# *Paul Byrne SC Memorial Lecture*

## *Uniform Evidence Law at 21*[*]

Stephen Odgers SC

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The *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) both commenced in that year — 1995. Twenty-one years have passed. It is time to think about the progress of what is often called the Uniform Evidence Law ('UEL'), to celebrate the positive aspects of those reforms, to reflect on the criticisms, and to ponder the future.

When I wrote the Introduction to the first edition of my book on the UEL in 1995 (Odgers 1995), I concluded as follows:

> Opinions will differ on the merits of the Act. No doubt, it will have its share of critics. On a theoretical level, it can be argued that the law in statutory form tends to become more rigid and inflexible, lacking the dynamics of the common law. Courts may have difficulty in developing rules of evidence in response to new types of evidence. The legislation will require more case law to clarify the uncertainties it creates. Amendment will be a difficult process. Injustice may be caused. On a more specific level, no doubt particular provisions will attract criticism, whether for the principles on which they are based or for the difficulties of interpretation and application they create.
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> Yet, for many, the legislation will be welcome. It will make the rules of evidence much easier to find. It may well make them easier to understand, and to inter-relate. It will certainly simplify many of the rules. It will facilitate the admission of evidence derived from modern information storing media and copying technologies. It will introduce greater flexibility in several areas of evidence law. It will hopefully provide a rational and principled system of trial procedure, one aimed at procedural justice. To the extent that other jurisdictions follow the lead of NSW in enacting parallel legislation, citizens across the country will experience a substantially uniform system of trial procedure.
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> Of course, it will not solve all the problems with evidence. Deciding whether evidence is 'relevant' to a proceeding, for example, will remain a task for which the law can only provide limited assistance. Some 'rules' can only be expressed in the most general language, articulating a principle rather than a precise test. While this provides flexibility, the price is uncertainty of result. In many areas, the Act accords considerable 'discretion' to trial judges, both expressly and implicitly. However, it attempts to articulate the applicable principles and provide guidance in the exercise of such discretion. Ultimately, it relies on the good sense of judges and magistrates to apply the Act in a way consistent with the policy framework around which the Act is constructed.

That overview in the first edition has changed little in subsequent editions of the book, although I have noted that a number of other Australian jurisdictions have enacted parallel legislation and that significant amendments have been made to the legislation to deal with issues that have arisen in its application. It is time to reflect on those initial observations and on the progress of this substantial reform enterprise.

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[*] The 2016 Paul Byrne SC Memorial Lecture was presented at Sydney Law School, The University of Sydney, on 17 October 2016.

The concern that the law in statutory form lacks the dynamics of the common law and tends to become more rigid and inflexible can be largely dismissed. One of the primary reasons for the reference to the Australian Law Reform Commission ('ALRC') in July 1979 was a recognition that the law of evidence had become ossified. The High Court had, for example, declined on a number of occasions to engage in any significant reform of the hearsay rule exceptions. It continues to maintain that position in those jurisdictions that have not adopted the UEL. In contrast, the UEL itself has been amended on a number of occasions. There were significant general amendments in 2008 and a number of UEL jurisdictions have been prepared to make non-uniform changes — Tasmania when it adopted only part of the package, New South Wales when it enacted s 89A, Victoria when it moved the bulk of the rules relating to jury directions into a discrete Act.

These developments have clarified that uniformity is not the ultimate goal. While it may be desirable, particularly for those who regularly appear in the courts, that there be uniformity of trial procedure, the benefits of such uniformity are limited. More important are the other goals that I referred to in my first overview — simplifying the rules, facilitating the admission of evidence derived from modern information storing media and copying technologies, above all developing a rational and principled system of trial procedure aimed at procedural justice.

It is worth remembering some of the significant reforms introduced by the UEL, both initially and as it has developed:

- the rule in *Walker v Walker*, requiring the tender of documents the subject of a 'call', has been abolished (s 35);
- the rules relating to the competence of young children to give evidence have been loosened (s 13);
- cross-examination of a party's own witness does not require a finding that the witness is 'hostile' — it is enough that the witness gives evidence 'unfavourable' to that party (s 38);
- trial judges are mandated to disallow improper questions, including questions that are based on stereotypes, in cross-examination (s 41);
- trial judges have been given explicit power to disallow leading questions in cross-examination in appropriate circumstances (s 42);
- the 'original document rule' has been abolished (s 51) and the rules with respect to proof of the contents of documents simplified (pt 2.2);
- the admission of computer produced evidence has been facilitated (ss 146, 147);
- the fiction that a 'view' is not evidence was abolished and the tribunal of fact permitted to draw reasonable inferences from what is seen at the view (s 54);
- the exceptions to the hearsay rule have been significantly expanded in both civil and criminal proceedings (pt 3.2);
- the 'ultimate issue' and 'common knowledge' rules in respect of opinion evidence have been abolished (s 80);
- the 'finality rule' for cross-examination on collateral matters has been very significantly qualified (s 106);
- the strictness of the application of the privilege against self-incrimination has been qualified, by allowing a witness to choose to give evidence with the protection of use

and indirect use immunity, and requiring a witness to answer questions with such protection where a court is satisfied that such compulsion is 'in the interests of justice' (s 128).

There have also been major reforms specifically in respect of evidence in criminal proceedings:

- a special hearsay exception which has the effect of permitting defence evidence of a third party admission even where the person is unavailable to testify (s 65(8));
- the 'voluntariness' rule of admissibility for admissions has been replaced by provisions which focus on extreme misconduct (s 84), the reliability of the admission (s 85), considerations of 'fairness' (s 90), and 'improperly or illegally obtained evidence' (s 138);
- with respect to 'tendency' and 'coincidence' evidence, the unduly strict 'Pfennig test' for admissibility under the common law has been replaced by a test which requires the prosecution to satisfy the court that 'the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant' (s 101);
- where evidence of the 'good character' of an accused is admitted, the common law rule permitting the prosecution to rebut the existence of prior good character with any evidence tending to show bad character has been replaced by a more focused provision, where if evidence of good character is limited to a particular aspect of character, the prosecution is only permitted to adduce evidence to rebut that aspect of character (s 110);
- with respect to identification evidence, rather than simply relying on the general probative value/unfair prejudice discretion a number of specific admissibility provisions have been introduced in an effort to maximise the reliability of the identification (ss 114, 115).

It is true that the benefits of some of these reforms have been questioned, for example:

- there is legitimate criticism of the identification evidence provisions (which were not adopted by Tasmania). It may be said that they are too narrowly focused, have had limited practical impact and place an undue emphasis on identification parades when modern modes of photographic identification offer significant advantages;[1]
- the existence of two sets of rules in relation to privilege, one common law, one statutory, very similar in content but operating in different legal contexts, is a source of continuing confusion and difficulty;
- amendments designed to make it easier to allow in expert evidence to correct myths regarding victims of child sexual abuse have not been utilised to any significant extent.

However, my own view, trying to be as objective as I can, is that the reforms introduced by the UEL have, on balance, significantly improved the quality of trial procedure in those jurisdictions that have adopted it.

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[1] For example, it may be easier to ensure that 'fillers' resemble the suspect. In an identification parade, differences between the suspect's demeanour may be different from the demeanour of the fillers, suggesting to the witness that the suspect is more likely to be the offender. Photographic identification may be held closer in time to relevant events than it is possible with an identification parade, reducing memory concerns. See *Winmar v Western Australia* (2007) 35 WAR 159; 177 A Crim R 418; [2007] WASCA 244 at [49]–[54].

That said, the goals of making the rules of evidence easier to find, easier to understand, and easier to inter-relate, well, the score-card is plainly mixed. My first edition, leaving appendices out, was 308 pages. My 12th edition, again leaving appendices out, is 1608 pages. An increase of more than 500 per cent.

It was, of course, inevitable that the appellate courts would have to provide guidance on the application of the provisions of the UEL, bearing in mind the fact that many of the rules could only be expressed in the most general language, articulating a principle rather than a precise test. But the record of the High Court in construing the UEL, consistently with the policy framework around which the Act is constructed, has not been entirely smooth.

Early judgments, such as *Papakosmas v The Queen*, did emphasise that it is the language of the statute that determines the manner in which evidence is to be treated, that the rules are not to be construed to try to replicate the common law and the discretions, as Justice McHugh observed, 'confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility' (at [97]). Many High Court judgments in respect of different parts of the UEL, such as *Sio v The Queen* in respect of the hearsay exceptions in s 65(2), have adopted the same focus.

However, sometimes suspicions linger that common law approaches still influence the constructional choices made. Occasionally there are doubts that the High Court has given sufficient emphasis to the policy framework around which the Act is constructed. Sometimes, judgments of the High Court on the UEL have required statutory amendment. I will give some examples.

In *Adam v The Queen* the High Court gave a literal construction to s 102, which had the odd consequence that evidence which was relevant but not admissible for a hearsay use did not have to satisfy the tests for use as credibility evidence, could be admitted for a credibility use simply because it was relevant for that use and then, by the operation of s 60, could be used for a hearsay use. There was a failure to acknowledge that s 60 only operated on evidence that had been admitted for a non-hearsay use and had no bearing on the question of whether it should be admitted for the non-hearsay use in the first place. Amendments made in 2008, modifying s 102 and adding a new s 101A, reversed that position. The credibility rules now apply to evidence that is relevant but not admissible for a non-credibility use.

In *Lee v The Queen* the High Court gave a narrow construction to s 60, limiting its operation to first-hand hearsay. Amendments in 2008 reversed that position, although the actual result in *Lee* was maintained by creating a special exception for remote hearsay of an admission.

In *Graham v The Queen* the High Court gave a narrow construction to the test of 'fresh in the memory' in s 66, based partly on authority relating to the same test under the common law for witnesses refreshing their memory from documents, holding that it means 'recent' or 'immediate' (at 405). Amendments made in 2008 modified that position by requiring a court to take into account not only the time delay but also the nature of the event remembered, thereby requiring closer focus on recent research on memory.

In *Kelly v The Queen* the High Court adopted a narrow construction of the words 'official questioning', found in both the UEL and related Tasmanian legislation, thereby significantly undermining the protections conferred by that legislation designed to protect against both verballing and the making of unreliable admissions. Amendments made in 2008 ensured that these protections would apply to admissions even if the police were not formally questioning a suspect at the time the alleged admission was made.

In *TKWJ v The Queen* the High Court held that there was no power to give an advance ruling on evidence under the UEL. Another amendment in 2008 explicitly permits a court to give advance rulings and findings in relation to evidence.

It should be understood that I am certainly not suggesting that all these High Court judgments were necessarily erroneous. No doubt, in a number of cases, better statutory drafting may well have avoided these outcomes. What I am saying is that, at least in some cases, insufficient importance was given by the High Court to the reformist goals of the UEL in moving away from the common law and in serving the policy framework on which the legislation is built.

The question that arises is whether the time has come for another review of the UEL. Over the last few years, a number of issues have emerged that would support such a review. For example, in *Em v The Queen* some members of the High Court appear to have concluded that questions of the reliability of what was said by a suspect (subsequently the accused) to police, and what consequences might follow from illegal or improper conduct by investigating authorities, are simply not to be taken into account at all when applying the fairness discretion in s 90. It may be accepted that a court must be careful to distinguish the issue of 'fairness' from, for example, public policy considerations arising from police impropriety. However, it is a different thing to say that s 90 is simply not available in cases where issues of police illegality or impropriety arise. It would be a drastically restrictive reading of the term 'the circumstances in which the admission was made' to completely exclude from consideration circumstances which are characterized as involving 'impropriety' or 'illegality', or which impaired the reliability of an admission made to the police. Yet in *R v Cooney* the New South Wales Court of Criminal Appeal held that a judge had erred in having regard to police conduct involving unlawfulness 'through the prism of s 90' rather than s 138 (at [8]).

Some other continuing issues may be mentioned:

- the practicality of a witness being permitted to give evidence in narrative form under s 29 remains questionable, except where the witness is an expert witness;
- there is considerable uncertainty as to whether affidavit evidence is subject to pt 2.1 of the UEL;
- the application of the provisional relevance provision in s 57 to the question of authentication of documents and things remains controversial;
- doubts exist regarding the adequacy of safeguards under the UEL to ensure the reliability of evidence of digitally stored data;
- the practical application of the requirement in s 78 that non-expert opinion evidence 'is necessary to obtain an adequate account or understanding of the witness's perception of the matter or event' continues to cause difficulty;
- there is continuing uncertainty regarding the implications of the requirement for expert opinion evidence that the opinion be based on 'specialised knowledge' and, in particular, the extent to which the principles established by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc* have application under s 79;
- the precise parameters of the 'dominant purpose' test for client legal privilege is unsettled;

- difficulties exist regarding the application of the privilege against self-incrimination provision in s 128 (particularly but not exclusively in relation to affidavit evidence) given the pre-condition in s 128(1) that 'a witness objects';
- it is quite unclear whether 'actual persuasion' of the occurrence or existence of the fact(s) in issue in a civil proceeding is required under the civil standard of proof provision in s 140;
- the precise nature of appellate review of determinations made under the UEL is a matter of continuing controversy.

However, two recent developments in particular point to the need for a new review of the UEL. The first is the judgment of the High Court in *IMM v The Queen*, handed down in April. The second is the work of the Royal Commission into Institutional Responses to Child Sexual Abuse and, in particular, the release by the Commission in September of a Consultation Paper which touches on a number of aspects of the UEL, including tendency and coincidence evidence and directions to juries.

In *IMM v The Queen*, the High Court determined the proper approach to the assessment of the 'probative value' of evidence, a term which appears in a number of important provisions in the UEL and is defined in the Dictionary to the Act to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. In a 4:3 split, the majority of the Court held that a judge determining that probative value must proceed upon the assumption that the jury will 'accept' the evidence and the trial judge should not have regard to questions as to the credibility or reliability of the evidence. The majority of French CJ, Kiefel, Bell and Keane JJ stated at [52]:

> Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated.

There was no issue in the High Court that the word 'could' in the definition of 'probative value' focused on the capability of the evidence and that it required a trial judge to determine the highest extent of effect on the probability of the existence of a fact in issue that a jury could rationally give the evidence. The debate was as to whether, in determining the probative value of the evidence, a trial judge must proceed upon the assumption that the jury will 'accept' the evidence. The majority held that even though the words 'if it were accepted', which appear in the definition of relevance in s 55, do not appear in the definition of 'probative value', those words should be understood to apply to the assessment of probative value. This conclusion was reached on the basis that such an approach is 'dictated by the language of the provisions and the nature of the task to be undertaken' (at [49]).

It is very difficult to understand how it is that the language of the provisions 'dictates' that those words, found in s 55 and missing in the definition of probative value, 'should be understood also to qualify the evidence to which the Dictionary definition refers'. The majority provided the following explanation at [50]: 'At a level of logic it is difficult to see how a trial judge could approach the question as to what the probative value of the evidence could be in any other way, for the reasons alluded to by Gaudron J in *Adam v The Queen*.'

The majority had noted at [27] that Gaudron J had considered that the definition of 'probative value' must have read into it an assumption that a jury will accept the evidence in question because, as a practical matter, 'evidence can rationally affect the assessment of the

probability of a fact in issue only if it is accepted' (*Adam v The Queen* at [60]). However, the majority acknowledged that Justice McHugh had expressed the opposite view in *Papakosmas v The Queen* at [86], where his Honour observed that an assessment of 'probative value' would 'necessarily involve considerations of reliability'. Two of the minority on this issue in *IMM*, Nettle and Gordon JJ, stated at [140]:

> With respect, the view expressed by McHugh J in *Papakosmas* is logically to be preferred. Evidence cannot affect the assessment of the probability of the existence of a fact in issue unless the evidence is rationally capable of being accepted. Hence, to determine whether evidence has the capacity rationally to affect the assessment of the probability of the existence of a fact in issue requires a determination of whether the evidence is rationally capable of acceptance. And for the court to determine whether it thinks that evidence is rationally capable of acceptance requires the court, among other things, to determine whether it thinks that the degree of reliability which it would be open to the jury rationally to attribute to the evidence is such that it will be open to the jury rationally to accept the evidence. It follows that, according to ordinary principles of statutory construction, there is no warrant for reading s 97 or the definition of 'probative value' in the Dictionary to the Act as involving an assumption that evidence will be accepted.

If evidence is *not* accepted, in the sense that the tribunal of fact comes to a positive conclusion that the witness is a liar or completely unreliable, the evidence will not affect the assessment of the probability of a fact in issue in the proceedings. However, there are degrees of 'acceptance' and degrees of probative value. A rational fact finder may not (completely) accept evidence, harbouring doubts about the truthfulness and/or reliability of the witness, and thus giving less weight to the evidence. The evidence will still rationally affect the assessment of the probability of a fact in issue, it will have some weight, although that weight will be less than it would have been if it were (completely) accepted. If a trial judge considered that evidence was unreliable (to some extent) then it might be concluded that the extent to which the evidence could be accepted, and the extent to which it could rationally affect the assessment of the probability of a fact in issue, is limited.

The proposition that the language of the provisions 'dictates' that the words 'if it were accepted' in s 55 should be understood to appear in the definition of 'probative value' is contrary to the general approach to statutory construction that a court has no power to read in words which the legislature has not used. If anything, the language of the provisions, where in one the assessment of rational effect on the assessment of the probability of the existence of a fact in issue is qualified by a required assumption, while in the other there is no such qualification, would appear to 'dictate' the opposite conclusion.

The other explanation advanced in the majority judgment, that the nature of the task of determining 'probative value' also 'dictates' that the words 'if it were accepted' in s 55 should be understood also to qualify the evidence to which the definition of 'probative value' refers, is also difficult to accept. The majority defended the proposition at [51]:

> At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility. As Simpson J pointed out in *R v XY*, the evidence will usually be tendered before the full picture can be seen. A determination of the weight to be given to the evidence, such as by reference to its credibility or reliability, will depend not only on its place in the evidence as a whole, but on an assessment of witnesses after examination and cross-examination and after weighing the account of each witness against each other.

The use of the term 'actual probative value' is curious, since the majority had pointed out at [30] that 'probative value' is 'not used in that sense' in the Act 'but rather in the sense of the *potential* of the evidence to have the relevant quality' (emphasis in original). Nevertheless,

the proposition that assessment of credibility and reliability cannot be made until all the evidence is in, so that a trial judge cannot be expected to take into account such considerations when determining admissibility, appears at first sight to be persuasive. However, the response of Nettle and Gordon JJ was as follows (at [156]):

> But, as Price J knowingly observed in *XY*, more often than not the assessment of probative value is made on the basis of depositions without the need to call witnesses and, where the depositions are insufficient to resolve the point, it is possible for a witness to be cross-examined on a voir dire to enable the judge to make an assessment of the probative value of the witness's evidence. As was noted by all members of this Court in *Hoch*, such procedures were commonplace under the common law. And, as many trial judges will know, they were not productive of insurmountable or ordinarily undue difficulties. It should not be any different under s 137. Such procedures are provided for in the Act and the Act envisages that the admissibility of evidence may need to be determined proleptically with reference to evidence yet to be adduced.

An additional point needs to be made. If a trial judge is not in a position to properly assess probative value at the point when evidence is adduced, s 137 would *not* be engaged because the provision mandates exclusion only where the court is satisfied that 'probative value is outweighed by the danger of unfair prejudice'. If 'probative value' cannot be assessed, s 137 simply has no application. In any event, the controversial nature of an argument based on 'practicality' highlights that it cannot 'dictate' that words not included in the definition of probative value 'should be understood' to qualify the words that are there.

It follows that I find the reasoning in the majority judgment difficult to accept. But a much more significant criticism relates to the confusion regarding what precisely the majority did decide. At first sight, the holding appears clear and easy to apply. When a witness testifies as to the existence of a fact, the trial judge assesses the probative value of that evidence on the assumption that this evidence will be accepted, that is, that the fact existed. The probative value of the evidence will vary depending on the extent to which the existence of that fact could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding. Thus, if a witness in a criminal trial where the accused is charged with murder testifies that he or she heard the accused threaten to kill the victim, the trial judge assesses the probative value of the evidence on the assumption that the accused did threaten to kill the victim.

However, when the majority gave an example of how their holding would operate in practice and came to apply their holding to the particular evidence in *IMM*, difficulties emerge. The example given was identification evidence. The majority stated at [50]:

> It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The circumstances surrounding the evidence may indicate that its highest level is not very high at all. The example given by JD Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). On another approach, it is an identification, but a weak one because it is simply unconvincing. … [I]t is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.

Thus, assume that a witness to a crime testifies that '[the accused] is the person who I saw committing the crime'. According to the majority, the trial judge assumes that 'the jury will accept the evidence taken at its highest' but such factors as the lighting conditions, the time for observation and any prior knowledge may be taken into account to reach a conclusion that the probative value of the evidence is low.

That analysis is difficult to understand. If the assertion that the accused was the offender is assumed to be accepted, that would suggest that the probative value of the evidence is to be assessed on the assumption that the accused did, as the witness has asserted, commit the crime. The factors referred to by the majority as reducing the probative value of the evidence would have to be disregarded, since they would tend to undercut that assumption.

One view might be that the factors referred to by the majority are *not* factors that bear on the credibility or reliability of the witness (which would depend on such considerations as truthfulness, eyesight, attention span and memory). Thus, a distinction could be drawn between the source of the evidence (the witness) and the context of the evidence ('the circumstances surrounding the evidence'). The judge is to disregard considerations that relate to the witness, the source of the evidence, but may take into account considerations which involve the objective circumstances of the witness, the context of the evidence.

However, this view, which adopts a narrow view of factors that bear on the 'reliability' of an identification witness and are to be ignored by the trial judge, does not provide an answer as to why consideration of contextual factors is permitted if the evidence of the witness is assumed to be accepted. Such factors undercut an assumption that the assertion that the accused was the offender is to be accepted.

In my opinion, there is only one way to make sense of the majority's analysis. It is to focus carefully on the evidence of the witness and to identify precisely what is being asserted by the witness — what are 'the facts' being 'stated'. The evidence may be seen as evidence of a belief:[2] 'I believe, based on a comparison of my memory of the appearance of the offender with the accused person, that the accused is the offender'. So understood, it is to be assumed that the jury will accept that the witness does in fact hold that belief. The trial judge should not have regard to any considerations suggesting that the witness is not being truthful when he or she testifies that this belief is held or suggesting that he or she is not reliably recounting the content of that belief. But the trial judge need not assume that the belief itself is to be accepted. Other evidence may indicate that the belief is unreliable, is 'weak' and 'unconvincing', and accordingly is of low probative value.

The example given by Heydon, and adopted by the majority, was one where the probative value of the identification evidence was low because the circumstances in which the observation of the offender was made show that the subsequent identification (the belief itself) is of low probative value. Another example would be where the circumstances in which the (first) identification of the accused as the offender render that identification of low probative value (for example, where there was a high level of 'suggestion' that the accused was the offender). Thus, in *Bayley v The Queen* the Victorian Court of Appeal applied the analysis of the majority in *IMM* to hold that certain identification evidence from a witness GH should have been excluded under s 137. The Court stated at [61]:

> In our opinion, the probative value of GH's purported identification from Facebook was scant. That identification was made by GH from a single photograph, some 12 years after the attack upon her. The photograph itself had been taken 11 or so years after the offending. Further, the circumstances were highly suggestive in that, at the time that she made her purported identification, GH knew that the individual depicted in the photograph had been charged with both rape and murder.

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[2] This term is used rather than 'opinion', to avoid any confusion generated by the fact that there is an exclusionary rule in the UEL in relation to 'opinion evidence'. However, in any event, there is considerable authority that an identification is appropriately characterized as 'opinion evidence' where there is a risk of misidentification: *Smith v The Queen* (2001) 206 CLR 650 at [57] (Kirby J); *R v Drollett* [2005] NSWCCA 356 at [43]–[44].

The logic of this analysis would carry through to consideration of expert evidence in the context of s 137 (and, indeed, s 135). When an expert asserts an opinion, the assessment of the probative value of that evidence requires an assumption that the expert is being truthful regarding the content of the opinion and is reliably recounting the content of the opinion held by the expert. However, it does not require an assumption that the opinion itself is 'reliable', in the sense that the opinion may be relied upon as correct. When assessing the probative value of evidence from an expert that the accused 'matched' an offender seen in a surveillance video, there is no requirement that it be assumed that the expert is correct (that is, that the accused and the offender are the same person). The court is permitted to consider factors bearing on the cogency of that opinion in determining the extent to which a rational fact-finder could regard the evidence as affecting the probability of the existence of a fact in issue.

Support for an approach that requires close analysis of what precisely a witness is asserting, in order to determine what precisely must be assumed to be accepted, is to be found in the discussion by the majority in respect of complaint evidence admitted in the trial of IMM. A number of witnesses testified that the complainant had complained to them regarding sexual abuse she had experienced at the hands of the appellant. In substance, each witness testified that '[the complainant] said to me that [the accused] sexually abused her'. It was contended that this hearsay evidence (which fell within the scope of an exception to the hearsay rule) should have been excluded under s 137.[3] The majority judgment held (at [73]):

> The complaint evidence was tendered for the purpose of proving the acts charged. Given the content of the evidence, the evident distress of the complainant in making the complaint and the timing of the earlier complaint, it cannot be said that its probative value was low. It was potentially significant.

It is apparent that majority did *not* proceed on the basis that, for the purposes of determining the 'probative value' of the evidence of the witnesses, it should be assumed that the complaint made by the complainant would be accepted. Factors bearing on the likely truthfulness of the complainant (considerations going to *her* credibility and reliability) were taken into account in determining that the evidence was not of low probative value. That would be consistent with the proposition that the evidence of the witnesses that the complainant had said the words recounted by them was assumed to be accepted but the actual assertion contained in the words said by the complainant was not assumed to be accepted. While each witness asserted that the words were said by the complainant, none of them asserted that what the complainant said to them was true.

Nevertheless, there are a number of objections to an analysis that distinguishes between what a witness actually asserts (which must be assumed to be accepted) and the use that may be made of that evidence (where there may be good reason to regard the evidence as of limited value). The first objection is that the majority in *IMM* did not make explicit the distinction that I have drawn. Given the importance of the issue and the need for trial judges to have clarity as to how they should approach assessments of probative value, it is surprising that the majority did not provide a clear explanation as to how they reconciled their statements of principle with the actual application to the identification evidence example and the complaint evidence sought to be excluded under s 137. While I maintain the view that the analysis I have suggested is the only way to make any sense of the majority judgment, the fact remains that the judgment is likely to generate considerable confusion at the trial court level.

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[3] One of the arguments advanced on behalf of the appellant was that the probative value of the evidence was low because the complaints were not spontaneous and were made in response to leading questions, in circumstances where the complainant may have been motivated to distract attention from her own bad behaviour.

The second objection is that the majority in *IMM* stated (at [54]):

> The only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence, is provided by s 65(2)(c) and (d) and s 85. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury, albeit that a jury would need to be warned by the trial judge about evidence which may be unreliable pursuant to s 165.[4]

Thus, in applying s 137 a trial judge must not consider the 'reliability' of the evidence in question. That would suggest that, where complaint evidence is adduced, factors which might be regarded as bearing on the reliability of the complainant may not be taken into account in assessing the probative value of the evidence. As explained above, it is very difficult to reconcile that approach with the analysis of the majority in which factors bearing on the likely truthfulness of the complainant were taken into account in determining that the evidence was not of low probative value. Equally, the factors taken into account in the identification evidence example - the lighting conditions, the time for observation and any prior knowledge of the person identified - are appropriately characterized as factors bearing on the reliability of the identification. In my view, it would be too glib to say that such factors render the identification 'weak' and 'unconvincing' but do not bear on the 'reliability' of the identification. After all, an assessment of 'reliability' is the extent to which reliance may be placed on the particular item of evidence to prove some fact in issue in the proceeding.

In my view, the only way to make sense of the prohibition on a trial judge considering the 'reliability' of evidence is to conclude that it applies to the reliability of the fact stated or asserted (the jury is to be assumed 'to accept it completely in proof of the facts stated': *IMM* at [52]) and not to the 'reliability' of that fact. Thus, it does not apply to the judicial assessment of the extent to which the existence of that fact could rationally affect the assessment of the probability of the existence of a fact in issue. It would not apply to such an assessment of the fact that a witness has a belief that the accused is the offender, the fact that an expert witness is of the opinion that the accused matched the offender and the fact that the complainant had told her relatives that she had been sexually abused. Nevertheless, the problem remains that the hearsay exceptions in s 65, referred to by the majority, require a judge to consider the reliability of the assertion contained in the words recounted by the witness — if those exceptions (and s 85) constitute the 'only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence', this would indicate that a trial judge may *not* otherwise consider the reliability of a hearsay assertion. Again, the judgment is likely to generate considerable confusion at the trial court level.

Even more potential confusion is generated by the majority judgment's analysis of the tendency evidence admitted in the trial of IMM. That evidence was given by the complainant and she testified that, while she and another girl were giving the appellant a back massage, he ran his hand up the complainant's leg. The prosecution relied on the evidence to prove that the appellant had a sexual interest in the complainant and was willing to act on that sexual interest, which could then be used to infer that he was guilty of the offences with which he was charged. The jury were directed that they could use the evidence in that way. To be admissible, s 97 required that the trial judge think that the evidence 'will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value'. According to the majority, that probative value must be assessed on the assumption that the evidence of the complainant is to be accepted.

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[4] The proposition that s 65(2)(c) and (d) and s 85 provide '[t]he only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence' has been endorsed by all five members of the High Court in *Sio v The Queen* [2016] HCA 32 at [64].

Thus, it must be assumed that the appellant *did* run his hand up the complainant's leg. If he did do that (which the appellant denied), it was never suggested by the defence that it could not reasonably be inferred that this showed the tendency contended for by the prosecution. Establishing that the appellant had a sexual interest in the complainant and was willing to act on that sexual interest would seem to meet the requirement that the probative value of the evidence be 'significant'. Yet the majority held at [62]–[64] that the evidence did not have 'significant probative value':

> In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.
>
> Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.
>
> For these reasons the tendency evidence given by the complainant did not qualify as having significant probative value and was not admissible under s 97(1)(b).

The reasoning appears to be as follows. The central fact in issue in the proceeding was whether the complainant's allegations regarding the charged sexual abuse were true. Evidence from the complainant regarding other uncharged acts (tending to show sexual interest) would have a limited capacity to rationally affect the probability of that fact in issue.

However, if the trial judge (and the members of the High Court) must assume that the appellant did run his hand up the complainant's leg when assessing probative value, and there was no issue that if he did do this it showed that he had a sexual interest in the complainant, surely that would mean that the evidence met the requirement of 'significant probative value'? The majority judgment reached the opposite conclusion because the complainant's 'account' that the appellant exhibited sexual interest in her could not significantly increase the probability that her 'account' of the charged acts was true, without explaining why the required assumption that her evidence was to be accepted did not require a different conclusion. Perhaps the explanation can be found in the approach to the requirement of 'significance' under s 97 but, again, the judgment is likely to generate considerable confusion among practitioners and trial judges.

In my opinion, the majority judgment in *IMM* is unpersuasive, incoherent and is likely to result in real confusion at the trial court level for years to come. Given the centrality of the issues that it deals with to the UEL, particularly in criminal proceedings, consideration should be given to again asking the ALRC to review the need for a legislative response.

Turning now to the Consultation Paper released in September 2016 by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission 2016), it touches on a number of aspects of the UEL, including tendency and coincidence evidence, hearsay complaint evidence and directions to juries.

In respect of tendency and coincidence evidence, the Royal Commission has indicated a preliminary view that 'the current law needs to change so that it facilitates more

cross-admissibility of evidence and more joint trials in child sexual abuse matters' (Royal Commission 2016:389, 448). It has also stated that '[t]he Western Australian approach seems preferable, at least as it operates in Western Australia' to the approach taken under the UEL (Royal Commission 2016:449) and '[t]here appears to be significant merit in the approach adopted in England and Wales' (Royal Commission 2016:449). The Royal Commission favours an approach where tendency and coincidence evidence will be admissible if relevant but may be excluded in the exercise of a judicial discretion if the court is persuaded that the evidence is more unfairly prejudicial than probative. However, it is apparent that the Royal Commission would regard that as a rare event, given its apparent acceptance of research conducted for it which 'found no evidence of unfair prejudice to the accused' from tendency and coincidence evidence in cases of child sexual abuse (Royal Commission 2016:419).

In my view, the Western Australian provisions should be approached with caution. To the extent that they differ from the UEL, the test adopted is problematic. Thus, one requirement is that the court must be satisfied that 'the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial'. Counsel Assisting the Royal Commission have themselves been very critical of such a test, stating:

> This is not an area where some possible qualification on a fair trial is at issue. Rather, the dual interests of admitting tendency or coincidence evidence which is relevant, but without causing undue prejudice to the accused, are both elements of seeking a fair trial. That being so, the language of 'the degree of risk of an unfair trial' may both be something of a distraction, and fail to offer appropriate guidance to judges (Case Study 38 2016:[235]**)**.

The Western Australian legislation provides that, in determining admissibility, 'it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion'. That goes significantly further than what was stated by the majority of the High Court in *IMM v The Queen* at [59] that a possibility of joint concoction will not deprive coincidence evidence of probative value. The NSW Director of Public Prosecutions indicated in evidence before the Royal Commission that the current position under the UEL with respect to the severance of joint indictments because of the possibility of concoction is satisfactory (Tl7694). Counsel Assisting the Royal Commission have themselves accepted that cases may arise where the evidence of concoction/contamination is 'so strong as clearly to deprive the evidence of significant probative value, such as to remove the basis for crossadmissibility' (Case Study 38 2016:[30]).

To the extent that the Royal Commission focuses on how the Western Australian provisions actually operate in practice, the only evidence on this issue received by the Commission came from two prosecutors. As Counsel Assisting have pointed out, 'a feature of the public hearings was the absence of a contradictor' (Case Study 38 2016:[281]). Counsel Assisting also stated that '[t]here is … an absence of academic scrutiny of the Western Australian system' (Case Study 38 2016:[281]). The Royal Commission appears to have been influenced by an absence of evidence before it or 'any suggestion of injustices arising as a result of these changes' (Royal Commission 2016:447) but absence of evidence of injustice should not be conflated with evidence that there has not been injustice — one might ask what evidence could ever be obtained to demonstrate that a conviction was unjustly obtained as a result of the admission of such evidence:

> As regards the approach adopted in England and Wales, a test for admissibility of mere relevance, with the possibility of discretionary exclusion by a trial judge, it is noteworthy that such an approach has not been followed in other comparable jurisdictions, such as Canada and New Zealand. These countries continue to insist that tendency and coincidence evidence should only be admitted where the prosecution satisfies the court that the evidence has sufficient probative value to justify admission. While Professor Spencer, an English academic, indicated to the Royal Commission that he generally supported the English approach, his view is not widely supported among the academic community in England. By replacing an exclusionary rule with a discretion to exclude, appellate review has been significantly reduced because of appellate reluctance to overturn discretionary determinations, with the consequence that guidance is much less available from appellate courts to trial courts. Most important, the English approach rejects the view that, as a general rule, guilt should not be 'inferred from the character and tendencies of the accused' (*Pfennig v The Queen* at 512–14 (McHugh J)).

There is no doubt that the Royal Commission has been influenced by the research done for the Royal Commission which 'found no evidence of unfair prejudice to the accused' from tendency and coincidence evidence in cases of child sexual abuse (Royal Commission 2016:419). I have serious reservations about the significance one can give to that mock jury research. For example, one form of 'unfair prejudice' is what the researchers call 'character prejudice' — a juror considers the accused a person of bad character and for that reason applies a lesser standard of proof. Such bad character might be established by previous incidents that the accused has admitted, or does not dispute. The evidence used in the mock jury research was not of that kind. There were simply multiple complainants. The fact that the mock juries do not appear to have adopted a lower standard of proof in those cases does not disprove the unfair prejudice hypothesis. Equally, the prejudice that a jury will over-value tendency evidence could not realistically be measured for the same reason — it is unlikely the jury were satisfied of one allegation and then used it to infer guilt in respect of others. It is more likely they engaged in coincidence reasoning ('it is more likely one allegation is true because an independent person has made a very similar allegation'). As regards the danger of the jury over-valuing the evidence for coincidence reasoning, it is not apparent whether the research would be able to measure that. A juror saying, as some apparently did, that they needed more for proof beyond reasonable doubt in cases where tendency evidence was admitted may simply reflect the juror considering that there was in fact more evidence of guilt (because of the tendency evidence) and rationalising accordingly.

Far more important than these points, the fact is that the focus of the Royal Commission, and of the research, has been on cases of child sexual abuse. The applicable law operates in respect of tendency and coincidence evidence generally, in all legal proceedings. It would not be appropriate to introduce statutory provisions which apply only to tendency and coincidence evidence in trials involving allegations of child sexual abuse. Given this, the Royal Commission should not propose significant changes to the law that will apply generally to all tendency and coincidence evidence. What may be considered appropriate for one category may be inappropriate for another category. There are obvious differences between tendency and coincidence evidence in trials involving allegations of child sexual abuse and such evidence in cases of, for example, burglary, murder and even adult sexual assault. There will be significant differences in the probative value of such evidence, depending on the issue to which it is relevant, and there are likely to be differences in the ways that juries might approach such evidence, with consequent differences in dangers of unfair prejudice.

For these reasons, the ALRC is the appropriate body to review of the law relating to tendency and coincidence evidence, assisted by the work already done by the Royal Commission. Such a review could consider the issues more generally, carry out any further

research, invite the participation of law reform bodies in other Australian jurisdictions and develop a suitable general reform package.

Equally, the continuing uncertainty with respect to the admissibility of evidence of complaint in child sexual abuse cases, particularly in relation to the 'fresh in the memory' test under s 66, raises the question of whether a different criterion for admissibility should be adopted that is more clearly focussed on reliability. Each of the non-UEL jurisdictions have enacted child-specific modifications to evidence law which make it easier to have admitted statement made by a child to another person in certain criminal trials including child sexual assault trials. However, the provisions are different in scope and application and vary as to whether the statement may be used for a hearsay purpose. Perhaps, rather than adopting a special hearsay exception for complaint evidence in sexual assault trials, the UEL should simply adopt the same approach for criminal proceedings that has been taken in civil proceedings under s 64, a general hearsay exception for first hand hearsay where the person who made the representation is available for cross-examination.

As regards the issue of jury directions, the Royal Commission has raised the issue whether judicial directions to juries in child sexual assault trials should be codified. It is noted in the Consultation Paper that, in 2015, Victoria codified the law relating to the giving of judicial directions to juries in criminal trials in the *Jury Directions Act 2015* (Vic). The provisions in Part 4.5 of the *Evidence Act 2008* (Vic) dealing with jury warnings have been amended so that they apply only to juries in civil proceedings. As a result, the uniformity in the UEL jurisdictions has been significantly reduced but, more important, there are significant substantive differences between the two largest UEL jurisdictions, New South Wales and Victoria, which raise real questions regarding the whole approach to jury directions about evidence in criminal trials.

For example, where a prosecution case relies upon circumstantial evidence and an intermediate conclusion of fact in the inferential process constitutes an 'indispensable link in a chain of reasoning towards an inference of guilt', most Australian jurisdictions, including UEL jurisdictions, require a judge to direct a jury that such fact must itself be proved beyond reasonable doubt (*Shepherd v The Queen* at 579, 581). Most jurisdictions go further, and require a jury to always be directed not to use tendency evidence against an accused unless satisfied that the tendency has been proved beyond reasonable doubt (*HML v The Queen* at [247]). Section 62 in the Victorian *Jury Directions Act 2015* removes both requirements. It is very difficult to support abolition of the first requirement — in my view a jury should not rely on some circumstantial intermediate fact to prove guilt beyond reasonable doubt without that fact itself having been proved beyond reasonable doubt. As for abolition of the second requirement, that is more supportable, but it would be a cause for concern if a jury did in fact rely to convict on the existence of some criminal tendency which was not itself proved beyond reasonable doubt.

Another example is that Victoria has abolished the 'Markuleski' direction, where in a case involving multiple alleged offences committed by the accused on a complainant, a judge may be required to direct the jury that any doubt they may form with respect to one aspect of the complainant's evidence ought to be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts (*R v Markuleski* at [191]). I do not support such abolition. At its core, the purpose of such a direction is to ensure that a jury is not misled by a direction that they should consider each count separately and that different verdicts may be reached on different counts. A danger may exist that a juror, having doubts about a complainant's account in respect of one count, will believe that those doubts should

be disregarded when considering the complainant's account in respect of another count. A judicial direction may be necessary to ensure that such an erroneous approach is not taken.

The very question of codification needs consideration. Victoria has codified the law relating to the giving of judicial directions to juries in criminal trials in order to preclude the courts from expanding the list of necessary directions and in an attempt to minimise the extent to which an omission to give a direction that was not asked for can result in a successful appeal. A related issue under the UEL that needs to be clearly resolved is the significance of a failure of a party to seek exclusion of inadmissible evidence. However, it may be doubted whether all topics requiring direction can be anticipated in advance. The courts must be permitted to develop the law to deal with emerging issues. The UEL experience is that, to the extent that concerns arise with respect to directions given under the common law on the basis that they are not consistent with the latest expert knowledge, amendments may be introduced to correct that deficiency.

Plainly enough, these are important issues which have application far beyond the scope of the Royal Commission. There is scope for expanding the UEL hearsay rule exceptions. All the law relating to the giving of judicial directions to juries in criminal trials is in need of review. Just as with the question of the proper approach to the admissibility of tendency and coincidence evidence, a reference to the ALRC would be appropriate.

It is time for a new, comprehensive, review of the UEL. There should be a reference by the Federal Government to the ALRC to permit that review. It will be an opportunity to build on the very substantial reforms to the law of evidence introduced by the UEL. Such a review is needed to address some problematic High Court judgments, to resolve continuing uncertainties about the law, to respond to technological and social changes which require that procedural law to adapt. It will also be an opportunity to consider whether changes to evidentiary law in non-UEL jurisdictions might be adopted more widely and I would hope that those jurisdictions would participate in the review. It would also be an opportunity for those non-UEL jurisdictions to consider, again, whether the reforms introduced in the UEL in the past, and hopefully after a review, might be worth copying — always remembering that the ultimate goal is not uniformity but rather a rational and just system of trial procedure.

## Cases

*Adam v The Queen* (2001) 207 CLR 96

*Bayley v The Queen* [2016] VSCA 160 (19 June 2013)

*Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993)

*Em v The Queen* (2007) 232 CLR 67

*Graham v The Queen* (1998) 195 CLR 606

*HML v The Queen* (2008) 82 ALJR 723; 245 ALR 204

*IMM v The Queen* (2016) 330 ALR 382

*Kelly v The Queen* (2004) 218 CLR 216

*Lee v The Queen* (1998) 195 CLR 594

*Papakosmas v The Queen* (1999) 196 CLR 297

*Pfennig v The Queen* (1995) 182 CLR 461

*R v Cooney* [2013] NSWCCA 312

*R v Drollett* [2005] NSWCCA 356

*R v Markuleski* (2001) 125 A Crim R 186; 52 NSWLR 82

*Shepherd v The Queen* (1990) 170 CLR 573

*Sio v The Queen* [2016] HCA 32 (24 August 2016)

*Smith v The Queen* (2001) 206 CLR 650

*TKWJ v The Queen* (2002) 212 CLR 124

*Winmar v Western Australia* (2007) 35 WAR 159; 177 A Crim R 418; [2007] WASCA 244 (2 November 2007)

## Legislation

*Evidence Act 1995* (Cth)

*Evidence Act 1995* (NSW)

*Evidence Act 2008* (Vic)

*Jury Directions Act 2015* (Vic)

## References

Case Study 38 (2016) 'Opinion of Counsel Assisting the Commission Regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence' <https://www.childabuseroyalcommission.gov.au/documents/criminal-justice/opinion-of-counsel-assisting-r.pdf>

Odgers S (1995) *Uniform Evidence Law*, The Federation Press

Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission) (2015) *Consultation Paper: Criminal Justice* <https://childabuseroyalcommission.gov.au/getattachment/a445c7b0-f5dc-4c88-80c6-0acd6a6fc375/Consultation-paper>