IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D12 of 2015

BETWEEN:

Redacted for Publication

IMM
Appellant

AND

THE QUEEN
Respondent

10

APPELLANT'S SUBMISSIONS

PART I. CERTIFICATION

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

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PART II. A CONCISE STATEMENT OF ISSUES

2.1 Should a court determining the "probative value" of evidence for the purposes of s 97(1)(b) and s 137 of the uniform evidence law assume that the evidence will be accepted by the tribunal of fact?

PART III. CERTIFICATION WITH RESPECT TO SECTION 78B

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

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PART IV. REPORTS

4.1 The judgment of the primary judge with respect to the admission of complaint evidence has the following internet citation: *The Queen v IMM (No 2)* [2013] NTSC 44.

4.2 The judgment of the primary judge with respect to the admission of tendency evidence has the following internet citation: *The Queen v IMM (No 3)* [2013] NTSC 45.

Filed on behalf of the Appellant
Dated: 13 January 2016
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4.3 The judgment of the Northern Territory Court of Criminal Appeal has the following internet citation: *IMM v The Queen* [2014] NTCCA 20.

PART V: A NARRATIVE STATEMENT OF THE RELEVANT FACTS

5.1 The appellant was charged with the following four offences allegedly committed on his step grandchild ("the complainant"):

10 1. on or about 12.6.2002, indecent dealing with child under 12 (touching the child's vagina while the child was in the bath, when the child was aged about 4);

2. between 1.1.2004 and 13.6.2004, indecent dealing with child under 12 (rubbed his penis on outside of her vagina, when the child was aged about 5);

3. between 1.12.2004 and 31.1.2005, sexual intercourse with a child under 16 (cunnilingus, when the child was aged about 6);

4. on 2.11.2009, indecent dealing with a child under 16 (rubbed penis on outside of
20 her vagina, when the child was aged about 11).

After a trial in the Supreme Court of the Northern Territory, the appellant was found not guilty of count 1 and guilty of the other counts.

5.2 The complainant made a complaint to family members in August 2011 and the police were informed. The police conducted interviews with the complainant on 31.8.2011, 3.9.2011 and 27.1.2012 and the first two interviews were admitted as part of her evidence at the trial.

30 5.3 The complainant alleged that the charged acts occurred during a continuing course of sexual abuse (during occasions when the appellant had access to the complainant) from when she was about 4 years old (2002) until the end of the relationship between the appellant and the complainant's grandmother, when the complainant was 12 years old (2010-2011). Evidence from the complainant of this history of sexual abuse was admitted by the trial judge as "context evidence" and the jury were directed on the limited way that evidence could be used.

5.4 The allegations of the complainant were uncorroborated. The trial judge directed the jury that "there was no supportive evidence of the commission" of the alleged offences (SU
40 6.2).

5.5 The appellant testified, denying the allegations against him (T 185-6).

5.6 Over objection from the defence, the prosecution was permitted to adduce "tendency evidence" and "complaint evidence".

5.7 The "tendency evidence" was evidence from the complainant that, some time in late 2010 or early 2011, while the appellant was being given a massage by the complainant, the appellant ran his hand up her leg. In a police interview conducted on 31.8.2011, the complainant stated that she and another girl were giving the appellant a back massage and "he ran his hand up my leg" (69.9 on 31.8.2011). The complainant said the other girl was unaware of this. It was put to the complainant in cross-examination on behalf of the appellant that "you weren't touched at all" but she replied "I was" (T 63.7 on 24.10.2012).

5.8 The "complaint evidence" came from several witnesses:

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(a) SS (a friend of the complainant): the complainant told her that the appellant "touched me" (24.8 on 30.1.2012)

(b) SW (aunt): "the things you are trying to protect me from have already happened"; when asked "was it [the appellant]?" she replied "yes" (para 14-20 in statement of 1.2.2012; T 104.4, 109.7-109.9 on 14.11.2013)

(c) SC (grandmother): when SW asked if "[the appellant] had been touching her, this is when … [the complainant] told [SW] that it had been happening since she was little" (para 49 in statement of 14.2.2012; T 90.8 on 14.11.2013)

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(d) KW (mother): she asked the complainant "How long has this been going on for", the complainant replied "from when I was little, about 4"; she asked "How often did this go on?", the complainant replied "every day"; the complainant said "I was naked … he was naked" and "he used to lay on top of me and squash me …" (para 73-89 in statement of 19.1.2012; T 126.7 on 14.11.2013; T 145.7 on 15.11.2013)

5.9 The complaints to SW, SC and KW were all made in August 2011. The defence case was that these complaints lacked credibility because they were made in circumstances where the appellant was no longer a part of the family (he had separated from the complainant's grandmother in late 2010), the complainant was being disciplined for bad behaviour at school and some of the complaints were in response to leading questions. The evidence relating to this is outlined at para 6.49 below.

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5.10 There was an issue at the trial about when the complaint to SS was made. On the defence case it was made *after* the complaints to SW, SC and KW but on the prosecution case it was made earlier, in October or November 2010. The evidence relating to this is outlined at paras 6.50-6.52 below.

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PART VI. THE ARGUMENT

"Tendency evidence"

6.1 As noted at para 5.3 above, the prosecution adduced from the complainant evidence of uncharged acts, admitted for the purpose of putting her allegations about the charged conduct into context and not as "tendency evidence". The trial judge gave examples of this

alleged conduct when ruling that it was admissible as "context evidence": *R v IMM (No 3)* [2013] NTSC 45 at [3]. The evidence was admitted for the limited credibility use of putting her allegations about the charged conduct into context and not as "tendency evidence": *R v IMM (No 3)* [2013] NTSC 45 at [7]-[8]. The jury were directed (SU 22.3):

> This evidence was admitted solely for the purpose of placing [the complainant's] evidence towards the proof of the charges into what the Crown says is a realistic and intelligible context. ... [Y]ou must [not] use this evidence of other incidents as establishing a tendency on the part of the accused to commit offences of the type charged.

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6.2 However, the "tendency evidence", that while the appellant was being given a massage the appellant ran his hand up the complainant's leg, was admitted to show a sexual interest on the part of the appellant for the complainant: *R v IMM (No 3)* [2013] NTSC 45 at [10]. The jury were directed (SU 23.3):

> The prosecution has leaded [sic] this evidence to prove that [the appellant] had a sexual interest in [the complainant]. If you accept it beyond reasonable doubt as true that this occurred, and if you find as a result that [the appellant] was sexually interested or attracted to [the complainant] and was willing to act on that attraction, you may use that finding in determining whether [the appellant] committed the alleged offences..

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6.3 Section 97(1)(b) of the *Evidence (National Uniform Legislation) Act* (NT) (hereafter "the Act"), which governed the admission of the tendency evidence in the trial, requires that "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value". Defence counsel contended that the evidence was not admissible as tendency evidence, submitting that the evidence "is simply bolster ... [i]t's pulling yourself up by bootstraps" (see T 10.1, 22.2, 23.8 on 11.7.2013).

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6.4 The trial judge held that the test in s 97(1)(b) was satisfied (*R v IMM (No 3)* [2013] NTSC 45 at [10]):

> on the assumption that I am required to make that the jury accept her evidence.

6.5 It was submitted in the Court of Criminal Appeal and it is submitted here that it was erroneous for the trial judge to assess the "probative value" of the tendency evidence on the basis of that assumption.

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"Probative value"

6.6 The tendency rule expressed in s 97 is extracted in the legislative provisions annexure. Section 97 appears in Chapter 3 of the Act in Part 3.6 which is devoted to tendency and coincidence evidence. Chapter 3 (headed Admissibility of Evidence) is substantially uniform with other jurisdictions which have adopted the uniform evidence law (the Commonwealth, N.S.W., Victoria, the A.C.T. and, to some extent, Tasmania). That

uniform evidence law is the product of a series of reports by the Australian Law Reform Commission ("ALRC"). Chapter 3 commences with provisions relating to the threshold test of admissibility: relevance. Section 56(2) provides that "[e]vidence that is not relevant in the proceeding is not admissible". Section 56(1) provides that "[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding". Relevant evidence is defined in s 55(1):

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of
10 the existence of a fact in issue in the proceeding.

6.7 The ALRC *Evidence (Interim) Report No 26* (1985) ("ALRC 26"), observed (vol 1, para 641) that the proposed definition "requires a minimal logical connection between the evidence and the 'fact in issue'." The requirement that the evidence is assumed to be "accepted" for the purposes of assessing its relevance gave effect to that approach. In *Papakosmas v R* [1999] HCA 37, 196 CLR 297, McHugh J observed at 322 [81]:

> The Commission thought that, as a threshold test, relevance should require only a logical connection between evidence and a fact in issue. To the extent that other
20 policies of evidence law, such as procedural fairness and reliability, required the strict logic of the relevance rule to be modified, that could best be done by the exclusionary rules - such as the hearsay rule and the credibility rule - and by conferring discretions on the court as in ss 135-137.[1]

6.8 The exclusionary rules referred to by McHugh J appear in Chapter 3. The rules are typically expressed as *prima facie* rules of exclusion unless certain criteria are met. Many of those criteria direct judges to determine issues relating to the reliability of the evidence. These determinations are made in accordance with the procedure outlined in s 142 of the Act. For example, s 59 creates a "hearsay rule", and subsequent provisions create
30 exceptions to that rule. Section 65(2) creates four discrete exceptions in criminal proceedings where the maker of the "previous representation" is "not available". Each exception requires specified conditions to be met, those conditions being intended to ensure the reliability of the evidence.

6.9 A number of provisions in Chapter 3 contain specific rules or stricter rules of admissibility applying only to prosecution evidence in criminal trials (see, for example, the rules in Part 3.9 in relation to identification evidence). Tendency evidence is another example. Tendency evidence adduced by the prosecution in criminal trials must satisfy the requirements for admissibility specified in both s 97 and s 101 of the Act.

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6.10 Chapter 3 concludes with Part 3.11 which contains a number of discretions to exclude evidence and, for prosecution evidence in criminal trials, a mandatory exclusionary provision in s 137. These more broadly expressed provisions act as a safety net and allow trial judges scope to ensure a fair trial by regulating the admission of evidence that might otherwise escape the exclusionary provisions.

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1 McHugh J cited ALRC 26, vol 1 at paras 638-644.

6.11 "Tendency evidence" is defined in the Dictionary to the Act to mean "evidence of a kind referred to in subsection 97(1) that a party seeks to have adduced for the purpose referred to in that subsection". The evidence from the complainant that, while the appellant was being given a massage, the appellant ran his hand up her leg, adduced for the purpose of showing a sexual interest on the part of the appellant and a willingness to act on that attraction, was evidence of that kind. The requirement in s 97(1)(b) imposed an obligation on the trial judge to consider whether the tendency evidence would, at the time the evidence came to be assessed by the jury, have "significant probative value". The trial judge was
10 required to consider whether that would be the case either considering the evidence alone or in the light of other prosecution evidence.

6.12 For the following reasons, it was erroneous for the trial judge to assess the "probative value" of the tendency evidence "on the assumption that" the complainant's evidence would be accepted.

(a) **The natural meaning**.

6.13 Apart from s 97(1)(b), the expression "probative value" appears in many provisions of
20 the Act, including ss 98, 101, 135, 136, 138 and 190. The expression is defined in the Dictionary to the Act:

> ***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

6.14 Section 3(1) provides that "[e]xpressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings given to them in the Dictionary".[2] Transposing the definition of "probative value" in the Dictionary into s 97(1)(b), the trial judge was required to ask whether the tendency
30 evidence would be capable of rationally affecting, to a significant extent, the assessment of the probability of the existence of a fact in issue (where the facts in issue were whether the appellant committed any of the charged offences).

6.15 Giving the words of the definition their natural meaning, it may be said that a judge applying s 97(1)(b) is asked to determine the capacity of the evidence (by itself or in the light of other prosecution evidence) to affect the proof of any of the charged offences. In requiring the "extent" of the capacity to be considered, the definition is premised on the assumption that evidence can vary in its capacity to affect the probability of the existence of a fact in issue and demands a determination of the extent of that capacity. The court is
40 required to consider all matters that would rationally bear on such an assessment by the tribunal of fact.

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[2] It is true that s 18 of the *Interpretation Act* (NT) provides that "[d]efinitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires" but there is nothing in the context or subject matter of s 97(1)(a) which indicates that the definition in the Dictionary is not to apply.

6.16 Since the focus is on the extent to which the evidence could rationally affect the assessment by the tribunal of fact, it would be directly contrary to the natural meaning of the words to constrain the determination of extent by requiring an assumption that the tribunal of fact will assess the evidence in a particular way (that is, accept it), particularly in cases when there are reasons to question the reliability of the evidence.

(b) **Statutory context.**

6.17 The statutory context supports a conclusion that the words "if it were accepted" were
10 intentionally left out of the definition. The definition may be contrasted with s 55(1), which defines relevant evidence:

> The evidence that is relevant in a proceeding is evidence that, *if it were accepted*, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. [emphasis added]

6.18 The words "if it were accepted" found in the definition of relevant evidence do not appear in the definition of "probative value" and it should be inferred were deliberately left out so as to require a court to assess the probative value of evidence without making any
20 such assumption. Given the importance of these two concepts in the uniform evidence law, there is every reason to view the absence of the words in the latter definition as intended and significant.

6.19 As McHugh J observed in *Papakosmas v R* at 323 [86]:

> The distinction which the Act makes between relevance and probative value also supports the view that relevance is not concerned with reliability. Probative value is defined in the Dictionary of the Act as being "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in
> 30 issue." That assessment, of course, would necessarily involve considerations of reliability. "Probative value" is an important consideration in the exercise of the powers conferred by ss 135 and 137. An assessment of probative value, however, must always depend on the circumstances of the particular case at hand.

(c) **Adding words.**

6.20 The definition of "probative value" should not be construed as if it read:

> ***probative value*** of evidence means the extent to which the evidence, *if it*
> 40 *were accepted,* could rationally affect the assessment of the probability of the existence of a fact in issue.

6.21 While the justification to add words to a statutory formulation is a matter of judgment and degree, none of the ordinary circumstances which might justify such an approach are present, see *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9, 253 CLR 531 at [37]-[39]. There is no basis to conclude that the omission of the words was a drafting error. To the contrary, it is argued below the omission of the words "if it were accepted" was

intended and significant. Further, as also outlined below, a natural reading of the statute is consistent with the statutory structure, is supported by extrinsic materials and does not produce unusual or unworkable consequences.

6.22 In *Adam v R* [2001] HCA 57, 207 CLR 96 at 115 [59], Gaudron J accepted at [59] that "the dictionary definition differs from s 55 in that it is not predicated on the assumption that the evidence will be accepted". Her Honour then stated (at 115 [60]):

> The omission from the dictionary definition of "probative value" of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition.

To the extent that her Honour was making the point that the practical outcome of the application of the Dictionary definition will in most cases be that probative value will be determined on the assumed basis that the evidence is truthful, the appellant respectfully agrees as outlined below at para 6.30. However, the appellant respectfully takes issue with the proposition that the words *"if it were accepted"* must be read into the definition.

6.23 If evidence is *not* accepted, in the sense that the tribunal of fact comes to a positive conclusion that the witness is a liar or completely unreliable, the evidence will not affect the assessment of the probability of a fact in issue in the proceedings. However, there are degrees of "acceptance" and degrees of probative value. This is recognised in the definition of probative value by the words "the extent to which ...". If a tribunal of fact were to completely reject evidence, it would have no weight. If a court considered that evidence was so manifestly unreliable that a jury could not rationally accept it, then it might be concluded that the evidence has no probative value. On the other hand, a rational fact finder may not (completely) accept evidence, harbouring doubts about the truthfulness and/or reliability of the witness, and thus giving less weight to the evidence. The evidence will still rationally affect the assessment of the probability of a fact in issue, it will have some weight, although that weight will be less than it would have been if it were (completely) accepted. If a court considered that evidence was unreliable (to some extent) then it might conclude that the extent to which the evidence could be accepted, and the extent to which it could rationally affect the assessment of the probability of a fact in issue, is limited. If a court considered that a witness was plainly lacking in credibility, then it might conclude that a rational fact-finder could not regard the witness as "credible", with the consequence that the extent to which the evidence could be accepted, and the extent to which it could rationally affect the assessment of the probability of a fact in issue, is limited.

(d) **Extrinsic materials.**

6.24 Extrinsic materials support the conclusion that the legislature intended a court, in assessing "probative value", to take into account considerations bearing on the "reliability" of the evidence (that is, the court is not required to assume that the evidence will be accepted). The Reports of the ALRC may be considered in interpreting the Act pursuant to

s 62B *Interpretation Act* (NT). The ALRC proposed the definition of "probative value" found in the Act (ALRC, *Evidence,* No 38 (1987) ("ALRC 38") Appendix A, Draft Legislation, cl 3). In explaining why it proposed broadening exceptions to the hearsay rule (such as s 66), the ALRC stated (ALRC 38 at [146]):

> ***Hearsay evidence and the exclusionary discretions.*** It was intended that the relevance discretion and, in criminal trials, *the probative value/prejudice discretion,* would apply to hearsay evidence which comes within the exceptions to the proposed hearsay rule. It was questioned whether this was achieved on the ground that the
10 unreliability of the evidence offered is not a ground for exclusion under those discretions. *The Commission remains of the view that the court can and should consider the reliability of the evidence concerned in applying those discretions. The Bill does not refer to the 'unreliability of the evidence' but it refers to the probative value of the evidence.* ... The judge can also look to the surrounding circumstances in which the statement was made to the plaintiff and other matters going to the reliability of the evidence, such as how recently after the event the statement was made, whether the person who made the statement had an interest or not in the matters referred to and whether the circumstances placed some obligation on the person who made the statement to tell the truth. *The reliability of the evidence is an*
20 *important consideration in assessing its probative value.*[emphasis added]

6.25 While the ALRC was referring to the meaning of the term "probative value" as it appeared in what is now s 135 and s 137 of the Act, the ALRC clearly intended that the definition of "probative value" that it proposed (identical to that found in the Act) would encompass reliability considerations.

(e) **Risk of joint concoction.**

6.26 In applying the identical test of admissibility for coincidence evidence in s 98(1)(b), it
30 is well-established that a court may determine that the evidence lacks "probative value" because of the possibility or "real chance" that two complainants have jointly concocted their allegations: *AE v The Queen* [2008] NSWCCA 52 at [44]; *PNJ v Director of Public Prosecutions (Vic)* [2010] VSCA 88, 27 VR 146 at [28]; *Murdoch (a Pseudonym) v The Queen* [2013] VSCA 272, 40 VR 451 at [4], [95]; *Velkoski v The Queen* [2014] VSCA 121 at [173](c)-(d). That is consistent with the approach taken by the High Court with respect to similar fact evidence: *Hoch v R* [1988] HCA 50, 165 CLR 292. This authority is necessarily premised on the view that the assessment of probative value for the purposes of determining admissibility does not require an assumption that the evidence of a complainant will be accepted.

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(f) **Propensity evidence at common law.**

6.27 Under the common law, there is no requirement to assess the probative value of "propensity evidence or similar fact evidence" for the purposes of determining admissibility on the basis of an assumption that the evidence will be accepted. In *Pfennig v The Queen* [1995] HCA 7, 182 CLR 461, Mason CJ, Deane and Dawson JJ stated at 482[60]:

> Obviously the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed.

(g) **Caution regarding importing the common law meaning of "probative value".**

6.28 While there is authority under the common law that the "*Christie* discretion", which requires a weighing of "probative value" and "risk of prejudice", should be applied by a court on the assumption that the evidence is "truthful" (see below at para 6.45), as Gleeson CJ and Hayne J observed in *Papakosmas v The Queen* at [10] (see also [38]–[40], [66], [88]):

> It is the language of the statute which now determines the manner in which evidence of the kind presently in question is to be treated.

The approach taken at common law cannot take precedence over the language of the provision within the context of the statutory scheme. In that regard, it is important to bear in mind that the definition of "probative value" applies in a large number of different contexts in the Act (see ss 97, 98, 101, 135, 136, 138, 190), including in civil proceedings and trials by judge alone. Common law authority with respect to the common law version of s 137 has marginal significance in that context.

(h) **Consequences.**

6.29 The construction of the expression "probative value" advanced by the appellant will *not* result in any absurd or unworkable outcomes (so as to render less plausible a legislative intention that it be given that construction).

6.30 First, when determining the extent to which evidence that comes from a person who is *not* the complainant *could* rationally affect the assessment of the probability of the existence of a fact in issue, the practical outcome will be that probative value will usually be determined on the basis that the evidence is truthful – because, in most cases, a rational fact finder "could" conclude that there was no real risk that the person was untruthful. It will only be in cases where the witness is the complainant that this pragmatic outcome will not apply. That is not because a different approach is taken to "probative value" but because the application of the test will produce a different outcome in circumstances where the witness giving the evidence is also the critical witness as to the facts in issue.

6.31 Second, the construction advanced by the appellant will not result in any unworkable consequences, even in the context of ss 135, 136 and 137. Considerations bearing on the reliability of an item of evidence would only require a court to consider the application of those provisions where a coherent argument is advanced in respect of the other side of the balancing exercise. For example, a court would not be required to engage in the balancing exercise required under s 137 (and assess probative value) if there is no danger apparent that the evidence will be misused by the jury (see, for example, *Aytugrul v The Queen* [2012] HCA 15, 247 CLR 170 at [30]). In addition, where the balancing exercise is

required, the court must consider the extent to which any such danger may be reduced by some action, such as the giving of directions and warnings to the jury.

Miscarriage of justice (tendency evidence)

6.32 If it is accepted that it was erroneous for the trial judge to assess "probative value" on the assumption that the complainant's evidence would be accepted, the application of the test in s 97(1)(b) miscarried. The appeal should be allowed unless admission of the evidence as tendency evidence was inevitable: cf *Graham v R* [1998] HCA 61, 195 CLR
10 606 at 610[10]; *Stanoevski v R* [2001] HCA 4; 202 CLR 115 at 128[50], 131[67]. It was not inevitable. It would be well open to a court to conclude that the evidence did not have "significant probative value" given that the evidence came from the complainant alone.

6.33 The central issue at the trial was whether the complainant's account of the charged events should be accepted. The tendency allegation was required to have "significant probative value" to meet the s 97 threshold for admissibility. This meant that the complainant's allegation of the "massage incident" needed to have a significant bearing on whether the jury would accept that the complainant's account of the charged incidents, particularly in light of the reliability concerns that arose given the context of the
20 complaints. But the evidence suggesting sexual interest derived solely from the complainant whose credibility was in issue.

6.34 In effect, the Crown was seeking to bolster the credit of the central witness by adducing uncorroborated supportive evidence from the same witness. As Howie J observed in *Qualtieri v The Queen* [2006] NSWCCA 95, 171 A Crim R 463 at 494 [118], in order to meet the threshold of admissibility, evidence of sexual interest in the complainant will "usually be found outside of the complainant's evidence, such as in a letter written by the accused to the complainant or some other act of the accused that shows a sexual interest in the complainant or children generally." This is not because any requirement of
30 "corroboration" is being introduced. Rather, it is because reliance on the complainant's evidence to show a tendency to commit the offence alleged by the complainant may involve bootstrap reasoning.

6.35 Accordingly, it would be open to a court to consider that, even giving the tendency evidence the highest level of weight that it could rationally be given, it would not have a significant bearing on the likelihood that the accused committed a charged act. In the particular circumstances of this case, it would be open to a court to hold that the complainant's assertion could not have particular significance given that her credit was fundamentally in issue in the trial.

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The complaint evidence

6.36 Objection was taken at trial to the complaint evidence (summarised at para 5.8 above) on several bases, including the hearsay rule and the "discretion" in s 137. The trial judge ruled that s 66 applied with the consequence that all the complaints were admissible for a hearsay use – to prove the truth of the matters complained about: *R v IMM (No 2)* [2013]

NTSC 44 at [24]-[25]. The evidence was admitted on that basis and the jury were directed as follows (SU 28.2):

> [I]f you find any of the evidence concerning complaints was made substantially to the effect that the accused had been engaged in sexual misconduct with [the complainant], you can use evidence of what was said in the compliant [sic] as some evidence that an offence did occur. The law says a jury is entitled to used [sic] what was said in a compliant [sic] as evidence of the truth of what is alleged.

10 **Section 137**

6.37 Section 137 provides:

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

6.38 The trial judge adopted a "restrictive approach" to the assessment of the "probative value" of the complaint evidence for the purposes of s 137. The trial judge stated at [2013]
20 NTSC 45 [29]:

> [T]he enactment of s 137, as with the common law Christie discretion, *does not involve considerations of the reliability of the evidence* when considering its "probative value". ... Even prior to the UEA, the term "probative value" included *an assumption that the evidence would be accepted* ... [emphasis added]

6.39 It was submitted in the Court of Criminal Appeal and it is submitted here that considerations of the reliability of the complaint evidence should have been taken into account when assessing "probative value" for the purposes of s 137 and that the trial judge
30 was not required to assume that the evidence would be accepted. The considerations supporting a conclusion that it was erroneous for the trial judge to assess "probative value" under s 97(1)(b) on the assumption that the complainant's evidence would be accepted (see paras 6.12 - 6.31 above) are relied upon in this context. There is no reason to believe that the definition of "probative value" is to be construed differently in this context. Nor is there any reason to believe that it was intended that the expression would have a different meaning in civil proceedings and judge-alone criminal trials (see ss 135, 136). The definition of "probative value" in the Dictionary is intended to apply through the Act, not only with respect to s 137. The statutory context supports a consistent approach to assessment of probative value.

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6.40 Furthermore, the extrinsic materials referred to above (the ALRC reports) support the conclusion that a court, in assessing "probative value" for the purposes of applying this provision, may take into account considerations bearing on the "reliability" of the evidence (that is, the court is not required to assume that the evidence will be accepted). The ALRC proposed retaining the common law "*Christie* discretion", although it was stated that there were a number of uncertainties with that discretion: ALRC 26, vol 1, para 957. In applying that common law discretion, a court may take into account considerations bearing on the

"reliability" of evidence (for example, identification evidence, expert evidence): see general discussion in *Dupas v R* [2012] VSCA 328, 40 VR 182 at [69]-[142].

6.41 One of the major policy concerns that guided the formulation of the ALRC proposals in respect of criminal trials was the concern to minimise the risk of wrongful conviction: ALRC 26, vol 1, paras 58-60. Specific reference was made in that context to this "discretion" (para 60). In criminal trials, s 137 provides the final critical safeguard which can be applied where appropriate to minimise the risk of wrongful conviction. To construe that provision narrowly and artificially can only weaken its capacity to perform that vital
10 role.

6.42 Finally, the statutory structure supports a conclusion that the assessment of "probative value" in this provision should not proceed on the assumption that the evidence will be accepted. While the relevance rule requires that issues about the reliability of the evidence are to be ignored, it was noted above that a number of the subsequent exceptions to the exclusionary rules include criteria to be satisfied that are directed, at least in part, to the issue of the reliability of the evidence. When s 137 is reached in an admissibility argument, the court is considering an item of evidence that has passed through one or more of those exclusionary sections because it has satisfied their specific reliability requirements. It is not
20 plausible that it was intended that those reliability aspects would be ignored when applying the final safeguard of assessing probative value for the purposes of balancing it with the risk of unfair prejudice. This analysis overlaps with consideration of the ALRC reports. A very broad test of relevance was proposed, along with some relaxation of the admissibility rules. The function of this provision is to act as a broad safety net in criminal cases to minimise the risk of wrongful conviction.

6.43 It may be accepted that there is authority to the contrary, holding that reliability considerations may not be taken into account when assessing "probative value" for the purposes of s 137. The leading judgment in that regard is that delivered by Spigelman CJ
30 in *R v Shamouil* [2006] NSWCCA 112, 66 NSWLR 228. It is necessary to meet a number of propositions advanced by his Honour at 237[61]-238[65]:

(a) The proposition at [61] that the focus on capability draws attention to what it is open for the tribunal of fact to conclude, rather than what a tribunal of fact is likely to conclude, is accepted. However, this proposition does not require any assumption that the evidence will be accepted or that considerations bearing on the reliability of the evidence are to be ignored. Rather, the court is required to determine the level of weight that a rational fact finder could give the evidence in the light of all material considerations that would bear on that assessment. What the
40 "capacity" test requires is an acknowledgment that a rational fact finder might come to a somewhat different view regarding the significance of the evidence – perhaps regarding the risk of unreliability (including the risk of untruthfulness) as less than the view of the court. The court is required to accept the existence of a range of assessments of probability, none of which are irrational, and assess probative value as at the highest point of that range in the context of the issues alive at the trial. The task for the trial judge at this point is consistent with the approach outlined by

Allsop P (as his Honour then was) in *DAO v R* [2011] NSWCCA 63, 81 NSWLR 568 when considering the terms of s 97(1)(b) at [99]:

> A statutory precondition is provided for in s 97(1)(b) that the court (that is the judge ruling on the admissibility) thinks something. That something is that the evidence 'will', that is looking forward, have the required quality. I do not think that that requires predicting how a jury will react to the evidence (if there is a jury), other than through the logical assessment called for by the definition of "probative value". What is required however, as a precondition, is that the court thinks that it will have that effect in the body of anticipated or expected evidence. In the ordinary course this is a quintessential task of a trial judge dealing with the living fabric of the trial and the evidence unfolding before him or her.

(b) The propositions at [61] that "[e]vidence has 'probative value, as defined, if it is capable of supporting a verdict of guilty" and at [63] that s 137 may be applied on the basis that "it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue", are potentially misleading. If the evidence is capable of supporting a verdict of guilty, it is relevant. If it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue, the evidence is not relevant. Accordingly, this provision would have no application, since the evidence would be inadmissible under s 56(2). An assessment of "probative value" requires the court to determine "the *extent* to which" the evidence is capable of supporting a verdict. If the court considered the evidence highly unreliable, it might logically be concluded that the extent to which the evidence could rationally affect the assessment of the probability of guilt is low (allowing, of course, for the possibility that the jury might reasonably consider the evidence less unreliable).

(c) The proposition at [64] that "[t]o adopt any other approach would be to usurp for a trial judge critical aspects of the traditional role of a jury" should be rejected. While that is clearly a policy to be borne in mind as underlying the law on no-case submissions, s 137 relates to the admissibility of evidence. As outlined above, Chapter 3 of the Act imposes a series of obligations on trial judges to make admissibility decisions which inherently interfere to some extent with the jury's fact finding process. This is because other policy concerns have been given priority, particularly the concern of minimising the risk of wrongful convictions and miscarriages of justice in criminal proceedings. Indeed, when the High Court held in *Doney v The Queen* [1990] HCA 51, 171 CLR 207 at 275 that a trial judge may not direct an acquittal on the basis that a verdict of guilty would be unsafe and unsatisfactory, the Court also acknowledged at 212 that "the discretion to reject technically admissible evidence" may mean that the remaining evidence is insufficient for a *prima facie* case, citing *R v R* (1989) 18 NSWLR 74 at 76 (where Gleeson CJ accepted that "unsatisfactory" identification evidence might be excluded in discretion). The appellant notes the following comment of the Victorian Court of Appeal in *Dupas* at [68]:

> With great respect to Spigelman CJ, however, the analysis in Shamouil is founded on a misapprehension of the role of the judge under the common law test. From its inception as a discretionary rule, it has always been necessary when the Christie discretion was invoked for a trial judge to have regard to the reliability of the evidence. The judge was to assess what weight it might reasonably be given. As we shall seek to show, the approach adopted in Shamouil, and followed subsequently, has not preserved but has materially altered the relationship between trial judge and jury. By divesting the trial judge of a power that had previously existed, a safeguard was removed that is critical to the avoidance of miscarriages of justice and to ensuring that the accused has a fair trial.

6.44 The decision of the NSWCCA in *Shamouil* was described as "manifestly wrong" by the Full Bench of the Victorian Court of Appeal in *Dupas* (at [63]). The appellant respectfully acknowledges and adopts much of the detailed and considered analysis of *Shamouil* in that decision, particularly at [116] – [139], [165] – [174], [182] and [200] – [211].

6.45 However, the appellant does not submit that the Court should wholly adopt the approach taken in *Dupas*. The Court held that judges must approach the assessment of probative value for the purposes of s 137 in a manner identical to the common law *Christie* discretion (at [65]-[67]). The Court considered that such an approach required judges to assume the "truthfulness" of evidence but not its reliability when assessing its probative value for the purposes of s 137 (at [63]).

6.46 The appellant contends that the definition of probative value should be drawn from the natural meaning of the definition as it appears within the statutory context. The words and statutory context do not provide any basis for distinguishing between the truthfulness of a witness's account and the reliability of that account when determining "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". The suggested dichotomy appears nowhere in the Act. For example, the definition of "credibility" in the Dictionary to the Act expressly includes considerations of both truthfulness and reliability such as the ability of the witness to "observe and remember facts and events". The hearsay provisions also incorporate considerations of both reliability and truthfulness when assessing admissibility (see, for example, s 65(2)(b) and (c)). The ALRC recommendations expressly contemplated that reliability considerations would form part of a probative value assessment but did not draw any distinction between reliability and "truthfulness". To the contrary, the reference by the ALRC to reliability considerations (relied upon in *Dupas* at [157]) included matters which would not be contemplated if evidence were assumed to be truthful. The ALRC stated in ALRC 38 at para 146:

> The judge can also look to the surrounding circumstances in which the statement was made to the plaintiff and other matters going to the reliability of the evidence, such as … whether the person who made the statement had an interest or not in the matters referred to and whether the circumstances placed some obligation on the person who made the statement to tell the truth.

6.47 As outlined above, the statutory structure supports a consistent approach to the definition of "probative value" throughout the Act. It is both undesirable and potentially unworkable for a different definition to be applied when assessing the probative value of tendency evidence for the purpose of s 101 and when applying s 137 in respect of other evidence (or, indeed, the same evidence). The Court in *Dupas* accepted that s 101 "is to be construed according to its terminology, rather than by reference to the test which the common law applied to the balancing exercise" (at [137]). The appellant respectfully submits that implicit in that acceptance is an acknowledgment that the terminology of the
10 provision does not require acceptance of the truthfulness of a witness. *Dupas* noted, without criticism, a series of decisions assessing probative value for the purposes of ss 97, 98 and 101 which considered whether evidence was disputed or if the evidence had been contaminated or concocted (at [165]). It is not entirely clear if the *Dupas* approach assumes the complete acceptance of complaint evidence for the purpose of s 137 as the judgment notes that judges applying the *Christie* discretion have taken into account the internal consistency of complaint evidence in the assessment of probative value (at [138]).

Miscarriage of justice (complaint evidence)

20 6.48 If it is accepted that it was erroneous for the trial judge to assess "probative value" on the assumption that the complaint evidence would be accepted, the application of the test in s 137 miscarried. The appeal should be allowed unless admission of the evidence was inevitable: cf *Graham v R* at 610[10]; *Stanoevski v R* at 128[50], 131[67]. It was not inevitable. It would be open to a court to conclude that the "probative value" of the evidence was outweighed by the danger of unfair prejudice.

6.49 It would be open to a court to consider that the complaints made to SW, SC and KW had low probative value for a number of reasons. The complaints were made in August 2011 in circumstances where the appellant was no longer a part of the family. He had
30 separated from the complainant's grandmother in late 2010 (para 41 in statement of SC of 14.2.2012). The initial complaint to SW was made when the complainant was in trouble: para 45 in statement of SC of 14.2.2012; T 23.8-25.9 on 5.9.2012; T 64 on 24.10.2012; T 79.7, 81.7, 82.6 on 14.11.2013; T 108-9 on 14.11.2013. At least some of the first complaint was given in response to questions of a leading nature: para 49 in statement of SC of 14.2.2014; T 90.8, 109.9 on 14.11.2013. The trial judge acknowledged that "there are reasons the jury will need to consider the weight to be given the disclosures": *R v IMM (No2)* [2013] NTSC 44 at [27] (see also at [20]).

6.50 It would be open to a court to consider that the complainant made to SS had low
40 probative value. On a careful reading of the entirety of the evidence given by SS, it was not open to conclude that, on her account, the complaint was made prior to the complaints made to the complainant's aunt, grandmother and mother in August 2011. The conclusion of the CCA that "the preponderance of the evidence points to the complaint to SS having been made before any complaint to family members" focused on the objective evidence relating to the break up of the complainant's grandparents relationship but obscured the significance that SS had placed on the pre-existing disclosure to the complainant's mother when she gave her account (CCA at [6]). SS was vague and uncertain about the timing of

the conversation overall but she was clear each time she was asked that it was after the complainant had told her mother. In her child forensic interview on 30.1.2012, SS recounted the complainant ringing her one night and telling her about how her grandfather had "touched her" (19.1). It occurred after the complainant's grandparents "broke up" (19.2). She believed that the conversation could have been at the end of 2010 or in the first 6 months of 2011 (23.4). When asked how long after her grandparents had split up she answered: "… I think she'd just told her mum and she rang me and told me that she'd told her mum what happened" (23.7). When asked about "the first time she mentioned it to you" (23.9) she said: "The night she rang she told me that her grandparents had split up and
10 then she told her mum that – what happened …". Significantly, SS did not suggest that she had ever told the complainant to "tell her mother". The complainant stated that when she told SS that her grandfather was "molesting" her, SS told her to tell her mother (child forensic interview, 3.9.2011, 80.9). The account given by SS was quite inconsistent with any suggestion that she told the complainant this. On her account, SS learned of the allegations contemporaneously with learning the complainant had made those allegations to her family, specifically her mother and her grandmother ("Nanna").

6.51 This issue was raised directly with the complainant in cross-examination by counsel for the appellant. SS agreed that "the first time" that she was told anything about
20 something happening to the complainant "was in a phone call" (T 18.5). She agreed that it was possible that that call was later than June 2011 (T 19). Then, she answered "Yes" when she was asked the following question (T 19.8):

> What you do remember from that phone call was that [the complainant] had told you that she told her mum and her Nanna before she spoke to you?

She was then asked:

> And that was very clear, that she'd already told Nanna and her mum … when she
> 30 rang you?

Again she answered "Yes". There was no re-examination of the witness.

6.52 The Crown submitted in his closing address that SS had conflated two telephone calls separated by a number of months (T 242.9-243.8). This gloss on the evidence was critical to the Crown case because it was the only way to reconcile the complainant's version of a disclosure to SS prior to being in trouble with her family with SS's account. No attempt was made by the Crown Prosecutor to raise that hypothesis with SS to give her an opportunity to respond to it or to allow the defence an opportunity to rebut it. The failure of
40 the Crown to put the proposition to SS was not only unfair, it created a miscarriage of justice (*R v Anderson* (1991) 53 A Crim R 421). It was not open to invite the jury to draw such an inference without giving SS the opportunity to respond, particularly when the matter had been directly confronted by defence counsel in cross-examination.

6.53 Quite apart from the preceding arguments, a discrete argument with respect to the "probative value" of the complaint evidence relies on the general nature of the complaints. As was submitted by defence counsel before the trial judge (*R v IMM (No2)* [2013] NTSC

44 at [20]) "[n]one of the representations ... go to proof of any charge on the indictment". None of the complaints referred specifically to any of the offences alleged in the counts on the indictment. It is contended that, as a result, the evidence was, in substance, "context evidence". It showed, at its highest, a history of sexual abuse. If direct evidence of such a history was only to be admitted to show context (as the trial judge had ruled in respect of evidence from the complainant about uncharged acts), it must follow that *hearsay* evidence of such a history should only be admissible for such a purpose. The reason for this is the operation of s 97. No application was made by the prosecution to use the complaint evidence to establish a tendency to commit the charged offences. Accordingly, the
10 evidence could not be used for that purpose. It follows that the complaint evidence could only be used to support the credibility of the complainant in the way that Howie J explained in *Qualtieri* at [117] and [119]:

> Context evidence is relevant to the credibility of the complainant only in that his or her version of the particular incident which is the basis of the charge in the indictment may be more capable of belief when seen in the context of what the complainant says was his or her sexual relationship with the accused. It may explain, on the complainant's version, why the accused and the complainant acted as they did in circumstances where without the context of the relationship those acts
> 20 might be inexplicable. But other than generally assisting the complainant's credibility in this way, context evidence does not make the complainant's account more reliable than it would be in the absence of that evidence. Context evidence does not make it more likely that the accused committed any of the offences charged in the indictment.

6.54 Similarly, Adams J (Hislop J agreeing) stated in *SKA v The Queen* [2012] NSWCCA 205 at [275] – [277]:

> It is adduced merely to set the evidence of the complainant as to the charged acts in
> 30 context so that her evidence as to those matters (not the facts) can be fairly understood. ... the evidence, as contextual, was admissible for the purpose alone of enabling the complainant to give a coherent account and, in that sense, to avoid the apparent lack of credibility which a partial account might have.

The complaint evidence in this case could only serve the same limited purpose. As a consequence, its "probative value" was necessarily limited.

6.55 The Court of Criminal Appeal rejected this argument on the basis that the complaints to KW were "referrable to the counts on the indictment, both as general disclosures of
40 sexual misconduct by the appellant, and also as including details consistent with individual charges" (at [26]). However, the proper application of s 66 precluded that analysis. The trial judge ruled that the hearsay rule did not apply to the complaint evidence by reason of the operation of s 66(2). Section 66(2) required that the court be satisfied that "when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation". Taking the example of the complaint made to SS, SS recounted that the complainant had told her that "[the appellant] touched me", the asserted

fact[3] is that the appellant had (sexually) touched the complainant at some time in the past. On the prosecution case, the "representation" was made in October or November 2010. It would be open to be satisfied that the complainant had, at that time, a fresh memory of having been sexually touched in the past (that is, a history of sexual touching). However, even if it were to be assumed that the reference to touching was "referable" to the counts of the indictment (which allegedly occurred in 2002, 2004 and 2009), a court could not be satisfied that such an "asserted fact" would be fresh in the complainant's memory. While the temporal factor is not the only matter to be taken into account (s 66(3)), on the complainant's account, these were not isolated occurrences but constantly repeated acts. There was no basis on which to find that the complainant's memory of the charged acts, as distinct from the overall history of sexual abuse, was "fresh". The same analysis would apply with even greater strength with respect to the complaints made in August 2011 to SW, SC and KW. In those circumstances, the evidence should not have been permitted to be used as direct evidence that the charged offences were committed.

6.56 There was a real danger of unfair prejudice arising from the complaint evidence, even if careful directions were given regarding the use that could be made of the evidence. There was a risk that a jury might use the evidence to show that the appellant had a tendency to engage in sexual abuse of the complainant and infer that he acted in conformity with that tendency in relation to the charged offences. In circumstances where the jury would have direct evidence of such a history, hearsay evidence of such a history would add little or nothing to that context evidence. In those circumstances, it would be open to a court to conclude that the "probative value" of the evidence was outweighed by the danger of unfair prejudice.

Directions on complaint evidence

6.57 Notwithstanding that no request was made to the trial judge to direct the jury that they could use the complaint evidence only to support the credibility of the complainant, it is submitted that such a direction was required and the failure to give it resulted in a miscarriage of justice.

6.58 As noted above, the jury were directed that they could use the complaint evidence "as some evidence that an offence did occur. The law says a jury is entitled to used [sic] what was said in a complaint as evidence of the truth of what is alleged" (SU 28). This direction was quite different from the directions given in respect of the (direct) context evidence (SU 22). There was a real risk that the jury would not apply those directions to the complaint evidence. In any event, for the reasons discussed above at para 6.53-6.55, the jury should have been directed that the complaint evidence should not be used as direct evidence that the charged offences were committed. They were not.

PART VII. APPLICABLE PROVISIONS

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

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[3] Section 59(2) provides that "an asserted fact" is a fact "that it can reasonably be supposed that the person [who made the previous representation] intended to assert by the representation."

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

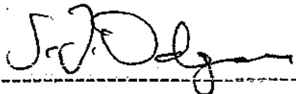
PART VIII. ORDERS SOUGHT

8.1 The orders sought are: Appeal allowed, judgment and orders of the Court of Criminal Appeal of the Northern Territory quashed, the appeal against conviction allowed and a new trial ordered.

10 **PART IX. TIME ESTIMATE**

9.1 It is estimated that 2-3 hours are required for the presentation of the appellant's oral argument.

Dated: 13 January 2016



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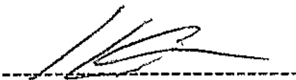

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