Judicial College of Victoria

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Detailed brief

David Hamer, 'Myths, Misconceptions and Mixed Messages: An Early Look at the New Tendency and Coincidence Evidence Provisions' 45 Crim LJ 232

A set of reforms to the *Uniform Evidence Law* (*UEL*) designed to relax the rules around the admissibility of tendency and coincidence evidence have been proposed for Victoria. The proposals follow the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse. As of January 2022, there is no Bill to amend the *UEL* before the Victorian Parliament.

This article argues that while the reforms are likely to facilitate the prosecution of child sexual offences ('CSO'), the design and drafting of the reforms are flawed in several respects.

The key reforms proposed include:

- The presumption of "significant probative value" in s 97A, which flips the original rule from a presumption of exclusion to a presumption of admission.

- Removal of the requirement that probative value *substantially* outweighs unfair prejudice from the balancing admissibility test in s 101 – it now only needs to outweigh.

The article makes several observations and criticisms of the proposed reforms:

- The reforms retain the existing complexity by maintaining separate rules for tendency and coincidence evidence, plus the balancing test in s 101.

- Section 97A introduces a complex two-stage process for rebutting the presumption. The section prohibits a court from considering certain matters which courts would ordinarily consider, such as the lack of shared distinctive or unusual features, and the 'level of generality' of the tendency allegedly displayed, unless the court considers there are exceptional circumstances in relation to those matters to warrant taking them into account. Thus, a court must first consider the prohibited matters to decide whether there are exceptional circumstances, before then deciding whether those prohibited matters, along with any other considerations, mean the evidence lacks significant probative value.

- The reforms dilute the '*Bauer* principle' that direct evidence of the defendant's commission of the other misconduct (say, from another alleged victim) should – at the admissibility stage – be taken "at its highest". The article argues that the silence in s 94(5) on other credibility issues – such as internal inconsistencies in allegations, or delay – leaves open an argument that these matters *may* be considered at the admissibility stage. Even if that reasoning is rejected, in cases where the prosecution relies upon circumstantial evidence to establish the defendant's other misconduct, any doubts by the trial judge about whether the defendant committed other misconduct may diminish the probative value of the evidence.

- Removing the requirement that the probative value of tendency and coincidence evidence "*substantially* outweighs" prejudicial risk is sensible. The former test operated irrationally in excluding evidence where probative value outweighed prejudicial risk but not by a substantial amount.

- It will be much more challenging to establish unfair prejudice. With probative value presumed to be significant, the test will be satisfied unless there is, at least, a significant danger of unfair prejudice. If the danger is significant, the balance in favour of admission may nonetheless be tipped if the prosecution argues that probative value is more-than-significant (including by pointing to the 'prohibited matters' listed at s 97A(5)).

- The reforms intend to erode the exclusionary potential of s 101 following Royal Commission research which found that prejudicial risk is minimal. Similar reforms to UK legislation resulted in evidence of bad character being put

before juries more frequently, and juries being trusted to weigh up that evidence. This article worries that the complexity and restrictions around s 97A overshadows the message to courts to reassess prejudicial risk.

- The s 97A presumption has a restricted sphere of operation. It is limited to CSO proceedings; tendency evidence – not coincidence evidence – of a defendant's sexual interest in children; and it appears likely that the restrictions are also limited to cases where commission of an act is in issue (rather than identity, medical justification, or accident). The article argues that there are no sound policy reasons for these restrictions, and that resulting tensions may impact the way the presumption is applied in practice. For example, a case involving both CSO and adult sexual offence counts, where the prosecution seeks cross-admissibility between the complainants' direct evidence, would raise issues around the cross-admissibility within each set of counts, and the admissibility of the direct evidence in each set of counts in relation to the other. Alleged victims in related civil proceedings cannot rely on the presumption. It is not plain whether CSO includes offences of possession of child pornography which does not involve 'real' children, or grooming offences involving "apparently innocuous conduct" or where charges were laid following a police 'sting' where no 'real' children were involved.

- Maintaining the distinction between tendency and coincidence evidence (against the recommendation of the Royal Commission) results in internal inconsistency. Section 97A encourages prosecutors to characterise evidence as tendency evidence; Section 98(1A) clarifies that the evidence of multiple alleged victims making similar claims may be admitted under the coincidence rule. Section 94(5) precludes a coincidence characterisation for evidence of other allegations.

- The distinction between tendency and coincidence evidence is artificial and unnecessary. By inflating its importance, the reforms are likely to waste court time, increase costs, confuse juries, enable prejudice, and increase errors.