Review Essay

Critical Perspectives on the Uniform Evidence Law by Andrew Roberts and Jeremy Gans (eds) (2017) Federation Press, 263 pp, ISBN 9781760021368

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Abstract

This review essay discusses various aspects of the edited collection of essays on the *Uniform Evidence Law* ('*UEL*'). First, some general observations on the *UEL* are offered. Second, the chapters on the origins, development and future of the *UEL* are used to discuss the *UEL*'s place in Australia and the world. Third, the role of probative value is considered with respect to Andrew Roberts' chapter. Fourth, David Hamer's views on tendency and coincidence evidence are critically discussed. Finally, some concluding remarks are offered.

I Introduction

In July 1979, the Federal Attorney-General Peter Durack issued terms of reference to the Australian Law Reform Commission ('ALRC') seeking a report on the possibility of creating a uniform law of evidence for the Commonwealth of Australia.[1] The report was to be written 'with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements'.[2] The resulting report, issued in 1985, recommended that

> [t]he enactment of a comprehensive uniform law of evidence for Federal and Territory courts is highly desirable. It is unacceptable as a matter of principle to have in the one polity, the Commonwealth, differing rules that may lead to different results in the application of national legislation where this is the result of the irrelevant factor of where a case is commenced.[3]

During the 10 years that passed between the issuing of this interim report and the enactment of the first of the 'uniform' evidence laws, the Standing Committee of Attorneys-General would, in 1991, agree in principle to the adoption of a uniform evidence law for all courts, state and federal, across Australia.[4]

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1 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) xxviii.

2 Ibid.

3 Ibid 118.

4 *See* Andrew Roberts and Jeremy Gans, 'Introduction' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 1.

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In the volume of essays *Critical Perspectives on the Uniform Evidence Law*, editors Andrew Roberts and Jeremy Gans have assembled eminent scholars to reflect upon the successes and failures of this ongoing project.[5] The first of the Uniform Evidence Laws ('*UEL*') were enacted by the Commonwealth[6] and New South Wales[7] in 1995. Seven years later, Tasmania followed suit[8] and another seven years after that, Victoria passed its version of the *UEL*.[9] Both the Australian Capital Territory ('ACT')[10] and the Northern Territory[11] have enacted versions of the uniform legislation, as has Norfolk Island.[12] As would be obvious from this list, the project is still ongoing because Queensland, South Australia and Western Australia have yet to enact *UEL* legislation. What may be less obvious is that uniformity itself remains elusive among the states and territories that have adopted the *UEL*. As described by the book's editors, '[t]he Australian statutes have never been entirely uniform and recent years have seen local amendments that have increased the divergence of the main Australian jurisdictions.'[13]

This book of critical evaluations of the *UEL* is, therefore, timely and important — one might even say critical — at a time where specific consideration of the laws of evidence is increasingly needed given that judicially created complexity is adding to many complexities inherent in the laws. The book has been published in the midst of the handing down and continued consideration of several major, and occasionally high-profile, High Court of Australia decisions on the *UEL* and the principles for interpreting and applying its provisions. These decisions have involved unsettled and developing areas of the law such as expert opinion evidence[14] and the standards surrounding inferences that can be drawn from the absence of evidence.[15] Other decisions have resolved disparities between at least two of the main Australian *UEL* jurisdictions, New South Wales and Victoria, on the issues of the correct standard for the assessment of probative value[16] and the significant probative value test for tendency and coincidence evidence.[17] In addition to resolving the disparities, these decisions also attempted to clarify standards for the application of the principles underlying the law itself. How successful these attempts have been remains an open question, further pointing to the need for a book such as this one to provoke conversation, evaluation and, perhaps, reform.

The book has also been published shortly after the report issued by the Royal Commission into Institutional Responses to Child Sexual Abuse, released in August

[5] Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017).
[6] *Evidence Act 1995* (Cth).
[7] *Evidence Act 1995* (NSW).
[8] *Evidence Act 2001* (Tas).
[9] *Evidence Act 2008* (Vic).
[10] *Evidence Act 2011* (ACT).
[11] *Evidence (National Uniform Legislation) Act 2011* (NT).
[12] *Evidence Act 2004* (NI).
[13] Roberts and Gans, above n 4, 2.
[14] *Honeysett v The Queen* (2014) 253 CLR 122.
[15] *R v Baden-Clay* (2016) 258 CLR 308.
[16] *IMM v The Queen* (2016) 257 CLR 300 ('*IMM*').
[17] *Hughes v The Queen* (2017) 344 ALR 187 ('*Hughes*').

2017.[18] Among other things, the Royal Commission Report evaluated and made recommendations for reform to the tendency and coincidence rules in prosecutions for sexual offences against children.[19] These recommendations for reform were, of course, made shortly — and in the case of *Hughes* just weeks — after the decisions by the High Court that affect these very areas of the law. Thus, it seems an ideal time to consider seriously the strengths, weaknesses and future of the *UEL* from both a scholarly and practical perspective.

This essay will look briefly at how that evaluation has been done in *Critical Perspectives on the Uniform Evidence Laws* by looking at a few themes that emerge from the various chapters. Part II of this essay will discuss the opening book chapters on the origins and initial growth of the *UEL* and the prospects for future adoption. Part III will then consider Roberts' chapter, mainly focusing on the High Court decision in *IMM* and its effect on probative value considerations. Given the scope of the decision in *IMM*, and its connection with many areas of evidence law raised throughout the book, it is worthwhile to take a closer look at this particular chapter. Part IV will be devoted to a discussion of David Hamer's chapter on his theories about and suggestions for reform to the tendency and coincidence rules. This is an especially timely subject given the High Court's recent decision in *Hughes* and the Royal Commission Report, which cites with approval submissions and testimony made by Hamer along the same line as the argument set forth in his chapter here.[20] Part V will offer some concluding thoughts.

II The Origins, Growth and Future of the *UEL*

Gans' early chapter relates one of the more fascinating, certainly oddest and presumably least known aspects of the *UEL* — that although three of the largest Australian states have yet to adopt the *UEL*, localised versions of it have been adopted in several nations (and one self-governing territory) on the other side of the globe.[21] Specifically, evidence statutes based largely on the initial draft of the *UEL* attached to the ALRC's 1985 report have been enacted in Barbados, Saint Lucia, the British Virgin Islands and Saint Kitts and Nevis.[22] In a breezy, opinionated chapter filled with authorial asides, Gans recounts some of the development of the *UEL*, chastises the High Court for its treatment of the *UEL* in *IMM* and describes how the *UEL* likely made its journey around the world, whilst still bypassing Queensland, South Australia and Western Australia.

Gans criticises the *IMM* majority for not treating all *UEL* jurisdictions as equal by citing only decisions from courts in New South Wales and Victoria and

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18 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) ('Royal Commission Report').

19 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) pt VI 409 ('Royal Commission Criminal Justice Report').

20 See, eg, ibid pt VI 579–90.

21 Jeremy Gans, 'The Uniform Evidence Law in the Islands' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 13.

22 Ibid 15.

ignoring decisions from courts in the ACT and Tasmania.[23] In Gans' estimation, this omission could be due to several possible influences, namely

> the parochial foibles of the majority judgment's unidentified author, the traditional dominance of New South Wales and Victorian judges on the national court and the High Court's recent tilt towards brevity to a fault in its reasons for judgment.[24]

However, the main focus of the chapter is less on these identified possibilities as much as it is to point out that the High Court has ignored the 'true extent of the *UEL*'s spread' within and beyond Australia.[25]

Gans takes a keen eye to point out both similarities and differences in the various, globe-hopping versions of the *UEL* and uses these connections as a springboard to argue that looking to the offshore similarities in evidence laws in the immediate region (such as New Zealand), around the world (such as the Caribbean, Canada and the Solomon Islands), and within Australia (specifically to Tasmania) could enhance the acceptance, further propagation and principled development of the *UEL*.[26] Whether this will eventuate, and Gans seems somewhat sceptical that it will, especially given the High Court's recent reluctance to even look as far afield as Tasmania,[27] it is noteworthy that the *UEL* can be found in nearly as many jurisdictions outside Australia as it can within national borders.

Whether the *UEL* will make its way to those holdout states is the subject of Andrew Hemming's subsequent chapter — and his assessment is that the prognosis for intranational *UEL* propagation is not good.[28] This conclusion is based on letters Hemming received from the Attorneys-General of Queensland, South Australia and Western Australia, each providing explanations for why those states were satisfied with their own evidence laws and, therefore, were not considering adoption of the *UEL* at this time.[29] Hemming identifies at least two common themes in the responses: 'the view that the common law is superior to the uniform evidence legislation and the perceived lack of any clear benefit to joining the uniform evidence regime'.[30] He also critically analyses each of the individual responses in order to discern whether the rationales for the rejection of the *UEL* are reasonable and well-considered.[31] Perhaps the best that can be said at this stage is that the *UEL* project will remain an ongoing one for some time to come.

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23 Ibid 13–14.
24 Ibid 14.
25 Ibid.
26 Ibid 31–3.
27 Ibid 32.
28 Andrew Hemming, 'Adoption of the Uniform Evidence Legislation: So Far and No Further?' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 34.
29 Ibid.
30 Ibid 35.
31 Hemming, above n 28.

III The High Court of Australia's Approach to the *UEL* and Probative Value

In the first chapter to grapple with both the substance and interpretation of a specific provision of the *UEL*,[32] Roberts examines the *UEL* approach to probative value through a critical analysis of the High Court's recent decision in *IMM*.[33] In short, and to vastly compress and oversimplify the majority judgment, the High Court endorsed New South Wales' approach to the assessment of probative value over that of Victoria. The High Court held that probative value — defined in the *UEL* Dictionary as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' — is to be evaluated without considering the reliability of the evidence at issue, as reliability is to be reserved exclusively for the jury.[34] In Roberts' opinion, this approach is 'incoherent' and the result of a process of reasoning that stemmed from a 'conceptually impoverished and intellectually "thin" analysis in the appellate courts'.[35]

The main thrust of Roberts' argument criticising the High Court decision is that the justices in the majority paid insufficient regard to the concept of rationality that is included in the definition of probative value referred to above. This failing is presented as a simple case of misapplied statutory interpretation. Roberts builds his argument upon the premise — a premise never fully explicated, explained or justified — that when interpreting statutory language 'it is clear that some words are more important than others'.[36] Roberts then proceeds to argue that the word 'rational' in the definition of probative value is the most important word and the one that requires more full and careful consideration by interpreting courts, especially the High Court.[37]

Roberts attempts to further flesh out the problems with the High Court's decision through the example used by Heydon in an article cited in the High Court's majority judgment.[38] In the example, Heydon posits an identification with inherently low probative value because it was made 'very briefly in foggy conditions and in bad light by a witness who did not know the person identified'.[39] The High Court rejected an approach to this identification that would assess it as 'as high as any other identification [when taken at its highest]' with the judge then able to 'look for particular weaknesses in the evidence (which would include reliability).'[40] Instead, it found that the correct approach was to consider the evidence 'an identification, but a weak one because it is simply unconvincing'.[41] The rejected approach disallows

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32 Andrew Roberts, 'Probative Value, Reliability, and Rationality' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 63.

33 (2016) 257 CLR 300.

34 Ibid 315 [50].

35 Roberts, above n 32, 64.

36 Ibid.

37 Ibid 65.

38 *IMM* (2016) 257 CLR 300, 315 [50] citing J D Heydon, 'Is the Weight of the Evidence Material to its Admissibility' (2014) 26(2) *Current Issues in Criminal Justice* 219, 234.

39 Heydon, above n 38, 234.

40 *IMM* (2016) 257 CLR 300, 315 [50].

41 Ibid.

judicial consideration of extrinsic determinations, such as reliability, that should be left to the jury. The endorsed approach restricts the considerations to the internal strengths and weaknesses inherent in a piece of evidence, such that a court is not obligated to establish a high probative value for every piece of relevant evidence, even where that evidence is 'taken at its highest', since the highest a particular piece of evidence could be taken may not be very high at all.[42]

For Roberts, this reasoning demonstrates that 'the incoherence of the approach is obvious'.[43] In his estimation, the High Court majority's analysis seems to be drawing a distinction where none exists, essentially creating a reliability test, but explaining that test without reference to reliability and, thus, obfuscating the test's true effect. The biggest issue with this argument is that it is continually asserted without being effectively demonstrated. What the High Court seems to be getting at, albeit in a manner that is less than crystal clear, is that there is a genuine distinction between a probative value analysis that (impermissibly) includes reliability as a consideration and one that correctly does not. That distinction is based on a court looking at the evidence at issue and considering its probative value by asking 'of what is the evidence meant to be probative?'. In the example used by the High Court,[44] the answer would be 'probative of the identification of the person purportedly identified'. That being the nature of the inquiry, the court can now ask '*how much* is the evidence probative of that fact?'. For the identification example, the answer would be 'not very, due to the inherent weaknesses of the identification itself'. No consideration of the reliability of the evidence is needed here because the probative value discounting weaknesses are part and parcel of the identification itself. The court need not make any assumptions about the weight that a jury might assign to the piece of evidence when the court concludes that even if the jury takes this identification for everything it is worth, it still will not be worth that much.

In a further justification of his reasoning, Roberts asserts his contention that the focus of the probative value inquiry should be on the word 'rational' in the definition of the term.[45] As Roberts explains it, 'in admonishing trial judges to refrain from considering issues of credibility and reliability, the appellate courts prevent trial judges from engaging in the evaluative inquiry that the dictionary definition of probative value requires'.[46] Yet, Roberts never explains why the word 'rational' in the definition is more important than the word 'could', which is also in the definition. If emphasis is placed on the fact that the definition states that probative value is 'the extent to which evidence *could* rationally affect the probability of the existence of a fact in issue', then the focus of the inquiry appears to shift from the court's allowable assessment of the evidence to a view of what the jury *could* make of the evidence. The basic principles behind the evaluative task may remain the same, but the limits on the court's ability to insert itself into the jury's fact-finding role takes on greater importance than Roberts wants to allow.

42 Ibid.
43 Roberts, above n 32, 69.
44 *IMM* (2016) 257 CLR 300, 315 [50].
45 Roberts, above n 32, 74.
46 Ibid 75.

Roberts suggests that the question may be one of perspective. He asks, 'if the trial judge is not to assign weight to the evidence himself or herself, or consider what weight the jury might place on it, from whose perspective is the evaluative task to be undertaken?'[47] The answer to that question seems to be that the evaluative task is to be undertaken from the perspective of a hypothetical jury, but not necessarily the one that has been seated in the actual trial. In other words, the judge must be careful not to make fact-finding determinations on the jury's behalf or to substitute a judicial evaluation of the facts for that of the hypothetical jury. To put that another way, the judge is only to assess the extent to which a piece of evidence *could* rationally affect the jury's assessment of the probability of the existence of a fact in issue. The judge cannot, and should not be able to, assess whether the jury *will* view the evidence rationally or assign the evidence its full hypothetical weight or reject it altogether.

Roberts' argument that the *IMM* majority's probative value approach is incoherent presents as a kind of tautology — the approach is incoherent because insufficient attention is given to rationality, the concept of which is inextricably linked to reliability, so reliability must be a component of the probative value assessment, making the High Court's approach incoherent. That circularity of reasoning is, ultimately, the argument's downfall. However, the chapter is important in that it invites a critical reading of *IMM*, which in many respects does not do the heavy lifting required to provide the guidance that lower courts may need when considering the task of probative value assessment — especially those outside of New South Wales that may have less experience with the endorsed approach. *IMM* will almost certainly require further evaluation in the area to which the assessment of probative value was ultimately directed in the case — tendency and coincidence evidence, the subject of the next part of this essay.

IV Tendency, Coincidence and the *UEL*

One of the most interesting, and potentially influential, chapters in the book comes courtesy of Hamer and his explication of a theory about tendency and coincidence evidence in criminal trials.[48] The broad outline of the theory is that tendency evidence is merely a subcategory of coincidence evidence, which makes treating those types of evidence as separate entities irrational and unnecessary.[49] Hamer's theories have already gone beyond the pages of the book and informed recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.[50] This makes it all the more important to examine the changes that reliance on the theories could bring to tendency and coincidence assessment.

Before discussing Hamer's theory and the use of it by the Royal Commission, it will be useful to include a brief description of tendency and coincidence evidence in the *UEL*. Section 97 of the *UEL* establishes the rule for admissibility of tendency

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47 Ibid 76.

48 David Hamer, '"Tendency Evidence" and "Coincidence Evidence" in the Criminal Trial: What's the Difference?' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 158.

49 Ibid 174–5.

50 Royal Commission Criminal Justice Report, above n 19, pt VI 579–90.

evidence and s 98 does the same for coincidence evidence. Tendency evidence is defined in s 97 as

> [e]vidence of the character, reputation or conduct of a person, or a tendency that a person has or had [that is used] to prove that a person has or had a tendency (whether because of that person's character or otherwise) to act in a particular way, or to have a particular state of mind.

Coincidence evidence is defined in s 98 as

> [e]vidence that 2 or more events occurred [that is used] 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.

Sections 97 and 98 are exclusionary rules in that each section excludes tendency or coincidence evidence unless two prerequisite criteria are satisfied, one procedural and one substantive. The procedural requirement is that reasonable notice be given in writing to each other party of the intention to adduce the evidence.[51] The substantive requirement is that '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'.[52]

What may not be obvious from these definitions of tendency and coincidence evidence is that each involves its own process of reasoning to demonstrate its utility and, therefore, its probative value. For tendency evidence, the reasoning process is that the tendency itself is relevant to a fact in issue in the proceeding and that the incidents that are alleged to establish the tendency actually serve, in some meaningful way, to establish that tendency. There is no requirement that the incidents (which may reflect on the character, reputation or conduct of a person) be similar to one another in any specific way, a point made explicit by the High Court's majority judgment in *Hughes*.[53] This is in direct contrast to s 98, which is premised on the existence of similarities in either the events or the circumstances, or both, such that those similarities can be used to argue that the person's involvement in the commission of a particular act or the person's having a particular state of mind is unlikely to be coincidental. Tendency evidence can, thus, generally be used in a more positive manner — to prove that a person has a tendency to act in a particular way or to have a particular state of mind. Coincidence evidence, on the other hand, can generally be used to cut off a line of argument or a defence, by diffusing the possibility that apparently repeat behaviour is the product of mere coincidence.

For Hamer, these are distinctions without difference given the theoretical underpinnings of tendency and coincidence-type evidence and, in his terminology, the natural forms of the evidence. As Hamer describes it, tendency evidence against an accused operates sequentially; that is, the reasoning process progresses from adducing the incidents said to establish the tendency, to establishment of the tendency, to acceptance of the tendency by the jury, to the jury reasoning that the

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51 Unless notice is dispensed with, as allowed by s 100 of the *UEL*.

52 *UEL* ss 97(1)(b), 98(1)(b).

53 (2017) 344 ALR 187. The *Hughes* majority did, however, note that similarities would likely enhance the probative value of the tendency evidence: at 199 [39]–[40].

accused acted consistently with the tendency at the time of the offence charged, to the increased likelihood of the accused's guilt.[54] Coincidence evidence is described as operating more holistically, as the similarities proffered are pooled together along with the offence charged in order to diminish or eliminate the likelihood of the similarities being produced by coincidence.[55]

Just what turns on these different conceptions of the evidence is not made fully clear. Hamer seems to find problems with the idea that coincidence evidence can be disputed on the basis that the uncharged acts that are alleged to establish the similarities are unproven.[56] This problem is exacerbated by the requirement from *IMM* that the court is required to assume, for purposes of assessing probative value, that the evidence will be accepted by the jury.[57] Thus, it is difficult, if not impossible, for a court to take into account the overall strength of the evidence of similarity when assessing the admissibility of coincidence evidence.[58]

In the first instance, it is not entirely clear that this is a correct reading of *IMM*. As discussed in Part III of this essay, the majority judgment in *IMM* allows for a probative value analysis that evaluates the inherent probative value of the evidence, such that not every piece of evidence must be considered equally probative. It is true that *IMM* requires that evidence be taken at its highest so that the court does not usurp the jury's fact-finding role.[59] But if there are inherent weaknesses in the evidence, then the court still has the capacity to find that the probative value of the evidence is low.[60] There is little doubt that this is a complicated test to apply and it is especially complicated in the area of tendency and coincidence where a court may be asked to evaluate the cumulative impact of both charged and uncharged acts or incidents said to establish the tendency or disprove the coincidence. But even *IMM* seems to indicate — though in a portion of the majority judgment that is itself potentially problematic (and outside of the scope of this essay) — that the court can assess the probative value of the components of the tendency or coincidence evidence in its assessment of whether the evidence has significant probative value.[61]

In fact, Hamer seems to have tendency and coincidence evidence exactly backward when he states his view of the natural forms of the kinds of evidence, arguing that each type of evidence has a natural fit in particular circumstances:

> The more sequential propensity inference appears better suited to cases where a prior conviction or uncontested admission clearly established the defendant's commission of the other misconduct from the outset. From that firm base, the fact-finder may be asked to infer that the defendant has a tendency to commit that kind of misconduct, and that the tendency led the defendant to commit the

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[54] Hamer, above n 48, 159.
[55] Ibid 160.
[56] Ibid.
[57] *IMM* (2016) 257 CLR 300, 314 [49], 315 [52].
[58] Hamer, above n 48, 160.
[59] *IMM* (2016) 257 CLR 300, 315 [50].
[60] Ibid.
[61] Ibid 317–18 [60]–[64]. The reasoning in *IMM* should also allow the court to take the inherent weaknesses of the evidence into account for purposes of the balancing test in s 101 of the *UEL* (or s 137, if necessary).

> charged offence. The more holistic coincidence inference may appear better suited to cases where the defendant is merely implicated in an array of harms (including the charged offence) by opportunity evidence or disputed accusations of other alleged victims. There is no firm base from which to move to the defendant's tendency and then to the defendant's guilt. However, when the evidence is pooled together it may appear wholly implausible that so many harms could be connected with the defendant if he were innocent.[62]

This description does not seem to fit where uncharged acts form the basis for the tendency evidence, as in *Hughes*.[63] The non-complainant witnesses in *Hughes* were able to give evidence notwithstanding the fact that the incidents of molestation testified about were not the subject of charged offences that themselves would have to be proved. No prior admission or conviction was adduced in that case. Thus, the tendency connection was premised on the accused having actually been involved in the incidents even though proof of the defendant's involvement did not have to be established. The sole ability for the defence to challenge the witnesses' evidence would be to challenge the substance of the evidence or discredit the witnesses on cross-examination, the effect of which would only make it less likely that the jury would accept the existence of the tendency. This is, of course, how tendency reasoning works. The point here is that conclusively linking the defendant to the incidents said to establish the tendency is not strictly necessary.

Coincidence, on the other hand, does seem to require some specific connection to the accused. Since coincidence evidence is premised on similarities in the events or circumstances, it is difficult to see how the events or circumstances offered as coincidence evidence could be relevant, much less have significant probative value, if no connection to the accused could also be offered so that the similarities prove anything about the facts in issue. The classic case of *Makin v Attorney-General (NSW)*[64] provides a good example. The Makins, husband and wife, were both convicted of the murder of an infant, whom they had taken into their home following a payment made to them by the child's mother. At their trial, evidence was adduced that the Makins had taken in and murdered several other children following similar arrangements.[65] The evidence of the other children's murders was based on exhumations of bodies found buried at residences where the Makins had previously lived.[66]

It is difficult to see how this evidence could be adduced on anything other than a coincidence basis. There does not seem to be an argument available for the Makins to have a tendency to commit infanticide, even where the connection between the Makins, their residences and the other bodies was established. Rather, the connection between the Makins and their residences where the bodies were found lends itself to an argument that it could not possibly be a coincidence that infant bodies happened to be buried in each of the yards of houses in which the Makins lived. It is this orientation of coincidence evidence, which may be used to disprove, discount or eliminate an argument or defence of coincidence that separates

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62 Hamer, above n 48, 161–2.

63 *Hughes* (2017) 344 ALR 187, 191 [5].

64 [1894] AC 57.

65 Ibid 67–8.

66 Ibid 58–9, 68.

coincidence from tendency. In contrast, tendency is oriented around establishing something positive — that is, the existence of the tendency.

Hamer goes on to argue that tendency evidence is a specific subcategory of coincidence evidence that relies on similarities among the various incidents alleged to establish the tendency.[67] This means that the existence of the tendency and the inputs that allow the tendency to be demonstrated are not the product of coincidence.[68] These arguments have a pleasing circularity to them, but it does not appear that they accurately capture the distinctions between the processes specific to tendency and coincidence reasoning. It will also be interesting to see how Hamer reconciles these views with the *Hughes* majority's rejection of the necessity of similarities for tendency evidence.

As mentioned above, Hamer's views have taken on additional significance with the Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations for reform of the tendency and coincidence rules for child sexual offence proceedings.[69] Though the Royal Commission did not ultimately recommend removing the distinction between tendency and coincidence in the legislation, it did state that it '[did] not find the distinction between tendency and coincidence evidence convincing' and stated that it saw 'considerable merit' in Hamer's analysis on the issue.[70] The Royal Commission did, however, recommend that the significant probative value analysis for tendency and coincidence evidence be replaced by one that would allow for admissibility of the evidence where '"relevant to an important evidentiary issue" in the [child sexual offence] proceeding'.[71] The new test would also eliminate the protections provided by s 101 of the *UEL* for tendency or coincidence evidence about an accused. This recommendation was also influenced by submissions made to the Royal Commission by Hamer.[72]

It is difficult to imagine any Parliament in a *UEL* jurisdiction amending the evidence laws for tendency and coincidence only with respect to child sexual offences, rather than amending the tendency and coincidence rules generally. At first glance, it seems as if the Royal Commission recommendations are designed to allow a great deal of tendency and coincidence evidence to be admitted in proceedings, without much oversight or gatekeeping by the courts. This may be emotionally satisfying in prosecutions for child sexual offence proceedings, but the emotional nature of this kind of evidence suggests that it may be more prudent to maintain an active role for the courts in interrogating the propriety of tendency and coincidence evidence with respect to each case.

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67 Hamer, above n 48, 171.
68 Ibid.
69 Royal Commission Criminal Justice Report, above n 19, pt VI 409, 638, 640.
70 Ibid 643.
71 Ibid 642.
72 Ibid 640–41.

V Conclusion

This brief overview hopefully demonstrates in some way the importance of continuing the discussions suggested by this timely, and occasionally provocative, book. In addition to the sections covered here, there are other important chapters such as those by: Gary Edmond and Kristy A Martire on expert evidence; Mark Weinberg on admissions; Annie Cossins and Jane Goodman-Delahunty, and a chapter by Miiko Kumar, each on aspects of delayed complaint evidence; and Mehera San Roque on identification evidence. Going forward, the High Court will no doubt have to revisit its decisions in *IMM* and *Hughes* on many occasions to clarify and standardise what are likely to be difficult judgments for lower courts to apply with consistency. Parliaments in *UEL* jurisdictions will also have to grapple with the issues raised by the Royal Commission, further contributing to the development, and possible greater lack of uniformity, of the *UEL*. This is an interesting time for Australian evidence law and Roberts and Gans have done a service by assembling these authors to advance the conversation.