HIGH COURT OF AUSTRALIA

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File Number:	S173/2023
File Title:	BQ v. The King
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	29 Feb 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BQ**
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION FOR PUBLICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUES

2. In August 2018, the appellant was convicted after trial **(the 2018 trial)** of a series of offences related to the sexual and indecent assault of his two young nieces AA and BB[1] **(the complainants)**. The offences were committed between 2007 and 2012 **(the offending period)**, when AA and BB were aged 5-9 and 10-13 years respectively. At the 2018 trial, expert opinion evidence of Associate Professor **(A/Prof)** Shackel was admitted. A/Prof Shackel's evidence concerned how child victims of sexual assault may respond to and disclose offending. The opinions expressed by A/Prof Shackel were of a general character and did not address the behaviour of the complainants. The issues raised by this appeal are two-fold:

   a. Was such evidence of A/Prof Shackel as is now challenged by the appellant inadmissible and, if so, did its admission give rise to a miscarriage of justice; and

   b. Was a miscarriage of justice occasioned by the absence of directions that were not sought at trial but which the appellant now asserts ought to have been given.

[1] Section 578A of the *Crimes Act 1900* (NSW) and s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) prevent the publication of the names of the complainants or publication of any matter which would be likely to lead to the identification of the complainants. These and other references in these submissions reflect the pseudonyms adopted in the trial and on appeal to give effect to those provisions.

PART III SECTION 78B NOTICE

3. The Respondent does not consider that notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV STATEMENT OF FACTS

4. The Respondent does not challenge the factual matters referred to at Appellant's Submissions (**AS**) [6]-[11]. There are however aspects of the evidence and the proceedings that require further elaboration.

The relationship between the appellant and the complainants over the offending period

5. At the time the offences were committed, the complainants and the appellant (their uncle) were part of a "very close" extended family: CCA [23] (CAB 129). Their grandparents (**the grandparents**) had three children: a son and two daughters. The son was the complainants' father. One of the daughters was the appellant's wife. The appellant, his wife and children lived in a renovated section of the grandparents' home between the end of 2007 and September 2012: CCA [28]; [179] (CAB 130; 167). Prior to that, they lived in a unit for 12 months: CCA [38]; [51] (CAB 132; 135). The extended family came together often for dinners and Sunday lunches: CCA [23] (CAB 129).

6. In addition to attending those occasions, the complainants visited the grandparents' home including overnight during contact visits with their father, who also lived in the home for periods after his separation from their mother. After their father had moved out, the complainants continued to spend "most of the custody time that was supposed to be with their father with their grandparents" (CCA [26] (CAB 129-130)) in the home where, by then, the appellant and his family also lived. It was not in dispute at trial that the appellant enjoyed a close relationship with the complainants over the offending period. The appellant himself said of the relationship, "we loved them" and "they loved us": Exhibit L1 A118-119 (RBFM 36).

7. BB gave unchallenged evidence that she and her siblings AA and JJ stayed overnight at the appellant's unit (where Count 1 was committed) "more than" once or twice: T201.10-30 (RBFM 13). After the appellant and his family moved into the grandparents' home, she spent time there "all the time" with the same siblings. "Nearly every time" they stayed there overnight, the siblings (BB included) would sleep in the appellant's lounge room: one of two interconnected rooms in the renovated section of the home occupied by the appellant

and his family: T214.21-49 (RBFM 14); see also Exhibit J and Exhibit 2 (RBFM 53; 55).[2] The appellant slept on a recliner in the same room: CCA [72]; [108] (CAB 142; 150). The complainants and their brother JJ otherwise spent "most of the time" they were at the grandparents' home in the appellant's lounge room, at times playing with their cousins (the appellant's children): T185.20-186.7; Exhibit L1 A128-135 (RBFM 11-12; 36-37). It was not uncommon for AA to sit with the appellant on his recliner, nor for his youngest son to become jealous when she did so: T612.17-37; Exhibit L1 A224-233 (RBFM 20; 44-45).

8. Consistent with the above, the appellant did not dispute that BB was under his authority[3] at the time of Counts 1-7: SU 16; 19, 21 (CAB 24; 27; 29). "Under authority" was not an element of the remaining offences.

The offences

9. Seven of the eleven offences in respect of which the appellant stood trial were alleged to have taken place in the grandparents' home (Counts 2-4, 7-8 and 10-11); six of them in the section that he and his family occupied. The alleged offences related to nine different incidents: four in relation to AA, and five in relation to BB. The different incidents were spread across the offending period. Some counts, including but not limited to Counts 1 and 2, took place early in that period. Each complainant gave evidence that the appellant indecently assaulted her on other occasions as she sat with him on his recliner: CCA [29]; [81] (CAB 130; 144). That evidence was admitted, without objection, as context evidence.

10. Contact between the complainants and their father and his family ceased after the complainants' mother got full custody of them, which appears to have coincided with the imprisonment of their father: Exhibit L1 A110-112 (RBFM 35). As the CCA observed at [27] (CAB 130), evidence from their mother as to when such contact ceased was imprecise: T428-429 (RBFM 15-16). A number of witnesses gave evidence that the complainants visited the grandparents' home on or about Christmas Day 2012: CCA [27]; [180]; [184]-[187] (CAB 130; 167-169). No visits were reported after that time.

11. AA first disclosed the abuse to her mother on the morning of Valentine's Day 2014, when she was 10 years old. AA provided further details in a second conversation later the same day and in further conversations over a period of time: CCA [88]-[90] (CAB 146). AA had three brief conversations with BB about the abuse: CCA [93]-[95] (CAB 147). When asked

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[2] Exhibit J is a diagram drawn by BB of the area of the grandparents' home that was occupied by the appellant, his wife and their children after the renovations had been completed. That area is marked "Bedroom 4" in the floor plan of the premises (Exhibit 2) and includes the adjoining room.

[3] Section 61H(2) of the *Crimes Act 1900* (NSW) provided that a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.

by her mother why she had not said anything before, AA replied that she was "scared that he would hurt her, or me, or BB": CCA [88] (CAB 146). AA herself told police that she was embarrassed: MFI 2 A386 (RBFM 24).

12. BB first disclosed the abuse *to police* on 14 September 2016 in the course of providing a short statement clarifying matters related to AA that had been missed in her 2014 statement: CCA [19] (CAB 128). BB informed the police officer that she had not told the truth in her first statement as to whether the appellant had done anything to her and said, "I can't go into court and not tell the truth about what really happened": T675.3-47 (RBFM 21). BB spoke to her mother at the courthouse later the same day: CCA [20] (CAB 128). Those disclosures caused the appellant's first trial (**the 2016 trial**) to abort part-way through the evidence of AA. They were not, however, BB's first disclosure of the appellant's abuse. BB first disclosed the abuse to her cousin in about August 2015 (CCA [83] (CAB 145); T528.21-530.49 (RBFM 17-19)) and later to her partner, about three or four weeks before the 2016 trial (CCA [84] (CAB 145)). In evidence given during the 2018 trial, BB explained that she had not disclosed the abuse earlier because "I thought that I was doing the wrong thing because I didn't say no to him and I liked it": CCA [66] (CAB 139). When pressed in cross-examination as to why she did not comfort AA by revealing her own abuse, BB explained "I was blaming myself, so I thought that I was making it happen and I didn't put myself in the same situation as AA… because she was so much younger and… I could've said no but I didn't…": CCA [86] (CAB 145). The credibility of BB's evidence was supported by the appellant's admission that he referred to her by the nickname "Sexy Chocolate" (CCA [68] (CAB 140-141)), part of the tendency evidence admitted in the proceedings.

13. In the first trial, AA's account of Count 8 (as it later became) was challenged on the basis that she failed to make immediate complaint to her aunts, whom she trusted, after they walked into an adjacent room when the appellant was putting his fingers in her "*wee*" (referring to her genital area): T54.1-55.17 (RBFM 4-5). In relation to count 11, which occurred last in time, it was suggested to AA that she would not have unhesitatingly approached the appellant as she did on that occasion, if he had previously offended against her: T62.16-63.33 (RBFM 6-7). A similar challenge was made to AA's account that the appellant had touched her a couple of times under a blanket as she watched TV (part of the context evidence). It was suggested, it not having been the first time that the appellant had, on her account, touched her that the "easiest thing to do" would have been to remain sitting with either of her siblings rather than approach the appellant when he summoned her. AA agreed that she had approached the appellant as he requested without arguing whereupon

he touched her indecently: T77.1-49; T81.24-82.17 (RBFM 8-10). AA's evidence from the first trial was played in the 2018 trial.[4]

Voir dire

14. The objection to the admissibility of A/Prof Shackel's evidence was determined at a voir dire hearing which was conducted before the jury was empaneled in the 2018 trial. No oral evidence was adduced at the hearing. The evidence at the hearing comprised a report of A/Prof Shackel dated 12 July 2018. The report addressed two topics. The first related to how victims of childhood sexual assault as a class respond to and disclose the offending. The second related to aspects of the behaviour of AA and BB based upon material from the brief of evidence and whether such behaviour was consistent with that identified and discussed in the research: J 1-2 (ABFM 4-5).

15. The Crown argued that the evidence was admissible pursuant to ss 79 and 108C of the *Evidence Act 1995* (NSW) (**the Evidence Act**): J 2 (ABFM 5). The Crown Prosecutor referred to the acknowledgment by the Australian Law Reform Commission in Report 102 that misconceptions about the behaviour of child victims of sexual assault persist and submitted that the evidence would assist the jury in evaluating the credibility of "another witness" referring, in context, to the complainants.[5]

16. The appellant's objection to the evidence was put on three bases. First, that the (asserted) late service of the report precluded him from obtaining a further expert opinion on the issue. Second, that A/Prof Shackel's opinions as to the particular conduct of the complainants did not sufficiently expose her reasoning, referring to *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 (**Makita**): J3 (ABFM 6). Third, the appellant complained that A/Prof Shackel had not been provided with all material relevant to the second topic: J 6-7 (ABFM 9-10).

17. The trial judge held that evidence as to the first topic was admissible. In doing so, his Honour referred to s 79 of the *Evidence Act*: J5-6 (ABFM 8-9). In respect of the first topic, his Honour did not separately address s 108C. The trial judge held that evidence as to the second topic was inadmissible: J 5-7 (ABFM 8-10).

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[4] A recording of AA's evidence from the 2016 trial was played in the 2018 trial pursuant to s 306I of the *Criminal Procedure Act 1986* (NSW).
[5] T53.46-54.9; T72.3-4.

PART V ARGUMENT

Ground 1: Admissibility of A/Prof Shackel's evidence

18. The evidence of A/Prof Shackel was of narrow compass. It was confined to the behaviour of child sexual assault victims generally: T407-411; T414-417 (ABFM 17-21; 24-27). The appellant's challenge to the admissibility of that evidence is confined to portions of it that are identified at AS [23] and extracted at CCA [234]; [236] and [238] (CAB 179-183). Broadly speaking, the challenged evidence falls into two categories: evidence that is said to amount to opinions about the behaviour of perpetrators and risk factors for sexual abuse, and evidence concerning intrafamilial relationships.

19. The bases upon which the appellant challenges those aspects of the evidence (both now and before the CCA) were not advanced at trial. The appellant did not, by the terms of his objection or in cross-examination, challenge A/Prof Shackel's evidence as to the circumstances in which child sexual offences are committed or her evidence concerning intrafamilial relationships. The issues now raised in relation to A/Prof Shackel's evidence must be seen against that background.

20. The ground of appeal relied upon by the appellant pleads error within the third limb of s 6(1) of the *Criminal Appeal Act 1912* (NSW).[6] For reasons that follow, the CCA was correct to conclude that the evidence was admissible and did not occasion a miscarriage of justice.

Relevance of the evidence

21. Counter-intuitive behaviour evidence refers to evidence admitted in cases involving allegations of child sexual abuse for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may intuitively hold which, if uncorrected, may lead to an unfounded process of reasoning.[7] An acceptance that such misconceptions persisted and a desire to address demonstrated judicial reluctance to admit such evidence under s 79(1) led to the insertion of ss 79(2) and 108C into the *Evidence Act* by the *Evidence Amendment Act 2007* (NSW).[8]

22. As Simpson AJA observed in *Aziz (a pseudonym) v R* (2022) 110 NSWLR 317 at [60] (**Aziz**), the admissibility of such evidence under either ss 79 or 108C continues to depend on the characterisation of the evidence as "opinion evidence" (AS [20]). The necessary

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[6] *Filippou v The Queen* (2015) 256 CLR 47 at [4]; [8]; [14].
[7] *DH v R* (2015) 1 NZLR 625 at [2].
[8] Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, (2005), pp 314-315 [9.139]; pp 319-320 [9.155]-[9.156]; pp 422-423 [12.122] (**Report 102**).

starting point for an assessment of the admissibility of such evidence is identification of its relevance, which requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving.[9]

23. While the appellant acknowledges that the evidence was relevant because it served an educative purpose "to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour in cases alleging child sexual abuse" (AS [17]), that statement does not go far enough. The evidence was relevant in that way because, if accepted, it could rationally have affected the assessment of the credibility of the complainants' evidence by correcting any misconceived notions that the jury may have held, thereby allowing it to be assessed on a neutral basis.[10]

24. The fact that the evidence was general in nature and did not address the behaviour of the particular complainants does not detract from that conclusion, as the decisions in *Aziz* at [63] and *AJ v R* (2022) 110 NSWLR 339 at [68] (**AJ**) demonstrate. While it is accepted that the trial judge did not separately address the admissibility of the evidence under s 108C, that does not demonstrate that the evidence was not admitted for a credibility purpose (cf AS [16]).

25. Like many trials involving allegations of child sexual abuse, in the present case, the credibility of the complainants was a central fact in issue in the proceedings. Without the benefit of A/Prof Shackel's evidence, unjustified assumptions about the likely behaviour of a victim of child sexual abuse at the time of or after the abuse may have influenced the jury's assessment of the credibility of the complainants' evidence. That risk was reinforced by aspects of the cross-examination pursued by trial counsel for the appellant.

26. As noted above, the educative purpose of the evidence is directed to facilitating the assessment of the credibility of the complainants' evidence on a neutral basis. That is consistent with how the evidence was used by the Crown in this case. Notably, it was no part of the Crown case that evidence given by A/Prof Shackel could or should be used to assess the alleged behaviour *of the appellant*: cf *AJ* at [68]; [87]-[88]; [171]. This assumes particular significance in light of the first category of evidence he challenges.

Evidence concerning the circumstances in which child sexual assault offences are committed

27. The first category concerns the evidence extracted at CCA [238] (CAB 181-183) (AS [23(b)]- [23(e)]). The assertion that this evidence is inadmissible rests upon the appellant's

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[9] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [31].
[10] *DH v R* (2015) 1 NZLR 625 at [2]; *MA v R* (2013) 40 VR 564 at [22].

characterisation of the evidence as evidence of opinions in respect of the behaviour of perpetrators (AS [25]-[26]). That characterisation is inapt. It ignores both the immediate evidential context of the challenged passage and the use that was made of the evidence on the part of the Crown.

28. Considered in context, A/Prof Shackel's evidence that, for example, "the research shows us that in the context of intrafamilial child sexual assault, the abuse often takes place within the home… in the course of everyday activities…" (AS [23(b)]; [23(c)]) was, as the CCA recognised, an explanation for the behaviour of the child who has been sexually assaulted; why the child might react (or not react) in a particular way: CCA [239] (CAB 183). A/Prof Shackel explained that where the sexual abuse takes place in these circumstances, a child may have more difficulty in "distinguish[ing] appropriate touching from inappropriate touching": CCA [238] (CAB 182).

29. Similarly, A/Prof Shackel's evidence that "opportunity often means that the sexual assault will take place within the family home in the course of day-to-day activities with other people" (AS [23](d)) was a description of the circumstances in which child sexual assault occurs. The singular reference to "risk factors" for abuse was made in that context.[11] The use of the phrase was not responsive to the question and added little to the response, in which A/Prof Shackel restated her observation regarding the commission of offences in the course of day-to-day activities. As the CCA observed at [240] (CAB 183), that description followed on from and was triggered by the response discussed in the preceding paragraph.

30. Evidence that "it is not uncommon for perpetrators to make a child feel like they're different or special…" (AS [23(e)]) was, likewise, together with other factors, an explanation for the behavioural response of the child: "the child feels ambivalence because of all of those mixed emotions around the abuse and the way that they're being treated": CCA [238] (CAB 183).

31. In each of the above respects, the circumstances of the offending informed the behavioural responses of child victims. The appellant's submission that the impugned opinions did not relate to children's behaviour and development (AS [25]) should not be accepted.

32. Sections 79(2) and 108C refer (relevantly) to evidence of "an opinion relating to … the development and behaviour of children *who have been victims of sexual offences*" (emphasis added). The behaviour in question is a response to and product of the sexual offences. Such evidence cannot be given in a manner that omits reference to the

[11] Cf AS [33] which erroneously characterises factors that arise in the context of familial child sexual assault as risk factors. That is not a fair characterisation of the evidence at T414.34-36 (ABFM 24).

circumstances in which the abuse takes place. As A/Prof Shackel explained, those circumstances influence child victims' behaviour.

33. Adoption of the approach for which the appellant contends would limit an expert witness to a description of the behavioural responses of child victims of sexual assault divorced from, and without reference to, the circumstances in which the abuse occurs. Such an approach proceeds on an erroneously confined view of A/Prof Shackel's expertise and ignores the conditions of admissibility of such evidence. It would impede the ability of the expert to express their opinion accurately and fully and would deprive the tribunal of fact of the ability to make an informed assessment as to whether to accept or reject the opinion.

34. The CCA did not depart from *AJ* (cf AS [32]), a decision which it carefully considered.[12] Rather, the CCA correctly recognised that the admissibility of the challenged evidence and whether a miscarriage of justice had been demonstrated turned on the particular evidence that was adduced in this case and how it was used.

35. The present case stands in marked contrast to *AJ* in two important respects. First, the two impugned responses extracted in *AJ* at [66] were not merely descriptions of the circumstances in which child sexual abuse takes place to facilitate an understanding of child victims' behavioural responses, as they were in the present case (cf *AJ* at [72]). Rather, each of the impugned responses in *AJ* was directed to the psychology underlying perpetrator behaviour: respectively, why perpetrators choose brazen settings to offend and whether perpetrators are necessarily deterred by the presence of others. That the responses in *AJ* are properly so characterised is apparent from the questions that were asked. It is reinforced by the use that was made of the evidence. Properly understood, the impugned evidence in *AJ* was materially different to the evidence adduced in the present case (cf AS [27]; [32]).

36. Second, and relatedly, central to the conclusion in *AJ* that the admission of such evidence occasioned a miscarriage of justice was the use of the evidence to meet any suggestion as to the implausibility of the accused acting as he was alleged to have done: *AJ* at [72]; [87]-[88]; [171]. The evidence that was impugned in *AJ* was relied upon as relevant to the assessment of the behaviour *of the accused*, not to the behaviour of child victims of sexual assault: *AJ* at [68]; [72]. Recognition of that distinction is fundamental to a proper understanding of the conclusions expressed by the CCA in that case. In direct contrast, in the present case, neither the Crown nor trial counsel for the appellant suggested that the

[12] See, for example, CCA [217]-[219]; [231]-[233]; [235]; [271] (CAB 175; 177-180; 192).

evidence of A/Prof Shackel could or should be used to assess the alleged behaviour *of the appellant*.

37. The terms of the evidence in *AJ* (understood in light of the corresponding question) and the use that was made of it were central to the rejection of a submission that the impugned evidence was an aspect of evidence of the responses of victims to trauma in the form of child abuse: *AJ* at [72]; [83] (per Beech-Jones CJ at CL; Harrison J agreeing[13]). In contrast, in the present case, reference to the circumstances in which child sexual assault offences take place was an inseverable aspect of the opinions expressed by A/Prof Shackel as to the behaviour *of the child* (cf AS [25]; [28]).

38. In *AJ*, Beech-Jones CJ at CL held that the opinions expressed by A/Prof Shackel as to the behavioural responses of child victims of sexual assault were within her expertise: *AJ* at [82]; [85]. Evidence that was held to be admissible included reference to "[r]easons that relate to the circumstances of the abuse…[including] a close relationship between the child and the perpetrator" and of factors that may arise "within the context of a familial situation of child sexual abuse": *AJ* at [64]. However, his Honour also held that it had not been demonstrated that A/Prof Shackel's expertise extended to "patterns of sexually deviant behaviour" and "the offending patterns of perpetrators": *AJ* at [83]. Those references should be understood in the context of the evidence that was given in that case and how it was used; described above as evidence of the psychology underlying perpetrator behaviour (see Respondent's Submissions **(RS)** [35] above). That is consistent with his Honour's reference, by way of analogy, to the topic of recidivism of such offenders including those who have recognised psychiatric and psychological conditions associated with their sexual attraction to children. It is also why A/Prof Shackel's lack of clinical experience speaking to perpetrators and the absence, in her report, of analysis of research papers relevant to her oral evidence about brazen offending assumed particular significance: *AJ* at [83]-[84].[14] Specialised knowledge of the psychology underlying perpetrator behaviour required such engagement. The impugned evidence in the present case did not (cf AS [30]-[31]).

39. Those conclusions permit, rather than preclude, a description of the circumstances in which child sexual assault offences are committed for the purpose of explaining the behaviour of child victims and recognise that A/Prof Shackel's specialised knowledge extends to such matters. Evidence that was held to be admissible in *AJ* included such descriptions (see RS

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[13] *AJ* at [130]. Fagan J agreed with the reasons of Beech-Jones CJ at CL at [73]-[82]: *AJ* at [162]. His Honour separately addressed the evidence extracted at [66]; see *AJ* at [163]-[174].

[14] It should be noted that that finding was based on the evidence that was adduced in *AJ*: see eg *Campbell v R* (2014) 312 ALR 129 at [319] (cf AS [30]).

[38] above) (cf AS [32]). The appellant's submissions to the contrary are predicated on his mischaracterisation of the evidence (addressed above) and an erroneously confined view of A/Prof Shackel's expertise.

40. A/Prof Shackel's expertise was founded on a combination of her academic qualifications, including but not limited to her PhD, and related to that and arising out of it, her study. Both concerned the behavioural responses, not of children generally, but of child victims of sexual abuse: T407-409 (ABFM 17-19). Specialised knowledge based on study of the behavioural responses of victims of child sexual assault necessarily involves specialised knowledge of the circumstances in which such offences are committed. That is because, as noted above, the behaviour is a response to the abuse and is influenced by the circumstances in which it is committed. Without knowledge of the latter, it is difficult to see how an expert could be appropriately qualified to express an opinion as to the former. As the terms of A/Prof Shackel's evidence made clear, the research, of necessity, addresses both, as well as the interrelationship between them. Recognition that A/Prof Shackel had critically applied the skills and knowledge she had derived from her academic study in her review of that research (including studies and data as to the circumstances in which child sexual offences are committed) underscored the conclusion that she had specialised knowledge based on study of the behavioural responses of victims of child sexual abuse: see *AJ* at [82] (cf AS [31]).

41. As her answers made clear, the statements made by A/Prof Shackel concerning the circumstances in which child sexual assault offences are committed were drawn from the research and were directly relevant to a proper understanding of the behavioural responses of child victims of sexual assault. The CCA was correct to recognise that such evidence, which included knowledge as to the circumstances in which child sexual abuse is committed, was within her expertise: CCA [239]-[240] (CAB 183).

42. An important sequelae of the characterisation of evidence admitted under ss 79(2) and 108C as opinion evidence is that, as Kiefel CJ and Gageler J (as his Honour then was) observed in *Lang v The Queen* (2023) 97 ALJR 758 at [11] (**Lang**), in order to satisfy the conditions of admissibility, "the inference drawn by the expert which constitutes the opinion must be supported by reasoning on the part of the expert sufficient to demonstrate that the opinion is the product of the application of specialised knowledge of the expert to the facts which the expert has observed or assumed". That requirement is reflected in the extra-curial observation by Sir Owen Dixon, adopted judicially in *Makita*[15] and by this

[15] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [60].

Court,[16] that "courts cannot be expected to act upon opinions the basis of which is unexplained".[17]

43. In *Lang*, Gordon and Edelman JJ described sufficiency as an "elastic concept", noting that the extent of the required explanation of how the opinion is based upon expertise can vary.[18] Their Honours observed that "[i]n some cases, where expert evidence is given on a matter which is not in real dispute, the expert may not be required to expose in great detail the basis upon which the opinion is based on their expertise".[19]

44. The absence of any cross-examination of A/Prof Shackel demonstrates that, in the present case, there was ultimately no dispute about the opinions she expressed or the foundation for them. Nonetheless, A/Prof Shackel was not limited to bare *ipse dixit*: a description of the behaviour of child victims of sexual assault without reference to the circumstances in which it occurred (cf the suggestion at AS [28]). A/Prof Shackel was entitled, if not required, to expose the reasoning that underscored the opinions she expressed about the behaviour of child victims of sexual assault. In referring to the circumstances in which child sexual abuse takes place, A/Prof Shackel did not purport to express an opinion about perpetrator behaviour in the sense that was criticised in *AJ*, rather, she was exposing her reasoning process and the facts observed and assumed upon which the opinion was based. As is explained above, and as her answers made clear, her description of those circumstances was drawn from the research and formed part of her expertise. The absence of any challenge to A/Prof Shackel's description of those circumstances is unsurprising. The fact that it is not uncommon for child sexual abuse to take place within a familial setting accords with the long experience of the Courts[20] and cannot be a matter about which there is controversy: cf AS [30]-[31].

45. As to AS [34], the CCA was correct to dismiss the appellant's criticism of the use of the terms, "victims" and "perpetrators". As A/Prof Shackel explained, she had used those terms and made reference to "abuse" because that is how it is referred to in the research: T417.22-24 (ABFM 27). That not all of the research upon which A/Prof Shackel's opinion was done on cases which had been determined does not detract from the observation at CCA [255]

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[16] Eg, *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [92]; *Lang v The Queen* (2023) 97 ALJR 758 at [13].
[17] Dixon, "Science and Judicial Proceedings", in Crennan and Gummow (eds), Jesting Pilate, 3rd ed (2019) 124 at 130.
[18] *Lang v The Queen* (2023) 97 ALJR 758 at [228]. See also, *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37].
[19] *Lang v The Queen* (2023) 97 ALJR 758 at [228].
[20] See, for example, both *Aziz* and *AJ*. See also, *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [5]-[7]; *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at [14]; *DL v The Queen* (2018) 266 CLR 1 at [4]; *HML v The Queen* (2008) 235 CLR 334 at [135]; [204]; [223]; *KRM v The Queen* (2001) 206 CLR 221 at [5]; *HG v The Queen* (1999) 197 CLR 414 at [2].

(CAB 188) that no prejudice was occasioned by the use of those terms. The assertion that there was "no evidence that the research had been done in this way" overlooks A/Prof Shackel's unchallenged description of the research as including studies involving victims of child sexual assault and "talking with offenders about how they offended": T408.17-20 (ABFM 18). The reference to ethical dilemmas did not controvert that description (cf AS [30]). Rather it explained why the research also drew on "alternative methodologies": T409.2-9 (ABFM 19). The use of the terms is not predicated on predictive risk (cf AS [34]).

46. The CCA did not err in concluding that the evidence extracted at CCA [238] (CAB 181-183) was admissible.

Evidence concerning intrafamilial relationships

47. The appellant's contention that A/Prof Shackel's evidence concerning intrafamilial relationships (extracted at CCA [234]; [236] and [238] (CAB 179-183); AS [23(a)]) is inadmissible is predicated on two matters: an asserted failure to articulate what the research meant by the term "intrafamilial" as opposed to "non-familial", and the continuing evolution of the research (AS [41]).

48. The appellant does not explain how the latter bears upon the question of admissibility. Nor is it a fair characterisation of A/Prof Shackel's description of the research. Her description of the research as "a very rapidly expanding field" was contextualised by a statement made immediately thereafter that "[o]ver the last 15 or 20 years, we've seen an explosion in this area and the research has increasingly become much stronger": T408.14-16 (ABFM 18). It is not a criterion of admissibility that the body of specialised knowledge is static. The evolution of expert learning is a feature common to most, if not all, academic and scientific fields. To the extent it is necessary to establish that an area of specialised knowledge is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience,[21] it is plain that that condition is met in respect of the body of specialised knowledge upon which A/Prof Shackel's opinions were based. The decision *AJ* demonstrates as much. As the CCA noted at [233] (CAB 178), opinions given by A/Prof Shackel in *AJ* about the behavioural responses of children to abuse committed within a "familial situation" were held to be admissible.

49. As to the first matter, the contention is likewise without foundation. The fact that, as A/Prof Shackel acknowledged, different studies use different definitions of the phrase "intrafamilial" does not render her evidence on the topic inadmissible. A/Prof Shackel

[21] *Lang v The Queen* (2023) 97 ALJR 758 at [224], referring to *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] and *HG v The Queen* (1999) 197 CLR 414 at [58].

explained, "when you look at the research in its entirety… one way that you can categorise the research and the findings of the research is to look at intrafamilial cases of child sexual assault, or extra-familial cases of child sexual assault" - meaning "inside and outside the family": T414.25-32 (ABFM 24). It is plain that that is the sense in which she was using the terms and that it reflected how she had categorised the findings for the purpose of formulating the opinions she expressed (cf AS [42]-[43]). The jury were not uninformed as to the meaning of those terms, nor was there any need to set out the different definitions that were used in the research (cf AS [41]).

50. It is not to the point that A/Prof Shackel's specialised knowledge was based on study of the research as opposed to data collection or clinical experience for which she was personally responsible. The suggestion to the contrary at AS [41] assumes, contrary to her evidence, that A/Prof Shackel was unfamiliar with the different definitions that were used.

51. A/Prof Shackel distinguished between intrafamilial situations, and abusers who were "non-familial" or strangers. She explained that certain factors arise in the context of intrafamilial child sexual assault where there is a different type of relationship between the child and the perpetrator, referring in that context to a relationship of trust, a relationship where there is quite often dependence and where there is often attachment or affection: CCA [236] (CAB 180-181). A/Prof Shackel went on to discuss how and in what respects the research shows that abuse within a familial relationship may affect the responses or behaviour of child victims of sexual abuse, including due to concerns held by the child about potential negative consequences of disclosure for family members other than the perpetrator: CCA [234], [236], [238] (CAB 179-183). The criticism of that evidence at AS [43] is without foundation.

52. As noted above at RS [5]-[8], the closeness of the familial relationship that existed between the appellant and the complainants over the offending period was not in dispute at trial, nor was the broader familial context; that is, that they were part of a very close extended family. The suggestion that there is any uncertainty as to whether the relationship between the appellant and the complainants met the descriptor "intrafamilial" in the sense it was being used by A/Prof Shackel should be rejected. It relies on a generic description of the appellant as "an extended non-biological family member" (AS [41]), ignoring both the elucidation of what was meant by "intrafamilial" and the evidence adduced at trial as to the nature of the relationship, including the living arrangements.

53. Contrary to the submission at AS [44], the CCA was correct to have regard to the absence of any objection to the evidence on this topic (beyond the global objection the bases of

which are set out above at RS [16]): CCA [251]-[252] (CAB 187). It is consistent with the absence of dispute about the closeness of the relationship between the appellant and the complainants, and relatedly the absence of the need for any further clarification of the descriptor "intrafamilial". Further, for the reasons given above at RS [43], the absence of any real dispute about the evidence is a matter that informs the assessment of the sufficiency of the exposition of the basis on which the opinion is based on their expertise. It was plain from the terms in which A/Prof Shackel gave evidence that her opinions in relation to intrafamilial abuse were based on her specialised knowledge. No further exposition was necessary.

54. The CCA was correct to find that any failure to define more closely what constitutes intrafamilial relationships neither detracted from the evidence nor gave rise to the risk of a miscarriage of justice: CCA [237] (CAB 181). The suggestion that the failure to articulate what the research meant by the term "intrafamilial" as opposed to "non-familial" meant that the evidence was or may not have been relevant (AS [41]) should also be rejected.

The evidence did not give rise to a miscarriage of justice

55. Further, and contrary to AS [35]-[38] and [45], in the event that the evidence challenged by the appellant or any part of it is found to be inadmissible, its admission did not give rise to a miscarriage of justice. There was neither a real risk that the jury would place unwarranted reliance on the evidence nor that it would use A/Prof Shackel's evidence as a predictive tool.

56. The evidence was of limited compass and was given in terms that made it clear that it was of a general character and did not relate to the behaviour of the complainants in the trial. Neither party invited, directly or by implication, impermissible reasoning. Trial counsel for the appellant did not address the evidence of A/Prof Shackel in his closing address. The Crown Prosecutor addressed the evidence in a manner that emphasised the general terms in which it was given and reminded the jury of A/Prof Shackel's evidence that there is "no typical response". The terms of the closing addresses are considered further below. The direction given by the trial judge, with the agreement of the parties, in relation to A/Prof Shackel's evidence emphasised its general character and educative purpose.

57. It should not be accepted that there was a real prospect that, unsolicited by any submissions of counsel, the jury would engage in "reasoning of equivalence" or predictive reasoning from a feature as anodyne as the alleged abuse having taken place in the home in the course of everyday activities (cf AS [37]). As to AS [38], the appellant's reliance on the observation by Fagan J in *AJ* at [172] fails to acknowledge that, unlike in *AJ*, no such

submission was made in this case. In fact, no reference was made in the closing address of the Crown to any of the evidence said to relate to the perpetrator behaviour or risk factors for abuse. There is no "real chance" that such evidence as is found to be inadmissible affected the jury's verdict[22] or that it had the "capacity for practical injustice" or "was capable of affecting the result of the trial".[23]

Ground 2: The jury directions

58. In the present case, the directions given by the trial judge to the jury included a direction in relation to the evidence of A/Prof Shackel: SU 39-40 (CAB 47-48). The content of the direction was discussed with the parties at the conclusion of the evidence, prior to the commencement of the summing up: CCA [273] (CAB 193). Whilst trial counsel for the appellant sought a number of other directions, no further direction was sought in relation to the evidence of A/Prof Shackel at that point or at any point thereafter: CCA [260]; [274]-[275] (CAB 190; 193); SU 47 (CAB 55). It follows that there is no "decision" on a question of law that could be the subject of second limb error: see *Papakosmas v The Queen* (1999) 196 CLR 297 at [72] (per McHugh J). The appellant must establish that the failure to give the directions that he now contends ought to have been given (AS [54]-[55]) constituted a miscarriage of justice.

59. While a concern has been expressed both judicially[24] and extra-judicially[25] that the admission of counter-intuitive behaviour evidence may give rise to a risk that the jury may engage impermissibly in predictive or diagnostic reasoning, it is not axiomatic that such a risk arises whenever counter-intuitive behaviour evidence is admitted (cf *BRS v The Queen* (1997) 191 CLR 275 at 308 (McHugh J); *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [69]). It would be inapt to equate it, for example, to the risk of propensity reasoning that arises when multiple counts of sexual offences against several complainants involving similar fact evidence are tried together. Resort to such reasoning has been described as "natural" as a matter of "ordinary human experience".[26] The risk of predictive reasoning in the context of counter-intuitive behaviour evidence is considerably more remote for two reasons. First, because it does not involve using evidence of the behaviour of a particular individual to reason as to how the same individual acted on another occasion. Second, because the terms in which it is commonly expressed – that, for example, a

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[22] *Hofer v The Queen* (2021) 274 CLR 351 at [41]; [47]; [118].
[23] *Edwards v The Queen* (2021) 273 CLR 585 at [74].
[24] *M v The Queen* [2011] NZCA 191 at [31]-[32]; *Jacobs v The Queen* [2019] VSCA 285 at [60].
[25] Report 102 p 320 [9.157]; New Zealand Law Reform Commission, *Evidence Code and Commentary*, Report 55 (1999), Vol 2 at [C110]-[C111].
[26] *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [43].

particular behaviour is "not uncommon" – guard against the irrational use of the evidence as predictive.

60. Further, where it is present, the risk is not equal in every case. The extent of the risk will be affected by the particular circumstances of the case, in particular, having regard to the evidence (including the terms in which it was given, whether it was confined to evidence of a general character, how it was led and whether it was challenged), how the Crown used the evidence and the approach taken by defence counsel at trial: see CCA [269] (CAB 192). The assessment of that risk also requires consideration of the effect of directions given by the trial judge: *M v The Queen* [2011] NZCA 191 at [46] (**M**).

10 61. The CCA was correct to conclude that there is no universal rule or "invariable prescription" that a direction warning against the improper use of counter-intuitive behaviour evidence (that is, use of the evidence as a predictive or diagnostic tool) must be given in every case in which such evidence is admitted: CCA [269] (CAB 192); *M* at [45]-[49].[27] To the extent the submissions at AS [53] suggest otherwise, they ignore the conclusion of the New Zealand Court of Appeal in *M*. Rather, whether the failure to give such a warning or direction in a particular case will give rise to a miscarriage of justice, depends upon an assessment of the risk that impermissible reasoning would have been employed by the jury in the particular circumstances of the case having regard to the matters described above at RS [60].[28]

20 62. For the reasons outlined below, the appellant has not demonstrated that there was a "real chance"[29] that the jury so reasoned.

63. First, and as noted above, in the present case, the evidence of A/Prof Shackel was of narrow compass. It was given in terms that made it clear that the evidence was general in nature, drawn from a body of research unrelated to the complainants. A/Prof Shackel's evidence commenced with the observation that there are "no typical ways" in which a victim of child sexual assault will respond at the time of or after the abuse; "[e]very child is different and every situation of assault is different": T409.30.43; T411.33-38 (ABFM 19; 21). The Crown closing address drew attention to each of those matters: CCA [244] (CAB 184-185). Against a starting point that there are no typical responses, A/Prof Shackel described
30 behaviours that were "not uncommon", using terms calibrated to the purpose for which the

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[27] In *Jacobs v The Queen* [2019] VSCA 285 at [58]-[61], the Victorian Court of Appeal cited, in obiter, the principles summarized in *M* but did not further consider the question of direction other than in connection with the application of the proviso (see [83]).
[28] *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [52].
[29] *Hofer v The Queen* (2021) 274 CLR 351 at [41]; [47]; [118].

evidence was led (to dispel misconceptions), terms which (as noted) themselves tended against the use of the evidence in a predictive or diagnostic sense.

64. Second, the Crown did not, in the present case, rely on the evidence of A/Prof Shackel as supportive of the credibility of AA and BB generally or in respect of certain counts (cf AS [57]). The appellant's submission to the contrary relies on three passages of transcript the relevant portions of which are extracted at CCA [243]-[245] (CAB 184-186). Insofar as the identified passages drew any connection between the evidence of A/Prof Shackel and that of the complainants, the reference was brief and limited to delay in complaint. The Crown Prosecutor's submissions were directed to meet a submission anticipated and in fact made by trial counsel for the appellant that delay in complaint (including a failure to protest at the time of the offences) undermined the credibility of the complainants' accounts: CCA [270] (CAB 192). The purpose of the Crown Prosecutor's submission was to address a commonly held misconception that delay in complaint indicates that the allegation that the offence was committed is false. An acceptance that such a misconception persists founds the delay in complaint direction mandated by s 294 of the *Criminal Procedure Act 1986* (NSW). The CCA recognised both the limited purpose of the Crown Prosecutor's submissions and the overlap between the direction required by s 294 and A/Prof Shackel's evidence as to delay in complaint: CCA [270]-[271] (CAB 192) (cf AS [60]). Both were directed to the same misconception. Criticism of the trial judge's reference to A/Prof Shackel's evidence in the course of the delay in complaint direction should be rejected for the same reason (AS [56]). Neither involved an invitation to use predictive or diagnostic reasoning, or contributed to the risk that the jury would do so.

65. Third, as to the suggestion that the risk of impermissible reasoning arose from the evidence challenged by Ground 1 (AS [55(a)]; [55(b)]), neither party invited such reasoning (cf *AJ* at [87]-[88]; [171]). In fact, as noted above, the Crown Prosecutor made no reference to the evidence of A/Prof Shackel as to the circumstances in which child sexual assault offences take place. Consistent with the purpose for which it was admitted, the Crown Prosecutor's summary of the evidence focused on A/Prof Shackel's opinions as to the behaviour of child victims of sexual assault. Reference to intrafamilial situations was similarly confined (see CCA [244] (CAB 184-185)).

66. Fourth, the suggestion that the jury, in the absence of a direction in the terms suggested at AS [55(c)], used A/Prof Shackel's evidence to substantiate the alleged tendencies should not be accepted (cf AS [58]). The submission ignores the clear articulation of the evidence

that comprised the tendency evidence in the Crown closing address (T836.20-49 (ABFM 54)) as well as the description of it in the tendency direction itself: SU 37 (CAB 45).

67. It is accepted that the trial judge related an aspect of the evidence of A/Prof Shackel regarding "piecemeal" disclosure to that of the complainants' mother in the course of summarising the Crown address: SU 44-45 (CAB 52-53). The reference did not reflect the terms in which submissions had been made by the Crown. It was a singular reference that was not repeated.

68. Any risk that the jury may have engaged in predictive reasoning was sufficiently ameliorated by the directions that were given (cf AS [58]). The trial judge's summing up should be read as whole. The directions are not to be considered in isolation, but rather it is the combined force of the relevant directions that must be considered. There are four important aspects of the summing up. First, the trial judge reminded the jury that it was their duty to act rationally and exhorted them to use their commonsense. Relatedly and immediately thereafter, the trial judge directed the jury that it was for them to assess the evidence of each witness and decide whether the evidence was both truthful and accurate: SU 2-3 (CAB 10-11). Second, the trial judge directed the jury that they must carefully consider each complainant's evidence and that, before they could convict the appellant, they must be satisfied beyond reasonable doubt that the evidence of each complainant was both truthful and reliable: SU 6 (CAB 14). That those directions ameliorate the risk of impermissible reasoning of the kind being considered is consistent with and supported by *M*[30] (cf AS [58]).

69. Third, the direction given by the trial judge in relation to the evidence of A/Prof Shackel, the content of which had been foreshadowed to the parties, emphasised the general nature and educative purpose of the evidence: SU 39-40 (CAB 47-48). Fourth, the trial judge directed the jury that they should be "extremely careful about drawing any inference" and that they should "not draw any inference from the direct evidence unless it is a rational inference in the circumstances": SU 8-9 (CAB 16-17).

70. Viewed in the context of the evidence that was given, the use that was made of it by the parties and the directions discussed above, the jury can have been in no doubt that A/Prof Shackel's evidence was general in nature, that such evidence could not establish that it was probable that the complainant was telling the truth and that they could not use any correlation between aspects of a complainant's behaviour and A/Prof Shackel's description

[30] *M v The Queen* [2011] NZCA 191 at [45]-[49].

of behaviour of child sexual assault victims that was "not uncommon" to infer that the complainant was telling the truth. Likewise, there is no "real chance", in the circumstances, that the jury used A/Prof Shackel's description of the circumstances in which child sexual assault offences are not uncommonly committed to infer that the appellant was more likely to have behaved in the manner alleged. To do so, would have been both irrational and contrary to common sense.

71. The appellant has not demonstrated that the absence of further directions in terms such as those set out at AS [54]-[55] occasioned a miscarriage of justice.

72. While not determinative of whether the failure to give those directions has produced a miscarriage, the fact that trial counsel for the appellant did not seek the directions that are now sought may support a conclusion that, in the context of the trial the direction was not required to avoid such a miscarriage: *De Silva v The Queen* (2019) 268 CLR 57 at [35]; *GBF v The Queen* (2020) 271 CLR 537 at [25]. As the CCA correctly observed, the fact that no further direction was sought in the present case, where trial counsel was on notice of what the trial judge proposed to say in relation to the evidence of A/Prof Shackel and actively sought other directions, suggests that the omission was not a mere oversight: CCA [275] (CAB 193). It illustrates that, in the atmosphere of the trial and in light of the way it had been conducted, the possibility of the jury engaging in the impugned form of reasoning was not readily apparent.

73. The CCA did not err in finding that a miscarriage of justice was not occasioned by the absence of further direction in relation to the evidence of A/Prof Shackel.

PART VI ESTIMATE OF HOURS

74. The Respondent estimates that no more than two hours will be required for the presentation of the respondent's oral argument.

Dated: 29 February 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

BQ
Appellant

and

THE KING
Respondent

10 **ANNEXURE A**

RESPONDENT'S LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN WRITTEN SUBMISSIONS

CONSTITUTIONAL PROVISIONS

1. No constitutional provisions are referred to in the Respondent's submissions.

STATUTES

2. *Crimes Act 1900* (NSW), s 61H (multiple versions in force from 1 January 2007 to 30 November 2008, and from 1 December 2008 to 21 February 2010)

20 3. *Criminal Appeal Act 1912* (NSW), s 6 (version in force from 1 July 2021 to 18 February 2024)

4. *Criminal Procedure Act 1986* (NSW), ss 294 and 306I (version in force from 13 August 2018 to 30 August 2018)

5. *Evidence Act 1995* (NSW), ss 55, 79 and 108C (version in force from 2 July 2018 to 29 February 2020)

6. *Evidence Amendment Act 2007* (NSW) (version in force from 8 December 2008 to 1 January 2009)

STATUTORY INSTRUMENTS

30 7. No statutory instruments are referred to in the Respondent's submissions.