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Submission to Royal Commission into Institutional Responses to Child Sexual Abuse

Criminal Justice Issues

Tendency and Coincidence Evidence

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1. Introduction

Evidence of other alleged victims can be crucial to a successful prosecution of child sexual assault. And yet, this kind of evidence is subject to an exclusionary rule. This is the case at common law – propensity evidence and similar fact evidence is subject to exclusion – and under the Uniform Evidence Law (UEL) – the tendency and coincidence rules (ss 97, 98, and also s 101). Despite the exclusionary rule(s), the evidence may be admissible if certain requirements are satisfied. The jury will then be given directions on how to use the evidence. The questions raised by the Consultation Paper is concerned with whether the exclusionary rules and the required jury directions are inappropriately restrictive on the use of this kind of evidence and call for reform to facilitate more effective prosecutions.

As well as assessing the stringency of the exclusionary rule and admissibility tests, it is appropriate to consider whether the law is working well otherwise.

In this submission I provide a general discussion of the underlying issues as I see them in the sections that follow, and then a set of answers to the specific questions at the end.

Broadly speaking, in my view the more lenient approaches to admissibility that are currently being taken (for example, in NSW and WA) appear about right. However, the law is applied very unevenly, and within Australia (for example, the common law in Queensland, and some NSW and Victorian courts applying the Uniform Evidence Law (UEL)) an inappropriately stringent approach is taken to tendency and coincidence evidence. At the same time, the law as it currently operates appears needlessly complex, with the development of principles which bear no relation to inferential logic.

2. Common law admissibility test

The common law admissibility test is extremely problematic. To gain admission, it seems, the evidence must be so probative that there is '[no] rational view of the evidence that is consistent with the innocence of the accused': *Pfennig* (1995) 182 CLR 461, 483. This test appears to be extremely stringent as it is based upon the criminal standard of proof. It seems to conflate and confuse probative value and proof. Perhaps its stringency may be tempered by the fact that the probative value assessment is contextual; other evidence, such as the direct evidence of the complainant may help reach the threshold. Part of the problem with the test is its incoherence.

However, a case like *Phillips* (2006) 225 CLR 303 demonstrates how it may be productive of injustice. Six (young adult women) complainants made similar allegations of sexual assault. The counts were joined at trial with cross admissibility and the defendant was convicted on most the counts. This was upheld on appeal to the Queensland Court of Appeal (QCA). But the High Court criticised the QCA for applying *Pfennig* too weakly. Holding that '[t]he similarities relied upon were not merely not "striking", they were entirely unremarkable' (at [56]), the High Court held that the evidence was wrongly admitted, ordered a retrial and released the defendant on bail. On release, the defendant promptly committed further offences. This should not have been a surprise. The evidence clearly supported the proposition that the defendant had a strong propensity for sexual assault. While the common law may only now apply in Queensland, this still requires attention for that jurisdiction.

I argue further below (at §3 in particular) that coincidence and tendency evidence is more probative than courts such as the HCA in *Phillips* appreciate.

3. The probative value of tendency/coincidence evidence, and the stringency of exclusion

Some Australian legislatures deliberately rejected the stringency of the common law admissibility test of *Pfennig: Velkoski* [2014] VSCA 121 [58]; *Crimes Act 1958* (Vic) s 398A (introduced 1997); *Evidence Act 1906* (WA) s 31A (inserted 2004); *Evidence Act 1929* (SA) s 34S (inserted 2011). The UEL predated the concerns with the stringency of the *Pfennig* test, but did not adopt the requirement of a fixed high threshold. Instead, the probative value threshold is 'significant probative value' (ss 97,98) and, further, the probative value must 'substantially outweigh' the risk of unfair prejudice (s 101).

The asymmetry in s 101, skewing the test towards exclusion, appears unjustifiable. The test can be viewed as a cost/benefit assessment where the evidence will be rejected even where the benefit (probative value) outweighs the cost (prejudicial risk). The asymmetry displays a conservative respect for what was 'one of the most deeply rooted and jealously guarded principles of our criminal law' (*Mawell v DPP* [1935] AC 309, 317). This conservatism appears unjustified.

As the courts have recognised, the admissibility tests require an 'evaluative judgment' (*Ellis* (2003) 58 NSWLR 700 [94]-[95]) turning on the 'facts and circumstances of the particular case' (*Hughes* [2015] NSWCCA 330 [189]). As a consequence, whether or not a particular test ends up being all that stringent to a large extent depends upon the approach taken in the individual case. The evaluative nature of the judgment creates scope for different courts to apply the same statutory test more or less stringently. Since each decision turns, to some extent, on the facts of the individual case, it is difficult to generalise about whether different courts are applying the test differently. However, it does appear that this is occurring. It was suggested in *Velkoski* that the Victorian courts are upholding a more stringent approach while the NSW courts have lowered the admissibility threshold (at [90], [140], [164]). This appears broadly correct, though the split between more and less stringent approaches does not run precisely along the NSW/Victorian border.

Courts taking the more stringent approach demand more numerous and distinctive similarities between the other misconduct and the charged offence for the evidence accrue sufficient probative value for admission. Echoing the HCA in *Phillips* (above §1), similarities in location, acts, victim age are downplayed as, 'in reality, unremarkable circumstances that are common to sexual offences against children', and insufficient for admission: *AE* [2008] NSWCCA 52 [42].¹ The less stringent approach, by contrast, recognises that, while '[s]ome features may be "commonplace" with

¹ See also *CGL v DPP (Vic)* (2010) 24 VR 486 [31]; *NAM v The Queen* [2010] VSCA 95, [11]; *GBF v The Queen* [2010] VSCA 135, [36], [42], [45]; *RR v The Queen* [2011] VSCA 442 [39]; *PNJ v DPP (Vic)* (2010) 27 VR 146, 151 [22]; *Murdoch* [2013] VSCA 272 [102]; *Velkoski* [2014] VSCA 121 [73]-[74].

allegations of this kind ... that does not deny them significance': *BC* [2015] NSWCCA 327 [99] (Beech-Jones J). In *Velkoski*, the Victorian Court of Appeal indicated, taking a stringent line, '[c]ommonality of relationship between offender and victim will not ordinarily be sufficient', mentioning, as examples, parent/child and teacher/student. Other courts, however, have suggested that the commission of a sexual offence within a certain relationship, for example, incest, is sufficiently remarkable to provide considerable probative value: eg, *BP* [2010] NSWCCA 303 [112]; *RHB* [2011] VSCA 295 [18]; *DR* [2011] VSCA 440 [58].

The more stringent approach seems out of step with other common law jurisdictions. Indeed, it seems that even the more lenient Australian approaches are stricter than approaches taken in comparator jurisdictions. At common law, the House of Lords indicated that, for admissibility, the court would not necessarily require shared features that are anything more than the 'stock in trade' of the paedophile: *DPP v P* [1991] 2 AC 447, 461. Under the *Criminal Justice Act 2003* (UK) propensity evidence gains admission without having to satisfy a special admissibility test, however, the court must be satisfied that the evidence of other misconduct does demonstrate a probative propensity. Because child sexual assault is viewed as 'unusual behaviour' in and of itself, the court will quite readily consider a propensity to be established on the basis of limited evidence, for example a single prior conviction without striking similarity: *Hanson* [2005] 2 Cr App R 21 [49]. In New Zealand's *Evidence Act*, propensity evidence must be more probative than prejudicial to gain admission. Evidence of child sexual assault satisfies this test quite readily since 'sexual activity with children is in itself unusual, even where it does not involve unusual acts': *Robin* [2013] NZCA 105 [25]; see also *Smith* [2010] NZCA 361 [17]; *Vuletitch* [2010] NZCA 102 [38].

The less stringent approach to admissibility is preferable. The question of the probative value of evidence of other offending has empirical and logical elements, both of which call into question the more stringent approach. First, the suggestion that highly distinctive similarities are required for tendency or coincidence evidence to acquire significant probative value appears premised on a notion that child sex offenders are highly specialised in their offending. This is not borne out by empirical studies. As I commented in a recent chapter, reviewing some of the literature:

The empirical work in this area suggests that child sex offenders, in common with many other types of offenders, are "specialised generalists", tending to commit a range of offences but ... more likely to commit their specialization offence than any other particular offence'. Further, sex offenders 'tend to specialize in their sexual offending confining themselves to one victim-type'. A consistent finding has been that sex offenders that have selected child victims are unlikely to switch to adult victims, and vice versa, although sex offenders with adolescent victims might switch to either adult or child victims. Within the category of child sex offences, there is empirical support for the proposition that intrafamilial and extrafamilial offenders form distinct groups with 'little victim crossover'. Some studies suggest that offenders are consistent with regard to

the age and gender of the victim, but the other studies provide contrary evidence. Heil, Ahlmeyer and Simons found that while official reports suggested a lack of versatility (7% on age, 8.5% on gender), interview with polygraph revealed far greater versatility (70% and 36% respectively). A recent study suggests that while the gender of the victim and the level of violence may remain relatively steady for persistent offenders, there is greater variation in 'the nature of sexual acts (hands-on, hands-off, oral sex, and penetration) and victim's age'.²

This empirical work, which is consistent with research commissioned by the Royal Commission,³ does not support the notion that child sex offenders are highly specialist. Instead, it suggests that, in many respects, child sex offenders display considerable versatility.

Empirical work on the behaviour of child sex offenders connects with the probative-value enquiry in another respect – the relationship between predictability of repeat offending and probative value. Efforts to predict offending behaviour have not been very successful. Recidivism figures are generally quite low,⁴ and it has proven difficult to generate reliable detailed offender profiles.⁵ Some commentators suggest that the difficulty of predicting that a child sex offender will reoffend means that evidence of other offences lacks probative value.⁶ David Hoitink and Anthony Hopkins have recently argued, on this basis, that the 'restrictive and cautious approach to admissibility [of *Velkoski*] is warranted'.⁷ However, this misunderstands the logic of

² David Hamer, 'Proof of Serial Child Sexual Abuse: Case Law Developments and Recidivism Data' Arlie Loughnan and Thomas Crofts (eds), *Criminalisation and Criminal Responsibility In Australia* (OUP, 2015) 242, 255-6 (references omitted).

³ Michael Proeve, Catia Malvaso, Paul DeFabbro, *Evidence and frameworks for understanding perpetrators of institutional child sexual abuse* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016).

⁴ Eg, 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, Table 1, 825-828; Patrick Lussier and Jesse Cale, 'Beyond sexual recidivism: A review of the sexual criminal career parameters of adult sex offenders' (2013) 18 *Aggression and Violent Behavior* 445, 455. Accurate recidivism data for child sexual offending is difficult to obtain given the hidden nature of the offence. Cases considered by the Royal Commission suggest that many child sex offenders are chronic recidivists. But it is difficult to know the ratio of chronic recidivists to one-time offenders. The average recidivism rate may still be quite low.

⁵ Eg, Michael Proeve, Catia Malvaso, Paul DeFabbro, *Evidence and frameworks for understanding perpetrators of institutional child sexual abuse* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016).

⁶ Eg, Michael S Ellis, 'The Politics Behind Federal Rules of Evidence 413, 414 and 415' (1998) 38 *Santa Clara Law Review* 961, 982; CH Rose, 'Would the Tail Wag the Dog? The Potential Effect of Recidivism Data on Character Evidence Rules' (2006) 36 *New Mexico Law Review* 341.

⁷ David Hoitink and Anthony Hopkins, 'Divergent approaches to the admissibility of tendency evidence in NSW and Vic: The risk of adopting a more permissive approach' (2015) 39 *Criminal Law Journal* 303, 323.

probative value. The likelihood of a defendant, with a prior conviction, reoffending is only one element of the probative value of that prior conviction. This likelihood needs to be compared with the likelihood of someone without a prior conviction committing the offence. Prior conviction evidence is probative, not because it is highly probable that someone with a prior conviction is likely to reoffend, but because such a person is far more likely to commit an offence than someone without a prior conviction. Recidivism rates, while not incredibly high, are far higher than crime rates. Probative value is a 'comparative judgment', and its comparative nature suggests that tendency and coincidence evidence can have considerable probative value.⁸

The less stringent approach towards admissibility under the UEL may appear about right – though there are other problems as discussed below. But this approach has not received universal support. Even in NSW, some judges have recently drawn inspiration from the more stringent approach of the common law: eg, *BC* [2015] NSWCCA 327 [20] (Adams J, diss); *El-Haddad* (2015) 88 NSWLR 93 [70]. Perhaps the High Court in the *Hughes* appeal will provide greater certainty: [2016] HCATrans 201. However, whatever the High Court has to say – and its recent efforts in *IMM* [2016] HCA 14 don't provide much hope for it bringing clarity – this should not preclude a more extensive and considered legislative intervention to secure a less stringent approach to the admission of tendency and coincidence evidence.

4. The tendency / coincidence distinction

As well as the question of the stringency of the UEL admissibility test, concerns have been expressed about its complexity: *Velkoski* [2014] VSCA 121 [40]. One aspect of this is the distinction between the coincidence and tendency rules.

As 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: *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 UEL 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

⁸ Mike Redmayne, *Character in the Criminal Trial* (OUP, 2015) 131.

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 – that is too great a coincidence for so many similar allegations to be made if the defendant were innocent. To the extent that the possibility of coincidence is rejected, support is provided for the prosecution's alternative hypothesis – the defendant is guilty.

It is not clear how important the structural difference is between the sequential tendency inference and the holistic coincidence inference. 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
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.⁹

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.¹⁰ 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

⁹ Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016) [97.120], [98.120].

¹⁰ Quoted at (1995) 182 CLR 461, 472 (Mason CJ, Deane and Dawson JJ), 534 (McHugh J).

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 improbable for the defendant to commit similar offences on different occasions would also be improbable, and the prosecution theory would be no more plausible than the defence theory.

The strong similarities between the tendency and coincidence inferences call into question the significance of the distinction in the UEL. 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'.¹¹ These 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 does not.'¹² '[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.¹³

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.¹⁴ This

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

¹² *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].

¹³ 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].

¹⁴ *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].

principle has recently been overturned in Victoria by legislation.¹⁵ However, in NSW it seems that it has recently been adopted as a further admissibility requirement: *Matonwal* [2016] NSWCCA 174 [92].

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.¹⁶ 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 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.¹⁷ But where there are independent allegations from multiple alleged victims it is clear that the tendency inference is not indispensable.¹⁸ The accusations of other alleged victims provide independent support for the complainant's direct evidence of the charged offences.

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

¹⁵ *Jury Directions Act 2015* (Vic) ss 61-62.

¹⁶ *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.

¹⁷ 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.

¹⁸ 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].

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.

5. The risk of unfair prejudice

The traditional exclusion of tendency and coincidence evidence appears based upon both scepticism about its probative value and concerns over its prejudicial risk. These two considerations are related; the commonplace claim that the two are 'incommensurable' is overstated.¹⁹ The unfair prejudice concern to mainly boils down to the risk that the jury will give the evidence more weight than it deserves. The more probative the evidence actually is, the less the scope for the evidence to be overvalued. Probative value and unfair prejudice are in an inverse relationship. As discussed above in §3, there are strong arguments that tendency and coincidence evidence is more probative than traditionally appreciated. To the extent that this is correct, concerns about unfair prejudice should be discounted. Claims about 'reasoning prejudice' – that jurors harbour mistaken psychological beliefs regarding the consistency and uniformity of the behaviour – appear largely unfounded.

However, the prejudice concern does not disappear altogether. Unless the evidence is conclusive, there is still room for 'moral prejudice' to bring about a perverse conviction. It is plausible to suggest that jurors, hearing evidence that the defendant has or may have done bad things in the past, will fail to give the defendant the benefit of a reasonable doubt. On the other hand, the claim that a jury will follow judicial directions and not breach its ethical responsibilities also appears plausible.

Ultimately, whether or not there is a risk of unfair prejudice is an empirical question – do juries overvalue evidence? The empirical research commissioned by the Royal Commission provides some reassurance that juries comply with their ethical obligations and judicial directions and avoid reasoning and moral prejudice. However, empirical research into complex real world phenomena face immense challenges. It is very difficult to be sure that the research is ecologically valid. Goodman-Delahunty, Cossins and Martschuk went to great lengths to give realism to the experiments they conducted, but the 'mock jurors' would still have known that their 'verdict' posed no risk of locking up an innocent defendant or freeing a serial paedophile. Perhaps real jurors

¹⁹ See discussion in David Hamer, 'The legal structure of propensity evidence' (2016) 20 *International Journal of Evidence and Proof* 136, 154-158.

would behave differently and reason more prejudicially. Further, it extremely difficult to ensure that these kinds of experiments cover all potentially relevant variables. For example, it may be that prior convictions and admissions carry a greater risk of moral prejudice than disputed allegations: see *Pfennig* (1995) 182 CLR 461, 530 (McHugh J); *Mahomed* [2011] 3 NZLR 52 [89].²⁰ 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. My understanding of the Commission's empirical research is that they did not test a scenario involving evidence of prior convictions or admissions.

In this area in particular, there seems to be a difficulty in establishing the benchmark against which juror reasoning is compared. As discussed above in §3 and §4, the established legal understanding of tendency and coincidence inferences is confused and open to criticism. To determine whether jurors give too much weight to tendency and coincidence evidence we would need to know how much jurors should give tendency and coincidence evidence, and this itself is not clear-cut.

6. Concoction, contamination and credibility issues

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. The legal issue this raises is 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 UEL in Victoria and NSW.²¹ It may, however, operate more weakly reflecting the fact that the probative value requirement is generally lower under the UEL 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.²² And more recent NSW

²⁰ See also *ibid*, 157, 156-158.

²¹ *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].

²² *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

authorities, however, have thrown doubt upon it. In *McIntosh v The Queen* where 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].²³

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.²⁴

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 trial

designates truthfulness a jury question, but reliability a question for the trial judge: *Dupas* (2012) 40 VR 182 [50](c).

²³ 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.

²⁴ 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.

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 provide this explanatory function even if the grooming evidence implicated, not the defendant, but, for example, someone else from the same paedophile ring.²⁵

7. Fair trial principles

Under section 31A of the Evidence Act 1906 (WA), propensity evidence is admissible if the court considers that it would have significant probative value and 'that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial'. This test is open to criticism on the basis that it is incoherent and contrary to the fundamental principles of criminal justice to suggest that there might be a public interest in deliberately running the risk of an unfair trial.

This criticism is valid. However, this is not to say that the fair trial concept is purely for the defendant's benefit pointing, inevitably, towards the exclusion of potentially prejudicial evidence. 'In 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"'.²⁶ Clearly, it is in the interests of the prosecution and the community that child sexual assault be prosecuted effectively. Given the nature of child sexual assault the

²⁵ See David Hamer, 'The legal structure of propensity evidence' (2016) 20 *International Journal of Evidence and Proof* 136, 144-145, 141-147.

²⁶ *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].

prosecution's task is often extremely difficult. These trials are often word-against-word battles of credibility where the prosecution (appropriately) carries a very heavy burden of proof. The evidence of other alleged victims can be extremely valuable in such cases. It may be perceived as unfair for an overly stringent exclusionary rule to deny the prosecution access to this evidence. It is this kind of consideration that has led legislatures and courts to reject the stringency of the High Court's exclusionary rule in *Pfennig*, and which leaves the High Court's attachment to the rule in *Phillips* so open to criticism. A bipartisan conception of fair trial would confirm that the admissibility determination takes into account the prosecution's need for the evidence, given the nature of the case. In sex offences cases in particular, tendency and coincidence evidence is particularly valuable, and fair trial principles require that account be taken of this in determining admissibility.²⁷

8. Convictions and acquittals

It appears that a defendant's prior conviction is not admissible as proof that the defendant committed an offence on that other occasion: eg *Evidence Act 1995* (NSW) s 91. This exclusion seems to be based upon the view that it would breach the hearsay and opinion exclusionary rules to take the conviction as proof of the offence. The prosecution will instead have to prove the defendant's commission of that other offence through admissible evidence.

In some cases, the prosecution can achieve this quite simply, for example, where the defendant pleaded guilty and the guilty plea can be admitted as an admission. However, where the conviction stemmed from a contested trial, the prosecution's task may be more difficult. It may be that the defendant will admit the other offence as a way of avoiding the calling of other victims as witnesses, but there is potential for the proof of the other offences to become messy and awkward, particularly where witnesses are unavailable or unwilling. Given that the other offence has previously been proven, resulting in a conviction, it seems that these obstacles should be avoidable. Evidence of prior convictions is admissible to prove the commission of other offences in Canada and England, apparently without raising any grave concerns of injustice.²⁸ Obviously, if the prior conviction has been overturned or is under appeal, this may preclude reliance on it. It should not be hard to draft a provision that works effectively.

The fact that the defendant has previously been acquitted of an offence should not prevent the prosecution from being able to use evidence that the defendant committed the offence for a tendency or coincidence purpose. Current practice on this point in Australia appears unsettled. Stephen Odgers writes that the 'acquittal does not

²⁷ See David Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30 UNSWLJ 609, 634-7.

²⁸ David Hamer, *The Admissibility and Use of Tendency, Coincidence and Relationship Evidence in a Selection of Foreign Jurisdictions: Report for the Royal Commission* (2016), 17, 51.

necessarily mean that the evidence will be inadmissible', citing a case which appears not to exist.²⁹ Dyson Heydon writes that 'the accused is entitled to the full benefit of the acquittal'³⁰ 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.³¹ New Zealand imposes no such bar, although the court may be reluctant to, in effect, retry the other charges without good reason.³² In England there is no bar to prosecution reliance on allegations previously resulting in acquittals.³³

The English approach was laid down by the House of Lords in *R v Z* [2000] 2 AC 483 which 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.

9. Specific questions

- whether or not the law in relation to tendency and coincidence evidence and joint trials should be reformed

Yes. The common law admissibility test is too strict. The admissibility practice under the UEL is inconsistent. Some courts under the UEL take a relatively lenient approach to admissibility which appears about right. However, other courts apply the UEL too stringently. Further, the law is more complex than is necessary. There is scope to simplify the law and confirm the less stringent approach to admissibility.

- the validity of the concerns of the courts in relation to unfair prejudice in light of the Jury Reasoning Research findings and any other relevant material

The commissioned research provides some assurance that the risk of prejudice is not too great. However, in an area as complex as this concerns over ecological validity inevitably arise, and research of this kind can never provide unclouded insights into the real world phenomena.

However, there are other reasons to discount concerns over prejudice. Tendency and coincidence evidence is more probative than many courts appreciate. This, in itself,

²⁹ 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.

³⁰ JD Heydon (10th ed, 2015), 717

³¹ 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.

³² *Ibid* 67.

³³ *Ibid* 24.

suggests that concerns over unfair prejudice are often exaggerated simply because, as probative value increases, there is less room for the evidence to be overvalued.

- the approaches adopted in any overseas jurisdictions and, in particular, whether there is any reason why we should not recommend adopting the approach in England and Wales

The English legislation, like the UEL, has generated masses of appeals. While the English approach may provide a useful direction for reform, it would require some refinement. The English reforms, in effectively dropping the exclusionary rule for propensity evidence, are pretty radical. I am not sure that Australia should go that far.

- should there be any requirement beyond relevance for admissibility and, if so, what should it be
- if there is to be any requirement for similarity in the evidence, how should it be expressed and what should it allow and exclude
- if there is to be a weighing of probative value against prejudicial effect, should the test favour admissibility or exclusion of the evidence
- should the burden for persuading the court be on the prosecution (to admit the evidence) or the accused (to exclude the evidence)

There is something to be said for the New Zealand approach. As compared with the UEL, for example, it avoids the complexity of the tendency/coincidence distinction. Also, since the exclusionary principle applies to evidence revealing the defendant's propensity, rather than evidence adduced for a particular purpose, it covers relationship evidence as well, so avoiding many of the difficult classification issues that such evidence generates.

The NZ admissibility test is simple – does probative value outweigh prejudicial risk. This avoids the double threshold (s 97/98 plus s 101). And it is lower than the UEL s101's asymmetrical requirement that probative value substantially outweighs prejudicial risk. Adopting this test would signal a relaxation in the exclusionary rule.

There is also benefit in the guidance the NZ Act provides in terms of assessing probative value and prejudicial risk: ss 43(3),(4). There is scope for this guidance to be improved and expanded so as to discourage conservative courts from seeking to continue with their pre-existing stringent approaches to admissibility.

- should issues of concoction, contamination or collusion be left to the jury

I think the minority approach in *IMM* should be taken to this issue as it should to probative value generally. There should be no assumption that evidence is credible and reliable. But the trial judge should take the evidence at its highest. It, on this basis, probative value outweighs prejudicial risk, the evidence should be admitted.

- should the evidence need to be proved beyond reasonable doubt

No. The criminal standard of proof only applies to the elements of the offence. Tendency and coincidence evidence is circumstantial evidence which is offered in support of the complainant's direct evidence. This support can be valuable even where it has not been proven beyond reasonable doubt that the defendant committed the other misconduct. Circumstantial proof operates cumulatively. It is not all or nothing.

- should evidence of prior convictions be admissible

Yes. This would be a practical and efficient reform. However, some qualification may be required to deal with prior convictions that are still vulnerable to be overturned.

- should evidence of alleged conduct for which the accused has been acquitted be admissible

Yes. Allegations that previously led to acquittals may, in combination, have sufficient strength to achieve a conviction on present charges.

- does any specific provision need to be made in favour of joint trials, in addition to any reform to the law in relation to admissibility of tendency and coincidence evidence
- if so, what provision should be made

As is the current practice, joinder should depend upon cross-admissibility.

- should any reforms apply specifically to child sexual abuse or institutional child sexual abuse offences, or should any reforms be of general application.

As a matter of principle, on a matter as significant as this, the reforms should be general. To treat institutional child sexual assault differently from inter-familial child sexual assault, or child sexual assault differently from adult sexual assault or non-sexual child abuse would appear unprincipled. The goal should be for simple, principled reform that is justifiable across the board. However, the general principles will take into account the differences between different kinds of cases. Consistently with fair trial principles, account may be taken of the important role that tendency and coincidence evidence plays in child sexual assault cases, given the dearth of other evidence. The increased need for the evidence in such cases can play a role in the probative value assessment.