THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Model Amendments to the Uniform Evidence Law

27 February 2017

The Royal Commission into Institutional Response to Child Sexual Abuse

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The NSW Young Lawyers **Criminal Law** Committee (Committee) makes the following submission in response to the Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice System Model Amendments to the Uniform Evidence Law **(model amendments)**.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

The Committee welcomes the opportunity to address the model amendments to the Uniform Evidence Law (UEL). We reiterate our concerns about the continued complexity of the law regarding the use of tendency and coincidence evidence; accordingly, the Committee agrees that tendency and coincidence evidence warrant reform, so that it is simpler to use such evidence in appropriate circumstances. However, the Committee submits that the proposed amendments do not achieve this objective and that the draft provisions undermine the ability of courts to ensure a fair trial. It is clearly a complex task to appropriately balance the interests of the community, the victims and the accused. This means that changing the rules relating to tendency and coincidence requires a consideration of the implications throughout the criminal justice system, as well as in civil trials. Furthermore, the Committee submits that any changes should be based on robust evidence. With this in mind, the Committee submits that further consideration of the rules relating to tendency and coincidence evidence ought to be undertaken by the Law Reform Commissions.

General Concerns

In addition to the specific issues outlined below, the Committee also briefly notes two general problems with the proposed amendments.

First, these proposals are not limited in application to child sexual abuse prosecutions. The Royal Commission has identified issues regarding the cross admissibility of evidence and joint trials in child sexual assault matters. These problems remain particularly salient in the prosecution of offences of this nature – as the circumstances in *R v Hughes*[1] demonstrate. Accordingly, as a matter of fairness to victims, the Committee submits that there is certainly a need to broaden the circumstance where evidence of this nature may be admitted. However, this should be done without undue prejudice to defendants. Furthermore, in light of the fact that these reforms would apply across the criminal justice system, it is the Committee's view that it is not enough to accept that the proposed models appropriately respond to the unique features of child sexual abuse prosecutions. The impact of these reforms in prosecutions for different offences has not been fully canvassed. Different offences lead to different assumptions, different approaches to reasoning by juries, and different types of tendency or coincidence evidence being relied upon.

Second, the Committee submits that the model amendments do not simplify the law. The proposed changes introduce new, often broadly defined tests that are profoundly uncertain in ambit. While the Committee notes that the model amendments are largely based on current UK legislation, and accordingly courts may find guidance in the case law from that jurisdiction, it is the Committee's view is that the proposals are unnecessarily complex and sweeping. A better approach may be to adopt the recommendations of Counsel Assisting, namely that the balancing test in s 101 of the UEL be amended to require that the probative value of tendency or coincidence evidence only need outweigh, not substantially outweigh, its prejudicial effect in order to be admitted.[2]

Important evidentiary issue as a test for admissibility

The Committee submits that the important evidentiary issue (IEI) test for admission is problematic in light of the overall legislative scheme provided for in the amendments. Beyond relevance, this test does not effectively exclude inappropriate evidence. Furthermore, the three categories – the third in particular – are very broadly defined and the threshold for admission is lowered significantly.

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[1] [2015] NSWCCA 330.
[2] Kirk SC and Barrow (2016) *Opinion of counsel assisting the Commission regarding week 1 of the hearing: Admissibility of tendency and coincidence evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney).

The current 'significant probative value' test directs attention to the extent to which the relevant evidence can 'rationally affect the assessment of the probability of the existence of a fact in issue'.[3] The court has to assess the probative value of the evidence proposed to be admitted. Such an assessment must be contextual and fact-specific.[4] The proposed rules remove this requirement. Evidence is admissible if the evidence is relevant to one of the enumerated IEI, and that the notice requirements have been met.

The proposed amendments specify that evidence falling within those categories is relevant, and therefore admissible. Importantly, the interaction here with ss 55 and 56 of the UEL is unclear. It may be that there is evidence that falls within the IEI categories that, because of its nature, could not rationally affect the assessment of the probability of the existence of a fact in issue. In such circumstances, it would not be an unfair reading of the proposed provisions that ss 55 and 56(2) are modified by the new concept of relevance to an IEI. Therefore, even if s 55 remains the appropriate test for relevance under the proposed amendments, it is apparent that the new evidentiary threshold will be lower than the current interpretations of 'significant probative value.'

Application of tendency rules to complainants and witnesses

The Committee notes that the proposed admissibility test would also apply to tendency and coincidence evidence (also referred to as 'propensity' evidence by the proposed reforms) that relates to complainants and witnesses, or is otherwise led by the defendant. Under the present rules, if an accused wants to run a tendency argument in respect of the behaviour of a complainant, they must show that the evidence in question has significant probative value – that is, the evaluative test referred to above. This evidence can also then be excluded under s 135 of the UEL if the court considers it appropriate to do so. Under the proposed provisions, provided that such evidence is relevant to an IEI (and the procedural requirements are met), there would be no power for the court to exclude that evidence. This could have a perverse effect of allowing the admission of evidence that relies on tendency reasoning to improperly impugn the behaviour or state of mind of a complainant or witness.

Expansion of credibility evidence

The Committee submits that the interaction between s 94(1) and ss 95A(1)(a) (model A) and 96 (model B) is not clear. Section 94(1) provides that Part 3.6 does not apply to evidence that is relevant solely to the

[3] *Uniform Evidence Law* dictionary.
[4] Hamer (2016) *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, (Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney), p 7.

credibility of a witness. That is to say that while 'evidence of [prior dishonesty] shows a 'tendency' to be untruthful, if the evidence is relevant only to the credibility of the witness this Part has no application.'[5] This provision is retained by the model amendments.

Sections 95A(1)(a) (model A) and 96(1)(a) (model B) provide that 'evidence that shows a propensity of a party to be untruthful if the party's truthfulness is in issue in the proceeding' is an IEI. It is not required to be a *fact* in issue. Therefore, if evidence shows such a propensity, it appears to be admissible.[6] Credibility evidence is relevantly defined as evidence that is relevant to a witness's credibility but also relevant for some other inadmissible purpose, in this case tendency or coincidence.[7] Under the existing rules, generally speaking, evidence that discloses a tendency to be dishonest would be excluded by operation of s 94 of the UEL. However, such evidence is now arguably admissible. Expanding the circumstances wherein tendency and coincidence evidence may be admitted necessarily limits what constitutes credibility evidence, circumscribing the operation of Part 3.7 of the UEL.

For example in a civil matter, a young plaintiff [8] may have a propensity to lie to their parents or teachers when misbehaving. Currently, Part 3.6 would not apply to this evidence.[9] However, the model amendments make this a potential IEI. Thus, the evidence is admissible to show that the complainant has a tendency to be untruthful. Furthermore, as the proposed amendments stand, there would be no scope for a trial judge to exclude such evidence. Because it is admissible for a non-credibility purpose, the evidence no longer falls within the definition of credibility reasoning and so the evidence may be used, not only for tendency reasoning, but also to directly challenge the credibly of the complainant. This may limit the operation of the exclusionary rules for credibility because the evidence is admissible for a tendency purpose and therefore is no longer credibility as defined by s 101A. This may also make directions to the jury regarding the limitations of tendency ineffective because the evidence could be used for credibility purposes.

Safeguards against unreliability and unfairness

The Committee submits that in light of this amended test for admissibility, the model amendments do not adequately safeguard against the potential unreliability or unfairness of tendency and coincidence evidence. The proposed ss 101 (model A) and 101A (model B) are particularly concerning because they exclude the

[5] Odgers (2016) EA.94.60
[6] Model amendments ss 97(2)(b), 98(2)(b) (model A) and 98(2)(b) (model B).
[7] UEL, s 101A(b).
[8] The IEI is restricted to 'a party' which suggests it would not be applicable to a complainant. It is also important to recall the observations made by the Royal Commission's consultation paper about behavioural problems manifesting in child victims of sexual abuse.
[9] UEL, s 94.

operation of ss 135 and 137 from the new Part 3.6 of the UEL. Those later sections are essential evidentiary gates that allow the court to ensure trials are fair. Indeed, the other changes proposed by the model amendments may be less problematic were the ultimate discretion to admit or limit the use of tendency and coincidence evidence retained. The jury reasoning research does not exhaustively address legitimate and long-held concerns regarding evidence of this nature. In any event, this research does not provide a rationale for removing the existing discretionary safeguards.

The proposed amendments include a provision that potentially reproduces the protections of s 137. However, the Committee submits that the new provision – ss 98A (model A) and 99 (model B) – is inadequately defined, and does not to give courts enough discretion. The evaluation of evidence is a context-dependent exercise wherein judges should be given a degree of latitude. Under the proposed amendments, provided that the evidence is relevant (i.e. *could* rationally affect the probability of a fact in issue) to an IEI, its probative value (i.e. the *extent* to which is could affect that fact in issue) is not considered in the operation of the exclusionary provision.

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

The use of the standard of 'unlikely' in the second limb of the exclusionary test is also of concern. The effect of the provision, in conjunction with ss 98A(3) (model A) and 99(3) (model B), is that if it is likely that directions to the jury will remove the unfairness, the trial judge *must* admit the evidence. The Committee has two concerns with this approach. First, if the empirical evidence on the efficacy of directions is relied upon, it will be rare that directions are 'likely' to cure any unfairness. Indeed, the jury reasoning study observed that '[t]he findings in this study are in line with a large body of empirical research demonstrating the

ineffectiveness of most jury directions'.[10] Second, and more fundamental than the efficacy of directions, the proposed amendments accept that there will be circumstances where directions do not in fact resolve any potential unfairness. 'Likely' and 'unlikely' set a standard that would probably be similar to a 'substantial or real chance rather than a mere possibility.'[11] Therefore, it is inherent in the proposed test that there may be circumstances where directions do not, in fact, cure the unfairness, and so on balance the evidence ought not be admitted, but must be admitted by operation of this provision.

Ultimately, the jury reasoning research is certainly encouraging in its assessment of the capacity of juries to engage in some of the complicated reasoning required of them in difficult cases. However, the Committee submits that the lack of replication and application of the research in a broad range of situations makes it an inappropriate basis for making such wide-ranging changes to the UEL.

Evidence of acquittals

The Committee is also concerned about the express inclusion in s 94(5)(b)) of evidence of acts for which a person has been acquitted. The Committee acknowledges that an acquittal is not necessarily coterminous with innocence. Accordingly, where a person who has committed the charged acts is ultimately acquitted, it can seem perverse that that acquittal should preclude the presentation of evidence of those acts in later prosecutions for other acts for the purposes of tendency or coincidence reasoning. However, it would be equally aberrant to allow such evidence to be admitted in the case where an accused was correctly acquitted.

Concluding Comments

The Committee acknowledges the valuable work of the Royal Commission in considering reforms to these rules of evidence. However, in light of the specific focus of the Royal Commission, the Committee submits that changes that will affect the entire criminal law, as well as civil litigation, ought to be considered in a holistic and thorough way. Given the far-reaching effects of the proposals, the Committee reiterates its earlier submission that the Australian Law Reform Commission is the appropriate review body for this legislation. Regardless, the Committee has concerns about the consequences of some of the proposed reforms, particularly in relation to the impact of the IEI test for admissibility on the current UEL relevance

[10] Goodman-Delahunty, Cossins, & Martschuk, (2016) *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, (Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney) p 28.
[11] *R v Teremoana* (1990) 54 SASR 30, at 31.

threshold, the limiting of the operation of Part 3.7 of the UEL, and the lowering of the safeguards against unreliable evidence and unfairness to an accused.

NSW Young Lawyers and the Committee thank you for the opportunity to make this further submission. Should you have any further queries, please do not hesitate to contact the undersigned.

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