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# **BAD CHARACTER EVIDENCE IN THE CRIMINAL TRIAL: THE ENGLISH STATUTORY/COMMON LAW DICHOTOMY- -ANGLO-AUSTRALIAN PERSPECTIVES**

**Michael Stockdale, Emma Smith and Mehera San Roque\***

**Abstract:** Evidence of Bad Character (BCE) is an important evidential category, and its admission can have a significant impact upon the criminal trial. The Criminal Justice Act 2003 (CJA 2003) provides a definition of bad character evidence (s98/112 CJA 2003) that where applicable requires BCE to surmount one of the gateways to admissibility in s101(1) CJA 2003. Regarding some Uniform Evidence Law jurisdictions in Australia, the Evidence Act 1995 (EA 1995) governs the admissibility of evidence to demonstrate ‘tendency’/‘coincidence’ (or the improbability thereof) and the use of BCE to rebut defendant-led good character (see ss97, 98, 101 and 110 Evidence Act 1995). The definition of BCE provided in s98 CJA 2003 requires ‘evidence of, or of a disposition towards, misconduct’ and ‘misconduct’ is further defined within s112 CJA 2003 as ‘the commission of an offence or other reprehensible behaviour’. A wealth of case law has developed around when evidence ‘has to do with the alleged facts of the offence charged’ in s.98(a) CJA (an exception to the definition of BCE) as well the scope of the overlap between s.98(a) and certain gateways to admissibility (for example, s101(1)(c), (d) CJA 2003), which has led to both a degree of flexibility and also to uncertainty within the law in this area. Similarly, in Australia, in many cases evidence incidentally disclosing other (mis)conduct by the accused have been held to fall outside the provisions regulating the admission of tendency (and coincidence) evidence. This article will explore some of the areas of uncertainty that have developed since the implementation of the 2003 reforms, informed by consideration of the approach to equivalent questions in the Australian jurisdictions.

**Keywords:** *bad character, admissibility, relevance, Criminal Justice Act 2003, Uniform Evidence Law.*

## **Introduction: Reforming ‘Bad Character’**

The 2003 Criminal Justice Act ushered in a new regime for the admission of bad character evidence in England and Wales. The reforms were notionally intended to substantially reform an area of evidence law that had been increasingly seen as unwieldy, unnecessarily complex, and, by some commentators and courts at least, as incoherent. In recommending reform the Law Commission was attentive to, and drew in some respects upon, a comparable project that had been undertaken some years earlier in Australia—a slow reform process that ultimately resulted in the enactment, in 1995, of the optimismistically named ‘Uniform’ Evidence Law in two Australian jurisdictions.<sup>1</sup> However the approach ultimately adopted by the Law

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1. In its report, Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Comm No 273, 2001), the Law Commission considered the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). Australia is a federation, with State, Territory and Federal courts. Each jurisdiction operates more or less autonomously, with its own legislature and court hierarchy. Criminal law is primarily the responsibility of the States and Territories, and the majority of criminal cases are tried in State (and Territory) courts. The High

Commission and the Criminal Justice Act to the codification of this area of law differed in significant respects from the direction taken by the Australian Law Reform Commission and the resulting (Uniform) Evidence Acts.<sup>2</sup>

The reforms implemented within the Criminal Justice Act 2003 represented an attempt to clarify and codify the law, but the implementation of the 2003 Act's provisions, particularly when considered alongside the approach taken by the UEL in Australia, indicates that uncertainty, especially in the relation to the definition of evidence of bad character, and the scope of the new provisions, remains. The complexity identified by the Law Commission as a problem, has been displaced to other areas, with consequences for admissibility and subsequent use of bad character evidence at trial that are still being worked through. The aim of this article is to explore some of the areas of uncertainty that have developed since the implementation of the 2003 reforms. The focus is on the development of the law in England and Wales, but the analysis is informed by reference to the ways in which a comparable jurisdiction, and one that was influential on the Law Commission's recommendations, has approached reform to this area of the law. Overall, the development of the law, post 2003, raises questions as to whether the approach initially taken by the Law Commission, and subsequently modified in the drafting of the Criminal Justice Act 2003, has been effective in simplifying/clarifying this area of the law.

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Court of Australia is the ultimate appellate court for all jurisdictions, arbitrates differences that emerge in State jurisdictions, and establishes the common law for Australia. Most jurisdictions in Australia have now implemented a variation of the UEL and so in addition to the Cth and NSW Evidence Acts, the UEL regime now encompasses the *Evidence Act 2001* (Tas), *Evidence Act 2004* (Norfolk Island), *Evidence Act 2008* (Vic), *Evidence Act 2011* (ACT) and *Evidence (National Uniform Legislation) Act 2011* (NT). However, notwithstanding apparent uniformity in legislative framework, and principles of comity encouraging intra-jurisdictional deference, some significant differences have emerged as between the two major jurisdictions (in terms of volume of cases), New South Wales and Victoria. This includes differing approaches to tendency evidence and to the evaluation of probative value and unfair prejudice. See for example David Hoitlink and Anthony Hopkins, 'Divergent approaches to the admissibility of tendency evidence in New South Wales and Victoria: The risk of adopting a more permissive approach' (2015) 39 *Criminal Law Journal* 303; G Edmond, D Hamer, A Ligertwood and M San Roque, '*Christie*, section 137 and forensic science evidence after *Dupas v The Queen* and *R v XY*' (2014) 40 *Monash University Law Review* 389. Note also the *Jury Directions Act 2015* (Vic) has made significant changes to this area of the law in Victoria as compared to other UEL jurisdictions. The recent High Court case of *IMM v The Queen* [2016] HCA 14, while purportedly addressing one of the major sites of diverging interpretation—that relating to the assessment of probative value under s 137—has, perhaps inadvertently, complicated the law with respect to tendency evidence. The remaining common law jurisdictions, South Australia, Queensland and Western Australia are governed also by jurisdiction-specific legislation in relation to, for example, joint trials that indirectly affect the operation of the common law rules relating to the admission of character evidence, broadly defined, and propensity and similar fact evidence in particular. Beyond the scope of this article. Some commentators, drawing on some of this jurisdiction specific legislation, have recommended specific amendments to the UEL applicable to child sexual assault trials. See Anne Cossins 'The Behaviour of Persistent Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35(3) *Melbourne University Law Review* 821-864.

<sup>2</sup> The Law Commission explicitly rejected aspects of the approach under the UEL (see for example, Law Commission (n 1) 11.14 onwards), noting in particular what was seen to be lack of clarity in some key terms, such as the evaluation of probative value and prejudicial effect (on the accused). The ALRC acknowledged in its review of the operation of the Evidence Acts in 2009, that these terms had given rise to some confusion, but saw this as primarily an issue of transition, and made no major alterations to the sections regulating 'bad character' evidence. See discussion in Australian Law Reform Commission Report 102, *Uniform Evidence Law* at para 3.4 ff. However, the difficulties in drawing a coherent set of principles from the recent case of *IMM v The Queen* (n 1) that addressed the evaluation of (significant) probative value and prejudice indicates that some of the concerns of the Law Commission may be justified. See discussion in David Hamer 'The province of jury fact-finding and principles of judicial restraint after *IMM v The Queen* [2016] HCA 14' (forthcoming).

The Law Commission's draft Bill, the Criminal Justice Act 2003 and the Uniform Evidence Acts each adopt different approaches to the regulation of 'bad character' evidence in general, as well as to the management of evidence which forms part of the *res gestae* and to background, contextual and explanatory evidence in particular. This includes variation in approaches to the issue of whether such evidence falls within the ambit of statutory admissibility codes directed specifically towards the management of 'bad character', or whether its admissibility is governed by general principles, or indeed continues to be governed by common law principles. When comparing these three regimes (Law Commission recommendations, 2003 Act and Uniform Evidence Acts), one issue is whether any one of these three approaches produces (or in the case of the Law Commission's draft Bill, would have produced) an admissibility regime that is more intuitive, more coherent and/or more readily comprehensible than the others. This includes the sub-issue of whether each regime is internally coherent within itself or whether it creates grey areas of ambiguity, for example in the case of the 2003 Act as regards the relationship between the statutory code and retained common law principles. These are salient questions that require further analysis, given that the aims and motivations behind reform promulgated by the Government were to remedy the difficulties associated with the old law identified by the Law Commission, in their report number 273 in 2001, and Lord Justice Auld, in his report.<sup>3</sup> Baroness Scotland on behalf of the Government, when the Criminal Justice Bill was being debated in the House of Lords, indicated that the new statutory scheme for admissibility was to depart from the 'plethora of rules that have developed over a century or more, couched on an exclusionary basis and unclear in their application... the new statutory scheme for evidence of bad character [should be] as straightforward and as accessible as possible'.<sup>4</sup> A further issue is the extent to which the differences between the three regimes identified above are of practical significance in the sense that evidence of the same type (though, perhaps classified differently) would in practice be more or less readily admissible either for the prosecution or for the defence under one regime than is or would be the case under another. There may also be corollaries with respect to the necessity for or content of judicial directions provided in response to the admission of evidence; it may be that bad character directions will differ, or even disappear depending on the admissibility regime adopted and/or the route to admissibility that is followed within a specific admissibility regime.<sup>5</sup>

In codifying the law in England and Wales, the Criminal Justice Act 2003 was intended to bring the admissibility framework for bad character evidence under one statute, the position having formerly been regulated by a combination of common law principle and statutory provisions.<sup>6</sup> Under the 2003 Act, evidence of misconduct on the part of the accused that falls within the definition of bad character created by sections 98 and 112 of the 2003 Act will be admissible 'if but only if' the requirements of one or more of the gateways created by section 101(1) of the 2003 Act are satisfied. There are seven s.101 gateways in total, and the nature of those which are of particular relevance to the present discussion is outlined below. (There are also three gateways in s.100 that regulate the admissibility of

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<sup>3</sup> The Right Honourable Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' (Ministry of Justice, September 2001) Available at <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/ccr-00.htm> (Last accessed 13/07/2016)

<sup>4</sup> Hansard HL, vol. 652 cc741-742, 15 Sept 2003.

<sup>5</sup> This is an important issue, see below and for further discussion: Huxley, 'Mental gymnastics and intellectual acrobatics: the meanings of statutory and common law "bad character"' (2011) *Journal of Criminal Law* 132.

<sup>6</sup> Thus, the Law Commission indicated in Part IV of its report, 'As can be seen from all the problems identified in this Part, many are matters of substance, but some also arise from the fact that the law has to be disinterred from so many sources. Thus part of the solution is to bring together all the rules into one place. This Commission has long advocated the advantages of codification of criminal law and procedure, including the law of evidence', Law Commission (n 1) para 4.82 (footnotes omitted).

evidence of bad character of persons other than the accused). As is seen below, the s.101 gateways determine whether evidence of the accused's 'bad character' will be admissible but do not dictate the use to which such evidence, once admitted, may be put. Rather, the judge will direct the jury as to the potential relevance of the evidence which is not limited by the gateway through which it has been admitted.

Whereas the basis of the Law Commission's recommended approach had been the exclusion of bad character evidence, the Government favoured 'a more targeted approach...one of inclusion that makes it clear that relevant evidence is admissible'.<sup>7</sup> Thus, the Government's intention was that '[t]he law should...make it clear that the test should be whether the evidence is relevant, and then whether it should be excluded'.<sup>8</sup> As is demonstrated below, the bad character provisions of the 2003 Act do not apply to residual areas of evidence of misconduct (specified by s.98(a) and (b)) which the Act does not classify as evidence of bad character and, in this regard, do not precisely embody the Law Commission's recommended approach. The admissibility of such evidence continues to be regulated by the common law test of relevance rather than by the more onerous requirements that govern the availability of the statutory admissibility gateways and the nature of judicial directions to the jury appears to differ depending upon whether the statutory or the common law regime is applicable. Unfortunately, the borderline which section 98 of the 2003 Act creates between evidence of "misconduct" which amounts to evidence of bad character, the admissibility of which is governed by statute, and evidence of "misconduct" which does not amount to evidence of bad character, the admissibility of which is regulated by the common law, is subject to uncertainty. Indeed, the applicable jurisprudence of the Court of Appeal does not seem fully reflect either the intention of the Law Commission or that of the Government regarding where this borderline should be drawn.

Turning to the Australian position, in approaching reform of the law with respect to the (bad) character of a defendant the Australian Law Reform Commission (ALRC) was also attempting to address the considerable uncertainty that had developed, particularly in relation to the admission of propensity and similar fact evidence, as well as offer what it saw to be a more rational structure dealing with the overlap and relationship between rules relating to "character" and those relating to "credibility". The ALRC identified a number of uncertainties as to the scope of the exclusionary rules in relation to past misconduct of the accused, arising in part from the contradictions inherent in a body of law that on the one hand asserted a strong exclusionary orientation—and sometimes even an absolute prohibition on the admission of evidence disclosing an accused's propensity—but at the same time allowed such evidence to be admitted in particular cases in support of some specific tendency or pattern of conduct, or to refute a defence, or to disprove coincidence, or for some other reason altogether.<sup>9</sup> The ALRC did identify as a common thread the need to assess the probative value of the evidence as against the prejudice against the accused that would flow from its admission and sought to preserve that consideration, while at the same time making it clearer that the aim was to ensure that evidence disclosing propensity could be permitted in certain cases, as long as the probative value was scrutinised with care.<sup>10</sup> In the ten years

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<sup>7</sup> Hansard HL, vol. 654, col. 737, 4 Nov 2003 (Baroness Scotland).

<sup>8</sup> *Ibid*

<sup>9</sup> Evidence (Interim) [1985] ALRC 26 para 164 and 813.

<sup>10</sup> *Ibid* para 164 ff. The ALRC considered that there remained good reasons to restrict the use of general 'propensity' reasoning, but acknowledged that allowing inferences as to the (im)probability of coincidence to be drawn from a pattern of conduct or events often gave rise to the same risks of prejudice as reliance on propensity reasoning, and thus the draft Bill included an exclusionary structure that addressed both types of reasoning, while requiring that evidence would only be admitted against a defendant in the Crown case if the evidence was found to have substantial probative value. See Evidence (Interim) [1985] ALRC 26 at para 810ff and Evidence [1987] ALRC 38, Appendix A, cl 89(2). Odgers points out that this proposed clause could have

between the release of the ALRC recommendations, and the eventual enactment of the New South Wales and Commonwealth Acts, the draft Bill underwent a number of revisions, and the 1995 Acts were again reviewed and amended in 2009.<sup>11</sup> As compared to the CJA, the Uniform Evidence Law (UEL) represents less of an obvious break with the preceeding common law, but it did reframe the way in which the evidence is to be analysed, emphasising a restriction directed towards certain types of reasoning—consequently principles that had previously applied in criminal cases in respect of prosecution evidence (only) were extended to apply to all types of trials and to evidence adduced by all parties.<sup>12</sup>

The UEL regulates the admission of ‘character’ evidence about the defendant in a number of relatively distinct ways. Overall, the UEL regime targets the uses or purpose to which evidence is being put, rather than the evidence itself, and draws a distinction between evidence adduced responsively, to negate ‘good character’ evidence adduced by a defendant, and evidence adduced by the prosecution (or by a co-defendant), that can be regarded as going directly to facts in issue, albeit by way of circumstantial reasoning.<sup>13</sup> So, for example, if evidence of a defendant’s (past) conduct is being used to prove that the defendant has a tendency to act in a particular way, or a tendency to have a particular state of mind, and that because of that tendency, they are more likely to have committed the offence for which they have been charged, then the evidence is inadmissible for that *purpose* unless the prosecution satisfies both ss 97 and 101 of the Act.<sup>14</sup> However, as discussed below, evidence that is not being used to underpin tendency (or coincidence) *reasoning*, but is considered to be relevant and admissible for some other purpose, will not necessarily be captured by s 97 (or s 98), and in that context, UEL and common law jurisdictions may continue to apply the same principles. The focus on the regulation of the permissible and impermissible *reasoning* (consistent with a number of other exclusionary rules) has meant that the UEL regime expresses a preference for the use of directions (to the jury) for the management of the prejudicial effects that may flow from the admission of evidence of a defendant’s other misconduct, rather than exclusion.

In this article we consider in the context of English Law the extent to which the statutory/common law dichotomy that the 2003 Act’s bad character Act created has resulted in uncertainty and/or may result in unfairness to the accused, and whether this might in part

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applied to any evidence where similar conduct was being relied on against an accused. This clause was not enacted, however, in the final Act. See Stephen Odgers, *Uniform Evidence Law* (12<sup>th</sup> Edition, Sydney: Thomson Reuters, 2016), para 101.60

<sup>11</sup> ALRC Rep.102 (n 2).

<sup>12</sup> The UEL is not a Code, but the rules in Part 3.6 are generally considered to cover the field in relation to the admission of tendency and coincidence evidence. However, while it was confirmed in *R v Ellis* [2003] NSWCCA 319 that the test from the key common law case of *Pfennig v The Queen* [1995] HCA 7 was no longer directly incorporated into the interpretation of equivalent section of the Act, it nonetheless remain a significant reference point. Similarly *Hoch v The Queen* [1988] HCA 50 continues to inform decisions on relevance of concoction, and the common law case of *Phillips v The Queen* [2006] HCA 4 can be applied to decisions under the UEL where there are multiple allegations of sexual assault and the issue in dispute is consent.

<sup>13</sup> Part 3.6 of the UEL contains the rules relating to the admission of tendency (propensity) and coincidence (similar fact) evidence, and the circumstances in which tendency or coincidence reasoning is permitted, whereas Part 3.8 regulates Character evidence, and contains the sections that regulate the admission of responsive/rebuttal evidence in situations where the accused has adduced evidence of his or her ‘good character’. Credibility evidence—evidence relevant only to the credibility of the defendant, or evidence relevant to credibility and another purpose, but inadmissible for that alternative purpose—is regulated separately under Part 3.7 of the Act.

<sup>14</sup> Similarly, if evidence of related events is being adduced to refute coincidence as an explanation for a repeated pattern, or multiple complaints, the evidence must satisfy the requirements of the ‘coincidence rule’ in s 98, as well as the balancing test in s 101. Conversely, evidence whose purpose is to refute a claim of good character, will be admitted under s110 in Part 3.8 of the UEL.

have been avoided had the Government's approach embodied the Law Commission's recommended approach more precisely. We also consider, from an Australian perspective, whether the approach adopted under the UEL provides a more certain, coherent or consistent approach to the classification and/or treatment of evidence that in English Law would fall on the common law side of the statutory/common law borderline.

### **Res Gestae, Relationship and Background Evidence**

The precise location of the borderline between evidence which falls within or outside the bad character regime created by the Criminal Justice Act 2003 is subject to a degree of uncertainty and in relation to the treatment of evidence of motive does not appear to reflect legislative intent. It is also arguable that the existence of this borderline is capable of giving rise to unfairness to defendants because the rigour of the applicable admissibility tests and the protection provided by judicial directions to the jury may vary depending upon which side of the borderline a particular item of evidence falls.

In England and Wales, prior to the introduction of the Criminal Justice Act 2003's statutory bad character code, evidence of "acts" which formed part of the same "transaction"<sup>15</sup> as the offence with which the accused was charged was admissible at common law as forming part of the *res gestae*.<sup>16</sup> Evidence of conduct which formed part of the historical background to the offence charged was also potentially admissible at common law<sup>17</sup> and could be relevant either to help the court understand the facts of the case<sup>18</sup> or as evidence of motive<sup>19</sup>.

The Law Commission identified the following four "indicators" of *res gestae* or background evidence in English Law:

(1) the evidence may be close in time, place or circumstances to the facts or circumstances of the offence charged; (2) the evidence may be necessary to complete the account of the circumstances of the offence charged, and thus make it comprehensible to the jury; (3) the accused may have had a relationship with the victim of the offence charged, and the previous misconduct evidence may relate to this victim rather than the victims of other offences; (4) the evidence may assist in establishing the  *motive*  behind the offence charged.<sup>20</sup>

The Law Commission regarded indicator (1) as approximating to evidence which formed part of the *res gestae*.<sup>21</sup> It regarded evidence of motive (see indicator 4) as sitting within the realm of background evidence, which serves a contextualising/explanatory purpose.<sup>22</sup> This is important given that, as is seen below, the Law Commission intended that leave of the court would not be required in order to adduce evidence to which indicator (1) was applicable but intended that leave would be required where indicator's (2)-(4) were applicable. As is

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<sup>15</sup> For use of the terminology of "acts" forming part of a "transaction" see Bayley J in *R v Ellis* (1826) 6 B&C 145, 147.

<sup>16</sup> See, for example, *Ibid* (*Ellis*) and *R v Bastin* [1971] Crim LR 529.

<sup>17</sup> See, for example, *R v Pettnam* May 2 1985 (unreported); *R v Sidhu* (1984) 98 Cr App R 59; *R v Fulcher* [1995] 2 Cr App R 251, *R v Nicholls* LTL 11/7/97; *R v Underwood* [1999] Crim LR 227, *R v M* The Times September 7 1999, *R v Sawoniuk* [2000] 2 Cr App R 220 and *R v Clarke* [2002] EWCA Crim 2948.

<sup>18</sup> In relation to evidence which helps the court to understand the facts of the case see, for example, *Bastin* (n 16), and the cases of *Pettnam*, *Sidhu*, *Underwood*, *M* and *Sawoniuk*, *Ibid*.

<sup>19</sup> In relation to evidence of motive see, for example, *Fulcher* (n 17); *Clarke* (n 17); *Nicholls* (n 17)

<sup>20</sup> Law Commission, (n 1) para 10.1 (footnotes omitted). Author's emphasis added.

<sup>21</sup> *Ibid* para 10.6.

<sup>22</sup> *Ibid* para 10.8-10.12.

demonstrated below, this was also in line with the Government's intended treatment of these respective categories of evidence under the bad character provisions of its Criminal Justice Act, but sits at odds with recent decisions of the Court of Appeal, which seem to categorise evidence of motive as equating with evidence to which indicator (1) is applicable.

So far as the position in Australia is concerned both the common law and the UEL regime allow for a evidence of the defendant's past (mis)conduct, and/or uncharged acts contemporaneous with charged offences, to be relevant and admissible for a variety of purposes, including those identified by the Law Commission above.<sup>23</sup> Under the common law, evidence classified as 'relationship', or background information, will generally not be regarded as triggering the exclusionary regime governing what would formerly have been characterised as propensity evidence.<sup>24</sup> Similarly, evidence that formed part of the relevant 'transaction' or is necessary to understand the critical context of an event does not necessarily engage the exclusionary rules in Part 3.6 or their common law equivalents. Consistent with the UEL's focus on the regulation of the *purpose* for which evidence is adduced, or the reasoning process employed, evidence that assists the fact finder to understand the relationship between the defendant and a victim, or which can be used to understand the reactions of a victim, will not be caught by the rules governing the admission of tendency (propensity) or coincidence (similar fact) evidence. Similarly, in a case that reveals the fine distinctions sometimes drawn, evidence of a defendant's conduct from which it was possible to infer his support for militaristic Jihad at a particular time, was admitted not as evidence relevant to establishing that the defendant had a 'tendency' to support such Jihad, but as evidence (merely) pointing to his 'state of mind' at a specific time prior to the offence, from which it was possible to infer that he *continued* to have that state of mind at the time of the offence for which he was charged.<sup>25</sup> As compared to the reformulation intended by the Law Commission above, the UEL framework anticipated a narrower ambit in terms of the coverage of the new provisions, in so far as the examples of all of the indicators outlined above will remain outside of the specific rules.

A significant aspect of the UEL regime, is the way that the evidence that is capable of grounding tendency (or coincidence) reasoning, but admitted because it is relevant to, for example, background, relationship or state of mind, or motive, will be confined to that purpose by way of directions. This is effected by s 95 of the UEL,<sup>26</sup> that stipulates that evidence can only be used for tendency or coincidence purposes if it has satisfied the conditions contained within ss 97/98 and 101. So, for example, evidence admitted to explain background or context, or to explain the reaction of a victim, or, as in *Elomar*, as evidence of the state of mind of the defendant, cannot also be used in the Crown case to support tendency reasoning unless the court finds that the evidence has 'significant probative value' with respect to that tendency, and the probative value of the evidence substantially outweighs the

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<sup>23</sup> In relation to 'transaction' evidence (considered to be aligned most closely to *res gestae*, *O'Leary v The King* (1946) CLR 566 allows for evidence of a continuous set of events to be admissible, and this pathway has been maintained under the UEL. See for example *R v (Richard) Adam* (1999) A Crim R 510 and *Higgins (a Pseudonym) v The Queen* [2016] VSCA 47 (18 March 2016).

<sup>24</sup> *HML v The Queen* (2008) 235 CLR 334. However, the distinctions that have been drawn are not always clear or coherent. See David Hamer, 'Admissibility and the use of relationship evidence in *HML v The Queen*: One Step Forward, two steps back' (2008) 32 Criminal Law Journal 351 and for further discussions around propensity evidence see Hamer, 'The legal Structure of Propensity Evidence' (2016) International Journal of Evidence and Proof 136.

<sup>25</sup> *Elomar v The Queen* [2014] NSWCCA 303. See also *Higgins* (n 23).

<sup>26</sup> S.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.



danger of prejudice to the accused.<sup>27</sup> Similarly, evidence adduced in rebuttal under part 3.8 of the Act, cannot also be used by the prosecution to support tendency reasoning unless ss 97 or 101 have also (already) been satisfied.<sup>28</sup> Conversely, evidence that satisfies the requirements of ss 97 and 101 *can* be used also to establish, for example, background, context or relationship. The UEL takes, in this respect, a ‘hierarchical’ approach to evidence relevant for more than one purpose—once the evidence has been admitted for the purpose considered to carry the highest risk of unfair prejudice, it is likely to be available for all other relevant purposes. S.101 (like its precursor, the common law *Pfennig* test<sup>29</sup> in relation to propensity evidence) is considered to impose the most stringent restrictions on the admission of evidence that carries a risk of unfair prejudice.<sup>30</sup> Whereas evidence admitted to show, for example, relationship or background, would be subject only to the requirements of relevance (ss 55 – 57) and the general obligation to exclude evidence where the probative value is outweighed by the danger of unfair prejudice contained in s 137.<sup>31</sup> In formulating its approach, the ALRC does not seem to have considered the concept of *res gestae* as a useful or necessary principle for delineating the demarcation between evidence subject to the tendency provisions, and evidence relevant (and admissible) for some other purpose.<sup>32</sup> But as discussed further below, one effect of the focus on restricting reasoning has been to allow for an increasing number of situations where evidence falls outside of the scope of the provisions in Part 3.6 of the Act.

Returning to the relationship between the Law Commission’s draft Bill and the bad character provisions of the 2003 Act, whilst ‘the Government’s approach [was] closely informed’ by the Law Commission’s report,<sup>33</sup> there were ‘substantial differences’ between the Law Commission’s proposals and the proposals in the Government’s Criminal Justice Bill.<sup>34</sup> So far as the treatment of evidence which forms part of the *res gestae* is concerned, the Law Commission had sought to ‘formulate the exclusionary rule in such a way that it does not exclude evidence which goes directly to the facts of the alleged offence, or evidence of misconduct in the course of that offence or close to that offence in time, place or circumstances’.<sup>35</sup> In reaching its conclusion that evidence which formed part of the *res gestae* ‘should be automatically admissible’,<sup>36</sup> the Law Commission had regard<sup>37</sup> to the view of the Australian Law Reform Commission that ‘surrounding detail puts a narrated transaction in context, assisting evaluation of the truth of the narration and thus is “indirectly” relevant to the issues’.<sup>38</sup> In formulating its approach the Law Commission believed that ‘a way forward’

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<sup>27</sup> S.101(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.

<sup>28</sup> See for example *R v OGD (No 2)* [2000] NSWCCA 404. Noting also a trial judge would be reluctant to consider an application by the prosecution to rely on tendency reasoning after its case had closed, since this is likely to be considered an impermissible ‘splitting’ of the Crown case: see *R v Chin* (1985) 157 CLR 671. The UEL also imposes notice requirements in respect of tendency and coincidence evidence: s 99.

<sup>29</sup> *Pfennig* (n 12)

<sup>30</sup> See *HML v The Queen* (n 24).

<sup>31</sup> The omission of the moderator ‘unfairly’ in s101, as compared to the wording of the general provision in s.137 is of less significance that might otherwise appear, with an emphasis in the case law that it is necessary to show that that risk to be addressed is not mere prejudice but that the evidence will be used in some improper way. However, it is generally accepted that s.137 is a redundant provision if s.101 is satisfied.

<sup>32</sup> Though it is worth noting that it was an issue considered in the 2005 review of the UEL, in the context of considering the application of equivalent existing law in Victoria relating to propensity evidence (s.398A, Crimes Act 1958 (Vic)) See ALRC Rep. 102 (n 2) Appendix 2.

<sup>33</sup> Criminal Justice Act 2003, Explanatory notes, para 46.

<sup>34</sup> Hansard HL, vol. 654, col. 737, 4 Nov 2003 (Baroness Scotland).

<sup>35</sup> Law Commission (n 1) para 8.23.

<sup>36</sup> *Ibid* para 10.3.

<sup>37</sup> *Ibid* 134, footnote 8.

<sup>38</sup> Evidence (Interim) [1985] ALRC 26 para 59.

was provided by those provisions of section 104 of the Australian Evidence Act 1995 (Cth) which referred to ‘(a) the events in relation to which the defendant is being prosecuted; or (b) the investigation of the offence for which the defendant is being prosecuted’.<sup>39</sup> The Law Commission noting that ‘this formulation did not appear to have generated major problems of interpretation’.<sup>40</sup> It has been argued by Tapper that the recommendation, by the Law Commission, that there should be a separate regime for evidence relating to the central facts was perhaps unnecessary given that this is not a distinction that has caused problems in the past.<sup>41</sup>

The provisions of s.104 of the 1995 Act which influenced the Law Commission served (and continue to serve) a very different purpose from that which would have been served by cl 2(1)(a),(b) and which is served by s.98(a),(b) of the 2003 Act. Section 104 forms one of a number of provisions of the 1995 Act that relate to “credibility evidence”. Section 104 itself concerns the cross-examination of the accused and s.104(5) concerns the nature of those circumstances in which the prosecution needs to obtain leave to cross-examine the defendant in relation to the matters relevant to the defendant’s credibility (only). To that extent, and in that specific context, it is generally regarded as an unproblematic provision that has not given rise to substantial discussion or uncertainty, indicating that even taking into account the limited application of s104, Tapper is right to point out that a separate regime is unnecessary.<sup>42</sup> Under the 1995 Act the issue of whether evidence that would be admissible in England and Wales under s.98 (had the ambit of that provision been interpreted in line with the Law Commission’s proposals) would be dealt with under the provisions of the Act which concern ‘Tendency and Coincidence’ (or the provisions relating to Character evidence more generally), but only where the evidence was being used to ground tendency (or coincidence) *reasoning*. Arguably the manner in which the UEL targets reasoning or purpose, rather than evidence per se avoids the problem of needing to analyse whether evidence relating to offence reveals, incidentally, bad character.<sup>43</sup> Though this is not to say that the UEL regime avoids other related difficulties, such as when (as yet unproven) facts relevant to the events with which the defendant has been charged will be admissible for the purposes of inferring

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<sup>39</sup> Law Commission (n 1) paras 8.25-8.26. See also s104(5) Evidence Act 1995 (NSW) wherein this wording can be found.

<sup>40</sup> Law Commission (n 1) para 8.25.

<sup>41</sup> Colin Tapper, ‘Criminal Justice Act 2003: Part 3: Evidence of Bad Character’ (2004) *Criminal Law Review* 533, 539: ‘The Law Commission argued for this on the basis that the prosecution must be entitled to prove the central facts of the offence irrespective of the fact that they showed the accused to be of bad character. This is very puzzling. There has never been the slightest suggestion in any common law system that such evidence should be excluded, and in this respect even the Criminal Evidence Act 1898 gave little trouble’.

<sup>42</sup> S.104 applies in *addition* to s103, which is the primary exception to the exclusionary credibility rule contained in s.102 for questions asked in cross-examination. S.103 requires that the evidence could ‘substantially affect the assessment of the credibility of the witness.’ Importantly, s.103 (and thus s.104) will only come in to play if the evidence is relevant solely to the witness/accused’s credibility or has more than one purpose, but is inadmissible for that other purpose (s.101A). Evidence relevant directly to the offence, even if it were to also have an affect on the credibility of the accused will in most cases have been otherwise (already) admitted. S.104(5) generally has very little work to do—especially because s.104(3) also lifts the bar in relation to evidence that a defendant has a motive to be untruthful, is unable to recall matters or has made a prior inconsistent statement—the few cases on s 104 are primarily concerned with whether the conduct of the defendant has been sufficiently deliberate in attacking a prosecution witnesses credibility as to justify the grant of leave for questioning on matters falling outside of s104(3) (or s.104(5)). That is to say the cases have been concerned with fairness to the defendant, and not the scope of s.104(5). See *R v El-Azzi* [2004] NSWCCA 455. Note also similar concerns discussed in the context of s112 which requires leave for a defendant to be cross-examined on matters relevant to evidence adduced under Part 3.9 of the UEL relating to ‘Character’ evidence: see *Stanoevski v The Queen* [2001] HCA 4; *R v El-Kheir* [2004] NSWCCA 461 and *Huges (a Pseudonym) v The Queen* [2013] VSCA 338.

<sup>43</sup> Part 3.6 and Part 3.9 of the Uniform Evidence Acts.

that the defendant has a particular tendency or propensity.<sup>44</sup> This issue is perhaps especially complex where multiple allegations from multiple complainants are heard together, but has reemerged as an issue of contention in relation to evidence of uncharged conduct in respect of a single complaint.<sup>45</sup>

Over and above the difficulties of transposing wording and concepts from a section that was designed to capture a very specific situation in cross-examination, the effect of its reliance on s.104 Evidence Act 1995 is unclear, given that the Law Commission's wording is so widely drawn. Had the wording of s.104 been reproduced precisely in cl.2(1) of the Law Commission's draft Bill, and subsequently in s.98(a) of the 2003 Act (both reproduced below), this would arguably have reduced the need for the type of difficult fact-sensitive decision-making that s.98(a) as enacted requires the criminal courts to undertake. The looseness of the Law Commission's (and thus the s.98(a)) formulation has been recognized by Tapper, who expresses a preference for the Evidence Act 1995's wording:

It is still more puzzling that the Law Commission, having isolated the situation so narrowly, should attach so loose a phrase to categorise it as evidence which "has to do with the alleged facts of the offence". It is especially odd in view of the terminology of s.104 of the Australian Evidence Act 1995, corresponding to the second branch of the exclusion, which the Law Commission explained as needing to be inserted so as to cater for evidence relating to credibility, and for application to the bad character of non-defendants, but which uses the phrase "the events in relation to which the defendant is being prosecuted", which is clearly capable of application here, and is, it is submitted, much clearer and less susceptible to abusive expansion.<sup>46</sup>

Influenced by the 1995 Act, but not reproducing its precise wording, the Law Commission's draft clause 2(1) provided that:

In criminal proceedings evidence of a person's bad character is admissible only with leave of the court, unless the evidence-- (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

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<sup>44</sup> See for example *R v PWD* [2010] NSWCCA 209 and *Hughes v The Queen* [2015] NSWCCA 330. Overall it has become far easier, especially in New South Wales, for evidence of as yet unproven allegations to be admitted to support a tendency case, in part because the New South Wales courts have made it clear that the tendency in question does not have to parallel the conduct with which the defendant has been charged, and because the courts no longer require, under the UEL, striking similarity in the pattern of conduct. However, at the same time, in common law cases such as *Phillips v The Queen* [2006] HCA 4, a counter trend has reinforced the need for 'striking similarity' and has even called into question the *relevance* of multiple allegations in sexual assault trials where consent is the issue. See 'Locating Consent in Similar Fact Cases: Commentary on *Phillips v R*' in Heather Douglas et al. (eds), *Australian Feminist Judgments: Righting and Re-writing Law* (Hart Publishing, 2014)

<sup>45</sup> In *IMM v The Queen* (n 1) the High Court was asked to address whether evidence from a single complainant about another incident said to disclose a tendency could have, by itself or in combination with other evidence, 'significant probative value'. The court split on the question of how the evidence was relevant, whether such evidence could (ever) have significant probative value in the context of establishing a tendency as well as on what was considered to be the central question underlying the appeal—whether in assessing the probative value of the evidence the court should presume it to be credible and/or reliable.

<sup>46</sup> Tapper (n 41) 539

Under the Law Commission's proposed bad character regime, the admissibility of evidence which had to do with the alleged facts of the offence charged and evidence concerning the investigation or prosecution of the offence charged would have been governed by statute but the leave of the court would not have been required in order for such evidence to be admissible. The effect of this would have been that whilst evidence that fell within cl.2(1)(a) or (b) would have amounted to evidence of bad character its admissibility would not have been governed by other provisions of the Law Commission's draft Bill which prescribed the nature of those circumstances in which leave to adduce evidence of the bad character of a defendant or a non-defendant could be given.

In contrast, to the Law Commission's approach, the Government's approach, which was implemented in s.98 of the Criminal Justice Act 2003, was to remove evidence of the types that fell within the ambit of the Law Commission's cl.2(1)(a) or (b) from the definition of bad character. As Baroness Scotland indicated:

The Law Commission preferred to include evidence of the facts of the alleged offence, and evidence of misconduct in its investigation or prosecution, within the meaning and definition of evidence of bad character...The Government considered it more straightforward to say that such evidence simply did not come within the definition. However, the effect is the same: it is admissible without leave.<sup>47</sup>

The Government's preferred approach was implemented via s.98 of the 2003 Act which provides that:

References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which— (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

Thus, at least technically, the effect of the Government's approach, in retaining a category of evidence of misconduct that falls outside the ambit of the statutory code, is not the same as that of the Law Commission's. Tapper has suggested that the Government's approach had 'the draconian effect of doing away with any general need to seek leave to adduce evidence of the bad character of the accused, leading to a result effectively contrary to that intended by the Law Commission'.<sup>48</sup> In practice, it seems that uncertainty as to the ambit of section 98, which is discussed below, has resulted in a position in which parties may serve a bad character notice under Crim PR Part 21 specifying an applicable statutory admissibility gateway in case the evidence in question does not fall within s98(a) whilst also asserting that s98(a) is applicable. The effect of this is that in practice the court may be required to consider whether leave is required in a potential s98(a) case.<sup>49</sup>

Had the Law Commission's proposed statutory code been enacted, evidence that now falls within the ambit of s.98(a) or (b) of the 2003 Act would have been admissible under

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<sup>47</sup> Hansard HL, vol. 654, col. 736, 4 Nov 2003 (Baroness Scotland).

<sup>48</sup> Tapper (n 41) 539

<sup>49</sup> See for example *Lunkulu* [2015] EWCA Crim 1350 in which the prosecution, some weeks before the beginning of the trial, 'served a skeleton argument in which it set out that it intended to argue that the incidents on 31 July 2009 and 30 September 2009 were 'to do with the facts of the offence'... It was expressly stipulated that the bad character notice that has been served in advance was designed to cater for the possibility that the court took the view that this material was insufficiently connected with the facts of the present offence' [86].

cl.2(1)(a) of its draft Bill. In contrast, under the Government's approach as embodied s.98(a) and (b), the admissibility of evidence which has to do with the alleged facts of the offence charged or which concerns the investigation or prosecution of the offence charged is not governed by statute but, rather, is excluded from the statutory code. This is so because whilst s.99(1) of the 2003 Act provides that, 'The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished', s.112(1) provides that "'bad character" is to be read in accordance with section 98'. Thus, since evidence which falls within the ambit of s.98(a) or s.98(b) does not amount to evidence of bad character for the purposes of the bad character provisions of the 2003 Act, the admissibility of such evidence continues to be governed by the common law.<sup>50</sup>

### **Practical Significance of the English Statutory/Common Law Dichotomy**

It is important to consider whether the Government's decision to remove the issue of the admissibility of evidence of misconduct falling within s.98(a) or s.98(b) from the ambit of the statutory code is one which has any practical, as opposed to merely technical, significance.

One practical consequence is that evidence that falls outside the ambit of the statutory code will be admissible at common law provided that it is relevant.<sup>51</sup> As is seen below, this contrasts with the position of evidence that falls within the statutory code, the admissibility of which is governed by tests imposed by provisions of the 2003 Act which impose higher admissibility thresholds than that imposed by the common law test of relevance. So far as the threshold imposed by the common law test of relevance in this context is concerned, The Court of Appeal has suggested that evidence which falls within s.98(b) 'is almost bound to be relevant'.<sup>52</sup> Presumably the same must be true of evidence that falls within the ambit of s.98(a), given that such evidence will only fall within the ambit of that provision in the first place if it 'has to do with the alleged facts of the offence with which the defendant is charged'. Where such evidence is relevant but was tendered by the prosecution, the court possesses the ability to exclude it, in the exercise of its discretion under s.78 of the Police and Criminal Evidence Act 1984, to exclude prosecution evidence the admission of which would have such an adverse effect on the fairness of the trial that it ought not to be admitted.<sup>53</sup>

The admissibility regime which is encountered where s.98(a) or (b) are applicable appears to equate with that which would have existed if the Law Commission's cl.2(1) had been enacted, because the Law Commission had envisaged that evidence that fell within the ambit of cl.2(1)(b) 'might...be excluded on the grounds that it has no relevance or under section 78(1) of PACE on the ground that it is too prejudicial'.<sup>54</sup> The Government's view, expressed by Baroness Scotland, that its approach is more straightforward than that recommended by the Law Commission is, however, disputed because whereas under the Law Commission's approach evidence of misconduct that now falls under s.98(a) would, intuitively, have been classified as evidence of the accused's bad character which was admissible under a statutory bad character exception created by cl.2(1), under the Government's approach as implemented in s.98(a) such evidence will, unintuitively, be classified as evidence of misconduct but will not amount to evidence of bad character.

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<sup>50</sup> See, for example, *R v Apabhai* [2011] EWCA Crim 917 and *R v Manister* [2006] 1 WLR 1885.

<sup>51</sup> See, for example, *R v Mullings* [2011] 2 Cr App R 2 (in relation to s.98(a)), *Apabhai Ibid* (in relation to s.98(b)) and *Manister Ibid* (in relation to those circumstances in which evidence falls outside the ambit of the statutory code because it does not amount to evidence of misconduct (which, in accordance with s.112 (1)) 'means the commission of an offence or other reprehensible behaviour').

<sup>52</sup> See *Apabhai* (n 50) per Elias LJ [31].

<sup>53</sup> For examples of the existence and non-existence of exclusionary discretion in relation to prosecution and defence evidence see, respectively, *Mullings* (n 51); *Apabhai* (n 50).

<sup>54</sup> Law Commission (n 1) para 8.28.

An example of the confusion which the Government's approach can produce in practice is provided by a decision of the Court of Appeal in which it accepted that evidence may be "admissible" in the context of a single count both under s.98(a) and under one or more of the 2003 Act's bad character gateways.<sup>55</sup> Yet, logically, how can evidence which (due to the operation of s.98(a)) does not amount to evidence of bad character within the meaning of the 2003 Act be admissible in relation to a single count under gateways which are only applicable to bad character evidence, and vice versa? Rather, the correct approach must be that the admissibility of evidence of misconduct which falls within the ambit of s.98(a) is governed by the common law whereas if s.98(a) is not applicable admissibility will be governed by one or more of the 2003 Act's bad character gateways.<sup>56</sup> As is demonstrated below, the position may be different in the context of a multi-count indictment, in which the same evidence may fall within the ambit of s.98(a) in relation to one count but under a bad character gateway created s.101(1) of the 2003 Act in relation to another.

Apart from a lack of coherence which has the potential to confuse lawyers, judges, legal academics and law students, there are notable dangers from the perspective of the defence if the admissibility of "bad character" evidence becomes easier to establish because it is admitted via the less rigorous common law pathway to admissibility rather than via a more onerous statutory admissibility test. Thus, Huxley recognised that there is a 'lack of protection for the defendant when the common law engages' and that, '[t]he common law does not depend on an enhanced test of relevance such as that found in s. 101 of the CJA 2003 through use of the words 'important matter in issue' (s. 101(1)(d)) and 'substantial probative value' (s. 101(1)(e))'.<sup>57</sup> Equally, the common law admissibility test does not impose a threshold as high as that which the definition of "important explanatory evidence" in s.102 imposes (or at least, as is seen below, was intended to impose) in the context of background evidence.

As articulated above, the UEL regime focuses on restricting tendency and coincidence *reasoning*, alongside offering a pathway for the admission of rebuttal of certain kinds of character-related assertions by a defendant. The focus on reasoning, as opposed to the evidence itself thus avoids the ambiguities explained herein, engendered by such a complex approach to defining character evidence capable of falling within the 2003 statutory regime. The UEL seems to offer a cleaner and more readily accessible classification structure, that allows the court to focus on the use to which the evidence can be put, rather than what can appear to be increasingly artificial classifications under s 98. However, the UEL approach gives rise to its own difficulties of classification, particularly in terms of a parallel concern to that discussed here in respect of the CJA, that is, that the focus on reasoning has allowed too much evidence to bypass what are considered to be the higher threshold requirements contained within s.97 and s.101 and enter the courtroom via a less stringent pathway.<sup>58</sup> Further, precisely because the UEL maintains the restriction on using the evidence to support tendency reasoning in cases where the evidence has been admitted for another purpose, this necessarily raises the question of what will be an appropriate and effectively framed judicial direction to ensure that restriction is enforced.<sup>59</sup> Successfully confining the evidence to the purpose or use that does not give rise to tendency reasoning places high expectations in

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<sup>55</sup> See, for example, Hallett VP in *R v Okonono* [2014] EWCA Crim 2521 [63].

<sup>56</sup> See Lloyd Jones LJ in *R v Haxihaj* [2016] EWCA Crim 83 [15-19].

<sup>57</sup> Huxley (n 5) 136.

<sup>58</sup> These issues can be particularly pressing in cases of (child) sexual assault, where evidence of uncharged acts have been admitted as 'relationship' or 'background' or as evidence that the defendant has revealed a 'guilty passion' or improper sexual interest in the complainant (see above n 24), but are also evidenced in cases such as *Elomar*, outlined above (n 25). See also discussion below around (n 102).

<sup>59</sup> This is the effect of s.95 that reinforces that the only gateways enabling the fact finder to reason on a tendency or improbability basis are ss. 97, 98 and 101.

relation to the capacity of juries to understand and implement the directions given.<sup>60</sup> However, this reliance on directions, and the expectations that jurors are able to differentiate between permissible and impermissible inferences has come under robust critique in recent years and, as noted above, runs counter to other sections in the UEL that have either abandoned or moderated these expectations in other areas.<sup>61</sup> The recently enacted Jury Directions Act in Victoria has addressed many of these concerns and attempts to place limits on the obligation of the Court to give directions, as well as simplify the nature and content of those directions. The Act applies despite any obligations arising under s.95 of the UEL, and emphasises the need for the defence to request directions, and specifies that the trial judge must explain the permissible use of the evidence (if requested), but is not under an obligation to include in the directions information about impermissible uses of the evidence.<sup>62</sup>

In contrast to the position in Australia, where evidence of bad character is admitted in England and Wales under any of the gateways created by s.101 of the 2003 Act, the Court of Appeal in *R v Campbell*<sup>63</sup> made clear that,

[o]nce the evidence has been admitted through a gateway it is open to the jury to attach significance to it in any respect in which it is relevant. To direct them only to have regard to it for some purposes and to disregard its relevance in other respects would be to revert to the unsatisfactory practices that prevailed under the old law.

The Court of Appeal made clear, however, that the judge should tell the jury ‘in simple language’ why the evidence may be relevant and, ideally, should warn them not to place too much weight on the evidence and not to conclude that the accused is guilty just because he or she has bad character.<sup>64</sup> Moreover, the Court of Appeal in *R v Lowe*<sup>65</sup> made clear that where evidence of bad character does not take the form of previous convictions it will also be necessary for the judge to direct the jury to the effect that before it relies on the evidence it must first be sure that the facts of the incidents that are relied on as bad character evidence have been proved to the requisite standard of proof.<sup>66</sup>

There has been no definitive Court of Appeal judgment concerning the nature of the directions that should be given in relation to evidence which falls within the ambit of s.98(a)

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<sup>60</sup> This was acknowledged by the the ALRC in its 2005 review, see ALRC Rep. 102 (n 2) para 3.23, but was only addressed peripherally as an issue that needed to be considered. Similarly across a range of cases, judges have asserted that the law must proceed on the assumption that jurors are able to differentiate between permissible and impermissible use, and that they are able to effectively operationalize the directions given to them. At the same time, many have expressed considerable doubt as to the capacity of jurors to manage the increasing complexity of directions across a range of domains, and recent reforms to jury directions in Victoria, were based in part on a sobering review of empirical evidence of juror comprehension. See the *Simplification of Jury Directions Report* (Melbourne, Supreme Court of Victoria, 2012). See Cheryl Thomas *Are Juries Fair?* (Ministry of Justice Research Series 01/10, 2010) for similar observations made regarding juries in England and Wales. As a counterpoint, however, see the more optimistic analysis of the capacity of lay decision makers to reason in line with directions given, in research conducted for the Royal Commission into Institutional Responses to Child Sexual Assault. See Jane Goodman-Delahunty, Anne Cossins and Natalie Martschuk *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study*, (Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse, 2016).

<sup>61</sup> Most notably in respect of evidence of previous representations admitted for a ‘non-hearsay’ purpose. The UEL introduced an exception to the hearsay rule that applies once evidence has been admitted for that other purpose, and (with the exception of admissions made by the defendant) even extends to second hand hearsay: see s. 60 of the UEL.

<sup>62</sup> Jury Directions Act 2015 (Vic) s.27.

<sup>63</sup> *R v Campbell* [2007] 2 Cr App R 28 per Lord Phillips LCJ [25].

<sup>64</sup> See *Ibid* [38] and [43].

<sup>65</sup> See *R v Lowe* [2007] EWCA Crim 3047, [21]-[22]. See also *Tirnaveanu* [2007] 2 Cr App R 23 and *Highton* [2005] 1 Cr App R 7

<sup>66</sup> See *R v Lowe* [2007] EWCA Crim 3047 [21]-[22].

or (b) and which is admitted at common law. A limited degree of guidance may be obtained by examining the jurisprudence of the Court of Appeal relating to s.98(a). These authorities appear to suggest that in general the Court of Appeal does not expect a bad character direction to be given in circumstances in which s.98(a) is applicable.

For example, In one case in which the Court of Appeal held that s.98(a) was applicable, the appellant's complaint was that the evidence was 'bad character evidence...when a particular or special direction may be called for' but the Court of Appeal simply held that 'this was not such evidence'.<sup>67</sup> In another such case in which it was asserted that a bad character direction should have been given, their Lordships held that 'that point is simply answered because this evidence as clearly described by the judge had to do with the facts of the offence and was not therefore extraneous, reprehensible or criminal conduct requiring a bad character application'.<sup>68</sup> In a third s.98(a) case the Court of Appeal held that the judge, who had directed the jury concerning the relevance of the evidence, had not been required to give a "*Lowe* direction".<sup>69</sup>

In the latter case, the Court of Appeal accepted that there may be circumstances in which the jury 'should be told to be careful not to make unwarranted assumptions about a defendant because of his or her reprehensible conduct admitted pursuant to section 98 of the CJA 2003'.<sup>70</sup> Their Lordships also suggested that had the judge directed the jury that it could also have used the evidence as though it had been admitted as evidence of bad character then a tailored "*Lowe* direction" should have been given as part of a 'two-pronged approach'.<sup>71</sup> Their Lordships referred in this regard to an earlier decision of the Court of Appeal<sup>72</sup> in which a two-pronged approach had been adopted by the judge, who had directed the jury to the effect that it was for them to decide whether the evidence amounted to evidence of the facts of the alleged offence and that if they decided that it did not so amount then the evidence was evidence of bad character (the judge providing additional guidance concerning how the jury was entitled to use such evidence if this was the case).

Contrary to the approach of the judge in this case, it is suggested that the decision whether evidence of misconduct falls within the ambit of the statutory or the common law route to admissibility is one that the judge is required to make and not one that should be delegated to the jury. Rather, the better view appears to be that, it is not enough for a judge to conclude that such evidence could either be admitted at common law or under the provisions of the 2003 Act but that 'the judge should [decide] which route it [is] appropriate to go down'.<sup>73</sup> Huxley suggested that '[i]t is when the evidence in question is capable of being admitted either under the statutory regime or at common law or both that the jury direction is vital. The step preceding admissibility is, however, for the judge to be clear as to the purpose of admitting the evidence'.<sup>74</sup>

It has already been suggested above that admissibility under both s.98(a) and a statutory bad character gateway should not be a possibility where evidence is tendered in relation to a single count in an indictment but may be a possibility where there are several counts in an indictment and evidence of the accused's misconduct might fall within the ambit of s.98(a) in relation to one count but might not do so in relation to another. An example of such circumstances is provided by a case in which evidence of bad character was admitted on

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<sup>67</sup> *R v Singh* [2010] EWCA Crim 591 per Laws LJ, [14].

<sup>68</sup> *R v Hang* [2009] EWCA Crim 931 per Scott Baker LJ at [34].

<sup>69</sup> *R v Stewart* [2016] EWCA Crim 447 [45].

<sup>70</sup> *Ibid* [46].

<sup>71</sup> *Ibid* [46].

<sup>72</sup> *Lunkulu* (n 49).

<sup>73</sup> *R v Fox* [2009] EWCA Crim 653 per Scott Baker LJ, [23].

<sup>74</sup> Huxley (n 5) 137.



the basis that it fell within s.98(a) because it had to do with the alleged facts of counts 1 to 9 in the indictment. When the judge subsequently ruled that the accused had no case to answer in relation to those counts the effect was, as the Court of Appeal subsequently recognised, that ‘the evidence became bad character evidence because it no longer had to deal with the alleged facts of offences with which the Defendant was charged’.<sup>75</sup> Unfortunately, nobody at the trial had appreciated this and, consequently, the judge did not give the jury a “conventional bad character direction”.

Authority for the proposition that the jury may require ‘considerable guidance’ in at least some cases in which s.98(a) is applicable is provided by another decision of the Court of Appeal in which the prosecution asserted that evidence that the accused had been aware of her co-accused’s propensity to sexually abuse children and had not taken steps to prevent this provided evidence of her propensity to assist her co-accused (her partner) to sexually abuse his alleged victim. The Court of Appeal was uncertain whether s.98(a) was applicable on these facts but held that whether or not it was applicable the judge should have reminded the jury of the evidence, told them that they had to be sure that the accused had known that her co-accused had been abusing children and had not taken steps to prevent it and provided them with guidance concerning how they could use this finding in reaching a verdict against the accused.<sup>76</sup>

This case law on judicial directions given in circumstances in which evidence of misconduct falls within the ambit of s.98(a) does not provide clear and comprehensive advice as to the nature of the approach that the court should adopt in directing the jury in relation to such evidence. What it does demonstrate, however, is that a practical consequence of the statutory/common law dichotomy created by s.98(a) and (b) of the 2003 Act is that the nature of directions given to the jury may vary depending upon which route to admissibility is applicable. The Crown Court Compendium (2016), which replaces The Bench Book, offers little guidance beyond what is detailed herein, simply stating that it would ‘be prudent to have in mind the statutory safeguards attaching to the admission of evidence under ss.100 and 101 and to consider appropriate directions to the jury on the use to which it should put and, if appropriate, the weight they should attach to that evidence’ and where the gateway in s.101(1)(c) is an issue – the potential for overlap with s.98(a) ‘should be borne in mind’.<sup>77</sup>

### **The Statutory/Common Law Dichotomy: the Location of the Borderline**

So far as the relationship between the Law Commission’s proposals, the provisions of the 2003 Act and, indeed, the internal consistency of the 2003 Act are concerned, an issue arises out of the relationship between s.98(a) and the gateway to admissibility of evidence of the accused’s bad character created by s.101(1)(c) of the 2003 Act. Section 101(1)(c) creates a gateway under which evidence of the accused’s bad character is admissible if ‘it is important explanatory evidence’. Section 102 provides that ‘evidence is important explanatory evidence if— (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial’. The Law Commission believed that the reason for admitting such ‘background evidence’ was that such evidence, ‘though not forming part of the alleged facts, is nonetheless linked to those central facts by virtue of its force in making them comprehensible’.<sup>78</sup> When stating this conclusion it referred<sup>79</sup> to the view of the Australian

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<sup>75</sup> *R v B* [2010] EWCA Crim 1251 per Maurice Kay LJ, [14].

<sup>76</sup> *R v C* [2010] EWCA Crim 2402 per Wyn Willoiams J, [85].

<sup>77</sup> Maddison, Ormerod, Tonking, Wait, *Crown Court Compendium. Part One: Jury and Trial Management and Summing up* (Judicial College: May 2016) 12-1 and 12-8.

<sup>78</sup> Law Commission (n 1) para 10.3.

Law Reform Commission that ‘Information which aids in the understanding of other relevant evidence is...relevant’.<sup>80</sup>

At common law, background evidence was admissible if it was relevant, though its admissibility was subject to the exercise of discretion to exclude evidence the probative value of which was exceeded by its prejudicial effect.<sup>81</sup> The Law Commission believed, however, that, at common law, ‘evidence [was] admitted as “background” evidence without any assessment of its potentially prejudicial effect’.<sup>82</sup> Thus the Law Commission recommended that background evidence, including evidence of motive, ‘should...have to pass a test of admissibility’.<sup>83</sup> The test which the Law Commission recommended essentially equates to that contained in the 2003 Act, but with one significant omission. The omission is that unlike the provisions of the 2003 Act, the Law Commission’s draft Bill imposed an additional condition in the form of an inclusionary discretion relating to the admissibility of important explanatory evidence which would have required the court to be satisfied:

(a) that, in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or (b) that the value of the evidence for understanding the case as a whole is such that, taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible’.<sup>84</sup>

It is likely that, had this provision been reproduced in the 2003 Act, the admissibility of bad character evidence where it has some purported explanatory value would have been more difficult to establish.<sup>85</sup> The removal of this inclusionary discretion by the Government is telling in that, according to Tapper, ‘there is no equivalent to the inclusionary discretion... Indeed no discretionary control appears in the Act in relation to this provision’... So here again in its terms the Act achieves the exact opposite of the Law Commission’s bill’.<sup>86</sup> We would argue, however, that this is perhaps not quite the opposite, in that (unlike the previous common law position), the Government did intend the s.101(1)(c) test to impose a high admissibility threshold. Indeed, the Government’s view of the provision that now exists as s.101(1)(c) was that, [t]he test for explanatory evidence set out in the Bill is a high one. Once it has been met, we consider it is important that the court should have this information to perform its task effectively. We do not therefore provide for the exclusionary test to apply.<sup>87</sup> Moreover, where the admissibility gateway created by s.101(1)(c) is relied upon by the prosecution it seems that admissibility may be subject to potential exclusion in the exercise of the court’s discretion under s.78 of the 1984 Act.

Spencer queried whether the s.78 discretion was available in the context of s.101(1)(c) (two other gateways, created by s.101(1)(d) and (g), are specifically subject to an equivalent discretion conferred by s.101(3), which does not apply to s.101(1)(c)), though he ultimately concluded that in the absence of express statutory exclusion of the general power, the

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<sup>79</sup> *Ibid* p.134, footnote 8.

<sup>80</sup> Evidence (Interim) [1985] ALRC 26 [59].

<sup>81</sup> See *Fulcher* (n 17), *Nicholls* (n 17) and *Clarke* (n 17).

<sup>82</sup> Law Commission (n 1) para 10.7.

<sup>83</sup> *Ibid* para 10.3.

<sup>84</sup> See cl.7(4) of the Law Commission’s draft Bill (n 1).

<sup>85</sup> Thus, JR Spencer suggests that such restrictions would have reduced the amount of explanatory evidence that was admissible, and it is therefore not surprising that such restrictions did not make it into the Act – *Evidence of Bad Character* (Second Edition, Hart Publishing, 2009) 64, para 4.8.

<sup>86</sup> Tapper (n 41) 544

<sup>87</sup> Hansard HL, vol. 740, cols. 739-740, 4 Nov 2003 (Baroness Scotland).

preferable position is that s78 should be applicable<sup>88</sup> Similarly, the Court of Appeal has suggested that the exclusionary discretion conferred by s.78 of the 1984 Act is potentially applicable in the context of prosecution applications to adduce evidence of bad character under s.101(1)(c), though their Lordships accepted that this view is ‘possibly controversial’.<sup>89</sup>

Whether or not s.78 is applicable in the context of prosecution applications under s.101(1)(c) the position clearly differs from that which the Law Commission had intended to create. This is so because the Law Commission’s third condition would have applied to prosecution and defence applications to adduce important explanatory evidence whereas, as was indicated above, s.78 does not apply where an application to adduce bad character evidence against a co-accused is made by a defendant.

As regards the relationship between s.101(1)(c) and s.98(a), the Law Commission regarded evidence that satisfied the first of its four “indicators”, reproduced above, as evidence that had to do with the alleged facts of the offence charged (and thus fell within cl.2(1)(a)) but regarded evidence that satisfied any of indicators 2-4 as evidence in relation to which leave was required under its ‘Evidence with explanatory value’ exception, in cl.7.<sup>90</sup> Thus, in line with indicator 4, the Law Commission intended the admissibility of evidence of motive to be governed by cl.7 rather than by cl.2(1)(a). The Government recognised that, the Law Commission had sought to draw a clear distinction between evidence that had to do with the alleged facts of the offence charged and important explanatory evidence and indicated that it intended to reflect this division in its statutory code.<sup>91</sup>

Unfortunately, the case law that has explored the relationship between s.98(a) and s.101(1)(c) has not resulted in the degree of coherence that the Law Commission and the Government had anticipated. This is so for three reasons. First, uncertainty with regard to the temporal ambit of s.98(a). Secondly, the classification by the Court of Appeal of evidence of motive as falling within the ambit of s.98(a), contrary to the Law Commission’s intention that such evidence be categorised as explanatory evidence. Thirdly, and perhaps a significant cause of the willingness of the Court of Appeal to adopt a broad and/or uncertain interpretation of s.98(a) that encompasses evidence of motive, the view accepted by the Court of Appeal in some of its influential decisions that whether evidence is admitted under s.98(a) or under s.101(1)(c) is as a matter which is of little practical significance. The danger is that once it is assumed (too readily it is suggested) that the practical significance of admitting evidence of misconduct does not differ regardless of which route to admissibility is followed, it may be also be assumed too readily that both routes to admissibility are available upon a given set of facts rather than recognising both that the statutory route is subject to a higher admissibility threshold than the common law route and that the ambit of s.98(a) (the pathway to the common law route) is (or is intended to be) limited.

In relation to the temporal ambit of s.98(a), the Court of Appeal has held that ‘the exclusion must be related to evidence where there is some nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seek to adduce’.<sup>92</sup> It has indicated that this nexus ‘is not one of probative value [but] is essentially factual and extends to evidence of matters “reasonably contemporaneous with and closely associated with the alleged facts of the offence”’.<sup>93</sup> It has been suggested that central to this reasoning is ‘a distinction between evidence which is relevant to the alleged offence

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<sup>88</sup> Spencer (n 85) 21

<sup>89</sup> *R v Davis* [2009] 2 Cr App R 17 per Rix LJ, [36].

<sup>90</sup> Law Commission (n 1) paras 10.6 and 10.8.

<sup>91</sup> Hansard HL, vol. 652, col. 745, 15 Sept 2003 (Baroness Scotland).

<sup>92</sup> *Tirnaveanu* (n 65) per Thomas LJ, [23].

<sup>93</sup> *R v Rostami* [2013] EWCA Crim 1363 per Moore-Bick LJ, [14] quoting from *McNeill* [2007] EWCA Crim 2917

and evidence which is to do with the alleged offence' and that 'evidence which is to do with the offence is something narrower than evidence merely relevant to it'.<sup>94</sup> Indeed, the Court of Appeal has recognised that,

'one of the purposes of the bad character provisions in the Criminal Justice Act 2003 is to bring within their scope evidence of extraneous misconduct or disposition towards misconduct so as to subject it to the rigour of analysis for relevance and purpose under the s.101 gateways...the wider the embrace of evidence which "has to do" with the facts of the alleged offence, the less effective the statutory purpose becomes'.<sup>95</sup>

It is perhaps unrealistic to suggest that a provision that requires the courts to grapple with such considerations of temporal nexus, in attempting to resolve the question of fact and degree<sup>96</sup> that s.98(a) poses, was ever likely to result in the creation of a clear distinction between evidence which falls within and outside the 2003 Act's bad character code. As was indicated above, it is arguable that had the precise wording used in s.104 of the 1995 Act been adopted (the events in relation to which the defendant is being prosecuted) this problem would have been avoided. Whether, had the s.104 wording had been adopted, its adoption would have resulted in the courts classifying evidence of motive as falling within the ambit of the 2003 Act's bad character gateways, rather than treating it as falling within the ambit of s98(a), must remain an open question.

The experience in Australia would indicate that while s.104 has not posed any significant interpretive challenges within its very specific ambit of regulating cross-examination of the accused,<sup>97</sup> problems of classification under the UEL do raise similar concerns in relation to the admission of potentially prejudicial evidence via a less stringent pathway. In particular, the fact that so much evidence about the accused can bypass regulation under Part 3.6, because, despite disclosing some type of pattern of conduct, it is not being adduced for a tendency *purpose* does give rise to the same concerns that too much leeway is being granted to prosecutorial (and judicial) choices in terms of whether tendency reasoning will be engaged (or not). Under the UEL, difficult questions arise in the context of drawing a distinction between evidence that is caught by s.97 and s101 (ie. where the Crown is seeking to rely on tendency reasoning, or the defendant objects on the same basis) and evidence that escapes those provisions because it is possible to characterise the effect of the evidence as having another purpose. While they are not discussed in the same terms, arguably attempts to place evidence such as that adduced in *Elomar*<sup>98</sup> (under the rubric of 'state of mind') outside of the scope of s.97 demonstrate the difficulty in drawing clear lines of distinction between evidence adduced for a tendency purpose and evidence adduced for a different purpose. Indeed as the court acknowledges in *Elomar*, the evidence *could* have been regarded as tendency evidence, but the court made a choice to regard it as something different.<sup>99</sup>

When considering what may be differing treatment of background or relationship evidence, evidence that under the CJA might be characterised as 'important explanatory evidence' but under the UEL would be dealt with outside of the rules relating to tendency evidence, there may be good policy reasons to prefer the approach under the CJA. That is to say that there may be good reasons to deal with such evidence under the rubric of 'bad

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<sup>94</sup> *R v Singh* (n 67) per Laws LJ, [12].

<sup>95</sup> *R v Mullings* (n 51) per Pitchford LJ, [32] and see later discussions of *McNeill*.

<sup>96</sup> In *R v W* [2010] EWCA Crim 203 the Court of Appeal accepted that whether evidence 'has to do with the alleged facts of the offence' is a question of fact and degree (see Pill LJ, [28-29]).

<sup>97</sup> See above at n 42.

<sup>98</sup> *Elomar* (n 25).

<sup>99</sup> *Ibid.*

character’ or ‘tendency’ evidence, as opposed to maintaining the distinctions relied on in the Australian context. As pointed out by Priest JA in *Murdoch (A Pseudonym)*, the distinctions drawn between ‘context’ or ‘relationship’ evidence and evidence disclosing tendency, particularly in cases of child sexual abuse and/or assault, are neither satisfactory nor coherent, and would be better dealt with if it were acknowledged that such evidence was, in reality, being used for a tendency purpose.<sup>100</sup> It is worth noting that the concerns about evidence being too readily admitted as relevant to (for example) relationship led to the 2005 review of the UEL considering whether the more stringent evaluation of probative value and prejudicial effect contained in the UEL’s s.101 should apply to all evidence that disclosed the defendant’s misconduct regardless of relevance.<sup>101</sup> This question was not pursued in the final revisions made in 2009, but subsequent case law indicates that the categories of evidence classified as non-tendency continue to expand,<sup>102</sup> while at the same time, in New South Wales at least, the application of s.97 and s101 has *also* become less stringent.<sup>103</sup>

Cogent evidence that the enactment of s.98(a) has not resulted in the creation of the clear distinction that the Government had anticipated is provided by the judicial treatment of evidence of motive as falling within the ambit of s.98(a) in a line of authority in which the Court of Appeal has distinguished the key temporal nexus cases and has, thus, rejected an interpretation of s.98(a) that requires the existence of a close temporal nexus as an ‘essential prerequisite for a conclusion that bad character evidence has to do with the facts of the alleged offence’.<sup>104</sup> The basis of this line of cases is the Court of Appeal’s view that, ‘[s]ection 98 includes no express or obviously implicit temporal qualification’, that ‘[t]he words of the statute are straightforward, and clearly apply to evidence of incidents alleged to have created the motive for the index offence’ and that, ‘where the evidence is reasonably relied upon for motive, it would be irrational to introduce a temporal requirement’.<sup>105</sup> Thus, current practice based on the developing jurisprudence of the Court of Appeal in these motive cases is that ‘section 98(a) includes no necessary temporal qualification, and it applies to evidence of incidents whenever they occurred so long as they are to do with the alleged facts of the offence with which the defendant is charged’.<sup>106</sup> Spencer describes *Sule*, the leading

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<sup>100</sup> ‘In short, the law in the general area of what might be classed propensity evidence, is a farrago from which it is impossible to derive much harmony.’: *Murdoch (A Pseudonym) v The Queen* [2013] VSCA 272. While there was agreement as to the outcome of the case, Priest JA’s highly critical analysis of the regime as a whole is not adopted by the other members of the court, but has been implicitly endorsed by a number of commentators. See also Hamer (n 24).

<sup>101</sup> This suggestion replicates in many respects a notable variation as between the 1985 draft Bill and the provisions ultimately enacted was the inclusion in the draft Bill of an additional protection where the conduct was similar to the offences charged, that it was suggested would have applied regardless of the prosecutorial intention as to the use of the evidence in the trial. See above (n 10).

<sup>102</sup> Odgers identifies eleven separate categories enabling evidence to bypass the restrictions imposed by ss.97.98 and 101, noting that categories such as ‘relationship’, ‘evidence which corroborates the testimony of a complainant’ and ‘state of mind’ are particularly ill defined. See Stephen Odgers *Uniform Evidence Law* (n 10), para 101.150.

<sup>103</sup> This trend has been noted by commentators and judges as apparent more generally across jurisdictions, see for example discussion in Jill Hunter et. al, *The Trial: Principles, Process and Evidence* (Sydney: Federation Press, 2015), p.427ff, reflecting on the position in Australia and on Nicola Lacey’s analysis of the Criminal Justice Act 2003, but in the Australian context this trend is particularly associated with the New South Wales jurisprudence, and is one of the points of difference that have arisen as between NSW and Victoria. If and when these differences fall to be settled by the High Court, recent cases such as *IMM v The Queen* (n 1) would indicate that the NSW position is likely to prevail.

<sup>104</sup> *R v Hussain* [2013] EWCA Crim 2053 per Pitchford LJ, [20].

<sup>105</sup> *R v Sule* [2013] 1 Cr App R 3 per Stanley Burnton LJ, [11-12]. See also *Lunkulu* (n 49)

<sup>106</sup> *Lunkulu* (n 49) per Fulford LJ, [99].

case in this area, as a borderline case, in that it sits at the intersection between various of the gateways/exceptions to the definition.<sup>107</sup>

A common feature between the earlier temporal nexus cases and the subsequent motive cases is that in the leading temporal nexus case, the Court of Appeal agreed with Spencer's view that '[i]n practice nothing of any legal significance depends on which of these two routes it is by which the evidence comes in'<sup>108</sup> and in the leading motive case the Court of Appeal reproduced and agreed with this proposition.<sup>109</sup> There are two major problems inherent in the assumption that the dichotomy between statutory and common law routes is a matter that is of little or no practical significance. First, as was seen above, the approach of the courts does seem to differ depending upon the route to admissibility in that bad character directions do not appear to be required when evidence is admitted via the common law route.

Secondly, as the Court of Appeal recognised in *McNeill*<sup>110</sup> (which was distinguished in *Sule*), if access to the common law route via s.98(a) is provided too generously then this clearly does have the potential to circumvent the more rigorous admissibility criteria imposed by some of the statutory gateways, such as s.101(1)(c). As the Court of Appeal put it in *McNeill*,

'the ambit of s.98(a) should be construed 'in the overall context of the bad character provisions of the 2003 Act' meaning that the breadth of its wording is 'clearly limited by the context for instance of section 101(1)(c)'s reference to important explanatory evidence, and gateway (d)'s more general reference to important matter in issue, which taken together with section 103 relates to propensity and previous convictions'.<sup>111</sup>

For example, section 101(1)(e), which creates a bad character gateway concerning defendant bad character evidence which is only available to a co-defendant, imposes an enhanced relevance requirement under which evidence of the accused's bad character is only admissible if it has substantial probative value in relation to an important matter in issue between the defendant and the co-defendant. The Court of Appeal has held 'that the term "substantial probative value" must mean that the evidence has an enhanced capability of proving or disproving a matter in issue' and that this requires 'evidence which is more than merely probative/relevant'.<sup>112</sup> In contrast, as was seen above, when s.98(a) is applicable to defence evidence, admissibility at common law is only subject to a simple test of relevance. Moreover, s.104 contains other supplementary provisions relating to s.101(1)(e) which will not be applicable under the common law admissibility route.<sup>113</sup>

These tests are crucial in enabling the courts to exclude evidence where it 'generates more heat than light' and where s78 PACE 1984 as a general exclusionary power is unavailable.<sup>114</sup> Yet, when considering the relationship between s.98(b) and s.101(1)(e), the Court of Appeal suggested that there was little practical difference between evidence tendered by a co-defendant being classified as falling within the ambit of s.98(b) or being classified as evidence of bad character and potentially admissible under s.101(1)(e) because:

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<sup>107</sup> JR Spencer, 'Evidence of Bad Character: Where We Are Today. Part I' (2014) Archbold Review 5, 5.

<sup>108</sup> *R v Tirnaveanu* (n 65) per Thomas LJ, [24].

<sup>109</sup> See *R v Sule* (n 105) per Stanley Burnton LJ, [11].

<sup>110</sup> *McNeill* (n 93)

<sup>111</sup> *Ibid* per Rix LJ, [14].

<sup>112</sup> *R v Phillips* [2012] 1 Cr App R 25 per Pitchford LJ, [39], [40].

<sup>113</sup> S.104 provides as follows. '(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant's defence. (2) Only evidence (a) which is to be (or has been) adduced by the co-defendant, or (b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible under section 101(1)(e).'

<sup>114</sup> JR Spencer, 'Evidence of Bad Character: Where We Are Today. Part II' (2014) Archbold Review 6, 7

if the bad character evidence would be relevant and admissible if it fell under section 98(b)- and it is almost bound to be relevant if it falls within that provision - then it is highly likely to be admissible under gateway (e) if it is properly characterised as bad character evidence falling outside section 98(b).<sup>115</sup>

The Court of Appeal reached this conclusion in a case in which, with reference to the s.101(1)(e) “substantial probative value” test that ‘the word substantial must mean that the evidence concerned has something more than trivial probative value’.<sup>116</sup> The Court of Appeal has subsequently held, however, that:

[t]he term “more than trivial probative value” is, in our view, capable of being misleading” and asserted that “if by the term evidence of “trivial” probative value is meant evidence which is barely probative, we think the term “substantial” may be deprived of its intended statutory meaning as requiring evidence which is more than merely probative/relevant.<sup>117</sup>

Once it is accepted that s.101(1)(e) imposes an admissibility threshold that is significantly higher than the common law test of relevance, the proposition that relevant evidence that falls within the ambit of s.98(b) is highly likely to fall within the ambit of s.101(1)(e) becomes somewhat less convincing. The same is true of s.101(1)(c), which, again, does not impose a mere test of relevance but, rather, imposes the “high threshold” important explanatory evidence test to which the Government referred. Admissibility for the prosecution under s.101(1)(c) is subject both to this high threshold test and, as was seen above, arguably to potential exclusion under s.78 of the 1984 Act (unless the evidence is tendered by a co-defendant).

Whilst *McNeill* was distinguished in *Sule*, the leading motive case, it is submitted that the approach in *McNeill* is to be preferred. The alternative, as Fitzpatrick recognises, is that there is a risk of the prosecution using the exceptions to the definition of bad character tactically, and ‘[t]he extent to which this creates a risk that prejudicial evidence might be admitted without sufficiently robust consideration remains a proper question.’<sup>118</sup> Some commentators would argue that the courts view s.98(a) as a provision they can interpret/extend ‘almost at will’,<sup>119</sup> and that ‘The meaning of the words used in s.98(a) are so vague that the effect of the provision is to confer a broad discretion on trial judges to determine whether evidence of bad character ought to be subject to the admissibility conditions and safeguards that are set out in the statutory scheme, or the principles that apply to the admissibility of evidence generally’.<sup>120</sup> In the Australian context, similar risks could be said to arise in so far as the proliferation of cases when the courts have circumscribed the application of s.97 (and s.101), instead allowing evidence to be admitted as context, or relationship, or state of mind, or motive. Consistent with Munday’s concern, it can be difficult to draw clear principles from the cases, and the availability of these alternative

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<sup>115</sup> *R v Apabhai* (n 50) per Elias LJ, [31].

<sup>116</sup> *Ibid* per Elias LJ, [42].

<sup>117</sup> *Phillips* (n 112) per Pitchford LJ, [39], [40].

<sup>118</sup> Ben Fitzpatrick ‘Criminal Justice Act 2003: Bad Character’, (2008) 72(2) *Journal of Criminal Law* 105, 108

<sup>119</sup> Roderick Munday ‘Misconduct that “[h]as to Do with the Alleged Facts of the Offence with which the Defendant is Charged” ... More or Less’ (2008) 72 *Journal of Criminal Law* 214, 234.

<sup>120</sup> Andrew Roberts, ‘R. v Sule (Sahid): bad character evidence - adducing previous incidents as motive for index offence Court of Appeal (Criminal Division): Stanley Burnton L.J., Thirlwall J. D.B.E. and the Recorder of Preston: May 23, 2012; [2012] EWCA Crim 1130’ [2013] *Criminal Law Review* 504, 506.

pathways offer prosecutors tactical advantages, and courts a high degree of flexibility, in categorising evidence.<sup>121</sup> However, perhaps in contrast to the position under the CJA, the difference in terms of the stringency of the tests imposed via the different pathways may become less significant if the trend, especially apparent in New South Wales, that has made it easier for evidence to pass the test of ‘significant probative value’ in s.97, is maintained.

## Conclusion

Post-2003, the framework regulating the admissibility of bad character evidence in England and Wales can now be located within one statute, which is an improvement on the previous position if one accepts that the scattering of the relevant rules across common law and statute was problematic. The law is arguably more cohesive in this respect – but it remains a difficult and complex area of law. One problem, which forms the focus of the present article, is that s.98(a) and (b) of the 2003 Act exclude certain evidence of misconduct from the definition of bad character and thus from the statutory framework. It can at times be difficult to say when evidence will be brought within the scope of the 2003 Act’s bad character provisions or when it will fall within the ambit of s.98(a) and, thus, be subject to residual common law principles, brought back into play to address the admissibility black hole which s.98(a) creates.

There is potential for uncertainty when the court is required to determine which route to admissibility is applicable and judicial practice in this area does not totally reflect the intent of the Law Commission/legislature. Moreover, the drawing of this distinction does have practical consequences, both in that the 2003 Act’s provisions impose higher admissibility thresholds than does the common law test of relevance and in that the nature of judicial directions to the jury appears to vary depending upon which admissibility route is applicable.

The UEL has not engaged in such attempts to categorise evidence as bad character *per se*, but has instead focused upon the regulation of reasoning processes. This has meant that a clearer hierarchical approach has emerged, and the regime does not experience the same difficulties in terms of reconciling overlapping statutory provisions. However, parallel concerns have emerged regarding the classification of evidence as Tendency/Coincidence (which is caught by the UEL regime, and subjected, at least in theory, to a more rigorous admissibility standard) or relationship/background/explanatory/state of mind evidence which is capable of showing tendency, but it not subject to the the higher admissibility threshold in Part 3.6 of the UEL. This approach has necessarily created a greater reliance upon judicial directions to enforce the demarcations between permissible and impermissible use required under s.95, and this reliance runs counter to much (though not all) of the empirical research on juror decision making.

Ultimately, it would seem that this is a difficult area of law to regulate with any degree of coherence, but there are lessons to be learned from *both* jurisdictions. Taken together it is clear that any reliance upon judicial directions to regulate use of evidence, or delineate the relevance of it at least, is insufficient alone to prevent juror misuse, or prevent slippage between permissible and impermissible reasoning, *if* that remains a concern, but chiefly to stop prejudicial evidence being admitted without having established sufficiently rigorous admissibility standards. This is a problem that emerges in both jurisdictions and despite the difference in the approach and structure of the legislative reform, we see a

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<sup>121</sup> See above (n 102)



convergence in terms of the issues that continue to arise at the point of definition and delineation of the scope of the different regimes.