

# CHILDRENS COURT OF QUEENSLAND

CITATION: *R v RSM* [2021] QChC 3

PARTIES: **R (respondent)**  
**V**  
**RSM (applicant)**

FILE NO/S: D45/2019

DIVISION: Criminal

PROCEEDING: 590AA Application

ORIGINATING COURT: Childrens Court of Queensland at Maroochyore

DELIVERED ON: 22 February 2021

DELIVERED AT: Kingaroy

HEARING DATE: 15 June 2020 and 16 October 2020

JUDGES: Long SC DCJ

ORDER: **Evidence of the statements made or given by the applicant to police officers on 8 April 2019 is not admissible in the trial of the applicant upon the charge of arson on 8 April 2019.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE OF AN INTERVIEW – EXCLUSIONS: IMPROPERLY OBTAINED EVIDENCE – CONFESSIONS AND ADMISSIONS – ADMISSIBILITY – DISCRETION TO EXCLUDE – QUESTIONING OF ABORIGINAL PEOPLE AND TORRES STRAIT ISLANDERS – QUESTIONING OF CHILDREN – SUPPORT PERSON – where the applicant seeks exclusion of evidence of a recorded interview conducted with her by investigating police on 8 April 2019 – where the applicant seeks exclusion of the interview on the basis of unfairness to the applicant for it to be admitted and on public policy grounds – where the applicant contends that requirements of the Youth Justice Act 1992, the Police Powers and Responsibilities Act 2000 and the Police Powers and Responsibilities Regulation 2012 have not been complied with. – Whether the evidence is admissible pursuant to s 29 the Youth Justice Act 1992

LEGISLATION: *Criminal Law Amendment Act 1892* (Qld), s10.  
*Police Powers and Responsibilities Act 2000* (Qld) ss 420,

421, Schedule 6.

*Police Powers and Responsibilities Regulation 2012* (Qld), s 34.

*Youth Justice Act 1992* (Qld), ss 3, 29, Schedules 1 and 4.

CASES:

*Bunning v Cross* (1978) 141 CLR 54.

*McDermott v The King* (1948) 76 CLR 501.

*Pollard v The Queen* (1992) 177 CLR 177.

*R v Ireland* (1970) 126 CLR 321.

*R v Swaffield* (1998) 192 CLR 159.

COUNSEL:

N Turner for the applicant

AQ Stark for the respondent

SOLICITORS:

Aboriginal and Torres Strait Islander Legal Service for the applicant

Director of Public Prosecutions for the respondent

**Introduction**

- [1] The applicant is charged on indictment with an offence of arson of a dwelling house at Coes Creek on 8 April 2019.
- [2] By this application, she seeks the exclusion of evidence of an interview conducted with her by investigating police and recorded between 10.15am and 10.55am on 8 April 2019.
- [3] It is common ground that at the time of that interview, the applicant was aged 13 years and eight months, in foster care under the supervision of the Department of Children's Services, completing Grade 8 at school and able to read and write, but having never previously been the subject of any police investigation.
- [4] Although this application was made and heard upon an indictment in which the applicant was singularly charged before this Court, there is another female juvenile co-offender who has also been charged. More recently, a further indictment has been presented in this Court which charges the applicant and her co-accused with the same offence of arson of a dwelling house at Coes Creek on 8 April 2019. It is common ground that each of the defendants was then living with foster carers at the carers' residence. It was this residence which was the subject of the offence, with resultant extensive damage. Also as a consequence of the fire, two dogs were killed and the foster mother suffered smoke inhalation, singed hair and minor burns to her face and arms. Her 23 year old son who also lived at the residence, suffered minor burns to his hands. It is also noted that there was another foster child in residence, a nine year old boy.
- [5] The defendants shared a downstairs bedroom of the two-storey house and the evidence indicates a largely good relationship with the foster carers and without there being any "real issues other than normal pre-teenage stuff".
- [6] However, in the three days prior to the fire (from Friday to Sunday), the defendants had been absent from school and home. Their foster mother had spoken to them about their absences but without there being any arguments. On the night prior to the fire, Sunday night, the defendants were at a friend's residence at Woombye and the applicant told her foster mother, in a telephone call, that they were absent again

because she would not let them visit their friends. The applicant told friends she wanted to set the house on fire. She laughed when saying this and others present also laughed with her. That evening their foster mother collected the defendants from the Woombye residence and drove them home.

- [7] The prosecution case places reliance on the interview conducted with the applicant to particularly establish that on the Monday morning shortly before 8:00am, the applicant's co-defendant set her bra padding on fire with a lighter and placed the padding on her bed. The applicant then used a lighter and set her bed blanket alight and both girls climbed out their bedroom window and left with packed bags. Also and having regard to the applicant's age, reliance is placed on some assertions by her in the interview as to knowing that what she did was wrong.
- [8] At the time the residence was set alight and the defendants left, remaining at the residence were their foster mother, her 23 year old son, the nine year old foster child and the dogs.
- [9] The defendant girls were located by Constable Murphy at the Nambour Train Station shortly after 11:30am. He informed both of them that they were under arrest for the fire at the house and then drove them to the Nambour Police Station, where they were left in the custody of Senior Constables Coffey and Andrejic. Arrangements were made for a Justice of the Peace ("the JP") to attend at the Nambour Police Station and each child was subsequently interviewed in the presence of the JP. The applicant's co-offender was interviewed first.
- [10] Further, it is common ground that there was no contact or attempted contact prior to the conduct of those interviews by any police officer with the Aboriginal and Torres Strait Islander Legal Service ("ATSILS") or Legal Aid Queensland ("LAQ") or the Department of Child Safety ("DCS"), despite knowledge of the availability of ready telephone contact with each entity. As was confirmed by a matter of further common ground, that after the applicant was interviewed, the following notifications were made in respect of her situation:
- (a) At 12.47, Caloundra Child Safety (by voicemail);
  - (b) At 13.45, Youth Justice (by email);
  - (c) At 13.46, ATSILS (by email);

- (d) At 14.26, the applicant's mother (by telephone); and
- (e) At 15.52, DCS Caloundra (by unknown means).

### **The application**

[11] Initially in written submissions the applicant sought exclusion of the interview on the basis that “it would be unfair to the defendant for it to be admitted”. Although no specific reference was made to an exercise of discretion based on public policy considerations, as have been particularly recognised since the decisions in *R v Ireland*<sup>1</sup> and *Bunning v Cross*,<sup>2</sup> the submissions proceeded on the basis that the applicant was not

“afforded multiple legislative and procedural protections designed to protect her established rights and to provide her special/additional protections because of her status as a child and an Aboriginal person”.

Whilst it has been recognised that consideration of the separate bases for the exercise of judicial discretion to exclude such evidence may tend to overlap,<sup>3</sup> it is necessary to note that to the extent that the basis is in unfairness and other than upon consideration of the public policy considerations, the concern is with the potential use of the evidence and accordingly, as that relates to the right of an accused to a fair trial.<sup>4</sup> However and in that context it has been further noted that:<sup>5</sup>

“while unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted.”

[12] As this matter proceeded and particularly because of the underlying reference to lack of compliance with “legislative and procedural protections”, a focus was upon the public policy basis upon which judicial discretion might be exercised to exclude such evidence. However, it should also be noted that in *R v Swaffield*, it was further observed:<sup>6</sup>

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<sup>1</sup> (1970) 126 CLR 321.

<sup>2</sup> (1978) 141 CLR 54.

<sup>3</sup> *R v Swaffield* (1998) 192 CLR 158 at [74].

<sup>4</sup> *Ibid* at [53] – [54].

<sup>5</sup> *Ibid* at [54].

<sup>6</sup> *Ibid* at [60].

“In *Foster v R*, which was decided two years before *Ridgeway*, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said that, although in many cases the two discretions will overlap, their focus is different.

In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on “large matters of public policy”.

Their Honours added that in cases where both discretions are relied upon, “it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused”.

[13] Prior to the initial hearing of this application, no reference had been made to the potential application of s 29 of the *YJA*. That is perhaps consistent with what appears to be an absence of any assistance to be gained from other identified instances of consideration of that provision. Unsurprisingly and as the matter developed, the application of s 29 of the *YJA* was adopted for the applicant.

[14] Since 1 July 2003,<sup>7</sup> s 29 of the *YJA* has provided as follows:

**“29 Support person must be present for statement to be admissible**

- (1) In a proceeding for an indictable offence, a court must not admit into evidence against the defendant a statement made or given to a police officer by the defendant when a child, unless the court is satisfied a support person was present with the child at the time and place the statement was made or given.
- (2) Subsection (1) does not apply if—
  - (a) the prosecution satisfies the court there was a proper and sufficient reason for the absence of a support person at the time the statement was made or given; and

*Examples—*

- 1 There was a reasonable suspicion that allowing a support person to be present would result in an accomplice or accessory of the relevant person taking steps to avoid apprehension.

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<sup>7</sup> As then substituted by Juvenile Justice Amendment Act 2002 No. 39 s 7, as section 28 of the *Juvenile Justice Act 1992 (Qld)*.

2 A support person was excluded under the Police Powers and Responsibilities Act 2000.

- (b) the court considers that, in the particular circumstances, the statement should be admitted into evidence.
- (3) This section does not require that a police officer permit or cause to be present when a child makes or gives the statement a person the police officer suspects on reasonable grounds—
  - (a) is an accomplice of the child; or
  - (b) is, or is likely to become, an accessory after the fact;
 

in relation to the offence or another offence under investigation.
- (4) This section does not limit the common law under which a court in a criminal proceeding may exclude evidence in the exercise of its discretion.”

[15] Particular reference is made to the youth justice principles relating to dealing with children in the criminal justice system, including principles 4, 6 and 16 of those set out in the Charter of youth justice principles in Schedule 1 of the *Youth Justice Act 1992* (“YJA”).

[16] In addition, particular attention is drawn to the provisions of ss 420 and 421 of the *Police Powers and Responsibilities Act 2000* (“PPRA”) as those sections were at the time of the conduct of this interview, as follows:

**“420 Questioning of Aboriginal people and Torres Strait Islanders**

- (1) This section applies if—
  - (a) a police officer wants to question a relevant person; and
  - (b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait Islander.
- (2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must—
  - (a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and
  - (b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

- (3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.
- (4) The police officer must not question the person unless—
  - (a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and
  - (b) a support person is present while the person is being questioned.
- (5) Subsection (4) does not apply if the person has, by a written or electronically recorded waiver, expressly and voluntarily waived his or her right to have a support person present.
- (6) If the police officer considers the support person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

#### **421 Questioning of children**

- (1) This section applies if—
  - (a) a police officer wants to question a relevant person; and
  - (b) the police officer reasonably suspects the person is a child.
- (2) The officer must not question the child unless—
  - (a) before questioning starts, the police officer has, if practicable, allowed the child to speak to a support person chosen by the child in circumstances in which the conversation will not be overheard; and
  - (b) a support person is present while the child is being questioned.
- (3) However, the child may not choose as a support person a person against whom the offence is alleged to have been committed.
- (4) If the police officer considers the support person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during the questioning.”

[17] The other legislative provision to which reference is made is s 34 of the *Police Powers and Responsibilities Regulation 2012* (“PPRR”), which provided as follows:

**“34 Ensuring support persons understand role**

- (1) Before a police officer questions a relevant person in the presence of a support person, the police officer must—
  - (a) give the support person information in the approved form about the role of support persons during questioning; and
  - (b) ensure, as far as practicable, that the person understands the nature of the support person’s role; and
  - (c) if the support person asks, give an explanation of anything relevant to the person’s role as a support person; and
  - (d) inform the support person of the identity of the relevant person and why the person is being questioned.
- (2) The information must include the following—
  - (a) a summary of sections 427, 428, 429 and 430 of the Act;
  - (b) a statement that the support person must act in the best interests of the relevant person;
  - (c) a statement that, unless the support person is a lawyer, the support person must not provide legal advice to the relevant person but may ask the relevant person questions to ensure the relevant person understands—
    - (i) that the person may ask for a lawyer to be present during questioning or at any time before questioning ends; and
    - (ii) that the person is not obliged to say anything during questioning; and
    - (iii) that anything the relevant person says during questioning may be used in evidence in a court; and
    - (iv) what is said by a police officer during questioning.”

[18] In addition, reference is made to a number of provisions found in various police operational manuals and which also touch on the issues which are the subject of

these legislative provisions. As far as it is necessary to do so, later reference will be made to relevant provisions of such manuals.

- [19] The particular concern of this application is with the fact that, in the circumstances, this interview was conducted at all, rather than with what occurred in the course of it, or any concern as to circumstances giving rise to any potential impact upon the reliability of the admissions which the prosecution seek to rely upon. The underlying concern may be seen as a particular reflection of the following principle stated in the Charter of youth justice principles, in Schedule 1 of the *YJA*:

“4 Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.”

As is noted in s 3 of the *YJA*, the Charter of youth justice principles “underlie the operation of [the] Act” and accordingly provide a rationale for the protections set out in s 29 of the *YJA*.

- [20] As to the general importance of compliance with the statutory provisions of the *PPRA* and *PPRR*, in relation to the discretionary exclusion of evidence obtained by police questioning of suspects, reference may be made to *Pollard v The Queen*.<sup>8</sup>

- [21] A critical issue which arises is in understanding the effect of the definition of “support person”: as referred to in this legislative provision and also in the provisions of s 421 of the *PPRA* in relation to police questioning of children. This is because for s 29 of the *YJA*, the definition in Schedule 4 of that Act is by way of reference to the definition in Schedule 6 of the *PPRA*. Relevantly and at the time this interview was conducted, that definition was:

“*support person* means—

- (a) for an Aborigine or Torres Strait Islander who is at least 17—
  - (i) an adult relative or another adult chosen by the person; or
  - (ii) a lawyer acting for the person; or
  - (iii) a representative of a legal aid organisation; or

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<sup>8</sup> (1992) 177 CLR 177, particularly at 183-4, 195-197, 208-210, 223-224 and 234- 237.

- (iv) a person whose name is included in a list of support persons and interpreters; or
- (b) for a child—
  - (i) a parent or guardian of the child; or
  - (ii) a lawyer acting for the child; or
  - (iii) a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or
  - (iv) an adult relative or friend of the child who is acceptable to the child; or
  - (v) if the child is an Aborigine or a Torres Strait Islander and no-one mentioned in subparagraphs (i) to (iv) is available—a person whose name is included in the list of support persons and interpreters; or
  - (vi) if no-one mentioned in subparagraphs (i) to (v) is available—a justice of the peace, other than a justice of the peace who is a member of the Queensland Police Service or a justice of the peace (commissioner for declarations);...

[22] The interview with the applicant occurred between 10.15am and 10.55am on Monday 8 April 2019.<sup>9</sup> It was common ground on this application that:

- (a) there was ability prior to the interview with the applicant for the police officers to have contacted the persons and organisations who were contacted subsequently to that interview;
- (b) the applicant is of Aboriginal descent and was at the time understood to be of Aboriginal descent and as well, a child.
- (c) because she was then under the care of the Chief Executive, the representatives of the Chief Executive in the Department of Child Safety were effectively able to be contacted as her guardian.<sup>10</sup>

### **The contentions**

[23] Initially in its written submissions, the prosecution position was couched as follows:

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<sup>9</sup> T 15/6/20: 1-22.46.

<sup>10</sup> See: *Child Protection Act 1999* (Qld), s 61.

“The respondent concedes that the interviewing police failed to comply with legislative provisions, at least clearly with respect to failures of notification for notifying the legal aid organization (and interviewee of that notice) pursuant to section 421(2) (questioning of children) *Police Powers and Responsibilities Act 2000* (“PPRA”). (There is a similar provision in Section 420 with respect to questioning of Aboriginal and Torres Strait Islanders, but it is excepted where the police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally). However, this is less clear with respect to the other provisions or operational procedures cited by the applicant’s outline of submissions, at least in degree in a manner relevant to the exercise of the court’s discretion. Ultimately, the respondent submits that the court should not exercise its discretion to exclude the interview on the basis of fairness or public policy.”<sup>11</sup>

[24] However and in supplementary written submissions,<sup>12</sup> that concession was withdrawn, particularly because “the present section 421(2) was not in force at the time of the interview and was only added by legislative amendment subsequent to the interview”. As it now operates that sub-section provides:

**“421 Questioning of children**

- (2) Unless the police officer is aware the child has arranged for a lawyer to be present during questioning, or has spoken, under subsection (3)(a), to a lawyer acting for the child, the police officer must—
  - (a) inform the child that a representative of a legal aid organisation will be notified that the child is in custody for the offence; and
  - (b) as soon as reasonably practicable and before questioning starts, notify or attempt to notify a representative of the legal aid organisation that the child is in custody for the offence.”

[25] The respondent’s position is then summarised as follows:

The respondent refers to its previous outline of submissions. The respondent withdraws the concession that the interviewing police failed to comply with relevant legislative provisions, particularly with respect to failures of notification for notifying the legal aid organization (and interviewee of that notice) pursuant to section 421(2) (questioning of children) *Police Powers and Responsibilities Act 2000* (“PPRA”). This is because the present section 421(2) was

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<sup>11</sup> Respondent’s written rules filed 10/6/2020. This was a reflection of reliance for the applicant also of the subsequently amended provisions.

<sup>12</sup> Respondent’s supplementary written submissions filed 11/06/2020 at 1.

not in force at the time of the interview and was only added by legislative amendment subsequent to the interview.

The respondent instead submits that the conduct of the interviewing officer does not disclose any clear contravention of the relevant legislative provisions or operational procedures cited by the applicant's outline of submissions. At most, it would be limited to disclosing diversion from those provisions or procedures as a question of degree or of a technical nature, which would obviously favour the conclusion that the court should not exercise its discretion to exclude the interview on the basis of fairness or public policy."

- [26] As to the application of s 29 of the *YJA*, the contention is that the JP who the police arranged to attend did not, in the circumstances, fulfil the definition of "support person" as it related to the applicant as a child, because he could only so qualify "if no-one mentioned in sub-paragraphs (i)-(v) is available", and because of the availability of persons who were subsequently contacted and who would have variously satisfied a number of the earlier sub-paragraphs in that definition. In particular the focus is upon the availability of:

a guardian of the child, pursuant to sub-paragraph (b)(i); and

a person employed by an agency whose primary purpose is to provide legal services, pursuant to sub-paragraph (b)(iii).

However, the position in the first respect, unlike the second, is complicated by evidence asserting a misunderstanding as to the legal effect of the child's situation and that her foster parents were her guardians and not, as the complainants in respect of the allegation under investigation, able to fulfil the role of support person.<sup>13</sup>

- [27] For the applicant, this application was particularly approached upon the basis of the ready availability of a representative of the Chief Executive and lawyers who could have fulfilled the role of support person. Each of the investigating officers conceded awareness that each of the organisations, Legal Aid Queensland and the Aboriginal and Torres Strait Islanders Legal Service, had a "24 hour phone hotline" for contact in respect of defendants in custody and that there was no urgent or pressing need to proceed with the interview.<sup>14</sup>

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<sup>13</sup> See paragraph 28.

<sup>14</sup> T 15/6/20: 1-45.24-47 and 1-73.44-1-74.20.

[28] However, the respondent's position is premised upon the contention that, in the circumstances, the JP did nevertheless qualify as a support person, as defined. The contention is that none of the preferred alternatives was available in a "practical, real and timely sense", because of the choices of the applicant to decline contact with any such person and "ultimately a choice to accept [the JP] himself".<sup>15</sup> This is a reflection of the approach described in the evidence of the police officers. As described by DSC Coffey, it was as follows:<sup>16</sup>

"MR STARK: The – at that point, the – those females were under arrest?

SCON COFFEY: Yes.

MR STARK: So obviously were suspects in relation to - - -?

SCON COFFEY: That's right.

MR STARK: - - - the incident?

SCON COFFEY: Suspects, and witnesses now.

MR STARK: Now, upon presentation you could assess them both to be juveniles?

SCON COFFEY: That's right.

MR STARK: In terms of ethnicity, could you assess them to be Aboriginal in ethnicity?

SCON COFFEY: Yes.

MR STARK: And that's at the outset?

SCON COFFEY: Yes.

MR STARK: Now, did you make arrangements for a support person to be present for or to attend for both defendant juveniles?

SCON COFFEY: Yes, I made arrangements for it. Yes. Yeah.

MR STARK: Right. Well, firstly, who – ultimately, who was arranged to be the support person?

SCON COFFEY: Well, the support person ended up being [...]. I don't know his last name.

MR STARK: Okay?

SCON COFFEY: He's a – a – the coordinator of the JPs at Nambour.

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<sup>15</sup> T 6/10/20:1-22.20-31.

<sup>16</sup> T 15/6/20: 1-23.33 – 1-25.30.

- MR STARK: So a justice of the peace who was coordinator of the Nambour justices of the peace?
- SCON COFFEY: That's right, yes.
- MR STARK: So had you had contact or knowledge of him before?
- SCON COFFEY: Yeah. Yeah. He's in Nambour all the time. He does the voluntary JPing over at the court house, and we've used him before. He's on a list we have with JPs.
- MR STARK: So you mentioned a list; was that a list of JPs?
- SCON COFFEY: Yes.
- MR STARK: Now, if I can take you through – well, ask you about the process by which you arranged that person - - -?
- SCON COFFEY: Yeah.
- MR STARK: - - - that is, [the JP] , to be the support person. Did you speak to [RSM] about a support person for her?
- SCON COFFEY: Yes.
- MR STARK: Now, as close as possible to the actual words that you can recall, or as in her actual words or the actual words of the conversation, can you tell us what that conversation was, tell us what was said by you to her and from – by you to – her to you?---
- SCON COFFEY: Yeah. Yeah. I asked her that we needed a support person in the inter – interview. The process was to interview her. I said, "The first person we have to do is your parents." She said she didn't want her parents. I said, well, the foster parents, but she couldn't use the foster parents; they were the victims of the matter. I said, "Aboriginal and Torres Strait Islanders? Legal Aid?" and she said she didn't want anything, anyone at all. And I said, "Well, we can supply a JP." I also to her she could have family members or anyone – anyone she wanted to have either. She said no and she said she was happy to have a JP.
- MR STARK: All right. So you asked her about her natural parents?
- SCON COFFEY: Yes. That's the usual - - -

MR STARK: And it's in the plural, or one or the other, or just - - -?

SCON COFFEY: "Your parents."

MR STARK: Right?

SCON COFFEY: Yeah.

MR STARK: And she said no?

SCON COFFEY: No.

MR STARK: And you said you asked her about Aboriginal and Torres Strait Islander Legal Service?---

SCON COFFEY: Yes. I remember saying to her too, "We will cover this again in the interview," yeah.

MR STARK: And she said no?

SCON COFFEY: No. No.

MR STARK: She didn't want anything from there?

SCON COFFEY: No, didn't want anyone from Legal Aid.

MR STARK: All right. So sorry, I – that's a point I wanted to clarify. You said Aboriginal and Torres Strait Islander Legal Service and Legal Aid?

SCON COFFEY: Yeah, Legal Aid.

MR STARK: So you asked about both?

SCON COFFEY: Yeah. Yeah. And then any members of the family, any of her, you know, adult – they had to be an adult.

MR STARK: All right. So family member?

SCON COFFEY: Yeah. And she said - - -

MR STARK: Did you ask about whether she wanted an adult friend or - - -?

SCON COFFEY: Yeah. Yeah.

MR STARK: And what was her res - - -?

SCON COFFEY: And she didn't want anyone, no.

MR STARK: All right. So she didn't want her parents, ATSILS or Legal Aid - - -?

SCON COFFEY: No.

MR STARK: - - - a family member or friend?

SCON COFFEY: No.

- MR STARK: And so then you asked her about having a justice of the peace present?
- SCON COFFEY: That's correct, yeah.
- MR STARK: And what was her response for that?
- SCON COFFEY: She said, "Yeah." I said, "That's – that's – that's all we've got - - -"
- MR STARK: Right?
- SCON COFFEY: "- - - a justice of the peace."
- MR STARK: Did you ask her about – did you refer – ask her about or refer to anyone from the Department of Child Safety?
- SCON COFFEY: No, I didn't.
- MR STARK: Right, and why was that?
- SCON COFFEY: Well, we never do ask for Child Safety. Usually in this state, the guardian would be the foster parents. They make all the day-to-day issues. They make all the day-to-day decisions of that child, yeah.
- MR STARK: All right. So in a sense, you believed – her guardians were her foster parents, was your reason?
- SCON COFFEY: That's correct, yes."

DSC Andrejic gave the following evidence:<sup>17</sup>

- MR STARK: Yes. And – now, given the division of labour or the division between the two of you of who was interviewing which child, you did not speak to the defendant juvenile [RSM], did you?
- CON ANDREJIC: I was not privy to conversations in relation to support persons
- MR STARK: Yes. Did you have such discussion nor conversation with [the co-accused]?
- CON ANDREJIC: Yes, I did.
- MR STARK: All right. But as I said, you weren't privy to conversation with - - -?
- CON ANDREJIC: Not to my recollection at all.

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<sup>17</sup> T 15/6/20: 1-58.25 – 1-59.13.

- MR STARK: Well, were you present for any such conversation?
- CON ANDREJIC: No.
- MR STARK: As you've said, ultimately, a justice for peace was used?
- CON ANDREJIC: That's correct.
- MR STARK: [the JP]?
- CON ANDREJIC: Yep.
- MR STARK: And who contacted [the JP]?
- CON ANDREJIC: I contacted him through the courthouse, as he was on – instructed there for the day and he's been a previous justice of the peace that's been used at Nambour and, as a result, he was at the courthouse and available to assist us.
- MR STARK: If you can recall, was that your decision or was it a decision told to you by Officer Coffey or - - -?
- CON ANDREJIC: In relation to contacting him.
- MR STARK: Yes?
- CON ANDREJIC: It would have been a joint decision. The way we go in relation to JPs is it's – generally, we have a list there and it's whoever is available first. I do recall, on this account, contacting multiple JPs without any success, and then I contacted the courthouse to see if they had a JP who was available and [the JP], who has been used by Nambour before, was available and happy to come and help.
- MR STARK: Was that this particular matter, did you say?
- CON ANDREJIC: Yes.
- MR STARK: Was he – I so you contacted – what – multiple JPs from a list?
- CON ANDREJIC: Yes, from a list at Nambour.
- MR STARK: Right. And [the JP] was present at the – was at the courthouse?
- CON ANDREJIC: Yes, that's correct."

[29] The evidence of DSC Coffey was directed at his recollection of an unrecorded interaction with the applicant on 8 April 2019. However, and as he said he had

indicated to the applicant, he did return to the matter in the recorded interaction with her. That began as follows:

“SCON COFFEY: It’s okay. Okay, today’s date is the 8<sup>th</sup> of the 4<sup>th</sup> which is April, 2019. My name is Rob Coffey, I’m detective from the Child Protection Unit here at Nambour, my registered number is 1-288-3. I’m here in the company of ...

SCON COFFEY: [RSM]. Okay, ... what I wish to speak to you about is a matter of are, a house caught fire today in Coes Creek Road at Nambour, okay. The time now is 10:15 AM, you agree today is Monday the 8<sup>th</sup> - -?

[RSM]: Yep.

SCON COFFEY: Of April, 2019?

[RSM]: Yes.

SCON COFFEY: Do you agree we’re at Nambour Police Station?

[RSM]: Yes.

SCON COFFEY: And do you agree the time is 10:15?

[RSM]: Yes.

SCON COFFEY: Okay. You know what I wish to speak to you about but before I ha-, ah, talk to you about that whatsoever - -.

[RSM]: Mmhmm.

SCON COFFEY: I have to give you all your rights. Okay. First one is, you have the right to remain silent, means you do not have to say anything - -.

[RSM]: Mm.

SCON COFFEY: Answer any questions or make any statements. However, if you do say something or make any statements, it can later be used in court as evidence. Do you understand that [RSM]?

[RSM]: Yes.

SCON COFFEY: Okay. Explain that to me. Okay. I’ll just go through it - -.

[RSM]: Explain what you just said?

SCON COFFEY: Yeah.

[RSM]: Um - -.

SCON COFFEY: You have the right to remain silent, what does that mean to you?

[RSM]: Ah, to be able not to speak if you don't want to.

SCON COFFEY: That's right, yeah. However, if you do say something, it'll - - .

[RSM]: It will be used - - .

SCON COFFEY: That's right.

[RSM]: On the court for evidence.

SCON COFFEY: Okay. And you're happy with that?

[THE JP]: I am.

SCON COFFEY: Us - - .

[THE JP]: Yes.

SCON COFFEY: Okay. You also have the right to contact a solicitor of your choice, let him or her know where you are, what you're here for and to have them here present. Do you wish to contact a solicitor? Do you know what a solicitor is?

[RSM]: No.

SCON COFFEY: Do you know, okay, so, I'll just tell you, let's say ah, they give you advice or, or legal advice, do you know what a judge is?

[RSM]: Mmhmm.

SCON COFFEY: Okay. Do you know what a, yeah it's sort of like a, a solicitor is, is someone that ah, has legal advice, okay.

[RSM]: Mmhmm.

SCON COFFEY: Okay. Do you wish to contact a solicitor of your choice? Okay.

[NB:At about this point the applicant shakes her head].

[RSM]: Mmhmm.

SCON COFFEY: You happy that she understands what I'm saying [JP]?

[THE JP]: I believe she does understand this.

SCON COFFEY: Yep. And you also have the right to contact a support person, okay, let him or her know where you are, what you're here for or to have them here, present. You have [the JP] here today because prior to ah, this interview, I

asked you, did you want me to contact your mum or your dad or, or anyone? And you said, no, okay. To, to be at the interview, you didn't know and I said well, we can get a J-P, okay. Are you happy to have [the JP] here?

[RSM]: Yeah.

SCON COFFEY: As you support person?

[RSM]: Yep.

SCON COFFEY: Okay. Do you agree that um, you've been in the room here with [the JP] for a while before the interview by yourself without police?

[RSM]: Yep.

SCON COFFEY: And you've spoke to each other, I introduced you to him.

[RSM]: Mmhmm.

SCON COFFEY: Okay. [the JP], do you agree with all of that?

[THE JP]: I do agree. Yes.

SCON COFFEY: And you've read that form, [the JP], that information?

[THE JP]: I have read the form, yes.

SCON COFFEY: As a support person? Okay. Any time during the interview ah, if you don't think that I've explained it properly or vice versa - -.

[THE JP]: Yes.

SCON COFFEY: Feel free to, okay. But your role is exactly that, a support person, okay. So, you're not here to answer questions for [RSM].

[THE JP]: No.

SCON COFFEY: Okay. Is that okay?

[RSM]: Mmhmm."

[30] That interchange is to be viewed in the context of evidence that after the JP had been arranged and attended to be the support person for the applicant and her co-accused and after the completion of the interview in which he acted as a support person for the other child, he then spoke with the applicant for some part of a period

of 12 minutes between 10.03am and 10.15am, in the room in which the recorded interview was then conducted.<sup>18</sup>

- [31] He referred to a form, with which he was familiar, being present in that room, a copy of which was admitted as Exhibit 2. For present purposes, it may be noted that the information supplied in that form contained, amongst other things, a recitation of the requirements of s 34(2)(c) of the *PPRR* and that the information required by s 34(2)(b) was included as the last sentence of the first paragraph of the form, as follows:

“Your role as a support person during the questioning of a person includes ensuring that as far as possible the person is questioned in a way that avoids any situation or circumstances which may give rise to a suggestion of oppression, unfairness, fear or dominance by a police officer, or to any other injustice. Your role also includes ensuring that as far as possible the person is questioned in a way that avoids any situation or circumstance whereby he or she may be overborn, oppressed or otherwise unfairly or unjustly treated. In your role as a support person you must act in the best interests of the person.”

- [32] This application was not concerned with what appears to be the main import of that passage, in avoidance of circumstances which might be relevant to the issue of voluntariness of the statements made by a suspect to a police officer. As was recognised in *McDermott v The King*<sup>19</sup> and subsequent authority, that question relates to an exercise “of a free choice to speak or remain silent”,<sup>20</sup> and not subject to any intimidation or inducement, as may engage s 10 of the *Criminal Law Amendment Act 1892*.
- [33] However, and as is clear from the requirements of s 34(2)(b) of the *PPRR* and the other legislative requirements for explanation by an interviewing police officer to suspects to be questioned as to the commission of indictable offences, of their “rights”,<sup>21</sup> the best interests of such a person will include having an appropriate understanding of those rights. That is, a legislatively recognised concern that not only is there a free exercise of choice to speak but also one that is appropriately informed.

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<sup>18</sup> T 15/6/20:1-84.5-1-86.15 and Exhibit 3.

<sup>19</sup> (1948) 76 CLR 501.

<sup>20</sup> See *R v Swaffield* (1998) 192 CLR 159 at [50].

<sup>21</sup> Eg: s 431 of the *PPRA* and as set out in Part 5 of Schedule 9 of the *PPRR*, pursuant to s 28 of the *PPRR*.

[34] It is also necessary to understand that in respect of some types of suspect, there is recognition of particular disadvantage or vulnerability so as to require the addition of a “support person” in the process. And it is not just a matter of that addition being regarded as a requirement or necessary step to enable the investigatory desire of obtaining information and potentially admissions from the suspect but as a protective measure, having regard to the interests and rights of the suspect, including but not limited to the right to choose not to speak.

[35] The evidence of the JP in respect of how he fulfilled that role in this instance, was as follows:<sup>22</sup>

“MR STARK: And earlier you spoke in terms of your evidence of perhaps not discriminating between Aboriginal and non-Aboriginal person, but your role as a support person for an Aboriginal person involves providing support or – support – for support to them or protecting them against potential vulnerability?

[THE JP]: Supporting that person to me means that I go in there with an open mind, and I advise them of their rights – that is, that they – I’m there to see that they have not been offered any bribe or coerced in any way or offered anything or been stood over at any time by the police. When I first go into the room, some – occasionally, some of the police shut the door. Some of them don’t. And I always shut the door and have 10 to 15 minutes with each individual person.

MR STARK: And that’s speaking to them about your role as - - -?

[THE JP]: Speaking to them about the role that I’m there to look after their welfare, and, if, at any time, they don’t understand anything that’s said, either ask the police officer, or they can ask me to ask the police officer to clarify what they have said, so that the person being interviewed understands the question.

MR STARK: And, when you – and I – you think – I think you indicated a timeframe you usually speak to someone like that is – did you say the time?

[THE JP]: Between 10 and 15 minutes.

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<sup>22</sup> T 15/6/20: 1-81.30 – 1-83.37.

- MR STARK: And do you check or ask or ask questions as to whether there's – they would want anyone else?
- [THE JP]: Yes. I ask them if they – they wish to have parents or guardians or is there any family member that they wish to have. And, in this particular case, I did ask, because of the colour of her skin, if she was an Aboriginal. And she said yes. And I said, "Well, do you need something from Legal Aid, from Aboriginal Legal Aid, to represent you?" And she said to me no.
- MR STARK: Do you have any recollection of whether you explained of a role of Legal Aid or what a lawyer does or - - -?
- [THE JP]: I didn't explain the role of Legal Aid. But I just explained basically that a solicitor or barrister is very similar; that they would just look after her wellbeing.
- MR STARK: Right. And so you've said you have – you've given evidence in terms of you have a general – this is your general practice. But you specifically recall speak – with respect to this defendant... - - -?
- [THE JP]: Yes.
- MR STARK: - - - asking after a parent, asking after a family member - - -?
- [THE JP]: Solicitor.
- MR STARK: - - - and also, because of - - -?
- [THE JP]: Lawyer.
- MR STARK: And a solicitor?
- [THE JP]: A lawyer from Legal Aid.
- MR STARK: Legal Aid and ATSILS. And she dec – she – you've indicated that she - - -?
- [THE JP]: She said no. And I did ask her, if – after introducing myself at the end then – I had introduced myself and been introduced by Detective Coffey to her. And I asked if she still was happy for me to be there, and she said yes.
- MR STARK: All right. Have you had any – have – in your recollection, has any support person indicated they don't want you present?

[THE JP]: No.

MR STARK: Sorry. Any - - -?

[THE JP]: Yeah.

MR STARK: - - - suspect want – didn't want you present as a support person?

[THE JP]: No.

MR STARK: All right. If – would you continue – well, if someone were to say they didn't want you as a support person, what would you - - -?

[THE JP]: It - - -

MR STARK: What would be your practice in doing - - -?

[THE JP]: I would have to excuse myself.

MR STARK: All right. And – from – and tell police that they didn't want you?

[THE JP]: Yes. And I guess that they would give a reason.

MR STARK: All right. And now do you have any – also any recollection of whether you spoke to her in terms of your general practice of whether she'd been threatened or stood over or anything like that?

[THE JP]: Would you please repeat that?

MR STARK: You said before, in your role as a support person, that you checked that they haven't been threatened or bribed or stood over or - - -?

[THE JP]: Yeah.

MR STARK: Or – and you're there for them. Did you remember speaking to her in those sort of terms, or - - -?

[THE JP]: I do it as a matter of course every time.

MR STARK: Did you check whether she'd had any sort of refreshment or water or anything like that?

[THE JP]: Yes, she had done, because she still had a cup on the desk in front of her when I went up to the office.

MR STARK: All right?

[THE JP]: So I knew she'd had a drink. If they – if I don't see a glass or cup near them, I always ask them, in this early part of it, if they would like a water

or tea or coffee. And then I put it on the police to get it.

MR STARK: And earlier, before, you said it was your practice with support persons to – as a support person with a child, being – to be interviewed by police, you talk to them about if they don't understand anything to – sorry, what do you do in that case? What's your explanation to them if they don't understand anything? What - - -?

[THE JP]: If they don't understand it they can either ask the police or me and I will ask the police officer to explain it in a more – in a way that they understand it.

MR STARK: Right. And is that something you recall asking – do you have a particular recollection with this defendant?

[THE JP]: I don't recall having done that at all, myself.

MR STARK: Sorry, do you have a particular recollection of explaining that to this defendant?

[THE JP]: Yes, I do.

MR STARK: Right. Do you have any practice with respect to talking to an interviewee about whether they have to say anything or have some right – the right to silence?

[THE JP]: Yes. They have the right – they can answer questions, or they can say they decline to answer that question. They don't have to admit to anything at all.

MR STARK: Right. And do you recall talking to this defendant in those terms?

[THE JP]: I did.”

[36] The mixture of questions and responses directed to general practices and recollection as to what occurred in interactions with the applicant, is best understood in the context of this witness giving evidence on 15 June 2020, without the benefit of any contemporaneous notes (except the log which enabled him to identify some times of his involvement)<sup>23</sup> or any statement prepared at any substantially earlier point in time.<sup>24</sup> In cross-examination and after he referred to the

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<sup>23</sup> T 15/6/20: 1-90.34 – 38.

<sup>24</sup> T 15/6/20: 1-92.23 – 25.

information form (Exhibit 2) as a “cheat sheet” or point of reference, he relevantly gave the following evidence:

“MR TURNER: How does that cheat sheet relate to the conversation you have with each child?

[THE JP]: To introduce myself and tell them why I am there and my role as a JP, what it entails.

MR TURNER: And do you seek feedback from them as to whether they understand what your role is?

[THE JP]: I’m not sure what you mean by that.

MR TURNER: Do you – after you explain what your role is, do you ask them to explain it back to you?

[THE JP]: No, I don’t.

MR TURNER: Have you ever been given any training in relation to Aboriginal children and about asking them to explain back to you?

[THE JP]: I don’t generally ask them to explain it back to me, but I ask them if they understand it. If that’s what you’re meaning, that’s what happens<sup>25</sup>

...

MR TURNER: And you mentioned before that, when you were having that discussion with [RSM], before the interview, that you spoke to her about a solicitor and a barrister. Did you actually use that word solicitor?

[THE JP]: I did.

MR TURNER: Did you tell her what a solicitor was?

[THE JP]: A person with legal knowledge.

HIS HONOUR: Sorry, that’s what you said to her. Is that what you said to her or is that what you understand a solicitor to be?

[THE JP]: I would have told it to her it was a somebody on the legal – as a legal person.

HIS HONOUR: Mr Turner.

MR TURNER: Were you - - -?

[THE JP]: Who understands the law.

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<sup>25</sup> T 15/6/20: 1-91.37 – 1.92.21.

- MR TURNER: Was it – when you were having that discussion with her, was it your understanding that she understood what you meant when you used that word solicitor?
- [THE JP]: Well, when I asked her if she understood, each time she said yes.
- MR TURNER: Okay. Do you remember, during the interview – and you were given a transcript - - -?
- [THE JP]: I was.
- MR TURNER: - - - by Mr Stark previously. Do you remember that she is asked, during that interview, whether she knows what a solicitor is and she says no?
- [THE JP]: I do recall that.
- MR TURNER: Okay. Did you, at that stage, consider saying to the police officer, “Look, I think it’d be in her best interests if I go and have another discussion with her and explain to her what a solicitor is”?
- [THE JP]: Your question on that one is am I – did I or could I ask the police officer could I have time to have more an explanation with her.
- MR TURNER: Yeah. At the time that this occurred, this question and answer, did you think to yourself, “I might ask the police officer if we can have a break so I can go and explain to her what that means”?
- [THE JP]: Well, I think, in that case there, it would be – if she said she didn’t understand it, then it was up to the police officer to do that.
- MR TURNER: Okay?
- [THE JP]: It’s not up – really up to me to interrupt their interview as such, unless she indicates to me that she doesn’t understand the question.
- MR TURNER: Isn’t that her indicating she doesn’t understand the question?
- [THE JP]: She wasn’t talking to me. She spoke to the police officer.
- MR TURNER: So do you only interrupt if she specifically talks to you?
- [THE JP]: If she asks me, yes.

- MR TURNER: Okay. You're aware that your role as a support person means you must act in the best interests of that person?
- [THE JP]: I do.
- MR TURNER: And that – are you aware of whether your role as a support person is different when someone is an Aboriginal?
- [THE JP]: They all have to be treated equally, my idea. As it is, whether they be black, white or blue, they all have to be treated equal.
- MR TURNER: Okay. And that's the same whether they're a child or an adult?
- [THE JP]: Everybody's equal.
- MR TURNER: Okay?
- [THE JP]: The children may have to have more explanation to them than the adult, but they all should be treated as equal no matter what colour they are.<sup>26</sup>
- ...
- MR TURNER: Okay. So tell me, what rights of hers did you tell her she had?
- [THE JP]: What rights has she got? I told her that she can (a) answer every question, she can refuse to answer any questions, or she can ask even for legal aid at any time during the questioning.
- MR TURNER: Okay. Did you tell her that she could ask for legal aid prior to the questioning starting?
- [THE JP]: Yes.
- MR TURNER: Did you ask – well, what was her response to that?
- [THE JP]: And she said no, she didn't want it.
- MR TURNER: Is that when you had that discussion with her about solicitor and barrister?
- [THE JP]: That's the private part, yes.
- MR TURNER: It's the what part, sorry?
- [THE JP]: In the first 10 minutes – 15 minutes.

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<sup>26</sup> T 15/6/20: 1-92.37 – 1-93.41.

- MR TURNER: Okay. But you - - -?
- [THE JP]: I asked her then as well, and quite a lot of the questions – Detective Coffey asked several times if she understood.
- MR TURNER: Yeah, I’m not worried about the interview?
- [THE JP]: And then he referred back to me and said, “Did I believe that she understood?” And they were the same things that I had asked her in the earlier part, in the private conversation, and she said yes or no to.
- MR TURNER: Okay. So the question was about before the interview, but seeing as you’ve raised that, the – when she was asked did she know what a solicitor was, and she said no, do you remember that Senior Constable Coffey then went on to explain to her that it was sort of like a judge? Did you have a belief at that time that she understood was a solicitor was?
- [THE JP]: I don’t know what her beliefs were at that time.
- MR TURNER: Okay. But you said:
- I believe she does understand this.*
- And to be fair, I’ll say Senior Constable Coffey then turned to you and said:
- Are you happy that she understands what I’m saying, [the JP]?*
- And you say:
- I believe she does understand this.*
- [THE JP]: I did, because I - - -
- MR TURNER: What gave you - - -?
- [THE JP]: Well, in the early part of the interview, when I said to her does she understand these things, she said yes.
- MR TURNER: What part of – well, are you talking about the interview now or the discussion you had?
- [THE JP]: The discussion earlier.
- MR TURNER: Okay. But at no stage did you ever ask to her say in her own words - - -?

[THE JP]: No.

MR TURNER: No. Because that's just not part of your practice - - -?

[THE JP]: No.

MR TURNER: - - - or your training; is that true?

[THE JP]: That's true.

MR TURNER: Okay. Are you able to say what rights of hers, apart from – you've just said – told me that you asked – you told her that or you explained to her that she didn't have to answer any questions?

[THE JP]: That's right.

MR TURNER: What other rights of hers did you explain to her that she had?

[THE JP]: She doesn't have to answer any questions asked to her, and she can refuse to answer the questions or she can answer any that she sees fit, or she can ask for legal aid at any time.

MR TURNER: Okay. Did you explain to her that she had the right or the opportunity to ask for legal aid to be contacted before the interview starts?

[THE JP]: That's right.

MR TURNER: You did ask? You did tell her that?

[THE JP]: I did that.

MR TURNER: Okay?

[THE JP]: That's why in the questions Detective Coffey asked do I believe that she understood these things, and I said yes.

MR TURNER: You also believed that she understood what a solicitor was?

[THE JP]: I did.

MR TURNER: Even before she - - -?

[THE JP]: From my initial conversation with her, I do believe that she understood.

MR TURNER: Okay. Did you ever ask her if she wanted you to contact either of her parents on her behalf?

[THE JP]: I asked her if at any time she wanted any of those persons contacted, and she said no.”<sup>27</sup>

[37] Otherwise, he indicated that he was not aware that the applicant was in foster care, until during the interview and could not recall being told what the investigation was about at the outset.<sup>28</sup> He did not ask where her parents were,<sup>29</sup> or what her level of schooling was or even if she could read and write. He responded, in part, by saying:

“... I just have to explain what’s on that sheet and ask them if they understand what I’m talking about and then basically be there to see that the police treat them fairly.”<sup>30</sup>

He also conceded his understanding that the applicant did not choose him as a support person on the basis that “...when the police rang the courthouse looking for a JP, she wouldn’t know who she was getting.”<sup>31</sup> But he also said “...I always ask them are they happy for me to be there at the end of it.”<sup>32</sup>

[38] It must of course be recognised that, as discussed in the evidence, the JP was acting as a volunteer and that this application is not directly concerned with criticism of anything done or omitted by him. Rather, it is concerned with the actions of the police in proceeding with this interview with the JP fulfilling the requirement of having a support person present for the applicant. However, what may be discerned from the evidence which has been discussed above, is an obvious rationale for the structure of the definition of support person, as it applies to dealing with children. That is, in understanding the potential vulnerability or disadvantage of such persons in dealing with police officers and particularly as to their appreciation of their ability to assert their rights, and in the expressed preference for support persons who may be expected to be more concerned with assisting such appreciation due to association, or duty in respect of the child’s interests, or legal training.

[39] It may also be accepted that ultimately, it is for the child to make the necessary choices, such as whether or not to speak to the investigators. However, choices made prior to or without the benefit of the involvement of a support person and about having such a person, are necessarily made in the full context of the

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<sup>27</sup> T 15/6/20: 1-95.18 – 1.97.3.

<sup>28</sup> T 15/6/20: 1-94.32-43.

<sup>29</sup> T 15/6/20: 1-95.4.

<sup>30</sup> T 15/6/20: 1-99. 27-29.

<sup>31</sup> T 15/6/20: 1-97.31-32.

<sup>32</sup> T 15/6/20: 1-92.33.

disadvantage and vulnerability which is sought to be addressed by the statutory requirements, including having a support person present.

[40] Accordingly and whilst it may be noted that s 421(2)(a) and (3) of the *PPRA*, unlike s 29 of the *YJA*, does expressly contemplate the concept of choice by the child as to a support person, those provisions may be seen as directed at the choice of and suitability of a particular person to fulfil that role, as opposed to a type of person, to act as support person. The distinction is exemplified by the evidence of the JP, in that and to the extent that the respondent relied upon such evidence as evidencing the choice of the child to have him as her support person, it came only after he had been arranged to come to the interview room by police and was expressed in terms of offering the applicant to then decline to have him personally, rather than any JP, as her support person.

[41] The effect of s 421(2)(b) however remains as an issue for the Court, as it was, at the time of the interview, for the investigating police. That is, as to whether, in these circumstances the JP was “a support person”, having regard to the applicable definition in dealing with children.

[42] Essentially two things can be noted about the evidence in respect of any choice offered and exercised by the applicant as to who would be contacted to be her support person. Whilst it may be understandable that the child, in her circumstances, might indicate that she did not want her parents or family members there, the recollected response to DSC Coffey’s reference to Aboriginal and Torres Strait Islanders Legal Aid, was that the child’s said that “she did not want anyone at all” and the officer’s response, “Well we can supply a JP”, with the child saying she “was happy to have a JP”. Whilst it may be said that it is difficult to discern any sense of choice in those circumstances such as to negate any sense of availability of any lawyer who may have been contactable through the on-call telephone services, a second difficulty arises from the only recording as to the effect of this discussion. No explanation was provided and neither is it apparent as to why this important issue that was raised with the child as to the involvement of a support person, was not itself earlier recorded. However, it is notable that in the recording there is only reference to the following exchange:

“You have [the JP] here today because prior to ah, this interview, I asked you, did you want me to contact your Mum or Dad or, or anyone? And you said, no, ok. To, to be at the interview, you didn’t know and I said well, we can get a JP, ok.”

Further, this has occurred immediately after she is told that she has the right to contact a solicitor of her choice and to have such a person present. Then, and after being asked if she wished to contact a solicitor and in apparent reaction to a lack of response the further question is “Do you know what a solicitor is?” She says “No”. She is then given what is properly contended as an inappropriate analogy with a judge and whilst there is reference to the ability of such a person to give legal advice, the recorded responses of the child provide no comfort towards any sense of her understanding or appreciation of that right. And in the circumstances, as have been set out from the evidence given by the JP, neither would there appear to be any basis for his agreement as to a belief that she did understand what was being explained to her.

[43] The difficulty that confronts police officers in such situations and in dealing with the legal prescriptions, are apparent. For instance, this application does not in the end, turn upon what was asserted to be a misunderstanding as to the legal effect of the child’s situation and that her foster parents, who were precluded from being a support person, were to be regarded as her guardians. Neither was it pressed upon any attempt to demonstrate any ready availability of her actual parents or any friend or relative. And the evidence in the application was that there was no separate list of support persons and interpreters for Aborigines or a Torres Strait Islanders at the Nambour Police Station.<sup>33</sup>

[44] Moreover, the difficulties of the situation are exemplified by the comparison between the express requirements set out respectively in ss 420 and 421 of the *PPRA*. Although submissions were directed in this application to the application of s 420 and despite the acknowledged aboriginality of the applicant, it is clear that it applies, pursuant to s 420(1)(b), to “an adult Aborigine or Torres Strait Islander”. Accordingly, s 420(2) was not applicable to the applicant’s circumstances. It is not easy, at face value, to understand the rational for limiting the impetus placed upon securing the availability of legal advice to disadvantaged adult Aborigines and

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<sup>33</sup> T 15/6/21: 1-26.37 – 1-27.30.

Torres Strait Islanders. However, that was then the effect of s 420(1)(b) and the absence of any commensurate provision in s 421.<sup>34</sup> Therefore, s 420(3) does not apply and is certainly not to be addressed as in the following submission of the respondent:

“The applicant was an Aboriginal juvenile female, 13 years of age and approaching 14 years of age, but otherwise presented as comparable to other such juvenile females of her age (and level of education) as well as from a background of non-indigenous foster care. In short, her presentation and background was such that the interviewing officers reasonably suspected that she was not at a disadvantage in comparison with members of the Australian community generally.”

Clearly, any sense of comparison for the purpose of application of s 420(3) is generally with adult members of the Australian community.<sup>35</sup>

[45] It is unnecessary to proceed to any particular consideration of any implications arising from any purported failure of the investigating police in respect of the provisions of various manuals issued by the Commissioner of Police and to which reference was made for the applicant. In the main, it can be observed that such provisions appear in repetition of the various legislative provisions. That includes in reference to s 29 of the *YJA*, although it may be observed, without clear recognition of the different and important effect of that provision.

[46] Neither is it necessary to dwell upon the considerations which might inform an exercise of discretion as to the exclusion of this evidence having regard to public policy issues. In particular, the respondent’s contentions as to there being particular weight in the contentions that:

- The evidence is sought to be admitted in respect of an allegation of some seriousness;
- There is a clear appearance of cogency or probative and reliability in the evidence and that none of the complaints as to the conduct of the interview appear to impinge on those considerations; and

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<sup>34</sup> As already noted, this anomaly has been subsequently addressed in that since ..... , a commensurate provision has been added in s 421(2), as applicable to all child suspects.

<sup>35</sup> Notably and unsurprisingly, s 421 as amended since ..... , does not contain any provision which is commensurate to s 420(3).

- The absence of deliberate avoidance of the requirements, in the context of the complexity of them and in the materials in which they are addressed to police officers.

[47] That is because it is necessary to understand that the effect of s 29 of the *YJA* is not merely to effectively reverse the onus to the respondent in respect of considerations as might inform the exercise of judicial discretion to exclude evidence. It is necessary to understand that s 29(1) applies in a proceeding like this for an indictable offence, to prohibit a court from admitting into evidence any statement made or given by a defendant, as a child, “unless the court is satisfied a support person was present with the child at the time and place the statement was made or given”. It is clear that those words are directed at the adoption of the structure of the definition of support person adopted from the *PPRA* and therefore at whether the person adopted as the support person qualified as such under that definition. And it was not suggested otherwise in submissions in this matter.

[48] Rather, it was the respondent’s first submission that choices of the applicant culminating in the JP being her support person, effectively meant that no one who may have fulfilled the requirement of any of the preceding sub-paragraphs of the relevant definition, was available in a “practical, real and timely sense.” For the same reasons as have been noted in respect of the application of this definition in s 420 of the *PPRA* and particularly as was the focus of this application on the ready availability of a support person capable of satisfying (b)(iii) of that definition, the circumstances are not open to conclusion that no such person was available. As a matter of reality and practicality and timeliness, such a person was available for the making of a telephone call.

[49] The second submission of the respondent was that the same consideration as to the choices of the applicant would satisfy s 29(2)(a) as “a proper and sufficient reason for the absence of a support person at the time the statement was made or given.” That submission should not be accepted:

- (a) first there are the difficulties in any sufficient evidential foundation for the contention that the applicant made any choice, let alone a real or meaningful one, to not have a lawyer (or that she had any understanding as to how any

such stranger may have been able to assist her), or choice to instead have a JP present;

- (b) secondly there is the inherent difficulty which has been noted in any such sense of choice being necessarily laden with the very disadvantage and vulnerability which may be recognised as underpinning the issue of having the involvement of an appropriate support person; and
- (c) thirdly there would appear an inherent difficulty in accepting as “a proper and sufficient reason” a fundamental failure of recognition, of the impediment that the ready availability of a person satisfying paragraph (b)(iii) of the definition of support person for a child, presented to arranging for the JP to attend to be her support person.

### **Conclusion**

[50] Accordingly, the first and an essential requirement of s 29(2), in excluding the application of prohibition in s 29(1) as to the admission of this interview, is not established. There is therefore no necessity to consider any discretionary considerations as engaged by s 29(2)(b), as an additional requirement of admissibility. The interview is not, in these circumstances, admissible as a matter of law. However, it may be observed that the same considerations and particularly as they relate to the denial to the applicant of the full effect of the protective requirements of s 421 of the *PPRA*, would necessarily provide a substantial foundation for the exercise of discretion to exclude this evidence on the basis of unfairness, if not public policy grounds.

[51] The ruling is that evidence of the statements made or given by the applicant to police officers on 8 April 2019 is not admissible in the trial of the applicant upon the charge of arson on 8 April 2019.