Myths, Misconceptions and Mixed Messages: An Early Look at the New Tendency and Coincidence Evidence Provisions

David Hamer*

Following the Royal Commission into Child Sexual Abuse, Uniform Evidence Law jurisdictions are implementing reforms to the tendency and coincidence evidence provisions. These reforms aim to relax the exclusionary rules so that the prosecution can more readily rely upon other allegations against the defendant and the defendant's prior guilty pleas. The reforms purport to address the traditional misconception that such evidence would lack probative value unless the defendant's other misconduct shares distinctive similarities with the charged offence. The reforms can be expected to increase the rate of successful prosecutions. However, these benefits are likely to be compromised by the reforms' unnecessary complexity. Rather than improve understanding of the inferential value of other misconduct evidence, the reforms may sow confusion, wasting the resources of courts, and creating associated costs for complainants, defendants, and other participants.

I. Introduction

The Royal Commission into Institutional Responses to Child Sexual Abuse released its *Criminal Justice Report* in 2017, noting that "[t]he criminal justice system is often seen as not being effective in responding to crimes of sexual violence".[1] "[C]hild sexual abuse offences, including institutional child sexual abuse offences, are generally committed in private and with no eyewitnesses. In many cases, there will be no medical or scientific evidence capable of confirming the abuse."[2] A key recommendation was to introduce reforms "to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence".[3] This would make the prosecution's task easier where defendants were the subject of multiple allegations or had previously pleaded guilty to similar offences.

Draft legislation prepared for the Royal Commission by the New South Wales (NSW) Parliamentary Counsel's Office[4] was criticised by legal stakeholders, and the Council of Attorneys General (CAG) developed its own set of reforms to implement the recommendation.[5] At the CAG meeting in November 2019 the *Uniform Evidence Law* (*UEL*) members[6] agreed to adopt these reforms.[7] New South Wales

* Professor of Evidence Law, University of Sydney Law School.

[1] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Criminal Justice Executive Summary and Parts I–II, 9.

[2] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 411.

[3] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Recommendation 44, 634.

[4] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts VII–X, Appendix N.

[5] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1913 (Mark Speakman, Attorney General); Council of Attorneys-General (CAG), *Communique*, 1 December 2017.

[6] The *Uniform Evidence Law* legislation consists of *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT).

[7] CAG, *Communique*, 29 November 2019.

passed legislation incorporating the reforms into Pt 3.6 of its *UEL*, commencing 1 July 2020.[8] The Australian Capital Territory (ACT) followed with its own identical reforms, commencing 29 July 2020.[9] Other *UEL* jurisdictions are expected to pass identical amending legislation. The new provisions will apply to proceedings commencing after the commencement date including those that concern allegations relating to events prior to the commencement date.[10]

The reforms may go some way towards achieving the Royal Commission's goal of facilitating the prosecution of child sexual offences (CSOs). However, the design and drafting of the reforms are flawed in a number of respects. Prior to the reforms, the *UEL* tendency and coincidence provisions were described by the Victorian Court of Appeal (VCA) as "exceedingly complex and extraordinarily difficult to apply".[11] The reforms do nothing to address the problem of complexity. Indeed, they introduce several further layers of complexity.

The reforms retain the existing double exclusionary rule – one each for tendency evidence (s 97) and coincidence evidence (s 98) – and the double admissibility test (ss 97(1), 98(1)(b) and s 101(2)). The reforms make it easier for the prosecution to satisfy the admissibility tests. The first admissibility test continues to require that tendency and coincidence evidence, to gain admission, have "significant probative value". However, in certain highly restricted situations it will be presumed that evidence has this required level of probative value. The presumption only applies to tendency evidence, about a defendant's sexual interest in children, in CSO proceedings, where commission is in issue. The presumption is rebuttable, but this possibility is subject to further constraints.

The second admissibility test in s 101 has been relaxed. Previously, for prosecution tendency and coincidence evidence about a defendant to gain admission, its probative value had to "substantially outweigh" the risk of prejudice. The asymmetry has been removed; probative value now needs only "outweigh… the danger of unfair prejudice".[12] In satisfying this relaxed balancing test, the prosecution may take advantage of the s 97A presumption of significant probative value in the very limited situations in which the presumption is available. Note that, the s 101 reform is not subject to the s 97A restrictions. It applies to all prosecution tendency and coincidence evidence about the defendant.

Part II of this article briefly considers the background to the reforms – the pre-existing case law regarding the probative value and admissibility of tendency and coincidence evidence under the *UEL*, and the Royal Commission's view that the law operates too strictly. Part III then closely examines reforms to the admissibility tests – the s 97A presumption of significant probative value and the relaxation of the second balancing admissibility test in s 101. Part IV provides a critical examination of the numerous restrictions operating on the operation of the s 97A presumption.

The article concludes in Part V that the reforms are likely to facilitate CSO prosecutions in many cases. However, the reforms are poorly designed and self-defeating. They purport to further the understanding of the inferential value of tendency and coincidence evidence. However, in adding to unnecessary legal complexity and technicality they appear more likely to proliferate confusion. The reforms risk wasting the resources of trial and appeal courts, with associated costs for defendants, complainants and other participants.

II. Background to the Reforms

This part begins with a brief discussion of the approach taken by courts to the exclusionary rule prior to the current reforms. In a series of decisions, the High Court has rejected the stringent approach favoured

[8] *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) s 2. For convenience, the new provisions will be referred to as *UEL* (2020).

[9] *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT) s 2; ACT Legislation Register.

[10] *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) s 28; see also *Rodway v The Queen* (1990) 169 CLR 515; 47 A Crim R 426.

[11] *Velkoski v The Queen* (2014) 45 VR 680, [33]; 242 A Crim R 222; [2014] VSCA 121.

[12] The wording of the reference to prejudice has also been modified to bring *UEL* s 101(2) into line with s 137. However, there was no significance to the former difference in wording: *R v Bauer* (2018) 266 CLR 56, [73]; 271 A Crim R 558; [2018] HCA 40.

by Victorian courts, however, the exclusionary rule remains relatively demanding. As outlined in the second section, the Royal Commission's jurisprudential and empirical research led it to the view that the probative value of tendency and coincidence evidence has been underestimated. The admissibility of tendency and coincidence evidence should be opened up. The Reforms currently being implemented are examined in the next part.

A. Assessing Probative Value, Pre-reform

Independently of the Royal Commission's work, the admissibility of tendency and coincidence evidence has been an area of considerable activity in recent years. Courts have differed as to the extent to which the other misconduct need correspond with the charged misconduct for the evidence to gain sufficient probative value for admission under the *UEL*. Some earlier authorities suggested that without distinctive similarities the other misconduct evidence would be virtually irrelevant. It would be "of so little moment as to render the evidence probative of nothing".[13] The evidence "would not be significantly if at all probative".[14] The proposed propensity would be "so general as to be practically inutile".[15] In recent years, a schism opened between the VCA, maintaining a more stringent approach to admissibility, and the NSW Court of Criminal Appeal (NSWCCA), adopting a more permissive approach. Several appeals have reached the High Court; however, clear guidance has not been forthcoming.

In 2014 in *Velkoski v The Queen* (*Velkoski*)[16] the VCA favoured a relatively stringent approach to exclusion, approving earlier authority that the features shared by the other misconduct and the charged offence would need to be "'remarkable', 'unusual', 'improbable' [or] 'peculiar'"[17] for tendency evidence to gain significant probative value. The VCA criticised the NSWCCA, which had suggested that the other misconduct need not be "closely similar"[18] with the charged offence, for lowering the admissibility threshold "too far".[19] The following year, the NSWCCA in *Hughes v The Queen* (*Hughes*) indicated it did "not accept that the language used by the VCA [in *Velkoski*] represents the law in New South Wales".[20] Robert Hughes, the 1980s TV star, had been convicted for a series of child sex offences against five complainants. At trial the prosecution relied heavily on tendency evidence from other complainants and other alleged victims. The NSWCCA upheld admissibility notwithstanding wide variation in the types of sexual misconduct, the contexts for alleged offending, the ages of the alleged victims, and their social and professional relationships with the defendant.[21]

The defence in *Hughes* appealed to the High Court arguing that the more stringent approach in *Velkoski* should be adopted. The other allegations were too "dissimilar"[22] and the alleged tendency at too high a level of "generality"[23] for the evidence to be admissible.[24] The appeal was dismissed by a majority of four to three. The majority judgment of Kiefel CJ, Bell, Keane and Edelman JJ described the VCA's

[13] *R v Fletcher* (2005) 156 A Crim R 308, 319–320 [49]–[50]; [2005] NSWCCA 338.

[14] *GBF v The Queen* [2010] VSCA 135, [26].

[15] *GBF v The Queen* [2010] VSCA 135, [31].

[16] *Velkoski v The Queen* (2014) 45 VR 680; 242 A Crim R 222; [2014] VSCA 121.

[17] *Velkoski v The Queen* (2014) 45 VR 680, [133]; 242 A Crim R 222; [2014] VSCA 121, citing *Reeves v The Queen* (2013) 41 VR 275, [53]; 236 A Crim R 448; [2013] VSCA 311. Previously, the Court had occasionally taken a more liberal approach, at least in incestuous CSO cases: *RHB v The Queen* [2011] VSCA 295, [17], [18]; *DR v The Queen* [2011] VSCA 440, [58]. Contrast *Velkoski v The Queen* (2014) 45 VR 680, [115]; 242 A Crim R 222; [2014] VSCA 121.

[18] *Velkoski v The Queen* (2014) 45 VR 680, [120], [155]; 242 A Crim R 222; [2014] VSCA 121, citing, for example, *R v Ford* (2009) 201 A Crim R 451, [41]; [2009] NSWCCA 306; *R v PWD* (2010) 205 A Crim R 75, [79]; [2010] NSWCCA 209.

[19] *Velkoski v The Queen* (2014) 45 VR 680, [164]; 242 A Crim R 222; [2014] VSCA 121.

[20] *Hughes v The Queen* (2015) 93 NSWLR 474, [188]; [2015] NSWCCA 330.

[21] Some was only held admissible in respect of some counts: *Hughes v The Queen* (2015) 93 NSWLR 474, [140]; [2015] NSWCCA 330.

[22] Hughes, "Appellant's Submissions", Submission in *Hughes v The Queen*, Case No S226/2016, 7 October 2016, [20].

[23] Hughes, "Appellant's Submissions", Submission in *Hughes v The Queen*, Case No S226/2016, 7 October 2016, [77].

[24] Hughes, "Appellant's Submissions", Submission in *Hughes v The Queen*, Case No S226/2016, 7 October 2016, [21].

approach in *Velkoski* as "unduly restrictive"[25] and inconsistent with the legislative scheme.[26] However, it is unclear how permissive the majority were in their approach to admissibility. While suggesting that significant probative value does not require "operative features of similarity with the conduct in issue",[27] the majority doubted whether it would be sufficient if "the evidence does no more than prove a disposition to commit crimes of the kind in question".[28] In this case, while there were wide variations in a number of dimensions of the alleged misconduct, the majority emphasised features which it saw as common to all the offences. As well as displaying the defendant's general "sexual interest in … underage girls", the evidence revealed that the defendant had "a tendency to act on that interest by engaging in sexual activity with underage girls *opportunistically*, notwithstanding the *risk of detection*'".[29]

In *Hughes*, Nettle J, dissenting, supported a more stringent approach to exclusion. He described the VCA's approach as "orthodox"[30] and, like the VCA, criticised the NSW courts "for so lowering the bar" without "justification in principle or as a matter of statutory interpretation".[31] Nettle J indicated that there must be "a logically significant underlying connection … unity or commonality"[32] which may be found in "similarity in the relationship of the accused to each complainant; … between the details of each offence or the circumstances in which each offence was committed; [or in the] modus operandi or system of offending".[33] He expressly held that the shared features of opportunism and riskiness did not amount to a sufficient connection.[34]

Hughes was decided just four years ago. But since then the High Court has handed down two further decisions regarding the admissibility of tendency evidence under the *UEL*, *R v Bauer* (*Bauer*)[35] and *McPhillamy v The Queen* (*McPhillamy*).[36] These are all but unanimous decisions[37] and while the composition of the High Court had not changed since *Hughes*, these decisions may lean more towards the stringency of the VCA in *Velkoski* and Nettle J's dissenting decision in *Hughes* than with the more liberal approach of the NSWCCA to which a majority of the High Court seemingly lent support in *Hughes*.

In *Bauer*, a prosecution appeal from the VCA, the High Court spoke of the need for a "special, particular or unusual feature",[38] "some feature of or about the offending which links the two together".[39] Without this, "evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant".[40] In *Bauer*, the tendency evidence was held to be cross-admissible, and the counts correctly joined, but the Court placed emphasis on a special shared feature.

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[25] *Hughes v The Queen* (2017) 263 CLR 338, [12]; 264 A Crim R 225; [2017] HCA 20.

[26] *Hughes v The Queen* (2017) 263 CLR 338, [32]; 264 A Crim R 225; [2017] HCA 20.

[27] *Hughes v The Queen* (2017) 263 CLR 338, [39]; 264 A Crim R 225; [2017] HCA 20.

[28] *Hughes v The Queen* (2017) 263 CLR 338, [57]; 264 A Crim R 225; [2017] HCA 20, see also [111] (Gageler J).

[29] *Hughes v The Queen* (2017) 263 CLR 338, [2]; 264 A Crim R 225; [2017] HCA 20 (emphasis added), see also [114] (Gageler J).

[30] *Hughes v The Queen* (2017) 263 CLR 338, [173]; 264 A Crim R 225; [2017] HCA 20.

[31] *Hughes v The Queen* (2017) 263 CLR 338, [194]; 264 A Crim R 225; [2017] HCA 20.

[32] *Hughes v The Queen* (2017) 263 CLR 338, [158]; 264 A Crim R 225; [2017] HCA 20.

[33] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20.

[34] *Hughes v The Queen* (2017) 263 CLR 338, [159], [169]; 264 A Crim R 225; [2017] HCA 20.

[35] *R v Bauer* (2018) 266 CLR 56; 271 A Crim R 558; [2018] HCA 40.

[36] *McPhillamy v The Queen* (2018) 92 ALJR 1045; [2018] HCA 52.

[37] In *McPhillamy v The Queen* (2018) 92 ALJR 1045; [2018] HCA 52 Edelman J agreed with the majority in a short separate judgment.

[38] *R v Bauer* (2018) 266 CLR 56, [48]; 271 A Crim R 558; [2018] HCA 40.

[39] *R v Bauer* (2018) 266 CLR 56, [58]; 271 A Crim R 558; [2018] HCA 40.

[40] *R v Bauer* (2018) 266 CLR 56; 271 A Crim R 558; [2018] HCA 40.

All the offences were against the same complainant. This provided the necessary link.[41] The High Court suggested that, in single complainant cases generally, "there is ordinarily no need of a particular feature of the offending to render evidence of one offence significantly probative of the other."[42]

In *McPhillamy*, a defence appeal from the NSWCCA, the High Court held the tendency evidence to be inadmissible. The defendant was charged with sexual offences against an 11-year-old altar boy, A, in the mid-1990s when the defendant was an acolyte. The tendency evidence related to admitted prior sexual misconduct against two 13-year-old boys, B and C, at a boarding school, 10 years earlier when the defendant was housemaster. A majority of the NSWCCA had upheld admissibility on the basis that there was an "overriding similarity" from which differences between the cases "did not detract".[43] It was open to the jury to reason that the defendant's sexual interest in boys had not attenuated over the 10-year time difference.[44] But the High Court preferred Meagher JA's dissenting judgment in the NSWCCA in which he referred to the "generality of the tendency"[45] and the "absence of sufficient similarity".[46] The High Court said there was a need for "some feature of the other sexual misconduct and the alleged offending which serves to link the two together"[47] and emphasised that there was "no evidence that the asserted tendency had manifested itself in the [intervening] decade".[48] It was not enough that the defendant held a similar supervisory position over all three boys, that the boys were close in age, and that they alleged broadly similar sexual misconduct.[49] The Court noted differences between the circumstances of the other misconduct and the charged offence[50] – the boarders, homesick and vulnerable, had sought the defendant's support and the offending took place in the privacy of the defendant's bedroom; the defendant was alleged to have followed the altar boy into a public toilet and molested him there. In view of these differences, the evidence "rose no higher in effect than to insinuate that [the defendant] was the kind of person who was more likely to have committed the offences".[51]

It is difficult identifying broad trends from disparate admissibility decisions. Determining whether evidence has significant probative value is an "open-textured, evaluative task"[52] and, to a degree, each case turns on its own facts.[53] At the same time, comparisons must be drawn. "The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances."[54] While there were far fewer victims in *McPhillamy* than in *Hughes*, and a time gap, the similarities between the misconduct appear stronger and the differences slighter. *McPhillamy* appears to confirm that, despite *Hughes*, the High Court does not support a permissive approach to the admission of propensity evidence under the *UEL*.

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[41] *R v Bauer* (2018) 266 CLR 56, [60]; 271 A Crim R 558; [2018] HCA 40, at [55] distinguishing *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14.

[42] *R v Bauer* (2018) 266 CLR 56, [60]; 271 A Crim R 558; [2018] HCA 40.

[43] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [17]; [2018] HCA 52, quoting from *McPhillamy v The Queen* [2017] NSWCCA 130, [127].

[44] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [17]; [2018] HCA 52; *McPhillamy v The Queen* [2017] NSWCCA 130, [129].

[45] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [18]; [2018] HCA 52.

[46] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [24]; [2018] HCA 52.

[47] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [31]; [2018] HCA 52.

[48] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [27]; [2018] HCA 52.

[49] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [4], [6], [7]; [2018] HCA 52.

[50] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [31]; [2018] HCA 52.

[51] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [32]; [2018] HCA 52.

[52] *Hughes v The Queen* (2017) 263 CLR 338, [42]; 264 A Crim R 225; [2017] HCA 20.

[53] For example, *Pfennig v The Queen* (1995) 182 CLR 461, 529 (McHugh J); 77 A Crim R 149; *R v Collins* [2013] QCA 389, [52] (McMurdo P); see also *Saoud v The Queen* (2014) 87 NSWLR 481, [36] (Basten JA); 243 A Crim R 229; [2014] NSWCCA 136.

[54] *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

B. Nexus, Similarity, and the Royal Commission's Views on Probative Value

The Royal Commission released its *Criminal Justice Report* in 2017 a few months after the High Court decided *Hughes*. The Royal Commission took the view that the High Court decision would broaden admissibility, but considered the decision did not go far enough.[55] As discussed in the previous section, since *Hughes*, in *Bauer* and *McPhillamy*, the High Court seems to have moved in the direction of greater stringency, speaking of the need for a "special, particular or unusual feature",[56] "some feature of or about the offending which links the two together".[57] The Court was scathing about the probative value of tendency evidence lacking such features.[58] If *Hughes* is too stringent, following *Bauer* and *McPhillamy* there is still greater need for reform.

The Royal Commission considered that the traditional judicial demands for shared distinctive features are misplaced. One of its objections is based upon the jurisprudence of probative value. The Royal Commission pointed out that the demand for specificity "overlook[s] the fact that the probative value of the tendency or coincidence evidence should be assessed in the context of the issues and the other evidence in the trial".[59] The contextual approach to probative value has been endorsed by the High Court on several occasions at common law and under the *UEL*. At common law in *Phillips v The Queen*, the Court held that, in assessing probative value, "due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case".[60] The majority in *Hughes* indicated that the requirement for significant probative value does not apply to "the disputed evidence … *by itself* [but to] the disputed evidence together with other evidence".[61] On the contextual approach, it seems that a weak connection between the other misconduct and the charged offence – for example, very few other instances of misconduct with only slight similarities with the charged offence – may be compensated by the prosecution having an otherwise strong case. An unqualified demand for a strong nexus or connection between the other misconduct and the charged offence fails to recognise that "the value of the tendency or coincidence evidence must be determined in light of the other prosecution evidence".[62]

As well as this jurisprudential point, the Royal Commission raised a further objection to demands for distinctive similarities or a strong nexus, one based upon empirical research. Such demands seem to assume that child sex offenders are highly specialised in their offending. However, the Royal Commission's work showed that while child sex offenders may have particular preferences, many offend against "both girls and boys and children of quite different ages, … in a variety of ways [and] in different contexts – institutional, familial and others".[63] From this the Royal Commission suggested that it is

[55] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 635.

[56] *R v Bauer* (2018) 266 CLR 56, [48]; 271 A Crim R 558; [2018] HCA 40.

[57] *R v Bauer* (2018) 266 CLR 56, [58]; 271 A Crim R 558; [2018] HCA 40. Virtually identical words were used in *McPhillamy v The Queen* (2018) 92 ALJR 1045, [31]; [2018] HCA 52.

[58] *R v Bauer* (2018) 266 CLR 56, [58]; 271 A Crim R 558; [2018] HCA 40; *McPhillamy v The Queen* (2018) 92 ALJR 1045, [32]; [2018] HCA 52.

[59] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 594.

[60] *Phillips v The Queen* (2006) 225 CLR 303, [63]; 158 A Crim R 431; [2006] HCA 4.

[61] *Hughes v The Queen* (2017) 263 CLR 338, [40]; 264 A Crim R 225; [2017] HCA 20.

[62] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 606. The *UEL* replicates the common law's ambiguity as to whether the assessment operates on the evidence standing alone or contextually. Sections 97 and 98 unhelpfully instruct the trial judge to assess the probative value of the evidence "either by itself *or* having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence" (emphasis added). Courts appear not to acknowledge the express ambiguity: for example, *BC v The Queen* [2019] NSWCCA 111, [75]; *DSJ v The Queen* (2012) 84 NSWLR 758, [72]; 215 A Crim R 349; [2012] NSWCCA 9; *R v Zhang* (2005) 158 A Crim R 504, [139]; [2005] NSWCCA 437; *R v MR* [2013] NSWCCA 236, [70].

[63] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 606.

unnecessary to demand detailed similarities in CSO cases. "The two most important similarities are already present – *sexual* offending against a *child*".[64]

It may be argued that, notwithstanding empirical findings regarding the behaviour of child sex offenders, past offending still provides a poor basis for predicting future offending.[65] On this view, low recidivism rates for child sex offending indicate that propensity evidence lacks probative value.[66] The Royal Commission rejected this argument pointing out that a criminal court is concerned with proof of a past event and not prediction of a future event.[67] Evidence may be highly probative and make a strong contribution to proof without necessarily providing a confident basis for prediction. Consider motive evidence; the possession of a motive to kill may be predictively weak: "the vast majority of people with a motive to kill do not go on to commit murder".[68] However, motive evidence can be crucial "because people with a motive to kill are more likely to kill than those without a motive to kill: it is the comparative element which creates probative value".[69]

In this connection the Royal Commission considered Mike Redmayne's argument that probative value can be understood by reference to comparative propensity – the likelihood of someone with a criminal history committing such an offence, relative to the likelihood of someone without this history committing such an offence.[70] Recidivism figures correspond roughly with the first value while figures for the incidence of crime provide some indication of the second value. Evidence of other offending gives rise to high comparative propensity rates because recidivism rates, while not high, are far higher than crime rates.[71] The Royal Commission reached its conclusions on the probative value of propensity evidence without express reliance upon the comparative propensity theory.[72] However, as outlined in Part IVC, comparative propensity reasoning is implicit, and sometimes explicit, in the probative value reasoning of courts.

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[64] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) (emphasis in original).

[65] Law Reform Commission, *Evidence*, Report No 26 (1985) Vol 1, [394] (*Interim Report*); see also *Hughes v The Queen* (2017) 263 CLR 338, [184] (Nettle J); 264 A Crim R 225; [2017] HCA 20.

[66] Law Reform Commission, *Interim Report*, n 65, [796]–[797]; Peter M Robinson, "Prior Convictions, Conduct and Disposition: A Scientific Perspective" (2016) 25 *Griffith Law Review* 197, 205; 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 Crim LJ 303, 323; Tamara Rice Lave and Aviva Orenstein, "Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes" (2013) 81(3) *University of Cincinnati Law Review* 795, 816; Charles H Rose, "Would the Tail Wag the Dog? The Potential Effect of Recidivism Data on Character Evidence Rules" (2006) 36 *New Mexico Law Review* 341. It is widely accepted that child sex offenders exhibit relatively low recidivism: for example, Taina Laajasalo et al, "Low Recidivism Rates of Child Sex Offenders in a Finnish 7-year Follow-up" (2020) 21 *Nordic Journal of Criminology* 103. However, some child sex offenders commit many offences: "On 4 October 2010, Gerard Vincent Byrnes was sentenced to 10 years' imprisonment, including a non-parole period of eight years, after he pleaded guilty to 44 child sexual abuse offences against 13 girls who were then aged between eight and 10 years": Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 6: The Response of a Primary School and the Toowoomba Catholic Education Office to the Conduct of Gerard Byrnes* (2015) 4.

[67] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 604, 607.

[68] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017)607, quoting Mike Redmayne, *Character in the Criminal Trial* (OUP, 2015) 16–17.

[69] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 607.

[70] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 605–606, citing Redmayne, n 68, 21–22. See also David Hamer, "The Significant Probative Value of Tendency Evidence" (2019) 42 *Melbourne University Law Review* 506, 544–546; David Hamer, "'Tendency Evidence' and 'Coincidence Evidence' in the Criminal Trial: What's the Difference?" in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 166–168.

[71] These relative values also correspond with the tendency and coincidence elements of propensity reasoning discussed in Part IVC: see further Hamer, "What's the Difference?", n 70, 166–168. These two values can also be understood as the numerator and denominator of a Bayesian likelihood ratio: Redmayne, n 68, 21–23; Hamer, "Significant Probative Value", n 70, 530–533.

[72] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 603.

III. The Double Admissibility Test and the Presumption of Significant Probative Value

The Royal Commission considered that courts have traditionally underestimated the probative value of tendency and coincidence evidence. This was a major reason for its recommendations that the exclusionary rule be relaxed. This part examines the modifications to the admissibility test. The first section takes a close look at the primary reform mechanism – a powerful presumption of significant probative value. In the limited situations in which it operates the presumption has the potential to admit tendency evidence far more readily. While the presumption is rebuttable, the scope of rebuttal is tightly constrained. Section B considers reforms to the second admissibility test. The balancing admissibility test has been relaxed – to require that probative value outweigh (no longer substantially outweigh) the danger of unfair prejudice – and also made subject to the presumption's operation. These reflect the Royal Commission's view that the prejudicial risk of tendency and coincidence evidence has been traditionally overstated. These reforms have the scope to open up admissibility to a considerable degree.

A. The s 97A Presumption of Significant Probative Value

As outlined in the previous part, the Royal Commission identified jurisprudential and empirical grounds for relaxing the exclusionary rule. The draft legislation prepared for the Royal Commission did not find favour, but the CAG developed an alternative set of reforms to implement the Royal Commission's recommendation to relax the exclusionary rule. The Royal Commission's draft legislation was messy,[73] but the new version, approved by the CAG and in the process of being adopted by *UEL* jurisdictions, is scarcely an improvement.

The centrepiece of the reforms is the presumption of significant probative value in s 97A. In certain defined situations propensity evidence will be "presumed … [to] have significant probative value".[74] (The restrictions operating on the scope of the presumption are discussed in Part IV.) The presumption is rebuttable. However, a trial judge will only be permitted to find that the evidence lacks significant probative value if "satisfied there are sufficient grounds to do so".[75] At this point the drafting becomes rather convoluted. Under s 97A(5), unless there are "exceptional circumstances" certain matters "(whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds".[76] The matters excluded from consideration are:

(1) differences in the "sexual interest or act" displayed in the other misconduct and the charged offence;[77]
(2) differences in the "circumstances" of the other misconduct and the charged offence;[78]
(3) differences in the "personal characteristics … (… age, sex, or gender)" of the other alleged victim(s) and the complainant;[79]
(4) differences in the defendant's "relationships" with other alleged victim(s) and the complainant;[80]
(5) the "period of time" between the other misconduct and the charged offence;[81]
(6) whether the other misconduct and the charged offence lack "share[d] distinctive or unusual features";[82] and
(7) the "level of generality" of the tendency allegedly displayed by the other misconduct.[83]

[73] David Hamer, "Propensity Evidence Reform after the Royal Commission into Child Sexual Abuse" (2018) 42 Crim LJ 234.

[74] *UEL* (2020) s 97A(2).

[75] *UEL* (2020) s 97A(4).

[76] *UEL* (2020) s 97A(5).

[77] *UEL* (2020) s 97A(5)(a).

[78] *UEL* (2020) s 97A(5)(b).

[79] *UEL* (2020) s 97A(5)(c).

[80] *UEL* (2020) s 97A(5)(d).

[81] *UEL* (2020) s 97A(5)(e).

[82] *UEL* (2020) s 97A(5)(f).

[83] *UEL* (2020) s 97A(5)(g).

Section 97A(5) will ordinarily prevent the court from taking these matters into account in assessing probative value. But these are precisely the kinds of things that courts would ordinarily consider.[84] As the majority in *Hughes* noted, the probative value of a tendency is in proportion with the "particularity"[85] with which it can be expressed. The problem is that courts traditionally have not appreciated that tendency evidence can gain significant probative without distinctive similarities. As discussed in the previous section, the Royal Commission thought *Hughes* too demanding in this respect, and subsequent High Court decisions appear still more demanding. In the second reading speech the NSW Attorney General indicated that the intention of the list of excluded matters is:

> to support the operation of the rebuttable presumption by ensuring that courts do not determine that the presumption is rebutted on the basis of the sorts of myths or misconceptions about the probative value of tendency evidence that have been perpetuated in case law, but were dispelled by the royal commission.[86]

The list of matters that are "not to be taken into account" is exclusive, immediately raising the question whether any potential factors are missing from the list. The list appears quite comprehensive, but there are several that do not appear. The list does not include the age of the defendant. "Since offending declines with age, one should be wary of thinking that a few convictions gained by age 19 says much about a person at age 24 if they have not offended since."[87] Nor does it mention the intervention of some significant event between the other misconduct and the charged offence, such as the defendant's attendance at a rehabilitation program.[88] These considerations would not necessarily be covered by the reference in s 97A(5)(e) to the "period of time" between the other misconduct and the charged offence. The list also does not include the number of other incidents. The trial judge may find that the other misconduct evidence lacks significant probative value because it was an isolated event.[89] These omissions seem more likely the result of oversight than calculation. These missing matters have the same basic nature as the matters that do appear.

Another matter missing from the list has a different nature: doubt about whether the defendant actually committed the other alleged misconduct. It is plain logic, not a myth or misconception, to suggest that evidence of other misconduct is not probative of the accused's guilt unless "there is some evidentiary link, direct or circumstantial, with the accused".[90] Nevertheless, this consideration does not always diminish probative value at the admissibility stage. Where there is direct evidence of the defendant's commission of the other misconduct, for example, from another alleged victim, then pursuant to *Bauer*, the trial judge at the admissibility stage should take this evidence "at its highest".[91] Confusingly, the reforms include a narrower version of the *Bauer* principle.[92] A new s 94(5) prevents the trial judge from considering "the possibility that the evidence may be the result of collusion, concoction or contamination". This leaves open an argument that *expressio unius est exclusion alterius* (an express mention of one matter indicates

[84] For example, Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters Professional Australia Pty Limited, 15th ed, 2020) [97.120].

[85] *Hughes v The Queen* (2017) 263 CLR 338, [64]; 264 A Crim R 225; [2017] HCA 20; Gageler J used the term "specificity": for example [93].

[86] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1915 (Mark Speakman, Attorney General), quoted in *R v Brookman* [2021] NSWDC 110, [24].

[87] Redmayne, n 68, 27, though he also notes "the hazard rate for sexual reoffending declines slowly compared to theft".

[88] See, eg, Friedrich Lösel and Martin Schmucker, "The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis" (2005) 1 *Journal of Experimental Criminology* 117.

[89] See, eg, *Bauer v The Queen (No 2)* [2017] VSCA 176, [82]; *R v Bauer* (2018) 266 CLR 56, [97]; 271 A Crim R 558; [2018] HCA 40. But "a single previous incident can form the basis of tendency evidence": *TL v The Queen* [2020] NSWCCA 265, [224] quoting from *Aravena v The Queen* (2015) 91 NSWLR 258 [86]; [2015] NSWCCA 288.

[90] *R v Sweitzer* [1982] 1 SCR 949, 949.

[91] *R v Bauer* (2018) 266 CLR 56, [69]; 271 A Crim R 558; [2018] HCA 40.

[92] The NSW Attorney General in the second reading speech noted that the corresponding recommendation "largely aligns" with *R v Bauer* (2018) 266 CLR 56; 271 A Crim R 558; [2018] HCA 40: New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1916 (Mark Speakman, Attorney General). No hint was given as to the rationale behind the slight misalignment.

that other matters are excluded)[93] and other credibility issues – such as the witness's demeanour, bias against the defendant, internal inconsistencies in her allegations, or delay[94] – *may* be considered by the trial judge at the admissibility stage. If *expressio unius* reasoning is rejected[95] and the *Bauer* principle applies more broadly this will still leave cases where the prosecution relies upon circumstantial evidence to establish the defendant's other misconduct. In such cases, the trial judge's doubts about whether the defendant committed other misconduct may diminish the probative value of the evidence.

The prohibition on the consideration of the listed matters is not absolute. The listed matters may be "taken into account [if] there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account".[96] This appears to establish a two-step process. First the trial judge should consider the prohibited matters in order to determine whether exceptional circumstances exist. Then, if this preliminary finding is made, the trial judge may consider those matters a second time in determining whether the evidence lacks significant probative value. There may be considerable overlap between the two steps, however, the trial judge would be well advised to keep them separate. As stated in the second reading speech, "[t]he threshold of exceptional circumstances in relation to the consideration of these matters was chosen intentionally in order to set a high bar".[97] No guidance is provided on what will make circumstances "exceptional" beyond making it clear that the conclusion may be reached as a result of the various matters in combination.

The s 97A presumption is powerful. However, as this discussion demonstrates, it is overly elaborate. While the actual presumption of significant probative value is straightforward, the two-stage rebuttal process is complex. Gaps in the drafting may be a further source of difficulty for courts and practitioners seeking to determine the effect of the presumption in specific cases.

B. Prejudice and the Revised Balancing Test

The reforms also make the second admissibility test in s 101 easier for the prosecution to satisfy, in two respects. Previously the balancing test was skewed in the defence's favour. For admission, the probative value of tendency and coincidence evidence had to "*substantially* outweigh" prejudicial risk.[98] The reforms remove the asymmetry. Evidence is admissible under the amended s 101 where its probative value exceeds its prejudicial risk to any degree. This reform is sensible. The balancing test is a cost-benefit test. The former asymmetrical version of the test operated irrationally in excluding evidence where its benefit (probative value) outweighed its cost (prejudicial risk) but not by a substantial amount.[99]

The second change is that the prosecution, in attempting to satisfy the balancing test, gets the benefit of the s 97A presumption (in the limited situations in which the presumption operates). Unlike in relation to the first admissibility test, it is not presumed that the second admissibility test is necessarily satisfied. The prosecution still must establish that probative value outweighs the danger of unfair prejudice. However, with probative value presumed to be significant, the test will be satisfied unless there is an,

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[93] Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 174.

[94] Legislative reform limits the scope for the trial judge to direct the jury that the credibility of an allegation of sexual assault is damaged by delay: for example, *Criminal Procedure Act 1986* (NSW) s 294. However, there is still scope for such a direction where the delay is substantial and unexplained: *Crofts v The Queen* (1996) 186 CLR 427, 452; 88 A Crim R 232. Presumably similar principles would apply to the trial judge at the admissibility stage.

[95] The maxim should be "applied with care … only when the intention it expresses is discoverable on the face of the instrument": Pearce, n 93, 177, quoting from *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94.

[96] *UEL* (2020) s 97A(5).

[97] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1915 (Mark Speakman, Attorney General); quoted in *R v Brookman* [2021] NSWDC 110, [57].

[98] *UEL* (2020) s 101(2).

[99] Hamer, n 73, 243–244; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 586. See further David Hamer, "The Legal Structure of Propensity Evidence" (2016) 20 *The International Journal of Evidence & Proof* 136, 155.

at least, significant danger of unfair prejudice.[100] If the danger is significant, the prosecution may still argue that probative value is more than significant – substantial, perhaps[101] – to satisfy the test. At this point the prosecution may maintain that certain aspects of the tendency evidence, including those listed in s 97A(5), favour probative value. As noted in the second reading speech, "[t]he provision also does not prevent the court from concluding that the tendency evidence may have a higher degree of probative value where there is, for example, a feature of the evidence that serves to link it to the alleged offending or the alleged conduct of the accused is particularly distinctive."[102]

These reforms significantly weaken the exclusionary potential of s 101. The s 97A presumption boosts the probative value of tendency evidence and, at the same time, with the removal of the asymmetry from the balancing test, less probative value is required for s 101 to be satisfied. The prosecution may also gain assistance in satisfying the s 101 balancing test from a third source – evolving attitudes towards the assessment of prejudicial risk.

As the majority noted in *Hughes*, "[t]he reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways".[103] The main concerns appear to be the risk that evidence of the defendant's other misconduct will have an undue influence on the jury, either from the jury's poor reasoning, or from its emotional response to the evidence.[104] In more recent years these risks have been downplayed by some courts attributing greater weight to the "intelligence and focus with which juries go about their deliberations",[105] particularly today's "better educated and more literate juries",[106] and particularly where they have been "properly directed".[107] This perspective has been qualified by the recognition that the too ready assumption that judicial direction cures prejudice would render the s 101 protection nugatory.[108] However, the Royal Commission, relying upon commissioned empirical research[109] and its own observations of actual trial results,[110] has further downplayed the risk of prejudice. And its findings have been relied upon in passing the reforms. As the NSW Attorney General noted in the second reading speech, "the royal commission found that the risk of unfair prejudice to the accused arising from tendency and coincidence evidence has been overstated and that, in fact, this risk is minimal."[111]

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[100] This assumes that the two are commensurable, which is a defensible assumption: Redmayne, n 68, 134; Hamer, n 99, 155; compare *Pfennig v The Queen* (1995) 182 CLR 461, 528 (McHugh J); 77 A Crim R 149.

[101] "'[S]ignificant' probative value must mean more than mere relevance but something less than a 'substantial'" degree of relevance": *R v Lockyer* (1996) 89 A Crim R 457, 459 (Hunt CJ), quoted in *R v Fletcher* (2005) 156 A Crim R 308, [106]; [2005] NSWCCA 338.

[102] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1915 (Mark Speakman, Attorney General).

[103] *Hughes v The Queen* (2017) 263 CLR 338, [17] (Kiefel CJ, Bell, Keane and Edelman JJ); 264 A Crim R 225; [2017] HCA 20.

[104] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20, see also at [73] (Gageler J); see also Odgers, n 84, [101.190]; Andrew Palmer, "The Scope of the Similar Fact Rule" (1994) 16(1) *Adelaide Law Review* 161, 169–171.

[105] *R v PWD* (2010) 205 A Crim R 75, [790]; [2010] NSWCCA 209.

[106] *R v H* [1995] 2 AC 596, 613.

[107] *R v PWD* (2010) 205 A Crim R 75, [90]; [2010] NSWCCA 209; see also *DAO v The Queen* (2011) 81 NSWLR 568, [172]; [2011] NSWCCA 63; *BC v The Queen* [2019] NSWCCA 111, [91]; *TL v The Queen* [2020] NSWCCA 265, [226].

[108] For example, *Taylor v The Queen* [2020] NSWCCA 355, [122] (xxvii), citing *Sokolowskyj v The Queen* (2014) 239 A Crim R 528, [56]; [2014] NSWCCA 55.

[109] Jane Goodman-Delahunty et al, "Royal Commission into Institutional Responses to Child Sexual Abuse: Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study" (Report, May 2016); compare Jill Hunter and Richard Kemp, "Proposed Changes to the Tendency Rule: A Note of Caution" (2017) 41 Crim LJ 253; Peter M Robinson, "Joint Trials and Prejudice: A Review and Critique of the Report to the Royal Commission into Institutional Child Sex Abuse" (2017) 43 *Monash University Law Review* 723.

[110] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 618.

[111] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1912 (Mark Speakman, Attorney General); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 607.

The new s 97A presumption of significant probative value and the relaxation of the s 101 balancing test appear likely achieve the goal of opening up admissibility. Of course, determining whether the admissibility tests are satisfied remains an "open-textured, evaluative task" and trial judges could conceivably maintain their former practices. In relation to broadly similar changes introduced into English law by the *Criminal Justice Act 2003* (UK) (*CJA*), Paul Roberts and Adrian Zuckerman suggested that "deep-seated attitudes are not going to be changed simply by reversing the polarity of judicial supervision, replacing presumptive exclusion … with a statutory rule of presumptive admissibility".[112] But the practice of English courts did change considerably. Judges recognised that the reform "completely reverses the pre-existing general rule".[113] They implemented the legislative intention "that evidence of bad character would be put before juries more frequently than in the past".[114] They respected the British Government's intention that greater "trust" should be put in juries "to use their judgment".[115]

The NSW Attorney General indicated in the second reading speech that the legislation "should be considered in light of the objective … to facilitate greater admissibility of tendency evidence".[116] It appears likely that Australian courts will seek to take heed of this message.[117] Unfortunately, however, the message may not come through as clearly as it might due to the presumption's complexity, discussed above, and the technical and baseless restrictions within which it operates, as discussed in the next part.

IV. Restrictions on the s 97A Presumption

At the centre of the reforms to the exclusionary rules is the rebuttable partial presumption of admissibility in s 97A. As explained above, this presumption may greatly assist the prosecution in satisfying the double admissibility test. However, the presumption has a tightly restricted sphere of operation. The restrictions operate by reference to the type of proceedings (child sex offence proceedings), the type of evidence (tendency evidence – not coincidence evidence – of a defendant's sexual interest in children), and it appears likely that the restrictions are also limited to cases where commission of an act is in issue (rather than identity, medical justification, or accident).

A. Criminal Proceedings Involving Child Sexual Offences

As indicated by the section heading, s 97A only operates in "proceedings involving child sexual offences".[118] Section 97A(1) provides that the section applies "in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue". This restriction reflects the Royal Commission's terms of reference which focused on "child sexual abuse and related matters in institutional contexts".[119]

The expression "child sexual offence" presents issues of interpretation.[120] "Child" is defined straightforwardly to mean a person under 18 years.[121] However, in other respects, the expression has

[112] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP, 2nd ed, 2010) 586.

[113] *R v Manister* [2006] 1 Cr App R 19, [35].

[114] *R v Edwards* [2006] 2 Cr App R 4, [1]; see also Redmayne, n 68, 145; John R Spencer, *Evidence of Bad Character* (Hart Publishing, 3rd ed, 2016) 19.

[115] Hilary Benn, *Standing Committee B*, House of Commons, Session 2002-03, 23 January 2003, Col 548.

[116] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1915 (Mark Speakman, Attorney General), quoted in *R v Brookman* [2021] NSWDC 110, [23].

[117] In *R v Brookman* [2021] NSWDC 110 District Court Judge Abadee rejected defence submissions that "would effectively seek to *restore* the position as it was prior to the 2020 amendments", indicating that this "would not … be a legitimate exercise in judicial power": [57].

[118] See *UEL* (2020) s 97A(1),(2), (6).

[119] Thankfully s 97A is not limited by the last three words quoted from the terms of reference: Terms of Reference, Attorney-General (Cth), 13 November 2014.

[120] Note also "child sexual offence" is defined to include conduct that occurred beyond the legislating jurisdiction but would have constituted a "child sexual offence" had it been committed in the jurisdiction: s 97A(6)(c).

[121] *UEL* (2020) s 97A(6).

unclear scope. It extends beyond offences involving "sexual intercourse" with a child, to offences involving "an unlawful sexual act with, or directed towards … a child".[122] This may not include possession of child pornography, particularly where the material, text or images, is not based on real children.[123] Also potentially lying beyond the scope of the section are grooming offences involving "apparently innocuous conduct"[124] rather than overtly sexual acts; with grooming offences "the critical feature is not the conduct itself, but the intention that accompanies it".[125] The extension to grooming offences also appears doubtful where "the 'child' does not exist and charges were laid following a police 'sting'".[126]

The restricted application of the presumption creates some odd contrasts. The prosecution may rely upon the presumption in criminal proceedings for child sexual assault, but alleged victims in related civil proceedings may not.[127] Further, tendency evidence will gain admission more readily in prosecutions of child sexual assault than in adult sexual assault prosecutions. This appears particularly surprising given that the high incidence and low enforcement of adult sexual assault in recent years has raised a similar level of concern as child sexual abuse, giving rise to widespread law reform.[128] The appropriateness of excluding adult sexual assault from the reforms was raised during the second reading debates,[129] resulting in the inclusion of requirement that the new laws be reviewed after two years.[130] In the meantime, trial judges may find these contrasts unwarranted and seek to resolve the tension either by applying s 97A weakly or by extending the increased permissiveness of s 97A to other types of proceedings.

B. Evidence of the Defendant's Sexual Interest in Children

In child sex offence proceedings, s 97A does not operate to assist the prosecution gaining admission for all tendency and coincidence evidence. The presumption is limited to tendency evidence about the defendant's sexual interest in children. The restriction to tendency evidence (to the exclusion of coincidence evidence) is discussed in the next section. This section considers the restriction to evidence of the defendant's sexual interest in children.

Section 97A(2)(a) applies the presumption to "tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest)".[131] Paragraph (b), which extends the presumption to "tendency evidence about the defendant acting on a sexual interest the defendant has or had in children", adds very little. Evidence that the defendant acted on a sexual interest would clearly be evidence about the defendant's sexual interest. However, the combination of these

[122] *UEL* (2020) s 97A(6)(a), (b).

[123] Hadeel Al-Alosi, "Criminalising Fictional Child Abuse Material: Where Do We Draw the Line?" 41 Crim LJ 183.

[124] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4668 (R Clark, Attorney-General), quoted in Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 83.

[125] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4668 (R Clark, Attorney-General), quoted in Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 83.

[126] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 79.

[127] The defence, facing an action in defamation for having labelled the plaintiff a paedophile, will also be unable to rely upon the presumption in invoking truth as a defence.

[128] Most recently reform has related to consent: Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (June 2020); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences*, Report No 148 (September 2020); Mark Speakman, "Consent Law Reform" (Media Release, 25 May 2021) <https://www.dcj.nsw.gov.au/news-and-media/media-releases/consent-law-reform>; see Andrew Dyer, "A Reasonable Balance: The New South Wales and Queensland Law Reform Commissions' Reports about Consent and Culpability in Sex Cases Involving Adults" (2021) *Australian Bar Review* (forthcoming); Andrew Dyer, "Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?" (2021) Crim LJ (forthcoming).

[129] For example, New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 March 2020, 2055 (Jenny Leong).

[130] *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) s 30.

[131] *UEL* (2020) s 97A(2)(a).

paragraphs makes it clear that the presumption is not limited to evidence of the defendant's commission of other CSOs or other sexual acts relating to children. The evidence may, for example, concern an admission by the defendant that he is or was sexually attracted to children.[132]

It is important to note that the statutory reference to "tendency evidence about the sexual interest the defendant has or had in children" turns, not only on the content of the evidence, but also its intended use. Consider a case where the defendant was charged with both CSO counts and adult sexual offence counts, and the prosecution sought cross-admissibility between the direct evidence of the various complainants. This would raise four distinct sets of issues – (1) cross-admissibility between CSO counts; (2) admissibility of the direct CSO evidence in relation to the adult sexual offence counts; (3) admissibility of the direct adult sexual offence evidence in relation to the CSO counts; and (4) cross-admissibility between the adult sexual offence counts:

(1) It seems clear that the s 97A presumption would apply in relation to the cross-admissibility of tendency evidence between the CSO counts. The content of the evidence concerns the defendant's sexual interest in children, and it is being used to show that the defendant's tendency to have a sexual interest in children.
(2) In most cases the direct CSO evidence would not be covered by the s 97A presumption in relation to the adult sexual offence counts. The CSO evidence shows the defendant's sexual interest in children, however, it is being used to show the defendant's more general tendency towards sexual misconduct. In an unusual case, the prosecution may argue that the CSO evidence is nevertheless being used to show the defendant's tendency to have a sexual interest in children, for example, where the defendant allegedly infantilised the adult complainants. (Note that this argument would not be available in proceedings with no CSO counts which would then not be CSO proceedings.)
(3) The issue whether the direct evidence of the adult sexual offences would be admissible in relation to the CSO counts resembles (2). In most cases the s 97A presumption would not apply as the evidence would be being used to show a more general tendency towards sexual misconduct. Again, however, if the adult complainants were allegedly infantilised, then the prosecution may be able to argue that their evidence is being relied upon to show the defendant's sexual interest in children.
(4) Finally, consider whether the s 97A presumption would apply in relation to the cross-admissibility of evidence between the adult sexual offence counts. The presumption would generally be unavailable. However, the prosecution may again argue that it does have application in those unusual cases where the adult complainants were allegedly infantilised by the defendant. (Note again that this argument would not be available in proceedings with no CSO counts.)

As with the restriction to CSO proceedings, the restriction to the defendant's sexual interest in children may strike trial judges as unwarranted. In particular, why should the powerful presumption aid cross-admissibility between the CSO counts, but not between the adult sexual offence counts? The tension may be resolved by s 97A being given a weaker application to tendency evidence of the defendant's sexual interest in children, or by a more permissive approach being taken to the other tendency evidence.[133]

C. Application to Tendency Evidence, Not Coincidence Evidence

The reforms operate within the existing structure of the *UEL*. Part 3.6 contains two exclusionary rules, s 97 for tendency evidence, and s 98 for coincidence evidence. "Tendency evidence" is defined as:

> Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, [adduced] to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind[.][134]

[132] For example, *R v Brookman* [2021] NSWDC 110, [13]–[15], [27], [47]–[53].

[133] *R v Brookman* [2021] NSWDC 110 may provide an illustration. Some of the evidence was the defendant's admissions that he was "turned on" by "young males": [15]. It was unclear whether "young male" fell within the scope of "child: in s 97A. Abadee District Court Judge resolved this issue by indicating that "even if s 97A did not apply … I would have found that the evidence was of significant probative value": [54].

[134] *UEL* (2020) s 97(1), Dictionary.

Coincidence evidence is defined as:

> Evidence that 2 or more events happened [adduced] to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they happened, or any similarities in both the events and the circumstances in which they happened, it is improbable that the events happened coincidentally[.][135]

Despite being subject to different exclusionary rules, on the face of the legislation at least, tendency evidence and coincidence evidence are subject to identical admissibility tests. These tests, discussed above, require the evidence to have significant probative value (ss 97, 98) and probative value that outweighs the danger of unfair prejudice (s 101(2)) to gain admission.

In addition to the restrictions noted in the preceding sections, the s 97A presumption is limited to tendency evidence. It has no application to coincidence evidence. In this respect the reforms depart from the Royal Commission's recommendations. The Royal Commission saw "little merit in maintaining" the distinction between tendency and coincidence evidence which, it suggested, "seems to be … artificial."[136] While the Royal Commission did not go so far as recommending that the distinction be abolished at this stage, it "anticipate[d that this would happen] in due course".[137] The Royal Commission certainly did not recommend that the artificial distinction be widened by limiting the reforms to tendency evidence.[138] This restriction may pose further difficulties for the courts.

The reforms amplify an existing line of authority. The Victorian *Criminal Charge Book* instructs that "[c]are must be taken to distinguish 'tendency evidence' from 'coincidence evidence'".[139] Some courts suggest that, to gain admission, "coincidence evidence will ordinarily need to exhibit a greater level of similarity, or commonality of features, than is required for tendency evidence".[140] But this line of authority is problematic. Rather than having a sound policy basis, the more stringent requirements for coincidence evidence appear to be largely based upon a misreading of a fine detail in the language of the coincidence rule in the *UEL*. The term "similarity" appears in the *definition* of coincidence evidence. This goes to the scope of the *exclusion*, not the requirement for *admissibility*. But from this courts have drawn the non sequitur that the admission of coincidence evidence "does, in terms, depend upon similarity. Tendency evidence does not".[141] "[T]he existence of similarities is a necessary condition of the admissibility of coincidence evidence."[142]

The Royal Commission followed a different more considered line of authority which views the distinction as problematic. Coincidence evidence and tendency evidence "overlap";[143] there is "awkwardness" in

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[135] *UEL* (2020) s 98(1), Dictionary.

[136] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 643.

[137] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017).

[138] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 642.

[139] Judicial College of Victoria, *Criminal Charge Book* (2020) 4.18 [5], citing *R v Nassif* [2004] NSWCCA 433; *Gardiner v The Queen* (2006) 162 A Crim R 233; [2006] NSWCCA 190; *KJR v The Queen* (2007) 173 A Crim R 226, [46]; [2007] NSWCCA 165; see also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (February 2021) [4-200], [4-235].

[140] *Page v The Queen* [2015] VSCA 357, [53]; see also *El-Haddad v The Queen* (2015) 88 NSWLR 93, [48]; 248 A Crim R 537; [2015] NSWCCA 10; *O'Keefe v The Queen* [2009] NSWCCA 121, [64]; *Rapson v The Queen* (2014) 45 VR 103, [11]; 244 A Crim R 386; [2014] VSCA 216; *CEG v The Queen* [2012] VSCA 55, [21]–[22]; *R v PWD* (2010) 205 A Crim R 75, [79]; [2010] NSWCCA 209.

[141] *RJP v The Queen* (2011) 215 A Crim R 315, 335 [113]; [2011] VSCA 443; see also *RHB v The Queen* [2011] VSCA 295, [17]; *R v PWD* (2010) 205 A Crim R 75, [50], [78]–[79]; [2010] NSWCCA 209; *Velkoski v The Queen* (2014) 45 VR 680, [176]; 242 A Crim R 222; [2014] VSCA 121; *Page v The Queen* [2015] VSCA 357, [46], [54].

[142] *Page v The Queen* [2015] VSCA 357, [46].

[143] *El-Haddad v The Queen* (2015) 88 NSWLR 93, [46]; 248 A Crim R 537; [2015] NSWCCA 10, citing *KJR v The Queen* (2007) 173 A Crim R 226, [46]; [2007] NSWCCA 165.

distinguishing between them.[144] As Basten JA in *Saoud v The Queen* (*Saoud*)[145] observed, "[the admission of] 'tendency' evidence will usually depend upon establishing similarities in a course of conduct, even though the section does not refer (by contrast with s 98) to elements of similarity."[146]

It is arguable that the distinction between tendency and coincidence evidence is not only awkward, it is fallacious.[147] The apparent difference between the two is largely one of characterisation. The probative value of tendency evidence depends not only on the strength of the tendency and the likelihood of the defendant engaging in the conduct, but also on the unusualness of the conduct, a coincidence notion. The probative value of tendency evidence will be greater where the conduct is unusual. Given the unusualness of the conduct it would be a coincidence to find that the defendant, though innocent, has an incriminating tendency. Correspondingly, the probative value of coincidence evidence depends not only on the unusualness of the conduct, but the strength of the tendency, and the likelihood of it manifesting in the conduct on the charged occasion. In *Saoud*, in which two female co-workers made similar allegations against the defendant, Basten JA appreciated that the evidence relied simultaneously upon both coincidence and tendency notions. The inference "combine[d] the implausibility of independent complainants both falsely describing similar conduct with the inference that a person who conducted himself in a particular way on one occasion may well have done so again on another".[148]

In *Hughes*,[149] a tendency evidence case, the High Court also referred the notion of coincidence in relation to the probative value assessment. The majority suggested that it is not only a matter of the strength of the tendency and whether "a person who has a tendency … to act in a particular way … may not have acted in that way, on the occasion in issue".[150] Regard should also be had to "the number of persons who share the tendency to … act in that way".[151] Gageler J combined considerations of tendency and coincidence in a relative judgment. The question is whether the tendency is "so abnormal … that a man shown to have such a tendency is … more likely than other men to have engaged in [the behaviour]".[152] The degree of probative value depends upon "how much more likely".[153] This reasoning, involving the relative consideration tendency and coincidence elements, is the comparative propensity reasoning outlined in Part IIB.

Whether or not one thinks there is a genuine distinction between tendency and coincidence evidence, the potential for overlap remains, at least in some cases. To a greater or lesser degree, the prosecution can choose whether to characterise evidence as tendency evidence or as coincidence evidence. The line of authority mentioned above, making greater demands of coincidence evidence, already motivate prosecutors to prefer the tendency characterisation.[154] The reforms will increase this motivation. This is

[144] *Saoud v The Queen* (2014) 87 NSWLR 481, [43]; 243 A Crim R 229; [2014] NSWCCA 136. See also *Page v The Queen* [2015] VSCA 357, [4], [51]; *RHB v The Queen* [2011] VSCA 295, [17].

[145] *Saoud v The Queen* (2014) 87 NSWLR 481; 243 A Crim R 229; [2014] NSWCCA 136.

[146] *Saoud v The Queen* (2014) 87 NSWLR 481, [44]; 243 A Crim R 229; [2014] NSWCCA 136, see also at [28].

[147] Hamer, "What's the Difference?", n 70, 168–170; Hamer, "Significant Probative Value", n 70, 530–533.

[148] *Saoud v The Queen* (2014) 87 NSWLR 481, [43]; 243 A Crim R 229; [2014] NSWCCA 136.

[149] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20.

[150] *Hughes v The Queen* (2017) 263 CLR 338, [17]; 264 A Crim R 225; [2017] HCA 20.

[151] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20.

[152] *Hughes v The Queen* (2017) 263 CLR 338, [109]; 264 A Crim R 225; [2017] HCA 20.

[153] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20.

[154] Ironically perhaps, this preference is a reversal of an early common law position. Coincidence or "improbability" reasoning was seen as a way of avoiding the supposed absolute prohibition on "propensity" or "character" reasoning: Law Reform Commission, *Interim Report*, n 65, 83 [165]; 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. The latter reasoning was viewed as more prejudicial: n 155. Note that South Australian legislation admits coincidence evidence more readily than evidence "that relies on … propensity or disposition": *Evidence Act 1929* (SA) s 34P(2)(b); *MDM v The Queen* (2020) 136 SASR 360, [57], [79], [84], [103], [107]–[108], [111], [116]–[117]; [2020] SASCFC 80.

unfortunate since coincidence reasoning leaves open the defendant's responsibility for the other harms. "The risk of prejudice is much less."[155]

In most CSO cases prosecution evidence of a defendant's other misconduct evidence will fit the tendency characterisation quite readily. For example, evidence that the defendant has previously pleaded guilty to CSO charges can be taken as evidence that the defendant has committed CSOs before and has a tendency commit CSOs.[156] Despite fitting squarely within the definition of tendency evidence, guilty pleas may also be viewed as coincidence evidence. The trial judge may consider that the defendant's previous guilty plea on similar charges would be a "remarkable coincidence" if the defendant were innocent on the current charges.[157]

Other allegations that the defendant has committed CSOs fit the tendency characterisation less squarely. Traditionally, evidence of other allegations has been viewed as coincidence evidence. Highlighting the similarities between the allegations of the various witnesses, the prosecution would rely upon the improbability that they would all be telling similar lies.[158] In *Velkoski*, the VCA suggested that evidence of other CSO allegations would be "more potent" as coincidence evidence than as tendency evidence. In *Cox v The Queen*,[159] an adult sexual assault case involving other allegations, the VCA indicated that the trial judge was right to "not allow the Crown to run both tendency and coincidence in the same trial".[160] The evidence was only available for coincidence reasoning.[161]

To view evidence of other allegations as tendency evidence would require the trial judge to accept, at least provisionally, the truth of the allegations. As discussed in Part IIIA, this is how trial judge should approach evidence at the admissibility stage. Prior to the passage of the reforms the High Court in *Bauer* held that the trial judge should take evidence "at its highest";[162] "the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence".[163] As mentioned in Part IIIA, the reforms include a new provision to similar effect. A new s 94(5) prevents the trial judge from considering "the possibility that the evidence may be the result of collusion, concoction or contamination".[164] These principles preclude the trial judge from adopting "improbability of similar lies" reasoning.[165]

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[155] *Pfennig v The Queen* (1995) 182 CLR 461, 530 (McHugh J); 77 A Crim R 149; see also *Mahomed v The Queen* [2011] 3 NZLR 52, [89] (McGrath and William Young JJ); *Gardiner v The Queen* (2006) 162 A Crim R 233, [135] (Simpson J); [2006] NSWCCA 190; Law Reform Commission, *Interim Report*, n 65, 220 [400]; David Hamer, "The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence" (2003) 29 *Monash University Law Review* 137, 159; David Hamer, "The Case for Principled and Practical Propensity Evidence Reform" (2020) 94 *Australian Law Journal* 239.

[156] For example, *Page v The Queen* [2015] VSCA 357, [4].

[157] *Pfennig v The Queen* (1995) 182 CLR 461, 542 (McHugh J); 77 A Crim R 149.

[158] Donald Piragoff, *Similar Fact Evidence: Probative Value and Prejudice* (1982) 38; Zelman Cowen and Peter B Carter, "The Admissibility of Evidence of Similar Facts: A Re-examination" in Zelman Cowen and Peter B Carter (eds), *Essays on the Law of Evidence* (OUP, 1956) 116. *Velkoski v The Queen* (2014) 45 VR 680, [175]; 242 A Crim R 222; [2014] VSCA 121. The third possibility, in addition to the witnesses telling the truth or coincidentally telling a similar falsehood (through dishonesty or mistake), is that the witnesses arrived at the same false accusation through a common cause, concoction or contamination: *DPP v Boardman* [1975] AC 421, 444 (Lord Wilberforce); *Hoch v The Queen* (1988) 165 CLR 292, 295 (Mason CJ, Wilson and Gaudron JJ); 35 A Crim R 47. Under the *UEL* this third possibility, however, is generally not to be considered by the trial judge at the admissibility stage: nn 91–92.

[159] *Cox v The Queen* [2015] VSCA 28.

[160] *Cox v The Queen* [2015] VSCA 28, [21].

[161] See also *Jacobs v The Queen* [2017] VSCA 309, an adult sexual offence case involving multiple allegations which the prosecution characterised as coincidence evidence.

[162] *Jacobs v The Queen* [2017] VSCA 309, [69]. This is consistent with statement of principle in *IMM v The Queen* (2016) 257 CLR 300, [49]–[54]; [2016] HCA 14 (*IMM*) but inconsistent with how the principle was applied in *IMM*. In that case *tendency* evidence was held inadmissible on credibility grounds: David Hamer, "The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after IMM v The Queen" (2017) 41 *Melbourne University Law Review* 689, 702–703.

[163] *R v Bauer* (2018) 266 CLR 56, [70]; 271 A Crim R 558; [2018] HCA 40.

[164] As discussed above, a question may be raised as to whether this is as broad as the case law principle of *R v Bauer* (2018) 266 CLR 56; 271 A Crim R 558; [2018] HCA 40, covering all credibility concerns, or just those expressly mentioned: nn 91–92.

[165] Hamer, "What's the Difference", n 70, 160.

While making the tendency characterisation more natural, the *Bauer* principle does not preclude a coincidence characterisation. The trial judge may still consider it a remarkable coincidence that the defendant had committed the other sexual offences, as alleged, if the defendant were innocent of the charged sexual offence. And, of course, the *Bauer* principle does not prevent a jury from employing "improbability of similar lies" reasoning. The sharp distinction between tendency evidence and coincidence evidence may raise difficulties where evidence has been admitted as tendency evidence, but the jury has been invited by the prosecution or the trial judge to engage in coincidence reasoning.[166]

Guilty pleas and other allegations fit the tendency characterisation quite well. But courts may be reluctant to extend it to cases where the defendant's link to other misconduct is weak and circumstantial. In *El-Haddad v The Queen*,[167] the defendant was linked to the importation of several packages of drugs but denied responsibility for any of them. The NSWCCA indicated that while "little distinction was made between the tendency rule and the coincidence rule at trial"[168] it "would regard this case as being one which predominantly involves coincidence reasoning".[169] In *Gardiner v The Queen*[170] the defendant, the President of a motorcycle club, was charged with several counts of illegal possession of weapons largely on the basis that the weapons were found in two of the club's premises. The NSWCCA appeared to consider that the evidence could be characterised as coincidence evidence (though lacking sufficient probative value for admission) but not as tendency evidence.[171] Such a characterisation issue could arise in CSO cases where the other alleged victims are unable to clearly identify the perpetrator, for example, because they are too young or do not know the defendant. In these cases, however, a tendency characterisation cannot be ruled out altogether. To the extent that evidence indicates that the other harms are the product of the defendant's misconduct, then there is an argument that the evidence shows (however weakly) the defendant's tendency to engage in that kind of misconduct. Given the strongly preferential treatment received by tendency evidence under the new s 97A, prosecutors may be prepared to push more strongly for tendency characterisation such cases.

Ironically, while s 97A strongly encourages the tendency characterisation, the reforms include a further provision to encourage prosecutors to make more use of the coincidence characterisation. A new s 98(1A) seeks to clarify that the evidence of multiple alleged victims making similar claims may be admitted under the coincidence rule. This provision is supposed to deal with the objection, raised in a couple of cases, that it would "strain the natural and ordinary meaning of the words"[172] to bring this evidence under s 98. According to this objection, s 98 is concerned with "objective" similarities in events and not similarities in witnesses' subjective accounts.[173] But this objection, as well as being pedantic and unpersuasive,[174] has received little support.[175] While it is true that, increasingly, evidence of multiple alleged victims is being adduced under s 97 instead of s 98, this is likely to be the consequence of the

[166] See also *Doyle v The Queen* [2014] NSWCCA 4 [100], [103], [145]; *KJR v The Queen* (2007) 173 A Crim R 226, [3], [52]; [2007] NSWCCA 165; *Gardiner v The Queen* (2006) 162 A Crim R 233, [117]; [2006] NSWCCA 190.

[167] *El-Haddad v The Queen* (2015) 88 NSWLR 93; 248 A Crim R 537; [2015] NSWCCA 10.

[168] *El-Haddad v The Queen* (2015) 88 NSWLR 93, [51]; 248 A Crim R 537; [2015] NSWCCA 10.

[169] *El-Haddad v The Queen* (2015) 88 NSWLR 93, [50]; 248 A Crim R 537; [2015] NSWCCA 10.

[170] *Gardiner v The Queen* (2006) 162 A Crim R 233; [2006] NSWCCA 190.

[171] *Gardiner v The Queen* (2006) 162 A Crim R 233, [133] (Simpson J); [2006] NSWCCA 190. See also at [61] (McClellan CJ at CL).

[172] *Tasmania v Y* (2007) 178 A Crim R 481, [37] (Crawford J); [2007] TASSC 112.

[173] *Tasmania v Y* (2007) 178 A Crim R 481; [2007] TASSC 112, citing *R v WRC* (2002) 130 A Crim R 89, [36] (Hodgson JA); [2002] NSWCCA 210.

[174] Rarely will a court have access to events other than through witness accounts. The reference in s 98 to "similarities in the events or the circumstances in which they occurred" should be interpreted to cover similarities in the witness accounts rather than just the inaccessible "objective" features.

[175] *Tasmania v Y* (2007) 178 A Crim R 481; [2007] TASSC 112 appears to have only been cited by Tasmanian courts. This aspect of *R v WRC* (2002) 130 A Crim R 89; [2002] NSWCCA 210 does not appear to have been taken up by other courts. Courts have regularly brought this evidence under s 98 and *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14 envisages such evidence being handled under s 98: [59]. See Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 13th ed, 2018) [101.120].

matters discussed above – the fact that courts admit tendency evidence more readily than coincidence evidence. Section 97A increases this imbalance, defeating the purpose of s 98(1A).

The distinction between tendency and coincidence evidence is artificial and unnecessary. By giving it greater importance, the reforms are likely to result in a waste of time and effort by parties and courts, and to engender jury confusion, prejudice, and error.

D. "Commission by the defendant of an act … is a fact in issue"

The s 97A presumption of significant probative value is potentially very powerful, but it only operates within a very narrow scope. As discussed in previous sections, it would only operate on *tendency evidence* about the defendant's *sexual interest in children* adduced in *child sex offence proceedings*. It does not apply to coincidence evidence, nor evidence showing other tendencies, nor other kinds of proceedings. In addition to these restrictions, it appears that the presumption only operates in proceedings where *commission* is in issue, rather than, for example, identity.

Actually, the existence and shape of the commission restriction is not entirely clear. It hinges on the interpretation of s 97A(1), which provides "[t]his section applies in a criminal proceeding in which the *commission by the defendant of an act* that constitutes, or may constitute, a child sexual offence is a fact in issue".[176] This is open to different interpretations. If emphasis is placed on the words "commission … of an act" (but not "by the defendant"), the presumption would be limited to cases where the defendant has been clearly identified by the alleged victim but denies the allegation. Many sexual offence cases involve allegations against people known to the complainant and are of this kind. However, a second interpretation is open. If emphasis is instead placed on the words "by the defendant", then the presumption would extend to identity cases.

The first interpretation, restricting the section to commission cases, is supported by reference to the background to the reforms.[177] It would pick up on a proposition which recently received the support of the majority and Gageler J in *Hughes*. The joint judgment indicated that "[t]he probative value of tendency evidence will vary depending upon the issue that it is adduced to prove".[178] More would be required of evidence adduced "to prove the *identity* of the offender for a known offence [than] where the fact in issue is the *occurrence* of the offence".[179] Subsequently, the Royal Commission endorsed this distinction between identity cases and commission cases:

> Where the tendency or coincidence evidence is not required to establish the identity of the accused – typically because the complainants have each named the accused as their abuser – it is not clear why any particular level of similarity between incidents of proven or alleged child sexual abuse is required.[180]

The Royal Commission's recommended relaxation of the exclusionary rule was limited to commission cases.[181] This passage from the Royal Commission's report was quoted in the NSW Attorney General's second reading speech.[182] The intention of the reforms appears to be to implement the Royal Commission's recommendation in this respect and confine the presumption's operation to cases where commission is in issue, and not identity.

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[176] Emphasis added.

[177] Arguably s 97A is ambiguous in this respect. However, ambiguity is not required for a broad reference to context. "The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy": *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow J).

[178] *Hughes v The Queen* (2017) 263 CLR 338, [39]; 264 A Crim R 225; [2017] HCA 20.

[179] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20; see also at [95] (Gageler J).

[180] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 595.

[181] Evidence (Tendency and Coincidence) Model Provisions cl 96A(1)(a): Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts VII–X, Appendix N, 594.

[182] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1913 (Mark Speakman, Attorney General).

The proposition that tendency evidence is inherently more valuable in commission cases than in identity cases lacks a solid basis. Underlying this proposition is the notion, discussed in Part IIB, that probative value is to be assessed contextually. The majority in *Hughes* suggested that the admissibility test does not apply to "the disputed evidence … *by itself* [but to] the disputed evidence together with other evidence".[183] The Royal Commission indicated that "the value of the tendency or coincidence evidence must be determined in light of the other prosecution evidence".[184] In the typical commission sex offence case, the other evidence, the complainant's direct evidence of the offence, may provide strong support – if accepted, it proves all the elements of the offence. The tendency evidence goes to the narrower issue of whether the "the complainant's account … has been fabricated".[185] On this reasoning, the true operative distinction is not between identity and commission cases, but between cases where the propensity evidence operates alone and those where it operates in conjunction with, and derives support from, other evidence.[186] "[T]here is no special rule for identification cases."[187]

There is no sound reason to allow tendency evidence in more readily in commission cases than identity cases. The line between the two may be negligible. Consider two almost identical cases. In both the complainant, a young child, testifies that the defendant, her stepfather, sexually assaulted her. In the first case the defendant denies that it happened at all. In the second, the defendant admits that the sexual assault happened but suggests that the child is confused, and it was actually her natural father that committed the sexual assault.[188] In both cases, the prosecution seeks to adduce tendency evidence that the defendant has prior convictions for child sexual assault. Why should the tendency evidence gain admission more readily in the first case than in the second case?

Consider another CSO case where the prosecution has medical evidence of the assault, but the child is too young to identify his abuser. The prosecution relies upon powerful opportunity evidence that only two people, the child's parents, had the opportunity to commit the assault. There is also evidence one of the parents, the defendant, has prior convictions for child sexual abuse. Although going to identity, the tendency evidence in this case may be considered particularly valuable and gain ready admission due to the limited number of potential perpetrators – the strong contextual opportunity evidence.[189] Confining s 97A to commission cases to the exclusion of identity cases lacks a sound rationale.

The drafting of this part of the section presents a further difficulty. Section 97A(1) limits the presumption to cases "in which the commission by the defendant *of an act* that constitutes, or may constitute, a child sexual offence is a fact in issue".[190] It seems that the presumption would not apply where, for example, the defendant admitted that he had touched the child as the child alleged, but claimed that it was accidental or was justified for a medical purpose.[191] As with the exclusion of identity cases, it is not clear why the prosecution should be denied the benefit of the presumption where accident or justification is in issue.[192]

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[183] *Hughes v The Queen* (2017) 263 CLR 338, [40]; 264 A Crim R 225; [2017] HCA 20.

[184] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III-VI, 606.

[185] *Hughes v The Queen* (2017) 263 CLR 338, [40]; 264 A Crim R 225; [2017] HCA 20; see also at [60] (Kiefel CJ, Bell, Keane and Edelman JJ), [95] (Gageler J).

[186] *R v John W* [1998] 2 Cr App R 289, 300; English Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, Cm 5257 (October 2001) [2.23], [4.6]; see also Roderick Munday, "Similar Fact Evidence: Identity Cases and Striking Similarity" (1999) 58 *Cambridge Law Journal* 45, 46; Hamer, "Structure and Strength", n 155, 184–185.

[187] English Law Commission, n 186, [2.23], [4.6].

[188] For example *HG v The Queen* (1999) 197 CLR 414;[1999] HCA 2.

[189] *TL v The Queen* [2020] NSWCCA 265, [224]; *O'Leary v The King* (1946) 73 CLR 566 (Williams J); see further discussion in Hamer, "Structure and Strength", n 155, 184–185.

[190] Emphasis added.

[191] For example *Hughes v The Queen* (2017) 263 CLR 338, [40], [107]; 264 A Crim R 225; [2017] HCA 20; *Velkoski v The Queen* (2014) 45 VR 680, [178]; 242 A Crim R 222; [2014] VSCA 121.

[192] In this respect, the majority in *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20 treated cases where the issue is whether the defendant's "anodyne conduct has been misinterpreted" in the same way as commission cases: *Hughes v The Queen* (2017) 263 CLR 338, [40]; 264 A Crim R 225; [2017] HCA 20.

V. Conclusion

As the Royal Commission recognised, the criminal justice system has failed to effectively enforce the prohibition on child sexual abuse. One of the obstacles faced by the prosecution in achieving convictions has been operation of the tendency and coincidence rules which exclude evidence of other allegations and guilty pleas. The Royal Commission recommended that the exclusionary rules be relaxed to facilitate CSO prosecutions. Model provisions, prepared by the CAG, are in the process of being adopted by *UEL* jurisdictions, beginning with NSW and the ACT.

Central to the reforms is the presumption of "significant probative value" in s 97A. It will be presumed that prosecution evidence satisfies the first admissibility test. Prior to the reforms the admission of propensity evidence was "exceptional".[193] Under the reforms, with regard to this first test, exclusion is "exceptional".[194] The reforms also make it easier for the prosecution to satisfy the second balancing admissibility test in s 101. The balancing test is no longer skewed in favour of the defence. The prosecution need only establish that the probative value of the challenged evidence outweighs (rather than substantially outweighs) the danger of unfair prejudice. And in establishing this, the prosecution obtains a boost from the s 97A presumption of significant probative value.

The NSW Attorney General may well be correct in predicting that the reforms will meet "the Royal Commission's objective of facilitating greater admissibility of tendency and coincidence evidence in child sexual assault proceedings".[195] However, the implementation of the reforms appears likely to be frustrated by poor design and mixed messaging. The NSW Attorney General claims that the reforms provide "[t]argeted legislative guidance [to] help dispel misconceptions that have minimised the perceived value of this evidence in the past".[196] However, this is not the whole story. The reforms may go some way towards dispelling the view that a defendant's other misconduct must share highly distinctive similarities with the charged offence to warrant admission. But the reforms propagate other myths and misconceptions – that tendency evidence is inherently more valuable than coincidence evidence; that tendency evidence in CSO cases is inherently more valuable than tendency evidence in adult sexual offence cases and other cases; that tendency evidence is more valuable where commission is in issue than where identity is in issue. In these respects, the reforms appear paradoxical and ill-conceived.

The tendency and coincidence evidence reforms work towards a vital goal – the more effective enforcement of the prohibition on child sexual assault. However, the achievement of this goal appears likely to be compromised by the needlessly excessive complexity of the reforms. This complexity appears destined to waste the resources of the courts and parties. It may also inhibit the proper understanding of the inferential value of a defendant's other misconduct, contributing to miscarriages of justice.

[193] *DPP v Boardman* [1975] AC 421, 444 (Lord Wiberforce), quoted in for example, *DSJ v The Queen* (2012) 84 NSWLR 758, [46]; 215 A Crim R 349; [2012] NSWCCA 9; *Phillips v The Queen* (2006) 225 CLR 303, [54]; 158 A Crim R 431; [2006] HCA 4.

[194] *UEL* (2020) s 97A(5).

[195] NSW Attorney General, "Evidence Law Reform" (Press Release, June 2019) <https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/evidence-law-reform.aspx>.

[196] NSW Attorney General, n 195.