Council of Attorneys-General, Admissibility of Tendency and Coincidence Evidence Working Group *Scoping Paper*

Submission

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1. Stringency and complexity

I agree with the Royal Commission that the exclusion of tendency and coincidence evidence currently operates too stringently, particularly in child sex offence cases. However, like others, I do not support the approach advanced by the Royal Commission – 'relevant to an important evidentiary issue', borrowed from the English legislation. This does not fit well with the existing language of the Uniform Evidence Law (UEL). It introduces new concepts, is overly complex, and it is unpredictable as to how it may operate: *Scoping Paper* [11],[52]. I support the CAG's efforts to explore other potential reforms.

The CAG now has a great opportunity to further substantial reform. It should make the most of this opportunity and avoid an overly cautious approach. In my view there are two broad problems with the provisions as they currently operate. First, the problem identified by the Royal Commission – the exclusion is too stringent (still so after *Hughes* (2017) 344 ALR 187); admissibility should be broadened. The second problem, as the Victorian Court of Appeal (VCA) recognised in *Velkoski*, is that the law is 'exceedingly complex and extraordinarily difficult to apply'.[1] As well as costs and delays, complexity can lead to a failure of justice with appeals and retrials leading to attrition.

It is easy to be defeatist about the problem of complexity. Contrary to the VCA's suggestion that, prior to the UEL, the law was 'regarded as reasonably well-settled, and capable of straightforward application'[2] concerns are broad and long-standing. Midway through the last century the law was described by leading Australian commentators as being of 'apparently insoluble difficulty'.[3] In 1975 in *DPP v Boardman*[4] Lord Hailsham described the common law as a 'pitted battlefield'. In 2001 Chris Sanchirico described the United States law of bad character as 'the most derogated, legislated, and litigated aspect of evidence law'.[5]

However, the law can be made more workable. Consider New Zealand's experience. The NZ Law Commission is currently in the process of the second review of their *Evidence Act 2006*:

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* This submission borrows from my other published and unpublished work. I may not have always been successful in indicating clearly where this has occurred.

[1] [2014] VSCA 121 [33]

[2] Ibid [40].

[3] Z Cowen and PB Carter, 'The Admissibility of Evidence of Similar Facts: A Re-examination' in *Essays on the Law of Evidence* (Clarendon Press, 1956) 106.

[4] *DPP v Boardman* [1975] AC 421, 445.

[5] Chris W Sanchirico, 'Character Evidence and the Object of the Trial' (2001) 101 *Columbia Law Review* 1227, 1231; see also Edward J Imwinkelreid, 'An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character theory of Logical Relevance, the Doctrine of Chances' (2006) 40 *University of Richmond Law Review* 419, 433.

http://www.lawcom.govt.nz/our-projects/second-review-evidence-act-2006; http://www.legislation.govt.nz/act/public/2006/0069/55.0/DLM393463.html. This review is far from a token exercise. Along with other Australian evidence scholars I spent a few days in NZ last year exchanging views on evidence law with NZ evidence scholars and the Law Commission, and they have recently published an Issues Paper of more than 250 pages. However, they haven't felt the need to revisit their propensity provisions: see at [1.53]-[1.54]. Compared to the UEL provisions, the NZ law is very simple, both in its drafting and its operation. I'll say more about the NZ provisions below.

Avoiding unnecessary complexity should be a key principle for reform, alongside facilitating greater admissibility, and ensuring a fair trial. The further principle adopted by CAG, not limiting reform to child sexual abuse proceedings [21], is sensible as it avoids the complexity of drawing a distinction between these charges and related charges, for example murder, or the commission of non-sexual physical harm.

The Working Group has elected not to consider the operation of the exclusionary rule in civil proceedings: [23]. This will not necessarily create undue technicality (unlike the Royal Commission's restriction to child sexual abuse proceedings). However, this putting civil proceedings out of scope should not inhibit the Working Group's consideration of options within its remit. For example, some potential reforms may potentially subject tendency and coincidence evidence to a weaker admissibility test in the criminal sphere than the civil sphere. This potential should be viewed as precluding criminal reforms. Better that a sensible reform in the criminal sphere provide a catalyst to reform in the civil sphere, than that a dysfunctional principle in the civil sphere inhibit sensible reform in the criminal sphere.

2. Distinguishing tendency and coincidence evidence

One major advantage that NZ law has over the UEL in this area is that it does not draw a distinction between tendency and coincidence evidence. Instead, the provisions apply to 'propensity evidence' which is defined as 'evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved': s 40(1)(a). As Basten JA suggests in *Saoud* [2014] NSWSCCA 136 [36], there is 'awkwardness in the separation of "tendency" evidence and "coincidence"'. The UEL lays down the same admissibility tests for the two types of evidence in ss 97, 98 and 101, and courts have recognised there is considerable scope for 'overlap', in that evidence of a defendant's other misconduct can generally support either type of reasoning.[6] But the very fact that there are two rules, one for tendency evidence and one for coincidence evidence, invites technical distinctions to be drawn. And these distinctions are being drawn, often for purely strategic reasons.

In *Page* [2015] VSCA 357 [53], 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'.[7] Such propositions appear to be based on legislative language rather than a proper understanding of inference structure. 'Under the [UEL] coincidence evidence pursuant to s 98 ... does, in terms, depend upon similarity. Tendency evidence

[6] 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].
[7] See also *El-Haddad* (2015) 88 NSWLR 93 [48]; *Rapson* (2014) 45 VR 103 [11].

does not.'[8] '[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.[9] This differentiation may grow following *Hughes* (2017) 344 ALR 187 in which a majority of the High Court favoured a broad approach to admissibility of *tendency* evidence. It said nothing about coincidence evidence, leaving scope for a more stringent approach to be continued towards coincidence evidence.

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: *Scoping Paper* [98]-[100].[10] This principle has recently been overturned in Victoria by legislation.[11] However, in NSW it seems that it has been adopted as a further admissibility requirement: *Matonwal* [2016] NSWCCA 174 [92]. This proof/admissibility requirement, applied to particular steps in the use of particular strands of evidence, is illogical, as well as being absurdly complex, and should be abolished. The criminal standard of proof applies to the elements of the offence, not the evidence that goes to prove them. Evidence operates cumulatively, like the strands of a cable, as the High Court recognized in *Shepherd* (1990) 170 CLR 573, 579-580. It is rare for proof of an element of an offence to hinge upon a single strand of evidence.

If this proof/admission requirement is abolished, then this would strengthen the perverse incentive for the prosecution to present evidence as tendency evidence rather than coincidence evidence, notwithstanding that, in some cases, the tendency characterization is less natural. Consider, for example, the common situation of multiple complainants each making a similar allegation against the defendant, in which the prosecution relies upon the improbability of (the coincidence of) similar lies. The prosecution is increasingly adducing this as tendency rather than coincidence evidence: eg *Hughes*. The defence may then object that coincidence reasoning is involved in the use of such evidence (which would be correct), and the court's time is wasted dealing with an unnecessary conflict: see eg, *Doyle* [2014] NSWCCA 4 [97]-[141].[12]

The Working Party, in reforming the rules relating to tendency and coincidence evidence, should take the opportunity to address the unnecessary complexity that is growing around the tendency/coincidence distinction. This issue should not be viewed as out of scope. For reasons given above, addressing the distinction can 'facillitate greater admissibility': *Scoping Paper* [110]. The Working Group should not view this issue as too difficult for consideration at this time: *Scoping Paper* [111]. Technicalities around the tendency/coincidence distinction seem to be unique to the UEL. The distinction plays far less of a role at common law and is scarcely mentioned in other jurisdictions. It is not the case that 'collapsing the distinction … would represent a complete rethink': [109]. It could be made clear that evidence that was formerly classified as tendency evidence and

[8] *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].
[9] Eg *Rapson* (2014) 45 VR 103 [11]; *s*ee also *Hughes* [2015] NSWCCA 330 [118]; *RHB* [2011] VSCA 295 [17]; *Velkoski* (2014) 45 VR 680, [187].
[10] *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].
[11] *Jury Directions Act 2015* (Vic) ss 61-62.
[12] Hamer, ' "Tendency evidence" and "coincidence evidence": What's the difference?' in Roberts and Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (2017) 158, 163.

coincidence evidence is now to be treated together as, eg, propensity evidence, without differential treatment on admissibility and proof.

3. A single limb admissibility test

The two limb test is needlessly complex in a number of respects. Why are there two limbs? If evidence satisfies the second limb, and its probative value substantially outweighs the risk of prejudice, then why should it *also* be required to satisfy the first limb by possessing significant probative value?

It might be suggested that, in practice only one limb matters. Evidence that has sufficient probative value to substantially outweigh prejudicial risk (satisfying the second limb) necessarily has significant probative value (satisfying the first limb). (Perhaps this is implied by the *Scoping Paper* [46].) If this is the case, then the first limb is redundant and should be abolished. However, I don't think this is the case. The view may be taken, for example, that any risk of prejudice can be addressed through judicial direction (see further below), and that the first limb does some genuine work. Certainly there is much jurisprudence on the meaning of 'significant probative value' including the recent High Court appeal in *Hughes* (2017) 344 ALR 187. And this again raises the question, what purpose is served by excluding evidence for lacking significant probative value if its probative value substantially outweighs its prejudicial risk?

4. Symmetrical balancing test

Further, as the Royal Commission recognised, the second limb itself is hard to justify: *Scoping Paper* [66]. Why require probative value to *substantially* outweigh prejudicial risk? The asymmetry obviously leaves scope for evidence to be excluded even though its benefits (ie, probative value) outweigh its costs (ie, prejudicial risk). This appears inherently irrational.

There is a lot to be said for the proposition that there should be a single admissibility test, requiring merely that probative value outweighs prejudicial risk. This symmetrical balancing test is the admissibility requirement in Canada at common law, and New Zealand under s 43(1) of its *Evidence Act*: *Scoping Paper* [69]-[70].

One argument against this is that if this reform were adopted for criminal cases, the admissibility test for criminal cases could be potentially less demanding than for civil cases, which would still require tendency and coincidence evidence to possess significant probative value under ss 97, 98. However, as commented above, while this may create a tension in the law it would not add complexity to trials as they would be either criminal or civil; there would not be conflicting tests in a single case. And the best way to resolve the tension would be to extend sensible reform to the civil realm in due course rather than missing the opportunity to introduce sensible reform to the criminal realm.

A further argument that may be raised against the symmetrical balancing test is that it would add nothing to s 137. This section already requires prosecution evidence to be excluded if its prejudicial risk outweighs probative value. Unlike the more general exclusionary provision in s 135, s 137 is mandatory rather than discretionary. However, despite its mandatory nature, the burden under s 137 is still on the defendant to apply to the trial judge to have evidence excluded: eg, *Blick* (2000) 111 A Crim R 326 [19]-[20]. Adopting the symmetrical balancing test as an admissibility test would clearly put the burden on the prosecution. The location of the burden is significant in two respects. First, tendency and coincidence evidence would be presumptively subject to exclusion and could not be admitted in the absence of a prosecution application (and the notice requirement may be retained, etc). Second, given that probative value and prejudicial risk are both nebulous concepts,

and are very different concepts ('incommensurable'[13] may be an exaggeration), there may be quite a few cases where it is not clear where the balance lies. Such cases would be resolved against the party bearing the burden. And so, the balancing admissibility test would tend to operate as a more powerful exclusion than the existing s 137.

5. Probative value versus prejudice, and alternative formulations

The balancing admissibility test appears in various places in the UEL: ss 101, 135-137. There is a bit of variation in the references to the prejudice:

a) 'any prejudicial effect it may have on the defendant': s 101
b) 'danger of unfair prejudice to the defendant': s 137
c) 'danger that a particular use of the evidence might be unfairly prejudicial to a party': ss 135, 136

Despite the different wordings, prejudice has the same meaning in these sections. Sections 101 and 137 are concerned with prosecution evidence that may be prejudicial to a defendant, whereas ss 135 and 136 operate on evidence generally and so there is reference to 'a party'. The absence of the qualifier 'unfair' in s 101 makes no difference (*Ford* [2009] NSWCCA 306 [55], though it would be preferable for the language to be consistent). 'Unfair' is clearly implicit.

The main form of prejudice that each section is concerned with is the risk that the evidence may be given more weight than it deserves either through overvaluation or illegitimate reasoning (eg *Yates* [2002] NSWCCA 520 [252]). This will clearly carry a risk to factual accuracy. If tendency evidence is given too much weight it may lead to a wrongful conviction of an innocent defendant. Exclusion avoids this risk, but it introduces another risk to factual accuracy. The fact-finder will be deprived of the probative evidence that the evidence rationally possesses and may make an error the other way. With tendency evidence excluded, a guilty defendant may be acquitted.

Evidence that is probative but also prejudicial poses a dilemma for the court. The balancing test is the best answer that can be found, but it seeks to only minimise the potential cost of error. The horns of the dilemma can not be avoided altogether.

This balancing process, though imprecise and somewhat open-ended, is reasonably well understood. It is clearer and better designed than the alternative that the Royal Commission advanced and the Working Party is now considering: s 100A(1)(a); *Scoping Paper* [73]-[82]. (The Royal Commission put this forward as an exclusionary provision, not an admissibility test.) It would exclude evidence on the basis that its 'admission is more likely than not to result in the proceeding being unfair to the defendant'. The explicit introduction of the balance of probabilities to this test gives this formulation false precision. It is very unclear how it would operate. There is no reference here to probative value and prejudicial risk. Perhaps they would still be factors in determining whether the proceedings may be rendered unfair. But the notion of an unfair trial is very hard to pin down.

The proposed exclusionary provision bears a superficial resemblance to UEL s 90:

90 DISCRETION TO EXCLUDE ADMISSIONS

[13] See discussion in David Hamer, 'The legal structure of propensity evidence' (2016) 20 International Journal of Evidence and Proof 136, 154-158.

> In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
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> (a) the evidence is adduced by the prosecution, and
>
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

The operation of this provision is far from clear. Very different approaches were taken in different judgments in *Em* (2007) 232 CLR 67 in which Kirby J observed at [177]:

> Unfairness, for the purposes of s 90, cannot be defined comprehensively or precisely. A general law on evidence (such as the Act) must cover the admission (or rejection) of evidence adduced in a vast range of predictable and unpredictable circumstances. Moreover, what is "unfair" will vary over time in response to changing community attitudes and perceptions. The language of s 90 of the Act expresses the concept of unfairness "in the widest possible form".

Even to the slight extent that s 90 authorities might have clarified the meaning of unfairness in that context, regarding the exclusion of admissions, this would have little bearing on what unfairness might mean as a ground for excluding tendency and coincidence evidence.

In one respect the proposed unfairness test may operate quite differently from the balancing test. The balancing test weighs the *benefit* of the evidence to the prosecution (its probative value) against the risk it will mislead the jury and impose an unfair *cost* on factual accuracy and the defendant. However, the proposed unfairness test only focuses on the risk of 'the proceeding being unfair to the defendant'. In this respect it appears that the provision operates more narrowly than the broader 'principles of fair trial [which] require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims'.[14] In this respect, the proposed unfairness test may bring a shift in the defendant's favour, which is contrary to the intention of broadening admissibility. The broader notion of fair trial leave scope for arguments that 'the balance between the rights of the defendant and those of the complainant is in need of adjustment' if vulnerable complainants 'are to be given the protection under law to which they are entitled'.[15]

6. Guidelines on assessing probative value

I see value in providing guidelines on the assessment of probative value and prejudicial risk. These kinds of guidelines are included in UEL s 138(3) (regarding the exclusion of improperly and illegally obtained evidence) and appear to work quite well there.

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[14] R v Horncastle [2010] 2 AC 373, [67] (SC), quoting from Doorson v Netherlands (1996) 22 EHRR 330, [70]. See also Dietrich v R (1992) 177 CLR 192, 335 (Deane J), quoting from R v Barton (1980) 147 CLR 75, 101 (Gibbs ACJ and Mason J); R v E(AW) [1993] 3 SCR 155, [84].

[15] R v A (No 2) [2002] 1 AC 45, [55] (Lord Hope). See also ibid [92]–[94] (Lord Hope); PL v DPP [2004] 4 IR 494, 533, where Fennelly J suggested that sexual assault cases receive a 'special jurisprudence' in which the defendant 'may be required to accept the risk of an unfair trial'; cf 507 (Hardiman J), 520 (Geoghegan J). The more orthodox view is that, whilst 'the guarantee of a fair trial… is absolute', in determining 'what the concept of a fair trial entails… account may be taken of the familiar triangulation of interests of the accused, the victim and society': R v A (No 2) [2002] 1 AC 45, [38] (Lord Steyn).

On the probative value side, NZ includes a list: s 43(3) *Evidence Act*; *Scoping Paper* [72]. At common law, the Canadian Supreme Court provides a similar list in *Handy* [2002] 2 SCR 908 [76]:

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
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.

These lists could be considered, along with Australian jurisprudence (judicial decisions and commentaries), in developing some useful guidelines for Australian courts.

6.1 Similarity

One issue which could usefully be addressed in guidelines is the way similarity between other misconduct and the charged offence contributes to probative value. The confusion about this (with regard to 'significant probative value' in s 97, let alone ss 98 and 101) has not been fully resolved by *Hughes* (2017) 344 ALR 187: *Scoping Paper* [56]. While the majority was clearly less demanding on this point than Nettle J in dissent, the majority still placed emphasis on the opportunism and riskiness of the defendant's alleged behaviour: eg, at [2]. As the Royal Commission has argued, in this respect, the majority still appears to be taking a more stringent approach than is justified.[16]

6.2 Frequency

It is interesting to note, however, that the majority appeared to think that a lack of specificity in similarities could be offset by the frequency of alleged other misconduct: at [62]. However, it seems to make sense that the more frequent the other misconduct, the stronger the tendency. Also, the more frequent the other allegations, the more improbable that they are, coincidentally, all similar lies. It is worth putting factors like this in guidelines so they are not missed by trial judges and appeal courts. The High Court previously missed the importance of frequency in *Phillips* (2006) 225 CLR 303 (a common law decision).[17]

6.3 Consent issue

The guidelines might also address another problem with *Phillips* (2006) 225 CLR 303. This was a multiple complainant adult sexual assault case with consent in issue on some counts. High Court held that the evidence of other alleged victims was irrelevant to the complainant's consent. The court said (at [47]) that the evidence:

> does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her.

[16] Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'), Criminal Justice Report (Commonwealth of Australia, 2017) Parts iii-vi, 665.
[17] David Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 University of New South Wales Law Journal 609, 627.

As I have argued elsewhere, the court's logic does not withstand analysis.[18] As the House of Lords[19] and the New Zealand Court of Appeal.[20] have appreciated, if one woman has had non-consensual sex with the defendant, clearly this supports another woman's claim to have had non-consensual sex with the defendant. The common thread is the defendant's willingness to use force or other strategies in order to make women have sex with him against their will.

6.4 Tendency and coincidence again

A further point that could be made in the guidelines is that the similarity requirements are not more demanding for coincidence evidence than tendency evidence. The Canadian and New Zealand lists mentioned above apply to both kinds of evidence – no distinction is drawn. 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.[21] This would discourage prosecutors from seeking to always squeeze their other misconduct evidence into the tendency box, when it more naturally fits in the coincidence box.

6.5 Credibility, concoction and contamination

The guidelines could also clarify whether the credibility of a witness alleging other misconduct goes to admissibility or it is a matter to be left for the jury. This can become an issue in particular where the defendant claims that multiple allegations are the product of joint concoction or contamination. As the *Scoping Paper* notes at [93]-[97], the law on this point is uncertain.

The High Court in *IMM* (2016) 330 ALR 382 had the chance to settle it, but left matters very unclear. With regard to witnesses generally, the *IMM* majority suggested that the trial judge should take the evidence at its highest, leaving credibility for the jury: [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].[22]

On the narrower concoction issue, the *IMM* majority was equally ambiguous. Basten JA's suggestion in *McIntosh* that credibility be left for the jury received a degree of approval by the majority (at [59] fn 45). But the majority then supported reasoning inconsistent with this position. 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]. 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. [23]

This issue requires clarification. In the interests of simplicity it would be preferable if tendency/coincidence evidence were treated the same way as evidence more generally. Both with regard to tendency/coincidence evidence and more broadly it seems that currently, despite some of

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[18] David Hamer, 'Similar Fact Reasoning In *Phillips*: Artificial, Disjointed And Pernicious' (2007) 30 *University of New South Wales Law Journal* 609, 616.
[19] *R v Z* [2000] 2 AC 483.
[20] *R v Healy* (2003) CRNZ 93.
[21] Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016) [97.120], [98.120].
[22] Borrowing the example from JD Heydon, 'Is the Weight of Evidence Material to its Admissibility?' (2014) 26 *Current Issues in Criminal Justice* 219n 10, 234.
[23] 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.

the majority's statements in *IMM*, credibility can be taken into account at the admissibility stage. It would be preferable if this was made clear. This does not mean that any evidence of possible concoction or contamination would keep the evidence out. The credibility challenge would have to be such that the admissibility test is not satisfied – for example, having regard to the witness's credibility, the probative value of evidence of other alleged misconduct does not outweigh its prejudicial risk.

6.6 Commission versus identity cases

Another important issue regarding assessment of probative value, not mentioned in the *Scoping Paper*, is whether tendency/coincidence evidence acquires probative value more readily in commission cases (eg, most child sexual assault cases) as opposed to identity cases (eg, the less common 'stranger rape' cases, and a good proportion of murder cases). In *Hughes* (2017) 344 ALR 187 [39] the majority suggested that more is required of tendency evidence 'to prove the *identity* of the offender for a known offence [than] where the fact in issue is the *occurrence* of the offence'. In relation to identity, 'the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence'. But close similarity may not be required where the commission of the offence is in issue. Similar suggestions can be found in Gageler J's judgment (at [95]) and elsewhere,[24] including the Royal Commission's work.[25] But despite this widespread support the distinction has not been properly substantiated. The better view is that 'there is no special rule for identification cases'.[26]

Why would tendency evidence generate probative value more readily where commission is in issue rather than identity? The majority's explanation employs evidential context in a problematic manner. According to the *Hughes* majority, 'it is not necessary that the disputed evidence has [significant probative value] *by itself*. It is sufficient if the disputed evidence together with other evidence [has significant probative value]' ([40] emphasis in original). In a sexual assault case with commission in issue, the complainant's direct evidence typically addresses all the elements of the offence. The tendency evidence simply plays a supporting role – in *Hughes* 'its force was that [the complainant's account] should not be rejected as unworthy of belief': [60]. The more credible the complainant's account, the greater the probative value of the tendency evidence 'together with' the complainant's evidence, leaving less work for the tendency evidence by itself.

Suggestions that the demands on tendency evidence are greater in identity cases, for example 'stranger rape' cases, appear based on the implicit or express assumption that in these cases tendency evidence is 'the only evidence' on the issue.[27] But this will not always be the case. There may be other evidence on identity, such as evidence of opportunity or motive, an eyewitness or forensic identification evidence, an admission or consciousness of guilt evidence. This other evidence, will lessen the demand on the tendency evidence to some degree. On this reasoning, the

[24] *DPP v P* [1991] 2 AC 447, 462; see David Hamer, 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 23 *Monash University Law Review* 137, 183-5.
[25] Royal Commission, above n 4, 594-595, 606.
[26] *R v John W* [1998] 2 Cr App R 289, 301; quoted with approval, English Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, Cm 5257 (October 2001), [2.23], [4.6]; see also Hamer, above n 89, 184-5.
[27] *R v John W* [1998] 2 Cr App R 289, 300; see also Hamer, above n 89, 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.

acquisition of probative value depends, not on whether identity or commission is in issue, but on the degree of support provided by the evidential context.[28]

7. Guidelines on prejudicial risk

7.1 Risk of overvaluation

It would also be helpful in these reforms to clarify what is meant by 'prejudice'. As discussed above, it is generally understood that, in the context of excluding prejudicial evidence (ss 101, 135, 137), 'prejudice' is the predominantly the risk that the evidence will be given more weight than it deserves. The empirical research carried out for the Royal Commission concluded that 'fears or perceptions that tendency evidence … is unfairly prejudicial to the defendant are unfounded'.[29] However, while this research has value, the conclusion may be overstated. The gap between experiments and the real world is always difficult to breach.[30]

Of course, the risk of overvaluation is closely connected with the matter of actual (rational) probative value of the evidence. Concerns about overvaluation are based upon assumptions that other misconduct evidence is only weakly probative. I agree with the Royal Commission that other misconduct evidence is more probative than has traditionally been appreciated. The Royal Commission's work, and other research it draws upon, shows that it is common for child sex offenders to offend multiple times, and without specialising in terms of their choice of victims, and nature and circumstances of offending.[31] Other misconduct evidence has strong probative capacity and this leaves less room for jury overvaluation.

Nevertheless, unless the tendency/coincidence evidence provides certainty there will be some room for overvaluation prejudice. This might arise in various ways. In *Hughes* (2017) 344 ALR 187 [73] Gageler J distinguished the 'problem of cognitive bias' from 'the potential for a tribunal of fact to make improper use of tendency evidence'.[32] In *MM* [2014] NSWCCA 144 [43] the court

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[28] See *O'Leary v The King* (1946) 73 CLR 566, 582 (Williams J); Dyson Heydon, *Cross on Evidence* (10th Aus ed, 2015), [21175] fn 266; Colin Tapper, 'Similar Facts: Peculiarity and Credibility' (1975) 38 Modern Law Review 206, 208.

In *Hughes*, Gageler J provides another explanation tendency evidence having greater force in a typical commission case. The evidence serves two functions, working 'not only by increasing the likelihood that the defendant acted in accordance with that tendency on the occasion to which the charge relates, but also by making more plausible the testimony of the complainant that the defendant did so act on that occasion and less plausible the testimony of the defendant that he did not': (2017) 344 ALR 187 [96]. But to suggest that the dual use gives the evidence greater force relies upon double-counting. These are just two perspectives on the same inference. It lends support to the complainant's credibility by supporting an inference of commission.

[29] Jane Goodman-Delahunty, Annie Cossins and Natalie Marschukin, Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study, (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016), 271.

[30] The Goodman-Delahunty et al research has had a mixed reception: Royal Commission, *Criminal Justice Report*, 467-486; Jill Hunter and Richard Kemp, 'Proposed Changes to the Tendency Rule: A Note of Caution' (2017) 41 Criminal Law Journal 253.

[31] Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'), *Criminal Justice Report* (Commonwealth of Australia, 2017) Parts iii-vi,595, , 603, citing Annie Cossins, 'The behaviour of serial child sex offenders: Implications for the prosecution of child sex offences in joint trials' (2011) 35 Melbourne University Law Review 821, 837; Hamer, David Hamer, 'Proof of Serial Child Sexual Abuse: Case-law Developments and Recidivism Data' in Thomas Crofts and Arlie Loughnan (eds), Criminalisation and Criminal Responsibility in Australia (Oxford University Press, 2015) 242, 255-6

[32] This corresponds to some degree with Andrew Palmer's distinction between 'reasoning prejudice' – overvaluing evidence – and 'moral prejudice' – the risk that evidence of the defendant's other misconduct

referred to 'a real risk that the evidence will be misused by the jury in some unfair way, such as provoking some irrational, emotional or illogical response, or giving the evidence more weight than it truly deserves'. This is quite a catalogue. Figuring out the risk of the jury giving the evidence more weight than it deserves is not straightforward. Guidance could be helpful.

As far as the emotional impact of other misconduct evidence, this will obviously depend upon the nature of the other misconduct. Child sex offences may rate fairly high on the scale, particularly if they involve penetration (rather than just touching or exposure), and with aggravating factors such as abduction or additional physical harm. Misconduct in some regulatory areas may lie at the other end of the spectrum (eg, a case like *Martin v Osborne* (1936) 55 CLR 370, running an unlicensed carriage service).

Another factor is the extent to which the defendant's other misconduct is proven, as opposed to alleged or merely potential. The prior convictions in *Pfennig* (1995) 182 CLR 461 for child abduction, child sexual assault, and in circumstances where it appeared the defendant was planning to murder the child and dispose of the body are extremely prejudicial because of the nature of the other misconduct, and because the defendant admitted and pleaded guilty to these offences. The jury may consider the defendant to be a proven monster. This is different from cases where the other misconduct is very serious, but it is merely alleged (eg *Hughes* (2017) 344 ALR 187; *Phillips* (2006) 225 CLR 303) or potential (eg, *Perry* (1982) 150 CLR 580 where the evidence only connected the defendant with a serious of poisonings that may have been accidental). The jury, rather than considering the defendant to be a bad person, may entertain the possibility that the defendant is, him or herself, an innocent victim – of false accusations. Guidelines could invite the trial judge to consider this kind of factor.

7.2 Jury directions

An issue considered in the caselaw and mentioned in the *Scoping Paper* is the extent to which jury directions can avert the risk of jury misuse of the evidence: [84]-[86]. This raises another extremely difficult empirical issue on which there is a wealth of literature[33] and on which judges have disagreed markedly (eg, *BC* [68]-[70] Adams J, [102] Beech-Jones J). Part of the problem is that the effectiveness of jury directions depends very heavily on the subject matter of the direction, how it is phrased and delivered, and the broader context of the case. This is certainly a topic that should be considered, both in drafting guidelines, and also in providing guidelines on how to direct juries. However, there are no simple answers.

7.3 Prohibited reasoning

The considerations above are all epistemic, addressing the risk that the jury will give the evidence more weight than it deserves, leading to a mistaken conviction. The guidelines might also clarify whether the use of tendency/coincidence evidence carries non-epistemic costs. Traditionally, propensity reasoning was viewed as inherently prejudicial, and 'forbidden'.[34] This might reflect the

'may engender such "antipathy" towards the accused that the jury is unwilling to give them the benefit of any reasonable doubt'. Andrew Palmer 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161, 171.

[33] Eg Lily Trimboli, 'Juror understanding of judicial instructions in criminal trials' Contemporary Issues in Crime and Justice Number 119 (BOCSAR, 2008); Joel D. Lieberman, 'What social science teaches us about the jury instruction process' (1997) 3 *Psychol. Pub. Pol'y & L.* 589; Sara Gordon, 'Through the eyes of jurors: The use of schemas in the application of "plain language" jury instructions' (2013) 64 *Hastings L.J.* 643; of course this topic has generated numerous Law Reform Commission reports.

[34] Eg, *DPP v Boardman* [1975] AC 421, 453 (Lord Hailsham), see also 438 (Lord Morris), 461 (Lord Salmon).

view that propensity reasoning is inconsistent with the criminal justice system's commitment to rehabilitation, or the assumption of autonomy underpinning criminal responsibility.[35]

You would think that this proposition has clearly been rejected by s 97 which expressly permits 'tendency' reasoning in certain situations. However, the 'forbidden' notion lingers on. In *Velkoski* (2014) 45 VR 680 [116] the Victorian Court of Appeal warned of 'the danger of admitting evidence as tendency evidence simply because that evidence suggests that the accused is or was the sort of person who is more likely to commit the kind of offence with which he is charged'.[36] The Goodman-Delahunty research on prejudice lists 'character prejudice' as one of its concerns – 'the use of evidence from one crime to infer criminality on the part of the defendant'.[37] The *Scoping Paper* suggests that the point of the exclusion is 'to avoid the risk that the jury will use the evidence to reason impermissibly that the defendant is guilty of the charge because they have acted in a particular way in the past': [3]. But as Beech-Jones J points out in *BC*, this 'is not improper … To the contrary, that is the very reasoning that the tendency evidence supports and is the very basis upon which it is admitted.'[38]

8. Other issues

8.1 Proof of convictions

I see practical value in allowing convictions to be admitted as proof of other misconduct as occurs in the UK: *Criminal Justice Act 2003* (UK) s 103(2). To the extent that this requires exceptions to the hearsay and opinion rules, surely such exceptions could be justified. This seems worth considering, notwithstanding that the conduct giving rise to the convictions would still require some clarification.

8.2 Proof of acquittals

Alleged conduct for which the defendant has been acquitted should be available as tendency or coincidence evidence if other admissibility tests are satisfied. The law on this is currently unclear and requires clarification. The working party should not consider evidence of acquittals out of scope.

Current practice on this point in Australia appears unsettled. Stephen Odgers writes that the 'acquittal does not necessarily mean that the evidence will be inadmissible', citing a case which appears not to exist.[39] Dyson Heydon writes that 'the accused is entitled to the full benefit of the acquittal'[40] providing only general cross-reference to a discussion of issue estoppel and double jeopardy. Other jurisdictions adopt contrasting approaches. Canada uses the issue estoppel concept to preclude reliance on the acquittal.[41] New Zealand imposes no such bar, although the court may be

[35] Hock Lai Ho, *A Philosophy of Evidence Law—Justice in the Search for Truth* (2008), 337.
[36] quoting from *CEG v The Queen* [2012] VSCA 55 [14]; see also *BC v The Queen* [2015] NSWCCA 327 [40], and [24] (Adams J, diss) citing *Markby v The Queen* (1978) 140 CLR 108, 116 (Gibbs ACJ). See further, David Hamer, 'The structure and strength of the propensity inference: Singularity, linkage and the other evidence' (2003) 29 *Monash University Law Review* 137, 144-145.
[37] Jane Goodman-Delahunty, Annie Cossins and Natalie Marschukin, Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study, (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016), 45-46.
[38] [2015] NSWCCA 327 [81].
[39] Odgers, *Uniform Evidence Law* (12th ed, 2016) 763, citing *ELD* [2005] NSWCCA 413. This case is not on any databases. The case of *RN* has this medium neutral citation, but is not on point.
[40] JD Heydon, *Cross on Evidence* (10th ed, 2015), 717
[41] David Hamer, *The Admissibility and Use of Tendency, Coincidence and Relationship Evidence in a Selection of Foreign Jurisdictions: Report for the Royal Commission* (2016), 52.

reluctant to, in effect, retry the other charges without good reason.[42] In England there is no bar to prosecution reliance on allegations previously resulting in acquittals.[43]

This should not be considered inconsistent with the double jeopardy principle because there is no effort to punish for the behaviour for which the defendant was acquitted. It is simply using evidence of the other misconduct to prove guilt on fresh charges.[44] This may be entirely appropriate – the case against a serial murderer or rapist will be stronger at a later point, and the prosecution should be able to rely on the earlier offences even if they resulted in acquittals.

The House of Lords decision in *R v Z* [2000] 2 AC 483 provides an illustration of the importance of not imposing a bar. The defendant had obtained acquittals for three previous rapes, each being tried separately. It was only on the present rape charges that the court was presented with the full picture. The previous allegations, combined together, provided considerable support to the present charges. They were held admissible and the defendant was convicted. The House of Lords upheld the admissibility ruling rejecting the claim that this challenged the correctness of the earlier acquittals contrary to the protection against double jeopardy.

8.3 'Relationship/background evidence'

What about evidence of a defendant's other misconduct towards the complainant that the prosecution purports to adduce, not for tendency or coincidence reasoning, but merely to provide context or background regarding the relationship between the defendant and the complainant. If the court accepts that the evidence has a non-tendency/coincidence use, then this can avoid the exclusionary rules in UEL ss 97 and 98. However, the evidence may still carry prejudicial risk for the defendant. The defendant may seek to have it excluded under s 137 instead, but this is a weaker exclusion.

At common law it is not clear whether this kind of evidence is covered by the exclusionary rule. some courts at common law have assumed that evidence 'tendered for other purposes and [which] only incidentally reveals a prejudicial propensity … is outside the exclusionary presumption altogether'.[45] Members of the High Court of Australia (HCA) in *HML v The Queen*[46] warned against 'set[ting] up false dichotomies between evidence that establishes disposition or propensity and evidence that has some other use';[47] 'whether or not it is tendered for the *purpose* of establishing the accused's disposition, it will very often have that *effect*'.[48] But while *HML* appeared to lean towards a broad exclusion, a majority in *Roach v The Queen*[49] appear to support a narrow exclusion.[50]

This is a subject that received little if any consideration by the Royal Commission and is not mentioned in the scoping paper. With the broadening of admissibility, the distinction between tendency/coincidence evidence and relationship evidence becomes less important. It is interesting to note that the New Zealand definition of propensity evidence is in terms of what evidence

[42] Ibid 67.
[43] Ibid 24.
[44] Further, it may be possible to use the misconduct giving rise to fresh charges as 'fresh and compelling evidence' to overturn acquittal regarding the other misconduct: Crimes (Appeal and Review) Act s 100.
[45] Andrew Ligertwood and Gary Edmond, *Australian Evidence* (5th Ed, LexisNexis, 2010) 155, citing *Kailis v The Queen* (1999) 21 WAR 100 [188]; *R v Neiterink* (1999) 76 SASR 56.
[46] (2008) 235 CLR 334.
[47] Ibid [160] (Hayne J).
[48] Ibid [320] (Heydon J) (emphasis in original).
[49] (2011) 242 CLR 610.
[50] Ibid [28] As noted by Stephen Odgers, *Uniform Evidence Law* (14th ed, Thomson Reuters, 2014) 509, fn 117.

'show[s]', unlike the UEL approach which is by reference to the supposed purpose for which it is adduced. The New Zealand approach does appear preferable for the reasons given by the High Court in *HML*. Arguably, relationship/background evidence would be less prejudicial and so gain admission more readily under this approach.

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