

**SUBMISSION:**  
**DISCUSSION PAPER “STRENGTHENING CHILD SEXUAL ABUSE LAWS IN NSW”**  
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This submission provides analysis and answers to the following question:

**Q31. Should the approach to tendency and coincidence evidence proposed in the draft legislation at Appendix E be adopted? If not, should aspects of that approach or any other option for reform be pursued in NSW?**

A number of commentators have recognised that the rules governing the admissibility of tendency and coincidence evidence have a significant impact on the trial process in a child sexual assault (CSA) trial, particularly where an accused is charged with multiple offences against more than one child complainant.

The admission of such evidence may also arise where other witnesses can give evidence of the defendant’s sexual behaviour with them, where a witness can give evidence of what they know about the defendant’s sexual behaviour with children or where there is evidence of the defendant’s use of child pornography. Where there are multiple complainants, the cross-admissibility of each complainant’s evidence in relation to the charges pertaining to the other complainants is the threshold question for determining whether or not separate trials or a joint trial will be held.

From a public policy perspective, separate trials create an artificial context in which the charges pertaining to each complainant are heard, particularly where each complainant is from, for example, the same family, school class, sporting team, church group or boarding school. The jury will not know that other children in the particular group have also made similar complaints against the accused, leaving them with the question, why this child and not other children in the same group? Separate trials also confer a significant tactical advantage on the defendant whose trials will be conducted, from the point of view of the

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jury, as if there is only one complainant. The defendant will be able to conduct his defence in each trial in isolation from the other charges and will be able to more convincingly argue that each complainant has fabricated her/his evidence due to a lack of corroborating evidence from other victims, thus increasing the likelihood of acquittal. This means the prosecution's case will be considerably weakened since the jury will be ignorant of the defendant's alleged patterns of behaviour in relation to targeting, grooming and seducing children. Indeed, lack of corroboration is likely to account for the lower conviction rates that have been found in relation to separate trials (as reported in the Jury Research Project, discussed by the Royal Commission in its *Criminal Justice Report*).

While unfair prejudice, as a result of juries inappropriate reasoning, is generally the judicial basis for restricting the admissibility of tendency/coincidence evidence, the Jury Research Project, discussed by the Royal Commission in its *Criminal Justice Report* found no evidence of impermissible prejudicial reasoning.

As submissions to the Royal Commission about the Jury Research Project showed, it is still an entrenched view within the criminal justice system that jurors will inevitably misuse tendency/coincidence evidence about the defendant, even though none of these submissions contained empirical evidence to prove this misuse. Indeed, this view must be balanced against the jury research that shows that a significant proportion of both jurors and jury-eligible citizens hold a wide range of myths, prejudices and misconceptions about women and children who report sexual assault, which favour the defence case.<sup>2</sup>

Thus, I think the case made by the Royal Commission and others<sup>3</sup> about the need to reform the rules governing the admission of tendency and coincidence evidence in CSA trials has been made out.

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<sup>2</sup> Taylor, N. & Joudo, J. (2005) *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, Australian Institute of Criminology: Canberra; 2005; Cossins, A (2008) 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us', *Psychiatry, Psychology and Law*, 15: 153-170; Cossins, A., Goodman-Delahunty, J. & O'Brien, K. (2009) 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System', *Psychiatry, Psychology & Law*, 16: 435-452.

<sup>3</sup> A Cossins (2010) *Alternative Models for Prosecuting Child Sex Offences in Australia*, Sydney, National Child Sexual Assault Reform Committee.

## Reform options

In other Australian jurisdictions, reforms to ensure that multiple complaints of CSA against a single defendant are heard in a joint trial have focused on:

- (i) Procedural reforms to ensure a presumption in favour of joint trials;
- (ii) Evidentiary reforms to ensure the cross-admissibility of the evidence of multiple complainants in a joint trial; or
- (iii) both.

**While the Royal Commission has not proposed procedural reforms, I believe such reforms should also be considered in conjunction with evidentiary reforms, discussed later.**

## Procedural reforms

Both Victoria and South Australia have enacted a rebuttable assumption that where there are two or more counts involving sexual assault complainants, the counts are to be tried together while Western Australia has taken a slightly different approach as set out below.

### **Victoria**

Under s194 of the *Criminal Procedure Act 2009* (Vic) there is a presumption in favour of joint trials for sex offences<sup>4</sup>:

(2) Despite section 193 and any rule of law to the contrary (other than the Charter of Human Rights and Responsibilities), if in accordance with this Act 2 or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together.

(3) The presumption created by subsection (2) is not rebutted merely because evidence on one charge is inadmissible on another charge.

Since Victoria is a Uniform Evidence Legislation (UEL) jurisdiction, s 194 suggests that the tests under ss 97 and 98 of the UEL for determining the admissibility of tendency/coincidence evidence are irrelevant to the decision to hold a joint trial. However,

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<sup>4</sup> The precursor to s194 was s372(3AA) of the *Crimes Act 1958* (Vic) which created a presumption that if a prosecutor joins two or more counts charging sexual offences on the one presentment, those counts are to be tried together. Under s372(3AB), this presumption was not to be rebutted simply because the evidence that could be taken into account by the jury in relation to one count was inadmissible in relation to another count.

s194 does not deal with the need to ensure that the probative value of the tendency/coincidence evidence outweighs its prejudicial effect. Since separate trials can still be ordered on the grounds of prejudice to the accused under s193(3), it is clear that the presumption under s194 is insufficient on its own to encourage the joinder of child sexual assault charges as evidenced by the Victorian Court of Appeal's preference for separate trials in CSA cases since the enactment of the UEL in Victoria in 2008.<sup>5</sup>

### **South Australia**

Under s278(2a) of the *Criminal Law Consolidation Act 1935*, the issues of joinder and concoction were originally dealt with together, although sub-section (c) (set out below) has since been abrogated and re-enacted under s 34S of the *Evidence Act 1929 (SA)*:

Despite subsection (2) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences involving different alleged victims are joined in the same information, the following provisions apply:

- (a) subject to paragraph (b), those counts are to be tried together;
- (b) the judge may order a separate trial of a count relating to a particular alleged victim if (and only if) evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim;
- (c) in determining admissibility for the purposes of paragraph (b)—
  - (i) evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity; and
  - (ii) the judge is not to have regard to—
    - (A) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; or
    - (B) whether or not the evidence may be the result of collusion or concoction.

Like the Victorian provision (s194), s278(2a) creates a rebuttable assumption that where there are two or more counts involving complainants, the counts are to be tried together.

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<sup>5</sup> For more detail see Cossins, A. 'The Behaviour of Persistent Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35 *Melbourne University Law Review* 821-864; Cossins, A., 'The Future of Joint Trials of Sex Offences after *Hughes*: Resolving Judicial Fears and Jurisdictional Tensions with Evidence-Based Decision-Making'(forthcoming) 41(3) *Melbourne University Law Review* (copy held by author).

Under s278(2a), a judge may only order separate trials if the evidence of two or more complainants is not cross-admissible, whereas the Victorian provision attempts to encourage joint trials even without cross-admissibility.

The issue of concoction is not able to be taken in account in relation to the decision to order separate trials while the common law *Pfennig* test was specifically abrogated in relation to determining whether or not evidence would be cross-admissible as a result of the wording in 278(2a)(c)(ii). As stated above, subsection (c) has since been abrogated and re-enacted under s 34S of the *Evidence Act 1929*:

**34S—Certain matters excluded from consideration of admissibility**

Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following:

- (a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;
- (b) the evidence may be the result of collusion or concoction.

***Western Australia***

In Western Australia, a trial judge can only order separate trials under s133(3) of the *Criminal Procedure Act 2004* if s/he is satisfied that there would be a likelihood of prejudice to the accused by the joinder of two or more charges.<sup>6</sup> However, because of s133(5), a judge need not automatically order separate trials of particular offences simply because they are of a particular nature or because evidence in relation to some of the charges is not admissible in relation to others. In other words, this provision allows for consideration of the extent to which prejudice can be overcome by a jury direction:

(5) In deciding whether to make an order under subsection (3) ... in respect of an indictment to be tried by a jury, it is open to a superior court —

- (a) to decide that any likelihood of the accused being prejudiced can be guarded against by a direction to the jury;
- (b) to so decide irrespective of the nature of the offence or offences charged; and
- (c) to so decide even if —
  - (i) the evidence on one of the charges is inadmissible on another; or

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<sup>6</sup> *WKD v WA* [2005] WASCA 196 at [146], per Roberts-Smith JA.

(ii) the evidence against one of the accused is not admissible against another,  
as the case requires.

When considering the likelihood of prejudice, the trial judge *cannot* take into account that the evidence of two or more complainants or witnesses may be the result of collusion or suggestion because of s133(6) of the *Criminal Procedure Act 2004*:

In considering, for the purposes of this section, the likelihood of an accused being prejudiced in the trial by a jury of an indictment that contains 2 or more charges of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

This provision means that the likelihood of prejudice to which s133(3) refers cannot include prejudice associated with the possibility of concoction by two or more complainants or witnesses.

A judge's decision to order or refuse to order separate trials is reviewable on appeal such that the trial will be adjourned until the appeal is determined (s133(7), *Criminal Procedure Act 2004*). Both the defence and the prosecution can appeal against a decision to refuse or to grant a separate trial, respectively (s26, *Criminal Appeals Act 2004*), although leave to appeal is required (s27, *Criminal Appeals Act 2004*). If convicted, an accused cannot later appeal against his conviction on the grounds that a joint trial was held *if* he has already exercised that right of appeal before his trial (s26(4), *Criminal Appeals Act 2004*).

### **Conclusion: what the above reforms have achieved**

In relation to the conduct of sexual assault cases which involve two or more complainants:  
(i) concoction has been removed from the admissibility equation in SA and WA and is now a matter for the jury when determining the weight to be given to the evidence of each complainant;

- (ii) the *Pfennig* ‘no rational view of the evidence’ test has been abrogated in SA<sup>7</sup>;
- (iii) a joint trial can still be held even if propensity evidence is not cross-admissible in Victoria and WA; and
- (iv) it is envisaged that the prejudice arising from the admission of propensity evidence can be cured by a warning in WA.

In line with these reforms, I believe that NSW ought to enact a provision which creates a presumption in favour of joint trials of child sex offences even if the evidence to be adduced on one count is inadmissible on another count. Such a presumption would send a clear parliamentary message that these cases require different treatment because of the very nature of the crime. In other words, because CSA is a crime in which the perpetrator usually undertakes a considerable amount of grooming and/or coercion to ensure the sexual abuse happens in secret and without disclosure by the victim, this prevents immediate report and the gathering of inculpatory evidence. A presumption in favour of joint trials would also ensure less emphasis was placed on the cross-admissibility of the evidence of multiple complainants, which is presently the main barrier to holding joint trials.

If a trial judge’s discretion to order separate trials is to be preserved on the grounds of prejudice under s21(2) of the *Criminal Procedure Act 1986* (NSW), this ought to be subject to two qualifications:

- (i) that the court must have regard to whether the likelihood of the accused being prejudiced can be guarded against by a direction to the jury; and
- (ii) that the court must not have regard to the possibility that the evidence of a witness or the evidence of two or more witnesses may be the result of concoction, collusion or suggestion.

**The Royal Commission has proposed evidentiary reforms. I believe that the reforms posed by the Royal Commission do not go far enough, as discussed below.**

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<sup>7</sup> See s 34P(2), *Evidence Act 1929* (SA); note that the *Pfennig* test also does not apply under the UEL: *R v Ellis* [2003] NSWCCA 319, nor does it apply in WA as a result of s31A, *Evidence Act 1906*.

## Evidentiary reforms

In its recommendation, the Royal Commission has eliminated the ‘significant probative value’ test from ss97 and 98 in relation to the admission of the evidence of multiple complainants in CSA trials. The difficulties posed by this test are discussed in *Hughes* and have been due to the over-reliance by the Victorian Court of Appeal, in particular, on using the common law striking similarities test (and similar formulations) even though s97 is silent on the need for similarities between the evidence to be adduced and the defendant’s alleged criminal conduct.

It is necessary to understand a little bit more about how ss 97 and 98 operate. Admissibility under ss97 and 98 is framed in negative terms, in that tendency/coincidence evidence will not be admissible *unless* the court thinks the evidence will have ‘significant probative value’. As a second, albeit higher, test of relevance,<sup>8</sup> the test involves asking whether ‘the evidence is capable, to a significant degree, of rationally affecting the assessment ... of the probability of the existence of a fact in issue’.<sup>9</sup> It is a subjective evaluation because ss97(1)(b) and 98(1)(b) refer to whether ‘*the court thinks* that the evidence will ... have significant probative value’ (emphasis added).<sup>10</sup> This inherent subjectivity is important for critiquing what different courts have said about when tendency/coincidence evidence will be considered to exhibit significant probative value, a point highlighted by the majority in *Hughes*.

As stated above, s97 does not expressly rely on similarities between the charges in question and the other criminal conduct adduced to prove a defendant’s tendency. But still the question remains, what degree of similarity is required for tendency evidence to possess *significant* probative value? This issue has plagued the interpretation of s97 since it was enacted, particularly in sexual assault trials. It is this contentious issue that the High Court had to deal with in *Hughes* because of the belief that lay jurors will engage in impermissible propensity reasoning if dissimilar evidence of the defendant’s conduct is admitted.

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<sup>8</sup> *Dao v The Queen* (2011) 278 ALR 765, [98] (Allsop P). See also *R v Fletcher* (2005) 156 A Crim R 308, [49] (Simpson J). In *R v Lockyer* (1996) 89 A Crim R 457, 459, Hunt CJ at CL held that “‘significant’ probative value must mean something more than mere relevance but something less than a “substantial” degree of relevance.’

<sup>9</sup> *Dao* (2011) 278 ALR 765, [184] (Simpson J).

<sup>10</sup> *Ibid*, 783 [98] (Allsop P); 770 [27] (Spigelman CJ).



This is despite the fact that s97 does not specify how *particular* the conduct by the accused has to be to give rise to a tendency, nor did the Australian Law Reform Commission, when recommending the enactment of uniform evidence legislation, state that only strikingly similar or a similar pattern of behaviour was required for admissibility.<sup>11</sup> In fact, when s97 was enacted it omitted ‘any requirement of similarity’, contrary to the ALRC’s draft provision.<sup>12</sup>

How specific or similar to the facts in issue should evidence of a defendant’s other sexual conduct be before it is accepted that it amounts to ‘acting in a particular way’ under s97 so that the evidence has significant probative value? The answer to this question is essential for deciding whether the evidence of multiple complainants will be heard in a joint trial. It was the key issue for the High Court in *Hughes*<sup>13</sup>, although no definitive answer was provided.

In relation to the common law terms used by the Victorian Court of Appeal to determine when evidence will have significant probative value under s 97, the majority in *Hughes* noted that these statements ‘do not stand with the scheme of Pt 3.6’ of the UEL.<sup>14</sup> In other words, s 97 does not refer to similarities or to common law concepts such as ‘underlying unity’, ‘pattern of conduct’ or ‘modus operandi’. This omission provided ‘a clear indication that s97(1)(b) is not to be applied as if it had been expressed in those terms’ so that tendency evidence cannot be limited to conduct exhibiting those features.<sup>15</sup> In fact, the use of common law concepts overlooks the fact that in criminal proceedings, ‘the risk that the admission of tendency evidence may work unfairness to the accused is addressed by s101(2)’.<sup>16</sup>

Furthermore, the majority in *Hughes* considered that the approach of the Victorian Court of Appeal in *Velkoski* limits s97 to a tendency to perform a particular *act* which does not reflect

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<sup>11</sup> Law Reform Commission, *Evidence Law Reform Stage 2*, Discussion Paper No. 23 (1985) 15.

<sup>12</sup> [2017] HCA 20, [23] (Kiefel CJ, Bell, Keane and Edelman JJ).

<sup>13</sup> *Ibid*, [1].

<sup>14</sup> *Hughes* [2017] HCA 20, [32] (Kiefel, CJ, Bell, Keane, and Edelman JJ).

<sup>15</sup> *Ibid*, [33]-[34]. See Gageler J at *ibid*, [104] who disagreed with the majority’s criticisms of *Velkoski*.

<sup>16</sup> *Ibid*, [32].

the terms of the provision. Rather, it is possible for evidence to have significant probative value at a general level of particularity, 'notwithstanding the absence of similarity in the acts which evidence it'.<sup>17</sup> This statement suggests that evidence of a general tendency to sexually abuse children would satisfy the significant probative value test, as discussed below.

### *General versus particular conduct*

During the High Court hearing, Edelman J observed:

at a very high level of generality the question might really just be asking whether the tendency evidence could rationally affect the assessment of the existence of a fact in issue. In other words, it is just asking the relevance test. To get to the next hurdle, one needs to descend to a greater level of particularity.

The question raised but not answered by the *Hughes* case is whether or not judges are qualified to assess this 'greater level of particularity' or whether child sex offending, in and of itself, is 'a tendency to act in a particular way' (s97, UEL). Arguably, the answers lie in the unusual nature of CSA as well as the phenomenon, identified in the research literature, of cross-over behaviours of a subset of child sex offenders, as discussed below.

The words, 'to act in a *particular* way or to have a *particular* state of mind' under s97 are consonant with the particularity of child sex offending as a mental disorder, not just as a type of criminal behaviour. Child sex offending is defined as a mental disorder under the *Diagnostic Statistical Manual of Mental Disorders (DSM-5)*<sup>18</sup> (the bible for psychologists and psychiatrists)<sup>19</sup> which confirms that it is unusual, and deviant sexual conduct. Thus, a person's sexual interest in, or sexual activity with, children is not a mere disposition but, rather, a demonstrable particularity, that is, a particular mental disorder under the DSM-5. As such, it seems irrational to consider similarities and dissimilarities in relation to a form of sexual behaviour that amounts to a mental disorder or to regard some forms of child sex offending as 'commonplace' and others as 'distinctive'.

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<sup>17</sup> Ibid, [37].

<sup>18</sup> Published by the American Psychiatric Association ([www.psychiatry.org/psychiatrists/practice/dsm](http://www.psychiatry.org/psychiatrists/practice/dsm)).

<sup>19</sup> See M. B. First, 'DSM-5 and Paraphilic Disorders' (2014) 42 *The Journal of the American Academy of Psychiatry and the Law* 191.

Other courts have recognised this. For example, in *Robin v R*<sup>20</sup>, the New Zealand Court of Appeal, said that there is a ‘line of authority which establishes that sexual activity with children is in itself unusual even where it does not involve unusual acts’. Similarly, the NZ Court of Appeal in *Hetherington v R* noted that it is artificial to ‘draw a distinction based on severity’ when the sexual conduct amounts to the same ‘category of offending’, that is, sexual behaviour with children.<sup>21</sup>

Unless the unusual nature of child sex offending as a sexual practice is recognised, then admissibility under ss97 or 98 will be based on splitting hairs around what is and is not similar, distinctive or unusual or what type of sexual acts amount to an ‘underlying unity’.

The majority in *Hughes* considered that the type of child sex offending committed by Hughes was unusual:

An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience.<sup>22</sup>

Rather than a clear pattern of conduct or *modus operandi*, as required at common law, the majority considered it was Hughes’ ‘unusual interactions’ which meant he ‘court[ed] a substantial risk of discovery by friends, family members, workmates or even casual passers-by’, thus giving rise to a ‘disinhibited disregard of the risk of discovery’ which was ‘even more unusual as a matter of ordinary human experience’.<sup>23</sup>

The majority in *Hughes* were keen to emphasise two issues: first, the fact ‘that the appellant expressed his sexual interest in underage girls in a variety of ways did not deprive proof of the tendency of its significant probative value’.<sup>24</sup> Second, an assessment of Hughes’ conduct

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<sup>20</sup> [2013] NZCA 105, [25] (French J).

<sup>21</sup> [2012] NZCA 88, [20].

<sup>22</sup> [2017] HCA 20, [57].

<sup>23</sup> *Ibid*, [57].

<sup>24</sup> *Ibid*, [63].

did not amount to accepting 'that the evidence does no more than prove a disposition to commit crimes of the kind in question'.<sup>25</sup>

So when will sexual conduct with a child amount to 'significant probative value'? The majority in *Hughes* stated that the test under s 97(1)(b) is to be interpreted following the NSW CCA in *Ford*: 'the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged'.<sup>26</sup> This statement provides broad scope for admitting or excluding disputed evidence but does not clarify what amounts to 'a significant extent' in the context of a CSA trial, unless, as suggested above, the majority accepts that *any* type of sexual activity with a child will make the facts in issue more likely to a significant extent.

The probative value of evidence of other sexual behaviour with children is necessarily linked to the extent to which it increases the probability of the existence of the elements of the specific charge<sup>27</sup>, although this is still a subjective assessment based on whether a judge takes a general or a particular approach:

A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant.<sup>28</sup>

But how does a judge choose that level of particularity if that assessment is uninformed by expert evidence and the only tool left is judges' human experience, a term used by the majority in *Hughes*? Even if one were to concede that the word 'significant' has to involve an analysis of the similarities/dissimilarities in the tendency evidence in question, that interpretation comes down to 'how much similarity', an inherently subjective process, usually undertaken in the absence of any reference to the scientific literature.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid, [40]; citing *Ford* (2009) 201 A Crim R 451, 485 [125].

<sup>27</sup> Ibid, [41].

<sup>28</sup> Ibid, [64].

Because child sex offending has been defined as a mental disorder, judges would be hard pressed to argue that evidence of any sexual contact with a child would not rationally affect the assessment of the probability of the defendant's commission of a sexual act with another child, unless the sexual acts had been committed, say, many years apart. As evidence of a mental disorder, why would that evidence *also* not be sufficient to support proof of a tendency to a significant extent?

The literature on child sex offenders reveals that issues such as victim choice and sexual behaviours are not stable amongst a proportion of sex offenders (such as Hughes). While some child sex offenders do make very specific age, gender and relationship choices, many do not. There is a group of offenders—depending on the study, from a significant minority to more than 50% of offenders—who are not specific in their choice of victim and exhibit cross-over behaviours, that is, those who sexually abuse both boys and girls, and/or children of different ages, and/or related and unrelated children.<sup>29</sup> This means that sex offenders fall into two broad groups:

- (i) those who target children of similar ages and/or genders and with whom they have a similar relationship (related or unrelated);
- (ii) those who exhibit cross-over behaviours and target children of different ages, different genders and/or with whom they have a mixture of relationships (related and unrelated).

These cross-over behaviours mean that the sexual behaviour itself is highly variable, depending on (i) the child's gender (offenders engage in different sexual behaviours with boys compared to girls); (ii) the child's age (iii) and the offender's access to the child including location. Thus, confining the word 'significant' to sexual acts or ages or genders of

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<sup>29</sup> Gene Abel et al, 'Multiple Paraphilic Diagnoses among Sex Offenders' (1988) 16 *Bulletin of the American Academy of Psychiatry and the Law* 153; Michele Elliott, Kevin Browne and Jennifer Kilcoyne, 'Child Sexual Abuse Prevention: What Offenders Tell Us' (1995) 19 *Child Abuse & Neglect* 579; Jill Levenson, Jennifer Becker and John Morin, 'The Relationship between Victim Age and Gender Crossover among Sex Offenders' (2008) 20 *Sexual Abuse: A Journal of Research and Treatment* 43; Peggy Heil, Sean Ahlmeyer and Dominique Simons, 'Crossover Sexual Offenses' (2003) 15 *Sexual Abuse: A Journal of Research and Treatment* 221; Daphne Sim and Michael Proeve, 'Crossover and Stability of Victim Type in Child Molesters' (2010) 15 *Legal and Criminological Psychology* 401; Mark Weinrott and Maureen Saylor, 'Self-Report of Crimes Committed by Sex Offenders' (1991) 6 *Journal of Interpersonal Violence* 286.

children that are distinctive or highly similar ignores the reality of the variety of sexual acts to which any one victim could be subject.

Hughes' sexual behaviours provide a good example. He chose an age range of 6 to 16 years, children with whom he had a range of relationships, he engaged in a variety of sexual behaviours, and the locations in which the abuse occurred were different, all of which is consistent with the literature on cross-over offenders. Taking the tendency evidence as a whole, it acquires significant probative value because it demonstrates the defendant's variety of sexual behaviours with differently aged children, one of the hallmarks of cross-over offending behaviour.

This should be sufficient for the evidence to have a *significant* effect on the 'assessment of the probability of the existence of a fact in issue in the proceeding', which is what the test under s97 is designed to do, that is, not prove guilt beyond reasonable doubt, but increase the probability of the defendant's guilt.<sup>30</sup>

Gageler J raised the key problem that is left unresolved by the majority judgment; because a man who has a tendency to commit CSA is more likely than someone else to have committed CSA on other occasions, this leaves open the question:

how much more likely is not easy to tell, in part because common experience provides no sure guide, and the abhorrence any normal person naturally feels for such a tendency highlights the risk that any subjective estimation of the likelihood will be greater than is objectively warranted.<sup>31</sup>

But why do judges think they should be left with making a subjective estimation based on common experience? Gageler J recognised that the wording under s97 ('the court thinks') allows for 'judicial understanding of the probative value ... of particular tendencies to be informed by social science data' which would allow judges to make informed decisions based on the latest data and 'best practice'. However, his Honour observed that '[n]o party

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<sup>30</sup> *Ford* (2009) 201 A Crim R 451, [52] (Campbell JA).

<sup>31</sup> *Hughes* [2017] HCA 20, [109].

or intervener in the present appeal sought to direct attention to data or scholarly work bearing on actual probabilities'.<sup>32</sup>

This argument reveals the arbitrariness of what amounts to general or particular sex offending. There is little but subjective 'human experience' to distinguish the reasoning of Gageler J and the majority judges. And both approaches are but a step away from saying that evidence of any kind of sexual activity with a child will be significantly probative under s97.

An alternative way of framing the argument is to acknowledge child sex offending as a mental disorder and, with reference to the literature on child sex offenders, including studies on their cross-over behaviours, recognise that people who sexually abuse children typically engage in a wide variety of sexual behaviours in a variety of circumstances. So which approach is preferable? Judges' ordinary human experience or scientific research? The problem with the former approach is that the majority's judgment—while apparently lowering the bar of admissibility too far under s97 (according to Nettle J)—actually leaves the way open for judges in future cases to raise the bar of admissibility based on their ordinary human experience since judges' 'human experience' is highly variable. The problem with the latter approach is that it is dependent on prosecutors presenting expert evidence or relevant data to courts for their consideration, as suggested by Gageler J.

But these cases are far too important to be left to subjective interpretations of child sex offender behaviour. Perhaps more importantly, it is time for parliament to examine the reality of the fear that juries in joint trials of sexual abuse allegations will engage in impermissible propensity reasoning. Rather than considering each count of sexual abuse separately, it is assumed (rather than proved) that juries will either engage in accumulation prejudice because the accumulation of the charges and/or witnesses gives the appearance of a stronger case than actually exists, or will decide a case based on moral or character prejudice. However, as documented in the Royal Commission report, the empirical research

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<sup>32</sup> Ibid, [110].

on juries' reasoning processes in joint trials does not support the long-standing fears about juries' impermissible reasoning in joint trials.

Given the prevalence of CSA in the Australian community<sup>33</sup> and the extent of institutional CSA as revealed by the Royal Commission into Institutional Responses to Child Sexual abuse, it is necessary to consider evidentiary reform options to increase the likelihood of joint trials being held in relation to multiple allegations of CSA.

### **Comments on the Royal Commission's recommendation for evidentiary reform**

I agree with the Royal Commission that it is necessary to ensure that similarities are not a pre-condition for admissibility under s 97 of the UEL and that common law principles/rules should be explicitly abolished. However, I perceive the following problems with the Royal Commission's recommendation, part of which is set out below:

#### **Section 96A Special provisions for defendants in child sexual offence proceedings**

- (i) For the purposes of this Part, each of the following kinds of evidence is *relevant to an important evidentiary issue* in a child sexual offence proceeding:
  - (a) evidence that shows that a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or similar kind is in issue in the proceeding,
  - (b) evidence that is relevant to any matter in issue in the proceeding if the matter:
    - (i) concerns an act or state of mind of the defendant; and
    - (ii) is important in the context of the proceeding as a whole.
- (ii) In applying section 97(1A)(a), 98(1A)(a) or 100A (1)(a) to evidence about a defendant in a child sexual offence proceeding, the court is to determine whether the test referred to in the provision is satisfied assuming the evidence were to be accepted as credible and reliable.
- (iii) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence in a proceeding

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<sup>33</sup> Around the world, the highest prevalence for CSA was found in Australia for girls at 21.5% (M. Stoltenborgh, M. van Ijzendoorn, E. Euser and M. Bakermans-Kranenburg (2011) 'A global perspective on child sexual abuse: Meta-analysis of prevalence around the world.' 16 *Child Maltreatment* 79), a finding that was stable over more than 20 years.



on the basis of its inherent unfairness or unreliability is not relevant when applying this Part to tendency or coincidence about a defendant in a child sexual offence proceeding.

Overall, I consider that s 96A(i) is a complicated provision that will be difficult to apply in practice. The provision reinforces the common law approach to admitting propensity evidence by requiring *some* degree of similarity for such evidence to be admitted. In other words, under s 96A(i)(a) in a CSA trial, the prosecution will have to show ‘a propensity to commit particular kinds offences’ which could be broadly interpreted as child sex offences, or narrowly interpreted as a *particular* sexual act (such as, aggravated indecent assault or sexual intercourse). Thus, s 96A leaves open the way for courts to continue to search for degrees of similarity, even if they don’t apply common law principles.

Without further guidance, this means that a court could take a broad approach and decide that child sex offences are ‘particular kinds of offences’ but could also take a narrow approach and decide that the charges in the trial are a ‘particular kind of offence’. Indeed, the narrow approach is reinforced by the words, ‘of the same or similar kind is in issue’, suggesting that courts will be forced to consider degrees of similarity between the propensity evidence in dispute and the behaviour giving rise to the charges in the proceeding.

It is this narrow approach, most notably evident in decisions by the Victorian Court of Appeal, that a majority of the High Court criticised in *Hughes*. In light of this High Court decision, there is no good rationale for returning to the common law requirement of degrees of similarity as manifested in the term, ‘striking similarities’ and other formulations, such as degree of particularity<sup>34</sup>, as used by the Victorian Court of Appeal.<sup>35</sup>

Like the significant probative value test under s 97(1)(b), s 96A(i)(b) merely sets out another test of relevance. Under this new provision, instead of evidence having probative value which is ‘significant’, the evidence that is relevant must be ‘important’, a word that Hunt CJ at CL in *Lockyer* said explained the word ‘significant’ which must mean:

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<sup>34</sup> *CEG v The Queen* [2012] VSCA 55, discussing tendency evidence.

<sup>35</sup> See further Cossins, above n 5.

something more than mere relevance but something less than a ‘substantial’ degree of relevance. ... One of the primary meanings of the adjective ‘significance’ is ‘important’ or ‘of consequence’. ... To some extent ... the significance of the probative value of the tendency evidence (whether led by the Crown or by the accused) must depend upon the nature of the fact in issue to which it is relevant and the significance (or importance) which that evidence may have in establishing that fact.<sup>36</sup>

Thus, we are left with the circular reasoning that ‘significant’ means ‘important’, and ‘important’ means ‘significant’, such that s 96A(i)(b) will be unlikely to produce any real change to the application of s 97 in CSA trials. As well, prosecutors and courts will need to determine whether the disputed evidence falls under s 96A(i)(a) or 96A(i)(b), assuming that the disputed evidence does not need to show both a propensity *and* its ‘importance in the context of the proceeding as a whole’. But it maybe that courts decide that only evidence displaying sufficient similarities to the charges in question could ever be ‘important to in the context of the proceeding as a whole’. In fact, s 96A is a confusing provision because if ‘the evidence that is relevant to any matter in issue ... is important in the context of the proceeding as a whole’, then of course it would be relevant to an important evidentiary issue. Thus, some of the wording of s 96A is redundant and unnecessarily repetitive.

Under ss 96A and 98A, the phrase, an ‘important evidentiary issue’ is used, although it is a phrase not otherwise used in the UEL. The typical terminology used under the UEL is ‘fact in issue’ under s 55 with the latter referring to the elements of the particular offence, or a fact relevant to an element of the offence. It does not make sense to distinguish between an important fact in issue and a non-important fact in issue since all elements of the offence are important. Indeed, it appears that s96A is merely reiterating the relevance test.

By contrast, because of the difficulties with implementing the significant probative value test under ss97 and 98 of the UEL, the National Child Sexual Assault Reform Committee<sup>37</sup> recommended the following amendments to ss 97 and 98:

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<sup>36</sup> *R v Lockyer* (1996) 89 A Crim R 457 at 459, per Hunt CJ at CL; see also *R v Lock* (1997) 91 A Crim R 356 at 361; *R v Fordham* (1997) 98 A Crim R 359 at 368; *R v AH* (1997) 42 NSWLR 702 at 709; *R v Martin* [2000] NSWCCA 332.

<sup>37</sup> Cossin,s above n 3.

### **Recommendation 3.12**

#### **Insert the following sub-sections into s97 of the Uniform Evidence Act:**

(3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(4) In considering whether evidence about the sexual conduct of the defendant has significant probative value for the purposes of subsection (1), the court must not have regard to whether that evidence has striking similarities with other evidence about the sexual conduct of the defendant.

(5) It will be sufficient for evidence about the sexual conduct of the defendant to have significant probative value if that evidence shows the defendant has committed a charged or uncharged act of a sexual nature of any kind against or in the presence of a child.

#### **Insert the following sub-sections into s98 of the Uniform Evidence Act:**

(3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(4) In considering whether evidence of two or more events which describe the sexual conduct of the defendant has significant probative value for the purposes of subsection (1), the court must not exclude the evidence solely on the basis that there are insufficient similarities (or no 'striking similarities') in the sexual conduct of the defendant.

(5) It will be sufficient for the evidence of two or more events to have significant probative value if the evidence shows that the defendant has committed charged or uncharged acts of a sexual nature against a child, irrespective of whether the acts involve the same or different sexual conduct on the part of the defendant.

**Note:** For example, if event 1 describes the commission of oral sex by the defendant on a witness and event 2 describes the commission of sexual penetration by the defendant on another witness, these events will have the required degree of similarity to satisfy the significant probative value test in sub-section (1).

The above recommendation does the following:

- (i) it abolishes the common law striking similarities test; and

- (ii) unlike the Royal Commission's recommendation, it stipulates what amounts to significant probative value, thus being compatible with the approach of the majority of the High Court in *Hughes* (as discussed above).

Overall, this recommendation is clearer in its application and is also compatible with any decision to enact a presumption in favour of joint trial of child sex offences because it takes the focus off the admissibility issue. Instead, the focus reverts to balancing probative value against prejudicial effect.

### **Balancing probative value against prejudicial effect**

Under the UEL, tendency or coincidence adduced by the prosecution must satisfy the balancing test under s 101(2) in addition to the significant probative value test under ss 97 and 98.

The Royal Commission has recommended the following amendments in relation to this balancing test:

#### **Section 100A**

- (1) Despite sections 97 and 98, the court in a child sexual offence proceeding may, on the application of a defendant, refuse to admit tendency or coincidence evidence about the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that:
  - (a) admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant, and
  - (b) if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.
- (2) The admission of evidence is not unfair to a defendant in a child sexual offence proceeding merely because it is tendency or coincidence evidence.
- (3) If directions about the relevance and use of tendency or coincidence evidence will remove the risk of unfairness of the kind referred to in subsection (1)(b), the court must give those directions rather refuse to admit the evidence.
- (4) Tendency or coincidence evidence about a party that is admissible under this Part ... cannot be excluded under section[s] 135 or 137 on the ground that it is unfairly prejudicial to the party.

The first thing to note is that the above recommendation would not be compatible with a presumption in favour of joint trials, since separate trials of child sex offences could still be ordered on the ground of unfairness to the defendant, but with no guidance on the circumstances which would give rise to unfairness. The advantage of the above recommendation is that it alerts judges to the possibility that appropriate jury directions can be used to deal with the perceived risk of unfairness, although that is something that happens in joint trials of sex offences anyway, given the requirement to give a tendency direction as per the NSW Criminal Trials Benchbook.

In fact, the above recommendation pales in comparison with the WA provision that weighs probative value versus prejudicial effect. Like ss 97 and 98 of the UEL, s 31A of the Western Australian *Evidence Act 1906* uses the ‘significant probative value’ test for admitting propensity evidence in a joint trial, but has crafted a different approach to weighing probative value against the risk of prejudice to the accused, as set out below:

(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers:

(a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and

(b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is *such that fair-minded people* would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

(3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.<sup>38</sup>

Because the issue of concoction is excluded from the admissibility equation under s31A(2), a trial judge has to take the evidence at ‘its highest’<sup>39</sup>, and assume that it is true, an approach

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<sup>38</sup> Section 31A(3) overturns the decision in *Hoch* by removing the issue of concoction from the admissibility equation and leaving it to the jury when deciding the weight to be given to the propensity evidence in question: *Wood v WA* [2005] WASCA 179 at [41]; *WKD v WA* [2005] WASCA 196 at [108], per Roberts-Smith JA; *Di Lena v WA* [2006] WASCA 162 at [51], per Roberts-Smith JA.

<sup>39</sup> *WKD* [2005] WASCA 196 at [153], per Roberts-Smith JA.

that pre-dates the High Court decision in *IMM v R*.<sup>40</sup> Thus, s31A(3) does not permit a trial judge to consider the issue of concoction when assessing its probative value under s31A(2)<sup>41</sup>, and when assessing the risk of an unfair trial, because of the ‘quite clearly articulated legislative purpose of [the provision]’.<sup>42</sup> In other words, s31A(3) prohibits a court from having regard to the possibility of concoction ‘for the purposes of subsection (2)’ which must mean *all* the purposes of that subsection, including the balancing test under (2)(b).<sup>43</sup> If it were otherwise ‘the section would be inherently self-defeating.’<sup>44</sup>

By comparison, the Royal Commission’s recommendation (s 100A) does not consider the issue of concoction or collusion.

The wording of s31A(2)(c) is taken directly from the balancing test suggested by McHugh J who was the dissenting judge in *Pfennig*.<sup>45</sup> In enacting s31A, the legislature has introduced a balancing test to weigh the risk of an unfair trial against the competing public interests in holding a joint trial in which all relevant evidence is admitted. The decision made under s31A is a question of law, not an exercise of a judicial discretion and, once admitted, there is no room to exclude the evidence under the common law *Christie* direction.<sup>46</sup>

If the evidence (either by itself or having regard to other evidence adduced or to be adduced) has significant probative value, the trial judge must then ask whether fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over that risk, when comparing the significant probative value of the evidence against the risk of an unfair trial. In *Di Lena*, Roberts-Smith JA observed:

the exercise to be undertaken by a trial Judge is to decide how ‘fair-minded people’ would weigh those competing considerations. ... [T]he governing consideration is that the evidence *has* probative value and that the probative value is so *significant* that in the opinion of fair-minded people, the public interest in producing all evidence tending to prove the guilt of the

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<sup>40</sup> [2016] HCA 14. A majority of the High Court held that the trial judge must take the evidence in dispute at its highest when applying s 137 and assessing probative value versus prejudicial effect.

<sup>41</sup> *WKD* [2005] WASCA 196, [154], per Roberts-Smith JA.

<sup>42</sup> *Ibid*, [157].

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*, [158].

<sup>45</sup> (1995) 182 CLR 461 at 528.

<sup>46</sup> *Di Lena v WA* [2006] WASCA 162 at [60], per Roberts-Smith JA.

accused must take priority over the risk that the jury [might misuse the evidence] (emphases in original).<sup>47</sup>

For example, in *VIM v WA* [2005] WASCA 233 allegations of sexual assault over many years had been made by the two step-daughters of the accused who was indicted on 44 counts. The Western Australian Court of Appeal considered that this was ‘an example of the very type of case in which the legislature intended the jury to have the benefit of a full evidentiary familial picture’, including the extensive grooming of the complainants which commenced at puberty, the sisters’ fear that the accused would leave them like their father had left them, the extreme secrecy surrounding the accused’s behaviour, the escalation of the seriousness of the assaults over time, and the link between the commencement of the grooming of the younger daughter with the older daughter’s engagement and eventual escape from home. The Court of Appeal considered that fair-minded people would think the public interest in adducing the evidence of both sisters must have priority over the risk of an unfair trial.<sup>48</sup>

The test under s31A(2)(b), when referring to fair-minded people, clearly envisages that the public interests relating to the prosecution, the community and victims ought to be taken into consideration when weighing up the risk of prejudice to the accused. These considerations are especially important in relation to CSA since a particular complainant’s evidence will often make more sense when evidence is given of the *serial* nature of an accused’s sexual behaviour. It is also frequently the case that the only evidence capable of corroborating a particular complainant’s testimony is the evidence of another complainant.

Thus, the advantage of a test that incorporates the broader public interest in admitting tendency/coincidence evidence is that it is compatible with a presumption in favour of joint trials, and it permits a consideration of public interests in addition to those that pertain to the accused. In other words, whatever package of reforms is introduced in NSW, these reforms need to ensure that they are compatible with each other in order to achieve the

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<sup>47</sup> [2006] WASCA 162 at [52].

<sup>48</sup> [2005] WASCA 233 at [168], per Wheeler, Roberts-Smith JJA and Miller AJA).

public interest goals enunciated by the Royal Commission, that is, the need to increase the likelihood of joint trials of child sex offences.

Overall, I agree that it is necessary to amend ss 97 and 98 in order to promote the admissibility of tendency and coincidence evidence in CSA trials but not in the way proposed under ss 96A or 100A. There will be many legal practitioners and lawyers' organisations who will oppose reform, however, the justifications set out by the Royal Commission in their Report (Parts III-VI) provide sound reasons for doing so.