5 September 2018

CLANT response to 'Options Paper' regarding admissibility of tendency and coincidence evidence in criminal proceedings

This area of law is both complex and controversial and stimulates often diametrically opposed responses within the community and amongst legal practitioners. The tendency and coincidence provisions the subject of the options paper have been interpreted for over 20 years, and have been the subject of ALRC review and recommendation (report 102). The jurisprudence it has produced has struck a thoroughly considered balancing act between the paramount right of the accused to a fair trial against the right of State to present all relevant evidence.

It is against this background that CLANT caution against legislative intervention that will dramatically shift the balance in favour of admissibility of this evidence. We commend the dissenting decision of Justice Gageler in *Hughes v The Queen* [2017] HCA 20 who, with his typical intellectual sagacity, described the current balance as the court needing to be "comfortable that the evidence is of sufficient weight to justify the risk of the evidence unwittingly being given too much weight". He notes the ever present danger inherent in tendency reasoning as this (at [109]);

> A grown man does not normally have a sexual interest in female children less than 16 years of age. A tendency to have such a sexual interest and to engage in sexual activities with female children less than 16 years of age, opportunistically or at all, is so abnormal as to allow it to be said that a man shown to have such a tendency is a man who is more likely than other men to have engaged in a particular sexual activity with a particular female child on a particular occasion. Yet the problem is this: how much more likely is not easy to tell, in part because common experience provides no sure guide, and the abhorrence any normal person naturally feels for such a tendency highlights the risk that any subjective estimation of the likelihood will be greater than is objectively warranted.

We note a response is specifically sought as to the options proposed. Informed by the above concerns our view is that Option A is the most desirable because it does the least to alter the current balance. It would also bring Australia into line with New Zealand and Canada, allowing us to draw upon their jurisprudence.

While Option B aspires to clarify the meaning of 'significant probative value' in light of *Hughes*, it is not clear what form this clarification would take. Arguably *Hughes* was a decision of application to factually similar cases . It may be better to allow the meaning of 'significant probative value' to be resolved on a case by case basis. CLANT are concerned that in the absence of a draft proposal as to what form that clarification would take, it may cause unfairness to the accused.

CLANT are opposed to option C. To remove the requirement that the probative value of the evidence needs to be significant would effectively remove the current hurdle to its admissibility that s97, 98 and 101 provide. Almost all tendency evidence will be probative. The new test would simply repeat the general exclusion already provided in s137 of the Act, albeit with a slightly broader focus when assessing unfair prejudice.

Reform 1

As to the supplementary reforms, although not acknowledged in the 'Options paper' the Northern Territory has for almost 5 years had a legislative presumption in favour of joint trials where the accused is charged with more than one sex offence. Our provision was modelled on the Victorian equivalent. It has been interpreted to permit severance where the evidence is not cross-admissible[1]. We note supplementary reform 1 as currently drafted would permit a joint trial in circumstances where the prosecution "are seeking to lead tendency or coincidence evidence". This requires clarification so that the presumption would only apply in the event the prosecution were permitted to lead tendency and coincidence evidence (such evidence having been ruled admissible).

Reform 2

While at first blush this amendment would seem concerning, we note the decision of the High Court in *IMM*, specifically at [28] where in obiter, they referred with approval to the decision of Basten JA in *McIntosh v The Queen*[2] (with whom Hidden and Wilson JJs agreed) where he stated;

> [47] Whilst, in determining probative value as a question of capability to affect the assessment of a fact in issue, the court is not required to disregard inherent implausibility, on the other hand, contestable questions of credibility and reliability are not for the trial judge, but for the jury. Accordingly, the suggestion that the possibility of concoction is a factor which must (my emphasis) be taken into account in determining whether particular evidence has significant probative value should not be accepted.
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> [48]It should be acknowledged that this conclusion is inconsistent with the approach identified in the leading Australian text, *Cross on Evidence*. However, that reasoning appears to have relied upon cases which predated *R v Ellis* in 2003. Further, the view accepted here appears to be consistent with the explanation of *R v XY* accepted by the author of Cross as the applicable law in this State.
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> [49] In the present case, both Dion Chandler and CC were cross-examined in an attempt to cast doubt on the reliability of their evidence. The cross-examination was tentative, in the sense that while the possibility of conversations between the complainant and the witness were suggested, the possible content of those conversations was not explored, the topic being identified at a high level of generality. In any event, these challenges took place after the evidence had been admitted and not before. If a possibility of concoction at a level sufficient to affect the capacity of the evidence to bear significant probative value were to be identified, it would probably have been necessary to carry out a reasonably searching cross-examination on the *voir dire*, before admissibility was ruled on. That did not happen. Thus, the reason why the trial judge did not consider the possibility of concoction in making his rulings, was that it was neither relied upon by counsel for the accused at trial, nor was it inherently necessary for the judge to consider such matters in assessing significant probative value.

[1] *The Queen v O'Brien* [2017] NTSC 34 per Grant CJ at [11]; *The Queen v JRW* [2014] NTSC 52 per Riley CJ at [5]
[2] [2015] NSWCCA 184

While the decision in *McIntosh* leaves the door slightly ajar for the issue of concoction and contamination to be considered in the context of admissibility, the reality is that nothing short of an admission by the complainants to concoction will suffice to rob the evidence of its capacity to be significantly probative. In practice the courts invariably admit the evidence despite the possibility of contamination and concoction but only after the complainants have been subjected to searching cross examination at a pre-trial vior dire, in what is one of the last remaining exceptions to the practice of protecting the complainant from pre-trial cross examination. This amendment will close that door and protect complainants from unnecessary cross examination. CLANT support it.

Reform 3

CLANT do not support this reform. There is an inherent danger in the allure of this evidence that has long been recognised by the courts. Once a particular tendency has been established, there is a risk a jury may overestimate the likelihood of the accused acting in accordance with that tendency. Proof of a tendency beyond reasonable doubt is an important protection that should not removed.

Reform 4

It is difficult to envisage an occasion, post *Hughes,* when the prosecution would need to rely on this sort of coincidence reasoning. If the evidence of sexual abuse between witnesses bore sufficient similarity as to permit a coincidence inference to be drawn it would clearly be tendency evidence. However CLANT supports this reform.

Reform 5

This reform appears to remove any remaining vestiges of *Pfennig* from the UEA. As such it arguably simplifies and clarifies the balancing test required in s101. CLANT supports this reform.