Chapter 5A Consent to sterilisation of child with impairment

Part 1 Preliminary

80A Definitions for ch 5A

In this chapter—

active party see section 80K.[44]

alternative forms of health care includes menstrual management strategies and alternative forms of sterilisation.

chapter 5A application means an application under this chapter for consent to the sterilisation of a child[45] with an impairment.

child representative see section 80L.[46]

confidentiality order see section 80G(2).[47]

health care, of a child, is care or treatment of, or a service or a procedure for, the child—

(a) to diagnose, maintain, or treat the child's physical or mental condition; and

(b) carried out by, or under the direction or supervision of, a health provider.

impairment means a cognitive, intellectual, neurological, or psychiatric impairment.

sterilisation see section 80B.

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44 Section 80K (Who is an *active party*)

45 ***Child***, if age rather than descendancy is relevant, means an individual who is under 18—*Acts Interpretation Act 1954*, section 36 (Meaning of commonly used words and expressions).

46 Section 80L (Child representative must be appointed)

47 Section 80G (Open)

Schedule 4 Dictionary

section 3

abuse, for power, includes contravene this Act in relation to the power.

active party—

(a) for chapter 5A,[127] see section 80K;[128] or

(b) otherwise, see section 119.

administrator means an administrator appointed under this Act.

adult guardian means the adult guardian appointed under section 199.

advance health directive means an advance health directive under the *Powers of Attorney Act 1998*.[129]

alternative forms of health care, for chapter 5A, see section 80A.

approved clinical research see schedule 2, section 13.

approved form means a form approved under section 251.

authorised investment means—

(a) an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973*, part 3; or

(b) an investment approved by the tribunal.

capacity, for a person for a matter, means the person is capable of—

(a) understanding the nature and effect of decisions about the matter; and

127 Chapter 5A (Consent to sterilisation of child with impairment)

128 Section 80K (Who is an *active party*)

129 See the *Powers of Attorney Act 1998*, section 35 (Advance health directives).

Schedule 4 (continued)

(b) freely and voluntarily making decisions about the matter; and

(c) communicating the decisions in some way.

chapter 5A application, for chapter 5A, see section 80A.

child representative, for chapter 5A, see section 80L.[130]

clinical research see schedule 2, section 13(1).

close friend, of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person's welfare.

community visitor means a community visitor appointed under section 231.

complaint, for chapter 10,[131] see section 222.

confidentiality order—

(a) for chapter 5A, see section 80G(2);[132] or

(b) otherwise, see section 109(2).

conflict transaction see section 37(2).

consumer, for chapter 10, see section 222.

court means the Supreme Court.

criminal history, of a person, means—

(a) the person's criminal record within the meaning of the *Criminal Law (Rehabilitation of Offenders) Act 1986*; and

(b) despite the *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6,[133] any conviction of the person to which that section applies; and

130 Section 80L (Child representative must be appointed)

131 Chapter 10 (Community visitors)

132 Section 80G (Open)

133 *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6 (Non-disclosure of convictions upon expiration of rehabilitation period)

DISTRICT COURT OF QUEENSLAND

CITATION:	*R v H*
PARTIES:	**R** **V** **H (applicant)**
FILE NO/S:	57/05
DIVISION:	Criminal
PROCEEDING:	Section 590AA application
ORIGINATING COURT:	District Court, Beenleigh
DELIVERED ON:	11 August 2006
DELIVERED AT:	Beenleigh
HEARING DATE:	12 April 2006 and 13 July 2006.
JUDGE:	Tutt DCJ
ORDER:	1. **That the second record of interview between the police and the accused dated 16 April 2004 commencing at 5:25pm is inadmissible and is to be excluded from the evidence at trial.** 2. **That so much of the pre-recorded evidence and/or handwritten notes and/or s 93A (Evidence Act) statements of the witnesses D and K referring to the child B be edited from the evidence at trial.**
CATCHWORDS:	Evidence – admissibility of records of interview containing alleged admissions by the accused – whether the admissions were obtained by impropriety on behalf of the investigating police officers – whether receipt of evidence of admissions would be unfair to the accused at trial – whether discretion should be exercised in favour of accused to exclude the records of interview – whether discretion should be exercised to edit the s 93A (*Evidence Act*) statements and pre-recordings of affected child witnesses by excluding reference to a particular child. *Evidence Act* 1977 s 21AZ(2) *Police Powers and Responsibility Act* 2000 s 253. *R v Swaffield & Pavic* (1998) 192 CLR 159.

COUNSEL:	Ms P Kirkman-Scroope for the applicant.
	Mr P McCarthy for the respondent.
SOLICITORS:	Stacks Gray Lawyers for the applicant.
	Director for Public Prosecutions for the respondent.

Introduction

[1] There is an application before the court by the accused, H ("the applicant"), pursuant to s590AA of the Code for pre-trial rulings in respect of the following matters:

1. That the two (2) records of interview between the applicant and the investigation police officers ("the police") conducted on the 16 April 2004 commencing at 3:34pm and 5:25pm respectively be deemed inadmissible and therefore excluded from the evidence at the trial on the grounds that:

   (a) In respect of the first record of interview the police were in breach of s 253 of the *Police Powers and Responsibility Act* 2000 ("PPRA") in that the applicant was a person with impaired capacity[1] and that although he had a "support person" present during the questioning the "support person...was not aware of his role...and was not adequately able to assist the accused"[2];

   (b) In respect of the second record of interview the alleged admission/confession contained therein by the applicant that he indecently dealt with the complainant child D "only once"[3], was involuntary for a number of reasons including:

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1 Defined in Schedule 4 of the *Guardianship and Administration Act* 2000 as a person who is not capable of— "(a) understanding the nature and effect of decisions about the matter; and (b) freely and voluntarily making decisions about the matter; and (c) communicating the decisions in some way."

2 Paragraph 2.4.1(e) of the applicant's written submissions.

3 The alleged admission was in the terms "I only did it once".

(i) It was induced by threat;

(ii) The police acted in breach of s 263 of the PPRA; and

(iii) The applicant was under arrest at the time which should have heightened the police's strict compliance with their obligations under the PPRA.

(c) Generally for the above reasons it would be unfair to the applicant to admit the said records of interview.

2. That certain portions of the pre-recorded evidence of the complainant children D and K be excluded from the evidence at trial pursuant to s 21AZ(2) of the *Evidence Act* viz:

(a) Page 2 of the handwritten note of D (Exhibit 4);

(b) On page 99 line 53 to end of page; page 100 lines 1-3 and 23 to end of page of the pre-recorded evidence of D;

(c) On page 3 line 39 and page 4 paragraph 20 of the s93A (*Evidence Act*) statement of D (Exhibit 2);

(d) On pages 1 and 5 of the handwritten notes of K the words "what [H] done to [B]" and the numeral "3" in the words "he fingered us 3" respectively; and

(e) On page 4 line 47; page 7 line 23; page 9 lines 17-26; whole of second paragraph on page 10 and page 11 lines 8-13 respectively of the s 93A (*Evidence Act*) statement of K.

Applicant's Submissions

[2] Although formal objection was taken to the admissibility of the first record of interview, the applicant's primary objection is in respect of the second record of

interview on the bases that the applicant is a person with impaired capacity; the police failed to have present a support person within the terms of s 253 of the PPRA; the record of interview was not made voluntarily; therefore it would be unfair to the applicant to admit it into evidence and as such the court should exercise its discretion to exclude it[4].

[3] Specifically it is submitted on behalf of the applicant that the police's impropriety in respect of the second record of interview is that they:

(a) Induced the applicant's confession by threats[5];

(b) Continued to question the applicant "off camera" without a support person being present knowing him to be a person with impaired capacity and after he had been arrested on the charges before the court.

Crown's Submissions

[4] The Crown submits that the applicant's confession in the second record of interview was made voluntary; not induced by threats and that there is no basis to exclude it on the grounds of unfairness on a consideration of the whole of the evidence presented to the court[6].

[5] Essentially the Crown says that there were no improprieties by the police in their obtaining the applicant's confession in the second record of interview; the applicant was not a person with impaired capacity; he knew fully what he was doing and saying; he was given the appropriate warnings and there was no inducement held

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4 See *R v Swaffield & Pavic* (1998) 192 CLR 159.

5 See page 31 to 33 of the evidence of Detective Lisa Dwan on voir dire of 12 April 2006.

out to him to continue the interview if he did not wish to do so. As a result no unfairness to him has been established.

The Law

[6] It is common ground between the parties as to the law to be applied in relation to this application viz the onus rests with the Crown to prove on the balance of probabilities that the applicant's confession was made voluntarily but secondly the onus rests with the applicant to establish that in all the circumstances prevailing it would be unfair to admit such evidence and consequently in the exercise of the court's discretion it should be excluded from the trial.

[7] In *R v Swaffield & Pavic* (supra) Brennan J (as he then was) made the following observations which are apposite:

> "... in *Van der Meer* (1988) 62 ALJR 656 at 662, Mason CJ allowed a wider operation to the fairness discretion. In the circumstances of that case, he observed that:
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> > "[T]he police conduct of the interrogation was such as to make it unfair to use the later statements made by Ayliffe and those made by Storhannus against them. Had the police observed the principles governing the interrogation of suspects, it might well have transpired that the statements *would not have been made* or *not have been made in the form* in which they were made." (Emphasis added.)
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> His Honour found unfairness not in the admitting of a confession of dubious reliability but in the admitting of a confession that might not have been made or not made in the same form but for the improper conduct of the police. Later, in *Duke v The Queen* (1989) 180 CLR 508 at 513, I expressed the view that the fairness discretion should not be confined to the exclusion of confessions where reliability is doubtful:
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> > "*R v Lee* attributes a broader scope to that discretion. The unfairness against which an exercise of the discretion is

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6 See *R v Swaffield & Pavic* (1998) 96 A Crim R 96 at page 118 paragraph [53]; page 122 [71].

> intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. Trickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification - to name but some improprieties - may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent. The fact that an impropriety occurred does not by itself carry the consequence that evidence of a voluntary confession procured in the course of the investigation must be excluded. The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."

Findings

[8] On a consideration of all the evidence in respect of the admissibility or otherwise of the records of interview I make the following findings:

1. I am satisfied that the applicant is not a person with impaired capacity for the reasons that he was well aware of why the police called at his premises at 12 Windsor Street, Kingston to execute the search warrant; he deliberately avoided confirming that he was the "Michael Turner" they were looking for; he understood why he was going to the police station; he arranged for his neighbour G to accompany him there at the invitation of the police; he answered the questions asked of him in a rational manner and generally appeared to understand the nature of the interview and its purpose.

2. The applicant participated in the first record of interview voluntarily and there was no promise or inducement held out to him by the police nor did they act in any improper way in respect of that interview which could taint its admissibility as evidence in the trial.

3. I find that the applicant became upset towards the conclusion of the first record of interview and it was terminated as stated at 4:14pm before the applicant was arrested on the present charges.

4. I accept the evidence of the witness G and so find that at the time he left the interview room at the conclusion of the record of interview with the applicant the applicant had not been arrested at that point in time.

5. I find that subsequently the applicant was arrested on the present charge(s).

6. I find that later still but before 5:25pm on the 16 April 2004 the police recommenced questioning of the applicant which was not electronically recorded, in the waiting room of the police station and put to him several propositions and/or questions to which the applicant responded with the statement "I only did it once"[7]. Thereafter the police commenced the second electronically recorded interview with the applicant at 5:25pm as stated.

7. While I find that the police conducted the second interview by appropriately warning the applicant at its commencement that he was entitled to remain silent and not continue the interview if he did not wish to do so, I am not satisfied that in all the circumstances then prevailing particularly:

   (a) The fact that the applicant had already been arrested[8];

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7 T21 line 20.

8 A fact which the investigating officer appeared to have overlooked at the commencement of the second interview (T2 line 55).

(b) The fact that the police continued to question the applicant in a persistent if not aggressive manner, absent it being electronically recorded after he had been arrested;

(c) The fact that it was not the applicant who precipitated the second interview; and

(d) The fact that while the applicant was not a person with impaired capacity and therefore did not need a support person present, the police proceeded to interview the applicant alone when the first interview had been conducted in the presence of the witness G;

it would be fair to the applicant to admit the second record of interview into evidence at the trial.

[9] It follows therefore that in accordance with the principles espoused in *R v Swaffield & Pavic* (supra) adopting the observations of Brennan J (as he then was) above at [7] I rule that the second record of interview is inadmissible and should be excluded from the evidence in this trial on the grounds of unfairness to the applicant.

[10] In respect of the application for editing the transcript of the pre-recording of the children's evidence referable to the child, B, to exclude any reference to that child in the evidence to be admitted at trial, I find that it would be prejudicial to the accused to admit into evidence any reference to the child, B, and I am not satisfied that any potential prejudice to the accused could be adequately cured by appropriate directions to the jury to ignore such references.

[11] Therefore in the exercise of my discretion I rule that so much of the pre-recorded evidence and/or handwritten notes and/or s 93A (*Evidence Act*) statements of all of

the witnesses to be called at this trial (referred to in subparagraph 2 of [1] above) which refer to the child, B, be excluded from the evidence to be admitted in this trial.

Orders

[12] My orders in this application will therefore be as follows:

1. That the second record of interview between the police and the accused dated 16 April 2004 commencing at 5:25pm is inadmissible and is to be excluded from the evidence at trial.

2. That so much of the pre-recorded evidence and/or handwritten notes and/or s 93A (*Evidence Act*) statements of the witnesses D and K referring to the child B be edited from the evidence at trial.