at the end of the interview. The police must also make the video available for viewing by the child or their lawyer on request.

Sometimes, instead of an ERISP, police will type up a record of interview or write it in their notebook, and then ask the young person to sign the record of interview. **The child does not have to sign the record of interview, and should not do so unless it is accurate!** Make sure that the young person reads it carefully (or, if literacy is a problem, read it to them) and is satisfied of its accuracy before signing it.

You may be asked to sign the record of interview as a witness. By all means sign it, but only if you and the young person agree that it is accurate, and you are satisfied that the answers were given without threat, promise or inducement. Try to ensure that the young person gets a copy of the record of interview, and ask for a copy for yourself.

Make sure you have kept good notes, and that they also cover what was said and done outside the formal interview. You may be called upon to give evidence in court about the interview and the matters surrounding it. For example, the young person's lawyer may seek to have a record of interview excluded because it was unfairly obtained, or because the child was affected by intoxication or mental illness.

8 Tricks and traps

Please be aware of these potential pitfalls, most of which have already been mentioned:

Prior run-throughs: police can and do interview children without an adult present, often getting the child to make admissions. Although these admissions would be inadmissible in court, the police sometimes re-interview the child in the presence of an adult, saying "Do you agree that you've already told us ...?". A child who doesn't understand their rights may think they have no option but to confirm the admissions they have already made. Be wary of this.

Things said outside the formal interview: even if a suspect refuses to be interviewed, police may speak to them informally and take notes of what is said. You should ensure that a young person understands that anything they say could potentially be used against them. If you are a witness to any conversation between police and a young person outside of a formal interview, take notes of what was said, to minimise the chance of the young person being "verballed" by the police.

Forcing young people to go on ERISP: sometimes the police will tell the young person that they have to go on ERISP (audio and video) to record their refusal to answer questions. While they cannot legally force a person to be electronically recorded, they are sometimes very persistent and persuasive. If the young person does go on ERISP to record their refusal to be interviewed, as a support person you should make sure that the interview goes no further than this. Once the tape starts rolling, some police officers will take advantage of the situation and start asking questions, hoping to get a response from the young person. If the police start saying "I just want to put these allegations to you, in fairness to you...", you should politely but firmly remind them that the young person does not wish to answer any further questions.

Admissions for the *Young Offenders Act*: try to persuade the police to do a notebook interview rather than an ERISP. The temptation for the police to stray beyond the offence they are investigating, and the temptation for the young person to answer further questions, can be irresistible! Young people can sometimes inadvertently admit to more serious offences which are ineligible to be dealt with under the *Young Offenders Act* (eg drug supply instead of mere possession).

Another issue is that police may persuade a child to answer questions by telling them they will be getting a caution. The police then renege on this after the young person has made admissions. In this situation, it may be possible to get the admissions excluded from evidence on court, on the basis that they were obtained by inducement.

Witness versus suspect: sometimes the police will tell a young person they are a witness and not a suspect, and ask them to provide a statement. Witnesses do not have the same rights as suspects, for example, the police do not have to caution them about the right to silence and they are not usually entitled to a support person. On the other hand, a witness cannot be arrested or detained for the purpose of making a statement.

If the police tell the young person they are a witness and not a suspect, beware: this might be a trap. Even if the police honestly believe that the young person was not involved in the offence, young people may unwittingly incriminate themselves. There can be a fine line between a witness and a suspect, especially in cases of group offending.

For example, a person who stands by while a victim is robbed could be simply an eyewitness or they could be an offender, depending on their intention and whether there was any agreement between the offenders.

Sometimes police may pressure a witness to provide a statement by threatening to charge them with concealing a serious offence. If possible, you should insist that the young person gets legal advice before making a statement.

Support people and confidentiality: if the young person tells you something in private, you should treat it as confidential, especially if you have a professional relationship with them (eg if you are their counsellor or social worker). Generally, the police cannot force you to reveal what the young person told you. However, you might be subpoenaed to court to give evidence about what the young person said, and in this situation, you may no longer be able to protect the young person's confidentiality.

A dramatic example of this is the case of *JB*, decided by the NSW Court of Criminal Appeal in 2012. The young person was charged with murder. He had refused to speak to the police but had made some admissions to a support person (who worked as a youth liaison officer with the Sudanese community) during a private conversation at the police station. The court admitted the evidence of the conversation, holding that it was not confidential.

9 What next?

After a young person has been interviewed, or has declined to be interviewed, there are a few possibilities including:

- If the police have insufficient evidence against the young person, they may **release them without charge**.
- Sometimes the police may have insufficient evidence but may be continuing their investigations, in which case they may **release the young person pending further investigation**. In this situation you should assist the young person to get some legal advice, and warn them to be careful who they speak to about the matter (even if they think the conversation is private, police may have the under surveillance, including intercepting telephone calls).
- If the young person is under 18 and is to be dealt with under the *Young Offenders Act*, he or she will be released and told to come back on a certain date for a **caution**, or to wait to be contacted by a **conference** administrator.
- If the young person has to go to court, police may give them a **no bail** or **field court attendance notice**, or release them and tell them they will be sending out a **future court attendance notice** (what used to be called a **summons**). A no bail, field or future court attendance notice requires the young person to attend court, but does not have any bail conditions attached.
- More commonly, police will give the young person a **bail court attendance notice** which requires them to sign a **bail undertaking**. Beware of arresting or investigating officers who tell you there will be no problem with bail. The decision is not made by them but by a senior officer, often the custody manager, who may have a different view. This decision is not made until the investigating officer has created and submitted the relevant paperwork, which can sometimes take hours. During this time the young person will probably be waiting in a cell or dock and has no automatic right to have a support person present. However, the police may allow you to sit with them, at least for a while. **You should try to speak to the custody manager about bail**,

including making them aware of what support is available to the young person and advocating for appropriate conditions.

- If the young person is **refused bail at the police station**, they will be taken to court the same day or the next day to apply for bail. There will usually be a Legal Aid or Aboriginal Legal Service duty solicitor to assist them. If you can attend court or at least get in touch with the solicitor, you may be able to pass on helpful information that will assist the young person to get bail.

If and when the young person is released from the police station, make sure they have a copy of all relevant documents including court attendance notice, bail undertaking, ERISP CD or other record of interview, and custody management records. If the young person is likely to misplace them, you might offer to take them for safe-keeping and to pass them on to their lawyer if required.

If the young person has to go to court, you should help them to get legal assistance. Inform the young person about lawyers and court support workers, and about how to get advice or assistance before the court date. Make a referral and organise an appointment with a lawyer if appropriate.

If you have concerns about the way the young person was treated by the police, or the appropriateness of any arrest, search or interview, get the client's consent to pass this information on to their lawyer – it could be relevant to the case.

If the young person is on bail, make sure they understand their conditions! If you are concerned about the conditions being too onerous, try to arrange some legal advice straight away, so a bail variation application can be made at the first available opportunity. Do not assume that the young person will simply be able to get their bail varied on the first court date. For more information see the separate document on *Bail*.

The Shopfront Youth Legal Centre Updated November 2013

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and the Salvation Army.

This document was last updated in November 2013 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

This document provides a summary only of the subject matter covered, without the assumption of a duty of care. It should not be relied on as a substitute for legal or other professional advice.

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