Is There Any Prospect of a Model Provision for Similar Fact/Propensity Evidence or the Coincidence/Tendency Rules in Australia?

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Australia has five tests for the admission of similar fact or propensity evidence as it is known at common law, or alternatively coincidence or tendency evidence as it is known under the Uniform Evidence Legislation. Each test differs according to the difficulty or "bar" the Crown faces in obtaining the court's permission to adduce such potentially damaging evidence. This article will weigh the merits of each of the five tests in an endeavour to establish whether there is any prospect of a model provision, such that a uniform test across Australian criminal law jurisdictions for the admission of similar fact or tendency evidence could be adopted, aside from child sexual offences and domestic violence offences. It is acknowledged that where to set the bar of admission is both a moral and political one, weighing the moral harm of wrongful conviction against the public interest in convicting offenders (leaving aside local factors such as whether jury trials are mandatory or whether joint trials are common). The criteria for determining the test for a model provision will be considered in Part III, which if adopted will require a shift in the weight ascribed to these competing considerations in some jurisdictions.

I. Introduction

> Can the Ethiopian change his skin, or the leopard his spots? then may ye also do good, that are accustomed to do evil.
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> Jeremiah 13:23, King James Bible.

At common law, similar fact or propensity evidence is a specific form of character or disposition evidence, usually referring to "bad character" or discreditable conduct evidence. At common law, propensity evidence is considered to be a "special class of circumstantial evidence",[1] while similar fact evidence may be regarded as a subcategory of propensity evidence:

> There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term "similar fact" evidence is often used in a general but inaccurate sense.[2]

The expressions "similar fact", "propensity" evidence, "tendency" evidence and "coincidence" evidence will be treated as being synonymous in this article so as to minimise confusion and for ease of analysis.

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[1] *Pfennig v The Queen* (1995) 182 CLR 461, 482–483 (Mason CJ, Deane and Dawson JJ); 77 A Crim R 149.

[2] *Pfennig v The Queen* (1995) 182 CLR 461, 464–465; 77 A Crim R 149. Bagaric and Amarasekara, while viewing the above passage as "very cryptic and imprecise" have suggested it "could be viewed as alluding to a distinction between the *purpose* for which evidence of prior criminal acts is being tendered, as opposed to what it *discloses*" (original emphasis): Mirko Bagaric and Kumar Amarasekara, "The Prejudice against Similar Fact Evidence" (2001) 5(2) *International Journal of Evidence & Proof* 71, 73. On the basis of this distinction, the authors further suggest "all evidence that discloses prior criminal conduct is propensity evidence, but an important sub-set of this type of evidence is where it is directly relevant to a fact in issue, and here it is called similar fact evidence".

While it is acknowledged that the Uniform Evidence Legislation distinguishes between tendency and coincidence evidence, it will be argued that nothing turns on this distinction for the purposes of identifying a model provision as they share the test for their admissibility of "significant probative value". Indeed, Stratton has argued that "the artificial distinction made between tendency and coincidence evidence was a mistake".[3] All four terms refer to evidence which shows that on some other occasions the accused has acted in a manner which is strikingly similar or there is an underlying unity or pattern of behaviour to the way in which the Crown alleges the accused acted in relation to the charge before the court. Such evidence can sometimes be regarded as akin to a modus operandi (a criminal's characteristic way of committing a crime) and raises, in an especially acute form, the tension between two competing principles in the law of evidence: on the one hand evidence that is highly probative of a fact in issue should be admitted, while on the other hand evidence that is potentially highly prejudicial should be excluded in fairness to the accused.[4]

The original case that began Australia's long and winding road[5] to the present state of the law for the admission of propensity evidence is *Makin v Attorney-General (NSW)* (*Makin*)[6] where Lord Herschell LC identified two competing principles:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.[7]

It can be seen that the first sentence refers to the principle that evidence of previous criminal activity and bad character is not admissible to establish guilt of the offences on the indictment. Seeking to secure a conviction based on "once a thief always a thief" type of reasoning is forbidden. This is a principle of *exclusion* based on the risk of prejudice to the accused. However, the second sentence sets out a second principle, one of *inclusion*, which competes with the first principle of exclusion. The second principle states that evidence relevant to a fact in issue should be admitted if it does not fall within a recognised rule of exclusion. Thus, the third sentence in the passage refers to the difficulties in drawing the line between the two competing principles and is particularly apposite in giving a workable meaning to Lord Herschell's formulation first set down in 1894 which has caused difficulties for the judiciary and legislators ever since.[8]

The common law development of the admissibility of propensity evidence can be traced through a series of cases over the years that have applied the *Makin* formulation. These cases cover examples in which propensity evidence has been admitted under descriptions such as "relationship evidence",[9]

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[3] John Stratton SC, "Tendency and Coincidence Evidence" (Conference Paper, Public Defenders Criminal Law Conference, 15 March 2008) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_tendency_coincidence.aspx>.For an explanation of the different operation of the tendency and coincidence rules, see *BP v The Queen* [2010] NSWCCA 303, [131]–[132] (Hodgson JA) and *Vojneski v The Queen* (2016) 262 A Crim R 370, [50] (Murrell CJ and Refshauge J); [2016] ACTCA 57.

[4] *Makin v Attorney-General (NSW)* [1894] AC 57; Zelman Cowen and Peter Basil Carter, *Essays on the Law of Evidence* (Clarendon Press, 1956) 108.

[5] John Lennon and Paul McCartney, song "The Long and Winding Road", Album *Let It Be* (1970).

[6] *Makin v Attorney-General (NSW)* [1894] AC 57.

[7] *Makin v Attorney-General (NSW)* [1894] AC 57, 65.

[8] Andrew Hemming and Robyn Layton, *Evidence Law in Qld, SA and WA* (Thomson Reuters, 2017) 405.

[9] *R v Ball* [1911] AC 47, where the two accused, who were brother and sister, were indicted for incest under the *Punishment of Incest Act 1908* (UK). Evidence tendered by the Crown was to the effect that the accused were living together in the same house, which had only one furnished bedroom with a double bed, and that the two accused were the registered parents of a child.

or "statistically improbable",[10] or "identification evidence",[11] or "coincidence evidence",[12] or has been excluded as highly prejudicial and unfair to the accused.[13]

A House of Lords case that influenced the development of the common law as regards the admission of propensity evidence in Australia was *DPP v Boardman* (*Boardman*)[14] where although each of the five Law Lords dismissed the appeal, the fact that there were five separate judgments underscores the different tests open in the interpretation of the *Makin* formulation.

Lord Wilberforce's approach was to weigh the probative value against the prejudicial risk:

> In each case it is necessary to estimate (1) whether, and if so how strongly, the evidence as to other facts tends to support, that is, to make more credible, the evidence given as to the fact in question; (2) whether such evidence, if given, is likely to be prejudicial to the accused. Both these elements involve questions of degree.[15]

In *Boardman*, the House of Lords held that in order to be admissible similar facts must bear a *striking similarity* to the facts of the case currently before the court. Lord Wilberforce identified the following test for the admission of similar fact evidence:

> The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstances that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, be properly asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s).[16]

By contrast, Lord Hailsham preferred the test[17] in *R v Kilbourne*[18] as to whether there is "such an underlying unity between the offences as to make coincidence an affront to common sense". This test comes within the statistical probability approach to the *Makin* formula, which makes the first principle redundant because the evidence possesses relevance other than via propensity and comes under the second principle.

The influence of *Boardman* in Australia can be seen nine years later in the High Court judgments of Dawson J and Brennan J in *Sutton v The Queen* (*Sutton*).[19] Dawson J identified the test of admissibility

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[10] *R v Smith* (1915) 11 Cr App R 229, often referred to as the "brides in the bath" case. The defendant was accused of murdering his wife, who was found dead at home in her bath. Evidence of the death of two other "wives" in similar circumstances was held to be admissible, as it was statistically improbable that three different women with whom he had gone through a form of marriage, and who had made financial arrangements from which he would benefit, had all drowned in the bath by accident shortly afterwards.

[11] In *Sutton v The Queen* (1984) 152 CLR 528; 11 A Crim R 331, the applicant had been charged with seven counts of rape involving three different victims. Two of the girls identified the applicant as their assailant. The third girl did not, but in her case there was evidence that the applicant had confessed that he had committed the offences on her. The High Court held that the evidence on each charge was admissible in considering the other charges.

[12] In *BBH v The Queen* (2012) 245 CLR 499; 215 A Crim R 395, the coincidence of the brother and sister's independent evidence and the absence of collusion gave the brother's evidence probative force.

[13] In *Perry v The Queen* (1982) 150 CLR 580, the appellant had been tried and convicted for the attempted murder of her third husband, who was found to be suffering from arsenic poisoning in 1978. Evidence was admitted that her second husband and her brother had died of arsenic poisoning in 1961 and 1962 respectively, and that her de facto husband had died of an overdose of barbiturates in 1970. The appellant benefited financially from the deaths of her second husband and her de facto husband, and would have benefited from the death of her third husband if he had died. The appellant had not benefited financially from the death of her brother. The High Court determined that this case was not in the same universe of discourse as *R v Smith* (1915) 11 Cr App R 229, as the evidence being circumstantial must be capable of excluding any rational hypothesis other than guilt, and the evidence was not in this category.

[14] *DPP v Boardman* [1975] AC 421.

[15] *DPP v Boardman* [1975] AC 421, 442. Similarly, Lord Cross, at 456–457, held that the question was one of degree.

[16] *DPP v Boardman* [1975] AC 421, 444.

[17] *DPP v Boardman* [1975] AC 421, 450.

[18] *R v Kilbourne* [1973] AC 729, 759 (Lord Simon).

[19] *Sutton v The Queen* (1984) 152 CLR 528; 11 A Crim R 331.

of similar fact evidence as being one where there is no rational view of that evidence which is consistent with the innocence of the accused.[20]

Brennan J emphasised that "the admission of similar fact evidence is the exception rather than the rule".[21] Brennan J continued by stressing the need for the cogency of the similar fact evidence to transcend its prejudicial effect, which is a question of law not discretion and should meet the test of being so relevant that to exclude it would be an affront to common sense.[22]

Thus, it can be seen that at common law the stage was being set for the future enunciation by the High Court of Australia of a very high bar for the admission of similar fact or propensity evidence such that it is question of law and not judicial discretion, reinforced in 1991 when the House of Lords reconsidered *Boardman*. In *DPP v P*,[23] Lord Mackay of Clashfern LC, who gave a speech with which the other members of the House of Lords agreed, after considering at length the speeches in *Boardman* propounded a simple test of admissibility:

> From all that was said by the House in *Regina v Boardman* I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime.[24]

Lord Mackay went on to say that while such probative force may be derived from the striking similarity of the similar fact evidence this was not a precondition of admissibility:

> Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.[25]

By 1995, 11 years after *Sutton* was decided, a majority had emerged on the High Court in *Pfennig v The Queen* (*Pfennig*)[26] that the basis for the admission of propensity or similar fact evidence lay in its possessing a particular probative value or cogency such that, if accepted, it bore no reasonable explanation other than the inculpation of the accused in the offence charged.[27] The High Court has subsequently reaffirmed the test in *Pfennig* in a series of cases.[28]

In one of those cases, *Phillips v The Queen*,[29] in reaffirming *Pfennig*, the High Court in a unanimous joint judgment stressed that (1) *Pfennig* has to be seen in the context of the High Court decisions that preceded it; (2) the similar fact evidence must be viewed in the context of the prosecution case, and that the similar fact evidence would be accepted as true and that the prosecution case may be accepted by the

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[20] *Sutton v The Queen* (1984) 152 CLR 528, 564–565; 11 A Crim R 331.

[21] *Sutton v The Queen* (1984) 152 CLR 528, 547; 11 A Crim R 331, citing *Markby v The Queen* (1978) 140 CLR 108, 117 (Gibbs ACJ).

[22] *Sutton v The Queen* (1984) 152 CLR 528, 547–548; 11 A Crim R 331.

[23] *DPP v P* [1991] 2 AC 447.

[24] *DPP v P* [1991] 2 AC 447, 460.

[25] *DPP v P* [1991] 2 AC 447, 460–461.

[26] *Pfennig v The Queen* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ); 77 A Crim R 149. Toohey J gave only qualified support to Dawson J's "no rational view" test (506–507). McHugh J, while exhibiting some support for the "no rational view" test, did not consider that it was appropriate in all cases (530). See Jonathan Clough, "Pfennig v The Queen: A Rational View of Propensity Evidence?" (1998) 20 *Adelaide Law Review* 287, 294.

[27] Previously, in *Hoch v The Queen* (1988) 165 CLR 292, 296; 35 A Crim R 47, Mason CJ, Wilson and Gaudron JJ had agreed with the test identified by Dawson J in *Sutton v The Queen* (1984) 152 CLR 528, 564–565; 11 A Crim R 331.

[28] The High Court affirmed *Pfennig v The Queen* (1995) 182 CLR 461; 77 A Crim R 149 in *KRM v The Queen* (2001) 206 CLR 221; 118 A Crim R 262; [2001] HCA 11; *Phillips v The Queen* (2006) 225 CLR 303; 158 A Crim R 431; [2006] HCA 4; *HML v The Queen* (2008) 235 CLR 334; 183 A Crim R 159; [2008] HCA 16; *Roach v The Queen* (2011) 242 CLR 610; 210 A Crim R 300; [2011] HCA 12; *BBH v The Queen* (2012) 245 CLR 499; 215 A Crim R 395.

[29] *Phillips v The Queen* (2006) 225 CLR 303, 323–324 [62]–[63] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); 158 A Crim R 431; [2006] HCA 4.

jury; and (3) the similar fact evidence standing alone does not need to demonstrate guilt but does need to be excluded if there is a reasonable view of the evidence consistent with innocence.

Each of the "common law" States of Queensland, South Australia and Western Australia has modified the common law relating to propensity or similar fact evidence.[30] Arguably, following these statutory modifications, the jurisdiction that now most closely aligns with the common law is Queensland. In *HML v The Queen*,[31] Kirby J noted that the common law rule in *Pfennig* has been amended "to some extent". Similarly, Heydon J observed that "the common law stated in *Pfennig v The Queen* without the *Hoch* qualification survives only in Queensland".[32]

The common law relating to propensity or similar fact evidence has also been modified under the Uniform Evidence Legislation,[33] and is divided into two rules: the tendency rule under s 97, and the coincidence rule under s 98. Sections 97 and 98 apply to both civil and criminal proceedings, but for criminal proceedings there is an additional requirement set out in s 101(2), that "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant". In *R v Ellis* (*Ellis*),[34] Spigelman CJ held that the words "substantially outweighs" in s 101(2) called for a balancing exercise, whereas the "no rational explanation" test in *Pfennig* focused only on the requirement for a high test of probative value. The meaning of probative value was clarified by the High Court in *IMM v The Queen*[35] such that the court should take the evidence at its highest. Thus, the stringency of the "no rational explanation" test in *Pfennig* has been tempered under the statutory language in the Uniform Evidence Legislation by judicial emphasis on the balancing process between probative value and prejudicial effect.

However, a major change to the admission of tendency evidence for proceedings involving child sexual offences under the Uniform Evidence Legislation has occurred with the commencement of the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) on 1 May 2020, with the expectation that similar amendments will be enacted by all other jurisdictions under the Uniform Evidence Legislation umbrella. This change is based on the recommendations of the Final Report Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

In the next part, each of the tests relating to the admission of propensity or similar fact evidence will be examined in descending order of difficulty or "bar" that the Crown faces in obtaining the court's permission to adduce such potentially damaging evidence, commencing with Queensland.

II. Tests for the Admission of Propensity or Similar Fact Evidence

> "There is, I believe, in every disposition a tendency to some particular evil, a natural defect, which not even the best education can overcome."
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> "And your defect is a propensity to hate everybody."
>
> "And yours," he replied with a smile, "is wilfully to misunderstand them."
>
> Jane Austen, *Pride and Prejudice*.

Queensland has the most stringent "bar" in the form of the *Pfennig v The Queen* test at common law as set down by the High Court of Australia (excluding evidence of domestic violence). This is followed by South Australia with its permissible use test under s 34P of the *Evidence Act 1929* (SA). Next are the tendency and coincidence rules set out in ss 97, 98 and 101 of the Uniform Evidence Legislation. Then

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[30] *Evidence Act 1977* (Qld) ss 132A, 132B; *Evidence Act 1929* (SA) ss 34O, 34P, 34R, 34S; *Evidence Act 1906* (WA) s 31A.

[31] *HML v The Queen* (2008) 235 CLR 334, 365 [54]; 183 A Crim R 159; [2008] HCA 16.

[32] *HML v The Queen* (2008) 235 CLR 334, 431 [288] fn 309; 183 A Crim R 159; [2008] HCA 16, referring to *Hoch v The Queen* (1988) 165 CLR 292; 35 A Crim R 47, where the High Court held that the possibility of collusion or concoction by the witnesses attesting to the similar events was a ground for exclusion.

[33] The Uniform Evidence Legislation has been adopted in six jurisdictions in Australia: the Commonwealth, New South Wales, Tasmania, Victoria, the Australian Capital Territory, and the Northern Territory.

[34] *R v Ellis* (2003) 58 NSWLR 700, [94]–[96]; 144 A Crim R 1; [2003] NSWCCA 319.

[35] *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14.

comes Western Australia in the form of its public interest test under s 31A of the *Evidence Act 1906* (WA). The Royal Commission into Institutional Responses to Child Sexual Abuse proposed an even lower threshold for the admission of similar fact or tendency evidence (but only for child sexual offence proceedings) of being relevant to an important evidential issue in the proceeding. Finally, with the lowest bar for admission purposes, New South Wales has enacted a variation of the Royal Commission's threshold through the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW), which introduced a new s 97A Admissibility of tendency evidence in proceedings involving child sexual offences and amended s 101(2). This legislation follows a communique issued on 29 November 2019 by the Council of Attorneys-General entitled "Model Bill to Amend Uniform Evidence Law Test for Admissibility of Tendency and Coincidence Evidence in Criminal Trials". Accordingly, other jurisdictions within the uniform evidence regime are expected to follow New South Wales's lead.

A. Queensland

In Queensland, modification of the common law dealing with propensity or similar fact evidence is to be found in ss 132A and 132B of the *Evidence Act 1977* (Qld).[36] These sections were inserted into the *Evidence Act 1977* (Qld) following the passage of the *Criminal Law Amendment Act 1997* (Qld). The effect of s 132A is that in applying the *Pfennig* test, the possibility that the evidence was concocted is not a reason for ruling the evidence inadmissible. Thus, s 132A statutorily overrules *Hoch v The Queen* (*Hoch*).[37]

Section 132B permits the admission in evidence in a criminal proceeding in respect of certain offences in Chs 28–30 under the *Criminal Code* (Qld) of relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence charged was committed. However, s 132B is not to be read in isolation, and relevantly s 130, in giving statutory expression to the *The King v Christie* (*Christie*) discretion,[38] which deals with the rejection of evidence in criminal proceedings states: "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence." The question in *Roach v The Queen*[39] on appeal to the High Court was whether it was necessary to consider and apply the decision in *Pfennig* in connection with both ss 132B and 130 of the *Evidence Act 1977* (Qld).

The joint judgment reached two conclusions. The first was that evidence of domestic violence in the history of a relationship is admissible so long as it is relevant. The second was to characterise the interaction of ss 132B and 130 as countervailing forces, with s 132B operating more fairly to the complainant while the accused is protected from unfairness by virtue of s 130 of the *Evidence Act 1977* (Qld):

> [38] … The application of the rule in *Pfennig* would not be consistent with the common law discretion which is preserved by s 130. It follows that if the exclusionary rule in *Pfennig* was to apply to evidence of the kind in question, it would be necessary to express it as a qualification of s 132B. Absent such a qualification, and subject to the exercise of the s 130 discretion, evidence of domestic violence in the history of a relationship is admissible so long as it is relevant …
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> [43] It is difficult to resist the conclusion that it was intended, by the insertion of s 132B, that persons suffering from domestic violence not be disadvantaged in the giving of their evidence and that they be able

[36] Section 132A 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. Section 132B Evidence of domestic violence – (1) This section applies to a criminal proceeding against a person for an offence defined in the *Criminal Code*, Chs 28–30. (2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding. (3) In this section, domestic relationship means a relevant relationship under the *Domestic and Family Violence Protection Act 2012* (Qld) s 13. Note: Under the *Domestic and Family Violence Protection Act*, s 13, a relevant relationship means an intimate personal relationship, a family relationship or an informal care relationship, as defined under that Act.

[37] *Hoch v The Queen* (1988) 165 CLR 292; 35 A Crim R 47. For provisions similar to s 132A, see *Evidence Act 1929* (SA) s 34S(b) and *Evidence Act 1906* (WA) s 31A(3).

[38] *The King v Christie* [1914] AC 545.

[39] *Roach v The Queen* (2011) 242 CLR 610; 210 A Crim R 300; [2011] HCA 12.

> to tell their story comprehensively. It may be taken to express a perception that it is in the public interest that they be able to do so and that the prosecution of offences which involve a history of domestic violence be thereby enabled. The reception of the evidence operates more fairly to a complainant. Unfairness to the accused, by its reception, is to be considered by reference to s 130.[40]

Thus, relationship evidence is relevant for reasons other than just propensity evidence and may be used in proof of the offence charged. Such a view is consistent with *Wilson v The Queen*[41] where the history of a married couple's relationship was relevant to the jury's choice between murder and an accident.

The position in Queensland as regards propensity or similar fact evidence can be summarised as follows:

(1) Subject to the qualifications in ss 132A and 132B of the *Evidence Act 1977* (Qld), the key test for admissibility of propensity or similar fact evidence is the *Pfennig* test, namely, whether there is no "rational view of the evidence that is consistent with the innocence of the accused".[42]
(2) In applying the *Pfennig* test, the similar fact evidence must be viewed in the context of the prosecution case, and that the similar fact evidence would be accepted as true and that the prosecution case may be accepted by the jury.[43]
(3) Section 132A has the effect of overruling *Hoch*[44] such that the possibility the evidence was the result of collusion or suggestion is not a reason for excluding the evidence. The weight of that evidence is a question for the jury.
(4) Where evidence of domestic violence is involved, the text of neither s 132B nor s 130 of the *Evidence Act 1977* (Qld) contains any suggestion that the test in *Pfennig* is to be applied.[45]

Thus, it can be seen why Queensland, except for domestic violence trials, has the most stringent test in Australia for the prosecution to obtain the court's permission to adduce propensity or similar fact evidence, by virtue of the *Pfennig* test of no rational view of the evidence consistent with innocence. In other words, the strict *Pfennig* test has been the subject of the least adulteration in Queensland. The strictness of the *Pfennig* test in comparison to the relevance test for domestic violence trials can be seen in the observation of McHugh J in *Pfennig*[46] in a dissenting judgment that "evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused".

B. Uniform Evidence Legislation

As previously mentioned, the Uniform Evidence Legislation modifies the common law by dividing similar fact evidence into tendency and coincidence evidence.[47] One authoritative text on the uniform evidence regime describes the tendency and coincidence rules as broad and facing two quite surmountable conditions:

> In contrast to the hearsay and opinion rules, the tendency and coincidence rules are each subject to inclusionary exceptions that are as broad as the rules themselves. The result is that, rather than being

[40] *Roach v The Queen* (2011) 242 CLR 610, 623 [38], 624 [43] (French CJ, Hayne, Crennan and Kiefel JJ); 210 A Crim R 300; [2011] HCA 12.

[41] *Wilson v The Queen* (1970) 123 CLR 334, 344 (Menzies J).

[42] *Pfennig v The Queen* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ); 77 A Crim R 149.

[43] *Phillips v The Queen* (2006) 225 CLR 303, 323–324 [63] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); 158 A Crim R 431; [2006] HCA 4.

[44] *Hoch v The Queen* (1988) 165 CLR 292; 35 A Crim R 47.

[45] *Roach v The Queen* (2011) 242 CLR 610, 623 [38] (French CJ, Hayne, Crennan and Kiefel JJ); 210 A Crim R 300; [2011] HCA 12.

[46] *Pfennig v The Queen* (1995) 182 CLR 461, 516 (McHugh J); 77 A Crim R 149.

[47] In Victoria, Uniform Evidence Legislation Pt 3.6 should be read in conjunction with *Jury Directions Act 2015* (Vic) Pt 4 Div 2 Other Misconduct Evidence ss 25–30. For example, s 27(2) states that a trial judge in giving a direction on other misconduct evidence adduced by the prosecution following a request by defence counsel must (1) identify how the other misconduct evidence is relevant (whether directly or indirectly) to the existence of a fact in issue in the trial and direct the jury not to use the evidence for any other purpose; and (2) if the evidence forms only part of the prosecution case against the accused, inform the jury of that fact; and (3) direct the jury that it must not decide the case based on prejudice arising from what the jury has heard about the accused.

> generally excluded, tendency and coincidence reasoning is permitted so long as two quite surmountable conditions are satisfied:
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> - a requirement to give reasonable notice in writing to opposing parties
> - a requirement that the evidence have "significant probative value".[48]

Another text on the Uniform Evidence Legislation states that tendency evidence "replaces the common law terminology 'propensity evidence'" and coincidence evidence "replaces the common law terminology 'similar fact evidence'".[49] In order to understand the distinction, it is necessary to turn to the statutory language used in ss 97(1) and 98(1) of the Uniform Evidence Legislation, as well as to decided cases on point. For the tendency rule, s 97(1) refers to having a tendency "to act in a particular way, or to have a particular state of mind", while for the coincidence rule, s 98(1) refers to "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".

Thus, in a sexual assault case, evidence sought to be adduced by the Crown in relation to uncharged acts would fall to be considered under the tendency rule, as in *R v Bauer*[50] and *Hughes v The Queen*.[51] In the latter case, the High Court identified the issue in these terms:

> The issue reduces in this case to the question of whether proof that a man of mature years has a sexual interest in female children aged under 16 years ("underage girls") and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, is capable of having significant probative value on his trial for a sexual offence involving an underage girl.[52]

The most recent High Court authority on the tendency rule in single complainant sexual offences cases is to be found in *R v Bauer* in a unanimous judgment designed to speak one voice:[53]

> Henceforth, it should be understood that a complainant's evidence of an accused's uncharged acts in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM* or exhibit a special, particular or unusual feature of the kind described in *Hughes*.

As to the coincidence rule, or more accurately the improbability of a series of events being a coincidence which gives the evidence its probative value,[54] in *CW v The Queen*[55] the Victorian Court of Appeal held that the basis of the coincidence reasoning relied "on the existence of a relationship which uniquely links the accused person with two or more victims of similar crimes". Given that all of the fires occurred on the same evening, within a four-hour period, and all of the fires were in the same suburb, the court observed

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[48] Jeremy Gans, Andrew Palmer and Andrew Roberts, *Uniform Evidence* (OUP, 3rd ed, 2019) 271 [10.2].

[49] Geoffrey Bellew et al, *Australian Uniform Evidence Law: Principles and Context* (LexisNexis, 2019) 345 [12.1].

[50] *R v Bauer* (2018) 266 CLR 56; 271 A Crim R 558; [2018] HCA 40.

[51] *Hughes v The Queen* (2017) 263 CLR 338; 264 A Crim R 225; [2017] HCA 20.

[52] *Hughes v The Queen* (2017) 263 CLR 338, [2] (Kiefel CJ, Bell, Keane and Edelman JJ); 264 A Crim R 225; [2017] HCA 20.

[53] *R v Bauer* (2018) 266 CLR 56, [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); 271 A Crim R 558; [2018] HCA 40.

[54] *Perry v The Queen* (1982) 150 CLR 580, 588 (Gibbs CJ). Bagaric and Amarasekara, n 2, 89–90, give the example of *R v Straffen* [1952] 2 QB 911. Straffen had been committed to an institution having been found unfit to plead to the charge of the murder of two young girls on the grounds of insanity. Straffen escaped from the institution for an afternoon during which time another young girl was murdered. Bagaric and Amarasekara, at 90, argue that the relevance of the similar fact evidence could be derived via the normal probability process rather than via propensity. "The similar fact evidence disclosed that the accused was a member of a very small class of people. The preparedness to kill young children is so rare – perhaps one in several million – that the class is indeed very small. Accordingly, the cogency of the evidence need not stem from reasoning along the lines that 'the accused killed young children before, therefore he probably killed this young girl', but rather the more orthodox reasoning process: that it is most improbable that two persons who are prepared to kill young girls would have been in the vicinity at the time of the murder."

[55] *CW v The Queen* [2010] VSCA 288, [22] (Maxwell P, Buchanan and Neave JJA).

that the close proximity in time pointed "to the improbability of there having been more than one arsonist active on this particular night".[56]

Stratton disputes the value of the distinction between the two rules in the Uniform Evidence Legislation and has argued that there is no clear dividing line between tendency and coincidence evidence:

> In many instances material might be both tendency and coincidence evidence. For example the facts in *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1; [2003] NSWCCA 319 were that a number of break-ins occurred in which a glass pane was carefully removed and placed intact within the shop which was robbed. On the one hand, this material could be regarded as coincidence evidence, because the circumstances of the offences were "substantially and relevantly similar" (s 98). However the evidence could also be regarded as propensity evidence, in that the evidence suggested that Ellis had a tendency to commit break and enters in a particular way (s 97). In fact in *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1; [2003] NSWCCA 319 the Crown sought to tender the evidence both as tendency and coincidence evidence.
>
> It is probably unhelpful to be too concerned about whether a particular piece of evidence is more truly categorised as tendency or coincidence evidence. Rather the tendency and the coincidence principles should be regarded as alternative and overlapping avenues by which material may be introduced into evidence.[57]

Stratton's view is shared by Hamer, who views the distinction between tendency and coincidence evidence as a potential source of complexity and appeals:

> Differential rules like these, diverging from the logic of inference, are entirely counter-productive. They generate meaningless complexity in the law, encourage game-playing by counsel, and can only confound the rational inference processes of the law.[58]

However, notwithstanding the differences between tendency (sequential) and coincidence (holistic) evidence,[59] which at common law are both categorised as propensity evidence,[60] under the Uniform Evidence Legislation both rules face the same "quite surmountable condition"[61] of "significant probative value".[62] While the term "probative value" is defined in the Dictionary as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue", the meaning of the word "significant" in this context has been left to the courts to interpret. In *IMM v The Queen*,[63] Gageler J stated that "the statutory measure of 'significant' does not need to be 'substantial' but does need to be 'important' or 'of consequence'". In *Hughes v The Queen*,[64] it was held that "there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other

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[56] *CW v The Queen* [2010] VSCA 288, [24] (Maxwell P, Buchanan and Neave JJA).

[57] Stratton, n 3.

[58] David Hamer, "'Tendency Evidence' and 'Coincidence Evidence' in the Criminal Trial: What's the Difference" in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 175. For a critique of Hamer's position, see James Metzger, "Review Essay: Critical Perspectives on the Uniform Evidence Law" (2018) 40(1) *Sydney Law Review* 147, 153–157.

[59] Hamer, n 58, 174. Hamer argues that there is a genuine difference between the two inferences. "The tendency inference is sequential, moving from the defendant's commission of other misconduct to the defendant's tendency to commit that kind of misconduct, then to the defendant's commission of the charged offence. The coincidence inference is more holistic, operating on the accumulation of evidence linking the defendant to the various harms. The prosecution relies upon the improbability of bodies of evidence accumulating if the defendant were innocent." See also Gans, Palmer and Roberts, n 48, 263 [10.1.3]: "Tendency reasoning involves using evidence about a particular person to infer that a pattern of behaviour is likely to follow. Coincidence reasoning proceeds in the other direction, using evidence about a particular pattern of behaviour to infer that a person was likely to be behind it."

[60] See n 2: *Pfennig v The Queen* (1995) 182 CLR 461, 464–465 (Mason CJ, Deane and Dawson JJ); 77 A Crim R 149. Hamer views tendency evidence "as a subset of coincidence evidence. … The probative value of tendency evidence relies upon similarity and the improbability of coincidence": Hamer, n 58, 171.

[61] Gans, Palmer and Roberts, n 48.

[62] Uniform Evidence Legislation ss 97(1)(b), 98(1)(b).

[63] *IMM v The Queen* (2016) 257 CLR 300, [103]; [2016] HCA 14, citing *R v Lockyer* (1996) 89 A Crim R 457, 459; *DSJ v The Queen* (2012) 84 NSWLR 758, 771–772 [57]–[60]; 215 A Crim R 349; [2012] NSWCCA 9.

[64] *Hughes v The Queen* (2017) 263 CLR 338, [41] (Kiefel CJ, Bell, Keane and Edelman JJ); 264 A Crim R 225; [2017] HCA 20.

evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged".

As previously mentioned in the Introduction, in the application of the tendency and coincidence rules for criminal proceedings there is an additional requirement set out in s 101(2), that "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant". Until *Ellis*,[65] the *Pfennig* test was applied under the Uniform Evidence Legislation. However, in *Ellis*, Spigelman CJ found the reasoning of McHugh J in *Pfennig* (who was in dissent on the no rational explanation test) "compelling":[66]

> If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value "outweigh" or "transcend" the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed – at all events by the trial judge. The law has already done the weighing. This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect.[67]

It is arguable whether the adoption of the no rational explanation test results in the balancing exercise being superfluous. The test is grounded in an implicit assumption as to the magnitude of the risk of unfair prejudice (Pe) resulting from the admission of similar fact evidence, with the commensurate need for such evidence to have a particularly high probative value (Pv). If the formula for admission is Pv > Pe and Pe is substantial, then Pv will have to be of such an overwhelming nature as to approach the no rational explanation test. But this is different to saying the balancing exercise is superfluous. For present purposes, the selection of the appropriate test for admission of similar fact evidence is focused on the relativities or quantum of difference between Pv and Pe: a bare majority or a significant margin?[68]

In any event, the adoption of McHugh J's criticism of the no rational explanation test by Spigelman CJ was based on the statutory construction of s 101(2), and in particular the words "substantially outweigh":

> [94] … The "no rational explanation" test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.
>
> [95] Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. … The "no rational explanation" test focuses on one only of the two matters to be balanced – by requiring a high test of probative value – thereby averting any balancing process. I am unable to construe s 101(2) to that effect.[69]

So how far has the bar to the admission of tendency and coincidence evidence under the Uniform Evidence Legislation post *Ellis* slipped under the common law bar of *Pfennig*? Stratton's conclusion is not far at all, as the critical matter is whether or not there is a striking similarity between the proposed evidence and the events charged, for which the common law authorities will be of assistance such as *DPP v Boardman*[70] and *DPP v P*:[71]

> For a time after the decision of *R v Ellis* it seemed that the common law stringency about the admission of tendency and coincidence evidence had been abandoned. However in subsequent cases(*R v Fletcher*

[65] *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1; [2003] NSWCCA 319.

[66] *R v Ellis* (2003) 58 NSWLR 700, [91]; 144 A Crim R 1; [2003] NSWCCA 319.

[67] *Pfennig v The Queen* (1995) 182 CLR 461, 516 (McHugh J); 77 A Crim R 149.

[68] Lord Mackay in *DPP v P* [1991] 2 AC 447, 460 held that the probative value (Pv) needed to be "sufficiently great to make it just to admit the evidence".

[69] *R v Ellis* (2003) 58 NSWLR 700, [94]–[95] (Spigelman CJ); 144 A Crim R 1; [2003] NSWCCA 319.

[70] *DPP v Boardman* [1975] AC 421. Stratton, n 3, cites two examples of striking similarity from the judgment of Lords Hailsham and Salmon: if a burglar goes in through a ground floor window, that will not constitute a striking similarity, but if the burglar leaves an esoteric symbol painted in lipstick on the mirror, there may be a striking similarity. Similarly, in a sex case, repeated acts of sexual intercourse are unlikely of themselves to have a striking similarity but performing them in the headdress of a Red Indian chief might.

[71] *DPP v P* [1991] 2 AC 447.

> (2005) 156 A Crim R 308, [49]–[50] (Simpson J); [2005] NSWCCA 338; *R v Zhang* (2005) 158 A Crim R 504, [133], [141] (Simpson J); [2005] NSWCCA 437) it has emerged that to a great extent the common law principles limiting the admission and use of tendency and coincidence evidence remain.[72]

Stratton wrote his paper in 2008, two years before Victoria joined the uniform evidence regime and which in due course led to a difference of opinion between Victoria and New South Wales concerning the degree of similarity sufficient to support tendency reasoning, as spelt out in *Velkoski v The Queen*:[73]

> [163] Where there is an absence of remarkable or distinctive features in the manner in which the offences are committed, the difference in the law as stated by this Court and the New South Wales Court of Criminal Appeal has left the law in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning. One line of authority has held that some degree of similarity in the acts or surrounding circumstances is necessary before it will be sufficient to support tendency reasoning (*RHB* [2011] VSCA 295; *DR v The Queen* [2011] VSCA 440; *CEG* [2012] VSCA 5). Another line of New South Wales authority, that has not been followed in Victoria, has emphasised that tendency reasoning is not "based upon similarities," and evidence of such a character need not be present (*PWD* [2010] NSWCCA 209 [79]; *BP* [2010] NSWCCA 303). These lines of authority within each Court are not readily reconcilable.
>
> [164] Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of "significant probative value." If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible.[74]

A further point of difference between Victoria and New South Wales of whether the judge should take into consideration the weight the jury would give to the tendency or coincidence evidence in determining its probative value was finally resolved in *IMM v The Queen*.[75] Until the High Court decision in *IMM v The Queen* there was a schism between Victoria and New South Wales as to whether in determining "probative value" the court should take into account issues of credibility and reliability or should take the evidence at its highest. Victoria favoured the former,[76] while New South Wales preferred the latter.[77]

In *IMM v The Queen*, a majority (4–3) on the High Court endorsed the New South Wales position. In a joint judgment, the majority comprising French CJ, Kiefel, Bell and Keane JJ stated:

> [54] The view expressed in *Dupas v The Queen*, which reserved a particular role for the trial judge with respect to the reliability of evidence, did not have its foundations in textual considerations of the Evidence Act, but rather in a policy attributed to the common law. The Evidence Act contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. The only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence, is provided by s 65(2)(c) and (d) and s 85. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury, albeit that a jury would need to be warned by the trial judge about evidence which may be unreliable pursuant to s 165.[78]

While the majority decision in *IMM v The Queen* is open to criticism,[79] for present purposes its effect, under the Uniform Evidence Legislation if not the common law, is to give Pv the maximum possible

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[72] Stratton, n 3.

[73] *Velkoski v The Queen* (2014) 45 VR 680, 242 A Crim R 222; [2014] VSCA 121.

[74] *Velkoski v The Queen* (2014) 45 VR 680, [163]–[164] (Redlich, Weinberg and Coghlan JJA); 242 A Crim R 222; [2014] VSCA 121.

[75] *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14.

[76] *Dupas v The Queen* (2012) 40 VR 182; 218 A Crim R 507; [2012] VSCA 328.

[77] *R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112; *R v XY* (2013) 84 NSWLR 363; 231 A Crim R 474; [2013] NSWCCA 121.

[78] *IMM v The Queen* (2016) 257 CLR 300, [54] (French CJ, Kiefel, Bell and Keane JJ); [2016] HCA 14.

[79] Of particular concern is the statement that "the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence": *IMM v The Queen* (2016) 257 CLR

value by virtue of taking the evidence at its highest. The majority appear to have based their decision on the policy of the Uniform Evidence Legislation to leave questions of reliability to the jury. The key question of the appropriate policy, or perhaps more accurately the appropriate political decision, to be adopted for the admission of similar fact evidence will be considered in Part III.

Thus, the test for the admission of tendency and coincidence evidence under the Uniform Evidence Legislation is lower than at common law by virtue of (1) the rejection of the no rational explanation test, and (2) taking the evidence at its highest. Effectively, the test under the Uniform Evidence Legislation, leaving aside the recent insertion of s 97A and the amendment to s 101(2) in the *Evidence Act 1995* (NSW) discussed in Part II E, is one of heightened relevance such that "the evidence is of sufficient weight to justify the risk of the evidence unwittingly being given too much weight".[80] This test has two limbs: first, under s 97(1)(b) or s 98(1)(b) the evidence has significant probative value; second, under s 101(2) the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. In practice, the focus has been upon s 97 rather than s 101(2).

C. South Australia

In introducing the legislation that supplanted the *Pfennig* test, the South Australian Attorney-General described the common law in these terms: "The present law is overly restrictive, complex and unsatisfactory in having the practical effect that cogent and reliable evidence of past misconduct is often excluded from a criminal trial."[81] As for the test in the Uniform Evidence Legislation, the Attorney-General was equally unimpressed, describing the test as "not without its benefits but that model is also not without its problems and has not met with universal acclaim".[82] The Attorney-General basked in the favourable conclusion of the Joint Courts Criminal Legislation Committee on the final Bill: "The simplicity of the Bill stands in stark contrast to the present mess. We think it has merit. There is nothing in the wording which requires further comment."[83]

In South Australia, the *Evidence (Discreditable Conduct) Amendment Act 2011* (SA) came into force on 1 June 2012, which had the effect of introducing Pt 3 Div 3 Admissibility of evidence showing discreditable conduct or disposition into the *Evidence Act 1929* (SA) in ss 34O–34T. Essentially, these amendments slightly lower the common law threshold for the admission of discreditable conduct or disposition evidence (bad character evidence), for while the bar of impermissible use in s 34P(1) appears to be stricter than *Pfennig* or the Uniform Evidence Legislation, it is qualified by s 34P(2).[84] Section 34P Evidence of discreditable conduct is the key section of Pt 3 Div 3 of the *Evidence Act 1929* (SA):

300, [50] (French CJ, Kiefel, Bell and Keane JJ); [2016] HCA 14. See also Stephen Odgers, "Uniform Evidence Law at 21" (2017) 28(3) *Current Issues in Criminal Justice* 311, who is critical of the majority's reasoning in *IMM v The Queen*.

[80] *Hughes v The Queen* (2017) 263 CLR 338, [87] (Gageler J); 264 A Crim R 225; [2017] HCA 20.

[81] South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3287 (John Rau). Bagaric and Amarasekara, n 2, 79–83, review the dangers of similar fact evidence under four headings following McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461, 512–513; 77 A Crim R 149: burden of proof/presumption of innocence; practical problems; bias; and propensity reasoning and inability to estimate probability. The authors consider the latter two the weightier dangers. On bias, the authors suggest greater confidence should be shown in juries as lawyers underrate the level of intelligence, common sense and quality of decision-making of juries (82). On propensity reasoning and inability to estimate probability, the authors state "there is no evidence to suggest that the amount of weight accorded to past conduct is *disproportionate* to its logical relevance" drawing on the literature cited by Kirby J in *BRS v The Queen* (1997) 191 CLR 275, 322; 95 A Crim R 400 (83, original emphasis).

[82] South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3294 (John Rau).

[83] South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011 (John Rau).

[84] For a useful discussion of South Australia's new approach to the use of bad character evidence see David Plater, Lucy Line and Rhiannon Davies, "The Schleswig-Holstein Question of the Criminal Law Finally Resolved? An Examination of South Australia's New Approach to the Use of Bad Character Evidence in Criminal Proceedings" (2013) 15(1) *Flinders Law Journal* 55. For those unfamiliar with international law, the Schleswig-Holstein Question was a 19th century dispute between Denmark, Prussia, and Austria over the status of Schleswig and Holstein. The analogy with Schleswig-Holstein was used by the South Australian Attorney-General, the Hon John Rau MP, in introducing the legislation in 2011.

> Section 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 –
>
> (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.

In *R v Pearce*[85] Judge McIntyre usefully summarised the structure of s 34P:

> [17] Section 34P(1) provides that evidence of discreditable conduct is inadmissible subject to s 34P(2). The question whether to admit evidence under s 34P(2) is a question of law (*R v MJJ, R v CJN* [2013] SASCFC 51). Section 34P(2) divides discreditable evidence into two categories. Section 34P(2)(a) deals with non-propensity uses. Propensity or disposition evidence is dealt with in s 34P(2)(b).

Section 34P is required to be read in conjunction with s 34S Certain matters excluded from consideration of admissibility.[86] The principal legal implications of ss 34P and 34S of the *Evidence Act 1929* (SA) are three-fold: (1) the lowering of the common law threshold for the admission of evidence of discreditable conduct;[87] (2) the abrogation of the *Pfennig* test for admissibility of evidence of discreditable conduct under s 34S(a), and the abrogation of *Hoch* for the possibility of collusion or concoction under s 34S(b); (3) where the evidence of discreditable conduct is admitted for a non-propensity purpose, such as evidence of the history of the relationship between the parties, motive or intention, or to negative a defence, the probative value must substantially outweigh its prejudicial effect by virtue of s 34P(2)(a); by contrast, a higher threshold is required where the evidence of discreditable conduct is admitted for a propensity or similar fact purpose as circumstantial evidence of a fact in issue, such that the evidence must also have a strong probative value having regard to the particular issue or issues arising at trial by virtue of s 34P(2)(b).[88]

In *R v Maiolo (No 2)*[89] Peek J (Kourakis CJ and Stanley J agreeing) stated that "there is an important distinction between a general propensity (to commit crimes or to commit crimes of the same general kind) on the one hand [s 34P(2)(a)] and a propensity to commit a highly specific type of crime on the other hand" [s 34P(2)(b)]. Peek J[90] went on to observe that while the words used in s 34P(2)(a) resemble the *Christie* discretion,[91] the task involved is not an exercise in discretion:

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[85] *R v Pearce* [2013] SADC 89, [17] (Judge McIntyre).

[86] *Evidence Act 1929* (SA) s 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."

[87] *R v MJJ* (2013) 117 SASR 81, [15] (Kourakis CJ); 230 A Crim R 391; [2013] SASCFC 51: "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*."

[88] Hemming and Layton, n 8, 451, citing *R v MJJ* (2013) 117 SASR 81, [244] (Vanstone J; with whom Kourakis CJ agreed [13]); 230 A Crim R 391; [2013] SASCFC 51.

[89] *R v Maiolo (No 2)* (2013) 117 SASR 1, [32] (Peek J; Kourakis CJ and Stanley J agreeing); 232 A Crim R 507; [2013] SASCFC 36.

[90] *R v Maiolo (No 2)* (2013) 117 SASR 1, [51] (Peek J); 232 A Crim R 507; [2013] SASCFC 36.

[91] *R v Christie* [1914] AC 545.

> [51] … Rather, it is *a strict condition of admissibility* and it is for the prosecution to positively satisfy the trial Judge that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant.[92]

In determining the weighing exercise, the judge "must have regard", as required by s 34P(3), "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" impermissibly. The impermissible use to which s 34P(3) refers includes, at a minimum, use of the evidence "to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct" (s 34P(1)(a)).[93]

By contrast, the operation of s 34P(2)(b), was explained by Kourakis CJ in *R v MJJ*:[94]

> Section 34P(2)(b) expressly provides for the admission of discreditable conduct evidence which shows a particular propensity or disposition of the defendant. The particular propensity or disposition must be strongly probative of the offence charged, and outweigh its prejudicial effect.

Plater, Line and Davies question whether the addition of "strongly probative" in s 34P(2)(b) adds anything in practice: "If the probative value of evidence adduced for a propensity or similar fact purpose substantially outweighs its prejudicial effect, it appears likely that it will also have 'strong probative value'."[95] This reflects the position taken by Lord Mackay LC in *DPP v P*.[96]

The meaning of "propensity or disposition" in s 34P(2)(b) was considered in *R v Soteriou*[97] by Vanstone J after having consulted the Oxford English Dictionary: "It can be seen that the definitions of both words are fairly undemanding. They include inclination or tendency. The words can apply to a criminal propensity or disposition, but need not."

The reference to the definitions of propensity or disposition being "fairly undemanding" was reflected in Vanstone J's assessment of the evidence in *R v Soteriou*[98] where the appeal was against conviction for trafficking in ecstasy. The Crown adduced evidence which inter alia included notebooks containing lists of persons and amounts, and SMS messages apparently referring to sales negotiations:

> I consider that if the jury were minded to draw the inferences from the text messages and notebooks suggested by the prosecution, then inevitably it would have reached the view that the appellant had recently and repeatedly dealt in drugs, that he was in that business, and, it followed, that the appellant had a propensity or disposition to deal in drugs. In my view the step from the first and second conclusions to the third is a short one.[99]

Effectively, the South Australian test is faithful to the first principle in *Makin* by virtue of the impermissible use in s 34P(1)(a),[100] in contrast to all other Australian approaches, while being qualified by s 34P(2)(a) which provides that evidence of discreditable conduct may be admitted for a use (the permissible use) if, and only if, the court is satisfied that the probative value of the evidence to be admitted for a permissible use substantially[101] outweighs any prejudicial effect[102] that it may have on the defendant. There is a

[92] *R v Maiolo (No 2)* (2013) 117 SASR 1, [51] (Peek J); 232 A Crim R 507; [2013] SASCFC 36 (original emphasis).

[93] *R v CCN* (2013) 117 SASR 64, [24] (White J); [2013] SASCFC 44.

[94] *R v MJJ* (2013) 117 SASR 81, [18] (Kourakis CJ); 230 A Crim R 391; [2013] SASCFC 51.

[95] Plater, Line and Davies, n 84, 83–84, citing *Sutton v The Queen* (1984) 152 CLR 528, 559 (Deane J); 11 A Crim R 331.

[96] *DPP v P* [1991] 2 AC 447, 460–461.

[97] *R v Soteriou* (2013) 118 SASR 119, [16] (Vanstone J); 235 A Crim R 591; [2013] SASCFC 114.

[98] *R v Soteriou* (2013) 118 SASR 119; 235 A Crim R 591; [2013] SASCFC 114.

[99] *R v Soteriou* (2013) 118 SASR 119, [16] (Vanstone J); 235 A Crim R 591; [2013] SASCFC 114.

[100] The Attorney-General drew on Shakespeare in likening the effect of the admission of discreditable conduct evidence "which, once dropped like poison in the juror's ear, 'swift as quicksilver it courses through the natural gates and alleys of the body' (*Hamlet*, Act I, Scene v, ll. 66-67)": South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3290 (John Rau).

[101] "In truth, the word 'substantially' can probably have as much or as little effect as the individual judge wishes": Charles Robert Williams and Sandra Draganich, "Admissibility of Propensity Evidence in Paedophilia Cases" (2006) 11 *Deakin Law Review* 1, 18.

[102] "[P]rejudice does not refer to simple prejudice to the accused but, rather, the risk of an unfair trial and a wrongful conviction": South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3290 (John Rau).

further qualification in s 34P(2)(b) of requiring the evidence to have "strong probative value"[103] if the prosecution relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue (the second principle in *Makin*). Thus, the two limbs for the admission of propensity or disposition evidence are first the probative value substantially outweighs any prejudicial effect, and second the evidence has strong probative value.

By comparison, as previously mentioned, under the Uniform Evidence Legislation the limbs are reversed: the first limb under s 97(1)(b) or s 98(1)(b) requires the evidence to have significant probative value (as opposed to strong probative value in s 34P(2)(b) above), while for the second limb under s 101(2) the probative value of the evidence substantially outweighs any prejudicial effect (same language as s 34P(2)(a) above) it may have on the defendant. For present purposes, reversing the order of the limbs does not matter.

D. Western Australia

On 1 January 2005, s 31A of the *Evidence Act 1906* (WA) commenced operation.[104] Section 31A(2)(b) reflects the test McHugh J proposed in *Pfennig*[105] in dissent:

> (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.

It can be seen that the first limb of the test, the evidence has significant probative value in s 31A(2)(a), is written in very similar language to ss 97(1)(b) and 98(1)(b) of the Uniform Evidence Legislation. The second limb in s 31A(2)(b) substitutes the risk of an unfair trial for prejudicial effect in s 101(2) of the Uniform Evidence Legislation.

The breadth of the definitions of "propensity evidence" and "relationship evidence" in s 31A(1) was commented upon by Mazza JA (Martin CJ and Pullin JA agreeing) in *Asplin v Western Australia*:[106]

> These definitions are extraordinarily wide in their scope. For example, the definition of propensity evidence goes beyond what the common law understood by that category of evidence. It embraces not just similar fact evidence, but also evidence of the character or reputation of the accused, or of a tendency that he or she has or had, as well as "other evidence of the conduct of the accused person".[107]

Thus, s 31A substantially altered the common law, such that propensity evidence or relationship evidence is admissible provided the requirements of s 31(2)(a) and (b) have been satisfied. The policy or political background to the insertion of s 31A into the *Evidence Act 1906* (WA) was discussed by Miller JA in *Dair v Western Australia*:[108]

> [179] … [I]t was intended that the courts would be given a greater capacity to admit propensity and relationship evidence, see Western Australia, *Parliamentary Debates* Legislative Assembly, 30 June 2004, 4608 (Mr JA McGinty, Attorney General):

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[103] "What will amount to strong probative value will depend on the particular circumstances of each case. The test of establishing strong probative value is not intended to be the same as under *Pfennig* as requiring the exclusion of any rational inference inconsistent with innocence": South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3291 (John Rau).

[104] For a helpful overview of the operation of *Evidence Act 1906* (WA) s 31A, see William Woo, "Re-thinking Evidence Act 1906, s 31A Evolution, Experience and Back to Basics" (2015) 40 *The University of Western Australia Law Review* 481.

[105] *Pfennig v The Queen* (1995) 182 CLR 461, 528–529; 77 A Crim R 149.

[106] *Asplin v Western Australia* [2013] WASCA 72.

[107] *Asplin v Western Australia* [2013] WASCA 72, [30] (Mazza JA).

[108] *Dair v Western Australia* (2008) 36 WAR 413; 182 A Crim R 385; [2008] WASCA 72.

> [T]he proposed amendments will provide the courts with greater capacity to admit propensity and relationship evidence. The court will still need to be satisfied that the evidence has a significant probative value and that the probative value outweighs the risk of an unfair trial.[109]

In the same case, Steytler P explained the nature of the comparison in s 31A(2)(b) of the *Evidence Act 1906* (WA):

> [62] Once the evidence is found to have significant probative value, either by itself or taken with other evidence, the court must engage in the process contemplated by s 31A(2)(b). Because there will already have been an assessment of the probative value of the evidence (taking into account the purpose for which it is adduced and its likely effect when considered together with the other evidence), it is necessary, next, to assess the degree of risk of unfairness in the trial that will be brought about by the admission of the evidence.[110]

Once the degree of risk has been assessed, a comparison is made between the probative value of the evidence and the degree of risk of an unfair trial. In *Donaldson v Western Australia*[111] Roberts-Smith JA (with whom Wheeler JA and Miller AJA agreed) identified the risk of an unfair trial as:

> [127] … [T]he 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.[112]

This risk is effectively the first limb of *Makin*, and is similar to the "impermissible use" in s 34P(1)(a) of the *Evidence Act 1929* (SA).

As to the meaning of probative value in s 31A(2)(b) of the *Evidence Act 1906* (WA), in *AJE v Western Australia*[113] Mazza JA and Beech J were of the view that "in assessing whether the evidence had significant probative value, the evidence is to be taken at its highest from the perspective of the prosecution". Whether the evidence is accepted, and if so what weight to give the evidence is a matter for the jury, and the judge has no role to play in determining what weight ought to be given to the evidence. For the purpose of determining probative value, taking the Crown evidence at its highest is also the position under the Uniform Evidence Legislation.[114]

The adjudicators in the s 31A(2)(b) comparison are "fair-minded people" which Miller JA has suggested means the same as "reasonable people":

> [188] The legislature has chosen to use the words "fair-minded people" rather than "reasonable people", but the expressions mean the same thing. In the context of s 31A(2)(b), I consider "fair-minded people" to be people who would approach the issue of unfairness in a reasonable and objective fashion, appreciating that, in some cases, the risk of an unfair trial is outweighed by the public interest in having details of relevant prior convictions of an accused person before the court. The fair-minded person would, in some cases, see that it would be contrary to common sense and the interests of justice to exclude that evidence.[115]

For present purposes, of more significance is the critique by Steytler P that the comparison between the probative value of the evidence and the degree of risk to the fairness of the trial suffers from the same defect as the position under the common law of comparing two incommensurables:

> [67] The comparison that these fair-minded people are to be assumed to have undertaken is problematic. As McHugh J pointed out in *Pfennig v The Queen* (1995) 182 CLR 461 (528), "prejudicial effect [or, I would suggest, the degree of risk of an unfair trial] and probative value are incommensurables" that have "no standard of comparison". It is not easy to compare the probative value of the evidence with the degree of risk to the fairness of the trial that is brought about by its introduction.[116]

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[109] *Dair v Western Australia* (2008) 36 WAR 413, [179] (Miller JA); 182 A Crim R 385; [2008] WASCA 72.

[110] *Dair v Western Australia* (2008) 36 WAR 413, [62] (Steytler P); 182 A Crim R 385; [2008] WASCA 72.

[111] *Donaldson v Western Australia* (2005) 31 WAR 122; [2005] WASCA 196.

[112] *Donaldson v Western Australia* (2005) 31 WAR 122, [127] (Roberts-Smith JA); [2005] WASCA 196.

[113] *AJE v Western Australia* (2012) 225 A Crim R 242, [73]; [2012] WASCA 185.

[114] *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14.

[115] *Dair v Western Australia* (2008) 36 WAR 413, [188] (Miller JA); 182 A Crim R 385; [2008] WASCA 72.

[116] *Dair v Western Australia* (2008) 36 WAR 413, [67] (Steytler P); 182 A Crim R 385; [2008] WASCA 72.

Thus, whether the balancing exercise is taking place under s 31A(2)(b) of the *Evidence Act 1906* (WA) or under s 101(2) of the Uniform Evidence Legislation, "[i]t requires the court to make a judgment, rather than to exercise a discretion".[117] However, the balancing exercise under s 31A(2)(b) is a public interest test adjudged by fair-minded people, rather than a judicial balancing exercise under s 101(2). Arguably, a public interest test is a different species of test because it is broader than the judicial balancing exercise which focuses on the facts and circumstances of the individual case under consideration. A public interest test is more transparent than the Pv > Pe balancing exercise, and explicitly recognises that admissibility tests are political decisions. The courts, whether engaged in developing the common law or interpreting a statutory test, are necessarily involved in those political decisions.

Under s 31A(2)(b) of the *Evidence Act 1906* (WA) the public interest test for the admission of propensity evidence and relationship evidence can be distinguished from public interest immunity and the exclusion of improperly or illegally obtained evidence, because the balancing exercise of the latter is between two public interests. As such, combined with the wide definitions of "propensity evidence" and "relationship evidence" in s 31A(1) of the *Evidence Act 1906* (WA), the public interest test in Western Australia for the admission of similar fact or propensity evidence represents the lowest bar in Australia. This public interest test is akin to the public's (in practice the jury's) right to know versus the defendant's right to a fair trial. The public interest test appears to reinforce the armoury of the State's resources against the individual defendant, as opposed to the *Pfennig* test which impliedly presumes the similar fact or propensity evidence should be excluded because the bar of no rational view of the evidence consistent with innocence is set so high against the State. This begs the question of whether any model provision for similar fact/propensity evidence or the coincidence/tendency rules in Australia is more a matter of policy or political decision-making than of law. To state otherwise would be a fiction. The political dimension to the selection of a test admitting potentially highly prejudicial evidence is further examined in the next section.

E. The Royal Commission into Institutional Responses to Child Sexual Abuse and the Evidence Amendment (Tendency and Coincidence) Act 2020 (NSW)

The Final Report Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) addressed reform of tendency and coincidence evidence and joint trials in order "to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials",[118] but only for child sexual offence proceedings.[119] For present purposes the central proposed reform to both s 97 the tendency rule and s 98 the coincidence rule reads as follows:

> [T]he 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, be relevant to an important evidentiary issue in the proceeding.[120]

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[117] *R v Ellis* (2003) 58 NSWLR 700, [95] (Spigelman CJ); 144 A Crim R 1; [2003] NSWCCA 319, citing *R v Blick* (2000) 111 A Crim R 326, [20] (Sheller JA); [2000] NSWCCA 61; F Bennion, "Distinguishing Judgment and Discretion" [2000] PL 368.

[118] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (2017) 105 [44]. See <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf>.

[119] This is the situation in the United States under the Federal Rules of Evidence (FRE). FRE 404(b)(1) provides an absolute prohibition whereby "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character". However, FRE 413(a) provides an exception to the absolute prohibition for similar crimes in sexual assault cases: "In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." For a review of England/Wales, New Zealand, Canada and the United States see David Hamer, *The Admissibility and Use of Tendency, Coincidence and Relationship Evidence in Child Sexual Assault Prosecutions in a Selection of Foreign Jurisdictions*, Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse (2016). See <https://www.childabuseroyalcommission.gov.au/sites/default/files/research_report_-_tendency_coincidence_and_relationship_evidence_in_foreign_jurisdictions_-_government_responses.pdf>.

[120] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Evidence (Tendency and Coincidence) Model Provisions, *Public Consultation Draft* (2016) 3. See <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Criminal%20justice%20-%20Model%20Bill.pdf>.

As Hunter and Kemp have pointed out this is "a very low threshold, essentially one of relevance".[121] Each of the following kinds of evidence is defined as being "relevant to an important evidentiary issue" in a child sexual offence proceeding:

i. evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding
ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole.[122]

However, the admission of tendency evidence is subject to two conditions, having regard to the particular circumstances of the proceeding:

i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant, and
ii. if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.[123]

This essential fairness discretion would be incorporated in a new proposed s 98A.[124] In addition, s 101 is proposed to be repealed and replaced with a new section that excludes tendency evidence or coincidence evidence under ss 135 or 137 of the Uniform Evidence Legislation:

> Tendency evidence or coincidence evidence about a party that is admissible under this Part cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party.[125]

Hunter and Kemp argue that there are four reasons to justify halting consideration of the Royal Commission's proposed *Evidence (Tendency and Coincidence) Model Provisions Bill*:

> [T]he alarmingly low bar for admitting tendency evidence and the lack of clarity in the proposed *Evidence (Tendency and Coincidence) Model Provisions Bill* and the failure of the Jury Reasoning Study to substantiate these legislative changes, [and] the ruling in *Hughes v The Queen*.[126]

An alternative view, which argues that the dangers of admitting similar fact evidence have been overly exaggerated, has been put by Bagaric and Amarasekara:

> [T]he supposed dangers of similar fact evidence or other problems associated with admitting such evidence in criminal proceedings are either non-existent or have been significantly exaggerated. In particular, it is contended that the conceptual basis for the admissibility of similar fact evidence has been misunderstood. In *all* cases, such evidence does not derive its relevance from what is commonly termed "propensity reasoning". Instead, the cogency of similar fact evidence stems from the fact that it places the accused in a limited class of persons who have a behavioural capacity to engage in the relevant conduct, thereby increasing the probability that the accused committed the offence charged.[127]

The authors suggest that reform should be based on similar fact evidence being prima facie admissible, provided admission of the evidence is accompanied by appropriate directions to the jury as to how they should use such evidence:

> In terms of reform suggestions, we propose that similar fact evidence should be *prima facie* admissible as being relevant to the mens rea of the offence or the identity of the culprit. Where such evidence is admitted the jury should be instructed that the reason for the admission of the evidence is that it establishes that the accused is one of a class of people in the community who has demonstrated that he or she is prepared in some circumstances to engage in the conduct in issue. The jury should also be directed that they should not use the similar fact evidence to reason that because the accused has previously engaged in similar

[121] Jill Hunter and Richard Kemp, "Proposed Changes to the Tendency Rule: A Note of Caution" (2017) 41 Crim LJ 253, 257.

[122] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, n 118, 105–106 [45].

[123] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, n 118, 106 [45].

[124] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, n 120, 4.

[125] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, n 120.

[126] Hunter and Kemp, n 121, 260. The authors contend that the ruling in *Hughes v The Queen* (2017) 263 CLR 338, [58]–[59] (Kiefel CJ, Bell, Keane and Edelman JJ); 264 A Crim R 225; [2017] HCA 20 "makes clear that the current UEA provisions, ss 97 and 101, achieve the goals of the Commission".

[127] Bagaric and Amarasekara, n 2, 71 (original emphasis).

> conduct he or she has a propensity for doing so and is therefore guilty of the offence. Further, they should be directed to evaluate the case on its merits and to cast aside any unfavourable sentiments that they may form towards the accused as a result of the similar fact evidence.
>
> The reason that we suggest that similar fact evidence is only *prima facie* admissible is that some offences are so common that previous commission of them does not place the agent in a very restricted class. Offences such as shoplifting and minor assaults would probably fall within this category. Whether this is ultimately the case depends on statistical observations concerning the frequency of the relevant conduct (where this is measured not by conviction rates but rather by the number of relevant offences which are reported and estimates of unreported offences).
>
> This proposal will place the existing law on similar fact evidence in line with the objectives of the criminal trial process and the current empirical evidence concerning the actual dangers inherent with such evidence. In our view this would represent a considerable improvement on the present approach, which demonstrates an irrational prejudice against such evidence and substantially subverts the principal aim of the criminal trial process: to identify and punish those responsible for criminal offences.[128]

The advantage of this approach is that it does not distinguish between classes of offences, and to some extent anticipated the fundamental change to the admission of evidence of bad character that occurred in England and Wales following the enactment of the *Criminal Justice Act 2003* (UK).[129]

In any event, the Council of Attorneys-General on 29 November 2019 issued a communiqué entitled "Model Bill to Amend Uniform Evidence Law Test for Admissibility of Tendency and Coincidence Evidence in Criminal Trials".[130] Accordingly, all jurisdictions within the uniform evidence regime are expected to adopt the Model Bill. New South Wales is the first uniform evidence jurisdiction to enact the Model Bill in the form of the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW). In introducing the Model Bill, the New South Wales Attorney-General anticipated comparable bills will be introduced in Victoria, Tasmania, the Australian Capital Territory, the Northern Territory and the Commonwealth.[131] Under this amendment, a new s 97A Admissibility of tendency evidence in proceedings involving child sexual offences has been introduced. Section 97A(2) is the key change "which will alter the operation of the first limb[132] in relation to tendency evidence in child sexual abuse prosecutions in order to facilitate greater admissibility of tendency evidence in those proceedings":[133]

> (2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2) –
>
> (a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest),
>
> (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.

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[128] Bagaric and Amarasekara, n 2, 97–98.

[129] The admissibility and use of similar fact evidence in criminal proceedings in England and Wales is governed by *Criminal Justice Act 2003* (UK) Ch 1 Pt 11, headed "Evidence of bad character", and which commenced on 15 December 2004. Section 99(1) abolished the common law rules. Section 101(1) provides that evidence of the defendant's bad character is admissible under one of seven gateways, the most important of which is s 101(1)(d): "it is relevant to an important matter in issue between the defendant and the prosecution." The threshold of "relevance" was also adopted by Royal Commission into Institutional Responses to Child Sexual Abuse, and contrasts with the higher threshold of "significant probative value" in the Uniform Evidence Legislation.

[130] Council of Attorneys-General (CAG) communiqué, 29 November 2019: Model Bill to Amend Uniform Evidence Law Test for Admissibility of Tendency and Coincidence Evidence in Criminal Trials. Uniform Evidence Law CAG members: (a) Noted that the Australasian Parliamentary Counsel's Committee has prepared a Model Bill to implement the proposed reform of the Uniform Evidence Law test for admissibility of tendency and coincidence evidence in criminal proceedings agreed by CAG on 28 June 2019; (b) Agreed to implement the Model Bill. See <https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-communique-29-november-2019>.

[131] "I anticipate that comparable bills will be introduced in Victoria, Tasmania, the Australian Capital Territory, the Northern Territory and the Commonwealth": New South Wales, *Parliamentary Debates*, House of Assembly, 25 February 2020, 15:37:17 (Mark Speakman).

[132] The "first limb" is a reference to tendency evidence only being admissible under s 97(1)(b) where a court thinks that it will have significant probative value.

[133] New South Wales, *Parliamentary Debates*, House of Assembly, 25 February 2020, 15:37:17 (Mark Speakman).

So, to be clear, s 97 has been left unchanged but for child sexual abuse prosecutions s 97A introduces a presumption that the tendency evidence identified in s 97A(2) has significant probative value for the purposes of ss 97(1)(b) and 101(2). This is a rebuttable presumption by virtue of s 97A(4) which states "the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so". However, s 97A(4) is qualified by s 97A(5)(a)–(g) setting out seven matters which "are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters".[134] It can be anticipated that given the rebuttable presumption under s 97A(4), the breadth of those matters listed in s 97A(5) ensure that courts will face a difficult task interpreting the meaning of "exceptional circumstances".

More generally, as Hunter and Kemp have argued, "any proposal to alter evidentiary rules according to classes of offences should cause pause for thought",[135] citing the Australian Law Reform Commission's 2005 Report on the Uniform Evidence Legislation which noted "the danger of increased complexity arising from fragmented regulation supports caution because rules of evidence do not readily adapt across different sorts of hearings".[136]

In addition to the newly inserted s 97A, s 101(2) has been changed to read: "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant". The New South Wales Attorney-General explained the reason for this amendment:

> Changing the test from substantially outweighs to simply outweighs seeks to address the asymmetry in the assessment of whether evidence with significant probative value should be admissible under the current test, which is disproportionately weighted towards the exclusion of such evidence. It would strike an even and appropriate balance between the competing interests of ensuring that relevant tendency and coincidence evidence with significant probative value is admissible, and in preventing unfair prejudice to defendants in criminal proceedings.[137]

Thus, the revised test under s 101(2) of "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant" applies to all proceedings under ss 97 and 98, irrespective of whether s 97A is engaged. The removal of the word "substantially" is a further erosion of the common law protection and the presumption of innocence and represents a lowering of the bar for the admissibility of tendency and coincidence evidence.

The political decision by jurisdictions within the uniform evidence regime to enact the Model Bill announced in the Council of Attorneys-General communiqué of 29 November 2019, begs three questions. Has the bar for the admission of tendency evidence and coincidence evidence been set too low under the Uniform Evidence Legislation? Is the decision to alter evidentiary rules according to classes of offences sound? Is there a better model for all jurisdictions in Australia? These questions will be addressed in the next section.

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[134] The matters not to be taken into account are listed in s 97A(5)(a)–(g): (a) the sexual interest or act to which the tendency evidence relates (the tendency sexual interest or act) is different from the sexual interest or act alleged in the proceeding (the alleged sexual interest or act); (b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred; (c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act; (d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act; (e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act; (f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features; (g) the level of generality of the tendency to which the tendency evidence relates.

[135] Hunter and Kemp, n 121, 256.

[136] Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2005) Ch 2 [18.169].

[137] New South Wales, *Parliamentary Debates*, House of Assembly, 25 February 2020, 15:37:17 (Mark Speakman).

III. Is a Model Provision for Similar Fact/Propensity Evidence or the Coincidence/Tendency Rules in Australia Feasible or Desirable?

> Man is born passionate of body, but with an innate though secret tendency to the love of Good in his mainspring of Mind. But God help us all! It is at present a sad jar of atoms.
>
> Lord Byron.

At the outset it is useful to address the question: why is a model provision for the admission of similar fact evidence needed or desirable? One possible answer is that a common position is required in the interests of justice. This then begs the question of whose interests: the complainant or the accused? For the interests of justice to be relevant, it would need to be demonstrated that there is a significant difference between the tests for the admission of similar fact evidence between jurisdictions in Australia. Policy reasons underpinned the decisions of all jurisdictions in Australia except Queensland to depart from *Pfennig*.

A further clarification is also in order. To describe a decision as being based on "policy" reasons cloaks or masks its true nature. In reality, "policy" is code for political, where certain interests are being prioritised over others. Thus, a lowering of the bar for the admission of similar fact evidence is a political decision to prioritise the interests of the complainant over that of the accused.[138] This was acknowledged in Western Australia with the rejection of the test in *Pfennig* and the adoption of the public interest test.

The political spectrum for the test for the admission of similar fact/propensity evidence or the coincidence/tendency rules in Australia ranges from the high bar in Queensland of *Pfennig* (no rational explanation consistent with innocence) except for domestic violence evidence to the low bar in New South Wales for child sexual offences of the rebuttable presumption that the tendency evidence has significant probative value, which merely has to outweigh the danger of unfair prejudice to the defendant (ss 97A and 101(2) of the *Evidence Act 1995* (NSW)).

The great dividing line in evidence law in Australia is between those jurisdictions which have joined the uniform evidence regime and those who have chosen to remain outside the regime. The author has previously argued, based on letters from the respective Attorneys-General, that collectively the three "holdout" States from the Uniform Evidence Legislation, namely, Queensland, South Australia and Western Australia have no present or future intention of joining.[139] As mentioned earlier, Queensland has followed *Pfennig*, South Australia has adopted the permissible use test, and Western Australia has introduced the public interest test. While Western Australia has the lowest bar for the admission of similar fact evidence, all three tests significantly restrict the Crown in adducing such evidence. The tests differ in degree. As to which test is "best", this falls to be decided on the measure adopted: the public interest, the rights of the accused, efficiency or workability?

Turning now to the Uniform Evidence Legislation, New South Wales has led the way with the insertion of a new s 97A and the amendment of s 101(2) in response to RCIRCSA. The question here is whether, as stated in the Council of Attorneys-General communiqué of 29 November 2019 and reiterated by the New South Wales Attorney-General,[140] all the other jurisdictions in the uniform evidence regime will follow suit. If this outcome was to occur, then a possible starting point for a model provision, if the benchmark is commonality between all the Australian jurisdictions, would be for the three jurisdictions outside the uniform evidence regime to adopt a suitable modification of the test in New South Wales for child sexual offences (ss 97A and 101(2)). The difficulty here is the suitability of enacting a test in isolation from other relevant parts of the Uniform Evidence Legislation, such as Pt 3.6 Tendency and Coincidence, Pt 3.7 Credibility, and Pt 3.8 Character.

In the context of commonality, how important is the amendment of s 101(2) in the *Evidence Act 1995* (NSW) which removes the word "substantially" in the balancing exercise between probative value and

[138] Other more mundane factors may also have played a part, such as trial complexity, appeals, jury directions and separate trials.

[139] Andrew Hemming, "Adoption of the Uniform Evidence Legislation: So Far and No Further?" in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 34, 34–35.

[140] New South Wales, *Parliamentary Debates*, House of Assembly, 25 February 2020 (Mark Speakman).

unfair prejudice? This removal contrasts with s 34P(2)(a) of the *Evidence Act 1929* (SA) where the probative value of the evidence must substantially outweigh any prejudicial effect. On one view, the removal makes little sense because under the *Evidence Act 1995* (NSW), s 101(2) is no different to s 137 Exclusion of prejudicial evidence in criminal proceedings.

In any event, it may be objected that the inclusion or exclusion of a term like "substantial" has little value as the meaning is vague and likely to give the misleading impression that the balancing exercise is quantitative and objective, when in reality it is qualitative and subjective. Nevertheless, the dictionary defines one meaning of "substantial" as "of considerable importance", and the use of the term implies that the quantum of Pv is boosted as a result. If one political criterion in the selection of the model test for the admission of similar fact evidence is a further lowering of the bar from *Pfennig* post *Ellis*, then removal of the term "substantial" is a step in the right direction. However, from a common position perspective it widens the difference with s 34P(2)(a) of the *Evidence Act 1929* (SA).

Another subtle change to s 101(2) in the *Evidence Act 1995* (NSW) is the substitution of the phrase "unfair prejudice" for "prejudicial effect". One explanation may be that the change was simply to conform to the language in s 137. Even so, unfairness has overtones of the test in Western Australia where under s 31A(2)(b) of the *Evidence Act 1906* (WA) the balancing exercise is whether "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".

As has previously been mentioned, the first limb of the test in s 31A(2)(a) of the *Evidence Act 1906* (WA), that the evidence have significant probative value, is written in very similar language to ss 97(1)(b) and 98(1)(b) of the Uniform Evidence Legislation.

Consequently, leaving aside child sexual offences, a possible initial model uniform position on the admissibility of similar fact/propensity evidence or the coincidence/tendency rules in Australia would be a two limb test: (1) the evidence has significant probative value; (2) the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. To conform with this test, South Australia would have to remove the word "substantially" from the balancing exercise in s 34P(2)(a) of the *Evidence Act 1929* (SA), while Western Australia would have to accept the phrase "outweighs the danger of unfair prejudice" in lieu of "priority over the risk of an unfair trial" under s 31A(2)(b) of the *Evidence Act 1906* (WA).

Essentially, South Australia and all the other jurisdictions in the uniform evidence regime would be required to follow the lead of New South Wales who amended s 101(2) of the *Evidence Act 1995* (NSW) to remove the word "substantially" in the balancing exercise. For Western Australia, the change would be linguistic rather than substantive as arguably it is New South Wales whose bar has come down to the same level as Western Australia with the measuring rod of "outweighs" equating to "priority". If, as stated in the Council of Attorneys-General communiqué of 29 November 2019, all the other uniform evidence jurisdictions follow the lead of New South Wales, which may be open to question,[141] then the uniform evidence regime has shifted towards the Western Australian use of the criterion of unfairness. From a political perspective, this would lower the bar for the admission of similar fact/propensity evidence or the coincidence/tendency rules in Australia to that of Western Australia. While the bar would be lowered, it is above the threshold of relevance proposed by the Royal Commission into Institutional Responses to Child Sexual Abuse.

This then leaves three outstanding issues. First, how to incorporate Queensland's position given it has the highest admission bar by virtue of following the common law *Pfennig* test, except for domestic violence. Second, how to integrate the treatment of the admission of child sexual offences within the proposed uniform position outlined above. Third, what definitions of "propensity evidence", "tendency evidence", "coincidence evidence" and "relationship evidence" should be adopted?

As regards the first issue of incorporating Queensland's common law position, it will be recalled from Part II B that McHugh J's critique of *Pfennig* was that because the evidence was required to be "consistent

[141] For example, apart from the adoption of the Uniform Evidence Legislation itself, Victoria has not generally followed the New South Wales lead on these matters.

only with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous".[142] While the description of the balancing exercise under *Pfennig* as being "superfluous" was criticised earlier, it is correct to say, as Spigelman CJ held in *Ellis*,[143] that the "no rational explanation" test in *Pfennig* focused only on the requirement for a high test of probative value. However, it is recognised this is also a problem for the significant probative value test.

Any change to the *Pfennig* test may depend in part on the Queensland government's response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. One possible response would be to legislate for a balancing exercise rather than relying on the common law. In such an event, then the two limb test under s 97(1)(b)/s 98(1)(b) and s 101(2) of the *Evidence Act 1995* (NSW) would merit consideration on consistency grounds, although the treatment of domestic violence evidence under s 132B would need to be accommodated. This two limb test would be subject to a major speculative outcome: Queensland, South Australia and Western Australia all agreeing to move closer to the Uniform Evidence Legislation in the areas of tendency and coincidence evidence.

This then leads into the second issue of how to integrate the treatment of the admission of child sexual offences within a possible uniform position. The solution in the *Evidence Act 1995* (NSW) is to introduce a new s 97A which sets the lowest possible bar for the first limb of the test by virtue of the rebuttable presumption that the tendency evidence identified in s 97A(2) has significant probative value for the purposes of ss 97(1)(b) and 101(2). Arguably, this first limb is even lower or on a par with the test of relevance proposed by the Royal Commission into Institutional Responses to Child Sexual Abuse. The second limb of the test has been lowered by the removal of the word "substantially" in s 101(2), but this also applies to offences under ss 97 and 98. Hence, arguably the integration of child sexual offences with all other offences coming within the tendency and coincidence rules occurs because the rebuttable presumption in s 97A that the evidence has significant probative value springboards into s 97(1)(b), which in turn faces the second common hurdle in the revised s 101(2). This solution is tidy, but does it address the criticism that "any proposal to alter evidentiary rules according to classes of offences should cause pause for thought"?[144] Furthermore, how will such a solution operate in the three jurisdictions outside the uniform evidence regime?

On its face, the first question would appear to depend on whether all the jurisdictions in the uniform evidence regime decide to follow the lead of New South Wales. One hesitation may be residual doubts as to altering evidentiary rules according to classes of offences. Politically, it is an open question as to how many of the State and Territory governments adopt any of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, which is why the three jurisdictions outside the uniform evidence regime may decide not to legislate for some version of s 97A of the *Evidence Act 1995* (NSW).

In the event there was a common response to RCIRCSA, as a first step it is at least feasible that all jurisdictions could adopt the two limb test in New South Wales under s 97(1)(b)/s 98(1)(b) and s 101(2) of the *Evidence Act 1995* (NSW). Consistent with this test, South Australia could amend s 34P(2)(a) of the *Evidence Act 1929* (SA), and Western Australia could amend s 31A(2)(b) of the *Evidence Act 1906* (WA). Queensland could enact a new s 132C of the *Evidence Act 1977* (Qld) to adopt the two limb test: (1) the evidence has significant probative value; (2) the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

If a common test were to be adopted, then the three jurisdictions outside the uniform evidence regime could enact a version of s 97A of the *Evidence Act 1995* (NSW), which would springboard into the first limb of the test through the rebuttable presumption that the evidence has significant probative value. The only difficulty is that s 97A deals with tendency evidence and operates through s 97, and has no relationship with s 98 which covers coincidence evidence. This leads into the third issue of what

[142] *Pfennig v The Queen* (1995) 182 CLR 461, 516 (McHugh J); 77 A Crim R 149.

[143] *R v Ellis* (2003) 58 NSWLR 700, [94]–[96]; 144 A Crim R 1; [2003] NSWCCA 319.

[144] Hunter and Kemp, n 121, 256.

definitions of "propensity evidence", "tendency evidence", "coincidence evidence" and "relationship evidence" should be adopted.

In the Introduction it was stated that the expressions "similar fact", "propensity" evidence, "tendency" evidence and "coincidence" evidence would be treated as being synonymous so as to minimise confusion and for ease of analysis. Consistent with this position, South Australia simply uses the broad expression of "discreditable conduct", and s 31A(1) of the *Evidence Act 1906* (WA) uses wide definitions of "propensity evidence" 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.

By comparison the tendency rule in s 97 and the coincidence rule in s 98 of the Uniform Evidence Legislation are as follows:

> Section 97(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.
>
> Section 98(1)
>
> (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.

The definition of "propensity evidence" in s 31A(1) of the *Evidence Act 1906* (WA) covers both similar fact evidence (coincidence evidence) and tendency evidence. This definition would suffice to have a Western Australian version of the rebuttable presumption in s 97A of the *Evidence Act 1995* (NSW) springboard into s 31A(2)(a) of the *Evidence Act 1906* (WA) for the purposes of satisfying the first limb of the test, namely, "significant probative value". The same would apply to the broad expression of "discreditable conduct" in s 34P of the *Evidence Act 1929* (SA). Queensland, starting with a blank page so to speak, could adopt definitions consistent with those of the other two "common law" States.

IV. Conclusion

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals.
>
> Benjamin N. Cardozo.

The enactment of s 97A and the amendment to s 101(2) of the *Evidence Act 1995* (NSW) has provided the catalyst for a lowering of the bar for admission of tendency and coincidence evidence, subject to s 97A being adopted in all jurisdictions under the uniform evidence regime. This article has contended that these legislative changes have had the effect of more closely aligning New South Wales to s 34P of the *Evidence Act 1929* (SA) and s 31A of the *Evidence Act 1906* (WA). Through the expedient of minor amendments to s 34P(2)(a) of the *Evidence Act 1929* (SA) and s 31A(2)(b) of the *Evidence Act 1906* (WA), the following two limb test would result: (1) the evidence has significant probative value and (2) the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

On the assumption that the three "common law" States adopt the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse to reform the admission rules relating to tendency and coincidence evidence, one option would be for the trio to legislate for some version of s 97A of the *Evidence Act 1995* (NSW). The incorporation of the wide definition of "propensity evidence" found in s 31A(1) of the *Evidence Act 1906* (WA) within the meaning of "discreditable

conduct" in s 34P of the *Evidence Act 1929* (SA), would allow the same springboard of the rebuttable presumption in s 97A in satisfaction of the first limb of "significant probative value" in s 97(1), to occur in the "common law" States.

In the event that all the uniform evidence jurisdictions do follow the lead of New South Wales, then there would be pressure on the three "common law" States to enact a modified version to the same effect. This would result in Australia achieving a degree of consistency for tendency and coincidence evidence, as well as a recalibration of the balancing exercise more in favour of the complainant in the admission of "discreditable conduct" evidence in all its forms.

More likely, given Queensland, South Australia and Western Australia have portrayed the Uniform Evidence Legislation as a dubious and partly failed experiment,[145] the trio's responses to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse will be fragmented and diffused as regards adopting the Model Bill in the Council of Attorneys-General communiqué of 29 November 2019. However, as Odgers has observed "the ultimate goal is not uniformity but rather a rational and just system of trial procedure".[146]

[145] Hemming, n 139.

[146] Odgers, n 79, 328.