THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Admissibility of propensity and relationship evidence in WA

Project 112 Final Report

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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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FOREWORD FROM THE COMMISSION

On 8 September 2021, the Attorney General for Western Australia, the Hon John Quigley MLA referred a project to the Law Reform Commission of Western Australia with Terms of Reference requiring the Commission to answer a specific question about the rules of evidence that should apply to determine the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct.

In December 2021, the Commission released an Issues Paper which posed a series of questions that were designed to assist in identifying the range of ways in which the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, might be appropriately regulated in Western Australia. Submissions were invited on these questions. The closing date for submissions was 11 February 2022.

The Commission received five written submissions after the release of the Issues Paper. On 7 April 2022, the Commission also conducted a consultation session for the purposes of encouraging stakeholders and members of the public to provide responses to the questions raised in the Issues Paper.

The written submissions that the Commission received, and the feedback that was provided by those who attended the public consultation sessions, were of great assistance to the Commission and have informed the discussion contained in this paper and the recommendations ultimately made by the Commission.

RECOMMENDATIONS

The following recommendations are based on the Commission's understanding that Western Australia will be adopting the Uniform Evidence Law in other respects.

Recommendation 1

If the Uniform Evidence Law is enacted in Western Australia, it should adopt the Uniform Evidence Law's approach to tendency and coincidence evidence, rather than inserting a reformulated version of section 31A of the *Evidence Act 1906* (WA).

Recommendation 2

The tendency and coincidence provisions should be available to assist in proving all offences, whether they are of a sexual nature or otherwise.

Recommendation 3

A version of section 97A of the Uniform Evidence Law, which contains rebuttable presumptions concerning the admissibility of tendency evidence in criminal proceedings concerning child sexual offence, should be enacted. That provision should only apply to child sexual offences. It should make it clear that a child sexual offence includes an attempted child sexual offence. The provision should not apply to coincidence evidence.

Recommendation 4

Parties should be required to provide notice of their intention to adduce tendency or coincidence evidence. The nature of the details that should be included in the notice, and the time within which the notice must be given, should be determined by the rules of court.

Recommendation 5

A version of section 101 of the Uniform Evidence Law that is currently in operation in the Australian Capital Territory, New South Wales and the Northern Territory, should be enacted so that tendency and coincidence evidence about the accused cannot be used against the accused unless the probative value of the evidence outweighs the danger of prejudice to the accused.

1. INTRODUCTION

On 8 September 2021, the Law Reform Commission of Western Australia (**the Commission**) received a reference from the Attorney General for Western Australia, the Hon John Quigley MLA (**the Attorney General**) as set out in 1.1.

1.1 Terms of reference

The Attorney General required 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 West Australian courts, while also ensuring the right to a fair trial?

1.2 Background to this reference

1.2.1 The current Western Australian approach

This reference concerns the admissibility in criminal proceedings[1] of two main types of evidence:

- Propensity evidence: evidence of an accused person's past conduct, character or reputation that demonstrates that they have a propensity to act in a certain way; and
- Relationship evidence: evidence of an accused person's attitude or conduct towards another person, or class of persons, over a period of time.

Since 2005, the admissibility of these types of evidence in Western Australia has largely been governed by section 31A of the *Evidence Act 1906* (WA) (**Evidence Act**), which states:

(a) In this section:

propensity evidence means:

(i) similar fact evidence or other evidence of the conduct of the accused person; or

(ii) 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.

(b) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers:

(i) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and

(ii) 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.

(c) 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.

Since its introduction, this provision has been applied regularly by courts in Western Australia when considering whether to admit propensity evidence and relationship evidence in criminal

[1] In the Issues Paper the Commission noted that it was going to restrict its focus to the admissibility of evidence in criminal proceedings. However, it noted the Uniform Evidence Law approach to this area also applies to civil proceedings. The Commission did not receive any submissions about whether the Uniform Evidence Law provisions, if adopted in Western Australia, should apply to civil proceedings. It makes no recommendations in this regard.

proceedings relating to a wide range of offences, including sexual offences, drug offences, offences against the person, and offences of dishonesty. It essentially requires a court to consider three issues:

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

(b) whether that evidence has significant probative value; and

(c) 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.

Despite the enactment of section 31A, evidence of an accused person's discreditable acts can also still be admitted in evidence in criminal proceedings in Western Australia in accordance with the common law.[2] At common law, evidence of a person's discreditable conduct is admissible in very narrow circumstances. The circumstances relevant to this reference were discussed in the Issues Paper.[3]

1.2.2 The Uniform Evidence Law approach

In 1985 and 1987, respectively, the Australian Law Reform Commission (**ALRC**) published two reports on the law of evidence: ALRC Interim Report, Evidence (1985) and Evidence (1987). After those reports were published, a draft Uniform Evidence Law (**UEL**) was prepared. The UEL included specific provisions that were concerned with the admissibility of propensity evidence, relationship evidence, and evidence of other discreditable conduct. As part of the reforms in this area, the terminology changed: these types of evidence became known as tendency evidence and coincidence evidence in the UEL.

Six jurisdictions subsequently adopted the UEL: the Australian Capital Territory (**ACT**), New South Wales (**NSW**), the Northern Territory (**NT**), Tasmania, Victoria and the Commonwealth. While the legislation in these jurisdictions largely reflects the model law, there are minor differences between them. Importantly, they each contain provisions (sections 55 and 56) which state that, except as otherwise provided in the statute, all relevant evidence is admissible. They then set out specific circumstances which operate to render certain relevant evidence inadmissible.

Of relevance to the current reference, each UEL jurisdiction has enacted a 'tendency rule' (section 97) and a 'coincidence rule' (section 98), which operate to render tendency and coincidence evidence inadmissible in certain circumstances. The tendency rule states:

> (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.

The coincidence rule states:

> (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

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

[3] Law Reform Commission of Western Australia, *Admissibility of Propensity and Relationship Evidence; Issues Paper* (December 2021), 5-6.

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.

Sections 99 and 100 of the UEL set out the requirements for notice to be given to the other party to proceedings that must be met before tendency and coincidence evidence can be admitted.

Section 101 of the UEL sets out a further requirement that must be met in the context of criminal proceedings. It requires the judge to balance the probative value of the tendency or coincidence evidence against any prejudicial effect it may have on the accused. In the Commonwealth, Tasmania and Victoria, the probative value of the evidence must substantially outweigh its prejudicial effect in order to be admitted. By contrast, in the ACT, NSW and the NT evidence may be admitted if its prejudicial effect is outweighed by its probative value.

1.2.3 The Royal Commission into Institutional Responses to Child Sexual Abuse

In August 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) published its 'Criminal Justice Report' (**Criminal Justice Report**). In Part VI of the Criminal Justice Report, the Royal Commission examined the law relating to the admissibility of evidence in cases involving child sexual abuse where that evidence 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 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. The Royal Commission also proposed draft legislative provisions.

In response to the Criminal Justice Report, the Council of Attorneys General established a working group to consider the test for admissibility of tendency and coincidence evidence under the UEL. As a result of the recommendations of the working group, the Evidence Law (Tendency and Coincidence) Model Provisions 2019 (**Model Provisions**) were developed, in order to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings relating to child sexual offences.

These provisions have been enacted in the ACT, NSW, and the NT, which have inserted a new section 97A into their version of the UEL. Section 97A only applies to the admissibility of tendency evidence in criminal proceedings concerning a child sexual offence. In relation to such proceedings, it:

(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

  (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.

1.2.4 Adoption of the UEL

As noted above, the UEL does not currently 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. The new Act will adopt the UEL but will retain any Western Australian evidentiary provisions that are deemed sound.

It is against this background that the current reference is framed. In effect, the Commission has been tasked with considering which approach to propensity evidence, relationship evidence and evidence of other discreditable conduct should be taken when Western Australia adopts the UEL framework.

1.3 Methodology

In undertaking its consideration of the Terms of Reference, the Commission published an Issues Paper in December 2021 (**Issues Paper**). The Issues Paper described in detail the approach that has been taken to propensity and relationship evidence in Western Australia. It also provided an overview of the way in which this evidence is dealt with in other jurisdictions, both in Australia and overseas. That information is not repeated in this Report. Readers of this report may wish to have regard to what is set out in the Issues Paper in order to gain a fuller understanding of how the admission of propensity and relationship evidence, and other evidence of discreditable conduct, is currently regulated in Western Australia and elsewhere.

The Issues Paper invited interested parties to make comments or submissions on aspects of the law, and reform of the law, relating to the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct in Western Australia. The Commission received five submissions from stakeholders, the contents of which have informed the preparation of this Report. The full list of submissions received is set out in **Annexure A**.

On 7 April 2022, the Commission conducted a consultation session for the purposes of encouraging stakeholders and members of the public to provide responses to the questions raised in the Issues Paper. That session, which was conducted online, was attended by nine stakeholders and a range of views were expressed by those in attendance. The Commission has taken those views into account in preparing this report.

1.4 Structure of this Report

Although the Issues Paper posed 10 separate questions, it is clear from the submissions and the Commission's own consideration of the issues that there are really only two main questions that need to be addressed:

- Should section 31A of the Evidence Act be retained in its current or an amended form, or should it be replaced with the UEL approach to tendency and coincidence evidence?
- If the UEL approach is adopted, what form should the tendency and coincidence evidence provisions take?

These questions are the focus of the next two chapters.

2. SHOULD SECTION 31A BE RETAINED?

2.1 Overview of submissions

This Chapter considers whether section 31A of the Evidence Act should be retained in its current form, or whether it should be replaced with the UEL provisions that regulate the admission of tendency and coincidence evidence.

None of the submissions received by the Commission supported the retention of section 31A in its current form. There were, however, two different approaches that were taken to the issue:

- The Director of Public Prosecutions for Western Australia (**DPP**) supported the retention of an amended version of section 31A;
- Almost all other submissions supported the repeal of section 31A, and its replacement with provisions that reflect the UEL.[4]

One submission argued in favour of repealing section 31A and reverting to the common law. No other stakeholders supported that approach, and the Commission does not agree that this should occur. The Commission is of the view that the common law can no longer be regarded as striking the correct balance between the admissibility of propensity and relationship evidence and the accused's right to a fair trial, especially in the case of sexual assault charges. Under the common law, a jury would be left to decide such cases without hearing evidence that is significantly probative of an accused's guilt. In addition, reverting to the common law would be inconsistent with the Western Australian Government's in principle acceptance of Recommendations 44 to 49 of the Criminal Justice Report.

2.2 Arguments in favour of retaining section 31A

As noted above, the DPP was the only stakeholder that supported the retention of section 31A. The DPP's support for retaining section 31A is perhaps not surprising given that the DPP, and the prosecutors who work in the Office of the DPP, are likely to have had the most practical experience in applying section 31A. The DPP's submission raised highly relevant and persuasive arguments in support of its retention, which the Commission sets out below.

The DPP's primary argument in support of the retention of section 31A was that the section has been in operation in Western Australia for over 15 years, and the courts and lawyers are now familiar with its operation in practice. It is also the case that a substantial body of jurisprudence has developed over that time such that the proper construction of, and the principles to be observed in applying, section 31A are now well understood.

By contrast, it was suggested that if section 31A is to be repealed and replaced with a different set of rules, this will result in a period of uncertainty. It was the view of the DPP that this will be a particular problem if the UEL approach is adopted, because of the ambiguities inherent in that approach. While the UEL has been in operation for many years in various jurisdictions, appellate courts in those jurisdictions have sometimes arrived at different interpretations of the same provisions. The DPP expressed concern that this will make it difficult to know how those provisions will be interpreted in Western Australia. In addition, there has not yet been any detailed judicial consideration of the Model Rules, which creates uncertainty surrounding their meaning.

The DPP submitted that the phrase 'propensity evidence', which is used in section 31A, has a well understood and sufficiently broad definition. By comparison, the concepts of 'tendency evidence' and 'coincidence evidence', which are used in the UEL provisions, lack clarity and have

[4] None of the submissions supported the adoption of the approaches currently taken in Queensland, South Australia, or any of the overseas jurisdictions that were identified in Appendix A of the Issues Paper. Consequently, this Report does not address those approaches.

been criticised by some commentators.[5] It was also noted that the UEL does not contain an equivalent to the concept of 'relationship evidence', as it is defined in section 31A(1).

The DPP referred to the Royal Commission's preference for section 31A.[6] The Royal Commission had expressed the view that section 31A 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'.[7] Further, it was suggested that section 31A(2)(b) transparently refers to the balancing test that is involved, and that it aligns with the objective of reform, because it explicitly refers to (and requires consideration of) contemporary community standards, rather than simply weighing probative value against the risk of unfair prejudice to an accused.

2.3 Arguments in favour of replacing section 31A with UEL provisions

Many of the stakeholders who submitted that section 31A should be replaced by the UEL provisions did so due to a desire for the harmonisation of evidentiary provisions between Australian jurisdictions. It was suggested that the UEL in general should be adopted in Western Australia, so that there would be uniform rules governing the admission of all evidence, including tendency and coincidence evidence.

Other arguments that were put in favour of adopting the UEL approach included:

The test in section 31A is too liberal and sets the bar for the admission of propensity and relationship evidence too low. Replacing section 31A with the UEL would remedy that situation.[8]

The test in section 31A(2)(b), which requires consideration to be given to what a 'fair-minded person would think' about 'the public interest in adducing all relevant evidence of guilt' and whether that 'must have priority over the risk of an unfair trial', is unclear and raises difficulties in its application.[9]

Section 31A has a wider operation in practice than it should. It was suggested that section 31A has been consistently used to allow prosecutors to rely on propensity and relationship evidence, and other evidence of discreditable conduct, to prove offences other than sexual offences, including drug offences and violent offences. It was contended that this was not what was intended when section 31A was introduced and that this has occurred because of the ambiguous language used in that provision.

2.4 Commission's view

In considering the issues in this reference, the Commission starts by reiterating that new legislation is currently being considered, which would repeal the Evidence Act and replace it with the UEL. If this legislation is adopted, the legislative framework will not support section 31A in its current form simply being carried across into the new legislation in place of provisions of the kind in sections 97A and 99-101 of the UEL. This is because section 31A operates on the premise that propensity and relationship evidence is inadmissible, even if relevant, unless it meets the requirements of the provision. By contrast, sections 55 and 56 of the UEL provide that all relevant evidence is admissible, except as otherwise provided. Other provisions in the UEL, including those dealing with tendency and coincidence evidence, then operate to render certain relevant evidence inadmissible. It follows that if section 31A were to be retained, it would have to be re-drafted so to ensure that it could operate within this different general framework of admissibility.

Given that section 31A would need to be reformulated, the question that then arises is whether there are any advantages in maintaining section 31A in its current form? That question must be answered by considering whether those advantages would outweigh the benefits that would be

[5] The DPP referred the Commission to two articles by David Hamer, and to observations that were made by The Royal Commission, about this issue. However, the DPP noted that the Royal Commission did not recommend making any changes to the provisions.
[6] Submission from the DPP, 10 February 2022, 5
[7] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report' (August 2017), 430.
[8] Submission from Aboriginal Legal Service of Western Australia Limited, 10 February 2022.
[9] Submission from Legal Aid Western Australia, January 2022.

gained by introducing provisions that were specifically drafted for inclusion in the UEL, and which are, therefore, consistent with that legislative regime, and which have been in operation for over 20 years in other Australian jurisdictions. Those benefits include a more uniform approach to the admission of propensity and relationship evidence, and other evidence of discreditable conduct, throughout Australia. Although there would not be an existing body of judicial consideration by the Western Australian courts, Western Australia would receive the benefit of other judicial consideration about the operation of the UEL. The Commission assumes that these two reasons align with the policy reasons underlying the proposed introduction of the UEL as part of the law of Western Australia.

In the Commission's view, the requirement under the UEL that the probative value of the relevant evidence (substantially) outweigh its prejudicial effect is easier to understand and apply than the section 31A test, 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'. While the Commission acknowledges the DPP's view that section 31A test is more appropriate and contemporary because it directs attention to what the community (represented by the notional fair-minded person) would think, it is concerned that the wording of the test makes it seem that notions of public opinion are relevant to the balancing exercise. In the Commission's opinion, the question of whether propensity and relationship evidence, and other evidence of discreditable conduct, should be admitted at a criminal trial is a legal question, to be answered by legally trained and highly experienced decision-makers. Although the Commission has no doubt that this is the way in which this has been approached in Western Australia, the statutory test for the admission of such evidence should make this clear and not leave any room for misunderstanding.

The test in section 31A(2)(b) comes directly from the minority judgment of McHugh J in *Pfennig v The Queen*.[10] The words used in judgments are not intended to have the same force as words used in statutes. If they are simply transposed into legislation, they can create difficulties in their interpretation.

In addition, the section 31A test identifies the two matters that a notional fair-minded person must balance: the probative value of the evidence and the degree of risk of an unfair trial. These are the same factors that require balancing under the UEL provisions, but those provisions operate adequately without requiring an enquiry into what a fair-minded person might think.

The Commission has also identified some other difficulties with the operation of section 31A that it considers would be overcome if the tendency evidence and coincidence evidence provisions of the UEL were adopted, rather than attempting to insert a re-formulated version section 31A into the UEL.

First, section 31A operates on the basis that evidence that falls within the scope of the statutory terms 'propensity evidence' and 'relationship evidence' will be admissible if the relevant requirements are met. However, the definitions of 'propensity evidence' and 'relationship evidence' are extremely broad.[11] For example, 'propensity evidence' includes 'other evidence of the conduct of the accused person'. A literal interpretation of that part of the definition might mean that *any* evidence of an accused person's conduct must satisfy the tests for admission in section 31A(2). Similar observations can be made in relation to the definition of 'relationship evidence', which includes 'evidence of … conduct of the accused person towards another person … over a period of time'. Whilst those matters might well be resolved through consideration by the courts, the use of such broad definitions has the real potential to create confusion about the proper operation of section 31A.

Secondly, section 31A does not expressly identify the purpose for which propensity and relationship evidence might properly be admitted, or the reasoning process that is required to be undertaken in deciding whether to admit such evidence. This also has the potential to create

[10] *Pfennig v The Queen* [1995] HCA 7, [40]; (1995) 182 CLR 461, 529.
[11] *The State of Western Australia v Jackson* [2019] WASCA 118, [20].

confusion. By contrast, the provisions relating to the admission of tendency and coincidence evidence that appear in the UEL do identify the use to which such evidence may be put, as well as the reasoning process that must be undertaken to decide whether it is admissible.

Section 97 of the UEL expressly provides that it relates to evidence that is admitted to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind. By requiring attention to be placed on the purpose of the evidence – to prove that an accused person has one or both of those tendencies – the question of whether the evidence is of significant probative value in establishing a further fact in issue is pulled into clearer focus. Section 97 sets out the reasoning process that must be engaged in for the purposes of deciding whether tendency evidence has significant probative value.

Section 98 of the UEL operates in a similar way by focussing attention on the capacity of evidence that two or more events occurred to prove that it is improbable that the events occurred coincidentally. The question of whether such evidence is of significant probative value can then be determined by reference to the degree of improbability found, having regard to similarities in the events or the circumstances in which they occurred.

Accordingly, while the Commission appreciates and acknowledges the persuasive arguments that were made by the DPP, the Commission recommends adopting the UEL approach to tendency and coincidence evidence, rather than reformulating section 31A. When the advantages of adopting those provisions are weighed against the disadvantages that might be caused by attempting to incorporate a reformulated section 31A into the UEL, the Commission is of the view that adoption of the UEL provisions should be preferred.

Recommendation 1

If the Uniform Evidence Law is enacted in Western Australia, it should adopt the Uniform Evidence Law's approach to tendency and coincidence evidence, rather than inserting a reformulated version of section 31A of the Evidence Act.

3. WHAT FORM SHOULD THE TENDENCY AND COINCIDENCE PROVISIONS TAKE?

As noted above, while six jurisdictions have adopted the UEL, they have each implemented it in slightly different ways. This means that it is necessary to consider what form the UEL provisions on tendency and coincidence evidence should take in Western Australia if the Commission's recommendation that those provisions be adopted is accepted.

This Chapter considers the following four issues, which were raised by stakeholders:

- Whether the UEL provisions should only apply to sexual offences;
- Whether the section 97A model provision should be introduced, and if so whether it should apply to adult sexual offences, family violence offences, attempted child sexual offences, or coincidence evidence;
- Whether the UEL notice provisions should be adopted; and
- Whether section 91 of the UEL should be amended to facilitate proof of prior convictions.
- In addition to those issues, the Commission identified a further issue that required its consideration:
- Should the law in Western Australia reflect section 101 of the UEL provisions that currently apply in the Commonwealth, Tasmania and Victoria, or should it reflect the provisions that now apply in the ACT, NSW and the NT?

3.1 Should the UEL provisions only apply to sexual offences?

Some stakeholders suggested that while the UEL tendency and coincidence provisions should be adopted in Western Australia, their operation should be restricted to cases in which an accused is charged with sexual offences. It was considered to be inappropriate for those provisions to apply to proceedings involving drug offences or property offences.

The Commission does not agree that the UEL provisions should be limited in this way. There will be many circumstances in which proof that a person has, or had, a particular tendency may be relevant in determining whether they committed an offence other than one that had a sexual character. Indeed, propensity reasoning was permissible under the common law in Western Australia even before the introduction of section 31A to prove the commission of other offences.[12] The Commission also observes that since the UEL was adopted in other states, both sections 97 and 98 have been regularly applied to permit tendency and coincidence evidence to be adduced in proceedings relating to offences other than sexual offences.[13]

In the Commission's view, the tendency and coincidence provisions should be available to assist in proving all offences, whether they are of a sexual nature or otherwise.

Recommendation 2

The tendency and coincidence provisions should be available to assist in proving all offences, whether they are of a sexual nature or otherwise

[12] See, for example, *Evans v R* [1999] WASCA 252, *Atholwood v The Queen* [2000] WASCA 76; *Noto v The State of Western Australia* [2006] WASCA 278. See also *Harriman v The Queen* [1989] HCA 50; (1989) 167 CLR 590; *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461.

[13] See, for example, *Potier v R* [2015] NSWCCA 130, *Xie v R* [2021] NSWCCA 1, *R v Ellis* [2003] NSWCCA 319.

3.2 Should section 97A be introduced

As noted above, following the Royal Commission, the ACT, NSW, and the NT inserted a new section 97A into their version of the UEL. This section applies to the admissibility of tendency evidence in criminal proceedings concerning a child sexual offence. It is necessary to determine whether this section should also be added to WA's version of the UEL.

The Commission did not receive any submissions that opposed the introduction of section 97A, although Legal Aid Western Australia and another stakeholder attending the public consultation noted that some caution should be exercised with the use of statutory presumptions. The DPP submitted that rebuttable presumptions such as those given effect to by section 97A of the Model Provisions should be inserted into section 31A, given the DPP's position that section 31A should be retained.

The Commission agrees that the Act should include the rebuttable presumptions set out in section 97A of the UEL. In reaching this position, the Commission has determined that a section equivalent to section 97A of the UEL will assist to admit tendency evidence in child sexual offence proceedings. In the Commission's view, it will communicate to the parties, the court and the public that this type of tendency evidence will generally have significant probative value. However, the court will retain the discretion to determine, in the particular circumstances of a case, that the evidence does not, in fact, meet that test.

The Model Provisions prepared as a consequence of the CAG Working Group's recommendations include a rebuttable presumption that certain tendency evidence be presumed to have significant probative value in prosecutions for child sexual abuse offences. That presumption is now reflected in section 97A of the ACT, NSW, and the NT versions of the UEL. The Model Provisions reflect that a tendency to have a sexual interest in a child or children, or to act on such an interest, is without more a tendency that has significant probative value in child sexual offence charges. This is consistent with findings that were made by the Royal Commission that evidence of such a tendency has significant probative value and should not often be excluded.[14]

The Royal Commission found that there was a need for reform in this area in relation to child sex abuse cases and that need arose, in part, from deficiencies in the operation of the relevant provisions of the UEL.[15] Given that the Commission is recommending the adoption of those UEL provisions, it is appropriate for the Commission also to recommend the adoption of the Model Provisions in order to meet the deficiency identified by the Royal Commission.

In order to allay a key concern that had been expressed by stakeholders about a provision that would otherwise have the effect of deeming certain tendency evidence to have significant probative value in all cases, the Model Provisions contain a rebuttable presumption.

The presumption in section 97A applies to tendency evidence about a sexual interest a person has or had in children (even if the person has not acted on the interest), as well as tendency evidence about a person acting on a sexual interest they have or had in children. The presumption in the Model Provisions will operate so that an accused's sexual interest in a child or children generally will have significant probative value in child sexual offence proceedings relating to a different child.[16]

The Model Provisions included a non-exhaustive list of factors that were not necessary for tendency evidence to have significant probative value in child sexual offence proceedings. Those factors were sourced from the findings of the Royal Commission. The Commission accepts that the Royal Commission inquired into these issues in some depth and received expert and lay

[14] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report' (August 2017) 633-634, 639-641.
[15] Ibid, 635.
[16] *Hughes v The Queen* [2017] HCA 20; (2017) 263 CLR 338; *The Queen v Dennis Bauer (a pseudonym)* [2018] HCA 40; (2018) 266 CLR 56; *McPhillamy v The Queen* [2018] HCA 52; (2018) 92 ALJR 1045.

evidence in support of them. They are now broadly reflected in section 97A(5) of the UEL provisions that are in operation in the ACT, NSW and the NT.

Having particular regard to the findings of the Royal Commission that were relied on to prepare the Model Provisions, the Commission agrees that there should be a rebuttable presumption that certain tendency evidence has significant probative value in prosecutions for child sexual abuse offences. The Commission favours the inclusion of section 97A in the UEL Provisions should they be adopted in Western Australia.

3.2.1 Should section 97A apply to adult sexual offences and offences of family violence?

The DPP submitted that if a version of section 97A is enacted, it should apply to all sexual offences, as well as to offences of family violence. It was submitted that there is no apparent justification for limiting its operation to child sexual offences, and it was pointed out that other offences are also committed in private and often cannot be corroborated by other witnesses or evidence.

The DPP also drew the Commission's attention to the existence of a small number of cases in which sexual offending against a child occurs, but then continues after the child reaches the age of consent and the sexual activity is non-consensual. The DPP suggested that difficulties may arises in the application of the presumption in section 97A of the Model Provisions in relation to those offences that occur after the child has reached the age of consent.

The Commission does not agree that the presumption in section 97A should extend beyond the scope of child sexual offences. The purpose of section 97A is to ensure that whenever it can be established that a person has an unnatural sexual interest in children, or a tendency to act on that sexual interest, it will be deemed to have significant probative value and will therefore be admissible. Section 97A therefore worked to overcome the effect of the High Court decision in *McPhillamy v The Queen*,[17] where it was held that a sexual interest in a child or children generally will not have significant probative value in child sexual offence proceedings relating to a different child.

Considering this background, having regard to the legislative purpose of section 97A, and in the absence of any evidence or detailed submissions that would justify expanding the reach of section 97A to offences other than child sexual offences, the Commission does not recommend that section 97A, if adopted in Western Australia, should be amended such that it would apply to all sexual offence and offences of family violence.

The Commission has considered the DPP's concern about cases of sexual abuse that continue into adulthood. However, the Commission does not believe that this is a concern of sufficient gravity to justify altering section 97A. As the DPP submitted, the potential issue will only arise in a small number of cases. More importantly, the Commission considers that in circumstances in which an accused person is alleged to have committed sexual offences against a child, and then committed further sexual offences against the same person after they reached the age of consent, it is unlikely that the presumption in section 97A is going to provide further assistance to the prosecution. This is because it seems highly likely that the prosecution would be permitted to rely on evidence of one or more occasions on which the offending occurred as evidence that the accused had sexual interest in the particular victim, and that they therefore were more likely to have acted on that sexual interest on the other occasions alleged.

3.2.2 Should section 97A apply to attempted child sexual offences?

The DPP drew attention to the fact that section 97A of the UEL is unclear about whether the presumptions apply in relation to attempted child sexual offences. Section 97A(1) of the UEL provides that it 'applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue'. The phrase 'child

[17] *McPhillamy v The Queen* [2018] HCA 52; (2018) 92 ALJR 1045.

sexual offence' is defined in section 97A(6), but it does not expressly refer to (and therefore may arguably not include) offences of attempting to commit sexual offences against children.[18]

The Commission is of the view that the arguments that justify having different rules for the admission of tendency and coincidence evidence in child sexual abuse cases apply similarly to charges of attempted child sexual abuse. Consequently, those special rules should apply to such cases. To ensure that the presumption in section 97A of the UEL applies in cases in which a defendant is charged with attempting to commit a sexual offence against a child, the Commission recommends that amendments be made to section 97A(6) to make this expressly clear.

3.2.3 Should the rebuttable presumptions in section 97A also apply to coincidence evidence?

The rebuttable presumptions contained in section 97A only apply to tendency evidence. They do not apply to coincidence evidence. In their submission, the DPP argued that the failure to apply these presumptions to coincidence evidence is a deficiency in scheme. However, the DPP did not explain why it was a deficiency and the Commission received no other submissions on this issue.

While the Royal Commission identified that both tendency and coincidence evidence required reform in the context of child sexual offences,[19] tendency evidence was the focus of the wording of section 97A. This also follows from the fact that section 98, which sets out the 'coincidence rule', focuses on evidential issues related to any similarities between '2 or more events' which is quite different from the emphasis of section 97A. Further, it is difficult to see how the presumptions in section 97A could be adapted to facilitate proof of matters that might bear on the improbability of events occurring coincidentally, for the purposes of section 98.

In the absence of any detailed submissions, or the existence of any other compelling reasons, the Commission does not recommend that changes be made to section 97A to ensure that it applies to coincidence evidence.

Recommendation 3

A version of section 97A of the Uniform Evidence Law, which contains rebuttable presumptions concerning the admissibility of tendency evidence in criminal proceedings concerning child sexual offence, should be enacted. That provision should only apply to child sexual offences. It should make it clear that a child sexual offence includes an attempted child sexual offence. The provision should not apply to coincidence evidence.

3.3 Should the notice provisions be enacted?

The UEL provisions that regulate the admission of tendency and coincidence evidence require a party seeking to adduce such evidence to give 'reasonable notice in writing to each other party of the party's intention to adduce the evidence'.[20] Notice must be given in accordance with regulations or rules of court, which prescribe what must be stated in the notice and the time within which the notice must be given.[21] A court may direct that the evidence may be adduced even if there has been a failure to give notice.[22]

There was broad support for the adoption of the UEL notice provisions in the submissions that were received by the Commission. That is understandable. As a general principle, parties to litigation should be entitled to prior notice of the case they are expected to meet.

[18] *Criminal Code Act Compilation Act 1913* (WA) s 4.
[19] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report' (August 2017), 634.
[20] Uniform Evidence Law, Sections 97(1)(a) and 98(1)(a).
[21] Uniform Evidence Law Section 99.
[22] Uniform Evidence Law, Section 100.

The Commission is aware that the practice of the superior courts in Western Australia is to require that formal applications to adduce evidence in accordance with section 31A be made before trial, even though section 31A does not contain any express requirement for notice to be given. Accordingly, if the UEL notice requirement was introduced it would be unlikely to bring about any dramatic changes to the operation of the law in Western Australia.

While the DPP was generally supportive of a requirement that notice be given, the DPP suggested that care should be taken before adopting the regulations that are in force in NSW and Victoria. The DPP submitted that much of the information that is required by those regulations is 'unnecessarily repetitive and cumbersome', and that critical information about the nature of the alleged propensity or relationship alleged, and the facts in issue to which that evidence is said to be relevant, does not have to be identified.[23]

The DPP also noted that any legislated requirement for notice to be given is likely to adversely impact the way in which many prosecutions are conducted in the Magistrates Court by police prosecutors. This is because police prosecutors are not often able to consider matters well in advance of a hearing and may therefore be unable to provide formal notice of an intention to adduce tendency and coincidence evidence. The DPP submitted that prosecutors in the Magistrates Court should only be required to give notice of the evidence and the use to which it was to be put at the commencement of a hearing.

By contrast, defence representatives submitted that section 31A is overused by prosecutors in the Magistrates Courts, especially in non-sexual cases, and that it would assist them to have notice of the intention to admit such evidence so that they could properly consider the admissibility of the evidence and thereby ensure a fair trial.

The Commission is of the view that all parties should have notice of an intention to adduce tendency and coincidence evidence, to ensure they are not taken by surprise and so that courts are not placed under unnecessary pressure to make decisions. However, what is appropriate notice may depend on the seriousness of the case.

Seriousness of a charge is a criterion which the law uses to determine the court in which a criminal charge is heard. The *Criminal Procedure Act 2004* (WA) provides for different procedures to be adopted for prosecutions in the Magistrates Court when compared to prosecutions in the superior courts. Consequently, the Commission believes that there is no reason different notice provisions should not apply in different courts. There may be good reasons why a prosecutor in the Magistrates Court should be required to give less notice of an application to adduce tendency or coincidence evidence than a prosecutor in a superior court.

In order to balance the need for notice to be given, with ensuring that the notice achieves its intended purpose and does not impose unnecessary burdens, it is the Commission's view that the precise nature of the details that should be included in a notice of intention to adduce tendency or coincidence evidence, and the time within which such notice should be given, should be dealt with in rules of court. The individual courts are best placed to determine those issues, having regard to their individual practices and procedures, and in consultation with their own stakeholders. Further, rules of court would permit greater flexibility as they can be more easily amended should the circumstances require.

Recommendation 4

Parties should be required to provide notice of their intention to adduce tendency or coincidence evidence. The nature of the details that should be included in the notice, and the time within which the notice must be given, should be determined by the rules of court.

[23] Submission from the DPP, 10 February 2022, 10.

3.4 Should section 91 of the UEL be amended to facilitate proof of prior convictions?

The DPP drew the Commission's attention to section 91 of the UEL, which states:

> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

The DPP suggested that this provision could have an adverse effect on the ability of the Office to prove that an accused person has a relevant tendency, or to rely on coincidence reasoning, because it may prevent the prosecution from proving the facts underpinning the essential elements of an offence giving rise to a previous conviction, or facts which have been proved to the satisfaction of a sentencing judge.

Since *Bennett v The State of Western Australia*,[24] in Western Australia evidence of a prior conviction is admissible in subsequent criminal proceedings against the same person as evidence of the material facts underpinning the elements of the offence the subject of the conviction, even if the conviction was obtained after trial. A question remains unresolved as to whether evidence of a conviction is capable of amounting to evidence of anything other than the material facts underpinning the essential elements and, if it is not, how prosecutors are able to prove any other facts that go beyond those essential elements.[25] Despite this, the decision in *Bennett* has been helpful in avoiding the need to call witnesses (particularly complainants) to prove the facts of a prior conviction that an accused is unable to challenge, in any event.

It is beyond the scope of the Terms of Reference to deal with the unresolved question identified above. However, the Commission is aware that the issue of proof has generally been resolved in a practical way by the parties placing relevant facts before the relevant court in the form of agreed facts. Arguably, this approach could also avoid the consequences of section 91 of the UEL.[26]

The Commission is of the view that an adoption of section 91 of the UEL would be inconsistent with the approach that has been taken in Western Australia, since *Bennett*, to the admissibility of convictions to at least prove the material facts underpinning the essential elements of a relevant offence that was admitted as tendency or coincidence evidence. It would be unhelpful if that approach had to change because of the adoption of the UEL.

3.5 Should the law in Western Australia reflect section 101 of the UEL provisions that currently apply in the Commonwealth, Tasmania and Victoria, or should it reflect the provisions that now apply in the ACT, NSW and the NT?

Section 101 of the UEL provides a further test of admissibility that must be met in addition to the tests in sections 97 and 98 of the UEL, in circumstances in which tendency or coincidence evidence is sought to be adduced. It is a test that requires the probative value of tendency or coincidence evidence to be balanced against any prejudicial effect it may have on the accused.

In the legislation that applies to the Commonwealth, and in Tasmania and Victoria, the probative value of the evidence must *substantially* outweigh its prejudicial effect in order to be admitted. This reflects the original form of section 101 of the UEL. By contrast, in the ACT, NSW and the NT, evidence may be admitted if its prejudicial effect is outweighed by its probative value:

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

[24] *Bennett v The State of Western Australia* [2012] WASCA 70.

[25] Ibid [66], [130] – [133], and [139].

[26] Section 191 of the Uniform Evidence Law permits parties to agree facts. Also, s 190 allows a defendant in criminal proceedings to consent to dispense with the application of certain provisions, including s 91.

(a) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(b) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

(c) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(d) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

The Royal Commission agreed with a submission made to it that as far as section 101 required a judgement that the evidence must *substantially* outweigh its prejudicial effect in order to be admitted, 'the asymmetry in s101, skewing the test towards exclusion, appears unjustifiable'.[27]

The Commission is of the view that the law in Western Australia should reflect section 101 of the UEL provisions that currently applies in the ACT, NSW and the NT, essentially for the same reasons that were given by the Royal Commission. The Commission is of the view that in respect of this issue it is inappropriate to distinguish between the test of admissibility in child sexual abuse cases and other cases.

Further, the Commission notes that section 31A of the Evidence Act has never required a decision to be made about whether the probative value of evidence sought to be adduced in accordance with its terms substantially outweighs the risk of a fair trial. The introduction of that more stringent test would represent a significant change to the approach that has been taken in Western Australia to the admissibility of propensity and relationship evidence, and other evidence of discreditable conduct, for a considerable period of time. The adoption of a more stringent test would inevitably result in less relevant evidence being made available to in courts in Western Australia. The Commission does not consider that would be a desirable outcome.

Recommendation 5

A version of section 101 of the Uniform Evidence Law that is currently in operation in the ACT, NSW and the NT, should be enacted so that tendency and coincidence evidence about the accused cannot be used against the accused unless the probative value of the evidence outweighs the danger of prejudice to the accused.

[27] Royal Commission into Institutional Responses to Child Sexual Abuse, 'Criminal Justice Report '(August 2017), 640-1.

4. CONCLUSION

The decision as to whether to insert a version of section 31A of the Evidence Act or sections of the UEL into a new Evidence Act for Western Australia that will be based on the UEL is finely balanced. A reason for that is because there is little difference between their effect. The Commission recommends adopting the UEL approach to tendency and coincidence evidence, rather than reformulating section 31A. When the advantages of adopting those provisions are weighed against the disadvantages that might be caused by attempting to incorporate a reformulated section 31A into the UEL, the Commission is of the view that adoption of the UEL provisions should be preferred.

APPENDIX A: LIST OF SUBMISSIONS

Submissions Received

Aboriginal Legal Service of Western Australia

Director of Public Prosecutions of Western Australia

Legal Aid Western Australia

Robert Lombardi

The Law Society of Western Australia

Consultation Session

Alison Finn

Amanda Forrester SC

Andrew Robson

Antoinette Fedele

Helen Prince

John Ling

Marilyn Loveday

Stephen McGrath

Tony Sullivan

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