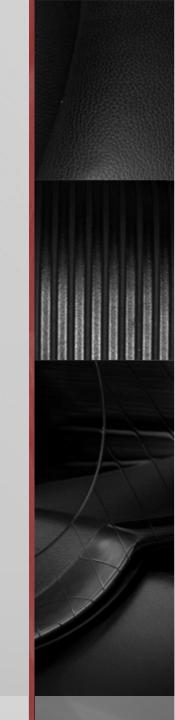
Tendency Evidence in multiple complainant cases of child sexual assault: the case for a restrictive interpretation and a high threshold of admissibility in criminal trials.

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The Issue

- Giving logical and appropriate meaning to the word 'significant' when assessing the **probative value** of tendency evidence under s 97 UEL in relation to facts in issue sought to be proved in criminal trials.
- Divergence between NSW and Victoria interpreting the threshold for s 97(1)
 (b) admissibility with main point of difference being the <u>degree of similarity</u> required before tendency evidence reaches the 'significant probative value' <u>threshold.</u>
- Lower in NSW no need to be 'closely similar' (R v Ford; R v PWD; RH v R; Saoud v R; Sokolowskyj v R; El-Haddad v R; Hughes v R) and higher in Victoria with 'some degree of similarity' required between the other relevant conduct and the offences charged (Velkoski v R; Rapson v R; Bauer (a Pseudonym) v R) not 'striking similarities'.
- Hughes v The Queen [2017] HCATrans 016 heard in High Court 8 February 2017 appellant contended *Velkoski* approach is correct whereas respondent and intervener (DPP Vic) contended NSW approach is more consistent with statutory language and purpose of s 97.

The arguments for a **high threshold** of admissibility – s 97 exclusionary rule

- "Significant" qualifies probative value so must impose a higher admissibility screen than s 55 relevance test.
- Tendency evidence to consider 'particular' ways or 'particular' states of mind inherent in definition and consistent with ordinary meaning that there will be identifiable similarities that mark out the tendency in establishing a pattern of behaviour across particular incidents. Inferential reasoning process beyond superficial similarity to high degree of cogency.
- Legislative intention and Act as a whole stricter regulation of tendency evidence evident in <u>multiple use prohibition in s 95</u> (cf hearsay evidence and operation of s 60) – recognising it is usually constituted by evidence of prior misconduct and bad character.
- No amendment recommended in ALRC102 (2005): <u>'ss 97-101 provide the means by which the trial judge can resolve this fundamental conflict'</u> between permissive and stringent admissibility thresholds. Schematic approach which must necessarily include s 101.

The role of section 101

- 'Any prejudicial effect' must be substantially outweighed by the significant probative value of the tendency evidence.
- Clear legislative recognition in the admissibility scheme of the need to protect the accused from prejudice and to promote accurate fact finding pulling in opposite directions but need a transparent balancing for a fair and objective comparison: R v Ellis less stringent than common law Pfennig 'no rational view consistent with innocence' test although this test may still apply when a very high degree of prejudicial effect is evident.
- Effect on probative value of real risk of concoction/contamination.
- Nature of tendency evidence in these cases viewed as abhorrent and deserving of punishment is an objective approach possible?
- Are costs of adducing tendency evidence avoided or sufficiently mitigated by <u>careful directions to jury (or judge-alone trials)</u>

Role and utility of judicial directions

- Curative effect of authoritative judicial directions to the jury about the legitimate use of tendency evidence in the inferential reasoning process?
- Law operates on assumption that judicial directions are understood and heeded by jurors – not borne out by available Australian and international jury studies.
- Directions to disregard evidence or make limited use of certain evidence are less likely to be effective and can be counter-productive – ALRC102 reference to studies by Tanford; and Lieberman and Arndt.
- Depends on directions may be contrary to common sense (counterintuitive) and lead to opposite reaction by jurors – moral prejudice and reasoning prejudice.
- Confidence in jury studies methodology and research design to ensure the true experience and reality of juror behaviour?
- Psychological research reports by recidivist child sexual assault offenders and nature of tangible similarities as basis to infer or predict similar behaviour in another person? Extrapolation to individual cases?
- Can the 'tendency' be fairly described in general terms given differing psychological characteristics from highly deviant motivations to selfish, distorted life theories or desire.
- Potential use of s 79 (expert opinion) in voir dire process what is unusual? What shows a pattern of behaviour that is a reliable predictor of future conduct? Effectively inform or hinder the criminal trial process?

CONCLUSION

- Adversarial criminal justice system based on fundamental tenets of the <u>presumption of</u> <u>innocence</u>, <u>due process and a fair trial</u>
- ✓ Liberty of the individual and minimising risk of wrongful conviction/miscarriage of justice
- ✓ Notorious effect of 'bad character' evidence
- Limitations of the criminal justice system in dealing with the reality of historical child sexual assault complaints. Where will the pendulum swing?
- Ways of accommodating prosecution
 evidence in a less prejudicial form –
 interpreting the scheme of ss 97-101 or
 legislative change? UK, US and NZ models.

