T A S M A N I A

LAW REFORM

I N S T I T U T E

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Amber Mignot
Department of Justice
GPO Box 825
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By email: amber.mignot@justice.tas.gov.au

Dear Amber,

Comments on proposed reform re tendency and coincidence evidence

The Tasmania Law Reform Institute (***the Institute***) welcomes the opportunity to provide feedback on the Tasmanian government's proposed reforms to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings.

My comments are set out below. A copy of the completed Response Template for Stakeholders is also attached.

First limb of the test for admissibility – retention of the requirement for tendency and coincidence evidence to have significant probative value.

This recommendation is not opposed.

New targeted provision to supplement the first limb to deem prosecution evidence of tendency in child sexual offences of significant probative value

Inclusion of this provision is opposed. This reform is unlikely to achieve the effect sought for it, which is to eliminate any requirement for courts to find similarity between the evidence sought to be adduced and the charged conduct. However, it is unlikely to be successful in that regard. That requirement may simply be displaced either to the question whether the evidence actually qualifies as *tendency* evidence or to the second limb of the test – whether its probative value outweighs the danger of unfair prejudice to the defendant.

Whether the evidence discloses a relevant tendency, of course, engages s 55 and in this context, similarity can play a significant role. In regard to the proposed second limb of the admissibility test, see the reasoning of the Canadian Supreme Court in *Handy* [2002] SCR 2 SCR 908 which extensively referenced similarity in assessing the cogency of the evidence. While similarity may be thought to be necessarily imported into the Canadian rule by its nomenclature as 'similar fact evidence', this case reveals how critical similarity can otherwise be, to the assessment of the "the principal driver"[1] of the probative value of tendency evidence - its connectedness to the alleged offences.[2] This remains the case despite

[1] *Handy* at [76].
[2] *Handy* at [76] and see *Hughes* [2017] HCA 20, *Bauer* [2018] HCA 40 and *McPhillamy* [2018] HCA 52 to similar effect.

the judgment of the High Court in *IMM*[3] because similarity engages relevance considerations rather than reliability concerns.

If the proposed second limb is not enacted in the form recommended in the Proposal Paper, and s 101 is retained in its present form, similarity will survive through the requirement that the probative value of the evidence substantially outweigh any prejudicial effect it may have for the defendant. Even were s 101 to be repealed, s 137 remains as a possible conduit to the requirement or consideration of similarity between the charged offence and the evidence sought to be adduced.

Accordingly, to achieve the outcome sought, it will probably be necessary to target similarity explicitly and exclude it as a factor to be taken into account in the determination of the admissibility of tendency evidence under all potentially applicable provisions, ss 55, 97, 101 and 137. However, I do not favour this approach, because there will be cases where similarity has justified significance in the determination of admissibility and where absence of similarity discloses the prejudicial nature of the evidence. Further, such an approach may compel courts to assess the relevance and probative value of tendency evidence in terms of its links to charged offences on less transparent and/or more tenuous grounds. A better approach would be to identify and perhaps graduate factors that are relevant to the determination of the probative force of the evidence, such as the nature of the conduct, the identity and characteristics of the complainants, the circumstances of the conduct, whether the conduct had resulted in previous convictions, and reports and research on tendency offending conduct.

The targeted provision is also likely to introduce undesirable complexities and uncertainty into the application of s 97. For example, it is not clear how this provision relates to the proposed second limb of the tendency and coincidence test or to s 137. Additionally, its implications for s 98 and therefore s 95 are not considered. The Proposal Paper makes clear that the targeted provision does not apply to s 98. Moreover, given the terms of s 98, and the purpose of the targeted provision, it cannot apply to that provision. This means that there would be a different standard of proof and approach to admissibility for these two provisions in child sexual offences cases. Yet policy and principle have characterised these two categories of evidence as contiguous in their application. This is evident in the way that the Uniform legislation has hitherto dealt with them, subjecting them to the same admissibility requirements etc. The targeted provision drives a coach and four through the accepted orthodoxy in this respect and through a consistent approach to these two types of evidence, their purposes and their dangers.

How the targeted provision would work with the proposed second limb and, therefore, also with s 137, which replicates the second limb, is also a puzzle. It is possible that, in practice, it will result in retention of the substantial probative value test that the Proposal Paper seeks to exclude. How might this occur? If the evidence is deemed to have significant probative value, then, in child sexual offences cases, it will only be excluded if its unfairly prejudicial effect *more than significantly* outweighs its significant probative value. Given the accepted dangers inherent in tendency reasoning, this level of unfair prejudice may not be difficult to establish. This means that the tendency evidence will only be admissible on application of the second limb, if its probative value is more than significant, potentially even substantial, unless an additional level of probative value between significant and substantial, is created. The targeted provision raises essentially the same concern in relation to s 137 in child sexual offences cases. However, the existence of s 135, which incorporates a substantial probative

[3] [2016] HCA 14.

value test, may inhibit, to some extent at least (though it is not certain how) this interpretation of s 137 and perhaps even the proposed second limb.

This reform is also opposed because it applies to a single category of offending only - sexual offending against a child or children. This limitation probably exists because the Proposal Paper responds to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse. However, if it is a justifiable reform (and I am not convinced that it is) then it should extend to all cohorts of complainants who are vulnerable to sexual predation including adult complainants with disabilities and elderly complainants. We should not approach reform of ss 97 and 98 in an ad hoc or piecemeal way. This means that we should not wait until delivery of the findings of the Royal Commissions into Elder Abuse and the Abuse of People with Disabilities before reforming ss 97 and 98 to cover these groups of people. After all, these are all categories of vulnerability which expose people to sexual predation and which, when it occurs, involves 'unusual conduct' of a kind that discloses a tendency to act in particular ways and to have particular states of mind. Accordingly, the limited application of the targeted provision raises concerns about differential justice for similar cohorts of victims. For this reason, as well, it is opposed.

Second limb

The addition of this provision is opposed because it is otiose given the existence of s 137. If enacted it would therefore undermine structured consistency in the operation of the Act. The purpose of the second limb is to abolish the requirement that tendency evidence tendered by the prosecution against defendants in criminal cases have *substantial probative value* (the current s 101 test). The best way to achieve this is to make specific provision to this effect, abolish s 101 and restrict the application of s 135. Sections 55, 97, 98 and 137 would then govern the admissibility of the evidence. While the Proposal Paper justifies the proposed reform on the basis that it will facilitate the admissibility of tendency and coincidence evidence in child sexual offences cases, it is not limited to such cases. It is not argued here that it should be. However, I am not convinced that such reform will facilitate the admission of tendency and coincidence evidence. In the absence of explicit prohibition, courts may still require that this evidence have a high degree of probative value given the usually high degree of its unfairly prejudicial effect. In any event, it is difficult to see how the replication of s 137 is justifiable.

Proposed supplementary reforms

Joint trials

This reform has already been enacted in Tasmania – s 326A *Criminal Code 1924* (Tas).

Concoction, collusion contamination

This reform has already been enacted in Tasmania - s 101(5) *Evidence Act 2001* (Tas).

Standard of proof

The introduction of a provision explicitly providing that tendency or coincidence evidence about a defendant is not required to be proved beyond reasonable doubt is opposed if it is to apply to *all* cases where tendency and coincidence evidence is adduced. In some cases, tendency or coincidence evidence will be the only or substantially the only evidence against

the defendant. *Pfennig*[4] is an example of such a case. In these cases, a direction to find the evidence proved beyond reasonable doubt will be necessary. In *Bauer*, the High Court stated:

> [T]rial judges … should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt.[5]

However, rather that resort to the High Court reasoning in *Shepherd,* [6] which distinguishes between strands and links in a chain when addressing the question of whether particular evidence should be proved beyond reasonable doubt, I would suggest that a direction that the jury must find particular tendency or coincidence evidence is proved beyond reasonable doubt before they can act on it, should only be given where the evidence is the only or substantially the only evidence of guilt. This approach effectively achieves the same result as the link in the chain reasoning but is more comprehensible and less opaque. It also confines the beyond reasonable doubt direction to cases where it is clearly necessary and defines what those cases are. The links in the chain approach is less certain in this regard and so open to argument and doubt. Accordingly, the proposed reform should be changed as suggested here to reflect the clear need for tendency and coincidence evidence to be proved beyond reasonable doubt in some cases. Conditional upon those amendments, this proposal is supported. With those amendments it ensures that the 'no rational inference test' in *Pfennig* is not imposed on ss 97 and 98.

Improbability of similar lies

Such evidence is already addressed by s 98 and therefore the proposed reform is unnecessary and may be counterproductive for this reason.

Excluding common law and equity

This provision is supported. It confirms and bolsters existing case law in this regard. It should also help to ensure, in particular, that the 'no rational inference test' in *Pfennig,* and the reasoning in *Hoch*[7] and *Sutton*[8] in relation to concoction, collusion and influence is not imposed on ss 97 and 98. The approach to admissibility in those cases is clearly at odds with the rejection, in *Ellis,*[9] of the *Pfennig* 'no rational inference test'. In this regard it will clarify the law generally and support the reform in s 101(5) *Evidence Act 2001* (Tas).

Kind regards,

Associate Professor Terese Henning
Director Tasmania Law Reform Institute

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[4] (1995) 182 CLR 461.
[5] *Bauer* at [86].
[6] (1990) 170 CLR 573.
[7] (1988) 165 CLR 292.
[8] (1984) 152 CLR 528.
[9] (2003) 58 NSWLR 700.