HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 21 Mar 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S173/2023
File Title:	BQ v. The King
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	21 Mar 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **BQ**

Appellant

and

THE KING

Respondent

APPELLANT'S REPLY

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY TO ARGUMENT OF THE RESPONDENT

Factual matters

2. The respondent elaborates on the evidence concerning the nature of the relationship between the complainants and the appellant during the offending period (Respondent's Submissions (**RS**) [5]-[8]). This elaboration omits that as regards the complainants, their mother (who was estranged from the appellant's family (T474.4-5 ABFM 31)) was their primary care giver throughout the offending period, and the complainants primarily lived with her (CCA [26] CAB 129). The complainants were exposed to this "close" extended family, including the appellant, on occasions during the periods their father had custody of them (CCA [26] CAB 129).

Ground 1

3. Contrary to the respondent's submission, both second and third limb error are raised by this ground (cf. RS [20]; see Appellant's Submissions (**AS**) [46]).

4. The respondent contends that the bases upon which A/Prof Shackel's evidence is challenged by the appellant were not advanced at trial and relies on this circumstance together with the absence of any cross-examination of A/Prof Shackel in defence of the admissibility of the impugned evidence (RS at [16], [19], [44], [53]). Objection was taken to all of A/Prof Shackel's evidence including on the basis that it failed to meet the criteria in s 79 of the *Evidence Act 1995* (NSW), and was understood by the parties and the trial judge to be an objection as to the whole or any part of A/Prof Shackel's evidence (Judgment at 1, 3 ABFM 4, 6). Notably, the appellant's trial

took place prior to the decisions in *AJ v R* (2022) 110 NSWLR 339 (***AJ***) and *Aziz (a pseudonym) v R* (2022) 110 NSWLR 317 (***Aziz***). As Kiefel CJ and Gageler J stated in *Lang v The Queen* (2023) 97 ALJR 758 (***Lang***) at [10], "it remains a condition of the admissibility of evidence of the opinion of an expert at common law that the opinion be demonstrated to be based on specialised knowledge or experience of the expert that is beyond the common knowledge and experience attributable to the tribunal of fact" (emphasis added). If, and only if, that condition is satisfied, is the evidence admissible as expert opinion, under the uniform evidence law: *Lang* at [11]. Further, the absence of cross-examination by trial counsel must be understood in that context where there was controversy over the admissibility of A/Prof Shackel's evidence.

Perpetrator behaviour and risk factor evidence

5. A central plank of the respondent's argument is that the impugned parts of A/Prof Shackel's evidence were an explanation for the behaviour of a child (RS [28]-[44]), simply about the "circumstances in which such offences are committed" (RS [40]) and that therefore A/Prof Shackel "did not purport to express an opinion about perpetrator behaviour in the sense that was criticised in *AJ*" (RS [44]). These propositions should be rejected. The respondent's characterisation of the impugned evidence as an "explanation" for the child's behaviour and the "circumstances in which child sexual assault takes place" (RS [27]-[41]) ignores the very terms of A/Prof Shackel's evidence as to "risk factors for child sexual assault", her description of where "the abuse often takes place", where sexual assault is "not uncommon to happen" and as to "perpetrator" behaviour (see AS [23]; CCA [238] CAB 181-183). Contrary to the respondent's submission, the appellant does not mischaracterise the impugned evidence, he simply refers to the words used by A/Prof Shackel in giving the evidence (cf. RS [27]-[31]; AS [23]).

6. Contrary to the respondent's submission at RS [35], [37]-[39] the impugned evidence was squarely evidence of "patterns of sexually deviant behaviour" and "the offending patterns of perpetrators", which was held to be inadmissible in *AJ* (see AS [27] and further *AJ* at [170]), and the same result should have followed here. *AJ* at [64] (relied on by the respondent at RS [38]) sets out some of the evidence of A/Prof Shackel in that trial, and is not, in terms, a ruling on admissibility (cf. RS [38]). The respondent's submission (at RS [29]) that A/Prof Shackel's evidence about "risk factors" was "not responsive to the question and added little to the response" ignores both the terms of the question put and the whole of the response (see T416.19-27 ABFM 26), and is no answer to the question of admissibility.

7. The respondent attempts to distinguish the decision and outcome in *AJ* on the basis that A/Prof Shackel's evidence in the appellant's case was "an inseverable aspect of the opinions expressed

… as to the behaviour *of the child*" (RS [35], [37]). The CCA did not find the impugned evidence was an "inseverable aspect" of A/Prof Shackel's evidence; rather it concluded the evidence was "so closely related to" A/Prof Shackel's expertise as to be unobjectionable (CCA [240] CAB 183). Neither formulation satisfy the test for admissibility under s 79 of the *Evidence Act* (see AS [28]). Further, the same argument was advanced by the respondent in *AJ* and rejected by Beech-Jones CJ at CL (at [83]) because "[t]he topics of response to trauma and patterns of sexually deviant behaviour are distinct". The respondent's argument is not improved by addition of the word "inseverable", is contrary to *AJ* [83], and does not overcome the application of *Gett v Tabet* (2009) 109 NSWLR 1 at [294]-[295] and *AC v R* (2023) 111 NSWLR 514 at [24]-[53].

8. The respondent's submission (at RS [32]) that s 79 of the *Evidence Act* necessarily requires evidence to be given as to the "circumstances in which the abuse takes place" is contrary to the respondent's earlier acceptance that the admissibility of "counter intuitive behaviour evidence" depends on the characterisation of the evidence as opinion evidence (RS [22], [42]; *Aziz* at [60]). Even if the evidence was simply an explanation or description as to the circumstances in which abuse takes place, A/Prof Shackel did not have demonstrated specialised knowledge to give that evidence. The need for the expert to expose his or her reasoning process in order for the opinions to be admissible does not render admissible opinions which fall outside the witness' expertise (cf. RS [32], [42]-[44]). Furthermore, an expert's reliance on their own opinions outside their expertise may then call into doubt the admissibility of the opinions which purport to be within their expertise.

9. The evidence having been objected to in its entirety at trial, with no cross-examination being entirely consistent with that contested position, rendered it "the more necessary… that the opinion expose the expertise upon which it is based" (*Lang* at [228]). The respondent does not answer the appellant's submissions at AS [30]-[34]. The evidence was that there were alternative methodologies and an eclectic body of research with different data sets, samples and populations (T409 ABFM 19). While she used the term "victims of childhood assault", rather than evidence of research done on or only on proven cases of child sexual assault, the evidence was to the contrary: AS [30], [34]. Nor did the evidence establish that A/Prof Shackel had expertise in perpetrator behaviour, risk factors or "the circumstances in which child abuse take place" as at the appellant's trial, which pre-dated that of the trial of *AJ*. Such expertise could not simply be assumed (cf. RS [40]-[41]).

10. Finally, it is not correct that the evidence was not used in the trial as relevant to an assessment of the behaviour of the appellant (cf. RS [36]) when: first, the central issue in the trial was the

complainant's credibility and reliability on the issue of his behaviour; second, the prosecutor did use the evidence to prove the complainants were "assaulted in the way that BB and AA say they were" (T835-836 CAB 53-54) and to support that they were involved "in this sexual abuse in an intrafamilial situation" (T831-832 CAB 49-50); and third, the trial judge directed the jury that they could rely on the evidence of A/Prof Shackel for credibility reasoning (see AS [56]-[57]). Finally, the danger of equivalence reasoning with the allegations was underscored by the CCA itself reasoning in a prohibited fashion (CCA [242] CAB 184; AS [37]).

Intrafamilial relationships

11. Contrary to the respondent's arguments, for the reasons set out at AS [40]-[44], A/Prof Shackel was required to expose her reasoning process in relation to what "the research" meant by the term "intrafamilial" and demonstrate her expertise on this topic (cf. RS [49]-[53]). There was no evidence from A/Prof Shackel as to the terms actually used in the research to describe what intrafamilial or non-familial actually meant (cf. RS [50]). The vice of not exposing what was encompassed by the terms is revealed at RS [52], where the respondent assumes what the terms can encompass and exclude, assumes the "sense it was being used by A/Prof Shackel" (when there was simply no evidence on that point), and then assumes that the circumstances of this case fell within the descriptor "intrafamilial". It is not known whether, for example, intrafamilial in the research meant immediate family such as parents or siblings, or meant people living full-time with each other, or meant something else. In the absence of an explanation of the meaning of those terms, it could not be shown the evidence was based on any specialised knowledge nor could it be evidence that served an educative purpose.

Ground 2

12. The respondent appears to accept that the relevant question is not whether the jury *in fact* used the evidence impermissibly, it is whether there is a "risk … of an impermissible course of reasoning by the jury" which was not averted by the directions (see, by analogy, *DJV v R* (2008) 200 A Crim R 206 at [31]). However, when it comes to the argument at RS [66], this is not the test applied. The respondent's answer to the question of miscarriage is to refer to what the parties submitted in closing (RS [56]). There was no occasion for defence counsel to address the evidence: he contended it was inadmissible and reference would only have exacerbated the prejudice. As for the Crown Prosecutor, A/Prof Shackel's evidence was emphasised throughout the closing address (see AS [37], [57]). In any event, what counsel said about the evidence is not the start nor the end of the inquiry. This evidence was led before the jury, and it is to be assumed, in accordance with their obligations and the trial directions, they had regard to it: *Demirok v The*

Queen (1977) 137 CLR 20 at 22 (Barwick CJ). The evidence was relevant and led by the prosecution to form part of the educative framework for the jury's otherwise "common sense" assessment of the trial evidence.

13. The respondent submits that A/Prof Shackel's evidence was general in nature and was not relied on as supportive of the credibility of AA and BB generally in respect of certain counts (RS [63]-[64]). This accords with the respondent's submission in the CCA: CCA [227] CAB 177. The respondent's final submission at RS [70] that it could not be used for credibility reasoning, contradicts an earlier passage of the respondent's submission where it contends that A/Prof Shackel's evidence was "relevant … because, if accepted, it could rationally have affected the assessment of the credibility of the complainants' evidence …" (RS [23]). It is also at odds with the way in which A/Prof Shackel's evidence was used at trial, despite the evidence not being admitted under s 108C of the *Evidence Act*. That the directions given occasioned a miscarriage of justice is reinforced by the respondent's acceptance that the credibility of the complainants was a central fact in issue in the proceedings (RS [25]). The educative limitation on the use of evidence of A/Prof Shackel was not the subject of direction by the trial judge, rather the directions invited credibility reasoning, and did so without any of the approved cautionary directions as set out at AS [48]-[53].

14. Evidence need not be admitted as propensity evidence in order for this Court to give guidance to trial judges on the essence of directions to be fashioned to the particular case, such as those set out at AS [54] (cf. RS [59]). This is particularly so in the context of cogent reasons for such guidance by intermediate courts of appeal in NZ and Victoria, and by the Supreme Court of New Zealand, and given the plain risks of the admission of educative evidence on the topic were recognised by the Australian Law Reform Commission in Report 102 at [9.157]: AS [50].

Dated: 21 March 2024

……..…..
Gabrielle Bashir SC
Forbes Chambers
T: (02) 9390 7777
gbashir@forbeschambers.com.au

……..…..
Georgia Huxley
Forbes Chambers
T: (02) 9390 7777
ghuxley@forbeschambers.com.au

……..…..
Naomi Wootton
6th Floor Selborne/Wentworth
T: (02) 8915 2610
nwootton@sixthfloor.com.au