HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **BQ**

Appellant

and

THE KING

Respondent

APPELLANT'S SUBMISSIONS

10

PART I CERTIFICATION

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

PART II ISSUES PRESENTED BY THE APPEAL

2. Did the NSW Court of Criminal Appeal err in holding that Associate Professor (A/Prof) Shackel's evidence concerning the behaviour of perpetrators of child sexual assault, risk factors for sexual abuse and intra-familial cases of child sexual assault was admissible under s 79 of the *Evidence Act 1995* (NSW), and did not cause the appellant's trial to miscarry?

3. What directions should be given in cases where expert evidence is admitted concerning the behaviour of children pursuant to s 79 of the *Evidence Act,* where the Crown does not rely on
20 s 108C of the *Evidence Act* as a basis for the admission of that evidence?

PART III SECTION 78B NOTICE

4. The appellant considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV CITATION

5. The judgment of the NSW Court of Criminal Appeal has not been reported; its medium neutral citation is *BQ v R* [2023] NSWCCA 34 (**CCA**).

PART V: RELEVANT FACTS

The trial

6. The appellant stood trial before Leatherbarrow SC DCJ and a jury on an indictment alleging 11 counts of child sexual assault offences: CCA [7]-[11] (CAB 122-126). He was found guilty of 9

counts (counts 1-4 and 7-11) and acquitted of 2 counts (counts 5 and 6): CCA [1], [7] (CAB 122-123). On appeal, his convictions on counts 8 and 11 were quashed. He was acquitted of count 11 and the CCA substituted a verdict of guilty of indecent assault in respect of count 8: CCA [289] (CAB 196).

7. There were two complainants who were sisters, AA and BB. The appellant was their non-biological uncle. Apart from counts 1, 5 and 6, the offences were alleged to have been committed by the appellant during visits to their grandparents' home or farm: CCA [23]-[28] (CAB 129-130). The appellant lived at that home during the periods, later particularised in the Crown closing, when the complainants' alleged that the conduct the subject of counts 3, 4, 7, 8 and 10-11 occurred. Counts 1-7 on the indictment related to offences against BB in the period 1 January 2007 to 28 January 2010, with count 1 alleged to have occurred at a unit where the appellant lived (in 2007), and count 2 prior to home renovations at the grandparents' house, which was a time before the appellant and his wife moved into that home: CCA [37], [71] (CAB 132, 142); Appellant's Book of Further Materials (**ABFM**) 36. BB was 10-13 years old during this period: CCA [22]. The time periods for the offences against AA were February-March 2009 (Count 8), August-September 2011 (Count 9), January 2012 (Count 10) and 1-25 December 2012 (Count 11). She was 5-9 years old during these periods: CCA [22] (CAB 129).

8. The prosecution case against the appellant comprised of evidence from the complainants in respect of the alleged offences (summarised at CCA [42]-[43], [71], [74], [80], [97]-[100], [101], [133], [166] (CAB 134, 142, 144, 148-149, 155, 163-164)), complaint evidence, context evidence comprising of allegations of other uncharged acts of indecent and/or sexual assault on them by the appellant, and tendency evidence comprising the evidence of the charged acts, considered with "all of the evidence" (including that the appellant referred to BB by the nickname "Sexy Chocolate"): CCA [29]-[30] (CAB 130); Summing Up (**SU**) 37 (CAB 45). The tendency alleged included the appellant using his position as their uncle to facilitate and continue assaults on them: SU 37 (CAB 45).

9. The trial was a second trial. The first trial, held in 2016, concerned only the allegations in relation to AA, in circumstances where BB had given a statement to police on 14 September 2014 specifically denying sexual conduct in terms, saying: "[h]e never touched me at all": CCA [19] (CAB 128). The first trial was aborted because while AA was giving evidence, BB said outside the court room to police that "he did it to me too": CCA [20] (CAB 128). BB also said to her mother that she could not let AA to do it on her own and that they were making AA look like a liar: CCA [20] (CAB 128).

10. There was evidence in the second trial that AA first complained on 14 February 2014 and then over a further period of time to her mother and BB: CCA [88]-[95] (CAB 146-147). AA told her mother she had not said anything before that time because she was scared the appellant would hurt her, her mother and BB: CCA [88]-[90] (CAB 146). The complaints were made after family law proceedings, contact with the children being stopped and in the context of the grandparents applying for contact with AA and BB, which was contested: CCA [27] (CAB 130), T474 (ABFM 31). There was evidence in the second trial that BB complained in around August 2015 to a cousin, then in August 2016 to her husband, and then to police and her mother at the first trial on 14 September 2016, while AA was being cross-examined: CCA [19]-[20], [83]-[85] (CAB 128, 145). BB said variously that she did not tell someone earlier as she thought she was doing the wrong thing because she did not say no and she liked it (T243 (ABFM 12)), and in cross-examination that her 2014 statement was "everything that I remembered at the time" (T253 (ABFM 13)), while later saying that she had always known everything that she alleged was done to her, and that she thought it was her fault (T264-265 (ABFM 15-16)). AA gave evidence of resistance to the alleged acts at times but not at others, and to others being present in the room at times (CCA [100], [104], [134], [180] (CAB 148-149, 156, 167)). BB gave evidence of acquiescing with the alleged sexual requests and acts of the appellant, including in the presence of others (CCA [42], [71], [74], [80], [81] (CAB 134, 142-143, 144-145)).

11. The appellant's case was that none of the offences occurred. He also relied upon good character evidence. The appellant was interviewed by police in 2014, and gave evidence at his trial, denying at all times that he committed the offences: CCA [32] (CAB 131).

The evidence of A/Prof Shackel

12. A/Prof Shackel's evidence was admitted, over objection, in the prosecution case: CCA [214] (CAB 174). A/Prof Shackel has been an Associate Dean in the school of law at Sydney University for 12 years and has degrees in science majoring in psychology and pure mathematics, a degree in law, a diploma of education, a Masters of Arts in psychology and a PhD: T407-408 (ABFM 17-18), CCA [212] (CAB 174). Her PhD thesis analysed psychological and related research in relation to victims of child sexual assault and how they respond to their victimisation: CCA [212] (CAB 174). A/Prof Shackel said the body of research was a "rapidly expanding field", with the research becoming increasingly stronger "utilising a wide array of different methodologies" including talking to victims of child sexual assault about their experiences, and that some research also involved talking to offenders about how they offended: T408.14-.20 (ABFM 18).

13. A/Prof Shackel said that victims of child sexual assault respond in different ways and there was no typical response to sexual assault: T409.32-.36 (ABFM 19). She gave general evidence about certain behaviours that are not uncommon in children and children who have been sexually abused and the possible reasoning of a child for those behaviours: T409-415 (ABFM 19-25). She also gave evidence in relation to perpetrator behaviour, risk factors for child sexual abuse and intrafamilial relationships (set out further below at [23]).

The Court of Criminal Appeal

14. The appellant appealed against his convictions on several grounds. Relevantly, ground 2A asserted that the trial judge erred in admitting the evidence of A/Prof Shackel as opinion evidence, however was not pressed following the decisions of *Aziz (a pseudonym) v The Queen* (2022) 110 NSWLR 317 (***Aziz***) and *AJ v The Queen* (2022) 110 NSWLR 339 (***AJ***). Ground 2B contended the trial miscarried on account of the admission of A/Prof Shackel's evidence at trial and included a challenge to the admission of that evidence as an error of law. The challenge focused on her evidence as to perpetrators, risk factors for abuse and intrafamilial relationships. Ground 2C asserted a miscarriage of justice on account of the trial judge's directions to the jury concerning A/Prof Shackel's evidence. The CCA refused leave to appeal in respect of ground 2C, granted leave to appeal in respect of ground 2B, and dismissed both grounds.

PART VI: ARGUMENT

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

15. The appellant contends that A/Prof Shackel's evidence in respect of the behaviour of perpetrators, risk factors for sexual abuse and intrafamilial relationships did not satisfy the test for admission under s 79 of the *Evidence Act*. The admission of this evidence was contrary to law and caused the appellant's trial to miscarry. The CCA erred in holding otherwise (see CCA [235], [237], [239]-[240], [242], [246]-[256] (CAB 180-188).

Relevance of the evidence and the basis for its admission

16. Counsel for the appellant at trial objected to the admission of A/Prof Shackel's evidence in its entirety: CCA [214] (CAB 174). The trial judge admitted A/Prof Shackel's evidence limited to educative evidence as to children's behaviour and responses generally under s 79 of the *Evidence Act*, with reference to the terms of s 79(2)(b): Admissibility Judgment of Leatherbarrow SC DCJ ("**J**") 5-6 (ABFM 8-9). The trial judge ruled A/Prof Shackel's evidence in respect of the credibility of each particular complainant to be inadmissible: J 6-7 (ABFM 9-10). The evidence

was not admitted for a credibility purpose pursuant to s 108C of the *Evidence Act*: CCA [227] (CAB 177).

17. The evidence that A/Prof Shackel was qualified to give 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 assault: Australian Law Reform Commission, Report 102 at [9.139], [9.155] (**Report 102**). The appellant does not challenge this insofar as A/Prof Shackel gave educative evidence in relation to how victims of childhood sexual assault as a class respond to and disclose their victimisation.

Section 79 of the *Evidence Act*

18. Section 79 of the *Evidence Act* provides as follows:

> (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
> (2) To avoid doubt, and without limiting subsection (1):
> (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and
> (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
> (i) the development and behaviour of children generally,
> (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

19. Subsection (2) was inserted into the *Evidence Act* by the *Evidence Amendment Act 2007* (NSW) as a result of recommendations by Report 102, and has cognates in the *Evidence Act* of the Commonwealth, ACT, NT, Victoria and Tasmania.

20. In *Aziz*, Simpson AJA observed at [54] that the difference between the proposed draft provision in Report 102 and that which was enacted lay in the scope of the provision: *Aziz* at [57]. The ALRC proposed draft provision was not confined to evidence of "opinions" and extended to "the admission of *evidence* in relation to the stated subject matters:" *Aziz* at [57] (emphasis in original). Her Honour concluded that admissibility under s 79 of the *Evidence Act* of this kind of evidence "continues to depend on the characterisation of the evidence as 'opinion evidence'": *Aziz* at [60]. Her Honour's conclusion is supported by the statements in Report 102 that "[t]he Commissions do not see the recommended reform as constituting any major departure from the existing law, but as highlighting the admissibility of a particular type of expert opinion evidence": Report 102 at [9.156].

21. Section 79(2) highlights that evidence of the development and behaviour of children generally is capable of falling within the terms of s 79(1) of the *Evidence Act*. Furthermore, as made clear by Simpson AJA in *Aziz*, the reference to "an opinion relating to …" in s 79(1)(b) does not change the test for admissibility in s 79. Any such opinion must be wholly or substantially based on a person's specialised knowledge in order to be admissible as expert evidence.

22. This construction accords with and advances the purpose of the provision: s 33 *Interpretation Act 1987* (NSW); *SZTAL v Minister for Immigration* (2018) 252 CLR 362 at [14]. That purpose is to clarify the position that expert opinions in respect of child development and behaviour can be admitted under s 79(1) of the *Evidence Act*, in order to overcome the reluctance to admit such evidence under that provision demonstrated by Australian courts: ALRC Report 102 at [9.156]. That opinion evidence given on these subjects meet the strict requirements for the admissibility of expert evidence ensures that the provision does not enable parties to a proceeding to rely on evidence that is speculation, unsubstantiated opinions or opinions not based on specialised knowledge. This is particularly apposite where the evidence is admitted for an educative purpose and "to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour": ALRC Report 102 at [9.155].

Evidence concerning perpetrator behaviour and risk factors for child sexual abuse

23. Before the CCA, the appellant argued that A/Prof Shackel's evidence concerning the behaviour of perpetrators and risk factors for sexual abuse, and intra-familial cases, was inadmissible because this evidence fell outside her specialised knowledge. The challenged evidence was as follows:

    a. as to factors said to arise in "intrafamilial"/familial circumstances of child sexual assault: T410-411, 414-416 (ABFM 20-21, 24-26);
    b. "'the abuse often takes place within the home. It takes place in the course of everyday activities; bathing, putting children to sleep, watching TV, playing with children": T415-417 (ABFM 25-26), CCA [238] (CAB 181-183);
    c. it was not uncommon for sexual assaults to happen in the family home: T415-417 (ABFM 25-26), CCA [238] (CAB 181-183);
    d. "[t]he research increasingly is pointing to the fact that one of the strongest risk factors for child sexual assault taking place is opportunity, and that opportunity is linked to families, cohabitation and the familiarity of the offender to the location. So 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 also in the home doing their day-to-day activities": T415-417 (ABFM 25-27), CCA [238] (CAB 181-183); and

e. "it's not uncommon for perpetrators to make a child feel like they're different or special, and that's the way in which they can actually access the child, and that's also a way in which they can keep the abuse secret": T415-417 (ABFM 25-27), CCA [238] (CAB 181-183).

24. The CCA concluded that, with the exception of the evidence identified in (c) and (d) above, the impugned evidence concerned the response and behaviour of children during and after the abuse, and the reference to abuse happening in the context of "everyday activities" was "an explanation of why the child might react (or not react) in a particular way": CCA [233], [235], [239] (CAB 179, 180, 183). The CCA held this evidence fell within A/Prof Shackel's expertise: CCA [239] (CAB 183). In relation to the evidence identified in (c) and (d) above, the CCA held that "her knowledge of what is contained in those two answers is very likely to have been obtained by her study of the cases which are the basis of the research. In our opinion, [those answers] were so closely related to the general discussion of the reactions and behaviour of children, that the evidence was not objectionable": CCA [240] (CAB 183). For the reasons below, the CCA erred in so concluding.

25. *First,* the opinions proffered by A/Prof Shackel purported to attest to the behaviour of perpetrators and risk factors for child sexual assault. These impugned opinions did not relate to children's behaviour and development, which is the category of evidence referred to in s 79(2) of the *Evidence Act,* and the category of evidence held to be admissible in the trial. The trial judge admitted evidence as to "how victims of childhood sexual assault as a class respond to and disclose their victimisation and …various generic conclusions as to the same": J 1, 5-6 (ABFM 4, 8-9). Further, evidence relating to the "behaviour of unidentified other offenders in unspecified circumstances could not rationally affect the probability that the [accused] acted as alleged": *AJ* at [172] per Fagan J; *Evidence Act,* s 55.

26. *Second,* the evidence fell outside A/Prof Shackel's expertise, as the impugned opinions were not substantially or wholly based on her training, study or experience. A/Prof Shackel's description of her expertise in evidence is set out above at [12]. A/Prof Shackel did not claim to be an expert in perpetrator behaviour and/or risk factors of child sexual abuse. In *AJ* at [83] and [84] Beech-Jones CJ at CL (as his Honour then was) concluded that A/Prof Shackel did not have the expertise to give opinions in respect of perpetrator behaviour, and her summary of points made in research papers which she did not author and which did not involve any additional analysis did not equate

to specialised knowledge on the topic of offending patterns based on study: *AJ* at [84]. As Beech-Jones CJ at CL held in *AJ* at [83]:

> The topics of response to trauma and patterns of sexually deviant behaviour are distinct (or at least the contrary was not shown). The courts often receive evidence from forensic psychologists (and psychiatrists) on the topic of recidivism of sexual offences, including those who perpetrate such offences against children. Such evidence is given by those categories of experts because it has been demonstrated that they have expertise on the topic of recidivism of such offenders …. However, it cannot be assumed that a psychologist with a focus on developmental psychology, or expertise on the topic of trauma affected responses of children to sexual assault, also has expertise on the topic of the offending patterns of perpetrators".

27. The impugned evidence was not simply an explanation of reasons why a child may react or not react in a particular way: *cf* CCA [239] (CAB 183). It extended well beyond how child victims respond to and disclose sexual assault. The evidence as to risk factors and perpetrators given in the appellant's case was not materially different to the evidence given in the 2021 trial of *AJ,* which was held to be inadmissible, because A/Prof Shackel did not possess the requisite expertise. The (inadmissible) evidence of A/Prof Shackel in *AJ* included the following: "child sexual abuse is an opportunistic offence … child sexual abuse often occurs because a perpetrator has access to a child and that's why the research suggests that child sexual abuse often occurs in those settings that might be considered – or might be described – as brazen such as the family home": *AJ* at [66]. It also included evidence that "the research highlights … that those, those settings that are within the context of a family home are settings that offer some, some safety in terms of minimising the possibility for detection of the abuse": *AJ* at [66].

28. The CCA here concluded that A/Prof Shackel's evidence concerning "opportunity" was "so closely related" to the "general discussion of the reactions and behaviour of children, that the evidence was not objectionable": CCA [240] (CAB 183). But the test for the admissibility of expert evidence under s 79 of the *Evidence Act* is not whether the evidence is "closely related" to the evidence an expert is qualified to give. There was a deliberate choice made by the legislature to limit the terms of s 79(2)(b) of the *Evidence Act* so that it did not extend to the admission of "evidence" as opposed to "an opinion", and to maintain s 79 as the exception to the prohibition in s 76: *cf* the ALRC's proposal, summarised in *Aziz* at [57]-[58]. The test remains whether the opinion is wholly or substantially based on the expert's specialised knowledge. The CCA's construction would have the surprising result that an opinion is rendered admissible because it is "closely related" to an area of expertise, even where it is not wholly or substantially based on the expert's specialised knowledge. This is contrary to the statutory language in s 79 of the *Evidence Act,* and is contrary to authority, including *AJ* at [83], where Beech-Jones CJ at CL rejected a

submission that evidence of the offending patterns of perpetrators is "an aspect of evidence of the responses of victims to trauma in the form of child abuse".

29. The strictures of the provision can be seen, for example, in the decision of Beech-Jones CJ at CL in *R v Officer A (No 1)* [2022] NSWSC 1362, where his Honour held that an expert with specialised knowledge of the "appropriate methods of training Corrective Services officers", could not give evidence as to the consistency between a particular use of force in a particular factual context, and that training. Plainly enough, the evidence was "closely related" to the expert's area of expertise, but that was not sufficient: the opinion expressed was not "based on" the expert's specialised knowledge (at [23]). Similarly, in *SLS v The Queen* (2014) 42 VR 64 (***SLS***), the Victorian Court of Appeal held (albeit *obiter*) that an expert in the evaluation and treatment of *proven* sex offenders was not qualified to give evidence of a "forward looking" characterisation of conduct as consistent with the *modus operandi* of sexual offending. Again, such evidence might well have been "closely related" to her area of expertise, but the Court of Appeal there noted the "disconnect" between the field of specialised knowledge in which the witness was an expert and the proposed evidence (at [211]-[212]). As observed by Sulan J in *R v Parenzee* [2007] SASC 143 at [129]-[135], it is relevant in determining a state of knowledge of an expert, to have regard to their further study in areas of specialisation, practical experience and whether such knowledge is limited to reading, or a "textbook understanding" rather than the depth recognised by "specialised" knowledge.

30. *Third*, it could not be concluded that it was "very likely" that A/Prof Shackel obtained specialised knowledge on the risk factors for child sexual assault from her study of the cases which were the basis of the literature she reviewed: *cf* CCA [240] (CAB 183). Rather, A/Prof Shackel described her thesis as analysing "psychological and related research, and what that body of research demonstrates with respect to how victims of child sexual assault respond to their victimisation": CCA [212] (CAB 174). Over objection, after referring to how perpetrators operate, she also gave evidence that because of ethical difficulties involved in talking to offenders, there were alternative methodologies employed, with research drawing on different types of data sets and samples and populations to try and answer questions as to how offenders perpetrate: T409 (ABFM 19). There was no evidence that she reviewed the cases the subject of the research: *cf* CCA [240], [255] (CAB 183, 188). Nor did she give evidence that she had authored any papers on the subject of risk factors. Her evidence at trial on this subject did not indicate she had conducted any additional analysis in relation to what the research said: see similarly in *AJ* at [74]-[77], [84]. While she said in evidence that "[s]ome of the research has also involved talking with offenders" there was no

evidence that she had spoken to, specifically researched or analysed this particular area. In *AJ*, which concerned a trial held subsequent to that of the appellant, there was express evidence that she had not done research of her own that involved speaking to offenders: *AJ* at [83].

31. *Fourth*, lest it be argued that the inclusion of references in A/Prof Shackel's report of papers concerning perpetrator behaviour and risk factors for child sexual abuse and/or papers concerning research that involved speaking to offenders meant that A/Prof Shackel had expertise to give opinions about perpetrators or risk factors, this is contrary to authority. The mere review of papers or research "in a field of discipline by a person with no relevant prior training, study or experience does not amount to "study"" under ss 79 or 108C of the *Evidence Act*: *AJ* at [75]-[77], [84]. Opinions based on a review of the research or papers in a particular discipline (here expressed, for the most part, as "the research shows") are only admissible where the person giving those opinions has appropriate academic qualifications and/or where it can be concluded that the expert has "critically applied the skills and knowledge that they have derived from their academic studies (as well as training and experience) in their review of that research to determine such matters as whether the research paper was from a respected source, reliable, representative of the entirety of the body of available research or only selective and otherwise justifies extrapolating from the specific to the general": *AJ* at [76].

32. *Fifth*, it is plain from the above analysis that the CCA did not follow the ratio in *AJ* at [74]-[77] as to the meaning of "study" and "specialised knowledge …based on study" in s 79 of the *Evidence Act* in this case. It provided no reasons for departing from what was at least persuasive reasoning in *AJ* as to these matters: *cf Gett v Tabet* (2009) 109 NSWLR 1 at [294]-[295]; *AC v R* [2023] NSWCCA 133 at [44]-[50]. The error is manifest in circumstances where the compelling reasoning in *AJ* concerned the very same type of evidence, from the very same witness, which is impugned in this case (see *AJ* at [82]-[84]). The CCA should have followed *AJ*, and it erred in failing to hold — as was held in *AJ* — that the evidence of A/Prof Shackel in relation to perpetrator behaviour and risk factors for child sexual assault did not meet the test for admissibility in s 79 of the *Evidence Act*.

33. *Sixth*, the evidence was said to be based on an emerging body of research, described variously as a "very rapidly expanding field", where there had been "mixed findings" in the research (T408, 411 (ABFM 18, 21)) and as to risk factors in terms of what the "research increasingly is pointing to" (T416 (ABFM 26)). In that context, risk factors that apply in "intrafamilial" or "familial" child sexual assault that "don't apply in cases that occur outside of the family" (T414.34-.36 (ABFM

24)) and risk factors "in the family home" (T416.15-.27 (ABFM 26)) was not evidence demonstrated to be within the *specialised* knowledge of A/Prof Shackel.

34. *Seventh,* it was also not correct for the CCA to hold that the research referred to by A/Prof Shackel was "done on cases which had been determined and where the terms [victim and perpetrator] were aptly applied", nor to use this as a basis for conclusions as to the cogency of this evidence: *cf* CCA [255] (CAB 188). There was no evidence that the research had been done in this way, rather the evidence was to the contrary as set out at [30] above. Nor did such cases enable "expert" evidence of predictive risk. This was another erroneous foundation for determining there was no miscarriage. While s 79(2) of the *Evidence Act* does use the term "victims", and A/Prof Shackel also used this term along with "perpetrators", it was A/Prof Shackel's evidence that this was because they were the *terms* used in the research: CCA [238] (CAB 183) (not because the research had actually been done on, or only on, proven cases of sexual assault).

35. *Finally,* the CCA also erroneously concluded that the evidence, even if inadmissible, did not occasion a miscarriage of justice: CCA [240]-[243] (CAB 183-184). Given the nature of expert evidence, it is critical that expert witnesses are confined to giving opinions that are wholly or substantially based on their specialised knowledge. Justice Dawson identified the danger of wrongly admitted expert evidence in *Murphy v The Queen* (1989) 167 CLR 94 at 131 as follows:

> The admission of such evidence carries with it the implication that the jury are not equipped to decide the relevant issue without the aid of expert opinion and thus, if it is wrongly admitted, it is likely to divert them from their proper task which is to decide the matter for themselves using their own common sense. And even though most juries are not prone to pay undue deference to expert opinion, there is at least a danger that the manner of its presentation may, if it is wrongly admitted, give it an authority which is not warranted.

36. Similarly, Gleeson CJ in *HG v The Queen* (1999) 197 CLR 414 (***HG***) at [44], speaking of the importance that "the opinions of expert witnesses be confined in accordance with s 79" explained that "[e]xperts who venture "opinions" … outside their specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted". See also *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at [671] per Allsop J.

37. The CCA held that even if the evidence was outside of A/Prof Shackel's expertise it was "difficult to see how it could have had a prejudicial effect on the [appellant's] prospect of acquittal. The evidence added nothing to what was already before the jury, which was that most of the incidents took place in the homes of the victims or their families, and in close proximity to other family members": CCA [242] (CAB 184). This reasoning of equivalence between expert evidence of

conduct of perpetrators and the alleged acts the subject of trial was the very vice of the evidence. The risk of the prejudicial use of the evidence by the jury arose because of its similarity to the circumstances of the alleged offences under consideration. There was a real risk that the jury would reason that because the allegations in the appellant's case involved "family", the commission of offences during "everyday activities", in homes and/or with other people also there, and because A/Prof Shackel's expert opinion was that perpetrators often committed offences in such circumstances (T416 (ABFM 26)), that the appellant was therefore guilty (a perpetrator) of the offences: see *M v The Queen* [2011] NZCA 191 (***M***) at [32], *Jacobs v The Queen* [2019] VSCA 285 (***Jacobs***) at [60]. This risk was present regardless of whether the Crown prosecutor highlighted the wrongfully admitted evidence in the closing address (*cf* CCA [246] (CAB 186) and despite counsel's failure to object: *cf* CCA [251]-[254] (CAB 187-188). In any case, the Crown submitted that the complainants were honest and reliable as to how things happened before addressing the evidence of A/Prof Shackel in detail, both by drawing attention to specific parts of it *and* inviting the jury to review it *in toto* (T831-832 (ABFM 49-50)).

38. Evidence as to the behaviour of other perpetrators cannot be used "as the basis for inferring what it is likely to have occurred on the occasion that is the subject of the charge": *AJ* at [172] per Fagan J. The evidence also gave rise to a similar kind of illogical reasoning that was criticised in *SLS* at [211], [213], [216], [219] in the context of evidence of grooming behaviours. There was both error of law and a miscarriage of justice, with neither admitting of the application of the proviso (which was not relied on by the Crown below). There was a significant possibility of misuse by the jury to reason that the appellant was a perpetrator and to support the credibility of the complainants, and in those circumstances, a miscarriage arose: see *Orreal v The Queen* (2021) 96 ALJR 78 at [20], [23], [41], [45]; *Edwards v R* (2022) 107 NSWLR 301 at [5], [67]; *Hofer v The Queen* (2021) 274 CLR 351 at [41], [47], [118].

Evidence concerning intrafamilial relationships.

39. Most of A/Prof Shackel's evidence in relation to intrafamilial relationships involved opinion as to what "the research" showed, with an opinion expressed that "there are certain factors that arise in the context of familial child sexual assault that don't apply in cases that occur outside of the family" (T414 (ABFM 24)), see also [30] above). In giving evidence on this subject, A/Prof Shackel gave evidence that the research often looked broadly speaking at "intrafamilial" versus "non-familial or stranger", and that "the research can use different definitions. So different studies do use different definitions": CCA [236] (CAB 180).

40. A/Prof Shackel's evidence had to be "wholly or substantially based" on "specialised knowledge based on training, study or experience". Section 79 "requires that the opinion is presented in a form which makes it possible to answer that question": *HG* at [39] per Gleeson CJ. The evidence must explain how the opinions are based on the specialised knowledge of the expert: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (***Dasreef***) at [37] citing *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] per Heydon JA; see also *Honeysett v The Queen* (2014) 253 CLR 122 at [24]. Where an expert witness has failed to demonstrate the opinion is so wholly or substantially based, the opinion is inadmissible: *Dasreef* at [42]. As observed by Kiefel CJ and Gageler J (as his Honour then was) in *Lang v The Queen* (2023) 97 ALJR 758 at [10] (see also [222] per Gordon and Edelman JJ), it is only when the opinion has been demonstrated to be based on specialised knowledge that the opinion can "assist the tribunal of fact to form the requisite opinion of its own as to the inferences to be drawn from the evidence to make findings about disputed facts should the tribunal of fact be persuaded to accept and act upon the opinion".

41. In failing to articulate what "the research" meant by the terms "intrafamilial" as opposed to "non-familial" (which differed from stranger), and given the continuing evolution of the research, the CCA could not conclude that the opinions expressed were based wholly or substantially on A/Prof Shackel's specialised knowledge: *cf* CCA [233], [236], [237] (CAB 178-181). This was particularly important given the following two circumstances. *First*, where A/Prof Shackel's "specialised knowledge" was not derived from her own data collection or clinical experience but from her own study of the research papers of others working in the field: *AJ* at [74]-[77]; CCA [249] (CAB 186-187). *Second*, where her evidence was relied on as relevant for an educative purpose as to the inferences that can be drawn from children's behaviour. The evidence could not assist the jury as opinion evidence serving an educative function in circumstances where the jury were not informed as to what was encompassed by the meaning of the term "intrafamilial/familial", what the "different definitions" of this term and others were that were used in the research, and what the different studies showed in respect of those different definitions or any unifying factor: *cf Evidence Act*, ss 55, 79. There was no evidence of the content of the term, such as that "intrafamilial" as used in the research encompassed relations beyond those between parental/step-parental-child and sibling relationships or whether it encompassed a broader concept of family, even including an extended non-biological family member, or what was meant by the family home. These were important distinctions in the context of considering the fact in issue that it is asserted the opinion proved or assisted in proving (in an educative sense), given the many variations of understanding of the meaning and concept of

family/intrafamilial/extrafamilial, and importantly whether the opinion expressed was demonstrated to be based on specialised knowledge.

42. It was no answer to the appellant's argument for the CCA to say that strangers were distinguished and "it is not helpful to be prescriptive": CCA [235], [237], [239] (CAB 180-181, 183). Definitions in studies, data collection and academic papers can be critical to the conclusions reached in particular studies or papers and to the expression of opinions. The point was made in *Aytugral v The Queen* (2012) 247 CLR 170 at [32] by French CJ, Hayne, Crennan and Bell JJ in the context of evidence about the results of DNA analysis, referring to s 79 and emphasising that evidence as to what an opinion "can and cannot demonstrate" will "usually be important, even necessary".

43. Here, if a study concludes that certain behaviour is present or common where abuse occurred in a "familial context", the definition of "familial context" used in that study is critical to not only what conclusions can be drawn from that study but whether there is a basis for the opinion in specialised knowledge. A/Prof Shackel proffered opinions as to what "the research" showed in the "intrafamilial" context. This purported to distinguish from extra or non-familial, which presumably at least included other authority figures such as babysitters, non-related carers, teachers and family friends and may well have included those outside of the immediate family unit. A/Prof Shackel went on to give evidence that in "the intra-familial context", there would be a relationship "of trust", that was "very close" and involving "dependence … attachment or affection, or – or love" (CCA [236] (CAB 180-181)). Such evidence rose no higher than assertion, was not based on specialised knowledge, and highlighted the difficulty with the "intra-familial" evidence, and in particular the characterisation of family activities or the family home as a risk factor for perpetrator conduct.

44. The CCA was critical of defence counsel for not cross-examining to elucidate who might be within the description of "familial situation": CCA [252] (CAB 187-188). However, the *admissibility* of A/Prof Shackel's evidence on the subject was conditional on demonstrating that her opinions were wholly or substantially based on her specialised knowledge: *Dasreef* at [42], *Aytugral* at [32]. Her failure to elucidate this in evidence in chief (and the prosecution's failure to lead such evidence) went to admissibility: it was not a matter for cross-examination, nor was the question whether it "detracted" from her evidence: *cf* CCA [237] (CAB 181).

45. It was not correct to hold that there was no risk of a miscarriage of justice from the admission of the evidence. There was a real risk the jury would place unwarranted reliance on the evidence in circumstances where the appellant was the uncle of the complainants and the tendency alleged

included use of his position as their uncle to facilitate assaults, despite the evidence establishing that the mother lived separately, there were family law proceedings, no contact with AA for over 1 year before her first complaint and no contact with BB for over 4 years before she reversed her 2014 statement to police, and an application for access to AA and BB on foot between 2012-2014. The expert evidence as to familial/intrafamilial factors added to the real risk of A/Prof Shackel's evidence being used as a predictive tool rather than for an educative purpose.

Conclusion on Ground 1

46. The CCA should have held A/Prof Shackel's evidence as to the behaviour of perpetrators, risk factors for child sexual assault and intrafamilial relationships was not admissible under s 79 of the *Evidence Act*, and its admission at the appellant's trial caused it to miscarry. There was no suggestion that Rule 4.15 of the *Supreme Court (Criminal Appeal) Rules 2021* (NSW) applied to this ground of appeal: CCA [254] (CAB 188). No directions could have cured the prejudice occasioned by the admission of the evidence as to perpetrators and risk factors. While there was no cross-examination or later further objection to the evidence, there was error of law (second limb of s 6(1) of the *Criminal Appeal Act 1912* (NSW) and a miscarriage of justice (third limb of s 6(1)). The errors do not admit of application of the proviso (which was not relied on below). Contrary to the reasoning of the CCA at [242] (CAB 184), there was a "real chance" that A/Prof Shackel's impugned evidence affected the jury's verdict and "was capable of affecting the result of the trial": *Hofer* at [41], [47], [118]; *Edwards v The Queen* (2021) 273 CLR 585 at [74]. This is particularly so where the directions to the jury in relation to her evidence did not address the risks of misuse of the evidence.

Ground 2: The jury directions

47. A/Prof Shackel's general evidence as to how children who have been sexually assaulted behave was admitted for an educative purpose. It was not admitted as credibility evidence under s 108C of the *Evidence Act*. It is accepted that there was no objection by defence counsel to the directions given on the expert evidence in this case, nor was the trial judge given the assistance to which he was entitled on fashioning appropriate directions by *any* of the parties. That is not determinative of whether a direction was required in order to avoid a perceptible miscarriage of justice: *De Silva v The Queen* (2019) 268 CLR 57 at [35].

48. In the New Zealand jurisprudence, such evidence led for an educative purpose is commonly described as "counter-intuitive evidence": see *DH v The Queen* [2015] 1 NZLR 625 (***DH***). In *MA v The Queen* (2013) 40 VR 564 (***MA***) at [22]-[23], Osborn JA (Relich and Whelan JJ

agreeing at [89]) approved of the rationale given by the New Zealand Law Reform Commission (**NZLRC**) for the admission of such evidence, where also admitted as to credibility, namely, to help the jury understand the evidence before it about the complainant's conduct, and be better able to evaluate it, by correcting erroneous beliefs that the jury may hold. However, such evidence "neither proves nor disproves that [the complainant] has been sexually abused. The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension back to a zero or neutral balance": NZLRC, *Evidence: Evidence Code and Commentary*, Report No 55 (1999) vol 2 at [C110]-[C111].

49. Even where opinions on a particular complainant's conduct and the behaviour of children who have been victims of child sexual assault are admitted for a credibility purpose under s 108C of the *Evidence Act*, there are limits as to the use of that evidence. Thus in *MA*, where an expert gave evidence specific to the conduct of a particular complainant, Osborn JA observed at [22]:

> Such evidence could not establish that it was probable the complainant was telling the truth, but it could establish that her behaviour was not demonstrative of untruthfulness by reference to common or usual patterns of behaviour as asserted by the defence. In this sense, it could establish that the counter-intuitive behaviour complained of was of neutral significance. It could not demonstrate that the behaviour rendered it more or less likely that the offending had occurred as alleged.

50. In Report 102, it was noted at [9.157] that "[t]here is some danger in admitting this category of evidence. In particular, the evidence might invite a jury to reason using the doubtful syllogism: abuse of children elicits certain behavioural responses; the complainant exhibited some or all of those behaviours; therefore the complainant is likely to be telling the truth about being sexually abused, or is likely to have been sexually abused, or was sexually abused". The ALRC considered this risk of prejudicial reasoning, a risk which lay in the nature of the evidence itself, could be addressed adequately by judicial comments or directions: Report 102 at [9.157]. The danger was not diminished by the form of the enacted provision.

51. Given this danger, where such evidence is led, the trial judge should carefully instruct the jury as to the purpose for which the expert evidence is led and that the evidence "says nothing about the credibility of the *particular* complainant": *M* at [32] (emphasis in original), *Jacobs* at [60], [83]. This is because there may be a tendency for the jury to reason that "delayed reporting (for example) is common where children have been sexually abused; this is a case where there is delayed reporting by a child alleging sexual abuse; given that there was delayed reporting, the child must have been sexual abused": *M* at [32], extracted in *Jacobs* at [60]. The Supreme Court of New Zealand in *DH* has expressly approved of the need for such directions, stating at [30(e)] (per O'Regan J on behalf of the Court) that:

> Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

52. Impermissible reasoning was a real risk in the context of the educative evidence of A/Prof Shackel on behaviours of children. Directions were required in the appellant's case to address the risk "that what is descriptive or observational information (some sexually abused children act in this way) is used as a predictive or diagnostic tool (a child who acts in this way must have been sexually abused)": *M* at [32].

53. The CCA here dealt with the principles articulated in *M* and *Jacobs* with the assertion that "[w]e do not consider that what was said by the New Zealand Court of Appeal in *M* should be adopted as laying down an invariable prescription where this type of evidence is led" (CCA [269] CAB 192). It goes without saying that the directions to be given depend on the context of the particular trial, but the CCA failed to grapple with the cogent reasons such directions are necessary to ameliorate the dangers of even educative expert evidence of this kind, as the Supreme Court of New Zealand has recognised in *DH* (at [30]), and as the Court of Appeal recognised in *Jacobs* (at [58]-[60], [83]-[86]), or with the additional dangers attendant on the impugned evidence, in particular as to perpetrators and "risk factors".

54. In a criminal trial, in order to guard against the risk of misuse of expert evidence of the behaviours of children and inferences to be drawn from a child's behaviour admitted pursuant to s 79 of the *Evidence Act*, the jury should be directed in terms such as:

    a. the evidence was led for an educative purpose in relation to inferences that might be drawn from children's behaviour; and
    b. the evidence says nothing about the credibility of the complainant(s) and was not led by the Crown for this purpose [where s 108C is not relied on] but merely relied on by the Crown as evidence that delay in complaint is not inconsistent with the allegation; and
    c. it would be wrong for the jury to reason that any correlation between what the research has found as to how some children may respond to abuse, and how the complainant(s) say they responded to the abuse alleged in this case, means that the complainant(s) must be telling the truth; and

d. the evidence could not be used to reason that either the complainant was a victim or the accused a perpetrator on account of any similarity of descriptions of circumstances with the circumstances of this case.

55. In the circumstances of the appellant's case, should any of the impugned evidence have been admissible, the following directions were also required to guard against the risk of the misuse of A/Prof Shackel's evidence that was before the jury:

a. it would be wrong for the jury to reason that any correlation between what the research has found as to how some perpetrators of child sexual assault (including intrafamilial abuse) commit abuse, and how the appellant is alleged to have acted towards AA and BB means that the appellant must have committed the offences charged or as predictive of how an alleged perpetrator (here, the appellant) in fact behaved;

b. it would be wrong for the jury to assume that the appellant fell within the term intrafamilial and therefore the evidence was predictive of the conduct of the complainants and the accused; and

c. it would be wrong for the jury to use the evidence of A/Prof Shackel to substantiate that the appellant had the tendencies alleged in the case by the Crown, and her evidence should not form part of their consideration of whether the Crown had established any such tendency.

56. In this case, not only did the trial judge not direct the jury as to the permissible and impermissible uses of A/Prof Shackel's evidence, the directions impermissibly suggested that the jury could rely on this evidence in support of credibility reasoning. The direction on delay in complaint drew the evidence of A/Prof Shackel into a direction about assessing the complaints made by the complainants, and highlighted reliance by the Crown on the appellant being the uncle of the complainants, giving rise to the risks in reasoning addressed above at [54](b)-(d) and [55](a)-(c): SU 35-36 (CAB 43-44). It was not correct for the CCA to hold that the trial judge clearly outlined the relevance of the evidence to the "reactions, responses and behaviours of the complainants": CCA [269] (CAB 192).

57. The trial judge's summary of the Crown case in the summing up similarly suggested that it was permissible for the jury to use A/Prof Shackel's evidence to support the complainant's credibility: SU 36-37 (CAB 44-45). This summary accorded with how the Crown sought to deploy A/Prof Shackel's evidence in the closing address whereby the prosecutor framed, correctly, the issue in dispute at trial as the reliability and credibility of AA and BB and then, impermissibly, relied on A/Prof Shackel's evidence as supportive of the credibility of AA and BB both generally and in

respect of certain counts: see eg. T826.7-.19, T831-833, T835.45-836.8 (ABFM 44, 49-51, 53-54). The directions on expert evidence, given earlier in the summing up, did not dispel such reasoning: SU 39-40 (CAB 47-48).

58. This was not a case where the directions given by the trial judge otherwise obviated the need for a direction as to the permissible and impermissible uses of A/Prof Shackel's evidence or reduced the risk of impermissible reasoning: *cf Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [46], [53], [57]. In particular, the risk was not reduced or eliminated by the directions to the jury that it was for them to assess the witness' evidence and determine whether they are telling the truth and their account is accurate (SU 3 (CAB 11)) and that the jury had to carefully consider each complainants' evidence and be satisfied beyond reasonable doubt that the relevant complainant was both truthful and reliable (SU 6 (CAB 14)). This is because the jury had not been warned that they could not use A/Prof Shackel's evidence as predictive or to support the relevant complainant's credibility. Rather, the other directions and summaries reinforced the need for adequate directions to be given in relation to A/Prof Shackel's evidence as they served to show that the critical issue in the trial was whether their accounts were true and accurate. Further, the reference in the tendency direction to not considering each of the acts in isolation and considering "all of the evidence" (SU 37-38 (CAB 45-46)) necessarily picked up A/Prof Shackel's evidence in relation to perpetrators and risk factors for child sexual abuse.

59. Given the limitation on the admission of A/Prof Shackel's evidence as educative, the CCA ought not to have concluded that the summing up "clearly outlined the relevance of [A/Prof Shackel's] evidence": CCA [269] (CAB 192)). Even if the evidence had been admissible for a credit purpose, the directions were required to prevent misuse for the reasons set out at [49]-[51] above. Nor could it be said that there was no miscarriage of justice given the danger inherent in the nature of this evidence, as recognised by the ALRC, the way in which the Crown sought to use the evidence in closing, and the directions in the trial: *cf* CCA [269], [276] (CAB 192-193).

60. The CCA appeared to place some weight on the delay directions set out in s 294 of the *Criminal Procedure Act 1986* (NSW): see CCA [271] (CAB 193). While s 294 may have work to do where expert evidence is not admitted and agreement is reached on the directions to be given (*cf AJ* at [69]), it does not address the appropriate direction to be given where expert evidence as to children's behaviour is admitted, nor does it prevent or prohibit directions on delay and credibility where there is sufficient evidence to justify a direction. It is therefore no answer to the appellant's argument to say that the provision does not require a trial judge to "warn positively" that an absence of complaint or delayed complaint "says nothing about the credibility of the particular

complainant". That provision was simply irrelevant to the question of what directions should be given in a case involving opinions of this kind.

61. In the absence of adequate directions being given in relation to A/Prof Shackel's evidence there was a real risk of the misuse of the evidence in an impermissible way by the jury in reasoning to guilt. This gave rise to a miscarriage, and it could not be said there was no substantial miscarriage of justice. As such, the proviso was not applicable (nor was it relied on by the Crown below), leave to appeal in respect of Ground 2C pursuant to Rule 4.15 of the *Supreme Court (Criminal Appeal) Rules 2021* (NSW) should have been granted, and the appeal upheld: *Obeid v The Queen* (2017) 96 NSWLR 155 at [24]-[25].

PART VII: ORDERS SOUGHT

62. The following orders are sought:

i. Appeal allowed.

ii. Set aside the orders of the CCA on 3 March 2023, apart from order 5 quashing the conviction and entering a verdict of acquittal on Count 11, and that part of Order 4 quashing the conviction on Count 8.

iii. The convictions on the remaining counts (Counts 1-4, 7-9 and 10) are quashed.

iv. Order a new trial on Counts 1-4, 7-10 (with the new trial on count 8 being limited to an allegation of an offence of indecent assault contrary to s 61M(2) of the *Crimes Act*).

PART VIII: ESTIMATE OF HOURS

63. The appellant estimates that 2 hours will be required for the presentation of oral argument.

Dated: 1 February 2024

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ANNEXURE A:
LIST OF STATUTES AND STATUTORY INSTRUMENTS

Pursuant to Practice Direction No. 1 of 2019, the appellant sets out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Title	Version as at relevant date
	Statutes	
1.	*Criminal Appeal Act 1912* (NSW) – s 6	Current (compilation dated 1 July 2021)
2.	*Criminal Procedure Act 1986* (NSW) – s 294	Current (compilation dated 28 November 2023)
3.	*Evidence (National Uniform Legislation) Act 2011* (NT) – s 79	Current (compilation dated 3 March 2023)
4.	*Evidence Act 1995* (Cth) – s 79	Current (Compilation No. 34 dated 1 September 2021)
5.	*Evidence Act 1995* (NSW) – ss 55, 76, 79 and 108C	Compilation dated 2 July 2018
6.	*Evidence Act 2001* (Tas) – s 79	Current (compilation dated 27 April 2023)
7.	*Evidence Act 2008* (Vic) – s 79	Current (compilation dated 1 July 2020)
8.	*Evidence Act 2011* (ACT) – s 79	Current (compilation dated 17 August 2022)
9.	*Interpretation Act 1987* – s 33	Current (compilation dated 30 October 2023)
	Statutory instruments	
10	*Supreme Court (Criminal Appeal) Rules 2021* (NSW), rule 4.15	Current (compilation dated 2 May 2021)