Contemporary Comment

Tendency and Coincidence Model Provisions: An Analysis of the Proposals by the Royal Commission into Institutional Responses to Child Sexual Abuse

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Abstract

The Royal Commission into Institutional Responses to Child Sexual Abuse was constituted in 2013 to investigate historical and contemporary child sexual abuse committed in various institutional settings. As part of its work, the Royal Commission investigated the criminal justice system's response to offending of this kind. This investigation has included proposing amendments to the rules regulating the admission of tendency and coincidence evidence. The comment will examine the proposed changes to those rules, and the empirical basis for them. It argues that while there is certainly grounds for reconsidering the tendency and coincidence rules, the reforms proposed by the Royal Commission drastically and improperly lower the threshold for admissibility, and do not have a solid evidential basis.

Keywords: child sexual abuse – tendency – coincidence – evidence – propensity – jury reasoning – Royal Commission – admissibility – directions – Uniform Evidence Law

Introduction

This comment will detail the proposals made by the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission') regarding tendency and coincidence evidence. While there are grounds for reviewing the operation of the rules relating to tendency and coincidence, the reforms proposed in the model amendments fail to simplify the law and significantly undermine the ability of courts to ensure that trials are fair. The first part of this comment will briefly summarise the background and current operation of the tendency and coincidence rules. The second part will introduce the proposed reforms and contextualise them within work of the Royal Commission. In particular, I will review the jury reasoning research commissioned by the Royal Commission which sought to identify whether there was an empirical basis for the concerns regarding tendency and coincidence evidence. Part three will analyse specific aspects of the proposals, arguing that the amendments would

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drastically and improperly lower the threshold for admissibility. This is undesirable because of the risk of prejudice to the accused, across the board in criminal matters, which would have a detrimental impact on the administration of justice

Tendency and coincidence evidence

Tendency and coincidence evidence has had an awkward history in the courts. The common law has longstanding doubts about evidence that invites the tribunal of fact to infer that because a person has done something in the past, the person has therefore done the thing that is in issue in proceedings at hand (see, for example, *Maxwell v DPP* at 317). Similar concerns arise when the reasoning is that similarities with past events are so many that they cannot be put down to coincidence. Pitched at this level of abstraction, it is easy to see the problem, particularly when the matter is to be resolved to a criminal standard of proof. Logically, the fact that someone has done something in the past is not necessarily a reliable indicator that they have done a similar thing now (Hamer 2016b). Furthermore, there is a substantial body of evidence that confirms these concerns (Hoitink & Hopkins 2015, pp. 317–23; Goodman-Delahunty, Cossins & Martschuk 2016, pp. 42–69). However, it is also clear that these worries are no longer as strongly held as they once were — by either courts or legislatures. There have been a number of changes in common law jurisdictions that broaden the range of circumstances in which evidence of this type may be admitted (Hamer 2016a).

There are two important assumptions bound up in the traditional concern regarding evidence of this type. The first is that the tribunal of fact will reason that the person tends to behave a certain way or have a certain state of mind and therefore exhibited that behaviour or state of mind on the occasions in question. This heuristic frequently leads to error (Hoitink & Hopkins 2015, pp. 317–19). Its premise is that 'behavioural patterns are constant and [that] past behaviour is an accurate guide to contemporary conduct' (*Pfennig v The Queen* at 512). The second assumption is that previous misconduct will prejudice the jury against an accused; there is a concern that a jury may be inclined to be more punitive by past, but unconnected, bad behaviour.

In light of these concerns, the common law has adopted stringent tests for admissibility of evidence of this sort in criminal trials. For example, the test for admission of 'similar fact' or coincidence evidence is that that 'the evidence [possesses] a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged' (*Pfennig v The Queen* at 481). However, courts have not had the same reluctance to admit this sort of evidence in civil matters (*Mood Music Publishing Co Ltd v De Wolfe Ltd*). This seems to reflect fundamental differences in the nature of criminal and civil proceedings. As will be detailed below, this readiness to admit tendency and coincidence evidence in civil matters is proposed to be reintroduced in the model amendments.

In its national reviews of evidence law, the Australian Law Reform Commission ('ALRC') spent much time considering the best way to treat evidence of this type (ALRC 1985; ALRC 1987; ALRC 2005). While traditional concerns about this kind of evidence are conceptually valid, there are also circumstances where evidence of this nature is particularly cogent. This may be the case where the evidence shows a high degree of similarity, frequency or proximity with charged events. The probative value of such evidence is also increased where the similar acts are themselves distinctive — that is, unique in their similarity. Evidence of this nature has particular importance when prosecuting historical child sex offences (Shead 2014) because such matters often lack medical or other scientific evidence or witnesses other than

the complainant (Hamer 2106a, p. 6). Accordingly, prosecutors seek to adduce evidence of other sexual offences committed by an accused, to either demonstrate their tendency to commit the crimes currently in question, or invite the jury to reason that coincidence is improbable (Hoitink & Hopkins 2015).

Ultimately the *Uniform Evidence Act* ('UEA') adopts the rules set out in pt 3.6. This part defines tendency 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 (UEA s 97).

Coincidence is defined to be:

> Evidence that 2 or more events occurred [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 occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally (UEA s 98).

Assuming the evidence in question is relevant (UEA s 55), neither type of evidence is admissible unless certain procedural requirements are met and, importantly, the 'court thinks that the evidence will, either by itself or having regard to other evidence adduced … by the party seeking to adduce the evidence, have significant probative value' (UEA ss 97(1)(b) and 98(1)(b)). The part does not apply to evidence that only relates to the credibility of a witness, nor if the tendency etc is itself a fact in issue (UEA s 94). The part also provides that if evidence is admissible for some other purpose, it cannot be used for tendency or coincidence reasoning (UEA s 95) unless it is also admissible under pt 3.6. Where this is potentially an issue, it is addressed by directions to the jury (*Toalepai v The Queen* at [47]; *R v Jiang* at [44]; *DJV v The Queen* at [16]). As discussed below, the effectiveness or otherwise of jury direction in this context is extremely important. Finally, in the case of criminal proceedings, tendency or coincidence evidence about an accused is inadmissible unless the 'probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant' (UEA s 101).

The Royal Commission

The Royal Commission was constituted to investigate widespread and systemic child abuse in institutional contexts. The terms of reference provide the Royal Commission with a broad mandate to investigate 'what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future' (Royal Commission 2013, [a]) This includes identifying measures that 'reduce impediments that currently exist for responding to child sexual abuse' (Royal Commission 2013, [c]) and 'ensuring justice for victims through [among other things] prosecution' (Royal Commission 2013, [d]). The Royal Commission is directed by the terms of reference to focus on systemic issues, including changes in law over time.

In fulfilling its terms of reference, the Royal Commission engaged in a thorough review of the criminal justice system's response to child sexual abuse. This review spanned the entirety of the system from initial reporting to law enforcement, investigation, prosecutions and trials, and sentencing (Royal Commission 2016). The review took the form of a number of case studies, expert evidence (for example, Kirk & Barrow 2016; Hamer 2016a) and specially commissioned research, including the jury reasoning research discussed below. As part of its work in this respect, the Royal Commission released a comprehensive consultation paper

(Royal Commission 2016) and invited contributions from interested parties. Around the same time, it released its proposed amendments to the rules of tendency and coincidence.

The consultation paper on the criminal justice system's response to child sexual abuse provides in-depth consideration of the rules relating to tendency and coincidence evidence. It comprehensively surveys the law throughout Australia and explains how these rules have impacted the outcomes of specific prosecutions for sexual offences committed against children. The consultation paper casts a critical eye over the concerns relating to unfairness, as they are thought to arise in prosecution of this kind of offence. In particular, it is thought the shocking nature of the offences will make juries more susceptible to engaging in impermissible reasoning. The consultation paper, to a large extent, disagrees with the otherwise 'incontrovertible truth' (Royal Commission 2016, p. 416) that this kind of evidence creates unfair prejudice. Its position is based on two lines of thinking.

The first relates to the low rates of prosecutions, and equally low rates of convictions (Royal Commission 2016, p. 416). In light of these low rates, the consultation paper suggests that juries may not be unfairly prejudiced 'by the heinous nature of the crimes' (Royal Commission 2016, p. 416). In this respect, the consultation paper points to circumstances where juries have acquitted on all counts where there have been multiple complainants. However, arguably such instances are only support for the proposition that juries do not convict based solely on the nature of the charge and that they do, in fact, attend to the evidence presented. Other, more convincing, indicators of the absence of unfair prejudice are found in joint trials where the jury convicts on some charges, but not on others. These trials, and the rejection of 'inconsistent verdict' appeals, are seen as 'illustration[s] of the capacity of juries to consider the charges separately and to deliver verdicts unaffected by any unfair prejudice' (Royal Commission 2016, p. 416). This is encouraging in that it highlights that some juries have been able to engage in the complex process required of them in trials of this nature.

While considering the outcomes of specific case studies is helpful, without more it is unpersuasive for at least three reasons. First, it is perhaps trite to observe that the Royal Commission's sample is inherently skewed. By its nature and processes it is unlikely to able to closely examine circumstances where tendency or coincidence evidence *has* created unfair prejudice. Second, the Royal Commission's frame of reference is limited to child sexual assault. Accordingly, it is not well positioned to analyse the risk of unfair prejudice in other matters, particularly more mundane — but still serious — prosecutions. While this is not a problem for a consultation paper that is considering the criminal justice system's response to child sexual abuse, it does not provide a robust basis for proposing a legislative change with broader applicability, such as that in the model amendments. Third, that some juries have been able to engage in this kind of complex analysis does not mean all juries can. If a jury convicting on some charges listed on an indictment demonstrates that it has parsed the evidence closely, then the inverse may be true as well. We can infer from situations where the jury convicts on all charges that it may not have thoroughly analysed the evidence. With regards to the former situation, it is almost a logical necessity that the jury has engaged in this kind of analysis. Regarding the latter, there is the possibility that the jury did closely analyse the evidence and were satisfied of the defendant's guilt on all charges. Another possibility is that jurors did not engage in that close analysis and were prejudicially influenced by the evidence. That this second possibility cannot be excluded is one of the primary concerns of the rules regulating tendency and conscience evidence. And because it is largely obscured, a stronger basis for reform is needed.

Jury reasoning research

For the consultation paper, the stronger basis for its claims is found in the jury reasoning research commissioned by the Royal Commission. This research 'investigated the extent to which joint trials with cross-admissible tendency evidence infringed a defendant's rights, and whether jury reasoning and decisions in joint trials resulted in unfair prejudice to the defendant' (Goodman-Delahunty, Cossins and Martschuk 2016, p. 39). It is important to note the limited scope of this research; it focuses solely on trials of historical child sex offences. This kind of detailed observational research is a tremendously valuable contribution to understanding how juries reason. The conclusions provided a basis for reconsidering tendency evidence[1] rules as they apply to child sex offence trials with multiple complainants.

The scale of the study was significant. It engaged with more than 1000 participants, allocated into 90 juries. These juries witnessed videos of one of four different types of trials that made varying use of tendency and relational evidence, had varying degrees of complexity, and received one of five sets of judicial directions. The study gathered quantitative and qualitative data, with the latter seeking to identify 'the prevalence of impermissible reasoning and jury susceptibility to unfair prejudice' (Goodman-Delahunty, Cossins & Martschuk 2016 2016, p. 26). The study concluded that joint trials did not lead to 'impermissible reasoning' such as factual errors, emotional or illogical reasoning, application of a standard less than beyond reasonable doubt, and character prejudice (Goodman-Delahunty, Cossins & Martschuk 2016, pp. 26–7). Furthermore, the research did not find that the accumulation of charges resulted in unfair prejudice against the defendant (Goodman-Delahunty, Cossins & Martschuk 2016, p. 265). The study also investigated the effectiveness of jury directions and question trails in assisting the juries' reasoning. The conclusion were that the former were not helpful, but that the latter did increase the efficiency of the deliberations (Goodman-Delahunty, Cossins & Martschuk 2016, pp. 28–9). In this respect, the study called for more empirical research (Goodman-Delahunty, Cossins & Martschuk 2016, p. 37). The study authors concluded that:

> it is unlikely that a defendant will be unfairly prejudiced in the form of impermissible reasoning as a consequence of … the admission of tendency evidence. Given the low probability, we found there is negligible risk to the defendant of a conviction based on reasoning logically unrelated to the evidence (Goodman-Delahunty, Cossins & Martschuk 2016, p. 37).

While critique of the study itself is not the focus of this article, there is reason to be cautious about its findings when considering the amendments proposed by the Royal Commission. First, it is important to observe that the study's mock trials only focused on a limited range of scenarios depicting prosecutions for child sex offences. This limitation is important to keep in mind when considering the proposed legislative amendments — which are not similarly restricted to child sex offences. Second, the mock trials all relied on adult male complainants and witnesses (Goodman-Delahunty, Cossins & Martschuk 2016, p. 76). It is reasonable to suggest that juries may reason differently in trials for different offences and where the complainants, witnesses and accused have different personal characteristics. Third, while it is difficult to conceive of other methods for observing jury reasoning, beyond covertly observing actual juries, the mock trials have a degree of artificiality to them. The concern over unfair prejudice relates (at least in part) to emotional responses, which may not present as significantly in a simulated environment. The report acknowledges this limitation (Goodman-Delahunty, Cossins & Martschuk 2016, pp. 268–70). Accordingly, it would be

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[1] Note that the research did not address coincidence evidence *per se*, although transcripts of mock jury reasoning do suggest coincidence reasoning was employed (see Goodman-Delahunty, Cossins & Martschuk 2016, pp. 145, 163).

prudent to establish that this observed effect is reproducible in other contexts and by other researchers.

Model provisions

Notwithstanding the circumscribed ambit of the research, the Royal Commission released model provisions to amend the rules relating to tendency and coincidence which would apply to all offence types. The 'Evidence (Tendency and Coincidence) Model Provisions' ('model provisions') spell out two alternatives for reform: 'model A' and 'model B.'

Model A retains tendency and coincidence evidence as separate types of evidence but changes the test for admission of evidence of this nature. This is discussed further below but, briefly, the draft legislation proposes the introduction of the concept of 'relevance to an important evidentiary issue'. The section prescribes three circumstances in which evidence will fulfil this requirement. In determining this, the court is directed to assume the evidence in question is credible and reliable, reflecting the recent position established by the High Court in *IMM v The Queen*. Further, the operation of UEA ss 135 and 137 is excluded from the new pt 3.6. Section 137 is replaced by an exclusionary provision that seeks to avoid unfairness to the accused.

Model B also adopts the new admissibility test but also merges tendency and convinced evidence into the cognate concept of 'propensity' evidence. In other words, the new propensity provision combines what is currently tendency and coincidence evidence into a single provision. However, the two types of evidence are still separately defined two subsections within the section. In introducing this statutory concept of propensity evidence, the model amendments make clear that existing common law or equitable rules regulating propensity evidence are abolished (model B s 94(4)).[2]

The distinction between tendency and coincidence is not always clear in practice. However, while 'there is an awkwardness in the separation' (*Saoud v The Queen* at [43]), Justice Hulme RA notes 'they cannot be construed as equivalents' and therefore treating them as the same can result in error (Hulme 2009, p. 1). Hamer (2016b, p. 506) notes that '[c]ourts appear to be giving the distinction increasing significance, adding to the complexity of an already messy corner of evidence law'. Elsewhere, he has observed that tendency evidence is best understood as a subset of coincidence (Hamer 2017). This understanding is reflected in aspects of the majority's reasoning in *Hughes v The Queen* (2017). Accordingly, combining these two concepts into a single concept of propensity evidence may be useful simplification.

Issues with the proposed rules

The rules for procedure and evidence in criminal trials need to balance the interests of the community, the victims and the accused. It is relatively uncontroversial that continued complexity continues to beset the use of tendency and coincidence evidence. Thus it is appropriate that reform to these rules occurs in a manner aimed at simplifying the use of tendency evidence in appropriate circumstances, such as those detailed above. However, the proposed amendments do not achieve this objective and the draft provisions significantly undermine the ability of courts to ensure a fair trial.

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[2] Note that this abolition is also present in model A, which preserves the distinction between tendency and coincidence: model A s 94(4). In itself this provision is a welcome clarification of the position with regards to evidence of this kind.

General concerns

There are a number of noteworthy general concerns regarding to the proposed changes. First, while these proposals have been drafted by the Royal Commission, they are not intended to be limited in application to child sexual abuse prosecutions. The Royal Commission has identified issues regarding the cross-admissibility of evidence and joint trials in child sexual assault matters. These problems are particularly salient in prosecution of offences of this nature — as the circumstances in *Hughes v The Queen* demonstrate. As a matter of fairness to victims, there is a need to broaden the circumstance where evidence of this nature may be admitted. However, this must occur without undue prejudice against defendants. Further, in light of the fact that these reforms would apply across the criminal justice system, it is not enough to accept that the proposed models appropriately respond to the unique features of child sex prosecutions. The impact of these reforms in prosecutions for different offence types does not appear to have been fully canvassed. Different offences may lead to different assumptions, different approaches to reasoning by juries and different types of tendency or coincidence evidence being relied upon.

A second concern is that it is not clear that the model amendments simplify the law. These changes introduce new, often broadly defined tests that are profoundly uncertain in ambit. However, this may not be as significant as it first appears when it is recalled that the model amendments are largely based on current United Kingdom legislation, so it may be possible to draw on case law from that jurisdiction for guidance. Nonetheless, a simpler approach may be adopting the recommendations of Counsel Assisting in the consultation paper, namely that the balancing test in UEA s 101 be amended to require that the probative value of tendency or coincidence should only need to outweigh, and not substantially outweigh, its prejudicial effect in order to be admitted (Kirk & Barrow 2016). This would lower the threshold for admissibility in appropriate cases, but retain existing tests and their accumulated case law, as well as according the court a degree of discretion to avoid injustices.

Important evidentiary issue

The Royal Commission has proposed that the test for admissibility be changed from requiring that the evidence have 'significant probative value' (UEA ss 97(1)(b) and 98(1)(b)) to one requiring that the evidence be relevant to an 'important evidentiary issue' ('IEI'). What constitutes an important evidentiary issue is defined by the model amendments to be one of three things:

1. evidence that shows a propensity of a party to be untruthful if the party's truthfulness is in issue in the proceeding;
2. evidence that shows a propensity of a party to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding; or
3. evidence that could be relevant to any matter in issue in the proceeding if the matter is important in the context of the proceeding as a whole (Model Amendments ss 95A (model A) and 96 (model B)).

The three categories — the third in particular — are very broadly defined and accordingly the threshold for admission is lowered significantly. Beyond relevance to an IEI, the test does not effectively exclude inappropriate evidence. Under the current law, the court is able to assess the probative value of the evidence and may decline to admit it.

The 'significant probative value' test directs attention to the extent to which the relevant evidence can 'rationally affect the assessment of the probability of the existence of a fact in issue' (UEA dictionary). The court has to assess whether the probative value of the evidence proposed to be admitted, in light of the other evidence and, in light of fact(s) in issue, is significant.The High Court has recently addressed the question of how to assess significant probative value for the purposes of tendency evidence (*Hughes v The Queen*). The majority held that assessing whether probative value is significant is a two-stage process. First, the evidence, by itself or together with other evidence, must strongly support proof of a tendency. Second, the tendency strongly support the proof of a fact that makes up the offence charged (that is, a fact in issue) (*Hughes v The Queen* at [41]).

The *Hughes* judgment is also important in the way that the majority approached tendency in child sexual abuse matters. The majority differentiated between two ways in which tendency evidence is commonly used. The first is where there is no doubt that an offence has been committed, but where the identity of the offender is in dispute. In such cases, the Court held that there will usually need to be a reasonably large degree of similarity between the tendency evidence lead and the fact in issue. This is because the focus will be on the first part of the process — the second part not being in dispute:

> The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence (*Hughes v The Queen* at [39]).

However, the second situation is where there is doubt that the offence actually occurred — but no question about the identity of the offender. As noted above, this is often the case with child sexual assaults, and even more so where there are delayed complaints, because physical evidence and corroborating witness testimony is often unavailable. In these cases, the tendency is also being used to support the existence of a fact in issue, and the second stage of the process becomes particularly important (*Hughes v The Queen* at [40]). If the tendency evidence supports the contention that an offence actually occurred, and if the identity of the offender is not in dispute, then there will not need to be substantial similarity between the evidence and the fact in issue. The majority's approach to assessing significant probative value is directly relevant to the reforms proposed by the Royal Commission. It clarifies that in appropriate circumstances a wider range of evidence will be admissible to demonstrate a tendency of an accused to have sexual interests in children (*Hughes v The Queen* at [56], [59]–[60]).

The current state of the law and the *Hughes* judgment both make clear that when determining admissibility, the court must evaluate the evidence. Such an assessment must be contextual (Hamer 2016a, p. 7). Regrettably, the proposed rules remove this fact-specific assessment. Provided that the evidence is relevant to one of the enumerated IEI, and provided that the notice requirements are met, it is admissible. In the case of criminal prosecutions, if the accused objects, this may be subject to a further exclusionary rule, discussed below. The proposed amendments specify that evidence falling within those categories is relevant, and therefore admissible. Importantly, the interaction here with UEA ss 55 and 56 is, at best, unclear. It may be that there is evidence that falls within the IEI categories that because of its nature could not rationally affect the assessment of the probability of the existence of a fact in issue. In such circumstances, it would not be an unfair reading of the proposed provisions that ss 55 and 56(2) are modified by the new concept of relevance to an important evidentiary issue. That is to say the model provisions can be read as making a statutory prescription about what is relevant to an IEI. Even if this is not the approach taken, and s 55 is the appropriate test for relevance, it is apparent that the new evidentiary threshold is lower than the current test of 'significant probative value'.

Application of tendency rules to complainants and witnesses

The proposed admissibility test would also apply to tendency and coincidence (or propensity) evidence that relates to complainants and witnesses, or otherwise led by the defendant. Under the present rules, if an accused wants to run a tendency argument in respect of the behaviour of a complainant, her or she must show that the evidence in question has significant probative value — the evaluative test referred to above. This evidence can also then be excluded pursuant to s 135 if the court thinks it is appropriate to do so. Under the proposed provisions, provided that such evidence is relevant to an IEI (and the procedural requirements are met) there would be no power for the court to exclude that evidence. This could have the perverse effect of allowing the admission of evidence that relies on tendency reasoning to improperly impugn the behaviour or state of mind of a complainant or witness. It is important to note that the exclusionary provisions in ss 98A (model A) and 99 (model B), discussed below, only apply upon application by the accused. The consequence of this may be particularly perverse in child sexual assault matters.

Safeguards against unreliability and unfairness

In light of this amended test for admissibility, the model amendments do not adequately safeguard against the potential unreliability or unfairness of tendency and coincidence evidence. The proposed ss 101 (model A) and 101A (model B) are particularly concerning because they exclude the operation of ss 135 and 137 from new pt 3.6 of the UEA. Those sections are essential evidentiary gates that allow the court to ensure trials are fair. Indeed, the other changes proposed by the model amendments may be less problematic were the ultimate discretion to admit or limit the use of tendency and coincidence evidence retained. The jury reasoning research does not exhaustively address legitimate and long-held concerns regarding evidence of this nature. In any event, this research does not provide a rationale for removing the existing discretionary safeguards.

The proposed amendments do include a provision that potentially reproduces the protections of s 137. The new provisions, ss 98A (model A) and 99 (model B), apply in criminal trials and allow the court to decline to admit evidence covered by the part, upon application of the defendant, where that evidence 'likely to result in the proceeding being unfair to the defendant' and 'appropriate directions to the jury [are] unlikely to remove the risk' of unfairness. Importantly, if the giving of directions is likely to remove the risk of unfairness, then the court *must* admit the evidence. This provision is based on the current position in the *Criminal Justice Act 2003* (UK) s 101(3)[3] (Hamer 2016a).

This proposed exclusionary rule for criminal prosecutions is inadequately defined, and does appear to give courts much discretion. The evaluation of evidence is a context-dependent exercise wherein judges should be given a degree of latitude. Under the proposed amendments, provided that the evidence is relevant (it *could* rationally affect the probability of a fact in issue) to an IEI, its probative value (the *extent* to which is could affect that fact in issue) is not considered in the operation of the exclusionary provision. The safeguards — only available upon application of a defendant — are 'likely' unfairness to an accused and whether judicial directions to the jury about 'use of the evidence is unlikely to remove the risk'.

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[3] See also the *Criminal Justice Act 2003* (UK) s 112(1), which defines 'important matter' as 'a matter of substantial importance in the context of the case as a whole' similarly to the IEI 'evidence that could be relevant to any matter in issue in the proceeding if the matter is important in the context of the proceeding as a whole' (model A s 95A(1)(c) and model B s 96(1)(c)).

The first limb of the test ('likely to result in the proceeding being unfair to the defendant') is problematic because ss 98A(2) (model A) and 99(2) (model B) effectively remove the central reason why evidence of this nature is treated cautiously in criminal proceedings. Sections 98A(2) and 99(2) provide that evidence is not 'unfair to a defendant in a criminal proceeding merely because it is propensity evidence'. While it may be correct to say that tendency and coincidence evidence is not unfair by nature, this overlooks the fundamental concern that the evidence may be used for improper reasoning. Accordingly, under the proposed test, evidence may be relevant to an IEI because it, in part, engages (unfairly prejudicial) tendency reasoning. However, by operation of s 98A(2) or s 99(2) it cannot be considered unfair simply because it is tendency, coincidence or propensity evidence. In other words, the provision states that the evidence is not unfair, despite the fact that it may lead the jury to assess the evidence in an unfair way.

The use of the standard of 'unlikely' in the second limb of the exclusionary test is also of concern. The effect of the provision, in conjunction with ss 98A(3) and 99(3) is that if it is likely that directions to the jury will remove the unfairness, the trial judge must admit the evidence. This is particularly concerning in light of the jury reasoning study that observed that '[t]he findings in this study are in line with a large body of empirical research demonstrating the ineffectiveness of most jury directions' (Goodman-Delahunty, Cossins & Martschuk 2016 2016, p. 28). So this suggests one of two outcomes. First, if the empirical evidence on the efficacy of directions is relied upon, directions will not be 'likely' to cure any unfairness. Second, if that empirical evidence is disregarded, courts may find themselves obliged to rely on directions — which are known to be ineffective — to cure unfair prejudice, rather than being able to exclude the evidence. More fundamental than the efficacy of directions, the proposed amendments accept that there will be circumstances where directions do not in fact resolve any potential unfairness. 'Likely' and 'unlikely' set a standard that would probably be similar to a 'substantial or real chance rather than a mere possibility' (*R v Teremoana* at 31). Therefore it is inherent in the proposed test that there may be circumstances where directions do not, in fact, cure the unfairness, and so on balance the evidence ought not be admitted, but must be admitted by operation of this provision.

Ultimately, while this research is certainly encouraging in its assessment of the capacity of juries to engage in some of the complicated reasoning required of them in difficult cases, the lack of replication, application in a full range of situations, or peer review makes it an inappropriate basis for such a wide-ranging change. In this respect, it may be appropriate to consider an evidentiary rule applicable solely to child sex offences, such as those noted by Hamer in his submissions to the Royal Commission (Hamer 2016a).

Conclusion

This comment has provided a brief background and analysis of aspects of the model amendments to pt 3.6 of the UEA, as proposed by the Royal Commission. These amendments appear to largely be a response to the extensive research undertaken on behalf of the Royal Commission into the way in which juries reason when presented with tendency evidence. This research is an invaluable contribution to the literature. However, it does not completely address the long-held concerns over the potential misuse of tendency and coincidence evidence. The work of the Royal Commission has demonstrated that evidence of this nature is uniquely important to prosecutions of child sex offences. This combined with the results of the jury reasoning research certainly justifies reconsideration of the current high threshold for admission of tendency and coincidence. However, the reforms proposed do not give the court sufficient discretion to ensure that proceedings before it are fair.

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