HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BQ**
Appellant

AND:

THE KING
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: Admissibility

Basis for admission of A/Prof Shackel's evidence

2. Admissibility of educative opinion evidence (sometimes described as counter-intuitive evidence) is subject to the strictures of admissibility of expert opinion evidence, as is plain from its text, context, and the purpose for the introduction of s 79(2): s 79 *Evidence Act 1995* (NSW) (**Vol 1 Tab 3**); *Aziz v R* (2022) 110 NSWLR 317 at [52]-[60] (**Vol 4 Tab 19**); ALRC Report 102 [9.156] (**Vol 5 Tab 27**); **AS [20]-[22]**.

3. A/Prof Shackel's evidence of "how victims of childhood abuse respond as a class to and disclose their victimization" was admitted for its educative purpose under s 79 of the *Evidence Act* and not as an exception to the credibility rule under s 108C: Admissibility Judgment (**J**) **ABFM 8-10**; **AS [16]**.

4. The educative purpose of the evidence was to assist the jury's function in drawing inferences from other evidence in the trial by dispelling misconceived notions they may have about the responses of child victims of sexual abuse: s 55 *Evidence Act* (**Vol 1 Tab 3**); ALRC Report 102 at [9.155] (**Vol 5 Tab 27**); *Doney v The Queen* (1990) 171 CLR 207 at 214 (**Vol 3 Tab 12**); *Lang v The Queen* (2023) 97 ALJR 758 at [8]-[11] (**Vol 4 Tab 22**); *Aytugrul v The Queen* (2012) 247 CLR 170 (**Vol 3 Tab 10**) at [69]-[70].

5. Contrary to the **RS [23]**, educative evidence of general responses to child sexual abuse admitted under s 79 is limited to neutralising misconceptions and says nothing about the credibility of the particular complainant: *DH v R* [2015] NZLR 625 at [30](b),(d) and (e) (**Vol 4 Tab 20**); *Jacobs (a pseudonym) v R* [2019] VSCA 285 at [54], [58]-[60] (**Vol 4 Tab 21**). If evidence is admitted under s 108C, then the evidence may be available for limited credibility reasoning, such as in *MA v R* (2013) 40 VR 564 at [21]-[22] (**Vol 4 Tab 24**) and *AJ v R* (2022) 110 NSWLR 339 at [68] (**Vol 4 Tab 18**).

Perpetrator behaviour/risk factors

6. A/Prof Shackel also gave evidence of opinions as to where "abuse often takes place", the "risk factors for child sexual assault", and the behaviour of perpetrators: CCA [238] **CAB 181-183**; **ABFM 26-27**.

7. This evidence was not materially different to the evidence held to be inadmissible in *AJ* at [66], [83]-[84] (**Vol 4, Tab 18**); **AS [27]**. A/Prof Shackel did not have the relevant specialised knowledge in either case: *AJ* at [72]-[77], [83]-[84] (**Vol 4, Tab 18**); **ABFM 17-19**; **AS [26], [30]-[34]**. The CCA erred in concluding otherwise, and erred in concluding that her expertise was likely obtained "by her study of the cases which are the basis of the research": CCA [239], [240], [255] **CAB 183, 188**; **AS [30], [34]**.

8. It was also erroneous for the CCA to conclude that the impugned evidence was "so closely related" to A/Prof Shackel's expertise as to be unobjectionable: CCA [240] **CAB 183**; **AS [28]**; **AR [7]-[8]**). That is not the test for admission under s 79 of the *Evidence Act*. Similar arguments were rejected in *AJ* at [72]-[73], [83] (**Vol 4 Tab 18**). The impugned evidence was not simply an explanation, nor an aspect, of "why a child might react (or not react) in a particular way", nor merely descriptions of the "circumstances" in which such offences take place and those descriptions did not render such evidence admissible: cf. CCA [233], [235], [239] **CAB 179, 180, 183**; **RS [28], [35], [40], [44]**; *AJ* at [72], [83] (**Vol 4 Tab 18**); **AS [27]**, **AR [5], [7]-[9]**.

Intra-familial relationships

9. A/Prof Shackel did not articulate what "the research" meant by the term "intra-familial" and "close family relationship". This, and her references to "mixed research" and the research using "different definitions", exposes a failure to demonstrate specialised knowledge sufficient to permit opinion evidence on this subject: cf. CCA [233], [236], [237] **CAB 178-181**; **ABFM 25**; *HG v The Queen* (1999) 197 CLR 414 (**Vol 3 Tab 14**) at [39]-[41], [44] (**Vol 3 Tab 14**); *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [36]-[37], [42] (**Vol 3 Tab 11**); *Lang* at [10], [222] (**Vol 4 Tab 22**); **AS [39]-[41]**; **AR [11]**. The CCA's observation at [237] **CAB 181** on who might fall within the term "intra-familial" illustrates this failure.

Error of law and miscarriage

10. The admission of A/Prof Shackel's impugned evidence constituted both error of law and a miscarriage of justice under s 6(1) *Criminal Appeal Act 1912* (NSW) (**Vol 2 Tab 5**): **AS [35]-[38], [45], [46]**; cf. CCA [221]-[222], [240]-[243] **CAB 183-184**.

11. There was a real risk of prejudicial reasoning in relation to the inadmissible evidence, individually and cumulatively given the evidence in the trial, the Crown Closing and the directions: ALRC Report at [9.157] (**Vol 5 Tab 27**); *HG v The Queen* at [44] (**Vol 3 Tab 14**); **AS [35]-[38]**; Crown Closing **ABFM 43-44, 46, 49-50, 53-54**; SU **CAB 42-44, 47-48, 52-53**.

12. The respondent did not rely on Rule 4.15 below: CCA [248], [254] **CAB 186, 188**. Objection was taken to A/Prof Shackel's evidence on the basis that it did not meet the requirements in s 79 of the *Evidence Act,* including on the basis of a lack of specialised knowledge. Following further objection, counsel was effectively told he misunderstood the ruling: cf. CCA [249]-[252] **CAB 186-187**, **AR [4]**.

Ground 2: Directions

13. The directions to the jury as to the admissible educative evidence were inadequate to explain that educative purpose of the evidence and how it could not be used, the latter in order to address the recognised dangers "of admitting this category of evidence" and to counter use in support of credibility: ALRC Report at [9.157] (**Vol 5, Tab 27**); **AS [50]**.

14. The prosecutor's closing address and the jury directions impermissibly linked the educative evidence with the complainant's credibility and it cannot be inferred that the jury would not attach any importance to those submissions and directions: *M* at [47], [49]; *Jacobs* at [83]-[86]; Crown Closing **ABFM 43-44, 46, 49-50, 53-54**; SU **CAB 42-45**; **47-48, 52-53**; **AS [56]-[57]**; cf. **RS [60]-[61], [68]**.

15. Directions were necessary to guard against doubtful syllogistic, diagnostic or predictive reasoning, which is not permissible even when admitted for credibility reasoning: *MA v R* at [22] (**Vol 4, Tab 24**); *M v The Queen* [2011] NZCA 191 at [32], [49] (**Vol 4, Tab 23**); *DH* at [30] (**Vol 4, Tab 20**); *Jacobs* at [54]-[60], [83]-[86] (**Vol 4, Tab 21**), ALRC Report [12.130] (**Vol 5 Tab 27**); **AS [48]-[55]**.

16. The directions did not and could not cure the unfair prejudice of the admission and use of the impugned evidence. The dangers as articulated at **AS [54]-[55]** were not guarded against by directions in the trial. There was no forensic advantage in failing to request such directions and there was a real chance of impermissible reasoning by the jury: cf. CCA [263] **CAB 190-191**.

17. The CCA erred in holding that the directions in the trial were adequate and did not occasion a miscarriage of justice: CCA [269], [276] **CAB 192-193**; **AS [52]-[61]**.

Appropriate orders

18. The convictions on counts 1-4, 7-10 should be quashed and a retrial ordered.

Dated: 10 May 2024

Gabrielle Bashir **Georgia Huxley** **Naomi Wootton**