

# THE DUTY OF ‘A RESPONSIBLE PERSON’ UNDER SECTION 13 OF THE *CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987 (NSW)*

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The admissibility of information or statements made by defendants in criminal proceedings in New South Wales is governed largely by the *Evidence Act 1995 (NSW)* (and its equivalent Commonwealth legislation, the *Evidence Act 1995 (Cth)*). In relation to children, however, special provision has been made by the NSW Parliament in the *Children (Criminal Proceedings) Act 1987 (NSW)* to govern the admissibility in court of evidence by children charged with criminal offences. The legislation provides guidance to police, to legal practitioners and to the courts by laying down a set of principles, as well as making specific provision for the practices and procedures by which children are dealt with by the judicial system. The legislation is both instructive and directive.

It is well accepted that children are at considerable disadvantage during an interview with police, and that there is a real risk that they may make untrue admissions.<sup>1</sup> The pressures upon children, which may lead to self-incrimination, or induce a breach of the foundation principle of the ‘right to silence’, are tacit in the power imbalance at a police station. It has been suggested that these pressures are intrinsic in the detention of a child by police, and accordingly national standards should be established.<sup>2</sup> In NSW the legislature’s response to these types of issues can be found in s 13 of the *Children (Criminal Proceedings) Act 1987 (NSW)* (the Act).

Section 13 of the Act sets out criteria for the admissibility of any ‘statements, confessions, admissions or information’ provided by a child to a member of the police force who ‘is a party to criminal proceedings’. Evidence of what the child said to the police will not be admitted in judicial proceedings, subject to certain provisions, unless a ‘person responsible for the child’ was present at the time the child spoke to the police.

It follows that the duty of a ‘person responsible’ will be significant. Is this person a mute observer, simply in attendance to ensure nothing untoward occurs? Or should the duty be more pro-active, ensuring the child’s rights are recognised and acted upon? In

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<sup>1</sup> R Ludbrook, *Police Questioning of Young People* (Discussion Paper, National Children’s and Youth Law Centre, 1994); H Blagg and M Wilkie, *Young People and Police Powers* (The Australian Youth Foundation: Sydney, 1995).

<sup>2</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

either situation the action, or inaction, of the 'person responsible' will have implications for the child.

The Act however, is silent about the role of 'a person responsible for the child', and it has fallen to the courts to provide a definition of the nature and extent of the duty. This paper will consider the interpretation by the NSW Supreme Court of the duty of 'a person responsible', under s 13 of the Act.

The case law in NSW, at least at first instance, seems to suggest that the courts have accepted that there is a limited duty upon 'a person responsible' to look after the interests of a child when interviewed by the police. There is an expectation that the person will be independent from the police. However, there is a divergence of views within the Court as to the implication of 'independence', and significant questions remain regarding the duty of a 'person responsible' for a child. These questions turn on the construction of the Act: does a legalistic interpretation of the Act give full consideration to the spirit of the legislation; is the interpretation by the Courts consistent with current benchmark international standards; are the Courts giving cognizance to the notion of 'children's rights' in the construction of the Act?

The introduction of the *Children (Criminal Proceedings) Act* in 1987 follows a history of special legislation aimed at managing the relationship between children and the courts.<sup>3</sup> The traditional view of children being in need of 'protection' has its expression in the legislative history within NSW, and early legislation linked the imposition of criminal sanctions to the provision of care and correction. Courts were expected to adopt a *parens patriae* attitude to children.<sup>4</sup> This attitude is evident in the *Child Welfare Act 1923*, which was reconsidered and developed in 1939.

The *Children (Criminal Proceedings) Act 1987* emerged in a dialogue about 'due process' and children's rights.<sup>5</sup> Moreover, Australia was feeling and responding to wider concerns raised at international level. International instruments such as the *Convention on the Rights of the Child*, set out principles and benchmark standards, of which children's rights are a significant part of this agenda. Furthermore, an interpretation of domestic legislation must have regard to international standards.<sup>6</sup> It is true, however, that the introduction of the 1987 Act moved the courts in a direction which explicitly endeavoured to protect the interests of children by in a sense, codifying the principles upon which children would be involved judicial proceedings. This must have important ramifications for the interpretation of the Act.

## I PROTECTING THE RIGHT TO SILENCE

The first step by the legislature intended to protect the admissibility of children's evidence in judicial proceedings came in an amendment, in 1977, to the *Child Welfare Act 1939*.

<sup>3</sup> J Seymour, *Dealing with Juvenile Offenders* (Law Book Company: North Ryde, 1988) 77.

<sup>4</sup> Australian Law Reform Commission, *Sentencing Young Offenders*, Report No 11 (1988) 1-12.

<sup>5</sup> J Seymour, above n 3.

<sup>6</sup> M Kirby, 'Human Rights Agenda for the Future' in B Galligan and C Sampford (eds), *Rethinking Human Rights* (Federation: Annandale, 1997) 20.

Section 81C provided that anything said by a child to a police officer at a police station could not be admitted into evidence in court unless the child's parent or a person with guardianship who was over 18 years old, was 'present at the place in the police station where and throughout the period of time during which it was made or given'. The section retained a judicial discretion to nonetheless allow admission for 'proper and sufficient' reason.

Notwithstanding this amendment, the courts continued to deal with the admissibility of a child's evidence (except when taken within a police station) in criminal proceedings in the same way as they would in relation to an adult.<sup>7</sup> This meant that the common law was to be applied by courts. In other words, courts could exclude evidence on the basis of unfairness, although as with adults there was a discretion to admit the evidence where the prejudicial value was not outweighed by its probative value.<sup>8</sup>

The discretion to exclude improperly obtained evidence is well established. The *Evidence Act 1995*, following upon the common law, in ss 81-90, outline the circumstances in which 'admissions' by an accused are governed. In substance, the Act respects the fundamental principle of an accused's right not to incriminate themselves (the right to silence). The admission of confessional evidence will have an undoubted effect on the likelihood of conviction and therefore the veracity of the evidence; that it was lawfully obtained is crucial.<sup>9</sup>

## II SECTION 13 OF THE *CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987* (NSW)

The *Children (Criminal Proceedings) Act 1987* was enacted as part of a raft of legislation dealing with the area of juvenile justice.<sup>10</sup> In this context, the thrust of the legislation retained a concern with at once protecting children, and establishing that children had rights within the administration of the legal system. This is not surprising given that the interface between care and criminal proceedings is complex, and 'riddled with contradictions'.<sup>11</sup>

A major provision of the *Children (Criminal Proceedings) Act 1987* is that it extended the protection offered to children, ensuring that all evidence taken from a child by a police officer must initially be considered through the filter provided by s 13 of the Act. The limited scope of s 81C of the *Child Welfare Act* was expanded to all information taken by police from a child, by s 13 of the 1987 Act. This overrides the *Evidence Act*, and establishes a framework in which all criminal proceedings dealing with children's evidence is now to be governed.<sup>12</sup>

The effect of the Act is that the judicial officer must first consider the circumstances of a child's conversation with the police within the context of the admissibility of evidence

<sup>7</sup> *Dixon v McCarthy* (1975) 1 NSWLR 617.

<sup>8</sup> *McDermott v The King* (1948) 76 CLR 501; *Bunning v Cross* (1977-78) 141 CLR 54; s 410 *Crimes Act 1900* (NSW).

<sup>9</sup> M Aronson and S Hunter, *Litigation, Evidence and Procedure* (Butterworths: Sydney, 6<sup>th</sup> ed, 1998) 302.

<sup>10</sup> R Blackmore, *The Childrens Court & Community Welfare in NSW* (Longman Professional: Sydney, 1989) 25.

<sup>11</sup> T Carney, 'The Interface Between Juvenile Corrections and Child Welfare' in A Borowiki and J Murray (eds), *Juvenile Delinquency in Australia* (Methuen: North Ryde, 1985) 202.

<sup>12</sup> Section 8 *Evidence Act 1995* states 'This Act does not affect the operation of any other Act'.

under s 13 of the Act before the provisions of the *Evidence Act* can come into play. The Act applies in all state jurisdictions and to all evidence of admissions, confessions and information given by a child to the police.

Section 13 of the Act draws a broad parameter for the courts in determining the admissibility of evidence given by children to the police and the use of that evidence within the courts. The Section reads as follows:

- 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 is 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 16 years – an adult (other than a member of the police force) who is present with the consent of the child; or
    - iv) a barrister or solicitor of the child's own choosing; or
  - b) the person acting judicially in those proceedings:
    - i) considers that there was proper and sufficient reasons for the absence of such an adult from the place where, or throughout the period of the 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.

The section clearly sets out a prohibition to the admission of evidence unless these policy requirements are satisfied. The material which is sought to be admitted must be obtained when either a 'person responsible' is present or an adult who is present with the consent of a person responsible who is not a member of the police force, or, alternatively, a lawyer of the child's own choosing. A child over 16 years of age has the right to consent to an adult being present at the interview (who is not a police officer) or lawyer.

By reason of s 13(1)(b), the Act provides for discretion to the judicial officer to admit the evidence notwithstanding the absence of persons responsible, or a lawyer, where there is 'proper and sufficient reason' and the 'particular circumstances' warrant the admission of the evidence in the proceedings.

It is noteworthy that the original s 81C provision gives the authority to a parent or guardian, whereas s 13 the Act vests this position in a person responsible. Significantly,

'a person responsible' has the authority either to be present or determine who will be present at an interview with the police, where a child is under 16 years of age. A child, whether 16 years or younger, may choose to have a lawyer present. However, the Act does not set out either the role of 'a responsible person', delegated adult or lawyer. Little more is gleaned from the definition of 'a person responsible' in s 3, which says,

- a) a parent of the child; or
- b) a person who has the care of the child (whether or not the person has the custody of the child)

while 'parent' includes a 'guardian' or a person with the 'lawful custody' of the child.

To gain a picture of what might be expected of 'persons responsible' under this section, it is necessary to examine the recent case law.

### III AN ADULT PERSON'S 'WATCHING BRIEF'

The interpretation of the duty of a person responsible for a child under s 13 of the Act by the Supreme Court might well be seen as developing from the principles governing child welfare over the past century. It has long been recognised that children are vulnerable.<sup>13</sup> In *R v Warren*,<sup>14</sup> Lee J considered the legislative intent of s 81C *Child Welfare Act 1939*. His Honour commented, in reading the section down:

No doubt the basis upon which the section was introduced into the Act was that, because a person under 18 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, but 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>15</sup>

It would seem that in *Warren's* case, the Court interprets the role of the adult present at an interview as simply being independent of the police, that is the person taking this role could not be a member of the police force. The role therefore is limited to that of a 'watching' brief, ensuring no impropriety or undue influence by the police.

Furthermore, questions of impropriety by the police are not, according to *R v Williams*,<sup>16</sup> the primary reason by which evidence would be held inadmissible. However, considerations of unfairness do come into play when the court comes to consider the admissibility of evidence, no doubt in the light of any evidence an adult present at the interview might give about adverse police conduct. Conversely, where no adult has been present, a court must carefully consider whether to exercise a discretion to exclude the evidence if the child was not 'afforded a real opportunity to exercise the choice to have a legal practitioner present'.<sup>17</sup>

<sup>13</sup> *Bromley v The Queen* (1986) 161 CLR 315.

<sup>14</sup> (1982) 2 NSWLR 360.

<sup>15</sup> *Ibid* 367.

<sup>16</sup> (9 August 1982) 7 Petty Sessions Review 3089.

<sup>17</sup> *McKellar & Booth v Smith & Another* (1982) 2 NSWLR 950, 957.

## IV PROTECTION OF THE ACCUSED CHILD - THE PRIMARY AIM OF S 13

That an accused child is in need of protection from improper police conduct is premised on an acceptance that children are vulnerable. Recent NSW legislation has made this explicit. The *Crimes (Detention After Arrest) Regulation 1998* defines a child as a 'vulnerable person'. In consequence a child detained by police pursuant to this regulation is entitled to have a 'support person' present.<sup>18</sup> Significantly, Reg 23 goes on to provide that 'A vulnerable person who is a child cannot waive his or her right to have a support person present'. The clear implication is that a child is, by definition, a person who must have the protection afforded by a 'support person' when dealing with the police as a suspect.<sup>19</sup>

The consequence of this vulnerability is that the child may not be able to act upon or exercises legal rights, principally against making admissions to the police that are not in their legal interests, whether untrue or otherwise. Children are at a disadvantage because of their youth in 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>20</sup> Is then, the primary aim of s 13 of the Act to protect an accused child from self-incrimination?

It was with the precedent of *William's* case in mind that Hunt J interpreted s 13 of the Act. *R v Cotton*<sup>21</sup> makes it clear that the construction of the section is premised on the protection of the accused. The section, according to Hunt J, is fundamentally aimed at protecting a child from self-incrimination or damage to themselves, which may arise from the provision of information to the police.

In *Cotton's* case the court links this section with the general discretion in relation to prejudicial and probative evidence saying:

Section 13, in combination with the general discretions, adequately protects such accused. Nothing more is required, although it is obvious from what I have already said that the youth of the accused and his standard of comprehension are matters to be taken into account in the exercise of those discretions.<sup>22</sup>

In *R v Briar & Jones*<sup>23</sup> Finlay J takes a different tack. He considers that the rationale for holding evidence of children inadmissible pursuant to s 13 of the Act is akin to the reasoning which makes inadmissible the evidence of persons who are mentally disabled. Finlay J relies on the judgement of Gleeson CJ in *R v Parker*<sup>24</sup> and *Bullock v Kennedy*.<sup>25</sup>

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<sup>18</sup> Reg 21(1).

<sup>19</sup> A strikingly similar position is adopted in Queensland, where, in s 4(b) *Juvenile Justice Act 1992* it states 'because a child tends to be vulnerable in dealings with a person in authority a child should be given the special protection by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed by the child' and at s 4(j) 'the age, maturity and, where appropriate, cultural background of a child are relevant considerations in a decision made in relation to a child under this Act'.

<sup>20</sup> Australian Law Reform Commission, above n 2, 18, 103.

<sup>21</sup> (1990) 19 NSWLR 593.

<sup>22</sup> Ibid 596.

<sup>23</sup> (8 March 1990, unreported).

<sup>24</sup> (1990) 19 NSWLR 177.

<sup>25</sup> (14 March 1988, unreported).

*Parker's* case links the mental illness of the accused with the evidential value of the admissions. Interestingly, Hunt J rejects this contention in *Cotton's* case.

Notwithstanding the differing views expressed by the Courts in *Cotton's* case and the *Briar & Jones* case, it is clear that the cases recognise that children are in a vulnerable class of person. This position is clearly articulated in *R v H*<sup>26</sup> where the primary aim of the section is reiterated; Hidden J says:

As Roden J observed in *Williams*, unfairness is catered for by the general law, now enshrined in various sections of the *Evidence Act 1995* (NSW), without reference to a statutory provision dealing specifically with the interrogation of children. The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of police.<sup>27</sup>

In summary, it can be determined that the courts accept two propositions: first, that children are in need of protection from committing harm to themselves; and second, that children are in need of protection from others who may harm them, namely the police. Furthermore, the provision made by s 13 is effectively a regime intended for judicial determination of what evidence can come before the court. Of course, while the actual effect of s 13 is to prohibit the use of the evidence in court, this does not stop the police from interviewing a child. It is in judicial proceedings where evidence before the court would go towards the consideration of whether or not an offence could be established against a child, that the legislature intended there to be a check and balance.

#### V THE DUTY OF A 'PERSON RESPONSIBLE' FOR A CHILD

What duty, therefore, does 'a person responsible' for a child play under s 13 of the Act? Is it sufficient that such a person is simply not being a member of the police force? Or is it enough to say that this duty is one which, at base, is independent of the police?

The reasoning in *Briar & Jones* provides some insight into the duty of 'a person responsible'. In that case the Court said that 'a person responsible' is not someone who has a position which may be adverse to the child. In that regard Finlay J states: 'whatever a person responsible for the child may mean, for the purpose of Section 13 I do not consider it to be his jailer'.<sup>28</sup>

Likewise, 'a person responsible' would not be someone who is a co-accused, or whose presence at the interview could operate unfairly to an accused. In *Cotton's* case, there were three records of interview conducted between the police and the accused. In the first interview, a co-accused, who was also the de facto husband of the accused, was present at the interview; and this was considered by Hunt J as not being within the spirit of the legislation (the court exercise a discretion to exclude that statement). In the second interview, her father accompanied the accused, and in the third interview there was an independent adult; in both these situations, the court admitted the evidence. Significantly, in commenting on the third record of interview, where a retired RAAF Officer had been present, Hunt J said:

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<sup>26</sup> (1996) 85 A Crim R 481.

<sup>27</sup> Ibid 486.

<sup>28</sup> *R v Briar & Jones* (8 March 1990, unreported) 13.

Section 13 does not give to the accused the right to insist upon the presence of an adult from a particular category of those specified in subs (1). Such a construction would permit grave abuses to occur, and it could bring the orderly preparation of cases for trial by police to a standstill...<sup>29</sup>

The perspective in *Cotton's* case is one in which the interpretation of the section does not emphasise the rights of an accused, but rather focuses on ensuring only that an appropriate "protection" mechanism is put in place at the time of interview. However, the Court, in this case, goes on to make a significant recommendation. Hunt J says:

I would suggest that in future greater emphasis be given to the independent status of any adult who has not been specifically nominated by the accused and whose presence has been arranged by the police.<sup>30</sup>

It would seem that for Hunt J, the duty of an independent person ('a person responsible') is to ensure that there are no inappropriate dealings with the child by persons in authority – by that is meant unfairness or impropriety. Independent persons have a duty which arises from being in a particular position, and an independent person is synonymous with 'a person responsible'.

This point is further illustrated in the case of *R v Dunn*.<sup>31</sup> In this case a Salvation Army officer, who was also a part-time police chaplain, sat in on a record of interview being conducted with a child. At the trial, defence counsel suggested that, because of his position as a chaplain for the police, the record of interview should not be admitted as it was given thereby to a 'member of the Police Force'. In rejecting this contention, the Court affirms that the import of s 13 is to ensure that there is no unfairness in the conduct of the interview. Consequently, it was not necessary that the responsible person (or their delegate) be aware of the precise allegations or charges against the young person. Once again, the Court in this case does not see the establishment of any rights for an accused in s 13.

Limited insight into the duty of a person responsible is gleaned from the way the courts have dealt with the exercise of judicial discretion contained in the section. Where a judicial officer is satisfied that there was a 'proper and sufficient reason', evidence obtained from a child during an interview with police without 'a person responsible' present may nevertheless be admitted in judicial proceedings 'in the particular circumstances of the case' at the court's discretion. The evidence can be admitted notwithstanding that the criteria of s 1(a) of the Act is not satisfied. As the Court in *Bullock v Kennedy*<sup>32</sup> notes, there must be a concurrence of these circumstances before the court will admit this evidence. This was affirmed by Finlay J in *Briar & Jones*.<sup>33</sup> Finlay J says, in reference to s 13(1)(b)(ii):

This latter condition requires the Crown to discharge an onus of satisfying the Court that it is a proper case for the Court to include the material. The effect of the legislation,

<sup>29</sup> *R v Cotton* (1990) 19 NSWLR 593, 598.

<sup>30</sup> *Ibid* 599.

<sup>31</sup> (15 April 1992, unreported).

<sup>32</sup> (14 March 1988, unreported).

<sup>33</sup> (8 March 1996, unreported).



where the Court is not satisfied that any of the required persons were present, is to treat the admission of the evidence in those circumstances as an exception to the general rule.<sup>34</sup>

In the light also of the *Cotton* judgment, it is clear that the court is concerned with the propriety of the way the evidence of the child is obtained by the police. Where an 'independent' person or a 'person responsible for the child' is not present, then the information obtained is prima facie inadmissible because a person classified with this status was not present. In a sense, the role played by people in this situation is conceived in terms of a 'watching' brief, or someone who can 'blow the whistle' if any untoward police conduct occurs. *Cottons'* case does not envisage a proactive role for the 'independent' person, and they are not in the position of advocates for the child. Once again, it is the compliance with the section which is relevant, not immediately whether or not the evidence is obtained by unfair or improper police practice. In a particular situation however, as *Dunn's* case confirms, the substantive problems associated with non-compliance with the form of the section may be fatal to the admissibility of the evidence of the child.

The interpretation thus far discussed of the role or duty of 'a person responsible' for a child, shows that the courts have historically accepted a legalistic and positivist attitude. It is not an attitude which lends itself to the development of 'rights', but rather sits comfortably within a paternalistic paradigm. In contradistinction to this approach, contemporary 'norms' and international benchmarks recognised and developed over the past 10 years through the High Court of Australia, place a new emphasis on the establishment of 'rights'. In the following section it will be argued that the interpretation of domestic legislation must be couched within the framework of international law. There must be a consequence for Australian jurisprudence and it is in this regard international law may be pointing the way forward in articulating the rights of children.

#### A *The nexus between the Children (Criminal Proceedings) Act and International Standards*

It is clear that Australia's recognition and acceptance of international covenants and treaties must have implications for the judicial landscape, in both the interpretation and application of domestic legislation. Consequently, when examining domestic legislation regard must be had to the international arena; the orthodox view of the status of international documents has been modified by the High Court.<sup>35</sup> There is no doubt that the High Court has accepted 'that international law is a legitimate and important influence on the development of common law'.<sup>36</sup> In this paper consideration is being given to the rights of children, an area to which the international community has paid particular attention. Can the role of a 'person responsible' for a child, as set out in domestic legislation, be illuminated or clarified by consideration of international instruments?

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<sup>34</sup> Ibid 11.

<sup>35</sup> R Piotrowicz and K Stuart, *Human Rights in International and Australian Law* (Butterworths: Sydney, 2000) 201.

<sup>36</sup> D Kinley, 'Legal Dimensions of Human Rights' in D Kinley (ed), *Human Rights in Australian Law* (Federation: Sydney, 1998) 22.

In considering the nexus of the *Children (Criminal Proceedings) Act 1987* with international standards, cognizance must be taken of the principles set out in s 6 of that Act. This section says:

A Court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:

- a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that effect them;
- b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
- c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
- d) that it is desirable, wherever possible, to allow a child to reside in his or her own home;
- e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

The significance of the inclusion of these principles within the Act cannot be underestimated. In a real sense the legislative birth of the Act marks a turning point in the court's approach to juvenile justice. A leading commentator and Chief Magistrate of the Children's Court in NSW at the time of enactment, states:

Section 6 of the *Children (Criminal Proceedings) Act* is a statement of principles courts must continually have resort to in exercising juvenile justice. For offenders the statement can be seen as a move away from any previous notions that the court simply acts in the apparent best interests of the child, and a move more towards the American model of 'due process'...<sup>37</sup>

That this is a recognition of the rights of the child is also clearly expressed. The Chief Magistrate goes on to comment,

The statement is one which espouses children's rights and freedoms, the desirability of children remaining in their local environment, but emphasises personal responsibility of children within the context of their development ...<sup>38</sup>

While the principles enunciated in s 6 of the Act do not explicitly refer to international human rights instruments, there is an obvious reflection or resonance with those principles enunciated in the provisions made by the section. This link can be made out in the numerous provisions declared in international instruments.

The *Universal Declaration of Human Rights*, accepted by the United Nations in 1948 as the foundational document from which all other treaties and instruments derive, clearly establishes a framework under which all human beings are to be governed. For example, Article 7 provides that 'all are equal before the law and are entitled without

<sup>37</sup> R Blackmore, above n 10, 54.

<sup>38</sup> Ibid 55.

any discrimination to equal protection of the law', and Article 10, 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charges against him'.

These rights provide for protection against arbitrary arrest and detention, freedom of movement and residence, freedom of conscience and the right to work, the choice of employment and of favourable working conditions including proper pay and remuneration. Significantly, Article 26 says that:

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible on the basis of merit.
- (2) Education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

These principles go on to be re-defined and refined within a number of treaties and international instruments. Particular attention is given to the position of children. For example, the *International Covenant on Civil and Political Rights* (ICCPR), adopted by the United Nations General Assembly in 1966 states in Article 10:

- (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;
- (2) (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
- (3) The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

More specifically, Article 14 refers to the need to deal specially with juveniles and at point 4 it says:

In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

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

The *United Nations Convention on the Rights of the Child* (UNCROC) adopts the general principles proclaimed in the charter of the United Nations as announced most clearly in the Declaration. UNCROC was ratified by the Australian government in 1990 and its protocols came into force on 16 January 1991. Although not all the articles have

been implemented, it is clear that ratification of the convention 'generated a legitimate expectation that the rights of the child would be dealt with by the decision-maker in accordance with the provision of the article'.<sup>39</sup>

This does not, however, mean that the convention has become domestic law in Australia, although ratification may mean that the international provisions have legal import. Enforcement is more problematic, particularly within a common law litigation based court system.<sup>40</sup> Pursuant to ratification the government agrees to provide a report on compliance to the UN committee established by CROC. Australia has only lodged one report so far. Furthermore, at this time, there is no mechanism in place under this convention which could accept complaints about breaches of children's rights.

UNCROC looks specifically at the plight of children and seeks to set up benchmark principles by which they should be considered. Children have all the rights accorded to adults and, in a sense, some more special rights because of their particular vulnerability.

Thus, Article 3 notes at (1):

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In this regard, parties to the Convention are exhorted to ensure that governmental institutions 'conform with the standards established by competent authorities' and further at Article 9:

States parties shall ensure that a child shall not be separated from his or her parents...(unless)...such separation is necessary for the best interest of the child. Children are considered actual participants in these proceedings, capable of forming their own views and expressing them, and where this is possible due weight being given in accordance with age and maturity.

At (2), UNCROC indicates:

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>41</sup>

Article 18 goes on to exhort that, in recognition of these principles, parents have the responsibility of upbringing and development or, as the case may be, a legal guardian, and to ensure that their actions are taken for the child in that child's best interests. Significantly in relation to the administration of justice, Article 37 provides:

(a) no child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility

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<sup>39</sup> A Mason, 'The Rule of the Judiciary in Developing Human Rights in Australian Law' in D Kinley (ed), *Human Rights in Australian Law* (Federation: Sydney, 1998) 30.

<sup>40</sup> D Kinley, above n 36, 23.

<sup>41</sup> Article 12.

of release shall be imposed for offences committed by persons below 18 years of age;

- (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family with correspondence and visits, save in exceptional circumstances;
- (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to promote decisions on such action.

Article 40 goes on to affirm the need for children to be dealt with in a way which takes into account their age and vulnerability. It states:

- (1) States parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which takes into account the child's age and desirability of promoting the child's re-integration and the child's assuming a constructive role in society.
- (2) To this end, and having regard to the relevant provisions of international instruments, States parties shall, in particular, ensure that:
  - a) no child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
  - b) every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - (i) to be presumed innocent until proven guilty according to law;
    - (ii) to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
    - (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

- (iv) not to be compelled to give testimony or to confess guilt, to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
  - (v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
  - (vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used;
  - (vii) to have his or her privacy fully respected at all stages of the proceedings.
- (3) States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law and, in particular:
- a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
  - b) wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- (4) A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and offence.

The framework of UNCROC, dealing as it does with the creation of children's rights cannot be ignored. It emphasises that the protection of a child's rights is of broad scope and wide duty; a narrow reading of children's rights would be inconsistent with the expressed intention and spirit of the document. This being so, there must be implications for domestic legislation, particular legislation dealing with children.

## VII THE IMPLICATIONS OF INTERNATIONAL STANDARDS FOR DOMESTIC LAW

The *Declaration of Human Rights*, the *International Covenant for Civil and Political Rights* and the *Convention on the Rights of the Child* are not domestic law in Australia. To become 'law', domestic legislation has to be enacted. This has been done rarely, and by the Commonwealth Government in relation to only three international covenants. These are: *Covenant Against Torture*, in the *Crimes (Torture) Act 1988*; *Convention on the Elimination of All Forms of Discrimination Against Women*, in the *Sex Discrimination Act 1984*; *Convention the Elimination of All forms of Racial Discrimination*, in the *Racial Discrimination Act 1975*. It should be noted also that the Commonwealth and NSW Evidence Acts adopt the *International Covenant on Civil and Political Rights* within the discretionary provisions of s 138.

These international instruments do, however, provide a benchmark by which we can consider the way domestic legislation and case law is applied. Significantly, the

instruments seek to establish a regime which is based on 'rights' as inherent principles, which would allow for implementation and application in the manner seen in countries which have a 'Bill of Rights'.<sup>42</sup> Australian legislators, and to a significant degree the courts, have not however traditionally looked to establish a 'rights' based jurisprudence, although 'protection' of individuals is found in Australian common law, classically demonstrated in cases such as *Bunning v Cross*,<sup>43</sup> *Driscoll's case*<sup>44</sup> and *McDermott's case*.<sup>45</sup>

Whilst it is true that the international instruments referred to in this paper have not been made into domestic law, it is equally true that the High Court of Australia has been reconsidering the place of international law within the common law framework. From at least the early 1990s it has been evident that the trend in the High Court is towards a recognition of rights.<sup>46</sup> Certainly human rights principles, as defined in these international instruments are not explicitly recognised by the Court in the same way as might occur under a bill of rights. Nor is there any provision within the Commonwealth Constitution, apart from perhaps the external affairs power under s 51(xxix), for implementing this kind of a regime. Nevertheless, the High Court explicitly acknowledges the force of international law within a domestic framework.

In a line of High Court authorities, a change in the Court's view about human rights can be identified. In *Mabo v Queensland (No 2)*<sup>47</sup> Justice Brennan, says:

The opening up of the international remedies to individuals pursuant to Australia's accession to the optional protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>48</sup>

This view has certainly been endorsed by Justice Kirby, where, for example, in *Newcrest v Commonwealth*<sup>49</sup> he urges that the interpretation of the Australian Constitution must be in the context of international principles of fundamental rights and that this interpretation should be in conformity to the meaning of those rights.<sup>50</sup>

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<sup>42</sup> As seen, for example, in the United States of America, Canada and New Zealand. Even the United Kingdom has adopted the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

<sup>43</sup> (1977-78) 141 CLR 54.

<sup>44</sup> *Driscoll v The Queen* (1977) 137 CLR 517.

<sup>45</sup> (1948) 76 CLR 501.

<sup>46</sup> N O'Neill and R Handley, *Retreat from Injustice Human Rights in Australian Law* (Federation: Annandale, 1994) 83.

<sup>47</sup> (1992) 175 CLR 1.

<sup>48</sup> *Ibid* 42.

<sup>49</sup> (1997) 147 ALR 42, 147.

<sup>50</sup> This is not a radical view; the position was confirmed in *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69 where the court affirmed that the principal that every statute is to be interpreted and applied consistently 'with the comity of nations or with the established rules of international law' but in English law it is also recognised 'that courts are bound by the statute law of their own country, even if that law should violate a rule of international law'.

Whilst it may be that parliamentary sovereignty must overcome explicit international convention unless specifically enacted in domestic legislation, it is equally true that the provisions of the international instruments should be taken into account in the exercise of administrative jurisdiction. In *Minister for Immigration v An Hin Teoh*,<sup>51</sup> Mason CJ and Deane J said:

...ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the convention and treat the best interests of the children as 'a primary consideration'. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.<sup>52</sup>

The consequences of the High Court's position for the interpretation of the *Children (Criminal Proceedings) Act 1987* are manifold, and must hold implications for how the State Courts define the role and duty of 'independent' persons under s 13 of the Act. Furthermore, s 6 of the Act establishes a paradigm of children's rights. The principles move the Act away from the traditional jurisprudence seen in cases such as *Cotton*,<sup>53</sup> *Dunn*<sup>54</sup> or *Briar & Jones*.<sup>55</sup> It should also be noted that the Commonwealth government has ratified a number of treaties, including the ICCPR and UNCROC. Whilst this has not often seen a direct implementation of the international principles into domestic legislation, it does provide for a complaint mechanism, and perhaps more significantly a clearer path for applying the common law in the light of these benchmarks.

#### A A Re-Reading of Section 13 of the *Children (Criminal Proceedings) Act 1987*

In the line of authority in New South Wales, marked by such cases as *Cotton* and *Dunn*, and *Briar & Jones*, we see the spirit of s 13 of the Act interpreted in a conventional and traditionalist perspective. The Court in those cases argues from the position of paternalism, interpreting the legislation in a way that reads down 'rights' which might otherwise be implicit in a different construction of the legislation. Taking cognizance of significant High Court decisions which show an increasing interest and tolerance in construction of domestic legislation in the light of international obligations, a new perspective can be taken on the interpretation of s 13 of the Act. This interpretation is one which emphasises the rights of the child, rather than the position of children within a paternalistic legal framework.

It is accepted, in both the NSW case law and in the international arena, that the presence of an adult is imperative. In *Cotton's* case, for example, Hunt J interprets the role of the

<sup>51</sup> (1995) 69 ALR 423.

<sup>52</sup> Ibid 432.

<sup>53</sup> (1990) 19 NSWLR 593.

<sup>54</sup> (15 April 1992, unreported).

<sup>55</sup> (8 March 1990, unreported).



‘person responsible’ for a child, or independent adult present at interview with consent of the responsible child, as merely guaranteeing the propriety of the interviewing process. Disregard is given to any role which would be pro-active in aiding or managing the rights of the accused child. In *Dunn’s* case, the adult present, an apparently respectable RAAF Officer, does not have to know the specific nature of allegations or charges faced by the person whom he is purporting to assist in the record of interview; apparently his duty is fulfilled by his presence, and keeping watch against any impropriety of the police. The duty of the person responsible is limited.

One might argue a different view based on a ‘rights’ principle and a child’s ‘best interests’.

International instruments refer to the vulnerability of children, arising from their age and position within society. Children are inherently powerless, and accordingly their interests must be safeguarded through legislation and in judicial process. Article 3(1) UNCROC underlines that decisions about a child’s welfare must be made in accord with their ‘best interests’.

UNCROC positions children’s rights at the forefront of the debate. It places obligations on government to ensure systems are in place which engender pro-activity. Rights can only be real if they are manifest in action. Article 14(2) makes this clear,

State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

It follows that the role or duty of a parent (vis ‘a person responsible’/ independent person) under s 13 of the Act cannot be passive. In UNCROC at Article 40(b)(ii) a child, through parents or legal guardian, is entitled to have legal assistance in the preparation of a defence. The Australian Law Reform Commission has recently underlined the problem for children in these situations. The Commission states: ‘Submissions to the inquiry suggest that in practice children are not made sufficiently aware of their rights by Federal, State or Territory police during questioning’.<sup>56</sup>

How can the preparation of a defence be organised if the adult sitting in the interview does not know the nature and extent of the charges and does not take action to ensure that the child has access to that advice from a lawyer? A notional ‘independence’ from all parties (including the child and the police) is patently inadequate to ensure that a child can effectively exercise their rights.

The 1997 ALRC Report is a considered response to the power disparity between children and adults, and in this context the recommendation about the purpose of an ‘interview friend’ is timely and apposite. The Report contends that ‘[T]he presence of the interview friend is an important means of compensating for the disadvantage experienced by young people when being interviewed by police’.<sup>57</sup> Thus the role is not one of notional independence, but rather the independent person has a crucial function in protecting the rights of the child, ensuring that their best interests are operative.<sup>58</sup>

<sup>56</sup> Australian Law Reform Commission, above n 2, 18, 98.

<sup>57</sup> Ibid 18, 102.

<sup>58</sup> In New Zealand, where the *Children Young Person and their Families Act 1989* recognises the

It is in this context that one must consider the principles set out in s 6 of the Act, and then look critically at the interpretation of the duty of 'person responsible' within s 13. A significant difference between s 81C *Child Welfare Act* and s 13 of the Act makes this point clear. Under s 81C the protection provided to a child to have an adult present when interviewed by the police was only afforded once the child was at the police station. Section 13 extended this protection to all contact between a child suspect and the police. In extending this protection the legislature has recognised the obvious absurdity arising under s 81C which allowed the police to obtain information from the child prior to reaching the police station, and without having to conform to a requirement of having an adult present.

It is a further breach of Article 40(b)(iv) in that, in this situation, the child is effectively compelled to provide testimony and perhaps even confession of guilt, by the act of omission of the 'independent/person responsible' in failing to advise the child of their right to obtain legal advice. Sitting an 'independent' person in the room while the child is interviewed by the police may stop the child being assaulted, but it does not ensure that they do not 'harm' themselves by saying imprudent or foolish things. Following the reasoning of the High Court in cases such as *Newcrest*, a court should interpret 'person responsible' or the role of the independent adult in a way which is consistent with the principles announced in UNCROC, that is, that the role of an independent person is pro-active in promoting what is in the 'best interests' of the child. Sustaining a child's ignorance of their legal rights (such as, to remain silent at the interview with police or to obtain legal advice) is clearly not consistent with the best interests of the child.

In the case of *Briar & Jones*, Finlay J explicitly rejected the proposition that a 'jailer' is an appropriate person to sit in on a record of interview ensuring the propriety of the conduct of the police. Note here that the 'jailer', who was employed by a Government department and entrusted with the custody of juveniles, is not a member of the police force specified in s 13. Yet the Court held that the spirit of the Act meant that a 'jailer', although having the control and care of the child, could not be classified as independent. The pro-active role of someone involved in 'sitting in' on a record of interview to assist a child cannot be actively seen as disabling the interests of the child.

Implicit in the UNCROC principles is an understanding that an 'independent person' would aid the child in this situation in terms of advising them how to seek full access to their rights. Surely this is consistent with s 6 of the Act, which sets out the principle that children have rights and freedoms before the law equal to those enjoyed by adults '... a right to be heard and a right to be heard in the process that leads to decisions that affect them'.<sup>59</sup> In this instance, it is suggested that for the child to participate, 'to be heard', in the process requires the active assistance of a person in a position of

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special vulnerability of children, recent review highlights the need for the independent person to actively support the child. It is suggested that training be given to people who accept the role of independent person and access to legal advice be immediately available. See S Porteous, 'Young People and Police Questioning: How Effective is the Nominated Person?' (July-December 2000) *46 Youth Law Review*.

<sup>59</sup> This notion is explicitly recognized in s 58 of the *Juvenile Justice Act 1992* (Qld) which places an obligation on the court to ensure that the child and the parent have full opportunity to be heard and participate in court proceedings. This means that they must understand the nature of the allegations, the elements required to establish the offence, and the nature and possible outcomes of court orders.

responsibility to effect the child's access to their rights.<sup>60</sup> This is obviously not a role, to quote Finlay J in *Briar & Jones*, that could be undertaken by a 'jailer'.

Ignorance of rights must vitiate real participation in the process and place in doubt the veracity of what a child may say to the police where their will may be overborne. This is the kind of protection of rights which is clearly seen, in more recent NSW legislation, in the provision of the *Young Offenders Act 1997*. In s 22 of that Act, before an 'investigating official' proceeds to caution a child certain rights must be explained, inter alia, 'that the child is entitled to obtain legal advice and where that advice may be obtained' and this explanation must 'if practicable' take place in the presence of 'a person responsible' for the child. Similarly this same obligation, at a later stage in court proceedings, is upon the advocate to ensure the court that the child understands the nature of the allegations, and the implications of the court proceedings.<sup>61</sup>

It may be that the police find the presence of a person at the interview discharges the duty laid out by the legislation. However a more obvious interpretation arises from the very nature of the relationship between a 'person responsible' and the child; this is, a relationship which must import trust and responsibility.

This type of interpretation is certainly not impossible within the traditional construction of the Act. It is, however, an interpretation which moves beyond a passive model to active intervention on behalf of a child. It is an approach which takes account of the vulnerability of children (as admitted in *Williams*, per Lee J) and promotes events in the 'best interests' of the child the subject of criminal allegations. The approach is not without precedent; in *McKellar & Booth v Smith & Another*<sup>62</sup> the Court stated that a child must be told of their rights (in this case, to have the assistance of a lawyer).

#### VIII THE DUTY OF A 'PERSON RESPONSIBLE' IN THE LIGHT OF *R v H*<sup>63</sup>

The role of a 'person responsible' should be seen in the light of contemporary standards, as judged by international benchmarks contained in international treaties and covenants. As noted in the judgments of Mason CJ and Dean J in *Teoh's* case '...ratification by Australia by an international convention is not to be dismissed as a merely platitudinous or ineffectual act'. Certainly Hidden J in *R v H*<sup>64</sup> address this issue, and develops a jurisprudence which recognises that a proper interpretation of s 13 gives rights to the child. He says,

...[T]hat 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 their 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.<sup>65</sup>

Children who are being interviewed by police about allegations of criminal conduct are entitled to be advised of their legal rights. This advice must be in a context in which it

<sup>60</sup> This reasoning is found in *T v Wayne* (1983) 35 SASR 247, where the court considered the admissibility of a statement made by a child to police without the presence of an adult.

<sup>61</sup> Practice Directions of the Children's Court and Forms, cl 10.

<sup>62</sup> (1982) 2 NSWLR 950.

<sup>63</sup> (1996) 85 A Crim R 481.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 486.

can be understood and acted upon by the child. If a child is unable to act upon or understand their rights within this context then it cannot be said that they are being allowed to exercise their fundamental human right to express or not express their views about an allegation. This is how the Act should be interpreted, to give the child the full rights implicit in a proper reading of the s 13. The point made by Kirby in *Newcrest* is particularly apt in looking at the role of a 'person responsible' in s 13 of the Act during the interviewing process. He says:

To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.<sup>66</sup>

Section 13 provides the child with a number of options for assistance. An alternative to 'a person responsible' is provided by s 13(1)(a)(iv), that is, the child may elect to have present 'a barrister or solicitor of the child's own choosing'. Can it be said that the courts expect any other role from a lawyer in this situation than that of giving appropriate and proper advice and advocacy? *R v H* certainly answers this in the negative; the Court states in this regard,

No one could suggest that a barrister or solicitor, whose presence is envisaged by s 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>67</sup>

The Act envisages an advocacy role, not the role of watchman. The UN Declaration expects children to be accorded the same rights as adults.<sup>68</sup> This principle is articulated in s 6(a) of the Act, and in the pro-active (and professional) duty of the lawyer recently affirmed in *Representation Principles for Children's Lawyers*.<sup>69</sup>

The 'person responsible', an 'independent adult' and a lawyer share a duty to ensuring that a child has access to their 'rights', and if they do not facilitate this during the interview process, then they are derelict in their duty both to the child and ultimately to the community. The ALRC, in Recommendation 212, sets out a national standard for the role of an 'interview friend':

An interview friend must be present during police questioning of a child suspect and have an opportunity to confer in private with the child prior to questioning. Statements made in the absence of an interview friend should not be admissible in evidence against the child. The function, responsibilities and powers of the interview friend should be defined by statute. The definition should encompass the interview friend's role in providing comfort,

<sup>66</sup> (1997) 147 ALR 42, 148.

<sup>67</sup> (1996) 85 A Crim R 481, 486.

<sup>68</sup> Article 7.

<sup>69</sup> Law Society of New South Wales, detailed in Law Society Report, *New Representation Principles for Children's Lawyers*, 2000; B Campbell (ed), 'New Representation Principles for Children's Lawyers' 38(11) *Law Society Journal* 50-54.

support and protection for the young person as well as ensuring the young person is aware of his or her legal rights.<sup>70</sup>

While a 'person responsible' is not expected to be a lawyer, they should be in a position to identify if the child needs legal advice, and it is incumbent in the duty to facilitate this advice. The role of a person responsible must be more than a mere 'watch dog' who ensures a child is not intimidated or assaulted by police; international standards expect more. The interpretation of the Act in a manner which does not take into account the standards set by international covenants deprives children of the fundamental protections intended by the legislators.

## IX CONCLUSION

This paper has identified clear divisions in the way s 13 of the Act is interpreted within the leading Supreme Court cases. The most recent consideration of the section, in *R v H*, draws together the major issues identified in previous case law and moves forward in recognition of both the underlying spirit of the Act and international expectations. To a significant degree a contemporary interpretation of the Act relies on the same material as the precedent cases, that is, the vulnerability of children. This concern is explicitly shared by the international community and is expressed through the benchmark standards of international instruments.

Where international standards are either implicit or expressed, as in the principals set out in s 6 of the Act, there must be a consequence for the construction of the legislation by the courts. Certainly the High Court acknowledges that the development of the common law must take into account the 'legitimate and important influence' of international standards. A barrage of international instruments, and specifically for the purposes of this paper the ICCPR and UNCROC, declare clear expectations (benchmark standards) for the management of criminal allegations against people; there is a particular concern shown for the welfare of children. These standards are expressed in the establishment of 'rights'.

In the light of s 6 of the Act the establishment of 'rights' is a necessary outcome of a contemporary construction of s 13. The guiding principle for a decision-maker must be what is in the best interests of the child, and in that sense a 'person responsible' can never merely take on a passive role where the rights of the child need to be exercised. The principles of s 6 engender a necessary shift in our jurisprudence towards the recognition of 'rights' in the context of 'due process'. If this is correct, then the duty of 'a person responsible', must take on a pro-active role during the operation of the section, that is, when the child is being interviewed by the police. A passive role cannot fulfill the duty. It is accepted in all the case law that the section has at least two purposes; to protect the child from self-harm and to protect the child from improper or unfair conduct by the police.

In *Cotton*, *Briar* and *Dunn*, the court perceives a 'watchman's' role for a 'person responsible'; whereas, in *R v H* the duty is to actively ensure that the child's best interests are recognised. The strength of the position in *R v H* is that it shows that a 'watchman's' role does not appreciate the intent of the legislators to ensure that children

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<sup>70</sup> Australian Law Reform Commission, above n 2, 109.

are actually protected in a situation where, to use Lee J's words in *Warren's* case, '...they are at considerable disadvantage alone in a police station being questioned by mature men...'.<sup>71</sup> Nothing in s 13 prohibits the child acting on their 'rights', and indeed to the contrary, the duty of the police, the lawyers and the courts is to ensure that children are aware and able to exercise those rights.

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<sup>71</sup> (1982) 2 NSWLR 360, 361.