Professor David Hamer
Sydney Law School

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Supplementary Submission to Royal Commission into Institutional Responses to Child Sexual Abuse

Criminal Justice Issues

Evidence (Tendency and Coincidence) Model Provisions

Introduction

The Model Provisions are drafted to fit within the Uniform Evidence Law (UEL), however, they may also be adopted by other jurisdictions.

The Model Provisions appear to be based upon the English reforms in Part 11 Chapter 1 of the *Criminal Justice Act 2003*, in particular ss 101(1)(d) and 103. The English reforms were fairly strong reform, reducing the admissibility test to one of relevance for a propensity purpose with discretionary exclusion. However, they achieve this in an overly complex manner. Some of the complexity comes from the provisions surrounding the propensity provisions, which do not feature in these Model provisions. However, some complexity is contained within the propensity provisions, and similar complexity does find its way into these model provisions.

This leads me to reiterate my preference (expressed in my previous submission) for the New Zealand approach to admissibility. The NZ Act has a common-law style balancing admissibility test. I do not think this would present much of an additional obstacle to admissibility over the approach in these model provisions. It is simpler in its drafting, and I think it would also be simpler in its application.

Alternative 1

This alternative retains the distinction between tendency and coincidence evidence. As explained below, I prefer the second alternative which, to a large degree, replaces these two categories with a single category of propensity evidence. As discussed in my previous submission, the distinction brings unnecessary complexity to the law. In this discussion I will use the term 'propensity' evidence or reasoning to cover both the tendency and coincidence variants.

[2] Section 94 Application

Insert after section 94 (3):

(4) 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 on the basis of its inherent unfairness or unreliability is abolished and, as a result, is not relevant when applying this Part to tendency evidence or coincidence evidence.

(5) Without limiting subsection (4), evidence is not inadmissible as tendency evidence or coincidence evidence only because it is about:

(a) the conviction before or by an Australian court or a foreign court of a party charged with an offence, …

If the intention is to enable prior convictions to gain ready admission to prove propensity, this may not go far enough. This section may override s 91 (Exclusion of evidence of judgment and convictions), but still leaves open the argument that prior convictions should be excluded under the hearsay and opinion rules (ss 59 and 102).

It would be simpler and clearer to include a provision like that in the *Criminal Justice Act*. Section 103(2) provides:

> [A] defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—
> (a) an offence of the same description as the one with which he is charged, or
> (b) an offence of the same category as the one with which he is charged.

[3] Section 95A

Insert after section 95:

95A Evidence relevant to important evidentiary issue

(1) For the purposes of this Part, each of the following kinds of

> evidence is ***relevant to an important evidentiary issue*** in a proceeding:
>
> (a) evidence that shows a propensity of a party to be untruthful if the party's truthfulness is in issue in the proceeding,
>
> (b) evidence that shows a propensity of a party 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,
>
> (c) evidence that could be relevant to any matter in issue in the proceeding if the matter is important in the context of the proceeding as a whole.

In various respects, this is an awkward section. If this broad approach to reform is maintained (rather than adopting the simpler NZ option), this section should be reduced and moved to be incorporated with the admissibility section where it has a better fit.

S 95(1)(a) – I am not sure what this is meant to achieve. It appears to be addressed to credibility, and yet this Part, Part 3.6, of the UEL does not deal with credibility – that is handled by Part 3.7: see s 94(1). If it does have some effect, in the criminal trial it has the potential to open up relatively unrestrained attacks on a criminal defendant's credibility which is contrary to the philosophy behind existing safeguards: eg, ss 104, 112. At the same time, credibility evidence regarding a criminal defendant is not particularly probative because, even without any such evidence, the defendant, if guilty, has such a strong obvious motive to lie. I think this para should be cut altogether.

S 95(1)(b) – One desirable effect of this provision is to deem a class of propensity evidence in the criminal trial to be admissible, expressly overriding the *Velkoski* (2014) 45 VR 680 [164] proposition that evidence is inadmissible if it does no more than 'prove a disposition to commit crimes of the kind in question'. This restrictive principle appears to be rejected in NSW anyway: *Hughes* [2015] NSWCCA 330 [188]. This provision works in conjunction with other admissibility sections below and is discussed there.

S 95(1)(c) – This para appears largely redundant. It does specify that 'an important evidentiary issue' is an issue that 'is important *in the context of the proceeding as a whole'* (emphasis added). But this really doesn't clarify things very much – importance is likely to have been viewed as inherently contextual in any case. There are issues about how 'context' should be brought to account: see David Hamer ''Tendency Evidence in *Hughes v The Queen*: Similarity, Probative Value and Admissibility' (2016) 38 *Sydney Law Review* 491, 500-502 http://sydney.edu.au/law/slr/slr_38/slr38_4/SLRv38n4HamerBTHC.pdf. But this

provision provides no clarification. Apart from that, its effect is to deem 'evidence that *could be* relevant …' to be 'relevant …' (emphasis added). But this is clear from the definition of relevance in s 55(1) anyway. I think this para should be cut.

95A Evidence relevant to important evidentiary issue

> (2) In determining whether evidence is relevant to an important evidentiary issue in a proceeding, the court is to consider whether the evidence, assuming it was accepted as credible and reliable, would be evidence of a kind referred to in subsection (1).

The effect of this is that credibility and reliability issues are not considered at the admissibility stage but are left to the jury. In the context of propensity evidence in child sex offence trials, it has particular application to the question whether another allegation is the product of joint concoction, contamination, or infection. This is a further point on which Victoria has recently taken a more pro-defence interventionist line than NSW: contrast *Velkoski* (2014) 45 VR 680, [124] [173](c) and *McIntosh* [2015] NSWCCA 184 [47].

Arguably, if this assumption is made in this context it should apply to admissibility issues across the board, in which case it should be a general provision and contained in UEL Ch 5 or the Dictionary.

S 95A(2) adopts the assumption apparently favoured by the majority in *IMM* [2016] HCA 14. As indicated in my previous submission, I prefer the minority approach, by which the trial judge makes no such assumption but takes the evidence at its highest. This assumption appears too strong, limiting the judge's ability to intervene and remove evidence from the jury's consideration for the sake of fairness or efficiency.

Further, since the subsection uses the language of the majority in *IMM* it may also incorporate the ambiguities of *IMM*, and fail to clarify . Consider the majority's notorious [50] in *IMM* which suggests direct eyewitness evidence may be held inadmissible as weak and unconvincing. And the majority also held that a complainant's tendency evidence may be inadmissible on the basis that it lacks independence from the complainant's direct evidence: [62]-[63]. This arguably could give rise to a challenge to the evidence of other alleged victims on the basis of concoction or contamination and so their evidence evidence lacks independence from the complainant's evidence, despite the majority's approval of *McIntosh*: [59] fn 45.

[4] Sections 97–98A

Omit sections 97 and 98. Insert instead:

97 The tendency rule

(1) This section applies to the admissibility of evidence (***tendency evidence***) of the character, reputation or conduct of a person, or a tendency that a person has or had, to prove that the person has or had a tendency (whether because of the person's character or otherwise) either to act in a particular way or have a particular state of mind.

This reproduces the existing definition of tendency evidence. For greater readability, would be preferable to add 'adduced' to read: 'adduced to prove that the person …'

(2) Tendency evidence is inadmissible unless: …

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding.

This replaces the existing admissibility test, requiring 'significant probative value', with a requirement that the evidence be 'relevant to an important evidentiary issue'. And so, s 97(2)(b) takes the admissibility enquiry back to s 95A(1).

The coincidence rule works the same way and s 95A(1) is discussed in both connections below.

98 The coincidence rule

(1) This section applies to the admissibility of evidence (***coincidence evidence***) of the occurrence of 2 or more events to prove that a person did a particular act, or had a particular state of mind, because of similarities in the events or the circumstances in which they occurred (or both).

This almost reproduces the existing definition of coincidence evidence. As with the tendency rule it would be clearer to say 'adduced to prove'. Also, there are some words missing from the existing s 98 which should be reintroduced. Following 'mind,' it should read: 'on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally'. Despite its length, this is a good definition of the coincidence aspect of the reasoning that the section targets. (I put to one side for the moment the difficulty of the distinction between tendency and coincidence evidence. This difficulty is handled quite well by the second alternative Model Provisions.)

(2) Coincidence evidence is inadmissible unless: …

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding.

As with the tendency rule, this replaces the existing admissibility test, requiring 'significant probative value', with a requirement that the evidence be 'relevant to an important evidentiary issue'. And so, s 97(2)(b) and s 98(2)(b) take the admissibility enquiry back to s 95A(1). The most relevant para is (b) which deems evidence that 'shows a [specified] propensity' to be 'evidence … relevant to an important issue'.

I have a few issues with the wording and operation of this para. One big one is that it introduces the term 'propensity' on top of the existing terms 'tendency' and 'coincidence'. This is very messy, adding to the existing unnecessary complexity of the tendency/coincidence distinction. The effect is much reduced in the second alternative Model Provisions, and the operation of the admissibility test will be discussed further there.

98A Additional provisions for tendency evidence or coincidence evidence in criminal proceeding

(1) Despite sections 97 and 98, the court in a criminal proceeding may, on the application of a defendant, refuse to admit tendency evidence or coincidence evidence if the court thinks, having regard to the particular circumstances of the proceeding, that:

(a) admission of the evidence is likely 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 is unlikely to remove the risk.

(2) The admission of evidence is not unfair to a defendant in a criminal proceeding merely because it is tendency evidence or coincidence evidence.

Note. See also section 94 (4) and (5).

(3) If directions about the relevance and use of tendency evidence or coincidence evidence are likely to remove the risk of unfairness of the kind referred to subsection (1) (b), the court must give those directions rather than refuse to admit the evidence.

[5] Section 101

Omit the section. Insert instead:

101 Exclusion of tendency evidence or coincidence evidence under section 135 or 137

> Tendency evidence or coincidence evidence about a party that is admissible under this Part cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party.

These provisions replace the existing s 101 test, which imposes an additional admissibility test for prosecution tendency and coincidence about a defendant, requiring that probative value substantially outweigh the danger of unfair prejudice. The proposed s 98A instead creates a discretion to exclude where the admission would create the risk of unfairness to the defendant which is not likely to be adequately addressed by judicial directions.

I have a couple of concerns with this discretion. First, it seems problematic that the only basis for the exercise of the discretion is unfairness to a defendant. There is no reference to fairness to the prosecution. In this respect it is narrower than the balancing tests in the existing s 101, or ss 135, 137, etc. It seems possible that the slightest risk of unfairness to the defendant might lead to discretionary exclusion since there is no need that this risk outweigh the probative value or benefits to the prosecution.

Second, it is probably unnecessary to include the reference to the likelihood of judicial directions addressing the unfairness. That is the approach that is taken anyway. If it is considered necessary to spell this out, it should be made to apply across the Act, and included in Chapter 5 or the Dictionary.

Third, it is unclear why this provides for discretionary and not mandatory exclusion, unlike the existing s 137. Section 101 excludes the operation of s 137 (and s 135). In fact it appears preferable to just rely upon the mandatory exclusion in s 137 rather than introduce another new basis for exclusion which is expressed in unclear and novel terms. (With regard to s 137, I think the minority approach in *IMM* should be adopted, as mentioned above.)

Alternative 2

This alternative is very similar to Alternative 1. Many of the comments above have equal application here. The only significant difference is that this alternative abolishes the tendency/coincidence distinction. This is a useful thing to do in terms of simplifying the law. It is particularly useful given the way in which the Model Provisions are intended to operate.

An extended criticism of the distinction is provided in my forthcoming chapter, 'Tendency and Coincidence Evidence: What's the difference?', in Andy Roberts and Jeremy Gans (eds), *Critical Perspectives on Uniform Evidence Law* (Federation Press, forthcoming, 2017) which I attach.

> **98 The propensity rule**
>
> (1) This section applies to the admissibility of evidence (***propensity evidence***) of:
>
> (a) any one or more of the following to prove that a person has or had a propensity to act in a particular way or have a particular state of mind:
>
> (i) the character or reputation of the person,
>
> (ii) a tendency that the person has or had,
>
> (iii) conduct of the person (including conduct of the same or a similar kind to conduct that is a fact in issue in the proceeding), or
>
> (b) the occurrence of 2 or more events to prove that a person did a particular act, or had a particular state of mind, because of similarities in the events or the circumstances in which they occurred (or both).

This provision replaces the tendency and coincidence rules with a single 'propensity rule'. Propensity evidence is defined in ss 98(1)(a) and (b) in terms very similar to the existing definitions of tendency and coincidence evidence. In an ideal world this would not be necessary. However, given the history this is probably a good idea. Actually, I'd make it more explicit by using the existing definitions of tendency and coincidence evidence. (See also discussion above relating to Alternative 1 regarding these definitions.)

> (2) Propensity evidence is inadmissible unless: …
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding. …

As with alternative 1, this replaces the existing admissibility requirement of 'significant probative value' with a requirement that the evidence 'be relevant to

an important evidentiary issue'. This then takes the admissibility enquiry back to the provision defining 'evidence relevant to an important evidentiary issue' (s 95A in Alternative 1; s 96 in Alternative 2).

Sub-s (1)(b) appears particularly important in this connection as it deems evidence showing a particular propensity to be evidence relevant to an important evidentiary issue. Actually, it would make sense for this provision to be shifted down to become a sub-section of the propensity rule, s 98. (As discussed above, paras (a) and (c) can be discarded.)

As currently drafted, this paragraph may operate too strictly. It requires that evidence 'shows' the defendant's propensity. This may be interpreted as requiring proof to some level. Australian courts' have a troubled history in imposing inappropriately stringent proof requirements at the admissibility stage, to propensity evidence. They don't need any encouragement. (See attached Draft Chapter, Parts 6 and 7.) It should be made clear that the requirement is only that the evidence be relevant to the defendant having that propensity.

S 98 would then create a general admissibility requirement that evidence be 'relevant to an important evidentiary issue'. And the section would deem that, in a criminal trial, evidence will satisfy this requirement if it is relevant to the defendant having a propensity to commit an offence similar to the kind with which the defendant is charged.

At first glance this provision may appear to replace a probative value threshold with a requirement of mere relevance. The general admissibility requirement is qualified by the reference to 'important evidentiary issue'. And the deeming provision contains another constraint. The evidence must be relevant to whether the defendant has a propensity to commit offences similar to that charged.

While the contrary view may be advanced, the better view is that this extends beyond evidence of the defendant's commission of other similar offences to evidence of a defendant's other (mis)conduct. However, it would not cover all evidence of a defendant's other misconduct. For example, in a child sexual assault case, the evidence of the following evidence regarding the defendant might be considered relevant to the defendant's propensity to commit that kind of offence:

- having had consensual sex with a 16-year-old girl;
- possession and use of child pornography;
- grooming evidence;
- evidence of an unusual though innocent sexual proclivity – say, a foot fetish – which featured in the allegation relating to the charged offence;

- evidence of an unusual violent act that featured in the allegation relating to the charged offence.

However, sexual misconduct against adults (not sharing any unusual features with the charged offence) may not be considered relevant. And other violent misconduct (not sharing any unusual features with the charged offence) may also be considered to lack the requisite relevance.

The deeming provision seems to be in a slightly awkward relationship with the more general requirement of relevance to an important issue. Usually deeming provisions operate in the favour of the party relying upon them. They may operate to define a term; extend a definition even to the extent of creating a legal fiction; or make it clear that particular cases the definition 'for the removal of doubt which might otherwise exist': *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203, 207; Pearce and Geddes, *Statutory Interpretation in Australia* (2014) [4.45], [4.46]. But this deeming provision doesn't seem to make it any easier to satisfy the general requirement. It may even be arguable that it is harder to fit within the deeming provision than the general requirement. The deeming provision potentially imports a proof requirement (above, with the word "show"), and also is restricted to a particular type of propensity which may be strictly construed (above, to only allow in evidence of the defendant's commission of other similar offences).

This awkwardness may give rise to complexity, with the prosecution in some cases relying on the deeming provision, while in other cases simply trying to fit within the general requirement. Again, this points the advantages of the NZ approach with a balancing test expressed in terms of probative value versus prejudicial risk. There should be some statement making it clear that this does not import the *Pfennig* admissibility test.

Missing in the Model Provisions

Guidance on assessing probative value and prejudicial risk/unfairness

As mentioned in my previous submission, it would be worth including provisions giving guidance on how a court should approach the assessment of probative value and prejudicial risk. The NZ Act contains provisions of this kind, although these could be improved on. There would still be plenty of scope for disparate approaches – both concepts are complex involving the assessment of many factors, and then the two may have to be weighed against each other. However, guidance could avoid the risk of courts misunderstanding the how probative value is acquired; forgetting relevant considerations; the various factors

impacting on prejudicial risk; and so on. Should this path be followed, I would like the opportunity to comment on this further.

Acquittals

As mentioned in my previous submission, it seems that there is some uncertainty regarding whether the prosecution may rely on evidence in support of an allegation that the defendant committed another offence the subject of a prior acquittal. On one view, this would be prevented by principles governing double jeopardy or issue estoppel. Provision should be made for this evidence to be admissible.

The Chamberlain *direction*

As mentioned in my previous submission NSW courts require a direction to be given that juries cannot use tendency evidence unless they find the other misconduct and the tendency proved beyond reasonable doubt. This is contrary to the logic of proof. The Act should contain a provision along the lines of that in the *Jury Directions Act 2015* (Vic):

> Unless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are—
>
> (a) the elements of the offence charged or an alternative offence; and
>
> (b) the absence of any relevant defence.

This should appear in Part 4.5.

Other directions

There is scope to improve the guidance that courts give juries on weighing probative value and avoiding prejudicial risk.