IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C13 of 2015

BETWEEN:

THE QUEEN
Appellant

and

GW
Respondent

HIGH COURT OF AUSTRALIA
FILED
04 NOV 2015
THE REGISTRY CANBERRA

APPELLANT'S SUBMISSIONS

Part I: PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: ISSUES

2. The issues raised by this appeal are:

   (a) In a trial where a witness gives unsworn evidence under s13 of the *Evidence Act 2011* (ACT) ("the Evidence Act"), a uniform Evidence Act, should there be a new mandatory requirement that the jury be warned that there is a difference between sworn and unsworn evidence and that they must take that difference into account when assessing the reliability of the witness's evidence?

   (b) Is unsworn evidence given under s13 of the Evidence Act intrinsically unreliable?

   (c) Does the Evidence Act establish a hierarchy of types of evidence, where sworn evidence has "primacy" over unsworn evidence, such that the tribunal of law must take this primacy into account when making rulings and giving reasons and directions?

   (d) Is there a particular set of words that must be used by a court when making a finding that a witness is not competent to give sworn evidence pursuant to s13(3) of the Evidence Act such that failure to adhere strictly to that wording invalidates the finding?

Part III: SECTION 78B

3. The appellant considers that notice pursuant to s78B of the *Judiciary Act 1903* (Cth) is not required.

The Director of Public Prosecutions (ACT)
20-22 London Circuit
GPO Box 595
Canberra City ACT 2601
DX 5725 Canberra City

Telephone: (02) 6207 5399
Fax: (02) 6207 5428

Ref: James Walker

Part IV: CITATIONS

4. The citations for the decisions in the Supreme Court of the Australian Capital Territory are:

   (a) Pre-trial evidence: *The Queen v GW* (SCC 55 of 2013, unreported, 6 August 2013, Burns J).
   (b) During the trial: *The Queen v GJ (No 1)* [2014] ACTSC 108 (26 March 2014, Penfold J).
   (c) On appeal: *GW v The Queen* [2015] ACTCA 15 (24 April 2015) (Murrell CJ, Refshauge and Ross JJ) ("the Court of Appeal").

Part V: NARRATIVE STATEMENT OF RELEVANT FACTS

5. The respondent is the biological father of two daughters, R and H. He was tried on six counts of committing acts of indecency upon or in the presence of R (counts one, three and five) and H (counts two, four and six) between 29 March 2012 and 2 April 2012 contrary to s61(1) of the *Crimes Act 1900* (ACT). During this period R was five years old and H was three years old.

Pre-trial hearing

6. On 6 August 2013 R's evidence was recorded at a pre-trial hearing before Burns J. R was aged six years old at the time she gave evidence. Before deciding to allow R to give unsworn evidence, Burns J heard from the prosecutor about R's capacity to give sworn evidence. The Crown prosecutor said:

> PROSECUTOR: The last point I wanted to make, your Honour, before we do that is that the child is six years old. I've spoken to her. I don't believe she can give sworn evidence. She doesn't understand what a Bible or affirmation is. It seems to me that the procedure is set out in 13(5) of the Evidence Act. When I spoke to her before she understood the importance of telling the truth.
>
> HIS HONOUR: Yes. It seems to me that I need to go through the process in subsection (3) of section 13 before we get to subsection (5).
>
> PROSECUTOR: That's right, your Honour. ...

7. This exchange drew no comment from the defence counsel, Mr Gill. Burns J then dealt with some other matters before questioning R about the s13 issue. His Honour then ruled R was not competent to give sworn evidence and provided succinct reasons:

> HIS HONOUR: Gentlemen, despite the fact that the witness has indicated that she understands that – at least understands the difference between the truth and what is not the truth – and says that she understands that she has an obligation to tell the truth today, I think that it is probably better to proceed under subsection (5). At the present time, because of the difficulty in truly gauging the level of her understanding and her age, I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence. So I propose to proceed under subsection (5) of section 13. Do you want to be heard in relation to that, Mr Gill?
>
> MR GILL: No, your Honour.

> HIS HONOUR: Thank you. Yes, well we'll go back [to the video-link over which R was appearing].

8. His Honour then went through the matters listed in s13(5) with R. R's evidence-in-chief consisted primarily of a recording of an interview between R and police.[1] This interview was tendered and then R was cross-examined.

The trial

9. On 21 March 2014 the trial began. Prior to the evidence of R being played to the jury, defence counsel (who had also appeared at the pre-trial hearing) asked the trial judge (Penfold J) to "advise"[2] the jury that R was not giving sworn evidence because the judge at the pre-trial hearing had found R did not understand the obligation to give truthful evidence. This was opposed by the Crown prosecutor. Penfold J declined to do so.

10. The request for a "direction" was renewed prior to the trial judge's summing up. Defence counsel stated:[3]

> MR GILL: So the first issue relates to the fact that R's evidence is unsworn, and it's unsworn because it was found that she didn't comprehend the obligation to tell the truth. I'd ask for a direction that that fact be identified to the jury. Unlike the other witnesses, her evidence is unsworn because she does not comprehend the obligation to tell the truth. I have no ---
>
> HER HONOUR: Well, on the basis of a finding.
>
> MR GILL: Yes. I have no difficulty with your Honour saying that does not necessarily make her less reliable, but that it's something that the jury must know in assessing her evidence. And I think that that together gives that direction balance.

This was opposed by the Crown prosecutor. Penfold J refused to give the warning.[4]

11. Defence counsel also objected to the admission of R's evidence from the pre-trial hearing on the basis that Burns J had misstated the s13(3) test and, as a result, had not properly ruled that R was not competent to give sworn evidence before proceeding to allow her to give unsworn evidence. The parties having previously agreed to be bound by Burns J's pre-trial ruling, the trial judge ruled that R's evidence could be admitted[5] and it was played to the jury.

12. The jury found the respondent guilty on count three, not guilty on counts five and six, and was unable to reach a verdict on counts one, two and four.

The Court of Appeal

13. The respondent appealed against his conviction. Of present relevance, two of the grounds of appeal were:

---

[1] Admitted pursuant to s40F of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).
[2] Transcript, 24 March 2014, T51.16.
[3] Transcript, 3 April 2014, T681.25-35
[4] Transcript, 3 April 2014, T694.13.
[5] Transcript, 24 April 2014, T79.21; *The Queen v GJ (No 1)* [2014] ACTSC 108.

(c) The unsworn evidence of R should not have been admitted; and
(d) The trial judge erred in failing properly to direct the jury regarding the unsworn evidence of R.

14. In his written submissions the respondent urged in relation to ground (c):

> In the present case, Burns J did *not* positively find that R did not have the capacity to understand that, in giving evidence, he or she was under an obligation to give truthful evidence. He was, rather, "not satisfied" that she did have that capacity. Technically speaking, the first condition for giving unsworn evidence was not satisfied.

15. And in relation to ground (d), the respondent argued:

> While s 13 does not mandate any directions to a jury, unlike s 9(4) of the *Evidence Act 1929*, South Australian authority regarding appropriate directions to a jury (see *R v J, AP*, *R v Lomman*) should be followed. Such a direction is required either under s 165 or in accordance with common law obligations. ... In any event, it is a basic common law principle that a judge should direct a jury regarding any matter bearing on the reliability of a witness which the jury may not fully appreciate: *Bromley v The Queen.*

16. On 5 November 2014 these arguments were maintained in oral submissions and were opposed by the Crown.

17. On 24 April 2015 the Court of Appeal upheld grounds of appeal (c) and (d). The Court of Appeal identified these as both involving a wrong decision on a question of law.[6] The Court of Appeal rejected the remaining appeal grounds (including, significantly, that the conviction was unsafe and unsatisfactory) and ordered a retrial on count 3.

18. The decision of the Court of Appeal on **both** grounds it upheld was underpinned by what the Court referred to as "the underlying policy that gives primacy to sworn evidence".[7]

19. On ground (c) the Court of Appeal held that the presiding judge had failed to address the correct question under s13(3). Instead, his Honour's finding that he was "not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence" reversed the s13(3) test, and failed to give "primacy" to sworn evidence.[8] The Court found:[9]

> The failure to apply a statutory precondition to the receipt of unsworn evidence (first finding that R was incompetent to give sworn evidence) meant that the trial was "not conducted according to law"....

20. On ground (d) the Court of Appeal held that the trial judge should have given a warning regarding R's reliability because she had given unsworn evidence, stating:[10]

---

[6] Court of Appeal, [7] invoking s37O(2)(a)(ii) *Supreme Court Act 1933*.
[7] Court of Appeal, [76].
[8] Court of Appeal, [80] and [84].
[9] Court of Appeal, [84].
[10] Court of Appeal, [103].

> R was the key witness in the prosecution case. The most fundamental and most difficult task that the jury had to undertake was to assess the reliability of her evidence. With a view to bolstering the reliability of evidence given in courts, the *Evidence Act* gives primacy to sworn evidence and makes it clear that unsworn evidence is acceptable only from a witness who is not competent to give sworn evidence. In those circumstances, it was important for the jury to understand the difference between sworn and unsworn evidence and take that difference into account when assessing the reliability of R's evidence. The jury should have been directed accordingly.

21. The Court of Appeal's decision on ground (d) was based on a finding that the warning as to reliability was required by the common law rather than by s165 of the Evidence Act.[11] However, the Court of Appeal found it "instructive"[12] to refer to *R v Lomman*,[13] which in fact had considered a South Australian statutory provision which had no equivalent in the uniform Evidence Acts. The derivation from *Lomman* led the Court of Appeal to conclude that s13 of the Evidence Act was a provision that "recognises the primacy to be accorded to sworn evidence".[14]

Part VI: ARGUMENT

A – Introduction

22. With respect to ground (d), the Court of Appeal's decision has the effect that where a witness gives unsworn evidence (and this will be, in the main, younger children giving evidence in sexual offence cases) the jury must now receive a direction that there is a difference between sworn and unsworn evidence, and be told that they must take that difference into account when assessing the **reliability** of the witness's evidence.

23. It is important to note that the circumstances postulated by the Court of Appeal for the giving of the warning – that R was a key witness in the prosecution case – will be present in every case where a child complainant is giving evidence in a sexual offence. Accordingly the new direction will have to be given routinely when a child is giving evidence in sexual offence prosecutions.

24. It is submitted that the Court of Appeal used impermissible reasoning to develop the common law by reference to interstate legislation which had no counterpart provisions in uniform Evidence Act jurisdictions. This distracted from the central issue as to whether the common law views unsworn evidence as intrinsically unreliable. The corollary is a requirement for a warning that is founded on stereotype rather than judicial experience.

25. No such warning has hitherto been required in the uniform Evidence Act jurisdictions, where the trend has been to **preclude** warnings in relation to reliability of children's evidence: see ss165 and 165A of the Evidence Act. The Court of Appeal's reasoning is also inconsistent with two important developments in the law

[11] Court of Appeal, [99]-[100].
[12] Court of Appeal, [101]-[102].
[13] [2014] SASCFC 55; (2014) 119 SASR 463 ("*Lomman*").
[14] Court of Appeal, [102].

regarding competence to give evidence particularly under the uniform Evidence Acts:

(a) the law has developed to recognise that the test for competence should be secular, and not based on a moral or religious understanding; and
(b) the law recognises that the evidence of children is not inherently less reliable than that of adults.

26. With respect to ground (c), the Court of Appeal's decision takes an artificially strict interpretation of compliance with s13 that results in a triumph of form over substance. The Court of Appeal's approach adds a gloss to what is required by s13 by requiring that judges make findings that accord "primacy" to sworn evidence. The result is that error is found in how the reasons are expressed rather than the correctness of the reasons given and ruling made. It is submitted that this is wrong.

27. In developing the argument, it is instructive to set out the developments in the law relating to competence. In doing so, it is noted that in a modern context those giving unsworn evidence are generally children.

History of competence and unsworn evidence

28. There was no entitlement to give unsworn evidence at common law.[15] Thus in the 1861 case of *Maden v Cattanach*:[16]

> Upon the trial of an action at in the County Court of Rochdale one of the plaintiffs was called as a witness and was about to be sworn when the defendant's solicitor interposed and was allowed to examine her on the *voir dire*, for which purpose she was sworn. As a result of this inquiry into her opinions, it appeared that she did not believe in a God, or in a future state of reward or punishments, but she believed she was responsible to her fellow-men and her own conscience if she failed to speak the truth, and that as a solemn declaration the oath which she had taken bound her morally to speak the truth. Thereupon she was rejected as a witness, and she and her co-plaintiff were nonsuited.

29. Similarly, a child could only give evidence if on "strict examination" it could be shown they understood the religious "nature and consequences of an oath" which depended on "the sense and reason they entertain of the danger and impiety of falsehood".[17]

30. This Court last considered the issue in *Cheers v Porter*, a case about s13 of the *Oaths Act 1900* (NSW) ("the Oaths Act"). Section 13 allowed for evidence to be taken on affirmation. In a dissenting judgment, Dixon J considered the common law approach and concluded:[18]

> It was inevitable that when an oath was essential and no alternative was permitted that a capacity to understand its solemnity and significance should be made the test of a child's competence to testify.

---

[15] *Maden v Cattanach* (1861) 158 ER 512 at 515 ("*Maden v Cattanach*").
[16] *Maden v Cattanach* as summarised in *Cheers v Porter* (1931) 46 CLR 521 at 529-530 (Dixon J) ("*Cheers v Porter*").
[17] *R v Brasier* (1779) 168 ER 202 at 202-203.
[18] *Cheers v Porter*, 531.

31. In the leading judgment Evatt J (Gavan Duffy CJ and Starke J agreeing) explained the operation of s13 of the Oaths Act:[19]

> In such cases [eg those involving child witnesses], the actual appearance of the witness in the box will often justify an inquiry in the interests of justice, and the right of inquiry is committed to the Court itself. The inquiry will be whether the proposed witness is incompetent to take an oath. It is intended that the scope of the inquiry should be limited to religious belief, because the only necessary result of the decision that there is incompetence is the authorization of the alternative ceremony. Sec. 13 is, therefore, not concerned with such incompetence to testify as results from mental incapacity or defective intellect. It is designed to prevent possible loss of testimony by the fact of religious unbelief or religious disbelief.

Towards a secular test of competence

32. The common law rule was gradually abridged by statute, such as by s13 of the Oaths Act.

33. The common law requirement that a witness have a "moral and religious understanding"[20] of the nature and consequences of an oath was regarded as "far from satisfactory"[21] by the Law Reform Commission ("LRC") in its Evidence (Interim) Report (Report 26). This was because testing the witness's comprehension of abstract concepts (such as "god" and of "future punishment") "might bear little relationship to [the] ability to comprehend questions and formulate rational responses".[22] Instead, it was proposed to adopt a test of competence that assessed witnesses by "their ability to function as a witness".[23]

34. In its final report the Commission noted that recent case law highlighted "the need for a secular test for psychological competence".[24] The Commission did not propose that the oath be abolished, recommending that the oath and affirmation be treated as "equal options".[25]

Evidence of children

35. Prior to the enactment of the uniform Evidence Acts, statutory amendments permitting children to give unsworn evidence were accompanied by statutory requirements that corroboration was required and corroboration warnings be given.

36. Even where there was no statutory requirement for corroboration, a "rule of practice" required a warning that the uncorroborated evidence of children should be scrutinised with special care, although this related to children's evidence generally and was not dependent on whether the evidence was sworn or unsworn.[26] The rationale for the

---

[19] *Cheers v Porter*, 536.
[20] Law Reform Commission, *Evidence (Interim) Report*, Report No 26, 1985, [243] ("LRC Report 26").
[21] LRC Report 26, [243].
[22] LRC Report 26, [243].
[23] LRC Report 26, [236].
[24] Law Reform Commission, *Evidence*, Report No 38, 1987, Appendix C, [3] ("LRC Report 38").
[25] LRC Report 38, [85]-[86].
[26] *Hargan v R* (1919) 27 CLR 13; *K v The Queen* (1992) 59 A Crim R 113 ("*K v The Queen*").

rule was that children belonged to one of the categories of suspect witnesses (along with accomplices and complainants in sexual offences).[27]

37. In 1971 the ACT introduced a provision permitting the evidence of a child under 14 to be taken without the need of an oath or affirmation provided the court explained to the witness that he or she was required to tell the truth.[28] Such evidence required corroboration.[29] In the ACT this corroboration requirement was abolished by statute in 1993.[30]

38. Section 164 of the uniform Evidence Acts abolished corroboration warnings, and they have been abolished by statute in all jurisdictions.

39. Apart from abolishing corroboration warnings, the uniform Evidence Acts also depart from the pre-existing law regarding children's evidence, reflecting the modern psychological research about children's evidence.

40. In *JJB v The Queen*[31] Spigelman CJ strikingly referred to this research when criticising observations of Deane J and McHugh J in *Longman v the Queen.*[32] His Honour noted:

> [3] Their Honour's observations are based on assumptions about child psychology which are widely held but which are not necessarily well founded. Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background. This has been shown to be so in sexual assault cases. (See *R v Johnston* (1998) 45 NSWLR 362 at 367-368.)
>
> [4] Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in *Longman* reflect a similar legal tradition that treated children as unreliable witnesses. In the past both categories of witnesses required corroboration.
>
> ...
>
> [6] There is a significant debate as to whether expert evidence should be admissible about the ability of children to give accurate evidence, especially in child sexual assault proceedings. See, most recently, *Uniform Evidence Laws Report* ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005 at 9.138-9.158; Criminal Justice Sexual Offences Task Force *Responding to Sexual Assault* Final Report, Sydney December 2005 pp165-176. These two recent reports refer to a range of earlier studies and reports. They also outline the legislation that already exists in some jurisdictions to permit such evidence and make recommendations for further legislative intervention.
>
> [7] There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence. [references omitted] These are complex

---

[27] *K v The Queen*, 119.
[28] *Evidence Act 1971* (ACT) s 64(1).
[29] *Evidence Act 1971* (ACT) s 64(3).
[30] *Evidence (Amendment) Act 1993* (ACT).
[31] [2006] NSWCCA 126; (2006) 161 A Crim R 187 ("*JJB v The Queen*").
[32] [1989] HCA 60; (1989) 168 CLR 79 ("*Longman*").

> issues, as reflected in reviews of the research on the ability of young children to distinguish fantasy from reality [references omitted]. The same is true of research about a child's ability to accurately recall stressful events [references omitted].

41. This research recognised that "there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings or that children are more likely to lie than adults".[33]

Uniform Evidence Law (Report 102)

42. There were further amendments to the uniform Evidence Acts following ALRC *Uniform Evidence Law* Report No. 102 ("ALRC Report 102") including the remaking of s13. A number of the amendments related to children's evidence, including the introduction of ss165(6) and 165A.[34] Those amendments specifically prohibited unreliable evidence warnings based on the age of a child or warnings that children as a class are unreliable witnesses. There were a number of other amendments affecting the evidence of children in the 2008 amendments.[35] As stated in the Explanatory Memorandum to the Bill:[36]

> The Bill contains a number of important reforms including amendments to make it easier for children and people with a cognitive impairment to give evidence.

43. Prior to the 2008 amendment a witness was not competent to give sworn evidence if they were "incapable of understanding the obligation to give truthful evidence": s13(1). To be competent to give unsworn evidence required the court to be satisfied that the witness understood "the difference between truth and a lie": s13(2). It was considered that this imposed substantially similar tests and could result in relevant evidence not being admissible. Accordingly, Report 102 recommended "a test of general competence founded on basic comprehension and communication skills. The test is to be applicable to the giving of both sworn and unsworn evidence".[37] This "more liberal" approach to competence was to be achieved "through the reform of s13, in particular, by introducing a test of general competence to give sworn and unsworn evidence and by distinguishing better the tests of competence to give sworn and unsworn evidence so that they are sufficiently different".[38]

44. That the tests are different does not mean that different weight is to be afforded to sworn and unsworn evidence. The different tests reflect the basic idea that the ability to tell the truth, not to the ability to understand abstract concepts, should be the threshold test of competence.

---

[33] ALRC and HREOC, *Seen and heard: priority for children in the legal process*, Report no 84, 1997, [14.22] (citations omitted) ("ALRC Report 84").
[34] *Evidence Amendment Act 2008* (Cth).
[35] Section 29 (permitting witnesses to give evidence in narrative form), s41 (improper questioning), s79 (opinion evidence based on specialised knowledge, specifically referring to specialised knowledge of child development and child behavior), s108C (expert evidence on the credibility of witnesses, also specifically referring to specialised knowledge of child development and child behavior).
[36] Explanatory Memorandum to the Evidence Amendment Bill 2008, 2.
[37] ALRC Report 102, [4.49].
[38] ALRC Report 102, [4.86].

Competence and unsworn evidence under the uniform Evidence Acts

45. The uniform Evidence Acts[39] supplant the common law of competence. This flows from the words "[e]xcept as otherwise provided by the Act" in s12 of the Evidence Act. These words show the legislature intended to cover the field and abrogate the common law rules of evidence regarding competence.[40]

46. The starting point is a general presumption that every person is competent to give **evidence**: s12(1). That presumption can be displaced if a person does not have the capacity to understand a question about a fact or to give an answer that can be understood to a question about the fact: s13(1).[41]

47. If the presumption of competence to give evidence about a fact is not displaced the Evidence Act establishes two pathways for witnesses giving evidence: sworn evidence or unsworn evidence. Subsection 21(1) provides that a witness in a proceeding must take an oath or affirmation before giving evidence. Subsection 21(2) excludes witnesses giving unsworn evidence under s13 from that requirement. In other words, the legislative scheme does not preference one form of evidence – sworn or unsworn – over another. The Evidence Act is structured to facilitate evidence being admitted down whichever pathway applies in a particular situation.

48. Section 13 is to be approached sequentially.[42] Subsections 13(1) and 13(2) are concerned with competence to give **evidence**. Where there is no issue about competence to give **evidence**, what follows is the consideration of whether the witness is competent to give **sworn evidence**. Subsection 13(3) is in these terms:

> (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence.

49. A person who is not competent to give sworn evidence "may" be competent to give unsworn evidence: s13(4), subject to the court's compliance with s13(5). Despite the use of the word "may", there is no discretionary power for the court to refuse to allow a witness to give unsworn evidence if the witness is competent to give evidence under s13(1). As Basten JA noted in *SH v The Queen*:[43]

> This ambiguity [arising from the use of "may"] is to be resolved in favour of the conclusion that there is no discretionary power to refuse to allow a child to give unsworn evidence, if the court is satisfied as to the capacity to understand a question and give a comprehensible answer, in accordance with sub-s (1). That conclusion follows from both the structure of the section and by reading sub-ss (4) and (5) together. Thus, sub-s (5) does not use equivocal language, but, subject to identified preconditions, states that a person who is not competent to give sworn evidence "is" competent to give unsworn evidence. That language, together with the absence of any

---

[39] The *Evidence Act 1995* (Cth) applied to proceedings in the ACT until it was replaced by the *Evidence Act 2011* (ACT).

[40] *McNeill v The Queen* [2008] FCAFC 80; (2008) 168 FCR 198, [60]-[63]. See also: *R v Ellis* [2003] NSWCCA 319; (2003) 58 NSWLR 700.

[41] A person may be differentially competent in relation to giving evidence: s13(2).

[42] *MK v The Queen* [2014] NSWCCA 274, [70] ("*MK v The Queen*").

[43] [2012] NSWCCA 79; (2012) 83 NSWLR 258, [8] ("*SH v The Queen*").

attempt to specify criteria relevant to the exercise of a discretion, demonstrate that no discretionary power was intended.

50. Subsection 13(6) creates a presumption that a person "is not incompetent because of this section". It is to be noted that the issue of competence under s13 arises in a number of different contexts. There is competence to give evidence s13(1), competence to give evidence about other facts s13(2), competence to give sworn evidence under s13(3), and competence to give unsworn evidence s13(4) and s13(5). The s13(6) presumption is apt to apply to **any** of those issues of competence.

10

51. None of this establishes some kind of hierarchy preferencing or giving primacy to sworn evidence – quite the contrary.

52. Subsection 13(8) permits the court to inform itself as it thinks fit for the purposes of determining a question under the section. Neither party carries the onus and it is for the court to determine whether it is satisfied on the balance of probabilities that a person is competent: s142(1).[44]

53. The approach to competence under the uniform Evidence Acts is a significant and
20 intentional departure from the common law. This is demonstrated by the availability of unsworn evidence as well as a number of other aspects of the uniform Evidence Acts. These include:

(a) The underlying policy of the uniform Evidence Acts, namely, that except as otherwise provided by the Act, relevant evidence should be admitted in a proceeding: s56(1).
(b) The abolition of the distinction between an oath and an affirmation: ss21(5), 22(4).
(c) The abolition of the need for a religious text to be used when swearing an oath:
30 s24(1).
(d) The provision of an alternative oath for persons who do not believe in "the existence of a god": s24A(1).
(e) The declaration that oaths are effective even if the person who takes the oath "did not understand the nature and consequences of the oath": s24(2)(b).
(f) The abolition of the corroboration requirement and the prohibition on warnings about children as a class of witnesses: ss164, 165(6) and 165A.

B – Court of Appeal Ground (d) - unsworn evidence direction

40 ***Lomman does not represent the common law***

54. Underpinning the Court of Appeal's reasoning leading to the decisions on both grounds is a concept of the primacy of sworn evidence.[45] With respect, the uniform Evidence Acts do not reflect this view of primacy; rather they establish two equivalent, though different, methods to receive evidence from witnesses.

55. The only authority cited with respect to this assumption was the South Australian case of *Lomman.* That case concerned failure to comply with a specific statutory

[44] *RA v The Queen* [2007] NSWCCA 251; (2007) 175 A Crim R 221, [11] ("*RA v The Queen*").
[45] Court of Appeal, [77]-[80] and [101]-[103].

requirement under s9(4) of the *Evidence Act 1929* (SA) that requires a judge to explain to the jury, where a witness gives unsworn evidence, the reason the evidence is unsworn, and, where a party requests, a mandatory warning of the need for caution in accepting the evidence, and the weight to be given to it. Western Australia is the only other Australian jurisdiction in which there is a legislatively mandated distinction in the weight to be afforded to sworn and unsworn evidence.[46] Those jurisdictions are in contrast to Queensland where it is legislated that the probative value of evidence is **not** decreased only because the evidence is not given on oath.[47] The uniform Evidence Acts are silent on the issue.

10

56. *Lomman* does not represent the common law. No issue of comity can arise due to the material difference in legislation between the jurisdictions. The assumption of primacy rests on impermissible analogical reasoning drawn from a provision the Legislature has not included in the Evidence Act. There is no consistent pattern of legislative policy to which the common law in Australia can adapt to presume unsworn evidence to be intrinsically unreliable.[48]

57. To accept that *Lomman* supports the assertion that the uniform Evidence Acts give primacy to sworn evidence necessitates circular reasoning: the principles discussed
20 in *Lomman* become applicable **only** if there is a hierarchy between the two forms of evidence. There is, however, no support for that hierarchy in the provisions of the uniform Evidence Acts. There is similarly no basis to "read in" such a hierarchy.[49] Such a hierarchy is entirely at odds with the recommendations of ALRC Report 102.[50] The Court of Appeal has "construct[ed] its own idea of a desirable policy, impute[d] it to the legislature, and then characterise[d] it as a statutory purpose".[51] The Court of Appeal's reliance on the primacy fallacy for its conclusions on both the s13 issue and the unsworn evidence warning issue is in error.

58. The Court of Appeal derived from *Lomman*:[52]

30

> ... [T]wo main reasons why sworn evidence is given primacy; a solemnity attaches to the taking of an oath or affirmation, and the failure of a witness to adhere to his or her oath or affirmation may result in significant sanctions. Underlying those reasons is the objective of maintaining the integrity of the judicial process and, as far as possible, ensuring that **truthful** evidence is given in court proceedings.

---

[46] *Evidence Act 1906* (WA) s100A(2). Even in that jurisdiction, it has been suggested that it is open for a jury to decline to accord unsworn evidence less weight: *Lau v The Queen* (1991) 58 A Crim R 390, 408-9 (Murray J).

[47] *Evidence Act 1977* (Qld) s9D(2)(a).

[48] Cf *Esso Australia Resources Ltd v FCT* [1999] HCA 67; (1999) 201 CLR 49, [23] (Gleeson CJ, Gaudron and Gummow JJ).

[49] See, eg, *Marshall v Watson* (1972) 124 CLR 640, 649 (Stephen J); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113-6 (McHugh J); *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386, 395; *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416, 421 (Black CJ); *James Hardies & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 159 ALR 268, 288 (Kirby J); *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9, [35]-[40].

[50] ALRC Report 102, 608.

[51] Cf *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1, [28].

[52] Court of Appeal [102], emphasis added.

59. The first reason offered may be dealt with in this way: the religious connotations have been removed as an essential feature of the solemnity of the oath. The procedure set out in s13(5) brings the solemnity of the occasion to the young witness, but in a way appropriate to their level of understanding.

60. As to the second reason, a witness under 10 years old (such as R) cannot be prosecuted for an offence.[53] Typically, those giving unsworn evidence will be children under 10 years.

No intrinsic unreliability of children's unsworn evidence

61. In determining whether a common law warning was required, the issue was whether unsworn evidence given under s13 is **intrinsically unreliable** such that a warning is "necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case".[54] There is nothing about those giving unsworn evidence as a class that requires a warning; their evidence does not suffer from some "intrinsic lack of reliability going beyond the mere credibility of a witness".[55] As the High Court noted in *Jenkins*, "[r]elating unreliability to classes of person, rather than to the circumstances of cases, involved stereotyping of a kind which is now out of favour".[56]

62. The Court of Appeal did not refer to any particular aspect of R's evidence that might affect an assessment of her reliability beyond the fact that her evidence was unsworn and that she was a key witness in the prosecution case.[57] In particular, there was no assessment as to the extent of R's incompetence to give sworn evidence. Incompetence could be established by a lack of capacity to understand the basal concept of **truth**; alternatively, it could be based on the lack of capacity to understand the compound expression **obligation to give truthful evidence**. By treating all unsworn evidence as requiring a direction, it follows that the Court of Appeal's reasoning regarded all witnesses who are not competent to give sworn evidence as unreliable. This is underlined by the Court of Appeal's reasoning that the "primacy" given to sworn evidence is about ensuring that truthful evidence is given.[58]

63. As outlined in *Jenkins*, to relate unreliability to classes of person, rather than the circumstances of the case, is an extraordinary measure which must be referrable to some intrinsic lack of reliability based on judicial experience. This has been referred to as "special knowledge, experience or awareness" possessed by the law that would not be apparent to a jury.[59] The Court of Appeal appears to have followed this reasoning in its statement of principle emanating from *Bromley*.[60]

---

[53] *Criminal Code 2002* (ACT) s25.
[54] *Longman*, 86. See also *Bromley v The Queen* [1986] HCA 49; (1986) 161 CLR 315, 319 ("*Bromley*"); *Robinson v The Queen* [1999] HCA 42; (1999) 197 CLR 162.
[55] *Carr v The Queen* [1988] HCA 47; (1988) 165 CLR 314, 319 (Wilson and Dawson JJ) ("*Carr*").
[56] *Jenkins v The Queen* [2004] HCA 57, [25] ("*Jenkins*").
[57] Court of Appeal, [103].
[58] Court of Appeal, [102].
[59] See, eg, *Carr*, 325 (Brennan J); *Crampton v The Queen* [2000] HCA 60; (2000) 206 CLR 161, [126] (Kirby J).
[60] Court of Appeal, [87].

64. The warning propounded in the instant matter runs counter to developments in understanding the evidence of children which were canvassed by Spigelman CJ in *JJB v The Queen* and received further discussion in judicial Bench Books[61] and the ALRC Report 102.[62] It is submitted that there is no basis for a conclusion that children giving unsworn evidence give evidence which is intrinsically unreliable.

65. This new warning, applying as it will to younger children giving evidence in child sex prosecutions, becomes in reality, a warning that children giving unsworn evidence as a class are unreliable witnesses, and that the evidence of children as a class is inherently less credible or reliable than adults. These warnings are expressly prohibited following the 2008 amendments. This new warning has the effect of smuggling them in by stealth.

A radical new warning

66. Adding to the problem, the Court of Appeal has not provided the content of the warning, nor has it explained **how** the warning is to be taken into account by the jury. Further, the new warning requires the jury, in assessing the reliability of a witness, to adopt at trial a finding made by the judge on the voir dire, without having been present for the evidence that led to that finding. Further it raises the question (raised by the trial judge in this matter): if such a warning is to be given, should not the jury be advised by the judge that the child was told of the matters in s13(5)?[63]

67. Although the content of the warning is not provided, it is a warning. The Court of Appeal held that the jury should have been "directed" to "take into account the difference between sworn and unsworn evidence".[64] This is a warning.[65] The warning can only be about the intrinsic unreliability of unsworn evidence (and the care that is needed when assessing that type of evidence) since otherwise there would be no need for such a warning.

68. The warning discovered by the Court of Appeal was hitherto unknown at common law. It was an error to extrapolate (from *Lomman*) the rationale underpinning a **statutory provision** with no local counterpart in order to unearth a previously unstated tenet of judicial experience. This required the Court of Appeal to read into the uniform Evidence Acts a non-existent hierarchy in the weight to be given to forms of evidence.

69. Ultimately, the question the Court of Appeal failed to ask was determinative of the fundamental issue: whether unsworn evidence suffers from some intrinsic lack of reliability such that there is a perceptible risk of a miscarriage of justice if it is left to the jury without further explanation. That question should be answered in the negative. Accordingly, there is no need for a warning, and there is no miscarriage of

---

[61] See, eg, NSW Judicial Commission, Equality Before the Law Bench Book, 6.3.2. Australian Institute of Judicial Administration, *Bench book for children giving evidence in Australian Courts*, updated February 2015, 25-53.

[62] ALRC Report 102, 605-608.

[63] Transcript, 24 March 2013, T52-53.

[64] Court of Appeal, [103].

[65] See *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50, [49]-[50] for the difference between a warning or direction on the one hand and a comment by the trial judge on the other.

justice arising out a failure to provide it. The Court of Appeal erred in concluding to the contrary.

C – Court of Appeal Ground (c) - strict compliance with section 13(3)

Section 13 was complied with

70. In relation to this ground, it is submitted first that Burns J did comply with the requirements of s13(3). The Court of Appeal's erroneous assumption of the supposed "primacy" to be afforded sworn evidence clouded their consideration of the way in which Burns J dealt with the application of s13.

71. There was no contest in this case that R was competent to give evidence about a fact in terms of s13(1). The primary judge adverted to the fact that he needed to go through the process in subsection (3) of section 13 before he could consider whether R would give unsworn evidence.[66]

72. It was not contended by either party that R was competent to give sworn evidence. In effect, given that R was competent to give evidence, that meant that both parties consented to R giving unsworn evidence. As pointed out above, once it was established that R was competent to give evidence but not competent to give sworn evidence, there was no discretion in the court to refuse R to give unsworn evidence.[67]

73. In other words, it was inevitable that R would give unsworn evidence, and defence counsel, when given an opportunity to raise an objection to this by the judge, did not.[68] Neither party bore an onus in relation to the issue which arose under s13(3): it was for the court to determine whether it was satisfied on the balance of probabilities: s142.[69] For the purpose of determining the question, the court could "inform itself as it thinks fit": s13(8).

74. His Honour clearly directed himself to the issue to be decided and satisfied himself that R was not competent to give sworn evidence. Given that neither party was asserting that R was competent to give sworn evidence, and given further that a witness who is competent to give evidence but not competent to give sworn evidence will give unsworn evidence, there was no particular significance in the way in which his Honour expressed his conclusion.

75. Burns J gave succinct ex tempore reasons addressing the s13(3) question noting it was "probably better" for R to give unsworn evidence because he was "not satisfied that [R] has the capacity" to give sworn evidence. In other words, that s13(3) had displaced the s13(6) presumption. It is submitted that his Honour's ruling that the relevant capacity is absent satisfied the requirement in s13(3) that the court needs to reach an "affirmative conclusion, or a definite conclusion, or an actual persuasion" that the witness does not have the relevant capacity.[70] Those reasons and ruling drew

---

[66] See above at [6].
[67] *SH v The Queen*, [8] (Basten JA).
[68] See above at [6].
[69] *RA v The Queen*, [11].
[70] *Morley v Australian Securities and Investment Commission* [2010] NSWCA 331; (2010) 247 FLR 140, [753]. It appears no issue was taken with this formulation when the matter was before this Court: *Australian Securities and Investment Commission v Hellicar & Anors* [2012] HCA 17; (2012) 247 CLR 345.

no comment from the Crown prosecutor nor the defence counsel (let alone a request for further reasons or an objection). Clearly, the substance and effect of the reasons and ruling was understood by the parties. By intruding the irrelevant notion of "primacy" into this process, the Court of Appeal fell into error.

Form over substance

76. Section 13(3) does not impose an obligation to give a ruling in a particular form, but to a particular effect: that the court finds on the balance of probabilities that the witness does not have the capacity to understand the obligation to give truthful evidence. Such a finding allows the court to proceed to ss13(4) and 13(5).

77. The substance and effect of his Honour's ruling is clear: R did not have the capacity to understand that, in giving evidence, she had an obligation to tell the truth. The reasons were succinct but were adequate, for example to allow the issue to be considered on appeal.[71] A ruling that the relevant capacity is absent satisfies the requirement in s13(3) that the court needs to reach an actual persuasion that the witness does not have the relevant capacity.

78. The Court of Appeal's reasoning uses the primacy of sworn evidence to justify a tightening of strict compliance with s13 such that addressing each sub-section is no longer sufficient. Now, rulings under s13(3) must use a particular form of words and syntax or risk failing to recognise the primacy of sworn evidence and being overturned on appeal.

79. The Court of Appeal took the view that Burns J had "reversed" the s13(3) test by expressing his ruling that he was "not satisfied that [R] has the capacity" to give sworn evidence.[72] This approach places a gloss on the statutory text, requiring something additional to that which is required by s13. The existence of this gloss is betrayed in the Court of Appeal's statement "[p]erhaps his Honour intended to give primacy to sworn evidence, but that is not apparent from his reasons".[73]

80. The present case differs from the line of authority from the NSW Court of Criminal Appeal, which has ruled that compliance with the substance of the pre-conditions for the receipt of unsworn evidence is required. Failures to strictly comply with s13 considered by that Court have included:

    (a) Making a finding indicating competence to give sworn evidence but failing to have that witness give sworn evidence.[74]
    (b) Not addressing s13(3) at all before telling the witness those matters stated in s13(5).[75]
    (c) Failing to tell all of the matters stated in s13(5) to a witness.[76]

---

[71] Cf *Evans v The Queen* [2007] HCA 59; (2007) 235 CLR 521, [34]-[35] (Gummow and Hayne JJ, Kirby J agreeing) ("*Evans*"); *Wainohu v The State of NSW* [2011] HCA 24; (2011) 243 CLR 181, [56]-[58] (French CJ and Bell J).
[72] Court of Appeal, [80].
[73] Court of Appeal, [80].
[74] *R v Brooks* (1998) 44 NSWLR 121.
[75] *RJ v The Queen* [2010] NSWCCA 263; (2010) 208 A Crim R 174; *R v JTB* [2003] NSWCCA 295.
[76] *SH v The Queen.*

(d) The Crown prosecutor telling the witness the matters stated in s13(5) instead of the court telling the witness.[77]

81. The present case does **not** raise the same issues. Here there was strict compliance with s13(5). In the present case, in contrast to the NSW decisions, the Court of Appeal has found error when his Honour *did* address the relevant sub-sections.

82. Burns J was required to rule on a preliminary question about R's competence to give sworn or unsworn evidence and, thus, the admissibility of R's evidence. His Honour informed himself by hearing from the Crown prosecutor (who informed him that, in his view, R was not competent to give sworn evidence) and by speaking to R. His Honour had the benefit of hearing and seeing R listen to and respond to his questions. With a factual basis established, it was for his Honour to determine on the balance of probabilities whether or not R was competent to give sworn evidence by ruling pursuant to s13(3). Section 13(3) imposed no obligation to give reasons or a ruling in a particular form.

83. A judge's reasons cannot be read as if they were the words of a statute. They should be read fairly, as a whole and with full recognition that such reasons are often delivered ex tempore and thus in the absence of the opportunity to choose every word or phrase. Particularly where reasons are delivered ex tempore an appellate court should be reticent to parse the words or syntax used at first instance with a fine-toothed comb.

84. In these circumstances, the so-called inversion of the s13(3) phrase "does not have the capacity" in the statement "not satisfied that she has the capacity" does not demonstrate error or a failure to strictly comply with s13. It is symptomatic of nothing more than an ex tempore ruling given without the clarity in formulation and syntax of language that might be expected had the subject matter of the ruling been contested and/or considered in chambers. As in *Wu Shan Liang*, it is only "some phraseology"[78] that suggests the possibility of a slip into the s13(3) test being applied incorrectly. The contrary view of Burns J's reasons would see trials becoming, to borrow Heydon J's expression from *Evans*, "interminable".[79] The Court of Appeal was in error to conclude that Burns J had incorrectly applied the s13(3) test and should be overruled.

Part VII: RELEVANT MATERIALS

85. The relevant statutory provisions are set out verbatim in Annexure A (attached).

Part VIII: ORDERS SOUGHT

86. The following orders are sought:

(a) The appeal be allowed.

---

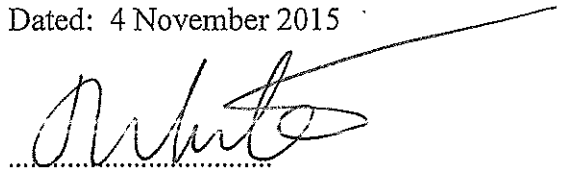
[77] *MK v The Queen.*
[78] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6, (1996) 185 CLR 259, 271 (Brennan CJ, Toohey, McHugh and Gummow JJ).
[79] *Evans*, [244] (Crennan J agreeing).

(b) That the orders of the Court of Appeal be set aside, and the conviction of the respondent on count 3 be restored.
(c) Alternatively, that the orders of the Court of Appeal be set aside and the matter remitted to that Court, differently constituted, to be determined according to law.
(d) That there be no order as to costs.

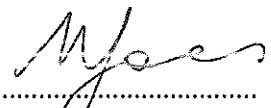
Part IX: ESTIMATE OF TIME

10 87. The appellant estimates no more than two hours will be required to present its argument.

Dated: 4 November 2015



Jon White SC
Director of Public Prosecutions (ACT)



Margaret Jones
Deputy Director of Public Prosecutions (ACT)