IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 23 of 2016

BETWEEN:

ROBERT LINDSAY HUGHES
Appellant
and

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

PART I. CERTIFICATION

1. It is certified that these submissions are in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF THE ISSUES

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I. How similar should tendency evidence be to the charged act before it can be found to have significant probative value pursuant to s.97 of the *Evidence Act 1995* (NSW)?
II. Can tendency evidence be said to have significant probative value if it is dissimilar to and occurred in dissimilar circumstances to the charged acts?
III. In such circumstances is it necessary to establish an underlying unity, a pattern of conduct or a modus operandi in order to find that tendency evidence has significant probative value?
IV. Is evidence of a tendency to "act on sexual attraction to girls under the age of sixteen" in an opportunistic fashion sufficiently specific to reach the threshold of significant
30 probative value for s.97?
V. If tendency evidence can be said to prove no more than a disposition to commit the offences in question, can that evidence have significant probative value?

PART III. CERTIFICATION WITH RESPECT TO SECTION 78B

2. It is certified that the appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and it is considered that no notice should be given.

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PART IV. REPORTS

3. The judgment of the NSW Court of Criminal Appeal (CCA) has the following internet citation: *Hughes v R* [2015] NSWCCA 330.

PART V: A NARRATIVE STATEMENT OF THE RELEVANT FACTS

4. In February 2014 the appellant stood trial in the District Court in relation to eleven charges involving sexual misconduct towards five victims under 16 years. On 7 April 2014 he was convicted of nine offences against three of the victims. On 8 April he was convicted
50 of a tenth offence in relation to a fourth victim (SM). The jury were unable to deliver a

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verdict in relation to an eleventh offence involving the fifth victim (EE). Judge Zahra SC sentenced the appellant to an aggregate sentence of 10 years and 9 months, with a non-parole period of 6 years, to date from 7 April 2014.

5. Tendency evidence was relied upon by the Crown in relation to each count. The tendency evidence included:
   (i) evidence of the charged acts against the five complainants;
   (ii) evidence of uncharged acts against the same complainants;
   (iii) evidence of uncharged acts against three tendency witnesses; and
   (iv) in relation to count 11, evidence relating to uncharged acts towards three further witnesses.

6. There had been a great deal of highly prejudicial pre-trial publicity about the proceedings in the mainstream media and on social media because the appellant starred in a popular commercial television series that screened in the 1980's called *Hey Dad..!* One complainant, **SM**, had worked with the appellant on *Hey Dad..*!, and had generated some of the publicity. She was paid about $100,000 for several media interviews about her dealings with the accused (CCA [13]). SM had communicated with at least one complainant (AK).

7. The trial judge refused an application to permanently stay the proceedings because of the pre-trial publicity, despite holding that the publicity was likely to engender significant ill will towards the appellant, had reinforced impressions of the appellant's guilt and was predominantly driven by commercial interest without regard for a fair trial (CCA [51-55]).

8. The trial judge rejected an application to examine the tendency witnesses on the *voir dire* to explore issues regarding possible contamination and concoction, and admitted the evidence over objection. An application to exclude the tendency evidence and, accordingly, to separate the counts on the indictment was also refused. Thereafter, much of the appellant's cross-examination of the complainants and tendency witnesses involved exploration of issues of contamination and concoction and the relationships and communications between the various complainants.

Evidence from the complainants

9. **JP**. Counts 1 and 2 charged offences of sexual intercourse between 1 January 1984 and 30 April 1985 against JP without the consent of JP, knowing that she was not consenting (s.61D(1)). JP was 14 or 15 years old. She was the daughter of the appellant's friends. The families socialised together. Count 1 related to an incident at JP's home where the appellant entered her bedroom and, whilst she was sleeping, put his hands inside her pyjama pants, causing her to wake. The appellant touched her vagina and then put his finger inside her vagina. JP pushed his hand away. The appellant licked her cheek and left. Count 2 occurred a month or so later, also at JP's house, when the appellant again entered her bedroom and put his hand inside her pants. He rubbed her clitoris. JP held his wrist (CCA [126]).

10. **SH**. Counts 3, 4, 5, and 6 charged offences of indecent assault between 1 March 1985 and 1 May 1986 upon SH (s.61E(1)). SH was 6, 7 or 8 years old. She lived close to the appellant's family and was his daughter's friend. She occasionally slept at the appellant's house. The charges related to two separate incidents at the appellant's house when the appellant came into the bedroom, instructed SH to roll over in bed, put her hand on his

penis and made her masturbate him until he ejaculated. He wiped some semen on her vagina with his penis. Evidence concerning other similar events was admitted as uncharged acts (CCA [126]).

11. **AK**. Counts 7, 8 and 9 charged offences of aggravated indecent assault in February 1987 upon AK (s.61E(1A)). AK was the appellant's daughter's school friend who stayed over at the appellant's house on occasions. Counts 7 and 8 related to an incident which occurred when AK was 9 years old during an outing with the appellant's daughter to a beach. AK was encouraged to swim between the appellant's legs. On two occasions when she did so she saw his penis exposed. He pinned her between his legs. Count 9 involved an event in the same time period when AK stayed at the appellant's house. She had ear infection. The appellant applied eardrops. To do so he instructed her to lay her head on his lap. When she did, she felt his erect penis through his trousers rubbing against her face. There were other uncharged incidents involving the appellant instructing her to sit on his lap whilst he had an erection and exposing his genitals to her on occasions (CCA [126]).

12. **EE**. Count 10 charged an offence of inciting EE to commit an act of indecency with the appellant between 1 September and 4 December 1988 (s.60E(2)). EE, aged 15 years, undertook work experience with the appellant's wife. Later, the appellant met EE several times to discuss her career aspirations. Count 10 related to an occasion when he drove EE home after they visited a harbourside park together. They walked together down the driveway to her house and began kissing. During the kiss he pressed his erect penis into her hip and then moved her hand onto his penis and said, "That's it". Evidence was adduced of another occasion when they sat together in the same park. EE was leaning back against the appellant and she could feel his erect penis in the small of her back. He put his arms around her and touched her breasts through her clothing. He kissed the back of her neck and she turned and kissed him. The accused asked her to find a place for them to have sex and then drove her home. EE said the appellant sent her roses with a card signed "RH" on her sixteenth birthday (CCA [126]).

13. **SM.** Count 11 charged an offence of committing an act of indecency towards SM between April and August 1990 when she was 16 years (s.61E(2)). SM worked with the appellant on the *Hey Dad ...!* series from the age of 8. Count 11 concerned an occasion when she was 12 or 13 years old. The appellant came out of his dressing room and stood in front of the mirror in view of SM. He deliberately undid his belt and let his pants and underpants drop to his ankles and exposed his penis in the mirror. He wriggled his hips back and forth looking at her in the mirror and then at his penis in the mirror. SM also gave evidence that she would sit on the appellant's lap for publicity photo shoots. He would put a hand underneath her, touch her on the chest and make her feel uncomfortable.

Evidence from tendency witnesses admissible on all counts

14. The evidence of BB, AA and VOD was admitted as tendency evidence in relation to all counts:
BB[1] was a member of the appellant's extended family. BB gave evidence of attending her grandparents' birthday party at the appellant's home when she was 11. BB said the appellant touched her breasts under her shirt and put his hand underneath the elastic of her jeans (CCA [127]).

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[1] BB is also referred to as SMM in the judgment on separate trials and tendency evidence.

AA[2] was also an extended family member. AA gave evidence of incidents that occurred when she was about 15 when the appellant touched her breast and between the legs when she was in a swimming pool. She also spoke of being touched on the breasts at his home after the appellant's daughter left the room and of having seen the appellant standing naked touching his genitals in front of the mirror with his bedroom door opened (CCA [128]).

VOD was a neighbor who slept at the appellant's house when she was 7 to 9 years old when SH was also present. She said that the appellant would walk around the house without clothes on. She said he had come into the room where they were sleeping without clothes on, that he walked around without clothes on and that she saw his genitals. (CCA [129]).

Evidence referable to Count 11

15. Three other tendency witnesses gave evidence of uncharged acts in relation to count 11. **LJ** was a costume designer on *Hey Dad ...!* who started work when she was around 24 years old. LJ had to wake the appellant when he slept in his dressing room. Initially he slept naked draped by a sheet. Later he was naked and uncovered. She would call him, leave the door open and he would cover himself. He tried to grab her breasts on occasions, hugged her and brushed past her, rubbing her with his genitals on her back or bottom (CCA [130]). **CS** worked in the wardrobe department of the show when she was about 19-20 years old. The appellant would brush past her and make contact with her bottom or breasts with his genitals or hands. Once he exposed his penis to her by dropping his pants in the dressing room (CCA [131]). **VR**, another wardrobe assistant who was 18 years old, said that the appellant put his hand under her armpit near her breast on several occasions and, when called upon to wake him in his dressing room, she saw him naked on the bed (CCA [132]).

Directions to the jury on the tendency evidence

16. The jury received written and oral directions about the tendency evidence. The written directions were read in full towards the start of the oral summing up (SU33-38). Those directions outlined that the tendency evidence was adduced to establish that the accused had a tendency to act with a particular state of mind, namely a sexual interest in female children under 16 years of age. They were also informed that the Crown relied upon the evidence to establish a tendency to act in the particular ways listed in the tendency notice. At this point the tendencies (i)(ii) and (v) listed in the tendency notice were read out in full (set out below at [23] below) (SU34-35). The trial judge did not take a consistent approach to the evidence relating to individual witnesses. When the trial judge dealt with the evidence relating to AK, he directed that the Crown relied on the evidence of the witness VOD to establish that accused had a tendency to have particular state of mind namely "he was a person who had a sexual interest in female children under 16" and to act in a particular way, "in particular by exposing his naked penis and genitalia" (SU90). When the trial judge summarised the evidence of tendency witness BB, his Honour noted that the Crown relied upon the evidence to establish that the accused had a particular state of mind, that is, "a sexual interest in females under the age of 16" and to act in a particular way, "[h]ere the Crown relies on her evidence of the accused touching her as she described in her evidence" (SU185-198). The jury were not given specific direction about the tendency evidence relating to JP, SM, EE or AK or the evidence of tendency witness AA.

[2] AA is also referred to as MOD in the judgment on separate trials and tendency evidence.

17. The jury were informed at the start of the summing up that the evidence of LJ, VR and LF was "in relation to Count 11" (SU35). The tendencies listed in (iv) and (v) were read aloud. The jury did not receive any direction to the effect that the evidence of the three wardrobe assistants could not be used in relation to the other counts (SU181-191). The failure of the trial judge to clearly confine the tendency evidence to Count 11 was also the subject of an unsuccessful ground of appeal in the CCA.

18. The appellant's appeal against the convictions to the New South Wales Court of Criminal Appeal (Beazley P, Schmidt and Button JJ) was on 12 grounds, including relevantly that his Honour erred by:
    - refusing to separate the counts (ground 3);
    - admitting the tendency evidence (ground 4); and
    - that the trial miscarried because of his Honour's refusal to separate the counts (ground 13 added with leave).

19. On 21 December 2015, the Court of Criminal Appeal dismissed both the appeal against conviction and sentence (*Hughes v Regina* [2015] NSWCCA 330).

PART VI. THE ARGUMENT

20. The appellant submits that the New South Wales Court of Criminal Appeal erred in:
    i. finding that the tendency evidence had significant probative value as required by s.97 of the *Evidence Act 1995* (NSW);
    ii. finding that the trial judge did not err in finding that the tendency evidence had significant probative value as required by s.97 of the *Evidence Act 1995* (NSW) in circumstances where the alleged acts relied upon as tendency evidence were dissimilar in nature, context and circumstance.

21. The appellant further submits that the New South Wales Court of Criminal Appeal erred by
    i. holding that an "underlying unity" or "pattern of conduct" need not be established for the tendency evidence to have significant probative value as required by s.97 of the *Evidence Act*; and
    ii. rejecting the approach adopted by Court of Appeal of the Supreme Court of Victoria in *Velkoski v R* [2014] VSCA 121 which requires an assessment of the degree of similarity when considering whether the proposed tendency evidence has significant probative value.

The Tendency Evidence

22. A tendency notice particularised the tendencies sought to be proved as being that the appellant tended to act in a particular way, and to have a particular state of mind, namely:
    (i) To have a sexual interest in female children under 16 years of age;
    (ii) To use his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;
    (iii) To use his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;
    (iv) To use his working relationship with females to utilise an opportunity to engage in sexual activities;
    (v) To engage in sexual conduct with females aged under 16 years of age by either:

a. touching in an inappropriate sexual way but maintaining the contact was inadvertent or accidental;
b. by exposing his naked penis / genitalia;
c. by making the child come into contact with his penis / genitalia;
d. touching the child's vaginal area;
e. by carrying out sexual acts upon the complainants when they were within the vicinity of another person."

23. The prosecution did not provide a coincidence notice or expressly rely on coincidence reasoning.

24. The listed tendencies did not apply to every count. The first tendency, "using his social and familial relationships" was not relevant to count 11 (SM). The second tendency, "using his daughter's relationship with female children" was not relevant to counts 10 and 11 (EE and SM).[3] The third tendency, "using his working relationship with females" was relevant to counts 10 and 11 (SM) but had no relevance to the counts involving JP, SH and AK (counts 1-9). The description of various physical acts in (v) was extensive because of the differences in the circumstances of each alleged act. For example, the counts involving AK and SM did not involve any touching of the child's vaginal area. There was no indecent exposure involved in the counts involving JP or SH. There was no attempt to make SH or SM come into contact with the appellant's penis/genitalia.

25. There were significant dissimilarities in the conduct charged in some of the counts. The complainants varied greatly in age from approximately 6 to 15. The context of the alleged offending was very different. The relationships between complainant and the appellant varied. The location of the offending varied greatly. The manner of offending was very different. For example, the offences involving SH were surreptitious, namely sneaking into a bedroom under the cover of darkness, and involved a very young child of 6-8 years. By contrast, EE was 15 and the alleged sexual conduct included personal conversations, consensual kissing and fondling at a public park. Count 11 concerning SM in the appellant's work place involved no physical contact at all and was completely different to all of the other acts charged.

26. Further, the generality with which the tendencies were expressed obscured the manner in which the tendency was said to arise. There was no allegation that the appellant had "used" his social and familial relationships in a particular way, such as befriending families with young children, orchestrating opportunities to be close to female children or engaging in grooming behaviour by showing select children special attention. The only common feature identified by the trial judge and the Court of Criminal Appeal was opportunism, in other words, the common feature was an absence of any modus operandi or systematic approach.

27. These complaints were raised at trial and on appeal. It was submitted that the dissimilarities in the evidence and the generality of the expressed tendencies deprived the evidence of significant probative value (CCA [149]-[155]). The trial judge and the Court of Criminal Appeal did not address the failure to properly particularise the tendencies. It is submitted that the trial judge and Court of Criminal Appeal erroneously accepted that

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[3] Counts 1 and 2 were only tenuously connected to this tendency. JP did not know the appellant because of her relationship with his daughter but because her parents were friends with the appellant and his wife and the families socialized together. The appellant's daughter was alleged to be present in the same bed during count 1 but her presence was not suggested to be anything more than incidental to the offence.

the evidence had significant probative value without articulating how tendency evidence lacking similarity, a pattern or any underlying unity could gain probative force to a significant degree. In doing so, the Court of Criminal Appeal expressly rejected the analysis of the Court of Appeal of the Supreme Court of Victoria in *Velkoski v R* [2014] VSCA 121 (CCA [188]). It is submitted below that if the Court of Criminal Appeal had adopted the approach articulated in *Velkoski,* the evidence would not have been admitted.

The approach of the trial judge in admitting the evidence

28. The appellant objected to the tendency evidence and applied to sever the counts at the start of the trial. In the decision rejecting the application, the trial judge summarised relevant legal principles and outlined the factual allegations in detail before applying the statutory test to the evidence. The trial judge assessed the probative value of the evidence relating to the eleven counts and six tendency witnesses globally rather than by count, complainant or by specified tendency. The trial judge accepted the Crown submission that the evidence established a pattern or system of behaviour or modus operandi and stated that "there are a number of features of the alleged conduct and of the events surrounding the conduct described by the complainants, the subject of the individual counts, which involve closely similar conduct on the part of the accused" (SU53-53). Those similar features were not identified or articulated. His Honour noted it was not necessary to establish striking similarity or even closely similar behaviour (SU53). Judge Zahra accepted that there were differences in the nature of the sexual acts and the circumstances in which they occurred. Despite those difference the evidence was found capable of establishing sexual interest in young female children. The issues at trial were said to be "whether the acts occurred; whether the accused sexually assaulted each of the complainants and [whether he] conducted himself as alleged in each count of the indictment" (SU53).

29. His Honour held "the proposed evidence is capable of demonstrating that the accused was a person who was sexually attracted to young female children and acted upon that attraction at various times in the particular way the Crown relies upon in support of each of the individual counts on the indictment" (SU53). The trial judge also noted the terminology used in the notice could be misleading because there was no allegation of a tendency to orchestrate or foster occasions to obtain sexual access to children but "to take advantage of situations which arose when he came into contact with young children" (SU53). Those situations included social and familial relationships; social relationships arising from relationships between the accused daughter and the complainants; and situations in a work context. Having outlined the tendency evidence in detail Zahra DCJ found the pattern of behaviour was "manifest, if not striking and requires little further analysis".

The approach of the Court Criminal Appeal

30. The Court of Criminal Appeal held that the trial judge was correct in his understanding of the tendency evidence and the reasons he gave when his Honour assessed it as having significant probative value [194]. The Court stated "there is no doubt that the tendency evidence in this case was admitted on a basis that allowed dissimilar circumstances and dissimilar acts to be in respect of different counts" and accepted that the dissimilarity was relevant to an assessment of significant probative value [196]. It further accepted the dissimilarities in the context in which the offences were committed were also "obvious on their face" [198]. The significant age difference between the complainants was not mentioned.

31. The Court of Criminal Appeal evidence established "two essential tendencies": to have a sexual interest in and to engage in sexual conduct with female children under 16 years of age. The tendencies were exhibited in "three different, but not significantly disassociated, contexts" namely "social and familial relationships; his daughter's relationship with her friends; and the work environment (CCA [197]).

32. It held [198]-[200]:

> "...what was common to them all was that they represented occasions on which young females were present and the applicant used those occasions for the purpose of engaging in sexual activities with them
>
> The same may be said of the dissimilarity in the sexual conduct alleged in the various counts. However, notwithstanding the dissimilarities, the conduct alleged was sexual in nature, directed towards young females, on occasions that presented themselves to the applicant. Underlying the similarity was that the conduct was, in effect, referable to the circumstances as they presented to the applicant. In short, the conduct occurred opportunistically, as and when young female persons were in the applicant's company.
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> In those circumstances, the evidence underpinning the tendency notice quoted at [117], which described the alleged tendency in the five paragraphs which identified, in detail, the various aspects of the tendency sought to be relied on, was correctly assessed as having significant probative value."

33. Earlier in the decision the Court of Appeal surveyed a series of New South Wales appellate decisions on tendency evidence (CCA [158]-[185]). The Court declared that "the law in New South Wales" is that a decision about whether evidence has significant probative "involves an assessment by the Court as to whether a jury could treat it of importance in supporting an inference of guilt on the count charged" and an assessment of the capacity of the evidence to have that effect (CCA [182]). The Court concluded that there need only be a tendency to act in a particular way relevant to the charged conduct (CCA [184]). Whilst alternative inferences may be considered, ultimately "the question is where the conduct is said to exhibit a tendency allows, by an inferential process of reasoning, that the person was more likely to act in a particular way or have a relevant state of mind on the particular occasion that is the subject of the charge" (CCA [185]).

34. When the Court of Criminal Appeal came to assess the probative value of the evidence in the present case it did not identify any particular feature of the conduct of the appellant, or of the evidence, which supported the inferential process of reasoning and made it more likely that the appellant would act in a particular way on the occasions subject to the charge. The Court did not identify how, for example, the appellant exposing his penis to a nine-year-old child swimming between his legs (AK) would make it more probable that he moved the hand of a fifteen-year-old girl to his penis after they kissed in his driveway after a personal conversation (EE), or vice versa. The Court did not identify any particular state of mind or particular manner of acting beyond a sexual interest in females under 16 and a willingness to act on that interest when the occasion arose. It did not refer to any commonality or similarity in the conduct, behaviour or manner of offending between the counts or the tendency evidence.

35. The Court did refer to the three contexts of offending as being "not significantly disassociated". That characterisation was inapposite as it reversed the requirement on the Crown to demonstrate relevant similarity between the environments. The three different contexts covered a very wide range of the appellant's daily routines – working environments and non-work, social environments. There was nothing significantly similar about these contexts. In fact, there were no other contexts in which the appellant operated and few, if any, other contexts in which the appellant could conceivably come into contact with females under the age of 16. The evidence was therefore admitted because it showed a tendency to have a sexual interest in and engage in sexual conduct with children under 16 years in a wide variety of circumstances in which the appellant found himself.

36. Accordingly, the characterisation of the tendency evidence differed from pure propensity evidence only in the respect that the court found the conduct occurred opportunistically "as and when young female persons were in the [appellant]'s company" (CCA [199]).

Differences in approach between New South Wales and Victoria

37. In *Velkoski v The Queen* [2014] VSCA 121, the Court of Appeal of the Supreme Court of Victoria (Redlich, Weinberg and Coghlan JJA) examined a series of appellate decisions from New South Wales and Victorian on tendency evidence. The Victorian Court of Appeal concluded that the law regarding tendency and coincidence evidence had developed along divergent paths in New South Wales and Victoria. The Victorian Court of Appeal referred particularly to the New South Wales Court of Appeal decisions in *R v PWD* [2010] NSWCCA 209; (2010) 205 A Crim R 75 and *Doyle* v *The Queen* [2014] NSWCCA 4 as points of departure in principle between the two intermediate appellate courts and appeared to suggest the latter case would have been decided differently in Victoria [118]-[120], [152]- [154].

38. The appellant relied upon the reasoning in *Velkoski* in the present case to support his submission that the tendency evidence did not have significant probative value. In *Hughes*, in a section of the judgment headed "Velkoski", the New South Wales Court of Criminal Appeal at [186] cited the following passage from the Victorian Court of Appeal decision:

> "Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of 'significant probative value.' If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible. This view, we think, clearly represents the present position of our Court reflected in the long line of authority to which we have referred. [164]"

39. The New South Wales Court of Criminal Appeal noted that the Victorian Court did not require striking similarity to be a condition of admissibility and cited another passage:

> "The features relied upon must in combination possess significant probative value which requires far more than 'mere relevance'. In order to determine whether the

features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal 'underlying unity', a 'pattern of conduct', 'modus operandi', or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength. [171]"
"

40. The New South Wales Court of Criminal Appeal concluded "[f]or reasons we have given, we do not accept that the language used by the Victorian Court of Appeal represents the law in New South Wales" (CCA [188]).

41. That conclusion is apt to be misleading without examination of the passages which precede it. The New South Wales Court of Criminal Appeal earlier accepted that while 'underlying unity', 'modus operandi' or 'pattern of conduct' were not required to establish significant probative value, the extent and nature of similarity *were* relevant to the assessment of probative value [167]. It also quoted with apparent approval an observation by Hodgson JA in *BP v The Queen* [2010] NSWCCA 303 at [108] that "generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value" (CCA [179]).

42. The Victorian Court of Appeal in *Velkoski* had accepted that common law principles which formerly governed the admissibility of tendency evidence no longer applied and that the provisions of the Act should be viewed as a Code [162]. The Court did not require that 'underlying unity', 'modus operandi' or 'pattern of conduct' be established but found it was apposite to assess these questions when identifying the particular features of the evidence which gave the inferential reasoning process its probative force [171]. The Court did, though, state that, "[T]he principle consistently applied in this court is that the evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct" [3].

43. The New South Wales Court of Criminal Appeal expressly disavowed the proposition in *Velkoski* [164] that "[T]o remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of 'significant probative value'. If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible" (CCA [186]. Further, it did so in a case where it accepted that it was correct to admit evidence of dissimilar acts occurring in dissimilar circumstance as tendency evidence. The line between the "Victorian approach" and the "NSW approach" was drawn deliberately and distinctly.

44. The reasoning of the Victorian Court of Appeal in *Velkoski* has been consistently applied in subsequent decisions of Victorian Court of Appeal, see *Alexander v The Queen (a pseudonym)* [2016] VSCA 92, *Uzun v The Queen* [2015] VSCA 292, *Rapson v The Queen* [2014] VSCA 216, *Luke Page (a pseudonym) v The Queen* [2015] VSCA 357, *Gentry v The Queen* [2014] VSCA 211 and *Bauer (a pseudonym) v The Queen* [2015] VSCA 55. A number of those decisions have noted that, particularly in cases involving multiple complainants, dissimilarities and variation in the manner of offending or circumstances will not necessarily deprive tendency evidence of probative force. What is required in such cases is identifiable sufficient similarity or unity to reach the significant probative value threshold. The features which give the evidence its probative force may

be drawn from the preparatory conduct, the particular acts engaged in or some combination of the two – see *Rapson* at [17]–[18]; *Luke Page* at [57] and [66].

45. Until the instant case, the New South Wales Court of Criminal Appeal had not expressly disagreed with *Velkoski*, nor arguably, the reasoning contained within it. Justice Basten in *Saoud v The Queen* (2014) 87 NSWLR 481, at [36] and [37], took a more cautious approach:

> "[A] statement of another intermediate court of appeal in such uncompromising terms in relation to uniform legislation operating in both jurisdictions raises an issue of some sensitivity for this Court. There are difficulties in responding to what is undoubtedly a thorough and troubling analysis. However, it is not entirely clear from the judgment in Velkoski how the issue of comparative jurisprudence arose, or what submissions were put to the Victorian court. Further, to be sure that a real difference of approach has been identified, rather than a difference in semantics, it will be necessary to decide whether comparable cases would be decided differently in each State. That was not an exercise expressly undertaken in Velkoski....
>
> It is neither productive nor appropriate (there being no hint of disagreement in the submissions before the Court) to consider whether in this respect the opinions expressed in Velkoski are correct. However, it may be noted that each Court has cited judgments of the other over a number of years without major points of departure being noted."

46. It is respectfully noted that the observations made by Basten JA in *Saoud* have considerable force. However, there is now a clear divergence between the approach of the two intermediate courts of appeal, the nub of which is in the domain where the evidence displays little or no similarity and where the evidence tends towards proving little more than a disposition to commit crimes of the type in question. The appellant submits that the approach of the New South Court of Criminal Appeal in the present case has removed any requirement of specificity or similarity in tendency evidence and has set the standard of admissibility too low. The approach in the present case gives insufficient weight to the statutory requirement that the evidence not only be relevant but of "significant probative value". Further, in distancing itself from the "Velkoski approach", the New South Wales Court of Criminal Appeal gave little or no guidance as to exactly how potential tendency evidence gathers its probative force where it is constituted by evidence of dissimilar acts carried out in dissimilar circumstances.

47. In the present case, the approach of the Victorian Court of Appeal would have required an articulation of how the tendency evidence reached the threshold of significant probative value, notwithstanding the absence of similarity and the presence of marked dissimilarities. A tendency to act upon an unlawful sexual disposition opportunistically would be insufficient to reach threshold of significant probative value; *Velkoksi* [22], [164]. The Court would be required to identify whether the significant probative value derived from the acts, the circumstances in which they were committed, the nature or identity of the complainants, or some combination thereof when evaluated in the context of the issues peculiar to the trial; *Velkoski* [108]-[110]. That did not occur. It is submitted that if that process had properly occurred some, at least, of the evidence would have been excluded resulting in a separation of counts. The admission of all of the complainants' evidence and all of the other tendency evidence caused a miscarriage of justice.

48. For the reasons outlined below it is submitted that the approach of the Victorian Court of Appeal is to be preferred.
    (i) An examination of the tendency rules as they operate within the context of the *Evidence Act* supports the conclusion in *Velkoski* that the legislature intended a high threshold of admissibility to be applied to tendency evidence.
    (ii) Section 97 of the *Evidence Act* invokes an inferential mode of reasoning inherently connected to the similarities underlying the alleged tendency.
    (iii) The terms of s.97 draw attention to the particularity of the alleged tendency and how cogently the alleged tendency advances the fact-finding process of the trial.
    (iv) The requirement that tendency evidence in all cases be excluded unless the evidence has significant probative value reflects longstanding skepticism towards propensity evidence and appreciation of the dangers of both misuse and unfair prejudice which can arise from the use of tendency reasoning.

The statutory provisions

49. The *Evidence Act (1995) (NSW)* ("the Act") is substantially in the same terms as the Uniform Evidence Law adopted by the Commonwealth and other States and Territories including Victoria[4]. The Act is structured so that all evidence must be relevant in order to be admitted. Evidence is relevant where, "if it were accepted, (it) could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding", s.55. The Act creates a presumption whereby relevant evidence is admissible unless a specific rule bars admissibility or the evidence is subject to the operation of a judicial discretion.

50. The Act requires careful attention to be paid to the purpose for which evidence is adduced. Evidence can be admissible for some purposes or uses but not others. There is a judicial discretion to limit the use of evidence outlined in s.136 and evidence can be excluded if, for example, that limited use would be unfairly prejudicial; s.137, or cause undue waste of time; s.135.

51. The tendency rules appear in Chapter 3.6 of the Act. The dictionary to the Act defines "tendency evidence" as: "... evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection."

52. Sections 95, 97 and 101 of *the Evidence Act 1995* (NSW) relevantly provide as follows:

95 Use of evidence for other purposes

(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

97 The tendency rule

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[4] The different provisions regulating the admission of tendency and coincidence in each State and Territory are helpfully outlined in T Game SC, J Roy and G Huxley "Tendency, Coincidence and Joint Trials" prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse at p41-58.

(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.

98 The coincidence rule

(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.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

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

(2) 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 substantially outweighs any prejudicial effect it may have on the defendant.

The statutory context of the tendency provisions

53. The statement in *Velkoksi* that s.97(1)(b) "is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold to admissibility" [164], is supported by an analysis of the terms of the provision in the context of the Act. As outlined below, that statement is consistent with, but not dependent upon, the common law background of the provision. The admission and use of tendency evidence in criminals trials is governed more strictly than most forms of evidence regulated by the Act, with the possible exception of admissions in criminal trials which are also subject to a number of special provisions and protections.[5] The following observations can be made of s.97 as it operates within the context and structure of the Chapter and the Act as a whole.

54. Tendency evidence in criminal cases must pass three barriers for admission namely ss55, 97 and 101. The barriers are of escalating difficulty, *R v Lockyer* (1996) 89 A Crim R 457 at 459 per Hunt CJ at CL.

[5] See s s60(3), 85, 89, 89A, 90.

(i) Relevant evidence must have the capacity to rationally affect the assessment directly or indirectly of a facts in issue, ss.55 and 56. A rational connection between the tendency evidence and the fact in issue in the particular trial must therefore, always be established between the evidence and the assessment of a fact in issue in that trial.

(ii) Use of evidence relying on tendency reasoning, namely evidence adduced to establish that a person has tendency to act in a particular way, or to have a particular state of mind, is *prima facie* excluded. In order to be admissible it must possess more than "mere relevance"; *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* (1995) 61 FCR 171 at 175-176. The evidence is not admissible for a tendency use unless, by itself, or in combination with other evidence, the Court thinks the evidence will have significant probative value; s.97. Section 97 applies to both criminal and civil trials.

(iii) Tendency evidence in a criminal trial, notwithstanding its passage through the threshold of significant probative value, faces a final hurdle prior to admission. The evidence cannot be adduced unless it can be established by the prosecution that the probative value of evidence substantially outweighs any prejudicial effect it may have on the defendant; s.101.

These three escalating barriers to admission are among the most onerous admissibility requirements in the Act.

55. The tendency rules are use prohibitions pursuant to s.95. This means, subject to the exceptions identified in s.94, the evidence cannot be used for a tendency purpose unless the evidence meets the required thresholds of ss.97 and 101. The use restriction in s.95(2) applies even if the evidence is also relevant for some other permissible purpose. The default prohibition on the use of tendency reasoning is strict and unusual in the context of the Act. For example, in many circumstances, hearsay evidence can be utilised for a hearsay use (proof of the intended asserted fact) even if the evidence is deemed inadmissible by the hearsay provisions provided the evidence is relevant and admissible for some other purpose; s.60. The Act does not prevent tendency evidence being used for another non-tendency purpose but admission remains subject to the judicial discretions and mandatory exclusions outlined in ss.135-137. The default prohibition on a particular mode of reasoning reflects legislative concern about the ambiguous strength of the inferential reasoning process underlying tendency evidence, see A Ligertwood and G Edmonds "Australian Evidence", 5 ed at p134 at [3.6].

56. Tendency evidence must comply with specified notice provisions, ss.97(1)(a), 99, 100. Notice provisions in the Act apply only to particular forms of carefully regulated evidence, including hearsay evidence where the party with direct knowledge is unavailable, ss.63(2), 64(2), 65(2)(3) and (8). The requirements are not intended to be a merely mechanical exercise, El-Haddad at [56]. The notice provisions ensure that careful attention is given to the specific conduct and the specific circumstances of the conduct so that a proper assessment be made by the Court of the probative value of the evidence as it relates to the facts in issue at the trial; *Martin v NSW* [2002] NSWCA 337 at [91]; *R v Gardiner* [2006] NSWCCA 190, 162 A Crim R 233 at [128].

57. The tendency rules are just one component of a suite of provisions in the Act which direct the focus of criminal trials on evidence delivered by witnesses with direct personal knowledge of the charged events. Hearsay evidence is generally limited so that witness evidence is confined to testimony of direct personal knowledge and observations. Exceptions are strictly governed and permit reliability to be considered if direct evidence is not available, s.65; *Sio v The Queen* [2016] HCA 32 at [72]. Opinion evidence is

limited; ss.76-79. Character evidence is strictly governed so as to make onerous preconditions for the admission of evidence of bad character; ss.110(2), 111 and 112. The limits on cross-examining a defendant about their credibility without leave are also designed to focus the trial on evidence regarding the facts in issue rather than the defendant's general character and disposition; s.104.

58. The tendency provisions reflect and support the notion of a fair trial which underlies the common law approach to the admissibility of evidence. In *Phillips v The Queen* [2006] HCA 4, 158 A Crim R 431, this Court observed at [79]:

> [C]riminal trials in this country are ordinarily focussed with high particularity on specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided. That threshold was not met in this case. It was therefore necessary that the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. ... No other outcome would be compatible with the fair trial of the appellant."

The inferential nature of tendency reasoning

59. Section 97 describes tendency evidence as evidence adduced to establish that the accused had a tendency to have "a **particular** state of mind" or "act in a **particular** way" (emphasis added). Tendency evidence is not to be admitted unless the court thinks the evidence, alone, or in combination with other evidence, has "significant probative value". Probative value is defined in dictionary as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". Accordingly, the assessment of the probative value of the evidence is directly connected to the extent to which that particular tendency bears upon on an issue of fact finding at the trial. To be of "significant probative value" the evidence must be influential in the context of fact-finding; *IMM v The Queen* [2016] HCA 14 at [46] (per French CJ, Bell, Kiefel and Keane JJ).

60. The connection between the alleged tendency and the facts in issue is not based on direct evidence but is inferred through a process of reasoning. In *Gardiner v R* [2006] NSWCCA 190, 162 A Crim R 233, Simpson J explained at [124]:

> [U]nderlying s 97 is an unstated but obvious premise. That is that proving that a person has a tendency to act in a particular way or to have a particular state of mind in some way bears upon the probability of the existence of a fact in issue. The fact in issue is the conduct, or state of mind, on a particular occasion relevant to the issues in the proceedings, of the person whose tendency is the subject of the evidence tendered. That is, evidence that a person has or had a tendency to act in a particular way or to have a particular state of mind is not tendered in a vacuum. It is tendered for the purpose of further proving (or contributing to proving) that, on a particular occasion, that person acted in that way or had that state of mind. Proof of the tendency is no more than a step on the way to proving (usually by inference) that the person acted in that way, or had that state of mind, on the relevant occasion.

61. Similarly, in *Elomar v R; Hasan v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303, the NSW Court of Criminal Appeal (comprised of Bathurst CJ, Hoeben CJ at CL and Simpson J) outlined:

> [T]endency evidence is evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning ... Tendency evidence is a means of proving, by a process of deduction, that a person acted in a particular way, or had a particular state of mind, on a relevant occasion, when there is no, or inadequate, direct evidence of that conduct or that state of mind on that occasion.

62. It is true that the terms of s.97 do not refer expressly to "similarity". In contrast, the terms of s.98 explicitly reference "similarity in events and circumstances". However, the inferential reasoning underlying tendency evidence inherently invokes consideration of similarity. In *Saoud v R* [2014] NSWCCA 136 Basten JA observed at [44], that tendency evidence:

> "...will usually depend upon establishing similarities in a course of conduct, even though the section does not refer (by contrast with s 98) to elements of similarity. That inference is inevitable, because that which is excluded is evidence that a person has or had a tendency to act in a particular way, or to have a particular state of mind. Evidence of conduct having that effect will almost inevitably require degrees of similarity, although the nature of the similarities will depend very much on the circumstances of the case."

63. The reference in the provision to a "particular" state of mind or a "particular" way of acting draws attention to the specificity with which the tendency is articulated. Specificity has different significance dependant upon the factual issues alive at the trial. Where the issue in question is the identity of the offender, the specificity of the tendency is influential because the more peculiar the tendency, the more likely the tendency is unique to the offender or at least informative of the identity of the offender; *R v Ellis* [2003] NSWCCA 319, 58 NSWLR 700. Where the fact in issue relates to the conduct of the party, the probative value of the evidence usually derives from the inference that "people behave consistently in similar situations" *R v FB* [2011] NSWCCA 217 (per Whealy JA, Buddin and Harrison JJ agreeing at [23]). The probative value of the evidence there derives from the operative, rather than merely incidental, features of similarity. In other words, features which might compel similar behaviour on a like occasion and support the inference that the conduct did in fact occur on another occasion; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* [2000] FCA 1886 at [58]-[67]. Where the tendency is a particular state of mind, like sexual interest, the commonality or peculiarity of that state of mind is relevant. For example, a tendency to have sexual interest in direct female lineal descendants is properly regarded as of greater significance than a tendency of a young man to have sexual interest in other young adult females; *BBH v The Queen* [2012] HCA 9 at [167]; contrast *Phillips v The Queen* (2006) 158 A Crim R 431 at [56].

64. Prior to the Court of Criminal Appeal decision in the present case, it was well accepted that generality was a handicap to evidence achieving significant probative value, *Sokolowsky v R* [2014] NSWCCA 55; 239 A Crim R 528, see also *DAO v R* [2011] NSWCCA 63 at [179], *Townsend v Townsend* [2001] NSWCA 136 at [78] (per Giles JA); *Ibrahim v*

Pham [2007] NSWCA 215. This is because it is the specificity of the alleged tendency which informs the strength of the inferential mode of reasoning and allows proper assessment of how the tendency contributes to the assessment of the issues at trial, *El-Haddad v R* [2015] NSWCCA 10, 248 A Crim R 537 at [72]. As Leeming JA observed:

> "It is, for example, one thing to say that a man has a tendency to steal cars; that says something, but not very much, as to whether he stole a particular car the subject of a charge. It is quite another to say that a man has a tendency to steal black European sports cars and then set them on fire, if the fact in issue is whether that man stole and burnt a black Porsche."

65. The Act places an explicit prohibition on evidence "that says something but not very much". Relevance is not enough. Reliance on tendency reasoning is prohibited unless the higher statutory threshold is met. Accordingly, is insufficient merely to demonstrate that the evidence has *some* logical capacity to contribute to the jury's assessment of a fact in issue. The difference between evidence *capable* of demonstrating guilt, like a disposition to commit sexual offences in various contexts, and evidence which identifies and particularises operative similarity to give force to an inferential reasoning process is at the core of the distinction between mere relevance and significant probative value. This was recognized by the Victorian Court of Appeal in *Velkoski* in the passage at [171] expressly rejected by the New South Wales Court of Criminal Appeal in this case.

66. It is accepted that there might be occasions where significant probative value can be derived from a tendency despite the absence of similarity in conduct. The value of evidence is always inextricably linked to the contribution of the tendency to resolution of issues at trial and the infinite variety of those issues can defy easy categorization. But where similarity is absent and marked and operative dissimilarity is present, the tendency cannot be expressed with generality because the evidence of tendency will have no cogency. There is no foundation for its probative force. Accordingly, it will not be influential in the fact-finding process and cannot reach the threshold of significant probative value.

The Common Law

67. In *El-Haddad v R,* Leeming J observed in relation to s.97 at [66]:

> "The statutory text did not emerge from a vacuum. Where as here the legislative text is patently open-textured, the immediate context – namely, its replacement of common law rules restricting the use of a particular type of evidence – is especially apt to illuminate its legal meaning."

68. The requirement that tendency evidence possess significant probative value is born out of the common law's recognition of the need to focus a criminal trial on the essential factual ingredients relating to the true issues at trial and to guard against the likelihood that mere propensity evidence will result in unfair reasoning towards guilt. Justice McHugh in *Melbourne v The Queen* [1999] HCA 32, 198 CLR 1 considered this phenomenon in the context of character evidence, at [36]-[37]:

> "The common law has developed strict rules for the admissibility of evidence designed to prove that, by reason of his or her character or propensities, the accused is likely to have committed the crime with which he or she is charged. In *Makin v Attorney-General for New South Wales*, Lord Herschell said that the prosecution cannot:

"adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

69. Common law cases have expressed a multiplicity of concerns about propensity and similar fact evidence. One concern was purely practical, regulating the admission of evidence of past misconduct and bad character reduced reliance on collateral issues and eliminated unnecessary inefficiency. But the principal concerns related to insufficient cogency and the risk of unfair prejudice. As McHugh J outlined in *Pfennig v R* (1995) 182 CLR 461 at [7], the inferential reasoning process underlying tendency evidence, that a tendency to act or think in a particular way could be used a guide to assess if a person did so on a particular occasion, was regarded with skepticism and suspicion. The assumption that behaviorial patterns were constant and that past conduct was a reliable guide to future behaviour was queried. Courts expressed concern that juries would place more weight on the evidence than its cogency merited. Chief Justice Gleeson observed in *HML v The Queen* (2008) 235 CLR 334, [2008] HCA 16 at 12, that propensity evidence was not excluded because it was irrelevant, rather "[i]t is the risk that evidence of propensity will be taken by a jury to prove too much that the law seeks to guard against".

70. Propensity evidence was also thought to be unfairly prejudicial for a number of reasons including the risk that the evidence would divert the jury from careful attention to the evidence of the instant offence and the risk that past misconduct might lead to a desire to punish the accused irrespective of his or her guilt; *Pfennig v R* at [7] (per McHugh J).

71. Propensity evidence was therefore, inadmissible unless its probative force transcended the merely prejudicial assertion that the accused had a propensity or disposition to commit the acts in question. One way in which the evidence could derive probative force was for the evidence to display 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern', *Hoch v R* (1998) 165 CLR 292 at 294. However, striking similarity was not and is not determinative at common law; *DPP* v *P* [1991] 2 AC 447; *Phillips v The Queen.* The criterion of admissibility is whether the evidence has sufficiently strong probative force in advancing the particular issues at trial. The evidence must rise beyond mere propensity and beyond mere relevance; *Perry v R* (1982) 150 CLR 580. In the absence of striking similarity, underlying unity or pattern, the evidence must show some other particular special or distinctive quality from which it derives its probative force.

72. In *Pfennig v The Queen,* the majority judgment held that:

> [T]here has been a tendency to treat evidence of similar facts, past criminal conduct and propensity as if they raise the same considerations in terms of admission into evidence. The difficulty is that their probative value varies not only as between themselves but also in relation to the circumstances of particular cases. Thus, evidence of mere propensity, like a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a **particular distinctive propensity** demonstrated by acts constituting particular

manifestations or exemplifications of it will have greater cogency, so long as it has some specific connexion with or relation to the issues for decision in the subject case. (emphasis added)

73. If evidence of general disposition were to be admitted under the Act it would be regarded as a radical departure from the common law. In *Maxwell v The Director of Public Prosecutions* [1935] AC 309 at 317, Lord Herschell's statement in *Makin* was said to give effect to "one of the most deeply rooted and jealously guarded principles of our criminal law". For the reasons outlined above, there is nothing in the terms of the provisions which suggests any such intention. To the contrary, the prohibition on the use of tendency reasoning unless the evidence possesses significant probative value in s97 is entirely consistent with the common law approach to the regulation of a particularly troubling and difficult form of evidence.

Application to the present case

74. The present case involved multiple complainants. No coincidence notice was filed so the prosecution disavowed, and by operation of s.95 and s.98 was precluded from relying upon, coincidence reasoning; *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355, 207 FCR 448 at [33]; *R v Zhang* [2005] NSWCCA 437, 158 A Crim R 504 at [135]. Accordingly, the prosecution were precluded from invoking such reasoning to submit that the number of complainants made it improbable that the allegations were false.

75. Cases involving multiple complainants involve special challenge. In determining whether the evidence has significant probative value, great care has to be taken when assessing the particular evidence in combination with the alleged tendency evidence to prevent unproven allegations gaining probative force from the existence of other unproven allegations rather than the features of evidence itself. The requirement that the evidence be proved beyond reasonable doubt does not completely eliminate the risk of self-reinforcing and circular reasoning. A compendious analysis of detailed and complex evidence exacerbates this risk.

76. Some of the tendency evidence relied upon the Crown may have been relevant to establishing some form of generalised sexual interest in under aged girls. But the tendency was required to be of significant probative value. The evidence needed to establish some particular state of mind or particular mode of conduct that made the occurrence of a fact in issue highly probable, *IMM* at [45]. In other words, there needed to be some specifically identified feature of the alleged conduct that advanced the inferential process of tendency reasoning to a significant degree.

77. It is submitted that the Court of Criminal Appeal erred because the alleged tendency was expressed at such generality that it could not reach the threshold of significant probative value. In essence, the identified tendency went little beyond a disposition to commit the offences in question. The Court of Criminal Appeal failed to identify how evidence that could not be particularised beyond a tendency to act on a sexual interest on occasions "as and when young female persons were in the applicant's company" could contribute to issues alive at a trial to a significant degree. It is trite to observe that almost all child sexual assault trials involve allegations of a person acting on an unlawful sexual interest. Acting opportunistically "refined the concept but not greatly"; *Sokolowskyj v R* [2014] NSWCCA 55 at [40] (per Hoeben CJ at CL). It was not suggested that the appellant acted on every occasion a female person under 16 was in his company. The Court of Criminal

Appeal accepted that similarities in conduct and circumstances were capable of establishing significant probative value. It accepted that greater specificity in similarity would typically increase probative value. But the Court of Criminal Appeal did not specify any such similarity from which the evidence could gain its force. Further, whilst it was accepted that dissimilarity could detract from probative value, the Court of Criminal Appeal did not identify why it did not in the present case. If the probative force did not derive from similarity but some other pattern or special features of the evidence in the context of the issues at trial, it was r.equired to identify and assess those features. That did not occur

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Conclusion

78. The trial judge and the Court of Criminal Appeal erred in admitting the tendency evidence. The tendency evidence was not capable of achieving significant probative value and was not admissible under s.97. The evidence displayed marked dissimilarities in the nature of acts, surrounding circumstances and the contexts in which they occurred. To overcome these dissimilarities the alleged tendencies were expressed with such generality that they amounted to little more than an allegation of a disposition to commit sexual offences. The generality deprived the evidence of probative force. The evidence would not have been
20 admitted if the Court adopted the approach outlined in *Velkoski* which would have required special attention be directed to the manner in which the tendency could achieve significant probative force in the absence of operative similarity. The admission of all evidence on all counts produced a miscarriage of justice.

PART VII. APPLICABLE PROVISIONS

79. The applicable provisions, which are still in force, are contained in an annexure.

PART VIII. ORDERS SOUGHT

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80. The orders sought are: Appeal allowed, judgment and orders of the Court of Criminal Appeal of New South Wales quashed, the appeal against conviction allowed and a new trial ordered.

PART IX. TIME ESTIMATE

81. It is estimated that 3-4 hours are required for the presentation of the appellant's oral argument.

40 Dated: 7 October 2016

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S 23 of 2016

BETWEEN: **ROBERT LINDSAY HUGHES**
Appellant

AND: **THE QUEEN**
Respondent

ANNEXURE A
Statutory Provisions

Part 3.6 Tendency and coincidence

94 Application

(1) This Part does not apply to evidence that relates only to the credibility of a witness.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply to evidence of:

(a) the character, reputation or conduct of a person, or

(b) a tendency that a person has or had,

if that character, reputation, conduct or tendency is a fact in issue.

95 Use of evidence for other purposes

(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

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96 Failure to act

A reference in this Part to doing an act includes a reference to failing to do that act.

97 The tendency rule

(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.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(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.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

99 Requirements for notices

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

100 Court may dispense with notice requirements

(1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit, and

(b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party,

(b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence,

(c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

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

(2) 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 substantially outweighs any prejudicial effect it may have on the defendant.

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

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

* All provisions are still in force as at 7 October 2016.

(All legislation sourced from: www.legislation.nsw.gov.au).