



**Royal Commission**  
into Institutional Responses  
to Child Sexual Abuse

# Background Paper

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## Similar Fact and Propensity Evidence and Joint Trials in Australian Jurisdictions

This background paper was prepared by Royal Commission staff. The legislation and cases it discusses reflect the law as at 1 October 2014.



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# 1 Outline

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This background paper sets out (1) the legal regimes in each Australian state and territory governing the law of propensity/tendency and similar fact/coincidence evidence in relation to criminal accused, (2) the rules regarding what jury directions should be given, and (3) the legal regimes in each state and territory governing joint/separate trials. In relation to the first point, this background paper also provides factual examples from the case law in each jurisdiction, including examples where there was evidence of ‘grooming’.

The last page of this background paper contains a table summarising the key commonalities and differences between jurisdictions.

The legislation and cases discussed in this background paper reflect the law as at 1 October 2014.

## 2 The Law of Similar Fact and Propensity Evidence by Jurisdiction

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### A Uniform Evidence Act Jurisdictions – NSW, Vic, Tas, ACT and NT

Uniform evidence legislation has been enacted by the Commonwealth,<sup>1</sup> New South Wales,<sup>2</sup> Victoria,<sup>3</sup> Tasmania,<sup>4</sup> the Australian Capital Territory<sup>5</sup> and the Northern Territory.<sup>6</sup> That legislation distinguishes between ‘tendency evidence’ and ‘coincidence evidence’, although similar exclusion rules apply to both. This terminology replaces the common law terminology of ‘propensity evidence’ and ‘similar fact evidence’.

Section 97 sets out the tendency rule, which also defines what tendency evidence is:

#### **97 The tendency rule**

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind unless:
  - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence, and

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<sup>1</sup> *Evidence Act 1995* (Cth).

<sup>2</sup> *Evidence Act 1995* (NSW).

<sup>3</sup> *Evidence Act 2008* (Vic).

<sup>4</sup> *Evidence Act 2001* (Tas).

<sup>5</sup> *Evidence Act 2011* (ACT).

<sup>6</sup> *Evidence (National Uniform Legislation) Act* (NT).



- (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Section 98 sets out the coincidence rule, which also defines what coincidence evidence is:

**98 The coincidence rule**

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
    - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
    - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- Note:** One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

Additionally, s 101 sets out a further exclusionary rule for both tendency and coincidence evidence adduced by the prosecution against an accused:

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

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

To summarise the cumulative effect of these provisions, evidence that a person has or had a tendency to act in a particular way or have a particular state of mind, and evidence that similarities between multiple events make it improbable those events occurred coincidentally, are each inadmissible unless a notice requirement is complied with, the evidence is of 'significant probative



value’ and, in criminal proceedings, that probative value ‘substantially outweighs any prejudicial effect it may have on the defendant’.

The common law *Pfennig* test has been confirmed to be inapplicable to the Uniform Evidence Act regime.<sup>7</sup>

Some propositions about the interpretation of ss 97, 98 and 101 do not appear to be contentious between the jurisdictions that have enacted the provisions:

- Because of s 95 (‘Use of evidence for other purposes’), ss 97, 98 and 101 will only operate to exclude evidence of a person’s disreputable conduct if that evidence is being used for certain specific purposes, either to prove that the accused had a particular tendency or to prove that it would be improbable for relevant events to have occurred coincidentally. This means that if such evidence is being used for a different purpose, for example to provide ‘background’ or ‘context’, ss 97, 98 and 101 are not engaged, although the evidence might be excluded anyway under ss 135 or 137.<sup>8</sup> Suggestions to the contrary<sup>9</sup> do not appear to have been taken up. Evidence might be excluded for some purposes but not others.
- Whether the probative value of evidence substantially outweighs that evidence’s prejudicial effect on the defendant for the purposes of s 101 requires a balancing exercise of the probative value against the prejudice.<sup>10</sup> In this context, to say that evidence has a ‘prejudicial effect’ refers to its possible misuse by a jury,<sup>11</sup> including that a jury thinks the evidence shows a mere disposition to engage in crime or discreditable conduct.<sup>12</sup>
- Whatever ‘significant probative value’ means, it does not require showing that tendency or coincidence evidence has ‘striking similarities’ with the charged acts.<sup>13</sup>

The following considers the interpretations of ss 97, 98 and 101 that have emerged in NSW, Victoria, the ACT and Tasmania. The Northern Territory does not yet have reported decisions on the Uniform Evidence Acts that shed light on the legislation’s interpretation. The following also does not consider the Commonwealth Evidence Act’s reception, on the basis that there are few occasions (child sex tourism) when the Commonwealth Act will be relevant for a case of child sexual abuse. For each jurisdiction, attention is drawn to what cases have said to be the meaning of ‘probative value’, the meaning of ‘significant’ in ‘significant probative value’, when evidence will satisfy the

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<sup>7</sup> *R v Ellis* (2003) 58 NSWLR 700, 718 [96]-[98] (Spigelman CJ), approved in *Ellis v The Queen* [2004] HCATrans 488 (1 December 2004).

<sup>8</sup> See, eg, *R v Li* [2003] NSWCCA 407 (23 December 2012).

<sup>9</sup> *Murdoch (A Pseudonym) v The Queen* [2013] VSCA 272 (27 September 2013) [93] (Priest JA).

<sup>10</sup> *R v Ellis* (2003) 58 NSWLR 700, 718 [95] (Spigelman CJ), approved in *Ellis v The Queen* [2004] HCATrans 488 (1 December 2004).

*R v Ford* (2009) 201 A Crim R 451, 469 [55]-[59] (Campbell JA, Howie and Rothman JJ agreeing).

<sup>12</sup> *HML v The Queen* (2008) 235 CLR 334, 354 [12] (Gleeson CJ).

<sup>13</sup> See, eg, *R v Ford* (2009) 201 A Crim R 451, 485 [125] (Campbell JA, Howie and Rothman JJ agreeing).



significant probative value threshold, the relevance of the possibility of concoction or contamination of evidence, and the standard of appellate review that applies to admissibility decisions.

## New South Wales

In NSW, the assessment of whether tendency or coincidence has ‘probative value’ (a term which recurs throughout the Uniform Evidence Acts) requires an assessment of ‘the reasoning processes that are open to a jury’ and the extent to which those processes might affect the existence of a fact in issue.<sup>14</sup>

A contentious question is whether, in assessing ‘probative value’, the court should take into account the reliability or credibility of the evidence, or take into account alternative inferences that can be drawn from the evidence other than what the party seeking to adduce it is seeking to argue. In *R v Shamouil*,<sup>15</sup> Spigelman CJ (Simpson and Adams JJ agreeing) said, in relation to when a court is called on to assess ‘probative value’ including in the context of tendency and coincidence evidence:<sup>16</sup>

The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility. There is no reason to change that approach.

In my opinion, the critical word in this regard is the word *could* in the definition of probative value as set out above, namely, ‘the extent to which the evidence could rationally affect the assessment ...’. The focus on *capability* draws attention to what it is *open* for the tribunal of fact to conclude. It does not direct attention to what a tribunal of fact is *likely* to conclude. Evidence has ‘probative value’, as defined, if it is capable of supporting a verdict of guilty.<sup>17</sup>

This approach was said to reflect the proper divide of the functions of the trial judge and of the jury.<sup>18</sup>

However, Spigelman CJ accepted that ‘there may be some, albeit limited, circumstances in which credibility and reliability will be taken into account when determining probative value’,<sup>19</sup> namely where ‘issues of credibility or reliability are such that it is possible for a court to determine 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’.<sup>20</sup>

The holding in *Shamouil* that credibility, reliability and weight generally do not have a role to play when assessing probative value was affirmed by the majority of a five judge bench in *R v XY*,<sup>21</sup> who

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<sup>14</sup> *R v Ford* (2009) 201 A Crim R 451, 468 [52] (Campbell JA, Howie and Rothman JJ agreeing).  
<sup>15</sup> (2006) 66 NSWLR 228.

<sup>16</sup> *R v Shamouil* (2006) 66 NSWLR 228, 238 [65].

<sup>17</sup> *R v Shamouil* (2006) 66 NSWLR 228, 237 [60]-[61] (emphasis in original).

<sup>18</sup> *R v Shamouil* (2006) 66 NSWLR 228, 238 [64].

<sup>19</sup> *R v Shamouil* (2006) 66 NSWLR 228, 235 [56].

<sup>20</sup> *R v Shamouil* (2006) 66 NSWLR 228, 237-8 [63].

<sup>21</sup> (2013) 84 NSWLR 363, 381 [65] (Basten JA), 385 [86]-[87] (Hoeben CJ at CL), 401 [175] (Simpson J)



declined to follow the Victorian decision of *Dupas* which had held that *Shamouil* was manifestly wrong.

However, within the majority, two judges (Hoeben CJ at CL and Blanch J) held that when assessing probative value, it is legitimate to take into account the *existence* of ‘competing inferences’ which might be available on the evidence, though not which competing inference *should be* or *would most likely be preferred* by a jury.<sup>22</sup> In contrast, two other judges in the majority (Basten JA and Simpson J) did not express such a view. This was later addressed in *R v Burton*, where three judges (Simpson J, R A Hulme J and Barr AJ agreeing) said that competing inferences or alternative explanations could not have a part to play for s 137, but could play a role for tendency and coincidence evidence under ss 97 and 98.<sup>23</sup>

For evidence to be admissible under ss 97 or 98, the probative value it has must be ‘significant’. This adjective has been read in NSW as meaning ‘important’ or ‘of consequence’.<sup>24</sup> To meet the threshold of significant probative value, it is therefore necessary ‘that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged’.<sup>25</sup>

In working out whether this threshold is met, concepts arising from the common law of propensity/similar fact evidence – such as whether the evidence reveals ‘unusual features’, ‘underlying unity’, ‘system’ or ‘pattern’ – can assist,<sup>26</sup> although it is wrong to say that there must be ‘striking similarities’ before evidence will have significant probative value.<sup>27</sup> Similarity is not, *inherently*, essential for tendency evidence, but is essential for coincidence evidence.<sup>28</sup> The Victorian Court of Appeal has taken exception with proposition, as discussed later below. However, where tendency evidence is expressed at a high level of generality, it is clear in New South Wales that it will be less likely to be of significant probative value.<sup>29</sup> Furthermore, one must be careful not to identify

<sup>22</sup> *R v XY* (2013) 84 NSWLR 363, 385 [88] (Hoeben CJ at CL), 406 [207] (Blanch J).

<sup>23</sup> [2013] NSWCCA 335 (20 December 2013) [196]. In relation to ss 97 and 98, the Court followed *DSJ v The Queen* (2012) 84 NSWLR 758.

<sup>24</sup> *Lockyer* (1996) 89 A Crim R 457, 459 (Hunt CJ at CL).

<sup>25</sup> *R v Ford* (2009) 201 A Crim R 451, 485 [125] (Campbell JA, Howie and Rothman JJ agreeing).

<sup>26</sup> *R v Fletcher* (2005) 156 A Crim R 308, 322 [60] (Simpson J, McClellan CJ at CL agreeing); *Saoud v The Queen* [2014] NSWCCA 136 (25 July 2014) [39] (Basten JA, Fullerton and R A Hulme JJ agreeing).

<sup>27</sup> *R v Ford* (2009) 201 A Crim R 451, 485 [125] (Campbell JA, Howie and Rothman JJ agreeing); *Saoud v The Queen* [2014] NSWCCA 136 (25 July 2014) [39] (Basten JA, Fullerton and R A Hulme JJ agreeing).

<sup>28</sup> ‘The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour. By contrast, coincidence evidence is based upon similarities. Section 98 provides in terms that two or more events occurring is not admissible to prove that a person did a particular act, on the basis that, *having regard to any similarities* in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless, the evidence has significant probative value’: *R v PWD* (2010) 205 A Crim R 75, 91 [79] (Beazley JA, Buddin J and Barr AJ agreeing) (emphasis in original).

<sup>29</sup> *Townsend v Townsend* [2001] NSWCA 136 [78] (Giles JA, Hodgson JA agreeing); *Ibrahim v Pham* [2007] NSWCA 215 (21 August 2007) [264] (Campbell JA, Hodgson and Santow JJA agreeing).





as similarities what are actually ‘unremarkable circumstances that are common to sexual offences against children’.<sup>30</sup>

Therefore, realistically:

‘tendency’ evidence [under s 97] will usually depend upon establishing similarities in a course of conduct, even though the section does not refer (by contrast with s 98) to elements of similarity. That inference is inevitable, because that which is excluded is evidence that a person has or had a tendency to act in a particular way, or to have a particular state of mind. Evidence of conduct having that effect will almost inevitably require degrees of similarity, although the nature of the similarities will depend very much on the circumstances of the case.<sup>31</sup>

Similarly:

It is not necessary in criminal cases that the incidents relied on as evidence of the tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or have a state of mind) that is closely similar to the act or state of mind alleged against the accused; or that there be a striking pattern of similarity between the incidents relied on and what is alleged against the accused: *Ford* at [38], [125], *PWD* at [64]-[65]. However, generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value.<sup>32</sup>

The relevance of the possibility that evidence has been concocted or is contaminated has received inconsistent treatment in New South Wales decisions. It is agreed to be relevant to the question of probative value under ss 97 and 98, and not just prejudice under s 101.<sup>33</sup> However, in *BP v The Queen*, Hodgson JA (Price and Fullerton JJ agreeing) said that tendency evidence can never have the necessary probative value if there is a ‘real chance’ of concoction or contamination.<sup>34</sup> In *BJS v The Queen*, Basten JA disapproved of Hodgson JA’s view because of how that view seemed to reinstate the common law decision in *Hoch*, which had been superseded by the Uniform Evidence Act.<sup>35</sup> Basten JA’s view has been since confirmed.<sup>36</sup>

Examples of NSW decisions where tendency evidence was admissible in the context of child sexual abuse cases are:

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<sup>30</sup> *AE v The Queen* [2008] NSWCCA 52 (20 March 2008) [42] (Bell JA, Hulme and Latham JJ).

<sup>31</sup> *Saoud v The Queen* [2014] NSWCCA 136 (25 July 2014) [44] (Basten JA, Fullerton and R A Hulme JJ agreeing).

<sup>32</sup> *BP v The Queen* [2010] NSWCCA 303 (13 December 2010) [108] (Hodgson JA, Price and Fullerton JJ agreeing).

<sup>33</sup> *BP v The Queen* [2010] NSWCCA 303 (13 December 2010) [110] (Hodgson JA, Price and Fullerton JJ agreeing); *BJS v The Queen* [2011] NSWCCA 239 (3 November 2011) [26]-[27] (Basten JA).

<sup>34</sup> [2010] NSWCCA 303 (13 December 2010) [110].

<sup>35</sup> [2011] NSWCCA 239 (3 November 2011) [26]-[27].

<sup>36</sup> *BJS v The Queen* [2013] NSWCCA 123 (24 May 2013) [67] (Hoeben CJ at CL, Davies and Adamson JJ agreeing).





- *R v Milton* [2004] NSWCCA 195 (18 June 2004): The tendency evidence showed that the accused attempted to foster a relationship with two boys conducive to sexual contact, despite their youth and immaturity, in encouraging them to drink and use drugs, loosening their natural sexual inhibitions and imposing his will upon them ‘in the teeth of their resistance’.<sup>37</sup>
- *R v Fletcher* (2005) 156 A Crim R 308: The tendency evidence showed a pattern of behaviour or modus operandi – the accused used his position as parish priest in meeting and becoming involved with Catholic families, developed a special relationship with the families and their children, and introduced the child to sexually explicit material and eventually inappropriate sexual behaviour. It did not matter that the tendency evidence involved fellatio whereas eight of the nine charged acts did not, since the argued tendency was not ‘to have sexual intercourse in a particular fashion’.<sup>38</sup>
- *R v PWD* (2010) 205 A Crim R 75: The tendency evidence showed that the accused, a music teacher at a boarding school, had a tendency to be sexually attracted to young male students, and to act upon that predilection in various ways and at different times, but where there was vulnerability on behalf of the students (boarder, homesick, or did not fit in with the normal pattern of school life).
- *BP v The Queen* [2010] NSWCCA 303 (13 December 2010): The tendency evidence supported a tendency for the accused to have an unusual sexual interest in relatives under his authorities when they were aged between four and seven years, with offending occurring in similar circumstances.

Despite earlier conflicting suggestions,<sup>39</sup> it is now settled in NSW that the standard of appellate review that applies to admissibility decisions under ss 97, 98 and 101 is that of *House v The King*.<sup>40</sup>

## Victoria

In contrast to the position in NSW and other jurisdictions, the Victorian Court of Appeal has said that the assessment of ‘probative value’ should always take into account considerations of reliability and credibility. In *Dupas v The Queen*, a unanimous five judge bench (Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA) held that the NSW decision *Shamouil*, which took the contrary position, was ‘manifestly wrong and should not be followed’.<sup>41</sup> In *Dupas*, the Court said that the common law understanding of ‘probative value’ incorporated considerations of the reliability and weight a jury might give to the evidence.<sup>42</sup> The Court read ‘probative value’ under the Uniform Evidence Acts as assuming the continued application of that common law position.<sup>43</sup>

<sup>37</sup> *R v Milton* [2004] NSWCCA 195 (18 June 2004) [31].

<sup>38</sup> *R v Fletcher* (2005) 156 A Crim R 308, 322 [67] (Simpson J, McClellan CJ at CL agreeing).

<sup>39</sup> See Basten JA’s dissent in *R v Zhang* (2005) 158 A Crim R 504, 514–15 [45].

<sup>40</sup> (1936) 55 CLR 499; see *DAO v The Queen* [2011] NSWCCA 63 (1 April 2011), as interpreted in *Bangaru v The Queen* [2012] NSWCCA 204 (20 September 2012) [261]-[262] (Beech-Jones J, Beazley JA and Hall J agreeing).

<sup>41</sup> (2012) 218 A Crim R 507, 524 [63].

<sup>42</sup> *Dupas v The Queen* (2012) 218 A Crim R 507, 547-8 [140]-[142].

<sup>43</sup> *Dupas v The Queen* (2012) 218 A Crim R 507, 547-8 [183]-[184].



The Victorian Court of Appeal has also taken a different stance from NSW on what meaning should be attached to ‘significant’ in ‘significant probative value’:

There have been judicial attempts to ascribe a meaning to significant for the purposes of s 97. Thus, Hunt CJ at CL in *Lockyer* and in *Lock* expressed the view that one of the primary meanings of ‘significant’ is ‘important’ or ‘of consequence’. His Honour also expressed the opinion, drawing on implications of the rejection of certain recommendations of the Australian Law Reform Commission, that ‘significant’ probative value must mean something more than mere relevance but something less than a ‘substantial’ degree of relevance. In my opinion, attempts at reformulation of the statutory language are unlikely to be productive of much in the way of enlightenment; but to my mind (and with respect to those views which coincide with that of Hunt CJ at CL) in context ‘significant’ must bear a meaning closer to ‘substantial’ than to ‘important’ or ‘of consequence’ which, as synonyms, to me do not adequately convey the import of ‘significant’. Three observations may, however, safely be made. First, s 97 is designed to impose a high (or, at least, higher) threshold of admissibility than for evidence which has ‘mere’ probative value. Secondly, the adjective ‘significant’ is directed to the quality of the evidence, rather than to its quantity. Thirdly, it is plain that the court is required to make an assessment of the quality of the evidence, since it is only if the court ‘thinks that the evidence will ... have significant probative value’ that it may be admitted. In every case this will be a matter of fact and degree, and will be influenced by the nature of the fact in issue sought to be proved (or disproved).<sup>44</sup>

As in NSW, for both tendency and coincidence evidence, the similarities or underlying unity that can be drawn between the evidence and the charged act will normally be very important when assessing the evidence’s probative value. Thus in *CGL v The Queen*, Maxwell P, Buchanan and Bongiorno JJA said, in a remark their Honours made clear also applied to coincidence evidence as well as tendency evidence:

As a general rule, the greater the degree of specificity with which the similarities can be identified, the more likely it is that the evidence will be probative of a tendency to act in a distinctive way or to do acts of a distinctive kind. Conversely, the greater the degree of generality, the more difficult it will be to demonstrate that the evidence in question has ‘significant’ probative value and – even more so – to demonstrate that its probative value ‘substantially outweighs’ the very real prejudicial effect of evidence of this kind.<sup>45</sup>

Similarly, in *RJP v The Queen*, Coghlan AJA (Redlich JA and Macaulay AJA agreeing) said:

Under the *Evidence Act 2008* (Vic) coincidence evidence pursuant to s 98 of that Act does, in terms, depend upon similarity. Tendency evidence does not, although the view has been taken that tendency evidence in most cases will only be significantly probative if the evidence between various complainants shows underlying unity.<sup>46</sup>

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<sup>44</sup> *Semaan v The Queen* [2013] VSCA 134 (3 June 2013) [37]-[38] (Priest JA, Buchanan and Ashley JJA agreeing).

<sup>45</sup> (2010) 24 VR 486, 497 [40]; see also *GBF v The Queen* [2010] VSCA 135 (7 June 2010) [31] (Nettle and Harper JJA and Hansen AJA).

<sup>46</sup> (2011) 215 A Crim R 315, 335 [113].



It is clear that there is no need for a 'striking similarity'.<sup>47</sup> Conversely, however, the similarities that are identified must not really be 'unremarkable circumstances that are common to sexual offences against children'.<sup>48</sup>

However, a view has developed in Victorian decisions that for tendency evidence to have significant probative value and therefore be admissible, it *must* have some similarity or other 'underlying unity' with the act in question. The first decision which could be read as elevating this view to a statement of principle appears to be *GBF v The Queen*, although even then the statement is made in the context of sexual offences against multiple people, in express contrast to when tendency evidence of a sexual interest in a complainant is used in relation to that complaint:

s 97 endorses the common law's healthy scepticism in relation to similar fact evidence. Accordingly, one is loath to accept that offending on one occasion is significantly probative of offending on another unless there are significant or remarkable similarities as between previous acts and the act in question, or as between the circumstances in which previous acts were committed and the circumstances in which the act in question was committed or, more compendiously, unless the evidence reveals a pattern of conduct, modus operandi or some other underlying unity, which logically implies that, because the accused committed the previous acts or committed them in particular circumstances, he or she is likely to have committed the act in issue.<sup>49</sup>

Then in *RR v The Queen*, Redlich JA said (Hansen JA agreeing):

For evidence of either to be admitted, relevant similarities must be present otherwise the evidence would be 'pure propensity evidence' and would not demonstrate 'underlying unity' or a 'common modus operandi' or a 'pattern of conduct' which would justify cross-admissibility.<sup>50</sup>

And recently, in *Velkoski v The Queen*, Redlich, Weinberg and Coghlan JJA said:

we have examined the principle which is applied in determining whether tendency evidence is admissible. The principle consistently applied in this Court is that the evidence must possess sufficient common or similar features with the conduct in the charge in issue so as

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<sup>47</sup> *R v Papamitrou* (2004) 7 VR 375, 388 [27] (Winneke P, Ormiston and Buchanan JJA agreeing); *CGL v The Queen* (2010) 24 VR 486, 494-5 [29] (Maxwell P, Buchanan and Bongiorno JA); *PNJ v Director of Public Prosecutions* (2010) 27 VR 146, 149 [12] (Maxwell P, Buchanan and Bongiorno JJA); *NAM v The Queen* [2010] VSCA 95 (22 April 2010) [26]-[27] (Nettle JA); *PG v The Queen* [2010] VSCA 289 (9 October 2010) [71] (Nettle JA, Neave and Harper JJA agreeing); *CW v The Queen* [2010] VSCA 288 (28 October 2010) [22] (Maxwell P, Buchanan and Neave JJA).

<sup>48</sup> *AE v The Queen* [2008] NSWCCA 52 (20 March 2008) [42] (Bell JA, Hulme and Latham JJ); see also *PNJ v Director of Public Prosecutions* (2010) 27 VR 146, 151 [19] (Maxwell P, Buchanan and Bongiorno JJA).

<sup>49</sup> [2010] VSCA 135 (7 June 2010) [27] (Nettle and Harper JJA and Hansen AJA) (footnotes omitted).

<sup>50</sup> [2011] VSCA 442 (16 December 2011) [40].



to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct.<sup>51</sup>

In *Rapson v The Queen*, Maxwell P, Nettle and Beach JJA denied that *Velkoski* “hardened up’ – that is, made more stringent – the requirements for the admissibility of tendency evidence’, said that *Velkoski* ‘reflect[s] the weight of decisions of this Court since the Evidence Act first came into force’, and said that ‘the clarity of the Court’s restatement of principle should facilitate rather than inhibit the utilisation of s 97 of the Evidence Act in the future’.<sup>52</sup>

Whether there is a possibility that tendency or coincidence evidence has been concocted or ‘contaminated’ must be taken into account for the question of significant probative value.<sup>53</sup> Where there is ‘a real possibility of contamination – concoction, collusion, unconscious influence and the like’, the Victorian Court of Appeal has categorically said that tendency or coincidence evidence will lack the significant probative value to be admissible under s 101.<sup>54</sup> This is at odds with the NSW position post-*BJS*. Some judges have also applied, in the context of the *Evidence Act 2008* (Vic), the *Pfennig/Hoch* test of ‘whether those features of the complainants’ accounts which had the requisite degree of similarity were capable of reasonable explanation on the basis of collusion and concoction’.<sup>55</sup> If there is evidence of contamination, the prosecution bears the onus of proof in persuading the trial judge that the evidence should be admitted.<sup>56</sup> The reliability of the evidence of contamination should not be assessed by the trial judge.<sup>57</sup>

Examples of factual patterns of tendency and coincidence evidence under the *Evidence Act 2008* (Vic) are:

- *PNJ v Director of Public Prosecutions* (2010) 27 VR 146: Charges were laid against the accused in relation to sexual assault of three boys at a youth training centre. However, the asserted similarities in their evidence were not distinctive so as to make the evidence have ‘significant probative value’ either as tendency or coincidence evidence. Rather, the evidence simply reflected the setting which the alleged offending occurred: that the assaults were perpetrated by a person in authority, the victims were ‘captive’, they were of a similar age, the offender initiated the sexual contact, and the offences took place during the same general period and at the same location. The Court said that a relevant similarity

<sup>51</sup> [2014] VSCA 121 (18 June 2014) [3].

<sup>52</sup> [2014] VSCA 216 (11 September 2014) [20].

<sup>53</sup> *PNJ v Director of Public Prosecutions* (2010) 27 VR 146, 153 [28] (Maxwell P, Buchanan and Bongiorno JJA).

<sup>54</sup> *Murdoch (A Pseudonym) v The Queen* [2013] VSCA 272 (27 September 2013) [7]-[8] (Redlich and Coghlan JJA), [99] (Priest JA).

<sup>55</sup> *Murdoch (A Pseudonym) v The Queen* [2013] VSCA 272 (27 September 2013) [4] (Redlich and Coghlan JJA); see also *SLS v The Queen* [2014] VSCA 31 (6 March 2014) [170] (Ashley, Redlich and Priest JJA).

<sup>56</sup> *Murdoch (A Pseudonym) v The Queen* [2013] VSCA 272 (27 September 2013) [100] (Priest JA, Redlich and Coghlan JJA agreeing); *SLS v The Queen* [2014] VSCA 31 (6 March 2014) [175] (Ashley, Redlich and Priest JJA).

<sup>57</sup> *BSJ v The Queen* [2012] VSCA 93 (17 May 2012) [21] (Maxwell P, Buchanan and Hansen JJA); *Murdoch (A Pseudonym) v The Queen* [2013] VSCA 272 (27 September 2013) [7] (Redlich and Coghlan JJA).



had to be ‘something distinctive about the way in which the accused allegedly took advantage of the setting or context’.<sup>58</sup>

- *GBF v The Queen* [2010] VSCA 135 (7 June 2010): Tendency evidence that the accused would touch the breasts and vaginas of female co-workers at work was ‘remarkable and unusual behaviour’ and therefore had significant probative value,<sup>59</sup> but evidence of a tendency to have a sexual interest in female staff members, or to touch their breasts without consent or attempt to rape them away from work, was not sufficiently unusual.<sup>60</sup>
- *KRI v The Queen* (2011) 207 A Crim R 552: Tendency evidence had significantly probative value because it could show a tendency to sexually assault each of the child complainants, each friends with the accused’s son and each visiting at the defendant’s home, by touching his penis, licking his anus or inserting his penis into the complainant’s anus either on the couch or the bedroom, and to have a sexual interest of the same. The same similarities also qualified the evidence as coincidence evidence with significant probative value.
- *RHB v The Queen* [2011] VSCA 295 (27 September 2011): The tendency evidence of the accused’s pleas of guilt to three charges of indecent assault of his daughters was admissible in relation to a charge concerning his granddaughter, because although the conduct the subject of the guilty pleas occurred decades earlier, ‘it is a remarkable thing for a man to commit sexual acts against his female lineal descendants ... in the home which the victim was in the [accused’s] care, while other adults were close by and the risk of detection was significant’.<sup>61</sup> The offending occurred ‘in a particular way, albeit perhaps not particularly striking, and in circumstances which were similar’.<sup>62</sup>
- *RR v The Queen* [2011] VSCA 442 (16 December 2011): Coincidence evidence was not admissible. The accused was charged with sexual offending, extending to penetration, against four of his children. One child gave evidence that the accused ‘bum fucked’ her by putting his hands up her butt and inside her underpants. There was also inconsistent evidence by the children of ‘water melon dancing’ where one or two children had to strip naked and do a striptease dance on the coffee table in front of the family singing a song about vaginas. Two judges (Redlich JA, Hansen JA agreeing) said that this evidence did not have the underlying unity to support probability reasoning regarding the penetration charges.<sup>63</sup> Neave JA said the evidence had substantial probative value as coincidence

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<sup>58</sup> *PNJ v Director of Public Prosecutions* (2010) 27 VR 146, 151 [20] (Maxwell P, Buchanan and Bongiorno JJA).

<sup>59</sup> *GBF v The Queen* [2010] VSCA 135 (7 June 2010) [32], [42] (Nettle and Harper JJA and Hansen AJA).

<sup>60</sup> *GBF v The Queen* [2010] VSCA 135 (7 June 2010) [31], [36], [39], [45] (Nettle and Harper JJA and Hansen AJA).

<sup>61</sup> *RHB v The Queen* [2011] VSCA 295 (27 September 2011) [18] (Nettle JA, Harper JA agreeing).

<sup>62</sup> *RHB v The Queen* [2011] VSCA 295 (27 September 2011) [21] (Nettle JA, Harper JA agreeing).

<sup>63</sup> *RR v The Queen* [2011] VSCA 442 (16 December 2011) [42].





evidence because it could be regarded as evidence of grooming behavior, but this probative value was substantially outweighed by its prejudicial effect.<sup>64</sup>

- *Reeves v The Queen* [2013] VSCA 311 (7 November 2013): The tendency evidence was sufficiently ‘unusual’ or ‘remarkable’ because it involved a man sexually interfering with his daughter and stepdaughter, each complainant was prepubescent, the accused purported to carry out a therapeutic act on the complainant to relieve physical discomfort thus giving him an opportunity for sexual assault, the accused pulled down both complainants’ underpants, and during the assaults there were others awake in the house.<sup>65</sup> There was only one other incident relied on to establish the relevant tendency.<sup>66</sup>

In relation to standard of appellate review for admissibility rulings, Victorian authorities have made clear that the *House v The King* standard applies.<sup>67</sup>

## Tasmania

In relation to what should be taken into account when assessing the ‘probative value’ of tendency or coincidence evidence, in *KMJ v Tasmania* (a pre-*Dupas* case),<sup>68</sup> Evans J (Blow and Tennent JJ agreeing) followed the view expressed in the NSW decision in *Shamouil* that the assessment should not usually take into account the reliability or weight of evidence but should take the evidence at its highest, even while expressing doubts about that view. His Honour said:

this Court should adopt the effect given to the term ‘probative value’ in *Shamouil* at [60]-[65], unless convinced that it is plainly wrong. I am not so convinced, although I confess that I have some difficulty in divorcing considerations of reliability and credibility from an assessment of the probative value of evidence. An aspect of my difficulty relates to the regard that should be had to the possibility of concoction when considering the admissibility of similar fact evidence from several witnesses. With reference to this question, in *AE v The Queen* [2008] NSWCCA 52, Bell JA, Hume and Latham JJ, at [44], said, ‘it was not an error to consider the possibility of joint concoction in assessing the probative value of the evidence’. *PNJ v Director of Public Prosecutions (Vic)* (2010) 27 VR 146 is an authority to the same effect. In that case Maxwell P, Buchanan and Bongiorno JJA, at [24] to [29], addressed the proposition that it had been an error for the trial judge to consider the possibility of concoction when deciding whether evidence had significant probative value. They said at [28], ‘It is, in our view, not only appropriate but necessary for a judge to consider whether, on the material before the Court, there can be seen to be such a possibility. Whether and to what extent such a possibility affects the probative value of the evidence relied on will be a matter for the judge to decide.’ It is not readily apparent to me why it is not improper to

<sup>64</sup> *RR v The Queen* [2011] VSCA 442 (16 December 2011) [2], [4].

<sup>65</sup> *Reeves v The Queen* [2013] VSCA 311 (7 November 2013) [54] (Maxwell ACJ, Coghlan JA agreeing).

<sup>66</sup> *Reeves v The Queen* [2013] VSCA 311 (7 November 2013) [58] (Maxwell ACJ, Coghlan JA agreeing).

<sup>67</sup> See, eg, *CEG v The Queen* [2012] VSCA 55 (27 March 2012) [17] (Nettle and Harper JJA and Hollingworth AJA); contra *PNJ v Director of Public Prosecutions* (2010) 27 VR 146, 150 [15]-[16] (Maxwell P, Buchanan and Bongiorno JJA) and *JLS v The Queen* (2010) 28 VR 328, 339 [34]-[35] (Redlich JA, Mandia and Bongiorno JJA agreeing).

<sup>68</sup> (2011) 218 A Crim R 87.



consider the possibility of concoction, a matter that goes to the credibility and reliability of evidence, when assessing its probative value or why, for some other reason, it is proper to do so. For present purposes I do not need to pursue this any further.<sup>69</sup>

In *Tasmania v L*, Pearce J, referring to *Dupas*, observed that NSW and Victorian courts have now diverged on whether *Shamouil* should be followed, but said that '[a]lthough I am faced with the apparently conflicting approaches adopted by the intermediate appellate courts in New South Wales and Victoria I am bound to follow KMJ and other decisions of single judges in Tasmania who have followed that line of authority since then'.<sup>70</sup>

Corresponding to the above passage from *KMJ*, initially, the real possibility of concoction or contamination has been held in Tasmania as potentially depriving evidence of its significant probative value.<sup>71</sup> However, in *Tasmania v W*, Blow J said:

It is interesting to see how the New South Wales Court of Criminal Appeal has dealt with concoction issues in cases of this nature since *Shamouil*. Obviously it would be inconsistent with *Shamouil* for a possibility of concoction or contamination to be treated as relevant to the probative value of evidence. In *FB v R* [2011] NSWCCA 217, that court proceeded on the basis that concoction and contamination were relevant not to the probative value of evidence, but to the risk of unfair prejudice. ... In my view I am obliged to follow that case. There have been a number of cases in which appellate courts have taken the view that the possibility of concoction or contamination is relevant to the assessment of the probative value of evidence. ... In my view that proposition is inconsistent with *KMJ*, and I must follow *KMJ*.<sup>72</sup>

It is not clear that the NSW Court of Criminal Appeal in *FB v R* treated the issue of concoction or contamination as relevant not to probative value but to the risk of unfair prejudice as Blow J suggests. However, it appears that counsel for the accused presented the argument on the basis that the real possibility of concoction and contamination should have led to the evidence being excluded under s 101.<sup>73</sup>

In Tasmania, as in NSW, significant probative value means something more than mere relevance but less than a substantial degree of relevance.<sup>74</sup>

Examples of when tendency evidence has been admitted in Tasmania in child sexual abuse cases are:

- *Tasmania v Y* [2007] TASSC 112 (16 November 2007): The six female complainants all frequently stayed over at the complainant's home and would frequently sleep in the same bed as the complainant. Their evidence was admissible as tendency evidence given the

<sup>69</sup> *KMJ v Tasmania* (2011) 218 A Crim R 87, 101 [34].

<sup>70</sup> [2013] TASSC 47 (24 July 2013) [43].

<sup>71</sup> *L v Tasmania* (2006) 15 Tas R 318, 397 [40] (Underwood CJ, Crawford and Tennent JJ agreeing).

<sup>72</sup> [2012] TASSC 47 (4 July 2012) [7]-[8].

<sup>73</sup> *FB v R* [2011] NSWCCA 217 [31].

<sup>74</sup> *L v Tasmania* (2006) 15 Tas R 318, 392 [31] (Underwood CJ, Crawford and Tennent JJ agreeing).





number of complainants, that the accused accepted some of the facts such as sharing a bed and supplying them with alcohol, that his indecent assaults on them rarely involved his penis (which was relevant in light of his having ‘a problem’ with becoming sexually aroused), and that the assaults occurred in similar circumstances.

- *Tasmania v McLean* [2008] TASSC 57 (17 July 2008): Tendency evidence was admissible when it involved two complainants of similar age who had worked at the accused’s coffee store, conversations concerning intimate details of the accused’s personal life, discussions about the girls’ virginity, the accused taking each girl home after work, and the accused supplied each girl with alcohol. It did not matter that the accused had intercourse with the first complainant whereas the second complainant stopped him after he touched her on her vagina.
- *Tasmania v Martin (No 2)* [2011] TASSC 36 (23 June 2011): Tendency evidence of child pornography possessed by the accused did not have significant probative value for the fact in issue, which was his knowledge that the complainant, who had been prostituted by her mother, was under the age of consent. It lacked significant probative value because of the generality of the expressed tendency it was said to support, which was to have a sexual interest in young females.<sup>75</sup>
- *Tasmania v L* [2013] TASSC 47 (24 July 2013): Tendency evidence had significant probative value because each of the complainants was a young male aged between 12 and 16, in each case the opportunity to offend arose from an offer of paid work at the accused’s home, all charges involved a similar method of engaging with the boys using alcohol and/or cannabis to decrease inhibition, games of chess, sexually interesting images and discussion of sexual interest in young girls, all involved the common use of showering to create a situation of sexual opportunity, all included sexual conduct at the home of the accused, and there was similarity in the nature of the offences.

Tasmanian courts have held that the *House v The King* standard of appellate review does not apply when an appellate court considers an admissibility ruling considering tendency or coincidence evidence under ss 97, 98 or 101.<sup>76</sup> The issue does not seem to have been considered since 2006, however.

### Australian Capital Territory

The Supreme Court of the Australian Capital Territory has tended to follow the NSW Court of Criminal Appeal’s interpretation of the Uniform Evidence Acts in relation to tendency and coincidence evidence.

Thus the assessment of ‘probative value’ requires taking the tendency or coincidence evidence at its highest, taking into account considerations of weight or reliability only in rare circumstances.<sup>77</sup> Significant probative value means something more than mere relevance but less than a substantial

<sup>75</sup> *Tasmania v Martin (No 2)* [2011] TASSC 36 (23 June 2011) [59]-[63] (Porter J).

<sup>76</sup> *L v Tasmania* (2006) 15 Tas R 381, 401 [51]-[55] (Underwood CJ, Tennent J agreeing).

<sup>77</sup> *R v Fitzpatrick* [2012] ACTSC 107 (13 July 2012) [18] (Burns J); *R v Schofield* [2013] ACTSC 247 (21 November 2013) [25]-[26] (Refshauge J).



degree of relevance.<sup>78</sup> In relation to tendency evidence, the view of the NSW Court of Criminal Appeal has been approvingly cited that similarities are not necessary for tendency evidence but that 'generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value'.<sup>79</sup> 'Striking' or 'unusual' similarities are not needed even for coincidence evidence.<sup>80</sup>

Following earlier NSW decisions, if the court finds that there is a reasonable possibility of concoction or contamination of the evidence, this is relevant to whether it has significant probative value.<sup>81</sup> The NSW decision which categorically said that the 'real chance' of concoction or contamination will mean that the evidence lacks significant probative value has been approvingly cited.<sup>82</sup>

There are a paucity of cases illustrating the circumstances in which the ACT Supreme Court will find that tendency or coincidence evidence is or is not admissible, but for example, in *R v PW*,<sup>83</sup> the proposed tendency of having a sexual interest in the child complainant and to act on it by tickling her as a way to disguise inappropriate touching and to gain her affection was held to lack the type of detail to have significant probative value. In contrast however, there are ACT decisions where a tendency expressed as a tendency to have a sexual attraction to female children or children generally was, of itself, held to have significant probative value.<sup>84</sup>

It is unclear in the ACT what standard of appellate review will apply to rulings about the admissibility of tendency or coincidence evidence.

## B Queensland

Queensland is the only jurisdiction where the common law of similar fact and propensity evidence survives for criminal proceedings, although it has been modified 'to some extent'.<sup>85</sup> Leading High Court common law cases, notably *Pfennig v The Queen*,<sup>86</sup> *HML v The Queen*<sup>87</sup> and *BBH v The Queen*<sup>88</sup> therefore still apply.

That common law position can be summarised as follows:

- The key test for admissibility of propensity evidence (that has not already been excluded on grounds of irrelevance) is the test from *Pfennig*, namely whether there is no 'rational view of

<sup>78</sup> *R v Schofield* [2013] ACTSC 247 (21 November 2013) [24] (Refshauge J).

<sup>79</sup> *BP v The Queen* [2010] NSWCCA 303 (13 December 2010) [108] (Hodgson JA, Price and Fullerton JJ agreeing), cited in *R v Edwin* [2013] ACTSC 6 (4 February 2013) [14].

<sup>80</sup> *R v AKN* [2013] ACTSC 64 (15 April 2013) [34].

<sup>81</sup> *R v Tully (No 1)* [2013] ACTSC 127 (12 July 2013) [44]-[46] (Burns J).

<sup>82</sup> *R v Tully (No 1)* [2013] ACTSC 127 (12 July 2013) [42], [46] (Burns J).

<sup>83</sup> [2014] ACTSC 121 (13 May 2014).

<sup>84</sup> *R v Johnston* [2012] ACTSC 89 (8 June 2012) [48] (Burns J) *R v Fitzpatrick* [2012] ACTSC 107 (13 July 2012) [18] (Burns J); *R v Edwin* [2013] ACTSC 6 (4 February 2013) [21]; *R v Tully (No 1)* [2013] ACTSC 127 (12 July 2013) [43] (Burns J).

<sup>85</sup> *HML v The Queen* (2008) 235 CLR 334, 365 [54] (Kirby J).

<sup>86</sup> (1995) 182 CLR 461.

<sup>87</sup> (2008) 235 CLR 334.

<sup>88</sup> (2012) 245 CLR 499.



the evidence that is consistent with the innocence of the accused'.<sup>89</sup> Similar fact evidence is considered a variant of propensity evidence.<sup>90</sup>

- In applying the test from *Pfennig*, the propensity evidence must be viewed in the context of the prosecution case, and it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case may be accepted by the jury.<sup>91</sup>
- The High Court has not resolved whether evidence of the accused's other disreputable conduct which is not used by the prosecution to establish a 'propensity' or 'coincidence' but which is instead used to provide context or background to clarify other evidence must comply with the *Pfennig* test. In *HML v The Queen*, three judges said it does not need to so comply,<sup>92</sup> three judges said it does,<sup>93</sup> and Heydon J expressly did not decide the point.<sup>94</sup>

The modification in Queensland to the common law alluded to above is provided for by s 132A of the *Evidence Act 1977* (Qld):

#### **Admissibility of similar fact evidence**

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

The effect of this provision is that, in working out in accordance with *Pfennig* whether there is no rational explanation of the propensity evidence consistent with the accused's innocence, one cannot consider the possible explanation that the evidence was concocted.<sup>95</sup> This abrogates *Hoch v The Queen*.<sup>96</sup>

Examples illustrating similar fact and propensity evidence in relation to child sexual abuse cases in Queensland are:

- *R v KP; ex parte Attorney-General (Qld)* [2006] QCA 301 (22 August 2006): The accused was charged with sexual offences against two brothers who the accused taught as a music teacher at a school, and for incidents where he made a brother touch the genitalia of one of the accused's children. The sexual acts involving the first brother were far more extensive than in relation to the second brother. The second brother's evidence was admissible as

<sup>89</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).

<sup>90</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 464-5 (Mason CJ, Deane and Dawson JJ).

<sup>91</sup> *Phillips v The Queen* (2006) 225 CLR 303, 323-4 [63] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

<sup>92</sup> (2008) 235 CLR 334, 358 [24] (Gleeson CJ), 485 [455] (Crennan J), 499 [505]-[507] (Kiefel J).

<sup>93</sup> (2008) 235 CLR 334, 370 [59] (Kirby J), 384-5 [114]-[117] (Hayne J, Gummow J agreeing).

<sup>94</sup> (2008) 235 CLR 334, 431-2 [288]-[289].

<sup>95</sup> *Phillips v The Queen* (2006) 225 CLR 303, 307 [6] n 23 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *HML v The Queen* (2008) 235 CLR 334, 431 [288] n 309 (Heydon J); *BBH v The Queen* (2012) 245 CLR 499, 532 [98] n 112 (Heydon J), 547 [159] n 162 (Crennan and Kiefel JJ).

<sup>96</sup> (1988) 165 CLR 292.



similar fact evidence in relation to the charges for the first brother because of a strikingly similar modus operandi: the accused purported to adopt a fatherly role and exploited it, he engaged in discussion about male anatomy and sexual response as a setting for his advances, he insisted on joint ablutions involving masturbation, he encouraged the boys to sleep naked and positioned himself in bed with the boy and engage in genital fondling, he used the pretext of if the boy was wearing anything as an opportunity for touching his genitals, and he insisted each boy get into the bath tub and wash his genitals. There was no rational view of this as consistent with innocence. However, the many general occasions of masturbation in relation to the first brother were not similar to the handful of occasions involving the second brother or the accused's children and therefore were *not* cross-admissible for those charges.

- *R v WAH* [2009] QCA 263 (8 September 2009): The accused was charged with sexual offending against his son's two stepdaughters. Here, there were striking similarities in the complainants' evidence of furtive, fleeting and opportunistic sexual abuse involving the distinctly curious behaviour of the accused constantly licking his finger or thumb after digital or attempted digital penetration.
- *R v Gregory* [2011] QCA 86 (6 May 2011): A previous offence was admissible as similar fact evidence because both that offence and the instant ones had striking similarities, patterns and unusual features – in both, the mature aged accused struck up a friendship with a male child and engineered the child sharing his bed in the evening, massage was used as a pretext either to directly pave the way for sexual handling or as part of a sexual grooming process, and there was progression from touching of the victim's penis to fellatio to sodomy. Although the instant offences were less obvious and coercive, this was explained by the presence of the accused's female friend in the household during the later offence.
- *R v Douglas* [2012] QCA 352 (14 December 2012): The accused was charged with sodomising his former de facto's son. The complainant gave evidence that on a camping trip the accused talked to him about sex and masturbation, and that when he was about to take a shower, the accused gave him a bottle of baby oil to make masturbating better. This was relevant as evidence of grooming to put the evidence of offending in context, and if the test from *Pfennig* was attracted it was satisfied here.
- *R v Ross* [2013] QCA 87 (19 April 2013): The accused was charged with sexual offences against his former de facto partner's daughter. Part of the complainant's evidence was that the accused asked if she could urinate on him, but she refused. The de facto gave evidence that during her (consensual) relationship with the accused, he had asked her to urinate on him, but she also refused. The de facto's evidence was admissible as similar fact evidence because, since there being a remarked similarity in the evidence about the requests to satisfy the accused's urologic desires, the evidence was relevant in demonstrating the accused's particular interest in practices involving urination – the consensual nature of the relationship did not matter. The Court said that *Pfennig* was not engaged because the evidence from the de facto regarding urine did not tend to show the accused was guilty of a



criminal act or discreditable conduct, and even if it was, there was no reasonable view of the evidence consistent with innocence.

- *R v Manning* [2014] QCA 49 (21 March 2014): The accused was charged with sexual offences against a friend's son. Evidence of a phone call the accused made to the complainant's father after a breakdown in the relationship between the accused and the family in which the accused cried and repeatedly said he was sorry and wanted to keep the relationship going was inadmissible as propensity evidence. This was because a rational innocent explanation of that evidence could not be excluded: that the accused was upset that the friendship with the family had ended and the phone call did not relate to the accused's particular relationship with the complainant.

## C Western Australia

On 1 January 2005, s 31A of the *Evidence Act 1906* (WA) commenced. That provision creates a 'public interest' test for admitting propensity and relationship evidence:

### Propensity and relationship evidence

- (1) In this section —  
**propensity evidence** means —
  - (a) similar fact evidence or other evidence of the conduct of the accused person; or
  - (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;**relationship evidence** means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.
- (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —
  - (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
  - (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
- (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

This has been read as abrogating the common law test from *Pfennig*.<sup>97</sup> It is based on the wording of Justice McHugh's dissent in that decision.<sup>98</sup> However, s 31A expressly covers 'relationship evidence',

<sup>97</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 144-5 [112] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing); *Di Lena v Western Australia* (2006) 165 A Crim R 48, 493 [51] (Roberts-Smith JA, Wheeler and Pullin JJA agreeing); *Noto v Western Australia* (2006) 168 A Crim R 457, 464 [26] (McLure JA, Steyler P and Wheeler JA agreeing).

<sup>98</sup> See *Wood v Western Australia* [2005] WASCA 179 (20 September 2005) [41] (Pullin JA, Roberts-Smith JA agreeing).





which is not subject to the exclusionary rules under ss 97, 98 and 101 of the Uniform Evidence Acts, and regarding which the common law position is unclear, as discussed in relation to Queensland. For evidence to have ‘significant probative value’ under s 31A(2)(a) there is needed, as in NSW, something more than mere relevance: there must be probative value of ‘importance’ or ‘of consequence’, but the degree of relevance does not have to be ‘substantial’.<sup>99</sup> ‘Probative value’ is not defined by the Act, but when Western Australian courts have assessed probative value under s 31A, they have said that the evidence should be taken ‘at its highest’ without the court determining what weight ought to be given to the evidence.<sup>100</sup> They do not appear to have referred to Spigelman CJ’s observation in *Shamouil* that there may be limited circumstances in which credibility and reliability will be taken into account when determining probative value. There also does not appear to have been consideration of the point considered in Victoria of whether similarities are an essential component of ‘significant probative value’.

The assessment of the risk of an unfair trial under s 31A(2)(b) requires a court to consider ‘the risk that a jury might uncritically overvalue the probative effect of the evidence and conclude the accused must have committed the offences charged simply because he or she has committed other offences or has done (or has a reputation for doing) other discreditable things, rather than confining the use of the evidence to a process of dispassionate, logical reasoning’.<sup>101</sup> The court should also take into account any directions that might be given to the jury to overcome possible prejudice.<sup>102</sup> Section 31A(2)(b) also prescribes a balancing exercise between the probative value and the degree of risk of an unfair trial. The ‘fair-minded people’ referred to in this respect are ‘reasonable members of the general public who are not lawyers’, who would have taken all relevant considerations into account.<sup>103</sup>

The prohibition against taking into account the possibility of collusion, concoction or suggestion of evidence under s 31A(3) extends not only to the assessment of the probative value of evidence under s 31A(2)(a) but also to the assessment of the risk of an unfair trial under s 31A(2)(b).<sup>104</sup> Examples of the analysis under s 31A in relation to child sexual offences include:

- *VIM v Western Australia* (2005) 31 WAR 1: The accused was charged with sexually abusing his two stepdaughters. Their evidence was cross-admissible as propensity evidence, having

<sup>99</sup> *Dair v Western Australia* (2008) 36 WAR 413, 429 [61] (Steytler P), 454 [175]-[176] (Miller JA); *Horsman v Western Australia* (2008) 187 A Crim R 565, 572 [22] (Buss JA, Martin CJ and Miller JA agreeing); *Buiks v Western Australia* (2008) 188 A Crim R 362, 373-4 [45] (Buss JA, Miller JA agreeing). *Dair* was cited approvingly in *Stublely v Western Australia* (2011) 242 CLR 373, 379-80 [11]-[12] (Gummow, Crennan, Kiefel and Bell JJ).

<sup>100</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 152 [153] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing); *AJE v Western Australia* (2012) 225 A Crim R 242, 254 [73] (Mazza JA and Beech J)

<sup>101</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 148 [127] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).

<sup>102</sup> *Dair v Western Australia* (2008) 36 WAR 413, 430 [64] (Steytler P); *Horsman v Western Australia* (2008) 187 A Crim R 565, 573-4 [23] (Buss JA, Martin CJ and Miller JA agreeing); *Buiks v Western Australia* (2008) 188 A Crim R 362, 375-6 [46] (Buss JA, Miller JA agreeing).

<sup>103</sup> *Dair v Western Australia* (2008) 36 WAR 413, 431 [66] (Steytler P); *Horsman v Western Australia* (2008) 187 A Crim R 565, 574 [23] (Buss JA, Martin CJ and Miller JA agreeing); *Buiks v Western Australia* (2008) 188 A Crim R 362, 376 [46] (Buss JA, Miller JA agreeing).

<sup>104</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 153 [157] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).



‘an underlying unity or pattern’.<sup>105</sup> The grooming process was similar with respect to each sister, starting with personal remarks about their bodies with the onset of puberty and then escalating sexual contact. There was a preference for fellatio and for sexual intercourse from behind while standing. The accused would take opportunities to have intercourse with a stepdaughter while her mother was showering.

- *Donaldson v Western Australia* (2005) 31 WAR 122: The accused was charged with abusing child swimmers at various swimming clubs and schools. There was no ‘striking similarity’ in the offences themselves, but nonetheless the complainants’ evidence was cross-admissible as propensity evidence because it disclosed an underlying unity, system or pattern in how the sexual assaults took place, irrespective of what physical acts were actually involved – each complainant was a female member of the swimming squad coached by the accused who therefore held a position of influence and trust over them, each complainant was around the same age at the times of the offence, all but one alleged offence occurred when the accused was alone with the complainant, the accused had previously ingratiated himself towards each complainant through gifts or by taking her out to dinner or to a concert, and the accused committed the offences while acting as if the circumstances were normal. The risk of an unfair trial through impermissible propensity reasoning could be guarded against through an appropriate and strong direction. A fair minded person would think that for justice to be done a jury should decide the case on all admissible evidence.
- *AJ v Western Australia* (2007) 177 A Crim R 247: The accused was charged with abusing his de facto’s daughter and son. The charged offences were quite different in relation to each complainant, involving penetration and cunnilingus for the daughter and masturbation for the son. The complainants’ evidence was cross-admissible as propensity evidence because of how the complainants were siblings and the accused’s de facto young stepchildren, the offences occurred in the family home, the counts occurred in close temporal proximity, the accused knew that the complainants’ natural father was sexually abusing them and appeared to have used that information to his advantage, and both complainants described a hole between the toilet and the complainants’ bedroom from which the accused used to watch the complainant. There was therefore significant probative value in tending to establish the accused’s distorted view of appropriate behaviour concerning children, and that the accused dealt with the complainants in a manner not innocent or properly parental. The evidence was also cross-admissible as relationship evidence.
- *KMB v Western Australia* [2010] WASCA 212 (29 October 2010): The accused was charged with sexually offending against his stepdaughter. Her evidence including of him having intercourse with her ‘just about every day if he had the chance to’ was held to be clearly significantly probative of the accused’s ongoing sexual interest in the complainant and the manner and extent to which he had acted on that interest.

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<sup>105</sup> *VIM v Western Australia* (2005) 31 WAR 1, 33 [163] (Weheeler and Roberts-Smith JJA and Miller AJA)





- *SIX v Western Australia* [2010] WASCA 243 (23 December 2010): The accused was charged with abusing his granddaughter. Evidence that the accused had also shown a pornographic magazine to his stepdaughter, made her masturbate him, attempted to make her perform fellatio and rubbed his penis on her back was held to have significant probative value in that it showed a predisposition to paedophilia in relation to young girls in his care and that the accused indulged in this form of depravity over a significant period against each of his granddaughter and stepdaughter. Fair-minded people would think it in the public interest for the evidence to be adduced because the risk of an unfair trial could be guarded against through appropriate jury directions and a *Longman* warning.
- *Asplin v Western Australia* [2013] WASCA 72 (15 March 2013): The accused was charged with abusing his daughter's six year old friend. A clinical psychologist's evidence that the accused had told her that he was sexually attracted to young children was held to clearly have significant probative value for the issue at trial, which was the identification of the offender.

It is unclear what standard of appellate review applies to admissibility rulings under s 31A. Decided cases do not appear to have examined the question.

## D South Australia

On 1 June 2012, Part 3 Division 3 of the *Evidence Act 1929 (SA)* commenced.

Section 34O(1), located in that Division, states that the Division prevails over common law evidence rules to the extent of any inconsistency. This has been read as abrogating the common law as enunciated in *Pfennig* and *Hoch*.<sup>106</sup> However, '[t]he common law authorities which have considered the probative force of discreditable conduct evidence, and the weighing of its probative force against its prejudicial effect, continue to inform the application of s 34P'.<sup>107</sup>

Sections 34P and 34S lays down a new rule for the admissibility of evidence of 'discreditable conduct'.

### **34P – Evidence of discreditable conduct**

- (1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence ('discreditable conduct evidence')
  - (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and
  - (b) is inadmissible for that purpose ('impermissible use'); and
  - (c) subject to subsection (2), is inadmissible for any other purpose.
- (2) Discreditable conduct evidence may be admitted for a use (the 'permissible use') other than the impermissible use if, and only if—

<sup>106</sup> *R v MJJ* (2013) 117 SASR 81, 86-7 [13], 90 [26] (Kourakis CJ), 139 [244] (Vanstone J).

<sup>107</sup> *R v MJJ* (2013) 117 SASR 81, 86-7 [13] (Kourakis CJ, Vanstone J agreeing).



- (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and
  - (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.
- (3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.
- (4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.
- (5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

...

**34S – Certain matters excluded from consideration of admissibility**

Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following:

- (a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;
- (b) the evidence may be the result of collusion or concoction.

Section 34P is drafted broadly enough to capture ‘relationship evidence’ as evidence that must pass the test of probative value outweighing prejudicial effect, although in such a case there is not an additional ‘strong probative value’ threshold.

Section 34P(1) also makes impermissible the use of evidence to draw ‘an inference of guilt from the fact that the accused has engaged in other conduct which has no relevant connection to the offence other than to share the epithet discreditable. Evidence of discreditable conduct of that kind may, admittedly with some imprecision, be described as evidence of a mere, or general, propensity’.<sup>108</sup>

There is no ‘closed list’ of the permissible purposes to which s 34P(2) refers.<sup>109</sup> However, the most common have been described as follows:

The permissible forms of reasoning allowed by s 34P of the *Evidence Act* are, speaking broadly, twofold. First, if the discreditable conduct evidence is strongly probative of the existence of a behavioural proclivity to engage in conduct of the kind charged whenever an opportunity arises, it is permissible to use that evidence as an item of circumstantial evidence indicating guilt. The second form of reasoning is improbability reasoning which has a probative force independent of any proclivity. The improbability can arise from a wide range of circumstances and in many different ways. Common examples include ‘cauliflower ear’ similarity in modus operandi, coincidental presence or involvement in the place or

<sup>108</sup> *R v MJJ* (2013) 117 SASR 81, 88-9 [18] (Kourakis CJ, Vanstone J agreeing).

<sup>109</sup> *R v C, CN* (2013) 117 SASR 64, 70 [23] (White J, Peek and Blue JJ agreeing).



circumstances of the crime for which an innocent explanation is improbable, and the improbability of complainants independently fabricating similar accounts.<sup>110</sup> (footnotes omitted)

In relation to the first of these permissible purposes, there is thus ‘an important distinction between a general propensity (to commit crimes or to commit crimes of the same general kind) on the one hand and a propensity to commit a highly specific type of crime on the other hand’.<sup>111</sup> Furthermore, evidence used to provide the context or show the relationship is evidence used for a permissible purpose.<sup>112</sup> Such relationship evidence will typically ‘outweigh the prejudicial effect of the discreditable conduct it reveals. It does so because the evidence is specific to the relationship and patterns of conduct of the accused to the victim, and not to people generally’.<sup>113</sup>

Section 34P(3) expressly recognises the danger of the impermissible use of evidence to a fair trial.<sup>114</sup> It is not clear whether the assessment of probative value will normally require taking into account considerations of weight and reliability. Some judges, without discussing principle, seem to have acted on the assumption that it does not.<sup>115</sup> However, in *R v MJJ*, Kourakis CJ (Vanstone J agreeing) said ‘I doubt that the factual assumptions on which the *Pfennig* test was applied have the same part to play in the application of s 34P of the *Evidence Act*’, citing the passages from *Phillips* and *HML* in which the High Court said that the *Pfennig* test is to be applied on the assumption that the similar fact evidence would be accepted by a jury.<sup>116</sup>

Examples of the operation of s 34P in child sexual abuse cases are:

- *R v Bond* [2012] SADC (4 October 2012): The accused was charged with sexually abusing two female nieces. There was evidence that the accused showed pornography and a playing card displaying sexual acts to one of the complainants. The trial judge said that the purpose of the evidence was to demonstrate grooming, that the evidence was strongly probative for that purpose, and that: ‘Grooming is sometimes used as a prelude to sexual abuse. It is sometimes seen as a first step towards, or a lead-up to, more serious conduct, particularly sexual abuse. Grooming may take any number of forms, from generosity to conduct bordering on criminal conduct, for example, a seemingly accidental or innocent touching of a sexual nature. It is a way of testing the reaction of the potential victim to see whether that person is alarmed, frightened, complains or is perhaps passive and does not react. It is sometimes a way of introducing a sexual dimension into a relationship and then increasing the level of it. Grooming does not always take place, but its absence leaves open the comment or argument that the alleged perpetrator was increasing the risk of discovery

<sup>110</sup> *R v C, CA* [2013] SASFC 137 (17 December 2013) [77] (Kourakis CJ, Anderson and Nicholson JJ agreeing).

<sup>111</sup> *R v Maiolo (No 2)* (2013) 117 SASR 1, 15 [32] (Peek J, Kourakis CJ and Stanley J agreeing).

<sup>112</sup> *R v Maiolo (No 2)* (2013) 117 SASR 1, 21-22 [50] (Peek J, Kourakis CJ and Stanley J agreeing).

<sup>113</sup> *R v MJJ* (2013) 117 SASR 81, 94-5 [44] (Kourakis CJ, Vanstone J agreeing).

<sup>114</sup> *R v Maiolo (No 2)* (2013) 117 SASR 1, 22 [52] (Peek J, Kourakis CJ and Stanley J agreeing).

<sup>115</sup> See, eg, *R v Cashion* (2013) 115 SASR 451, 456 [24] (Kourakis CJ, Sulan and David JJ agreeing); *R v Webb* [2013] SASC 162 (30 October 2013) [11] (Vanstone J).

<sup>116</sup> (2013) 117 SASR 81, 88 [15].



without first testing the response of the alleged victim. This is the purpose for which the evidence is admitted.<sup>117</sup>

- *R v Pearce* [2013] SADC 89 (5 July 2013): The accused was charged with committing sexual offences against three children. One was a child of friends the accused was living with, a second was a friend of the first, and the third was an acquaintance of the first two who the accused met at the cricket club. The account of each of the first two complainants was cross-admissible in relation to the other but not in relation to the account of the third complainant. There was no underlying unity between any of the three complainants, because the relationships of authority with the complainants had different bases, gift giving only occurred in respect of two complainants, the complainants and the accused shared sporting interests but these interests were unremarkable, there was only one alleged sexual offending at a beach, the offences against the first two regularly occurred in each other's presence but the offences against the third occurred when the third was alone, and evidence of pornography was not consistent. However, because the offences against the first two complainants occurred in the other's presence, each of their two accounts were corroborative of the other.
- *R v C, G* (2013) 117 SASR 162: The accused was charged with sexual offences against two girls and three boys to whom he was related through his mother's side. The complainants' accounts were cross-admissible because of the similarities and underlying pattern of sexual activity occurring at the accused's home of masturbation and anal sexual activity raised to a sufficient degree the improbability of the events occurring by mere coincidence.
- *R v Bonython-Wright* (2013) 117 SASR 410: The accused was charged with a number of sexual offences against two boys he had met through his work as a youth worker employed by the Department for Community Welfare. Evidence of earlier offending with respect to each complainant was cross-admissible for charges for conduct involving both at the same time, because it showed 'why the [accused] was bold enough to engage in that sexual conduct in the presence of both young men'.<sup>118</sup> This, as well as very close similarities in their accounts about sexual conduct involving both of them, meant that the evidence had strong probative value outweighing its prejudicial effect. The evidence also had strong probative value as relationship evidence.
- *R v C, CA* [2013] SASFC 137 (17 December 2013): The accused was charged with sexual offences against three children he knew through his son and stepdaughter. All three complainants' accounts were cross-admissible because they involved the showing of pornography or discussion about obtaining pornography, the playing of games involving the boys exposing their genitals, swimming naked with the accused, and the accused using the opportunity provided by showering with the complainants to stare at and touch their genitals. The first two complainants' accounts had the further similarities of the accused fondling them while masturbating themselves, the way in which the accused would initiate

<sup>117</sup> *R v Bond* [2012] SADC (4 October 2012) [17] (Rice DCJ).

<sup>118</sup> *R v Bonython-Wright* (2013) 117 SASR 410, 418 [47] (Kourakis CJ, Blue and Stanley JJ agreeing).



sexual activity when they slept over, and the accused disclosing to them his sexual activity with another youth. However, the offences against the third did not go further than touching of the genitals, in contrast to fellatio.

- *R v March* [2014] SASFC 54 (3 June 2014): The accused was charged with sexually offending against two of his step-granddaughters. Each complainant's evidence was cross-admissible for the charges against the other, and evidence of abuse of the accused's granddaughter was admissible, because of an underlying unity of the alleged acts, the victims were all of similar ages at the time of the offending, all the alleged acts occurred in the space of two years, the offending was brazen in that detection was a distinct possibility, the accused used a pretext to create an opportunity for indecent touching of saying goodbye, teaching the victim something or asking for help to sort the mail, the accused kissed each victim with an open mouth, and the accused made comments about two of the victim's bodies in the course of the offending.

The *House v The King* standard of appellate review does not apply to admissibility rulings under s 34P.<sup>119</sup>

### 3 Jury Directions for Similar Fact and Propensity Evidence by Jurisdiction

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The following survey does not consider the Northern Territory due to the lack of decided cases on point. There are also few cases for South Australia, Tasmania and the Australian Capital Territory. It is generally accepted among the various jurisdictions that the trial judge should direct the jury about the permissible and impermissible uses of evidence of discreditable conduct having regard to the way in which a jury might reason in the context of the case – a warning against a particular impermissible use of evidence need not be given if there is no real chance that the jury would misuse the evidence in that way.

However, a particularly contentious question relates to the standard of proof. Jurisdictions that have considered the question have said that where evidence is used to prove tendency, coincidence or common law analogues, that evidence must be established beyond reasonable doubt. However, in Western Australia, a distinction has been drawn between proving the propensity beyond reasonable doubt (which is necessary), versus proving individual uncharged acts supporting the propensity beyond reasonable doubt (which is not always necessary). Furthermore and putting this distinction to one side, the New South Wales Court of Criminal Appeal has recently questioned whether evidence of tendency or coincidence need be proven beyond reasonable doubt.

It appears that context or background evidence need not be proven beyond reasonable doubt in jurisdictions that have replaced the common law evidentiary regime. However, in Queensland where the common law and in particular *HML* still applies, this question has not yet been settled.

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<sup>119</sup> *R v Maiolo (No 2)* (2013) 117 SASR 1, 22 [51] (Peek J, Kourakis CJ and Stanley J agreeing).



## A New South Wales

There are strong dicta statements that evidence used as tendency or coincidence evidence must be proved beyond reasonable doubt and the jury should be directed to that effect.<sup>120</sup> However, this has been recently doubted in *Campbell v The Queen*, where Simpson J (Bathurst CJ and Hidden J agreeing) said:

It may be that the proposition that ‘tendency evidence’ tendered by the Crown in a criminal trial must be proved beyond reasonable doubt derives from the various judgments of the High Court in *HML v The Queen* [2008] HCA 16; 235 CLR 334 ...

If *HML* is the source of the proposition, then, in my opinion, the proposition is questionable, for a number of reasons. ...

There is a marked absence of unanimity in the judgments in *HML*.

Hayne J (with whom Kirby J, at least, generally agreed) concluded that evidence of sexual conduct other than the offences charged may be admissible under the tests stated in *Pfennig v The Queen* [1995] HCA 7; 182 CLR 461, but may be used by the jury as a step in reasoning towards guilt only if the jury is satisfied beyond reasonable doubt ‘of the premise for that chain of reasoning’: at [244]. But Hayne J emphasised (at [102]) that his conclusions were confined to cases in which absence of consent was not an element of an offence being tried. That caveat is important.

Even more importantly, *HML* was an appeal from a jurisdiction in which the issue fell to be determined on common law principles. South Australia has not adopted what was hoped would be uniform evidence legislation.

In NSW, it is to the *Evidence Act* that judges must look for guidance on the question of the admissibility (and standard of proof) of, *inter alia*, tendency evidence: *R v Ellis* [2003] NSWCCA 319; 58 NSWLR 700.

I can find nothing in the *Evidence Act* to support the proposition that evidence tendered as tendency evidence in a criminal trial must be proved beyond reasonable doubt before it can be used in proof of an offence.

Moreover, it is not at all clear, from the judgments in *HML*, what it is that must be proved beyond reasonable doubt. Under s 97 of the *Evidence Act*, evidence may be admitted to prove a tendency on the part of an accused (or other person), from which it might be inferred that that person acted in conformity with that tendency - that is, in proof of the offence charged. Is it the facts of which evidence is tendered to prove the tendency that must be proved beyond reasonable doubt? Or is it the tendency itself?

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<sup>120</sup> *DJV v The Queen* (2008) 200 A Crim R 206, 217 [30] (McClellan CJ at CL, Hidden and Fullerton JJ agreeing); *Doyle v The Queen* [2014] NSWCCA 4 (20 February 2014) [129] (Bathurst CJ, Price and Campbell JJ agreeing).





These questions cannot here be resolved. I emphasise that these remarks are not intended to express any concluded views. They are intended only to signal that I do not accept (or reject) the proposition that, in a criminal case, evidence tendered by the Crown as tendency evidence must be proved beyond reasonable doubt. That remains a live issue to be determined in an appropriate case. This is not that case.<sup>121</sup>

However, it is clear that evidence used as context and relationship evidence does not require such a direction.<sup>122</sup>

The jury should be carefully directed as to for what it can and cannot use the evidence.<sup>123</sup> This means that where evidence is admitted as context and relationship evidence but not as tendency or coincidence evidence, the trial judge should direct the jury against using the evidence as proof that the accused committed any offence on the indictment.<sup>124</sup> However, where there is no real likelihood that the jury will use tendency or coincidence reasoning, a warning on those lines need not be given.<sup>125</sup>

Furthermore, generally the judge should give warnings that the jury should not substitute the evidence of any other sexual activity for the specific activity that has been charged.<sup>126</sup>

## B Victoria

It appears, but is not settled, that in Victoria the jury should be directed that evidence to be used as tendency or coincidence evidence must be proven beyond reasonable doubt, but no such direction is necessary in respect of context or relationship evidence. In *R v Sadler*, Nettle, Redlich and Dodds-Streton JJA summarised their understanding of *HML* as follows:

In face of the competing views expressed in *HML*, we respectfully understand the ratio of the decision to be limited to this: that where evidence of uncharged sexual acts is admitted under the common law test propounded in *Pfennig*, and a priori the evidence is relied upon as a step in reasoning to a conclusion of guilt, the jury must be directed that they cannot find that the accused had a sexual interest in the complainant unless satisfied of that beyond reasonable doubt. ...

With respect, therefore, on a strict analysis, we understand the law for the time being to remain that evidence of uncharged sexual acts, like evidence of other uncharged acts, may be tendered as relationship evidence put forward as demonstrating the context in which the charged offence was committed, and that, generally speaking, if it is tendered for that purpose alone, as opposed to establishing a sexual interest in the complainant and a

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<sup>121</sup> *Campbell v The Queen* [2014] NSWCCA 175 (2 September 2014) [325]-[334].

<sup>122</sup> *DJV v The Queen* (2008) 200 A Crim R 206, 217 [31] (McClellan CJ at CL, Hidden and Fullerton JJ agreeing).

<sup>123</sup> *Qualtieri v The Queen* (2006) 171 A Crim R 463, 487 [80] (McClellan CJ at CL, Latham J agreeing).

<sup>124</sup> *R v ATM* [2000] NSWCCA 475 (24 November 2011) [76] (Howie J).

<sup>125</sup> *FDP v The Queen* (2008) 74 NSWLR 645, 657 [59] (McClellan CJ at CL, Grove and Howie JJ).

<sup>126</sup> *R v Greenham* [1999] NSWCCA 8 (8 March 1999) [28]-[29] (Hidden J, Sheller JA and Dowd J agreeing); *R v ATM* [2000] NSWCCA 475 (24 November 2011) [77] (Howie J).





disposition on the part of the accused to act to gratify that interest, it is not necessary for a trial judge to give separate directions about the standard of proof applicable to such uncharged acts, unless the judge perceives that the jury are likely to use the uncharged acts as a step in the reasoning towards guilt or that it is unrealistic to contemplate that any reasonable juror would differentiate between the reliability of the complainant's evidence as to the uncharged acts and as to the charged acts.<sup>127</sup>

In relation to how this applied in Victoria, at least in respect of the pre-Uniform Evidence Act regime which had been in force at the time *Sadler* was decided:

Pending further guidance from the High Court, a judge should ordinarily assume that there is a real risk of the jury using evidence of uncharged sexual acts as a sufficiently important step in their process of reasoning to guilt to warrant particular mention and, therefore, the judge should ordinarily direct the jury that they should not conclude from the evidence of uncharged acts that the accused had a sexual interest in the complainant unless they are satisfied of those acts beyond reasonable doubt.<sup>128</sup>

In *Neubecker v The Queen*, Neave and Mandie JJA and Cavanough AJA expressly chose not to decide if *Sadler* still applies to the Uniform Evidence Act regime.<sup>129</sup>

The jury should also be directed as to the permissible and impermissible uses of evidence which there is a chance the jury might use as tendency or coincidence evidence.<sup>130</sup> But if there is little chance of this, a warning need not be given.<sup>131</sup>

It is also necessary in relation to tendency and coincidence evidence for the trial judge to identify the particular evidence set out in the notice and to instruct the jury to consider whether such similarities or common features of the offence or the circumstances in which was it committed increased the probability of the act the subject of the charge under consideration.<sup>132</sup> The judge should direct the jury to scrutinise the evidence to determine whether it demonstrates a pattern of conduct or similarity of circumstances.<sup>133</sup>

No provision of the *Jury Directions Act 2013* (Vic) specifically relates to this area, with the possible exception of s 27:

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<sup>127</sup> (2008) 20 VR 69, 87-8 [59], [62].

<sup>128</sup> *R v Sadler* (2008) 20 VR 69, 89 [65].

<sup>129</sup> (2012) 34 VR 369, 382-3 [58].

<sup>130</sup> *Paton v The Queen* [2011] VSCA 72 (25 March 2011) [33] (Tate JA, Nettle and Neave JJA agreeing); *WFS v The Queen* (2011) 33 VR 406, 426-8 [93]-[106] (Robson AJA, Buchanan JA and Whelan AJA agreeing).

<sup>131</sup> *R v Bastan* [2009] VSCA 157 (26 June 2009) [25] (Buchanan JA, Maxwell P and Weinberg JA agreeing).

<sup>132</sup> *Velkoski v The Queen* [2014] VSCA 121 (18 June 2014) [230] (Redlich, Weinberg and Coghlan JJA).

<sup>133</sup> *Velkoski v The Queen* [2014] VSCA 121 (18 June 2014) [231] (Redlich, Weinberg and Coghlan JJA).



### Direction to avoid risk of improper use of evidence

- (1) If evidence is given of conduct but the prosecution does not rely on the evidence as evidence of incriminating conduct, defence counsel may request under section 11 that the trial judge—
  - (a) direct the jury that there are all sorts of reasons why a person might behave in a way that makes the person look guilty; and
  - (b) warn the jury that even if the jury thinks that the accused engaged in the conduct, it must not conclude from that evidence that the accused is guilty of the offence charged.

#### Note

Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 15 requires the trial judge to give a direction that is necessary to avoid a substantial miscarriage of justice.

- (2) Without limiting section 14, it is a good reason for not giving the requested direction if the trial judge considers that there is no substantial risk that the jury might use the evidence as evidence of incriminating conduct.

‘Conduct’ and ‘incriminating conduct’ have quite specific meanings, however. Section 22 defines conduct as ‘the telling of a lie by the accused, or any other act or omission of the accused, which occurs after the event or events alleged to constitute an offence charged’ and incriminating conduct as ‘conduct that amounts to an implied admission by the accused’ of the offence, of an element of the offence or a negation of a defence. Nonetheless, s 27 might still conceivably apply to tendency evidence where, for example, evidence of later discreditable sexual conduct is used. Section 27 has not yet received interpretation in reported cases.

## C Queensland

In the ordinary course a jury should be instructed by the trial judge that they must only find that the accused has a sexual interest in the complainant if this is proved beyond reasonable doubt.<sup>134</sup> However, in *HML v The Queen*,<sup>135</sup> the High Court did not resolve what standard of proof should apply to context or relationship evidence.

The trial judge should explain for what purposes evidence of discreditable conduct is tendered and should give a clear and comprehensible warning about misuse of the evidence.<sup>136</sup> Where evidence of discreditable conduct is admitted but is not admitted as propensity or similar fact evidence, a warning against the danger of propensity reasoning will ordinarily be required.<sup>137</sup> However, where evidence is admitted as propensity evidence, a warning against general propensity reasoning need not be given.<sup>138</sup>

<sup>134</sup> *HML v The Queen* (2008) 235 CLR 334, 371 [63] (Kirby J), 390 [132] (Hayne J, Gummow J agreeing), 500 [506] (Kiefel J).

<sup>135</sup> (2008) 235 CLR 334.

<sup>136</sup> *Roach v The Queen* (2011) 242 CLR 610, 625 [47] (French CJ, Hayne, Crennan and Kiefel JJ).

<sup>137</sup> *KRM v The Queen* (2001) 206 CLR 221, 264 [133]-[134] (Hayne J).

<sup>138</sup> *R v BBQ* (2009) 196 A Crim R 173, 187 [63] (Fraser JA, Muir JA and Wilson J agreeing).



## D Western Australia

In *AJE v Western Australia*,<sup>139</sup> a majority of the Court of Appeal (Mazza JA and Beach J, Pullin JA dissenting) held that where evidence of uncharged acts is used to prove the accused's sexual interest in the complainant, the jury must be directed that the sexual interest must be proven beyond reasonable doubt. However, the majority drew a distinction between the sexual interest and the uncharged acts founding the sexual interest:

we would apply the approach in [the Victorian decision of] *Sadler*. Generally, this does not mean that the jury must be satisfied beyond reasonable doubt as to each alleged uncharged act. Rather, the jury must be satisfied beyond reasonable doubt of the sexual interest. However, in this case only one uncharged act was relied upon to demonstrate sexual interest, so satisfaction of the sexual interest involves satisfaction as to the (one) uncharged act.<sup>140</sup>

However, the beyond reasonable doubt standard does not apply if the evidence is being used to provide background or context.<sup>141</sup>

Directions need to be given to guard against the risk of unfair prejudice of evidence of uncharged acts.<sup>142</sup> Nonetheless, where evidence is admitted as propensity evidence under s 31A of the *Evidence Act 1906* (WA), it is not necessary to give a warning against general propensity reasoning.<sup>143</sup>

## E South Australia

Section 34R of the *Evidence Act 1929* (SA) deals with jury directions:

### 34R—Trial directions

- (1) If evidence is admitted under section 34P, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used.
- (2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly.

Although s 34R(1), taken literally, 'seems to require a comprehensive direction on permissible and impermissible uses' such that the judge must direct the jury about uses of the evidence that are not

<sup>139</sup> (2012) 225 A Crim R 242.

<sup>140</sup> *AJE v Western Australia* (2012) 225 A Crim R 242, 253 [66].

<sup>141</sup> *PIM v Western Australia* (2009) 40 WAR 489, 527-8 [156]-[157] (Pullin JA), 563 [314]-[315] (Buss JA); *KMB v Western Australia* [2010] WASCA 212 (29 October 2010) [3] (Pullin JA), [63] (Buss JA), [153] (Mazza J).

<sup>142</sup> *Dair v Western Australia* (2008) 36 WAR 413, 433 [78] (Steytler P).

<sup>143</sup> *PIM v Western Australia* (2009) 40 WAR 489, 524 [140]-[141] (Pullin JA), 561 [302] (Buss JA).



relied on by the parties, the section should not be understood in that way.<sup>144</sup> Rather, ‘possible impermissible uses will vary according to the particular facts and issues involved in a particular case’, though in cases involving uncharged sexual acts, two impermissible uses that must be guarded against are a general finding of sexual offending and impermissible propensity reasoning.<sup>145</sup> Where evidence is admitted as propensity evidence, a propensity warning can only be given in a very limited way.<sup>146</sup>

Section 34R(2) has not yet received considered interpretation. How s 34R might relate to the question of the standard of proof of uncharged acts has also not yet been considered.

## F Tasmania

Where ‘an impermissible use of [evidence] might be made by the jury’, the judge should direct the jury of the evidence’s permissible and impermissible uses.<sup>147</sup> This extends to warning against impermissible propensity reasoning.<sup>148</sup>

## G Australian Capital Territory

Context and background evidence does not require a direction that it be proved beyond reasonable doubt.<sup>149</sup> ACT courts do not seem to have considered what the position is regarding tendency or coincidence evidence.

There appears to be some confusion in the ACT as to when a direction about the use of evidence should be given. Thus in *R v Vojneski*, Burns J said that in all cases where tendency or coincidence evidence is admitted the judge must direct the jury about how the evidence may or may not be used, including by giving a warning against general tendency reasoning.<sup>150</sup> In contrast, in *R v Fairbairn*, Refshauge J cited McHugh J in *KRM v The Queen*<sup>151</sup> to point out that a warning may excite the very prejudice it purports to eliminate, and that if evidence is admitted as propensity evidence then a propensity evidence warning would not ever be required.<sup>152</sup>

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<sup>144</sup> *R v Coutts* [2013] SASFC 143 (20 December 2013) [49]-[50] (Vanstone J, Sulan and Blue JJ agreeing).

<sup>145</sup> *R v Maiolo (No 2)* (2013) 117 SASR 1, 27 [73]-[74] (Peek J, Kourakis CJ and Stanley J agreeing).

<sup>146</sup> *R v Soteriou* (2013) 118 SASR 119, 129 [39] (Vanstone J, Sulan and Stanley JJ agreeing).

<sup>147</sup> *Glass v Tasmania* [2013] TASCCA 8 (5 September 2013) [40] (Estcourt J, Tennent J agreeing), citing *Marlow v The Queen* (2002) 113 A Crim R 118, 120 [5] (Cox CJ).

<sup>148</sup> *Glass v Tasmania* [2013] TASCCA 8 (5 September 2013) [41] (Estcourt J, Tennent J agreeing); *Tasmania v L* (2013) 232 A Crim R 123, 138 [53] (Pearce J).

<sup>149</sup> *R v Lam* [2014] ACTSC 49 (25 March 2014) [119] (Refshauge J), citing *DJV v The Queen* (2008) 200 A Crim R 206, 217 [31] (McClellan CJ at CL, Hidden and Fullerton JJ agreeing).

<sup>150</sup> [2014] ACTSC 66 (11 April 2014) [45] (Burns J).

<sup>151</sup> (2001) 206 CLR 221, 235 [39].

<sup>152</sup> (2011) 212 A Crim R 32, 50-1 [103].



## 4 Joint and Separate Trials by Jurisdiction

In all Australian states and territories, a court has a discretion to order separate trials.<sup>153</sup> Where such a discretion is given, the High Court has indicated that it should be exercised in favour of separate trials where evidence for one count is not ‘cross-admissible’ for another, for example as coincidence/similar fact evidence. The reason for this is that a jury may nonetheless erroneously and prejudicially use the evidence in relation to the count for which it is not admissible,<sup>154</sup> a risk heightened for sexual offences.<sup>155</sup> At least for sexual offences, this prejudice cannot be cured by a direction to the jury from the judge not to erroneously use the evidence in that way.<sup>156</sup> Only the Western Australian legislation appears to have significantly departed from this position.

### A New South Wales

In New South Wales, separate trials can be ordered if ‘it is desirable’ to do so, including if an accused will be prejudiced or embarrassed in the defence by being charged with more than one offence.<sup>157</sup> Whether evidence is cross-admissible between counts is a key consideration, but is not the only possible source of prejudice warranting joint trials.<sup>158</sup>

Furthermore, the legislation makes clear that proceedings for multiple offences or offences committed by multiple accuseds can be tried together if the accuseds and the prosecutor consent, the offences arise out of the same set of circumstances, or if the offences form or are part of a series of offences of the same or a similar character.<sup>159</sup> However, proceedings for multiple offences or multiple accused cannot be heard together if the court is of the opinion that the matters ought to be heard and determined separately in the interests of justice.<sup>160</sup> This has been interpreted as requiring consideration of not only the accused’s interests but also the interests of witnesses and the public.<sup>161</sup>

<sup>153</sup> *Crimes Act 1900* (ACT) s 264(2); *Criminal Procedure Act 1986* (NSW) s 21(2); *Criminal Code* (NT) s 341(1); *Criminal Code* (Qld) s 597A(1), 597B; *Criminal Law Consolidation Act 1935* (SA) s 278(2); *Criminal Code* (Tas) s 326(3); *Criminal Procedure Act 2009* (Vic) s 193(1)-(2); *Criminal Procedure Act 2004* (WA) s 133(3)-(4).

<sup>154</sup> Multiple accuseds: *Webb v The Queen* (1994) 181 CLR 41, 79-80 (Deane J); *Bannon v The Queen* (1995) 185 CLR 1. Multiple complainants: *Sutton v The Queen* (1984) 152 CLR 528, 541-3 (Brennan J); *De Jesus v The Queen* (1986) 68 ALR 1, 4 (Gibbs CJ), 12 (Brennan J), 16 (Dawson J).

<sup>155</sup> *De Jesus v The Queen* (1986) 68 ALR 1, 4-5 (Gibbs CJ), 12 (Brennan J), 16 (Dawson J); *Hoch v The Queen* (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ), 298 (Brennan and Dawson JJ).

<sup>156</sup> *De Jesus v The Queen* (1986) 68 ALR 1, 4-5 (Gibbs CJ), 12 (Brennan J), 16 (Dawson J).

<sup>157</sup> *Criminal Procedure Act 1986* (NSW) s 21(2).

<sup>158</sup> *DSJ v The Queen* [2014] NSWCCA 77 (13 May 2014) [75]-[84] (Gleeson JA, Hidden J agreeing).

<sup>159</sup> *Criminal Procedure Act 1986* (NSW) s 29(1)-(2).

<sup>160</sup> *Criminal Procedure Act 1986* (NSW) s 29(3).

<sup>161</sup> *Osman v The Queen* [2006] NSWCCA 196 (22 June 2006) [22] (McClellan CJ at CL, Johnson and Latham Similarly, in Victoria, if an indictment contains more than one charge or one



## B Victoria and Northern Territory

In Victoria, if an indictment contains more than one charge or one accused, a court can order they be tried separately if for any reason 'it is appropriate' to do so, including that there is prejudice to the fair trial of an accused.<sup>162</sup> In the Northern Territory, separate trials can be ordered if 'it is desirable' to do so, including if an accused will be prejudiced or embarrassed in the defence by being charged with more than one offence.<sup>163</sup>

However, in both jurisdictions, where multiple sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together,<sup>164</sup> and this presumption 'is not rebutted' because of how 'evidence on one charge is inadmissible on another charge'.<sup>165</sup>

In Victoria, although the presumption should 'be given full weight',<sup>166</sup> the presumption has been interpreted as not rendering the common law position otiose: that position will remain 'influential' because '[t]he capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of the discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused'.<sup>167</sup>

Thus in *R v TJB*, Callaway JA (Phillips CJ and Buchanan JA agreeing) said that:

If the judge has already decided that the prejudicial effect of the evidence of the alleged offence against A is so great that it is not just to admit that evidence in relation to the offence against B, how can he or she not conclude that the same prejudice that has led to the evidence being inadmissible also requires severance of the presentment? Experience may show that there are relatively few cases of that kind where separate trials should not be ordered.<sup>168</sup>

There is no Northern Territory case law considering the presumption.

## C Queensland

In Queensland, indictments can only charge more than one offence if the charges 'are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose'.<sup>169</sup> This implies 'a test in which time, place and the other circumstances of the offences as well as their legal character or category are all

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accused, a court can order they be tried to separate if for any reason 'it is appropriate' to do so, including that there is prejudice to the fair trial of an accused.<sup>161</sup>JJ agreeing).

<sup>162</sup> *Criminal Procedure Act 2009* (Vic) s 193(1)-(3).

<sup>163</sup> *Criminal Code* (NT) s 341(1).

<sup>164</sup> *Criminal Code* (NT) s 341A(1); *Criminal Procedure Act 2009* (Vic) s 194(2).

<sup>165</sup> *Criminal Code* (NT) s 341A(2)(a); *Criminal Procedure Act 2009* (Vic) s 194(3).

<sup>166</sup> *Velkoski v The Queen* [2014] VSCA 121 (18 June 2014) [173] (Redlich, Weinberg and Coghlan JJA).

<sup>167</sup> *R v Papamitrou* (2004) 7 VR 375, 388 [27] (Winneke P, Ormiston and Buchanan JJA agreeing).

<sup>168</sup> [1998] 4 VR 621, 631.

<sup>169</sup> *Criminal Code* (Qld) s 567(2).





factors which are considered for the purpose of seeing whether the necessary features of similarity and connection are present'.<sup>170</sup> In cases where a single accused is charged with offences against multiple complainants, those charges will only meet the threshold if evidence for the charges is cross-admissible.<sup>171</sup>

Where a person has been charged with multiple offences in the same indictment, the court may order separate trials if 'desirable' to do so, including if the accused will be prejudiced or embarrassed in the defence by being charged with more than one offence.<sup>172</sup> In examining possible prejudice or embarrassment, the court 'must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion'.<sup>173</sup> Prejudice will be unacceptable and joint trials must be ordered if evidence is not cross-admissible.<sup>174</sup> Thus:

in the present state of authority there is a strong leaning in favour of severance of sexual offences involving multiple complainants unless the principal evidence of each complainant is admissible in the cases involving the other complainants. There is however no absolute rule. The ultimate touchstone must be the prejudicial effect of evidence which would not otherwise be admissible in the trial of a particular accused, and the capacity of the court to counter such prejudice.<sup>175</sup>

Where there are multiple accused, separate trials may be ordered at any time during the trial.<sup>176</sup>

## D Western Australia

In Western Australia, the discretion to order separate trials is conditioned upon the court's satisfaction that the indictment containing multiple charges or charging multiple accused will likely prejudice an accused.<sup>177</sup>

In deciding whether to exercise its discretion to order multiple trials, it is open to a superior court to decide that prejudice can be guarded against by a jury direction, that such prejudice can be guarded against irrespective of the nature of the offence, and that an order should or should not be made regardless of the inadmissibility of evidence in relation to some charges or accused.<sup>178</sup>

Furthermore, in examining possible prejudice, the court 'must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion'.<sup>179</sup>

<sup>170</sup> *R v Cranston* [1988] 1 Qd R 159, 164 (Macrossan J, McPherson and de Jersey JJ agreeing).

<sup>171</sup> *Phillips v The Queen* (2006) 225 CLR 303, 307 [7] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

<sup>172</sup> *Criminal Code* (Qld) s 597A(1).

<sup>173</sup> *Criminal Code* (Qld) s 597A(1AA).

<sup>174</sup> *Phillips v The Queen* (2006) 225 CLR 303, 307 [7] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

<sup>175</sup> *S* (2001) 125 A Crim R 526, 533 [34] (Thomas JA, Ambrose and Cullinane JJ agreeing).

<sup>176</sup> *Criminal Code* (Qld) s 597B.

<sup>177</sup> *Criminal Procedure Act 2004* (WA) s 133(3)-(4).

<sup>178</sup> *Criminal Procedure Act 2004* (WA) s 133(5).

<sup>179</sup> *Criminal Procedure Act 2004* (WA) s 133(6).





This legislation has been interpreted as ousting the common law position that separate trials should generally be ordered for sexual offence charges where evidence is not cross-admissible.<sup>180</sup> There are no categories of cases, such as offences against children, which arouse particular prejudice.<sup>181</sup> However, s 133 is still concerned with guarding against the risk of prejudice created by impermissible propensity reasoning.<sup>182</sup> But where evidence is mutually admissible, it will be difficult to determine that there is prejudice.<sup>183</sup>

For example, in *Western Australia v GBT*,<sup>184</sup> the accused was charged with 78 counts of sexual misconduct against his daughter, six of his daughter's friends, and a friend of his other daughter. The evidence of the charges against the daughter were relevant to the charges against the other complainants because the offending against the daughter explained why the accused thought he could get away with such conduct over a long period of time against so many different girls, in that his daughter, having been normalised to sexual behaviour, convinced the other complainants that his behaviour was not so inappropriate that they should say something. The other complainants' evidence was admissible for the charges in relation to the daughter because of the improbability that such similar accounts were imagined or could be innocently explained. The Court of Appeal held that the 78 charges should be tried together, because of the cross-admissibility of evidence, and because even if the task of explaining to the jury in what way the evidence could be permissibly used in relation to each count was complex, it was not of an order of complexity that no reasonable jury could be expected to follow the directions.

## E South Australia

In South Australia separate trials can be ordered if 'it is desirable' to do so, including if an accused will be prejudiced or embarrassed in the defence by being charged with more than one offence.<sup>185</sup> Separate trials will typically be ordered where there is a lack of cross-admissibility.<sup>186</sup>

Where an information contains multiple sexual offence counts involving different victims, the only circumstance in which a separate trial may be ordered for a count is if 'evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim'.<sup>187</sup> This has been read as not altering 'the general proposition that if the evidence on one count is not admissible on the other count or counts, the Court will usually exercise its discretion to order separate trials, particularly in sexual cases'.<sup>188</sup>

<sup>180</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 144-5 [112] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).

<sup>181</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 151 [144] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).

<sup>182</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 148 [130] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing);

<sup>183</sup> *Donaldson v Western Australia* (2005) 31 WAR 122, 151 [146] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).

<sup>184</sup> [2006] WASCA 75 (11 May 2006).

<sup>185</sup> *Criminal Law Consolidation Act 1935* (SA) s 278(2).

<sup>186</sup> *Sutton v The Queen* (1984) 152 CLR 528, considering the South Australian legislation.

<sup>187</sup> *Criminal Law Consolidation Act 1935* (SA) s 278(2a).

<sup>188</sup> *R v N* [2010] SASFC 74 (21 December 2010) [44] (Sulan, Anderson and David JJ).



Note that charges for multiple offences may form part of the same information ‘if those charges are founded on the same facts, or form, or are a part of, a series of offences of the same or a similar character’.<sup>189</sup> Offences may be of a similar character despite being different types of offences, and may form part of a series even if they involve different victims and occur at different times or places – cross-admissibility is sufficient but not essential.<sup>190</sup> This is an inquiry that ‘must be answered on the particular facts alleged against the accused, i.e. it is impossible to categorize in advance what matters may or may not contribute to the answer’.<sup>191</sup>

## F Tasmania and Australian Capital Territory

In Tasmania and the ACT, separate trials can be ordered if it is ‘desirable’ to do so, including if an accused will be prejudiced or embarrassed in the defence by being charged with more than one offence.<sup>192</sup> In applying this discretion to single accuseds charged with offences against multiple complainants, the Supreme Courts of both jurisdictions have asked whether evidence for one count would be admissible for the others,<sup>193</sup> though in the ACT it has been said that even where evidence is cross-admissible it is not established that this will decisively favour joinder.<sup>194</sup>

In Tasmania, ‘charges of more than one crime may be joined in the same indictment, if those charges arise substantially out of the same facts or closely related facts, or are, or form part of, a series of crimes of the same or a similar character’.<sup>195</sup> In the ACT, while the indictment can contain multiple accounts a single accused,<sup>196</sup> multiple accused can only be charged on a single indictment if accessories to the offence.<sup>197</sup>

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<sup>189</sup> *Criminal Law Consolidation Act 1935* (SA) s 278(1).

<sup>190</sup> *R v Liddy* (2002) 81 SASR 22, 51-2 [118]-[119] (Mullighan J, Williams J agreeing); *R v MJJ* (2013) 117 SASR 81, 95-6 [48] (Kourakis CJ, Vanstone J agreeing).

<sup>191</sup> *R v McDonald* (1979) 21 SASR 198, 200 (King CJ and Sangster J).

<sup>192</sup> *Crimes Act 1900* (ACT) s 264(2); *Criminal Code* (Tas) s 326(3).

<sup>193</sup> *R v Kristiansen* [2008] ACTSC 110 (22 September 2008); *Tasmania v L* [2013] TASSC 47 (24 July 2013).

<sup>194</sup> *R v Mack* (2009) 4 ACTLR 55, 65 [48] (Refshauge J).

<sup>195</sup> *Criminal Code* (Tas) s 311(2).

<sup>196</sup> *Crimes Act 1900* (ACT) s 269.

<sup>197</sup> *Crimes Act 1900* (ACT) s 270.

Summary table of key commonalities and differences between jurisdictions

	Evidence regime for propensity / tendency	Test applicable for prosecution evidence against accused	Does test apply to relationship / context evidence?	Probative value – is reliability usually a relevant consideration when assessing?	Probative value – contamination or collusion relevant?	‘Significant’ probative value – meaning	Standard of review of admissibility – does <i>House v The King</i> apply?	Joint / separate trials
<b>NSW</b>	Uniform Evidence Act	Significant probative value substantially outweighs prejudicial effect	No	No	Yes	Important or of consequence	Yes	Can order separate trials if ‘desirable’ to do so; will be the case if evidence not cross-admissible
<b>Vic</b>	Uniform Evidence Act	Significant probative value substantially outweighs prejudicial effect	No	Yes	Yes	Substantial	Yes	Presumption in favour of joint trials; but common law emphasis on cross-admissibility still ‘influential’
<b>Qld</b>	Common law + some statutory abrogation	No rational view consistent with innocence ( <i>Pfennig</i> )	Unsettled ( <i>HML</i> )	No	Yes	N/A	No	Can order separate trials if ‘desirable’ to do so; will be the case if evidence not cross-admissible
<b>WA</b>	Jurisdiction specific statute	Significant probative value; fair-minded people would think public interest has priority over risk of unfair trial	Yes	No	No	Important or of consequence	Unclear from cases	Can only order separate trials if satisfied accused is likely to be prejudiced in trial; can decide no prejudice even if no cross-admissibility
<b>SA</b>	Jurisdiction specific statute	<i>Strong</i> probative value substantially outweighs prejudicial effect	Partly – must substantially outweigh prejudicial effect	Unclear from cases	No	N/A	No	Can order separate trials if ‘desirable’ to do so; will be the case if evidence not cross-admissible
<b>Tas</b>	Uniform Evidence Act	Significant probative value substantially outweighs prejudicial effect	No	No	No	Important or of consequence	No	Can order separate trials if ‘desirable’ to do so; will be the case if evidence not cross-admissible

Summary table of key commonalities and differences between jurisdictions

	Evidence regime for propensity / tendency	Test applicable for prosecution evidence against accused	Does test apply to relationship / context evidence?	Probative value – is reliability usually a relevant consideration when assessing?	Probative value – contamination or collusion relevant?	‘Significant’ probative value – meaning	Standard of review of admissibility – does <i>House v The King</i> apply?	Joint / separate trials
<b>ACT</b>	Uniform Evidence Act	Significant probative value substantially outweighs prejudicial effect	No	No	Yes	Important or of consequence	Unclear from cases	Can order separate trials if ‘desirable’ to do so; will be the case if evidence not cross-admissible
<b>NT</b>	Uniform Evidence Act	Significant probative value substantially outweighs prejudicial effect	No	No reported cases	No reported cases	No reported cases	No reported cases	Presumption in favour of joint trials