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The Case for Principled and Practical Propensity Evidence Reform

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The Case for Principled and Practical Propensity Evidence Reform

Note: The piece was written while NSW Parliament was considering these amendments. Unfortunately, they were passed with little amendment.

Valuable opportunity for reform

In September 2017 the Royal Commission into Child Sexual Abuse identified the exclusion of propensity evidence as 'one of the most significant [criminal justice] issues'.[1] Child sex offence (CSO) cases can be difficult for the prosecution to prove. They are often battles of credibility in which the complainant's allegation must be found far more credible than the defendant's denial to prove guilt beyond reasonable doubt.[2] Propensity evidence, that the defendant has prior convictions for similar offences, or has been the subject of other similar allegations, can be crucial to a successful prosecution. And yet this evidence is subject to exclusion at common law[3] and under the uniform evidence law (UEL).[4] To gain admission propensity evidence must satisfy certain potentially stringent requirements.

The Royal Commission, drawing on case studies, submissions, and commissioned research, concluded that propensity evidence is more probative and less prejudicial[5] than traditionally appreciated. It recommended that the admissibility requirements be relaxed. A working group of the Council of Attorneys General (CAG) developed a set of model provisions to implement the Royal Commission's recommendations. Late last November the CAG announced that UEL jurisdictions would implement them.[6] On 25 February 2020, the NSW Attorney General was the first jurisdiction to introduce a Bill to implement the reforms.[7] Other UEL jurisdictions appear likely to follow.[8]

Unfortunately, the Bill raises real concern. It is appropriate for the propensity evidence to be admitted more readily. But the way the Bill goes about this increases the complexity and inefficiency of the law and unnecessarily increases the risk of prejudice.

Current complexity

Relaxing the exclusionary rule offers the promise of more effective criminal law enforcement. However, in focusing on this goal the reform process has failed to give sufficient attention to

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[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Commonwealth of Australia, 2017) Parts III–VI, 411.
[2] Eg, *Liberato v The Queen* (1985) 159 CLR 507, 515 (Brennan J); *Pell v The Queen* [2019] VSCA 186.
[3] *Pfennig v The Queen* (1995) 182 CLR 461; *Phillips v The Queen* (1995) 182 CLR 461. The common law now only applies in Queensland: eg, *R v Davidson* [2019] QCA 120.
[4] Ss 97, 98, 101 appear in the same terms in *Evidence Act 1995* (NSW), *Evidence Act 1995* (Cth), *Evidence Act 2011* (ACT), *Evidence Act 1995* (NSW), *Evidence (National Uniform Legislation) Act 2011* (NT), *Evidence Act 2001* (Tas), *Evidence Act 2008* (Vic). Non-UEL jurisdictions have broadly similar provisions: *Evidence Act 1906* (WA) s 31A; *Evidence Act 1929* (SA) s 34S.
[5] Royal Commission, n 1, 603.
[6] CAG Communique (29 November 2019), https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-communique-29-november-2019.
[7] Evidence Amendment (Tendency and Coincidence Bill) 2020 (NSW).
[8] Second Reading Speech, Evidence Amendment (Tendency and Coincidence Bill) 2020 (NSW).

another longstanding problem with propensity evidence law – its complexity.[9] Mid-last century, the law was described as being of 'apparently insoluble difficulty',[10] and a couple of decades later, as a 'pitted battlefield'.[11] The Victorian Court of Appeal (VCA) suggested matters are even worse under the UEL provisions, describing them as 'exceedingly complex and extraordinarily difficult to apply'.[12]

The tendency and coincidence provisions of the UEL generate hundreds of appeals.[13] These complexities also consume time in pre-trial proceedings and at trial. And, of course these inefficiencies are matched by financial and emotional costs to defendants, complainants and other witnesses.

The UEL provisions raise a host of issues because of their 'density',[14] 'the sheer number … of elements or components'.[15] For no good reason, propensity evidence is split into two categories, tendency and coincidence evidence, each which its own exclusionary rule. Each category is subject to not one but two overlapping admissibility tests. On the face of the legislation the tests are identical for tendency and coincidence evidence, however, courts have not viewed them that way.[16] A further distinction, not in the legislation but supported by the High Court[17] and the Royal Commission,[18] is drawn between cases with commission in issue and cases with identity in issue.

It seems the reforms will do nothing to simplify the law. On the contrary they add further layers of complexity. The double admissibility test will be maintained and the fallacious distinction between tendency and coincidence evidence reinforced. Furthermore, The unsubstantiated distinction between commission and identity cases will be legislatively entrenched. And yet another bifurcation will be introduced – between CSO cases and non-CSO cases.

Even if the numerous technicalities served a worthwhile purpose, the question would arise whether 'the same purpose could be served with a simpler rule'.[19] But this is a stronger case of '*needless* complexity'.[20] These technicalities serve no useful purpose.

The tendency/coincidence distinction

The UEL currently has two exclusionary rules, one for tendency evidence and one for coincidence evidence, each with its own admissibility tests. The legislative language for the admissibility tests is identical, but courts have suggested that the requirements are more readily satisfied for tendency evidence than for coincidence evidence. This elevates the importance of the distinction leading to game playing by the parties and raising difficulties for the trial judge and the jury.

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[9] Though the Royal Commission did note that the law 'had become unnecessarily complicated': Royal Commission, n 1, 591.

[10] Z Cowen and PB Carter, 'The admissibility of evidence of similar facts: A re-examination', in *Essays on the Law of Evidence* (Clarendon Press, 1956) 106.

[11] *DPP v Boardman* [1975] AC 421, 445.

[12] *Velkoski v The Queen* (2014) 45 VR 680, [33].

[13] On 24 February 2020, the note-up feature of AustLII, applied to the key UEL tendency and coincidence provisions, ss 97, 98 and 101, identified 220, 125 and 174 NSWCCA decisions respectively.

[14] Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 3.

[15] R George Wright, 'The Illusion of Simplicity: An explanation of why the law can't just be less complex' (2000) 27 *Florida State University Law Review* 715, 716.

[16] See discussion in next Section.

[17] *Hughes v The Queen* (2017) 263 CLR 338, [39] (Kiefel CJ, Bell, Keane and Edelman JJ).

[18] Royal Commission, n 1, 595.

[19] David M Driesen, 'Complexity and simplicity in law' (2015) 45 *Environmental Law* 181, 189-90.

[20] Driesen, n 19, 189.

The tendency/coincidence distinction is artificial. The propensity inference has both tendency and coincidence elements. The propensity inference derives its probative value from the notion that the defendant, given his other misconduct, 'is a man who is more likely than other men to have engaged in [the charged behaviour]'.[21] This involves consideration of the strength of the tendency – how likely the defendant is to have repeated the conduct. It also raises the question of how common the conduct is generally – perhaps the defendant is innocent and the appearance of the other misconduct evidence is mere coincidence.

No other jurisdiction attaches great significance to the distinction.[22] It appears to be an artefact of history. For much of the 20th century propensity reasoning was considered to be absolutely 'forbidden'; evidence revealing a defendant's other misconduct could only admitted for non-propensity purposes.[23] Coincidence reasoning was occasionally advanced as non-propensity reasoning as a way of getting around the prohibition.[24]

In the later part of the 20th century, it became recognised that many of the supposed non-propensity purposes were fictions.[25] Propensity reasoning became permitted if it possessed sufficient probative force. But the common law distinction between tendency and coincidence reasoning, though artificial, may have served a purpose. The tendency inference is built on the proposition that the defendant actually committed the other misconduct.[26] The coincidence inference treats this as mere possibility until the inference is completed. As a result, the coincidence characterisation 'is arguably less prejudicial'.[27] 'The risk of prejudice is much less'.[28]

The tendency/coincidence distinction under the UEL has become wholly untethered from this history. Courts insist upon a strict distinction; '[c]are must be taken to distinguish "tendency evidence" from "coincidence evidence"'.[29] And courts make it harder for evidence to gain admission as coincidence evidence. For admission, 'coincidence evidence will ordinarily need to exhibit a greater level of similarity, or commonality of features, than is required for tendency evidence'.[30]

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[21] *Hughes v The Queen* (2017) 263 CLR 338, [109] (Gageler J), discussing tendency evidence; see also David Hamer, 'The Significant Probative Value of Tendency Evidence' (2019) 42 *Melbourne University Law Review* 506, 528-533.
[22] Eg, David Hamer, *The admissibility of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions* (Report for the Royal Commission, 2016).
[23] Eg, *DPP v Boardman* [1975] AC 421, 453 (Lord Hailsham); *Sutton v The Queen* (1984) 152 CLR 528, 533 (Gibbs CJ); *R v Ellis* (2003) 58 NSWLR 700*,* 716.
[24] Imwinkelreid EJ, 'An evidentiary paradox: Defending the character evidence prohibition by upholding a non-character theory of logical relevance, the doctrine of chances', (2006) 40 *University of Richmond Law Review*, 419; see also Law Reform Commission, *Evidence* (Report No 26, 1985) vol 1, 83 [165].
[25] Eg, *Boardman* [1975] AC 421,456-7 (Lord Cross); *Pfennig v The Queen* (1995) 182 CLR 461, 480-1 (Mason CJ, Deane and Dawson JJ), 527 (McHugh J); *Harriman v The Queen* (1989) 167 CLR 590, 599-601 (Dawson J); *BRS v The Queen* (1997) 191 CLR 275, 305 (McHugh J).
[26] Eg *Gardiner v The Queen* (2006) 162 A Crim R 233, [135].
[27] Law Reform Commission, n 24, 220 [400].
[28] *Pfennig v The Queen* (1995) 182 CLR 461, 530 (McHugh J). See also *Mahomed v The Queen* [2011] 3 NZLR 52, [89].
[29] Judicial College of Victoria, *Victorian Criminal Charge Book* 4.18 [5], citing *R v Nassif* [2004] NSWCCA 433; *Gardiner v The Queen* (2006) 162 A Crim R 233; *KJR v The Queen* (2007) 173 A Crim R 226. See also Judicial College of Victoria, *Victorian Criminal Charge Book* 4.19 [6]; Judicial Commission of NSW, *Criminal Trials Benchbook* [4-200], [4-235](b).
[30] *Page v The Queen* [2015] VSCA 357, [53]; see also *El-Haddad v The Queen* (2015) 88 NSWLR 93, [48]; *Rapson v The Queen* (2014) 45 VR 103, [11].

Predictably this motivates the prosecution to adduce other misconduct evidence in the more prejudicial form, as tendency evidence rather coincidence evidence.[31]

Once the evidence has been admitted as either tendency or coincidence evidence, the court will be stuck with that narrow characterisation. In the case of coincidence evidence, there may be call for 'a clear and detailed direction that [the jury] were not to engage in propensity reasoning'.[32] And '[t]he language of coincidence evidence [is ruled out for] evidence tendered as tendency evidence.'[33] This provides further fertile ground for legalistic argument. These constraints are also likely to hamper the provision of useful guidance to juries. For example, where the evidence of other alleged victims has been adduced as tendency evidence (due to the weaker admissibility requirements), the prosecution will be unable to ask the jury to consider the 'improbability of similar lies'.[34] This invitation could be of real assistance to a jury. But instead, the prosecution will only be allowed to refer to the more prejudicial tendency aspect of propensity reasoning.

The Royal Commission perceived some of these problems. It saw 'little merit in maintaining' a distinction which 'seems to be … artificial'.[35] However, it focused on increasing admissibility and saw the tendency/coincidence distinction as a side issue. The Royal Commission 'anticipate[d] that in due course'[36] the distinction would be abolished, but this was not one of its recommendations. Unfortunately, the reforms not only retain the distinction; they give it still greater force.

Stringent exclusion

The notion that propensity reasoning is absolutely forbidden gave way, in the latter part of the last century, to the proposition that propensity reasoning may be allowed if it has sufficient force. Some jurisdictions adopted the 'principled and functional'[37] admissibility requirement that probative value must exceed prejudicial risk.[38] However, in Australia, things got very messy. The High Court expressed doubts about that simple balancing test because it 'resemble[s] the exercise of a discretion rather than the application of a principle'.[39] In *Sutton v The Queen*, Gibbs CJ suggested the balancing test was one element of a 'double safeguard against the injustice that may be caused by evidence of this kind,'[40] the first element requiring that the evidence be 'strongly probative'.[41]

Ultimately, at common law, the High Court in *Pfennig v The Queen* dropped the balancing test and imposed a stringent fixed admissibility threshold: there must be '[no] rational view of the

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[31] Reflected in the NSWCCA figures: see n 13. Note also that all recent HCA appeals have been tendency cases: *IMM v The Queen* (2016) 257 CLR 300; *Hughes v The Queen* (2017) 263 CLR 338; *Bauer v The Queen* (2018) 92 ALJR 846; *McPhillamy v The Queen* (2018) 92 ALJR 1045.
[32] *Cox v The Queen* [2015] VSCA 28, [35]; see also *Jury Directions Act 2015* (Vic) s 29; Judicial College of Victoria, n 29, 4.18 [60]; Judicial Commission of NSW, n 29 [4-237].
[33] *Gardiner v The Queen* (2006) 162 A Crim R 233, [117]; see also *Doyle v The Queen* [2014] NSWCCA 4, [100], [103], [145]; *KJR v The Queen* (2007) 173 A Crim R 226, [3], [52].
[34] Eg *Hoch v The Queen* (1988) 165 CLR 292, 295.
[35] Royal Commission, n 1, 643; see also *Saoud v The Queen* (2014) 87 NSWLR 481, [43].
[36] Royal Commission, n 1, 643.
[37] S Lederman, A Bryant and M Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada* (LexisNexis, 4th ed, 2014), 673.
[38] *DPP v P* [1991] 2 AC 447, 460-1; *R v Handy* [2002] 2 SCR 908, [55]; *Evidence Act 2006* (NZ) s 43(1). For England, now see Part 1 of Chapter 11 of the *Criminal Justice Act 2003*.
[39] *Pfennig v The Queen* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ); see also *Sutton v The Queen* (1984) 152 CLR 528, 534 (Gibbs CJ).
[40] *Sutton v The Queen* (1984) 152 CLR 528, 534.
[41] *Sutton v The Queen* (1984) 152 CLR 528, 534.

evidence that is consistent with the innocence of the accused'.[42] The problematic common law test now only applies in Queensland.[43] The UEL, introduced in NSW and the Commonwealth in 1995, the same year as *Pfennig*, got stuck with the 'double safeguard'. Sections 97 and 98 require that tendency and coincidence evidence have 'significant probative value'. Section 101 requires that probative value 'substantially outweigh' the risk of prejudice.

While apparently less stringent than *Pfennig*,[44] the Royal Commission identifies the UEL tests as a major obstacle to the prosecution of child sex offenders.[45] In *Velkoski v The Queen* the Victorian Court of Appeal suggested that tendency evidence may require something '"remarkable", "unusual", "improbable" [or] "peculiar"'.[46] The Court criticised the NSW Court of Criminal Appeal, which had suggested that the other misconduct need not be 'closely similar'[47] with the charged offence, for lowering the admissibility threshold 'too far'.[48] A majority of the High Court in *Hughes v The Queen* appeared to favour the NSW approach, describing *Velkoski* as 'unduly restrictive' and dismissing the appeal.[49] However, the *Hughes* majority emphasised that, while there was considerable variation among the alleged incidents of sexual misconduct in that case, that they were all marked by opportunism and riskiness.[50]

The High Court's subsequent decisions appear more demanding. In *Bauer v The Queen*, the High Court spoke of the need for a 'special, particular or unusual feature',[51] 'some feature of or about the offending which links the two together'[52] (though noting that 'there is ordinarily no need of a particular feature' where the other misconduct involves the complainant)[53]. In *McPhillamy v The Queen*, the High Court reiterated the need for 'some feature of the other sexual misconduct and the alleged offending which serves to link the two together'.[54] Upholding a defence appeal it held that it was insufficient that tendency evidence, regarding events 10 years earlier, involved boys of similar age to the complainant, similar sexual misconduct, and that, in each case, the defendant had authority over the boy.[55]

The Royal Commission recognised that the demand for distinctive similarities is misplaced. 'The two most important similarities are already present – *sexual* offending against a *child*'.[56] If the other misconduct bears the same hallmark as the charged offence, probative vale will be heightened. However, propensity evidence can be highly probative without it. Child sex offenders are not specialists. Many offend against 'both girls and boys and children of quite different ages, … in

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[42] *Pfennig v The Queen* (1995) 182 CLR 461, 483.
[43] See nn 3-4.
[44] See *R v Ellis* (2003) 58 NSWLR 700, 719.
[45] Royal Commission, n 1, 411.
[46] *Velkoski v The Queen* (2014) 45 VR 680, [133] citing *Reeves v The Queen* (2013) 41 VR 275, [53].
[47] *Velkoski v The Queen* (2014) 45 VR 680, [120], [155] citing, eg *R v Ford* (2009) 273 ALR 286, [41]; *R v PWD* (2010) 205 A Crim R 75, [79].
[48] *Velkoski v The Queen* (2014) 45 VR 680, [164].
[49] *Hughes v The Queen* (2017) 263 CLR 338, [12] (Kiefel CJ, Bell, Keane and Edelman JJ).
[50] *Hughes v The Queen* (2017) 263 CLR 338, [2] (Kiefel CJ, Bell, Keane and Edelman JJ); see also [114] (Gageler J).
[51] *Bauer v The Queen* (2018) 92 ALJR 846, [48].
[52] *Bauer v The Queen* (2018) 92 ALJR 846, [58].
[53] *Bauer v The Queen* (2018) 92 ALJR 846, [60].
[54] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [31].
[55] *McPhillamy v The Queen* (2018) 92 ALJR 1045, [32].
[56] Royal Commission, n 1, 595.

a variety of ways [and] in different contexts – institutional, familial and others'.[57] The law requires change.

Pointless layers of complexity

The recommendation to relax the stringency of exclusion is well-made. Unfortunately, the problem of complexity has received less attention. There appears no good reason for there to be two overlapping admissibility tests, both measuring probative value.[58] The UEL adopted the 'double safeguard' while the law was in flux. After a quarter of a century, the law is ripe for rationalisation. But the reforms will retain the two UEL admissibility.

The tests will, however, be relaxed. The illogical asymmetry will be removed from s 101. This test will then resemble the simple requirement favoured by other jurisdictions: probative value need only outweigh (not substantially outweigh) prejudicial risk.[59] This sensible reform, however, is overwhelmed by the absurd complexity of the proposed changes to the other test.

The requirement of 'significant probative value' in ss 97 and 98 is to be retained with a 'new rebuttable presumption' of significant probative value in certain cases in a new s 97A, and 'targeted legislative guidance [to] the dispel misconceptions that have minimised the perceived value of this evidence in the past' in s 97A(5).[60] If well-designed, reflecting the logic of proof and empirical knowledge regarding criminal behaviour, such guidelines may be effective. Their effectiveness, however, may be limited by them operating within such a complex admissibility scheme, as a second (rebuttal) step of the first of two distinct admissibility tests. A far greater problem for the rebuttable presumption, though, is that it is hemmed in by technical restrictions. It will have application only to *tendency evidence*[61] of *sexual interest in a child*[62] in *CSO proceedings*[63] where *commission*[64] is in issue.

Limiting the rebuttable presumption to tendency evidence will greatly exacerbate current problems with the tendency/coincidence distinction. Prosecutors will be motivated to adduce evidence of a defendant's other misconduct as tendency evidence rather than coincidence evidence. The defence and the court will waste effort policing the boundary between the two. As well as being inefficient, this may hamper the jury's understanding and increase the risk of prejudice.

Restricting the rebuttable presumption to evidence of sexual interest in a child in child sexual offence proceedings is also problematic. As well as raising formal definitional issues, the restriction appears unjustifiable as a matter of substance. The Royal Commission's terms of reference were restricted to CSOs. These are both prevalent and difficult to prosecute. However, CSOs are not unique in these respects. Sexual assault against women is another common offence

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[57] Royal Commission, n 1, 595.

[58] David Hamer, 'Propensity Evidence Reform after the Royal Commission into Child Sexual Abuse' (2018) 42 *Criminal Law Journal* 234, 243.

[59] NSW Attorney General Press Release, June 2019: https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/evidence-law-reform.aspx.

[60] NSW Attorney General Press Release, n 59; see also Second Reading Speech, Evidence Amendment (Tendency and Coincidence Bill) 2020 (NSW).

[61] S 97A(2).

[62] S 97A(2).

[63] S 97A(1) and (6).

[64] S 97A(1).

that the criminal justice system has difficulty enforcing. In fact, the difficulty of these prosecutions is heightened by a further artificial restriction that the High Court has placed on propensity reasoning.

In *Phillips v The Queen*,[65] the defendant was charged over a series of sexual offences against young women. On a number of counts consent was in issue.[66] The High Court held that propensity evidence on consent is irrelevant. Evidence of other complainants' lack of consent 'proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her'.[67] This argument is fundamentally flawed.[68] Of course there is a connection between the different complainants' non-consent – the defendant's conduct. His strategies of isolation, threats and force. Why else would each of them have non-consensual sex with him? The fact that one woman (was coerced to have) had non-consensual sex with the defendant lends support to another woman's claim to have (been coerced to have) had non-consensual sex with the defendant in similar circumstances. In some cases the prosecution have got around the *Phillips* rule by identifying the defendants' means of obtaining non-consensual sex as the issue rather than the complainants' lack of consent.[69] However, in other cases *Phillips* has operated to stifle effective sexual assault prosecutions.[70] To introduce major reform into the law governing propensity evidence without overturning *Phillips* is indefensible.

Instead it appears the reforms will give legislative force to another artificial unfounded restriction. The rebuttable presumption of significant probative value will be limited to the commission issue. This reflects the majority's proposition in *Hughes* that '[t]he probative value of tendency evidence will vary depending upon the issue that it is adduced to prove'.[71] More would be required of evidence adduced 'to prove the *identity* of the offender for a known offence [than] where the fact in issue is the *occurrence* of the offence'.[72] The Royal Commission endorsed these views. '[A] search for additional similarities or distinctiveness … where the … evidence is not being relied on to prove the identity of the accused is unwarranted.'[73] However, neither the High Court nor the Royal Commission substantiated this distinction.[74]

The only apparent basis for admitting tendency evidence more readily in commission cases is that there may be less work to be done in such cases. In the typical CSO case the complainant's direct evidence occupies centre stage. Propensity evidence goes to the narrower issue of whether the 'the complainant's account … has been fabricated or [the defendant's] anodyne conduct has

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[65] *Phillips v The Queen* (2006) 225 CLR 303.
[66] *Phillips v The Queen* (2006) 225 CLR 303, [44].
[67] *Phillips v The Queen* (2006) 225 CLR 303, [47].
[68] David Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30(3) *University of New South Wales Law Journal* 609, 614-618.
[69] Eg, *R v Little* [2018] QCA 113, [36]; *Western Australia v Osborne* [2007] WASCA 183, [27].
[70] Eg, *R v Collins* [2013] QCA 389, [50]; *Jacobs v The Queen* [2017] VSCA 309, [34]-[35]. The Court in *Jacobs v The Queen* [2017] VSCA 309, [35] fn 31 suggested the High Court in *Stubley v Western Australia* (2011) 242 CLR 374 had referred to *Phillips v The Queen* (2006) 225 CLR 303 'without any criticism'. This is broadly correct, but in argument in *Stubley v Western Australia* [2010] HCATrans 269, Heydon J described *Phillips* as 'one of the most criticised decisions of the High Court of all time', and the High Court judgments placed little if any reliance on *Phillips*.
[71] *Hughes v The Queen* (2017) 263 CLR 338, [39].
[72] *Hughes v The Queen* (2017) 263 CLR 338, [39] (emphasis added).
[73] Royal Commission, n 1, 595.
[74] The distinction has been rejected in England: *R v W (John)* [1998] 2 Cr App R 289, 300; English Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, Cm 5257 (October 2001), [2.23], [4.6].

been misinterpreted'.[75] Compare this with a stranger rape case where the propensity evidence is the 'only evidence' going to identity.[76] But this is a weak justification. Even if it is appropriate for tendency evidence to derive probative value from evidential context,[77] it is wrong to assume that evidential context will always be stronger in commission than identity cases.

Consider two almost identical cases. In both the complainant, a young child, testifies that the defendant sexually assaulted her. In the first case the defendant denies that it happened at all. In the second, the defendant admits that the sexual assault happened but suggests that the child is confused and it was someone else, not the defendant.[78] In both cases, the prosecution seeks to adduce evidence of the defendant's CSO prior convictions. Why should the tendency evidence gain admission more readily in the commission case than in the identity case?

Squandering the opportunity

The Royal Commission's work provides a solid foundation and valuable opportunity for reform of a deeply dysfunctional area of evidence law. Unfortunately, the opportunity is at risk of being squandered. Understandably, the Royal Commission's primary focus was on the stringency of the exclusionary rule. The Royal Commission paid less attention to the rule's complexity. However, the law's complexity also presents an obstacle to effective law enforcement, in the area of CSOs and beyond.

Rather than addressing the complexity problem, the UEL reforms will worsen it. A presumption of significant probative value will make it far easier for the prosecution to rely upon propensity evidence, but only in a narrow range of cases. The presumption will be limited to *tendency evidence* of the defendant's *sexual interest in a child* in *CSO proceedings* with *commission* in issue. This is inefficient and needlessly increases the risk of prejudice. There are strong policy reasons for the presumption to operate more broadly, including, in particular, sex offences against women.

Propensity evidence law is already a 'tottering edifice built on inadequate foundations'.[79] Reform is needed. But for the model provisions to add further layers of complexity is not a sensible approach.

[75] *Hughes v The Queen* (2017) 263 CLR 338, [40] (Kiefel CJ, Bell, Keane and Edelman JJ); see also [95] (Gageler J)
[76] *R v W (John)* [1998] 2 Cr App R 289, 300.
[77] Hamer, n 21, 523-528.
[78] Eg, *HG v The Queen* (1999) 197 CLR 414.
[79] An expression used in quite a different context in *Re A* [2015] EWFC 11, [11].