IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S121 of 2018

BETWEEN: **RICHARD McPHILLAMY**
Appellant
and
THE QUEEN
Respondent

10 **RESPONDENT'S SUBMISSIONS**

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Did the majority of the Court of Criminal Appeal err in concluding that the evidence had significant probative value?

20

3. Did the majority of the Court of Criminal Appeal err in concluding that the probative value of the tendency evidence substantially outweighed its prejudicial effect?

4. Does s. 101 of the *Evidence Act* 1995 (NSW) require that there be no rational explanation of the tendency evidence that is consistent with innocence in order for tendency evidence to be admitted?

Filed on behalf of the Respondent by:
C Hyland, Solicitor for Public Prosecutions (NSW)
Level 17, 175 Liverpool Street
Sydney NSW 2000
DX 11525 Sydney Downtown

Date of this document: 6 July 2018
Ref: Dominique Kelly
Telephone: (02) 9285 8722
Facsimile: (02) 9285 8950
Email: dkelly@odpp.nsw.gov.au

Part III: Section 78B of the *Judiciary Act*

5. It is certified that this appeal does not raise a constitutional question. The respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Factual matters in contention

6. The respondent does not contest the factual issues set out in Part V (paras [5] – [14]) of the appellant's written submissions ("AWS") other than to note the following additional matters, which are relevant to the disposition of the appeal.

7. On 13 February 2015, the appellant was found guilty by a jury of six sexual offences relating to two incidents committed between 1 November 1995 and 31 March 1996 upon the complainant (NC) in the toilet of the St Michael and St John's Cathedral in Bathurst ("the Cathedral"). At the time of the offences, NC was an 11 year old altar boy who was being supervised by the appellant, who was then a 34 year old acolyte at the Cathedral.

8. Counts 1 and 2 on the indictment related to the first of the two incidents and counts 3 to 6 related to the second of the two incidents. In respect of the first incident, it was alleged that on a Saturday night prior to Mass, the appellant followed NC into the toilet and urinated into the toilet bowl at the same time as NC.[1] The appellant then said words to the effect of "*have you tried this before?*" and then masturbated in front of NC (count 1).[2] The appellant told NC to get his own penis out. The appellant assisted and instructed NC in masturbating NC (count 2).[3] The appellant ejaculated.[4] Both the appellant and NC went back into the church where the service commenced.[5]

9. The second incident was alleged to have occurred a few weeks after the first. On a Saturday night before Mass, the appellant again followed NC into the Cathedral toilet

---

[1] ***McPhillamy v R*** [2017] NSWCCA 130 ("CCA judgment") at [85] (Core Appeal Book ("CAB") at 132).
[2] T3/2/15 at 57.20 (Appellant's Further Materials ("AFM") at 46.20).
[3] T3/2/15 at 57.30 - 58 (AFM at 46.30 - 47).
[4] T3/2/15 at 58.35 (AFM at 47).
[5] T3/2/15 at 58.45 (AFM at 47.45).

and again masturbated in front of NC (count 3) and encouraged NC to do the same.[6] The appellant then masturbated NC (count 4). NC said that the appellant was "*a bit more hands on... more forward than the previous time.*"[7] The appellant then said that he would show NC "*something even better*".[8] The appellant then performed oral sex on NC (count 5) and required NC to perform oral sex on him (count 6).[9]

10. Shortly after NC started fellating the appellant, NC began gagging and crying.[10] The appellant stopped and comforted NC.[11] They then left the bathroom. NC went outside to calm down and then went into Mass.[12] After Mass, the appellant spoke to NC, and told NC that he couldn't tell anyone what had happened.[13] The appellant also said words to the effect that he (the appellant) was "*sorry it had gone that far*".[14]

11. In his evidence, NC agreed that he had obtained $30,000 from the Catholic Church in 2010 after he made a complaint to the Church about what the appellant had done.[15] NC said that the Church asked him to provide a written statement, and that in that written statement, he had included an allegation that the appellant had partially penetrated his anus during the second incident.[16]

12. When NC subsequently complained to police about what the appellant had done, NC volunteered to police that he had falsely told the Church that the appellant had anally penetrated him. In his evidence before the jury, NC explained that at the time that he made the false complaint about anal penetration, he was about to kill himself and that he was desperate for money.[17] NC maintained that he had never lied to the Court or to police about what the appellant had done to him.[18]

---

[6] T3/2/15 at 61.5 (AFM at 50.5).
[7] T3/2/15 at 61.15 (AFM at 50.15).
[8] T3/2/15 at 61.45 (AFM at 50.45).
[9] T3/2/15 at 61 – 62 (AFM at 50 – 51).
[10] T3/2/15 at 63 (AFM at 52).
[11] T3/2/15 at 63.45 (AFM at 52); CCA judgment at [86] (CAB at 133).
[12] T3/2/15 at 64.10 (AFM at 53.10).
[13] T3/2/15 at 64.25 (AFM at 53.25).
[14] T3/2/15 at 64.45 (AFM at 53.45).
[15] T3/2/15 at 66 (AFM at 55).
[16] T3/2/15 at 73.5 (AFM 62.5).
[17] T3/2/15 at 77 (AFM at 66); CCA judgment at [87] (CAB at 133).
[18] T5/2/15 at 200.40 (AFM at 172.40).

13. When questioned by police about the allegations which are the subject of the present charges, the appellant denied the alleged offences, but admitted that he knew NC.[19] The appellant agreed that NC had been an altar boy under his supervision when he was an acolyte at the Cathedral.[20] The appellant did not give evidence at the trial.[21]

14. The prosecution notified the appellant of its intent to adduce tendency evidence in its case by way of a tendency notice dated 9 October 2014.[22] That notice indicated that the tendency evidence sought to be adduced related to the evidence of two witnesses, TR and SL. Each of TR and SL were under the appellant's supervision as boarding students at St Stanislaus College at Bathurst. In 1985, whilst each boy was under the supervision of the appellant, TR and SL were sexually interfered with by the appellant on a number of occasions ("the tendency evidence").

15. In addition, the prosecution also sought to rely on the fact that the appellant had been found in possession of child pornography as tendency evidence in 2008.[23] The appellant had pleaded guilty to an offence of possessing child pornography in this respect.[24]

16. The materials tendered on the *voir dire* included the statements and previous evidence of SL and TR, the agreed statement of facts in respect of the child pornography offence and the transcript of evidence of Professor Quadrio, in which the Professor testified about the enduring nature of a sexual interest in children.[25]

17. After hearing submissions from the Crown and counsel for the accused, the trial judge ruled that the evidence of SL and TR was admissible as tendency evidence, but that the evidence concerning the location of child pornography on the appellant's hard drive was not admissible as tendency evidence.[26] No reasons were provided for either of these rulings. Neither party made any request for reasons during the course of the trial.

---

[19] Respondent's Further Materials ("RFM"), Exhibits 11 and 12 at 24ff.
[20] Exhibits 11 and 12, RFM at 24ff.
[21] CCA judgment at [9] (CAB at 107).
[22] AFM at 5.
[23] T2/2/15 at 5.40 – 6.15 (AFM at 13.45 – 14.15). Agreed Facts on Sentence (item 10 in the Tendency Notice), RFM at 45.
[24] AFM at 14.10.
[25] RFM at 47.
[26] T3/2/15 at 13.15 (AFM at 33); T9/2/15 at 307.

18. The trial judge directed the jury in respect of the use that could be made of the evidence at the time that the tendency evidence was given and in his Honour's Summing Up to the jury.[27] The trial judge provided the draft tendency directions to counsel before the directions were given.[28] No complaint was made about the content of the tendency direction in the trial or in the Court of Criminal Appeal ("CCA") and no complaint is made about the content of the tendency directions in this Court.

Part V: Argument

10

Introduction

19. This appeal concerns the admissibility of evidence of two complainants, TR and SL, who were each subject to sexual abuse by the appellant when they were in their early teens, and whilst they were under the appellant's supervision as boarding students at St Stanislaus College at Bathurst.

20. The appellant does not dispute the allegations made by TR and SL, which were unchallenged at trial.[29] In particular, the appellant does not dispute that he rubbed TR's
20 genitals whilst comforting TR when TR went to the appellant's bedroom when he was homesick; that he inappropriately touched TR's bottom after TR had showered; that he touched SL's genitals when he was massaging SL when SL went to the appellant's bedroom when he was homesick; or that on a second occasion after SL fell asleep on the appellant's bed whilst being massaged by the appellant, SL woke up to find the appellant kneeling beside the bed with his head near SL's groin, and that at this time, SL felt a sensation of wetness around his penis.

21. At trial, the Crown submitted that the evidence of TR and SL was capable of demonstrating that the appellant had an ongoing sexual interest in male children in their

---

[27] T9/2/15 at 217 – 219 (AFM 189 – 191) and SU 11.2.15 at 20 – 23 (CAB at 27 – 30).
[28] T5/2/15 at 214 (AFM at 186).
[29] AWS at [9]; CCA judgment at [9] (CAB at 107).

early teenage years who were under his supervision and that the appellant was prepared to act on that interest.[30]

22. The trial judge ruled that the tendency evidence was admissible. A majority of the CCA (Harrison and R A Hulme JJ; Meagher JA dissenting) dismissed the appellant's appeal, finding that the tendency evidence had significant probative value, and that the probative value of the evidence substantially outweighed its prejudicial effect.

23. As outlined further below, the primary difference in the reasoning between the majority and the dissent concerned the assessment of whether the tendency evidence had significant probative value. In particular, Meagher JA accepted the appellant's contention that the tendency evidence did not have significant probative value because the tendency evidence "*occurred in a different place and in different circumstances and involved different acts*".[31] In particular, Meagher JA concluded that the "*absence of sufficient similarity*" between the tendency evidence and the charged acts "*prevented the earlier evidence from having significant probative value when used to prove the tendency relied upon*".[32]

24. In contrast, whilst the majority justices accepted that there were some differences in the charged conduct and the tendency evidence, their Honours emphasised that the tendency evidence "*in all cases was concerned with or involved him taking advantage of his position of responsibility for young teenage boys in his care and with his exploiting the opportunity that was presented when alone with them to fondle their genitals or to engage in oral sex*".[33] For this reason, the majority concluded that "*any differences between the precise circumstances in which the conduct occurred or the different nature of the conduct concerned do not in our opinion detract from what seems to us to be the overriding similarity between the charged conduct and earlier incidents*".[34]

---

[30] T2/2/15 at 5.30 (AFM at 13.30); T2/2/15 at 6.30 – 6.50 (AFM at 26.30 – 26.50)
[31] CCA judgment at [5] (CAB at 106).
[32] CCA judgment at [117] (CAB at 142).
[33] CCA judgment at [127] (CAB at 145).
[34] CCA judgment at [127] (CAB at 145).

25. For the reasons outlined below, there was no error in the approach of the majority of the CCA. The tendency evidence had significant probative value. That probative value substantially outweighed the prejudicial effect of the evidence.

Ground 1: Whether the majority of the Court of Criminal Appeal erred in holding that the tendency evidence had significant probative value

26. NC gave evidence that the appellant had sexually interfered with him on two occasions when he was a young teenage boy. The appellant contended that NC had fabricated the allegations. The issue at trial was not the identity of the perpetrator of the acts complained of by NC. The issue at trial was whether the alleged acts occurred at all.

10

27. The unchallenged tendency evidence demonstrated that on a number of previous occasions, the appellant had fondled the genitals of young teenage boys and/ or engaged in acts of oral sex with them in circumstances where the appellant was in a position of authority and supervision over the boy, where there had been relatively little grooming[35] and where there was a risk of detection (either by way of complaint from the boy in question, or as a result of a person walking in on the appellant when he was with the boy).

28. The tendency evidence was relevant to the issues in dispute in the trial in two ways.
20 First, the tendency evidence demonstrated that, as a mature adult, the appellant had a sexual interest in young teenage boys who were under his supervision and authority. Second, the tendency evidence demonstrated that the appellant was prepared to act on that interest by fondling the genitals of young teenage boys and engaging in acts of oral sex in circumstances where the boys were under his under his authority and supervision and where there had been relatively little grooming and where there was a risk of detection (again, either by way of complaint from the boy in question, or as a result of a person walking in on the appellant when he was with the boy).

---

[35] The acts in respect of NC were preceded by conversation with the altar boys as a group that involved discussion about masturbation (he told the boys to keep their hands clasped together so that "*people wouldn't think we were fiddling with ourselves*"; NC also said that the appellant when the appellant assisted him in putting on his robes "there was more touching than was necessary": T3/2/15 at 51-52 (AFM at 40-41); the acts in respect of SL were preceded by a couple of occasions in which the appellant gave SL a massage: T9/2/15 at 272 (AFM at 225) and group discussion about masturbation: T9/2/15 at 279 (AFM at 232); the acts in respect of TR occurred the first time that TR went to the appellant's room alone: T9/2/15 at 228.35 (AFM at 200.35).

29. The unchallenged evidence of the two tendency witnesses was powerful evidence in support of NC's contested account that the appellant had sexually interfered with him. The tendency evidence demonstrated that the appellant had a motive to engage in the disputed acts (namely his sexual interest in young teenage boys who were under his supervision and authority). Further, the fact that the appellant had acted on his sexual interest in the past demonstrated that the appellant had previously overcome any internal inhibitions that he may have had about sexually abusing a child.[36] In each of these respects, the evidence had the capacity to support the credibility of the account given by NC: see similarly ***IMM v The Queen*** [2016] HCA 14; (2016) 257 CLR 300 at [62], per French CJ, Kiefel, Bell and Keane JJ.

30. More importantly, however, tendency evidence had the capacity to resolve doubts that the jury may have had about NC's evidence. At trial, the appellant's counsel submitted that it was "just implausible" that the events described by NC would have occurred in a Cathedral toilet that was accessible to the public: cf AWS at [23].[37] The tendency evidence had the capacity to resolve doubts that the jury may have had about the unlikelihood that a mature adult would follow young teenage boy into a public toilet of a Cathedral and immediately commence to masturbate him. Tendency evidence may gain its significance from other evidence: s. 97(1)(b) of the *Evidence Act*. It is well established that tendency evidence which is capable of resolving doubts about a complainant's direct evidence may have high probative value: ***IMM*** at [176], per Nettle and Gordon JJ, citing ***HML v The Queen*** (2008) 235 CLR 334 at [280].

31. As will be outlined further below, the tendency evidence in the present case is akin to the tendency considered in ***Hughes v The Queen*** [2017] HCA 20; 344 ALR 187 at [2]. Indeed, the tendencies relied on are more particular than those considered in ***Hughes.*** Whilst ***Hughes*** concerned a sexual interest in female children under the age of 16 years (in particular, girls aged between 6 years and 15 years of age), the tendencies relied on in the present case concerned a sexual interest in males of a narrower age bracket, namely 11 to 14 years of age (a possible difference of only 2 or 3 years).

---

[36] Royal Commission into Institutional Responses to Child Sexual Abuse, "Final Report Volume 2, Nature and Cause", at pages 144-148.
[37] T11/2/15 at 391.20 (CAB at 267).

32. Further, in ***Hughes*** the appellant's relationship to the complainants differed in character, in the present case, the relationship between the appellant and each of the boys was similar in character, in that each of the young males were, at the time of the acts in question, under the supervision of the appellant who held a position of authority in relation to them. Indeed, from the perspective of each of the boys, the appellant was a respected adult to be revered and obeyed. Moreover, from the perspective of the appellant, each of the boys were children for whom he had a responsibility to instruct and guide. The appellant's relationship with each of the boys was one of pastoral care.

33. The tendency evidence in the present case was highly probative of the facts in issue in the trial. In addition to the particularity of the tendency:

(1) There was more than one tendency witness;

(2) The appellant sexually interfered with each tendency witness on more than one occasion;

(3) The tendency evidence was of a nature that comprised both a tendency to have a state of mind (namely to have a sexual interest in young teenage boys who were under his authority and supervision) and a preparedness to act on that state of mind. Both the state of mind and the preparedness to act on that state of mind are matters which are unusual as a matter of common experience;[38] and

(4) The tendency evidence demonstrated that the appellant was prepared to engage in sexual acts upon young teenage males despite the risk of detection. In particular, the appellant masturbated boys in places where there was a risk that another person would inadvertently walk in and see what the appellant was doing, or notice that the appellant was alone in an inappropriate place with a young male (a bedroom, a toilet that was accessible by the public). Most importantly, in view of the complainant's ages and the relatively limited grooming of those complainants, there was a real risk that the complainants would immediately complain about the appellant's sexual acts towards them.

---

[38] ***Hughes*** at [57]. See similarly American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 5th edition ("DSM-5") at 698 ("*the highest possible prevalence for pedophile disorder in the male population is 3% - 5%*"); see also ***R v Hanson*** [2005] 2 Cr App 21 at [9] ("*Child sexual abuse ... [is a] comparatively clear example of such unusual behaviour*"; ***Robin v The Queen*** [2013] NZCA 105 at [25].

34. Accordingly, the tendency evidence was highly probative both as to the extent to which the evidence supported the tendency alleged; and as to the extent to which the tendency made the facts in issue more likely: ***Hughes*** at [41]. As the majority stated in ***Hughes***: "*Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has... fabricated his account has been excluded*": ***Hughes*** at [40].

35. As in ***Hughes***, "*considered in isolation*", NC's evidence "*might have seemed inherently unlikely*": the appellant, a Catholic acolyte, followed a young altar boy into the public bathroom of a Cathedral, and "*without making any effort to ensure* [his] *silence*" or to ensure through previous grooming that there would be no complaint, commenced to masturbate the boy: ***Hughes*** at [59].

36. As in ***Hughes***, it could be said that the jury might well be disinclined to accept NC's evidence that the appellant had engaged in conduct which was "*so much at odds with the jury's experience of the probabilities of ordinary human behaviour*": ***Hughes*** at [59]. Proof of the appellant's tendency to engage in sexual activity with early teenage males under his authority and supervision, with limited grooming and notwithstanding the evident risk of discovery or complaint, was capable of removing that doubt.

37. As the prosecution sought to rely on the evidence as demonstrating a tendency, rather than as coincidence evidence, and as the tendency evidence related to the question of whether the acts had been committed rather than the identity of the perpetrator, there was no need for similarity to be demonstrated, or for the tendency evidence to demonstrate an underlying modus operandi: ***Hughes*** at [34] and [39].

38. In any event however, there *were* marked similarities in the tendency evidence and the allegations in the present trial. In particular, as outlined above, there were similarities in the ages, gender and appearance of the complainants (young teenage boys of slight build);[39] and in the nature of the relationship between the appellant and the complainant (as outlined above, the boys were under the authority and supervision of the appellant).

[39] Exhibits 5, 6 and 10 (RFM at 1, 3 and 5).

39. Moreover, a modus operandi *is* apparent in the appellant's approach to each of the complainants: in respect of each complainant, there was relatively little grooming; rather, the appellant took advantage of opportunities that presented (SL and TR entering his bedroom alone, NC entering the Cathedral toilet alone); and the appellant sexually interfered with each boy on a limited number of occasions. In the case of both NC and SL, the appellant apologised for what he had done, and did not engage in further sexual conduct after that apology.[40]

40. The fact that the tendency evidence concerned sexual acts performed by the appellant 10 years before the acts charged is relevant to the assessment of the probative value of the tendency evidence, but does not deprive the evidence of its significance in the sense contemplated by s. 97 of the *Evidence Act*: cf AWS at [20].

41. As Harrison and RA Hulme JJ explained, the tendency of a mature male to have a sexual interest in teenage boys is "*capable of being regarded as an enduring tendency, rather than one that might arise and then wane or dissipate*".[41] It was not "*particularly controversial for a jury to be asked to infer that a sexual interest in young teenage boys would be unlikely to become attenuated in the space of ten years*".[42]

42. Similar observations have been made by courts in other common law jurisdictions. For example, ***R v Cox*** [2007] EWCA Crim 3365 concerned the admissibility of evidence relating to a child sexual assault committed 19 or 20 years before the sexual assaults of a child charged in the indictment. In admitting the evidence of the previous acts, the Court held that there is "*some force in the proposition ... that a defendant's sexual mores and motivations are not necessarily affected by the passage of time*". In so finding, the Court accepted "*unhesitatingly*" that "*as a matter of common sense*" "*the fact that this defendant had, many years ago, demonstrated a sexual interest in a pubescent girl of 12 made it more likely that he had committed the offence which was now charged*".

---

[40] T9/2/15 at 281 (AFM at 234) ("*He apologised to me for what he had done and ... said he had done the wrong thing. And I don't recall if he said he was sorry but he just told me that he had done the wrong thing to me and could be in a lot of trouble for it.*"); T3/2/15 at 64.45 (AFM at 53.45) ("*I remember him being sorry that it had gone that far.*").

[41] CCA judgment at [129] (CAB at 146).

[42] CCA judgment at [129] (CAB at 146).

43. It may be noted that these observations are also consistent with the evidence of Professor Quadrio that for "*people who in adult life offend against children, generally* [that] *interest began in adolescence and generally persists over a lifetime*".[43] (As outlined above, Professor Quadrio's evidence was tendered in the voir dire, but was not called at trial.)[44]

44. In this respect, it is also to be observed that there was no evidence that the appellant had received any treatment or counselling in the period between the unchallenged sexual acts performed against SL and TR and the acts alleged with respect to NC. Indeed, there was no evidence of any efforts at rehabilitation on the part of the appellant following the commission of the unchallenged sexual acts against SL and TR prior to 1995.

45. The maturity of the appellant at the time of the commission of each alleged act is also of relevance. The appellant was 34 years old at the time of the charged acts, and was 24 years old at the time of the acts to which the tendency evidence related. As the Court in ***Cox*** noted "*if it had been the case of a teenage affectionate and experimental relationship in which the female happened to be under the age of consent, then we can well see there would have been greater foundation for the argument that the circumstances differed from the present allegation. But a sexual interest by a grown man, properly developed with no handicaps, in his 30s, for a child of 12 is a different proposition altogether.*"

46. In these circumstances, the tendency evidence had the capacity to be "*important*" or "*of consequence*"[45] in the jury's determination of whether NC's account that the appellant had sexually assaulted him in the toilet of the Cathedral should be accepted. Accordingly, the majority of the CCA correctly held that the tendency evidence had significant probative value.

---

[43] RFM at 50.

[44] There is substantial research supporting the proposition that an adult's sexual interest in children will be enduring: see, for example, A Cossins, "The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials" (2011) 35 Melbourne University Law Review 821; Hanson, Steff and Gauthier, 'Long-Term Recidivism of Child Molesters' (1993) 61 Journal of Consulting and Clinical Psychology 646, 650; and DSM-5 at 699 ("*pedophilia appears to be a lifelong condition*").

[45] ***IMM*** at [46], per French CJ, Kiefel, Bell and Keane JJ; at [103], per Gageler J.

47. The appellant's reliance on the dissenting decision of Meagher JA in support of his argument that the tendency evidence did not have significant probative value is misplaced: cf AWS at [19]. Justice Meagher's reasoning does not accord with the principles established by ***Hughes*** concerning the assessment of the probative value of tendency evidence.[46]

48. In particular, Meagher JA held that the "*absence of sufficient similarity*" between the tendency evidence and the charged acts meant that the tendency evidence did not have significant probative value.[47] This conclusion is inconsistent with the majority decision in ***Hughes***, which rejected the contention that similarity is required for evidence to have significant probative value: "*[d]epending upon the issues in the trial, a tendency to act a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it*".[48]

49. The absence of strict similarity in the place of the acts, the precise relationship between the appellant with each boy and the precise acts charged may have deprived the tendency evidence of probative value if it were relied on as coincidence evidence. As the probative value of coincidence evidence relies on the unlikelihood of such similarities having occurred, the absence of similarity and presence of dissimilarity will have a direct effect on the probative value of the evidence. However, where, as here, the evidence was relied on as tendency evidence, its probative value was found in its capacity to support the contested evidence of the complainant. For the reasons outlined above, the tendency evidence was strongly probative in this respect. The majority of the Court of Criminal Appeal correctly concluded that the evidence had significant probative value.

---

[46] It may be observed that Meagher JA did not have the benefit of this Court's decision in ***Hughes*** at the time of delivering the decision, as the decision of the CCA in the present appeal was delivered on the same day as the decision of this Court in ***Hughes*** was delivered.
[47] CCA judgment at [68], [116] and [117] (CAB at 125-126, 142, 143).
[48] ***Hughes*** at [37].

Ground 2: Whether the majority of the Court of Criminal Appeal erred in holding that the probative value of the tendency evidence substantially outweighed its prejudicial effect

50. The statutory task prescribed by s. 101 of the *Evidence Act* requires that the Court first assess the probative value of the tendency evidence and its prejudicial effect before turning to a consideration of whether the probative value of the evidence "*substantially outweighs any prejudicial effect it may have on the defendant*". Each of these tasks are addressed below.

Assessment of prejudicial effect

51. For the reasons outlined above in respect of ground 1, the probative value of the tendency evidence was very high. For the reasons outlined below, the prejudicial effect of the tendency evidence was not high; whilst it is accepted that the tendency evidence carried some risk of prejudice, that risk was modest, at best.

52. In order to assess the prejudicial effect of tendency evidence, it is necessary to identify the "*actual prejudice* [arising] *in the specific case*": ***R v Ellis*** [2003] NSWCCA 319; (2003) 58 NSWLR 700 at [94]. In the present case, the nature of the potential prejudice arising from the tendency evidence does not appear to be the subject of dispute between the parties. In the present case, the potential prejudice is the risk that the tendency evidence will be given disproportionate weight, and the risk that the jury's assessment of whether the prosecution has discharged the onus may be clouded by their emotional response to the tendency evidence: ***Hughes*** at [17]; AWS at [30]. That risk will be present in any trial in which tendency evidence relating to the previous sexual misconduct of an accused is sought to be admitted.

53. In the proceedings before the trial judge, no particular form of prejudice was particularised by the appellant.[49] In contrast, in the proceedings before the CCA, the appellant argued that there were four respects in which the evidence carried a risk of prejudice that went beyond the prejudice referred to above (in particular, it was suggested that the jury might have regarded the appellant to be responsible for the

[49] T2/2/15 at 5 (AFM at 25).

caning which TR received for swearing at him and/or that the appellant might be associated with other institutional sexual abuse which was said to have occurred at the school attended by TR and SL).[50]

54. The CCA unanimously rejected the appellant's contention that these matters gave rise to an additional risk of prejudice. In particular, after setting out the above matters, Meagher JA held: "[h]*ad it been necessary to address* [the argument that the prejudicial value of the tendency evidence substantially outweighed its probative effect] *I would not have considered these matters as representing a significant risk of prejudice arising from the admission of the evidence which went beyond the prejudice that it is accepted was likely to arise in any event*".[51] Justices Harrison and R A Hulme agreed with this conclusion.[52]

55. It appears that the appellant does not maintain the contentions advanced in the CCA in respect of additional prejudice in this Court. The additional matters advanced before the CCA are not referred to in the appellant's written submissions. Rather, the only prejudice identified in the appellant's written submissions in this Court is the risk that the tendency evidence may have "*provoked an adverse emotional response*" or the risk that the tendency evidence may have "*been given disproportionate weight*", creating the danger that the jury would be disinclined to give the appellant the benefit of any reasonable doubt: AWS at [32].

56. It is accepted that these are forms of potential prejudice that must be taken into account in the weighing task required by s. 101 of the *Evidence Act*. However, contrary to the submissions of the appellant, these forms of prejudice were not, in the circumstances of the present case, "*considerable*": cf AWS at [34].

---

[50] CCA judgment at [121] (CAB at 143).
[51] CCA judgment at [121] (CAB at 143).
[52] CCA judgment at [130] (CAB at 146 – 147). Contrary to the appellant's submissions (AWS at [27]), the majority of the CCA did not fail to provide reasons for their conclusion that the probative value of the evidence substantially outweighed its prejudicial effect. Justice Meagher's reasons need to be read against the issues litigated at trial and on the appeal. Read in context, it is clear that Meagher JA rejected the appellant's contention that the tendency evidence in the present case carried added emotional force. Read in context, it is apparent that Harrison and R A Hulme JJ similarly rejected the appellant's contention that the tendency evidence in the present case carried added emotional force, and that, in these circumstances, their Honours found that, as the tendency evidence had significant probative value, the probative value of the evidence substantially outweighed its prejudicial effect.

57. In support of his submission that the potential prejudice in the present case was high, the appellant refers to psychological research that was cited in research that was considered by the Australian Law Reform Commission ("ALRC") in ALRC Report 26: AWS at [13]. That research suggested that evidence that "*appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.*"[53]

58. However, more recent research in this area demonstrates that previous concerns about the risk of juries engaging in such prejudicial reasoning may have been overstated. More recent psychological research has questioned the validity of the research referred to by the ALRC in Report 26. In particular, as the Royal Commission into Institutional Responses to Child Sexual Abuse ("Royal Commission") observed, the ALRC research focussed on conviction rates, did not study jury deliberation or jury reasoning, and did not assess whether verdicts were reached using permissible reasoning or whether the verdicts involved unfair prejudice to an accused.[54]

59. Such research was flawed. The fact that conviction rates were found to be higher in mock trials where tendency evidence was adduced may well have demonstrated only that the tendency evidence had probative force; not whether prejudicial reasoning was employed. As Gleeson CJ observed in ***HML v The Queen*** [2008] HCA 16; (2008) 82 ALR 204 at [12] "*Prejudice means the danger of the improper use of the evidence. It does not mean its legitimate capacity to inculpate.*"

60. To address these deficiencies, the Royal Commission recently commissioned an empirical study into Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse. That empirical study found that mock juries were capable of distinguishing between counts and basing their verdicts on the evidence that pertained

[53] ALRC Report 26, Vol 1 at para [644].
[54] Royal Commission into Institutional Responses to Child Sexual Abuse, "Criminal Justice Report Parts III - VI", at 28.1.5 (page 608ff).

to each count, whether presented in a joint or separate trial.[55] The study also found that jury reasoning and verdicts were logically related to the probative value of the evidence and that there was no evidence that decisions to convict were the result of impermissible propensity reasoning. Whilst the mock trials conducted in that the empirical study differ in some respects from the present case (in that the mock trials did not concern unchallenged allegations), the study contradicts the ALRC's concern that there is a high risk of prejudicial reasoning that inheres in tendency evidence of this nature.

61. The experience of the criminal courts also provides support for the findings of the Royal Commission's empirical study. As the Royal Commission observed, the comparatively low conviction rates for child sexual assault offences do not support the proposition that juries impermissibly reason of the basis of character.[56] Similarly, "*the* [high] *rate at which offenders are convicted of at least one but not all child sexual assault offences with which they were charged demonstrates that real juries distinguish between different counts and the evidence in relation to those counts, even where they have determined that the offender is guilty of at least one child sexual assault offence.*"[57] As the Commission observed, "*the rate of convictions of at least one but not all child sexual assault offences is not compatible with a view that juries – unconsciously or implicitly – reason impermissibly on the basis of character.*"[58]

62. In view of the above matters, the prejudice which arises only from the admission of tendency evidence of prior instances of sexual misconduct should not be assessed as high.

63. Any potential prejudice that the tendency evidence carried in the present case was also ameliorated by the directions that were given by the trial judge: ***Gilbert v The Queen*** [2000] HCA 15; (2001) 201 CLR 414 at [31] and ***Dupas v The Queen*** [2010] HCA 20; (2010) 241 CLR 237 at [29]. The trial judge directed the jury in respect of the proper

---

[55] Professor Jane Goodman-Delahunty, Professor Annie Cossins, Natalie Martschuk, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, May 2016 at 6.2 (page 268).
[56] Royal Commission into Institutional Responses to Child Sexual Abuse, "Criminal Justice Report Parts III - VI", at page 618.
[57] Royal Commission into Institutional Responses to Child Sexual Abuse, "Criminal Justice Report Parts III - VI", at page 618.
[58] Royal Commission into Institutional Responses to Child Sexual Abuse, "Criminal Justice Report Parts III - VI", at page 618.

use of the tendency evidence immediately before the tendency evidence was given, and again instructed the jury as to the proper use of the tendency evidence in the summing up.[59] In particular, the trial judge warned the jury that it would be "*completely wrong to reason that because the appellant may have committed one crime or been guilty of one piece of misconduct he is, therefore, generally a person of bad character and for that reason must have committed the offences charged.*"[60] The jury were also warned that they could not substitute the tendency evidence for evidence of the specific allegations in the indictment.[61] The jury were directed that they were required to find that that "each specific charge, individually considered, is proved beyond reasonable doubt" before a finding of guilt could be made.[62] The trial judge also directed the jury that they could not "*let sympathy, emotion, bias or prejudice sway* [their] *judgment.*"[63] No complaint was made about these directions at trial or in the CCA, and no complaint is made about the directions in this Court. The extent of the warnings, their repetition and their timing, significantly reduced the risk of unfair prejudice in the present trial.

The probative value of the tendency evidence substantially outweighs its prejudicial effect

64. The word "*substantial*" should be construed in accordance with its everyday meaning. As with s. 97, the "*statutory words* [of s. 101] *do not permit a restrictive approach*": ***Hughes*** at [42]. Rather, like s. 97, the text of s. 101 requires an "*open-textured*" inquiry which is attuned to the particular circumstances of the case: see similarly ***Hughes*** at [42].

65. In particular, there is no basis for the appellant's submission that the common law "*no rational explanation*" test should be imported into the test set out in s. 101: cf AWS at [39]. As French CJ, Kiefel, Bell and Keane JJ held in ***IMM*** at [59],

> "Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the 'rational view ... inconsistent with the guilt of the accused' test found in *Hoch v The Queen* [citing *R v Ellis* (2003) 58 NSWLR 700 at 714 – 718 [65] – [95]]."

[59] T9/2/15 at 217 – 219 (AFM 189 – 191) and SU 11.2.15 at 20 – 23 (CAB at 27 – 30).
[60] T9/2/15 at 218.30 (AFM at 190); SU11/2/15 at 22 (CAB at 29).
[61] T9/2/15 at 218.40 (AFM at 190); SU11/2/15 at 22 (CAB at 29).
[62] T9/2/15 at 219.5 (AFM at 190); SU11/2/15 at 22 (CAB at 29).
[63] SU11/2/15 at 5.30 (CAB at 12.30).

See similarly ***IMM*** at [167], per Nettle and Gordon JJ ("*The test for the admissibility of tendency evidence is no longer as strict as it was at common law*".)[64]

66. For the reasons outlined above, the prejudicial effect of the tendency evidence was at best modest, and the probative value of the tendency evidence was high. Accordingly, it follows that the probative value of the evidence substantially outweighed any prejudicial effect that it might have had on the appellant.

Conclusion

67. No error has been demonstrated in the findings of the majority of the CCA that the tendency evidence had significant probative value, or that the probative value of the tendency evidence substantially outweighed its prejudicial effect. Accordingly, the appeal should be dismissed.

Part VII: Time Estimate

68. It is estimated that oral argument will take 2 hours.

L Babb	K N Shead	B K Baker
Director of Public Prosecutions	Deputy Director of Public Prosecutions	Crown Prosecutor

Counsel for the Respondent

Tel 9285 8888
enquiries@odpp.nsw.gov.au

6 July 2018

[64] See similarly ***Stubley v Western Australia*** [2011] HCA 7; (2011) 242 CLR 374 at [11], per Gummow, Crennan, Kiefel and Bell JJ.