IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B31 of 2013

BETWEEN:

PEB
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Issues in the Appeal

2. In the matter of *R v PEB* [2012] QCA 333 there was an error of law because the Queensland Court of Appeal failed to provide proper reasons for the decision and orders made and failed to adequately make an independent assessment of the evidence when considering a ground of appeal that there was a miscarriage of justice because the verdicts were unreasonable or not supported by the evidence.

3. The error of law exists because both those failures occurred or one of them did.

4. The Queensland Court of Appeal also erred in concluding that there was no miscarriage of justice because the verdicts were reasonable or supported by the evidence and dismissing the appeal on that basis.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The appellant considers that no notice, pursuant to section 78B of the *Judiciary Act 1903,* needs to be given in this case.

Part IV: Citation

6. Appeal: *R v PEB* [2012] QCA 333; CA No 187 of 2012.

Trial unreported: District Court Maroochydore DC No 103 of 2012

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Part V: Material Facts

7. The appellant was convicted by a jury in the District Court at Maroochydore of two counts of unlawfully and indecently dealing with E, a child under 12 years of age who, at the time of each offence, was in the appellant's care.[1] Both offences were said to have taken place on the one day, a date unknown between 30 September 2008 and 1 December 2008.

8. The jury was unable to agree on a verdict in relation to a third, identical (though differently particularised) count.

Evidence at trial

9. The Crown case was made up of the evidence of E (comprising her recorded statements to police admitted pursuant to section 93A of the *Evidence Act 1977 (Qld)* and her pre-recorded evidence – sections 21AK and 21AM of the *Evidence Act 1977 (Qld)*)[2], her mother and the arresting police officer. The appellant (who E referred to as "poppy") and his wife, T, (who E referred to as "nanna") also gave evidence. They will also be referred to as the grandparents.

10. On 26 April 2011 E spoke with a Detective Senior Constable. The conversation was video recorded. When asked about her poppy she first referred to an assault on her mother by poppy with a soiled child's nappy and an occasion when he emptied a pool. She then said " ... *and s, and this is the part that like my mum wanted me to talk about with you, um like when um I came home um to talk to my mum I told her that poppy um touched my private parts*".[3]

11. Later in the interview E agreed she made the disclosure to her mother "last night".[4]

12. E told the police officer that she was sleeping over at her grandparents' place and that she and her brother, B, were the only other people in the house.[5] She said she had a bad dream and went into her grandparents' bedroom where she was invited by her grandfather to get into the bed. She said she woke up later and her grandfather was touching her private parts (count 1). She initially said "... *and yeah that's all I know*"[6] but when asked what happened next said he started doing it again[7] (count 2). She said she told her grandfather that she had to go to the toilet but she "*really didn't*".[8]

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[1] Section 210 (1) (a), (3) & (4) of the *Criminal Code* (Qld).
[2] E gave evidence on 29 March 2012 and 11 July 2012 (not 17 July 2012 as is recorded in paragraph [9] of the judgment of the Court of Appeal).
[3] Interview 26 April 2011, page 3.
[4] Interview 26 April 2011, page 34. The clear inference from that evidence and the evidence of the mother is that this was the first disclosure.
[5] Interview 26 April 2011, pages 13.
[6] Interview 26 April 2011, page 4.
[7] Interview 26 April 2011, page 17.
[8] Interview 26 April 2011, page 4.

13. As the interview progressed she gave more detail. She said that she wore a shirt, skirt and underpants to bed. She had a bad dream and went into her grandparents' bedroom where she was invited into the bed by her poppy. When she woke in the morning (daytime) her grandfather had his left hand under her underpants and was slowly and gently tickling her private parts.

14. She got out of bed and was, she thought, outside when later poppy came out and started doing it again. That was when she said she had to go to the toilet. Later she expanded on that and said she went out to the toy room and was playing with toys. Nanna had gone for a drive (stating that she would be back soon)[9] and poppy came and took her back into his room and started doing it again. On this occasion she was standing up near the toilet and he removed her underwear. He tickled her like before only a little harder.

15. She told him that she needed to go somewhere to which he replied that he wanted her to stay. She then said that she had to go to the toilet. She did not go to the toilet in the bedroom but went out to another toilet described as the "kid's toilet". While there she saw a big hairy spider.

16. When asked by the police officer what happened next she said that nanna came back and then it was the next day and she had to go home. She said that after she was in the toilet where she saw the spider, she watched a movie. While she was doing that she thought poppy was just lying in bed. She could not recall what movie she was watching but nanna came home half way through the movie.[10]

17. She was asked on a number of occasions when these events occurred and she said it was a couple of days before poppy's birthday. Her description of that event is consistent with it being a surprise party in that she refers to hiding and hiding places and surprising him.[11]

18. Toward the end of the interview E was asked if there was anything else she wanted to talk about today. She replied "*Um no*".[12] When relaying to the officer what she had disclosed to her mother she acknowledged that she did not tell her mother about going outside and playing with toys or about the spider. She volunteered that she did not know why she did not tell her mother those things.[13]

19. E was interviewed by police again on 15 March 2012 following a further disclosure to her mother. She repeated in general terms her earlier allegations and added that after the second incident poppy took her to the bed where he lay down. He positioned her on top of him and took his pants off. He placed her hand on his penis, took her underpants off (noting here that she said in the previous interview that he had taken them off prior to the second incident[14]), placed his hand on her

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[9] Interview 26 April 2011, page 21.
[10] Interview 26 April 2011, page 27.
[11] Interview 26 April 2011, page 14.
[12] Interview 26 April 2011, page 29.
[13] Interview 26 April 2011, page 34.
[14] Interview 26 April 2011, page 23 where she said she thinks that was the case and pages 31 and 32 where she does not qualify her evidence on that point.

vagina and started to bounce her up and down. She said that she pretended to laugh. Nanna came home[15] and her grandfather told her not to tell anybody and stopped what he was doing.

20. The interviewing police officer observed that they had spoken of these matters previously but there was something she did not tell him – obviously referring to the third incident (count 3). E said "*Yeah I forgot about it*".[16]

21. She was then asked for more detail about that. She repeated what she had said earlier except that she said her underpants were not removed until he lay on the bed and she did not repeat the allegation that he got her to touch his penis. The officer reminded her that she forgot about touching his penis in relation to which she then said she was uncertain about whether that happened before or after.[17] Later in the interview she gave more detail about the pulling down of the underpants and pulling them back up.[18] She said that occurred near to when her grandmother came home.

22. The child was cross-examined on two occasions. At the first hearing on 29 March 2012, two weeks after the second police interview, she was asked why she had not told her mother about the new information (the circumstances alleged in relation to count 3) straightaway. E replied that she was scared.[19] When asked why she had not told Brian (the interviewing police officer) in the first interview she said "*I'd forgotten that when I was telling Brian*".[20] She denied that she was "fibbing" in the first interview. She then said that she was scared of looking silly because she forgot something.[21] E then agreed that she felt a bit silly when she did remember the events relating to count 3 and when she did remember she told her mother.[22]

23. E was asked to repeat the events. She said that she woke up to feel her grandfather touching her vagina. After that she said she had to go to the toilet and after she came back he started doing it again behind a wall. He was standing. He then took her to the bed and lay on his back. He put her on top and took her underpants off. He touched her vagina and got her to touch his penis. Then nanna came home and he said not to tell anyone. She knew of the foster children but there was no one else in the house during the time she was there apart from her, her brother and her grandparents.[23]

24. E also stated that nanna was not at home when the touching started. She had gone out with her little brother.[24]

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[15] Interview 15 March 2012, page 4.
[16] Interview 15 March 2012, page 4.
[17] Interview 15 March 2012, page 9.
[18] Interview 15 March 2012, pages 12 and 13.
[19] 29 March 2012, page 1-13, lines 6-7.
[20] 29 March 2012, page 1-14, lines 1-3.
[21] 29 March 2012, page 1-14, lines 16-27.
[22] 29 March 2012, page 1-14, lines 44-50.
[23] 29 March 2012, pages 1-18 to 1-24.
[24] 29 March 2012, page 1-20, lines 28-36.

25. The second cross-examination occurred on 11 July 2012. On this occasion she was uncertain about whether the adopted children were at or living at her grandparents' house at the time. It was put to her that the only time she stayed at her grandfather's house around the time of the party was a couple of weeks after the party and not before hand. She could not remember.[25] She also said, when pressed, that she was not sure about her brother being at the house when she stayed over. She agreed that when she stayed over any contact with the foster children was supervised. She denied that there was a rule prohibiting her sleeping in her grandparents' bed and that she had never slept in that bed.

26. The child's mother, M, gave evidence that E is her daughter. The appellant is her husband's step-father. E and her other children slept over at the appellant's house on a regular basis throughout 2006, 2007 and 2008. It was a frequent event, at least once a fortnight and sometimes weekly.

27. M gave evidence about organising a surprise birthday party for the appellant in November 2008.

28. M said E first raised the allegations in early 2011, possibly March.[26] She said that E unusually asked to be tucked into bed and indicated she (E) wanted to talk about something privately. After then settling one of her other children M returned to E who then disclosed that poppy had touched her down there pointing between her legs. E said that poppy tickled her down there underneath her underpants but nowhere else. E's mother asked if it happened at any other time and E replied "*Yes, it had happened again the next day when Nana ... had gone out*".[27] E said that she told the appellant she needed to go to the toilet because she did not want it to keep happening; she got out of the situation by saying she had to go to toilet. E said that the offending occurred during a sleepover near poppy's surprise birthday party. E said she had gone to seek comfort because of a bad dream and had woken during the night[28] to find "*events happening to her body*". E disclosed only those two incidents.

29. Police were subsequently contacted and E was taken to the police station on 26 April 2011.

30. In March 2012 M spoke to E about the matter in preparation for an upcoming pre-recording of her evidence. E made a further disclosure that the next day after nanna had gone out poppy touched her under her underpants and that he placed her hand on his private area while he did not have underpants on. E said that he then took her to the bedroom sometime after that.[29] She had no underpants on but could recall the skirt she was wearing. E said poppy then placed her on top of his body (he was lying down) and bounced up and down. E said that she laughed and giggled. The witness then said, referring to E, "*She said that she felt bad for giggling and hadn't spoken to me about it before. I said to her*

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[25] 11 July 2012, page 1-5, line 43 to page 1-6, line 11.
[26] 17 July 2012, page 1-10, lines 45-51.
[27] 17 July 2012, page 1-11, lines 51-53.
[28] 17 July 2012, page 1-12, line 7.
[29] 17 July 2012, page 1-13, lines 27-34.

that that was probably nerves and she agreed and said that she felt very disturbed about that having happened".[30] E also said that poppy told her not to tell anyone.

31. In cross-examination M said that she was aware of the foster children and indicated that to her knowledge those foster children stayed with the appellant and his wife "on and off". She said she had a specific recollection of conversations about the appellant and his wife having her children over notwithstanding the presence of the foster children. She said that the suggestion that E had stayed over with the appellant on one occasion only in the October/November 2008 period (on 14 November) was not in accordance with her recollection.[31] M said that E stayed over regularly even during that period.

32. The investigating officer gave evidence. Through him the interviews with E were tendered in evidence. He also confirmed there was no forensic investigation done because of the passage of time between the alleged events and the complaint.

33. The appellant and his wife gave evidence. The appellant said a surprise party was held for him on 6 November 2008. The appellant said that on 15 October 2008 he and his wife took in three foster children.[32] As he generally slept with little or no clothing no children were permitted to sleep in their bed.

34. E would on occasion stay over however, save for one occasion, had not done so in the October/November 2008 period. On 14 November 2008 E stayed over by herself.[33] None of her siblings were with her. The foster children were at the house at the time. E was picked up after school and taken to their home. They all watched a movie and after the children had eaten all went to bed. E slept in the same bedroom as the two female foster children. At no point during the night or the next day did E come into or sleep in his bed.

35. At all times, including the next day, any interaction between E and the foster children was supervised. His wife did not go out that day. E was taken home later that day. The appellant denied the allegations of sexual offending.

36. In cross-examination the appellant said that his wife kept a diary particularly during the time the foster children were there. The appellant did not make entries into it or check it. In addition to recording events/activities, items such as mileage were recorded to support claims made to the relevant government department.

37. The appellant said that his memory of dates and events was assisted by reference to the diary and at least one other document. He said that he recalled E stayed over on 14 November because a diary entry records that fact and another diary entry for the 16 November referred to a trip to the beach which he remembered. He also recalled that E's last overnight contact before the arrival of

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[30] 17 July 2012, page 1-13, lines 41-44.
[31] 17 July 2012, page 1-16, lines 20-39.
[32] 18 July 2012, page 2-2, lines 41-44.
[33] 18 July 2012, page 2-3, lines 41-55.

the foster children was on 11 and 12 October. His recollection was confirmed by reference to entertainment park (Sea World) tickets which recorded a visit on those days. They stayed overnight in a unit, not their home.

38. The appellant's wife, T, gave evidence that since the arrival of the foster children the visiting practices involving E changed to avoid any potential for difficulties arising from any contact between E and those foster children. She also said that she and her husband did not allow children to sleep in their bed.[34]

39. She confirmed the surprise party was on 6 November 2008. She said that the only time E stayed over during the months of October/November 2008 was on 14 November. On that occasion B, E's younger brother, did not stay over but the foster children were there.[35]

40. In cross-examination T agreed that entries in the diary seem to recommence around 15 October and record information about the foster children. She said that she had two diaries, one being used specifically in relation to the foster children.

41. T said she was a light sleeper and wore earplugs to bed.[36] Her husband was a heavy sleeper. She denied the suggestion that E had come into their room at any time and discounted the possibility it could have occurred without her knowledge because she was such a light sleeper.[37] She confirmed her recollection of, and a diary entry recording, E's sleepover on 14 November. She said that her husband and E were not alone during that time.

42. She agreed that the diary did not record every incident in their lives.[38] It was not a journal but a diary mainly recording issues concerning the foster children but also recording other events such as outings, E's sleepover on 14 November and her work times. It did not record everything. She denied however the suggestion that E and/or B had stayed over at other times in October or November 2008 and such an event was not recorded in the diary.[39] The diary was not tendered in evidence.

The Court of Appeal

43. The relevant facts referred to by the Queensland Court of Appeal are set out below.

> [2] E was born on 6 December 2001. She was therefore six years old at the time of the offences, just short of her seventh birthday. The appellant was the stepfather of E's own father, in other words, her "step-grandfather".

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[34] 18 July 2012, page 2-17, lines 1-9.
[35] 18 July 2012, page 2-17, lines 11-32.
[36] E stated in the 26 April 2011 interview with police that T "had these little yellow things in her ear" (page 18) and that "they were those little ... yellow things ... not to like hear anything" (page 28). When asked "so does nanna wear a hearing device", E replied "Yeah" (page 29).
[37] 18 July 2012, page 2-23, line 57 to page 2-24, line 30.
[38] 18 July 2012, page 2-29.
[39] 18 July 2012, page 2-30, line 33 to page 2-31, line 38.

[3] The evidence disclosed that the offences came to light in March 2011, when E told her mother what had happened. She told her mother that the appellant had touched and tickled her underneath her underpants. It occurred when, having experienced a nightmare, E went into her grandparents' bed, where they both were, for comfort. She awoke to experience the appellant touching her. That was the conduct involved in the first count.

[4] E then told her mother that the appellant behaved similarly the following day. That was count two. E's grandmother had gone out. E then withdrew herself from the situation by saying that she needed to go to the toilet.

[5] E said that those events occurred at a time near to the time of a surprise birthday party held for the appellant. That party was in fact held on 6 November 2008.

[6] A police officer interviewed E on 26 April 2011. E gave a similar account of the two events to the police officer. She told him that the second incident occurred near a wall. Both incidents occurred during a "sleepover": E and her brother stayed overnight at the grandparents' house.

[7] In March 2012, in anticipation of the pre-recording of her evidence, E went through her account with her mother. Then for the first time she spoke of a third incident, and that became the subject matter of count three, on which the jury could not agree. E told her mother that the appellant touched her private parts and got her to touch his. He was wearing only a shirt. He bounced E's body on top of his own. She laughed and giggled during this incident, and said to the effect that she had not earlier wanted to tell her mother about it because she was embarrassed by what she considered to be her inappropriate reaction to what was being done to her. She said that the appellant told her not to tell anyone what had occurred.

[8] It will be seen that whereas E informed her mother of the first two incidents two years and four months after they occurred, she raised this third incident a further 12 months on. E gave a similar account of the third incident when interviewed again by a police officer on 15 March 2012.

[9] E was cross-examined on two occasions, 29 March 2012 and 17 July 2012. On the first occasion, she said that she did not tell her mother about the third incident, when she spoke to her mother for the first time about these things in March 2011, because she was scared, and that when she first spoke to the police officer she had forgotten about that incident.

[10] During each cross-examination, E was asked about whether foster children cared for by the appellant and his wife were present at the house. During the first cross-examination, E said that the foster children were not in the house when the offending occurred. During the second cross-examination, E said that she was not sure whether or not the foster children were then living with the appellant.

[11] E said that all of the offences occurred at a time near to the time of the surprise birthday party held for the appellant. As mentioned, that party occurred on 6 November 2008.

[12] The appellant gave evidence denying the charges. He said that two fostered girls came to stay at his house on 15 October 2008, and were there over the period in question. He said, relying on his wife's diary, that E and her brother slept over at his house on 14 November 2008. E slept in the same room as the fostered girls. He said that the last visit by E and her brother before the arrival of the foster children was on 11/12 October 2008 when they went to Sea World. The appellant's wife gave evidence which was consistent with the appellant's evidence.

Part VI: Appellant's Argument

44. **Adequacy of reasons:** When considering the ground of appeal that the verdicts were unreasonable or not supported by the evidence the Court of Appeal was undertaking a factual exercise, not determining a question of law.[40] The task of the Court of Appeal is to decide whether on the whole of the evidence it was open to the jury to be satisfied beyond a reasonable doubt that the appellant was guilty.[41]

45. The Court of Appeal has jurisdiction to hear and determine appeals against conviction.[42] It is the duty of the Court to exercise that jurisdiction when it is invoked. There is no legislative requirement that the Court of Appeal provide reasons for the orders made or conclusions reached. It is however normal that the Court of Appeal will provide such reasons. Failure to do so may constitute an error of law[43] depending on the circumstances. Where the Court of Appeal is considering, in a criminal appeal, a ground that a verdict is unreasonable or unsupported by the evidence, failure to give any or adequate reasons for the conclusion reached constitutes an error of law.[44]

46. Adequate reasons are needed (a) for the benefit of the parties who are entitled to know why a decision has been reached or an order made, (b) for the benefit of the public who are entitled to have an open and transparent justice system, and (c) where appropriate, for the benefit of any court to which an appeal may lie from the contested decision.

47. In the present case the reasons are inadequate for three reasons.

48. *Firstly*, they do not disclose the basis on which it was concluded that the complainant's evidence was sufficient to exclude a reasonable doubt. Apart from a reference in paragraphs [19] and [20] of the judgment to the issue of E's credibility the only reference to the quality of her evidence appears in paragraph [24] of the judgment where it was stated "*Especially having regard to the consistency of E's accounts, from when she first spoke to her mother in relation to counts one and two, the jury, acting reasonably, was entitled to take that view.*" The view referred to was satisfaction beyond a reasonable doubt that offences had occurred within the time frame alleged.

49. The use of the word "especially" indicates that there were other undisclosed reasons as to why E's evidence was concluded to have that quality. Further, whether her accounts were consistent is really a conclusion based on facts but the facts relied upon to come to that conclusion are not revealed. A mere statement that the complainant's evidence was consistent does not bring with it a necessary implication that it was reliable.

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[40] *M v The Queen* (1994) 181 CLR 487 at 492-493.
[41] Ibid at 493.
[42] Section 668E of the *Criminal Code* (Qld).
[43] *Jones v The Queen* (1989) 166 CLR 409 at 411.
[44] *Douglass v The Queen* (2012) 290 ALR 699 at 703, paragraph 14; **cf** *Fleming v The Queen* (1998) 197 CLR 250 and *R v Keyte* [2000] SASC 382.

50. The Court concluded that some members of the jury might not have been satisfied of her credibility on count 3 but satisfied of it sufficient to convict on the other two counts. It was suggested that E's explanation for the delay in complaining about the third incident was as a result of being scared and feeling embarrassed.[45] That conclusion leaves open the proposition that the complainant deliberately withheld important information.

51. That potential difficulty which would impact on an assessment of her credibility was not addressed. Acceptance of her evidence was vital to the conviction. Apart from a reference to consistency there is nothing to indicate why it was considered her evidence was of sufficient credibility and reliability. Similarly the identification of inconsistent explanations for the delay as set out in paragraph [9] of the judgment was not addressed.

52. *Secondly*, they do not record any findings about or assessment of the evidence given by the appellant or his wife. The reference to "competing considerations" in paragraph [24] of the judgment is not sufficient to explain why the jury must have rejected the appellant's evidence and that of his wife. The use of the phrase "competing considerations" in the light of an earlier reference to the acceptance of the complainant's evidence "in the context of the defence evidence" strongly indicates that the Court of Appeal approached the matter on the basis that resolution of the question of guilt or otherwise depended only upon an acceptance of E's evidence.[46] Acceptance of her evidence is not inconsistent with a reasonable doubt.[47]

53. *Thirdly*, a statement by His Honour the Chief Justice, with whom the other members of the Court agreed, that[48] *"Having reviewed the evidence as required, I am satisfied these convictions are not unsafe"*, is not sufficient explanation for why that might be the case or that the review (or assessment) properly supports the conclusion reached.

54. In *Fleming v The Queen*[49] this Honourable Court noted, when considering whether a trial judge had complied with certain statutory requirements relating to the provision of reasons, *"However, as we have said, an animating principle which lies behind the requirements of s 33 is that criminal justice not only be done but also be seen to be done. The judgment must show expressly or by necessary implication that the warning was taken into account. If the judgment does not do so, a breach of s 33(3) has occurred. It is no answer that the trial judge is an experienced judge who was well aware of the requirement of a warning and that he or she must have taken the warning into account."*

55. There is no demonstration of any link made between the evidence and the conclusion. There is no transparency of reasoning. In *SKA v The Queen*[50] the majority noted, when considering whether the New South Wales Court of Criminal

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[45] *R v PEB* [2012] QCA 333 at paragraph [20].
[46] **cf** *SKA v The Queen* (2011) 243 CLR 400 at 409, paragraph 23.
[47] *Douglass v The Queen* (2012) 290 ALR 699 at 703, paragraph 13.
[48] *R v PEB* [2012] QCA 333 at paragraph [24].
[49] (1998) 197 CLR 250 at page 265, paragraph 37.
[50] (2011) 243 CLR 400 at paragraph 23.

Appeal had adequately undertaken the task required of it when determining an appeal on the same ground, *"It was not sufficient to say that the complainant's account of the incidents was sufficiently particular to enable a jury to accept it."*

56. Later[51] the majority noted the requirement to demonstrate that the competing evidence had been weighed.

57. In the present case the requirement not only to undertake the task required but to demonstrate that has been done, has not been complied with.

58. Overall the reasons do not publically explain to the appellant or this Honourable Court why it was concluded that the verdicts were not unreasonable.

59. **Sufficiency of independent assessment of evidence:** Consideration of this issue to an extent overlaps with the first. The Court of Appeal must undertake an independent assessment of the evidence and must be seen to do so. There is a lack of indication in the judgment as to what assessment had been made of the evidence, including importantly the evidence of the complainant and that of the appellant and his wife. Any assessment that has been done is insufficient and does not actually weigh competing evidence and reason to a logical conclusion.

60. The references to E's evidence do not properly identify the variations and inconsistencies in it. For example neither of the references in paragraph [9] or paragraph [20] to E's explanation for the delay identifies that E said in cross-examination that when she remembered the third incident she told her mother.[52] The statement in paragraph [20] that the jury were entitled to accept the E's claim that she was scared and embarrassed as an explanation for the delay ignores her clarification in cross-examination that she did feel embarrassed about forgetting but told her mother when she did recall.[53] That can not sit with a claim that she failed to disclose because she was scared. The latter brings with it a conclusion that she deliberately failed to disclose which, it is submitted, is not her evidence. There is no consideration of these important issues in the judgment.

61. There are also other matters which call into question the reliability of the complainant which have not been addressed by the Court of Appeal. They include:

(i) E's claim to police that it was daytime when she woke to find her grandfather touching her[54] but her mother said E claimed she had woken during the night to find these things happening;[55]

(ii) E said that when she was first touched both poppy and nanna were in bed[56] but later stated that only her grandfather was present;[57]

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[51] Ibid at paragraph 24.
[52] 29 March 2012, page 1-14, lines 15-55.
[53] 29 March 2012, page 1-14, lines 44-53.
[54] Interview 26 April 2011, page 8, line 19 and page 16, line 8.
[55] 17 July 2012, page 1-12, line 7.
[56] Interview 26 April 2011, pages 17 and 18.
[57] 29 March 2012, page 1-20, lines 28-36.

(iii) Her initial claim that nanna came home while she was part way through watching a movie[58] whereas her later evidence was that her grandmother came home while her grandfather was indecently dealing with her;[59] and

(iv) E's evidence on 29 March 2012 that at the time of making her first statement to police she told the officer that poppy said to her "*don't tell anyone that this happened*"[60] despite her telling the officer that poppy did not say anything to her.[61]

62. The judgment contains factual errors. Of themselves they are minor but, together with the matters referred to above, serve to indicate a lack of detailed assessment of the evidence. They include:

(i) in paragraph [12] it was suggested the appellant gave evidence that two fostered girls came to stay whereas his evidence was that three foster children, two girls and a boy, came to stay;

(ii) in the same paragraph it was stated that the appellant's evidence was that E and her brother stayed over on 14 November whereas the evidence was that only E stayed over on that night; and

(iii) in paragraph [3] the Court of Appeal stated that the offences came to light in March 2011 whereas the evidence strongly suggests that the first disclosure was made the day before the police interview on 26 April 2011.

63. As noted earlier, apart from a recitation of the general effect of their evidence, there is nothing in the judgment which indicates that any independent assessment of the appellant's evidence and that of his wife has been undertaken. There has been nothing said about why, in the face of questions about the complainant's credibility - or even accepting her evidence - the evidence of the appellant and his wife was able to be excluded as raising a reasonable doubt.

64. In addition to identified errors or omissions, the failure to provide sufficient reasons can of itself establish that an independent assessment has not been undertaken. In *Fleming v The Queen*[62] this Honourable Court was considering the construction of s 33 of the *Criminal Procedure Act 1986 (NSW)* which required, in subsection (2), a judge sitting in a criminal trial without a jury to include in their judgment the principles of law applied and the findings of facts relied upon. This Court stated[63] *"Seventhly, if the judgment fails to show that the judge applied a relevant principle of law, two possibilities are presented. One possibility is that, notwithstanding such failure, the principle was applied. Upon that hypothesis, there has been a breach of s 33(2) by reason of the omission from the judgment. The other possibility is that the principle was not applied, with the result that, independently of the question of breach of s 33(2), there has been an error of law*

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[58] Interview 26 April 2011, page 26, line 40 to page 28, line 9.
[59] 29 March 2012, page 1-22, line 39 to page 1-23, line 21.
[60] 29 March 2012, page 1-25, lines 38-42.
[61] Interview 26 April 2011, pages 20 and 32 although at page 24 she says he said "no, stay here" at one stage.
[62] (1998) 197 CLR 250.
[63] Ibid, page 263, paragraph 30.

which may attract at least the second limb of s 6(1) of the Criminal Appeal Act. The obligation imposed by s 33(2) was to ensure that the judgment included all principles of law which the judge applied. Unless the judgment shows expressly or by implication that the principle was applied, it should be taken that the principle was not applied, rather than applied but not recorded."[64]

65. It is respectfully submitted that unless the judgment shows expressly or by implication that the relevant task (an independent assessment of the evidence) was undertaken it should be concluded that the task was not undertaken, rather than undertaken but not recorded. A statement that it has been done without more is not sufficient.

66. With respect, the Court of Appeal did not undertake the task required of it.

67. **Were the verdicts unreasonable or not supported by the evidence:** If this Honourable Court concludes that there was an error of law as set out above disposition of the matter can be effected by remitting the matter back to the Queensland Court of Appeal or this Court can perform for itself the appellate function that miscarried.[65]

68. It is respectfully submitted that the latter course ought to be adopted for the sake of finality and to release the appellant from the operational period of his suspended sentence as soon as possible.[66] Additionally this Honourable Court will have examined the evidence, which is not extensive, in determining the other questions.

69. It is accepted that the starting point for any consideration is respect for the verdicts of the jury as the primary fact finder. It is also accepted that the test to be applied is one of unreasonableness or lack of evidentiary support and not the existence of inconsistencies. However the resolution of a criminal case is to be achieved by a consideration of the evidence as a whole rather than simply deciding whose evidence is to be preferred.

70. It is submitted that for the reasons referred to above and taking into account that the jury could not agree on count 3, the evidence of the complainant was such that the jury ought to have entertained a reasonable doubt. This is so even taking into account the child's youth and reduced ability to clearly articulate events and ideas. There is enough evidence to conclude that she had a tendency to reconstruct or even manufacture evidence; for example her evidence about what was happening at the time her grandmother came home. She initially said she was watching a movie and later said the acts constituting count 3 were occurring. A detailed examination of her evidence reveals that it is not sufficiently persuasive to support a criminal conviction.

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[64] Adopted in *AK v Western Australia* (2008) 232 CLR 438, per Gummow and Hayne JJ at page 454, paragraph 48.
[65] *MFA v The Queen* (2002) 213 CLR 606 at 626-627, paragraphs 68-69. *Judiciary Act 1903 (Cth)* s 37.
[66] On 19 July 2012 the appellant was sentenced to 12 months imprisonment suspended after 6 months for an operational period of two years.

71. There was general appearance of consistency as to the basic allegations contained in counts one and two. However the matters referred to in paragraphs 50 and 51 above ought to have left the jury with a reasonable doubt about the allegations. The complaint was not made until some time after the alleged events and this ought to have impacted on the reliability of her recollections. During the course of her cross-examination on 11 July 2012[67] she said she could not remember whether her stay over was before or after the surprise party. Nor could she recall whether her brother stayed over on that night. This represented a change from her previous evidence.

72. Additionally the evidence of the appellant and his wife was strong, certain and consistent. There was some conflict with the evidence of M about the change in frequency of E's visits after the foster children arrived[68] but in that regard the evidence of M was far from persuasive.

73. In this case the advantage enjoyed by the jury in seeing the witnesses and hearing the evidence is not capable of resolving any doubt which arises. The doubt arises because of the quality of the evidence. Even if the jury rejected the evidence of the appellant and his wife just because of the way they presented in court, the evidence of the complainant was not of sufficient quality to exclude a reasonable doubt.

74. Taken as a whole the evidence ought to have left the jury with a reasonable doubt.

Part VII: Applicable Statutes, Authorities, etc

75. Section 668E of the *Criminal Code* (Qld), as it existed at the relevant time, is relevant to this appeal.

> **668E Determination of appeal in ordinary cases**
> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
> (2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the

[67] Page 1-6.
[68] See the evidence of T on 18 July 2012 (page 2-16, lines 40-51), the evidence of the appellant on 18 July 2012 (page 2-3, lines 11-18) and the evidence of M on 17 July 2012 (page 1-15 line 49 to page 1-17 line 10).

> conviction and direct a judgment and verdict of acquittal to be entered.
> (3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

76. At the date of making these submissions, this provision remains in force and remains in the same form.

Part VIII: Precise Form of Orders

77. The appellant contends that the following orders should be made:

1. Appeal allowed.
2. Orders of the Queensland Court of Appeal be set aside.
3. In lieu thereof (a) the appeal to that Court be allowed,
   (b) the convictions be quashed,
   (c) direct the entry of verdicts of acquittal for counts one and two of the indictment.

Alternatively

1. Appeal allowed.
2. The matter is remitted to the Queensland Court of Appeal for rehearing of the appeal.

Part IX: Time Estimate of Oral Argument

78. It is estimated that the appellant's oral argument will take one hour.

Dated: 8 July 2013

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