THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Admissibility of propensity and relationship evidence in WA

Project 112 Issues Paper

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The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

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1. INTRODUCTION

1.1 Terms of reference

On 8 September 2021 the Attorney General referred a project to the Law Reform Commission of Western Australia (**Commission**) with Terms of Reference (**ToR**) requiring the Commission to answer the following question:

'Having regard to section 31A of the *Evidence Act 1906* (WA) and the more recently introduced section 97A of the Model Uniform Evidence Bill, what rules should apply to determine the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, so that all relevant evidence is available to Western Australian courts, while also ensuring the right to a fair trial?'

For the purpose of this Issues Paper the Commission interprets the phrase 'other evidence of discreditable conduct' as referring to other evidence of an accused's discreditable conduct, as opposed to evidence of the discreditable conduct of witnesses and other persons.

This Issues Paper deals with the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct in criminal matters. Given the background to the ToR the Commission's tentative view is that the ToR are to be read as relating to the admissibility of evidence in criminal matters. If the Commission maintains this position, the Final Report will state that any recommendations relate to criminal matters only. However, s 97A of the Model Uniform Evidence Bill or Uniform Evidence Law (**UEL**)[1] (referred to in the ToR) applies to civil and criminal matters. The Commission welcomes submissions on whether there are issues relating to the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct in civil matters which ought to be considered by the Commission.

1.2 Background to Reference

In August 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) published its 'Criminal Justice Report'. In Part VI of that report the Royal Commission examined the law relating to the admissibility of evidence, in cases involving child sexual abuse, that is not relied on to directly prove the commission of a charged offence, but which proves that an accused engaged in other discreditable conduct. The particular categories of evidence of other discreditable conduct that was examined by the Royal Commission was evidence that was capable of establishing that an accused person had a tendency or propensity to act in a particular way ('tendency evidence'), evidence that proves that similarities in two or more events or circumstances make it improbable that the events occurred coincidentally ('coincidence

[1] The UEL, which was established in response to Australian Law Reform Commission Reports 26 (1985 Interim Report on Evidence) and 38 (1987 Report on Evidence), does not apply in Western Australia. The laws relating to the admission of evidence in proceedings in Western Australia are governed by the *Evidence Act 1906* (WA) and the common law.

evidence')[2], and evidence that puts charged offences into a proper context ('relationship' or 'context evidence').

While tendency evidence, coincidence evidence, and relationship or context evidence are not capable of directly proving the commission of an offence, such evidence may assist in proving that an offence has been committed in a number of ways. However, it has also been recognised that there is a risk that such evidence may unfairly prejudice an accused person at their trial, because, for example, there may be a tendency to over-estimate the weight that should be given to such evidence, or it may result in a bias being formed against an accused, or a decider of fact may impermissibly reason that because an accused did a discreditable act they must be guilty of the offence for which they are on trial, or it might confuse or distract a decider of fact from resolving the question of whether the accused committed the actual offence charged.[3]

The Royal Commission recommended that laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual offences should be the subject of legislative reform to facilitate the greater admissibility and cross-admissibility of such evidence, to ensure that there were more cases in which multiple charges of child sexual abuse offences were tried together.[4] While it also recognised historical concerns that tendency and coincidence evidence was unfairly prejudicial to an accused person, the Royal Commission concluded that the risk of unfair prejudice had been overstated. The Royal Commission also proposed draft legislative provisions.

On 27 June 2018, the Western Australian Government (**Government**) tabled its response to all 409 recommendations made by the Royal Commission.[5] Recommendations 44 to 49 of the Criminal Justice Report, relating to facilitating greater admissibility of tendency and coincidence evidence in criminal proceedings for child sex offences were accepted in principle. An 'accept in principle' response means that the Government "generally supports the intent or merit of the policy underlining the recommendation",[6] however it allows flexibility as to how the method for achieving the policy is achieved.

Nationally, the Council of Attorneys-General established a working group to consider the test for admissibility of tendency and coincidence evidence under the Model Uniform Evidence Bill or Uniform Evidence Law (**UEL**).[7] As a result of the recommendations of the working group, the Evidence Law (Tendency and Coincidence) Model Provisions 2019 (**Model Provisions**) were developed, which, once enacted, were intended to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings relating to child sexual offences.

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[2] Sometimes this evidence is called 'similar fact evidence'.

[3] *Dair v The State of Western Australia* [2008] WASCA 72; (2008) 36 WAR 413 [63] (Steytler P).

[4] It is questionable whether the Royal Commission made any specific recommendation about relationship evidence as a discrete category of evidence.

[5] Government of Western Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse - Response by Minister McGurk on behalf of the State Government of Western Australia* (June 2018) https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Royal-Commission/Pages/The-WA-Government-Response-to-Recommendations-(June-2018).aspx.

[6] Ibid, 10.

[7] The UEL, which was established in response to Australian Law Reform Commission Reports 26 (1985 Interim Report on Evidence) and 38 (1987 Report on Evidence), does not apply in Western Australia. The laws relating to the admission of evidence in proceedings in Western Australia are governed by the *Evidence Act 1906* (WA) and the common law.

The UEL does not apply in Western Australia, however, it is a matter of public knowledge that new evidence legislation is currently being drafted to replace the *Evidence Act 1906* (WA) (the Evidence Act). A new Act will adopt the UEL but retain WA provisions deemed sound.

The laws relating to the admission of 'propensity evidence' and 'relationship evidence' in proceedings in Western Australia are governed presently by s 31A of the Evidence Act and the common law. The phrases 'propensity evidence' and 'relationship evidence' are exhaustively defined in s 31A(1) of the Evidence Act, which is set out in Part 2 of this Issues Paper.

In the light of the Recommendations that were made by the Royal Commission, the Government's response to the Recommendations, its intention to replace the Evidence Act with the UEL and having regard to the Model Provisions, the laws that operate in Western Australia in respect to the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct may be in need of reform.

1.3 Scope and purpose

The purpose of this Issues Paper is to:

(a) summarise the approach that has been taken in Western Australia regarding the admission of propensity and relationship evidence, and other evidence of discreditable conduct;

(b) summarise the various approaches that have been taken by other comparable jurisdictions to the admission of such evidence;

(c) raise for discussion the various options that have been identified by the Commission about the rules that could apply in Western Australia to determine the admissibility of such evidence; and

(d) invite responses from stakeholders and members of the Western Australian community.

1.4 Submissions

The Commission has not reached a preliminary view at this stage as to whether reform is appropriate in Western Australia. The Commission seeks community and stakeholder feedback on all aspects of the Issues Paper.

The Commission invites interested parties to make comments or submissions on the aspects of the law and reform of the law outlined in this Issues Paper. This will assist the Commission in formulating its final recommendations for reform in relation to the issues raised by the ToR.

Comments and submissions may be made by email (preferred) or letter to the address set out in the box below. Those who wish to request a meeting with the Commission may telephone for an appointment.

Law reform is a public process. The Commission assumes that comments on this Issues Paper are not confidential. The Commission may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, please clearly identify which information is confidential and we will do our best to protect that confidentiality, subject to our other legal obligations. The Commission is subject to the requirements of the *Freedom of Information Act 1992* (WA).

The closing date for submissions is **Friday, 11 February 2022**.

Submissions can be sent to:

Email: lrcwa@justice.wa.gov.au
Mail: Law Reform Commission of WA, GPO Box F317, PERTH WA 6841

Assistance in making a submission: If you require an interpreter; or if you require some other assistance to have your views on the issues heard, please telephone the Commission on (08) 9264 1600.

If you would like a copy of this paper in an accessible format, please contact the Commission.

2. THE WESTERN AUSTRALIAN APPROACH TO THE ADMISSION OF PROPENSITY AND RELATIONSHIP EVIDENCE, AND OTHER EVIDENCE OF DISCREDITABLE CONDUCT

The admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, in criminal proceedings conducted in Western Australia is largely governed by s 31A of the Evidence Act.

Section 31A of the Evidence Act is in the following terms:

> (1) In this section —
>
> ***propensity evidence*** means —
>
> (a) similar fact evidence or other evidence of the conduct of the accused person; or
>
> (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;
>
> ***relationship evidence*** means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.
>
> (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —
>
> (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
>
> (b) 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.
>
> (3) In considering the probative value of evidence for the purposes of subsection (2) 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.

The Common Law

Prior to the commencement of s 31A of the Evidence Act, on 1 January 2005,[8] the common law governed the admissibility of evidence that amounted to 'propensity evidence' and 'relationship evidence' in criminal proceedings in Western Australian courts.

[8] Section 31A was inserted into the *Evidence Act 1906* (WA) by the *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* (WA).

Where evidence was sought to be admitted at common law to prove that an accused person had a relevant propensity or tendency, such evidence could not be admitted if there was a rational view of the evidence that, when considered with other relevant evidence, was inconsistent with the guilt of the accused (see ***Pfennig v The Queen***[9] and ***Hoch v The Queen***[10]). This test was extremely stringent and therefore was difficult to satisfy. In the context of cases concerning child sexual abuse offences, it meant that if there was a reasonable possibility that the allegations were the product of collusion, concoction or contamination of evidence between multiple complainants then the evidence of the complainants would not be cross-admissible.

There was some uncertainty about whether this rule applied to all evidence of discreditable conduct that was not relied on to establish an accused's propensity or tendency, such as evidence that proved the nature of the relationship between an accused and another person (see ***Noto v The State of Western Australia***[11]).

Section 31A of the Evidence Act

The purpose of s 31A of the Evidence Act was to make it easier for Western Australian courts to admit evidence that was capable of proving that an accused person had a relevant propensity or tendency, as well as evidence of the attitude or conduct of an accused person towards another person, or a class of persons, over a period of time. As the then Attorney General observed when the Bill that resulted in the introduction of s 31A into the Evidence Act was read for a second time:

> … the proposed amendments will provide the courts with greater capacity to admit propensity and relationship evidence. The court will still need to be satisfied that the evidence has a significant probative value and that the probative value outweighs the risk of an unfair trial.[12]

The effect of s 31A of the Evidence Act has been to enable courts to allow evidence to be admitted in circumstances in which the evidence would otherwise have been inadmissible at common law.

Since its introduction, s 31A of the Evidence Act has been regularly applied by courts in Western Australia when considering whether to admit 'propensity evidence' and 'relationship evidence' in criminal proceedings. While it could be argued that the principal reason for the introduction of s 31A of the Evidence Act was to better enable the admission of 'propensity evidence' and 'relationship evidence' in proceedings relating to sexual offences, it has also been regularly applied in prosecutions for other offences, including drug offences, armed robbery offences, and murder, as well as in cases concerning offences of dishonesty. Section 31A of the Evidence Act essentially requires a court to consider three issues:

[9] (1995) 182 CLR 461.

[10] (1988) 165 CLR 292.

[11] [2006] WASCA 278, [22].

[12] Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 June 2004, 4608. It was also said that the amendments reflected Recommendations 271, 272, 275 and 276 of the Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (September 1999), which were concerned with the issue of the joinder of charges. However, only s 31A(3) reflected those Recommendations.

(1) whether evidence that is sought to be admitted in a criminal proceeding falls within either of the definitions of 'propensity evidence' or 'relationship evidence' in s 31A(1);

(2) whether that evidence has 'significant probative value'; and

(3) whether the probative value of the evidence, when 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.[13]

The principles relating to the proper application of s 31A of the Evidence Act have been the subject of much judicial consideration since it commenced in 2005, but they were explained comprehensively by the Court of Appeal in ***The State of Western Australia v Jackson.***[14] In summary, those principles require courts to decide whether the evidence would rationally affect, to a significant[15] degree, a decision about the existence of a fact in issue. In making that decision courts are required to take the evidence at its highest, and to look at the evidence in the context of other evidence that will be adduced.

Courts must also ensure that the purpose for which the evidence is sought to be admitted is clearly identified, because it is only then that the question of whether it has significant probative value can be ascertained. If the evidence is relied on as propensity evidence then a court must determine the extent to which the evidence is capable of proving the propensity, and the extent that such proof increases the likelihood of the commission of the offence charged.

Despite s 31A of the Evidence Act, evidence of an accused person's discreditable acts can still be admitted in evidence in criminal proceedings in Western Australia in accordance with the common law.[16] For example, it is still possible to resort to the common law to justify the admission of evidence of uncharged acts relied on to put alleged offences into a proper context (***LNN v The State of Western Australia***[17]), or evidence of discreditable conduct that is relied on because it increases the likelihood that an offence was committed other than because of the existence of a propensity (***Dann v The State of Western Australia***[18]), or evidence of discreditable conduct that rebuts other evidence that has been adduced to prove an accused's good character (***MJS v The State of Western Australia***[19]).

[13] This aspect of s 31A of the *Evidence Act 1906* (WA) appears to mirror what was said in the dissenting judgment of McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461.

[14] [2019] WASCA 118.

[15] The word 'significant' has been held to mean important or of consequence (see *Jackson* at [18]).

[16] *MJS v The State of Western Australia* [2011] WASCA 112, [3].

[17] [2021] WASCA 39.

[18] [2021] WACA 15.

[19] [2011] WASCA 112.

3. THE APPROACH TAKEN UNDER THE UEL

As a consequence of the Australian Law Reform Commission Reports 26 and 38, which were published in 1985 and 1987 respectively, a draft UEL was prepared. That draft then formed the basis for what eventually became the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). Over time other Australian States also enacted their own versions of the UEL, including Tasmania, Victoria, the Australian Capital Territory and the Northern Territory.

Section 56 of the UEL provides that except as otherwise provided by the UEL, evidence that is relevant in a proceedings is admissible in the proceedings. Section 55 defines relevant evidence in a proceeding to be:

> evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

Part 3.6 of the UEL, which is in force in each of those jurisdictions, deals with tendency evidence and coincidence evidence in the same way.

Section 97(1) deals with what is termed 'the tendency rule'. It contains the test that must be applied when tendency evidence is sought to be admitted by any party to proceedings. It is not limited to criminal proceedings, and it (relevantly) provides as follows:

> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
>
> (b) the court thinks 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.

Section 98(1) is concerned with what is termed 'the coincidence rule'. It sets out the test that must be applied when coincidence evidence is sought to be adduced in any proceedings, as follows:

> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks 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.

Section 99 provides that notices given under ss 97 and 98 must be given in accordance with any regulations or rules of court, which prescribe what must be stated in the notices and the time when such notices must be served.[20] Pursuant to s 100 of the UEL, a court may direct that the tendency rule and the coincidence rule are not to apply despite the failure of a party to give notice under ss 97 and 98, respectively.

In addition to the test for admissibility that is provided for in ss 97 and 98, a further test applies to the admission of tendency and coincidence evidence, but only in the context of criminal proceedings. That test is set out in s 101. That section provides, in New South Wales, the Northern Territory and the ACT, that:

> Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence outweighs any prejudicial effect it may have on the accused.[21]

Sections 94 and 95 of the UEL should also be noted. Section 94 provides that Part 3.6, and therefore the tendency and coincidence rules, does not apply to bail or sentencing hearings, or evidence that relates only to the credibility of a witness. It also does not apply to evidence of a person's character, reputation, conduct or tendency, if those matters are a fact in issue.

Section 95 prohibits the use of evidence that is not admissible under Part 3.6 even if that evidence may be relevant for another purpose. This means that if evidence does not satisfy the requirements of ss 97, 98 and 101 it cannot be used as tendency or coincidence evidence even if it has been admitted for another reason.

More recently New South Wales, the ACT, and the Northern Territory have inserted s 97A into their versions of the draft UEL. Section 97A only applies to the admissibility of tendency evidence in criminal proceedings concerning a child sexual offence.

In relation to such proceedings, s 97A:

(a) Creates a presumption that certain tendency evidence will have significant probative value, namely:

    (i) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest); and

[20] In New South Wales, the relevant rules of court provide that notices must be served 21 days before the date for determining the date for hearing.

[21] In the other jurisdictions in which the UEL is in force (the Commonwealth, Tasmania and Victoria), s 101 provides that '[t]endency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence ***substantially*** outweighs any prejudicial effect it may have on the accused.'

(ii) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.

(b) Provides that the statutory presumption may be rebutted where the court is satisfied that there are sufficient grounds for it to determine that the tendency evidence does not have significant probative value.

(c) Provides that, when determining if there are 'sufficient grounds' to rebut the presumption, the court cannot take into account certain matters in the absence of exceptional circumstances, namely:

(i) the sexual interest or act to which the tendency evidence relates is different from the sexual interest or act alleged in the proceeding;

(ii) differences in the following between the tendency sexual interest or act and the alleged sexual interest or act:

(A) the circumstances in which the sexual interest or act occurred;

(B) the personal characteristics of the subject of the sexual interest or act (e.g. the subject's age, sex or gender);

(C) the relationship between the defendant and the subject of the sexual interest or act;

(iii) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act;

(iv) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features; and

(v) the level of generality of the tendency to which the tendency evidence relates.

The major differences between the approach that is taken to the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, under the UEL, when compared to the approach that is taken under s 31A of the Evidence Act, are as follows:

Sections 97 (together with s 97) and 98 of the UEL operate to *exclude* evidence that would otherwise be admissible under other provisions in the UEL, such as s 56.[22] More specifically, they expressly identify particular types of evidence and then prohibit the *use* of that evidence to prove certain matters. The tendency rule is concerned with prohibiting the use of evidence to prove 'that a person has or had a tendency … to act in a particular way, or to have a particular state of mind.' The coincidence rule is concerned with prohibiting the use of evidence to prove that a person did

[22] Section 56 of the UEL provides that '(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding. (2) Evidence that is not relevant in the proceeding is not admissible.'

an act or had a particular state of mind, on the basis of improbability reasoning. The UAE then provides for exceptions to those prohibitions that may operate if certain statutory tests are satisfied.

On the other hand, s 31A of the Evidence Act provides that if evidence is 'propensity evidence' and 'relationship evidence', as defined in s 31A(1), then it will be admissible if it satisfies the tests in s 31A(2) of the Evidence Act, without expressly focusing on the *use* to which the evidence is sought to be put.

The basic test for admissibility in both ss 97 and 98 of the UEL, and the test in s 31A(2)(a) of the Evidence Act, are essentially the same - the evidence must have 'significant probative value'. However, in criminal proceedings the UEL also requires that the 'probative value of the evidence outweighs any prejudicial effect it may have on the accused'. This can be contrasted with the arguably more convoluted test that is provided for in s 31A(2)(b) of the Evidence Act, which requires an assessment of whether 'fair-minded people would think that the public interest in adducing all relevant evidence must have priority over the risk of an unfair trial'.

Where s 97A of the Model Provisions has come into force, the tests for admissibility of tendency evidence have been significantly altered. In particular, there is now a presumption that tendency evidence will have significant probative value in proceedings for child sexual offences. Section 31A of the Evidence Act does not operate on the basis of any similar presumption.

The UEL requires that 'reasonable notice in writing' be given of an intention to adduce tendency or coincidence evidence. There are no such procedural requirements in the Evidence Act. In ***Hall v The State of Western Australia***[23] a majority of the Court of Appeal rejected an argument that a grant of leave was a necessary precondition to the admissibility of evidence pursuant to s 31A of the Evidence Act.

[23] [2013] WASCA 165; (2013) 232 A Crim R 107.

4. THE APPROACH TAKEN IN OTHER AUSTRALIAN JURISDICTIONS

4.1 Queensland

With some limited exceptions, the law in Queensland relating to the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, is still governed by the common law.

Section 132A of the *Evidence Act 1977* (Qld) provides:

> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

The evident purpose of this provision is to overcome the effect of the decision in ***Hoch v The Queen***,[24] in which it was concluded that where there is a possibility of joint concoction 'similar fact evidence' is not admissible. However, it does not otherwise alter or abolish the common law rule that if similar fact evidence is to be admitted it must bear no other reasonable explanation other than the guilt of the accused (***Pfennig v The Queen***[25]).

Section 132B of the *Evidence Act 1977* (Qld) provides:

(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.[26]

(2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.

Section 132B has the effect of abolishing the common law test in ***Pfennig v The Queen***,[27] but only in relation to evidence of the history of the domestic relationship between the defendant and the victim of the particular offence.

4.2 South Australia

In Division 3 of Part 3 of the *Evidence Act 1929* (SA) there are a number of provisions that alter the common law principles relating to the admission of propensity and relationship evidence, and other evidence of discreditable conduct.

[24] (1988) 165 CLR 292.

[25] (1995) 182 CLR 461.

[26] The offences relevant to the above section are homicide, offences endangering life or health, and assaults.

[27] (1995) 182 CLR 461.

Section 34O relevantly provides that Division 3 applies to the trial of a charge of an offence and prevails over any relevant common law rule of admissibility of evidence to the extent of any inconsistency. Section 34P then provides as follows:

(1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (**discreditable conduct evidence**)—

(a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and

(b) is inadmissible for that purpose (**impermissible use**); and

(c) subject to subsection (2), is inadmissible for any other purpose.

(2) Discreditable conduct evidence may be admitted for a use (**the permissible use**) other than the impermissible use if, and only if—

(a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and

(b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue — the evidence has strong probative value having regard to the particular issue or issues arising at trial.

(3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

Section 34R requires a judge to give certain directions to juries when evidence is admitted under s 34P, including directions that identify and explain the purpose for which such evidence can, and cannot, be used.

Section 34S provides:

> Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following:

(a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;

(b) the evidence may be the result of collusion or concoction.

Section 34S(a) therefore abolishes the test in ***Pfennig v The Queen***,[28] and s 34S(b) is designed to overcome the effect of ***Hoch v The Queen.***[29]

4.3 The approach taken internationally

At Appendix A, the Commission has set out in summary form some international approaches to the admissibility of tendency, coincidence and other related evidence, as described by the Royal Commission.

[28] Ibid.

[29] (1988) 165 CLR 292.

5. POTENTIAL STATUTORY MODELS THAT MIGHT BE ADOPTED IN WESTERN AUSTRALIA

The Commission has identified that there may be a number of options for reforming the law that applies to determine the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, so that all relevant evidence is available to West Australian courts, while also ensuring the right to a fair trial.

5.1 Retain s 31A of the Evidence Act

One option is to retain s 31A of the Evidence Act, without making any legislative changes.

It might be argued that s 31A of the Evidence Act already operates to ensure that all relevant evidence is available to Western Australian courts, while also ensuring the right to a fair trial. In that regard, in its 'Criminal Justice Report' the Royal Commission expressed the view that s 31A of the Evidence Act is 'probably the most liberal test for admitting tendency and coincidence evidence in Australia, particularly taking into account how it is applied by the Western Australian courts.'[30]

If s 31A was retained it would avoid the somewhat complex notice rules contained in the UEL.

It is also the case that s 31A of the Evidence Act has been in operation in Western Australia for over 15 years (being first introduced on 1 January 2005). During that time, it has been regularly applied by trial courts in a wide range of circumstances, and there is now a large body of appellate jurisprudence that informs its proper construction and practical application.

The Commission notes that if s 31A was to be retained in a new Act which enacted ss 55 and 56 of the UEL, its wording would need to be changed slightly to render it a rule of exclusion rather than inclusion.

5.2 Repeal s 31A of the Evidence Act and adopt relevant parts of the UEL and the Model Provisions

Another option is to repeal s 31A of the Evidence Act and to substitute it with all of the provisions that relate to tendency and coincidence evidence that appear in the UEL, as amended by the Model Provisions.[31]

The Model Provisions may make it easier for courts to admit evidence of propensity and relationship evidence, and other evidence of discreditable conduct, particularly in proceedings that relate to child sexual offences, when compared to s 31A of the Evidence Act. This is because the Model Provisions creates a presumption that tendency evidence will have significant probative value in relation to child sexual offences. Further, those provisions remove the requirement that, in criminal proceedings, the probative value of tendency and coincidence evidence must *substantially*

[30] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report' (August 2017), 430.

[31] The provisions that appear in Part 3.6, namely, ss 94 to 101.

outweigh any prejudicial effect that it may have on an accused, which is more consistent with the test in s 31A(2)(b) of the Evidence Act.

If the Model Provisions were adopted in Western Australia there would be a more uniform approach to the admission of propensity and relationship evidence, and other evidence of discreditable conduct, throughout Australia. This would also mean that Western Australia may receive the benefit of judicial consideration in other jurisdictions about the operation of the Model Provisions.

Adoption of the relevant parts of the UEL[32] could also mean that written notice would be required to be given before tendency and coincidence evidence could be relied on. Currently, there is no requirement for notice to be given if s 31A of the Evidence Act is relied on.

5.3 Repeal s 31A of the Evidence Act and include some of the UEL and the Model Provisions

It may be possible to retain s 31A of the *Evidence Act* in its current form, while also incorporating specific aspects of the Model Provisions.

This approach may have the advantage of ensuring continuity in relation to a provision that has been in effect for a relatively long period of time while at the same time enabling the courts to have the benefit of at least some of the reforms that have emerged from the Royal Commission.

For example, a provision that creates a statutory presumption, which operates in a manner that is consistent with s 97A of the UEL, might be incorporated into the Evidence Act such that certain tendency evidence will be presumed to have significant probative value for the purposes of s 31A(2)(a) of the Evidence Act.

Another option is that the notice provisions in the UEL might be incorporated into the Evidence Act such that the prosecution would be required to give adequate notice of an intention to rely on s31A.

Enacting the notice provisions only may have the advantage of ensuring a more structured approach to the admission of propensity and tendency evidence in Western Australia without changing the well-established law in s 31A of the Evidence Act.

5.4 Repeal s 31A of the Evidence Act and adopt the substantive parts of the UEL

Another option is to repeal s31A of the Evidence Act and to enact the substantive provisions of the UEL, but not the notice provisions. Enacting the substantive provisions of the UEL without the notice provisions may have the advantage of avoiding the introduction of procedural provisions that have arguably not been shown to be necessary in Western Australia.

[32] Sections 97(1)(a), 98(1)(a), 99 and 100.

5.5 Adopt one of the approaches taken in Queensland or South Australia

As a result of the length of time that s 31A of the Evidence Act has been in operation, and having regard to the recommendations that were made by the Royal Commission, and in relation to the Model Provisions, it may be that there is no compelling reason to adopt either of the approaches that are currently being taken in Queensland or in South Australia.

In Queensland the common law applies, albeit with some modifications. Further, the South Australia model requires courts to be satisfied that the probative value of the evidence substantially outweighs any prejudicial effect and, in the case of evidence of an accused's propensity or disposition, it has to have strong probative value. Adoption of either of those models would represent a significant tightening of the courts' ability to admit propensity and relationship evidence, and other evidence of discreditable conduct in Western Australia.

5.6 Adopt a new approach

A final option may be to repeal s 31A of the Evidence Act and to adopt a completely different approach to those taken in the Australian jurisdictions to date. Other approaches have been taken in England and Wales, in Canada, in New Zealand, and in the United States of America, all of which were summarised by the Royal Commission in Chapter 26 of its 'Criminal Justice Report' (See Appendix A which sets these out in summary form).

The Commission's tentative view is that this is not the best option because it would be introducing new substantive law in an area in which there is already well understood Western Australian and Australian provisions.

6. CONCLUSION

This Issues Paper has provided an overview of the current regime in Western Australia for the admission of propensity and relationship evidence, and other evidence of discreditable conduct. It has also referred to the various legislative rules that apply to the admission of such evidence in other jurisdictions. Finally, it has suggested a number of options for reform, including retaining s 31A of the Evidence Act.

7. QUESTIONS

The Commission would welcome submissions that address the following questions or any related matters:

Question 1

Should s 31A of the Evidence Act be retained in its current form?

Question 2

Are there any deficiencies in the way in which s 31A of the Evidence Act is currently drafted and applied that should be rectified? Should those deficiencies be rectified by making amendments to s 31A of the Evidence Act, or should it be completely re-drafted or replaced?

Question 3

Should s 31A of the Evidence Act be repealed and be replaced with all of the provisions that relate to tendency and coincidence evidence that appear in the UEL, as amended by the Model Provisions?

Question 4

Are there any deficiencies in the way in which the UEL provisions operate, or are likely to operate if amended in accordance with the Model Provisions, that could be avoided if those provisions were not adopted in Western Australia?

Question 5

If the UEL provisions, as amended by the Model Provisions, were adopted in Western Australia, should there be any further changes made to those provisions?

Question 6

Should s 31A of the Evidence Act be repealed and be replaced with some of the provisions that relate to tendency and coincidence evidence that appear in the UEL, as amended by the Model Provisions? If so, which provisions should not be enacted, and why?

Question 7

If s 31A of the Evidence Act was retained in its current form, should any specific aspects of the UEL, such as the notice provisions, be enacted to complement its operation?

Question 8

If the notice provisions of the UEL were adopted should the notice which the parties are required to give of applications under the substantive provisions be contained in the Act, prescribed in regulations or left to the discretion of the Court? If

Question 9

Should s 31A of the Evidence Act be repealed and be replaced by provisions that align with the approach that is currently taken in Queensland or South Australia?

Question 10

Is there a better evidentiary rule for the admission of propensity and relationship evidence, and other evidence of discreditable conduct, that could be adopted than the one that is currently provided for in s 31A of the Evidence Act, or in the UEL, or that is in operation in any of the other jurisdictions that have been discussed?

Approach to responding to questions

It would assist the Commission if, when you responded to questions, you supplied factual examples taken from the cases decided in this area which illustrate how the determination of admissibility may have been different or simpler if your preferred provisions had been in effect.

APPENDIX A

THE APPROACH TAKEN INTERNATIONALLY

England and Wales

The admissibility and use of tendency and coincidence evidence in England and Wales is governed by Chapter 1, Part 11, of the *Criminal Justice Act 2003* (UK). In summary:

- The common law rules governing the admissibility of evidence of 'bad character' have been abolished.
- Evidence of a person's 'bad character' is defined as evidence 'of, or of a disposition towards, misconduct on his part, other than evidence which has to do with the alleged facts of the offence with which an accused person is charged, or evidence of misconduct in connection with the investigation or prosecution of that offence'.
- Evidence of a defendant's 'bad character' is admissible if, and only if:
    - all parties to the proceedings agree to the evidence being admissible,
    - the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
    - it is important explanatory evidence,
    - it is relevant to an important matter in issue between the defendant and the prosecution,
    - it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
    - it is evidence to correct a false impression given by the defendant, or
    - the defendant has made an attack on another person´s character.
- When deciding whether to admit evidence of a defendant's 'bad character', a court is required to assume that the evidence is true, subject to limited exceptions.

Canada

The admissibility of tendency and coincidence evidence in Canada, known as 'similar fact evidence', and relationship evidence, is governed by the common law. The Royal Commission noted that:

> 'Historically, there have been two different approaches adopted in interpreting the scope of the exclusion of similar fact evidence. Under the broad interpretation, any evidence revealing the defendant's misconduct is inadmissible. The narrower approach is that evidence will only be inadmissible if it has been adduced for the purpose of propensity reasoning. Professor Hamer notes that it is unclear which interpretation is in force.'[33]

New Zealand

The admissibility of tendency and coincidence evidence is governed by Subpart 5 of Part 2 of the *Evidence Act 2006* (NZ). In summary those provisions provide:

[33] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report' (August 2017), 492.

- The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
- Propensity evidence is evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved.
- In assessing the probative value of such evidence a court is required to take into account a number of factors, including the nature of the issue in dispute, degrees of similarity, the potential for collusion, the frequency with which the relevant matters are alleged to have occurred, and the number of people making allegations.
- In assessing the potential for unfair prejudice a court is required to consider whether the evidence is likely to unfairly predispose the fact-finder against the defendant and whether the fact-finder will give disproportionate weight to the evidence in reaching a verdict.

United States of America

The Royal Commission noted that a less detailed overview of the relevant law in the United States for had been provided to it, for the following reasons:

- the approach in the United States is very different from that in Australia, England and Wales, Canada and New Zealand – it represents a more absolute exclusionary rule which could be considered to be at an earlier stage of development,
- the law in the United States is extremely inconsistent, and
- the institutional structure of the United States law and courts is complex, and this makes it difficult to provide a succinct statement of the law and its interpretation.[34]

It also observed that the current American common law and statutory principles closely reflect the position of earlier Australian common law.[35]

[34] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report' (August 2017), 498.

[35] Ibid.

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