Demystifying the Legal Aid Youth Hotline

1800 10 18 10

Introduction

The legal aid youth hotline is a service run by Children's Legal Service primarily aimed at providing advice to young people in police custody, but also to those not in custody about criminal law matters. There is also a referral component for young people to appropriate services where they require assistance outside our area of expertise, such as family or civil law. Only current and previous CLS solicitors provide hotline advice.

It operates 7 days per week, from 9am until 12 midnight on weekdays and 24 hours on the weekends and public holidays.

The advice given to young people is contemporaneously recorded by the solicitor and is later entered into our database by administrative staff in an electronic format. A copy of our standard advice form is attached. There is information that is generally recorded on these forms beyond the headings, such as timing of messages left on voicemail and call return times, as well as what police relay as the particulars of the offences. There is a Hotline Protocol in place with NSW Police in relation to these calls, which is attached.

Hotline not only keeps records in relation to the advice but we also have call records which log the originating phone number, time/date of call and the length of the call.

Information about hotline advice has proven particularly useful in arguing for the exclusion of ERISPS, and because its generally very easily accessible, we hope all solicitors who defend young people where there has been an ERISP conducted, start requesting hotline advices as part of their standard practice.

The Youth Hotline and exclusion of ERISPs

The following are some examples in which retrieving hotline advice might assist in a defended hearing where there is an argument for exclusion of an ERISP:

1. **Non-compliance with the regulations**

Under Section 25 of the *Law Enforcement (Powers and Responsibilities) Regulation* the custody manager must, as far as practicable, assist a vulnerable person in exercising their rights including the right to make a telephone call to a legal practitioner.

A child is included in the definition of a vulnerable person under section 24 of the regulations.

Where the vulnerable person is a child, the custody manager must assist them to contact the legal aid hotline: *R v Cortez; R v CE; R v ME; R v Ika; R v LT* unreported 3/10/02 per Justice Dowd. So, when presented with a matter where the police fail to call the hotline and an ERISP is done, it is well worth arguing that the police have failed to comply with the regulations, the admission was improperly obtained and therefore the ERISP should be excluded under s138. As a side note, it has also been held that contact by way of a fax to an office after-hours, is insufficient to discharge the police obligation (*R v APCR; R v CP* [2006] NSWDC per Nicholson J), so it is arguable that leaving a message on an answering machine might also be insufficient.

Regulation 26 of LEPRA governs who can act as a support person for a child, which can be generally summarised as: for a child under 16 years, a parent with guardianship/carer of the child or an adult approved by the parent/carer; for a child 16 years or over, an adult

nominated by the child. This is an important provision which is often overlooked when considering ERISP exclusion. Hotline solicitors can raise the issue of non-compliance but ultimately the police will do what they choose on these types of issues and sometimes take shortcuts (ie. Accepting the nomination by a 14 year old of an adult which has not been approved by the parent and later turned out to be his drug dealer or her pimp). The hotline solicitors, though, would keep notes of conversations with police on these types of issues.

2. Promises of the *Young Offenders Act*

The YOA also contains provisions requiring police to inform young people of their rights to obtain legal advice: S7(b); 22(1)(b) & 39(1)(b). Only specified offences can be dealt with under the YOA but as a hotline solicitor, one of the first questions posed, is will the child be dealt with under the YOA subject to admission of the offence: s10 YOA. The responses provided by police are recorded within the hotline advices, as well as any notable remarks (ie. Not proceeding with circ of agg on B & E so YOA can proceed).

There are a number of instances where police definitively state the matter will proceed by way of YOA caution and the matter ends up in Court. Sometimes that original intention is recorded on the Facts Sheet but often it is not. Where a child presents at Court and insists they did the ERISP because they were told they would get a caution, it is imperative to access the hotline forms. It is all too common for police to promise a YOA caution and use that promise and the subsequent participation in an ERISP as an investigative tool to ground a charge. In these situations, it is arguable that an admission made because of the promise to proceed without attendance at Court or conviction is one in which the truth could well be adversely affected. And if an argument under S85 is unsuccessful, an argument under ss 90, 137 & 138 may succeed.

Generally YOA admissions are recorded by way of formal ERISP, which has the usual implications for a young person such as the possibility of being subpoenaed to give evidence against a co-accused. Section 67 of the Young Offenders Act states that,

> *'Any statement, confession, admission or information made or given by a child during the giving of a caution or conference under this Act is not to be admitted in evidence in any subsequent criminal of civil proceedings'*

Some argue this offers no protection against future admissibility because it refers to statements 'during the giving of a caution or conference' and is not general in nature. In practice though, police officers attend young persons' homes to not only formally record the admission but to simultaneously impose the caution. In regional areas, sometimes the admission is also made at the same time as the giving of the caution. Those admissions could arguably fall within the ambit of Section 67 YOA.

3. The absence or inappropriateness of a support person

The information contained in the hotline advice can provide details as to: the presence or otherwise of a support person at the police station; any conversations between the solicitor and the support person; and/or whether any conversation took place between the solicitor and the police regarding the support person – including whether the solicitor raised with the police any issues relating to the appropriateness of the support person.

Some examples of where a solicitor might question the appropriateness of a support person include:

- When the support person has some form of relationship with the victim (or in some cases IS the victim!)
- When the support person is a witness in the matter

- When the support person does not have a strong command of English and there is no interpreter
- When the support person has an intellectual disability or is suffering from the acute phase of a mental illness.
- Whenthe support person appears to be affected by drugs or alcohol
- When the support person can be heard to constantly repeat “I brought my son up to be honest and I want him to tell the police the truth” (this will likely be me in a few years!)

Any conversation with, or pertaining to, the support person would be documented in hotline advices.

In circumstances where there was no support person present during a record of interview, reliance should be placed upon section 13 of the *Children's (Criminal Proceedings) Act 1987* to argue that the ERISP be excluded.

Section 13 has a discretionary element but states,

> *(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.*

Section 13 is useful not only in attempts to exclude ERISPs on the basis of the absence of a support person, but also in circumstances where the issue is the lack of appropriateness of the support person. It is no longer the case that mere presence of a support person is

sufficient, and greater importance is now being placed on the practical effect of such presence. To date, Section 13 has been given a liberal interpretation and where the role of the support person is not appropriately fulfilled, there have been grounds for exclusion: see *R v H (A Child)* per Hidden J.

In *R v Phung and Huynh,* Hunt CJ said (at paragraph 36),

> *The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights.*

LEPRA also provides a legislative guideline as to the obligations on a custody manager in ensuring the role of the support person is clear. Section 30 provides as follows:

> *(1) The custody manager for a detained person who is a vulnerable person is to inform any support person for the detained person that the support person is not restricted to acting merely as an observer during an interview of the detained person and may, among other things:*
> *(a) assist and support the detained person, and*
> *(b) observe whether or not the interview is being conducted properly and fairly, and*
>
> *(c) identify communication problems with the detained person.*
>
> *(2) The custody manager is to give a copy of the summary referred to in section 122 (1) (b) of the Act, to:*
> *(a) the support person, and*
> *(b) any interpreter for the detained person who attends in person at the place of detention.*
>
> *(3) If the support person or the detained person's legal representative is present during an interview of the detained person, the support person or legal representative is to be given an opportunity to read and sign any written interview record.*
>
> *(4) Any refusal by the support person or legal practitioner to sign a written interview record when given the opportunity to do so must itself be recorded.*

The obligations on a custody manager must be strictly applied in meeting the requirement for an informed and appropriate support person. As Wood CJ held: 'the provisions need to be faithfully implemented and not merely given lip service or imperfectly observed' (*R v Phung & Huynh*).The hotline advices can provide invaluable information on the presentation of the support person, including any conversations with or about that person, that can assist in legal arguments on point.

4. Intoxication, impairment and enlivening section 85 of the *Evidence Act*

Section 85 of the Evidence Act deals with the reliability of any admission and states,

> *(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.

(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.

The possibility of inducement has already been raised, but fundamental to any Section 85 argument is the condition or characteristic of the person making the admission. As solicitors with experience in dealing with young people, it becomes clearly apparent when a child comes to the phone for advice and their comprehension is well below others their age. It is even more apparent when they refuse to come to the phone at all by reason of intoxication, but you can hear them yelling abuse in the background. Unfortunately, the police are sometimes less than forthcoming when a child has an intellectual or mental disability that hinders their ability to understand the advice, but more than forthcoming when the child is affected by a substance. Either way, the hotline advice and the observations of the solicitor can be a useful tool if the intention is to prove a condition or characteristic of a young person at the time of participating in an ERISP under s85..

5. Unfairness and Section 90 of the *Evidence Act*

Section 90 provides:

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.

Hotline advices ordinarily include information about conversations with the custody manager confirming the young person's instructions that he/she does not want to participate in an interview nor have their refusal recorded on ERISP. It is not uncommon for police to insist on taking theyoung person into the interview room, even after receiving such advice, for the purposes of recording a refusal, only to ask questions about the offence. This is so despite the police circular issued (PC05/02) stating 'you do not have the power to compel or intimate to the suspect that they must participate in an electronic recorded interview for the purpose of recording their refusal'. Given the representative role of a solicitor generally, it is unusual that the practice of ignoring a solicitor's advice of what the child instructs is still accepted. Yet, in that setting, the police still proceed to question the young person directly and they are very rarely made accountable for it.

Similarly, there are instances where the information relayed to the solicitor about the offence is such that it does not constitute an accurate portrayal of the event. For example, the unfairness provision might be enlivened when a young person proceeds with an ERISP to outline self –defence on a charge that was portrayed by police as an assault with no injures, when the charge eventually laid is a wound with intent.

Whereas in a voir dire it may be decided not to call the young person, a solicitor providing advice on hotline may be able to give that same evidence with the benefit of having made contemporaneous notes.

Practicalities: How to get the hotline advice

Feel free to contact the hotline on 1800 10 18 10, preferably during office hours if you are seeking to access copies of documents, but usually after hours solicitors would be able to give you an indication of whether hotline was contacted or otherwise.

Where there is no hotline advice with Legal Aid and the client is is Aboriginal, the Aboriginal Legal Service can be contacted. They too have a system in place for recording hotline advice and can be contacted on 8303 6666.

Given the rules of evidence in relation to the tender of documents made in contemplation of court proceedings the tender of the hotline advice might require an affidavit from the particular solicitor who gave the advice.

The advice given on hotline

The advice provided to young people for hotline purposes consists of the same information that solicitors relay on a daily basis when dealing with young people in custody. Such information mainly pertains to the Young Offenders Act and the right to silence, but the issue of confidentiality will also be raised. There is further advice on ancillary issues provided by the hotline, such as whether to participate in an ID parade, AVOs and forensic procedures.

Young Offenders Act 1997

Section 8 sets out offences that can be dealt with under YOA, and those that are excluded. Subject to a few exceptions, the Act covers only summary offences and those indictable offences that can be dealt with summarily.

The offences specifically excluded from the Act are also outlined in Section 8, and include most drug offences, offences of a sexual nature, those resulting in the death of a person, traffic offences where the person is of licenseable age. The most controversial exclusion at present is that relating to “domestic violence offences”, which are legally defined as offences under the *Crimes (Domestic and Personal Violence) Act 2007*, (specifically contravene AVO and intimidation), but police seem to apply it to any assault that occurs in a domestic context, and even damage property offences.

Other than for warnings, a child is eligible to be dealt with under the YOA if they admit the offence in the presence of an appropriate support person and consent to a caution/ conference being given: ss19 & 36. A warning requires neither an admission nor consent.The initial decision as to whether the matter proceeds by way of the YOA rests with the police but if the child would otherwise be eligible and the investigating officer deems it inappropriate, a referral to a Specialist Youth Officer is required: ss14,20 & 21. There are a maximum of 3 cautions and 3 conferences available for each child: ss20(7) & 37(6).

Entitlement to be dealt with under the YOA is based on an admission by the young person (s19 in relation to cautions & s36 for conferences). Admission, however, is not defined in the

Act. Given the case law available on 'admissions' generally, and taking a purposive approach to the legislation, one might think an admission to consider eligibility is an admission only to the elements of the offence. Police have on occasion, and to serve some investigative purpose, wrongly imposed a very stringent view on the term 'admission' so that unless the child divulges names of co-accuseds and roles of each person then the police deem that the YOA does not apply. Children should be warned that extraneous material relating to the offence is not determinative of eligibility for YOA and if the police are taking the approach, it may be more appropriate for the matter to proceed to Court, who are also able to impose penalties under the YOA: ss31 & 40. Similarly, when a child has a mental health condition or doli incapax is an issue, it may be more appropriate to advise the child to exercise their right to silence and elect to have the matter dealt with by the Court.

As outlined earlier, it is imperative to obtain as much information as possible from the police and young person about the allegation against the young person, before providing advice. It is all too common for a police officer to indicate the charge as a steal from person (or for non-hotline solicitors, for a young person to say the police want to speak to them about stealing a handbag. As with most offences in criminal law, one fact can be the difference between years in custody, and in this case, not extracting information about whether there was an assault accompanying the stealing can be the difference between a YOA caution and a probation/ suspended sentence on a robbery charge. The failure to ask whether there are injuries sustained by the victim could be the difference between a robbery and an aggravated robbery, and the failure to ask about the nature of those injuries could be the difference between the matter being dealt with to finality in the Children's Court or a committal for sentence to the District on an aggravated robbery with wounding. Because of the nature of the children's court jurisdiction and the diversionary nature of the YOA, the failure to ask three simple questions, has the potential for dire consequences.

Alongside stealing matters, here are a few examples of other instances where it is imperative to ensure detailed information is obtained from the police or the young person:

- Assault matters – make sure you ask about the injuries sustained by a victim. Otherwise the 'it's an assault' will actually turn out to be a wound with intent, and in one case, after probing, it was discovered the victim was in an induced coma and unlikely to make it through the night. In that latter example, the original information from the police was 'oh we want to speak to him about an assault'. For assault matters, it may also be important to ask whether the relationship is domestic in nature, given most police adopt the view that the YOA is inappropriate for these charges.

- Drug matters – make sure you ask about the type and quantity of the drug. Don't forget to advise that sharing with friends (puff puff pass) is considered a supply and unlikely to be dealt with under the YOA.

- Break and Enter matters – make sure you ask about any co-offenders, time of day and if anyone was home, when police tell you they want to deal with it under the YOA.

In situations where the young person is not going to be dealt with under the YOA, advice on the right to silence is crucial, noting that, as discussed above, there is no obligation to have a refusal recorded on ERISP.

The right to silence

The right to silence includes the privilege against self-incrimination, but encompasses broader freedoms, and is linked to the presumption of innocence, the right to a fair trial, and can be characterised as an important protection of individual liberty. Children hold special

immunities by virtue of their age, naivety and vulnerability and as such, such protections are even more paramount than would otherwise be the case. However, there are instances where the right to silence is infringed by way of statute. One such example is the use of forms of demand.

Police have increasingly been placing forms of demand of young people purportedly in accordance with section 14 of LEPRA, which states:

> *(1) A police officer who suspects on reasonable grounds that a vehicle is being, or was, or may have been used in or in connection with an indictable offence may make any one or more of the following requests:*
>
> *(a) a request that the driver of the vehicle disclose his or her identity and the identity of any driver of, or passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the request was made or a direction was given under this Division to stop the vehicle,*
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> *(b) a request that any passenger in or on the vehicle disclose his or her identity and the identity of the driver of, or any other passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the request was made or a direction was given under this Division to stop the vehicle,*
>
> *(c) a request that any owner of the vehicle (who was or was not the driver or a passenger) disclose the identity of the driver of, and any passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the request was made or a direction was given under this Division to stop the vehicle.*
>
> *(2) Nothing in this section limits the operation of section 11.*

Failure to comply with a request made under this section can attract a penalty of 50 penalty units and/or 12 months imprisonment.

Advice has been received from a former Public Defender in relation to whether exercising a right to silence would amount to a defence of 'reasonable excuse'. The advice can be briefly summarised as:

- Exercising a right to silence is not a reasonable excuse for failing to comply with a request made under section 14;
- Only that information provided for in the section need be provided. The section does not compel a person to participate in an interview with police.

Confidentiality issues

Whilst it is well-accepted that legal conversations are subject to confidentiality, there have appears to be a recent trend whereby conversations that one might think would otherwise be confidential have been deemed admissible. The recent decision of *JB v Regina [2012] NSWCCA 12* is one such example and young people must now be advised that conversations with support people are not subject to confidentiality and could potentially be used against them as evidence in a criminal prosecution.

The following is a short summary of JB:

> JB was charged with murder. He was 15 years old at the time of the incident and was of Sudanese heritage. When arrested by the police an independent support person, who worked as a youth liaison officer within the Sudanese community, was contacted to attend the police station to act as a support person. Prior to the support person arriving at the police station the young person had plainly refused to say anything to the police. On arrival, the support person and the young person were place in an interview room alone. The support person asked YP what happened, and the YP answered that he stabbed a man. The support person subsequently told the police what the YP had said, and whilst refusing to provide a formal statement, was later called to give evidence at the young person's trial.

As a result of that evidence, JB was found guilty of murder. The evidence of the support person was deemed admissible, despite arguments raised in relation to the role of the support person, the previously liberal interpretation afforded to this requirement and the inappropriateness that such conversations be admissible. The appeal to the CCA regarding that admissibility relating to the evidence of the support person was dismissed.

A copy of that decision is attached.

prepared by

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Solicitor, Children's Legal Service, June 2012