CITATION:	*The King v Hampton* [2023] NTSCFC 4
PARTIES:	THE KING v RALPH HAMPTON
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	REFERRAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	22024586
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JUDGMENT OF:	Blokland J, Brownhill J and Riley AJ

CATCHWORDS:

CRIMINAL PROCEDURE – Evidence of vulnerable witness – *Evidence Act 1939* (NT) s 21B – Where audio-visual recording is made of evidence at special sitting – Where recording is or is proposed to be admitted into evidence and re-played as part of the witness's evidence at trial – Whether leave of the Court required for the Crown to call a vulnerable witness to give evidence at trial additional to their evidence at special sitting – Leave not required unless evidence completed at trial

CRIMINAL PROCEDURE – Evidence of vulnerable witness – Retrial – *Evidence Act 1939* (NT) s 21E – Where audio-visual record of witness's evidence at trial is made – Where record is or is proposed to be admitted into evidence at retrial – Whether leave of the Court required for the Crown to call a vulnerable witness to give evidence at retrial additional to their

evidence at initial trial – Leave not required unless evidence completed at retrial

EVIDENCE – Evidence of vulnerable witness – Examination-in-chief – Cross-examination – *Evidence Act 1939* (NT) s 21B – Where audio-visual recording is made of evidence at special sitting, admitted into evidence and re-played as part of the witness's evidence at trial – Where the witness is called to give further evidence at trial – Whether restrictions on evidence that may be adduced in examination additional to usual restrictions – No additional restrictions

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; *Allchin v The Queen* [2019] NSWCCA 278; *Associated Newspapers Ltd v Wavish* (1956) 96 CLR 526; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625; *Bropho v Western Australia* (1990) 171 CLR 1; *Brown v Petranker* (1991) 22 NSWLR 717; *Browne v Dunn* (1893) 6 R 67; *Coco v The Queen* (1994) 179 CLR 427; *Director of Public Prosecutions v Leys* (2012) 44 VR 1; *Doyle v The Queen* [2014] NSWCCA 4; *RH v The Queen* [2022] NTCCA 7; *Henning v Lynch* [1974] 2 NSWLR 254; *HFM043 v Republic of Nauru* (2018) 92 ALJR 817; *Jiminez v The Queen* (1992) 173 CLR 572; *King v The Queen* (1986) 161 CLR 423; *Libke v The Queen* (2007) 230 CLR 559; *Matthews v SPI Electricity Pty Ltd (No 36)* [2014] VSC 82; *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346; *MWJ v The Queen* (2005) 80 ALJR 329; *Nguyen v The Queen* (2020) 269 CLR 299; *Parker v The Queen* (1997) 186 CLR 494; *Potter v Minahan* (1908) 7 CLR 277; *Re Licensing Ordinance* (1968) 13 FLR 143; *Richardson v The Queen* (1974) 131 CLR 116; *Shaw v The Queen* (1952) 85 CLR 365; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531; *The Queen v Apostilides* (1984) 154 CLR 563; *The Queen v Gassy (No 3)* (2005) 93 SASR; *The Queen v Majak* [2022] NTSC 57; *The Queen v Masters* (1992) 26 NSWLR 450; *The Queen v Taufahema* (2007) 228 CLR 232; *The Queen v Wilkes* (1948) 77 CLR 511; *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513; *Wakeley v the Queen* (1990) 64 ALJR 32; *Whitehorn v The Queen* (1983) 152 CLR 657, referred to.

The Queen v SG (2011) 29 NTLR 157, overruled.

Criminal Code 1983 (NT) s 192.
Domestic and Family Violence Act 2007 (NT) s 120.
Evidence Act 1939 (NT) ss 21A, 21AA, 21AB, 21AC, 21AD, 21B, 21C, 21D, 21E, 21G, 21QA, 24, 56B.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 26, 27, 41, 46, 65, 69, 70, 135.
Interpretation Act 1978 (NT) s 62A.
Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 3.
Supreme Court Act 1979 (NT) s 21.

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Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 7341 (Peter Toyne, Minister for Justice and Attorney-General).
S Odgers, *Uniform Evidence Law* (Thomson Reuters, 16th ed, 2021).

REPRESENTATION:

Counsel:

Appellant:	SG Henchliffe KC with N Redmond
Respondent:	V Engel SC with J Davidson

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

The King v Hampton [2023] NTSCFC 4
(22024586)

BETWEEN:

THE KING

AND:

RALPH HAMPTON

CORAM: BLOKLAND J, BROWNHILL J and RILEY AJ

REASONS FOR JUDGMENT
(Delivered 9 March 2023)

THE COURT:

[1] This is a referral from the Supreme Court to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT). The referral seeks consideration and determination of the following questions:

1. Where, pursuant to s 21B(2)(b) of the *Evidence Act 1939* (NT) ('the Act'), an audio-visual recording of a vulnerable witness's evidence has been made and the recording has been admitted into evidence and re-played as part of the witness's evidence at a trial, or it is proposed that that will occur, may the witness be called by the Crown to give further evidence at the trial as of right, or is leave of the Court required?

1.1 If leave is required, what is the test to be applied?

2. Does the answer to Question 1 differ in the event of a re-trial and, if so, how?

3. Where, pursuant to s 21B(2)(b) of the Act, the examination of a vulnerable witness at a special sitting is recorded, admitted in evidence and the recording is re-played to the jury as part of the witness's evidence, and the witness is also called to give further evidence at the trial, are there any restrictions (additional to the usual restrictions applicable to witnesses in criminal trials) on:

3.1 The evidence that may be adduced in examination-in-chief of the witness and, if so, which party bears the onus of establishing what is or is not permitted?

3.2 The evidence that may be adduced in cross-examination of the witness and, if so, which party bears the onus of establishing what is or is not permitted?

[2] The facts comprising the factual basis for the purpose of the determination of these questions were agreed between the parties, as set out below.

[3] The accused is charged on indictment with having committed an offence contrary to s 192 of the *Criminal Code 1983* (NT) ('*Criminal Code*'). The particulars of the charged offence allege that on 1 August 2020 at Alice Springs, the accused had sexual intercourse with SS without her consent, knowing or being reckless as to her lack of consent.

[4] The accused resided in a caravan on the same property where SS resided with other members of her family. It is alleged that one evening when SS and her friend, DK, were in the accused's caravan with him the accused digitally penetrated SS without her consent.

[5] Both SS and DK were subject to Child Forensic Interviews ('CFIs') on 5 August 2020. Transcripts of the CFIs were before the Court on the reference.

[6] On 6 August 2020, Dr Jennifer Delima conducted a medical assessment of SS. Dr Delima made handwritten notes during this, including notes of her recollection of what SS said to her.

[7] On 20 April 2021, SS and DK gave evidence at a special sitting pursuant to s 21B(2)(b) of the Act and audio-visual recordings were made of their evidence ('the recorded evidence'). Transcripts of the recorded evidence were before the Court on the reference.

[8] Handwritten notes made by Dr Delima during her medical assessment of SS were first provided to counsel for the accused on the morning of the special sitting.

[9] During SS's recorded evidence she was not asked any questions about Dr Delima's medical assessment of her on 6 August 2020.

[10] A statement made by Dr Delima signed on 28 April 2021 was first provided to the accused's solicitor by the prosecution on 28 April 2021. A copy of the statement was before the Court on the reference.

[11] At a trial of the accused that commenced on 4 May 2021 ('the first trial'), pursuant to s 21B of the Act, the CFIs of SS and DK and the recorded

evidence were admitted into evidence and re-played to the jury as the whole of their evidence.

[12] At the first trial, Dr Delima was not called as a witness and no evidence was tendered in relation to her medical assessment of SS.

[13] At the first trial, the accused gave evidence in his own defence.

[14] The accused was convicted at the first trial.

[15] According to the evidence given by SS, the accused committed an act of non-consensual digital penetration.

[16] The evidence of the accused at the first trial was that there was no sexual interaction between him and SS.

[17] The accused appealed his conviction at the first trial. The accused's appeal against conviction was allowed, his conviction was quashed and a new trial ('the second trial') was ordered (see *RH v The Queen* [2022] NTCCA 7).

[18] At the second trial, the Crown intends to call Dr Delima to give evidence about, *inter alia,* statements that SS made to Dr Delima during her medical assessment of SS on 5 August 2020. The Crown accepts that, as a matter of fairness, if Dr Delima is called to give this evidence, SS should be made available for further cross-examination on this issue.

[19] If Dr Delima gives evidence in accordance with her statement, her evidence will include that SS told her she felt pain at the time of the digital penetration by Ralph Hampton.

The position absent Part 3 of the Act

[20] It is instructive to first consider the effect of the law in the absence of Part 3 of the Act because the Crown argued that the relevant provisions of the Act, particularly ss 21B and 21E, altered that position, whilst the Defence argued that they do not. There are three relevant matters. The first is the law relating to the manner of calling witnesses at a criminal trial. The second is the law relating to the recalling of witnesses. The third is the law relating to evidence on a retrial.

[21] The parties were generally *ad idem* as to the effect of the law in relation to these matters in the absence of Part 3 of the Act.

Calling witnesses

[22] It is a fundamental principle that it is for the prosecutor to determine in the particular case what witnesses will be called for the prosecution and it is for the prosecutor to decide what evidence, in particular what oral testimony, will be adduced, subject to ensuring that the Crown case is properly presented with fairness to the accused.[1] Many factors may be taken into account by the prosecutor when deciding what evidence to call, including

1 *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ; *The Queen v Apostilides* (1984) 154 CLR 563 at 575 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ; *Nguyen v The Queen* (2020) 269 CLR 299 at [26] per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ.

whether the evidence is credible.[2] The prosecutor's discretion is not reviewable and the tender of evidence by the Crown cannot be compelled by a trial judge.[3]

[23] It is also a fundamental principle (for which authority need not be cited) that (save for various statutory exceptions[4]), a witness gives oral evidence at a criminal trial.

[24] It is also a fundamental principle that, generally speaking, a party may question any witness and cross-examination is not limited to the topics covered in examination-in-chief.[5]

[25] By s 26 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA'), the Court has control over the questioning of witnesses, and may make such orders as it considers just in relation to, *inter alia*: (a) the way in which witnesses are to be questioned; and (b) the presence and behaviour of any person in connection with the questioning of witnesses.

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2 *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ; *Nguyen v The Queen* (2020) 269 CLR 299 at [34] per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ.

3 *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 per Dawson J; *Nguyen v The Queen* (2020) 269 CLR 299 at [35] per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ.

4 See, for example, ss 65, 69, 70, *Evidence (National Uniform Legislation) Act 2011* (NT).

5 Section 27, *Evidence (National Uniform Legislation) Act 2011* (NT); *Libke v The Queen* (2007) 230 CLR 559 at [119] per Heydon J. In a civil context, see also *Matthews v SPI Electricity Pty Ltd (No 36)* [2014] VSC 82 at [15] per Forrest J.

The Court also has inherent power to contain cross-examination if it constitutes an interference with the proper administration of justice.[6]

[26] By s 41 of the ENULA, the Court may disallow improper questioning put to a witness in cross-examination and must disallow improper questioning put to a vulnerable witness[7] in cross-examination. The latter is subject to the Court's satisfaction that, in all the relevant circumstances, it is necessary for the question to be put. 'Improper questioning' means a question that is misleading or confusing; is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; is put in a manner or tone that is belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype.[8]

[27] By s 135 of the ENULA, the Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; (b) be misleading or confusing; or (c) cause or result in undue waste of time.

Recalling witnesses

[28] Where a witness gives evidence at a trial, that evidence concludes and the witness is excused by the trial judge, any further evidence can only be

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6 See S.Odgers, *Uniform Evidence Law* (Thomson Reuters, 16th ed, 2021) [EA.26.150] and the cases there cited, including *Allchin v The Queen* [2019] NSWCCA 278 at [86] per Basten JA (Walton and Bellew JJ agreeing).

7 'Vulnerable witness' is defined to mean a witness under the age of 18 years, with a cognitive impairment or intellectual disability, or a witness the court considers to be vulnerable having regard to specified matters (ENULA, s 41(4)).

8 ENULA, s 41(3).

elicited from that witness with the leave of the Court, on application by either party.[9] Whether to grant leave is a discretionary decision.[10]

[29] That discretion is to be exercised having regard to the requirements of the interests of justice in the circumstances of the case.[11] Relevant matters for the exercise of the discretion include: (a) whether the application is made by the Crown (which may not split its case)[12] or the Defence;[13] (b) whether the application is made by the Crown after the Defence has opened its case;[14] (c) whether the evidence sought to be adduced had been overlooked[15] or was not elicited for some tactical reason;[16] (d) whether the other party would be prejudiced by the fact that the additional evidence is to be given after cross-examination and re-examination of the witness has been completed;[17] and (e)

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9 See, for example, *MWJ v The Queen* (2005) 80 ALJR 329 at [40] per Gummow, Kirby and Callinan JJ.

10 See, for example, *Doyle v The Queen* [2014] NSWCCA 4 at [312] per Bathurst CJ (Price and Campbell JJ agreeing); *Brown v Petranker* (1991) 22 NSWLR 717 at 728 per Clarke JA (Handley JA and Waddell AJA agreeing).

11 *The Queen v Gassy (No 3)* (2005) 93 SASR 454 at [318] per Bleby and White JJ, citing *Brown v Petranker* (1991) 22 NSWLR 717 at 728 per Clarke JA (Handley JA and Waddell AJA agreeing). See also *MWJ v The Queen* (2005) 80 ALJR 329 at [40] per Gummow, Kirby and Callinan JJ.

12 *Shaw v The Queen* (1952) 85 CLR 365 at 380 per Dixon, McTiernan, Webb and Kitto JJ.

13 See, for an example of an application by the Defence, albeit on a voir dire rather than at trial, *The Queen v Masters* (1992) 26 NSWLR 450 at 480 per Hunt CJ at CL, Allen and Badgery-Parker JJ.

14 *Shaw v The Queen* (1952) 85 CLR 365 at 380 per Dixon, McTiernan, Webb and Kitto JJ; *Brown v Petranker* (1991) 22 NSWLR 717 at 728-729 per Clarke JA (Handley JA and Waddell AJA agreeing), citing *Henning v Lynch* [1974] 2 NSWLR 254 at 259 per Jeffrey J.

15 *The Queen v Gassy (No 3)* (2005) 93 SASR 454 at [318] per Bleby and White JJ, citing *Brown v Petranker* (1991) 22 NSWLR 717 at 728 per Clarke JA (Handley JA and Waddell AJA agreeing).

16 *Brown v Petranker* (1991) 22 NSWLR 717 at 729 per Clarke JA (Handley JA and Waddell AJA agreeing).

17 Ibid.

practical considerations such as the availability of the witness and the ease with which he or she may be located so as to be recalled.[18]

[30] The general discretion is not constrained by s 46 of the ENULA, which permits the Court to grant leave to a party to recall a witness in circumstances were there may be a breach of the rule in *Browne v Dunn* (1893) 6 R 67.[19]

[31] Where leave is sought to recall a witness, it may be expected that the subject matter of their additional evidence will be identified by the party seeking to recall them. That is necessary in order to persuade the Court to grant the leave. It may also be expected that, if leave is granted: (a) the grant of leave will identify the subject matter of the additional evidence the witness is to give; and (b) the other party will be entitled to cross-examine the witness, but only in relation to the additional evidence they give as a consequence of the grant of leave. On the basis of the interests of justice, it may be expected that no party could elicit evidence from a recalled witness beyond the subject matter the subject of the leave and the additional evidence the witness gives upon being recalled.

Evidence on a retrial

[32] Generally speaking, a retrial is a trial afresh in every sense. On a retrial, witnesses are called by the Crown (in the exercise of the prosecutorial

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18 *The Queen v Gassy (No 3)* (2005) 93 SASR 454 at [318] per Bleby and White JJ.

19 *Doyle v The Queen* [2014] NSWCCA 4 at [311] per Bathurst CJ (Price and Campbell JJ agreeing).

discretion referred to above), and the Defence (if it goes into evidence), to give their evidence again. On a retrial, the witnesses who gave evidence at the initial trial are not being recalled, they are being called afresh. With one qualification, there is nothing to prevent either party eliciting evidence from a witness which goes beyond, or is different to, the evidence they gave at the initial trial, and there is nothing to prevent either party calling additional witnesses. No question of leave arises.

[33] The qualification is that, on a retrial, the Crown cannot make a new case which was not made at the initial trial.[20] The difference between the case relied on in an initial trial and the case relied on in a retrial must be substantial for it to be a barrier to the way the Crown may run its case on a retrial.[21] Examples of substantial differences include: (a) where there is a substantial amendment to the indictment;[22] (b) where the new case turns on other events which are different in time, place and quality from the events the subject of the initial trial;[23] (c) where the new case is inconsistent with any verdict of acquittal at the initial trial, either of a co-accused[24] or the

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20 *King v The Queen* (1986) 161 CLR 423 at 433 per Dawson J (Gibbs CJ, Wilson and Brennan JJ agreeing), considered in *The Queen v Taufahema* (2007) 228 CLR 232 ('*Taufahema*') at [59]-[60], [64] per Gummow, Hayne, Heydon and Crennan JJ. These principles were cited in the context of an appeal against conviction and the decision to order a retrial, but they clearly apply to the conduct by the Crown of a retrial.

21 *Taufahema* at [67] per Gummow, Hayne, Heydon and Crennan JJ.

22 *Parker v The Queen* (1997) 186 CLR 494 at 520 per Dawson, Toohey and McHugh JJ, cited in *Taufahema* at [66] per Gummow, Hayne, Heydon and Crennan JJ.

23 *Jiminez v The Queen* (1992) 173 CLR 572 at 589-590 per McHugh J, cited in *Taufahema* at [65] per Gummow, Hayne, Heydon and Crennan JJ.

24 *King v The Queen* (1986) 161 CLR 423 at 433 per Dawson J (Gibbs CJ, Wilson and Brennan JJ agreeing), cited in *Taufahema* at [64] per Gummow, Hayne, Heydon and Crennan JJ.

accused on counts other than those overturned on appeal;[25] and (d) where the Crown advances any factual allegation inconsistent with what the jury or the Court of Criminal Appeal have already found, or advances any factual allegation inconsistent with the case advanced at the initial trial.[26]

[34] There is no suggestion in this case that the Crown intends to make a new case which was not made at the first trial.

The statutory provisions

[35] Part 3 of the Act deals with vulnerable witnesses. The term 'vulnerable witness' is defined to mean a witness in proceedings: (a) who is a child[27]; (b) who has a cognitive impairment or an intellectual disability; (c) who is the alleged victim of a sexual offence[28] to which the proceedings relate; (d) who is a complainant[29] in a domestic violence offence[30] proceeding; or (e) whom a Court considers to be vulnerable (s 21AB).

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25 *The Queen v Wilkes* (1948) 77 CLR 511 at 517-518 per Dixon J (Rich and McTiernan JJ agreeing), cited in *Taufahema* at [61]-[63] per Gummow, Hayne, Heydon and Crennan JJ.

26 *Taufahema* at [68] per Gummow, Hayne, Heydon and Crennan JJ.

27 'Child' is defined to mean a person who is under 18 years of age (s 21AA).

28 'Sexual offence' is defined by reference to the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) (s 4), which defines the term to mean an indictable offence involving: (a) sexual intercourse or sexual penetration; (b) a sexual relationship; (c) sexual abuse; (d) indecent touching or an indecent assault; (e) any other indecent act directed against a person or committed in the presence of a child; (f) the making, collection, exhibition or display of an indecent object or indecent material; (g) sexual servitude or any other form of sexual exploitation; or (h) an attempt to commit, an act of procuring, or any other act preparatory to the commission of, any of the above (*Sexual Offences (Evidence and Procedure) Act 1983* (NT), s 3).

29 'Complainant' is defined to mean an adult against whom a domestic violence offence the subject of the proceeding is alleged, or has been found, to have been committed (s 21G).

30 'Domestic violence offence' means: (a) an offence constituted by, or involving, conduct that is domestic violence; or (b) an offence against s 120(1) of the *Domestic and Family Violence Act 2007* (NT), being, essentially, a breach of a domestic violence order (s 21G).

[36] Section 21A, headed 'Evidence of vulnerable witnesses', *inter alia*: deals with matters a Court may take into account in considering whether a witness is a vulnerable witness (s 21A(1)); provides that, subject to s 21B, a vulnerable witness is to give evidence at a place outside the courtroom using an audio-visual link, unless such link is not available or the witness chooses to give evidence in the courtroom (s 21A(2)); sets out arrangements to be made if a vulnerable witness is to give evidence in the courtroom (such as a screen, partition or one-way glass to obscure the witness's view of the accused, the presence of a support person and closure of the Court whilst the witness gives evidence) (s 21A(2AB)-(2AD)); and sets out warnings to be given by a judge to the jury where such arrangements are adopted (s 21A(3)).

[37] Section 21B is in the following terms.

> **21B Evidence of vulnerable witnesses in cases of sexual or serious violence offences**
>
> (1) This section applies to proceedings for the trial in respect of, or the hearing of a charge for, a sexual offence or a serious violence offence[31].
>
> (2) If a vulnerable witness is to give evidence in proceedings to which this section applies, the court may exercise one or both of the following powers:
>
> (a) the court may admit a recorded statement[32] in evidence as the witness's evidence in chief or as part of the witness's evidence in chief;

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31 'Serious violence offence' is defined to mean an offence against specified provisions of the *Criminal Code* that is punishable by imprisonment for 5 years or more (s 21AA). Those provisions include offences relating to child abuse material, sexual intercourse or gross indecency, murder, manslaughter, causing serious harm, assaults and offences against liberty and robbery.

(b) the court may:

(i) hold a special sitting[33] in relation to the witness; and

(ii) have an audio-visual recording made of the examination of the witness at the special sitting and admit the recording into evidence; and

(iii) re-play the recording to the jury as the witness's evidence or as part of the witness's evidence (as the case requires).

(3) If the prosecutor asks the court to admit a recorded statement in evidence or to hold a special sitting under subsection (2), the court must accede to the request unless there is good reason for not doing so.

(3A) Without limiting subsection (3), when considering the prosecutor's request to admit a recorded statement or to hold a special sitting, the court must take into account whether a recorded statement can be played or a special sitting can be held in the courtroom for the proceedings.

(4) Before the court admits a recorded statement, or the recording of an examination conducted at a special sitting, in evidence under this section, the court may have it edited to remove irrelevant or otherwise inadmissible material.

(5) A vulnerable witness may (but need not) be present in the courtroom when a recorded statement of evidence of the witness, or an audio-visual recording of the examination (or part of the examination) of the witness, is replayed in the courtroom.

(6) The vulnerable witness's demeanour, and words spoken or sounds made by the vulnerable witness, during the re-play of a recorded statement of evidence or an audio-visual recording of the examination (or part of the examination) of the witness, are not to be observed or overheard in the courtroom unless the vulnerable witness elects to be present in the courtroom for that part of the proceedings.

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32 'Recorded statement' is defined to mean an interview, recorded on video-tape or by other audio-visual means, in which an authorised person (such as a police officer) elicits from a vulnerable witness statements of fact which, if true, would be of relevance to a proceeding (s 21AA).

33 'Special sitting' is defined to mean a sitting of the court held for the purpose of conducting an examination, or part of an examination, of a vulnerable witness in proceedings for a sexual offence or serious violence offence (s 21AA).

[38] Section 21C, headed ‘Evidence given outside the courtroom’, deals with the manner in which a vulnerable witness may give evidence either from outside the courtroom that is contemporaneously transmitted to the courtroom, or at a special sitting. As to the latter, the special sitting is to be held in the absence of the jury (and may be held before the jury is empanelled) (s 21C(2)(b)); the witness and the accused are not to be in the same room (s 21C(2)(c)); and the Court may give directions on any matter incidental to the examination or the recording of the examination (s 21C(2)(e)).

[39] Section 21D, headed ‘Principles in relation to child witnesses’, provides that child witnesses should be given the benefit of special measures (s 21D(1)). The term ‘special measures’ is not defined anywhere in the Act. The section sets out principles to which the Court must have regard where a witness is a child, such as that: the Court must take measures to limit, to the greatest extent practicable, the distress and trauma suffered (or likely to be suffered) by the child when giving evidence; proceedings in which a child is a witness should be resolved as quickly as possible; and all efforts must be made to ensure that matters that may delay or interrupt a child’s evidence in a proceeding are determined before a special sitting or trial commences (s 21D(2)). However, special measures are not to be taken contrary to the wishes of the child if the Court is satisfied that a child witness is able, and wants, to give evidence in the presence of the accused (s 21D(3)).

[40] Section 21E is in the following terms:

21E Audio-visual record of evidence of vulnerable witness

(1) If a vulnerable witness is to give evidence in criminal proceedings, and facilities are available for making an audio-visual record of the evidence, the court may direct that an audio-visual record be made of the witness's evidence.

(2) An order may be made under this section whether or not special measures are taken for the protection of the witness.

(3) An audio-visual record made under this section forms part of the records of the court.

(4) If, in later civil or criminal proceedings, a court is satisfied that evidence of which an audio-visual record has been made under this section is relevant to the later proceedings, the court may admit the audio-visual record in evidence.

(5) Before the court admits an audio-visual record in evidence, it may have the record edited to exclude irrelevant material or material that is otherwise inadmissible in the later proceedings.

(6) If a court admits an audio-visual record in evidence under this section, the court may relieve the witness wholly or in part from an obligation to give evidence in the later proceedings.

Question 1 – Is leave required for a vulnerable witness to give additional evidence at the trial?

[41] The Crown argued that once the Court exercises the discretion in s 21B(2)(b)(i) to hold a special sitting in relation to a vulnerable witness, and at the special sitting the witness is examined-in-chief, cross-examined and re-examined, the witness's evidence is complete, with the effect that any additional evidence to be given by the witness at the trial must be the subject of an application for leave to recall the witness in accordance with the principles referred to in paragraphs [28] to [31] above.

[42] There is no express provision to this effect in the Act. In particular, there is no express provision to the effect that, in the absence of leave, the entirety

of a vulnerable witness's evidence must be given at the special sitting if one is ordered. Any such effect must therefore be implied into the Act.

[43] In *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 ('*Taylor*'), French CJ, Crennan and Bell JJ held (at [37]-[39]) as follows:

> Consistently with this Court's rejection of the adoption of rigid rules in statutory construction … it should not be accepted that [a] purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. … [I]t is possible to point to decisions in which courts have adopted a purposive construction having that effect. …
>
> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision… It is answered against a construction that fills "gaps disclosed in legislation" … or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".
>
> … [I]t may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme" … because any modified meaning must be consistent with the language in fact used by the legislature. [citations omitted]

[44] Gageler and Keane JJ (in dissent) held (at [65]) as follows:

> The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

[45] In a similar light, in *HFM043 v Republic of Nauru* (2018) 92 ALJR 817, Kiefel CJ, Gageler and Nettle JJ held (at [24]) that:

> The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it.

[46] The Crown argued, by reference to the relevant Second Reading Speech,[34] that the purpose of ss 21B, 21C, 21D and 21E of the Act was to reduce the trauma experienced by children and other vulnerable witnesses in criminal proceedings for sexual and serious violence offences, to improve the quality of evidence from those witnesses, and to ensure that the number of times a child is required to give evidence is minimised by allowing for recording of trial evidence and its use at any subsequent hearing in the event of a mistrial or appeal. So much may be accepted, but the Second Reading Speech clearly acknowledged that there was no intention to 'strip [the] accused of their rights' or 'remov[e] an accused person's opportunity to contest [such] charges against them using every legal means at their disposal'.[35] The Second Reading Speech stated that there was no intention to remove or erode that 'fundamental' right.[36] In other words, the purpose of Part 3 of the Act is to reduce the trauma associated with giving evidence for vulnerable witnesses without eroding the accused's right to a fair trial. The purpose of minimising the number of times a child witness is to give evidence was pursued primarily by abolishing oral examination of a child at the committal stage,[37] and by the passage of s 21E.[38] Section 21E is directed to later civil or criminal proceedings. It has no direct bearing on the evidence of

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34 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 April 2007, 4336 (Sydney Stirling, Minister for Justice and Attorney-General).

35 Ibid 4337.

36 Ibid.

37 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 7341 (Peter Toyne, Minister for Justice and Attorney-General).

38 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 April 2007, 4336 (Sydney Stirling, Minister for Justice and Attorney-General).

vulnerable witnesses in an initial trial. It will be considered in relation to Question 2 below.

[47] A construction that promotes the purpose or object underlying the legislation is to be preferred to a construction that does not promote the purpose or object.[39]

[48] Both parties accepted that a vulnerable witness who gives evidence at a special sitting may give additional evidence at the trial. The disagreement was as to whether this is because the Crown can call them as of right, or can only call them with leave because what is involved is a recall of the witness. It is not apparent why the latter construction promotes the purposes of Part 3 of the Act referred to above whilst the former does not. It is a reasonable assumption that the Crown would only call a vulnerable witness to give additional evidence at the trial beyond what they gave in the special sitting: (a) where that evidence is relevant and material to the issues in the case, consistent with the prosecution's obligation to put the Crown case fairly, which encompasses the presentation of all available, cogent and admissible evidence;[40] (b) cognisant of the particular vulnerable witness's trauma and resilience; and (c) with such measures in s 21A(2), (2AB), (2AD) and s 21C(1) as are appropriate. The need for an application for leave or the granting of leave to the Crown to call the witness would not impact on those matters. The larger concern for the Crown was the potential consequence

39 *Interpretation Act 1978* (NT), s 62A.

40 *Nguyen v The Queen* (2020) 269 CLR 299 at [36], [39] per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ.

that, if calling the vulnerable witness at the trial is not a recall, then the witness may be cross-examined on topics beyond what is covered in the evidence-in-chief given at the trial. This matter is the subject of Question 3 and will be addressed below.

[49] Importantly for present purposes, notwithstanding that the context of a statutory provision, including the mischief to which it is directed (or its purpose), is to be considered as part of the process of statutory construction,[41] the language which has actually been employed in the text of legislation is the surest guide to legislative intention and extrinsic materials (such as a Second Reading Speech) cannot be relied on to displace the clear meaning of the text.[42]

[50] When words are implied into a statute, it is usually necessary for the particular words and their place in the provision to be identified.[43] The Crown did not identify what words should be implied into s 21B (or any other provision) or where the words would sit so as to provide that a vulnerable witness's evidence is complete at a special sitting and/or that leave of the Court is required to call a vulnerable witness who has been examined at a special sitting to give additional evidence at the trial. That is a significant difficulty with the Crown's construction argument.

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41 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ.

42 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

43 See, for example, *Taylor* at [16], [24] and [26] per French CJ, Crennan and Bell JJ; *Director of Public Prosecutions v Leys* (2012) 44 VR 1 at [17] per Redlich and Tate JJA and Forrest AJA.

[51] Amongst other things, the Crown's argument was founded on the words 'of the examination of the witness at the special sitting' in s 21B(2)(b)(ii) and the definition of 'examination' as including cross-examination and re-examination (s 21AA). That the evidence given by the witness at the special sitting may *include* cross-examination and re-examination does not necessarily imply that the examination at the special sitting comprises the whole of the witness's evidence unless the witness is recalled with leave of the Court.

[52] Section 21B(2)(b)(iii) provides that the Court may replay the audio-visual recording of the examination of the witness at the special sitting to the jury 'as the witness's evidence or as part of the witness's evidence (as the case requires)'. Similarly, the definition of 'special sitting' is a sitting held for the purpose of conducting an examination, or part of an examination, of a vulnerable witness (s 21AA). In their ordinary meaning, those words indicate that the evidence given and recorded at the special sitting, and replayed to the jury at the trial, may comprise only part of a vulnerable witness's evidence.

[53] That may be because a vulnerable witness's evidence comprises the evidence given at a special sitting and any additional evidence given at the trial. Alternatively, it may be because the other part of the witness's evidence may be the recorded statement admitted in evidence under s 21B(2)(a).

[54] The latter proposition is denied by the words of s 21B(5), which refer to 'when a recorded statement of evidence of the witness' and when 'an audio-visual recording of the examination *(or part of the examination)* of the witness' is replayed in the courtroom. The separate references to the recorded statement and the audio-visual recording make clear that the evidence given at the special sitting may comprise part only of the witness's *examination* (which includes cross-examination and re-examination), a term which is distinct from the recorded statement.

[55] Consequently, a construction of s 21B(2)(b) which provides that, in the absence of leave, the entirety of a vulnerable witness's evidence must be given at the special sitting if one is ordered is, to adopt the words of French CJ, Crennan and Bell JJ in *Taylor*, 'too much at variance with the language in fact used by the legislature' in s 21B(5). Further, such a construction would seek to 'fill gaps' and 'make an insertion which is too big'.

[56] Consequently, we do not accept that the Crown's construction is open on the terms of s 21B.

[57] The Crown argued that s 21C(2), which applies if the Court holds a special sitting, indicates that the vulnerable witness's evidence is then under the control of the Court, with the implication that any additional evidence from a vulnerable witness can only be received with leave. On the contrary, those provisions only apply to the special sitting itself. They say nothing about the

status of the examination of a vulnerable witness once the special sitting is concluded.

[58] The Defence argued that the evidence of a vulnerable witness given at a special sitting is not complete until:

(a) a recorded statement (if any) is admitted into evidence pursuant to s 21B(2)(a);

(b) the audio-visual recording of the witness's evidence at the special sitting is replayed to the jury pursuant to s 21B(2)(b) and either:

(i) the vulnerable witness is called to give additional evidence at the trial, comprising examination-in-chief, cross-examination and re-examination, and is excused; or

(ii) the Crown indicates it does not intend to call the vulnerable witness to give additional evidence at the trial.

[59] That proposition is open on the express language of s 21B, particularly s 21B(2)(b)(iii), and is consistent with the absence of any express requirement for the leave of the Court before a vulnerable witness gives additional evidence at the trial. It is also consistent with the usual trial procedures for the admission and receipt of evidence, all of which occur at the trial in the presence of the jury. Under s 21B(2)(b), the evidence given by a vulnerable witness at a special sitting is not *evidence* in the trial until it is tendered, admitted and re-played to the jury during the trial. That distinction is confirmed by s 21C(2)(b), which provides that, where the trial is by jury, the special sitting is to be held in the absence of the jury and may be held before the jury is empanelled. The notion that a vulnerable witness's

evidence is complete at the special sitting sits awkwardly with the need to admit the audio-visual recording into evidence and re-play it to the jury at the trial under s 21B(2)(b)(ii) and (iii). It also sits awkwardly with the power of the Court to have the recorded statement or the audio-visual recording of an examination conducted at a special sitting edited to remove irrelevant or inadmissible material under s 21B(4).

[60] Further, if the legislative intention was to constrain the fundamental discretion of the prosecutor as to the evidence to be led at the trial on behalf of the Crown, one might expect such a constraint to be expressed with clarity in the provisions.[44] It is noteworthy that there are provisions in the Act which constrain or affect the usual trial procedures by a requirement to obtain the leave of the Court.[45] Those provisions indicate that where the legislature has intended to do that, it has expressly said so. Even if the Crown's construction of s 21B were open (which we do not accept), the construction which is consonant with the common law should be preferred.[46] The Crown's construction is not consonant with the fundamental principles regarding the prosecutorial discretion.

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44 See *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J, cited in *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ (Deane and Dawson JJ agreeing); *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 at 526 per Burchett and Ryan JJ.

45 See s 21QA(2) (which requires leave for an unrepresented defendant to directly cross-examine certain vulnerable witnesses). See also ss 24(6), 56B(2)(c).

46 See *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636 per the Court.

[61] For the above reasons, we do not accept that, if the Crown wishes to call a vulnerable witness who has been examined at a special sitting to give additional evidence at the trial, the leave of the Court is required in accordance with the ordinary principles relating to the recalling of a witness set out in paragraphs [28] to [31] above.

Question 2 – Is leave required for a vulnerable witness to give additional evidence at a retrial?

[62] Both parties submitted that the same approach they each pressed in relation to a trial applies upon any retrial. The Crown submitted that, if the Crown wishes to call a vulnerable witness who has been examined at a special sitting to give additional evidence at a retrial, the leave of the Court is required in accordance with the ordinary principles relating to the recalling of a witness.

[63] The Crown relied on s 21E of the Act in support of its argument, in particular s 21E(4) and (6). Section 21E(1) permits the Court to direct that an audio-visual record be made of a vulnerable witness's evidence. That 'evidence' would comprise all of the vulnerable witness's evidence given at the trial, including their recorded statement (admitted under s 21B(2)(a)), the audio-visual recording of their examination at the special sitting (admitted under s 21B(2)(b)(ii) and replayed under s 21B(2)(b)(iii)), and any oral evidence given by the witness at the trial. Section 21E(4) provides that, if satisfied that the vulnerable witness's evidence is relevant to later criminal or civil proceedings (which would no doubt be the case on a

retrial), the Court may admit the audio-visual record made in evidence in the later proceedings. Although s 21E does not say so, it would necessarily follow that if the Court admits the audio-visual record into evidence, it would be replayed to the jury. Section 21E(6) provides that if the Court admits the audio-visual record in evidence, the Court may relieve the witness, wholly or in part, from giving evidence in the later proceedings.

[64] The same difficulties for the Crown's construction, and the same factors in favour of the Defence's construction, as referred to above, are present in the case of a retrial and the operation of s 21E. In particular, the Crown's construction is at odds with the ordinary principles applicable to evidence on a retrial set out in paragraphs [32] to [33] above.

[65] As with the Crown's argument in relation to s 21B, the Crown identified s 21E(4) as the place where the implied words would go, but did not articulate what those words would be. Again, that is a significant barrier to the Crown's construction of the Act, given that it requires the implication of words into the provisions.

[66] Further, s 21E(6) permits the court to relieve the witness 'wholly *or in part* from an obligation to give evidence in the later proceedings'. That language indicates: (a) that the witness may give evidence additional to what is contained in the audio-visual record of their evidence at the initial trial; and (b) that the Court's discretion is to *relieve* the witness from giving evidence at the later trial, not to *allow* the witness to give evidence at the later trial. That language is therefore

inconsistent with the proposition that, for a vulnerable witness to give additional evidence at a later trial, the Court's leave is required. Like the Crown's argument in relation to s 21B, to imply a requirement for the Court's leave, adopting the description in Taylor, requires an insertion which is 'too much at variance with the language in fact used by the legislature' in s 21E(6) and such a construction would seek to 'fill gaps' and 'make an insertion which is too big'.

[67] It follows that the Crown's recourse to s 21E does not sustain its position that, on a retrial, the Crown may only call a vulnerable witness who has been examined at a special sitting for the initial trial with the leave of the Court.

Question 3 – Are there restrictions on additional evidence given by a vulnerable witness?

[68] This question is directed to both examination-in-chief and cross-examination.

[69] It follows from the conclusions set out above, particularly that there is no requirement for the leave of the Court for the Crown to call a vulnerable witness to give evidence at the trial additional to their evidence at a special sitting, that there are no restrictions on what the Crown may elicit beyond the usual restrictions applicable to eliciting evidence from witnesses in criminal trials, as set out in paragraphs [22] to [27] above.

[70] As regards cross-examination, the Crown accepted that the Defence is entitled to cross-examine such a witness about the additional evidence given at the trial. However, the Crown argued that the Defence requires the leave of the Court to cross-examine such a witness about any other matters. This argument was founded on:

(a) The position that where a vulnerable witness has been examined at a special sitting, their evidence is complete and to elicit further evidence, both parties require leave;

(b) The legislative intention to minimise the trauma to vulnerable witnesses of giving evidence; and

(c) The need to protect vulnerable witnesses from abuse of a capacity to cross-examine a vulnerable witness at large if they give additional evidence at the trial.

[71] The Defence argued that there are no restrictions on cross-examination of a vulnerable witness who has been examined at a special sitting other than those applicable to eliciting evidence from witnesses in criminal trials, as set out in paragraphs [22] to [27] above.

[72] We have already rejected the Crown's proposition in paragraph [69](a).

[73] As to the Crown's proposition in paragraph [69](b), there is no express provision in the Act dealing with cross-examination of vulnerable witnesses. The same difficulties as identified in relation to Questions 1 and 2 apply to the Crown's argument resting on paragraph [69](b). In particular, the Crown's construction is at odds with the fundamental principle that a party

is entitled to cross-examine a witness and the cross-examination is not limited to their evidence-in-chief.

[74] As to the proposition in paragraph [69](c), as set out in paragraph [26] above, the Court is empowered by s 41 of the ENULA to prevent improper questioning. If a vulnerable witness has been cross-examined about a particular topic at a special sitting, further cross-examination about that topic at the trial may, depending on the circumstances of the case, be unduly annoying, harassing, intimidating, oppressive or repetitive such as to comprise improper questioning. The Court's duty is to disallow such questioning unless satisfied it is necessary for the question to be put.

[75] If a vulnerable witness has *not* been cross-examined about a particular topic at a special sitting, there are a number of restrictions or protections in relation to cross-examination about that topic at the trial which exist outside of Part 3. Firstly, it has been held that:[47]

> Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his [or her] story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness.

[76] Secondly, the Court's powers to control the questioning of witnesses in s 26 of the ENULA and its inherent power to control cross-examination which

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47 *Libke v The Queen* (2007) 230 CLR 559 at [120] per Heydon J, quoting *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 359 per Viscount Sankey LC, quoting Lord Hanworth MR with approval (Lords Blanesburgh, Atkin, Macmillan and Wright agreeing); approved in *Wakeley v the Queen* (1990) 64 ALJR 321 at 86 per Mason CJ, Brennan, Deane, Toohey and McHugh JJ.

constitutes an interference with the proper administration of justice (set out in paragraph [25] above) would permit the Court to disallow cross-examination if, for example, the Court determined there was a deliberate failure to cross-examine about the topic at the special hearing with the intention of cross-examining at the trial in order to seek to obtain some forensic advantage.

[77] Thirdly, such cross-examination may also be oppressive, such as to comprise improper questioning within s 41 of the ENULA if the failure to cross-examine about the topic at the special hearing is, for example, unexplained.

[78] Consequently, there is no warrant to imply into Part 3 of the Act any further restriction on the power to cross-examine such that:

(a) Cross-examination at the trial about a topic already covered in cross-examination at the special sitting can only take place with the leave of the Court; or

(b) Cross-examination at the trial beyond the topics undertaken at the special sitting and the topic of examination-in-chief at the trial can only take place with the leave of the Court.

First instance decisions regarding s 21B

The Queen v SG

[79] The Crown placed considerable reliance on the decision of Barr J in *The Queen v SG* (2011) 29 NTLR 157 (‘*The Queen v SG*’). In that case, his Honour ruled that, where, pursuant to s 21B of the Act, a vulnerable witness was examined at a special sitting, the audio-visual recording of the special sitting was admitted into evidence but the trial miscarried and a retrial was

to occur, the prosecutor had lost control over whether or not to elicit the witness's evidence at the trial and the Court was bound to play that recording to the jury at the retrial, notwithstanding that the prosecutor had decided that the witness's evidence was unreliable and not to play the recording or call the witness at the retrial.

[80] The basis for this decision was essentially twofold. First, the power in s 21B(2)(b) is 'a composite power' requiring the step in paragraph (iii) to be undertaken in the initial trial and any retrial once the Court had taken the steps in paragraphs (i) and (ii) at the initial trial.[48] Second, s 21B(2)(b) removes the prosecutorial discretion to call evidence in a retrial,[49] a conclusion reached because, if that discretion was not removed, the Court would have to undertake each of the three steps again such that the vulnerable witness would have to be examined at another special sitting and all of their earlier evidence would be 'wasted', which was inconsistent with the legislative purpose of the provisions.[50]

[81] With respect, the construction of s 21B(2)(b) adopted by his Honour is not correct. Firstly, the effect of the words 'one or both' in s 21B(2) is simply that the Court has the power to do the thing set out in paragraph (a), or the things set out in paragraph (b), or both of the things set out in paragraphs (a) and (b). It does not characterise the things set out in paragraph (b) as a

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48 *The Queen v SG* at [24].

49 *The Queen v SG* at [28].

50 *The Queen v SG* at [29]-[35].

composite power as opposed to a set of powers which are discrete and separately exercisable. Even if the words connote the singular, what is set out in paragraph (b) can be *a* set (singular) of powers which may be exercised discretely.

[82] Secondly, the effect of the word 'and' at the end of paragraph (b)(i) and paragraph (b)(ii) is not that the Court may only do *all* of the things set out in the three paragraphs. Rather, the word 'and' has both a conjunctive and a disjunctive effect. Where there is a list of items, joined by 'and', and the list is governed or affected by words which show that the list is a list of alternatives, the effect of the word 'and' is conjunctive in that it links the members of the class together to indicate that the whole class is to be considered together, but the other words categorise the class, as a whole, as a class of alternatives.[51] Here, the word 'and' links the things in paragraph (b) as a class, but the preceding words 'the court may' (meaning the Court has a discretion) show that the things in paragraph (b) are a list of alternatives. That is, permitting the Court to do one or more or all of the things set out in paragraph (b). In addition, the word 'and' has been construed disjunctively in numerous authorities on the basis of the purposive approach to statutory construction.[52] That construction promotes the purposes of s 21B and Part 3 generally (as referred to above). For the same reasons, the word 'and' in s 21B(2)(b)(ii) has the same effect.

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51 *Re Licensing Ordinance* (1968) 13 FLR 143 at 147 per Blackburn J, citing *Associated Newspapers Ltd v Wavish* (1956) 96 CLR 526 per the Court.

52 See D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) [2.48]-[2.49] and the authorities there cited.

[83] Support for this construction is found in s 21C(1)(c), which provides, in similar form to s 21B(2)(b), that the court may give directions as set out in paragraph (i) 'and' paragraph (ii) 'and' paragraph (iii) 'and' paragraph (iv). It is abundantly clear from the content of those paragraphs that they are alternatives and the Court may give one or more than one or all of the kinds of directions referred to, rather than being a 'composite power' all aspects of which must be exercised together. This provision demonstrates that the word 'and' is used in the way referred to in paragraph [81] elsewhere in Part 3 of the Act.

[84] As to the second basis for the decision in *The Queen v SG*, for the reasons set out at paragraphs [22], [32] and [60] above, s 21B should not be construed as abrogating or confining the prosecutorial discretion regarding the evidence to be called at a trial, or at a retrial. That the prosecutorial discretion is preserved (for a trial) is confirmed by the introductory words of s 21B(2), namely: 'If a vulnerable witness is to give evidence'. Section 21E does not, in relation to the later proceedings, contain those express words, and the only express qualification in s 21E(4) for admission of the audio-visual record in evidence on a retrial is relevance. However, there is no warrant for abrogation or limitation of the prosecutorial discretion on a retrial by s 21E, where none operates at the initial trial by s 21B. Permitting the prosecutor to decide, in the exercise of their ordinary discretion, that a vulnerable witness whose evidence was recorded under s 21E at the initial

trial, is not to be called at a retrial (because their evidence is unreliable), is not inconsistent with the purposes of Part 3 of the Act.

[85] Ordinarily, where a special sitting is held, an audio-visual recording will be made of the vulnerable witness's examination, it will be admitted in evidence and re-played to the jury at the trial. That is, all the powers in s 21B(2)(b) would be exercised.

[86] In accordance with our construction of s 21E, on a retrial, the Court may admit the audio-visual recording of all of the vulnerable witness's evidence (including any recorded statement, their examination at the special sitting and any oral evidence given at the trial) in evidence at the retrial.

The Queen v Majak

[87] In *The Queen v Majak* [2022] NTSC 57, the complainant, a vulnerable witness, had been examined at a special sitting, of which an audio-visual recording was made. Before the trial, the Defence applied for her to be 'recalled' to be cross-examined about certain matters. The Crown opposed the application. The parties, and consequently the Court, proceeded on the assumption that it was an application to recall a witness. No consideration was given to the effect of s 21B or the matters the subject of this reference. It is of no assistance in the resolution of those matters and, for the reasons set out above, the assumption was erroneous.

Disposition

[88] For the above reasons, the questions on the reference are answered as follows.

[89] Question 1: Where, pursuant to s 21B(2)(b) of the Act, an audio-visual recording of a vulnerable witness's evidence has been made and the recording has been admitted into evidence and re-played as part (but not the whole) of the witness's evidence at trial, or it is proposed that that will occur, the Crown may call the witness to give additional evidence at the trial without the leave of the Court to do so.

[90] Question 1.1: Where such a vulnerable witness has completed their evidence at trial, either by the re-playing of the audio-visual recording only, or by the re-playing of the recording and additional evidence at the trial, and the prosecution subsequently in the trial seeks to adduce further evidence from the witness, the leave of the Court is required for the witness to be recalled, in accordance with the general law as to the recalling of witnesses.

[91] Question 2: The answers to Question 1 do not differ in the event of a retrial.

[92] Question 3: Where, pursuant to s 21B(2)(b) of the Act, an audio-visual recording of a vulnerable witness's evidence has been made, the recording has been admitted into evidence and re-played as part of the witness's evidence at trial, and the witness is also called to give further evidence at the trial, there are no restrictions (additional to the usual restrictions applicable to witnesses in criminal trials) on:

3.1: the evidence that may be adduced in examination-in-chief of the witness; and

3.2: the evidence that may be adduced in cross-examination of the witness.

However, that the witness has been examined at a special sitting under s 21B(2)(b) of the Act, and the content of that examination, may be relevant factors in the application of the usual restrictions.

[93] On the basis of the answers to the questions referred, in this case, in addition to the admission of the audio-visual recording of SS's examination at the special sitting, and it being re-played to the jury, the Crown may call SS to give additional evidence at the trial about what she said to Dr Delima without the leave of the Court. The Defence may cross-examine SS about that evidence and about any other matters, without the leave of the Court. SS's evidence, in examination-in-chief, cross-examination and re-examination, is subject to the usual restrictions applicable to witnesses in criminal trials. That she has been examined at a special sitting under s 21B(2)(b) of the Act, and the content of that examination, may be relevant factors in the application of the usual restrictions.
