CITATION:	*The King v JN (No 2)* [2024] NTSC 30
PARTIES:	THE KING
	v
	JN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22222084
DELIVERED:	16 April 2024
HEARING DATE:	18 March 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

EVIDENCE – Admissibility – Vulnerable witnesses – *Evidence (National Uniform Legislation) Act* ss 12, 13, 21B, 21D, s 21J, 26, 31, 37, 137, 138, 192 – Whether Child Forensic Interviews are admissible as evidence-in-chief at trial – Whether there is 'good reason' to not admit a recorded statement – Whether it is 'in the interests of justice' to admit a recorded statement – Presumption of competency – Leading questions – Leading questions asked within recorded interviews – Evidence obtained improperly or in contravention of law – Whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence – Probative value outweighed by danger of unfair prejudice.

A2 v The Queen [2018] NSWCCA 174, *Douglass v The Queen* (2012) 86 ALJR 1086, *Gray v The Queen* [2020] NSWCCA 240, *Hawker v The Queen* [2012] VSCA 219, *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334, *IMM v The Queen* (2016) 257 CLR 300, *Knowles v The Queen* [2015] VSCA 141, *Knowles v The Queen* [2015] VSCA 141, *LF v The*

King [2023] NSWCCA 232, *Martin v The Queen* (2013) 238 A Crim R 449, *Pease v The Queen* [2009] NSWCCA 136, *Pell v The Queen* (2020) 268 CLR 123, *Ridonfi v Heenan* [2008] NTMC 34, *RJ v The Queen* (2010) 208 A Crim R 174, *The Queen v AW* [2018] NTSC 29, *The Queen v A2* (2019) 269 CLR 507, *The Queen v BM* (2015) A Crim R 301, *The Queen v Brown* [2008] NTSC 14, *The Queen v Brown* [2010] NTSC 17, *The Queen v Drover* [2022] NTSC 12, *The Queen v Ellis* (1994) 1 NZCrimC 592, *The Queen v GW* (2016) 258 CLR 108, *The Queen v Lisoff* [1999] NSWCCA 364, *SLJ v The Queen* (2013) 39 VR 514, *Ward v The Queen* (2017) A Crim R 299, referred to.

Evidence Act 1939 (NT) ss 21B, 21AA, 21AB, 21D, 21H, 21J.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 12, 13, 26, 32, 33, 37, 137, 138, 192.

S Odgers, *Uniform Evidence Law* (LawBook, 16th ed, 2021).

REPRESENTATION:

Counsel

Crown:	M Aust
Accused:	P Crean

Solicitors

Crown:	Office of the Director of Public Prosecutions
Accused:	Grays Legal NT

Judgment category classification:	C
Judgment ID Number:	Bro2402
Number of pages:	54

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v JN (No 2) [2024] NTSC 30
No. 22222084

BETWEEN:

THE KING

AND:

JN

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 16 April 2024)

[1] The issue in this matter was whether the two recorded child forensic interviews ('CFIs') of the complainant, who was 16 years old, should not be admitted in evidence as part of her evidence-in-chief at the trial because: (a) the interviewing officers did not confirm that the complainant understood the importance of telling the truth during the interviews; (b) a statutory declaration made by the complainant 18 days before the first recorded interview was read to and adopted by her during the first CFI; and (c) in the second CFI, an interviewing officer told the complainant that Police had received information from another witness about two instances of alleged offending which the complainant had not previously mentioned to Police, and the complainant then gave evidence about those instances.

[2] On 18 March 2024, I ruled that the complainant's two CFIs were admissible and would be admitted as part of her evidence-in-chief at the trial. I indicated that I would publish my reasons in due course. These are my reasons.

Charges

[3] The accused was charged by indictment dated 31 July 2023 with nine counts in relation to conduct against the complainant, said to have been committed between 16 June 2016 and 27 January 2020, when the complainant was aged between 12 and 16 years old. The charges were four counts of sexual intercourse without consent, contrary to s 192(3) of the *Criminal Code* (Counts 1, 3, 5 and 8), two counts of attempted sexual intercourse without consent causing harm to the complainant, contrary to s 192(3), (5) and (7) of the *Criminal Code* (Counts 6 and 9), and three counts of aggravated assault, contrary to s 188(1) and (2) of the *Criminal Code* (Counts 2, 4 and 7).

[4] The Counts are alleged to have occurred on six separate occasions, as follows:

(a) Count 1, between 16 June 2016 and 6 April 2017;

(b) Counts 2 and 3, between 7 January 2018 and 10 July 2019;

(c) Count 4, on 11 July 2019;

(d) Count 5, between 6 April 2017 and 13 August 2019;

(e) Counts 6 and 7, on 27 January 2020 at around 5am; and

(f) Counts 8 and 9, on 27 January 2020 at around 9am.

Crown case

[5] The Crown case is that the accused is the biological father of the complainant. The complainant's biological mother died when she was about one year old. The accused is now married to another woman ('the mother'), who has been present for most of the complainant's childhood and is accepted by the family as the complainant's mother. The three of them emigrated to Australia in around June 2016. They lived at various places in Darwin before living in a house in the Darwin area ('the house') until about 6 April 2017, when they moved to a unit in the Palmerston area ('the first unit'). They lived in the first unit until about 13 August 2019 before moving to another unit in the same complex ('the second unit'). The complainant left that residence permanently on 27 January 2020.

[6] The Crown says the accused engaged in acts of violence against the complainant on many occasions, not particularised. Those acts generally occurred when the mother was out of the home, working night shifts. The Crown says the complainant and the mother were both subject to physical abuse by the accused.

[7] While living at the house, when the complainant was 12 or 13 years old, she was having a bath. The accused went into the bathroom and began wiping

her body with a cloth. He wiped her vagina and then inserted his finger into her vagina. He then left the room. That is the subject of Count 1.

[8] Whilst living at the first unit, when the complainant was 14 or 15 years old, the accused went into her bedroom while she was sleeping early one morning and woke her up. He was holding duct tape and chilli in a jar. He tied her hands behind her back with the duct tape and moved her onto the floor. She tried to escape and yelled at him to leave her alone. He removed her underwear and used his fingers to apply chilli to her vagina, causing her pain. He inserted his chilli covered finger inside her vagina and removed it. He kicked her in the vagina and squeezed her leg with his hand, causing her pain. He then left the room. That is the subject of Counts 2 and 3.

[9] On 11 July 2019, when the complainant was 15 years old, she was at home at the first unit during school holidays. Both the accused and the mother were at work. In the early afternoon, the complainant was having a shower when the accused came home from work unexpectedly. He unlocked the bathroom door and entered the bathroom. He asked the complainant why she had not cleaned the house. He told her he wanted to check if she was a virgin and bathe her. She refused. He opened the shower door and punched her to her arms and back and then pushed her head hard against the shower wall, causing pain. The accused told her to finish bathing and clean the house. He then left. That is the subject of Count 4. The complainant contacted the mother and told her what had happened. The mother decided to take the complainant to the Palmerston Regional Hospital, but told her to

give a false story to the hospital staff by saying she slipped and fell in the shower. The complainant had tenderness to the back of her head. She told the doctor she had shampoo in her eyes and hit her head.

[10] When the complainant was aged 13 to 15 and living at the first unit, the accused and the complainant were at home babysitting a child of a friend. The accused grabbed the complainant's hands and dragged her into the upstairs ensuite bathroom leaving the child downstairs. The accused forced the complainant to make a choice between him inserting his penis into her vagina or him inserting the rubber stopper from the back of the door into her vagina. She did not want either option but, fearing being assaulted regardless, she told him to use the rubber door stop. He removed the rubber door stop from the back of the door, removed her clothing, and made her put her hands on the sink and bend over. He held her on the back to stop her from moving and inserted the rubber door stop into her vagina, causing her pain. She told him to leave her alone. He removed the door stop from her vagina and let her go. She left the room. That is the subject of Count 5.

[11] At about 5am on 27 January 2020, when the complainant was 16 years old, the accused went into the complainant's bedroom and stood over her bed. He began touching her breasts and tried to kiss her. She moved her face away. He tried to remove her underwear. She resisted but he managed to remove them. He tried to open her legs to enable himself to insert either his penis or finger into her vagina. She physically resisted and pushed him away, telling him to leave her alone. She thwarted his attempt to have sexual intercourse

with her. He became angry and punched her to the chest, causing pain. He then left the room. That is the subject of Counts 6 and 7.

[12] At around 9am on 27 January 2020, the accused returned to the complainant's bedroom and said to her that he had to check her virginity. He removed her underwear and repeatedly inserted his finger in and out of her vagina. He exposed his penis and told her to touch it. She refused. He tried to insert his penis into her vagina but was unable to. He got off her and told her to have a bath and wash the bed sheets. He left the room. That is the subject of Counts 8 and 9.

[13] The accused denied any sexual activity with the complainant.

[14] The trial was listed for nine days commencing on 25 March 2024.

Contact with the Police

[15] The following matters are not in dispute.

[16] On 28 January 2019, Detective Senior Constable Toby Wilson ('Wilson') was briefed in relation to a complaint of ongoing sexual and physical abuse against the complainant by the accused.[1] The complaint was made by a family friend of the complainant who lives interstate ('EW').[2] Also on that date, Senior Constable Maree Scott ('Scott') was notified of an investigation

1 Statutory Declaration of Wilson made 28 January 2020 ('Wilson SD 2020'), [2].

2 Wilson SD 2020, [3].

involving the complainant and the accused.[3] Wilson and Scott went to the complainant's school with an officer from Territory Families to speak to the complainant.[4] Wilson and Scott were introduced to the complainant in a counselling room at the school. The complainant indicated she wished to speak only to females about the matter, so Wilson left the room.[5]

[17] The complainant told Scott that the accused had been both sexually and physically abusing her, that the abuse had first started in 2016 when they lived in the house and had continued when they moved to the first and second units.[6] The complainant said the accused would come into her room when her mother was asleep or at work.[7] He would tell her he wanted to check her vagina to see if she was still a virgin and, if she refused, he would slap or punch her.[8] Once when she screamed he had put a pillow over her face and bashed her up.[9] Once when she was in the bathroom and refused to let him see her vagina, he pushed her head against the shower wall so hard that she had to go to hospital.[10] In 2018, she had told her aunty what he was doing, her aunty told her mother. When the mother confronted the accused, he got so enraged that he punched the complainant. When the mother intervened, the accused punched the mother in the arm causing pain and

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3 Statutory Declaration of Scott made 28 January 2020 ('Scott SD 2020'), [2].

4 Wilson SD 2020, [4]; Scott SD 2020, [3].

5 Wilson SD 2020, [4].

6 Scott SD 2020, [4].

7 Scott SD 2020, [5].

8 Scott SD 2020, [6].

9 Ibid.

10 Scott SD 2020, [7].

swelling.[11] The accused had tied her up and put chilli on her vagina and she told her aunty about that.[12] The accused had tried to force the complainant to show him her vagina and when she refused, he put a knife against her belly.[13] The accused had tried to force his penis into her private parts but cannot get erect.[14] Most recently, the accused punched her in the chest and she could not breathe, and he has punched her in the chest before.[15] It was only when the complainant told family friends when she was visiting them interstate about what was happening that Police and Territory Families were notified.[16] The complainant was in fear of the accused and did not want to live with him as she was worried about what would happen when Police spoke to the accused and did not want to be present when they did.[17] On the basis of this information, Scott believed an emergency domestic violence order was required to ensure the complainant's protection from the accused.[18]

[18] On 28 January 2020, after leaving the school and being told by Scott about what the complainant had said, Wilson called EW.[19] EW told Wilson that she

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11 Scott SD 2020, [9].

12 Scott SD 2020, [10].

13 Ibid.

14 Ibid.

15 Scott SD 2020, [11].

16 Scott SD 2020, [12].

17 Scott SD 2020, [13].

18 Ibid.

19 Wilson SD 2020, [5]-[6].

was a close family friend of the complainant.[20] The complainant had called EW on 26 January 2020 saying the accused had hit her in the chest causing breathing problems, and had told EW that the accused struck the mother on 27 January 2020.[21] EW said the complainant had recently disclosed that violence towards both the complainant and the mother had been ongoing for several years, the complainant was terrified of the accused and EW was fearful the complainant would be at risk of further assault from the accused when the mother was at work during the evening of 28 January 2020, as he could become aware the complainant had spoken to Police.[22] EW told Wilson that the complainant first told her of earlier abuse by the accused on 4 January 2020 when the complainant went to visit her interstate, including that over the past few years the accused had been sexually abusing her by inserting his finger into her vagina and penile penetration.[23] The accused had told the complainant he would kill her and himself if she reported this.[24] Wilson believed EW sounded genuinely concerned about the complainant's safety and welfare, and he had no reason to doubt EW's account of her conversations with the complainant.[25] Wilson believed a domestic violence

20 Wilson SD 2020, [6].

21 Wilson SD 2020, [7].

22 Wilson SD 2020, [8].

23 Wilson SD 2020, [9].

24 Ibid.

25 Wilson SD 2020, [10].

order was required to protect the complainant from sexual abuse and violence by the accused.[26]

[19] On 29 January 2020, Scott called the complainant to arrange a time to obtain a statement from her.[27] The complainant told Scott she was not ready and asked to be contacted in a couple of days.[28] Later that day, Scott went to the complainant's school with Wilson and spoke to the complainant alone.[29] Scott explained to the complainant about a domestic violence order and the complainant agreed to provide her with a statement about what had happened to her, but said she was not ready to provide a full CFI.[30] Scott believed this was due to her fear of her father and just wanting to get away.[31] The complainant agreed to provide a written statement to be taken at the school and Scott took a handwritten statement to form part of the domestic violence order file.[32]

[20] On 29 January 2020, the complainant made a written statutory declaration before Scott ('statutory declaration'). In the statutory declaration, the complainant said:

> 1. My name is [complainant's name]. I am 16 years old. I attend school in Darwin. I am in Year 11. I moved to Darwin 2016, 16 July.

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26 Wilson SD 2020, [12].

27 Statutory Declaration of Scott made on 15 February 2022 ('Scott SD 2022'), [3].

28 Ibid.

29 Scott SD 2022, [4].

30 Scott SD 2022, [5].

31 Ibid.

32 Ibid.

2. When I move to Darwin from [country of origin] I moved with my parents, my father [accused's name] and my mother [the mother's name], she is my step mum but she has been in my life since I was a baby.

3. When [I, my father and my mother] first moved to Darwin we lived in [the house's suburb]. That when my father started to do stuff to me, he has been hurting me since 2017 and the last time was on Monday 27th January. It was a public holiday.

4. It was five o'clock in morning my dad came into my room, I was asleep. I woke up I felt someone staring. When I woke up my dad was standing at doorway the door was closed behind him, my room was dark but I leave my windows open so I could see him from the outside street lights.

   He was wearing white Tshirt and blue, white shorts.

   When he saw I was awake he said it's 5 o'clock and I've come to check you, I just looked at him; he then came up to my bed and said I should take my pants off, I was wearing dress and underwear underneath.

   I told him to leave me alone, he said either I take it off or he will take it off. I did do anything for two min he was counting down. Then once he finish counting he said you should just coroperate [sic].

5. He came up to my bed and tried to take my underwear off. I was holding them up. He was trying to take them off by pulling them down. When I would stop holding them he said coroperate [sic] or I will cut them off.

6. He took my pants off and threw them then he started to take his shorts off. I didn't realise he had taken his shorts off until he started touching my breast, he was touching my breast underneath my clothing I was still wearing my dress. I turned my face away, he started to try and kiss me. I turned my face away.

7. He said I should touch his penis so he can react it would be only two min then he could be done. I told him to leave me alone. I did not touch his penis. He tried to force my legs open his hands were on my knees trying to push my legs open. I was fighting to keep legs closed. He kept saying just two min I want to go to sleep.

8. Then he got angry and punch me with a closed fist hard to my chest using his right arm. I had pain right away and I struggled to breath [sic]. I had pain where he punched me for the whole day.

After he punched me he stood up looked at me and walked out of the room.

9. This is not the first time he has done this. Not sure of the date but were were living at [the first unit] – we have sinced [sic] moved to [the second unit].

10. I was in the bathroom having a shower when my father came in. He said he wanted to check if I was a virgin and wanted to bath me. When I refused by telling him to leave me alone he got angry he open the shower door glass. He punched me hard with a closed fist to my arms and back he then pushed my head against the wall hard. I was in pain straight away. I started to cry. My right side of my head was the part that hit the wall, It was around 2 or 3 in the afternoon when it happened. After he hit my head against the wall he said I had to finish bathing then clean the house. I was in pain when my mum got home I told her what had happen and she took me to the hospital. My mum told me to tell the hospital that I slip and hit my head. She know what he does. She says she will talk to him but he doesn't stop. I went to the hospital at about 10 o'clock at night.

11. Just before he hit my head against the shower, we were at [the first unit]. I'm not sure how it all started. I was in my room, my mum was out. My dad came into my room, it was in the morning about 10 o'clock. He had duck tape and chillie [sic] chop dried. You can buy it at the shops. It's in a jar like a paste.

12. He tied my hands behind my back with the duck tape. I don't remember if he said anything, he then put the chillie [sic] on my legs then on my private part, on my vagina. It hurt a lot; it was burning. I was wearing my dress I sleep in and then he took my underwear off before putting chillie [sic] on me. He then kicked my vagina, he did have shoes on but it hurt a lot. Not sure what he said but then he left. I went and had a shower.

13. I am scared of my father. My mum work nights I generally left alone in the house with my father, he is violent man who has hurt me a lot.

14. I don't want him to go to gaol but I don't want him to be allowed near me. I don't feel safe around him. I want the only he can have contact with me in [sic] with or through my mum, [the mother].

[21] At the time the complainant made the statutory declaration, arrangements were being made by Territory Families for the complainant to go and live with her aunty interstate, which did occur.[33]

[22] Wilson made arrangements for Queensland Police to conduct a CFI with the complainant in Queensland.[34]

Complainant's CFIs

1st CFI

[23] On 16 February 2020, the complainant was interviewed by two Queensland Police officers at the Child Protection Investigation Unit in a Police station in Queensland ('1st CFI'). Those officers were Senior Constable Narelle Hudson ('Hudson') and Detective Senior Constable Melissa Dixon ('Dixon'). The complainant was then 16 years and 2 months old.

[24] At the commencement of the 1st CFI, Hudson told the complainant she wished to talk to her about an incident she might have information about and it is important that the complainant tell her the truth. The complainant said 'yes'. Hudson had the complainant repeat after her a solemn and sincere declaration to tell the truth.

[25] Hudson recalled that on 29 January 2020, the complainant was spoken to at school, in the Northern Territory, by Scott. The complainant agreed with

33 Scott SD 2022, [6]-[7].

34 Scott SD 2022, [8].

each of those propositions. Hudson told the complainant that Scott had written notes of that conversation and asked if she agreed. She did. Hudson said:[35]

> So I'm just gonna read some of that out so that we can incorporate it in this ... interview. Okay?

[26] The complainant responded with: 'Mm, sure.'

[27] Hudson then read to the complainant paragraphs 1 to 8 of the statutory declaration. The complainant confirmed the pronunciation of the names of her parents, that the mother is her step mother and the pronunciation of the suburb where the house was located.[36] Hudson then asked the complainant to tell her what she knows about this incident that occurred on 27 January 2020, directing her to start at the beginning.[37]

[28] The complainant then described the incident in some detail, with Hudson asking the complainant to repeat things she had not heard or confirming what she had heard the complainant say.[38]

[29] The complainant then said that at 9am, the accused came back to check her and described a further incident with the accused at that time.[39]

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35 1st CFI, p 3.

36 1st CFI, pp 3-5.

37 1st CFI, p 5.

38 1st CFI, pp 5-8.

39 1st CFI, pp 8-11.

[30] The complainant then described that when the mother came home from work the complainant told her what had happened and about the pain to her chest, the mother's response and that she texted EW and told her what had happened.[40]

[31] Hudson then asked the complainant numerous questions requiring the complainant to describe, explain or give more details about the 5am incident and the 9am incident. This included asking the complainant to draw a diagram of her bedroom at the second unit.[41]

[32] Hudson then told the complainant that she was going back to the statement the complainant gave to Scott and read paragraph 9 of the statutory declaration.[42] The complainant responded with: 'Mm-hmm'. Hudson asked the complainant about when she lived at the first unit and the complainant responded by reference to her age.[43] Hudson then read partway through paragraph 10 of the statutory declaration and the complainant responded with: 'Yes'.[44] Hudson then read the remainder of paragraph 10 and asked the complainant to tell her everything about the time in the bathroom at the first unit when the accused punched her and pushed her head against the wall.[45]

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40 1st CFI, pp 12-13.

41 1st CFI, pp 13-44.

42 1st CFI, p 45.

43 1st CFI, pp 45-46.

44 1st CFI, p 46.

45 1st CFI, p 46.

[33] The complainant then described that incident.[46] Hudson then asked the complainant numerous questions requiring the complainant to describe, explain or give more details about the incident in the shower, telling the mother about it, going to the hospital and telling her aunt about it.[47]

[34] Hudson then referred the complainant to the next part of her statement to Scott and read to her paragraphs 11 and 12 of the statutory declaration.[48] She asked the complainant if this happened at the first unit and the complainant said: 'Yes'.[49] Hudson then asked the complainant to tell her everything about this incident and to start at the very beginning.[50] The complainant said she does not know what it was all about when he came back.[51] Hudson confirmed the accused came into the complainant's room in the morning and asked the complainant to draw a diagram of her bedroom at the first unit, which the complainant explained.[52] Hudson then asked the complainant questions about the chilli incident from the time she woke up when the accused was in her room, asking questions requiring the complainant to describe, explain or give more details about the chilli incident, at times prompting her with information from the paragraphs in the statutory

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46 1st CFI, pp 46-47.

47 1st CFI, pp 47-63.

48 1st CFI, pp 63-64.

49 1st CFI, p 64.

50 1st CFI, p 64.

51 1st CFI, p 64.

52 1st CFI, pp 65-67.

declaration.[53] When Hudson told the complainant she had said the accused put chilli on her legs, the complainant corrected her, saying he put the chilli on her vagina, not her legs.[54] Dixon asked the complainant if she had told anyone about this incident and the complainant said that she had told her aunty.[55]

[35] Hudson then told the complainant she would finish reading what is in her statement and read out paragraphs 13 and 14 of the statutory declaration.[56] She showed the statement to the complainant and asked if she had signed it, and the complainant said she did.[57] Hudson told the complainant she believed there were other incidents the complainant had not spoken to them about, and referred to a statement from EW in which EW had mentioned other incidents the complainant had told EW about.[58] Hudson told the complainant they would like to speak to her about those and the complainant confirmed she was 'okay with that'.[59] Hudson then asked the complainant whether all she had told the officers today was the truth, and the complainant confirmed it was.[60] Hudson asked the complainant if she understood it is an offence to make a statutory declaration that is false in

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53 1st CFI, pp 67-83.

54 1st CFI, p 75.

55 1st CFI, p 83-84.

56 1st CFI, p 85.

57 1st CFI, p 85.

58 1st CFI, p 85.

59 1st CFI, pp 85-86.

60 1st CFI, p 87.

any material particular and the complainant said: 'Yes'.[61] The 1st CFI then ended.

2nd CFI

[36] On 21 March 2020, the complainant was interviewed by Hudson and Dixon again at the Child Protection Investigation Unit in a Police station in Queensland ('2nd CFI').

[37] At the commencement of the 2nd CFI, Dixon told the complainant she wished to talk to her about an incident she might have information about, reminding the complainant that it is important that the complainant tell her the truth.[62] Dixon had the complainant repeat after her a solemn and sincere declaration to tell the truth.[63] Dixon confirmed with the complainant that she had previously spoken to herself and Hudson on 16 February 2020.[64]

[38] Dixon asked the complainant, without going over things they had already spoken about, to tell her everything about some of the things or all of the things that happened when she was living in the Northern Territory with her father.[65] The complainant said the abuse first started when they lived in the house and she then spoke in general terms about the accused coming to her room, touching her, saying he wants to check she is still a virgin, coming

61 1st CFI, p 87.

62 2nd CFI, p 2.

63 2nd CFI, pp 2-3.

64 2nd CFI, p 3.

65 2nd CFI, pp 2-3.

into the bathroom and wiping or bathing her and the mother's response when the complainant told her about it.[66] The complainant said when they moved to the first unit, the accused did the same thing.[67] She described how she had told an aunt about an incident when the mother confronted the accused about it, and the accused struck the complainant and the mother. She went on to describe how she had told EW and EW's mother about what was happening.[68] The complainant described what happened when she returned to Darwin from interstate, and how the Police came to be contacted.[69]

[39] Dixon asked the complainant to tell her about a specific time when the accused came to check if she was a virgin at the house.[70] The complainant did so, and went on to describe how she had told the mother about it.[71]

[40] The complainant was asked about another time she could recall a specific incident of the accused doing something to her and she said she could not.[72] She said there were other times but they were just like every day the same thing.[73]

[41] Dixon then referred the complainant to her having said she had told EW some things that have happened with the accused, and told the complainant

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66 2nd CFI, p 4.

67 2nd CFI, p 4.

68 2nd CFI, pp 3-6.

69 2nd CFI, pp 6-10.

70 2nd CFI, pp 11-12.

71 2nd CFI, pp 12-19.

72 2nd CFI, p 19.

73 2nd CFI, pp 19-20.

that Police had spoken to EW about some of those things, and EW mentioned something about objects the accused had put inside the complainant's vagina.[74] She asked the complainant if there were any occasions when the accused tried to put objects in her vagina and the complainant said 'just once'.[75] She then proceeded to describe that incident, which occurred at the first unit.[76]

[42] Dixon then said to the complainant that EW had said the complainant told her there were occasions when the accused would go into her bedroom and put his penis in her vagina. Dixon asked the complainant if there were occasions when he did that.[77] The complainant said: 'No, he tried to but he wouldn't.'[78] Dixon asked the complainant if she told EW there had been occasions where he had put his penis in her vagina and she said: 'Yeah'.[79] Dixon asked the complainant why she had told EW that and the complainant said: 'I didn't tell her like...he did it, I tell her like he tried doing it like when he put his tip, but not like his whole, you know he just did.'[80] Dixon then referred to the complainant telling them about an occasion when that had occurred when she last spoke to them, and asked if there were any other

74 2nd CFI, p 20.

75 2nd CFI, p 20.

76 2nd CFI, pp 20-27.

77 2nd CFI, p 27.

78 2nd CFI, p 27.

79 2nd CFI, p 28.

80 2nd CFI, p 28.

occasions when the accused tried to put his penis in her vagina, and the complainant said: 'No'.[81]

[43] Hudson asked the complainant about the disclosures that she made to EW and other people, and about why she moved interstate. The complainant described these events.[82]

[44] Hudson asked the complainant if she had been to a doctor about this and the complainant said: 'No'.[83] Hudson asked:

> Not at all, not even since you've come to Brisbane, you haven't been to the doctor? What about in Darwin, did you seek any medical assistance for, for anything at all that has occurred out of the incidents you're talking about?

[45] The complainant said she had not, only for stomach pain unrelated to the accused.[84] Hudson referred to the time her father pushed her head into the shower wall and asked if the complainant went to hospital that time, and the complainant said she did.[85] Hudson asked the complainant if there was no other time she had been to a hospital for any injuries or pain associated with these things.[86] The complainant confirmed there was not.

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81 2nd CFI, p 28.

82 2nd CFI, pp 28-31.

83 2nd CFI, p 31.

84 2nd CFI, pp 31-32.

85 2nd CFI, p 32.

86 2nd CFI, pp 32-33.

[46] Dixon asked the complainant if there was anything she could think of that she thought Police should know or that she wanted to tell them about.[87] The complainant told them about things the mother and family members had been saying about the complainant taking the accused to court.[88]

[47] Dixon asked if there were definitely no text messages or phone calls between her and EW. The complainant said: 'No. I mostly like talk face to face.'[89] She referred to calls with EW about EW contacting the Police.[90] Hudson asked the complainant whether she spoke to EW on the phone about 'this sort of stuff' or sent her text messages about it and the complainant said only EW asking her if the accused had tried anything, but nothing in detail.[91] Dixon asked if that was by text messages or Facebook Messenger, the complainant said it was via WhatsApp and the messages were possibly on EW's phone.[92]

[48] Dixon asked the complainant if all of what she had told her today had been the truth. The complainant said, 'Yes'. Dixon asked the complainant if she understood that it is wrong, and an offence, to tell them things that are not true and she said, 'Yes'. Dixon asked the complainant why they were

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87 2nd CFI, p 33.

88 2nd CFI, pp 33-34.

89 2nd CFI, p 34.

90 2nd CFI, pp 34-35.

91 2nd CFI, p 35.

92 2nd CFI, pp 35-36.

making the recording and she said: 'just to finish everything with a statement'.[93]

CFIs as evidence-in-chief

Part 3, Evidence Act – Vulnerable witnesses

[49] Section 21B of the *Evidence Act 1939* (NT) ('*Evidence Act*') applies to a trial in respect of a charge for a sexual offence,[94] or a serious violence offence[95] (s 21B(1)).

[50] The offences with which the accused has been charged are sexual offences and/or serious violence offences.

[51] Section 21B(2)(a) of the *Evidence Act* provides that, if a vulnerable witness is to give evidence in proceedings to which s 21B applies, the Court may admit a recorded statement[96] in evidence as the witness's evidence-in-chief or as part of the witness's evidence-in-chief.

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93 2nd CFI, p 36.

94 The term 'sexual offence' is defined to mean (relevantly) an indictable offence involving sexual intercourse or sexual penetration, sexual abuse, indecent touching or indecent assault or any other indecent act directed against a person or committed in the presence of a child or an attempt to commit any of such acts: s 4, *Evidence Act*, incorporating the definition in s 3, *Sexual Offences (Evidence and Procedure) Act 1983* (NT).

95 The term 'serious violence offence' is defined to mean (relevantly) an offence against various provisions of the *Criminal Code* punishable by imprisonment for five or more years, including ss 188 (common assault) and 192 (sexual intercourse without consent): s 21AA, *Evidence Act*. Section 188 of the *Criminal Code* is captured by paragraph (a)(ii) of the definition and s 192 of the *Criminal Code* as in force prior to the commencement of the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT) on 1 November 2022 is captured by paragraph (b) of the definition.

96 The term 'recorded statement' is defined to mean an interview, recorded on video-tape or by other audio visual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to a proceeding: s 21AA.

[52] As a child, the complainant was a vulnerable witness within the meaning of s 21B(2) (s 21AB(a)).

[53] Section 21B(3) of the *Evidence Act* provides that if the prosecutor asks the Court to admit a recorded statement in evidence, the Court must accede to that request unless there is good reason for not doing so.

[54] The two CFIs of the complainant are recorded statements within the meaning of s 21B (s 21AA).

[55] Section 21D(1) of the *Evidence Act* provides that it is the intention of the Legislative Assembly that, as children tend to be vulnerable in dealings with persons in authority (including courts and lawyers), child witnesses be given the benefit of special measures. Section 21D(2) sets out five principles the Court must have regard to where the witness is a child, as follows:

(a) the Court must take measures to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;

(b) the child must be treated with dignity, respect and compassion;

(c) the child must not be intimidated when giving evidence;

(d) proceedings in which a child is a witness should be resolved as quickly as possible;

(e) all efforts must be made to ensure that matters that delay or interrupt a child's evidence in a proceeding are determined before a special sitting or trial commences.

[56] In *The King v Hampton* [2023] NTSCFC 1, the Full Court held (at [46]) that the purpose of Part 3 of the *Evidence Act* is to reduce the trauma associated with giving evidence for vulnerable witnesses without eroding the accused's right to a fair trial.

Part 3A, Evidence Act – Domestic violence offence proceedings

[57] Part 3A of the *Evidence Act* contains provisions which permit a recorded statement of a witness to be played at a trial and admitted as the witness's evidence-in-chief (s 21H). The provisions apply to trials in respect of a domestic violence offence and recorded statements of complainants.

[58] Counsel for the accused made some submissions about these provisions, including an argument that s 21J of the *Evidence Act* was not satisfied in respect of the two CFIs of the complainant. Section 21J(1)(b) requires a recorded statement to be made with the informed consent of the complainant and s 21J(2) set out matters which were, arguably, pre-requisites to the making of a recorded statement with informed consent.

[59] The prosecutor eschewed any reliance on Part 3A of the *Evidence Act* as the basis for the admission of the two CFIs in this case. For that reason, and

also because s 21J(2) was repealed with effect from 25 March 2024, consideration of the provisions of Part 3A is unnecessary.

Good reason for not admitting the CFIs?

[60] Counsel for the accused argued that there were a number of matters which combined to provide a good reason within s 21B(3) of the *Evidence Act* for not admitting the two CFIs in their entirety.

[61] There does not appear to be a decision of this Court which has discussed the scope and content of the phrase 'good reason' in s 21B(3) of the *Evidence Act*. Two published decisions in the Northern Territory have concluded that the reasons identified by a party did not amount to 'good reason' not to admit a recorded statement, within the meaning of s 21B(3).[97] One published decision has concluded that the reasons identified by a party did amount to 'good reason' not to admit a recorded statement.[98]

[62] In that case, *The Queen v Brown*, Olsson J upheld (at [56]-[57]) the contentions of the Defence about the recorded interviews, noting (at [57]) that the Crown had conceded that, even given the latitude obviously contemplated by the *Evidence Act* and the legislative policy underlying its provisions, the mode of conduct of the recorded interviews 'clearly exceeded the bounds of what would have been proper examination-in-chief of a complainant by a prosecutor'. Olsson J held (at [58], [60]) that:

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97 *The Queen v Drover* [2022] NTSC 12; *Ridonfi v Heenan* [2008] NTMC 34. See also *The Queen v BM* [2015] NTSC 73, holding there was not 'good reason' not to hold a special sitting for the complainant's evidence.

98 *The Queen v Brown* [2010] NTSC 17.

> ... [W]hen it is borne in mind that the scheme erected by the *Evidence Act* (NT) is such that the content of a proper child forensic interview may be tendered as the evidence-in-chief of a young complainant, then the fact that basic principles of evidence and procedure are grossly breached in the mode of conduct of the interview is an important consideration as to admissibility.
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> ...
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> ...[T]he danger of contamination of the evidence of a very young child by the mode and context of the interrogation process was very real. ... [T]he relevant interrogation was so sustained and suggestive and the inducements made or implied were such that, at the end of the day, the probability of contamination was so great as to render the statements sought to be relied on as highly unreliable – to the point that little weight could safely be placed on them.

[63] In that case, the complainant was five years old. She was interviewed on three separate occasions. On the first occasion, the complainant did not assert any improper sexual activity on the part of the accused. On the second occasion, the interviewing officer told the complainant they were talking to her because she had told her mother some things that happened to her at child care. The complainant did not remember what she had told her mother about the accused, and said there was nothing she wanted to tell Police about the accused. There followed some 35 questions designed to get the complainant to say that the accused touched her in her vaginal area and, on each occasion, she did not indicate that this occurred. After being pressed this way, the complainant started to cry. A break was proposed, but the interview resumed immediately. The interviewing officer again pressed the complainant about why she did not want to see the accused, and she shrugged her shoulders. She gave further inconclusive statements and the interview was concluded. About half an hour later, a further interview was

conducted in which the complainant disclosed that the accused had touched her on her vagina over her clothes. As regards inducements to the complainant to implicate the accused, there was a false representation made to her by Police that anything she said would not go beyond the interview room, and she was told that Police would ensure her safety and that of other children. Before the third interview, after the complainant said she wanted to go home, her mother told her that if the complainant told the Police what she had told her mother, she would then be allowed to go home. There were also numerous other factors strongly suggesting unreliability of the complainant's interview, including inherent inconsistencies as to where the alleged touching incident occurred; the detail of what happened and how it came about was very sparse; and some things the complainant said (including telling others about it) were not supported by any other evidence.

[64] Other jurisdictions have legislation that permits a recorded interview of a child or other vulnerable witness to be received as their evidence-in-chief.[99] Of that legislation, only that which operates in Tasmania and New South Wales appears to contain any express legislative constraint on the Court's discretion to exclude some or all of a recorded interview.[100] The relevant constraint in Tasmania is that the Court hearing the proceeding considers that the receipt of the recorded interview as evidence-in-chief would be

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99 See s 106HB(1), *Evidence Act 1906* (WA); ss 367 and 368, *Criminal Procedure Act 2009* (Vic); s 306S, *Criminal Procedure Act 1986* (NSW); s 52, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s 13BA, *Evidence Act 1929* (SA); s 5A, *Evidence (Children and Special Witnesses) Act 2001* (Tas).

100 See s 5A(4), *Evidence (Children and Special Witnesses) Act 2001* (Tas); s 306Y, *Criminal Procedure Act 1986* (NSW).

contrary to the interests of justice. The relevant constraint in New South Wales is that the Court is satisfied that it is not in the interests of justice for the witness's evidence to be given by a recorded statement.

[65] Given the similar purpose of the legislative provisions that permit evidence of a child or other vulnerable witness to be given in this way, it is appropriate to understand the reference in s 21B(3) of the *Evidence Act* to 'good reason for not doing so' as requiring the Court to be satisfied that it is not in the interests of justice for a recorded interview to be received as the witness's evidence-in-chief. The interests of justice accommodate both the desirability of not occasioning further trauma to the child complainant, and the risk that the use of the recorded statement would cause undue or unfair prejudice to the accused.[101] It is clear, however, from the terms of s 21B(3), that to decline a prosecutor's request to admit a recorded statement in evidence, the Court must be positively satisfied that there is good reason for not doing so, ie that it is not in the interests of justice to admit the recorded statement as the evidence of that witness.

The complainant's understanding of the importance of telling the truth

[66] Counsel for the accused argued that a reason for not admitting the two CFIs into evidence was that in neither interview did the interviewing officers ask the complainant, who was a child, whether she understood the importance of telling the truth.

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101 See *LF v The King* [2023] NSWCCA 232 at [43] per Meagher JA (Wilson and Sweeney JJ agreeing).

[67] Section 12(a) of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA') provides that, except as otherwise provided by the ENULA, every person is competent to give evidence. Section 12 applies to every person, including children, of whatever age.[102] Section 13 of the ENULA lays down exceptions to the general condition of competency to give evidence created by s 12.[103] Section 13(6) provides that it is presumed, unless the contrary is proved, that a person is not incompetent because of s 13. The presumption of competency in s 13(6) applies to both competency to give evidence about a fact and competency to give sworn evidence.[104]

[68] Exceptions to this presumption of competency are found (relevantly) in:

(a) s 13(1) – a person is not competent to give evidence about a fact if, for any reason, the person does not have the capacity to understand a question about the fact or to give an answer that can be understood to a question about the fact;

(b) s 13(3) – a person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence; and

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102 *RJ v The Queen* (2010) 208 A Crim R 174 at [15] per Campbell JA (Latham and Price JJ agreeing).

103 Ibid at [16].

104 Ibid.

(c) s 13(4) – a person who is not competent to give sworn evidence about a fact may be competent to give unsworn evidence about the fact.

[69] Section 13(8) of the ENULA provides that, for the purpose of determining a question arising under s 13, the Court may inform itself as it thinks fit.

[70] If a question about competency of a witness arises, the Court must determine if it is satisfied that there is proof that a witness is incompetent, a question to be determined on the balance of probabilities.[105]

[71] There was no suggestion that the complainant was not actually competent, at the time of the two CFIs, to give sworn evidence about any fact. The only matter raised by counsel for the accused was the complainant's status as a child, which was said to require the Police officers to ascertain whether the complainant understood the importance of telling them the truth. It is erroneous to presume incapacity merely because of the age of the witness.[106] Further, it has been held that, where a witness's evidence-in-chief is given by way of a pre-recorded interview, the witness's capacity is assessed at the time of trial, not the time that the interview was recorded.[107]

[72] It must follow that a failure of interviewing officers to ask the complainant (a child aged 16 years) whether or not she understood the importance of

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105 *The Queen v GW* (2016) 258 CLR 108 at [14] per the Court.

106 *Pease v The Queen* [2009] NSWCCA 136 at [7]; *Gray v The Queen* [2020] NSWCCA 240 at [35(i)] per Lonergan J (Hoeben CJ at CL and Johnson J agreeing).

107 *Gray v The Queen* [2020] NSWCCA 240 at [35(v)], citing *A2 v The Queen* [2018] NSWCCA 174 at [859]-[865] per Hoeben CJ at CL, Ward JA, Adams J; *Hawker v The Queen* [2012] VSCA 219 at [26] per T Forrest AJA (Buchanan JA and Redlich JA agreeing).

telling the truth in a CFI did not, and could not, affect the admissibility of what she said in the two CFIs as some or all of her evidence-in-chief at the trial. To the extent that there was any question about her competency to give sworn evidence, that question could and should be determined at the trial.

[73] This issue has no weight in the consideration of whether there was good reason not to admit the two CFIs as the complainant's evidence-in-chief under s 21B(2) of the *Evidence Act*.

Leading questions

[74] Counsel for the accused argued that reading passages of the statutory declaration to the complainant in the 1st CFI, for her to adopt them, comprised putting leading questions to a witness in examination-in-chief within s 37(1) of the ENULA.

[75] Counsel for the accused also argued that prompting the complainant within the 2nd CFI by telling her EW had told Police about some things the complainant had told EW about, namely the accused putting objects inside her vagina and putting his penis in her vagina, comprised putting leading questions to a witness in examination-in-chief within s 37(1) of the ENULA.

[76] 'Leading question' is defined[108] to mean a question asked of a witness that:

(a) directly or indirectly suggests a particular answer to the question; or

108 Dictionary, ENULA.

(b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

[77] As to the 1st CFI, it is not clear that reading parts of the statutory declaration to the complainant for her confirmation amounted to asking the complainant leading questions. If she had never made the statutory declaration, and had disclosed to Police in the 1st CFI something as set out in the statutory declaration, and the interviewing officers said to her: 'You told us [something], tell us all about that?', that would not be a leading question.[109] Although in stages, with the complainant's disclosures to Police reduced to writing, and with a separation in time of some 18 days between disclosure and questioning, that is essentially what has occurred here. The passages read from the statutory declaration were, in substance, the complainant's disclosures to Police. The questions following the read passages did not introduce to the complainant facts about which she had not already given evidence, in the form of the statutory declaration.[110] Scott was not required to give evidence on the voir dire and there is no suggestion that the disclosures in the statutory declaration, the complainant's words which she declared to be true, were obtained in any improper manner.

[78] It is to be borne in mind that a CFI is part of the investigatory process, so objections that may be made to leading questions or other matters relating to

109 *Martin v The Queen* (2013) 238 A Crim R 449 at [52] per Redlich JA (Maxwell P and Neave JA agreeing).

110 Ibid.

the conduct of it, need to be applied with some caution because a CFI takes place in an environment that is not a court room, and instead takes place in an environment directed to eliciting and/or amplifying a potential young victim's account.[111]

[79] It may be that, because of the separation in time between the complainant's disclosures to Police in the statutory declaration and the 1st CFI, the reading of parts of the statutory declaration to the complainant in the 1st CFI did comprise leading questions. For that reason, and because the 1st CFI was sought to be admitted as part of the complainant's evidence-in-chief pursuant to s 21B of the *Evidence Act*, I have approached the matter as if they were leading questions within s 37(1) of the ENULA.

[80] As to the 2nd CFI, because they take the form: 'EW told Police you told her [something]. Were there any occasions when the accused did [something]?', those two questions are leading questions.

[81] Reliance was placed by counsel for the accused on the observation of Johnson J in *The Queen v A2; The Queen v KM; The Queen v Vaziri (No 21)* [2016] NSWSC 24 (at [27]) that s 37 of the ENULA applies to questions asked in a recorded interview which is to be tendered as part of a child's evidence-in-chief and the Court may rule as inadmissible the whole or any part of the contents of a recording adduced as evidence under New South

111 *A2 v The Queen* [2018] NSWCCA 174 at [884]-[885] per Hoeben CJ at CL, Ward JA, Adams J, citing *SLJ v The Queen* (2013) 39 VR 514 at [33] per Redlich JA (Osborn and Whelan JJA agreeing), and other authorities there cited.

Wales provisions equivalent to s 21B of the *Evidence Act*. In that case, Johnson J also observed (at [34]) that the Court can retrospectively give leave pursuant to s 37(1) of the ENULA for leading questions to be asked in a recorded interview which is to be admitted as the evidence-in-chief of a child under the equivalent provisions. That view was confirmed when the matter went on appeal.[112]

[82] A trial judge's ruling concerning the use of leading questions is an exercise of the Court's general discretion to control the form of questions pursuant to s 26 of the ENULA.[113] The factors to be taken into account include those in s 192(2) of the ENULA,[114] which include: (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; (b) the extent to which to do so would be unfair to a party or to a witness; (c) the importance of the evidence in relation to which the leave is sought; (d) the nature of the proceeding; and (e) the power (if any) of the Court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

[83] In relation to those matters, it is accepted that this is a criminal trial involving very serious alleged offences. It is also accepted that the complainant's evidence is the only direct evidence about the alleged

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112 *A2 v The Queen* [2018] NSWCCA 174 at [883] per Hoeben CJ at CL, Ward JA, Adams J. There was no challenge to this part of the Court of Criminal Appeal's decision in the High Court appeal: *The Queen v A2* (2019) 269 CLR 507.

113 *A2 v The Queen* at [883].

114 Ibid.

offending, making it very important. The other matters in s 192(2) are considered below.

[84] As regards the 1st CFI, the statutory declaration read during the 1st CFI was information provided to Police by the complainant regarding offending committed against her by the accused. The statutory declaration comprised the complainant's words, which she had declared, by her signature, to be the truth some 18 days prior to the 1st CFI. The information contained in it detailed an incident which she said occurred on 27 January 2020 at 5am in her bedroom at the second unit, an incident which she said occurred when she lived at the first unit which led to her being taken to the hospital, and an incident which she said occurred just before that incident at the same address. The information in the statutory declaration was not plucked out of thin air by the interviewing officers, or based on information obtained by them from other sources. Nor did it come after initial denials by the complainant of any wrongdoing by the accused.[115] It was the complainant's story of what had occurred on those three occasions. This points against a finding that the leading questions were likely to be productive of a misleading or inaccurate response.[116]

[85] After being told of what she had said in the statutory declaration about the occasion on 27 January 2020, and asked to tell the interviewing officers everything she knew about this incident, the complainant gave a narrative,

115 Cf *Douglass v The Queen* (2012) 86 ALJR 1086; cf *The Queen v Brown* [2008] NTSC 14.

116 Cf *Ward v The Queen* (2017) A Crim R 299 at [36] per Maxwell P and Redlich JA.

interspersed with questions to confirm matters of detail or to confirm what she had said, which went for three and a half pages in the transcript. She then volunteered information about a further incident which she said occurred on the same day at 9am. That narrative, also interspersed with questions to confirm matters of detail or what she had said, went for four pages in the transcript. What she had said about the 5am incident was then the subject of further questioning over some 25 pages of the transcript which elicited answers largely consistent with what the complainant had described in her narrative about it. What the complainant had said about the 9am incident was then the subject of further questioning over some six pages in the transcript which elicited answers largely consistent with what she had described in her narrative about it.

[86] After being told of what she had said in the statutory declaration about the occasion at the first unit which led to her being taken to the hospital, and asked to tell the interviewing officers everything about that occasion, the complainant gave a narrative which went for around half a page in the transcript. She was then asked questions over some 17 pages in the transcript, which elicited answers largely consistent with what she had described in her narrative about it.

[87] After being told of what she had said in the statutory declaration about the other occasion at the first unit, and asked to tell the interviewing officers everything about this occasion, the complainant was asked questions over some 22 pages which elicited answers largely consistent with what the

complainant had described in the statutory declaration. There was one additional reference to the statutory declaration in that questioning, which was to what the complainant had said she was wearing at the time. She described her clothing, to the extent she could remember it.

[88] Contrary to the submissions of counsel for the accused, the complainant did not merely adopt the passages of the statutory declaration that were read out to her. She described, at some length and in response to questions which were not objected to by counsel for the accused, what had occurred on each of the occasions referred to in the statutory declaration and an additional occasion. She gave details about the home in which she said these things occurred, whereabouts in the home they occurred, when they occurred, what she was or was not wearing at the time, and who she had told about these incidents.

[89] As regards the 2nd CFI, the complainant had earlier been asked if she could recall another specific incident of the accused doing something to her, and she answered that she could not, saying that there were other times, but every time was the same thing. It was then that she was prompted by reference to what EW had told the Police. When prompted with the reference to EW saying the complainant had told her the accused had put objects inside her vagina, the complainant said that happened just once, described where that occurred and what happened, with questions asking for details and the sequence of events, as well as who she told about it, which went for some seven pages of transcript. The complainant was then referred to EW

telling Police that the complainant had told her there were times when he would go into her bedroom and put his penis into her vagina, and asked whether there were any occasions when he did that. The complainant said 'no, he tried to but he wouldn't'. The complainant was asked if she told EW he had done that and why and she said she had told EW he tried doing that, putting 'his tip, but not like his whole'. She was referred to having spoken about a time when that had occurred in the 1st CFI, and was asked if there were any other occasions when the accused tried to put his penis in her vagina and she said: 'No'.

[90] To the extent that counsel for the accused relied on the complainant being suggestible because she was a child, or liable to agree with a person in authority, the complainant was not a young child; she was 16 years old. On some 12 occasions, she corrected the interviewing officer about something the officer put to her,[117] including correcting a detail that Hudson read from the statutory declaration about the alleged offending,[118] the correction of EW telling Police there had been multiple occasions when the accused had inserted objects into her vagina,[119] and the correction of EW telling Police the accused had put his penis in her vagina.[120] She also corrected herself on some two occasions,[121] and indicated, on some seven occasions, that she did

117 1st CFI, pp 6-7; 9; 10; 19; 23; 30; 37; 39; 2nd CFI, p 16-17.

118 1st CFI, p 75.

119 2nd CFI, p 20.

120 2nd CFI, pp 27-28.

121 1st CFI, pp 11 and 52.

not remember or know the answer to an interviewing officer's question.[122] The complainant was clearly capable of rejecting or denying a proposition put to her by the interviewing officers, including as to facts contained in the statutory declaration or facts which EW had told Police. The complainant was also capable of saying she did not know, or did not remember, some detail or fact if she did not. There is no basis for a finding that she was, or might have been, an acquiescent person.[123]

[91] The questioning of the complainant, particularly in relation to the alleged offending itself,[124] was not repetitive in a way potentially suggesting that her first answer was wrong or unsatisfactory, and leading her to depart from previous answers to the same or similar questions repeated to her.[125] The prompting by reference to information Police had about further offending the complainant had not already disclosed was consistent with the need to give some guidance to a child to disclose abuse which would be embarrassing, distasteful and which she would rather forget,[126] and to recall a specific instance of offending where she had said such things happened to her every day.

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122 1st CFI, pp 18, 58, 60, 79, 81; 2nd CFI, pp 12, 23, 27.

123 See *Ward v The Queen* (2017) 265 A Crim R 299 at [114] per Maxwell P and Redlich JA.

124 Counsel for the accused argued that Hudson's questions to the complainant in the 2nd CFI about whether she had 'been to the doctors about this' (2nd CFI, p 31), and whether she had text messages or phone calls with EW about the matter (2nd CFI, p 35) were unduly repetitive. That argument went nowhere because neither set of questions elicited any evidence from the complainant that was relevant or not already known.

125 Ibid, see also *LF v The King* [2023] NSWCCA 232 at [67].

126 See *The Queen v Ellis* (1994) 1 NZCrimC 592 at 600-601 per Sir Robin Cooke and Gault J, cited with approval in *LF v The King* at [77]-[78].

[92] Taking up the matter in s 192(2)(a) of the ENULA, giving leave for the complainant to be asked the leading questions she was asked in the two CFIs would shorten the length of the trial. To put it another way, to require the complainant to give her examination-in-chief orally at the special sitting would extend the length of the trial. The reason for that is the likelihood that, if the two CFIs were not admitted, the complainant would be cross-examined about what she had said in them if her oral evidence-in-chief differed in any material (or possibly immaterial) way from what she had said in the two CFIs. To the extent she gave evidence inconsistent with what she had said in the two CFIs, she may have been cross-examined on behalf of the accused in order to challenge her credibility, or by the prosecutor if leave to do so were granted pursuant to s 38(1)(c) of the ENULA on the basis that the complainant had given a prior inconsistent statement. Such cross-examination, by either party, is likely to have raised the manner of questioning in the CFIs.

[93] In *LF v The Queen* [2023] NSWCCA 232, this likelihood was a significant factor in the trial judge's decision for pre-recorded evidence of a vulnerable witness to be admitted at the trial despite it containing numerous leading or other problematic questions, and that ruling was upheld on appeal.[127] The Court held (at [68]) that, because the accuracy and reliability of the vulnerable witness's interview would likely arise for the jury's consideration in any event, it could not be in the interests of justice to

127 *LF v The Queen* [2023] NSWCCA 232 at [68]-[69].

require her to give evidence-in-chief orally and then be cross-examined by reference to the pre-recorded interview given 13 months earlier.

[94] Counsel for the accused sought to distinguish this case on the basis that it related only to those parts of the pre-recorded interview involving coercion by Police on the vulnerable witness to continue answering their questions after she became upset and asked to see her mother, in contrast to the present case which involved reading parts of the statutory declaration to the complainant in the 1st CFI, which was said to 'infect' its entirety.

[95] In that case, the pre-recorded interview was the first time the complainant had spoken to Police about the alleged offending. In the pre-recorded interview, she initially denied any impropriety against her by the accused and gave negative answers to more general questions suggesting his wrongful conduct. The vulnerable witness had become upset during the pre-recorded interview and the defence argued that the interviewer used her requests to see her mother as an opportunity to pressure her to implicate the accused before that could occur. Questions were argued to be leading, misleading and in some cases 'improper' within the meaning of s 138 of the ENULA. The challenged portions of the vulnerable witness's evidence were the later portions in which she implicated the accused. Notwithstanding those complaints, the Court held that the trial judge had not erred in admitting the whole of the pre-recorded evidence of the complainant as her evidence-in-chief.

[96] It is difficult to understand why a difference in the challenged proportion of the pre-recorded evidence (parts in that case and the whole in this case) is a proper basis to distinguish the decision and the approach taken by the Court to similar arguments as those made here, being essentially that the manner of questioning meant it was not in the interests of justice for the vulnerable witness's pre-recorded evidence to be admitted as her evidence-in-chief in a criminal trial for child sexual offences, with reliance on ss 37(1), 137 and 138 of the ENULA.

[97] I consider that the decision in *LF v The King*, as a recent decision of an appeal court in relation to similar arguments as those made by counsel for the accused in this case, is a useful and persuasive authority regarding the matters the Court must consider in this case. That is why I drew it to the parties' attention before the hearing.

Evidence obtained improperly or in contravention of law: s 138, ENULA

[98] Counsel for the accused argued that the complainant's evidence in the two CFIs was obtained improperly or in contravention of an Australian law within s 138(1) of the ENULA. The impropriety or contravention was said to be having read the statutory declaration to the complainant in the 1st CFI and having her adopt it, and telling the complainant about what EW had told Police the complainant had told them, in breach of s 37 of the ENULA. Counsel suggested that Hudson and/or Dixon may have knowingly or recklessly done this, knowing that the complainant was 'a reluctant witness',

in order to put into the recorded interviews what the complainant had previously told Police and what EW had told Police. The imputation appeared to be that, because they knew the complainant was 'reluctant', they may have knowingly or deliberately used this tactic to place into the recorded interview evidence which the complainant would not otherwise have given.

[99] It has been held that evidence elicited in response to a leading question in a recorded interview of a vulnerable witness is evidence obtained improperly or in contravention of s 37 of the ENULA within the meaning of s 138 of the ENULA.[128] Consequently, it is necessary to consider whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence (s 138(1)). The reference to 'desirability' is a reference to the public interest in reliable evidence of an accused person's guilt being admitted and considered by the tribunal of fact, which public interest encompasses both the accurate determination of facts in criminal trials and punishing criminals and deterring crime.[129]

[100] In making this determination, the Court is required to take into account the matters in s 138(3). Those matters are considered below.

128 *Knowles v The Queen* [2015] VSCA 141 at [71]-[72].

129 S Odgers, *Uniform Evidence Law* (Thomson Reuters, 16th ed, 2021), [138.180].

[101] First, the probative value[130] of the evidence in the two CFIs is very high.[131] Second, as the complainant's evidence, it was the only direct evidence of the alleged offending relied on by the prosecution. Consequently, it was very important. Third, the charged offences were of a very serious nature and related to a child. Each of these three matters weigh heavily in favour of the desirability of admitting the evidence.

[102] Fourth, on the basis of the evidence tendered on the voir dire, I find that the impropriety was not particularly grave. It was not a case in which Police engaged in or provoked criminal activity, or infringed the civil liberties of members of the community, or the fundamental right of the accused to silence. There was no evidence that it was in breach of any Police general orders or guidelines.[132] There was no evidence that this was a persistent or widespread Police practice, or that it had been previously brought to the attention of Police.

[103] Fifth, neither Hudson nor Dixon was called to give evidence, so there was no evidence regarding their motives or intentions in reading the statutory declaration to the complainant or referring her to what EW had said. In the 1st CFI, Hudson stated that she was going to read out some of the statutory declaration 'so that we incorporate it in this ... interview'.[133] To openly say

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130 'Probative value' of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue: Dictionary, ENULA.

131 The Court must assess 'probative value' on the assumption that the evidence will be accepted: *Kadir v The Queen* (2020) 94 ALJR 168 at [51] per the Court.

132 Cf *The Queen v BM* (2015) A Crim R 301 at [27].

133 1st CFI, p 3.

that was what she was seeking to do indicates that she had no knowledge or appreciation that she was doing anything improper.[134] There was no evidence to sustain a finding that either Hudson's conduct or Dixon's conduct was deliberately or recklessly improper. Nor does the fact that, on 28 and 29 January 2020, the complainant did not wish to make a formal statement to Police about offending against her by the accused, permit the inference that she was, on 16 February and 21 March 2020, reluctant to provide a formal recorded statement to Police disclosing such offending, given that she did, of her own free will, participate in the two CFIs on those dates.

[104] Sixth, there was no suggestion of inconsistency with any right recognised by the International Convention on Civil and Political Rights. Seventh, there was no evidence about any other proceeding having been or likely to be taken in relation to the impropriety.

[105] Eighth, it is something of an exercise in speculation to assess whether the complainant's evidence in the two CFIs could have been readily obtained from her without reading her the statutory declaration or asking her the leading questions, but that seems likely given the detailed descriptions she did give of the alleged offending. This factor weighs against the desirability of admitting the evidence.

134 This was confirmed by her evidence at the trial.

[106] On balance, for the reasons referred to in paragraphs [84] to [92] and [104] above, I consider that the desirability of admitting the two CFIs outweighs the undesirability of admitting it.

Probative value outweighed by danger of unfair prejudice: s 137, ENULA

[107] Counsel for the accused argued that the probative value of the two CFIs was outweighed by the danger of unfair prejudice to the accused within s 137 of the ENULA, requiring the Court to refuse to admit them, in their entirety.

[108] This involves a balancing exercise assessing and weighing the probative value of the evidence against any potential prejudicial effect it may have on the accused.

[109] As set out above, on the assumption that the evidence is accepted as credible and reliable,[135] the evidence in the two CFIs has high probative value.

[110] When undertaking this balancing exercise, the dominant consideration is to ensure that the accused is not deprived, by prejudice, of a fair trial.[136] The notion of prejudice in this general context '… means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate.'[137] Something more is required, such as the possibility that the evidence may be misused by the jury in some respect.

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135 *IMM v The Queen* (2016) 257 CLR 300 at [43]-[45], [48], [52] per French CJ, Kiefel, Bell and Keane JJ.

136 *The Queen v AW* [2018] NTSC 29 at [30] per Grant CJ.

137 *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ.

[111] The plurality in *Hughes* explained the kinds of potential prejudice that can arise in a criminal trial such as this:[138]

> In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the *Evidence Act* imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused. The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

[112] The test of danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of prejudice by reason of the admission of the evidence.[139]

[113] Counsel for the accused argued that there was a danger of unfair prejudice to the accused on the basis that a prosecutor would not be permitted to read to a complainant in evidence-in-chief a statutory declaration given by the complainant to Police alleging offending against them by an accused, with a view to having the complainant adopt it as their evidence. To do so would be to put leading questions to the complainant, and no court would permit it.

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138 *Hughes* at [17].

139 *The Queen v Lisoff* [1999] NSWCCA 364 at [60] per Spigelman CJ, Newman and Sully JJ.

He said that, if it could not be done that way in a court room, it should not be permitted to be done that way in a recorded interview which is to be admitted as the complainant's evidence-in-chief under s 21B of the *Evidence Act*.

[114] There are some difficulties with that argument.

[115] First, as the prosecutor submitted, it is ordinary practice for a witness to read their statement, or have it read to them, before they give their evidence in court. Consequently, for the complainant to have been reminded of what she said in the statutory declaration immediately prior to being asked questions about it is not inimical to the justice process.

[116] Second, the ENULA contemplates numerous circumstances in which a witness's statutory declaration or statement might be received as, or read to them in, their evidence-in-chief. As has already been mentioned, s 37(1)(a) permits the Court to give leave for leading questions to be put to a witness in examination-in-chief. It also permits leading questions to be asked where (relevantly) the question relates to a matter introductory to the witness's evidence, no objection is made to the question and the accused is legally represented, or the question relates to a matter that is not in dispute. Section 37(3) permits a court to exercise power under rules of court to allow a written statement to be tendered or treated as evidence-in-chief of its maker. Section 32(1) permits a court to give leave to a witness to try to revive their memory about a fact from a document, and s 32(3) provides that, if a

witness has used a document to try to revive his or her memory about a fact, the witness may, with the leave of the Court, read aloud as part of his or her evidence, so much of the document as relates to that fact. Section 33(1) permits a police officer, in any criminal proceeding, to give evidence-in-chief for the prosecution by reading or being led through a written statement previously made by them.

[117] It is therefore to put it too highly to say that, in all cases, or in all criminal cases, a witness would never be permitted to give evidence by having parts of a statutory declaration they had made read to them in court and adopting it.

[118] As the authorities referred to above show, the Court must consider the nature and content of the impugned evidence in the context of the remainder of the witness's evidence and decide whether or not to give leave for leading questions to have been asked, and must consider the factors relevant to the determinations under ss 137, 138, 192 and any other relevant statutory provisions or legal principles.

[119] As set out above, the complainant did not simply adopt the statutory declaration as it was read to her, she gave quite comprehensive and detailed evidence about the incidents referred to in the statutory declaration, which were her own words in written form. In the 2nd CFI, she described an incident not referred to in the statutory declaration or in what EW had said, again in a comprehensive and detailed way. I do not accept that what

occurred in the 1st CFI 'infected' or 'tainted' what occurred in the 2nd CFI. What the complainant said in the 2nd CFI was not dependent on, or even based on, what she said in the 1st CFI. The content of the 2nd CFI related to different specific incidents of alleged offending or to more general non-specific offending she said occurred on multiple occasions.

[120] Counsel for the accused argued that the jury would not be able to understand the impact that leading questions can have on the reliability of a child's evidence, and that no direction could be given by the Court which would assist them to do so.

[121] In *LF v The King*, Meagher JA (Wilson and Sweeney JJ agreeing) held (at [73]) that the assessment of the weight to be accorded to a witness's evidence by reference to the manner in which it was given by the witness is the province of the jury, and that remains the position irrespective of whether the evidence is given in person or by an audio-visual recording.[140] His Honour also held (at [74]) that, where there is a feature of the evidence, or of the manner in which it was given, which may adversely affect its reliability and which may not be evidence to a lay jury, then the fair trial of the accused requires the judge to draw it to the jury's attention, explain how it may affect the reliability of the evidence and warn the jury of the need for caution in deciding whether to accept it and the weight to be given to it.[141]

140 Citing *Pell v The Queen* (2020) 268 CLR 123 at [38] per the Court.

141 Citing *The Queen v GW* (2016) 258 CLR 108 at [50] per the Court.

[122] There was no evidence led in this case which suggested that some specialised knowledge was required in order for the jury to recognise and assess the likely impact of particular questioning techniques on the accuracy and reliability of the complainant's evidence.

[123] The two CFIs were video recorded, so the jury were able, over the course of their duration of three hours, to assess the spontaneity and genuineness or otherwise of the complainant's reactions and disclosures, and the effect of the interviewing officers' attitude and questioning.[142] The jury were well capable of assessing the accuracy and reliability of her evidence on the basis of their own general knowledge, noting also that the complainant was not a very young child, and noting that the jury could be given a direction about the impact of these matters on the reliability of the complainant's evidence.

[124] Counsel for the accused argued that the four times[143] when Hudson called the complainant 'darling' during the two CFIs were instances of inappropriate familiarity which did influence or could have influenced the complainant to agree with the leading questions put to her by Hudson. Each time Hudson called the complainant 'darling' was when the complainant spoke particularly quietly about a detail of the alleged offending which she had already described, and this was clearly done to gently encourage the complainant to speak more loudly so that she could be heard. These isolated

142 See *The Queen v Ellis* (1994) 1 NZCrimC 592 at 600-601 per Sir Robin Cooke and Gault J, cited with approval in *LF v The King* at [77]-[78].

143 1st CFI, pp 7, 10, 80; 2nd CFI, p 17.

instances in two recorded interviews of some three hours duration could not sensibly be said to have impacted the reliability of the complainant's evidence in the CFIs.

[125] Counsel for the accused argued that it was also 'improper' or 'unfair' for Hudson, at the end of the 1st CFI, to have read out the final paragraph of the statutory declaration, have the complainant agree that she had signed it, tell the complainant she believed that there remained incidents that the complainant had not told them about, and tell the complainant that EW had given a statement which contained things the complainant had told her about, that the complainant had not described, or that were slightly different to what the complainant had described, that the interviewing officers would like to speak to her about. As I understood the submission, the complaint was that the jury would hear this evidence when the 1st CFI was played to them. The difficulty with that submission is that the complainant gave evidence in the 1st CFI about the accused being violent towards her, the jury would hear evidence from the complainant about her fear of the accused and other offending she said had been committed against her, because she gave it in the 2nd CFI, and the jury would hear evidence from EW about what the complainant had told her when she was called as a witness at the trial. No risk of prejudice arises from the way the 1st CFI was ended. The absence of any such risk was supported by the Crown's offer to excise from the end of the 1st CFI the part objected to by counsel for the accused, who declined to take up the offer.

[126] On balance, given the high probative value of the complainant's evidence in the two CFIs, I do not accept that the probative value of the proposed tendency evidence is outweighed by the danger of unfair prejudice to the accused.

No good reason not to admit the two CFIs

[127] For the reasons set out above, and bearing in mind the principles contained in s 21D of the *Evidence Act*, I am not satisfied it was in the interests of justice to require the complainant, a vulnerable witness, to give her evidence-in-chief orally at the special sitting some four years after she gave the recorded interviews. In other words, I am satisfied that there is good reason for acceding to the prosecutor's request to admit the two CFIs in evidence pursuant to s 21B of the *Evidence Act*.

Disposition

[128] For the above reasons, my ruling was that the two CFIs be admitted at the trial as part of the complainant's evidence-in-chief pursuant to s 21B(2)(a) of the *Evidence Act*.
