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## Submission – Strengthening Child Sexual Assault Laws

In this submission I limit my attention to the issues around the admissibility of tendency and coincidence evidence, Ch 14 of the Discussion Paper. I also rely on my submissions to the Royal Commission on these issues:

- [Submission of 28 October 2016](#)
- [Supplementary Submission of 23 December 2016](#)

I believe that there are problems with the current tendency and coincidence rules. I agree with the Royal Commission that they operate more restrictively than they should. I agree that reform is called for, and that this is required as a matter of urgency. Unfortunately, however, I cannot support the draft provisions provided by the Royal Commission. While they may serve the desired purpose of enabling tendency and coincidence evidence to gain admission more readily, this would be achieved at the expense of considerable complexity. The current provisions are already overly complex in their operation, which is partly a product of the way they are drafted, and partly a problem of how they've been interpreted. The Royal Commission provisions do little to resolve this complexity, and may add to it considerably.

### 1. Probative value and prejudicial risk

The reason that tendency evidence and coincidence evidence is subject to exclusion is the traditional belief that such evidence is particularly susceptible to prejudicial misuse by juries. Such evidence is often said to be probative, but not as probative as juries are liable to believe it is. Juries may overestimate the strength of the prosecution case. In addition, juries, learning of the defendant's other misconduct, may take the view that the defendant should not have the benefit of a reasonable doubt, and may relax the criminal standard of proof. In either case, the consequence may be that the defendant will be wrongfully convicted.

There are a number of difficulties with this traditional view of tendency and coincidence evidence. The Goodman-Delahunty et al empirical research commissioned by the Royal

Commission<sup>1</sup> found no evidence of prejudice in the use of this evidence. There may be limitations with that research as the Law Council of Australia and others have argued, but it is difficult to discount entirely. It provides some reassurance that juries use tendency and coincidence evidence appropriately.

In addition, the Royal Commission points to acquittals in real trials where tendency and coincidence evidence has been admitted suggests that juries are resistant to prejudice.<sup>2</sup> Of course, this does not rule out prejudice altogether, however, it is inconsistent with the view that juries are maximally prejudicial.

A further argument against the traditional assumption that juries use tendency and coincidence evidence prejudicially is based upon the relationship between unfair prejudice and probative value. The main concerns regarding prejudice relate to the jury giving the evidence too much weight (either by overvaluing it or by weakening the criminal standard of proof). Scope for overvaluing the evidence is inversely related to the probative value actually possessed by the evidence. The traditional assumption that tendency and coincidence evidence poses a grave risk of prejudice appears to be based, at least in part, that such evidence has relatively little probative value. If, contrary to that assumption, tendency and coincidence evidence possessed considerable probative value, there would be less scope for it to be overvalued.

The assumption that tendency and coincidence evidence has relatively little probative value is open to question. Some of the common arguments offered in support of it are flawed. One argument is based upon psychological findings regarding personality and human behaviour. The High Court minority judges in *Hughes* [2017] HCA 20 relied upon ALRC 1985 research that human behaviour is unpredictable and 'highly dependent on situational factors and not, as previously postulated, on personality traits'.<sup>3</sup> 'The research confirms the need to maintain strict controls on evidence of character or conduct and for such evidence to be admitted only in exceptional circumstances.'<sup>4</sup> The ALRC's 2005 review was said to have 'confirmed, and in some instances strengthened, the basis for the Commission's original recommendation that the admission of tendency evidence should be strictly controlled'.<sup>5</sup>

This characterisation of the ALRC's views on trait versus situation is not entirely accurate. In its 2005 review the ALRC indicated that '[t]rait theory has not been wholly discredited. Personality psychologists argue that by aggregating behaviours across situations over time, one can discern consistent personality traits which may be used to predict an aggregate of future behaviour'.<sup>6</sup> However, the ALRC maintained 'this research does not challenge the basic proposition that the behaviour of an individual on one occasion has a very low correlation to his or her behaviour on another occasion in a different situation'.<sup>7</sup>

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<sup>1</sup> Jane Goodman-Delahunty, Annie Cossins, Natalie Marschuk, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study* (May 2016).

<sup>2</sup> Royal Commission, *Criminal Justice* (August 2017), 618 ('Royal Commission').

<sup>3</sup> *Hughes* [2017] HCA 20 [184] (Nettle J), citing, Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 451-452 [796]-[797] ('ALRC (1985)').

<sup>4</sup> ALRC (1985) 455-456 [799].

<sup>5</sup> *Hughes* [2017] HCA 20 [193] Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, (2005) at 83-85 [3.19]-[3.25] ('ALRC (2005)'); ALRC (1985) 456 [800].

<sup>6</sup> ALRC (2005) [3.20].

<sup>7</sup> *Ibid.*

The Royal Commission's recent *Criminal Justice* report reviewed the 'person-situation debate' and noted Mike Redmayne's view that 'the ... debate is more or less over. The rather predictable consensus is that person and situations are both important factors in explaining behaviour.'<sup>8</sup> The Royal Commission also adopted Redmayne's observation that distinction between traits and situations is a little artificial in that the way that a situation is shaped and characterised by an individual will depend upon that individual's personality.<sup>9</sup>

For several related reasons, the Royal Commission found that psychological findings on the situation-specificity of behaviour, interpreted against the background of its own work, does little to deprive tendency evidence of probative value in CSA cases. First, in these cases 'tendency ... evidence is not relied on to prove broad traits – it is always referring to specific situations',<sup>10</sup> those of the charged offences and other alleged misconduct. Second, the investigations of the Royal Commission revealed that 'perpetrators of child sexual abused have sought out situations – and, indeed, have created or manipulated situations – to provide themselves with opportunities to sexually abuse children'.<sup>11</sup> Third, in these situations, '[t]he two most important similarities are already present – *sexual* offending against a *child*'.<sup>12</sup> And finally, the Royal Commission's work and the research it commissioned<sup>13</sup> demonstrated that child sex offenders did not necessarily confine themselves to particular types and circumstances of offending. Some offenders offended against 'both girls and boys and children of quite different ages, ... in a variety of ways [and] in different contexts – institutional, familial and others'.<sup>14</sup> These findings regarding the lack of specialisation in offending are consistent with others in the literature.<sup>15</sup>

The connection, drawn by the ALRC<sup>16</sup> and adopted by the minority High Court judges in *Hughes*,<sup>17</sup> between probative value of tendency evidence and the predictability of criminal conduct is problematic in another way. The reasoning is: it is difficult to predict whether a past offender will reoffend; it follows that tendency evidence of a defendant's prior conviction lacks probative value. However, as the Royal Commission points out, this misses out a crucial logical consideration.<sup>18</sup> The probative value of tendency evidence does not depend solely upon the likelihood of the defendant reoffending. It is a comparative notion, and depends upon the likelihood of the defendant reoffending relative to someone committing an offence who has not previously offended. The defendant with a prior is far more likely to offend than a first-time offender. While recidivism rates may be fairly low, they are far higher than the incidence of crime.

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<sup>8</sup> Royal Commission, 604-05, quoting from M Redmayne, *Character in the criminal trial*, Oxford University Press, 2015, 12 ('Redmayne').

<sup>9</sup> Royal Commission, 605, citing Redmayne, 13.

<sup>10</sup> Royal Commission, 605.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, 595.

<sup>13</sup> Karen Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (March 2016).

<sup>14</sup> Royal Commission, 595.

<sup>15</sup> *Ibid.*, 603, citing D Hamer, 'Proof of serial child sexual abuse', in T Crofts and A Loughnan (eds), *Criminalisation and criminal responsibility in Australia*, Oxford University Press, 2015, pp 242-60, pp 255-6 (Hamer (2015a)).

<sup>16</sup> ALRC (1985), 452 [797], 453 [799]; ALRC (2005) at 80-81 [3.9]-[3.11], 82 [3.14], 85 [3.25].

<sup>17</sup> *Eg*, *Hughes* [2017] HCA 20 [75], [76] (Gageler J); [184], [202] (Nettle J).

<sup>18</sup> Royal Commission, 605, Redmayne, pp 21-2; Hamer (2015a), pp 242-60, pp 253-5.

A further flaw in the reasoning of some that are sceptical of the probative value of tendency and coincidence evidence relates to the contribution of the distinctiveness or unusualness feature. The more unusual the behaviour that is the subject of charges and the tendency or coincidence evidence, the more probative the evidence. The prosecution can argue, for example, that it is unlikely that these matching features would occur by coincidence; the defendant must be the culprit; the complainant must be telling the truth. However, some judges have responded that the behaviour is not very unusual at all. For example, in *Hughes* Nettle J said '[t]he commission of sexual offences by adults against children of either sex is depraved and deplorable, but, regrettably, it is anything but unusual';<sup>19</sup> 'the bulk of the work of criminal courts in this country is devoted to dealing with sexual offences and the bulk of those offences are sexual offences against children'.<sup>20</sup> But criminal courts are not the best judges of the unusualness of criminality – naturally, they are exposed to a great deal of it.<sup>21</sup> While the *Hughes* majority did not cite any empirical studies,<sup>22</sup> its view appears more defensible: '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>23</sup>

The points made above support the Royal Commission's view that tendency and coincidence evidence is both more probative and less prejudicial than traditionally assumed.<sup>24</sup> It follows that the traditional restrictions on tendency and coincidence evidence need reconsideration and arguably should be relaxed. While the *Evidence Act* is less restrictive than the common law, it still requires prosecution tendency and coincidence evidence to overcome two elevated probative value thresholds for admission: 'significant probative value' in ss 97 and 98, and probative value that 'substantially outweighs' the risk of prejudice in s 101. The majority in *Hughes* favoured the more open interpretation of the legislation to the 'unduly restrictive'<sup>25</sup> approach advanced by the VCA in *Velkoski*, but the statutory tests still require reconsideration. It should be noted that the operation of s 101 was not under consideration in *Hughes*, however, Nettle J still opined that certain evidence in that case, if it passed s 97, would be liable to exclusion under s 101.<sup>26</sup> The Royal Commission accepted my submission that s 101 is inherently illogical in that it is liable to exclude evidence even when its probative value outweighs, to some degree, the risk of unfair prejudice.<sup>27</sup>

## 2. Unnecessary complexity in the current law

As well as its unwarranted stringency, a further problem with Part 3.6 of the *Evidence Act* as applied by the courts is its unnecessary complexity which gives rise to high numbers of appeals: *Velkoski* [2014] VSCA 121 [40]. This complexity is partly a product of drafting and partly judicial interpretation.

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<sup>19</sup> *Hughes* [2017] HCA 20 [157].

<sup>20</sup> *Ibid* [202]; see also authorities discussed by Hamer (2015a), 249-250.

<sup>21</sup> However, they do not see a random or representative sample of all criminality. The matters that they get presented are subject to various systemic contingencies (regarding reporting, decisions to prosecute, guilty pleas).

<sup>22</sup> Various figures have been cited: Hamer (2015a), 253-254; see also Ben Mathews et al, *Scoping study for research into the prevalence of child abuse in Australia* (Sept 2016).

<sup>23</sup> *Hughes* [2017] HCA 20, [57]; similar views have been expressed in other jurisdictions:

<sup>24</sup> See eg Royal Commission, 603, 607.

<sup>25</sup> *Hughes* [2017] HCA 20, [12].

<sup>26</sup> *Ibid* [166].

<sup>27</sup> Royal Commission, 640-641.

## 2.1 Identity v commission; contextual assessments

One difficulty is not found in the Act but is a fabrication of judges and commentators, and seems to be gaining support. This is the idea that tendency (and coincidence?) evidence requires a high level of probative value to gain admission where identity is in issue than where commission is in issue. The majority in *Hughes* suggested that more will be required of tendency evidence adduced ‘to prove the identity of the offender for a known offence [than] where the fact in issue is the occurrence of the offence’.<sup>28</sup> In the former situation ‘the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence’. In the latter case ‘different considerations may inform the probative value of tendency evidence’. The implication of this is that sufficient probative value may be acquired by tendency evidence going to commission the close similarity required for tendency evidence going to identity.<sup>29</sup> In *Hughes*, Gageler J supported a similar differential,<sup>30</sup> and similar suggestions have been made in other jurisprudence both in Australian and foreign jurisdictions.<sup>31</sup> Unfortunately, the Royal Commission has also supported this distinction:

Where the tendency or coincidence evidence is not required to establish the identity of the accused – typically because the complainants have each named the accused as their abuser – it is not clear why any particular level of similarity between incidents of proven or alleged child sexual abuse is required in order for the tendency or coincidence evidence to have significant probative value.<sup>32</sup>

Why should greater demands be placed on tendency evidence on the identity issue than the commission issue? The majority’s explanation is that in determining whether tendency evidence has significant probative value, ‘it is not necessary that the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged’.<sup>33</sup>

The force of the tendency evidence as significantly probative of the appellant's guilt was not that it gave rise to a likelihood that the appellant, having offended once, was likely to offend again. Rather, its force was that, in the case of this individual accused, the complaint of misconduct on his part should not be rejected as unworthy of belief because it appeared improbable having regard to ordinary human experience.<sup>34</sup>

The Royal Commission gives a similar explanation.

Typically, tendency or coincidence evidence contributes to the evidence against the accused. How much work it has to do will depend on the strength of the other evidence. In a child sexual abuse prosecution, this would typically see the direct evidence of the complainant corroborated by evidence that the accused has abused, or is accused of abusing, another child or other children.<sup>35</sup>

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<sup>28</sup> *Hughes* [2017] HCA 20 [39].

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* [95].

<sup>31</sup> David Hamer, ‘Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious’ (2007) 30 *UNSWLJ* 609, 632-633 (‘Hamer (2007)’); David Hamer, ‘The Structure and Strength of Propensity Inference: Singularity, Linkage and the Other Evidence’ (2003) 29 *Mon ULR* 137, 183-185 (‘Hamer (2003)’).

<sup>32</sup> Royal Commission, 594.

<sup>33</sup> *Hughes* [2017] HCA 20 [40].

<sup>34</sup> *Ibid* [60]

<sup>35</sup> Royal Commission, 594.

These suggestions echo the High Court judgment in the common law case, *Phillips v The Queen*.<sup>36</sup> Responding to the claim that the *Pfennig* admissibility test, based on the criminal standard of proof, is overly stringent, the High Court indicated that 'due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case'.<sup>37</sup> On this view, *Pfennig* does not require the tendency evidence, by itself, to prove guilt beyond reasonable doubt. Hodgson JA of the NSWCCA suggests: '[T]he propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence.'<sup>38</sup>

In a sexual assault case with commission in issue, the tendency evidence will often operate in a strong evidential context. Typically, the complainant's direct evidence lies at the heart of the prosecution case. The tendency evidence simply plays a supporting role – removing any doubts regarding the complainant's credibility.<sup>39</sup> The stronger the complainant's credibility, the less work for the tendency evidence, and the lower the demands placed on it. Suggestions that stronger demands are made of tendency evidence on identity appear based on the implicit or express assumption that tendency evidence is 'the only evidence' on the issue.<sup>40</sup> But then the distinction is not between identity and commission, but between cases where the other evidence is weak and cases where it is strong. Where the other evidence on identity is strong – for example, the defendant is one of a very limited number of people with opportunity – the demands made of the tendency evidence would be less stringent.<sup>41</sup>

This strongly contextual approach to the tendency probative value assessment explains the otherwise puzzling distinction between the treatment of tendency evidence going to commission and tendency evidence going to identity. However, it is unclear whether this approach sufficiently differentiates the contribution of the challenged tendency evidence from the other evidence going to the same issue. It seems to create the possibility of weak tendency evidence gaining admission on the back of an otherwise strong prosecution case.<sup>42</sup>

Nor is the strong contextual required by the terms of the *Evidence Act*. The Dictionary states that "'probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.<sup>43</sup> S 97 indicates that the probative value assessment may be contextual requiring that 'the evidence will, either by itself or having regard to other evidence ... have significant probative value'.<sup>44</sup> However, this is poorly drafted and ambiguous and certainly does not dictate the strongly contextual approach. It leaves open the possibility that the probative value of the evidence is assessed 'by itself'. If the alternative is taken, and 'regard [is] had to other evidence' this does not necessitate that probative evidence of the tendency evidence is equated with the degree of proof provided by the tendency evidence and

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<sup>36</sup> (2006) 225 CLR 303

<sup>37</sup> (2006) 225 CLR 303, [63].

<sup>38</sup> WRC (2002) 130 A Crim R 89 [29] (Hodgson JA); see Hamer (2007), 630-1.

<sup>39</sup> [40].

<sup>40</sup> *John W* [1998] 2 Cr App R 289, 300; see also Hamer (2003) 175, 184; English Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, Cm 5257 (October 2001) [2.23], [4.6]; Roderick Munday, 'Similar Fact Evidence: Identity Cases and Striking Similarity' [1999] *Criminal Law Journal* 45, 46.

<sup>41</sup> *O'Leary* (1946) 73 CLR 566, (Williams J); Heydon, *Cross on Evidence* (10<sup>th</sup> Aus ed, 2015), [21175] fn 266; Colin Tapper, 'Similar Facts: Peculiarity and Credibility' (1975) 38 *Modern Law Review* 206, 208.

<sup>42</sup> Hamer (2003), 139-40; Hamer (2007), 629.

<sup>43</sup> Emphasis added.

<sup>44</sup> Emphasis added.

the other evidence combined. It would make more sense for the probative evidence assessment to still focus on the tendency evidence while referring to the other evidence in order to address the relational element of probative value – identifying the fact in issue, and determining the strength of connection that the tendency evidence has with the fact in issue.

## 2.2 Concoction, contamination and credibility

In child sex offence cases with multiple alleged victims, the risk that some or all of the allegations are the product of joint concoction or contamination will reduce the value of coincidence or tendency reasoning. The similarities may be due, not to the truth of the allegations or coincidence, but to their common cause – concoction or contamination. This raises the question whether the possibility of concoction or contamination should be considered at the admissibility stage or left to the jury.

At common law, there is clear High Court authority that the possibility of concoction or contamination is an admissibility issue. The trial judge should exclude the evidence of other alleged victims where there is a reasonable possibility that the similarity between the stories was the product of contamination or joint concoction: *Hoch v The Queen* (1988) 165 CLR 292, 296 (Mason CJ, Wilson and Gaudron JJ). There is authority that a version of this principle continues to apply under the *Evidence Act* in Victoria and NSW.<sup>45</sup> It may, however, operate more weakly reflecting the fact that the probative value requirement is generally lower under the *Evidence Act* than at common law: *R v Ellis* (2003) 58 NSWLR 700, [95]-[99]. But this approach is out of step with NSW authority that credibility and reliability issues should be left to the jury.<sup>46</sup> And more recent NSW authorities have thrown doubt upon it. In *McIntosh v The Queen* Basten JA indicated ‘the suggestion that the possibility of concoction is a factor which must be taken into account in determining whether particular evidence has significant probative value should not be accepted’: [2015] NSWCCA 184 [47]. However, other NSW authorities have recently left the question open: *BC* [2015] NSWCCA 327 [63], [120]; *Hughes* [2015] NSWCCA 330 [203]. In Victoria, it seems, concoction and contamination continue to be an admissibility issue, perhaps still requiring the application of the stringent *Hoch* test: *Harris* [2015] VSCA 112 [12].

It might have been hoped that the HCA would have settled this issue in *IMM* [2016] HCA 14, along with the broader question of whether credibility and reliability is an admissibility or a jury issue. Unfortunately, *IMM* leaves things unclear, and the majority judgment, in particular appears, contradictory. On the more general issue, the *IMM* majority expressed a preference for the NSW approach and laid down a seemingly clear cut principle that the trial judge should proceed on the basis that the jury ‘will ... accept [the challenged evidence] completely in proof of the facts stated’: [52]. However, notoriously, the majority appeared to contradict this principle by suggesting that ‘an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified ... is an identification, but a weak one because it is simply unconvincing’: [50].<sup>47</sup>

<sup>45</sup> *Velkoski* (2014) 45 VR 680, [124] [173](c); *Murdoch v The Queen* [2013] VSCA 272 [71], [95], [99]. *AE v The Queen* [2008] NSWCCA 52 [44]; *FB v The Queen* [2011] NSWCCA 217 [110]; *BJS v The Queen* [2011] NSWCCA 239 [27].

<sup>46</sup> *Shamouil* (2006) 66 NSWLR 228 [59]-[67]; *XY* (2013) 84 NSWLR 363 [66] (Basten JA), [86]-[87] (Hoeben JA), [162] (Simpson J). It may also be out of step with the Victorian approach which designates truthfulness a jury question, but reliability a question for the trial judge: *Dupas* (2012) 40 VR 182 [50](c).

<sup>47</sup> Borrowing the example from JD Heydon, ‘Is the Weight of Evidence Material to its Admissibility?’ (2014) 26 *Current Issues in Criminal Justice* 219, 234.

On the narrower concoction issue, the *IMM* majority was equally unclear. Basten JA's position in *McIntosh* received a degree of approval (at [59] fn 45), but the majority then supported reasoning inconsistent with this position. While suggesting that the trial judge should not discount credibility and probative value due to the risk of concoction between alleged victims, the majority held that a trial judge should discount the probative value of tendency evidence coming from a single complainant due to its lack of independence from the complainant's direct evidence of the charged offence: [62]-[63]. The majority appeared unaware that its observation (at [62]) that probative value will be reduced where the source is not 'independent of the complainant' is as applicable to joint concoction as it is to multiple instances reported by a single complainant.<sup>48</sup>

In *Hughes* in the High Court, concoction was not in issue, but Nettle J appeared to take the view that the risk of concoction would be a probative value question for the trial judge: [148], [164], [165], [177], and especially [193].

The question of when and how to address the risk of concoction and contamination remains unsettled and complex. This is a further area calling for legislative simplification and clarification. In terms of the broader question of the trial judge's assessment of probative value at the admissibility stage, the minority judgments from *IMM* are preferable. The trial judge should not feel compelled to assume that the evidence is credible and reliable: [96] (Gageler J), [140] (Nettle and Gordon JJ). But evidence should be taken at its highest: [90] (Gageler J); see also [162] (Nettle and Gordon JJ). This also seems to be a simple and sensible approach to the question of contamination and concoction.

I should mention, in passing, that even if a complainant's allegations of other uncharged misconduct lack probative value as tendency or coincidence evidence due to a lack of independence, this testimony can still be extremely valuable in providing context for the direct evidence of the charged offences. For example, the complainant's passive response to extreme charged offences may appear incongruous and unbelievable in the absence of evidence of the extensive uncharged grooming. In such a case the grooming evidence is clearly not intended to offer independent support for the direct evidence of the charged offences. On the contrary, the point of the evidence is that the charged offences are inextricably connected with the grooming conduct. Further, the value of the grooming evidence in this scenario is not dependent on it demonstrating the defendant's tendency for this kind of conduct. It would still serve this explanatory function even if the grooming evidence implicated, not the defendant, but, for example, someone else from the same paedophile ring.<sup>49</sup>

### 2.3 Tendency v Coincidence

A further source of complexity is the distinction between tendency and coincidence evidence. The comments in this section are heavily based on my submission to the Royal Commission. See also

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<sup>48</sup> The majority reasoning in *IMM* is also inconsistent with much of the reasoning in *HML* (2008) 235 CLR 334 [32] (Gleeson CJ), [183] (Hayne J), [280] (Heydon J). See also *IMM* [2016] HCA 14 [176] (Nettle and Gordon JJ); David Hamer, 'Admissibility and use of relationship evidence in *HML v The Queen*: One step forward, two steps back' (2008) 32 *Criminal Law Journal* 351, 366.

<sup>49</sup> See David Hamer, 'The legal structure of propensity evidence' (2016) 20 *International Journal of Evidence and Proof* 136, 144-145, 141-147.



Hamer, “Tendency Evidence” and “Coincidence Evidence” in the Criminal Trial: What’s the Difference?”, in Roberts and Gans, *Critical Perspectives on the Uniform Evidence Law* (2017).

As courts have recognised, there is considerable scope for ‘overlap’ between tendency and coincidence evidence. Evidence of a defendant’s other misconduct can generally support either type of reasoning: *Saoud v The Queen* (2014) 87 NSWLR 481, [43]; *El-Haddad v The Queen* (2015) 88 NSWLR 93 [46]; *Page* [2015] VSCA 357 [4], [51]; *RHB v The Queen* [2011] VSCA 295 [17]. The admissibility tests in ss 97, 98, 101 are identical for the two forms of evidence. However, the *Evidence Act* seeks to draw a line between the two types of evidence/reasoning, and the courts have increasingly given emphasis to the distinction.

There is a structural distinction between the two inferences. In a typical tendency evidence case, the prosecution presents evidence that the defendant committed other misconduct similar to the charged offence, for example, guilty pleas to other charges. From there the inference proceeds sequentially, to the defendant’s possession of a tendency to commit such misconduct, and then on to the defendant’s commission of the charged misconduct. To the extent that the steps of the inference are followed, the probability of the defendant’s guilt will be increased. Generally, this will be an independent line of inference that provides additional support for the complainant’s direct evidence of the defendant’s commission of the charged offence.

In a typical coincidence evidence case, the evidence does not establish the defendant’s other misconduct as clearly and the inference operates more holistically. Rather than guilty pleas or admissions the evidence is merely of allegations of other sexual offences. The evidence is pooled together with the direct evidence relating to the charged misconduct. The prosecution argument is the improbability of similar lies – it is too great a coincidence for so many similar allegations to be made if they were false and the defendant were innocent. To the extent that the possibility of coincidence is rejected, support is provided for the prosecution’s alternative hypothesis – the allegations are true and the defendant is guilty.

So there is a structural difference between the sequential tendency inference and the holistic coincidence inference. But it is not clear how important this is. It may be that tendency inferences based on prior convictions or admissions carry a greater risk of moral prejudice than coincidence inferences based on disputed allegations: see *Pfennig* (1995) 182 CLR 461, 530 (McHugh J); *Mahomed* [2011] 3 NZLR 52 [89].<sup>50</sup> In the former case the defendant may be viewed as a known paedophile. In the latter case the defendant may be viewed as someone who may have been the unjust subject of horrible accusations. The former evidence appears potentially more prejudicial. (A difficulty with the Goodman-Delahunt et al empirical research on jury prejudice is that it focused on the latter kind of evidence rather than the former.)

However, on the probative value side, the structural differences are counterbalanced by commonalities between the inference structures. Both inferences appear to acquire probative value in the same way. The strength of both depend upon the same considerations, matters such as:

1. the proximity in time and place of the similar acts
2. the extent to which the other acts are similar in detail to the charged conduct
3. the number of occurrences

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<sup>50</sup> See also *ibid*, 157, 156-158.

4. the circumstances surrounding or relating to the similar acts
5. any distinctive features unifying the incidents
6. any intervening events
7. any additional factors tending to support or rebut the underlying unity of similar acts.

This list comes from the Supreme Court of Canada in *Handy* [2002] 2 SCR 908 [76]. Canadian jurisprudence does not distinguish between tendency and coincidence reasoning. A similar list appears in the New Zealand *Evidence Act 2006* s 43(3). The New Zealand Act does not draw a distinction between the two types of reasoning. Stephen Odgers' commentary on the Uniform Evidence Law provides a similar list under the 'tendency' heading, and notes that it has 'some application' to coincidence evidence.<sup>51</sup>

The New Zealand Supreme Court has explicitly recognised that propensity reasoning is based on the idea of coincidence: *Mahomed* [2011] 3 NZLR 52 [95]. This was also acknowledged in the leading Australian common law case, *Pfennig*. The trial judge observed that '[t]he more unusual the type of crime, the more difficult it may be to accept mere coincidence as a reasonable explanation' for the defendant possessing a tendency matching the alleged offence.<sup>52</sup> It would not be a great coincidence that an innocent defendant, contesting speeding charges, was found to have other speeding tickets. But in *Pfennig*, McHugh J noted, it would have been a 'remarkable coincidence' for the defendant, if innocent of the charged child abduction and murder, to have pleaded guilty to another child abduction (with plans to murder the child had he not escaped): (1995) 182 CLR 461, 542. That would have meant that, 'in addition to the [defendant], there was present at Murray Bridge that day another person [with] a propensity to abduct a young boy': (1995) 182 CLR 461, 542.

So tendency evidence relies upon the coincidence notion. While less appreciated, coincidence reasoning often appears to rely upon the defendant's tendency for that kind of misconduct. Consider a child sexual assault case where the prosecution relies upon the similar allegations of a number of alleged victims. The defendant denies the allegations, and the prosecution points out the improbability of the witnesses telling similar lies. The invitation to reject the defence theory relies upon coincidence. However, while less apparent perhaps, the greater plausibility of the prosecution theory relies upon the defendant having a tendency to commit that kind of offence. This provides the necessary connection between the various allegations. If tendency was not relied upon, there would be no expectation of consistency and continuity in the defendant's behaviour. It would then be just as improbable that the defendant would commit similar offences on different occasions as that the similar offences were committed by different people. Both scenarios would be equally coincidental. The prosecution theory would be no more plausible than the defence theory.

The similarities and overlap between the tendency and coincidence inferences call into question the significance of the distinction in the *Evidence Act*. And yet the distinction seems to be carrying increasing weight. In *Page*, for example, the Victorian Court of Appeal said that 'coincidence evidence will ordinarily need to exhibit a greater level of similarity, or commonality of features, than is required for tendency evidence'.<sup>53</sup> These propositions appear to be based on legislative language rather than a proper understanding of inference structure. 'Under the

<sup>51</sup> Stephen Odgers, *Uniform Evidence Law* (12<sup>th</sup> ed, 2016) [97.120], [98.120].

<sup>52</sup> Quoted at (1995) 182 CLR 461, 472 (Mason CJ, Deane and Dawson JJ), 534 (McHugh J).

<sup>53</sup> [2015] VSCA 357 [53]. See also *El-Haddad* (2015) 88 NSWLR 93 [48]; *Rapson* (2014) 45 VR 103 [11].

[*Evidence Act*] coincidence evidence pursuant to s 98 ... does, in terms, depend upon similarity. Tendency evidence does not.<sup>54</sup> '[T]he existence of similarities is a necessary condition of the admissibility of coincidence evidence': *Page* [2015] VSCA 357 [46]. A consequence of this reasoning is that evidence of a defendant's other misconduct may more readily gain admission by being tendered as tendency evidence rather than as coincidence evidence.<sup>55</sup>

But tendency reasoning faces its own artificial obstacles. Authorities require the trial judge to direct the jury that, in order to use the tendency evidence, the jury must be satisfied beyond reasonable doubt both that the defendant committed the other misconduct, and that the defendant has the tendency to commit such misconduct.<sup>56</sup> This principle has recently been overturned in Victoria by legislation.<sup>57</sup> However, in NSW it seems that it has recently been adopted as a further admissibility requirement: *Matonwal* [2016] NSWCCA 174 [92]. The Royal Commission favours the Victorian position, recommending that facts relied upon as tendency or coincidence evidence not be subject to the criminal standard of proof: Rec 48, p 646, Draft Provisions s 96A(5).

This tendency-proof requirement is a particular application of the broader so-called *Chamberlain* direction that circumstantial facts need to be proven beyond reasonable doubt to support an inference of guilt.<sup>58</sup> The High Court subsequently recognised in *Shepherd* that this is contrary to principle and the logic of proof. Generally, only the material facts corresponding to the elements of the offence are subject to the criminal standard of proof. The direction would only make sense where an underlying circumstantial fact is indispensable to the proof of an elemental material fact, so that the latter cannot be proven beyond reasonable doubt unless the former is. But where the circumstantial fact is not indispensable it can make a cumulative contribution and support an inference of guilt without being proven beyond reasonable doubt: (1990) 170 CLR 573, 579-580. After *Shepherd*, however, in the child sexual assault cases *Gipp* (1990) 170 CLR 573, 579-580 and *HML* (2008) 235 CLR 334 [247] the HCA suggested that a tendency-proof direction may be required with regard to a defendant's alleged uncharged offences against the complainant. The reasoning behind this is unclear. Perhaps such a direction is justified where the complainant's evidence of the uncharged misconduct lacks independence from the complainant's direct evidence of the charged offences.<sup>59</sup> But where there are independent allegations from multiple alleged victims it is clear that the tendency inference is not indispensable.<sup>60</sup> The accusations of other alleged victims provide independent support for the complainant's direct evidence of the charged offences.

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<sup>54</sup> *RJP v The Queen* (2011) 215 A Crim R 315 335 [113]; see also *RHB* [2011] VSCA 295 [17]; *PWD v The Queen* (2010) 205 A Crim R 75, [50],[78]-[79]; *Velkoski* (2014) 45 VR 680, [176]; *Page* [2015] VSCA 357 [46], [54].

<sup>55</sup> Eg *Rapson* (2014) 45 VR 103 [11]; see also *Hughes* [2015] NSWCCA 330 [118]; *RHB* [2011] VSCA 295 [17]; *Velkoski* (2014) 45 VR 680, [187].

<sup>56</sup> *Hughes* [2015] NSWCCA 330 [226]; *RH* (2014) 241 A Crim R 1 [172] [162]; *DJV v R* (2008) 200 A Crim R 206 [30]; *HML* 235 CLR 334 [247]; *Doyle* [2014] NSWCCA 4 [129].

<sup>57</sup> *Jury Directions Act 2015* (Vic) ss 61-62.

<sup>58</sup> *Chamberlain v The Queen* (1984) 153 CLR 521, 536. See David Hamer, 'The continuing saga of the *Chamberlain* direction: Untangling the cables and chains of criminal proof' (1997) 23 *Monash University Law Review* 43.

<sup>59</sup> David Hamer, 'Admissibility and use of relationship evidence in *HML v The Queen*: One step forward, two steps back' (2008) 32 *Criminal Law Journal* 351, 365-367. See also *IMM* (2016) 330 ALR 382.

<sup>60</sup> Even more problematically, it is sometimes suggested the proof direction be applied to coincidence evidence: *Cox* [2015] VSCA 28 [24]; see also *BSJ* (2012) 35 VR 475 [32]; *Velkoski* (2014) 45 VR 680 [121]. This contradicts the very purpose of coincidence reasoning which is to aggregate items of evidence which lack sufficient strength individually: *R v Arp* [1998] 3 SCR 339, [66].

The seeming attraction of the tendency-proof requirement may be a product of the sequential nature of tendency reasoning. The inference moves from the defendant's commission of other misconduct, to the defendant's tendency to commit that kind of misconduct, to the defendant's commission of the charged offence. The inference may arise more naturally where there is solid proof that the defendant committed the other misconduct, such as a guilty plea. However, while the inference is sequential, this does not make it all or nothing. The inference can be more or less strong depending upon the strength of the evidence and the extent to which it is accepted that the defendant committed the other misconduct and possesses the tendency. Unless indispensable, there is no need to subject the inference to the criminal standard of proof.

Courts complain about the complexity of the law governing tendency and coincidence evidence. One increasing source of complexity is the emphasis placed upon the distinction between tendency and coincidence reasoning. As a matter of the logic of inference, the significance of the distinction is unclear. Courts' suggestions that coincidence evidence is more dependent upon similarity while tendency evidence should be subject to special proof requirements are unsubstantiated. There are clear arguments for dispensing with the distinction, or at least diminishing its significance.

### 3. Draft Provisions of the Royal Commission

The Royal Commission's draft provisions have some good features. They aim to weaken the force of the exclusion and open up admissibility. In so doing, they would abolish the current double admissibility test, and eliminate the illogical s 101 (which may exclude evidence where its benefits outweigh its costs). They would also abolish the illogical application of the criminal standard of proof to tendency and coincidence evidence: s 96A(5). And the provisions state that the evidence should be assumed credible, with the effect that questions of concoction and contamination are left for the jury: s 96A(2). This may not be the best option, but at least it provides clarity.

However, the Draft Provisions retain the needless and complex tendency/coincidence distinction. And in other respects, they introduce further complexity.

The provisions are limited to child sex offences. Given the significance of the changes that are introduced, it is undesirable that they should be limited to a narrow set of cases. While child sex offences do pose particular systemic proof problems for the prosecution, these problems are not confined to child sex offences. Acquaintance adult sexual assault cases pose similar systemic difficulties.

Further, child sex cases are not always discrete. Child sex offence charges may be combined with non-sexual physical assault charges, and adult sex offence charges, involving the same complainant (who turned 18 during a course of physical and sexual abuse), and other members of the same family. Ordinarily these charges would be heard together. However, that would create considerable difficulties for the trial judge in resolving admissibility questions. To the extent that different proof rules apply (eg, s 96A(5)) there would be further difficulties directing the jury. And to the extent that the case receives any public or media attention, the inconsistencies would make the law look incoherent and contradictory, potentially damaging confidence in the law.

The draft provisions are complex in other respects. It is difficult to understand exactly how the new admissibility test will operate, and to predict the statutory interpretation issues it will present. The provision is based on the UK's character evidence chapter of the *Criminal Justice Act 2003*. The UK reforms appear to have been effective in opening up admissibility of propensity evidence in the UK criminal courts, and, by adopting the same formula here, the Royal Commission hopes for a similar result. However, the UK character evidence reforms were more extensive than the Australian proposals, took place in a different particular context, and, whatever their strengths, did not receive a great deal of praise for their simplicity or clarity. The UK provisions do not provide a particularly good model for Australian reforms.

The new admissibility test does not, on its face, involve an elevated probative value threshold resembling that in the existing ss 97, 98 and 101. Instead it involves an elaborate relevance test – the evidence must be 'relevant to an important evidentiary issue in the proceeding': ss 97(1A)(a), 98(1A)(a).

Two kinds of evidence are deemed to satisfy this test: s 96A(1). The second (b) in large part restates the more general 'relevant to an important evidential issue in the proceeding' requirement. It deems this test will be satisfied by 'evidence that is relevant to ... [a] matter [that] is important in the context of the proceeding as a whole'. Strangely though, the deeming provision includes a restriction: (b)(i) the matter must 'concern[] an act or state of mind of the defendant'. It is unclear what this achieves. Even without this restriction being satisfied, the evidence would still, by definition, be 'relevant to an important evidentiary issue'.

The first type of evidence deemed to satisfy the admissibility test is also problematic. It involves s 96A(1)(a) 'evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding'. On the face of it, this looks like a significant relaxation of the exclusion, but only for certain kinds of evidence in certain kinds of cases. In commission cases, tendency or coincidence evidence that the defendant has committed a similar (or the same) kind of offence will be admissible.

The evidence must be of the defendant's commission of other similar offences. The deeming provision does not extend, for example, to grooming (which may not be an offence, and if it were, may not be viewed as a similar offence). It does not extend to legal sexual conduct in which the defendant displayed the same unusual proclivities as alleged in the charged offence, for example, foot fetishism. Nor would it extend to other distinctive tendencies, for example, smoking cigars or eating anchovies from a jar. It is unclear whether prosecution coincidence evidence of other alleged child victims regarding the defendant's cigar smoking or anchovy eating (with a greater or lesser connection with the alleged offending) would be covered by the draft provision.

Further the deeming provision only extends to cases where commission is in issue. It does not apply to child sex offences where identity is in issue. As such, the provision gives statutory endorsement to the view that tendency and coincidence evidence should come in more readily where commission is in issue. As discussed in Part 2.1 above, this view seems unsubstantiated and raises unanswered and largely unconsidered questions as to the nature of probative value and how it should be assessed, in particular regarding the role played by context and the other evidence.

If the admissibility test in ss 97(1A)(a) and 98(1A)(a) replaces the old ‘significant probative value’ test of ss 97 and 98, then the balancing test of s 101 is replaced by a new test in s 100A. This new test provides weaker exclusionary force in two respects. First, a burden is placed on the defendant to keep the evidence out, rather than on the prosecution, to get the evidence in. Second, it is discretionary rather than mandatory – if satisfied, the evidence ‘may’ be excluded. These choices appear defensible. However, s 100A has other problems.

First, why bother with a new special discretion to exclude? Why not just use the existing s 137? Instead, the operation of s 137 is excluded: s 100A(4). And the new provision introduces a new formula which poses new problems of interpretation. Rather than refer to the ‘danger of unfair prejudice’ (s 137) or ‘prejudicial effect on the defendant’ (s 101) the new provision talks of ‘the proceeding being unfair to the defendant’. How does this new concept compare to the notion of prejudice? Actually, the expression ‘unfair to the defendant’ is not entirely new. It appears in the s 90 discretion to exclude admissions – a section which the courts have been unwilling to pin down (*Em v The Queen* (2007) 232 CLR 67 [56] (Gleeson CJ and Heydon J); [177] (Kirby J)), but which at the same time has given rise to some restrictive interpretations: [109] (Gummow and Hayne JJ). Having said that, admission evidence is pretty different from tendency and coincidence evidence so s 90 jurisprudence may not be all that helpful anyway.

The new section (like s 90, unlike ss 101 and 137) does not introduce a balancing test. The risk of unfairness is not balanced against the probative value of the evidence. Arguably the balancing will still take place – if the evidence is highly probative and poses little risk of misuse then, on balance, the proceedings will not be viewed as unfair. However, there is a counterargument, in that the section talks of fairness to the defendant, not the prosecution. This may preclude reliance on the principle that ‘[i]n determining the practical content of the requirement that a criminal trial be fair, regard must be had “to the interests of the Crown acting on behalf of the community as well as to the interests of the accused”’.<sup>61</sup> Any unfairness to the defendant is sufficient for exclusion; unfairness to the prosecution from exclusion is irrelevant.

#### 4. Questions and recommendations

The Royal Commission has done a great deal of difficult work on the underlying policies and issues relating to tendency and coincidence evidence, and its recommendations in broad terms should be accepted. However, its draft legislation is extremely problematic, and may create as many problems as it solves. These problems, in part, relate to the fact that the Royal Commission was confining its attention to child sex offences (in an institutional setting), whereas it is preferable for any reforms to operate more broadly. But there are also other problems with the draft legislation apart from this.

Ideally, the reform of the tendency and coincidence provisions should be referred to the ALRC – either by themselves or as part of a more general Evidence Act review. However, if the Commonwealth Attorney-General does not refer the matter to the ALRC, NSW should conduct its own review. The prospect of a rupture in the uniformity of the uniform evidence law should not prevent this. First, ruptures are already occurring – eg, with Victoria’s judicial directions reforms.

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<sup>61</sup> *Dietrich* (1992) 177 CLR 192, 335 (Deane J), quoting from *Barton* (1980) 147 CLR 75, 101; see also *Horncastle* [2010] 2 AC 373, [67] (SC); *Doorson v Netherlands* (1996) 22 EHRR 330, [70]; *R v E(AW)* [1993] 3 SCR 155, [84].

Second, if NSW takes the lead on this, and does a good job, the other uniform evidence jurisdictions may follow.

In response to specific questions:

*Q31. Should the approach to tendency and coincidence evidence proposed in the draft legislation at Appendix E be adopted?*

No.

*If not, should aspects of that approach or any other option for reform be pursued in NSW?*

Yes.

*Should NSW:*

*1. Maintain the provisions in their current form.*

No.

*2. Adopt the Royal Commission's recommendations in relation to proceedings for adult sexual offences as well as child sexual offences.*

No.

*3. Amend the legislation governing the admissibility of tendency and coincidence evidence in all proceedings (not just child sexual abuse proceedings), either in NSW or in all Uniform Evidence Law jurisdictions, to facilitate greater admissibility.*

Yes, but not in the form proposed by the Royal Commission.

*4. Amend the legislation governing the admissibility of tendency and coincidence evidence in child sexual abuse proceedings, either in NSW or in all Uniform Evidence Law jurisdictions, to facilitate greater admissibility, but in a different way to that recommended by the Royal Commission.*

Yes, but not limited to child sexual abuse proceedings.

*5. Enact reform that was considered, but not recommended, by the Royal Commission, including:*  
*a. a presumption in favour of joint trials, independent of the cross-admissibility of evidence.*

No. As the Royal Commission suggests, joinder should depend largely upon cross-admissibility. Fixing cross-admissibility should be the goal.

*b. a provision for the admissibility of evidence of prior charges of which the accused was acquitted.*

I think this should not be subject to an absolute prohibition, but the form of the admissibility provision will require careful consideration.

*c. removing the distinction between tendency evidence and coincidence evidence in the legislation.*

Yes.