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POLICE QUESTIONING OF YOUNG PEOPLE: IS A SEPARATE REGIME REALLY NECESSARY?

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CONTENTS

ABSTRACT

This paper analyses the current regime in the Children, Young Persons, and Their Families Act 1989 for police questioning of young people. The focus of this paper is on the rights guaranteed by that Act. The situation for young people before the Children, Young Persons, and Their Families Act will be considered, and the Act itself will be compared to the approach of other jurisdictions. The main question that is considered is whether, given developments in case law, those rights are also protected under the New Zealand Bill of Rights Act 1990. In analysing that question considerable use is made of case law under the New Zealand Bill of Rights Act. The Law Commission's suggested changes to the common law regarding the admissibility of statements are also considered in this paper. Finally the Children, Young Persons, and Their Families Amendment Bill will be examined. It is recognised that there are clear differences between the New Zealand Bill of Rights Act regime and the separate regime for young people under the Children, Young Persons, and Their Families Act. It is conceded that at present case law developments do not mean that young people would have the same rights under the New Zealand Bill of Rights Act as they do under the Children, Young Persons, and Their Families Act. However it is contended that the Amendment Bill brings the separate regime closer to the New Zealand Bill of Rights Act regime. In that sense the separate regime for young people may become no longer necessary.

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The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 15,000 words.

I INTRODUCTION

This paper will examine the rights set out in the Children, Young Persons, and Their Families Act 1989 which regulate police questioning of children and young people.[1] A fundamental question will be considered: do young people need, in a legal sense, the protection of a separate[2] regime? This question looks at whether there are other protections available that would serve young people as well.

This question will be approached in three ways.

First, consideration will be given to what happened in New Zealand before the enactment of the Children, Young Persons, and Their Families Act 1989. The Children and Young Persons Act 1974, the common law and Police General Instructions will be analysed and there will be an assessment of how they served young people.

Secondly, the Children, Young Persons, and Their Families Act 1989 will be examined. It will be compared with legislative developments in other jurisdictions. Case law will also be examined and compared with overseas developments.

Thirdly, the rise of the New Zealand Bill of Rights Act 1990 and the developments arising from Bill of Rights Act case law will be considered. This paper will look at the extensions that have occurred in this case law. Cases arising under the Canadian Charter of Rights and Freedoms will be used for predictions and comparisons. These developments in case law suggest a broadening of rights and a willingness by the Courts to take a purposive approach extending the reach of Bill of Rights Act protections. The changes to the common law proposed by the Law Commission[3] will also be examined. The issue to be examined in this paper is whether those extensions would be enough to protect young people in the same way that they are protected now. In three key areas the differences between the New Zealand Bill of Rights Act and the Children, Young Persons, and Their Families Act will be considered.

The Children, Young Persons, and Their Families Amendment Bill[4] provisions suggest a narrowing or blurring of the time when police have to tell young people of their rights. The new clause 31A blurs the nature of young peoples' rights. The Amendment Bill's provisions will be analysed. Given the trend reflected in the Amendment Bill it will be suggested that the developments in the New Zealand Bill of Rights Act area could become increasingly significant for young people. The impact that the New Zealand Bill of Rights

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[1] In this paper the term "young people/person" is to be assumed as also referring to children, except where explicitly stated.

[2] Young people also receive separate attention when it comes to sentencing, see s 142 of the Criminal Justice Act 1985.

[3] *Preliminary Paper No.21 Criminal Evidence: Police Questioning - a Discussion Paper* (1992).

[4] The Children, Young Persons, and Their Families Amendment Bill 1994 No.269-2.

Act would have if it was applied to young people who are questioned by the police will be analysed.

It will be concluded that the Bill of Rights Act has travelled a long way since it was initially enacted and present trends may bode well for future flexibility of application. As yet the Bill of Rights Act would not provide the same protections for the young that they enjoy now. However, the Children, Young Persons, and Their Families Amendment Bill reflects that for young people the protections enacted in 1989 may well be over.

II HISTORY

A Introduction

Before the enactment of the Children, Young Persons, and Their Families Act young offenders did not enjoy the protection of a separate legislative regime when questioned by police. The Children and Young Persons Act 1974 did not contain a provision specifically directed to that question, and section 29(1) of that Act allowed the court to admit any evidence it saw fit. Young people were protected in the same way as adults. A young person received the conventional adult caution when questioned by the police. If a young person made an admission or confession during an interview that admission was admissible evidence as long as it was voluntary, in the sense that there was no oppression (with the limited exception available in section 20 of the Evidence Act 1908[5]), and fair. Devices such as the Judges' Rules[6] were used to assess fairness.

However there was some recognition of the special nature of interviewing young people. The police produced Police General Instructions[7] which set out guidelines for officers to follow when interviewing young people in particular, although none of the guidelines had the force of law.[8]

B The Court as Protector

Some of the cases indicate that before the Children, Young Persons, and Their Families Act the Courts cast a particularly careful eye over interviews with young people.

In *R* v *I*[9] Williamson J held that Instruction C42 of the Police General Instructions which made it clear that so far as possible interviews conducted with young people should be in the presence of their parent, guardian or teacher[10]

> should not be honoured in its breach.

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[5] Section 20 enables a court to admit an induced confession if the Judge is satisfied that the means by which the confession was obtained were not likely to have caused an untrue admission of guilt to be made.

[6] The Judges' Rules are common law rules which regulate police conduct. A breach of the Judges' Rules does not necessarily mean that evidence from an interview will be inadmissible; the Rules are general guidelines of fairness. The rule are "aids in determining the crucial question of police conduct" *R* v *Convery* [1968] NZLR 426, 441 per McCarthy J.

[7] Note that in England the police still use a Code of Practice which sets out the procedure for interviewing both adults and young people. The Code of Practice is also governed by the Police and Criminal Evidence Act 1984 but it is the document that sets out the practical procedure. Like the Police General Instructions the Code of Practice in England does not have the force of law.

[8] The General Instructions are part of the background fabric, they are a guide as to what is appropriate. *Police Interviews of Young People* Youth Law Project Inc, p 4. It is a matter of internal procedure and discipline for an officer to comply.

[9] (1987) 3 CRNZ 444.

[10] Ibid, 445.

While the Police General Instructions did not have the force of law, Williamson J said that they were a vital protection and should not be ignored. A young man of 15 was questioned about his possible involvement in the shooting of his mother and two sisters. Williamson J said (obiter) that he appreciated the difficulty that the police would have had finding a family member to sit in on the interview, but that it was of concern that no efforts at all were made to find a supportive adult for the young person. On the facts Williamson J excluded three of the young man's replies from evidence because of unfairness. There had been cross-examination of the young man during the interview. Cross-examination is a breach of Rule 7 of the Judges' Rules.

In *Munro* v *Police*[11] McGechan J excluded Munro's statement because of unfairness. The Police had breached several of the Judges' Rules. Munro had not been cautioned until his written statement was placed before him (breach of Rule 3), he was cross-examined and shouted at during the interview (breach of Rule 7), and the questions and answers were not fully recorded during the interview (breach of Rule 9). Special emphasis was given to Munro's age. McGechan J also expressed concern at the police failure to follow their General Instructions by making no attempts to contact the youth's parents. His Honour was scathing of police arguments that their Instructions were secret and sensitive and should not have been brought into argument.[12]

> Questions of Police procedure and the rights of the young are too important to allow technical procedural questions to stand in the way.[13]

In *R* v *Webb (No. 2)*[14] a 15 year old was interviewed in connection with the arson of his family home and the horrific murders of his mother and brother. The fire and the bodies were found shortly after midnight and Webb was interviewed for 7 and a half hours through the night. Webb's statement was excluded because of unfairness. Robertson J expressed his disquiet that the police had only made belated attempts to find a supportive adult for Webb. His Honour held that Webb was exhausted physically and mentally. Webb was not cautioned until his statement was read back to him 7 hours after the interview had begun. This was a clear breach of the Judge's Rules. Webb was particularly vulnerable and in Robertson J's view[15]

> [it was] the Court's wider responsibility to ensure that a young person is not disadvantaged because of his youth.

In *R* v *Tuhua* [16] the Court of Appeal emphasised the youth of the defendant saying[17]

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[11] Unreported, 3 June 1988, High Court, Wellington Registry, AP79/88.

[12] Pursuant to section 61A of the Police Act 1958 internal notices or circulars which might prejudice the maintenance of law, including the prevention, detection, and investigation of offences, are not to be released to the public. The Police General Instructions had already been released in an article in the 1980 New Zealand Law Journal; [1980] NZLJ 351.

[13] See above n 11, p 3.

[14] (1988) 4 CRNZ 21.

[15] Ibid, 25.

[16] Unreported, 22 November 1988, CA272/88.

[17] Ibid, 6.

> It is obvious enough that particular care and sensitivity is necessary on the part of police interviewers if they are to fairly question immature young people.

In *R* v *Wilson*[18] a 14 year old was accused of attempted rape. Once again the police failed to follow General Instructions and did not attempt to contact a supportive adult. There were several breaches of the Judges' Rules leading to the exclusion of the statement due to unfairness. Wilson was not cautioned (breach of Rule 2), and his statement was not recorded in writing (breach of Rule 9). Williamson J held that in the context of a 14 year old being interviewed in the middle of the night without any caution or the assistance of a parent or adult it was "abundantly clear"[19] that the procedures were unfair and that the statement should be excluded.

Those cases indicate that a "parental" or protective role was played by the courts[20] in a situation where a self-regulating procedure was failing to protect young people. However there was another tendency in the courts before the advent of the Children, Young Persons, and Their Families Act, this was to assess whether the young person was "streetwise" enough to be unaffected by deficiencies in police conduct.

C The Court as Assessor

In *R* v *Hemi*[21] Jeffries J held that the age of an accused is but one circumstance and that the Court should endeavour to assess the maturity of the accused. Jeffries J admitted a statement made by the accused in that case because he had a considerable fund of "street wisdom" and had handled the police officers in an aggressive and assured way. Hemi had been arrested at 1.55am after the discovery of a body in a suspicious fire. At 3.18am he confessed to murder. Hemi had requested his mother and a solicitor at the beginning of the interview, but at no stage were either made available to him. Jeffries J held that there was no conduct from the police that would suggest that Hemi needed that special protection and that he was not disadvantaged. Hemi's attitude did not indicate that he was overborne by an authority figure. The confession was admissible because as a matter of fact and degree it was voluntary and fair.

This approach has also been taken in a number of overseas jurisdictions. In the US case *Vance* v *Bordenkircher*[22] a confession to murder was held to be voluntary despite the defendant's age (17), mental disability and the duration of the 7 hour interview. The court held that the fact that there were no adults present was only due to the defendant's failure to request them. The police had not restricted him at all. The questioning was not unduly forceful and there were no tricks used. The defendant had been questioned by the police

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[18] Unreported, 26 August 1986, High Court, Christchurch Registry, T18/86.
[19] Ibid, 4.
[20] See also *R* v *Tuhua* (above) n 16 where the Court of Appeal excluded a statement because of unfairness. Like the other cases there was cross-examination in breach of the Judges' Rules and a failure by the police to allow the youth access to his family who had actually arrived at the station before the interview began.
[21] [1986] 2 NZLR 116.
[22] 692 F. 2d 978 (4th Cir 1982).

before and there was no reason to suggest that his will was overborne on this occasion. The interview was entirely fair.[23] In *R* v *Legere*[24] a Canadian court held that although there had been a request for his parents the statement from the accused was admissible because he had been adequately advised of his rights and had not exercised them. The statement was full and voluntary and was not the result of any unfairness on the part of the police. In Australia the Queensland Court of Criminal Appeal held in *R* v *Crawford*[25] that each case involving a young person was to be examined on its own circumstances. Consideration was to be given to the age of the young person, the maturity of the young person, and the young person's ability to look after his or her own interests.

This approach is open to criticism about the way that maturity or "streetwiseness" is assessed and the likelihood of error. This approach also suggests that the "streetwise" are entitled to less rights and a lesser standard of protection than others.[26]

D Conclusions

Before the enactment of the Children, Young Persons, and Their Families Act the approach of the Legislature, the police and the courts to police questioning of young people was fractured. The Legislature was simply inert, and the issue was left to the courts. The police saw their General Instructions as guidelines only, to be departed from where circumstances required it. The courts viewed the General Instructions strictly and used them in an assessment of whether an interview was fair. However the courts were divided over the approach to take; whether to look at the subjective features of the young person and to assess whether he or she would have been affected by deficiencies in police conduct, or whether to say that any deficiencies could not be justified.

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[23] F E Inbau, J P Buckley and J E Reid *Criminal Interrogations and Confessions* (Williams and Watkins Ltd, Baltimore, 1986) 243-246.

[24] (1989) 102 NBR (2d) 208; 254 APR 208 (QB).

[25] [1985] 2 Qd R 22.

[26] *Report of the Ministerial Review Team of the Children, Young Persons, and Their Families Act 1989* (Department of Social Welfare, Wellington, 1992) p 156.

III THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT AND OVERSEAS JURISDICTIONS

A Children, Young Persons, and Their Families Act 1989

1. Introduction

The Children, Young Persons, and Their Families Act was enacted in 1989. The Act had its critics from the start, but it was the care and protection provisions in Parts II and III of the Act which were the focus of discussion, not Youth Justice in Part IV. During the third reading the Minister of Social Welfare the Hon. Dr Michael Cullen said [27]

> There was only very brief debate on the youth justice sections, and I think that is because there is a fair degree of unanimity among members about those sections

The Children, Young Persons, and Their Families Act instituted a new regime. It was a unified approach initiated by the Legislature to be applied by the courts and the police in a defined way.

2. Principles

Part IV of the Children, Young Persons, and Their Families Act deals with Youth Justice. The first section in that part, section 208, sets out the principles which guide and underpin the implementation of Part IV.[28] Those principles are subject to the overriding principles in section 5 which guide the whole of the Act. The principles in section 5 reflect the overall object or purpose of the Act which is (per section 4)

> to promote the well-being of children and young persons and their families and family groups.

The principles in sections 5 and 208 reflect that object by focusing on the reintegration of young offenders and the involvement of family groups in decision making about young offenders.[29]

Section 208(h) sets the scene for the provisions in sections 215-226 which deal with the police questioning of young people. That guiding principle reads:

> (h) The principle that the vulnerability of the children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

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[27] *NZPD* vol 498, 10487, 16 May 1989.

[28] This format is used throughout the Children, Young Persons, and Their Families Act, in Part II which deals with Care and Protection of Children and Young Persons, s 13 sets out guiding principles. There are also General Principles which apply to the whole Act in ss 4 and 5.

[29] See particularly ss 5(2) and 208(c).

3. The provisions

The procedure in sections 215-226 of the Act activates the principle in section 208(h). Section 215 sets out the basic rights of young people, and declares that young people must be informed of those rights before questioning.[30] Section 221 provides a concrete basis to those rights. Section 221 states that no oral or written statement from a young person will be admissible unless the rights in section 215 have been explained in an appropriate manner, the young person has had an opportunity to consult with a solicitor and/or any other person nominated by the young person, and the statement has been made in the presence of a solicitor and/or another adult nominated by the young person (or the police where the young person fails to nominate) pursuant to section 222.[31] The rights cannot be merely read to a young person, they must be "explained" (sections 215-219). Section 218 directs that the explanation of rights must be given in a manner and a language that is appropriate to the age and level of understanding of the young person.

This places a lot of responsibility on the police to ensure that an understanding of the rights is achieved as far as possible. The procedure of an interview is also regulated by these sections in the Children, Young Persons, and Their Families Act. Unless a lawyer or acceptable nominated adult is present at an interview, the young person's statement will be inadmissible (section 221).

Section 224 states that a statement will not be inadmissible under section 221 if there has been reasonable compliance with the requirements in section 221. Interestingly, section 225 expressly saves other enactments or rules of law relating to the admissibility of confessions, saying that they are not affected by the Children, Young Persons, and Their Families Act as long as they are not inconsistent. In *R* v *Irwin*[32] Fisher J expressed the opinion that the rights provided by the New Zealand Bill of Rights Act 1990 may have

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[30] The explanations required by section 215 are the following:

(i) The young person may be arrested if there is a power to arrest without a warrant pursuant to s 214, or for failure to give details such as name and address;

(ii) The young person is not obliged to accompany the officer, and can withdraw agreement to accompany at any time;

(iii) There is no obligation to make a statement;

(iv) A statement may be used in evidence;

(v) Consent to make a statement may be withdrawn at any time; and

(vi) The young person is entitled to consult and have present a solicitor and any adult of their choice.

Section 215 is set out in full in the Appendix to this paper.

[31] Note that pursuant to s 223, s 221 does not apply where a statement is made spontaneously before there is a reasonable opportunity to comply. Also note that s 221 does not apply to certain transport offences (per s 233), and most immigration matters (per s 244).

[32] [1992] 3 NZLR 119, 133. In *R* v *Fitzgerald* Unreported, 30 October 1990, High Court, Auckland Registry, T183/90, at p 4 Thorp J suggested that because of the stringent requirements that the Children, Young Persons, and Their Families Act placed on police officers it was difficult to imagine a situation where a statement would be inadmissible on the grounds of unfairness where the Act had been complied with. These cases suggest that by its nature the separate regime for young people is inconsistent with other enactments relating to police questioning. See further discussion below n 92.

been overtaken by the more "stringent" requirements in the Children, Young Persons, and Their Families Act.

B UN Conventions and the Children, Young Persons, and Their Families Act

The two specifically relevant UN documents are the UN Convention on the Rights of the Child[33] and the UN Standard Minimum Rules for the Administration of Juvenile Justice.[34]

The Beijing Rules were summarised in a basic way in Article 40 of the UN Convention on the Rights of the Child. Article 40 is entitled "The Administration of Juvenile Justice". The separate regime for police questioning of young people in the Children, Young Persons, and Their Families Act complies with Article 40 by "treat[ing]" a "child alleged as, accused of or recognised as having infringed the penal law"[35] in a manner which "promotes the child's sense of dignity and worth"[36] and which "takes into account the child's age"[37] and the "desirability of promoting the child's reintegration and [assumption of] a constructive role in society". Article 40 also sets out the most basic guarantees which include (sic)[38]

> (ii) to be informed of charges (if appropriate through parents and guardians) and to have legal and other appropriate assistance in the preparation of his or her defence
> ....(iv) not to be compelled to...confess guilt.

The separate regime in the Children, Young Persons, and Their Families Act ensures that young people are protected in this manner and have their rights clearly explained to them.

The Beijing Rules go into more detail. In Part I the rights of juveniles are set out.

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[33] Dated 20 November 1989 and ratified by New Zealand on 6 April 1993.

[34] Dated 29 November 1985. The Rules will be referred to as the "Beijing Rules" in this paper.

[35] Note the three stages that the Convention comprehends: "alleged", "accused", and "recognised as having [committed]." The Children, Young Persons, and Their Families Act has three stages in sections 215-217: "before questioning", "on deciding to charge", and "on arrest." The first stage in the Convention is further on in an investigation than does the first stage in the Children, Young Persons, and Their Families Act.

[36] The Children, Young Persons, and Their Families Act states that a young person must have their rights "explained" to them. Further a young person has the choice of which adult will be present. This gives a young person a power of choice and control, promoting their dignity and self worth.

[37] Note that this provision is set out in s 25(i) of the New Zealand Bill of Rights Act 1990. The New Zealand Bill of Rights Act follows Art 14(4) of the International Covenant on Civil and Political Rights which also sets out this provision. The Children, Young Persons, and Their Families Act conforms with this provision. By its nature the Children, Young Persons, and Their Families Act only applies to a certain age group. Section 218 recognises that young people need their rights to be explained to them in a language and in a manner that they can understand. Section 10 directs that proceedings in court (be it the Family Court or the Youth Court) are to be explained to the young person.

[38] Article 40(2).

> Basic procedural safeguards such as the presumption of innocence, the right to be notified of charges[39], the right to remain silent[40], the right to counsel[41], the right to the presence of a parent or guardian[42], the right to confront and examine witnesses and the right to appeal shall be granted at all stages of the proceedings (emphasis added)

Part II of the Rules deals with what should occur during the investigation and prosecution of an offence. Parents and guardians are to be notified upon the apprehension of a juvenile. Section 229 of the Children, Young Persons, and Their Families Act complies with this requirement. By the use of the words "at all stages of the proceedings" the Beijing Rules may be read as suggesting that, like the Children, Young Persons, and Their Families Act, the rights are to be examined before questioning. However the use of the word "proceedings" tends to suggest that the application of the Rules was intended to be limited to situations where a young person is actually charged with an offence.

The UN Convention on the Rights of the Child and the Beijing Rules were obviously influential in the formation of the separate regime for young people, although it is notable that New Zealand did not ratify the Convention until April 1993.[43]

C Other Jurisdictions [44]

1. Canada

Section 56 of the Young Offenders Act 1982 sets out a similar procedure to the Children, Young Persons, and Their Families Act. The rights set out in section 56 are the same as the rights given by section 215(c), (e), and (f).[45] However section 56 differs from the Children, Young Persons, And Their Families Act provisions in several ways.

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[39] Section 232(1)(a) Children, Young Persons, and Their Families Act.

[40] Section 215(1)(c) Children, Young Persons, and Their Families Act .

[41] Sections 215(1)(f) and 227 Children, Young Persons, and Their Families Act .

[42] Sections 8 and 215(1)(f) Children, Young Persons, and Their Families Act .

[43] Some commentators have suggested that UN documents should be used as a tool for statutory interpretation, for example see Graeme Austin "The UN Convention on the Rights of the Child and domestic law" (1994) BFLJ 87; A Shaw and A Butler The New Zealand Bill of Rights Act Comes Alive (I) [1991] NZLJ 400; also *Public Law In New Zealand - cases, materials, commentary and questions* by Mai Chen and Geoffrey Palmer, (Oxford University Press, Auckland, 1993) Ch 19, pp 590-593. Shaw and Butler note that the long title of the New Zealand Bill of Rights Act states that it is to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights" and suggest that this leads to the Covenant being an interpretative tool. The Children, Young Persons, and Their Families Act does not mention international instruments at all despite some similarity to them. There is not as strong a basis for interpreting the Act with the help of international instruments. But note *Tavita* v *Minister of Immigration* [1994] 2 NZLR 257 where the Court of Appeal used the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child as aids in an immigration matter. It is arguable that international documents may be used more readily for interpretation (see Austin, above).

[44] It is recognised that there are differences in the definition of "child" and/or "young person" in the following legislation. Those differences are not discussed in this paper. The sections mentioned in this part that directly deal with police questioning of young people are featured in the Appendix to this paper.

[45] The rights to be explained to a young person in Canada are:

(i) That there is no obligation to make a statement;

(ii) That any statement that is made can be used in evidence; and

(i) Section 215 of the Children, Young Persons, and Their Families Act applies to questioning by and statements made to an "enforcement officer".[46] Section 56 applies to a "peace officer or other person who is, in law, a person in authority". This is arguably a wider scope.
(ii) Like section 225 of the Children, Young Persons, and Their Families Act, section 56 expressly saves other law applying to questioning and the admissibility of statements. However, despite that saving, sections 56(2)(a) and 56(5) somewhat redundantly provide that a young person's statement must be voluntary and not the result of duress.
(iii) Section 56 differs from section 215 of the Children, Young Persons, and Their Families Act in that it restricts and directs police questioning rather than setting out purposive rights. Section 215 speaks of "entitle[ments]", but section 56 speaks of "being given" rights. Section 215 affirms rights that already exist, whereas section 56 actually creates those rights and directs that they are to be complied with. In the sense of directing compliance section 56 is more like section 221.
(iv) Section 56 provides for a consultation with and presence by an adult at the questioning. Unlike the Children, Young Persons, and Their Families Act only one adult is contemplated.[47] There is a ranking in section 56(c) of preferable adults, a ranking that is not present in the Children, Young Persons, and Their Families Act:

> counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and adult relative, any other appropriate adult chosen by the young person.

The Children, Young Persons, and Their Families Act gives the choice and the power to young people to choose who is to be present and who to consult with. The only limitation on that is section 231(2).[48]
(v) Section 56(4) provides that a young person can waive their rights. A waiver must be in writing and there must be included a statement that the young person has understood the nature of the rights that are being waived. There is scope for the view that a young person must not only understand the rights that are being waived, but must also understand the consequences of waiving those rights.[49] The Children, Young Persons, and Their Families

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(iii) That there is a right to consult with and make a statement in the presence of an adult, counsel or a parent.

[46] See ss 2 and 214(3), an "enforcement officer" includes police, public servants, and officers of local authorities.

[47] See s 215(f) of the Children, Young Persons, and Their Families Act. The word "and" is used specifically contemplating the presence of more than one observer. See *R* v *Fitzgerald* above, n 32. Section 56 uses the word "or".

[48] This provision allows an enforcement officer to refuse to accept a young person's nomination of adult where he or she believes on reasonable grounds that the chosen adult would (broadly) be likely to pervert the course of justice.

[49] See *Clarkson* v *R* [1986] 1 SCR 383 for the Canadian view on the point. See similar authority in New Zealand for adults in *R* v *Tawhiti* [1993] 3 NZLR 594, per Smellie J at pp 597-598, because Tawhiti did not know the true nature of the jeopardy he faced (he had not been told that the man he had assaulted had died in hospital) his waiver could not be valid. See also *Keni* v *Police* (1992) 9 CRNZ 374 where the court held that there was an obligation on the prosecution to establish to the civil standard that a waiver had been made with the full knowledge of the rights being foregone. Also see *R* v *Yensen* (1961) 36 CR 339, below n 107.

Act does not allow waiver of the rights provided by the Act.[50] In *Police* v *BG (a young person)*[51] the young person gave the police an incorrect age and consequently had adult rights read to him rather than the rights in the Children, Young Persons, and Their Families Act. It was held that the young person could not waive his rights by giving an incorrect age. The subjective belief of a police officer as to the age of the alleged offender is irrelevant to the obligations under the section.

(vi) Section 56 has been held not applicable to purely investigative inquiries by the police.[52] The Children, Young Persons, and Their Families Act is not clear on this point. However section 215 of the Act also speaks of "questioning" in relation to the "possible commission of an offence" by a young person as distinct from the exclusive use of the word "statement" in section 56. A "statement" is the formal recording of an interview once a police officer has reasonable cause to believe that the young person has been involved in an offence.[53] "Questioning" about the "possible commission" is a more tentative sort of inquiry. Certainly the New Zealand police believe that the rights in section 215 have to be explained even at the investigative stage of an inquiry.[54]

2. Australia[55]

(a) Australian Capital Territory

Section 30 of the Children's Services Ordinance 1986 limits the police from interviewing or "caus[ing] [a] child to do anything in connection with the investigation of an offence" to situations where a parent, relative or appropriate adult is present. The following points can be made.

(i) The Ordinance refers only to a "police officer". It does not contemplate application to a "person in authority" as the Canadian section does.

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[50] See *Police* v *B* [1993] DCR 472 where Judge Twaddle held that a young person could not waive their rights under the Children, Young Persons, and Their Families Act because the Legislature had intended to give young people effective and concrete rights.

[51] (1993) 10 FRNZ 157. Note there is criticism of this decision; see *Trapski's Family Law* (Brooker & Friend, Wellington, 1991), vol 1, ch I.19, p A-254, note (wa).

[52] *R* v *A (CA)* (1989) 101 AR 155 (Prov Ct).

[53] Ibid, 157.

[54] See the police submissions in *Report of the Ministerial Review Team of the Children, Young Persons, and Their Families Act 1989* above, n 26, pp 146-159. The police fought hard for a change that is reflected in the Children, Young Persons, and Their Families Amendment Bill, see further discussion below at pp 35-38 of this paper. There is a prevailing view that the police were stringently constrained by the procedure: see *R* v *Toko* (1991) 7 FRNZ 447, 447-448 where Sinclair J held a statement inadmissible because Toko was not advised of his rights at all, and had accompanied an officer to the station without realising that he did not have to. Sinclair J expressed sympathy for the police saying

> How any serving police officer could be expected to remember...all the matters required to be remembered under section 215....places the officer in an impossible situation.

See also "New Zealand: Review Sought on Search Laws" New Zealand Herald, 13 February 1992, p 1. Note however the comments of the Hon. Dr Michael Cullen in *NZPD*, No. 5, 727, 24 March 1994

> The Law as it is, does not prevent [the police] from engaging in initial enquiries.

The issue is unclear. Police practice in this matter means that the Children, Young Persons, and Their Families Act was a real change from the former regime: Rule 1 of the Judges' Rules allowed for preliminary questioning.

[55] Note that other Australian states are different, for instance in South Australia the police are only constrained by the common law and their General Instructions.

(ii) Like the Canadian statute the Ordinance does not affirm rights, it serves to limit the powers of the police.
(iii) There is no ranking of the adults who are permitted to be present when a young person is questioned by police. It is not clear from the wording whether more than one of these adults can be present. It is clear that there is no specific right to consult with that adult, although in practice such consultation may take place.
(iv) While there is no provision entitling a waiver by a young person, section 30(3)(e) contemplates a situation where none of the adults referred to can be present. Section 30(3) allows for the presence of another person. That person may be a police officer unconnected with the offence. The New Zealand legislation also contemplates a situation where the nominated adult will not be available within a reasonable time (sections 221(2)(c)(iii)(B) and 231(1)(d)), but provides in section 222(2)(b) that another adult who is not an enforcement officer can be nominated. The New Zealand legislation gives the further protection of an independent adult in that situation.
(v) It is not clear whether the Ordinance applies to restrict police from making purely investigative inquiries to situations where one of the specified adults is present. The use of the words "cause the child to do anything in connection with the investigation of an offence" could be read as requiring adult presence during preliminary inquiries. Seymour[56] takes the view that the Ordinance applies only to interviews or procedures such as identification parades or re-enactments.

(b) New South Wales

Section 13(1) of the Children (Criminal Proceedings) Act 1987 provides that evidence given to the police by a child is not admissible unless an adult was present when the evidence was given. Several points can be made.
(i) The NSW statute is specifically linked to a police interviewing situation, rather than any person in authority.
(ii) Like the Canadian and ACT provisions, section 13(1) limits police rather than setting out the rights of young people.
(iii) The adults mentioned are not prioritised and the use of the word "or" suggests that only one person can be present. This is not clear. There does not appear to be a right to consult with that person, but once again it seems that practically such consultation must occur. It is also notable that the young person does not have the power to choose which adult is present unless he or she is of or above 16 years, sections 13(1)(a)(i) and (ii).
(iv) There is no provision entitling waiver. However sections 13(1)(b)(i) and (ii) contemplate the admission of evidence where the court is satisfied there was a "proper and sufficient reason for the absence of the required adult" and where in the particular circumstances the court considers the evidence should be admitted. The NSW statute retains a lot of judicial discretion. Section 224 of the Children, Young Persons, and Their Families Act provides that reasonable compliance must occur before evidence infringing the Act will be admissible. As Thorp J pointed out in *Fitzgerald*[57] there is no residual discretion to admit statements. Unless there had in fact been substantial compliance the statements would be excluded.

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[56] *Dealing With Young Offenders* by John Seymour (1988) p 195.
[57] Above n 32, 5.

(v) Section 13 applies to any "statement, confession, admission or information" (emphasis added) that is given to police. Seymour[58] sees the word "information" as indicating that the NSW statute applies at any stage during an investigation.

3. U.S.A

In the United States different states have enacted different statutes to ensure that the rights in *Miranda*[59] are applied to juveniles.[60] Some states have enacted statutory regimes which have additional requirements to the rights set out in *Miranda*. Those are requirements such as the presence of parents or statutorily approved places of questioning.[61] Generally throughout the United States the courts have acted and have gone beyond the requirements in *Miranda* to scrupulously examine the circumstances surrounding a juvenile's statement to police. Several points can be made.

(i) In order for *Miranda* to apply, whether statutorily supported or through case law, the young person must be interrogated in custody.[62] *Miranda* has been held not to apply to shop guards.[63] The regime is limited to formal interrogations, and appears to be limited to police officers.

(ii) *Miranda* sets out positive rights. Statute law and case law applying *Miranda* to juveniles have a tendency to control police conduct but this is true of case law in New Zealand as well.

(iii) In Pennsylvania the courts have created a rule which requires the exclusion of a young person's statements if it appears there was no opportunity for the young person to confer with an interested and informed adult prior to the making of the statement. There appears to be no prioritising of adults in that rule.

(iv) Whether a young person is competent to waive their rights is a controversial issue in the U.S. In *Fare* v *Michael C*[64] the Supreme Court decided that the appropriate test for evaluating waivers of rights is the "totality of all the circumstances test". The Court held that a young person is not incompetent by age alone and that there was no need for a parent or supportive adult to be present. Adult waivers must be knowing and voluntary, and for young people the same requirements must be imposed. Depending on the circumstances waiver is possible in the United States.

(v) Because *Miranda* only applies to custodial interrogation the statutes and case law relating to young people apply only to the formal interrogation procedure and not to the investigative stages of an inquiry.

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[58] Above n 55.

[59] *Miranda* v *Arizona* 384 US 436 (1966). The *Miranda* rights are that there be a warning prior to questioning of the right to remain silent, the fact that a statement may be used as evidence, and the right to the presence of an attorney, either retained or appointed. A discretion to exclude on overall fairness grounds is retained by the American courts.

[60] *Rights of Juveniles - The Juvenile Justice System* by Samuel M Davis (1981) ch 3, pp 44-47. Note that the courts have also acted to ensure that young people receive their constitutional rights such as the right to counsel, the right to silence, due process rights etc: see the Supreme Court in *Re Gault* 387 US 1 (1967).

[61] See New York State, *In Re Emilio M* 44 App.Div 2d 791(1974) where a statement was held inadmissible because it had not been taken in an approved place.

[62] *Representing the Child Client* by M I Soler et al (1990), ch 5, p 32.

[63] *In Re Deborah C* 635 P 2d 446 (Cal 1981).

[64] 442 US 707 (1979).

D Case Law

1. Introduction

In New Zealand the *Irwin*[65] decision caused a great deal of public debate about the separate regime for young people. *Irwin* was a blatant case of non-compliance by the police; Irwin was simply not advised of any of his rights. Fisher J held that the non-compliance had been inexcusable given the earlier decided cases and the police form "Youth Checklist - steps for investigation" that was in common usage. That form includes a checklist of the rights to be explained to young people. Fisher J held that it was his duty to give effect to the scheme sanctioned by Parliament. Irwin's statement was excluded and he was subsequently acquitted of a charge of murder.[66]

Case law in New Zealand has focused on two main issues: whether there had been reasonable compliance with the Children, Young Persons, and Their Families Act procedure and whether the procedure in the Act applied to an offender who allegedly committed an offence when a young person but who is no longer a young person.

In this section I will look at New Zealand case law on these issues. Case law from Canada and Australia on similar issues will also be considered.

2. New Zealand

Before any statement can be admissible evidence in New Zealand, the prosecution must show that there has been at least reasonable compliance with the Children, Young Persons, and Their Families Act procedures in the questioning of the young person. The Court of Appeal has indicated that reasonable compliance will be viewed strictly. The protections in the separate Children, Young Persons, and Their Families Act regime apply only to alleged offenders who are young people when proceedings are contemplated, not when the crime is allegedly committed.

In *Fitzgerald*[67] Thorp J made a very detailed analysis of the Children, Young Persons, and Their Families Act procedure. Fitzgerald was arrested after the courtroom machete attack

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[65] *R* v *Irwin* above, n 32.

[66] See *R* v *Irwin* Unreported, 3 December 1991, High Court, Hamilton Registry, T32/91 (judgment the day after the judgment excluding Irwin's statement, above n 32). Irwin was charged with the murder of Steven Slavich. His co-accused Rogers pleaded guilty. The police case against Irwin centred on whether he knew that murder was a probable consequence of their common purpose to carry out an aggravated robbery using a firearm. Although he was not arrested, Irwin was taken to the Paeroa police station. He was not advised of his rights. There was a lot of misinformation in the media about the *Irwin* decision, at best he could have been charged as a party to murder and the police had a dubious case on that ground. The case continues to create attention, see "Police Welcome Interview Powers" New Zealand Herald, 1 June 1992, p 1 and also "Criminal Children's Act" Letter to the Editor (with subsequent replies) Dominion, 15 July 1994.

[67] See above, n 32.

on a Youth Court Judge. Confusion occurred because Fitzgerald's lawyer was a witness and was unable to act for him. Fitzgerald's right to another lawyer was not clearly explained and he was not told that he also had the right to the presence of another adult. Thorp J excluded the statement that Fitzgerald made concluding[68]

> [the Act] looks to the substance rather than the form of the interrogation procedure.

The onus is on the Crown to prove beyond reasonable doubt that there had been reasonable compliance with Children, Young Persons, and Their Families Act procedure. His Honour pointed out that he had no residual discretion to admit statements, unless there had been in fact reasonable compliance the statements would be excluded.[69] Thorp J saw "reasonable compliance" as being "substantial compliance" with Children, Young Persons, and Their Families Act procedure. It was not sufficient to comply after the statement had been made.[70]

In *R* v *Crime Appeal (CA311/91)*[71] the Court of Appeal dealt with the issue of whether there had been substantial compliance with Children, Young Persons, and Their Families Act procedure. The Court supported Thorp J's view that the substance of the Children, Young Persons, and Their Families Act had to be complied with. A statement was admitted where it was taken at home, in the presence of the young person's mother and where the young person was told that he could be arrested, that he was entitled to legal advice, that he did not have to make a statement and that he could withdraw his consent at any time. He was given a period to consult with his mother in private. He was not told that he could nominate an adult to consult with and to be present. The Court of Appeal held that the spirit of the legislation had been complied with but that it was a borderline case, adding[72]

> We are far from suggesting that these sections impose mere formalities and may be disregarded with impunity by investigating police officers. That is certainly not the case.

The Court took a very strict view and held that for reasonable compliance to occur the spirit of each of the requirements must be reasonably complied with.

In *Police* v *Edge*[73] the Court of Appeal upheld a ruling that Children, Young Persons, and Their Families Act procedure only applied to offenders who were young people at the time proceedings were contemplated, not those who were young people when they committed

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[68] Ibid, 4.
[69] Ibid, 5.
[70] Ibid, *R* v *Fitzgerald* at p 11:
> I doubt whether there will be many cases when ex post facto compliance will be held reasonable compliance with the requirements of the Act. It is very difficult to go back to the starting point once an interrogation has continued to a stage where a confession...has been obtained...

[71] (1991) 7 CRNZ 539; (1991) 8 FRNZ 119.
[72] Ibid, 544.
[73] (1992) 9 FRNZ 659; [1993] 2 NZLR 7.

an offence. The Court of Appeal said the whole scheme of the Children, Young Persons, and Their Families Act was[74]

> to make provision for the perceived special needs and circumstances of children and young persons.

Where an offender was no longer a young person there was no need for that provision to be made.

3. Canada

The prosecution has the onus of proving that there was compliance with the procedures set out in section 56 of the Young Offenders Act 1982. In Canada the issue is not whether there had been reasonable compliance, but rather whether there had been a valid waiver. The prosecution must satisfy the court that the waiver was valid. In Canada there is a case which suggests a similar approach to that taken in *Edge*[75] on the question of whether an adult offender is protected by section 56 where the offence in question was allegedly committed while a young person.

In *Clarkson* v *R*[76] Wilson J held that a waiver must involve a true appreciation of the rights that are being given up. In Wilson J's view it was not enough for an accused to merely comprehend the rights that are being waived; the accused must appreciate the consequences of giving up those rights. It is up to the Crown to prove that the waiver is valid. Using Wilson J's test that would be an onerous task because it would be extremely difficult to prove actual comprehension.[77]

Section 5 of the Young Offenders Act 1982 extends the sentencing powers of the Youth Court to adult offenders who committed the offences when they were young people. In *R* v *Z (DA)*[78] the Supreme Court held that section 5 did not determine whether the whole Act applied to such persons. The Court held that the special purpose of section 56 was the deciding factor. The Supreme Court took a similar approach to the Court of Appeal in *Edge*[79] holding that the statement was admissible. The older the defendant was the less persuasive was the claim to the special protections given by the Legislature to protect the

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[74] Ibid, 661.

[75] See above, n 73.

[76] See above, n 49.

[77] It is by no means clear that Wilson J's test has been universally accepted. In *R* v *Mannien* [1987] 1 SCR 1233 the Canadian Supreme Court spoke of the need for an "actual waiver" but did not clearly define the term. In *R* v *Thibodeau* (1989) 101 NBR (2d) 208 statements were excluded on the grounds of unfairness. One of the features of unfairness was the fact that the prosecution had not shown that the accused was aware of the consequences of making the statements. The accused in *Thibodeau* was not aware of the consequences of giving up his right to silence. Note also the New Zealand case law on requiring subjective understanding, see *R* v *Mallinson* (1992) 8 CRNZ 409 (High Court first instance), (1992) 8 CRNZ 707 (Court of Appeal) and *Mallinson (No 2)* (1992) 9 CRNZ 691; see above n 49 and below at n 106 and n 107.

[78] [1992] 2 SCR 1025.

[79] See above, n 73.

immature. However in other cases the Canadian courts have extended section 56 protections to adults who allegedly committed the offence while young people.[80] The Supreme Court's judgment is of higher precedent value and is the later judgment; therefore that judgment may have decided the issue.

4. Australia[81]

In Australia it is accepted that the prosecution have the onus of satisfying the court that the evidence in question should be admitted. That includes the onus of proving that a particular statutory scheme has been complied with. Rather than there being a situation where reasonable compliance is required, the Australian courts retain a great deal of discretion to admit evidence despite deficiencies.[82] It is not clear what the general approach is to the question of whether a separate regime for young people would cover adults who allegedly committed offences while young people. There is New South Wales case law which suggests that those individuals will be protected by the separate regime for young people.

Like the New Zealand courts' approach to reasonable compliance the Australian courts have rarely exercised the discretion to admit young people's evidence that does not comply with a statutory scheme. In *T* v *Waye*[83] a 14 year old was separated from his elder brother and questioned without the presence of an independent adult. The court held that the defendant's subsequent confession was inadmissible because[84]

> a basic requirement in the questioning of juveniles has not been complied with.

In *R* v *M*[85] the Queensland Criminal Court held that the police officer in question ought to have told the 12 year old defendant that he did not have to accompany her to the station for questioning. The Court in *M* refused to exercise the discretion to admit the defendant's statement, instead holding it to be involuntary.

In *Bullock* v *Kennedy*[86] the court applied the statutory scheme[87] and held that an accused who was deemed a young person for the purposes of that Act was entitled to the protections for young people set out in section 81C. That section set out the protections that are now in section 13 of the Children (Criminal Proceedings) Act 1987. Section 13(2)(b) deems a person who is alleged to have committed an offence while a child to be

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[80] For example see *R* v *F (K)* (1990) 86 Nfld & PEIR 238 and *R* v *P (J)* (1989) 73 CR 205.

[81] Australian case law will be considered in general terms. The approach of specific states will not be separately considered.

[82] See for example s 40(1) Children's Services Ordinance 1986 (ACT) and s 13(1)(b) Children (Criminal Proceedings) Act 1987 (NSW).

[83] (1983) 35 SASR 247.

[84] Ibid, 251. This is a South Australian case. There is no separate statutory regime to deal with police questioning of young people. Police General Instructions and the common law apply. The confession was held inadmissible on the grounds of unfairness.

[85] [1976] Qd R 344.

[86] (1988) 12 NSWLR 200.

[87] In that case it was the Child Welfare Act 1939 (NSW).

within the definition of "criminal proceedings" and therefore covered by the special regime in that section. However it is not clear that this is a general trend.

E Conclusions

From the analysis of other jurisdictions it is clear that the Children, Young Persons, and Their Families Act and case law resulting from it takes a more protective stance than other jurisdictions. In New Zealand there is no residual discretion for the courts to admit a non-complying statement. The courts have taken a strict view of the requirement for "reasonable compliance". There is no entitlement for a young person to waive his or her rights. Finally, even if the young person's choice of adult is not available, the Children, Young Persons, and Their Families Act declares that an enforcement officer cannot be substituted for that independent adult. New Zealand and Canada seem to be united in one area; an adult offender who committed an offence while a young person is not entitled to the protection of a separate regime. The general Australian approach to that question is unclear.

IV THE NEW ZEALAND BILL OF RIGHTS ACT 1990

A Introduction

The New Zealand Bill of Rights Act 1990 was enacted after a lengthy process. The Act was initially to be entrenched legislation,[88] it was even considered as higher law, a kind of constitutional basis for New Zealand's other legislation. When it was enacted it was a basic statute. It was not greeted with enthusiasm.

There was a prevailing view that the new New Zealand Bill of Rights Act was a weak and useless piece of legislation; a "dead letter".[89] However as soon as the New Zealand Court of Appeal had the opportunity to interpret the Act it began to be taken more seriously.

In a series of cases the New Zealand courts have taken the dead letter and made it dynamic and extremely influential especially in the area of civil rights.

This part will examine a number of New Zealand cases[90] and trends suggested in Canadian case law. These cases indicate a broadening of the New Zealand Bill of Rights Act to include different applications of rights for different circumstances. With possible reform in the common law relating to police questioning and the admissibility of confessions signalled by the Law Commission,[91] this part will analyse whether those changes and the New Zealand Bill of Rights Act protect young people in the same way as they are protected now.

This part will also examine the Children, Young Persons, and Their Families Amendment Bill. In my view the Amendment Bill closes the gap between the adult regime and the separate regime for young people.

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[88] A constitutional or entrenched Bill of Rights imposes limits on legislative power and allows courts to declare legislation null and void. A statutory Bill of Rights controls executive and judicial power but not legislative power: see *Adams on Criminal Law*, (Brooker & Friend Ltd, Wellington, 1992) Vol 2, ch 10.

[89] "The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable" by David M Paciocco, p 1, "[the New Zealand Bill of Rights Act was] declared by most to have been still-born, a lifeless carcass." See also *Public Law in New Zealand - cases, materials, commentary and questions* by Mai Chen and Geoffrey Palmer, above n 43, ch 18, pp 463-564.

[90] It is recognised that there are a great number of issues surrounding the New Zealand Bill of Rights Act. These issues are all interesting and controversial but cannot all be covered in this paper. Canadian case law will be considered because of the similarity between the New Zealand Bill of Rights Act and the Canadian Charter of Rights and Freedoms.

[91] See, above n 3.

B The New Zealand Bill of Rights Act and Rights when Questioned

Section 225 of the Children, Young Persons, and Their Families Act specifically states that other enactments relating to the admissibility of statements and confessions are unaffected by the separate regime. Therefore the New Zealand Bill of Rights Act already has application to young people.[92]

The New Zealand Bill of Rights Act sets out rights relating to searches, arrests and detentions in sections 21 to 27. Sections 23, 24 and 25 are the relevant sections for police questioning. Section 23 sets out the rights of people who are arrested and detained. Included in those rights is the right to be informed of the reason for the detention (section 23(1)(a)), the right to consult and instruct a lawyer without delay and the right to be informed of the right (section 23(1)(b)) and the right to refrain from making a statement (section 23(4)). Section 24 sets out the rights of people who are charged with an offence. Section 25 sets out the minimum standards of criminal procedure. Included in section 25 are the following:

> (d) The right not to be compelled to be a witness or to confess guilt
>
> ...
>
> (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's[93] age

Note that the sections refer to people who are detained, arrested or charged with an offence. It is limited in scope to enforcement officers who have the power to detain, arrest, or charge.

C Case Law

1. A purposive interpretation

> In interpreting and applying the New Zealand Bill of Rights Act, the courts must strive to avoid becoming verbose and evolving fine distinctions. A Bill of Rights should be interpreted generously and simply, no matter whether or not it was entrenched[94]

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[92] *Brooker's Summary Proceedings* (Brooker & Friend Ltd, Wellington, 1994) ch 4, p 55. See also *R* v *Irwin* above n 32 p 129 where Fisher J expressed the opinion that the rights provided by the New Zealand Bill of Rights Act has been overtaken by the more "stringent" requirements in the Children, Young Persons, and Their Families Act. Note however, above n 73, that in *Police* v *Edge* and *Irwin* the court indicated that the statements would have been excluded even if the Children, Young Persons, and Their Families Act was not operable, because there were breaches of the New Zealand Bill of Rights Act.

[93] Note that "child" is not defined in the Act. There may be an issue as to whether the New Zealand Bill of Rights Act is therefore limited by the defined ages (child = under 14 years; young person = between 14 and 17, but under 17 years, per s 2) set out in the Children, Young Persons, and Their Families Act. Note that "child" is defined in the UN Convention on the Rights of the Child as a person under 18 years unless national laws recognise the age of majority earlier. This proviso is perhaps not surprising given the diversity of cultural views as to when a person is a child. Also see above n 44.

[94] *R* v *Te Kira* [1993] 3 NZLR 257, 261 per Cooke P.

The New Zealand courts have signalled in a series of cases that a "purposive" or "generous" interpretation is to be taken of the New Zealand Bill of Rights Act.[95] A purposive interpretation is a changing and evolving interpretation which takes account of particular circumstances to ensure that individuals are given the full measure of their rights.[96]

In *R* v *Kereopa*[97] the defendant was held by a store detective who suspected him of stealing a soft toy. A police officer was present for some of the time but the defendant was not formally arrested. During this detention the defendant was not told of his right to a lawyer. The District Court took a purposive interpretation of the defendant's right to a lawyer. The Court held that the most important function of that right was to enable the defendant to obtain advice and to ensure that he understood his rights, particularly the right to silence. For this particular defendant it was unfair to deprive him of his rights by failing to formally arrest him. A reasonable opportunity of access to counsel was not given.

The purposive approach taken by the courts first looks at the purpose, function or underlying value of a right and then looks at the particular circumstances, including the particular defendant. The purposive approach takes the meaning best suited to promote the right.

2. "Arrest" extended

When comparing it to the separate regime in the Children, Young Persons, and Their Families Act one of the obvious limiting factors in the New Zealand Bill of Rights Act is the fact that the rights in sections 23 to 25 apply only to those who are "arrested or detained under any enactment". The separate regime applies before questioning, before arrest is considered. The use of the words "detained under any enactment" prevent New Zealand Bill of Rights Act protections extending to detentions for the purpose of questioning, since there is no enactment which authorises detention for the purpose of questioning. To remedy this problem the Court of Appeal, using a purposive approach to the rights in the New Zealand Bill of Rights Act, extended the concept of "arrest" beyond its formal meaning. In *R* v *Butcher and Burgess*[98] the concept of "arrest" was extended to include de facto detention or a situation where the accused believes that there is an inability to leave and where that belief has been induced by police conduct. In *Goodwin*[99] the majority of the Court of Appeal drew back from *Butcher* and held that there must be a manifestation of an intention to arrest by words or conduct.

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[95] See also *Flickinger* v *Crown Colony of Hong Kong* [1991] 1 NZLR 439; *R* v *Butcher and Burgess* [1991] 2 NZLR 257; and *R* v *Tawhiti* [1993] 3 NZLR 594, 597

> What matters....is whether Mr Tawhiti was accorded the substance of his rights, and an overly analytical or compartmentalised approach....might obscure that question

See also *R* v *Big M Drug Mart* [1985] 1 SCR 295, 344.

[96] *Adams on Criminal* Law above n 88, Vol 2, ch 10, p 68.

[97] (1991) 7 CRNZ 204.

[98] See above, n 95.

[99] *R* v *Goodwin* [1993] 2 NZLR 153. Note that in *Goodwin* the Court of Appeal held that although not "arrested" the accused was arbitrarily detained in breach of s 22 of the New Zealand Bill of Rights Act.

Note however that in *R* v *Edwards*[100] the Court of Appeal said[101]

> [I]t is important not to lose sight of the fact that the police have a duty to investigate and prosecute crime. The fact that they are interviewing a suspect at a police station does not mean that he or she must inevitably be regarded as detained.

That approach was echoed by Thomas J in *R* v *Waddel*[102]

> Provided, therefore, that the rights of the person being interviewed are protected and the interview is conducted fairly, it is unnecessary and undesirable to bring forward the point of time when a person can properly be said to be under arrest.

This latter approach does not bode well for young people or in fact any person who is interviewed by the police. It could be said that this approach creates a right for the police to detain for questioning and not explain New Zealand Bill of Rights Act rights. It is an approach that has been criticised for restricting the right to counsel and the right of silence where no restrictions were imposed in the Act.[103] Under the Children, Young Persons, and Their Families Act young people have their rights explained to them before questioning.

This question has not been resolved, but it is clear that the courts have been endeavouring by taking a purposive approach to ensure that civil rights are granted to those who are questioned by the police. It is the purposive application of that approach that has divided the courts.

3. Rights case law and subjective circumstances

(a) Understanding rights

A great deal of case law on the New Zealand Bill of Rights Act has centred on whether an accused has waived the rights guaranteed under the New Zealand Bill of Rights Act. It has been accepted that before a waiver is valid an accused must understand the rights that are being given up. It has also been held that a mere incantation of rights will not necessarily be sufficient to comply with the Act. An accused must be "informed" of his or her rights. In *R* v *Adams*[104] the court held that the adequacy of a warning under the New Zealand Bill of Rights Act depended upon the clarity and accuracy of it and the surrounding circumstances. An incantation of the New Zealand Bill of Rights Act rights did not satisfy the Act. In *R* v *Cullen*[105] the Court of Appeal held that the police must be sure that the suspect understood the rights. However if it was reasonable on the facts to infer that the suspect did understand the New Zealand Bill of Rights Act rights then that was sufficient. There must be a reason for the officer to think that the suspect did not understand.

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[100] (1991) 7 CRNZ 528.
[101] Ibid, 535.
[102] Unreported, 25 November 1991, High Court, Auckland Registry, T119/91, p 4.
[103] See Paciocco, above n 89, pp 29-32.
[104] (1993) 10 CRNZ 687.
[105] (1992) 8 CRNZ 353.

In *R* v *Mallinson*[106] the Court of Appeal held that the content of the New Zealand Bill of Rights Act rights must be brought home to the accused. The court said that this was not the same question as whether the police were justified in assuming that an accused did understand them. Where an accused is advised of his or her rights there will be an inference of understanding. The Court of Appeal indicated that this was not the same approach as *Cullen*. It is not a question of whether an accused had some sort of disability that was obvious to the police officer which would require modification of the rights explanation. Normally an accused's statement that he or she did understand the rights explanation would be sufficient. However if an accused raises an evidential question about his or her understanding, it is a subjective test. The prosecution must prove subjective understanding of the rights by the accused. At the retrial in *R* v *Mallinson (No. 2)*[107] McGechan J held that the purposes of the New Zealand Bill of Rights Act were best to be served by a subjective approach as to whether a person has actually understood and been adequately informed of his or her rights. McGechan J viewed this approach as furthering the purposive interpretation of the New Zealand Bill of Rights Act - ensuring that the best protection is given to a suspect.

In *Ryan* v *Ministry of Transport*[108] the court held that due to the appellant's intoxication, state of upset and age (17 years) he had not been made aware of his New Zealand Bill of Rights Act rights. His appeal was allowed on this ground.

The consequences of waiving rights must also be understood by an accused.[109]

In Canada there is case law that suggests that "informing" an accused of his or her rights under the Canadian Charter of Rights and Freedoms may require the use of different language[110] for different suspects. The accused must at the least have the opportunity to become aware of his or her legal rights. In *McAvena* v *R*[111] the Saskatchewan Court of Appeal held that the duty to inform had five attributes, one of which was to inform in a language which the accused could understand and appreciate. The Court held that these

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[106] (1992) 8 CRNZ 707 (CA). On point see Andrew S Butler "An Objective or Subjective Approach to the Right to be Informed of the Right to Counsel? A New Zealand Perspective" 36 Criminal Law Quarterly (Canada) 317. For commentary relating to the application of this case to the term "without delay" in s 23(1)(b) see "Basic Requirements of section 23(1)(b) of the Bill of Rights Act 1990" by Bede Harris, Case and Comment [1993] NZLJ 86. Also note that the Court of Appeal judgment has also been read in reference to the duty to facilitate access to a lawyer: see *Ryder* v *Police* Unreported, 25 July 1994, High Court, Timaru Registry APPS17/94.

[107] (1992) 9 CRNZ 691. See also *R* v *Yensen* above n 77 where a Canadian court held that it is not sufficient to ask a child if she or he understood a caution. The police officer must demonstrate that the child understood the caution and the consequences that would flow from making a statement.

[108] (1993) 10 CRNZ 318.

[109] See, above n 77.

[110] See *R* v *Shields* (1983) 10 WCB 120 (Ont Co Ct), 122 per Borins J

..should be explained, in an easily understood language..

[111] (1987) 56 CR (3d) 303 (Sask.CA).

attributes were in conformity with the purposive interpretation to be taken of constitutional rights.[112]

Therefore, on the basis of this case law it is submitted that when assessing whether an accused has been informed of his or her rights the features of that accused, the surrounding circumstances and the language used to explain the rights will be considered by the court. The inference that once informed an accused understands his or her rights may be rebutted by the accused's young age.[113] The Canadian requirement that language be used that an accused will understand, would protect young people by ensuring that the requirement now present in section 218[114] of the Children, Young Persons, and Their Families Act is still satisfied.

(b) A particular right and a possible extension
- the right to consult and instruct a lawyer without delay

The right to consult and instruct a lawyer without delay and the right to be informed of that right is set out in section 23(1)(b) of the New Zealand Bill of Rights Act. Section 215 of the Children, Young Persons, and Their Families Act has a broader right than this; there is a right to a lawyer and/or a parent and/or a nominated adult. However the section 23(1)(b) right may have been extended to include a right to consult a parent or another adult.

A great deal of the case law about section 23(1)(b) has focused upon matters such as the right to privacy when consulting or instructing a lawyer[115] or the meaning of the term "without delay."[116] This paper will not focus on those issues. Instead note will be taken of two particular cases which suggest that an accused's right under section 23(1)(b) can be thwarted where the police do not allow contact with an adult of choice.

In *Knapton* v *Police*[117] the High Court held that the right to obtain legal advice varied in the way it was exercised in each case. In *Knapton* the police refusal to allow the defendant to telephone his wife had thwarted his right under section 23(1)(b). The specific features of the defendant were considered by the Court; he was an Australian citizen, he had no

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[112] Ibid, 309. The other four attributes of the duty to inform are (1) informing in a language which accurately describes the right; (2) at a time when the accused is capable of understanding and appreciating the right;(3) before the accused yields up any incriminating evidence; and (4) in sufficient time for the accused to use the rights (especially the right to consult and instruct a lawyer without delay).

[113] Following the reasoning in *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112 it could be said that the assumption of understanding lessens the younger an accused is. Such a rule does not take into account the subjective capabilities of each individual accused, but it would operate in a similar way as the Children, Young Persons, and Their Families Act does now.

[114] Section 218 requires that a young person be informed in a manner and language that is appropriate to his or her age and understanding. Section 25(i) of the New Zealand Bill of Rights Act requires that a child be dealt with in a manner that takes account of the child's age. A requirement for age-based language to be used may be implicit in any case.

[115] See for instance *Police* v *Kohler* (1993) 10 CRNZ 118 (CA) and *Scott* v *Police* (1993) 11 CRNZ 156.

[116] See for instance *R* v *Grant* (1992) 8 CRNZ 483 (CA) and *R* v *Tunui* (1992) 8 CRNZ 294.

[117] (1993) 10 CRNZ 515.

contacts in New Zealand and he believed that his wife would know who to call to get him legal advice.

The approach in *Knapton* was recently followed by the District Court in Dunedin in *Police* v *Ellis*.[118] The defendant was stopped and took a roadside breath test. The officer informed the defendant of his right to a lawyer and gave him a list of solicitors who were available to call. The defendant requested to be able to call his father in Wellington. That request was refused. Judge Everitt held that the police had thwarted the defendant's right to consult and instruct a lawyer without delay. The defendant did not indicate that the call to his father would be to gain access to a lawyer. Judge Everitt held that that should have been the implication to the officer because of several features about the defendant. Given his age (23), the fact he was a student living away from home, and his desire to avoid publicity,[119] his request to telephone his father for support was not unreasonable. Judge Everitt did not accept the view that because the New Zealand Bill of Rights Act only says "lawyer" an accused is only able to contact a lawyer.[120]

> [I]n my view it was overly restrictive to interpret the New Zealand Bill of Rights Act as to excluding anyone other than a lawyer. Had circumstances been different I might have been willing to put a different interpretation on the facts.

The *Ellis* case has been stated to the High Court for an appeal. The case indicates that the New Zealand Bill of Rights Act may be extended to include the right to consult a parent or another adult. However that right appears limited to situations where that adult can facilitate access to a lawyer. The extension has not gone as far as does the Children, Young Persons, and Their Families Act; there is no general right to consult the adult of choice. The approach taken by the New Zealand Bill of Rights Act is not common in overseas jurisdictions.[121]

Ellis and *Knapton* are interesting because of the focus on the specific features of each defendant. For relevance to the rights of young people note that the Court in *Ellis* saw age as a relevant factor for assessing whether the defendant should have the right to consult the adult of his choice.

The police must look not only at the specific features of an accused but also must take "proper and full account" of the condition of an accused[122] when assessing to what extent the section 23(1)(b) rights should be explained.[123]

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[118] Unreported, 31 May 1994, District Court, Dunedin, CRN4012007242.

[119] The defendant was a well-known sportsperson; a local representative and All Black rugby player.

[120] See above, n 118, pp 5 and 6.

[121] See for instance the right to consult a friend, relative, or other person interested in the defendant's welfare in s 56 of the Police and Criminal Evidence Act 1984 (UK) and s 23G(1)(a) of the Crimes Act 1914 (Australia). Note that the Law Commission, above n 3, p 168, thinks that such a right should be available for "vulnerable persons".

[122] *Cotterill* v *Police* Unreported, 2 December 1992, High Court, Wellington Registry, AP287/92.

[123] See the related commentary above at pp 27-29 of this paper. This duty applies generally to all the rights in the New Zealand Bill of Rights Act, not just s 23(1)(b). It is a duty to ensure that there is understanding as far as is possible.

> For example, it may not be compliance with the Act for a person to be told perfunctorily of the stipulated right of consultation and instruction at a time of great stress in the course of an arrest; or where a person of a passive nature and limited intelligence is understandably overawed by circumstances into not declaring a desire to exercise the right of consultation.[124]

It is submitted that the police have a two-fold duty under the court-extended section 23(1)(b).

First they must take account of the particular features of a suspect: his or her general circumstances; for instance whether he or she is living at home, whether he or she has contacts living in the area and the age of the suspect. Those features form part of the consideration of whether the defendant should be allowed to contact a person other than a lawyer.

Secondly, the police must take account of the condition of a suspect; for instance whether he or she is intoxicated, in an excited state, or particularly vulnerable. Those features are used to assess whether the right in section 23(1)(b) has been understood by the suspect. There may be a need to repeat that right[125] or reword it.[126]

In the absence of the Children, Young Persons, and Their Families Act these developments would mean that for young people there could be access to adults other than a lawyer and that the section 23(1)(b) rights would be "explained"[127] rather than being "informed" of those rights.

D Proposed Changes to the Common Law

The New Zealand Bill of Rights Act operates in conjunction with the common law rules about the admissibility of confessions and admissions.[128] A breach of the New Zealand Bill of Rights Act, or involuntariness or unfairness can all be grounds for exclusion in the court's discretion. The Law Commission in its paper *Criminal Evidence: Police Questioning*[129] suggested that changes be made to the common law. The Law Commission proposed to abolish the common law rule of voluntariness and the limitation on that rule in section 20 of the Evidence Act 1908.[130] The Law Commission stressed that

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[124] *R* v *Tunui* above n 116, 297.

[125] *R* v *Tawhiti*, see above n 94. In that case the defendant was handcuffed and held down after a scuffle resulting from an early morning drug raid. He was in an excitable state and did not listen to the officer who read him his rights.

[126] *R* v *Narayan* (1992) 8 CRNZ 235. In that case the defendant was unable to understand English and had an interpreter. To aid understanding during translation the rights could have been worded differently.

[127] To use Children, Young Persons, and Their Families Act terminology rather than "informed" which is New Zealand Bill of Rights Act terminology. Explaining rights suggests a degree of power in the hands of the recipient, while being informed suggests a passive listener.

[128] See above, p 4 of this paper. These common law rules are those about voluntariness and fairness.

[129] See above, n 3.

[130] See above, n 5. In the Law Commission's view those rules had not been operating effectively; ibid, at p 102. For instance the voluntariness rule does not operate to ensure that a statement is the result of an

its aim was to make the protection of suspects more effective by simplifying and clarifying the common law rules.[131]

The Law Commission proposed that three new rules operate in conjunction to cover all statements[132] that result from police questioning. The prosecution must prove beyond reasonable doubt that a statement was not influenced by oppressive conduct and that the circumstances surrounding the confession would not affect its reliability.[133] Finally there is the Improperly Obtained Evidence rule. That rule presumes all evidence inadmissible unless a court is satisfied that exclusion would be contrary to the interests of justice. The Law Commission suggested a series of factors ought to be considered by the court in its discretion under that rule: the nature and gravity of the police impropriety, any bad faith on the part of the police, whether the evidence existed and would have been obtained regardless, and the importance of the New Zealand Bill of Rights Act. In the Law Commission's view a suspect's subjective features would be considered under all of the rules. The Law Commission said that there was a further aim[134]

> [A] secondary concern of the rule [change] is that the police interviews of suspects are conducted in a way that minimises the risk of unreliability as far as reasonably practicable

In conjunction with the New Zealand Bill of Rights Act the proposed changes to the common law could work to protect suspects more thoroughly. The clarity of the Rules and the fact that proof beyond reasonable doubt is required means that even a possibility of circumstances surrounding the interview affecting the reliability of a statement would make the statement inadmissible. For young people, this could mean that age would be a decisive factor when looking at those circumstances. The Law Commission's proposal was supported by the Law Society[135] and its relevance to young people has also been noted.[136]

E Conclusions

By taking a generous approach to the interpretation of the New Zealand Bill of Rights Act the courts have allowed its scope to be extended. The subjective features of a defendant are relevant in several ways. A defendant's belief that he or she is detained, if induced by

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informed choice to make a statement; there is usually a great deal of psychological pressure imposed upon a suspect. Further, even if a statement is voluntary it may still be unreliable due, for example, to a suspect's mental illness.

[131] Ibid, p 100.

[132] Note that the Law Commission proposes that the new rules cover all statements, not just admissions or confessions. This is to preclude problems of the definition of a statement.

[133] The "oppression rule" and the "reliability rule".

[134] See, above n 3, p 104.

[135] See "Police questioning regime should not proceed: Society" *Lawtalk* 386, 8 February 1993, 1. The Law Society was not supportive of another proposal in the Law Commission's report; the possibility of holding a suspect for the purposes of questioning.

[136] See *Report of the Ministerial Review Team of the Children, Young Persons, and Their Families Act 1989* above, n 26, 158.

> [W]e anticipate that the Commission's findings may have a significant impact on the ultimate fate of section 215.

police conduct, activates his or her rights under the Act. A defendant must understand those rights and the defendant's capabilities are considered when explaining those rights. The defendant's personal circumstances would dictate how those rights could be exercised.

The proposed changes to the common law would mean that the confusion surrounding what weight is to be given to the Judges' Rules and section 20 of the Evidence Act 1908 would be alleviated. In all three of the proposed Rules a court would take into account the features of a particular defendant.

This emphasis on subjective features could bode well for young people, if, as the Review Team on the Children, Young Persons, and Their Families Act believed, the ultimate fate of section 215 will be affected by the changes in the adult regime. It would mean that age and vulnerability would be relevant considerations when assessing if evidence from an interview would be admissible.

However, while the focus on subjective features could bode well for young people, the new Rules leave a great deal to court discretion. The Children, Young Persons, and Their Families Act does not allow the court discretion, there must be reasonable compliance with the Act's requirements or the evidence resulting from an interview will not be admissible. Before the enactment of the Children, Young Persons, and Their Families Act the court exercised its discretion and differences of approach were common.[137]

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[137] See commentary above at pp 7-10 of the paper.

V THE DIFFERENCES BETWEEN THE NEW ZEALAND BILL OF RIGHTS ACT AND THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT

A Introduction

There are three important areas of difference between the New Zealand Bill of Rights Act and the Children, Young Persons, and Their Families Act. In each case the Children, Young Persons, and Their Families Act is more protective than is the New Zealand Bill of Rights Act.

The first difference is that the New Zealand Bill of Rights Act applies only to people who are arrested or detained under any enactment,[138] while the Children, Young Persons, and Their Families Act applies before questioning.

Secondly, a suspect is able to waive his or her rights under the New Zealand Bill of Rights Act. There is no ability to do so under the Children, Young Persons, and Their Families Act.[139]

Thirdly, the result of a failure to comply with each Act's requirements is different. In the Children, Young Persons, and Their Families Act section 221 states that evidence obtained in breach of the requirements under the Act will be inadmissible unless there has been at least reasonable compliance with those requirements. In contrast, the New Zealand Bill of Rights Act does not have a remedies section and it has been left to the courts to resolve this omission.

B Three Points of Difference

1. "Before questioning" vs. "Arrested or detained under any enactment"

(a) Differences

The Children, Young Persons, and Their Families Act applies at first instance before questioning (section 215), while the first time that the New Zealand Bill of Rights Act could apply is where a suspect is arrested or detained under any enactment.

The Children, Young Persons, and Their Families Act clearly applies at an earlier stage.[140] The Police Association saw the Children, Young Persons, and Their Families Act provisions as "an invitation to non-cooperation.(sic)" [141] The police submissions to the

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[138] See above, n 98 and the commentary at pp 26-27 of this paper.

[139] See above, n 50.

[140] See above, n 54. The question of when the Act first applies is contentious.

[141] *Report of the Ministerial Review Team of the Children, Young Persons, and Their Families Act 1989* above, n 26, 155.

Review Team reflected a view that the Children, Young Persons, and Their Families Act operated at too early a stage, allowing the "streetwise" to hinder police enquiries. The police view was that general enquiries should be undertaken before the necessity for the rights to be explained.

Despite the developments in extending the term "arrest" beyond its formal meaning, the New Zealand Bill of Rights Act still requires conduct on the part of the police which induces a suspect's subjective belief that he or she is not free to leave.[142]

(b) The proposed change in the Amendment Bill

(i) Clause 31 - "reasonable grounds to suspect"

The Children, Young Persons, and Their Families Amendment Bill resulted from the Review of the Children, Young Persons, and Their Families Act and the subsequent report of the Review Team.[143] The Review Team recommended that section 215 be amended to clearly reflect that the police could undertake general enquiries before the rights in section 215 had to be explained to a young person. Clauses 31 and 31A in the Amendment Bill deal with the issue of police questioning of young people. Parliament did not follow the Review Team's recommendation, although the Government had previously agreed in principle to that recommendation.[144]

Clause 31 operates to limit the scope of the term "in relation to the commission or possible commission of an offence by that child or young person" in section 215. The Review Team's recommendation was to limit the term "before questioning". Under clause 31 the obligation to explain the rights in section 215 arises only where the enforcement officer has reasonable grounds to suspect the young person of having committed an offence, or where the questioning is intended to obtain an admission. Rather than being related to the possible commission of an offence a young person's rights would only be explained to him or her where the enforcement officer has reasonable grounds to suspect that the young person did commit an offence. The courts are well-used to interpreting concepts such as "reasonable grounds to suspect". In section 58A(1)(c) of the Transport Act 1962[145] an enforcement officer can require a person to undergo a breath test if that officer has "good cause to suspect" that the person has committed an offence against Part V of that Act. For drug related investigations where a detention warrant or an interception warrant is required, or where a search is made[146] there must be "reasonable cause to believe" that the warrant is necessary or that the individual is in possession of a controlled drug. Where there has been improper communication with a juror the court will use its discretion to declare a miscarriage of justice only where there is a "reasonable suspicion" that the action influenced the jury's verdict causing real damage.[147]

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[142] See above, n 95.

[143] See above, n 26.

[144] *The Government's Response to the Report of the Review Team* (Department of Social Welfare, Wellington, May 1992), p 46.

[145] See also s 69A of the Transport Act 1962 for a similar test in relation to heavy traffic.

[146] Sections 13E and 15 of the Misuse of Drugs Amendment Act 1978 and s 18 Misuse of Drugs Act 1975.

[147] *R* v *Bates* [1985] 1 NZLR 326, 328.

Cases in these areas[148] establish that the test is an objective one. The court looks at whether there were reasonable grounds for an officer to have that belief. It is not sufficient for a court to be satisfied that the officer believed there was good cause to suspect. There must be objective grounds to support that belief. In *Goodwin* v *Police*[149] the High Court allowed an appeal against a conviction for driving with excess breath alcohol. The officer did not have reasonable grounds to suspect that the appellant had been drinking and driving because he had not asked the appellant if he had been drinking.

For young people the insertion of this test means that the explanation of rights would take place at a later stage than at present. There are problems that would arise by the use of this test. It is a matter of subjective judgment on the part of a police officer as to when there are reasonable grounds to suspect a person of committing an offence. Each police officer would have a different view in different circumstances. There would not be a uniform approach to the time that rights are explained. Further, it is unclear what would happen if a court viewed the situation differently from the police officer; for instance if the court found that there were reasonable grounds to suspect an individual at an earlier stage than the police officer thought reasonable grounds existed. Would this mean that evidence resulting from the entire questioning would be excluded? Would it mean that evidence would be excluded from the time that the court believed there were reasonable grounds existed?

These questions remain unresolved. As a general statement clause 31 would mean that questioning could occur without young people being aware of their rights. This undercuts section 208(h) which recognises young people as particularly vulnerable.

(ii) Clause 31A - a discretion

Clause 31A was inserted by the Social Services Select Committee after submissions were heard. It provides that an enforcement officer is required to inform a young person of his or her rights in section 215 where that young person asks about them. However, the enforcement officer is only obliged to explain

> such of those matters as, in the circumstances of the particular case, are appropriate to the enquiry that was made.

This proviso limits the explanation to those matters that the enforcement officer considers have been brought up by the enquiry. This certainly limits the effectiveness of the rights in section 215.

A discretion is left to the enforcement officer to decide what rights to explain to a young person where a request is made. The wording of the clause suggests that an objective test

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[148] For instance: *Sokolich* v *Ministry of Transport* [1992] 2 NZLR 637, *Noomotu* v *Police* [1994] 1 NZLR 181 (Transport Act 1962); *O'Fagan* v *S* Unreported, 19 April 1994, High Court, Christchurch Registry, M107/94 (Misuse of Drugs Amendment Act 1978); *R* v *Sannd* (1988) 6 CRNZ 323, *R* v *Norton-Bennett* [1990] 1 NZLR 559 (improper communication with jurors).

[149] Unreported, 7 February 1989, High Court, Palmerston North Registry, M336/88.

is intended ("as in the circumstances of the case"), but, it is submitted, the effect practically for young people faced by police officers is that the officer can decide which rights to explain to them. Further, even with the objective test, an officer could only explain the rights specifically referred to by a request and not those that would assist a young person. As an example, a young person, D, is not arrested (because there were not reasonable grounds to suspect D committed an offence) but asked to accompany the police for questioning. D asks whether she can call her father. A police officer could explain that D did have that right, and fail to tell D that she had the right to refuse to accompany the officer for questioning. D's request was limited to one particular right and that right is explained to her. Effectively a young person waives his or her rights by not asking about them. In *Police* v *Kohler*[150] the Court of Appeal expressly approved the following passage from *Miranda*[151]

> The accused who does not know his [or her] rights and therefore does not make a request may be the person who most needs counsel.

It is the most vulnerable young people unaware of their rights under the Children, Young Persons, and Their Families Act who will be affected most considerably by this proviso. The power and control is taken away from young people and given to the police.

(iii) Conclusions about the Amendment Bill

When the Select Committee report was tabled the Chair of the Committee Roger Sowry MP said[152]

> There was considerable debate in the committee about the point at which a child or young person should have their rights explained. The committee really erred on the side of strengthening the rights of children and young people, whilst also treading that fine balance of making sure that the police can go about their normal course of work.

It is submitted that the Amendment Bill does not strengthen the rights of young people, it undercuts them. The Amendment Bill serves to confuse the matter still further. The Amendment transfers power to police discretion. Firstly the police officer decides when there are reasonable grounds to suspect that a young person has committed an offence.[153] Secondly, even where a young person asks about his or her rights it is the police officer who decides what rights that request refers to, and what rights to explain.

Both the time when the rights are explained and the nature of the rights are changed by the Amendment Bill.

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[150] See above, n 115, 123.

[151] See above, n 59. *Miranda* v *Arizona* 384 US 436 (1966), 441-442.

[152] *NZPD*, No.5, 717, 24 March 1994.

[153] Also it is for the officer to decide whether to ask a question in order to gain an admission; this is the other ground in the Amendment Bill. It is submitted that in any case the police would only question with the intention of gaining an admission where there are reasonable grounds to suspect a young person of committing an offence. This second ground is somewhat redundant.

Janet Mackey MP was of the view that "the matter needs further discussion."[154] The Hon. Dr Michael Cullen said[155]

> I suspect that we may have now ended up with a somewhat more complicated procedure about which there may be further legal arguments in the future, which will cause further difficulties in practice.

In my view that is an astute statement.

2. Waivers

The second notable difference between the New Zealand Bill of Rights Act and the Children, Young Persons, and Their Families Act is that young people cannot waive their rights.[156] In Canada[157]

> [T]he onus is on the Crown to demonstrate that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and an appreciation of the consequences of waiving that right.

The Court of Appeal have followed that reasoning. In *Kohler*[158] the Court of Appeal held that a valid waiver requires a conscious choice that is both informed and voluntary, and the Court noted that a voluntary waiver cannot be implied from silence.

There is confusion surrounding what standard of proof is required to establish a valid waiver. In *Kohler* the Court of Appeal approved the test in *R* v *Te Kira*[159] and held that the appropriate standard for establishing a valid waiver is the balance of probability but "with the gravity of the issue borne in mind".[160] This, with respect, is not a clear standard of proof.

Waiver can be express or implied under the New Zealand Bill of Rights Act but it must be certain, voluntary,[161] and the "product of an operating mind".[162] A valid waiver requires knowledge of the right being waived and knowledge of the degree of risk involved in waiving rights.[163]

The test for a waiver involves an assessment of the understanding of a suspect. There must not only be understanding of the nature of the right being waived, there must also be

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[154] *NZPD*, No.5, 724, 24 March 1994.
[155] Ibid, at page 727.
[156] See above, n 50. Also see *Adams on Criminal Law*, above n 87, Ch 10, pp 103-109.
[157] *R* v *Wills* (1992) 12 CR (4th) 58, 73.
See also *Clarkson* v *R* above, n 49 and *R* v *Mannien* above, n 77.
[158] *Police* v *Kohler*, see above, n 115, 123.
[159] See above, n 94.
[160] See above, n 115, 123. Also see *R* v *Dobler* (1992) 8 CRNZ 604, 612 "an enhanced balance of probabilities".
[161] Not the result of pressure: see *R* v *Evans* (1991) 63 CCC (3d) 289 (SCC).
[162] *Adams on Criminal Law* above, n 88, vol 2, ch 10, p 105. A suspect must not, for example, be intoxicated.
[163] *R* v *Tawhiti* above, n 49.

understanding of the consequences of waiving that right. It is submitted that, given the purposive approach to the New Zealand Bill of Rights Act taken by the courts, the necessity for understanding, and the trend towards age as a mitigating factor,[164] it would be a rare situation where a waiver by a young person would be held to be a valid waiver under the New Zealand Bill of Rights Act.[165]

Even allowing for that, by simply having the possibility of a valid waiver the New Zealand Bill of Rights Act would not give young people as concrete a regime as the Children, Young Persons, and Their Families Act does.

3. Breaches and admissibility

(a) Children, Young Persons, and Their Families Act 1989

The third notable difference between the New Zealand Bill of Rights Act and the Children, Young Persons, and Their Families Act is the result of a breach. Under the Children, Young Persons, and Their Families Act there must at least reasonable compliance with the requirements in section 221 before a statement will be admissible. The Court of Appeal[166] viewed the requirement for reasonable compliance strictly to mean that the spirit of each of the requirements must be reasonably complied with. There is no residual discretion to admit statements as evidence.

(b) New Zealand Bill of Rights Act 1990

In *Ministry of Transport* v *Noort*[167] Cooke P said:

> [T]he New Zealand [Bill of Rights] Act contains no express provisions about remedies or the exclusion of evidence. We have no counterpart of Article 24(1) and (2) of the Canadian Charter[168] which deal expressly with those matters. This difference is probably not of much consequence. Subject to [sections] 4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection.

Paciocco calls this "a bold statement" and points out that there were many impediments in the New Zealand Bill of Rights Act that could have inhibited access to remedies.[169]

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[164] See *Police* v *Ellis* above, n 118, *Munro* v *Police* above n 11, *R* v *Webb (No.2)* above n 14, *R* v *Tuhua* above n 16; see also s 25(i) New Zealand Bill of Rights Act above at p 24 and p 12 of this paper and Art 40 of the UN Convention on the Rights of the Child above n 38.

[165] This is also the approach in the U.S. Truly knowing waivers by young people are very rare. See *Representing the Child Client* by M I Soler et al (Matthew Bender & Co Inc, New York, 1990) ch 5, p 33. Note the study quoted in Soler (at p 33) which examined the ability of young people to understand their *Miranda* warnings which found that over 50% completely misunderstood at least one of the four warnings.

[166] *R* v *Crime Appeal (CA311/91)* above, n 71. See also *R* v *Fitzgerald* above, n 32 and the discussion at p 16 of this paper.

[167] [1993] 2 NZLR 260, 266. See generally *Adams on Criminal Law* above n 88, ch 10, pp 109-121.

[168] Article 24 provides a right for persons to apply to a court for "appropriate and just" remedies for Charter breaches, and art 24(2) provides for the exclusion of evidence obtained in breach of the Charter where its admission would bring the administration of justice into disrepute.

[169] See above, n 89. Also see "Remedies for Violations of the New Zealand Bill of Rights Act 1990" by David M Paciocco in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Publication No.32, 1992) p 40.

In *R* v *Goodwin*[170] Richardson J said that the "ordinary range of remedies" included

> the exclusion of evidence wrongly obtained, stay of proceedings, habeas corpus, damages for false imprisonment and judicial review of the exercise of statutory powers.[171]

In several cases the Court of Appeal has established that where evidence is obtained following a breach of the New Zealand Bill of Rights Act that evidence will be presumed inadmissible.[172] The evidence must be obtained in consequence of the breach. For the presumption of exclusion to operate, the accused must show that there is a causal link between the breach and the obtaining of the evidence.[173] Lack of causation often means that the breach is "inconsequential" or "merely technical".[174] A breach would be inconsequential where the evidence at issue would have been given in any event.[175] In *R* v *Grant*[176] the Court of Appeal held that the defendant's confession to burglary was admissible despite the fact that he had initially not been told of his right to a lawyer. It was admissible because when the defendant was eventually told of that right, he made no attempt to contact a lawyer, but instead confessed to 16 further burglaries. The Court of Appeal was satisfied that the defendant would have made the admissions in any event. A breach will also be inconsequential where the real evidence at issue would have been inevitably discovered. In *R* v *Butcher and Burgess*[177] certain items of real evidence found as a result of the defendant's admissions in a flawed interview were held admissible. It was accepted that they would have been discovered by the police in a search of the defendant's property in any case. However other items located on a country road were inadmissible because the police would not have searched the road were it not for the defendant's statement and that statement would not have been obtained were it not for the breach of the New Zealand Bill of Rights Act.

Even if there is a causal link established by the accused, the court retains a discretion to admit the evidence where the prosecution satisfies the court that it would be just to do so. There are a number of factors that the court considers when deciding whether to exercise this discretion.[178] These are factors such as whether the evidence is incriminating, whether

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[170] See above, n 99, 191-192.

[171] Note also the recent Court of Appeal decisions in claims from the Auckland Unemployed Rights Centre and the Estate of Elizabeth Baigent allowing those parties to seek compensation from the police for breaches of the New Zealand Bill of Rights Act; see "Court decision allows centre to sue police" Evening Post, July 1994, p 2.

[172] *R* v *Goodwin* above, n 99, 191; *R* v *Butcher and Burgess* above, n 95; *R* v *Kirifi* [1992] 2 NZLR 8.

[173] See *R* v *Latta* (1992) 8 CRNZ 520. It is an evidential burden. See *R* v *Te Kira* above, n 94, 667 per Richardson J

> What is both necessary and sufficient is that there be a real and substantial connection between the violation and the obtaining of the evidence.

[174] These are terms that were used in *R* v *P (T176/91)* (1992) 9 CRNZ 119, 135.

[175] See *Ministry of Transport* v *Noort* above, n 167, 275 per Cooke P

> [A]t least evidence obtained after a violation should not be admitted unless the prosecution proves that it would be forthcoming or discovered whether or not there had been a violation.

[176] See above, n 116.

[177] See above, n 95.

[178] See *Adams on Criminal Law* above, n 88, pp 116-119.

the evidence is credible and whether, if admissible, the evidence would cause undue prejudice to the accused.[179] There is also a suggestion that the discretion to admit evidence obtained as a result of a breach will be exercised sparingly, given the importance of the New Zealand Bill of Rights Act.[180]

(c) Comparison

It is clear that a breach of the New Zealand Bill of Rights Act will not necessarily have the same result as a breach of the Children, Young Persons, and Their Families Act does. Evidence will not necessarily be excluded. There needs to be a causal link between the violation and the evidence, and, even if there is that link, the court retains a broad discretion to admit the evidence notwithstanding that violation. The New Zealand Bill of Rights Act remedies are based upon court discretion and the notion of fairness.[181]

Unless there has been reasonable compliance, Children, Young Persons, and Their Families Act violations do lead to automatic exclusion. The court does not have a discretion to admit statements despite the violation.

In terms of comparisons it is clear that the Children, Young Persons, and Their Families Act takes a more protective stance to the rights of suspects than does the New Zealand Bill of Rights Act.

C Conclusions

It is evident that on the important issues of the time that rights are explained, the way that rights are explained, waivers of rights, and the remedies for breach of rights the current Children, Young Persons, and Their Families Act is more protective of young people than the New Zealand Bill of Rights Act is of adults.

If the Children, Young Persons, and Their Families Amendment Bill is enacted in its current form the differences on the issues of timing, waiver, and the nature of the rights would not be as great. It is recognised that the Amendment Bill does not remove the

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[179] Per *R* v *Cowie* [1992] 3 NZLR 112, 118. Photographs taken by the police of the accused at the crime scene after his confession were held inadmissible because they were unduly prejudicial and placed further weight on his statement.

[180] See *R* v *Edwards* [1991] 3 NZLR 463, 469 per Hillyer J.

> [T]he pattern of Judges in New Zealand excluding evidence which in their view had been obtained unfairly in interviews, would indicate that that would be one remedy open to the Courts. Whether that remedy must now be exercised more aggressively when it comes to violations of the Bill [of Rights Act] is a matter which will have to be considered by another Court in due course".

But note that there is case law which suggests that failure to advise of the right to counsel would not lead to a remedy where there is reason to believe that the suspect was aware of that right: *R* v *YD* Unreported, 16 October 1991, High Court, Auckland Registry, T146/91; *R* v *Chase* Unreported, 26 September 1992, High Court, Hamilton Registry, T48/92; *R* v *Thompson* Unreported, 13 December 1991, High Court, Hamilton Registry, T72/91.

[181] "From *Goodwin* to good law" by Don Mathias [1993] NZLJ 10, 11. If there is a reasonable possibility of unfairness (in the sense of a miscarriage of justice) evidence will be excluded.

separate regime. It is contended that the Amendment Bill, the New Zealand Bill of Rights Act case law and the Law Commission's proposals signals a development towards a universal regime in the police questioning area.

VI CONCLUSION

Mark what unvary'd laws preserve each state
Laws wise as Nature and as fix'd as Fate
In vain thy Reason finer webs shall draw
Entangle Justice in her net of Law

Alexander Pope
"An Essay on Man"
Epistle III; Lines 187 - 190

1. The vulnerability principle

The Youth Law Project have said that young people need special safeguards to protect them when they are questioned by the police.[182] This is because immaturity and inexperience place young people in a disadvantageous position. Generally young people are vulnerable to pressure, lack verbal fluency, are inexperienced in dealing with questioning and are socialised to agree with adults and authority figures. Young people are more vulnerable and the separate regime ensures, as far as possible, that they are aware of their rights.

The Gribblehurst Park murder in 1980[183] is often used as the example for why young people deserve special protection when they are being questioned by the police. In that case after sustained questioning two young people confessed to the murder of a vagrant in Auckland. Scientific evidence later established that neither defendant could possibly have been responsible for the crime. The young people said that they had felt that the questioning would stop if they confessed, but not otherwise. The words of the 17 year old defendant in *R* v *Wilson* [184] were similar. In that case after questioning held in a stuffy black room lasting nearly 6 hours, the defendant confessed to murder. The Court of Appeal ruled the defendant's confession inadmissible because it was involuntary due to oppression. The defendant was not availed of his right to a lawyer and his parents were not allowed to see him. He said that he "just wanted the questions to stop".

The Legislature specifically recognised the vulnerability of young people when it enacted the Children, Young Persons, and Their Families Act.[185]

This paper does not dispute that young people are vulnerable in questioning situations.[186] Instead this paper focused on the legal framework set up to protect the vulnerable. The

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[182] *Report of the Review Team on the Children, Young Persons, and Their Families Act* above, n26, p 147.
[183] *Children, Young Persons, and Their Families Act 1989* by Judge Brown, Lowell Goddard QC and Simon Jefferson, (New Zealand Law Society Seminar, October 1989) at p 33.
[184] [1981] 1 NZLR 316, 321.
[185] See s 208(h) of the Act at p 11 of this paper.

question that was analysed was whether a separate framework continues to be necessary given the developments under the New Zealand Bill of Rights Act.

2. Rigidity or necessary parentalism

In Parts II and III of this paper the separate regime in the Children, Young Persons, and Their Families Act was examined and compared to the approach of other jurisdictions. At every turn the Children, Young Persons, and Their Families Act protects young people more fiercely than any of the overseas examples.

There can be no waiver of the rights under the Act. Even where the police were entirely blameless[187] a breach of the Act led to the exclusion of evidence. The courts have no residual discretion to admit evidence and have interpreted the "reasonable compliance" proviso so strictly that there almost needs to be total compliance for it to be "reasonable". Even where a young person fails to nominate an adult to be present and/or consult with the police are constrained; fellow officers cannot be chosen to be present. The rights set out in the Act are more extensive than any of the overseas jurisdictions. There is a focus on the young person. Young people are able to choose the adult they wish to be present. The adult must be someone that the young person is comfortable with; there is no presumption that that person should be a parent. Further, more than one adult can be present. That focus on the young person is also reflected in the Court of Appeal decision in *Edge*.[188] In that decision the Court held that the separate regime was intended to protect individuals who are young people when proceedings are contemplated, rather than individuals who committed offences when young people. The New Zealand police have initiated a practice of informing a young person of his or her rights before undertaking even investigative enquiries.

All of these features of New Zealand law make it uniquely protective of young people.

3. New Zealand Bill of Rights Act 1990

The difference between the rights set out in section 215 of the Children, Young Persons, and Their Families Act and the New Zealand Bill of Rights Act is basically that a young person is able to consult and have present their choice of adult and in fact can have more than one adult present. The New Zealand Bill of Rights Act only guarantees the right to consult and have a lawyer present.

The developments in New Zealand Bill of Rights Act case law suggest that the subjective features of a suspect would influence the way that right to consult was exercised. It could be broadened to include a right to consult another adult. A purposive and protective approach has been taken by the courts. The New Zealand Bill of Rights Act also allows

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[186] See research such as "Children in Court" by Beth Wood *Children* (no. 11, December 1993, Office of the Commissioner for Children) pp 13-14.

[187] See *Police* v *BG (a young person)* above, n 51. The young person told the police that he was an adult. As a consequence he did not have his Children, Young Persons, and Their Families Act rights explained to him.

[188] See above, n 73.

for the waiver of rights. New Zealand Bill of Rights Act case law suggests some interesting trends. There is a focus on understanding rights and the subjective features of a suspect. These trends are reinforced by the proposed changes to the common law suggested by the Law Commission.[189]

If applied to young people the developments under the New Zealand Bill of Rights Act suggest that rights would have to be explained in an appropriate manner and language, and that due to their specific vulnerability young people may be able to consult with someone other than a lawyer. A lack of capacity to understand the consequences of a waiver would limit a young person's ability to make a valid waiver, so that difference between the Children, Young Persons, and Their Families Act and the New Zealand Bill of Rights Act may be of no consequence. If the Law Commission's proposed changes were accepted, the circumstances surrounding the questioning of a young person would be vigilantly scrutinised to ensure reliability and fairness.

4. Problems with the New Zealand Bill of Rights Act for young people

Case law under the New Zealand Bill of Rights Act brings it closer to the separate regime, suggesting that perhaps a separate regime for young people is no longer necessary.

However there seems to be one insurmountable difference. There remains a great deal of confusion about what happens when there is a breach of the New Zealand Bill of Rights Act.[190] Burdens of proof, evidential onuses and the necessity for a causal link between the breach and the evidence obtained are all features of the case law surrounding this issue. There is a residual court discretion to admit a statement. Worrying trends suggesting the fractured approach of pre-Children, Young Persons, and Their Families Act years have emerged. If a defendant is aware of the right to consult and instruct a lawyer (is "streetwise") a failure to inform of that right would not result in a statement being inadmissible. The statement would not be the direct result of the failure to inform of that right.[191]

5. The Children, Young Persons, and Their Families Amendment Bill

The Amendment Bill does not change the exclusionary remedy at the heart of the Children, Young Persons, and Their Families Act. However it would quite dramatically change the power dynamic in the Act. The police would decide at what stage there are grounds to suspect a young person.[192] This means that the police would have the power to decide when to explain the rights in section 215 of the Act. The police also have the power to decide which rights to explain where a young person asks about his or her rights.

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[189] See above, n 3.

[190] Under the Children, Young Persons, and Their Families Act it is clear that if there is a breach (unless there is reasonable compliance) a statement will be inadmissible.

[191] See above, n 180; *R* v *Chase*; *R* v *YD*; *R* v *Thompson*. See also *R* v *Hemi* above n 21 for a similar approach taken before the enactment of the Children, Young Persons, and Their Families Act.

[192] It is submitted that the New Zealand Bill of Rights Act also gives police the power to decide, although more indirectly. At the least there must be conduct on the part of the police which induces a suspect's belief that he or she is unable to leave which would mean that a suspect was "arrested". Only then would a suspect's rights under the New Zealand Bill of Rights Act be activated.

The question of whether the Amendment Bill would create more problems than it would solve remains contentious.[193] The Children, Young Persons, and Their Families Act was initially intended to give more power to the community.[194] It is arguable that the Amendment Bill undercuts this intention. By changing the timing and the nature of the rights under the Children, Young Persons, and Their Families Act the Amendment would bring those rights closer to the regime under the New Zealand Bill of Rights Act.

6. Conclusion

The Children, Young Persons, And Their Families Act 1989 has dramatically changed the lot of young people who are questioned by the police. Previously the approach to regulating police interviews of the young was fractured and inconsistent. The Children, Young Persons, and Their Families Act follows overseas trends but adds a distinctly New Zealand sense of community involvement. The Amendment Bill would dramatically change the power dynamic in the Act, perhaps bringing it closer to the New Zealand Bill of Rights Act regime. However, as yet, the developments in New Zealand Bill of Rights Act case law remain tentative and the difference in the approach to a breach of the Act would be very disadvantageous to young people.

The conclusion is that the New Zealand Bill of Rights Act would not protect young people in the same way as does the Children, Young Persons, and Their Families Act. However it is suggested that the separate regime may become legally no longer necessary given the trend reflected in the Children, Young Persons, and Their Families Amendment Bill and the recognition that section 215 is inevitably influenced by developments in the adult regime.[195]

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[193] See for example, "Youth Justice Proposals in the Children, Young Persons, and Their Families Amendment Bill" by Gabrielle Maxwell in *Children* (No. 11, Office of the Commissioner for Children, Wellington, December 1993,) pp 6 - 7.

[194] See "The Children, Young Persons, and Their Families Act 1989 - A Blueprint to be Applied to Adults? - A new Model of Justice" by Judge F McElrea, *New Zealand Law Conference Papers*, (Wellington 1993), pp 231-240. Judge McElrea argues that there has been a transfer of power to victims and the family through the use of the Family Group Conference.

[195] See the comments of the Review Team, above n 26, 158 (see above n 136).

APPENDIX

1. Section 215 Children, Young Persons, and Their Families Act 1989

Child or young person to be informed of rights before questioned by enforcement officer - (1) Subject to sections 233 and 244 of this Act, every enforcement officer shall, before questioning any child or young person in relation to the commission or possible commission of an offence by that child or young person, explain to that child or young person -

(a) Subject to subsection (2) of this section, if the circumstances are such that the enforcement officer would have the power to arrest the child or young person without a warrant, that the child or young person may be arrested if, by refusing to give his or her name and address to the enforcement officer, the child or young person cannot be served with a summons; and

(b) Subject to subsection (2) of this section, that the child or young person is not obliged to accompany the enforcement officer to any place for the purpose of being questioned, and that if the child or young person consents to do so that he or she may withdraw that consent at any time; and

(c) That the child or young person is under no obligation to make or give any statement; and

(d) That if the child or young person consents to make or give a statement, the child or young person may withdraw that consent at any time; and

(e) That any statement made or given may be used in evidence in any proceedings; and

(f) That the child or young person is entitled to consult with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222 of this Act.

(2) Nothing in paragraph (a) or paragraph (b) of subsection (1) of this section applies where the child or young person is under arrest.

2. Children, Young Persons, and Their Families Amendment Bill (a) Clause 31

Child or young person to be informed of rights before questioned by enforcement officer - (1) Section 215(1) of the principal Act is hereby amended by omitting the words "in relation to the commission or possible commission of an offence by that child or young person", and substituting the words "whom there are reasonable grounds to suspect of having committed an offence, or before asking any child or young person any question intended to obtain an admission of an offence".

(2) Section 215 of the principal Act is hereby amended by adding the following subsection:

"(3) Without limiting subsection (1) of this section, where, during the course of questioning a child or young person, an enforcement officer forms the view that there are reasonable grounds to suspect the child or young person of having committed an offence,

the enforcement officer shall, before continuing the questioning, give the explanation required by that subsection."

(b) Clause 31A

Rights to be explained to child or young person on request - (1) The principal Act is hereby amended by inserting, after section 215, the following section:
"215A. Subject to sections 233 and 244 of this Act, where -
"(a) Any enforcement officer is questioning any child or young person in relation to that child's or young person's involvement in the commission of an offence or suspected offence; and
"(b) That child or young person makes any enquiry that relates (in whole or in part), or that may reasonably be taken as relating (in whole or in part) to any of the matters set out in any of paragraphs (a) to (f) of section 215(1) of this Act, -
that enforcement officer shall explain to that child or young person such of those matters as, in the circumstances of the particular case, are appropriate to the enquiry that was made."
(2) Section 218 of the principal Act is hereby consequentially amended by inserting, after the expression "section 215", the expression "or section 215A".
(3) Section 219 of the principal Act is hereby consequentially amended by inserting, after the expression "section 215", the expression "or section 215A".
(4) Section 220 of the principal Act is hereby consequentially amended by inserting, after the expression "section 215", the expression "or section 215A".

3. Section 56 Young Offenders Act 1982 (Canada)

56. (1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.

(2) No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority is admissible against a young person unless
(a) the statement was voluntary;
(b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his [or her] age and understanding, that

(i) the young person is under no obligation to give a statement,
(ii) any statement given by him [or her] may be used as evidence in proceedings against him [or her],
(iii) the young person has the right to consult another person in accordance with paragraph (c), and
(iv) any statement made by a young person is required to be made in the presence of the person consulted, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of an adult relative, any other appropriate adult chosen by the young person; and
(d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(3) The requirements set out in paragraphs (2)(b), (c) and (d) do not apply in respect of oral statements where they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

(4) A young person may waive his [or her] rights under paragraph (2)(c) or (d) but any such waiver shall be made in writing and shall contain a statement signed by the young person that he [or she] has been apprised of the right that he [or she] is waiving.

(5) A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young person in respect of whom the proceedings are taken if the statement was given under duress imposed by any person who is not, in law, a person in authority.

4. Section 30 Children's Service Ordinance 1986 (Australian Capital Territory)

Children not to be interviewed in certain circumstances
30. (1) Where a police officer -
(a) suspects that a child may have committed a serious offence or an offence against the person or property;
(b) believes, on reasonable grounds, that a child may be implicated in the commission of such an offence; or
(c) is holding the child under restraint,
the police officer shall not interview the child in respect of an offence or cause the child to do anything in connection with the investigation of an offence -
(d) unless a person who is not a child or a police officer but is -
    (i) a parent of the child;
    (ii) a relative of the child acceptable to the child; or
    (iii) a barrister and solicitor acting for the child or some other appropriate person acceptable to the child,
is present; or
(e) unless -
    (i) the police officer has taken reasonable steps to secure the presence of a person referred to in paragraph (d);

(ii) it was not practicable for such a person to be present within 2 hours after the person was requested to be present; and
(iii) another person (who may be a police officer) who has not been concerned in the investigation of an offence is present.

(2) Sub-section (1) does not require a police officer -
(a) to permit a person whom the police officer believes to be an accomplice of the child in respect of the offence to be present while the child is being interviewed, or is doing anything, in connection with the investigation of the offence; or
(b) to take steps to procure the presence of a person referred to in paragraph (1)(d) whom the police officer believes to be an accomplice of the child in respect of the offence.

(3) A reference to sub-section (2) to an accomplice shall be read as including a reference to a person whom the police officer believes, on reasonable grounds, to be likely to secrete, lose, destroy or fabricate evidence relating to the offence.

(4) Sub-section (1) does not prevent a police officer from interviewing a child, or asking or causing a child to do a particular thing, where the police officer has reasonable grounds for believing that it is necessary to do so with out delay in order to avoid danger of the death of, or serious injury to, any person or serious damage to property.

5. Section 13 Children (Criminal Proceedings) Act 1987 (New South Wales)

Admissibility of certain statements, etc.
13 (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 16 years -
an adult (other than a member of the police force) who was 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) 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 a 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.

6. Practice Notes for the Children, Young Persons, and Their Families Act (Police Association)
(a) Rights before questioning

Rights Before Questioning

Police Officer SHALL explain to C/YP:

1. **May be arrested if:**
   — **Power of arrest without warrant;**
   — **Refuses details which leads to inability to serve summons.**
2. **Not obliged to accompany for purposes of questioning. Can withdraw agreement at any time.**
3. **Not obliged to make statement.**
4. **Statement may be used in evidence.**

NORMAL CAUTION

5. **May withdraw consent to make statement.**
6. **Entitled to consult and have present Solicitor/nominated person.**

Exceptions: 1. — Breath/Blood alcohol provisions.
2. Rights explained within previous hour.

Rights upon arrest

Police Officer shall explain to C/YP:

1. Not obliged to make statement.
2. Statement may be used in evidence.

NORMAL CAUTION

3. May withdraw consent to make statement.
4. Entitled to consult and have present Solicitor/nominated person.

Exceptions: 1 Breath/Blood Alcohol provisions.
2 Immigration Act.
3 Rights explained within previous hour.

Fig. 33

CASE LIST

1. Children, Young Persons, and Their Families Act

Munro v *Police* Unreported, 3 June 1988, High Court, Wellington Registry, AP79/88
Police v *B* [1993] DCR 472
Police v *Barry* Unreported, 5 August 1991, Youth Court Otahuhu, CRN0032140569
Police v *BG (a Young Person)* (1993) 10 FRNZ 157
Police v *Corbin* Unreported, 17 December 1992, CA327/92
Police v *Edge* Unreported, 29 September 1991, Youth Court, Oamaru, CRN1245003903
Police v *Edge* (1992) 9 FRNZ 659; [1993] 2 NZLR 7
Police v *G (a Young Person)* Unreported, 30 July 1990, Youth Court, Henderson, CRN020005035
Police v *W* (1990) 6 FRNZ 711
Ratten v *Edge* (1992) 9 FRNZ 297
R v *C* Unreported, 28 February 1984, High Court, Auckland Registry T100/83
R v *Crime Appeal CA311/91* (1991) 7 CRNZ 539; (1991) 8 FRNZ 119
R v *Fitzgerald* Unreported, 30 October 1990, High Court, Auckland Registry, T183/90
R v *Hemi* [1986] 2 NZLR 116
R v *I* (1987) 3 CRNZ 444
R v *Irwin* [1992] 3 NZLR 119; (1991) 8 CRNZ 39; (1991) 8 FRNZ 487
R v *Irwin* Unreported, 3 December 1991, High Court, Hamilton Registry T32/91
R v *Toko* (1991) 7 FRNZ 447; (1991) 7 CRNZ 265
R v *Tuhua* Unreported, 22 November 1988, CA272/88
R v *Webb (No 2)* (1988) 4 CRNZ 21
R v *Wilson* Unreported, 26 August 1986, High Court, Christchurch Registry, T18/86
R v *Wilson* [1981] 1 NZLR 316
Ruissen v *Minister of Police* (1990) 6 CRNZ 488; (1990) 7 FRNZ 9
Williams v *Police* (1993) 10 FRNZ 317

2. Overseas Cases

Bullock v *Kennedy* (1988) 12 NSWLR 200
Collins v *R* [1987] 1 SCR 265
Clarkson v *R* [1986] 1 SCR 383
Fare v *Michael C* 442 US 707 (1979)
Gillick v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112
In Re Emilio M 44 App.Div 2d 791(1974)
In Re Deborah C 635 P 2d 446 (Cal 1981)
McAvena v *R* (1987) 56 CR (3d) 303 (Sask.CA)
McKellar v *Smith* [1982] 2 NSWLR 950
Miranda v *Arizona* 384 US 436 (1966)
Re Gault 387 US 1 (1967)
Re Winship 397 US 358 (1970)
R v *A (CA)* (1989) 101 AR 155 (Prov Ct)
R v *Big M Drug Mart* [1985] 1 SCR 295
R v *Crawford* [1985] 2 Qd R 22
R v *Evans* (1991) 63 CCC (3d) 289 (SCC)
R v *Legere* (1989) 102 NBR (2d) 208; (1989) 254 APR 208 (QB)
R v *M* [1976] Qd R 344
R v *Mannien* [1987] 1 SCR 1233; (1987) 41 DLR (4th) 301
R v *P (J)* (1989) 73 CR 205
R v *Shields* (1983) 10 WCB 120 (Ont Co Ct)
R v *Thibodeau* (1989) 101 NBR (2d) 208
R v *Wills* (1992) 12 CR (4th) 58 (Ont CA)
R v *Yensen* (1961) 36 CR 339
R v *Z (DA)* [1992] 2 SCR 1025
T v *Waye* (1983) 35 SASR 247
U.S v *Morales* 233 F Supp 160 (1964)
Vance v *Bordenkircher* 692 F. 2d 978 (4th Cir. 1982)

3. New Zealand Bill of Rights Act

Beatson v *Police* (1993) 10 CRNZ 68
Briggs v *Police* (1992) 10 CRNZ 89
Cocup v *R* (1992) 8 CRNZ 271
Cotterill v *Police* Unreported, 2 December 1992, High Court, Wellington Registry, AP287/92.
Flickinger v *Superintendent of Mt Eden Prison and the Crown Colony of Hong Kong* [1991] 1 NZLR 439
Keni v *Police* (1992) 9 CRNZ 374
Knapton v *Police* (1993) 10 CRNZ 515
Kohler v *Police* (1993) 9 CRNZ 611
McKay v *Police* Unreported, 25 November 1992, High Court, Wellington Registry, AP281/92
Ministry of Transport v *Noort* [1993] 2 NZLR 260
Police v *Ellis* Unreported, 31 May 1994, District Court, Dunedin, CRN4012007242
Police v *Kereopa* (1991) 7 CRNZ 204
Police v *Kohler* (1993) 10 CRNZ 118 (CA)
R v *Adams* (1993) 10 CRNZ 687
R v *Barber* (1993) 10 CRNZ 301
R v *Biddle* (1992) 8 CRNZ 488
R v *Butcher and Burgess* [1991] 2 NZLR 257; (1991) 7 CRNZ 407
R v *Cullen* (1992) 8 CRNZ 353
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